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Dedicated to the memory of Professor L.F.E. Goldie - scholar, counselor, and friend.

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FOREWORD

The International Law Studies "Blue Book" series was initiated by the Naval War College in 1901 to publish essays, treaties and articles that contribute to the broader understanding of international law. This, the sixty-fourth volume of that series, coincides with a renaissance in the study of international law within the Naval War College and the return of the "Blue Book" series to the forefront of analysis and development of the rules of law governing the world's oceans both in time of peace and in time of war.

As editor and contributing author to this volume, Professor Horace B. Robertson has made a singular contribution to this tradition of legal scholarship. The principal focus of this work is the *Commander's Handbook on the Law of Naval Operations* promulgated within the Department of the Navy for the guidance of operational commanders and supporting staff elements of all levels of command of the Navy and Marine Corps. The thirteen contributors to this volume are among the world's most highly respected authorities in the field. Each has addressed a separate facet of oceans law and all have provided an independent, and sometimes critical, assessment of the articulations of law set forth in the *Handbook*. While the opinions expressed in this volume are those of the individual authors and are not necessarily those of the United States Navy nor the Naval War College, they collectively provide a valuable contribution to the study and development of the rules of law governing the conduct of nations on and over the world's oceans. On behalf of the Secretary of the Navy, the Chief of Naval Operations and the Commandant of the Marine Corps, I extend to Professor Robertson and the contributing authors of this informative and provocative work our gratitude and thanks.

Joseph C. Strasser
Rear Admiral, U.S. Navy
President, Naval War College

PREFACE

It is in accord with the highest traditions of the United States Naval War College that it should be in the forefront of the development, debate, and exposition of international law. It is therefore appropriate that in connection with the promulgation of *The Commander's Handbook on the Law of Naval Operations* (NWP 9) by the Department of the Navy in 1987 the War College should authorize the publication under its auspices of a volume in its "Blue Book" series marking that event and serving to bring it to the attention of an audience beyond the Department of the Navy.

The promulgation of *The Commander's Handbook on the Law of Naval Operations* is a welcome event. Its predecessor publication, *Law of Naval Warfare* (NWIP 10-2), was first published in 1955, and although amended on several occasions, was in need of updating. Further, since naval operational manuals are an important vehicle for expressing the official views of a government as to its official position with respect to the international norms governing the conduct of naval forces in both time of peace and time of war, it is important that governments publish such manuals at reasonable intervals so that their positions may be known to other governments, international organizations, scholars, and others with a concern for the behavior of the Navy in the international arena. The process of obtaining intra-government agreement on the norms promulgated also serves as a means of requiring the various elements of the government that have a legitimate concern with naval operations to focus on the evolving standards of the relevant international law and agree as to how naval commanders shall be instructed in this respect.

The structure of the *Commander's Handbook* differs from its predecessor manual in two major respects, namely: (1) it is divided into two parts, Part I dealing with "The Law of Peacetime Naval Operations," and Part II covering the "Law of Naval Warfare." NWIP 10-2, the predecessor manual, dealt exclusively with the law of naval warfare; and (2) it is not footnoted and annotated but rather is written for "the operational commander," to enable him "to understand better the commander's responsibilities under international and domestic law [and] to execute his mission within that law." (*Handbook*, Preface.)

Both of these changes are applauded. The addition of Part I, with its extensive and up-to-date elaboration of the international law of the sea, provides a much needed guidebook for peacetime operations for naval commanders and their staffs. The elimination of footnotes, both those providing sources of the rules and those elaborating or qualifying the rules, though criticized by some, is, in my opinion, a major improvement. The footnotes in NWIP 10-2 tended to confuse and frustrate the lay reader.

As stated in the Preface to the *Handbook*,

> The explanations and descriptions in this publication are intended to enable the naval commander and his staff to comprehend more fully the legal foundations upon which the orders issued to them by higher authority are premised and to understand better the commander's responsibilities under international and domestic law to execute his mission within that law. This publication sets forth general guidance. It is not a comprehensive treatment of the law nor is it a substitute for the definitive legal guidance provided by judge advocates and others responsible for advising commanders on the law.

For the benefit of "judge advocates and others responsible for advising commanders on the law," there is an encyclopedic *Annotated Supplement to The Commander's Handbook on the Law of Naval Operations*, prepared under the auspices of the Judge Advocate General of the Navy and the Naval War College, which has been distributed to appropriate Navy and Marine Corps legal officers. It contains a section-by-section analysis of the *Handbook* with full discussion of the concepts involved and the sources of the rules stated.

The present volume in the "Blue Book" series, *The Law of Naval Operations*, was conceived as a vehicle for bringing broader attention to the publication of the *Handbook* and stimulating a renewed debate on naval operational law and the law of armed conflict at sea. The essays that constitute the volume are not intended to be a comprehensive treatment of all of the subjects dealt with in the *Handbook* but rather are focused on some of the more controversial and significant areas of the law dealt with in it. In some cases they are in the nature of a critique of the *Handbook*'s treatment of a subject (see, for example, Professor A. V. Lowe's chapter V, "The Commander's Handbook on the Law of Naval Operations and the Contemporary Law of the Sea," and Professor Frits Kalshoven's chapter X, "Noncombatant Persons: A Comment to Chapter 11 of the Commander's Handbook on the Law of Naval Operations"). In others, the authors use the *Handbook* as a take-off point for discussions of particular areas of naval operational law or maritime policy (see, for example, Professor Bernard Oxman's chapter II, "International Law and Naval and Air Operations at Sea," and Professor Louis B. Sohn's chapter III, "Peacetime Use of Force on the High Seas").

In all cases, the authors have been free to express their own opinions, whether such opinions are consistent with those stated in the *Handbook* or the positions of the Naval War College or the Department of the Navy. Such freedom of expression is consistent with the long-standing policy of the Naval War College to foster open debate by its students, instructors, speakers, and authors on governmental and naval policies. The editor and authors of this volume are grateful to the President and staff of the Naval War College for encouraging this policy of freedom of expression.

The *Handbook* has been modestly revised since its initial promulgation to the Fleet in July, 1987 and it is the revised text, denoted "(Rev. A)" that appears in the Appendix. Because the authors of the essays within this volume

had before them the original text, the changes in the revised *Handbook* set out in the Appendix have been underlined. While attachment of the original text would have been more faithful to the commentary of the authors, it was considered appropriate that the most up-to-date iteration of the *Handbook* be appended to this volume.

I wish to thank each of the authors represented in this volume for their contributions. I also wish to thank Professor Richard J. Grunawalt and the other members of the Naval War College faculty and staff for their invaluable assistance, support, and patience.

Horace B. Robertson, Jr.

Chapter I

Moving International Law from Theory to Practice: the Role of Military Manuals in Effectuating the Law of Armed Conflict

by
W. Michael Reisman* and William K. Leitzau**

Military manuals and handbooks containing operational rules prescribed by international law (hereinafter "manuals") are important to the operation of the international legal system for two related reasons. First, they are the indispensable modality for disseminating normative information to those whose behavior is the target of the norms in question. Second, they are an essential component in the international lawmaking process, often the litmus test of whether a putative prescriptive exercise has produced effective law. Without adequate dissemination, this putative international lawmaking is an exercise in the elaboration of myth through *lex simulata*[1] rather than the installation of an effective operational code.

There is a developmental aspect to both of these properties in the sense that if they are effectuated adequately, they contribute to the operation of the sector of international law concerned with armed conflict. There is, as well, a necessarily comparative aspect to inquiry about these properties in that this area of law, even more than others, depends for its vigor on reciprocity. Unless there is a comparable and manifest "scoring" on the manuals (or their functional equivalents) of adversaries, the symmetry necessary for reciprocity will be absent and the norms with which they are concerned are unlikely to be effectively incorporated into international legal practice.

I. Military Manuals As A Mode of Dissemination

A. The Importance of Dissemination

In small groups and micro-communities, the same persons who make law, act on it, apply it and enforce it.[2] But, as Durkheim observed, the large social organizations characteristic of most sectors of modern life require labor and role divisions and refined task specializations.[3] As a result, it is not only probable that entirely different persons will make law, act on it, apply it and

enforce it, but it is also likely that there will be considerable temporal and social distance between the specialists performing each of these functions. The phenomenon is not unique to international law. In the United States, the Supreme Court encounters much the same problem. James Levine writes,

> The conditions necessary for Supreme Court efficacy are much more stringent when the people and institutions to be controlled are farther removed from the Court's range of command and less threatened by the force of its sanctions. It is much easier for the Supreme Court to curb a few cantankerous federal judges than to reallocate the fundamental values of the society.[4]

"Causal distance," as Levine styles it, can be an even greater problem in the more complex international political system.

In large social organizations, effective lawmaking requires an additional step: the efficient dissemination and effective internalization of authoritative norms in those persons "in the field" as it were, whose behavior is the target of the norm in question. The process of dissemination is a necessary component of any communication that extends beyond the mediation of subjectivities between two proximate persons. It can be most economically expressed in terms of Harold D. Lasswell's classic paradigm of Who/What/Whom/How/Results/Effects. Less cryptically, Lasswell's heuristic asks for pertinent information to be organized in terms of:

Who is communicating (Communicators)
What (Content)
To whom (Target Audiences)
Through what channels (Channels)
With what results (Immediately Changed Subjectivities)
And with what longer term effects (Long Term Changed Subjectivities).[5]

When information is so organized, the aggregate consequences of a communication are clarified and the factors that accounted for success or failure may be analyzed, appraised and made the subject of policy recommendations.

Our focal content is the law of armed conflict and related internationally prescribed norms. Audiences may vary depending upon the type of activity sought to be regulated. Decisions about the use of nuclear weapons, for example, are unlikely to be made by men and women in the ranks. Dissemination of norms regarding nuclear weapons employment should therefore target higher military and political echelons. Comparative examinations of manuals must take account of variables such as these.

We are concerned with identifying channels because, as is well known, human beings mediate subjectivities on different levels and with varying degrees of explicitness. As we will see, contrary messages about prescribed behavior may be modulated simultaneously through different channels. We are concerned with results, for lawmaking is not a form of communication that is ritualistic, with its social functions fulfilled by the action of

communication itself. It is designed to precipitate social results. To the extent that it fails to do this, the entire exercise has failed. We are concerned with longer term effects because prescriptive communications also shape perspectives about the constitutive process[6] and value regulations other than those which have been manifestly targeted.

In a socially meaningful sense, then, the making of law necessarily involves much more than the clarification and establishment of some community policy in authoritative form. If law is to be effective, it must be transmitted and, where necessary, translated into formulations appropriate for those operating in the field whose behavior is the ultimate target of the principles in question. This process, which has been variously described as promulgation, dissemination, implementation, or publication, is a necessary step if law is to be transformed from an exercise in theory to a matter of practice.[7]

Unless a large number of those who are the target of particular formulations become familiar with and internalize the norms in question, the entire burden of enforcement is shifted to appliers and is greatly magnified. Their resources are limited, however, and would hardly suffice for such an enormous task. Moreover, if the norms they are asked to apply have not been internalized by a large part of the community, their actions appear arbitrary, retroactive and *ex post facto* and undermine rather than reinforce the symbol of law.[8] Though many legal systems insist that *ignorantia legis haud excusat*, all seem to appreciate that the point of legislative exercises is not to punish those who prove to be ignorant of the law. It is to get the message across beforehand to those who are expected to adjust their behavior in accordance with the norm.[9]

Dissemination can also precipitate the reciprocal consequence. Where an international prescription has been internalized at the rank-and-file level, it may serve to limit violations among the elites themselves. Even when prescriptive violations appear to serve short-term special interests, elites may find that there is rank-and-file resistance to norm repudiations. In effect, by disseminating rules of warfare, national command authorities raise the costs of violating those rules both in peace and war. Essentially, they are divesting themselves of power in return for other expected gains. Policy changes must first be communicated to the appropriate field authorities and then disseminated to relevant actors—in some cases the individual troops. Even if successfully communicated, the cost of deviating from a known policy is much greater than that of simply reversing a government-to-government statement. Neither personal demands for rectitude nor notions of chivalry are dead among military personnel. Moreover, the effectiveness of military units depends on leadership which exemplifies integrity.

The point merits emphasis. Dissemination not only internalizes norms within the domestic system; it internalizes them within the members of a warrior class who take their profession seriously. This is not to say that soldiers

can not be made to violate international law; some will predictably do so in violation of orders. What effective dissemination does mean, however, is that the default position is set in favor of accepted norms, and the costs of resetting will have to be weighed.

B. Methods of Dissemination

Law, like all types of learned behavior, can be transmitted in many, not necessarily exclusive ways: by single or repetitive communication, in manifest or latent forms, by precept and example, by positive or negative reinforcement, etc. Transmission can be relatively simple and single-step, for example, publication in an official gazette, or complex and multi-step as in a sequential opinion-formation process. Each phase may be inhabited and/or dominated by different specialist groups which are expected to interpret, digest and formulate the message in ways that make it comprehensible and practicable to the level they are serving.

Each phase of the transmission process may, in turn, become a sub-power-arena, in which politically relevant social forces bring to bear whatever bases of power are relevant in the setting in order to secure an interpretation and refashioning of the authorized policy that discriminates in their own favor.[10] In politics, as its practitioners know, there is no end to politics and, as the adage puts it, "nothing is finished until it's done."

Consider, by way of example, the sequence of linkages by which the Supreme Court's ruling in *Miranda*[11] filtered down from the Supreme Court, through the law enforcement bureaucracy, to the policemen on the beat. Institutional interpreters at different levels acted as mediators between the Court, with its general policy objective, and the actual law enforcement officers. The mediators, sensitive to contexts of application in ways in which the Court could not have been, introduced nuanced changes as they reformulated the *Miranda* doctrine into an operational code. There were many steps in this translation, involving attorneys in the Department of Justice, in many local police departments reflecting regional diversities, and finally commanding officers and police officers in lower grades. Before the principles became established, there were numerous feedback loops and challenges to the courts, with reinterpretations of various sorts.[12] Academies and private interest groups made their power felt at many points. The media played an important role, both in transmitting the normative content of *Miranda* and its social importance, while firmly anchoring it in folklore. The point of emphasis is that a sequence of steps of this sort is indispensable if formal prescriptions are to be even minimally effective.

The dissemination of general normative information to the modern military is substantially the same as dissemination to any other sub-specialized organization. Hence one will not be surprised to discover, at the constitutive level, authorized channels for dissemination,[13] authorized symbols denoting

normative information and its level of importance[14] and, at lower and more mundane levels, the handbooks, manuals and loose-leaf collections[15] so symptomatic of large, contemporary social organizations operating in the fluid environments that are the quintessence of modernity.

But the dissemination of international legal information and, in particular, that part of it now known as the "law of armed conflict" makes the military organization distinctive. The dissemination of normative information is ordinarily eufunctional, incorporating and reinforcing the organization's authority. In contrast, the dissemination of the law of armed conflict in the military is (i) premised on a distinct supra-organizational authority, that is (ii) assumed to be competent to prescribe behavior which by definition contributes to the operation of the larger system but, at the same time, limits and may even undermine the particular military organization which has incorporated it. An important element of this prescribed behavior is reciprocity, which must sometimes be ascertained by the actors subject to the norms. Thus, the disseminating scheme is of critical significance in this context, for it represents the closest parallel to an "act" which can verify national intent. Moreover, it is the *only* means to achieve deterrence, since there are few opportunities for employment of "example" in which a *post hoc* violation/punishment nexus can be observed. Hence dissemination of normative information in the military setting is marked by simultaneous contrary organizational dynamics in which some authoritative elements are pressing for compliance while others are resisting it.[16]

These unique features of the law of armed conflict are important in comparative appraisals of dissemination. Precisely because there are strong organizational dynamics militating against norm implementation, dissemination must be contextually and systematically analyzed, not simply acknowledged via a perfunctory check for the presence or absence of a manual containing certain verbal formulae. Unless information in the manuals is accompanied by secondary guidance or metacommunications indicating the gravity and preeminence of the information, and the transmission is embedded in an enforcement system which is adequate and vigilant, manuals themselves mean nothing. And unless comparable manuals are in operation and in evidence in the different latent war communities, much of the normative information in the manuals may not be acted upon.[17]

One may, then, examine the effectiveness of a military manual in terms of content, mode of delivery, the secondary norms establishing its relative position in the effective normative hierarchy, its system of enforcement and reciprocity. Let us consider each of these components briefly.

(i) **Content:** We are not interested in the existence of a manual on the simple-minded assumption that all manuals are the same.[18] Of critical importance is the *specific content* of the manual under examination in terms of more generally prescribed international norms. It is not enough to develop

a mechanical checklist to verify that certain items are in the manual. How they are translated into the pertinent vernacular and with what nuance and shading are also important. Content must be examined not only in terms of what is manifest in a particular manual, but in terms of the aggregate of orders about action putatively regulated by the law of armed conflict. Consideration should also be given to the relative ease with which a provision could be perversely construed to allow for self-serving interpretations in the future. In short, inquiry must identify the larger, functional manual and not only the words enclosed by pasteboard covers on which the word "manual" is emblazoned. Training publications and other instructional material regarding tactics may, for example, implicate referenced norms. If, by way of hypothesis, classified orders were to state that, on the occurrence of certain contingencies, those orders come into operation and override normative material that is found in any other communication, those orders would have to be considered part of the manual.

(ii) **Mode of Delivery or Vehicle:** Normative information may be conveyed in many forms. The advantage of a manual, especially in a hierarchical setting, is that it is relatively precise and unchanging, allowing for standardization and clarity in communication and ease in ascription of responsibility. It is also relatively easy to disseminate.[19] Each operative may be given a complete manual. The test is not satisfied, however, unless the content of the manual is *in fact* disseminated to the appropriate levels in credible fashion.[20] Timing here can be of moment since early indoctrination might stimulate more resistance to a potential violation.

Equally relevant, a manual simplifies international surveillance. While one should resist elevating form over substance, form here is of decided importance. Written prescriptions have a permanence which makes repudiation observable even to those not targeted by the dissemination.[21] There is a greater political cost involved in violations which are inconsistent with previous governmental statements. On the other hand, there are military organizations or situations in which manuals may be inappropriate. Where, for example, officers and ranks are illiterate or semi-literate, other vehicles for dissemination must be sought.[22] Likewise, dissemination should take account of the decision-making level of the target. Each sailor, for example, need not possess a manual explaining the juridical bay concept.

(iii) **Secondary Norms:** Unless a manual is identified by secondary norms within the organization as of transcending importance, it is not worth the paper on which it is printed. The key norms in this regard are, first, the preeminence of international law over national law and second, that superior orders do not constitute a defense to a violation of international law. These secondary norms must be effective. Here again, words do not suffice. The expectations of the effectiveness of norms are sustained and reinforced by the availability of manifest and credible methods of implementation; norms

erode into *lex simulata* if it becomes apparent that there is neither means nor will to implement them. During combat, the more proximate authority and control system will prevail over the more distant. Hence, from a practical standpoint, it is important that the substantive content of the international norm be incorporated *before* conflict. This will constitute effective superordination of international over national law.[23]

(iv) **Systems of Enforcement:** There must be an environing indigenous system of enforcement of the norms which is sufficiently manifest and efficient to become part of the expectation pattern of those whose behavior is the target of the norms in question. This component is closely tied to that of secondary norms in that it is the domestic enforcement system which gives teeth to the acknowledged preeminence of international law.[24]

(v) **Reciprocity:** The military organization must provide for an accurate method for determining whether adversarial behavior is reciprocal where reciprocity is an element of continuing validity.[25] It is important that there be distinctions between the inevitable single unauthorized violations of prescribed norms, on the one hand, which should not authorize suspension of the norms by the other party, and systematic authorized violations, which should warrant suspension.[26] Without the means for making such distinctions, certain norms are likely to be suspended shortly after the first shot is fired.[27]

On the basis of the foregoing factors, comparative appraisals of the effectiveness of military manuals may be expressed in terms of a general quotient. More importantly, these distinct inquiries may be useful in terms of identifying pathologies with particularity and targeting them for appropriate remedies.

II. Military Manuals As Part Of The Process Of Making International Law

In addition to their important function in dissemination and transmission of international legal information, manuals are an important mode for making international law as well as evidencing its existence.

Lawmaking, in any setting, involves the determination and communication of normative information accompanied by authorizing symbols and credible indications of control intention. In organized national systems, the popular and scholarly conception of this activity has involved prescription through legislatures and other highly institutionalized prescribing modes.

Consensual international law is essentially made in two ways: by explicit agreement and by implicit agreement—which is usually referred to as custom. Explicit agreement includes treaties, the classic mode, as well as many newer methods involving explicit clarification of policy in an organized arena. Implicit agreement includes all the modes by which authoritative policy is informally arrived at and intercommunicated.

With regard to international law concerning the conduct of military conflict, manuals are important in both modes. Even when norms are prescribed in formal settings, a critical phase in their consolidation is national incorporation. Because international law notoriously lacks its own enforcement system, national implementation is often a critical factor in successful international lawmaking. The content of manuals, while not absolutely probative that particular international norms are being effected at the national level, is a *conditio sine qua non* for their implementation. Certainly, both the absence of a manual or the use of manuals whose content does not include the relevant norms would strongly suggest that those norms have not been adopted.[28]

Manuals play an even larger role in processes of implicit agreement. In the international system, as is well known, the bulk of international prescription is accomplished through processes which are informal and non-institutionalized. The critical building block in these processes is national action. It is not surprising that the U.S. Military Tribunal at Nuremburg stated that while not in themselves a competent source of international law, "[army regulations], as they bear upon a question of custom and practice in the conduct of war, might have evidentiary value, particularly if the applicable portions had been put into general practice."[29] Customary law is even more significant to the law of naval warfare since, it has been argued, attempts to codify norms relevant to land warfare have historically enjoyed more success than similar attempts regarding naval warfare.[30]

Some international norms are formed by homologous national action. Consider *The Scotia* case[31] in which Justice Strong ruled in favor of a British ship which had collided with an American vessel. He found that British orders regarding navigational lights had in fact become international law. Homologous national action may be evidenced in manuals or their functional equivalent.[32] Given the competitive character of their enterprise, specialists in adversary organizations will scrutinize the operational codes of their opponents to determine whether particular international norms have been adopted and put into effect.[33] The extent to which they have will obviously influence the willingness of others to adopt and act on them.

The chivalric code of the Middle Ages was largely generated in this fashion. Since a vast majority of warriors, like the population at large, were illiterate, a written manual would have been pointless. Functional manuals transmitted authorized norms of warfare through a familiar oral tradition. Froissart recorded a fourteenth century incident which evidences the existence of this functional manual. Upon surrender, three French knights gave themselves to their English captors saying, "We are yours: you have vanquished us. Act therefore to the law of arms."[34]

A number of norms in the contemporary law of armed conflict may be traced to this pattern of lawmaking. Even in antiquity rules of warfare were

often orally disseminated to troops. Cyrus, King of Persia (559 B.C.), Alexander the Great (333 B.C.), and Titus of Rome (70 B.C.) all insisted that their troops observe basic humanitarian rules such as sparing civilian populations and property and respecting religious buildings.[35] Protection of enemy wounded and prisoners of war can also be traced to earlier oral codes.[36]

For the latent lawmaking function no less than for the immediate operation of the laws of armed conflict, it is important that manuals be made available to potential adversaries.[37] Ironically, however, notifying an adversary regarding battlefield intentions may yield strategic or tactical advantages. It will be recalled that many in the military felt and still feel that the publication by Senator Goldwater of Rules of Engagement for part of the Vietnam theatre undermined U.S. military efforts there.[38] There is, thus, an understandable reluctance to publicize this material. On the other hand, its suppression decreases the probability of the norms being adopted by the adversary. It might be useful for the International Committee of the Red Cross (ICRC) to act as a clearinghouse for such material as a way of facilitating implementation and reinforcement of this part of the law of armed conflict.[39]

III. Military Manuals In Future Constructs

Alexander Bickel described the heroes among common law judges as those who "imagined the past and remembered the future."[40] Generals are often cautioned against fighting their last war. Likewise, those who play a role in defining legal relationships must keep abreast of developing trends and technological advances. The probable role of military manuals in future conflicts is a question as perplexing as that of how the next battle will be fought.

Many futures can be imagined; in each, the role and degree of effectiveness of military manuals will vary. In many, however, it would seem that effective dissemination, which is favorably measured by the criteria laid out earlier, will have some mitigating effect on the harshness and cruelty of warfare. Technological advances and the melange of future conflicts may be significant factors affecting the impact of manuals on the law of warfare. Dissemination needs must be constantly reconsidered in light of these concerns.

Burgeoning technologies can significantly increase or decrease the number of actors necessary to perpetrate an act of violence. It is unlikely that the role of the individual rifleman will ever become obsolescent, but an increase in irregular warfare can vastly increase the numbers of willing and unwilling combatants and, as it were, consumers of the law of armed combat. At the same time, however, each technological advance can also significantly reduce the number of individual entities who need be concerned with the full range of the rules of warfare. As more sophisticated and efficient radars, targeting systems, sensing devices and weapon delivery systems are developed,

battlefield decisions become more concentrated at higher echelons. This is especially true at sea where improved combat information systems allow centralized control of myriad weapon systems. Manuals that are to be continuously relevant will need to focus on the type of decisions made at these levels.

Concurrent with increased efficiency and destructiveness, modern weapon systems tend toward increasing the physical distance and reducing the psychological linkages between the initiator of violence and its recipient. As victims become more remote, the effect of the principle of chivalry declines as an influence on conduct,[41] and humanitarian law receives less assistance from other cultural restraints on human behavior. The task of constraining warfare becomes more difficult. Prescribers must make themselves cognizant of the effects of such latent pathologies in technology-assisted decision-making if effective humanitarian norms are to be crafted and maintained.

A related factor affecting future combat is likely to be the development of advanced rapid communication systems. As observed in recent U.S. engagements,[42] modern communication systems drastically reduce battlefield decision-making, proportionately diminishing the need for field manuals, while pushing manual requirements "upstairs."[43]

On the other hand, the centrality of command and control in modern warfare will certainly make communications a preferred early target. Current strategies must consider the likelihood that adversaries will make every attempt to disrupt communications.[44] The same prudence demanded tactically must be observed when considering the effect of contingencies on observance of international law. Additionally, commanders' handbooks and manuals can serve to prepare leaders for contingencies which implicate international law. While a decision regarding neutral shipping, for example, may indeed be made at higher levels than that of the on-site commanding officer, prior training and familiarity with the manual may trigger an awareness of potential international law problems. Thus, even if the manual is not explicitly used as a reference to resolve a problem or question, it precipitates an identification of the issue which can be transmitted to higher echelons or used in split-second decisions.[45]

The most unpredictable construct regarding international norms is the twentieth century phenomenon of "total war." Partly a product of technological advances, recent wars have entailed an element of totality involving both mass participation and mass destruction. The ravages of the First World War led nations to renounce war entirely with the Kellogg-Briand Pact,[46] but they also highlighted the negative effects of losing. While total war may not have total winners, it can have total losers. Thus, a curious irony ensues. The current law of armed conflict has been framed by parties who have rejected warfare in general. Yet, when and if they do ever go to war, their interest in winning will be compelling, to say the least.

The potential severity of defeat in modern conflicts aggravates the compliance problem. Indeed the advent of total warfare has spelled for several theorists the death of *jus in bello*.[47] To some, the psychopathic character of von Clausewitz's statement, "[t]o introduce the principle of modernization into the theory of war itself would always lead to logical absurdity," is elevated to normality in total war scenarios.[48] When loss could mean national extinction, it is reasonable to assume that elites will reconsider past agreements or decisions which are strategically limiting. In an absolute conflict, a specific norm will rarely be attributed as much importance as winning.[49]

While key components of *jus in bello* seem likely to be an early casualty on the battlefield, effective multilateral dissemination could serve to preserve some lasting import for rules of warfare. Elites might understandably choose to reject customary rules during a given conflict, but their ability to do so is severely reduced once the rules have been effectively promulgated as we described earlier. By the time a conflict escalates to such a level that elites might consider abandoning norms, manuals will have been used for planning and training, and the norms they establish will have been internalized by the military and civilian components of the community.[50] The costs of attempting to change those norms will have been raised.

All putative future legal constraints must take account of reciprocity. If a given adversary does not demonstrate reciprocal compliance with rules of warfare, pressure to abandon norms is likely to come from the combatants themselves. Similarly, the perceived content of the law of armed conflict could quickly change if one were losing a large-scale war with an adversary which had not adopted reciprocal normative constraints. Hence the effect of military manuals may depend not only on the nature of the conflict but the identity and behavior of the adversary.

In these future constructs, the target of dissemination shifts "upward" to a few relatively senior leaders. In such an environment, the utility of manuals both in effectuating and in making law may be greatly diminished. Accepted norms will not incorporate the stability of wide-spread dissemination, and secondary constraints will only be effective as they operate on elites. The effect of domestic systems of enforcement and inherent constraints will be low and, in a total war setting, the motivation to violate norms may be high. Assurance of reciprocity, then, must come not through promises of non-use but through more measurable agreements, e.g. verifiable disarmament,[51] or imaginative new schemes such as programming norms into weapon targeting systems.

The design of manuals for the total war construct is not the end of inquiry; the terminology, "armed conflict," instead of "war" or "warfare," suggests that a certain number of future conflicts are expected to be limited in scope and conducted in the context of routine peaceful activities or as protracted,

low intensity belligerencies.[52] Extended troop-intensive counter-insurgencies must also be considered as well as limited reprisals and antiterrorist activities.

The resurgence of circumscribed reprisal/self-defense initiatives seen in recent years[53] provide limited opportunities for actual field reference to manuals due to the above mentioned nature of command and control. Similarly, specialized antiterrorist or rescue operations are likely to be specifically and thoroughly planned so as to obviate the need for referencing a manual of international norms. Therefore, it is all the more urgent to incorporate a manual of appropriate norms in the formative and training processes. Manuals will only have value in these conflicts if the norms they contain have been internalized before the fact.

Guerrilla warfare and other forms of combat which may be extended in time but limited in scope, could prove to be most suited for effective use of military manuals.[54] In guerilla warfare, decision-making, by necessity, must be delegated; the proliferation of inevitable personal contacts gives rise to the kinds of situations most appropriately addressed in manuals and other disseminations.[55] Unfortunately, this type of combat situation is not adequately addressed by current conventions and treaties.[56]

In all of the constructs outlined above, the effectiveness of military manuals depends on two conditions: (i) dissemination and internalization of the norms *prior* to the fact, and (ii) reciprocity. The current focus should be on thoroughly incorporating international norms into planning and training exercises so that they will not be quickly jettisoned in combat. Moreover, we must "remember the future" and consider new schemes for effectively ensuring reciprocal observance in the evolving social organization of armed conflict.

Conclusion

Manuals are not an end in themselves. They are an instrument for achieving an end: the prescription and application of a law of armed conflict which tempers the harshness and cruelty of combat and confines human and material destruction to targets of military necessity and utility.

Conflict is a social organization which requires a great deal of subjective and objective symmetry between the antagonists if the conflict is to be conducted in normatively authorized ways. The lower the level of subjective and objective symmetry, the more difficult it will be to establish and make effective norms regarding how armed conflict is to be conducted. Hence one will find in the socio-political situation the ultimate limits for lawmaking in this regard.

The point is of moment in any consideration of the possibilities of the contemporary law of war. It is ironic that perspectives of how civilized peoples are supposed to fight are relatively homogenous within alliances and, formal documents notwithstanding, heterogeneous as between manifest and

latent antagonists. The differences loom increasingly large in confrontations between the West and Fundamentalist Islamic groups, for the latter draw upon a history that has authorized and justified terror as a legitimate weapon for an expanded notion of self-defense. Information available about the training academies for terrorists in Iran suggest a functional manual, diverging widely from that common in western military organizations.[57] Part of the contemporary war against terrorism is, in fact, a war of manuals, in which coercion is being used to make adversaries fight "civilized." The outcome of this war is far from certain. If it is lost, future manuals will look quite different from the one reviewed in this volume. The implications for national values and domestic political processes could be grave.

Notes

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1. *Lex simulata* has been defined as a legislative exercise that produces an apparently operable statutory instrument which neither prescribers nor target ever intend to be applied. W. Michael Reisman, *Folded Lies* (New York: Free Press, 1979), pp. 31-34.

2. Consider, for example, the internal workings of social organizations or "clubs," or the adoption of procedures by the Constitutional Convention in 1787. For a discussion of law making in micro-communities *see* W. Michael Reisman, "Law From the Policy Perspective" in Myres S. McDougal and W. Michael Reisman, eds., *International Law Essays: A Supplement to International Law in Contemporary Perspective* (Mineola, NY: Foundation Press, 1981), pp. 7-9.

3. Emile Durkheim, *The Division of Labor in Society* (G. Simpson trans.) (New York: Macmillan, 1933).

4. James P. Levine, "Methodological Concerns in Studying Supreme Court Efficiency," *Law and Society Review*, v. 4, p. 583, 584 (1970).

5. See, Myres S. McDougal, et al., *The Interpretation of Agreements and World Public Order* (New Haven, CT: Yale University Press, 1967), pp. xii-xvi. *See Also* Harold D. Lasswell, *Politics: Who Gets What, When, How* (New York: Peter Smith, 1950) (earlier formulation); W. Michael Reisman, "International Lawmaking: A Process of Communication," *American Society of International Law: Proceedings*, 1981, pp. 105-13 (Harold D. Lasswell Memorial Lecture discussing Lasswell's approach to understanding lawmaking's communicative nature).

6. This is especially true in those fields in which assessments of reciprocity must be made before the fact. In other fields reciprocity can be measured because adherence to a norm can be observed. In the area of armed conflict, however, true, or at least, operational intentions—the intentions that "count"—cannot be easily observed until after the conflict has begun. Effective dissemination, coupled with the metacommunication of a military law enforcement system (discussed below), demonstrates intention and practice. Both serve as earnest for future agreements.

7. Dissemination is required by numerous provisions of treaties addressing the law of armed conflict for this very reason. *See e.g.* article 47 of the Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949 (6 U.S.T. 3114, T.I.A.S. 3362, 75 U.N.T.S. 31); article 48 of the Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 12 August 1949 (6 U.S.T. 3217, T.I.A.S. 3363, 75 U.N.T.S. 85); article 127 of the Geneva Convention (III) Relative to Treatment of Prisoners of War, 12 August 1949 (6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135); article 144 of the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287); article 25 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954 (249 U.N.T.S. 240; U.S. not a party); and article 19 of the Protocol (II) Additional to the 1949 Geneva Conventions Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 (16 I.L.M. 1448; U.S. not a party).

Protocol (I) Additional to the 1949 Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (16 I.L.M. 1391; U.S. not a party) serves as a good example of the emphasis placed on dissemination; article 6 (training of qualified personnel); article 82 (legal advisors

in armed forces); article 84 (rules of application); and article 87 (duty of commanders). The principal provision regarding dissemination, article 83, states:

> 1. The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the Conventions and this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction and to encourage the study thereof by the civilian population, so that those instruments may become known to the armed forces and to the civilian population.
>
> 2. Any military or civilian authorities who, in time of armed conflict, assume responsibilities in respect of the application of the Conventions and this Protocol shall be fully acquainted with the text thereof.
> *Id.*, p. 1427.

8. Some scholars from vanquished countries have opined that norms argued at the Nuremburg and Tokyo war crimes trials are representative of this detrimental kind of *ex post facto* prescription. *See, e.g.*, Wilbourn E. Benton and George Grimm, eds., *Nuremburg, German Views of the War Trials* (Dallas, TX: Southern Methodist University Press, 1955); William J. Bosch, *Judgment on Nuremburg* (Chapel Hill, NC: University of North Carolina Press, 1970); Eugene Davidson, *The Nuremburg Fallacy* (New York: Macmillan, 1973); Chihiro Hosoya, et al., eds., *The Tokyo War Crimes Trial* (New York: Kodansha International, 1986); Richard H. Minear, *Victors' Justice: The Tokyo War Crimes Trial* (Princeton, NJ: Princeton University Press, 1971). *Cf.* Ann Tusa and John Tusa, *The Nuremburg Trial* (New York: Atheneum, 1984).

9. Even Nuremburg prosecutors had at their disposal evidence demonstrating that international norms had indeed been disseminated to German officers. *See, e.g.*, "Introduction of the Hague Convention on Land Warfare in the German Army," *Proceedings of the Investigating Committee of the German Constitutional Assembly and the German Reichstag 1919-1928* (resolution adding the Hague Convention text to the German Field Manual); "German Military Law and Law of War," *Journal of Military Law* (German), January 1944, pp. 389-93 (synopsis of course on military law); and A. Waltzog, *Kriegsgerichtsrat der Luftwaffe* (1942) (German Air Force manual).

10. Consider, for example, Senate reservations and understandings regarding various treaties or the evolution of departmental understandings of "customary law". One example, brought to our attention by Professor Levie, concerns chemical warfare. After signing the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare, the Department of the Navy decided that it was in its interest to view the normative content as representative of custom. The Navy's action may indeed have helped the norm to become custom. *See* Howard S. Levie, "Nuclear, Chemical, and Biological Weapons," *infra* chapter XI.

A related example involves the U.S. practice of "restrictively" interpreting the use of straight baselines. *The Commander's Handbook on the Law of Naval Operations*, Naval Warfare Publication 9, 1987, par. 1.3.2 [hereafter cited as *Handbook*]. This shaping of the general norm is a result of the transmission process. *See* article 4 of the Convention on the Territorial Sea and the Contiguous Zone, 29 April 1958 (15 U.S.T. 1606, T.I.A.S. 5639, 516 U.N.T.S. 205).

See, generally, Harold D. Lasswell, et al., *Propaganda and Promotional Activities* (Chicago: University of Chicago Press, 1969). For material on the bureaucratic process *see* Peter M. Blau and Marshall W. Meyer, *Bureaucracy in Modern Society*, 2nd ed., (New York: Random House, 1971); Michel Crozier, *The Bureaucratic Phenomenon* (Chicago: University of Chicago Press, 1964); Henry Jacoby, *The Bureaucratization of the World* (E. Kanes trans.) (Berkeley, CA: University of California Press, 1973); Joseph LaPalombara, ed., *Bureaucracy and Political Development*, 2nd ed., (Princeton, NJ: Princeton University Press, 1967); Max Weber, "Bureaucracy," in H. H. Gerth and C. Wright Mills, eds., *From Max Weber: Essays in Sociology* (New York: Oxford University Press, 1958). *Cf.* Robert Presthus, *The Organizational Society* (New York: Alfred A. Knopf, 1962). For a specific case study *see* Graham T. Allison, *Essence of Decision: Explaining the Cuban Missile Crisis* (Boston: Little Brown, 1971).

11. Miranda v. Arizona, 384 U.S. 436 (1966) (seminal case regarding custodial interrogation and the exclusionary rule).

12. *See, e.g.*, Adam Carlyle Breckenridge, *Congress Against the Court* (Lincoln, NE: University of Nebraska Press, 1970) (detailed account of Congressional reaction to *Miranda*); Fred P. Graham, *The Self-Inflicted Wound* (New York: Macmillan, 1970), pp. 305-32 (account of reaction to *Miranda*); Yale Kamisar, "How to Use, Abuse—and Fight Back with—Crime Statistics," 25 Okla. L. Rev. 239 (1972). *See also* Michigan v. Tucker, 417 U.S. 433 (1974) (construing *Miranda* not to mean that the procedures themselves are rights); State v. Bliss, 238 A.2d. 848 (Del. 1968) (*Miranda* not applicable to minor crimes and traffic offenses).

13. *E.g.*, Congressional endorsement of executive law regarding the discipline of the armed forces, chains of command, delegated agencies assigned the task of writing various publications.

14. *E.g.*, "Orders" as opposed to "guidelines," posters and their locations, letterheads and other trappings of officialdom.

15. *See Handbook supra* note 10; Department of the Army, FM 27-10, the *Law of Land Warfare* (Washington: Government Printing Office, 1956); Department of the Air Force, AFP 110-31, *International Law—The Conduct of Armed Conflict and Air Operations* (Washington: Government Printing Office, 1976). Lower level dissemination involves a wide variety of less comprehensive training and instructional publications.

16. Consider the complex situations afflicting many decisions in the Vietnam conflict. The common use of hamlets to shield Viet Cong combatants and the effective use of snipers, for example, contributed to tensions with respect to prescriptions against attacking undefended villages and norms regarding proportionality of response. *See* Guenter Lewy, *America in Vietnam* (New York: Oxford University Press, 1978), pp. 230-32.

17. It is important to realize, however, that the very existence of the manual, if adequately internalized, is of significance regardless of any adumbrations of reciprocal dissemination or compliance. Treatment of prisoners of war, for example, is an area in which reciprocity can rarely be observed until after the fact. Additionally, the targets of dissemination will seldom be the same actors who make comparisons of other operational codes. Thus even without reciprocity, manuals may serve, at least temporarily, to restrain one force in a manner which will not be reciprocated by the adversary. In a way whose significance may vary with context, effective dissemination of unreciprocated norms could clearly disadvantage the complying party.

18. Even historically related military organizations may construe international norms differently in their manuals. The British equivalent to the U.S. Army's field manual on the law of war states that defectors should not be treated as prisoners of war. (The British War Office, *The Law of War on Land being Part III of the Manual of Military Law* (London: Her Majesty's Stationery Office, 1958), par. 126). U.S. policy, derived from the same treaty provisions, is the opposite (Howard S. Levie, *International Law Studies v. 59: Prisoners of War in International Armed Conflict* (Newport, RI: Naval War College Press, 1979), p. 80). For differences between the British manual and the U.S. counterpart, *see* R.R. Baxter, "The Cambridge Conference on the Revision of the Law of War", *Am. Journal of Int'l Law*, v. 47, p. 702 (1953).

19. Dissemination via military manuals is an encouraged means. *See*, International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff, 1987), p. 963 [hereinafter cited as *Commentary*].

20. The International Committee of the Red Cross [hereinafter ICRC] regularly attempts to define "credible fashion" in its publications and training programs. *See, e.g.*, ICRC, *Dissemination of International Humanitarian Law and of the Principles and Ideals of the Red Cross*, XXIVth ICRC Conference (1981). The ICRC publishes a monthly periodical on the dissemination of international humanitarian law entitled *Dissemination*. It also organizes courses for teaching humanitarian law throughout the world. *See* "Dissemination Among the Armed Forces", *Dissemination*, April 1985, p. 2.

ICRC conferences which have stressed the necessity of dissemination include: Centenary Congress, 1963, Resolution IV; XXth International Conference of the Red Cross, 1965, Resolution XXI; XXIst International Conference of the Red Cross, 1969, Resolution IX; XXIInd International Conference of the Red Cross, 1973, Resolution XII; XXIIIrd International Conference of the Red Cross, 1977, Resolution VII; XXIVth International Conference of the Red Cross, 1981, Resolution X.

A notable exception to the groups successfully targeted by the ICRC dissemination program has been the armed forces of Warsaw Pact countries. *See* Independent Commission on International Humanitarian Issues, *Modern Wars: The Humanitarian Challenge* (Atlantic Highlands, NJ: Zed Books, 1986), p. 174.

21. For an example of the potential long-term effects of written manuals on surveillance, *see* Military and Paramilitary Activities In and Against Nicaragua (Nicar, v. U.S.), 1986 I.C.J. 14, pars. 113 and 122 (merits 27 June 1986) (Court finding that CIA supplied FDN with a 1983 manual of psychological guerrilla warfare which advocated certain violations of international law).

Written statements can also focus critical attention on a nation if legal norms espoused in writing are later rejected. A state may lose the benefit of not signing a specific treaty or convention if it later promulgates regulations which comport with the norms therein.

22. The ICRC regularly participates in programs to promote the dissemination of international humanitarian law throughout the world, often in collaboration with the Henry Dunant Institute or the International Institute of Humanitarian Law. *See supra* note 20.

23. The point bears emphasis. Genuine humanitarian concerns might cause a soldier to disobey a national legal requirement, but international law will probably be ineffective in doing the same. Indoctrination and training of military personnel is such that few would ever consider elevating international law over national law, especially during war. Superordination must therefore take place within the national system; national law, with its more immediate and effective sanctioning, must be made to reflect accepted international norms.

24. Military discipline can be said to serve the dual function of ensuring that orders are carried out expeditiously *and* in accordance with the law. *See* AFP 110-31, *supra* note 15, pp. 1-5, pars. 1-3. A graphic example of this latter function with respect to the law of armed conflict is found in article 44 of the "Lieber Code" of 1863:

> All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense.
>
> A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior.

Secretary of War, General Orders No. 100, "Instructions for the Government of Armies of the United States in the Field", 24 April 1863, *reprinted in* Richard Shelly Hartigan, *Lieber's Code and the Law of War* (Chicago: Precedent Publishing, 1983), p. 54.

See also Calley v. Callaway, 519 F.2d. 184 (1975), *cert. den.* 425 U.S. 911. Lieutenant Calley's court martial demonstrates one answer to the need for an enforcement scheme in the post-Nuremburg world of limited conflicts. Several provisions in the Uniform Code of Military Justice parallel or may implicate international humanitarian law. *See, e.g.*, art. 90 (Assaulting or willfully disobeying superior commissioned officer); art. 92 (Failure to obey order or regulation); art. 93 (Cruelty and maltreatment); art. 97 (Unlawful detention); art. 99 (Misbehavior before the enemy); art. 102 (Forcing a safeguard); art. 103 (Captured or abandoned property); art. 104 (Aiding the enemy); art. 105 (Misconduct as prisoner); art. 106 (Spies); art. 106a (Espionage); art. 116 (Riot or breach of peace); art. 118 (Murder); art. 119 (Manslaughter); art. 120 (Rape and carnal knowledge); art. 121 (Larceny and wrongful appropriation); art. 122 (Robbery); art. 124 (Maiming); art. 125 (Sodomy); art. 126 (Arson); art. 127 (Extortion); art. 128 (Assault); art. 129 (Burglary); art. 130 (Housebreaking); art. 134 (General article). Uniform Code of Military Justice, 10 U.S.C. sections 801-940 (1982 and Supp. IV 1986). If other states do not apply similar domestic enforcement schemes, dissemination of content is likely to be ineffectual.

25. Policies must be determined well before conflict but may be substantially based on expectations regarding a potential adversary's likely conduct during a future encounter. Since the midst of combat is too late for identifying pathologies or specific norms which are destined for nullification, we can only look to "actions" which incorporate or manifestly demonstrate intent to obey (*e.g.* disarmament and/or dissemination). The centrality of expectations of reciprocity is dramatic in U.S. policy regarding chemical weapons. *See Handbook, supra* note 10, par. 10.3.2.1. The failure to reject second use of such weapons illustrates the deleterious effect on the norm caused by expected deviations.

26. It is worth noting that the Soviet Union claims to comply with Geneva Convention obligations to disseminate norms. *See* I. Blishchenko and V. Grin, *International Humanitarian Law and the Red Cross* (Moscow: Executive Committee of the Order of Lenin Alliance of Red Cross and Red Crescent Societies of the USSR, 1983), p. 36. (the authors state, "[t]he members of the Soviet Armed Forces study the provisions of international humanitarian law regularly and systematically. . . . All members of the Armed Forces are familiarized with the texts of the Geneva Conventions. . . . The officer corps thoroughly study the provisions of international humanitarian law." *Id.*, p. 39. For an extensive compilation of various state claims regarding dissemination *see* ICRC, *Dissemination of Knowledge and Teaching of International Humanitarian Law and of the Principles and Ideals of the Red Cross, Answers from Governments and National Societies to the I.C.R.C. Questionnaire*, XXIVth ICRC Conference, (1981) [hereinafter cited as Answers].

27. It is important to differentiate those norms which are based primarily on reciprocity and those which are not. Where absolutist concepts animate a construction of the rules, they will justify adherence regardless of reciprocity. Some norms will be upheld for good order and discipline or to prevent grossly uncivilized behavior. *See*, Thomas Nagel, "War and Massacre" in Charles R. Beitz, et al., eds., *International Ethics* (Princeton, NJ: Princeton University Press, 1985), pp. 53-74. Internalizing norms within the rank-and-file can thus have an effect even outside of reciprocal agreement.

28. Even if a norm has been adopted, lack of a written manual greatly reduces the costs involved in later disavowing it. Expectations therefore cannot be drawn.

29. *Trials of War Criminals Before the Nuremburg Military Tribunal* (Washington: Government Printing Office, 1950), v. XI, p. 1237. The effect of this dictum is unfortunately blurred since its focus was the incompetence of regulations in authoritatively defining international law. The statement defeats a defense claim that U.S. Army Regulations encouraged obedience even to unlawful orders.

30. *See* Robert W. Tucker, *Naval War College International Law Studies, 1955: The Law of War and Neutrality at Sea* (Washington: Government Printing Office, 1957), p. 26.

31. The Scotia, 81 U.S. (14 Wall.) 170 (1871).

32. Cooperative intergovernmental efforts in the development of manuals may assist in the process of international norm formulation. *See* Baxter *supra* note 18 (discussing collaborative efforts between the United States and Great Britain in updating army field manuals).

33. There seems to be little evidence that systematic comparisons are being made in the United States. The ICRC has been actively monitoring disseminations however. *See* Answers *supra* note 26; and International Institute of Humanitarian Law in San Remo, *Annexe documentaire* (1972) (containing extracts from the Federal Republic of Germany Military Instruction Manual, the U.S. Field Manual, the French Regulations on general discipline in the armies, the British Manual of Military Law, the Italian "Law of War" and the Swiss Manual on Laws and Customs of War).

34. Kervyn de Lettenhove, ed., *Oeuvres de Froissart* (Brussels: 1869), tome VIII, p. 43, *reprinted in* M.H. Keen, *The Laws of War in the Late Middle Ages* (London: Routledge and Kegan Paul, 1965), p. 1 (treatment of early codes and the principles of chivalry).

35. Kuhn, "Responsibility for Military Conduct and Respect for International Law," *Dissemination*, August 1987, p. 1. *See also*, William E.S. Flory, *Prisoners of War* (Washington: American Council on Public Affairs, 1942), pp. 10-15 (discussing treatment of prisoners in ancient and medieval times).

36. *See* Flory *supra* note 35. *See also* Keen *supra* note 34.

37. Intergovernmental communication of manuals has been specifically encouraged by the ICRC *See* Commentary, *supra* note 19; International Institute of Humanitarian Law supra note 33.

38. "Statement of Senator Goldwater," *Congressional Record*, 6 June 1976, p. S17551.

39. The ICRC has historically been extremely active in promoting dissemination of the law of armed conflict. Indeed, the ICRC proposed a third paragraph to article 83 of the 1977 Protocol (I) to the 1949 Geneva Conventions which read: "The High Contracting Parties shall report to the depositary of the Conventions and to the International Committee of the Red Cross at intervals of four years on the measures they have taken in accordance with their obligations under this article." Commentary, *supra* note 19, p. 961, n. 15. The proposal was defeated in plenary. *Id.*, p. 963. The ICRC has begun soliciting dissemination reports despite the failure to obtain a provision mandating them. *See* Answers *supra* note 26.

40. Bickel was quoting Namier in an address originally delivered in the 1969 Oliver Wendell Holmes Lecture series at Harvard Law School, *reprinted in* Alexander Bickel, *The Supreme Court and the Idea of Progress* (New York: Harper and Row, 1970), p. 13.

41. Legal limits on belligerent conduct are often described as being delineated by three principles: 1) military necessity (justifying the amount and kind of force necessary to achieve submission of the enemy with minimal expenditure of human and material resources); 2) humanity (prohibiting all force not necessary for military purposes); 3) chivalry (prohibiting resort to dishonorable means). *See* Adam Roberts and Richard Guelff, eds., *Documents on the Laws of War* (Oxford: Clarendon Press, 1982), p. 5; Myres S. McDougal and Florentino P. Feliciano, *Law and Minimum World Public Order* (New Haven, CT: Yale University Press, 1961), pp. 521-30; Denise Bindschedler-Robert, "A Reconsideration of the Law of Armed Conflicts," in Conference on Contemporary Problems of the Law of Armed Conflicts, *Report*, (New York: Carnegie Endowment for International Peace, 1971), pp. 14-16; Morris Greenspan, *The Modern Law of Land Warfare* (Berkeley, CA: University of California Press, 1959), pp. 313-16.

42. Consider, for example, recent attacks on Iranian oil platforms. Communication resources enabled the entire action to be directed from the White House. Julie Johnson, "Before the Order for Retaliation, a Major Effort to Woo Congress", *New York Times*, 19 April 1988, p. A1:4.

43. The same technological advances have also multiplied the number of situations a commander might confront. The utility curve for any given instruction or manual must consider the downside of such voluminous treatment.

44. *See* Paul Bracken, *The Command and Control of Nuclear Forces* (New Haven, CT: Yale University Press, 1983), pp. 219-20.

45. *See* Joseph Metcalf, III, "Decision Making and the Grenada Rescue Operation," in James G. March and Roger Weissinger-Baylon, *Ambiguity and Command* (Marshfield, MA: Pitman Publishing, 1986), pp. 277-97 (demonstrating the continued need for relevant decision-making at various levels of the chain of command). *See also* Col. William G. Eckhardt, "Command Criminal Responsibility: A Plea for a Workable Standard," 97 Mil. L. Rev. 1 (1982) (examining the criminal responsibility of superiors for subordinate misconduct and the need for effective legal standards of professional military conduct).

46. Renunciation of War as an Instrument of National Policy, 27 August 1928, 46 Stat. 2343, U.S.T.S. 796, 94 L.N.T.S. 57.

47. *See* Michael Howard, "Temperamenta Belli: Can War Be Controlled?" in Michael Howard, ed., *Restraints on War* (Oxford: Oxford University Press, 1979) (arguing that the historical success of rules depended on the limited nature of relevant conflicts); Elaine Scarry, *The Body in Pain* (New York: Oxford University Press, 1985) (criticizing total war); Flory *supra* note 35, p. 9 (many rules become inapplicable in total war).

48. Carl Von Clausewitz, *On War* (M. Howard and P. Paret trans.) (Princeton, NJ: Princeton University Press, 1976), p. 76. *But cf.* Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977).

It may be appropriate to note that rational explanations have been suggested for the validity of many of the laws of warfare. Absolutist concepts and natural law arguments would favor adhering to international norms of warfare without regard to adversary compliance. *See* Nagel *supra* note 27. In some cases utilitarian arguments justify complying with certain rules even from a unilateral perspective. *See* R.B. Brandt, "Utilitarianism and the Rules of War," *Philosophy and Public Affairs*, Winter 1972, p. 145. *Cf.* N.W. Royse, *Aerial Bombardment and the International Regulation of Warfare* (New York: Harold Vinal, 1928) (predicting that only ultimate utility will be able to constrain aerial bombardment). Attention here is directed to the "problem rules" - rules which disallow a tactically prudent or strategically advantageous course of action. In extreme situations it is these rules which are in danger of being violated, and it is these rules which publication in manuals might help to safeguard.

49. Consider the vain attempts to control air power and submarine warfare prior to World War II, *e.g.*, the 1923 Hague Rules of Aerial Warfare (Department of State, *Papers Relating to the Foreign Relations of the United States, 1923* (Washington: Government Printing Office, 1938), v. I, p. 73; *American Journal of International Law (Supp.)*, v. 17, p. 245 (1923); *id.*, v. 32, p. 12 (1938); the Proces-Verbal of 6 November 1936 Relating to the Rules of Submarine Warfare Set Forth in Part IV of the London Naval Treaty of 1930 (3 Bevans 298, 173 L.N.T.S. 353).

50. The import of this ramification obviously depends on the specific situation. If violating a norm requires little additional training or is not particularly offensive to subordinate parties, the manual limitation will be minimal.

51. Consider, for example, a chemical weapon system capable of being deployed via long-range cruise missiles. An agreement to prohibit the use of such weapons is meaningless, even if effectively disseminated, as long as the weapons exist in operational form and military organizations are prepared to employ them. An elite decision to ignore the agreement would only incur international political costs, as opposed to the more immediate concerns of reprogramming an entire military community.

52. *See*, James D. Atkinson and Donovan P. Yeuell, "Must We Have World War III?", *U.S. Naval Institute Proceedings*, July 1956, p. 711; Morton H. Halperin, *Limited War in the Nuclear Age* (New York: John Wiley and Sons, 1963).

53. *E.g.*, U.S. punitive raids against Libya, the Grenada invasion, the Israeli preemptive attack on an Iraqi nuclear facility, Chinese attacks on Vietnam, recent U.S. attacks on Iranian oil platforms.

54. For a didactic illustration of the effect of the Geneva Conventions on a limited conflict, *see* ICRC, *Protection of Victims of Armed Conflict, Falkland-Malvinas Islands* (1984) (discussion of humanitarian law as it applies to the conflict). *See also* Sally V. Mallison and W. Thomas Mallison, *Armed Conflict in Lebanon, 1982: Humanitarian Law in a Real World Setting* (Washington: American Educational Trust, 1983) (discussion of humanitarian law applied to the invasion of Lebanon).

55. *See* Walter Laqueur, *Guerrilla* (London: Weidenfeld and Nicolson, 1976) (guerrilla warfare generally); Walzer, *supra* note 48, pp. 176-96 (humanitarian law applied to guerrilla warfare).

56. *See* Keith Suter, *An International Law of Guerrilla Warfare* (New York: St. Martin's Press, 1984) (discussing lack of progress in drafting rules for guerrilla warfare); Lewy, *supra* note 16, pp. 223-70 (provisions of Geneva conventions found inapplicable in many situations due to problematic tactics used in Vietnam conflict). It is in this type of combat that the U.S. refusal to accept Protocol I to the 1949 Geneva Conventions may have the most impact, since the Protocol changes requirements for prisoner-of-war status.

57. *See* Amir Taheri, *The Holy Terror: Inside the World of Islamic Terrorism* (Bethesda, MD: Adler and Adler, 1987). For historical background *see* Bernard Lewis, *The Assassins: A Radical Sect in Islam* (New York: Basic Books, 1968). For contemporary application *see* Arsanjani, "The Impact of Islamic Fundamentalism on International Politics and Law", *American Society of International Law: Proceedings*, 1988, p. 82 (forthcoming).

Chapter II
International Law and Naval and Air Operations at Sea

by
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Introduction

The publication of *The Commander's Handbook on the Law of Naval Operations* (NWP-9) is a suitable occasion for reconsidering the relationship between international law and naval and air operations at sea in times of peace.[1]

The *Handbook* is replete with articulations of specific rules and principles of the law of the sea that may be of use to the naval or air commander. Its purpose is "general guidance" and "not a comprehensive treatment of the law."[2] The rules and principles it articulates relating to navigation and overflight are expressly based on those set forth in the 1982 United Nations Convention on the Law of the Sea,[3] "[a]lthough not signed by the United States and not yet in formal effect."[4] The *Handbook* could hardly be significantly more faithful to the text of the Convention[5] had the United States ratified the text of the Convention and Congress enacted penalties for its violation.

Still the *Handbook* contains interesting innovations not found in the Convention. For example, use of the terms "national waters" and "international waters"[6] was doubtless designed to facilitate an explication to the non-expert of the law of naval and air operations in the exclusive economic zone.[7] If the *summa divisio* between "national" and "international" waters persists as such in coastal areas—a matter open to some doubt—it might be useful for the commander to know that the classifications set forth in the *Handbook* might prove controversial. Unlike the authors of the *Handbook*, some coastal states would regard the exclusive economic zone as falling within the former category and at least some commentators might regard international straits (and comparable archipelagic sealanes) as falling within the latter category.

Another arguable innovation is the concept of "assistance entry" into the territorial sea.[8] The concept is appropriately rooted in the ancient duty of

mariners "to assist those in danger of being lost at sea."[9] Although the Law of the Sea Convention does not expressly address the question of entry into the territorial sea for the purpose of rescue, textual support can be found in the newly articulated and analogous principle of the Convention that permits stopping and anchoring while in innocent passage through the territorial sea "for the purpose of rendering assistance to persons, ships or aircraft in danger or distress."[10] In the principle that the sovereignty of the coastal state over the territorial sea is subject to other rules of international law,[11] and in the principle that the coastal state's rights and jurisdiction must be exercised in a manner which would not constitute an abuse of right,[12] one can find ample basis for concluding that the coastal state's rights must be interpreted in light of the ancient duty to rescue, and that the coastal state is presumed to consent to *bona fide* efforts to rescue those in danger of being lost at sea.

Probably in order to avoid too much confusing detail, the *Handbook* is also less than complete on the question of straits overlapped by internal waters.[13] Article 35(a) of the Law of the Sea Convention makes it clear that the regime of straits applies to internal waters established by a system of straight baselines in accordance with the Convention where the waters enclosed were not previously considered internal (that is they would not be regarded as juridical bays, for example). Why then, except perhaps for reasons of economy of text, is overflight excluded from transit passage of such straits?[14] Why is the discussion of international straits essentially limited to "International Straits Overlapped by Territorial Seas?"[15]

All (or at least almost all) of this is as it should be. Taken as a whole, the *Handbook* should achieve its purposes admirably. This writer has expressed his specific views on the legal rules governing naval and air operations at sea elsewhere, and will not repeat them here.[16]

What the *Handbook* does not address, or addresses only in passing, is why those concerned with naval and air operations at sea should be concerned with the international law of the sea. Such an analysis is probably beyond the scope of a handbook of the kind addressed here. But the analysis is essential if one is to understand what one is probably reading, and why one is reading it, when one refers to the *Handbook*.

The Duty to Obey International Law

From the perspective of the naval commander, a fairly simple answer can be posed to the question, "Why worry about international law?" As the *Handbook* notes,[17] article 0605 of U.S. Navy Regulations, 1973, states:

> At all times, a commander shall observe and require his command to observe the principles of international law. Where necessary to the fulfillment of this responsibility, a departure from other provisions of Navy Regulations is authorized.

The *Handbook* also attempts an explanation of the underlying reasons for this duty:

> International law provides stability in international relations and an expectation that certain acts or omissions will effect predictable consequences. If one nation violates the law, it may expect that others will reciprocate. Consequently, failure to comply with international law ordinarily involves greater political and economic costs than does observance.[18]

The *Handbook* does not stop there however. It ventures into the complex world of law and interest when it states, "In short, nations comply with international law because it is in their interest to do so."[19] This sentence is not without its ambiguities. Legal restraints are of particular significance when one perceives an interest in ignoring those restraints. What the authors presumably mean is that the interest in observing international law ordinarily outweighs the perceived interest in acting otherwise in a particular instance.

The brief discussion concludes with a declaration at once as terse and as pregnant as one is likely to encounter: "Like most rules of conduct, international law is in a continual state of development and change."[20] Nothing at all is said about the role of the *Handbook* itself in this process. As for the role of naval and air forces, the *Handbook* asserts:

> When maritime nations appear to acquiesce in excessive maritime claims and fail to exercise their rights actively in the face of constraints on international navigation and overflight, those claims and constraints may, in time, be considered to have been accepted by the international community as reflecting the practice of nations and as binding upon all users of the seas and superjacent airspace. Consequently, it is incumbent upon maritime nations to protest through diplomatic channels all excessive claims of coastal or island nations, and to exercise their navigation and overflight rights in the face of such claims. The President's Oceans Policy Statement makes clear that the U.S. has accepted this responsibility as a fundamental element of its national policy.[21]

What the *Handbook* appears to be saying is that because the law may evolve and change, it is important for the United States to influence that process, where appropriate, using its naval and air forces to that end. More than that, the *Handbook* appears to be used to resist attempts by other states to change the law, particularly "excessive maritime [presumably coastal state] claims" and "constraints on international navigation and overflight." The "law" that the United States will defend is expressly identified with the rules of the Law of the Sea Convention affecting navigation and overflight rights.

We have now moved beyond a mere duty to respect international law as it is now or as it may evolve in the future. The law of the sea, at least that part of it governing naval and air operations at sea, has itself become an object of those operations. Why?

International Law and Large Navies

Large navies operate around the world. Their ships approach or enter the territory of many states. Their operations are subject to scrutiny within their own government and legislature, by their own press and public at least in democratic states, and by the governments, press and people of foreign countries, whether friendly or hostile. Alone or in combination, every one of these groups has some actual or potential influence on the ability to define naval missions and to carry them out. The question of whether they should have such influence is beside the point.

Few naval missions (other than purely humanitarian assistance) are likely to be applauded by everyone. Even a peaceful visit to a port of a friendly country may be an implicit warning to others. The capacity to define and carry out naval missions is maximized if one maximizes the number of people with influence over the definition or execution of the mission who believe that:

(1) the specific mission is desirable;

(2) navies should have the right to conduct that kind of activity in the manner undertaken; and

(3) navies do have the right to conduct that kind of activity in the manner undertaken.

Human nature being what it is, there is some likelihood that an individual who falls within group 1 will also fall within group 2, and that an individual who falls within group 2 will also fall within group 3. However, not everyone who falls within group 1 or even 2 will necessarily fall within group 3. For example, some people who believe that Israel's rescue of hostages in Entebbe or even its raid on the Iraqi nuclear reactor were, if viewed in isolation, desirable, also believe that such intrusions into the territory of a foreign state are (and should be) of doubtful legality.

Moreover, what if a significant number of people with actual or potential influence over the definition or execution of the mission do not believe that the specific mission, or its mode of execution, is desirable? The objective in that case to achieve their acquiescence is facilitated (but by no means guaranteed) if they are persuaded either that the navy should, or that it does, have a right to carry out the mission in the manner contemplated.[22] To put the matter differently, the political, economic or military resources that must be expended to achieve acquiescence are minimized, and often eliminated, if those whose acquiescence is sought believe a navy does or should have a right to undertake the action in the manner contemplated.[23]

Since no government's political, economic, or military resources are unlimited, the more costly it is to achieve acquiescence, the more limited are a government's options to choose and execute its naval missions.

Accordingly, perceptions of what the law is or should be by people with influence over the definition or execution of the mission have a real influence over the range of a government's naval options.

Whose Acquiescence is Important?

For purposes of this analysis, a naval or air mission might be divided into three parts: the objective, the means, and the logistics.

We might assume, for example, that the proposition up for decision is delivering a warning to some government or group in the eastern Mediterranean region designed to deter violence or escalation of violence on land or at sea. We might assume further that the means under consideration are a substantial augmentation of naval presence in the eastern Mediterranean Sea. Finally, we might assume that the augmentation would require the movement of ships from the Atlantic Ocean and perhaps the Indian Ocean, the former through the Strait of Gibraltar and the latter through the Strait of Bab-el-Mandeb and the Suez Canal.

The classic argument for maintaining and using a large surface navy in this manner is nicely summarized in the *Handbook*:

> Depending upon the magnitude and immediacy of the problem, naval forces may be positioned near areas of potential discord as a show of force or as a symbolic expression of support and concern. Unlike land-based forces, naval forces may be so employed without political entanglement and without the necessity of seeking littoral nation consent.[24]

Three aspects of this statement require emphasis. First, it is normally assumed that the naval forces will be positioned "near areas of potential discord," that is near land, and may engage in naval maneuvers once there.[25] This is true whether one wishes to influence the behavior of regular or irregular land forces or the behavior of armed ships or boats likely to operate mainly in coastal areas. Second, it is normally assumed that some "positioning" in response to the specific mission is required, i.e. that the ships will have to be moved into position from elsewhere. Third, it is assumed that the positioning may be achieved "without political entanglement and without the necessity of seeking littoral nation consent."

Taken together, these assumptions presuppose the acquiescence of three different classes of foreign states. The first class comprises the state or states near whose coast the force will be positioned. The second class consists of the state or states off whose coast the ships will navigate en route to their position. The third class embraces other states with global or "blue water" navies.[26]

Let us assume that states in all three classes either oppose, do not wish to support, or do not wish to appear to support the mission. The question then

becomes one of acquiescence. The various classes of states will be examined in reverse order in this connection.

1. Other Naval Powers

Much attention is normally devoted to the third class and, in particular, the Soviet Union. History has demonstrated that the United States and Soviet navies and air forces, notwithstanding occasional lapses into pubescent behavior,[27] are reluctant to engage each other far from their shores (and exercise at least relative caution even in their own waters). The reaction of other major naval powers is therefore ordinarily a political rather than strictly military consideration, although one must of course bear in mind that political cost may reduce one's flexibility to undertake a mission.

Moreover, because the same rules normally apply to all, it may be assumed that governments with large navies generally believe all states have, or should have, the right to do what large navies generally do. In other words, much as the Soviet Union may dislike a particular United States naval mission in the eastern Mediterranean Sea, or the United States may dislike a particular Soviet naval mission in the Caribbean Sea, each is likely not only to concede (albeit privately) the legal right of the other to do what it is doing, but perhaps even welcome (albeit silently) the augmentation of state practice in support of the kinds of operations large navies undertake.[28]

From this analysis, one may draw at least the following inferences regarding the effect of the international law of the sea on the acquiescence of other naval powers in operations off the coasts of third states. The naval powers have no desire to engage each other directly. The law of the sea would appear to be relevant to the degree of acquiescence obtained from other naval powers in two different ways. If the naval powers disagree on what the law of the sea rules are or should be, and that disagreement involves the question of whether there has been an incursion on the territory or rights of a third state by the naval power undertaking the mission, the disagreement could force a more severely negative reaction by the other naval power either in principle or because of political or defense commitments to the third state. Conversely, if the naval powers agree on what the law of the sea rules are, and those rules are observed, the perception that the power undertaking the mission is within its rights—and that other naval powers wish to preserve the right to do the same thing elsewhere—may increase the degree of acquiescence, that is dampen the political opposition.

This is the first illustration of a basic point central to the relationship between the law of the sea and naval and air operations at sea: to the extent that the law of the sea is relevant to the question of acquiescence by a foreign power, its relevance depends not on what the naval power undertaking the mission believes its rights to be, or even on whether that belief is well founded

in law, policy or good morals, but rather on whether the powers concerned agree or disagree with each other on what the rules are.

2. States Off Whose Coast Ships Will Navigate En Route to Their Position

The *Handbook* assumes that ships will be able to navigate to their intended position "without political entanglement and without the necessity of seeking littoral nation consent." In this case, the reference is therefore to the acquiescence of states off whose coasts ships will navigate en route to their position. In this connection, the political, military, and psychological question of what constitutes a route close to the coast of another country must be distinguished from the strictly legal question of what rights a state may claim and exercise in waters off its coast. For purposes of this analysis, the acquiescence of a state "off whose coast" one must navigate is relevant if that state has the means and the will to disrupt, or otherwise increase the political, economic or military cost of, the mission.

A route close to land may be selected because of geographic necessity. For example, a ship cannot enter or leave the Mediterranean Sea without traversing a strait (or canal) at some point. Some seas are so constricted that one is rarely far from land. A route close to land may be selected for reasons of safety or weather. It may also be selected because it is substantially shorter and more convenient than an alternative route. The same considerations may apply in the case of military aircraft where consent to overfly land territory is unavailable.[29]

The acquiescence of states along a selected route therefore affects the mobility of naval forces as well as the mobility of air forces for which consent to overfly land territory is unavailable. Such acquiescence affects naval and air transports in the same way, whether used to move ground or amphibious forces or to deliver material to friendly foreign forces. The number of states potentially involved is large and difficult to predict. It depends on the location of possible missions, the location of ships when assigned such missions, and the routes selected.

In considering the implications of this problem, one must bear in mind that states do not have balanced bilateral reciprocal interests in the right to navigate off each other's coast without consent.[30]

One reason for the imbalance relates to geographic position. Not many states have an overwhelming interest in navigating close to the coast of the United States without consent, despite the enormity of the United States coastline. Many would perceive a far greater interest in navigating close to England and France, Spain and Morocco, Greece and Turkey, Oman and Iran, or Singapore, Indonesia and Malaysia.

Another reason for the imbalance relates to naval capacity, defense strategy, and foreign policy. Very few states maintain global navies or a

defense strategy or foreign policy that entails deployment of their navies at great distances from their own shores. While it is true that a significant number of states rely, explicitly or implicitly, on the mobility of a global navy for protection from another global power or ambitious regional powers, not many are likely to attach a high priority to this interest without insistent reminders from their naval ally. Moreover, in some regions, particularly semi-enclosed seas, it is fashionable to believe that elimination of the right of warships (of global navies) to navigate in the region would, by removing the great naval powers, promote peace and stability. These views are sometimes inspired by regional powers whose ambitions may be held in check by the actual or potential presence of a global navy.

The significance of the imbalance means that unlike other naval powers, states along the route taken to a mission position will not necessarily perceive a strong interest (if any) in the proposition that navies should generally have the right to navigate close to the coast in order to take the necessary or most convenient route to their mission destination. Thus, to the extent one wishes to encourage their acquiescence in the use of the route off their coast, one must often rely more on their perception of what the law is than on their perception of what the law should be.

The acquiescence of this particular group of states is central to any concept of flexibility to deploy forces at sea. Prudence requires the planner to anticipate that a naval force may provoke political resistance and retaliation, or even armed resistance, once the force reaches its mission position (especially when the very purpose of the mission is to deter violent behavior by those in the region). But what if, even in peacetime, the decision-maker must deal with such contingencies not only at the mission destination but in connection with the movement of ships to their destination?

Several methods for promoting acquiescence are possible. One is the threat of armed resistance or retaliation. A cost of this approach is that every naval mission then requires the potential diversion of additional military resources to yet another mission, namely defense of the means to reach the mission destination. In addition, the political or economic costs of threatening friends and the military costs of threatening adversaries may be too high.

Another method is the threat of economic retaliation. Such retaliation is in fact more difficult than it appears. Those responsible for international trade policy can be expected to resist interference with trade either in principle or because the United States as well as the target state would be hurt.

Moreover, absent an extreme emergency, forceful military or economic measures are unlikely to be used unless those individuals with substantial influence over decisions by the government of a major naval power believe there is a legal right to use the route in question. In other words, before one can effectively pressure the foreign state to acquiesce, one must have persuaded one's domestic constituency of the right to use the route. That

constituency will include all relevant participants in government decision-making (including defense and foreign ministry lawyers), members of the legislature, informed and influential members of the public, and at least some influential friendly foreign leaders. Therefore, even if one chooses to ignore international law as such as the means to obtain acquiescence from the foreign states concerned, one would probably need to use international law to persuade the relevant domestic constituency to threaten military or economic retaliation.

One also may purchase acquiescence. Those familiar with the full political, military, and economic costs of some base-rights agreements could doubtless appreciate what it would cost to buy, on a bilateral basis, acquiescence in the right to navigate along all foreign coasts likely to lie astride the approaches to possible mission destinations. As previously noted, very few states would perceive a reciprocal interest in the right to operate warships (or even merchant ships) off the United States coast. Most would wish something in return that they would not otherwise receive; many would insist that the value to them of what is received be comparable to the value to the United States of the mobility of its naval forces; a goodly number would reserve an explicit or implicit right to renegotiate terms or end the arrangement; and some would refuse (or would be forced by political pressures to refuse) to deal at any conceivably acceptable price.[31] One must also bear in mind that purchasing (agreeing bilaterally on the existence of) rights to navigate in one place arguably implies that exercising such rights in similar areas elsewhere requires agreement of the coastal state.

This analysis suggests that the international law of the sea would be a useful tool in helping to induce the acquiescence of foreign states lying along the route to a particular mission. A variety of tactical considerations reinforce this conclusion.

While the number of states that perceive a direct interest in the global mobility of warships may be small, the number that perceive an important interest in the free movement of international trade by sea is quite large. By linking the two in a single principle of freedom of navigation or free transit of straits, one can substantially increase the number of governments that believe all ships (and therefore warships) should have a right to navigate along the coast where necessary to reach their destination.

Some governments would have difficulty gaining domestic acceptance of the premise that all warships, or warships of a particular state, have been accorded a right to navigate off the coast. Their capacity to act on the basis of such a premise is enhanced if the right is not localized, but rather derives from a global rule applicable to all similarly situated coastal states everywhere.

This being said, we must recall the object of the exercise: inducing the acquiescence of states lying along the routes used to reach the mission

destination despite their opposition to, or unwillingness to support, the mission itself. This is then the second illustration of the basic point, referred to earlier, central to the relationship between the law of the sea and air operations at sea.

The challenge then is to affect the perceptions of others as to what the law is (what some term their "expectations").

One way is to persuade them that the particular proffered rule of law serves their interests. The potential for using this approach has already been discussed.

Another way is to rely on habit. There is some tendency to associate the factual *status quo* with the legal *status quo*. If your neighbor crosses your land regularly, you are more likely to believe that he has a right to do so or, perhaps more importantly, that you would be disrupting good-neighborly relations ("legitimate expectations founded on custom") if you tried to stop him. Thus, whatever the theoretical relationship between a program of exercise of rights and the preservation of rights under international law, foreign states as a practical matter are more likely to acquiesce in activities off their coasts that occur regularly and without serious impairment of their interests.

Still another way is to influence directly the foreign state's perceptions of legitimacy, that is, to operate from a platform of principle likely to be accepted by the foreign state in determining its own behavior. One thing is certain: a platform of principle unilaterally enunciated by the naval power (including its legislature and its domestic partisans) is not likely to be regarded by foreign states as "law" necessarily binding on them.

To induce foreign acquiescence in navigation rights important to naval mobility, we must find propositions that:

(1) are understood to allow activities important to naval mobility, and

(2) are accepted as law by the states off whose coast one must navigate.

The most commonly cited repository of such propositions is called customary international law, fairly defined by the *Handbook* as the "general and consistent practice among nations with respect to a particular subject, which over time is accepted by them generally as a legal obligation."[32] But if this is so, have we come full circle?

The object of the exercise was to use law, rather than or in conjunction with other means, to induce foreign acquiescence at the lowest possible cost. Yet we are now told that this law rests on general and consistent practice among nations. Therefore, in order to ensure our first objective, namely that the law is understood to allow activities important to naval mobility, we will have to discourage states everywhere in the world from engaging in practices to the contrary. Whether we are especially interested in the actual or potential need to use an area off the coast of a particular state, we must discourage the emergence of new practices inconsistent with our view of what the relevant law is and needs to be.

When we object to the change in practice, the foreign state could accurately quote the *Handbook*: "[L]ike most rules of conduct, international law is in a continual state of development and change."[33] The foreign state might add: If law changes, and if customary international law is rooted in general practice, then the only way customary law can change is if general practice changes, and the only way general practice can change is if someone starts the process alone.

How then do we ensure that state practice is generally consistent with the existence of rights necessary to naval mobility? One way is by investing political, economic, and even military resources in the endeavor. This means that those concerned with the maintenance of an international law of the sea that encourages acquiescence of foreign states in naval operations must constantly persuade their colleagues in government that this is an objective worth the investment of national resources. Their task is not an easy one. The same people are frequently asking for money to acquire and maintain the ships and personnel necessary to have a navy. The political or economic costs of doing more than protesting adverse claims (practice) by a foreign coastal state are likely to be more immediate or apparent than the abstract erosion of a legal position.

Another possibility is to place more direct emphasis on the element of acceptance of a legal obligation and less on practice. One example would be a treaty setting forth the relevant rules and accepted by all. This is exactly what was attempted in the negotiation of the United Nations Convention on the Law of the Sea.[34] But for serious disagreements on the question of mining of seabed hard minerals in areas beyond (at times well beyond) 200 miles from any land, it appears that the Convention might have achieved very widespread ratification, thus by definition setting forth rules regarded by foreign states as legally binding on them. Moreover, since the Third United Nations Conference on the Law of the Sea, a very large number of states seem prepared to accept all or virtually all of the propositions set forth in the Convention as an authoritative source of law binding on all.

The *Handbook*, the Statement of the President on United States Oceans Policy,[35] and other government statements represent an effort to use the treaty strategy under the rubric of customary international law. They declare that the propositions set forth in the U.N. Convention on the Law of the Sea reflect customary international law. Where the Convention text is sufficiently precise, legal argument is then largely confined to interpretation of the text as if it were a treaty, with little if any attention devoted to state practice. States that make claims or undertake activities regarded as inconsistent with the propositions set forth in the Convention are told that their activities are inconsistent with the Convention and therefore illegal under customary international law.

The reason for this approach is obvious. The propositions set forth in the Convention are generally understood to allow activities important to naval mobility. Because the Convention was negotiated largely by a consensus procedure over a long period of time with the participation of the entire community of states, it enjoys substantial legitimacy as a source of rules binding on all. Thus, from the perspective of naval mobility, there is nothing to gain and a great deal to lose by allowing inconsistent state practice to overtake the Convention as a source of law in any specific instance or, even more importantly, in principle.

It is open to serious doubt whether a government that refuses to ratify the Convention, or even to renegotiate the objectionable deep seabed mining provisions, can succeed in the long run in persuading foreign governments to respect as law the provisions of the Convention affecting navigation, overflight and related naval activities. But the authors of the *Handbook*, compelled to accept that risk for the present, are almost certainly correct in concluding that treating the Convention as if it were a treaty in force for all, including positive "enforcement" of its provisions if need be, represents a policy regarding the law of the sea most likely to achieve the underlying naval objective: acquiescence by others in activities important to naval mobility at the lowest possible cost.

It is in this context that the provisions of the *Handbook* regarding the exercise and assertion of navigation and overflight rights and freedoms might be understood.[36] The strategy for inducing foreign acquiescence in naval activities seems to be one of combining habit with the textual legitimacy of the Convention. The Convention serves a double function in this regard. First, it is the most plausible platform of principle from which to seek to encourage foreign acquiescence. Second, because of its international pedigree, it is the most plausible platform of principle from which to seek domestic support for a sometimes risky or costly program of exercise of rights and freedoms designed to establish a pattern, or habit, of naval activity around the world permitted by the Convention (at least as understood by the United States).

3. States Near Whose Coast the Force Will be Positioned

Much of the analysis set forth in the previous section is relevant to the question of positioning forces off a state "without the necessity of seeking littoral state consent." The most important new element is that the objective of deploying forces "without political entanglement" becomes a larger part of the equation.

In principle, it is of course difficult to station a naval force off any area of actual or potential conflict "without political entanglement." Indeed, the very objective is "a show of force" or "a symbolic expression of support and concern." The key to the point being made in the *Handbook* is that "[u]nlike land-based forces," naval forces may be positioned near areas of potential discord without political entanglement. The salient difference

would appear to be the possibility of positioning naval forces near areas of potential discord without introducing a military presence into the territory of a foreign state, particularly one that is the scene, object, or source of the discord.

This facility can be important in two opposite situations. In one situation, the appearance of the naval force off the coast of a state may be designed as a warning to those threatening that state or its government. If the naval force is deemed to be located outside the coastal state and its consent is not required for the force to be positioned in the area, then both the coastal state and the naval power can reap the benefits of the force's presence without necessarily implying any political or military alliance or arrangement, and in particular without the stationing of armed forces of a major power on the territory of the state concerned.

In another situation, the appearance of the naval force off the coast of a state may be designed as a warning to that very state's government. If the naval force is deemed to be located outside the coastal state and its consent is not required for the force to be positioned in the area, then the coastal state is in a position to react to the message as it deems best without the need to defend its territory from intrusion, while the naval power is in a position to send a very strong and direct message without necessarily entangling itself in armed hostilities.

To an important degree, the positioning of the naval force in both of these scenarios depends on the coastal state's perception of the extent of its maritime territory and jurisdiction. In some circumstances, the political or military consequences of entering a maritime area claimed by the coastal state may be the same whether or not that claim is recognized by the naval power. If the purpose of the mission is to support the government of the coastal state, one would presumably prefer to avoid, if possible, a potentially embarrassing dispute over an intrusion into what the coastal state regards as its territory. If the purpose of the mission is to warn the government of the coastal state while minimizing the risk of direct military engagement, the risk of a military or political reaction to an intrusion into the state's claimed waters must be considered even if the claim is not recognized by the naval power (and perhaps others).[37]

This, then, is a third illustration of the basic point, referred to earlier, central to the relationship between the law of the sea and naval and air operations at sea.

Naval and Air Operations at Sea, International Law and Domestic Politics

The influence of the international law of the sea on domestic politics has

two important implications for naval and air operations at sea. Both relate to the restraints on and costs of deploying naval or air forces in furtherance of political, military or economic objectives.

A deployment may be opposed for legal reasons by either supporters or opponents of a mission. Legal objections may preclude a decision to deploy, may increase the domestic political costs of the deployment, or may erode domestic support for the mission and more generally for the maintenance of military and naval options. The greater the doubts about the international legality of a naval operation, the greater the difficulty one may encounter in assembling and maintaining the necessary domestic support. A foreign ministry will not necessarily accept a navy's view of what the law permits; a legislature will not necessarily accept a foreign ministry's view; and an informed public will not necessarily accept the legislature's view. In brief, the international pedigree of the platform of principle on which a naval mission is based must be almost, if not quite, as great for domestic reasons as for international ones.

The maritime interests of a large naval power are by no means limited to the preservation of its options to deploy its navy at will to different parts of the world. Like those of most coastal states, its people would probably want uninvited foreign navies to stay far away, control of as much of the ocean's natural resources off the coast as possible, stronger measures to intercept illegal immigrants and smugglers, and would probably fear an environmental catastrophe not only from tankers and oil rigs off the coast but perhaps from nuclear armed or powered warships or aircraft. If the paradigm coastal state might prefer a thousand-mile territorial sea for itself without regard to the global consequences, the paradigm maritime power, since it is also a coastal state, would probably prefer a thousand-mile territorial sea for itself and a three-mile territorial sea for everyone else.

Limiting the authority of coastal states over the use of the sea off their coasts is important to global navies and, more broadly, global deployment of armed forces; to international trade and communications; and to those fishermen who seek their livelihood off foreign coasts rather than their own. Most remaining ocean interests either favor increased control of the sea by coastal nations, or are unconcerned with the issue. Accordingly, the legislators of even great naval powers are under constant pressure to expand the coastal state's control over the oceans in one area or another or for one purpose or another.

This pressure presents a global navy with two problems. First, it cannot plausibly assert rights off foreign coasts that its own government denies foreign ships or aircraft off its own coast. Second, and more seriously, increasing unilateral assertions of coastal state jurisdiction by the great naval powers tends to legitimate the notion that each coastal state may unilaterally assert control over activities off its coast to the extent such an assertion serves

its interests. The fact that a global naval power may perceive an interest in coastal state control of fishing vessels but not warships does not, from this perspective, preclude some other state from calculating its interests in a different way and making different kinds of unilateral claims. The whims of a quixotic national legislature are unlikely to provide a firm foundation for a platform of principle from which to seek global acquiescence in the definition and exercise of legal rights.

The problem is even more severe if the global navy is attempting to harmonize perceptions of legality around a particular articulation of the law, in this case the U.N. Convention on the Law of the Sea. The key to this effort is the legitimacy not merely (and in some cases not principally) of the particular rule set forth in the Convention, but rather the legitimacy that flows from the notion that the Convention itself is the reflection of the positive will of the community of states. Quite apart from the controversy over deep seabed mining, if the legislature of the naval power exercises the option to ignore certain proscriptions of the Convention, why should other states not ignore other proscriptions?

Given the strong competing pressures on their own government and legislature, the promoters of a law of the sea conducive to foreign acquiescence in global naval operations are constantly attempting to prevent domestic laws or actions, often in response to problems of the moment, that would undermine the navy's long-term global legal position and strategy. Their ability to persuade their own government to respect certain rules and restraints depends in part on what domestic decision-makers and their advisers believe international law requires.

Whether or not one may properly characterize as wishful thinking the view that customary international law based on the 1982 U.N. Convention on the Law of the Sea will restrain the behavior of foreign governments as much as a ratified Convention would, there is no basis whatever for believing that the United States Congress, in the face of political pressures to the contrary, is as likely to respect the restraints imposed by an unratified treaty as it is a ratified one. Indeed, as a matter of the pure theory of customary international law, it is likely that international custom and practice would rather quickly conform to virtually any coastal state claim likely to be made by the United States, precisely because the state with perhaps the greatest interest in opposing and capacity to oppose the emergence of such custom and practice is the one making the claim in the first place.

No international legal strategy can alone solve the domestic problem. Those responsible for promoting a legal climate conducive to protecting the option of present and future governments to deploy naval forces to any part of the sea must however recognize that a strategy for ensuring domestic restraint is at least as important as a strategy for ensuring foreign restraint. Indeed, an excessive claim by one foreign state may well have no operational

significance and limited legal impact. On the other hand, every domestic claim by a major naval power automatically limits the options of its navy in every part of the world, and frequently tempts significant numbers of foreign governments to make even more ambitious claims.

Conclusion

The willingness of foreign governments to acquiesce in naval operations has an important bearing on the range, cost and utility of options to maintain and deploy a navy off foreign shores. The perceptions of foreign governments regarding the rights and obligations of states with respect to naval operations may in turn have an important bearing on their willingness to acquiesce in such operations. Any long-term naval strategy should therefore contain within it a strategy for influencing the perceptions of foreign governments regarding the content of the international law of the sea and enhancing their willingness to respect its proscriptions voluntarily. That strategy should also include a system for ensuring scrupulous domestic restraint along similar lines.

Any successful strategy for achieving these legal goals will entail some political, economic, and even military costs. Those costs must be measured against the importance of maintaining the option to deploy a navy off foreign shores and the likelihood and costs of obtaining by other means the desired degree of foreign acquiescence over time and in all the places it may be needed. Moreover, the alternative costs of different strategies for achieving these legal goals must be assessed carefully.

The *Handbook* is a useful part of this process. At the least it encourages behavior from United States forces consistent with the international legal positions and objectives of the United States. It is a reasonably accurate guide to the perceptions of foreign governments primarily because it is based on the U.N. Convention on the Law of the Sea. Accordingly, it is likely to remain an accurate guide only so long as the United States and foreign governments resist the temptation to act in ways at variance with the provisions of the Convention limiting coastal state powers in principle, and in particular over navigation, overflight and related naval operations.

It is not likely that many coastal states (or legal commentators) will conclude that customary international law limits the freedom of action of coastal states more than the Convention. Any significant change in the law of the sea is therefore likely to be either neutral or prejudicial from the perspective of naval operations, not favorable. The *Handbook* is therefore correct in seeking to anchor the future evolution of the sea in the principles of the Convention. It is also correct in emphasizing the importance of a program of routine exercise of rights and freedoms not only to avoid perceptions of acquiescence in coastal state claims but to enhance the

perception that naval operations are normal and lawful. While the point is not made, such a program is important whether or not there is a ratified Convention. The meaning and effect of treaties may also evolve in response to practice.

The question remains whether the objectives of a legal strategy would be enhanced by a globally ratified Convention on the Law of the Sea. In considering this matter, two additional questions are particularly important. First, are governments more likely to respect the restraints on their freedom of action set forth in a ratified Convention on the Law of the Sea? Second, are missions for the purpose of exercising rights and freedoms protected by the Convention, in the face of inconsistent claims or otherwise, more likely to be supported by the Executive Branch and Congress if they are rooted in ensuring respect for a ratified Convention?

If these questions are answered in the affirmative, then are the benefits of a widely ratified Convention worth the costs that may be entailed in obtaining it? Stripped of the legal and political rhetoric hurled at this issue, it comes down to a simple question of priorities.

Notes

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1. It is also a suitable occasion for examining the same question with reference to armed conflict. This writer (fortunately) was not invited to address that subject.

2. *The Commander's Handbook on the Law of Naval Operations* NWP-9, p. 27 (hereinafter *Handbook*).

3. United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. Pub. Sales No. E.83.V.5 (1983), *reprinted in International Legal Materials*, Nov. 1982, v. 21, p. 1261 (hereinafter cited as Law of the Sea Convention).

4. *Handbook*, *supra* note 2, par. 1.1.

5. As the United States Navy would be expected to understand it.

6. *Handbook*, *supra* note 2, pars. 1.4, 1.5, 1.8.

7. The authors of the *Handbook* are to be congratulated on an elegant attempt at a solution to the question of the relationship between the exclusive economic zone and the regime of the high seas. This writer believes that the question cannot be resolved by assigning a geographic status to the exclusive economic zone identical to that assigned to the high seas beyond: "The question whether relevant aspects of the economic zone regime are part of the high seas regime has been resolved by making relevant aspects of the high seas regime part of the economic zone regime and by deleting the geographic definition of the high seas." Bernard H. Oxman, "The Third United Nations Conference on the Law of the Sea: the 1977 New York Session," *American Journal of International Law*, January 1978, v. 72, p. 57 (more generally at pp. 67-75).

It should be noted nevertheless that insofar as the authors of the *Handbook* are concerned with the kinds of operations warships and military aircraft ordinarily conduct in peacetime, rather than with other activities, they point to a conclusion not markedly different from that previously stated by this writer:

> To put the matter differently, warships in principle enjoy freedom to carry out their military missions under the regime of the high seas subject to three basic obligations: (1) the duty to refrain from the unlawful threat or use of force; (2) the duty to have "due regard" to the rights of others to use the sea; and (3) the duty to observe applicable obligations under other treaties or rules of international law. The same requirements apply in the exclusive economic zone, with the addition of an obligation to have "due regard to the rights and duties of the coastal State" in the exclusive economic zone.

Bernard H. Oxman, "The Regime of Warships Under the United Nations Convention on the Law of the Sea," *Virginia Journal of International Law*, Summer 1984, v. 24, p. 809, at pp. 837-38 (English adaptation

of an article originally published in *Annuaire Francais de Droit International*, v. 28, p. 811 (1982)) (hereinafter the Regime of Warships).

8. *Handbook*, *supra* note 2, par. 2.3.2.5.

9. *Id.*

10. Law of the Sea Convention, *supra* note 3, art. 18, par. 2.

11. *Id.*, art. 2, par. 3.

12. *Id.*, art. 300.

13. In considering the importance of this question, one might bear in mind, for example, that the baselines established by Oman extend well into the Strait of Hormuz, and that the question of navigation and overflight rights in the Arctic Ocean north of Canada and the Soviet Union is not necessarily resolved even if one were to regard as valid the internal waters claims overlapping part or all of the Northwest Passage or Northeast Passage.

14. *Handbook*, *supra* note 2, par. 2.3.1.

15. *Id.*, par. 2.3.3.1.

16. See Oxman, The Regime of Warships, *supra* note 7. Some of the matters treated in that article are not addressed at length in the *Handbook*. These include the implications of the prohibition on the threat or use of force for peacetime activities (p. 814), the duty to protect and preserve the marine environment (p. 819), disclosure of sensitive information (p. 822), reservation of the high seas for "peaceful purposes" (p. 829), the international seabed area (p. 832), as well as military maneuvers (p. 838), installations and structures (p. 841), scientific research (p. 844), intelligence collection (p. 846), and residual rights in the exclusive economic zone (p. 847).

17. *Handbook*, *supra* note 2, p. 28.

18. *Id.*

19. *Id.*

20. *Id.* It is possible to infer, at least with regard to the international law of the sea, that the word "continual" conveys precisely the intended meaning.

21. *Id.*, par. 2.6. The reference is to the following excerpt as quoted from the President's Statement on United States Oceans Policy of March 10, 1983:

> The United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the [1982 LOS] convention. The United States will not, however, acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses.

President's Statement on United States Oceans Policy, *Weekly Compilation of Presidential Documents*, v. 19, No. 10, p. 383 (March 14, 1983), reprinted in *International Legal Materials*, v. 22, p. 464 (1983) (hereinafter cited as Presidential Statement).

22. Those contemplating the distinction between agreement with an objective and support for the freedom to pursue that objective may recall the famous quotation attributed to Voltaire, "I disapprove of what you say, but I will defend to the death your right to say it." John Bartlett, *Familiar Quotations* (Boston: Little Brown & Co., 1980), 15th ed., p. 344.

23. The importance in this type of consideration is a universal feature of law. For example: A and B are neighbors in a suburb. A paints the exterior of his house yellow. B does not like yellow. B may acquiesce because B believes A has a right to choose the color of his house, or because B believes A should have that right. B may hold to that view for a variety of reasons, including B's interest in preserving his own right to choose the color of his own house. Note, however, that these considerations operate only in a limited range of tolerances. Should A paint his house black, he is not only less likely to obtain the acquiescence of his neighbors, but he may bring about an end to the principle that each home owner in the community has an independent right to choose the color of his home.

24. *Handbook*, *supra* note 2, par. 4.3.1.

25. The *Handbook* specifically refers to the right to conduct naval maneuvers in this context. *Id.*

26. Another class that may be implicated comprises the state or states from whose ports the warships normally operate or may need to obtain support. That class is excluded from this analysis because a port visit requires the consent of the port state and a home-porting or logistical support arrangement may well entail "political entanglement" with the port state.

27. It is rare that the law prohibits actions that have not occurred and are deemed unlikely to occur. With this in mind, one may approach with dark amusement a reading of the activities prohibited by the U.S.-U.S.S.R. Agreement on the Prevention of Incidents on or over the High Seas, May 25, 1972, 23 U.S.T. 1168, T.I.A.S. No. 7379, 852 U.N.T.S. 151, and the Protocol thereto, May 22, 1973, 24 U.S.T. 1063, T.I.A.S. No. 7624. The agreement is described in *Handbook*, *supra* note 2, para. 2.8.

28. A remarkable example of how the interests of major naval powers, even those who may regard themselves as adversaries, may converge is found in the Joint Statement of United States Secretary of State Baker and Soviet Foreign Secretary Shevardnadze at Jackson Hole, Wyoming, on September 23, 1989. In their statement the Secretaries state:

> The Governments are guided by the provisions of the 1982 United Nations Convention on the Law of the Sea, which, with respect to traditional uses of the oceans, generally constitute international law and practice and balance fairly the interest of all States. They recognize the need to encourage all States to harmonize their internal laws, regulations and practices with those provisions.

They attach to their Joint Statement a "Uniform Interpretation of the Rules of International Law Governing Innocent Passage," which, *inter alia*, states that "[t]he relevant rules of international law governing innocent passage of ships in the territorial sea are stated in the 1982 United Nations Convention on the Law of the Sea. . . ." The Uniform Interpretation states explicitly that warships enjoy the right of innocent passage without the requirement of prior notification nor authorization. "Joint Statement by the United States of America and the Union of Soviet Socialist Republics," September 23, 1989, reprinted in *International Legal Materials*, Nov. 1989, v. 28, p. 1444–47.

29. One assumes, for example, that United States military aircraft en route from bases in Great Britain to a mission over Libya in 1986 would not have chosen to enter the Mediterranean Sea via the Strait of Gibraltar had consent to overfly France or Spain been sought and granted (or inferred from existing military agreements). "The F-111's flew a route of about 2,800 nautical miles, and over the Strait of Gibraltar, to avoid flying through the airspace of any other nation, [U.S. Secretary of Defense] Weinberger said. In response to questions, he said that permission to fly over France had been sought and had been denied." "Pentagon Details 2-Pronged Attack," *The New York Times*, Apr. 15, 1986, p. A1, col. 5.

Because the sovereignty of a state extends to the airspace over its territorial sea, because a state may extend its territorial sea up to 12 nautical miles from the coast, because the Strait of Gibraltar at its narrowest point is substantially narrower than 24 nautical miles, and because the Strait is completely overlapped by the territorial sea claims of the coastal states in that narrow area, it is in fact not possible "to avoid flying through the airspace of any other nation" in order to reach the airspace over the Mediterranean Sea. At least from the perspective of encouraging foreign acquiescence, the right of a military aircraft to transit the Strait of Gibraltar, without the need to seek and obtain the consent of the state whose territorial sea is overflown, rests on the proposition that the right of transit passage of straits elaborated in the Law of the Sea Convention is in this respect declaratory of customary international law binding on that state.

30. Since we are discussing navigation off a foreign coast without the need to obtain consent, we exclude navigation off a state whose port a ship plans to enter or has entered, because port entry itself requires consent.

31. Considerations such as these presumably played a role in the refusal of the Malaysian government to base its rights to use the waters of the Indonesian archipelago on a bilateral agreement rather than on a global multilateral treaty on the international law of the sea.

32. *Handbook*, *supra* note 2, p. 28.

33. *Id.*

34. Law of the Sea Convention, *supra* note 3.

35. President's Statement, *supra* note 21.

36. See note 21 *supra* and accompanying text.

37. "The sudden appearance of a warship for the first time in years in a disputed area at a time of high tension is unlikely to be regarded as a largely inoffensive exercise related solely to the preservation of an underlying legal position." Report of the Special Working Committee on Maritime Claims of the American Society of International Law, *Newsletter of The American Society of International Law*, March-May 1988, p. 1, 6.

Chapter III
Peacetime Use of Force on the High Seas

by
Louis B. Sohn*

I: Scope of Comment

The subject discussed in this comment—peacetime use of force on the high seas against foreign vessels—is approached rather gingerly in Chapter 3 of *The Commander's Handbook on the Law of Naval Operations*. The main thrust of the chapter is to protect United States persons and property at sea by U.S. naval forces in peacetime against actions by pirates, terrorists or insurgents, and against the hazards of the sea, such as storms or mechanical failure. But the chapter deals also with such topics as transport of slaves, international narcotics traffic and unauthorized broadcasting from international waters; it also deals with the right of U.S. warships to approach and visit vessels sailing on the high seas under a foreign flag if suspected of such activities or in other special circumstances.

In the case of the transport of slaves, no direct guidance is given; if confronted with such situation, "commanders should request guidance from higher authority." Similar advice is given in the case of unauthorized broadcasting. In both cases also it is noted (in paragraph 3.8) that the vessel may be approached, stopped and boarded, and the ship's documents examined, in order to verify its nationality. There the advice stops, and nothing is said about possible search and seizure. While the last sentence of paragraph 3.8 suggests that the procedure for exercising the right of approach and visit is similar to that used in exercising the belligerent right of visit and search, it is not clear whether this statement applies only to "stateless vessels" with which it is linked in a separate subparagraph, or also to other suspected vessels. It is quite obvious, on the other hand, that the belligerent and peacetime situations are quite different, and throughout history the United States has strongly opposed this analogy (as will be documented later in this comment).

The issue of suppression of international narcotics traffic is even more puzzling, as that traffic is not mentioned at all in paragraph 3.8, which lists the only situations in which approach and boarding of foreign vessels were allowed. Reliance is placed instead on "bilateral arrangements" (paragraph 3.6), or "Congressional direction" and "consent" of the foreign flag nation,

granted by a bilateral agreement or *ad hoc* for the particular occasion (paragraph 3.12.4). There seems to be admission here that there is no general rule of international law authorizing such action, especially if the action envisaged here should extend beyond approach and visit, including even arrest, search and seizure.

It might be useful to the commander on the spot, as well as the "higher authority" which is supposed to provide him with guidance, to explain the history of the two main efforts to authorize warships to visit, search, and, if justified, seize the vessels of other nations, and the reasons for the opposition of some major powers, including for a long time the United States and even today France, to this "strengthening" of the law and of the means to enforce it. This comment will thus discuss primarily the efforts to strengthen the control over transport of slaves and international narcotics traffic, with only incidental references to piracy (where international law developed detailed rules, which are generally accepted) and to the limited and by now mostly obsolete arrangements for stopping the smuggling of alcoholic beverages into the United States.

Since its early days, the principle of the freedom of the high seas has been subjected to a two-pronged attack: the efforts of some coastal states to extend their jurisdiction far into the sea, and the assertion by some naval powers of the right to exercise jurisdiction over the vessels of other states navigating on the high seas. While the first attack has led to a dramatic diminution of the area of the high seas, the second attack has led to such strong resistance that it resulted in only minor inroads on the freedom of navigation of the high seas. Nevertheless, in the last years of the twentieth century, after stopping repeated attempts to subject foreign vessels on the high seas to search and seizure in the name of abolishing the universally condemned slave trade (which unfortunately still exists under different guises), a new danger to the freedom of navigation on the high seas has arisen from unilateral attempts to enforce national legislation on the high seas in an area almost as odious—traffic in narcotic drugs. In view of this development, it seems useful to explore the reasons for the persistence of the original opposition to such encroachments on the freedom of the seas, to consider the applicability of these arguments to the current situation, and to suggest some means to overcome the difficulties.[1] As this subject is still too vast, this comment is necessarily limited to a discussion of only some of the rules of international law which relate to the activities of naval vessels on the high seas in time of peace, authorizing some and prohibiting others.[2]

II. Crusade Against Slave Trade

The essence of the great principle of the freedom of the seas is that all nations have an equal right to the uninterrupted use of the high seas for their

navigation. From this principle flow two additional principles: that a ship on the high seas is subject only to the jurisdiction of the state whose flag it flies and that no state has the right to interfere in any manner with vessels of other states navigating upon the high seas in time of peace. Even in time of war the right to visit, search or seize a neutral vessel has important limits, and the state exceeding these limits must pay compensation to the neutral state for any loss or damage caused to the vessel, its owner, crew, or cargo; even more, freedom of navigation must be observed in time of peace, and the violator must pay compensation proportional not only to the damage and loss, but also to the gravity of the violation.[3]

These rules have been recognized for at least two hundred years. For instance, in the often quoted statement in the 1817 *Le Louis* case, the eminent British Admiralty judge, Sir William Scott (later Lord Stowell), explained these principles in the following manner:

> Upon the first question, whether the right of search exists in time of peace, I have to observe that two principles of public law are generally recognized as fundamental. One is the perfect equality and entire independence of all distinct states. Relative magnitude creates no distinction of right; . . . and any advantage seized upon that ground is mere usurpation. This is the great foundation of public law, which . . . mainly concerns the peace of mankind, both in their public and private capacities, to [be] preserve[d] inviolate. The second is, the uninterrupted use of the unappropriated parts of the ocean for their navigation. In places where no local authority exists, where the subjects of all states meet upon a footing of entire equality and independence, no one state, or any of its subjects, has a right to assume or exercise authority over the subjects of another. I can find no authority that gives the right of interruption to the navigation of states in amity upon the high seas, excepting that which the rights of war give to both belligerents against neutrals. This right, incommodious as its exercise may occasionally be to those who are subjected to it, has been fully established in the legal practice of nations, having for its foundation the necessities of self-defence, in preventing the enemy from being supplied with the instruments of war, and from having his means of annoyance augmented by the advantages of maritime commerce. Against the property of his enemy each belligerent has the extreme rights of war. Against that of neutrals, the friends of both, each has the right of visitation and search, and of pursuing an inquiry whether they are employed in the service of his enemy, the right being subject, in almost all cases of an inquiry wrongfully pursued, to a compensation in costs and damages.[4]

A 1950 memorandum prepared by the Secretariat of the United Nations for the International Law Commission, after examining the pretensions of various nations to claim dominion over vast areas of the sea, concluded that the concept of the freedom of the seas which was developed to counteract these claims means not only that every nation has an equal right to use the high seas, but also that ships flying the flag of one state are prohibited from interfering with ships flying the flags of other nationalities. The memorandum pointed out that:

> Such interference, which is naturally forbidden in the mutual relations of users, is not even tolerated in the case of warships, which might be considered to have as their general mission to watch over the maintenance of order and security at sea. In peace-time warships have no police powers except over private vessels flying their own flag. The

> general policy powers of warships on the high seas in respect of private foreign vessels are limited to the right of approach, and do not comprise the right to check nationality by examination of ships' papers. The only exception to this rule is in the case of grave suspicion, and the State to which the investigating warship belongs is responsible for any damage caused by an examination that proves to be unwarranted. A warship which considers it necessary to interfere in this way with the navigation of a ship flying a flag other than its own, assumes, and thereby involves the State to which it belongs in, full responsibility for the action taken and for any possible damages.[5]

In his opening statement to the 1958 Conference on the Sea, Admiral Oswald S. Colclaugh called attention to the fact that the United States "had often had to defend itself against the infringements of the principle [of the freedom of the seas]," and that, therefore, it "attached great importance to it."[6]

A dispute arose as early as the 1790s between the United States and Great Britain with respect to the British practice of stopping foreign vessels, including the American ones on the high seas, and removing sailors considered by the British to be still British subjects although they were naturalized abroad. This British abuse of the right of visit and search was one of the reasons for the War of 1812, and although this practice was in fact abandoned soon thereafter, the United States continued to raise the issue for some thirty years.[7] The American objections were spelled out in 1823 by John Quincy Adams, then Secretary of State:

> [T]he United States have never disputed the belligerent right of search, as recognized and universally practiced conformably to the laws of nations. They have disputed the right of belligerents, under colour of the right of search for contraband of war, to seize and carry away men, at the discretion of the boarding officer, without trial and without appeal; men, not as contraband of war or belonging to the enemy, but as subjects, real or pretended, of the belligerent himself, and to be used by him against his enemy. It is the fraudulent abuse of the right of search for purposes never recognized or admitted by the laws of nations; purposes in their practical operation of the deepest oppression and most crying injustice, that the United States have resisted and will resist, and which warns them against assenting to the extension in time of peace, of a right which experience has shown to be liable to such gross perversion in time of war.[8]

The matter was only settled by an exchange of notes made in connection with the Webster-Ashburton Treaty in 1842.[9]

When in 1807 the British Parliament prohibited slave trade by British citizens,[10] the British Government embarked on a crusade to stop this trade also by citizens of other countries. Remembering the difficulties about the impressment of seamen, the United States—though in 1807 it also prohibited importation of slaves into the United States[11]—refused to concede to the British Navy the right to visit and search vessels under the United States flag. While British courts approved searches and seizures of American vessels during the Napoleonic wars,[12] Sir William Scott had to consider the seizure in peacetime of *Le Louis*—mentioned above—which involved a French vessel, condemned by the British admiralty court at Sierra Leone on the grounds that it was equipped for carrying slaves, that it resisted the capture, and that

in the process it "piratically killed" eight members of the crew of the British cruiser. Sir William held that slave trade was not piracy nor a generally accepted crime under the law of nations, and that its illegality under the laws of both England and France was not a sufficient ground for the vessel's seizure. He started with the premise that neither a British act of parliament, nor any commission founded on it, can effect any right or interest of foreigners unless they are founded upon principles and impose regulations that are consistent with the law of nations. While a state has the "right to see that its own vessels are duly navigated," it has no right "to visit and search all the apparent vessels of other countries on the high seas, in order to institute an inquiry whether they are not in truth British vessels violating British laws." He added that a state should not make regulations which it "cannot enforce without trespassing on the rights of others." He emphasized that

> [t]o press forward to a great principle by breaking through every other great principle that stands in the way of its establishment; to force the way to the liberation of Africa by trampling on the independence of other states in Europe; in short, to procure an eminent good by means that are unlawful, is as little consonant to private morality as to public justice.

If a country should agree by convention to allow visit and search in time of peace, it would be "for the prudence of states to regulate by that convention the exercise of the right with all the softenings of which it is capable," and to make sure that it would be "so constructed as not to excite just irritation." He pointed out, finally, that France rejected a proposed treaty permitting search on a reciprocal basis, "upon the express ground that she would not tolerate any maritime police to be exercised on her subjects but by herself."[13]

After the British Government concluded treaties with Spain, Portugal and the Netherlands allowing, on a reciprocal basis, search and seizure of vessels and adjudication by a mixed commission, the United States rejected a similar treaty. John Quincy Adams, then Secretary of State, claimed that in accordance with this plan, citizens of the United States would be liable

> in time of peace to have their vessels searched and with their persons seized and carried away by the naval officer of a foreign power, subjected to the decision of a tribunal in a foreign land, without benefit of the intervention of a jury of accusation or of a jury of trial, by a court of judges and umpires half of whom would be foreigners and all irresponsible to the supreme authorities of the United States.[14]

On another occasion, Mr. Adams made clear, however, that

> although Great Britain . . . may be willing to abandon those of her subjects who defy the laws and tarnish the character of their country by participating in this trade to the dispensation of justice even by foreign hands, the United States are bound to remember that the power which enables a court to try the guilty authorizes them also to pronounce upon the fate of the innocent and the very question of guilt or innocence is that which the protecting care of their Constitution has reserved for citizens of this Union to the exclusive decision of their own countrymen. This principle has not been departed from by the statute which has branded the slave trader with the name, and doomed him to the punishment, of a pirate. The distinction between piracy by the law of nations and

piracy by statute is well known and understood in Great Britain; and while the former subjects the transgressor guilty of it to the jurisdiction of any and every country into which he may be brought or wherein he may be taken, the latter forms a part of the municipal criminal code of the country where it is enacted and can be tried only by its own courts.

At that time, Mr. Adams explained also, with real passion, that the United States had even more basic objections to the whole idea of search and seizure. He noted that:

[T]he nature of the right of search at sea . . ., as recognized or tolerated by the usage of nations, is a right exclusively of war, never exercised but by an outrage upon the rights of peace. It is an act analogous to that of searching the dwelling-houses of individuals on the land. The vessel of the navigator is his dwelling-house, and like that, in the sentiment of every people that cherishes the blessings of personal liberty and security, ought to be a sanctuary inviolable to the hand of power, unless upon the most unequivocal public necessity, and under the most rigorous personal responsibility of the intruder. Search at sea, as recognized by all maritime nations, is confined to the single object of finding and taking contraband of war. By the law of nature, when two nations conflict together in war, a third, remaining neutral, retains all its rights of peace and friendly intercourse with both. Each belligerent, indeed, acquires by war the right of preventing a third party from administering to his enemy the direct and immediate materials of war; and, as incidental to this right, that of searching the merchant vessels of the neutral on the high seas to find them. Even thus limited, it is an act of power which nothing but necessity can justify, inasmuch as it cannot be exercised but by carrying the evils of war into the abodes of peace, and by visiting the innocent with some of the penalties of guilt. Among the modern maritime nations, an usage has crept in, not founded upon the law of nature, never universally admitted, often successfully resisted, and against which all have occasionally borne testimony by renouncing it in treaties, of extending this practice of search and seizure to all the property of the enemy in the vessel of the friend. This practice was, in its origin, evidently an abusive and wrongful extension of the search for contraband: effected by the belligerent, because he was armed; submitted to by the neutral, because he was defenseless; and acquiesced in by his sovereign for the sake of preserving a remnant of peace, rather than become himself a party to the war. Having thus, occasionally, been practiced by all as belligerents, and submitted to by all as neutrals, it has acquired the force of an usage which, at the occurrence of every war, the belligerent may enforce or relinquish, and which the neutral may suffer or resist, at their respective options.

This search for and seizure of the property of an enemy in the vessel of a friend is a relic of the barbarous warfare of barbarous ages—the cruel and, for the most part, now exploded system of private war. As it concerns the enemy himself, it is inconsistent with that mitigated usage of modern wars which respects the private property of individuals on the land. As relates to the neutral, it is a violation of his natural right to pursue, unmolested, his peaceful commercial intercourse with his friend. Invidious as is its character in both these aspects it has other essential characteristics equally obnoxious. It is an uncontrolled exercise of authority by a man in arms over a man without defense—by an officer of one nation over the citizen of another—by a man intent upon the annoyance of his enemy, responsible for the act of search to no tribunal, and always prompted to balance the disappointment of a fruitless search by the abusive exercise of his power, and to punish the neutral for the very clearness of his neutrality. It has, in short, all the features of unbridled power, stimulated by hostile and unsocial passions.

> I forbear to enlarge upon the further extension of this practice by referring to injuries which the United States experienced when neutral in a case of vital importance; because, in digesting a plan for the attainment of an object which both nations have equally at heart, it is desirable to avoid every topic which may excite painful sensations on either side. I have adverted to the interest in question from necessity, it being one which could not be lost sight of in the present discussion.
>
> Such being the view taken on the right of search, as recognized by the law of nations and exercised by belligerent powers, it is due to candor to state that my Government has an insuperable objection to its extension by treaty, in any manner whatever, lest it might lead to consequences still more injurious to the United States, and especially in the circumstance alluded to. That the proposed extension will operate in time of peace and derive its sanction from compact present no inducements to its adoption. On the contrary, they form strong objections to it. Every extension of the right of search on the principles of that right is disapproved. If the freedom of the sea is abridged by compact for any new purpose the example may lead to other changes. And if its operation is extended to a time of peace, as well as of war, a new system will be commenced for the dominion of the sea, which may eventually, especially by the abuses into which it may lead, confound all distinction of time and circumstances, of peace and of war, and of rights applicable to each state.[15]

In 1824, a British-American treaty was drafted based on a proposal made by then Secretary of State John Quincy Adams, who took into account the fact that both countries had enacted laws declaring the slave trade to be piracy punishable by death,[16] as well as a resolution of the United States Congress requesting the President to conduct negotiations leading to the ultimate denunciation of the slave trade "as piracy under the law of nations, by the consent of the civilized world."[17]

The 1824 Treaty declared that the right to visit and search, reciprocally conceded, is wholly and exclusively founded on the consideration that the two nations have by their laws made the slave trade piracy, and that each power shall use its influence with all other civilized powers, to procure from them the acknowledgement that the slave trade is piracy under the law of nations. To remove United States objections to foreign adjudication the treaty also provided that a slave trading vessel of one country captured by the naval vessel of the other should be delivered to a port of the captured vessel's own country for adjudication.[18] The Senate circumscribed its consent to ratification with several amendments cutting down United States obligations; these amendments were rejected by the British Government, and the treaty had to be abandoned.[19]

After this attempt to find a compromise came to naught, the situation deteriorated. In 1839, the British Parliament enacted a law which was primarily directed against Portuguese vessels, but also applied to vessels "not being justly entitled to claim the protection of the flag of any state or nation."[20] It authorized their visit to ascertain their nationality; seizing them not only when slaves were found on board but also if they were equipped for slave trade (e.g., carrying shackles, handcuffs, extra food and water, and large boilers for mass cooking); bringing them for adjudication as if they were

the property of British subjects; granting a bonus ("indemnity") to all persons concerned in their capture; and protecting the captors from any suit against them in a British court.[21]

When this bill was presented to the House of Lords, the Duke of Wellington, the great British hero who defeated Napoleon in the Battle of Waterloo, opposed the bill regardless of its laudable objective. He reminded the lords that "the greatest judge who ever presided over an Admiralty Court" (Lord Stowell) had laid down in the *Le Louis* case that in peacetime even the right of search was illegal and contrary to the law of nations, unless that right had been conceded by treaty. If British cruisers should start stopping and searching suspicious ships of other nations, whether a treaty existed or not, as they had already started doing in relation to some foreign flag ships, other nations might soon resist or retaliate, and there would be a grave danger of universal war.[22] Wellington's view prevailed, and the House of Lords rejected the bill; it was, however, adopted on the second reading, after the Government made sufficient changes in the bill to persuade enough lords to accept it.[23]

In 1840, the British Government informed the United States that it could not allow foreign vessels to protect themselves by a fraudulent use of the American flag, and instructed the Admiralty to board American flag vessels suspected of being non-American for the restricted purpose of examining their papers and ascertaining whether they were actually entitled to display the American flag. If these papers were in order, the vessel would have to be immediately released; if they were not in order, it would be permissible to search the vessel; and if it had slaves on board or was equipped for slave trading, it would have to be detained and sent to the appropriate port for trial. The Admiralty's orders made it clear that American vessels must be shown every possible courtesy when boarded, but no one should be allowed to refuse inspection, and force might be used if necessary.[24]

After the United States protested the boarding of American flag vessels, Lord Palmerston, the British Foreign Secretary, explained that "the right existed of ascertaining in some way or another the character of the vessel, and that by her papers and not the colours on flag, which might be displayed," and that such inspection of papers "could not be regarded as amounting to a right of search." In reply, the United States ambassador, Mr. Stevenson, made clear that "under no circumstances could the government of the United States consent to the exercise of the right on the part of any foreign nations, to interrupt, board, or search their vessels on the high seas." He added that "to admit the right of a foreign naval officer, to decide upon the genuineness of American vessels, by boarding them . . . was in effect allowing the right of search, and therefore utterly indefensible."[25]

The difference of views on the right of visit was ingeniously papered over in the Webster-Ashburton Treaty of 1842, which dealt with a number of

important British-American disputes. It provided for sending two squadrons, one British and one American, to West Africa to suppress, separately but in concert and cooperation, the slave trade.[26] It was understood that the main duty of the American squadron would be to ascertain, in case of doubt, the right of a vessel to display the American flag, and thus to avoid its visit by a British warship.[27]

In order to avoid further conflict, the British Admiralty issued the following instructions to the Navy:

> The Slave Trade has been denounced by all the civilized world as repugnant to every principle of justice and humanity. You are, however, to bear in mind, that Great Britain claims no rights whatever with respect to foreign ships engaged in that traffic, excepting such as the Law of Nations warrants, or as she possesses by special Treaties and Conventions with particular states.
>
> It is your duty to make yourself thoroughly conversant with the Treaties, Conventions, and Laws, as well as with all the Instructions given to you relative to the Slave Trade.
>
> You are not to visit a vessel under a Foreign flag on the High Seas on suspicion of the Slave Trade, except in virtue of special authority under Treaty, or in case you have reason to believe that the vessel has no right to title to claim the protection of the flag she bears . . .
>
> Towards every functionary, British or Foreign, with whom you may come in contact, you will invariably maintain a respectful and courteous demeanour.
>
> You will take special care to ensure propriety of language and demeanour on the part of officers, seamen and marines, towards all persons (officers being held responsible for any 'exhibition of intemperance' on the part of those under their command).[28]

Nevertheless, other incidents occurred, and in 1852 Secretary of State Cass reopened the controversy by notifying the British Government that the United States denied "the right of cruisers of any other power whatever, for any purpose whatever, to enter their vessels by force in time of peace. . . . No change of name can change the illegal character of the assumption. Search, or visit, it is equally an assault upon the independence of nations."[29] When the British Government asked the law officers of the Crown for their opinion on this subject, they responded that the United States was right in its interpretation of international law, and that an American vessel could be boarded by British officers only at their own risk. Consequently, British cruisers were ordered "to respect the American flag under any circumstances."[30]

President Lincoln, upon taking office, immediately authorized Secretary of State Seward to start negotiations with the British Government on a convention to suppress the slave trade. These negotiations terminated in April of 1862 by the conclusions of a detailed convention, which authorized the ships of the two navies to "visit such merchant vessels of the two nations as may, upon reasonable grounds, be suspected of being engaged in the African

Slave Trade, or having been fitted for that purpose; or of having, during the voyage on which they are met by the said cruisers, been engaged in the American Slave Trade, contrary to the provisions of this Treaty." The means of the search were carefully specified in the treaty, and it was made clear that "the only object of the search is to ascertain whether the vessel is employed in African Slave Trade, or is fitted up for the said Trade." The right to search was originally limited to the distance of 200 miles from the coast of Africa, southward of the 32nd parallel of north latitude, and within 30 leagues of the coast of Cuba; later it was extended to the area within 30 leagues of Madagascar, Puerto Rico and Santo Domingo.

The two governments agreed to establish three Mixed Courts of Justice, formed of an equal number of individuals from both countries; their seats were to be at Sierra Leone, Cape of Good Hope and New York. Each captured ship was to be brought before one of these courts and, if condemned, was to be broken up (to avoid its later sale to another slave trader); the master and crew of any condemned vessel were to be punished according to the laws of the country to which such vessel belonged, and should ordinarily be delivered for the execution of that punishment to the nation under whose flag the condemned vessel was sailing; and punishment was also to be meted to the owners of the condemned vessel and the persons interested in her equipment or cargo unless they should be able to prove that they had no participation in the enterprise. The enslaved Africans found on board of a condemned vessel were to be placed at the disposal of the Government whose cruiser had made the capture; they were to be set free immediately, the Government to whom they had been delivered guaranteeing their liberty. Should the Mixed Court of Justice decide, however, that the cruiser was guilty of an arbitrary and illegal detention, the cruiser's Government would be obligated to make good any losses suffered by the subjects or citizens of the other country, such indemnification to be paid within one year from the Court's decision. If one Government should complain that a navy officer of the other country had deviated from the stipulations of the Treaty, his government would be bound to institute an inquiry and to inflict upon the officer, if found guilty of willful transgression, a punishment proportionate to the transgression.[31]

By the end of the 1860s, the slave trade diminished greatly, and Congress asked for the abolition of the Mixed Courts of Justice in order to cut unnecessary expenditures.[32] These courts were terminated in 1870, and their jurisdiction was transferred to national courts competent to deal with maritime prizes. Any American vessel captured by a British cruiser was to be sent for adjudication to New York or Key West, whichever should be more accessible, or was to be handed over to a United States cruiser, if one should be available in the neighborhood of the capture; similarly, a British vessel captured by an American cruiser was to be sent for adjudication to

the nearest or most accessible British colony, or was to be handed over to a British cruiser, if one should be available in the neighborhood of capture. All enslaved Africans on board either an American or British vessel were to be handed over to the nearest British authority, to be immediately set free and guaranteed liberty by the British Government. If some of them had to be sent with the detained vessel as necessary witnesses, they were to be set free as soon as their testimony should no longer be required and their liberty was to be guaranteed.[33] This ambitious treaty ended the American-British debate about visit and search, but it had little practical effect as the slave trade across the Atlantic came to an end at about the same time as a result of Brazil's change of attitude and its willingness to take effective action against importation of slaves.[34]

The work of the abolitionists was not yet finished. In the meantime, there was an increase in slave traffic from East Africa across the Indian Ocean, which led in 1888 to the renewal of the debate about the right of visit and search between, on the one hand, Great Britain and Germany, who were supposedly helping the Sultan of Zanzibar to blockade the coast, and, on the other hand, France. In addition, problems arose between Great Britain and Germany, which dealt harshly with captured vessels, their crews, and even the liberated cargo.[35]

When the Brussels conference on the affairs of Africa was convened by King Leopold II of Belgium in 1889, the British Government made sure that the issue of terminating maritime slave traffic would be on the agenda, and proposed a general agreement to establish a specific slave trade zone within which the signatory powers would have the "right of supervision, jointly and severally, whether on high seas or in territorial waters, over all sailing vessels under any flag."[36] The proposal was to be implemented by bringing the captured slavers before mixed tribunals representing at least five of the signatory powers; by turning the offenders over to their own national authorities for punishment under their own laws, which would provide for severe penalties; and by establishing international offices to exchange information not only about the slave trade but also about ships authorized to fly each national flag and the sentences passed on slavers.[37]

The French Government responded with a proposal which allowed inspection within a more limited zone of only indigenous vessels for the sole purpose of verifying the flag. It required, in case of doubt about a vessel's right to fly a particular flag, that the investigation be handed over to the flag nation. It provided for returning the vessel to the captor if it was not entitled to fly the flag it claimed, and imposed compensation for wrongful arrest, to be settled, in case of a dispute, by an international tribunal.[38]

The Russian jurist, Frederic de Martens, was given the task of preparing a compromise solution, and his proposal became chapter III of the General Act for the Repression of African Slave Trade, signed at Brussels on July

2, 1890.[39] It provided for more effective repression of the slave trade in the maritime zone of the Indian Ocean extending from south of Madagascar to Persia (Iran) in the north, and including the Red Sea and the Persian (Arab) Gulf. The surveillance was to be limited to native vessels whose tonnage was less than 500 tons. A warship of any signatory power, having reason to believe that a vessel of such tonnage, navigating within the specified zone, was engaged in the slave trade or was guilty of the fraudulent use of a flag, was entitled only to examine the ship's papers; any further search or calling the roll of the crew and passengers was only authorized when permitted by a prior convention for suppression of the slave trade concluded by the flag state of the vessel. Should the acts of supervision permitted by the treaty or convention convince the naval officer in command of the cruiser that irrefutable proofs existed of fraudulent use of the flag or participation in the slave trade, he had to bring the arrested vessel to the nearest port of the zone where there was a competent magistrate of the flag state of that vessel or to turn it over to a cruiser of that vessel's nationality, if the latter consented to take charge of it. If the investigation by the magistrate proved that the flag was fraudulently used, the vessel would be put at the disposal of the captor. If slaves should be found on board or any other offense connected with the slave trade was proven, the vessel and cargo would remain sequestered in charge of the magistrate who had conducted the investigation until the vessel had been properly condemned and transferred to the captor, or declared innocent and permitted to continue on its course. The slaves were to be liberated by the local authority and either returned home or settled on the spot. If the vessel was illegally arrested, an indemnity had to be fixed by the magistrate in proportion to the damage suffered by the vessel being taken out of its course. If the officer of the capturing vessel disagreed as to the amount of the indemnity the matter had to be immediately submitted to arbitration. The captain and the crew of the vessel condemned for an offense were to be brought promptly before a tribunal of the nation whose flag had been used by the accused or to a specially commissioned authority of that nation.

The main antagonists were satisfied with the final text. The British Government received the right to visit all likely slave-carrying vessels within the zone, and French vessels were freed from visit and search outside the zone.[40] Nevertheless, the French Chamber of Deputies refused to accept the provisions relating to the verification of the flag, and to preserve the treaty France was allowed to exclude these clauses in its ratification document.[41] In consequence, the apparent consensus disintegrated and a shadow was thrown again on the right of visit and search.

By the end of the 19th century, the measures taken under the Brussels Act contributed to the almost complete abolition of the slave trade, though it survived under various guises in a few places throughout the 20th century.[42]

In revising the map of the world after the First World War, the victors decided to get rid of the cumbersome anti-slavery provisions of the Brussels Act, and replaced them as between the parties to one of the Saint-Germain Conventions of 1919, by a provision which merely contained a general statement that the parties will endeavor "to secure the complete suppression of slavery in all its forms and of the black slave trade by land and sea."[43]

In 1925, the British Government proposed to the League of Nations the adoption of a convention implementing the general provision of the 1919 convention. It suggested strong enforcement measures including a provision that "[t]he act of conveying slaves on the high seas shall be deemed to be an act of piracy, and the public ships of the signatory powers shall have the same rights in relation to vessels and persons engaged in such act as over vessels and persons engaged in piracy." It also would have provided for a decision by the courts and according to the laws of the country of the captor with respect to the validity of the capture of the vessel and the liberation of slaves, but for handing over of the persons engaged in the act of conveying slaves on the high seas to the authorities of their own country which was to bring them before its court.

In view of a strong opposition to these proposals, the special committee to which this matter was referred limited the provision in Article 3, paragraph 2, of the 1926 Convention on the Suppression of Slave Trade and Slavery to an undertaking to negotiate a convention based on an agreement concluded in 1925 relating to international trade in arms, which, in turn, contained enforcement provisions similar to those of the 1890 Brussels Act, including restrictions to native vessels of limited size, special zones, the right to verify the nationality of the suspected vessel, and the authorities entitled to decide about the illegality of the trade.[44] Article 3, paragraph 3, of the 1926 Convention also authorized the parties to it "to conclude between themselves, without, however, derogating from the principles laid down in the preceding paragraph, such special agreements as, by reason of their peculiar situation, might appear suitable in order to bring about as soon as possible the complete disappearance of the slave trade." Neither these special agreements nor the supplementary convention envisaged in paragraph 2 of the Article have, however, been concluded, and the British effort was sidetracked again.[45]

After a lapse of almost thirty years, the indomitable British diplomats tried again, taking advantage of a 1951 report of the United Nations *Ad Hoc* Committee on Slavery which complained that the then existing arrangements for suppressing slave trade at sea were less satisfactory then those of the 1890 Brussels Act. They suggested the preparation of a convention which would supplement the 1926 Convention by declaring slave trading on the high seas to be a "crime similar to piracy in international law," and subjecting slave trading to the same treatment and punishment as piracy.[46] The British Government presented such a draft convention in 1954. It contained provisions

similar to those presented by it in 1925. It proposed to make slave trade equivalent to piracy, but instead of the detailed provisions relating to capture and legal proceedings against the vessel and the crews, it merely proposed that the "[p]ublic vessels under the control of parties to this Convention shall have the same rights in relation to vessels engaged in [the act of conveying slaves on the high seas or slave-raiding] as they have in relation to vessels and persons engaged in acts of piracy."[47] A Drafting Committee appointed by the Economic and Social Council revised the British draft several times, and prepared a more elaborate article making clear that the provisions relating to the slave trade would apply only to specified areas of the Indian Ocean, and added a provision authorizing warships or military aircraft to exercise the same rights of visit, search and seizure in relation to vessels "suspected on reasonable grounds of being engaged in the act of conveying slaves as they have in relation to vessels so suspected of being engaged in acts of piracy." It limited the enforcement to vessels of parties to the proposed Convention, and a proposal to extend it to "stateless vessels" was withdrawn.[48] At the Conference held in 1956 to adopt the convention, strong opposition was expressed to the provisions relating to visit, search, and seizure by foreign warships. A more limited draft restricted to visit and search, and leaving further action to the flag state, was also rejected.[49] Consequently, the 1956 Convention leaves the enforcement completely in the hands of the flag state. It requires only that states take effective measures to prevent the transport of slaves by ships and aircraft and to "punish persons guilty of such acts or of using a national flag for the purpose." They must also exchange information to ensure practical coordination of measures for combating the slave trade. It is also provided that "[a]ny slave who takes refuge on board any vessel of the State Party to this Convention shall *ipso facto* be free."[50]

During the 1950s, in the context of the codification of the international law of the sea, the International Law Commission also encountered the question of the scope of the rule relating to the right to visit and search foreign vessels on the high seas. Its rapporteur, Professor J. P. A. Francois, in his first report stated that the "only police measure [on the high seas] allowed in time of peace is the right of approach, that is to say the right to ascertain the identity and nationality of the vessel, but not the right to check nationality by examination of ship's papers, and not, *a fortiori*, the right of search." After noting the British efforts to establish "the legality, if not of boarding foreign merchant vessels, at any rate of the verification of the flag," he pointed out that wireless telegraphy had almost eliminated the various reasons for which formerly vessels were induced to make material contact with each other on the high seas.[51]

In his second report, Professor Francois stuck to his position with respect to the main principle, but added three clarifications. Acts of interference may be allowed by a treaty; boarding and further action may be justified, if "there

is a reasonable ground for suspecting that the vessel is engaged in piracy;" and, if suspicion of piracy should "prove to be unfounded and should the stopped vessel not have given by unjustified acts any ground for suspicion, the vessel shall be compensated for any loss due to stoppage."[52]

In view of concurrent discussions in the United Nations *Ad Hoc* Committee on Slavery,[53] Professor Francois suggested that some special provisions on slave trade might be included in the International Law Commission's draft. He rejected, however, the proposal that slave trade be regarded as an act of piracy, permitting the stoppage and search of any vessel suspected of engaging in such a trade by any warship and taking it to a port of the captor for trial there by national courts. He pointed out the following differences between piracy and slave trade:

> Part at least of the ground for internationalizing the crime of piracy is that the acts occur on the high seas and that in many cases there are no relations between the pirate and a given country. The slave trade, on the other hand, takes place between two given countries. Since both these countries are bound to cooperate in repressing the slave trade, internationalization— meaning that the vessel may be conducted to any port for trial by the local courts—does not appear appropriate.

He considered also that the right of control in this case should be limited to small vessels below a specified tonnage, and should not extend to the whole area of the high seas but to a limited area only where slave trade is still carried on, by analogy to the Berlin Act of 1890.[54] Finally, he made clear that a visit of a suspected vessel should be restricted to an examination of its papers, that examination of the cargo or search of the vessel is permissible only when, and to the extent, authorized by a convention to which the vessel's flag state is a party, that trial should be by the courts of the flag state of the captured vessel, and that in case of illegal arrest an indemnity would have to be paid.[55] During the discussion of his report by the International Law Commission, Professor Francois pointed out that while old types of slavery were disappearing, the concept of slavery was being widened, thus threatening that vessels would be boarded "at all times and in all places," and increasing the hesitancy of states to accept the right of approach. When the prohibition of slavery and slave trade by the Universal Declaration of Human Rights[56] was invoked in order to justify the exercise of the right of approach "everywhere in respect of vessels suspected of being engaged in the slave trade," Francois replied that "[t]o recognize that the slave trade was prohibited was one thing, to recognize the right of approach was another."[57]

The Commission decided in 1951 that in the interests of stamping out the slave trade, the right of approach to ships engaged in the slave trade "should be put on the same footing as in the case of piracy, and hence should be permissible without regard to zone or tonnage."[58] Consequently, Professor Francois submitted the following proposal to the Commission concerning the right of approach, designed to safeguard the freedom of navigation and to

prohibit, except in clearly defined cases, the boarding and inspection of ships on the high seas:

> Except where acts of interference are done under powers conferred by treaty, a warship which encounters a foreign merchant vessel at sea is not justified in boarding her or in taking any further action unless there is reasonable ground for suspecting that the vessel is engaged in piracy or in the slave trade. Should such suspicions prove to be unfounded and should the stopped vessel not have given by unjustified acts any ground for suspicion, the vessel shall be compensated for any loss due to the stoppage.[59]

In addition, he proposed the following separate article emphasizing the duty to cooperate in measures for the repression of the slave trade:

> All States are required to cooperate for the more effective repression of the slave trade. They undertake to adopt efficient measures to prevent the transport of slaves on vessels authorized to fly their colours and to prevent the unlawful use of their flag for the purpose.
>
> Any slave who has taken refuge on board a ship of war or a merchant vessel shall be *ipso facto* set free.[60]

Similar provisions on slave trade were included in the rapporteur's 1954 report and in the Commission's 1955 text. The 1954–55 texts contained also, for the first time, more elaborate provisions on piracy.[61] New difficulties did arise, however, with respect to the right-of-approach proposal. At the 1955 session of the Commission, Professor Scelle revived the traditional distinction between the right to verify the flag and the right to board and search, and pointed out that the existing situation was dangerous as the "exercise of the right of verification could easily, and almost imperceptibly, become an act of boarding and searching;" that it "was the thin edge of the wedge;" and that "such possibility should be guarded against." As a remedy he suggested that "verification should take place on board the investigating warship."[62] In reply, Professor Francois explained that "the problem of the policing of the high seas was both complex and difficult." He pointed out that:

> It was generally accepted that warships had the right to demand that merchant vessels at sea should show their flag upon request. Such a request for identification was perfectly natural, because it was not the usual practice for merchant vessels continually to fly their flags at sea. It was also widely recognized that, if the merchant vessel refused to show her flag or gave an evasive reply, the warships had the right to investigate her identity. That, again, was an essential condition for the control of piracy. . . .
>
> Sanctions for unjustified verification had previously been provided in the form of damages, the award of which was to be made by one of two methods. The first, and more severe, was that whereby, if the suspicion proved to be unfounded, compensation must be rendered for any loss due to the stoppage. The second, and less stringent, provided for compensation to be paid if it could be shown that the vessel had been stopped for insufficient reason. He had chosen the first of those alternatives because of the liability to abuse in the application of the second owing to the difficulty of judging motives.

He opposed, however, the proposal that verification should take place on board the investigating warship, stressing "the danger in even a moderate sea of carrying the ship papers—the loss of which would be a most serious matter—to and from the investigating warship in a small open boat." With some exceptions, the practice of investigation on board the merchant vessel has been followed since 1659.[63]

Professor Scelle insisted, however, that the need to verify the flag goes far beyond piracy and slave trade, is essential for the general policing of the seas in view of the fraudulent practices in the registration of ships and the need to determine responsibility for any damage done by merchant vessels on the high seas by violating general rules on navigation or pollution. He added later that "it was as important to prevent ships from sailing under false colours as it was to suppress slavery and piracy."

This view was opposed by several members of the Commission who wanted the right to verify a vessel's flag restricted to piracy and slave trade. The Scelle proposal for a general right of flag verification was rejected by a vote of 6 to 2, with 2 abstentions.[64] The rapporteur accepted more easily the suggestion that a warship should be allowed to board a foreign-flag vessel if there was a reasonable ground to suspect that the vessel was in fact of the same nationality as the warship. It was generally recognized also that a warship can verify the flag of merchant vessels flying the same flag as the warship, and can seize it and bring to a port of the flag state for punishment if the vessel was flying the flag without authority.[65]

Another controversy arose with respect to the right to visit and search a vessel when a warship has reason to suspect it of engaging, "during times of imminent peril to the security of the State, in activities hostile to the State of the warship."[66] This proposal was supported on the basis of the general principle of self-defense, but it was objected that this principle cannot be applied to boarding a vessel on the high seas on mere suspicion that it was threatening the security of a state, as such "exception to the principle of the freedom of navigation might destroy that freedom altogether, since States would tend to invoke the argument of legitimate defense to justify any act of interference."[67] As a result of that discussion, the Commission's comment to the article on the right of visit explained that the Commission found it inadvisable to provide for the right to board a vessel being suspected of committing acts hostile to the state to which the warship belongs, at a time of imminent danger to the security of that state, as there was a danger of abuse because of the vagueness of terms like "imminent danger" and "hostile acts."[68]

The draft of text and comments approved by the Commission in 1955 was only slightly changed in 1956, when the Commission adopted the final report for the Law of the Sea Conference. In this report the Commission extended the right to visit also to the situation where there is reasonable ground for

suspecting that "while flying a foreign flag or refusing to show its flag, the vessel is, in reality, of the same nationality as the warship." The Commission explained that in this case "it can be presumed that the vessel has committed unlawful acts and the warship should be at liberty to verify whether its suspicions are justified." At the same time, the Commission limited the boarding of ships suspected of slavery to maritime zones treated as suspect in the international conventions for the abolition of slave trade, in order to ensure that the right of control would not be used as a pretext for exercising the right of visit in waters where the slave trade would not normally be expected to exist.[69]

At the 1958 Law of the Sea Conference, the provisions on slave trade were strongly attacked by delegations of several African and Eastern European states. For instance, Mr. Ben Salem (Tunisia) argued that:

> No state had the right to police the high seas. No state had the right to interfere with the ships of another State on the high seas. The provisions relating to the slave trade and piracy were of purely historical interest. The provision regarding action based on a suspicion that a ship was engaged in the slave trade should not be used as a pretext for inspecting a ship when there was no warrant for such suspicion. Warships, although they had the right to determine what flag a foreign ship was flying, did not have the right to determine whether it had the right to fly the flag, or *a fortiori*, the right to visit the ship. Unfortunately, the fears he was voicing on the subject were justified by a number of acts of interference which had been committed recently . . . [C]ertain states had arrogated to themselves the right to inspect and detain ships of other states on the high seas as if they owned the high seas. Such an act was an infringement of the law and a violation of the principle of the freedom of the seas.[70]

Mr. El Erian (United Arab Republic, later Egypt) considered that there was no justification for a provision allowing warships to board ships suspected of engaging in slave trade in certain maritime zones specified in the 1890 Act of Brussels. While such provision had perhaps been justified in the nineteenth century, conditions had changed since, as was recognized in the 1919, 1926, and 1956 conventions on abolition of slavery which contained no such provisions. Such a provision "was objectionable and a potential source of disputes."[71] Egypt proposed, therefore, the deletion of the provision presented by the International Law Commission.[72] Mr. Keilin (Soviet Union) supported such deletion for several reasons:

> In the first place, would it not be discriminatory automatically to regard certain maritime zones as suspect in the matter of the slave trade? It was well known which countries had warships cruising in those neighbourhoods and had interests which would be served by the right of visit thus established. Secondly, it was inadmissible and unjustified to presume that ships in the "suspect" zones were engaged in the slave trade; such a suspicion would probably only be a pretext for controlling maritime trade in violation of the principle of the freedom of the high seas. Thirdly, the sub-paragraph was in no way necessary for effectively combating the slave trade, and it seemed that the International Law Commission had allowed itself to be influenced by happenings in a former age in an entirely different set of circumstances, of which the memory lay sleeping in the dust of archives. Finally, the provision ran counter to the Supplementary Convention on Slavery of 1956, article 3 of which laid down that the transport or

> attempted transport of slaves from one country to another was a penal offence and that persons found guilty of such offences were liable to severe penalties. The suppression of such offences could and should be undertaken by the States of which the flag was flown by the ships attempting to engage in the transport of slaves.[73]

The Egyptian amendment was defeated in the Second Committee of the Law of the Sea Conference by 22 votes to 16, with 11 abstentions.[74] One of the abstainers was Ghana, which objected primarily to the restriction of the right to board ships suspected of slave trade to a specific region. Its delegation preferred a provision that would allow the boarding of "ships suspected of slaving wherever they might be."[75] The idea was revived at the time of the final vote in the plenary meeting of the Conference, where South Africa proposed the deletion of the reference to the maritime zones suspected of slave trade, as a counterproposal to the proposal by the United Arab Republic and Saudi Arabia to completely delete the provision granting the right to board ships suspected of slave trade. The South African proposal was approved by 32 votes to 25, with 15 abstentions, and the other proposal was withdrawn. The right to board article was then approved by 62 votes to none with 9 abstentions.[76]

As a result of these developments the 1958 Convention on the High Seas,[77] which—according to its preamble—is "generally declaratory of established principles of international law," contains eight elaborate articles on piracy, a general article concerning national measures to prevent and punish the transport of slaves, and an article allowing boarding of foreign merchant vessels on the high seas in three specified cases.

One of the piracy articles is the only article which provides expressly for the seizure of the pirate vessel or aircraft, the arrest of the persons and a decision of all issues by the court of the state of the warship that captured the private ship or aircraft. Article 19 provides, in particular, as follows:

> On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

Article 13 imposes on each state the following general obligation with respect to the maritime slave trade:

> Every State shall adopt effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag, and to prevent the unlawful use of its flag for that purpose. Any slave taking refuge on board any ship whatever its flag, shall, *ipso facto*, be free.

Finally, Article 22 authorizes the following minimal rights of interference with foreign ships on the high seas:

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting:

(a) That the ship is engaged in piracy; or
(b) That the ship is engaged in the slave trade; or
(c) That, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

2. In the cases provided for in sub-paragraphs (a), (b), and (c) above, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

The corresponding articles of the 1982 Law of the Sea Convention[78] contain only minor changes. Article 99, now entitled "Prohibition of the transport of slaves," and Article 105, now entitled "Seizure of private ship or aircraft," repeat word for word Articles 13 and 19 of the High Seas Convention. Only a few changes were made in Article 110 on the "Right to visit," which corresponds to Article 22 on the High Seas Convention. In the text of Article 110, which follows, the changes and additions have been highlighted:

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, *other than a ship entitled to complete immunity in accordance with Articles 95 and 96*, is not justified in boarding it unless there is reasonable ground for suspecting that:

(a) the ship is engaged in piracy;
(b) the ship is engaged in the slave trade;
(c) *the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under Article 109*;
(d) *the ship is without nationality; or*
(e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

2. In the cases provided for in paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

4. *These provisions apply mutatis mutandis to military aircraft.*

5. *These provisions also apply to any other duly authorized ships or aircraft clearly marked and identifiable as being on government service.*

It may be noted that the 1958 text deals only with the interference by a warship with a "foreign merchant ship" on the high seas. It does not apply to an encounter between two warships, or between a warship and a government ship operated only for non-commercial purposes.[79] This last point was made more explicit in the new text, which makes it clear that a foreign ship can be boarded in the specified limited circumstances only if it is "other than a ship entitled to complete immunity in accordance with articles 95 and 96," namely, if it is a warship (Article 95) or a ship "owned or operated by a State and used only on government non-commercial service."

While the "warship" that is permitted to interfere is narrowly defined in the 1958 Convention as a ship belonging to the naval forces of a State, properly marked as such, commanded by a duly commissioned naval officer and manned by a crew under regular naval discipline,[80] the 1982 Convention on the Law of the Sea permits action under Article 110 to be taken also by a military aircraft, as well as "duly authorized ships or aircraft clearly marked and identifiable as being on government service."[81] Thus, even though it might have been doubtful whether the Coast Guard was entitled to act under the 1958 Convention, it has a clear right to take action under the 1982 Convention provisions to the extent that they are generally accepted as rules of customary international law.[82]

The 1958 and 1982 Conventions have broadened in two ways the field of applicability of the 1890 General Act of Berlin: their provisions are applicable to all vessels, not as previously only to vessels of less than 500 tons; and they are applicable to all the oceans, not only to a small part of the Indian Ocean and its subsidiary seas and gulfs.[83]

Finally it should be noted that originally there were only two grounds for stopping a foreign ship, namely the existence of reasonable grounds for suspecting that the ship is engaged in piracy or slave trade. Later, the case was added of a ship suspected of concealing the fact that it was of the same nationality as the warship. The 1982 Convention went two steps further, adding ships suspected of being "without nationality," and—under strong pressure by Western European countries—ships suspected of engaging in unauthorized broadcasting.[84] In the latter case, only warships of three categories of countries and two specific groups of countries were allowed to board such ships, namely, those of the flag State of the ship; the State of registration of a high seas installation; the State of which the person engaged in broadcasting is a national; any State where the transmissions can be received; or any State where authorized radio communication is suffering interference.[85] While illegal broadcasting belongs clearly to a special

category, it was included because of the existence of the European regional convention on the subject.[86]

The question of control over stateless vessels arose several times in previous discussions, especially after the controversial British law of 1839,[87] and more recently at the 1958 Conference on the Law of the Sea, where the subject became complicated by the fear that a warship might be able to stop any vessel on the high seas by claiming that the vessel is stateless because there was no genuine link between the vessel and the flag state.[88] The inclusion of the right to board stateless vessels in the 1982 Convention was due to the general acceptance of the proposition that it was dangerous to have ships sailing on the high seas which were not subject to the jurisdiction of any State, and being law unto themselves did not comply with any generally accepted international regulations to ensure safety at sea. Consequently, the rule was adopted that such a ship can be stopped by any warship and dealt with according to the law of the warship's State.[89] It is not clear what would happen if the examination should show that the stopped ship has complied with all international regulations and there was no valid reason for interfering with its navigation. In any case, the persons on board the ship should be treated in accordance with the internationally recognized human rights, and if they have not been found engaged in any illegal activity, their basic "right to life, liberty and the security of person" should be recognized.[90] Unless these persons are also stateless, they may be entitled to the protection of the State of their nationality regardless of the fact that they are travelling on a stateless vessel.[91] Even if they are stateless, they are entitled to basic human rights.[92]

An additional complication is caused by the provisions in the 1958 Convention on the High Seas and of the 1982 Law of the Sea Convention, which establish the rule that a "ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality."[93] Some states have considered this provision as a license to treat such a ship and its crew in any way they please, forgetting their obligations under international law of human rights. In particular, the rules about equal treatment and non-discrimination are applicable to the persons on these ships, and regardless of the place in which the alleged crime was committed they are entitled to be protected against governmental violations of internationally recognized human rights.[94]

III. Campaign Against Illicit Traffic in Narcotic Drugs

There is another important difference between the 1958 and 1982 Conventions. While the 1958 Convention on the High Seas contained no provision on illicit traffic in narcotic drugs, the 1958 Convention on the

Territorial Sea and the Contiguous Zone had a limited provision on the subject in Article 19, which read as follows:

> 1. The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases:
>
> (a) If the consequences of the crime extend to the coastal State; or
> (b) If the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; or
> (c) If the assistance of the local authorities has been requested by the captain of the ship or by the consul of the country whose flag the ship flies; or
> (d) If it is necessary for the suppression of illicit traffic in narcotic drugs.
>
> 2. The above provisions do not affect the right of the coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters.
>
> 3. In the cases provided for in paragraphs 1 and 2 of this article, the coastal State shall, if the captain so requests, advise the consular authority of the flag State before taking any steps, and shall facilitate contact between such authority and the ship's crew. In cases of emergency this notification may be communicated while the measures are being taken.
>
> 4. In considering whether or how an arrest should be made, the local authorities shall pay due regard to the interests of navigation.
>
> 5. The coastal State may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters.[95]

This convention thus authorized the coastal states to arrest any person or to conduct any investigation on board a foreign ship passing through their territorial sea, if it is necessary for "the suppression of illicit traffic in narcotic drugs," subject to conditions specified in paragraphs 3 and 5, and paying "due regard to the interests of navigation" (paragraph 4).

This provision can be traced to a more limited suggestion of the International Law Commission, that was due to an initiative of the Government of Israel which called to the attention of the Commission the fact that its draft on the regime of the territorial sea contained no mention of the right of the coastal state to take steps to suppress illicit traffic in narcotic drugs.[96] In 1956, at the last session of the Commission devoted to the law of the sea, Professor Francois, the Rapporteur of the Commission on the regime of the territorial sea, was asked whether a reference on this subject should be added in the text of the article relating to the arrest on board a foreign vessel in the territorial sea. He replied that the paragraph allowing coastal state action if the consequences of a criminal act extended beyond the vessel would almost always apply to the illicit traffic in narcotic drugs.[97]

The final report of the Commission added a sentence in the commentary to Article 20, stating that an "arrest for the purposes of suppressing illicit traffic in narcotic drugs may be justifiable, if the condition in sub-paragraph (a) is fulfilled," i.e., if "the consequences of the crime extend beyond the ship."[98]

At the 1958 Conference on the Law of the Sea the issue was revived by Pakistan, which proposed the addition of a sub-paragraph in Article 20, which would allow the coastal state, in certain specified circumstances, to arrest a person on board a foreign ship passing through the territorial sea, "[i]f it is necessary for the suppression of illicit traffic in narcotic drugs."[99]

The First Committee of the Conference adopted this proposal by 33 votes to 8, with 30 abstentions, after a short discussion.[100] On the one hand, it was argued by the representative of Turkey that this proposal dealt with an issue of such importance that the proposal should be broadened; it should not be limited to the territorial sea as "the question of illicit traffic in narcotic drugs was of universal concern."[101] On the other hand, some delegates thought that this addition was not necessary, as it was covered by other subparagraphs of Article 20, relating to the right of arrest if "the consequence of the crime extend beyond the ship," or "the crime is of a kind to disturb the peace of the country or the good order of the territorial sea."[102] The representative of Norway doubted whether such provision would assist in suppressing illicit traffic in narcotic drugs, as "it was difficult to imagine cases where crimes of the kind envisaged in the Pakistan proposal would actually have been committed on the ship during its passage." He also noted that the proposed text would enable the coastal state to detain and search ships on mere suspicion, causing delays and derogating considerably from the right of innocent passage. He suggested that a "coastal State which had good reason to suspect that a ship passing through the territorial sea was being used for purposes of illicit traffic in narcotic drugs would be better advised to alert the ship's first port of call, where appropriate action could be taken.[103]

Article 20 of the Territorial Sea Convention with only minor drafting changes became Article 27 of the 1982 Law of the Sea Convention. In particular, the provision relating to narcotic drugs was changed slightly, allowing arrest of any person on board or an investigation, if "such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances."[104]

Although the 1958 Convention on the High Seas contained no provision on narcotic drugs, a basic provision on the subject was included in Article 108 of the 1982 Convention on the Law of the Sea. No complementary provision was included, however, in Article 110 relating to the right of visit. This is especially surprising in view of the fact that the other new 1982 version, the one relating to unauthorized broadcasting—discussed above—is followed up by listing that activity as one of those justifying boarding a suspected vessel. In addition, Article 109, paragraph 4, makes clear that any one of the states

specified in that article "may, in conformity with article 110, arrest any person or ship engaged in unauthorized broadcasting and seize the broadcasting apparatus." There are no parallel provisions with respect to illicit traffic in narcotic drugs.

It has to be noted, however, that during the drafting of Articles 108 and 109 suggestions were made for strengthening these provisions for the control of illegal traffic in narcotic drugs. The United Kingdom delegation, true to its tradition of support for the policing of the high seas, suggested in 1974 that the convention on the law of the sea should contain provisions with regard to ships found trafficking in narcotics.[105] A draft was soon presented which, in addition to language that, with minor changes, became the text of paragraphs 1 and 2 of Article 108 of the Convention, contained the following proposal:

> Any state which has reasonable grounds for believing that a vessel is engaged in illicit traffic in narcotic drugs may, whatever the nationality of the vessel but provided that its tonnage is less than 500 tons, seize the illicit cargo. The State which carried out this seizure shall inform the State of nationality of the vessel in order that the latter State may institute proceedings against those responsible for the illicit traffic.

This proposal was included in this form in the Second Committee's basic compilation of proposals expressing the "main trends" at the Conference on a particular topic, together with a suggestion that a reference to psychotropic substances should be added in appropriate places.[106] Nevertheless, when the Chairman of the Second Committee prepared in 1975 the first "informal single negotiating text," he included the two other paragraphs in Article 94 of his text, but omitted the clause allowing the seizure of illegal cargo by any state, and providing for the punishment by the flag state of the persons responsible for the illegal traffic.[107] The delegation of Peru revived the issue in 1980, when it recommended both adding in Article 108 a provision on cooperation with the coastal state in case of seizure of a foreign vessel in that state's exclusive economic zone by a warship of a third state, and an addition in Article 110 of a provision allowing boarding on the high seas of vessels engaged in the illicit traffic in narcotic drugs or psychotropic substances.[108] Neither of these proposals was incorporated in the final text.

Consequently, there is no mention of illicit traffic in narcotic drugs in Article 110, and Article 108 provides only that:

> 1. All States shall co-operate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions.
>
> 2. Any State which has reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic in narcotic drugs or psychotropic substances may request the co-operation of other States to suppress such traffic.

Three issues raised by this provision need to be emphasized. In the first place, the obligation to "co-operate" is generally considered as a "weak"

obligation, merely a promissory note, which requires implementation by more detailed provisions, such as those relating to piracy (1982 Convention on the Law of the Sea, Articles 101-107) or unauthorized broadcasting (Article 109, paragraphs 2-4 and 110, paragraph 1(c)).

Second, paragraph 2 is carefully restricted. Only the flag state is entitled to ask other states for co-operation in catching one of its ships, if it has reasonable grounds for believing that this ship is engaged in illicit traffic in narcotic drugs. The opposite side is not mentioned—whether another state is entitled to ask the flag state to allow the boarding of a suspected vessel sailing under that flag. This is a clear case of "don't call me, I'll call you," designed to protect the flag state against finding itself in the unpleasant situation where it would have to permit boarding, as otherwise it would be suspected of assisting the drug trafficker. Its right to protect its vessels against possibly unwarranted interference is thereby destroyed for all practical purposes. Consequently, instead of a practice of *ad hoc* arrangements, flag states are likely to prefer the conclusion in advance of a basic agreement that would spell out the permitted measures and would provide some guarantee against possible abuses.[109]

Third, paragraph 1 allows only the suppression of high seas traffic in narcotic drugs and psychotropic substances which is "contrary to international conventions." The obligation to co-operate thus depends on the content of several conventions relating to such drugs and substances which have been adopted since 1912.[110] These conventions developed a system of co-operative arrangements for the suppression on illicit traffic in narcotic drugs and psychotropic substances through control of manufacture, and of export and import, of such drugs and substances, exchange of information on illicit activities, and acceptance of an obligation to punish or extradite the offenders.

All the previous conventions on the subject were replaced in 1961 by the Single Convention on Narcotic Drugs,[111] which in turn was amended by a 1972 Protocol.[112] This convention improved the system of international control through strict limitation of manufacture, exports and imports of an increasing list of drugs. The States Parties to the convention agreed to co-operate closely in a co-ordinated campaign against the illicit traffic in narcotic drugs and to assist each other in the campaign;[113] they agreed also to punish adequately the persons involved in such traffic, including those found guilty of intentional participation in, conspiracy to commit and attempts to commit, the offenses (listed in the convention) that were connected with such traffic.[114] It should be noted, however, that no mention was made of any special co-operation with respect to any activities at sea, although it was known that a large proportion of illicit traffic was using ships for smuggling the drugs. The 1972 Protocol strengthened the extradition provisions of the 1961 Convention, but again was silent on facilitating action against vessels engaged in illicit

traffic.[115] Similarly, the parallel provisions of the 1971 Convention on Psychotropic Substances did not mention enforcement at sea.[116]

During the 1970s the United States mounted a comprehensive effort to stem the increasing flood of illicit drugs into the United States, and developed a program of interdiction on the high seas of vessels suspected of carrying narcotics to the United States. To justify the program under international law, the United States relied sometimes on the analogy to slavery, arguing that persons addicted to drugs are enslaved both to a dangerous habit and to the drug traffickers on whom they slavishly depend, willing to do anything to obtain the drugs needed to satisfy their constant craving for narcotics.[117] Although the United States was reluctant to utilize the treaty process envisaged by the introductory phrase in Article 22 of the Convention on the High Seas and by the parallel provision in Article 110 of the Law of the Sea Convention, it started concluding informal arrangements with other countries, especially Latin American ones, which established an informal procedure for obtaining in each case a permission to board a particular vessel. A 1980 note by the United States to the United Kingdom describes these arrangements as follows:

> Upon initially intercepting a suspicious vessel the Coast Guard seeks, without boarding the vessel, to establish its identity and to develop other pertinent information. On the basis of this information, the government of the claimed or displayed nationality of registration is contacted to verify the claim or display of nationality. If this claim is not verified or is otherwise demonstrated to be false, the United States Coast Guard may then approach the suspected vessel and proceed against it, as if it were a United States flag vessel, in accordance with the principles relating to stateless vessels embodied in Articles 6 and 22 of the Geneva Convention on the High Seas. If, however, the claim or display of nationality is verified, and absent other facts, a special arrangement must be entered into with the flag state if the Coast Guard is to be allowed to board, search, and, if contraband is found seize the foreign flag vessel. Only after an arrangement has been reached does the United States Coast Guard take action with respect to the suspected vessel, and then only in strict compliance with the arrangement.
>
> In some cases the government concerned grants the Government of the United States permission to board, search and, if contraband is found indicating a violation of United States law, seize the vessel under United States law and take all further actions concerning the vessel under United States law. Alternatively, some governments grant the Government of the United States permission to board and search and, if contraband is found, seize the suspected vessel and hold it for further action by the flag state. In the latter case, the suspected vessel is normally taken to a port in the United States where it is held for flag state authorities. The contraband is destroyed by the Government of the United States, with only evidentiary samples being retained. The crew is either expelled from the United States to their country or countries of nationality or prosecuted under United States law if there is sufficient evidence of intent to smuggle the narcotics into the United States. Due to United States constitutional restraints the Government of the United States cannot normally enter into undertakings with the flag state to hold the crew for flag state prosecution. Furthermore, in pursuing the alternative of holding the vessel for flag state action, it is made clear to the flag state that once the vessel

is in the United States the claims of third parties against the vessel may make it impossible for the Government of the United States to release the vessel to the flag state.[118]

As the United Kingdom authorities were not willing to proceed in such an informal manner, an agreement was negotiated by the United States with that country, in the form of an exchange of notes,[119] modelled to some extent on the liquor smuggling treaty of 1924.[120] This agreement is a unilateral one; it allows the United States to board on the high seas (for which the agreement substituted the phrase "outside the limits of the territorial sea and contiguous zone of the United States") vessels under the British flag. It does not give the reciprocal right to the United Kingdom to board vessels under the United States flag, perhaps because the United States Congress may be still reluctant to allow United States citizens to be arrested on the high seas by foreign officials and tried by foreign courts. The boarding is permitted only in two geographically limited areas, comprising, in the first place, the Gulf of Mexico, the Caribbean Sea, and a portion of the Atlantic Ocean West of longitude 55 West and South of latitude 30 North (i.e., a line drawn slightly East of the Antilles and then West to Florida), and, in the second place, an area extending 150 miles from the Atlantic coast, North of Florida. United States authorities are allowed to board in those areas private vessels under British flag "in any case in which those authorities reasonably believe that the vessel has on board a cargo of drugs for importation into the United States in violation of the law of the United States."

The agreement relies on the generally recognized reason for boarding, namely the right of a warship (or Coast Guard vessel) to establish the nationality of a vessel on the high seas. The boarding party may for this purpose "examine the ship's papers;" it may also, in this instance, "address enquiries to those on board," and "take such other measures as are necessary to establish the place of registration of vessel." Then comes the shift: "When these measures suggest that an offense against the laws of the United States relative to the importation of drugs is being committed, the Government of the United Kingdom agrees that it will not object to the authorities of the United States instituting a search of the vessel." While this provision is far-reaching, it may be noted that it implies that the starting point for this reinforced suspicion cannot be a physical search of the ship (as this is the *next* step), but must be the result of findings derived from documents or statements by the captain or the crew. Finally, if the authorities of the United States have been led by the search to the belief that an offense against the anti-drug laws of the United States is being committed, then they are allowed to seize the vessel and take it into a United States port.

As all these steps are to a large extent in the discretion of the authorities of the United States and lend themselves easily to abuse, the United Kingdom Government reserved to itself the right to object, within 14 days of the vessel's

entry into port, to further exercise of United States' jurisdiction, and the United States agreed that thereupon it would release the vessel without charge. Similarly, if the United Kingdom, within 30 days of the vessel's entry into port, objects to the prosecution of any United Kingdom national found on board, such person has to be released by the United States. On the other hand, in a departure from the traditional rule that the flag state is entitled, and perhaps even obliged, to protect the members of the crew of its vessels regardless of their nationality,[121] the United Kingdom agreed that it "will not otherwise object to the prosecution of any other person found on board the vessel." In order to enable the United Kingdom to make these requests, in every case of boarding of a vessel under the British flag the United States "shall promptly inform the authorities of the United Kingdom of the action taken and shall keep them fully informed of any subsequent development."

There is finally a weak provision for the settlement of disputes under this agreement, especially those relating to any loss or injury "suffered as a result of any action taken by the United States in contravention of these arrangements or any improper or unreasonable action taken by the United States pursuant thereto." In such a case, "representatives of the two Governments shall meet to decide any question relating to compensation." If they don't agree, there is no other recourse, as surprisingly there is no arbitration treaty between the two countries despite the fact that in the past they have found it possible to submit many claims to arbitration.

There is not a perfect model, but a good beginning. Perhaps it is even too good, as the United States has not embarked, as it did in 1924, on a diplomatic effort to have similar agreements with all other interested States. It is possible that the mild restrictions of the United Kingdom agreement on possible abuse of power by the United States authorities are found too uncomfortable; and that these authorities prefer instead to obtain *ad hoc* consent for each search and seizure,[122] or even to pretend that the fact that the flag State did not later object is equivalent to an *ex post facto* ratification of the seizure.[123] It is in order to avoid such abuses of the basic rules of the international law of the sea and of the interrelated rules of international human rights law, that the Law of the Sea Conventions require "a treaty" properly defining the allowable searches and seizures and providing at least some minimum guarantees that the fate of the ship and of the captain and the crew will not be at the complete mercy of the foreign warship.[124]

At the same time, other countries became concerned about the growth of illicit traffic in narcotic drugs and the need for adequate international arrangements to deal with this issue. When the Commission on Narcotic Drugs established in 1982 an expert group to study the functioning, adequacy and enhancement of the 1961 Single Convention on Narcotic Drugs, Canada used this occasion to propose to that group the preparation of an "arrangement for law enforcement authorities to board vessels flying foreign flags."[125] The

group of experts noted that "bilateral arrangements had been made in certain specified geographic areas whereby ships flying the flag of the other country concerned could be boarded and inspected in order to apprehend drug traffickers or to seize illicit narcotic drugs," and recommended the preparation of a study of existing agreements, analyzing their structure and functioning, and assessing their usefulness and advisability.[126]

On the basis of the experts' report, Canada, Italy, Pakistan and the United States presented a resolution to the Commission on Narcotic Drugs suggesting the adoption of certain modest measures "to improve international cooperation in the maritime interdiction of illicit drug traffic."[127] This proposal was adopted by the Economic and Social Council, with slight drafting changes; it emphasized the need for "effective steps by all States to provide, in accordance with relevant domestic constitutional safeguards and legislations, for prompt, positive and unmistaken identification of private vessels registered under their flags," and recommended several steps to achieve this goal.[128]. Neither the four states' proposal, nor the Council's resolution mentioned, however, the problem of boarding foreign vessels.

Nevertheless, a report by the Secretary-General noted that the Commission on Narcotic Drugs and the United Nations Secretariat's Division on Narcotic Drugs have started studying the possible ramifications of the 1982 Law of the Sea Convention, especially of Article 27 (criminal jurisdiction on board a foreign ship in the territorial sea) and Article 108 (cooperation with respect to illicit traffic on the high seas), as well as of the effect of provisions broadening the jurisdiction of the coastal States by increasing the breadth of the territorial sea and the contiguous zone and the establishment of the exclusive economic zone and archipelagic waters. The view was expressed that some States seem to expect that "the complex problems States face in intercepting vessels suspected of smuggling drugs may be overcome with the entry into force of the Convention, in particular, that drug law enforcement agencies of States Parties would have a greater ability to take action in respect of foreign ships in extended areas under their jurisdiction."[129] It was this approach that the United Kingdom and the United States were trying to avoid in their 1981 agreement[130] by substituting for the "high seas" a reference to the area "outside the limits of the territorial sea and the contiguous zone," thus indicating indirectly that a coastal State's jurisdiction with respect to the control of drug trafficking does not extend beyond the limits of the contiguous zone and does not, in particular, apply to the vast extent of the exclusive economic zone.

Another approach was tried by two (partly overlapping) groups of Latin American countries, which proposed in 1984, respectively, that "traffic in narcotic drugs should be considered a crime against humanity, with all the legal consequences implicit therein," and that a "special conference should consider declaring drug trafficking to be a crime against humanity, since it

seriously affects people's lives, health and welfare, has a negative impact on the economic and social system and poses a danger to the stability of democratic processes in Latin America."[131] These proposals led to the adoption by the General Assembly of a resolution, supported by several additional countries of the Americas, Asia and Africa, including Canada and the United States, requesting the Commission on Narcotic Drugs to initiate the preparation of a "draft convention against illicit traffic in narcotic drugs" which would deal, in particular, with problems "not envisaged in existing international instruments."[132] A draft convention, prepared by Venezuela, was annexed to the resolution; it would have condemned trafficking in narcotic drugs or psychotropic substances as "a grave international crime against humanity," and would have provided also for "imprescriptibility of the crimes" and "mutual assistance in combating illicit trafficking."[133] A parallel Declaration on the Control of Drug Trafficking and Drug Abuse was adopted by the General Assembly at the same time; it also condemned drug trafficking, but called it only "an international criminal activity."[134] The delegate of the United Kingdom immediately objected to the application of the concept of the crime against humanity, which had "specific connotations in international law," and "would give rise to prolonged and unproductive discussion."[135] On the other hand, the delegate of Argentina considered that drug trafficking was "a crime against humanity, and its declaration as such would make way for the formulation of precise legal definitions which would ensure that the crime was punished and that national borders were no longer used as shields for committing it."[136]

At the 1985 meeting of the Commission on Narcotic Drugs, several representatives made clear that their governments would find it impossible to accept a convention that included drug trafficking in the definition of crimes against humanity which had "specific historical and legal connotations," or included the proposal to make drug traffic crimes imprescriptible, as this proposal would "run counter to the principles of widely accepted penal policy." Many representatives supported the inclusion in the proposed new convention of provisions designed "to strengthen the capacity of Governments to render mutual law enforcement and judicial assistance;" in particular, it was emphasized that "the present opportunity should be taken to consider the problem of drug smuggling by ship," especially in view of "the difficulty encountered in intercepting suspect vessels on the high seas." It was also suggested that drug trafficking on the high seas "be given the same status as piracy, in international law."[137]

The Commission asked in 1985 for comments and suggestions concerning the elements to be included in the proposed convention. Australia replied that it might prove difficult to incorporate in the convention "the concept of interception on the high seas of vessels involved in drug trafficking." The United Kingdom emphasized the importance of maintaining "the principle

of free right of passage for ships on the high seas." Consequently, it proposed—together with the United States and Turkey—that any "provision allowing the stopping and boarding of vessels on the high seas . . . would have to make such intervention conditional upon the consent of the flag State." Egypt and Spain called attention to the 1982 Convention of the Law of the Sea and suggested that Article 108 of that convention could be elaborated upon in the new convention. Egypt and the United States revived the idea that "illicit traffic on the high seas might be assimilated to piracy and treated as such under applicable international law." To implement that concept, the United States proposed that the convention should provide "that a State may request another State [for] authority to board a vessel flying the latter's flag and seize, arrest and prosecute as appropriate when there are reasonable grounds to believe that such vessel is engaged in drug trafficking;" and that, upon receipt of such request, "the flag state would be required to take action to ensure that the vessel is not engaged, or permitted to engage further, in trafficking." Egypt, on the other hand, suggested that the new convention should take advantage of Articles 27 (criminal jurisdiction on board a foreign ship passing through the territorial sea) and 33 (contiguous zone) in order to cover also cases of illicit traffic in the territorial sea and the contiguous zone.[138]

Some of these comments were echoed at the next meeting of the Commission on Narcotic Drugs. Strong opposition was expressed to the "qualification of illicit traffic as a crime against humanity," and to imprescriptibility of traffic offenses. On the other hand, several representatives supported the inclusion of provisions allowing for "appropriate intervention on the high seas in cases of illicit drug traffic," and of provisions encouraging "[i]mproved co-operation and bilateral and regional agreements in this field."[139] The Commission decided accordingly to include as one of the elements in its guidelines for the drafting of the convention the strengthening of "mutual co-operation among States in the suppression of illicit drug trafficking on the high seas."[140]

In June 1986, the Division of Narcotic Drugs of the United Nations Secretariat, with the assistance of a group of experts volunteered by several nations (including the United States), prepared a preliminary draft on the convention, Article 12 of which dealt with "illicit traffic by sea."[141] At its 1987 session, the Commission on Narcotic Drugs had also before it another series of comments by the governments,[142] including elaborate comments by the United States.[143] The Commission was able to engage only in a general discussion and a preliminary consideration of non-controversial articles and of the difficult definitional article (Article 1); there was no discussion of Article 12.[144] In the general debate, some representatives mentioned the need to strengthen Article 12, in order to make the high seas "off limits" to drug traffickers; others wanted to delete the provisions relating to search and

seizure of vessels, "because of the serious implications which their implementations could have in certain areas of international trade and also in view of their possible abuse by certain States."[145]

The Commission asked the Division of Narcotic Drugs to prepare a working document, consolidating all proposals, and recommended to the Economic and Social Council the establishment of an open-ended intergovernmental expert group to review that document, "to reach agreement on the articles of the convention, wherever possible, and to prepare a revised working document," to be reviewed by the Commission at the beginning of 1988.[146] The Economic and Social Council approved this proposal in May 1987,[147] and a group of 135 experts from 57 countries met promptly in Vienna in June and July 1987, reviewed the Secretariat document,[148] and redrafted a number of articles of the draft convention, including Article 12.[149]

One further development should be mentioned, which stimulated action in this field. The International Conference on Drug Abuse and Illicit Trafficking, held at Vienna in June 1987, approved as Target 28 for suggested courses of action on national, regional and international levels, to establish control over ships on the high seas and aircraft in international airspace. In particular, the Conference suggested the following courses of action:

> *At the national level.* Should the ministry or authority concerned have reasonable grounds for suspecting that a vessel or aircraft registered under the laws of the State is illicitly carrying drugs, it may request another State to assist in carrying out a search: for example, that other State may be asked to direct its authorities to board and inspect the vessel and, if drugs are found, to seize them and arrest persons involved in the trafficking. In such circumstances, the State's own authorities may board or seize a vessel or aircraft registered under its laws. Subject to the provisions of international law, the law enforcement authorities should, to the fullest extent permitted by national law, undertake to board and seize a vessel unlawfully carrying drugs, provided that the authorization of the State of registry and, when applicable, of a coastal State has been obtained. A State should endeavour to respond promptly when asked for permission to stop, board and search a vessel under its registry for reasons of illicit drug trafficking control. Subject to the same considerations, an aircraft may be subject to search upon landing at a designated airport.
>
> The appropriate ministry or authority should, after the seizure of such a vessel or aircraft, deal promptly with illicit drugs and traffickers found thereon under the country's own laws if the conveyance is registered under that country's laws or, if registered under the laws of another State, pursuant to such agreement as is reached with the State of registry without unnecessary delay.
>
> States could authorize the appropriate agency or responsible authority to take appropriate action in these matters. This action might include the prompt communication of information indicating whether a particular vessel or aircraft is registered under the laws of the requested State and also authority to empower a requesting State to seize the suspect vessel or aircraft.
>
> *At the regional and international levels.* International bodies and States could consider whether international standards can be established for the identification, seizure and disposition of vessels and aircraft on the surface suspected of carrying drugs illicitly, and of the

> drugs and traffickers found thereon. States should also make every effort to conclude bilateral, multilateral and regional agreements to strengthen such co-operation between States.[150]

At the same time, the Conference made clear that "appropriate co-operative procedures need to be devised which do not interfere with legitimate passage of commerce," and which comply with "existing relevant conventions."[151]

In settling these issues, as shown over almost two hundred years of efforts, it did not prove easy to establish the balance between two aspects of national sovereignty—the freedom of a state's ship to navigate the oceans without interference by other states, and the right of other states to protect some important interests against a possibility of interference by foreign vessels engaged in a generally condemned activity. In the field of slavery, despite repeated efforts by some governments, international conferences consistently rejected any interference with foreign vessels which would go beyond the right to approach and to ascertain a vessel's flag and registration, and all attempts to equate slavery with piracy were unsuccessful. Once a vessel's nationality has been ascertained, any further action had to be deferred to the flag state.

Are coastal states entitled to go further as far as illicit traffic in narcotic drugs is concerned? At the Third Law of the Sea Conference, only a few years ago, the decision went in the opposite direction, and the proposals to put drug trafficking on the same level as slavery were clearly rejected. In other negotiations, attempts to include illicit drug traffic among "crimes against humanity" were strongly opposed. There is clearly a hierarchy here—piracy, slavery, drug traffic; and the measures that may be taken against a vessel engaging in such activities diminish gradually.

In the recent negotiations on the new convention against illicit traffic in narcotic drugs and psychotropic substances, the old arguments were often repeated, though sometimes in new, more modern guises.

In particular as was noted previously, several proposals were made to declare that the traffic in illicit drugs was a "crime against humanity" or that it should be assimilated to "piracy."[152] In view of the strong opposition to these proposals by other Governments,[153] the Secretariat of the United Nations did not include this concept in its early drafts,[154] and no further mention was made of this issue. The United Kingdom was not able to achieve this objective with respect to slavery; now, it was the United States that was trying to achieve a similar goal with respect to the illicit drug traffic, but the opposition of the United Kingdom and other States made it impossible.

Article 12 of the Secretariat's 1986 Draft[155] became the focus of the debate on the "illicit traffic by sea." To facilitate the comparison, the semifinal text, referred by the Commission on Narcotic Drugs in 1988 to the Plenipotentiary Conference, is also included here, the changes in the two texts being italicized, together with additions or omissions.

1986 Text:	1988 Text:
1. The Parties shall co-operate to the fullest extent possible to suppress the illicit traffic *in controlled substances* by sea.	1. The Parties shall co-operate to the fullest extent possible to suppress the illicit traffic by sea.
2. A Party which has reasonable grounds to suspect that a vessel *registered under its laws* is being used for the illicit traffic *in controlled substances may request* the assistance of other Parties in suppressing its use for that purpose. Parties so requested shall render such assistance, within the means available to them.	2. *If* a Party, which has reasonable grounds to suspect that a vessel *flying its flag or not displaying a flag or markings of registry* is being used for the illicit traffic, *requests* the assistance of other Parties in suppressing its use for that purpose, *the* Parties so requested shall render such assistance, within the means available to them.
3. *A* Party which has reasonable grounds *to believe* that a vessel is engaged in illicit traffic *and is on the high seas as defined in Part VII of the United Nations Convention on the Law of the Sea* may board, search and seize such a vessel if: (a) *The vessel is registered under its law; or* (b) That Party *seeks and receives* permission from the *Party of registry; or* (c) *The vessel is not displaying a flag or markings of registry.*	3. *Without prejudice to any rights provided for under general international law*, a Party, which has reasonable grounds *for believing* that a vessel *that is beyond the external limits of the territorial sea of any State and is flying the flag of another Party* is engaged in illicit traffic, may, if that Party *has received prior* permission from the *flag State*, board, search and, *if evidence of illicit traffic is discovered*, seize such a vessel.
4. A Party shall respond in an expeditious manner to requests from another Party to determine, *for the purpose of paragraph 3 of this article*, whether a vessel is registered under its laws, and to requests for permission made pursuant to the provisions in that paragraph. Each Party shall designate an authority to receive and *act upon* such requests. The authority designated by each Party for this purpose shall be notified through the Secretary General to all other Parties.	4. *For the purposes of paragraph 3 of this article*, a Party shall respond in an expeditious manner to requests from another Party to determine whether a vessel is registered under its law and to requests for permission made pursuant to the provisions in that paragraph. *At the time of adhering to the Convention*, each Party shall designate an authority to receive and respond to such requests. The authority designated by each Party for this purpose shall be notified through the Secretary-General to all other Parties *within one month of the designation.*

5. Where evidence of illicit traffic is found, the Party having custody of the vessel shall take appropriate action with respect to the vessel and persons on board, in accordance with:	5. Where evidence of illicit traffic is found, the Party having custody of the vessel shall take appropriate action with respect to the vessel and persons on board, in accordance with treaties, where applicable, or any *prior* agreement or arrangement otherwise reached *with the flag State.*
(a) *Its own judicial requirements if the vessel is registered under its laws; or*	
(b) *Existing bilateral* treaties, where applicable, or any agreement or arrangement otherwise reached *at the time of seizure with the Party of registry.*	
6. *The right to challenge the nature or effect of the agreement or arrangement referred to in paragraph 5 (b) of this article shall rest exclusively with the Party of registry.*	6. *A Party which has taken any action contemplated in this article shall promptly inform the flag State concerned of the results of that action.*
7. The Parties shall consider entering into bilateral and regional agreements to carry out, or to enhance the effectiveness of, the provisions of this article.	7. The Parties shall consider entering into bilateral and regional agreements to carry out, or to enhance the effectiveness of, the provisions of this article.

No change was made in paragraph 7, and only minor changes were made in paragraphs 1 and 4. Paragraph 2 was redrafted slightly to include some phrases from the original paragraph 3 relating to a vessel that is not displaying a flag or markings of registry. Paragraphs 3 and 5 were the most controversial provisions.

As far as paragraph 3 was concerned, it was already mentioned that the controversy over the status of the exclusive economic zone, which has plagued the Third United Nations Conference on the Law of the Sea,[156] was revived during the preparation of the draft convention against the illicit traffic in narcotic drugs and psychotropic substances.[157] The 1986 Secretariat Draft allowed the boarding of a suspected vessel "on the high seas as defined in Part VII of the United Nations Convention on the Law of the Sea."[158] Part VII, entitled "High Seas" does not actually define the high seas, but in Article 86 merely states that it applies "to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State." At the same time, Article 86 makes clear, however, that this provision "does not entail any abridgement of the freedoms [of the high seas] enjoyed by all States in the exclusive economic zone in accordance with Article 58." Article 58, in turn, mentions expressly the freedom of navigation and the applicability

in the exclusive economic zone of Articles 88 to 115 and other pertinent rules of international law, thus including Articles 92 (exclusive jurisdiction of the flag State), 108 (illicit traffic in narcotic drugs), 110 (right of visit) and 111 (right of hot pursuit ceases "as soon as the ship pursued enters the territorial sea of its own State or of a third State").[159]

To avoid any conflict with respect to the meaning of the "high seas" phrase, the United States immediately proposed that the right to board a suspected vessel should extend to the whole area "outside the territory and the territorial sea of any State," thus including the contiguous zone and the exclusive economic zone within the area in which boarding does not require the consent of the coastal State. This proposal was without prejudice to the requirement of "prior consent of the State of registry."[160] The United States proposal was accepted by the Intergovernmental Expert Group, whose draft authorized the boarding of a suspected vessel "beyond the external limits of the territorial sea of any State." The group also added, at the beginning of paragraph 3, the phrase "[w]ithout prejudice to any rights provided for under general international law."[161]

At the 1988 session of the Commission on Narcotic Drugs, several representatives expressed reservations about paragraph 3. One of them proposed redrafting the first phrase to read: "Without prejudice to any rights conferred on the coastal State under the United Nations Convention on the Law of the Sea . . ." Another one proposed, more elaborately, to revise that sentence as follows: "Without prejudice to the right deriving from the rules and principles of international law, particularly in the zone contiguous to the territorial sea." Alternately, that representative suggested a new paragraph 3 reading: "The provisions of the preceding paragraph shall not affect the rights which the coastal State may exercise, in conformity with international law, in the zone contiguous to its territorial sea." Other representatives pointed out that the text adopted by the Expert Group "could imply that third States would be given certain rights in the area between 12 and 200 miles (Exclusive Economic Zone) which were not contemplated in the Convention on the Law of the Sea." They argued, therefore, for restoring the original phraseology proposed by the Secretariat. In response, one representative supported the language proposed by the Expert Group on the ground that the International Maritime Organization, when faced with a similar issue in drafting the Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation,[162] decided also to use a phrase referring to jurisdiction "beyond the outer limits of the territorial sea."[163]

Other issues were also raised. One representative, taking into account Article 107 of the Convention on the Law of the Sea, suggested that "a search or seizure may be effected only by a ship and/or aircraft which was clearly marked and identifiable as being on government service and authorized to undertake such activities."[164] Another representative commented on

paragraph 5, according to which, where evidence of illicit traffic is found, "the Party having custody of the vessel shall take appropriate action." He pointed out that the notion of "custody of the vessel" covered a legal situation not contemplated by the draft convention, and proposed that the main part of the sentence be simplified to read: "the Party which has intercepted a vessel pursuant to paragraph 3 shall take appropriate action with respect to the vessel and persons on board, in accordance with treaties or with any prior agreement or arrangement reached with the flag State."[165] It may be noted that this text and the Commission's 1988 version differ here from the 1986 text by emphasizing the need for a "prior" agreement or arrangement, thus coming closer to Article 108 of the Convention on the Law of the Seas which allows measures going beyond a visit to verify the ship's right to fly its flag only "where acts of interference derive from powers conferred by a treaty." Two steps seem to be thus required: a prior agreement (under paragraph 7) establishing the means for obtaining permission allowing a foreign authority to go beyond a visit and to search or seize a ship; and an actual grant of approval for a particular action, i.e., to search the ship only, or to search and, if evidence of illicit traffic is found, to seize that evidence (and transmit it to the flag State for further action), or to seize the ship and arrest the persons engaged in illicit traffic.

Several representatives, by analogy to Articles 106 and 110, paragraph 3, of the Convention of the Law of the Sea, proposed that a new paragraph should be inserted in Article 12 to guarantee compensation for vessels that were subjected to unjustified search measures, to be paid by the State that organized the search and determined its scope. Although the flag State had granted its approval for a search, it should not bear responsibility as its permission was dependent on the information provided by the State requesting a search.[166]

Finally, one more general comment was made. One representative stressed that it should be stipulated in the preamble to the Convention that the measures envisaged in the Convention "must be consistent with human rights, respect the traditions and customs of national or regional groups and protect the environment." He also proposed that the Convention should indicate that "international co-operation, whether bilateral or multilateral, should develop free of pressures of any kind."[167]

At the end of the debate, several representatives expressed the following conclusions: that Article 12 provided "a workable mechanism to facilitate international co-operation against illicit traffic on the high seas;" that it "took into account the need not to interfere with legitimate rights of passage;" that, by requiring "the consent of the flag State prior to intervention, [it] preserved the important principle of flag State responsibility;" and that, in spite of the difficulties faced by some States, the article reflected the compromise reached

by the Expert Group, which merited consolidation by the Plenipotentiary Conference.[168]

Without making any changes itself, the Commission on Narcotic Drugs decided to forward draft Article 12 to the Plenipotentiary Conference "for appropriate consideration."[169]

On the Commission's recommendation,[170] the Economic and Social Council decided to convene a further group of experts to review the outstanding issues, and to convene thereafter a plenipotentiary conference to complete the negotiations and adopt the final version of the Convention.[171]

The United Nations Conference for the Adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances met in Vienna from November 25 to December 20, 1988. The final text was adopted by consensus, without vote, on December 19, 1988, and 43 of the 106 States participating in the Conference signed it on December 20. The signatory states ranged from Afghanistan to Zaire, including China, the United Kingdom and the United States; France and the Soviet Union were not, however, among the original signatories.[172] The 35 substantive articles of the Convention impose upon the parties an obligation to take specific law enforcement measures to improve their ability to deal more effectively with various aspects of illicit traffic in narcotic drugs having an international dimension (Article 2).[173] In the preamble to the Convention, the parties recognize that "the illicit traffic is an international activity, the suppression of which demands urgent attention and highest priority;" and express, in particular, their determination "to improve international cooperation in the suppression of illicit traffic by sea."

The final text, as revised by the May 1988 Review Group[174] and the Conference, deals with maritime interdiction in Article 17; in addition, certain jurisdictional aspects are dealt with in Article 4(1)(b)(ii).
The final text of Article 17 reads as follows:

> 1. The Parties shall co-operate to the fullest extent possible to suppress illicit traffic by sea, in conformity with the international law of the sea.
>
> 2. A Party which has reasonable grounds to suspect that a vessel flying its flag or not displaying a flag or marks of registry is engaged in illicit traffic may request the assistance of other Parties in suppressing its use for that purpose. The Parties so requested shall render such assistance within the means available to them.
>
> 3. A Party which has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying marks of registry of another Party is engaged in illicit traffic may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures in regard to that vessel.
>
> 4. In accordance with paragraph 3 or in accordance with treaties in force between them or in accordance with any agreement or arrangement otherwise reached between those Parties, the flag State may authorize the requesting State to, *inter alia*:

(a) Board the vessel;
(b) Search the vessel;
(c) If evidence of involvement in illicit traffic is found, take appropriate action with respect to the vessel, persons and cargo on board.

5. Where action is taken pursuant to this article, the Parties concerned shall take due account of the need not to endanger the safety of life at sea, the security of the vessel and the cargo or to prejudice the commercial and legal interests of the flag State or any other interested State.

6. The flag State may, consistent with its obligations in paragraph 1 of this article, subject its authorization to conditions to be mutually agreed between it and the requesting Party, including conditions relating to responsibility.

7. For the purposes of paragraphs 3 and 4 of this article, a Party shall respond expeditiously to a request from another Party to determine whether a vessel that is flying its flag is entitled to do so, and to requests for authorization made pursuant to paragraph 3. At the time of becoming a Party to this Convention, each Party shall designate an authority or, when necessary, authorities to receive and respond to such requests. Such designation shall be notified through the Secretary-General to all other Parties within one month of the designation.

8. A Party which has taken action in accordance with this article shall promptly inform the flag State concerned of the results of that action.

9. The Parties shall consider entering into bilateral or regional agreements or arrangements to carry out, or to enhance the effectiveness of, the provisions of this article.

10. Action pursuant to paragraph 4 of this article shall be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

11. Any action taken in accordance with this article shall take due account of the need not to interfere with or affect the rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea.

The next text is an amalgamation of the previous drafts, using some language of both the 1986 Secretariat text and that of the earlier Review Group, which the Commission on Narcotic Drugs forwarded to the Conference,[175] with certain changes and several additions. In particular, two references were added to the "international law of the sea," it being generally understood, and expressly stated by the United States delegation, that these references relate to international customary law, as reflected in the 1982 United Nations Convention on the Law of the Sea. Thus paragraph 1 follows clearly Article 108(1) of that Convention, and paragraph 2 is based on its Article 108(2), and, following recent practice, expands the right to request assistance to include the case of illicit traffic by stateless vessels. It is also necessary to note that new paragraph 11 requires that any interdiction action "shall take due account of the need not to interfere with or affect the rights and obligations of the coastal States in accordance with international law,"

which have been considerably broadened by the 1982 Convention. The United States delegation made clear, however, during the negotiations that this paragraph refers only to those situations in which a coastal state has generally recognized rights beyond the outer limit of the territorial sea, as in the case of hot pursuit in the exclusive economic zone and on the high seas, and the right to take action in the contiguous zone for the limited purposes recognized in Article 33 of the LOS Convention.

Paragraphs 3-6 expand considerably the text contained in earlier drafts and define more clearly the respective rights of the flag state and of the state wishing to search a foreign ship. A state having reasonable grounds to suspect that a vessel flying the flag of another state is engaged in illicit drug traffic may take three steps: (a) notify the flag state so that this state itself may take the necessary action; (b) request confirmation of registry; and (c) if registry is confirmed, request authorization from the flag state to "take appropriate measures in regard to that vessel." It is thus made clear that, once it is confirmed that the vessel is actually entitled to fly the flag of another state, no action can be taken against the vessel without express authorization of the flag state.

The authorization can be made directly "pursuant to this article" of the 1988 Convention, and in such case no additional agreement or arrangement is required. The Convention encourages the parties, however, to enter into bilateral or regional agreements or arrangements to carry out the provisions of this article (paragraph 9); and the United States has already started to conclude such agreements.[176] It is not clear what is meant by "arrangements;" it probably means exchanges of notes or other executive agreements not requiring ratification, but does not include informal *ad hoc* agreements reached by telephone at the time of a request for authorization.

Whether or not there is an agreement or arrangement, the flag state has several choices. In the first place, it may authorize the requesting state only to board the vessel (e.g., to ascertain the registration); or it may authorize a search of the vessel; or, if that search finds evidence of involvement in illicit traffic, the flag state may authorize the requesting state to "take appropriate action with respect to the vessel, persons and cargo on board" (paragraph 4). In the second place, the flag state may, consistent with its obligation to "cooperate to the fullest extent" (paragraph 1), "subject its authorization to conditions to be mutually agreed" by the two states concerned. If the requesting state is not able or willing to comply with those conditions, the authorization can be denied. One of the conditions may be that the requesting state should agree to be responsible for any damage caused by its action against the vessel (paragraph 6). This may be onerous, as the Convention also provides that in any action to be taken under this article, the requesting state must "take due account of the need not to endanger the safety of life at sea, the security of the vessel and the cargo." More broadly, it shall not "prejudice

the commercial and legal interests of the flag State or any other interested State" (paragraph 5).

Paragraphs 7 and 8 reflect the prior drafts, with only minor changes. Paragraphs 9 and 11 have already been discussed above. In accordance with the new paragraph 10, action under this Article can be taken only by "warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect." This provision reflects several articles of the 1982 LOS Convention.[177]

By thus codifying the rules on interdiction of foreign vessels, the Conference took an important step which would bring the campaign against illicit drugs to a point beyond that ever reached by the crusade against slave trade. Whether this step will endanger the freedom of the high seas will depend on the interpretation of the provisions relating to the obligation requiring the prior consent of the flag state, not merely in a particular case, under pressure of the circumstances, but through a properly ratified, bilateral or multilateral agreement, containing proper safeguards against abuse.[178] In the 1920s it proved possible for the United States to conclude sixteen such agreements in order to combat liquor traffic.[179] Perhaps it may be possible to conclude agreements similar to the one made with the United Kingdom in 1981,[180] which would permit the United States—in the words of paragraph 9 of Article 17 of the Convention—"to carry out, or to enhance the effectiveness of, the provision of [that] article." Only that kind of action would maintain the integrity of Article 110 of the Convention on the Law of the Sea, and would protect the United States and its Navy against the disintegration of the concept of the freedom of the high seas, on which the security of the United States depends.[181]

Notes

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1. As Professors McDougal and Burke have pointed out, the story of the attempts to broaden the right to visit and search slave-trading vessels "possesses current interest as testimony of the traditional aversion of interference by foreign warships with national vessels on the high seas." Myres S. McDougal and William T. Burke, *The Public Order of the Oceans* (New Haven and London: Yale University Press, 1962), p. 881.

2. This comment will not consider such issues as the extent of a coastal state's jurisdiction in a contiguous zone, right of hot pursuit from coastal waters into the high seas, jurisdiction over activities on the continental shelf and in the exclusive economic zone, the protection of certain living resources of the high seas, or the exploration of the mineral resources of the seabed area beyond the limits of national jurisdiction. For an early collection of treaties, laws and regulations dealing with some of the issues mentioned in this footnote, which was prepared by this author for the International Law Commission, *see* United Nations Legislative Series, v. 1, *Laws and Regulations on the Regime of the High Seas*, U.N. Doc. ST/LEG/SER.B/1 (1951), U.N. Publ. Sales No. 1951.V.2.

3. *See* the *I'm Alone* case, where the United States was ordered to pay $25,000 in punitive damages for the intentional sinking by a United States Coast Guard vessel of a British ship of Canadian registry suspected of smuggling alcoholic beverages. Report by a Joint Commission, January 5, 1935, United Nations, *Reports of International Arbitral Awards*, v. 3, pp. 1609, 1617-18.

For punishment of British commanders for illegal captures of slave ships, see *infra* note 21. See also the treaty of 1862, *infra*, note 31, Article 7, and the text preceding that note.

The Treaty of Amity and Commerce with Prussia, September 10, 1785, provided in Article XV that even in time of war between one party and a third power, if a vessel of war of the belligerent party should encounter the vessel of the neutral party on the high seas, it would not be permitted to approach the neutral vessel within a cannon-shot, nor send more than two or three men in their boat on board that vessel, to examine her sea-letters or passports (i.e., documents proving their neutral nationality); and should the persons belonging to the war vessel "molest or injure in any manner whatever the people, vessels, or effect of the other part," they would be "responsible in their persons and property for damages and interest." As at that time, the United States Navy had to rely for assistance on privateers, there was the additional provision that "all commanders of private owned vessels" must give sufficient security for such damages "before they are commissioned." William M. Malloy, *Treaties, Conventions, etc., between the United States of America and Other Powers, 1776-1909* (Washington, D.C.: Government Printing Office, 1910), v. 2, pp. 1477, 1482.

For a spirited defense of the United States' need for privateers, *see* the statement of U.S. Minister at London, Mr. James Buchanan (later President of the United States), March 24, 1854, reprinted in John Basset Moore, *A Digest of International Law* (Washington D.C.: Government Printing Office, 1906), v. 7, p. 550. In 1856, the United States Government announced its willingness to adhere to the Declaration of Paris abolishing privateering, provided that at the same time the other powers would agree that "the private property of subjects and citizens of a belligerent on the high seas shall be exempt from seizure by the public armed vessels of the other belligerent, except it be contraband," thus evening the odds between Great Britain, then the biggest naval power, and the United States, then having the biggest merchant marine (easily changeable to privateering). See *id.*, pp. 563-65. See also the statement by Secretary of State Marcy, July 28, 1856, *id.*, pp. 552-54.

4. *Le Louis*, 2 Dodson 210, 243-44 (High Court of Admiralty, 1817); reprinted in James Brown Scott, ed., *Cases on International Law* (St. Paul: West Publishing Co., 1905), pp. 352, 356-357 (1905).

In a similar spirit, Justice Story stated that:

> Upon the ocean, then, in time of peace, all possess an entire equality. It is the common highway of all, appropriated to the use of all; and no one can vindicate to himself a superior or exclusive prerogative there. Every ship sails there with the unquestionable right of pursuing her own lawful business without interruption; but, whatever may be that business, she is bound to pursue it in such a manner as not to violate the rights of others. The general maxim in such cases is, *sic utere tuo, ut non alienum laedas.*

The *Marianna Flora*, 24 U.S. (11 Wheaton) 1, 42 (1826).

5. U.N. Secretariat, *Memorandum on the Regime of the High Seas*, U.N. Doc. A/CN.4/32 (1950), p. 4 (prepared by Professor Gilbert Gidel).

6. [First] United Nations Conference on the Law of the Sea, Official Records, v. 4 (Second Committee: High Seas; General Regime), U.N. Doc. A/CONF.13/40 (1958), U.N. Publ. Sales No. 58.V.4, Vol. 4, p. 15 (hereafter cited as 1958 LOS Conference). Admiral Colclaugh emphasized that the principle of the freedom of the seas had two vital elements: first, that the high seas were open to all nations; and second, that certain restraints and regulations were necessary to safeguard the exercise of the freedom in the interests of the whole international community." *Id.*

7. *See* Moore, *supra* note 3, pp. 987-1001; and Green H. Hackworth, *Digest of International Law* (Washington, D.C.: U.S. Government Printing Office, 1941), v. 2, p. 659.

In the *Trent* incident in 1861, a United States warship removed Confederate commissioners from a British mail steamer. When they were later released to the British ambassador, Secretary of State Seward explained that United States action was inconsistent with the principles espoused by the United States in the impressment of seamen case. He quoted from an 1804 statement of James Monroe, then Secretary of State in the Jefferson Administration, that leaving the decision about the future of an individual to a naval officer rather than a tribunal would be contrary to "[r]eason, justice and humanity." Moore, *supra*, note 3, v. 7, pp. 626-29. See also *id.*, pp. 768-79.

8. Reproduced in Moore, *supra* note 3, v. 2. p. 998.

9. *Id.*, at p. 999.

10. Act for the Abolition of Slave Trade, March 25, 1807, British Statutes, v. 21, 47 George III, 1st session, ch. 36.

11. Act to Prohibit the Importation of Slaves into any Port or Place Within the Jurisdiction of the United States, March 2, 1807, U.S. Statutes at Large, v. 2, p. 426.

12. *See The Amedie*, 1 Action 240 (Lords Commissioners of Appeal, 1810), and *The Fortuna*, 1 Dodson 81 (High Court of Admiralty, Sir William Scott, 1811), digested in Moore, *supra* note 3, v. 2, pp. 914-16. For a criticism of these cases, see William Beach Lawrence, *Visitation and Search* (Boston: Little, Brown

and Company, 1858) p. 18 (an excellent brief for freedom of vessels from visit and search by foreign warships).

13. *Le Louis, supra* note 4, pp. 240, 253-58. This decision was followed closely by Chief Justice Marshall in *The Antelope*, 23 U.S. (10 Wheaton) 66, 118-23 (1825). His main conclusion was:

> No principle of general law is more universally acknowledged, than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality, that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone. A right, then, which is vested in all, by the consent of all, can be divested only by consent; and this trade, in which all have participated, must remain lawful to those who cannot be induced to relinquish it. As no nation can prescribe a rule for others, none can make a law of nations; and this traffic remains lawful to those whose governments have not forbidden it. If it be consistent with the law of nations, it cannot in itself be piracy. It can be made so only by statute; and the obligation of the statute cannot transcend the legislative power of the state which may enact it.
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> If it be neither repugnant to the law of nations, nor piracy, it is almost superfluous to say, in this court, that the right of bringing in for adjudication, in time of peace even where the vessel belongs to a nation which has prohibited the trade, cannot exist. The courts of no country execute the penal laws of another; and the course of the American government, on the subject of visitation and search, would decide any case in which that right had been exercised by an American cruiser, on the vessel of a foreign nation, not violating our municipal laws, against the captors. It follows, that a foreign vessel engaged in the African slave-trade, captured on the high seas, in time of peace, by an American cruiser, and brought in for adjudication, would be restored. [*Id.*, p. 120.]

14. Letter to British Minister at Washington, August 15, 1821, reproduced in Moore, *supra* note 3, v. 2, p. 919. When John Quincy Adams was Ambassador to Great Britain, he was asked whether there could be a worse evil than the slave trade. He replied tartly that it would be a much worse evil if the United States Government should allow any vessel flying the Stars and Stripes to be stopped and examined by a British cruiser, for that would be to make slaves of the whole American people. Quoted from W. E. F. Ward, *The Royal Navy and the Slavers: The Suppression of the Atlantic Slave Trade* (New York: Schocken, 1970), p. 161. For a slightly different version of this statement, see Hugh G. Soulsby, *The Right of Search and the Slave Trade in Anglo-American Relations, 1814-1862* (Baltimore: Johns Hopkins Press, 1933), p. 18, published in 51 Johns Hopkins University, Studies in Historical and Political Science (1933), No. 2, p. 18.

15. Letter from Mr. Adams to Mr. Canning, June 24, 1823, *American State Papers, Foreign Relations*, Second Series, v. 5 (1858) pp. 330, 331-32. The text of the draft convention prepared by Mr. Adams may be found in *id.*, pp. 335-37.

16. Act to Punish the Crime of Piracy, May 15, 1820, U.S. Statutes at Large, v. 3, p. 600; Act for a More Effectual Suppression of the African Slave Trade, March 31, 1824, British Statutes, v. 27, 5 George IV, ch. 17, reprinted in American State Papers, *supra* note 15, v. 5, p. 342.

17. U.S. Congress, Resolution on Slave Trade, 1823, *Annals of Congress*, 17th Congress, 2d session, pp. 928, 1147-55.

18. *British and Foreign State Papers*, v. 12, 1824-25, p. 838, Articles V and X.

19. *See* Moore, *supra* note 3, v. 2, pp. 924-26.

20. This clause, which is the source of the modern clause authorizing the boarding of stateless vessels (see *infra*, text preceding note 89), was suggested to the British Foreign Secretary, Lord Palmerston, by Lord Minto, First Lord of Admiralty, who pointed out the practice of slave traders, when threatened with capture, to dispense completely with flag and papers. As the jurisdiction of courts over slave trade offenses was based either on the trader's British nationality or on a treaty with his flag state, the courts have held that "[i]f a ship's nationality could not be established with any certainty, neither a mixed court nor a national court had jurisdiction over it, and it could not be condemned." On the other hand, such a ship could not claim the protection of any government, and a British law could empower British cruisers to search and capture slave ships not entitled to the protection of any state, and to take them before British admiralty courts. See Leslie M. Bethell, "Britain, Portugal and the Suppression of the Brazilian Slave Trade: The Origins of Lord Palmerston's Act of 1839," *English Historical Review*, v. 80 (1965), pp. 761, 777.

21. For the text of the act, *see* 2 & 3 Vict., ch. 73. For its discussion, see William Law Mathieson, *Great Britain and the Slave Trade, 1839-1865* (London, 1929: reprinted by Octagon Books: New York, 1967), p. 23. Mathieson also points out that to escape the British warships, the slave ships progressed from the French flag to the Spanish one, then to the Portuguese flag, and finally to the American one, "ending

naturally and inevitably with the only Power which had refused to concede the right of search." *Id.*, p. 25.

The provision abolishing the jurisdiction of courts to award damages in cases of captures of vessels which were not based on a treaty with the flag state was necessary as British courts considered such captures illegal and imposed on the commanders of warships responsible for such captures the obligation to pay heavy compensation for all damages and losses. See, e.g., the case of the *Gaviao*, Ward, *supra* note 14, pp. 84-86; and the cases cited in Soulsby, *supra* note 14, pp. 73-75. *But see Buron v. Denman, id.*, pp. 186-87, discussed in Christopher Lloyd, *The Navy and the Slave Trade* (London: Frank Cass, 1949, reprinted 1968), pp. 97-99; Mathieson, *supra*, pp. 92-93 (citing Exchequer Reports, (1848), v. 2, p. 167) (decided for Denman "because his proceedings, though contrary to the law of nations as laid down by Sir William Scott in the [*Le Louis*] case, had been endorsed by the British Government").

22. *See* Bethell, *supra* note 20, pp. 778-79

23. *See id.*, pp. 780-81. A similar crisis arose in 1845, when the 1826 Brazilian-British treaty for the suppression of slave trade expired and Brazil notified the British Government that the British cruisers had lost, therefore, their right to visit and search Brazilian ships. The British response was contained in the so-called "Lord Aberdeen's Act," British Statutes, v. 35, 8-9 Vict., ch. 122, of August 8, 1845, which relied on the provision of the 1826 treaty which condemned slave trade as piracy, and on that basis applied to Brazil provisions similar to those enacted in 1839 against Portugal (*supra*, note 21), allowing search and capture, and empowering British admiralty courts to condemn the vessels found guilty of slave trade, etc. For the history of the 1845 Act, see Wilbur Devereux Jones, "The Origins and Passage of Lord Aberdeen's Act," *Hispanic American Historical Review*, v. 42 (1962), pp. 502, 512-20.

24. Ward, *supra* note 14, p. 140.

25. Soulsby, *supra* note 14, pp. 58-59. *See also id.*, pp. 56-57, for an earlier United States note on this subject, and *id.*, pp. 60-61, for an elaborate reply by Lord Palmerston. The dispute did not stop there; for further correspondence on the subject, see *id.*, pp. 61-72. The British Government has, however, indemnified the United States for unjustified seizures, though sometimes after long delays, *id.*, pp. 73-76.

26. Treaty to settle and define the boundaries between the territories of the United States and the possessions of Her Britannic Majesty in North America, for the final suppression of the African slave trade, etc., August 9, 1842, Articles VIII and IX, 8 Statutes at Large 572, U.S. Treaty Series 119, 12 Bevans 82.

27. Concerning the drafting of the treaty, the acrimonious debate in Congress, and the difficulties that arose as to its interpretation, *see* Soulsby, *supra* note 14, pp. 78-106. *See also* Moore, *supra* note 3, v. 2, pp. 930-41.

28. See Lloyd, *supra* note 21, p. 41.

29. Note on April 10, 1858, reprinted, in part, in Moore, *supra* note 3, v. 2, pp. 942-43.

30. *See* Mathieson, *supra* note 21, p. 156. *See also* Moore, *supra* note 3, v. 2, pp. 941-45; Soulsby, *supra* note 14, pp. 139-66. Seizures of American flag vessels did not cease, however, and a new controversy arose with respect to the right of a warship to compel a merchant vessel to display its flag, as some masters of American vessels manifested a disinclination to hoist a flag when asked by a British warship. This problem was finally solved by the issuance of instructions that captains in the merchant service should "display their colors as promptly as possible, whenever they meet upon the ocean an armed cruiser of any nation." *See* Soulsby, *supra*, pp. 166-72.

31. Treaty for the Suppression of African Slave Trade, April 7, 1862, as amended on February 17, 1863, U.S. Statutes at Large, v. 12, p. 1225; v. 13, p. 645; Malloy, *supra* note 3, v. 1, pp. 674, 687.

Annex B to the treaty (*id.*, pp. 681-87) contained detailed Regulations for the Mixed Courts of Justice, which provided, for instance, in Article IV that in case of a disagreement between the two judges "they should draw by lot the name of one of the two arbitrators," who shall consult with the two judges, the final decision being rendered by the majority of the three.

32. *See* W. E. B. DuBois, *The Suppression of the African Slave-Trade to the United States of America, 1638-1870* (1896, reprinted by Schoken Books: New York, 1969), pp. 287-88. This book contains also an excellent "chronological conspectus of state, national, and international legislation," with a summary of legislative history, and citation of sources for each item. *Id.*, pp. 230-88.

According to Moore, *supra* note 3, v. 2, p. 467, no vessels were known to have been condemned in the British-American Mixed Courts by 1868. *See also* Warren S. Howard, *American Slavers and the Federal Law, 1837-1862* (Berkeley and Los Angeles: University of California Press, 1963), pp. 63-64. For a report from the United States members of the Mixed Court at Freetown, Sierra Leone, see the Message of the President of the United States on African slave trade, July 2, 1864, 38th Congress, 1st session, Senate Exec. Doc. No. 56, pp. 24-26 (containing recommendations, *inter alia*, for technical assistance in labor-saving devices to tribes willing to abandon slavery). An analysis of the work of all the Mixed Commissions and

Courts may be found in Leslie M. Bethell, "The Mixed Commissions for the Suppression of the Transatlantic Slave Trade in the Nineteenth Century," *Journal of African History*, v. 7 (1966), p. 79-93.

33. Convention for the Suppression of Slave Trade, June 3, 1870, Malloy, *supra* note 3, v. 1, p. 693. Article 2 of the accompanying Instructions provided that any search authorized by the Convention "shall be conducted with the courtesy and consideration which ought to be observed between allied and friendly nations."

34. *See* Suzanne Miers, *Britain and the Ending of the Slave Trade* (London: Longman, 1975), p. 16, no. 40 and pp. 19-20, n. 61.

35. *Id.*, pp. 211-21. *See also* Christopher Lloyd, *supra* note 21, pp. 187-274.

36. Miers, *supra* note 34, pp. 233-34, 238, 240.

37. *Id.*, p. 241.

38. *Id.*, pp. 241-42.

39. 27 Statutes at Large 886; U.S. Treaty Series 383; 1 Bevans 134. Chapter I dealt with measures to be taken in the places of origin of the slave trade; chapter II with transportation of slaves by land; chapter III on trade by sea is discussed in the preceding text; chapter IV prohibited the importation of slaves by countries where domestic slavery still existed; chapter V provided for the establishment of an international information office in Zanzibar (with a supplementary, more limited office in Brussels), which was given the task to centralize all documents relating to the capture of vessels and their condemnation or release, and all information that might lead to the discovery of persons engaged in slave trade.

40. *See* Miers, *supra* note 34, pp. 244-45.

41. *Id.*, p. 293.

42. *See*, e.g., the Report of the *Ad Hoc* Committee on Slavery, U.N. Doc. E/1988 (1951), 13 ESCOR, Annexes Ag. Item 21, p. 1, para. 8-19; Benjamin Whitaker, *Slavery: Report to the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities*, U.N. Doc E/CN.4/Sub. 2/1982/20/Rev. 1 (1984); U.N. Publ. Sales No. E.84.XIV.I (1984), pp. 10-20, especially 18-20.

43. Convention on the Revision . . . of the General Act . . . of Brussels, St. Germain-en-Laye, September 10, 1919, Articles 11 and 13, 49 Stat. 3027; U.S. Treaty Series 877; 2 Bevans 261. See also Miers, *supra* note 34, pp. 309-14. In consequence of the 1919 Convention, the 1890 Brussels Act does not apply any longer as between the United States, Belgium, France, Germany, Italy, Portugal and the United Kingdom.

44. *See* United Nations, *The Suppression of Slavery* (Memorandum submitted by the Secretary-General to the *Ad Hoc* Committee on Slavery of the Economic and Social Council), U.N. Doc. ST/SOA/4 (1951), U.N. Publ. Sales No. 1951.XIV.2), pp. 12-14, 16-19, *See also* Joyce A. Gutteridge, "Supplementary Slavery Convention, 1956," *International Comparative Law Quarterly*, v. 6, pp. 449, 454-56. For the text of the Anti-Slavery Convention, Geneva, September 25, 1926, *see* 46 Stat. 2183, U.S. Treaty Series 778, 2 Bevans 607, 60 League of Nations Treaty Series 253. A protocol of December 7, 1953, transferred the functions of the League of Nations under the 1926 Convention to the United Nations, 7 UST 479; TIAS No. 3532; 182 UNTS 57.

For the text of the Convention on the Suppression of International Trade in Arms and Ammunition and in Implements of War, June 17, 1925, *see* Malloy, *supra* note 3, v. 4 (ed. by E. J. Trenwith, 1938), p. 4903; Manley O. Hudson, ed., *International Legislation*, v. 3 (Washington, D.C.: Carnegie Endowment for International Peace, 1931), p. 1634. The convention was ratified by the United States, but it did not enter into force, as it did not seem to have received the necessary 14 ratifications. *See* Hackworth, *supra* note 7, v. 2, p. 672. The relevant provisions of that convention were Articles 12, 20-24, and Annex II, section II (Maritime Supervision).

45. *See* Gutteridge, *supra* note 44, p. 460. *See*, however, the exchange of notes accompanying the treaty of friendship and mutual co-operation of February 10, 1934, between the British Government and the Imam of Yemen, in which the Imam agreed to the prohibition of the African slave trade and commended his governors to do their utmost to prevent it in both the country and the ports. 157 LNTS 63, 73.

46. U.N. Doc. E/1988 *supra* note 42, para. 27, and recommendation B.2. See also Gutteridge, *supra* note 44, 460.

Slavery and slave trade have been considered by the United Nations as prohibited activities, as violations of basic human rights. The Universal Declaration of Human Rights, adopted by the General Assembly in 1948, provided that "[n]o one shall be held in slavery or servitude; slavery and slave trade shall be prohibited in all these forms." General Assembly Resolution 217 A (III), December 10, 1948, Article 4, 3 GAOR, Part I, Resolutions, p. 71. An almost identical provision is contained in the International Covenant on Civil and Political Rights, adopted by General Assembly Resolution 2200 A (XXI), December 16, 1966, Article 8, 99 UNTS 171. (By December 31, 1987, this Covenant has been ratified or acceded to by 87 states; the United States has signed this document but has not ratified it.) For a summary of action taken by the United Nations in the field of slavery, *see* Whitaker, *supra* note 42, pp. 27-30.

47. Letter from the Permanent Representative of the United Kingdom to the Secretary-General of the United Nations, U.N. Doc. E/2540/Add.4 (1954); 17 ESCOR, Annexes, Ag. Item 15, p. 9, Annex (Draft Convention), Article 2. For comments on that document, *see* U.N. Docs. E/AC.43/L.1 (1955) and Adds. 1 and 2 (1956).

48. U.N. Doc. E/2824 (1956), 21 ESCOR, Annexes, Agenda Item 12, p. 1, paras. 97-139, and Annex I (Draft Convention), Article 3; Gutteridge, *supra* note 44, p. 466.

49. Gutteridge, *supra* note 44, pp. 466-69; U.N. Secretariat, Memorandum on the Relation between the Articles concerning the Law of the Sea Adopted by the International Law Commission and International Agreements Dealing with the Suppression of the Slave Trade, U.N. Doc. A/CONF.13/7 (1957), paras. 17-25, reprinted in 1958 LOS Conference *supra* note 6, v. I, pp. 165-68.

50. Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, Geneva, September 7, 1956, Articles 3 and 4, 18 U.S.T 3201, T.I.A.S 6418, 266 U.N.T.S 3.

51. U.N. Doc. A/CN.4/17 (1950), p. 12.

52. U.N. Doc. A/CN.4/42 (1951), p. 22. Professor Francois relied on a statement by Justice Story that a warship seizes a foreign vessel at its peril and, if unjustified, "must make full compensation." *The Marianna Flora, supra* note 4, p. 42 (1826).

53. *See supra* notes 42 and 46.

54. *See supra* text preceding note 40.

55. U.N. Doc. A/CN.4/42, *supra* note 52, pp. 23-29.

56. *See supra* note 46.

57. *See Yearbook of the International Law Commission*, 1951, v. 1, pp. 350-54, especially 123rd meeting, paras. 91, 109-10, 124, 127-28, 132.

58. Report of the International Law Commission, 6 U.N. GAOR, Suppl. No. 9, U.N. Doc. A/1858 (1951) p. 16, reprinted in Yearbook, *supra* note 57, v. 2, pp. 139-40.

59. U.N. Doc. A/CN.4/51 (1952), p. 9.

60. *Id.*, p. 11.

61. Francois, Sixth Report, A/CN.4/79 (1954), pp. 23-27; International Law Commission, Seventh Session, Report, 10 GAOR, Suppl. No. 9, U.N. Doc. A/2934 (1955), pp. 6-8, reprinted in Yearbook, *supra* note 57, 1955, v. 2, pp. 24-27. Francois acknowledged that the piracy articles were a condensation of a more elaborate draft convention prepared by the Harvard Research in International Law in 1932, reprinted in the *American Journal of International Law*, v. 26 (1932), Suppl., pp. 739-885. See *Yearbook, supra*, 1955, v. 1, p. 39.

62. Yearbook, *supra* note 57, 1955, v. 1, p. 20.

63. *Id.*, pp. 26-27.

64. *Id.*, pp. 28-29, 31-33.

65. *Id.*, pp. 29, 31.

66. Proposal by Mr. Edmonds (Commission member from the United States), *id.*, p. 32. *See also* statement by Mr. Garcia Amador, *id.*, p. 29.

67. *Id.*, pp. 33-34. *See also id.*, p. 229.

68. *See* the Commission's 1955 report, 10 GAOR, Suppl. No. 9, U.N. Doc. A/2934 (1955), p. 8, reprinted in *Yearbook, supra* note 57, 1955, v. 2, p. 27.

69. 1955 Report, *supra* note 68, Article 21, p. 8, reprinted in 1955 Yearbook, *supra* note 68, v. 2, pp. 26-27; Commission's 1956 Report, 11 GAOR, Suppl. No. 9, U.N. Doc. A/3159 (1956), Article 46, pp. 29-30, reprinted in *Yearbook, supra* note 57, 1956, v. 2, pp. 283-84. *See also* Francois Report, U.N. Doc. A/CN.4/97 and Adds. 1 to 3 (1956), reprinted in *Yearbook, supra* note 57, 1956, v. 2, p. 20.

70. 1958 LOS Conference, *supra* note 6, v. IV, p. 21. The Tunisian delegate recalled a recent incident, when the Yugoslav merchant vessel *Slovenija* was stopped on the high seas and escorted to Oman where a part of its cargo was confiscated. See the Yugoslav complaint about this incident, *id.*, pp. 8-9, where the Yugoslav delegate also noted that "no state was entitled to arrogate to itself, without the consent of the international community, any rights regarding the high seas except those laid down in rules adopted by joint agreement."

71. *Id.*, p. 31. For similar statements by the delegate of the Ukrainian S.S.R., see *id.*, pp. 32 and 81-82.

72. *See id.*, p. 31. In support of such deletion, another delegate of the U.A.R. pointed out that proposals similar to the one suggested in 1958 had been heavily defeated at the three recent conferences dealing with slave trade which were mentioned by Mr. El Erian. *Id.*, p. 80.

73. *Id.*, pp. 82-83.

74. *Id.*, p. 90.

75. *Id.*, p. 83.

76. 1958 LOS Conference, *supra* note 6, v. 2 (Plenary Meetings), U.N. Doc. A/CONF.13/38 (1958), U.N. Publ. No. 58.V.4, Vol. 2, p. 22.

77. Convention on the High Seas, April 29, 1958, 13 UST 2312, TIAS No. 5200, 450 UNTS 82.

78. United Nations Convention on the Law of the Sea, December 10, 1982, reprinted in United Nations, *The Law of the Sea, Official Text of the United Nations Convention on the Law of the Sea*, U.N. Publ. Sales No. E.83.V.5. (Hereafter cited as the 1982 LOS Convention.)

79. *See* the discussion on this point in the Second Committee of the 1958 LOS Conference, *supra* note 6, v. 4, pp. 80, 90, 109, 149 (rejection of the Bulgarian proposal which would have granted immunity also to government vessels used for commercial purposes).

80. Convention on the High Seas, *supra* note 77, Article 8, paragraph 2, and Article 22, paragraph 1. Only Article 21, relating to piracy, allows seizure also by "military aircraft" and "other ships or aircraft on government service authorized to that effect." With respect to the applicability of that provision also to Article 22, *see* the rather ambiguous statements by the United Kingdom in the Second Committee of the First LOS Conference, summarized in 1958 LOS Conference, *supra* note 6, v. 4, pp. 108-9, and in the Plenary, *id.*, v. 2, p. 22.

81. *See* 1982 LOS Convention, *supra* note 78, Article 110, paras. 4 and 5, which parallel Article 107 relating to ships and aircraft which were entitled to seize a foreign ship on account of piracy. On the one hand, it broadens its application to boarding of ships suspected of other illegal activities or flag misuse, and, on the other hand, it narrows it from seizure to boarding only.

82. For U.S. acceptance of the navigation provisions of the 1982 Convention, see the Statement of the President on United States Ocean Policy, *Weekly Compilation of Presidential Documents*, v. 19, No. 10, pp. 383-85 (1983), reprinted in *International Legal Materials*, v. 22 (1983), p. 464.

83. 1958 High Seas Convention, *supra* note 77, Article 22; 1982 LOS Convention, *supra* note 78, Article 110, paragraph 1.

84. *Id.*, Article 110, subparagraphs (1)(c) and (d).

85. *Id.*, Article 109.

86. European Agreement for the Prevention of Broadcasts Transmitted from Stations Outside of National Territories, January 22, 1965, 634 U.N.T.S. 239. For the proposal by a group of European countries to add a provision relating to unauthorized broadcasting from the high seas, *see* U.N. Doc. A/CONF.62/C.2/L.54 (1954), reprinted in Third United Nations Conference on the Law of the Sea, Official Records (hereafter cited as the 1982 LOS Conference), v. 3, pp. 229-30, Article 21 *ter*. *See also id.*, v. 2, p. 236, paragraph 59, and p. 292, paragraph 2; *id.*, v. 3, p. 134 (main trends, Provision 177); *id.*, v. 4, p. 166 (Informal Single Negotiating Text, Article 95 and Article 96, paragraph 1c).

The delegation of Israel made a proposal to delete Article 109, paragraph 3, relating to the right of various states to arrest and punish persons engaged in unauthorized broadcasting, to delete also Article 110, paragraph 1(c) relating to boarding of ships engaged in that activity, and to allow instead the coastal state to exercise control over such broadcasting in the 24-mile contiguous zone. *See id.*, v. 15, p. 20, paragraph 34; and Doc. C.2/Informal Meeting/38 (1978), reprinted in Renate Platzoder, *Third United Nations Conference on the Law of the Sea: Documents* (Dobbs Ferry, N.Y.: Oceana Publications, 1984), v. 5, p. 44. No action was taken on this proposal as by that time the text prepared by the Second Committee became practically immutable.

87. *See* the text preceding footnote 20 *supra*.

88. *See* 1958 LOS Conference, *supra* note 6, pp. 11-12 (para. 8).

89. A United States court in *United States v. Cortes*, 588 F.2d 106, 110 (5th Cir. 1979), quotes Oppenheim's statement that it is "[i]n the interest of order on the open sea" that a stateless vessel enjoy no protection. L. Oppenheim, *International Law* (7th ed. H. Lauterpacht, London: Longmans, Green & Co., 1948), v. 1, p. 546. According to another author, statelessness "robs a ship of privileges, and deprives it of a State to espouse its cause when it suffers injustice at the hands of another State." Robert Reinow, *Test of the Nationality of a Merchant Vessel* (New York: Columbia University Press, 1937), p. 13.

In *Naim Molvan v. Attorney-General of Palestine*, [1948] A.C. 351, 369-70, the Judicial Committee of the Privy Council stated that "[n]o question of comity or breach of international law can arise if there is no State under whose flag the vessel sails." It added that, having no flag, a vessel cannot claim the protection of any State, nor can "any State claim that any principle of international law was broken by her seizure."

A stateless vessel can be stopped by any warship, because, as the United States courts view the situation, stateless vessels do not have the protection provided by a flag state. *United States v. Dominguez*, 604 F.2d 304, 308 (4th Cir. 1979), cert. denied, 444 U.S. 1014 (1980). "International law shelters only members of the international community of nations from unlawful boarding and searches on the high seas." *United States v. Cortes*, *supra* at 110.

It has to be remembered, however, that, as Mr. Francois has pointed out, a stateless vessel "should not be treated as a pirate unless it actually commits acts of piracy." U.N. Doc. A/CN.4/17, *supra* notes 51, pp. 6-7.

90. The Congress of the United States has denied assistance to countries which engage in "a consistent pattern of gross violations of internationally recognized human rights," including a "flagrant denial of the right to life, liberty and the security of person." Foreign Assistance Act of 1961, as amended, 22 U.S.C. 2151n. Clearly, any United States legislation should be interpreted also in the spirit of these pronouncements, thus avoiding any gross violation of internationally recognized human rights, both substantive and procedural. *See, e.g.*, Judge Faye, dissenting in *United States v. Warren*, 578 F.2d 1058, 1081-82 n. 2 (5th Cir. 1978), *cert. denied*, 446 U.S. 956 (1980) ("I see no reason why a possible drug importer on the high seas should have fewer rights when confronted by the Coast Guard than should a person on land near the Mexican border when confronted by an officer of the Border Patrol").

It may be also noted that there is a strong connection between human rights and international security. As President Reagan stated at Helsinki on May 27, 1988, "[t]here is no true international security without respect for human rights," and "[s]ecurity and human rights must be advanced together, or cannot truly be secured at all." *Weekly Compilation of Presidential Documents*, v. 24 (1988), p. 677, at 678, 679.

It seems however, that some United States courts do not recognize any individual rights in the drug interdiction cases beyond those guaranteed by the Fourth Amendment. Even this fundamental constitutional guarantee is diluted on the high seas. *United States v. Williams*, 617 F.2d 1063, 1082-84, 1089-90 (5th Cir. 1980). But see the concurring opinion by Judge Roney, in which five other judges joined, *Id.*, at 1093 ("Williams, as a United States citizen on a foreign ship, just as on foreign soil, does have constitutional rights against an unreasonable search and seizure by United States Government authorities").

For a more detailed discussion of the relationship between the arrest of foreign nationals on foreign ships and the international law of human rights, *see* Louis B. Sohn, "International Law of the Sea and Human Rights Issues," in Thomas A. Clingan, Jr., ed., *The Law of the Sea: What Lies Ahead?* (Honolulu, Hi.: University of Hawaii, 1988), pp. 51-71.

91. *See*, for instance, the treaty of friendship, commerce and consular rights between the United States and Honduras, December 7, 1927, which provides in Article I that the "nationals of each High Contracting Party shall enjoy freedom of access to courts of justice of the other . . . for the defense of their rights," and "shall receive within the territories of the other . . . the most constant protection and security for their persons and property, and shall enjoy in this respect that degree of protection that is required by international law." 45 Statutes at Large 2618; Treaty Series No. 764, 8 Bevans 905; 87 LNTS 421. Similar provisions may be found also in the treaty of friendship, commerce and navigation between the United States and Liberia, August 8, 1938. 54 Statutes at Large 1739; Treaty Series No. 956; 9 Bevans 595; 201 LNTS 163. According to the treaty of friendship, commerce and navigation between the United States and Japan, April 2, 1953, "[n]ationals of either Party within the territories of the other Party shall be free from unlawful molestations of every kind, and shall receive the most constant protection and security, in no case less than required by international law," and "shall be accorded national treatment and most-favored-nation treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights." Articles 2 and 4, 4 UST 2063, TIAS No. 2863, 206 UNTS 143.

92. *See* Convention relating to the Status of Stateless Persons, September 28, 1954, 360 U.N.T.S. 130 (in force with respect to more than thirty states, but not ratified by the United States). The Convention contains generally accepted standards on the subject. After all, stateless persons retain their status as human beings and should be treated as such. A state should accord such persons treatment at least as favorable as that accorded to its own nationals or to aliens generally; in the latter case the requirement of reciprocity should be waived. See *id.*, Articles 3, 4, 7, 16. There is even a special provision for stateless seamen. *Id.*, Article 11.

93. High Seas Convention, *supra*, note 77, Article 6, paragraph 2, 1982 LOS Convention, *supra*, note 78, Article 92, paragraph 2.

94. The persons on board a ship assimilated to a stateless ship should be treated at least as well as stateless persons (*supra*, note 92), or in accordance with their national status (*supra*, note 91).

95. Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, 15 UST 1606, TIAS No. 5639, 516 UNTS 205.

96. Yearbook of the International Law Commission, 1956, v. 2, p. 59; *id.*, v. 1, p. 207.

97. *Id.*

98. 1956 Report of the Commission, *supra* note 69, p. 21; Yearbook of the Commission, 1956, v. 2, p. 275.

99. U.N. Doc. A/CONF.13/C.1/L.53 (1958); reprinted in 1958 LOS Conference, *supra* note 6, v. III, (First Committee), p. 226.

100. *Id.*, p. 117, para. 43.

101. *Id.*, p. 116, para. 36. This issue was also raised by the representative of Norway who pointed out that if such a rule is going to be introduced, "it would not be natural to limit the new possibilities of action against ships involved in the traffic [in narcotic drugs] to foreign ships in the territorial sea." *Id.*,

p. 116, para. 40. The representative of Turkey tried again to broaden his proposal "to empower the coastal State to exercise its criminal jurisdiction even if the offense had been committed outside the territorial sea," but the proposal was not pressed to a vote, when the Drafting Committee opposed it. *Id.*, p. 202, paras. 46–49.

102. *Id.*, p. 116, paras. 34, 39.

103. *Id.*, paras. 40–41.

104. This change was suggested early in the Conference, and was incorporated promptly in the negotiating text, with a minor amendment. *See* 1982 LOS Conference, Official Records, v. 3, p. 114; *Id.*, v. 4, p. 156; *Id.*, v. 5, p. 157.

105. *Id.*, v. 2, p. 237, para. 69.

106. *Id.*, v. 3, p. 133, Provision 174.

107. *Id.*, v. 4, p. 166.

108. *See* Platzoder, *supra* note 86, v. 5, pp. 66–70. The suggestion relating to an addition in Article 110 appeared earlier in 1975, in the anonymous "blue papers" of the Second Committee, suggesting changes in the "main trends papers." *See* Platzoder, *supra*, v. 4, p. 137 (Provision 174B, para 1(c)) and 145 (same provision, with a note that consultations with respect to this matter have not been completed).

109. This procedure was suggested by Sir William Scott in 1817 (see *supra*, text preceding note 13), and was followed by Great Britain throughout the nineteenth century. *See*, however, the objections to this approach by the United States, *supra*, text preceding notes 14 and 16.

110. *See* Convention Relating to the Suppression of the Abuse of Opium and other Drugs, January 23, 1912, 38 Statutes at Large 1912, Treaty Series No. 612, 1 Bevans 855; Agreement Concerning the Suppression of the Manufacture of, International Trade in, and Use of, Prepared Opium, February 11, 1925, 51 League of Nations Treaty Series, p. 337, *Hudson, International Legislation, supra* note 44, v. 3 (1931), p. 1580; Convention on Traffic in Opium and Drugs, February 19, 1925, 81 League of Nations Treaty Series, p. 317, Hudson, *supra* p. 1589; Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, July 13, 1931, 48 Statutes at Large 1543, U.S. Treaty Series No. 863, 139 League of Nations Treaty Series, p. 301; Agreement Concerning the Suppression of Opium Smoking, November 27, 1931, 177 League of Nations Treaty Series, p. 373, Hudson, *supra*, v. 5 (1936), p. 1149; Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, June 26, 1936, 12 U.N.T.S. 208, Hudson, *supra* v. 7 (1941), p. 359; Protocol of December 11, 1946, amending the Agreements, Conventions, and Protocols on Narcotic Drugs of January 23, 1912, February 11, 1925, February 19, 1925, July 13, 1931, November 27, 1931, June 26, 1936, 61 Statutes at Large 2230, T.I.A.S. No. 1671, 4 Bevans 267, 12 U.N.T.S. 179; Protocol of November 19, 1948, Bringing under International Control Drugs outside the Scope of the Convention of July 13, 1931, as amended, 2 U.S.T. 1629, T.I.A.S. No. 2308, 44 U.N.T.S. 277; Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium, June 23, 1953, 14 U.S.T. 10, T.I.A.S. No. 5273, 456 U.N.T.S. 3.

111. Single Convention on Narcotic Drugs, March 30, 1961, 18 U.S.T. 1407, T.I.A.S. No. 6298, 520 U.N.T.S. 204. For the amended text of the Convention, see 976 U.N.T.S. 105.

112. Protocol of March 25, 1972, Amending the Single Convention on Narcotic Drugs, 26 U.S.T. 1439, T.I.A.S. No. 8118, 976 U.S.T.S. 3.

113. Single Convention on Narcotic Drugs, *supra* note 111, Article 35.

114. *Id.*, Article 36.

115. Protocol Amending the Single Convention, *supra* note 112, Article 14.

116. *See* Convention on Psychotropic Substances, February 21, 1971, 32 U.S.T. 543, 564–66, T.I.A.S. No. 9725, 1019 U.N.T.S. 175, 191–92.

117. *See, e.g.*, the 1972 statement by John E. Ingersoll, Director of the Bureau of Narcotics and Dangerous Drugs, U.S. Department of Commerce, who pointed out at a Congressional hearing that the international narcotics traffic "is a production and merchandising system based on the slavish demands of addicted individuals," whose demand is constant and whose purchasing power, "whether earned through wages or in crime, is considerable." Protocol Amending the Single Convention on Narcotic Drugs: Hearing before the Senate Committee on Foreign Relations, 92nd Congress, 2nd Session, p. 2 (1972).

118. U.S. Note to the British Embassy, November 21, 1980, published in Department of State, *Digest of United States Practice in International Law*, 1980, pp. 484–85. (Cited hereafter as *U.S. Digest*). For a list of cases upholding such arrangement with foreign governments, see *id.*, p. 486; see also the memorandum from the Office of the Legal Counsel of the Department of Justice to the Department of State, February 19, 1980, *id.*, pp. 475–84.

119. Agreement to facilitate the interdiction by the United States of vessels of the United Kingdom suspected of trafficking in drugs, November 13, 1981, TIAS 10296. It was an exchange of notes, not requiring advice and consent of the Senate, which was probably based on the general authorization by Congress permitting the President "to conclude agreements with other countries to facilitate control of the . . . transportation and distribution of . . . controlled substances." 22 U.S.C. 2291(a)(2) (enacted by

the Foreign Assistance Act of 1971, sec. 109). *See also* the Justice Department memorandum, *supra* note 118, pp. 476-77, which relies on this provision and on the general international co-operation article (Article 35) of the 1961 Single Convention on Narcotic Drugs, *supra* notes 111 and 113.

120. Convention for the Prevention of Smuggling of Intoxicating Liquors, January 23, 1924. 43 Statutes at Large 1761, U.S. Treaty Series No. 685, 12 Bevans 414, 27 League of Nations Treaty Series 182.

121. *See* Charles Cheney Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (Boston: Little, Brown and Company, 1945), v. 2, pp. 1179-80.

122. According to Morris Busby, Office of Ocean Affairs, U.S. Department of State, the United States should not take the initiative to define the means of boarding foreign vessels on the high seas, but should continue to request permission on a case-by-case basis. Coast Guard Drug Law Enforcement: Hearings before the Subcommittee on Coast Guard and Navigation of the House Committee on Merchant Marine and Fisheries, 96th Congress, 1st session, p. 55 (1979).

123. The United States courts have held that the failure of the flag State to object is equivalent to consenting to the seizure after the fact. The Court in *United States v. Hensel*, 699 F.2d 18, 28 (1st Cir.), *cert. denied*, 461 U.S. 958 (1983), decided that "[g]iven the need for speedy action, the hostility shown by all nations including Honduras to the international drug trade, and the fact that Honduras apparently did not protest the seizure, Honduras may arguably be said to have ratified the search." The Court cited *United States v. Dominquez*, 604 F.2d 304, 308 (4th Cir. 1979), *cert. denied* 444 U.S. 1014 (1980), for support of this statement; in *Dominguez*, the Bahamas government consented to the search of a ship on the basis of a registration number that proved to be wrong, but did not protest when a vessel with a different number was searched instead.

124. *See supra* texts preceding and following note 78.

125. U.N. Doc. E/CN.7/1983/2/Add. 1 (1982), p. 3, para. 4(a).

126. *Id.*, p. 12, paras. 39-40.

127. Commission on Narcotic Drugs, Report on the 30th Session, ESCOR, 1983, Suppl. No. 5 (E/1983/15), pp. 3, 20 (para. 77).

128. U.N. Doc. E/RES/1983/4. The Economic and Social Council, *inter alia*, noted that "illicit drug traffickers also engage in fraudulent practices with respect to the flag State registration of these vessels," and that "registry information must be readily accessible to and verifiable by law enforcement personnel aboard the vessel and within the claimed flag State." It requested Governments "to explore methods of strengthening international co-operation in combating illicit maritime drug trafficking, and to respond promptly to enquiries made for law enforcement purposes by other States regarding the registry of vessels." *Id.*

129. Law of the Sea: Report of the Secretary-General, U.N. Doc. A/39/647 (1984), p. 15, para. 49.

When a later draft included the United States-United Kingdom formula applying the "illicit traffic by sea" provision to the area "beyond the external limits of the territorial sea," one representative objected to it, as implying that "third States had been attributed certain rights in the area between 12 and 200 miles (Exclusive Economic Zone) not contemplated in the United Nations Convention on the Law of the Sea." He expressed preference for an earlier formula applying to ships "on the high seas as defined in Part VII" of that Convention. Commission on Narcotic Drugs, Report of the Tenth Special Session, ESOR, 1988, Suppl. No. 3 (E/1988/13), p. 24 para. 28.

130. *See supra* note 119 and the text that follows it.

131. U.N. Docs. A/39/407 (1984) and A/C.3/39/8 (1984).

132. General Assembly Resolution 39/141, December 14, 1984, 39 GAOR, Suppl. No. 51 (A/39/51), p. 229. For the report of the Third Committee of the General Assembly on the preparation of this resolution, see U.N. Doc. A/39/710 (1984), paras. 7-9, 16.

133. 39 GAOR, Suppl. No. 51, *supra* note 132, pp. 229-31, Annex, Articles 2, 6 and 9.

134. General Assembly Resolution 39/142, December 14, 1984, *id.*, p. 231. Even more strongly, in a later resolution on the preparation of the draft convention against illicit traffic in narcotic drugs and psychotropic substances, the General Assembly condemned "unequivocally drug trafficking in all its illicit forms—production, processing, marketing and consumption—as a criminal activity," and requested "all States to pledge their political will in a concerted and universal struggle to achieve its complete and final elimination." General Assembly Resolution 41/127, December 4, 1986, 41 GAOR, Suppl. No. 53 (A/41/53), pp. 184, 185, para. 1.

135. U.N. Doc. A/C.3/39/SR.42 (1984), para. 37. According to an Australian delegate, drug trafficking was not of the same nature as the crimes against humanity listed by the International Law Commission in its draft Code of Offenses against the Peace and Security of Mankind; he considered that "[c]aution was necessary before a new offence was branded as a crime against humanity without proper consideration by competent legal bodies." U.N. Doc. A/C.3/39/SR.44 (1984), para. 6. A similar view was expressed by the delegate of Nigeria, who cited in support the latest report of the International Law Commission

(U.N. Doc. A/39/10 (1984) para. 45), which did not include drug trafficking among the crimes against humanity. U.N. Doc. A/C.3/39/SR.53 (1984), para. 4.

136. U.N. Doc. A/C.3/39/SR.43) (1984), para. 23.

137. Commission on Narcotic Drugs, Report on the 31st Session, ESCOR, 1985, Suppl. No. 3 (E/1985/23), pp. 14-16.

138. Comments and Proposals Received from Governments Concerning a Draft Convention on Illicit Traffic in Narcotic Drugs and Psychotropic Substances: Report of the Secretary-General, U.N. Doc. E/CN.7/1986/2 (1985), pp. 21-22.

139. Commission on Narcotic Drugs, Report on the Ninth Special Session, ESCOR, 1986, Suppl. No. 3 (E/1986/23), p. 8.

140. *Id.*, pp. 9, 26 (para. 3(j)).

141. Preparation of a Draft Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances: Report of the Secretary-General, U.N. Doc. E/CN.7/1987/2 (June 17, 1986) (hereafter cited as the 1986 Draft). The text of this draft, together with the United States comments on it, was reprinted in United States Senate Caucus on International Narcotics Control, *The U.N. Draft Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances: A Report on the Status of the Draft Convention, the U.S. Negotiating Position, and Issues for the Senate*, 100th Congress, 1st Session, Committee Print, Senate Print No. 100-64 (1987) (hereafter cited as the 1987 Senate Report), pp. 22-38.

142. U.N. Secretariat, Compilation of Comments and/or Textual Changes Submitted by Governments Concerning the Preliminary Draft Convention, U.N. Doc. E/CN.7/1987/2/Add. 1 and Add. 2 (1987).

143. For the full text of U.S. comments (October 1986), *see* 1987 Senate Report, *supra* note 141, pp. 39-62. That report contains also an article-by-article comparison of U.S. position with the 1986 preliminary draft, *id.*, pp. 13-21.

144. Commission on Narcotic Drugs, Report on the 32nd Session, ESCOR, 1987, Suppl. No. 4 (E/1987/17), pp. 14-25.

145. *Id.*, p. 19, para. 42.

146. *Id.*, pp. 1-2.

147. U.N. Doc. E/RES/1987/27 (1987).

148. U.N. Division of Narcotic Drugs, Working Document on the Draft Convention, U.N. Doc. DND/DCIT/WP.1 (April 6, 1987) (hereafter cited as 1987 Working Document), reprinted in Senate Report, *supra* note 141, pp. 63-79.

149. Interim Report of the Open-Ended Intergovernmental Expert Group Meeting on the Preparation of a Draft Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, U.N. Doc. DND/DCIT/WP.12 (July 22, 1987), reprinted in Senate Report, *supra* note 141, pp. 80-89.

150. Report of the International Conference on Drug Abuse and Illicit Trafficking, U.N. Doc. A/CONF.133/12, U.N. Publ. Sales No. E.87.I.18 (1987), pp. 70-71, paras. 327-31.

151. *Id.*, p. 70, para. 326.

152. *See supra*, text accompanying notes 133, 136 and 138.

153. *See supra* note 135 and accompanying text, and text accompanying notes 137 and 139.

154. *Supra* notes 141 and 148.

155. *Supra* note 141.

156. *See, e.g.*, American Law Institute, Restatement of the Law Third, *The Foreign Relations Law of the United States*, v. 2, p. 57, 514, Comment *b* and p. 62. Reporters' Note 2; International Law Association, "The Freedom of the High Seas and the Exclusive Economic Zone: The Problem of Interactions," Report of the 61st Conference (1984), pp. 183-200; Horace B. Robertson, Jr., "Navigation in the Exclusive Economic Zone," *Virginia Journal of International Law*, v. 24 (1984), p. 865, at 870-80.

157. *See supra* note 129 and accompanying text.

158. *Supra* note 141.

159. *Supra* note 78.

160. 1987 Senate Report, *supra* note 141, p. 39, at 60-62

161. *Id.*, p. 80, at 88. According to the 1987 Report of the Secretary General on the Law of the Sea (U.N. Doc A/42/688, pp. 13-14, para. 44), the Expert Group considered also a version of the provision referring to the area "beyond the external limits of the territorial sea without prejudice to any rights enjoyed by the coastal State seaward of those limits," but objections were made to this formula on the ground that it was incompatible with the Convention on the Law of the Sea.

162. For text, *see* International Maritime Organization, Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Rome, March 10, 1988, Article 4 ("The Convention applies if the ship is navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States"), IMO Doc. SUA/CONF/15 (1988), reprinted in *International Legal Materials*, v. 27 (1988), p. 672, at 675.

163. For a summary of the discussion in the Commission, *see* Commission on Narcotic Drugs, Report on the Tenth Special Session, ESCOR, 1988, Suppl. No. 3 (E/1988/13), p. 29, paras. 59-61.

164. *Id.*, p. 30, para. 64.

165. *Id.*, para. 65.

166. *Id.*, p. 29, para. 63.

167. *Id.*, p. 41, para. 139. The representative cited in this connection paragraphs 4 and 7 of the principles and objectives of the Inter-American Program of Action Against the Illicit Use and Production of Narcotic Drugs and Psychotropic Substances and Traffic Therein, adopted by the Inter-American Specialized Conference on Traffic in Narcotic Drugs, Rio de Janeiro, April 1986.

168. Report, *supra* note 163, p. 30, para. 66.

169. *Id.*, para. 67.

170. *Id.*, Draft resolution A.I, paras. 7-9.

171. U.N. Doc. E/RES/1988/8 (1988).

172. U.N. Press Release SOC/NAR/473 (1988).

173. For text of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *see* U.N. Doc. E/CONF.82/15 (1988), reprinted in *International Legal Materials*, v. 28 (1989), p. 497.

174. For the text, as revised by the Review Group, *see* U.N. Doc. E/CONF.82/3 (1988).

175. These two texts are reproduced in the text following note 155, *supra*.

176. In addition to the 1981 agreement with the United Kingdom cited in n. 119, *supra*, the United States has concluded an agreement with the Bahamas in February 1989 (not yet published in TIAS).

177. *See* LOS Convention, Articles 29 (definition of warship), 107 (piracy), 110(5) (right of visit), 111(5) (hot pursuit), and 224 (protection of marine environment).

178. During the July 1987 meeting of the Intergovernmental Group of Experts, it was emphasized that "any action against ships by States other than the flag States in cases where the evidence of the illicit traffic was not clear and manifest could lead to abuses and might undermine important legal principles." 1987 Report of the Secretary General on the Law of the Sea, U.N. Doc. A/42/688 (1987), p. 13, para. 43.

179. *Supra* note 120. For a list of these treaties, *see* Hackworth, *supra* note 7, v. 1, p. 679.

180. *Supra* note 119.

181. According to the 1954 Statement of Policy of the United States on the Freedom of the Seas (*Foreign Relations of the United States, 1952-1954*, v. 1, p. 1721):

> It is a traditional policy of the United States to support the principle of freedom of the seas. Such freedom is essential to its national interests. The effective defense of its security, the maintenance of its pre-eminence in commercial shipping and air transport, and the prosperity of its fishing industry would all be hampered by any serious compromise of the principle of freedom of the seas.

Chapter IV
International Straits

by
Lewis M. Alexander*

An international strait, as noted in paragraph 2.3.3 of *The Commander's Handbook on the Law of Naval Operations* (NWP 9)[1] is a strait used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. The definition comes from articles 37 and 38 of the 1982 United Nations Convention on the Law of the Sea,[2] and includes both straits which at some point are overlapped by the territorial seas of the bordering State or States,[3] and those straits through which there is a continuous corridor of high seas or an exclusive economic zone (EEZ).[4] A strait is a natural waterway, "a contraction of the sea between two territories, being of limited width."[5] There are in the world over two hundred waterways which would appear to satisfy the requirements of being an "international strait."[6]

1. The Transit Passage Regime

According to the LOS Convention, a regime of transit passage prevails with regard both to ships and aircraft through an international strait that is overlapped at least at its narrowest part by bordering territorial seas.[7] Transit passage, "which shall not be impeded,"[8] means "the exercise . . . of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait."[9] There are a few carefully-phrased exceptions in the Convention to the transit passage provisions, as noted below. Passage of ships and aircraft is to take place in their "normal modes" of transit,[10] a term which the United States interprets as meaning that submarines may transit submerged, providing that depths in the strait are sufficient to permit such operations. This interpretation, which is reflected in paragraph 2.3.3.1 of NWP 9, is consistent with the U.S. negotiating position throughout the Third United Nations Conference on the Law of the Sea (UNCLOS III).[11]

Warships and Military Aircraft in Transit Passage. Ships and aircraft, while exercising the right of passage, "must proceed without delay through or over the strait."[12] The concept of transit passage, however, does not preclude passage through the strait "for the purpose of entering, leaving or

returning from a State bordering the strait, subject to the conditions of entry to that State."[13]

While in transit passage, ships and aircraft must avoid "any threat or use of force against the sovereignty, territorial integrity or political independence of the State bordering the strait,"[14] and "refrain from any activities other than those incident to their normal modes of continuous and expeditious transit, unless rendered necessary by *force majeure* or by distress."[15] It is United States policy that warships, operating in their normal mode through international straits overlapped by territorial seas, may undergo formation steaming, and launch and recover aircraft.[16] To the extent that such activities are incidental to normal navigational practices and do not otherwise constitute a threat directed against the bordering states, this interpretation appears consistent with the transit passage regime.

Vessels in transit must comply with "generally accepted international regulations, procedures and practices" for (1) safety at sea, and (2) the prevention, reduction and control of pollution from ships.[17] What these provisions intend is that transit-passage vessels should comply with the international conventions adopted by the International Maritime Organization (IMO) over the past several decades, and which now are in force.[18] Although this restriction is set forth generally in paragraph 2.1.2 of NWP 9 it would be helpful to operational commanders (to whom the *Handbook* is directed) if it were explicitly included in paragraph 2.3.3.1, the paragraph dealing with transit passage.

With regard to safety at sea, there are two basic IMO conventions. One is the 1972 Convention on International Regulations for Preventing Collisions at Sea.[19] The Convention regulates the behavior of ships at sea in respect to other vessels in order to prevent collisions, and it deals with such matters as lights, sound signals and conduct under conditions of restricted visibility. There are also provisions for the establishment of ships' routing systems. Under IMO's direction there is now an established world-wide network of traffic separation schemes, deep water routes, and areas to be avoided.

A second convention is the 1974 Safety of Life at Sea Convention (SOLAS).[20] It is concerned with vessel construction issues, equipment, safety of navigation, and the carriage of dangerous goods.

The principal IMO convention relating to vessel-source pollution is the 1973 Convention for the Prevention of Pollution from Ships (MARPOL), as amended in 1978.[21] A State bordering a strait may adopt rules and regulations concerning vessel-source pollution, giving effect to the provisions of MARPOL. It should be noted, however, that warships, naval auxiliaries, and other vessels owned and operated by a State and used at the time being only on government non-commercial service, enjoy sovereign immunity and are exempt from the provisions of the LOS Convention regarding the protection and preservation of the marine environment.[22] But if a ship, entitled to

sovereign immunity, acts in a manner which is contrary to the bordering State's laws and regulations, the flag State of the ship "shall bear international responsibility for any loss or damage which results to States bordering straits."[23]

During transit passage, foreign warships may not carry out research or survey activities without the prior authorization of the State bordering the strait.[24] They must also respect designated sea lanes and traffic separation schemes, if these were established in conformity with generally accepted international regulations.[25] The latter of these restrictions is in paragraph 2.3.3.1 of NWP 9, but curiously the former is not.

Military aircraft in transit passage shall normally comply with the Rules of the Air established by the International Civil Aviation Organization (ICAO), "and will at all times operate with due regard for the safety of navigation."[26] They also shall "at all times monitor the radio frequency assigned by the competent internationally designated air traffic control authority or the appropriate international distress radio frequency."[27]

NWP 9 articulates the view that the transit passage regime of the 1982 Convention remains viable in time of conflict. This approach to the Law of Neutrality posits that neutral nations cannot suspend, hamper or otherwise impede the right of transit passage of surface ships, submarines and aircraft of belligerent States through international straits. Under this view, belligerent forces in transit must proceed without delay, and must refrain from the threat or use of force against the neutral nation, or from acts of hostility or other activities not incident to their transit. The forces may not use international straits as a place of sanctuary or a base of operations, and warships may not exercise the belligerent right of visit and search in such waters. When in transit, however, belligerent forces may take such defensive measures as are consistent with their security, including the launching and recovery of aircraft, screen formation steaming, and acoustic and electronic surveillance.[28] This application of the transit passage regime to the traditional law of neutrality seeks to preserve the balance between the rights of neutral States to preserve the inviolability of their territorial seas and the rights of belligerents to conduct armed conflict at sea. To what extent this approach will be embraced by other States remains to be seen,[29] although recent practice in the Straits of Hormuz would seem to indicate acceptance of this position.

With respect to belligerent military aircraft, NWP 9 provides that the airspace above international straits remains open at all times to transit passage. Such passage must be continuous and expeditious, and must be undertaken in the normal mode of flight for the respective type of aircraft. The aircraft must refrain from any acts of hostility, but may engage in activities that are consistent with their security and the security of accompanying surface and subsurface forces.[30] Again, state practice in the Straits of Hormuz during the Iran-Iraq conflict seems to support this interpretation.

Rights and Duties of the Bordering State. The State bordering an international strait may, as noted earlier, "designate sea lanes and prescribe traffic separation schemes . . . where necessary to promote the safe passage of ships."[31] These sea lanes and traffic separation schemes must conform to standards set by IMO. Moreover, the bordering State may, when circumstances require, substitute other sea lanes or traffic separation schemes for those previously designated, although prior to the actual substitution, the bordering State must refer proposals to IMO with a view to the proposal's adoption.[32] States bordering straits "shall clearly indicate all sea lanes and traffic separation schemes . . . on charts to which due publicity shall be given."[33]

A State bordering an international strait may adopt laws and regulations relating to "the loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration, or sanitary laws and regulations" of the bordering State.[34] Any bordering State's laws or regulations relating to sea lanes and traffic separation schemes, or to the loading or unloading of any commodity, currency, or person "shall not discriminate in form or in fact among foreign ships or in their application have the practical effect of denying, hampering or impairing the right of transit passage.[35]

According to the LOS Convention, there are two additional duties of a state bordering a strait. One is that it "give appropriate publicity to any danger to navigation or overflight within or over the strait of which [it has] knowledge."[36] The second is that it should by agreement with user States cooperate in the establishment and maintenance of "necessary navigational and safety aids or other improvements in aid of international navigation."[37] NWP 9 would benefit from inclusion of these duties in its treatment of international straits.

Summarizing the rights and duties of warships and military aircraft passing through straits used for international navigation between two parts of the high seas or exclusive economic zones, it is clear from the LOS Convention that such vessels or aircraft enjoy unimpeded transit passage in their normal modes of continuous and expeditious transit. The vessels must respect IMO-sanctioned sea lanes and traffic separation schemes and the aircraft shall normally comply with ICAO safety measures and monitor assigned radio frequencies. Warships must not carry out marine scientific research while in transit without authorization of the bordering State, and cannot load or unload commodities, currencies or persons in contravention of the laws and regulations of the bordering State. While the Convention's provisions regarding the protection and preservation of the marine environment do not apply to vessels having sovereign immunity, if the warship, in violating the bordering State's laws and regulations, causes loss or damage, the flag State

(e.g., the United States) bears international responsibility for such loss or damage.

What can the crew of a warship expect from the bordering State? That its sea lanes and traffic separation schemes conform to IMO standards. That any laws and regulations applying to warships do not negatively impact on the right of transit passage. That the State give publicity to any danger to navigation or overflight of which it has knowledge. That it establishes and maintains in the strait necessary navigation and safety aids. That under no condition does it suspend the right of transit passage to warships or military aircraft of States at peace with the bordering State, but involved in conflict with another State. NWP 9 accurately reflects these important principles.[38]

Archipelagic Sea Lanes Passage. Independent island countries possessing certain geographical characteristics may delimit straight baselines encompassing the archipelago, joining together the outermost islands and drying reefs.[39] Single baselines must not exceed 100 nautical miles in length,[40] nor may they depart to any appreciable extent from the general configuration of the archipelago.

Seaward of the baselines the archipelagic State may measure its territorial sea and exclusive economic zone. Within the baselines, the waters are termed "archipelagic waters," and have virtually the same status as territorial waters.[41] NWP 9 notes that the United States recognizes the right of qualifying States to establish archipelagic baselines and waters.[42] Traversing the archipelagic State are archipelagic sea lanes and air routes; these corridors join international straits located on the periphery of the enclosed State. The sea lanes and air routes include "all normal passage routes used as routes for international navigation or overflight through or over archipelagic waters."[43] Through such sea lanes and air routes, warships and military aircraft enjoy "the rights of navigation and overflight in the normal mode solely for the purpose of continuous, expeditious and unobstructed transit."[44]

The sea lanes and air routes are defined by a series of continuous axis lines from the entry to the exit points of the archipelago, and ships and aircraft in archipelagic sea lanes passage must not deviate more than 25 miles to either side of such axis lines during passage. In cases where the width of the waterway is less than 50 miles, transiting ships and aircraft must not navigate closer to the coast than 10 per cent of the distance between the nearest points on islands bordering the sea lane.[45] The depiction of an archipelagic sealane provided in Figure 2-1 of NWP 9 provides a visual illustration of this latter concept.

As in the case of international straits, the bordering or archipelagic State may designate sea lanes and traffic separation schemes within the archipelagic sea lanes, conforming to IMO standards. When circumstances require, the State may substitute other sea lanes and traffic separation schemes, after first submitting proposals to IMO. Warships must respect sea lanes and traffic

separation schemes established in accordance with IMO procedures. Other rights and duties of warships and military aircraft in international straits apply *mutatis mutandis* to archipelagic sea lanes passage.[46]

NWP 9 states the position that belligerent ships or aircraft, including submarines, surface warships, and military aircraft, retain the right of unimpeded archipelagic sea lanes passage through, over, and under archipelagic sea lanes. Such forces may engage in those activities that are incident to their normal mode of continuous and expeditious passage, are consistent with their security, and, in the case of aircraft, are consistent with the security of accompanying surface and subsurface forces.[47] Again, as with international straits, it is not clear whether other States will agree with superimposing the newly emerged principles of archipelagic waters on the traditional law of neutrality.[48]

Although a number of island nations have declared themselves to be "archipelagic States" and have delimited straight baselines about their territory,[49] none have formally designated archipelagic sea lanes and air routes. In these cases, the right of archipelagic sea lanes passage may be exercised through the inter-island routes normally used for international navigation.[50]

2. The History of the Transit Passage Regime

The concept of transit passage through international straits, and of the analogous regime through archipelagic sea lanes, is a relatively recent phenomenon. Even in the years immediately following World War II, there were no universal principles concerning straits passage, and no consideration of archipelagic sea lanes even existed.

Pre-UNCLOS I. Prior to 1949 the regime of passage through international straits overlapped by territorial seas was generally regarded as one of innocent passage, which "requires no supporting argument or citation."[51] Whether innocent passage referred to both warships and merchant vessels was not firmly established.[52] Where the minimum breadth of the strait was greater than the combined territorial sea breadths, a belt of high seas existed through the water way; within such a belt the high seas freedoms of navigation and overflight prevailed. The United States watched with considerable anxiety the gradual extension of territorial sea claims to breadths of up to twelve miles,[53] for this in effect closed off to air and subsurface navigation a considerable number of important straits, among them Gibraltar, Hormuz, and Malacca.

The first international action to regulate the regime of passage through international straits came in the 1949 *Corfu Channel Case*, between the United Kingdom and Albania, which was decided by the International Court of Justice.[54] Two British destroyers were damaged by Albanian mines while

passing through the Corfu Channel between the Greek island of Corfu and the Albanian mainland, with the resultant killing of 44 British seamen. Albania argued before the Court first, that the Corfu Channel was not an international strait, and second, that the British warships had no right of transit through the waterway without prior authorization by Albania.

The Court held that Corfu Channel was indeed an international strait, not because of the volume of traffic moving through the waterway, nor of the importance of the strait to world commerce, but because of "its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation."[55] In other words, "it is sufficient that a strait be a 'useful route for international maritime traffic for it to be considered an international strait.' "[56]

With regard to the right of British warships to transit the Corfu Channel, the Court held that in time of peace a State has the right to send its warships through such straits without prior authorization by the coastal State, provided such passage is innocent.

Seven months later, the International Law Commission, established within the framework of the United Nations, began work on a codification of the regime of the high seas and the territorial sea. One result was a draft article on straits, which read "There must be no suspension of the innocent passage of foreign vessels through straits normally used for international navigation between two parts of the high seas."[57] The word "normally" had been included at the suggestion of the Soviet member and over the objections of the United States member.

The 1958 Territorial Sea Convention. The International Law Commission's draft was used as a basis for negotiations at the 1958 Law of the Sea Conference (UNCLOS I), and article 16(4) of the subsequent Convention on the Territorial Sea and the Contiguous Zone reads "There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State."[58]

Three points are noteworthy in this article. First, innocent passage is non-suspendable, although it remains up to the coastal State to determine when passage by foreign vessels is non-innocent. Second, the word "normally" is omitted, adding to the confusion of the meaning of the phrase "used for international navigation." Third, there is inclusion of the term "the territorial sea of a foreign State," an obvious reference to the Strait of Tiran, bordered by Egypt and Saudi Arabia, which leads to the Gulf of Aqaba, at whose northern end are small areas of the territorial waters of Israel and Jordan. In 1958 the status of passage through the Gulf of Aqaba was a burning issue between Israel and Egypt.[59]

The Convention on the Territorial Sea and the Contiguous Zone came into force in 1964, but already there were evident deficiencies in the straits articles.

How subjective was a State's decision to declare certain types of passage as "non-innocent" and therefore disallowed? Were nuclear submarines, armed with ballistic missiles, expected to travel on the surface through international straits and show their flag—as is required for innocent passage through territorial waters? Could the overflight of territorial seas within straits be undertaken without the consent of the coastal State? And what did Article 23 of the Convention mean when it stated "If any warship does not comply with the regulations of the coastal State concerning passage through the territorial sea" it may be required to leave the area? Did this apply to the territorial waters of international straits?

Another problem soon arose with respect to archipelagic States. Indonesia, in 1957, purported to close off its inter-island waters by a series of straight baselines, declaring the waters within the baselines to be internal. The United States and other maritime powers refused to recognize this closure, but in the early days of the Third Law of the Sea Conference (UNCLOS III) starting in 1973, efforts were made to achieve some form of compromise with States composed solely of one or more archipelagos.[60]

UNCLOS III. The United States, the Soviet Union, and other major maritime States were determined, at UNCLOS III, to improve on the non-suspendable innocent passage regime for international straits, but their efforts were opposed by a number of States, among them Spain and Morocco (bordering the Strait of Gibraltar), Southern Yemen (Bab el Mandeb), Iran and Oman (the Strait of Hormuz) and Malaysia and Indonesia (Malacca-Singapore Straits). The United Kingdom advanced, and both the U.S. and the Soviets supported, the concept of transit passage, and articles 37 through 44 of the 1982 Convention spell out the details of this regime. Also article 53 defines the regime of passage in archipelagic sea lanes. These provisions are supplemented by other Articles of the Convention relating specifically to the rights of Government-owned vessels and aircraft (except those used for commercial purposes) through international straits.[61]

The LOS Convention was adopted at Montego Bay, Jamaica, in December 1982 by a vote of 130 in favor, 4 against (including the United States), and 17 abstentions. The basic cause of the U.S. non-support was Part XI of the Convention, dealing with the international seabed regime. Since the United States not only voted against the final text, but has subsequently refused to sign, and has indicated its intention not to ratify or accede to the Convention, the question could arise, are all of the navigational rights contained in the text, necessarily applicable to the United States? This issue might conceivably become more acute if and when the Convention ultimately enters into force.[62]

The United States' position is that the non-seabed portions of the Convention are declaratory of emerging customary international law, and are therefore binding on all States, whether or not they are parties to the Convention.[63] Scholars may, however, debate what the bases for emerging

customary international law really are, and why the United States, despite its views on the sanctity of the non-seabed articles, chooses to interpret article 64 on highly-migratory species (e.g., tuna) in a way which appears at variance with the text.[64]

3. Exceptions to the Transit Passage Regime

NWP 9 acknowledges, in a fleeting fashion,[65] that some straits are governed by the regime of non-suspendable innocent passage rather than transit passage. The text would be enhanced by a broader coverage of the exceptions.

Innocent Passage Straits. Innocent passage is defined in the LOS Convention as "passage which is not detrimental to the peace, good order, or security of the coastal State."[66] The Convention lists a series of activities as non-conforming with innocent passage, among them any threat or use of force against the coastal State, collecting information to the prejudice of the coastal State's defense or security, or the carrying out of research or survey activities.[67] Innocent passage is the regime for transiting the territorial sea. It also applies to navigation through straits which connect the high seas or an EEZ with the territorial sea or a bordering State, or straits excluded from the regime of transit passage by article 38(1).[68] In the case of such straits, the regime of innocent passage is non-suspendable by the bordering State.[69]

There are two potential situations in which innocent passage straits may exist. One is where the strait leads from the high seas/EEZ directly into a coastal State's territorial waters without later re-emerging into the high seas or an EEZ. Such is the case, for example, with Canada's Queen Charlotte Strait between the northern end of Vancouver Island and the mainland of British Columbia. Relatively few of the waterways of this type are officially named.[70]

A second situation is where the strait connects the high seas/EEZ with an historic bay—whose waters are by definition internal. Such a bay would be closed off by a straight baseline, seaward of which are territorial waters. There are no generally-accepted criteria for establishing claims to historic bays, and the United States, which itself has few historic claims,[71] tends to resist such claims by other States.[72] But there are some straits connecting with water bodies where the coastal State asserts strong historic claims.[73]

Straits Not Overlapped by Territorial Seas. According to the LOS Convention, transit passage does not apply to a strait "if there exists through the strait a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics."[74] Through such a route, or "corridor," the high seas freedoms of navigation and overflight would automatically exist.

If all States claimed a twelve-mile territorial sea, then all straits with least widths of less than 24 miles would have no such corridor. But a number of

States, including Australia and Finland, have territorial seas of less than twelve miles. This will permit a high seas/EEZ corridor through such waterways as Bass Strait, separating Tasmania from the Australian mainland, and the Entrance to the Gulf of Finland.[75] Any international strait, greater in least width than 24 miles, would *ipso facto* have a high seas/EEZ corridor passing through it.

Three questions arise with respect to this provision. A first concerns the meaning of "similar convenience." The navigable channel, for example, might not coincide with the high seas/EEZ corridor. Associated with this is the issue of the minimum width the corridor must have in order to be a viable transit route. In The Bahamas, for example, a twelve-mile territorial sea would leave a corridor of only a quarter of a mile width through Providence Channel at its narrowest point. How could a foreign naval squadron utilize such a narrow space? In order to qualify as being of "similar convenience," the corridor should probably be two or three miles in width at its narrowest point.[76]

Finally, there is the question of the status of the territorial waters adjoining the high seas/EEZ corridor. Presumably the status is one of suspendable innocent passage, with no right of overflight by foreign aircraft, nor of passage submerged by foreign submarines.[77]

The "Messina Exception." There are certain specific exceptions provided for in the Convention to the transit passage regime, even for straits connecting two parts of the high seas or an EEZ with one another. One of these is the "Messina exception," which was intended primarily to cover the situation of Italy's Strait of Messina, between the mainland and the island of Sicily. This waterway, which has a minimum width of about two miles, was of concern to the Italian Government in the event that a potentially hostile fleet might seek transit passage rights through the strait. In response to Italy's fears, a provision was included in the Convention stating that a right of transit passage is excepted "if a strait is formed by an island of a State bordering the strait and the mainland" provided "there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics."[78] Although the Convention does not so state, a right of non-suspendable innocent passage would exist through any strait as defined by article 38(1).

There are some uncertainties regarding the article. First, as noted earlier, what does the phrase "of similar convenience" mean? Should conditions of fog, ice, channel depth, or travel distance associated with the alternative route be no more adverse than with respect to the original waterway? In the case of distance, a ship utilizing the Strait of Messina on a voyage from Marseilles to Trieste would save approximately 60 miles from a route traveling around the island of Sicily.

Looking at straits other than Messina, article 38(1) might apply to the U.K.'s Pentland Firth between the Scottish mainland and the Orkney Islands, to Sweden's Kalmar Sund in the Baltic, and to Canada's Northumberland Strait in the Gulf of St. Lawrence. But there are definitional questions. For example, what constitutes the "mainland"? Can South Korea claim Cheju Strait as an article 38(1) exception when the mainland is actually a series of small islands and islets? In the western Aegean there is Keas Strait, close to Athens, which Greece might claim as an exception, although the "mainland" here is formed by the island of Mikronisos, about a mile off the true mainland coast.

No matter what the geographic situation might be, it would appear from a reading of article 38(1) that a strait, in order to be excepted, should at some point be closed off by overlapping territorial seas. Further, the alternative route must include through it a high seas or EEZ corridor. Given the propensity of States to alter their territorial sea claims, there exists considerable uncertainty as to which straits of the world would qualify as article 38(1) exceptions. United States policy is that the number of straits excepted under this article should be kept to an absolute minimum.

Straits Regulated by International Conventions. Another exception to the transit-passage regime is contained in article 35(c) which exempts straits in which passage "is regulated by long-standing conventions in force specifically relating to such straits." The obvious reference here is to the Turkish Straits,[79] which are regulated by the 1936 Montreux Convention.[80] This Convention guarantees freedom of transit through the Straits for merchant vessels of all nations at all times. But there is no corresponding right of free overflight of the Turkish Straits. The Convention also contains certain restrictions on the transit of warships of both non-Black Sea powers and Black Sea powers, one of them being that the maximum aggregate tonnage of warships of non-Black Sea powers within the Black Sea at any one time must not exceed 45,000 tons.

Another waterway to which this article might apply is the Danish Straits (Little Belt, Great Belt and Oresund), the subject of an 1857 Convention which lifted the dues requirements for ships transiting the Straits.[81] Since foreign warships at that time were not subject to such dues, some recent writers have argued that Denmark has no legal grounds for interfering with the passage of foreign warships through the Straits. But a 1976 Danish Ordinance requires advance notification for the passage of foreign warships through the Straits, demands that foreign submarines operate on the surface flying their flag, and notes that military aircraft can overfly Danish territorial waters (including those within the Straits) only if advance permission has been obtained.[82]

Two other straits that might conceivably be affected by the article are Gibraltar and Tiran. A 1904 Declaration between Great Britain and France regarding Egypt and Morocco guaranteed freedom of navigation through the Strait of Gibraltar, but made no mention of overflight rights.[83] The

Government of Spain has on occasion held that since Gibraltar is governed by the 1904 Declaration, freedom of overflight through the Strait does not exist. In 1973, at the outset of fighting between Israel and Egypt, U.S. military aircraft flying east from the Azores in order to supply Israeli forces, navigated through the approximately two-mile wide high-seas belt at the narrowest point in the Strait in order to avoid the three-mile territorial seas (then recognized by the United States) of Spain and Morocco. But in the 1986 air strikes on Libyan terrorist support infrastructure (after the United States had acknowledged other States' rights to a twelve-mile territorial sea) U.S. military aircraft operating from bases in Great Britain utilized the transit passage regime, as provided for in the LOS Convention, to justify overflying the Strait of Gibraltar.

In the case of the Strait of Tiran, the waterway, as noted earlier, connects the high seas/EEZ of the Red Sea with the territorial waters of the two bordering States, but also with the territorial seas of Israel and Jordan. Article 45(1)(b) of the LOS Convention provides for a regime of non-suspendable innocent passage through straits "between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign State." Following the independence of Israel in 1948, Egypt sought to restrict the movement of Israeli shipping through the Strait on the grounds that it did not constitute "innocent passage" so far as Egypt was concerned. Twice Israeli forces occupied the Egyptian heights overlooking Tiran to ensure that the Strait would be open to Israeli shipping. The 1979 Treaty of Peace between Egypt and Israel provides "The Parties consider the Strait of Tiran and the Gulf of Aqaba to be international waterways open to all nations for unimpeded and non-suspendable freedom of navigation and overflight."[84] Does this 1979 Treaty represent a "long-standing international convention," and what is its effect on Saudi Arabia, guarding the eastern shore of the Strait, since that country is not a party to the Egyptian-Israeli Peace Treaty?

Internal Waters in a Strait. The transit passage regime does not apply in any areas of internal waters within a strait, "except where the establishment of a straight baseline . . . has the effect of enclosing as internal waters areas which had not previously been considered as such."[85] The relatively few cases where internal waters exist within a strait are in connection with juridical[86] or historic bays, river mouths, harbor systems and roadsteads, and with straight baseline regimes. In the Corfu Channel, for example, a juridical bay exists along the western (Greek) shore and serves to narrow somewhat the width of the belt through which the transit passage regime applies. Other affected straits include the Oresund and the Strait of Hormuz. In the case of the Oresund, Copenhagen's roadstead extends about three miles into the main waterway, forcing the traffic lane eastward toward Sweden.

In the Strait of Hormuz, the Omani straight baseline system joins the mainland with the offshore islands out to the Great and Little Quoin, with the result that the traffic separation zone, landward of the Quoins, passes within the baseline. Although to date Oman has not sought to limit in any way passage along this sea lane, it might conceivably argue that the waters within the baseline had previously been considered as internal, and therefore were not subject to the transit passage regime.

Straits Connecting With the Territorial Sea of a Foreign State. A final exception to transit passage is a convention provision which calls for non-suspendable innocent passage in a strait "between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign State."[87] Mention has already been made of the Strait of Tiran, for which this provision was intended. The only other straits to which this provision might apply are Head Harbour Passage, leading through Canadian waters off the Province of New Brunswick to Passamaquoddy Bay, shared by New Brunswick and the State of Maine; Guatemala's Entrance to the Bay d'Amatique; and two shallow waterways in the Persian Gulf—the Bahrain-Qatar Passage leading to Saudi Arabian waters; and the Bahrain-Saudi Arabia Passage connecting with the waters of Qatar.

5. The Record of State Practice

NWP 9 does not address the record of State compliance with the transit passage regime. Given the stated purpose of that publication, this is probably unnecessary. It would be appropriate here, however, to examine what that record has been. The principal deviations from the Convention's straits articles have occurred in the Arctic. In 1985, the Canadian Government delimited a series of straight baselines about its Arctic Archipelago in reaction to the transit through the Northwest Passage of the U.S. Coast Guard vessel, POLAR SEA.[88] The Government also announced that the waters within the baselines were henceforth to be considered internal waters, with no right of free navigation existing through them. The legal justifications for Canada's actions have been variously described as environmental protection, the exercise of historic rights, the non-application of articles 37 and 38 to the Northwest Passage, or simply the delimitation of straight baselines in accordance with the provisions of the LOS Convention.[89] The United States protested Canada's enclosure action, but three years later concluded an agreement with Canada which, on the one hand, provided for prior notification by the U.S. in the event of its sending ice breakers through the Northwest Passage, and on the other reserved the U.S. position with regard to the Canadian assertion that the Northwest passage did not qualify as an international strait.[90] The United States was particularly concerned that if

it acquiesced in the Canadians' action, other States might also close off bordering straits on environmental or other grounds.

The Soviet Union considers the waters of the Laptev, East Siberian, and Chuckchi Seas, north of Siberia, as having a "special status" of their own. In 1967, for example, the Soviets turned back two U.S. Coast Guard vessels, the EDISTO and the EASTWIND, which were traveling eastward from the Barents and Kara Seas, and attempting to pass through Vil'kitsky Strait into the Laptev Sea. The Soviets never explained the rationale for their action, but so far as is known, no foreign-flag vessels since then have travelled in the Soviets' northern waters to the east of Vil'kitsky Strait.[91]

Outside of the Arctic basin, the Soviets apparently consider the Sea of Okhotsk, off the eastern Siberian coast, as a "closed sea," not open to foreign warships. Most of the coastline of the Sea is Soviet territory, although Japan controls some 50 miles of the coast on the island of Hokkaido. The Soviet position affects the passage of foreign warships through the straits of the Kurile Islands, leading into Okhotsk. Elsewhere, China considers Hainan Strait, connecting the South China Sea with the Gulf of Tonkin, to be an "historic" strait, although nowhere in the LOS Convention is there provision for an international strait to be claimed as historic.

One situation which might in time prove troublesome is Greece's policy toward the regime of passage through the inter-island waters of the Aegean Sea. The islands are controlled by Greece, but the waterways lead to Turkey. Because the islands are a part of Greece—basically a mainland country—they cannot be closed off as an archipelagic State, and Greece has maintained, first, that not all the inter-island passages are international straits, and second, that Greece reserves the right to designate the waterways to which the transit passage regime applies.[92] The issue of passage through non-archipelagic island groups was never settled at UNCLOS III.

6. The Relative Importance of International Straits

There is no fixed method for determining which straits are more important than others. One possible index is the number of transiting ships per day. In this respect, the leading straits are: Dover, Malacca-Singapore, Kattegat (at the northern approach to the Danish Straits), Gibraltar, Hormuz, and the Turkish Straits. It is difficult to obtain reliable statistics on many other straits, since no generally-available method of counting numbers of transits through these waterways exists.

Choke Points. Straits constituting strategic choke points are of critical economic and military importance. The term "choke point" implies that in the case of a particular waterway there is an opportunity for a State to close off, or at least restrict, the flow of ocean-borne traffic which is critical to a nation or nations. Three issues would appear to be of importance with

respect to choke points. First, there is no readily available alternative waterway to use if passage through the choke point is denied or restricted. The Strait of Hormuz is an obvious choke point in this regard; a strait, such as Anegada Passage, connecting the Caribbean with the Atlantic, would not be a prime choke point because of the number of alternative waterways available.

Second, a choke point is relatively narrow, and thus capable of being blocked—by mines, sunken ships, shore batteries, etc. Third, the waterway is of importance to the commercial and/or military traffic of some State or States. With respect to this last point, a distinction might be made between "global" and "regional" choke points. Gibraltar is a global choke point, of concern to many of the world's nations; the Turkish Straits are more regional in nature, of particular significance to the countries bordering the Black Sea.

Various listings of choke points are periodically compiled but with most analysts agreeing on the basic seven: the Danish Straits, Dover, Gibraltar, Bab el Mandeb, Hormuz, Malacca-Singapore, and Lombok (or Sunda) at the southern approaches to Indonesia. The Suez and Panama Canals are also choke points. Other frequent candidates are the Turkish Straits, Magellan, Bering Strait, Korea Strait, Osumi (Colnett) Strait—a major approach to the Sea of Japan and South Korea—Formosa Strait, and Windward and Mona Passages in the Caribbean. Some listings also include the Greenland-Iceland-UK gap, although this is hardly a narrow international waterway.

Other Important Straits. In addition to the straits noted above, some sixteen others would seem to be of concern to the U.S. and its allies. These are: Anegada Passage, Balabac Strait, the Straits of Florida, Kasos and Kithira Straits in the eastern Aegean, Luzon Strait, Makassar Strait, the Strait of Otranto, San Bernardino Strait, Soya-kaikyo (La Perouse Strait), Surigao Strait, Strait of Tiran, Torres Strait, Tsugaru-kaikyo, Unimak Pass, and Verde Island Passage. This is not meant to imply that other straits are not also significant, but perhaps these are the most strategic at this point in time.

For the United States, *all* straits are of potential importance, since no one can forecast where future military operations may be necessary.[93] Who, for example, in 1940, could have predicted that within two years the U.S. would be vitally concerned with the geography of Indispensable, Manning and Bougainville Straits in the Solomon Islands—or, a short time later, with Dampier, Vitiaz and Isumrud Straits off northeastern New Guinea?

Notes

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1. U.S. Navy Dept., *The Commander's Handbook on the Law of Naval Operations*, NWP 9 (Washington: 1987) (herinafter NWP 9 or Handbook).

2. United Nations Conference on the Law of the Sea, 3d, *United Nations Convention on the Law of the Sea*, A/CONF. 62/122 (n.p.: 1982) (hereinafter LOS Convention).

3. In this Chapter, the term "bordering State" will be used in connection with the regime of straits, whether or not there are one, two, or three States actually bordering a particular strait.

4. Within an exclusive economic zone, the high seas freedoms of navigation and overflight prevail. LOS Convention, *supra* note 2, art. 58(1).

5. Erik Bruel, *International Straits: A Treatise on International Law* (1947), p. 19.

6. Lewis Alexander, *Navigational Restrictions Within the New LOS Context: Geographical Implications for the United States* (Peace Dale, R.I.: Offshore Consultants, 1986), p. 99.

7. LOS Convention, *supra* note 2, art. 38(1).

8. *Id.*

9. *Id.*, art. 38(2).

10. *Id.*, art. 39(1)(c).

11. For an analysis of this position see Bruce A. Harlow, "Comments Concerning the 1982 Law of the Sea Convention," *Law and Contemporary Problems*, Spring 1983, v. 46, pp. 130-135.

12. LOS Convention, *supra* note 2, art. 39(1)(a).

13. *Id.*, art. 38(2).

14. *Id.*, art. 39(1)(b).

15. *Id.*, art. 39(1)(c).

16. NWP 9, *supra* note 1, par. 2.3.3.1.

17. LOS Convention, *supra* note 2, art. 39(2).

18. The International Maritime Organization, headquartered in London, is a specialized agency of the United Nations, and has, *inter alia*, the function of setting world-wide standards of pollution prevention, navigation efficiency, and marine safety.

19. International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, *United States Treaties and Other International Agreements*, v. 28, p. 3459, T.I.A.S. 8587.

20. Inter-Governmental Maritime Consultative Organization: International Convention for the Safety of Life at Sea, 1974, *International Legal Materials*, July 1975, v. 14, p. 959.

21. International Conference on Marine Pollution: International Convention for the Prevention of Pollution from Ships, 1973, *International Legal Materials*, Nov. 1983. v. 12, p. 1319.

22. LOS Convention, *supra* note 2, art. 236; NWP 9, *supra* note 1, par. 2.1.2.

23. LOS Convention, *supra* note 2, art. 42(5).

24. *Id.*, art. 40.

25. *Id.*, art. 41(3) and (7).

26. *Id.*, art. 39(3)(a).

27. *Id.*, art. 39(3)(b).

28. NWP 9, *supra* note 1, par. 7.3.5.

29. *See* Mark W. Janis, "Neutrality," *infra* Chapter VI; A.V. Lowe, "The Commander's Handbook on the Law of Naval Operations," *infra* chapter V.

30. NWP 9, *supra* note 1, par. 7.3.7.

31. LOS Convention, *supra* note 2, art. 41(1).

32. *Id.*, art. 41(4).

33. *Id.*, art. 41(6).

34. *Id.*, art. 42(1)(d).

35. *Id.*, art. 42(2).

36. *Id.*, art. 44.

37. *Id.*, art. 43(a).

38. NWP 9, *supra* note 1, par. 2.3.3.1.

39. An archipelagic State is one wholly constituted by islands, and to be entitled to draw straight baselines, the area of water to the area of land within the straight baselines must be between 1 to 1 and 9 to 1. LOS Convention, *supra* note 2, arts. 46 and 47.

40. *Id.*, art. 47(2). Up to 3 percent of the total number of baselines enclosing the archipelago may exceed 100 miles, up to a maximum length of 125 miles. *Id.*

41. The only difference between territorial and archipelagic waters is that in the latter, traditional fishing rights of adjacent neighboring States shall continue and be respected.

42. NWP 9, *supra* note 1, par. 1.4.3.

43. LOS Convention, *supra* note 2, art. 53(4).

44. *Id.*, art. 53(3).

45. *Id.*, art. 53(5).

46. *Id.*, art. 54.

47. NWP 9, *supra* note 1, par. 7.3.6.

48. *See* Janis, *supra* note 29.

49. Among these States are Antigua and Barbuda, Cape Verde, Comoros, Fiji, Indonesia, Kiribati, Maldives, Mauritius, Philippines, Sao Tome and Principe, Solomon Islands, Trinidad and Tobago, Tuvalu, Vanuatu.

50. LOS Convention, *supra* note 2, art. 53(12).

51. Philip Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (New York, N.Y.: G.A. Jennings, 1927), p. 120.

52. *Id.*

53. In 1945, 77 percent of the world's 60 coastal States had 3-mile territorial sea claims; by 1979, this figure had dropped to 18 percent of 131 States.

54. Hague, International Court of Justice, *Corfu Channel Case* ([The Hague]: The Court, 1949), v. 4.

55. *Id.*, p. 23.

56. R.R. Baxter, *The Law of International Waterways* (Cambridge, Mass. Harvard University Press, 1964), p. 9.

57. United Nations, General Assembly, International Law Commission, *Report*, 8th Session, A/3159 (New York: 1956), art. 17.

58. Convention on the Territorial Sea and Contiguous Zone, April 29, 1958, *United States Treaties and Other International Agreements*, v. 15, p. 1606, T.I.A.S 5639, 516 *United Nations Treaty Series*, v. 516, p. 205, art. 16 (4).

59. *See, e.g.*, Baxter, *supra* note 56, pp. 160 and 209.

60. For a discussion of the LOS negotiations on archipelagic States, *see* Patricia Rodgers, *Midocean Archipelagos and International Law* (New York: Vantage Press, 1981).

61. *E.g.*, LOS Convention, *supra* note 2, art. 236.

62. The LOS Convention enters into force twelve months after the sixtieth ratification or accession. LOS Convention, *supra* note 2, art. 308(1). As of December 1989, 42 states had ratified the Convention. Council on Ocean Law, *Ocean Policy News*, Dec. 1989, p. 1.

63. *See, e.g.*, the remarks of Brian Hoyle, Director, Office of Oceans Law and Policy, U.S. Department of State, in Lawrence Juda, ed., *The United States Without the Law of the Sea Treaty: Opportunities and Costs* (Wakefield, R.I., Times Press, 1983), p. 65 and 70; Restatement (Third) of the Foreign Relations of the United States, Part V, Introduction, v.2, p. 5.

64. The United States, almost alone among coastal States, asserts that the coastal State has no jurisdiction over highly migratory species, but requires international agreement for effective management. *See* Proclamation No. 5030, 3 C.F.R. 22 (1983 Compilation), and accompanying press statement, *Weekly Comp. of Pres. Doc.*, v. 19, p. 384 (April 14, 1983).

65. NWP 9, *supra* note 1, par. 2.3.3.1.

66. LOS Convention, *supra* note 2, art. 19(1).

67. LOS Convention, *supra* note 2, art. 19(2). NWP 9 contains a listing of those activities that a warship may not undertake while in innocent passage. NWP 9, *supra* note 1, par. 2.3.2.1.

68. *Id.*, art. 45(1). Those excluded by article 38(1) are straits between the mainland and an island of the bordering State where a route of similar convenience exists seaward of the island. See discussion of "The Messina Exception," *infra*, in text following note 76.

69. *Id.*, art. 45(2).

70. There are no named straits, for example, given to the waterways connecting the Atlantic Ocean with Boston Harbor, Narragansett Bay, New York Bay, or the Chesapeake Bay.

71. In *United States v. Louisiana*, 470 U.S. 93, 105 S.Ct. 1074, 84 L.Ed.2d 73 (1985), the Supreme Court ruled that the Mississippi Sound was an historic bay, notwithstanding the formal renunciation by the United States in 1971 of its earlier assertion of historic bay status of those waters. All other bays claimed as historic by the United States would now qualify as juridical bays.

72. The United States recognizes very few historic bay claims by foreign States, unless the bay could also be closed off as a juridical bay. One claim recognized is to the Gulf of Manner off the southeast Indian coast.

73. Canada, for example, strongly defends its historic claim to Hudson Bay, thereby affecting the regime of Hudson Strait.

74. LOS Convention, *supra* note 2, art. 36.

75. Prior to President Reagan's 1989 Proclamation of a 12-mile territorial sea for the United States (see Proc.No. 5928, 53 Fed. Reg. 777, January 9, 1989) this list would have included the Strait of Juan de Fuca between the United States and Canada.

76. Three nautical miles is the most frequently used width for sea lanes established under IMO auspices.

77. There is no provision in the LOS Convention for any status for bordering waters other than that of the territorial sea.

78. LOS Convention, *supra* note 2, art. 38(1).

79. The Turkish Straits consist of the Bosporus, Sea of Marmara, and the Dardenelles.

80. Convention Regarding the Regime of the Straits, with Annexes and Protocol, July 20, 1936, *League of Nations Treaty Series*, v. 173, p. 213.

81. Treaty for the Redemption of the Sound dues between Austria, Belgium, France, Great Britain, Hanover, the Hansa Towns, Mecklenburg-Schwerin, the Netherlands, Oldenburg, Prussia, Russia, Sweden-Norway, and Denmark, March 14, 1857, C. Parry, *Consolidated Treaty Series* (Dobbs Ferry, New York: Oceana Publications, Inc., 1969), v. 116, p. 357.

82. Gunnar Alexandersson, *The Baltic Straits: International Straits of the World* (Boston: Nijhoff, 1982), p. 22.

83. "Declaration Between Great Britain and France Respecting Egypt and Morocco, Together with the Secret Articles, April 8, 1904," *British and Foreign State Papers* (London: His Majesty's Stationary Office, 1912), v. 101, p. 1053.

84. "Treaty of Peace Between the Arab Republic of Egypt and State of Israel, 1979," *International Legal Materials*, March 1979, v. 18, p. 362.

85. LOS Convention, *supra* note 2, art. 35(a).

86. A juridical bay is described in article 10 of the LOS Convention as a well-marked indentation of the coast, whose distance across at its mouth does not exceed 24 miles and whose area is at least as large as a semi-circle whose diameter is a line drawn across its mouth. *See also, supra* note 1, par. 1.3.3.

87. LOS Convention, *supra* note 2, art. 45(1)(b).

88. In August 1985, the U.S. Coast Guard vessel POLAR SEA, with the support and participation of Canada, transited the Northwest Passage, from east to west. Since the U.S. Government, prior to the voyage, refused to formally request the Canadian Government's permission for the transit, the Canadian press categorized the voyage as an infringement on Canadian sovereignty. *The New York Times*, Sep. 11, 1985, sec. I, p. 9:1.

89. Article 7 of the LOS Convention provides that "[i]n localities where the coastline is deeply indented and cut into, or if there is a fringe of islands in the immediate vicinity, a method of straight baselines may be employed . . . [which] must not depart to any appreciable extent from the general direction of the Coast." Critics of the Canadian action argue that the baseline system in the Arctic Archipelago does not conform with these criteria.

90. Agreement Between the Government of the United States of America and the Government of Canada on Arctic Cooperation, Ottawa, Jan. 11, 1988, *International Legal Materials*, Jan. 1989, v. 28, p. 142. The Agreement provides that "all navigation by U.S. icebreakers within waters claimed by Canada to be internal" will be undertaken only with the consent of the Canadian Government. *Id.*, p. 143, para. 3. But the agreement does not affect the U.S. position that Canada's declaration that the Northwest Passage is not an international strait is without legal foundation. *Id*, par. 4.

91. The September 23, 1989, joint statement of U.S. Secretary of State James Baker and Soviet Foreign Minister Eduard Shevardnadze, issued at Jackson Hole, Wyoming, although not relating directly to straits but rather to innocent passage, may indicate the current position of the Soviet Union toward passage through the territorial sea generally, including such straits as Vil'kitsky. The "Uniform Interpretation of Rules of International Law Governing Innocent Passage," which were attached to that statement, provides, "All ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance with international law, *for which neither notification nor authorization is required.*" (Emphasis supplied) (Copy in possession of Editor).

92. Statement by the Delegation of Greece to the Third United Nations Conference on the Law of the Sea, A/CONF. 62/WS/26, *Third United Nations Conference on the Law of the Sea*, Off. Rec., v. 16, p. 266 (1982).

93. Richard Grunawalt, "United States Policy on International Straits," *Ocean Development and International Law*, v. 18, no. 4, 1987, p. 445.

Chapter V

The Commander's Handbook on the Law of Naval Operations and the Contemporary Law of the Sea

by
A. V. Lowe*

The Commander's Handbook on the Law of Naval Operations,[1] issued by the United States Department of the Navy in July 1987, is a model of clarity and conciseness. Given the audience for which it was intended, it is resoundingly successful in explaining the intricacies of the law. Its clear and authoritative style, however, sometimes conceals the controversial nature of some of the statements which it includes. It is the purpose of this paper to review the *Handbook*, discussing the more controversial pronouncements and setting it against the background of the contemporary, and sometimes unsettled, Law of the Sea. The comments made are in no sense intended as a criticism of the drafting of the *Handbook* as an exposition of the United States' view of international law, which could scarcely be bettered. They merely point out some of the difficulties which attend that view of the law, which for the most part could not reasonably be canvassed in the *Handbook* itself. The comments are not an exhaustive catalogue of the cases where the legislation or views of third States or commentators differ from that of the United States, but they are illustrative of the kinds of questions which might arise from strict adherence to the account given in the *Handbook*.

The *Handbook* is divided into two parts, The Law of Peacetime Naval Operations and the Law of Naval Warfare, which will be discussed in turn. First, however, it is necessary to deal with certain general issues raised in the Preface to the *Handbook*.

The *Handbook* claims disarmingly to set forth "general guidance," and not to be "a comprehensive treatment of the law" or "a substitute for the definitive legal guidance provided by judge advocates and others responsible for advising commanders on the law."[2] However, while there are certainly detailed points of interpretation upon which the *Handbook* is not to be taken as a definitive guide, it is plain that the *Handbook* is intended to represent United States Navy thinking on the broad lines of international law, and hence to some extent will operate as a constraint upon those who give more detailed

advice. For instance, the Preface lists only two sources of international law: custom and treaties. There is no suggestion of recourse to resolutions of international organizations for the determination of what international law might be. This is unfortunate since, quite apart from the crucial importance of such resolutions in the particular context of the legality of operations on the deep sea-bed, resolutions adopted by bodies such as the International Civil Aviation Organization are of great significance in the adumbration of the law concerning other maritime zones of more immediate concern to naval commanders.

Moreover, the definition of customary international law given in the Preface, though according closely with classical formulations which treat customary law as a homogeneous body of law applicable to all States, gives no sense of the decisive importance of persistent objection and acquiescence in State practice, which can, respectively, except States from the binding force of emergent norms of customary international law or bind them to acceptance of norms which command less than general acceptance in State practice.[3] Given that the United States persistently objected to territorial sea claims in excess of three miles until its conditional acceptance of wider claims in 1983 or so,[4] and that some of the statements in the *Handbook* amount to novel interpretations of the law of the sea, persistent objection and acquiescence remain important considerations in the accurate determination of the rules of international law applicable in any concrete dispute.

The Law of Peacetime Naval Operations

1. Legal Divisions of the Oceans and Airspace. The first chapter in this part of the *Handbook* deals with the legal divisions of the oceans and airspace, and it begins with a summary of the law concerning baselines. Two points call for comment. First, while acknowledging the propriety of straight baselines drawn along coastlines where it is impracticable to utilize the low-water mark, as where the coastline is deeply indented or fringed by islands,[5] the *Handbook* notes that "the United States, with few exceptions, does not employ this practice and interprets restrictively its use by others."[6] It is true that the restrictions on the use of straight baselines set out in the 1958 Territorial Sea Convention were recently reaffirmed in the 1982 Convention, and there was no significant support at UNCLOS III for any substantial relaxation of those restrictions. On the other hand, State practice is clearly moving towards a liberal interpretation of the circumstances in which straight baselines can be used. A recent study[7] sets out straight baseline claims made by 46 States, including many (such as those made by Algeria, Burma, Colombia, Cuba, Ecuador, France, Guinea, Iran, Italy, Kenya, Madagascar, Morocco, Mozambique, Senegal, Spain and Vietnam) which are by no means easy to

reconcile with the conventional and customary law criteria for the use of such baselines.

It is understood that the United States has protested against some of these claims, reserving its legal rights. There is a risk of the United States being held to have acquiesced in the validity of other claims, although since the acquiescence only arises from silence in circumstances which demand a protest because they affect the actual (as opposed to the abstract) interests of a State, this possibility is theoretical rather than real. However, there is a more insidious danger. If the pattern of liberal use of baselines persists and spreads, a view might emerge that it represents either an agreed interpretation of the conventional rules or a development in the customary law, in either case allowing such claims. This gives rise to complex questions of treaty law concerning the ability of what may ultimately be a minority (perhaps a small minority) of parties to hold out against an interpretation of a multilateral treaty adopted by the other parties. This problem is compounded by the difficult question whether the boundaries of a State, determined *inter alia* by its baseline, can differ *vis-a-vis* different States. While it would probably overstate the case to say that the United States is in danger of having its legal rights eroded by this development in State practice, there is at least a cause for concern here which should be recognized.

The second point concerns claims to historic bays, such as the Libyan claim to the Gulf of Sirte which has occasioned difficulties in the past.[8] The *Handbook* states that "[t]he United States has taken the position that an actual showing of acquiescence by foreign nations in such a claim is required, as opposed to a mere absence of opposition,"[9] if the historic claim is to be valid. This is controversial for two reasons. First, it might be said that it is not the acquiescence of foreign nations, but only of the United States, which need be shown: if the United States had acquiesced in the claim, it would be bound to accept its validity, whether or not other States had acquiesced in it. Acquiescence by the United States is, however, unlikely. In the Gulf of Sirte, for instance, the United States put beyond doubt its rejection of the Libyan claims by asserting its freedom to use the disputed waters as high seas. Secondly, the requirement of acquiescence, as opposed to the mere absence of protest, is itself less clearly settled than the *Handbook* might imply. The International Court in the *Anglo-Norwegian Fisheries* case suggested that the general toleration of a notorious claim—the mere absence of protest—is enough to render the claim valid, and controversy over the matter is alive in academic circles.[10] This point might also be argued in relation to straight baseline systems, which are simply a means of defining those waters which could become internal waters of a State by way of historic title even if the original drawing of the baseline was unlawful. Here again is a possibility that the *Handbook* points to in the rejection of certain maritime claims which might be held by an international tribunal to be opposable to the United States.

The *Handbook* turns next to the definition of the various maritime zones which might be claimed by States. Although these definitions are not of central importance, the rights and duties of States within the zones being dealt with in more detail elsewhere in the *Handbook*, it is worth noting that some of the definitions are questionable. Paragraph 1.5 of the *Handbook* is headed "International Waters," and covers the contiguous zone, Exclusive Economic Zone (EEZ), high seas and security zones. The contiguous zone is stated, with an impeccable adherence to the wording of the 1958 and 1982 Conventions,[11] to be the zone within which a State may prevent and punish infringements of its customs, fiscal, immigration and sanitary laws and regulations that occur within its territory or territorial sea. That definition is, however, arguably too restrictive. Many State claims to contiguous zones assert the right to punish not only infringements committed within the territory or territorial sea of the State, but also infringements committed within the contiguous zone itself; in short, they claim both jurisdiction to enforce and jurisdiction to prescribe in the contiguous zone. However, the terms of the conventional definition adopted in the *Handbook*, whether construed literally or in the light of the *travaux preparatoires* of article 24 of the 1958 Territorial Sea Convention, grant only jurisdiction to enforce in the contiguous zone.[12] Moreover, the list of interests which may be protected in the contiguous zone, which is limited to customs, fiscal, immigration and sanitary matters, sits awkwardly with United States judicial practice. In cases such as the *Taiyo Maru*[13] and *Gonzalez*,[14] United States courts have taken a liberal view of the rights of coastal States to exercise jurisdiction beyond the territorial sea in what may loosely be termed as the contiguous zone, extending in terms of subject matter beyond the limits laid down in the 1958 and 1982 Conventions. It has, however, to be said that the more conservative line taken in the *Handbook* accords with that taken by the Geographer of the United States Department of State.[15] In particular, the refusal of the *Handbook* to admit the validity of contiguous zones for security purposes[16] is consistent with the views of the Geographer.[17]

Perhaps the most significant divergence from the wording of the international conventions in this section of the *Handbook* concerns the Exclusive Economic Zone (EEZ). While the description of these 200-mile zones as "resource-related zones" might be regarded as a reasonable simplification of their nature, the description of the rights of third States in the zone is more controversial. It is stated that "in the EEZ all nations enjoy the right to exercise the traditional high seas freedoms of navigation and overflight, of the laying of submarine cables and pipelines, and of all other traditional high seas uses by ships which are not resource related."[18] That is not what the 1982 Convention says. Article 58 of the Convention expressly ascribes to third States in the EEZ only

> [T]he freedoms referred to in article 87 [on the freedoms of the high seas] of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the seas related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.

The controversy centers upon the legality of activities such as weapons testing and naval exercises, and the laying of submarine monitoring systems (such as the SOSUS chains) in the EEZ, without the permission of the coastal State.

One view, advanced in the *Handbook*, is that all such traditional high seas activities fall within the concept of "other internationally lawful uses of the seas related to" the freedom of navigation and pipe- and cable-laying set out in article 58, and that they are therefore lawful if committed in the EEZ of a third State, even if the State objects to such activities.[19] That view is not shared by all States. For example, Brazil, Cape Verde and Uruguay have asserted that various military activities, such as exercises involving the use of weapons, may not be conducted within the EEZ without coastal State consent.[20] States taking this position might argue that weapons testing and the deployment of underwater monitoring systems are neither expressly listed in article 58 as specific "high seas" freedoms preserved in the EEZ nor included within the category of "other internationally lawful uses of the seas related to" the specified freedoms. Naval exercises in an area of EEZ involving the use of guns, bombs and rockets, for example, might be said to be essentially different from and unrelated to the freedom of navigation, as may the sowing of unarmed mines.[21] The laying of SOSUS chains which monitor shipping movements in the area might equally be said to be distinct from normal pipe- and cable-laying activities, where the pipes and cables are used for transportation across the zone in question rather than for the collection of intelligence from it. Furthermore the exclusive right, of the coastal state, under article 60 of the 1982 Convention, to authorize and construct installations and structures in the EEZ which may interfere with the exercise of its rights in the zone offers an alternative basis for coastal interference. It might be said, for instance, that a SOSUS chain which stretches across the EEZ of a State so as to make it impossible for coastal State naval vessels to put to sea without detection by a third State interferes with the right of the coastal State to police and defend the waters adjacent to its coast. Finally, the coastal State might claim that any of the foregoing arguments are sufficient to create a doubt as to the respective scope of coastal and third State rights, and that a proper interpretation of article 59 (not 58) of the 1982 Convention resolves that issue "on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole."

The merits of these opposing arguments have been canvassed elsewhere,[22] and that task will not be repeated here. It should be clearly stated, however, that the views ascribed to Cape Verde have been expressed only by a tiny minority of States, and have been plainly rejected by rather more States (including the United States in the statement made at the signing of the Final Act of UNCLOS III)[23] and also by the overwhelming majority of commentators. It is, of course, entirely proper that the *Handbook* should refrain from raising what might reasonably be considered to be specious objections to the United States' view. However, it is equally proper that arguments which may yet be deployed against the United States should be noted in a commentary on the *Handbook*. If these disagreements over the interpretation of the 1982 Convention were to be resolved, that would do no more than clear the way for the even more difficult question of the extent to which the details of the Convention's provisions on the EEZ and other matters (and in particular article 59) have entered into customary law. The only point being made here is that the question of third-State rights in the EEZ is not quite as cut and dried as might appear from the *Handbook*.

Briefly, the *Handbook* adopts the definition of the continental shelf set out in the 1982 Convention, according to which coastal State rights over the shelf extend, broadly speaking, to the limits of the geological continental margin or to 200 miles from the baseline, whichever is farther.[24] The provision is significant for many States, notably in the Pacific Ocean, whose geological shelves are much narrower than 200 miles. Some might question whether contemporary customary law does yet follow the 1982 Convention in automatically ascribing the seabed out to 200 miles to the coastal State, where the continental margin does not extend out to that distance, and where the coastal State has not claimed seabed rights out to 200 miles. However, the *Handbook*, if it departs at all from customary law, concedes rights which the U.S. might otherwise have reserved and is therefore unlikely to generate international friction.

The final, minor, point on the definitions set out in chapter 1 of the *Handbook* concerns the assertion that in the absence of treaty constraints there is a freedom to use "international airspace (that over contiguous zones, exclusive economic zones, the high seas, and territory not subject to the sovereignty of any nation)."[25] It may be noted that this view has been challenged by some States. Argentina, Brazil and Uruguay are reported to have suggested that coastal States have the right to regulate by national legislation all aeronautical activities in their EEZ's.[26] However, the drafting history of the 1982 Convention clearly supports the United States' view, and this is supported by a recent report to the International Civil Aviation Organization which concludes that there is no basis for the assertion that the 1982 Convention gives coastal States jurisdiction over overflight in the EEZ.[27] While this conclusion is certainly right, the attitude of Brazil and others, mirroring

similar arguments concerning military uses of the EEZ, outlined above, should be seen as signalling that free overflight of the EEZ might not always and in all circumstances be regarded in practice as unquestionable by all states despite the true position in law.[28]

2. International Status and Navigation of Warships and Military Aircraft. The second chapter of the *Handbook* raises more acute issues of law touching upon naval operations. The definition of warships and military aircraft and the account of their immunities follows the terms of the 1958 and 1982 conventions on the Law of the Sea and is in general uncontroversial, although it should be noted that naval auxiliaries, while enjoying the same immunities as warships, are not within the definition of warships given in the *Handbook* or the conventions.[29] One aspect of the definition is, however, controversial. The *Handbook* adopts the view taken by the major maritime States that "[n]uclear powered warships and conventionally powered warships enjoy identical international legal status."[30] That view is contested by some States. For instance, Djibouti is reported to require no advance notification or permission for the passage of warships through its territorial sea, but does require advance notification for the passage of nuclear-powered ships, and Egypt requires prior permission for the passage of nuclear-powered, but only prior notice of the passage of conventional, warships.[31] Furthermore, States are of course entitled in exercising discretions allowed to them by international law to draw a distinction between those warships which are powered by or carry nuclear materials and those which do not. Perhaps the clearest example of such a discretion concerns the admission of warships to ports and internal waters. As the *Handbook* notes, in the absence of some treaty arrangement to the contrary, warships and auxiliaries have no right of entry to the ports or internal waters of a foreign state.[32] The Treaty of Raratonga, which implemented an agreed move by certain Pacific States towards the establishment of a nuclear-free zone in a large area of the southern Pacific around and to the east of Australia, provides in article 5.2 (headed "Prevention of stationing of nuclear devices") that:

> Each party in the exercise of its sovereign rights remains free to decide for itself whether to allow visits by foreign ships and aircraft to its ports and airfields, transit of its airspace by foreign aircraft, and navigation by foreign ships in its territorial sea or archipelagic waters in a manner not covered by the rights of innocent passage, archipelagic sea lane passage or transit passage of straits.[33]

As discussions in recent years between the governments of New Zealand and the United States have shown, there is considerable potential for lawful discrimination by coastal States against warships carrying nuclear materials, at least in relation to the entry by such ships into ports and other internal waters.[34] While special provision may be made to regulate their passage,[35] discrimination against ships carrying nuclear materials amounting to a denial

of passage through straits and archipelagic sea lanes does not appear to be lawful, nor does such discrimination in relation to rights of innocent passage *simpliciter*, although the scope of the right of innocent passage through the territorial sea has been clouded by the drafting of the 1982 Convention.

Article 19 of the 1982 Law of the Sea Convention, which defines innocent passage, is one of the most problematic provisions of that Convention from the point of view of naval operations, although most of the problems operate at the level of legalistic arguments against the robust good sense of the *Handbook*. Article 19 opens, in its first paragraph, with the definition used in the 1958 Territorial Sea Convention: "Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law."[36] The second paragraph then states that:

> Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:
>
> (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
>
> (b) any exercise or practice with weapons of any kind;
>
> (c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
>
> . . .
>
> (e) the launching, landing or taking on board of any aircraft;
>
> (f) the launching, landing or taking on board of any military device;
>
> . . .
>
> (j) the carrying out of research or survey activities;
>
> . . .
>
> (l) any other activity not having a direct bearing on passage.

The problems of interpretation are manifold. The question whether the list of activities incompatible with innocence in article 19(2) is illustrative or exhaustive is clearly answered in the *Handbook*, which is surely correct in regarding the list as merely illustrative.[37] No answer is given to the further question, whether the *ejusdem generis* principle applies to the construction of article 19, requiring that there be some *activity* on a par with those listed in article 19(2) before innocence be lost. If that construction is correct, it would follow that the mere fact of the presence of a passing warship, not engaged

in any "activity" of the sort listed in article 19(2), could not be the basis for a finding that its passage is non-innocent. Similarly, a law stating that the mere carriage on a merchant ship through the territorial sea of "cargo or any appliance or apparatus the use of which or persons who may constitute a threat against the sovereignty, territorial integrity or political independence of the Republic, shall be deemed to be not innocent . . . " could not be lawful.[38] Under the 1958 definition, which now constitutes article 19(1) of the 1982 Convention, a coastal State could argue persuasively in some circumstances that the very presence of a warship or carriage of such cargo prejudiced its peace, good order or security. For instance, the mere passage of a superpower naval squadron close to the shore during hours of darkness at a time of substantial civil unrest or insurrection might well be perceived by a government having a precarious hold on power, but nonetheless recognized internationally as competent to act on behalf of the State, as prejudicing the peace and good order of the State; the government might accordingly determine that such passage is non-innocent.[39] That government might, furthermore, take the plausible view that the right of a coastal State to take "the necessary steps in its territorial sea to prevent passage which is not innocent"[40] means that it is entitled to use the lowest effective level of force available to it at the time to prevent passage, and it is conceivable that there might be nothing available between the extremes of a radio message and a Silkworm missile. If such a situation were to arise, and the commander of the naval force were to rely on a different interpretation of article 19, requiring that his warships engage in some "activity" additional to mere passage before they lose their innocence, this doctrinal dispute could quickly develop into an international incident.

That does not exhaust the difficulties of interpreting article 19. Among the other difficulties which have been noted by commentators are the problems of article 19(2)(a): would the passage of a naval force threatening the use of force against a third State be a "threat . . . of force . . . in violation of the principles of international law embodied in the Charter of the United Nations," and would the passage of a naval force intended to assist a government put down an insurrection which is regarded in the United Nations as an attempt by the people of the country concerned to wrest the right of self-determination from an unwilling government fall within that provision, in either case resulting in the loss of innocence and possible political pressure on coastal States to attempt to prevent the passage? At what point, for instance, do monitoring coastal installations and broadcasts, soundings on the seabed or the testing of the salinity or temperature of the water amount to the collection of information to the prejudice of the defense or security of the coastal State, or to research or survey activities, proscribed by paragraphs (c) and (j)? Is the towing of a military device such as a towed sonar array, put overboard before entry into the territorial sea and taken aboard after

leaving the territorial sea, caught by paragraph (f)? And what "activities" are comprehended by paragraph (l)?: the movement of missiles onto launchers, or shadowing foreign submarines, or monitoring the seabed for military devices which might be emplaced there? Do proscribed activities automatically deprive passage of its innocence, even if there is no actual prejudice to the peace, good order or security of the coastal State?

Here, as elsewhere in this paper, the response may be given that there was a clear understanding at UNCLOS III as to the interpretation which is to be given to the terms of the 1982 Convention. This is a perfectly adequate justification for the approach taken in the *Handbook*, which was not drafted as a watertight legal document but as an operational guide. But this is not an entirely adequate response to the problem of coping in practice with the complex underlying legal questions which might be raised by States determined to hold to interpretations of the law diverging from those held by the United States.

Many of the provisions of the 1982 Convention, among them article 19, are finding their way into national legislation.[41] There is a real possibility that the interpretation of such national laws by national agencies, inevitably colored by the canons of interpretation applied in the relevant legal systems, may diverge from the interpretation of the 1982 Convention. Moreover, political considerations may induce States to interpret the words of the Convention itself in a manner different from that contemplated during the conference which spawned it—and if the world has learned anything from the U.S. legal system and its most skillful practitioners, it has surely learned that an agreement may be used ruthlessly against parties who neglect to ensure that the agreement actually says what they wanted it to say, and says no more. Most important, the underlying argument throughout this contribution to the debate is that States do differ in their interpretations of the law, and consequently the law is not always so clear and precise as to produce certainty, either concerning the rights and duties of the United States Navy or the likely attitudes and reactions of other States to the use of their waters by United States forces. This lack of certainty demands a certain circumspection in the exercise of the more controversial rights. It was, after all, the vigorous assertion by Libya of a claim to historic waters in the Gulf of Sirte, which most States would have regarded as wholly without legal merit, which produced fatal armed clashes with United States forces.

There are two further points concerning innocent passage to be made. The first concerns the statement in the *Handbook* that innocent passage may be temporarily suspended in specified areas of the territorial sea when this is essential for the protection of the security of the coastal State.[42] That statement is consistent with the provisions of the conventions,[43] and with the position taken by the United States in protesting against attempts by Libya to close certain areas of its territorial sea permanently.[44] It sits less happily

with State practice, which contains several examples of laws which have purported permanently to forbid navigation in specified areas adjacent to military dockyards and installations.[45] In practice, such claims do not appear to have given rise to international incidents; pragmatism and prudence may have prevailed over principle.

It may seem strange to leave until last the fundamental question, whether warships enjoy the right of innocent passage at all. The well-known controversy over this question has been debated at length over the years since Elihu Root, sometime Secretary of State of the United States, addressed to the arbitral tribunal in the *North Atlantic Coast Fisheries* case his much-quoted (and subsequently, no doubt, much regretted) remark concerning the territorial sea: "Warships may not pass without consent into this zone, because they threaten. Merchant ships may pass and repass because they do not threaten."[46] In essence, his argument was that because warships are inherently threatening to the coastal State they are inherently non-innocent and outside the scope of the right of innocent passage. Many States adopt a similar position. Nine or so require prior notification as a condition of passage, and a further twenty-eight or so require prior authorization, the States concerned being drawn from all the major power blocs and regions.[47] This position is not, however, the one taken by major maritime States such as the United States and the United Kingdom, both of which assert a right of innocent passage for warships without prior notification or authorization. Nonetheless, few international incidents have occurred, largely because of the *practice* of giving low-level and informal notice of passage on the occasions when naval vessels are sent into the territorial seas of States requiring notification or authorization, which may be followed by a purported "authorization" not sought by the passing ships: such ambiguous procedures save honor on both sides.[48] Important as the controversy is as an academic matter, in practice the world has lived more or less happily with the contradictory interpretations of the law now for many years, and the assertion of the right of innocent passage for warships in the *Handbook*[49] is unlikely to upset this *modus vivendi*.

One of the most critical elements in the package deal worked out at UNCLOS III was the safeguarding of rights of passage through strategic straits and archipelagic sea lanes in return for the acceptance of extended coastal State territorial seas and jurisdiction over the economic resources of the seas off their coasts. The parts of the *Handbook* dealing with rights to transit such waters are therefore of particular importance.

The 1982 Convention itself establishes a right of transit passage through international straits and a substantially identical right of archipelagic sea lanes passage through archipelagic sea lanes, which are much broader than the rights of innocent passage enjoyed in the territorial sea.[50] Transit passage and archipelagic sea lanes passage do not depend upon a showing of "innocence;" they include a right of overflight, which does not exist over the territorial

sea; they appear to allow submerged passage by submarines, which is forbidden in the case of innocent passage; and they impose strict limitations upon the regulatory competence of the coastal State over ships exercising the rights of passage. Here the status of the 1982 Convention is of critical importance. Iran, for example, has stated that the right of transit passage is "contractual," existing only for parties to the 1982 Convention, and presumably only once the Convention enters into force.[51]

There is little support evident for the Iranian position, and much that can be said against it. It is not the view taken in the *Handbook* or by the major maritime States. Thus, when the United Kingdom extended its territorial sea to twelve miles in 1987, it announced, albeit without using the term "transit passage," that rights equivalent to those established under the conventional transit passage regime would be accorded to ships sailing through the Straits of Dover and certain other straits around the United Kingdom.[52] Moreover, it is arguable that rights wider than the right of innocent passage existed through international straits under customary international law even before the adoption of the 1982 Convention. In support of this view it has been said that transit through and overflight of certain key straits such as Gibraltar has long been conducted in a manner which, like transit passage itself, is more akin to high seas freedom of navigation than to innocent passage. Furthermore, it might be said, this earlier practice offers an explanation for the rapid acceptance of the transit passage provisions into the Law of the Sea Convention and, perhaps more significantly, for the inclusion in the 1979 Treaty of Peace between Egypt and Israel of a right of "unimpeded and non-suspendable freedom of navigation and overflight" for all States through the Straits of Tiran and Gulf of Aqaba.[53]

Against this view it must be said that the evidence on passage through straits is by no means always clear. For instance, in the case of the Straits of Gibraltar, until the 1980s the United States recognized only a three mile territorial sea and accordingly acted on the basis that there was a high seas corridor through the strait—an assumption which, if correct, would render the exercise of freedoms of navigation and overflight through the strait uncontroversial, and preclude the counting of that practice towards the establishment of a right to exercise such freedoms through straits constituted entirely by the territorial seas of the littoral States. It should also be noted that several littoral States have stated that they do not recognize the right of transit passage in customary international law. The 1971 Declaration made by Indonesia, Malaysia and Singapore is but one among many examples.[54]

Moreover, there are certain technical problems with the view favoring the wider right. It is difficult to see how States such as the United States and United Kingdom, parties to the 1958 Territorial Sea Convention which, in article 16(4), gives merely a non-suspendable right of innocent passage through international straits, can claim wider rights as against other parties,

such as Malaysia and Spain, which border international straits. This problem is exacerbated by the fact that the 1958 Territorial Sea Convention contains no provision for its termination or denunciation, and the United Kingdom has recorded the view (in relation to a purported denunciation by Senegal of, among others, the Territorial Sea Convention) that denunciation is not possible.[55] There is, therefore, some difficulty in explaining how the parties to the Territorial Sea Convention can escape the restrictive rights of passage through straits which that Convention sets out.

It might be argued that only where a treaty intends to exclude wider customary law rights can the latter be curtailed by a restrictive treaty provision, and that this is not the case in relation to the law on passage through straits. But the difficulty of adducing unequivocal evidence to sustain claims to a customary law right analogous to transit passage or freedom of navigation through international straits which pre-dates the transit passage provisions of the 1982 Convention must cast serious doubts upon the legal validity of such claims. The better course is to argue that the transit passage provisions have passed into customary law since their elaboration at UNCLOS III so as to modify the pre-existent treaty rights under the 1958 Convention, and to seek to establish that position on the basis of State practice, including the assertion of such rights by the United States Navy, among others.

The most plausible explanation of this process might lie in the doctrine of desuetude, or disuse. It is said that for desuetude to operate, four requirements must be satisfied: 1) frequently repeated violations of the treaty, 2) which are imputable to a government and not merely to individuals, and 3) which have no reasonable explanation (other than as a violation of the treaty), and 4) which have not been negated by the protests of the injured party.[56] It is not clear, however, that the body of action and acquiescence is yet sufficiently persuasive to justify the conclusion that the provisions of the 1958 Convention have been swept away. It may be unwise to seek to force modifications of treaty rights which States appear willing to accept within any doctrinal straitjacket. The United Kingdom at one stage rejected the validity of archipelagic baselines claimed by Indonesia, another party to the Territorial Sea Convention, but it would now accept the validity of such baselines drawn in conformity with the provisions of the 1982 Convention. This position should perhaps best be seen as illustrating either the proposition that treaty obligations can be modified, with the agreement of the parties, by subsequent changes in customary law, or the proposition that States can choose to waive violations of their treaty rights. Whether this should be described as an application of the doctrine of desuetude, or as a consensual modification of treaty rights, or as some other form of development in the law, is less important than the fact of the change. If rights of transit passage are asserted often enough, and are not seriously challenged, such rights will become established in law.

If the claim is accepted that customary law includes a right similar to the conventional right of transit passage, further problems concerning transit passage remain. The *Handbook* states that the right of transit passage obtains in "straits used for international navigation through the territorial sea between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone."[57] There is nothing wrong with that statement, which follows the wording of article 37 of the 1982 Convention. The problem lies in determining what it means in practice, and the *Handbook* offers no guidance. Differences have arisen between the United States and other States over whether a particular strait falls within the category of "straits used for international navigation." For example, the United States has argued that the Northwest Passage through the Canadian archipelago is an international strait, but Canada has contested this, arguing that the waters in question are historic internal waters through which passage is subject to Canadian control and regulation. It might also be argued that the volume of traffic through the strait is so small as to disqualify it from the category of straits used for international navigation.[58] In such cases the account of transit passage given in the *Handbook* is of limited value: the critical factor is the political decision on the vigor with which the United States wishes to press its view and assert the rights which it claims in relation to such disputed straits.

Despite the admirable clarity of the definition of transit passage in the 1982 Convention, there are difficulties in determining its precise scope, highlighted by the manner in which the relevant rules are presented in the *Handbook*. The assertion that submarines may transit submerged[59] is commonly accepted, although this right is not spelled out in the 1982 Convention. It is an inference, albeit a reasonable one, from article 39(1)(c) of the 1982 Convention, which requires passing vessels to refrain from activities other than those incident to their "normal modes of continuous and expeditious transit" which, it is said, can only mean that submarines may transit submerged. More troublesome is the statement that warships may engage in "formation steaming and the launching and recovery of aircraft."[60] Formation steaming might be acceptable as a normal precaution for the security of the vessels concerned, but the 1982 Convention is silent on the question of launching and recovering aircraft. The right of overflight alone does not seem sufficient warrant for such activities, which are markedly different in nature from overflight between points lying outside the territorial sea of the littoral States, and the justification must be found in the nature of the right of transit passage itself. Whatever understandings may have been reached at UNCLOS III, these aircraft rights are not included in the Convention's actual provisions, and their validity will turn largely upon their unopposed exercise in practice, constituting an "agreed interpretation" of the Convention for the parties and a rule of customary law for non-parties.

It should also be noted that there is some doubt as to whether it is true in all circumstances that transit passage may not be suspended for ships engaged in armed conflict with a third State.[61] It is certainly true that the right of transit passage does not depend upon any criterion of innocence. However, it is stated, in article 38(3) of the 1982 Convention, that "[a]ny activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of this Convention." This raises the question, what "activities" put a vessel outside the scope of transit passage? At one extreme, it might be argued that *any* activity other than continuous and expeditious transit of the strait would have this effect. On the other hand, the duty of vessels engaged in transit to refrain from the threat or use of force against the littoral States is not included as an element of the definition of the right of transit passage in article 38, but as an ancillary duty in article 39 of the 1982 Convention, thus suggesting that there are activities other than mere transit which, though unlawful, do not deprive the passage of its transit character. Here again, the correct interpretation of the law will have to be constituted by State practice.

Undoubtedly, the major naval powers will choose to see transit passage as a right close to the high seas freedom of navigation, and will tend to argue that whatever a vessel in transit through the strait might do while it is in transit the right of passage cannot be denied, and any complaint of unlawful behavior must be pursued through the normal channels for settling international disputes. Of course, a vessel not engaged in transit but, say, deliberately stationed at anchor in the strait (the anchoring not being incidental to its passage) would fall outside the right of transit passage; and because it would by definition be in the territorial sea it would fall under the rules applicable to that zone, including the rules allowing the coastal State to use reasonable force to prevent non-innocent passage.

The foregoing remarks on transit passage apply equally to the provisions in the *Handbook* concerning the right of archipelagic sea lanes passage.[62] A further problem arises from the position taken by the Philippines, which stated on signature of the 1982 Convention that

> The provisions of the Convention on archipelagic passage through sea lanes do not nullify or impair the sovereignty of the Philippines as an archipelagic State over the sea lanes and do not deprive it of authority to enact legislation to protect its sovereignty, independence, and security.
>
> The concept of archipelagic waters is similar to the concept of internal waters under the Constitution of the Philippines, and removes straits connecting these waters with the economic zone or high sea from the rights of foreign vessels to transit passage for international navigation.[63]

One of the main aims of the provisions on archipelagic sea lanes passage was, of course, to "impair" the sovereignty of the littoral State, in the sense of limiting the right of the State to impose its laws on or restrict the movements of passing ships, and to give such ships transit rights through the major

established international seaways crossing the archipelago substantially identical to transit passage rights; and there is no doubt that this is precisely what the 1982 Convention does. The Philippine position appears absurd, but it is not entirely devoid of a certain superficial plausibility. It is true that the 1982 Convention does not detract from the rights of any State to act in self-defense under the provisions of article 51 of the United Nations Charter, and there is no obvious reason why an archipelagic State party to the 1982 Convention should not enact legislation to that effect, so long as it does not attempt to regulate passage through the sea lanes in a manner inconsistent with the 1982 Convention provisions. That said, it is difficult to believe that the Philippine statement was seeking merely to establish this banal proposition. It is also true that in the section of the 1982 Convention dealing with straits, the transit passage provisions do not extend to straits connecting the high seas or EEZ with the territorial or internal waters of a State. Furthermore, the transit passage regime, *stricto sensu*, does not apply to passages through archipelagic waters, although the provisions on archipelagic sea lanes passage, which are very similar to the transit passage provisions, do so apply. But again, it is hard to believe that these rather inconsequential points motivated the Philippine statement. It is scarcely surprising that several governments have registered forceful objections to the Philippine statement, characterizing it as an attempt to evade the obligation to accord rights of archipelagic sea lanes passage to foreign ships and aircraft.[64] If nothing else, the declaration offers a fine illustration of the danger of States adopting tortured interpretations of the 1982 Convention whenever it might suit them to do so.

Apart from the question of Flight Information Regions and Air Defense Identification Zones, which fall outside the scope of this paper but which have led to serious controversy in the past,[65] there are three further matters in the second chapter of the *Handbook* which call for comment and which are not dealt with elsewhere in this paper: they are the establishment of closed areas of the high seas, and certain particular problems arising in the Arctic and Antarctic. The high seas point can be dealt with swiftly. The *Handbook* states that

> Any nation may declare a temporary closure or warning area on the high seas to advise other nations of the conduct of activities that, although lawful, are hazardous to navigation and/or overflight. . . . Ships and aircraft of other nations are not required to remain outside a declared closure or warning area, but are obliged to refrain from interfering with activities therein.[66]

Although it has sometimes been asserted that there is a right to close off areas of the high seas temporarily, using force to prevent the entry of foreign ships, the statement in the *Handbook*, based on the freedom to use the high seas with due regard for the interests of other high seas users, seems to this writer to

be as accurate as it is succinct, and to be an admirably clear expression of the prevailing law.

The passages concerning the Arctic and Antarctic will also appear unobjectionable to most readers. However, the view that there is a high seas freedom of navigation and overflight on, over, and under the waters and icepack of the Arctic would not pass undisputed by all States.[67] As was mentioned above, Canada, for instance, has claimed certain waters in the Canadian Arctic archipelago as historic internal waters—a claim which, if valid, would necessarily oust the high seas freedoms in the areas concerned. Similarly, the United States position concerning Antarctica is premised upon its refusal to recognize any of the territorial claims on that continent: such claims have been made by Argentina, Australia, Chile, France, New Zealand, Norway, and the United Kingdom. In practice, however, international cooperation over the management of Antarctica has been and continues to be remarkably successful, and there is little danger of any serious international difficulties arising from the non-recognition of the various claims.

3. Protection of Persons and Property at Sea. From this point onwards in the *Handbook*, matters become much less clear. In most cases, where "pure" law-of-the-sea questions become enmeshed with questions concerning the legality of the use of force to protect persons, property or rights, one is faced with an array of possible justifications, one shading off into another so imperceptibly that it is often of little practical value to seek to determine the limitations of any particular justification. This is particularly true of the right of self-defense. It must be said at this point that the present paper does not attempt an exhaustive analysis of this unsettled area of the law. Such a task demands a paper in itself. With that proviso, an attempt is made in the following paragraphs to identify the main areas of controversy.

The first such area arises in the context of piracy. The *Handbook* gives a plain account of the rules on the repression of piracy, adhering for the most part to the wording of the relevant provisions of the 1958 High Seas Convention and the 1982 Law of the Sea Convention.[68] Thus, piracy is confined to cases of illegal acts of violence, detention or depredation committed for private ends by the crew or passengers of a private ship or aircraft in or over international waters against another ship or aircraft or persons and property on board. Specifically excluded from this definition are cases of mutiny and passenger hijacking, which do not constitute piracy because they do not involve acts committed by one ship or aircraft against another.[69] The definition is a matter of international law. Individual States may choose to enact municipal legislation describing hijackings as "piracy," but such acts would not constitute piracy as a matter of international law and so would not be subject to the exceptional jurisdictional rules allowing

any State to seize pirate ships on the high seas.[70] This point is considered further below.

This scrupulous adherence to the terms of international conventions breaks down in the provisions concerning the pursuit of pirates. The *Handbook* states categorically that

> Pursuit of a pirate vessel or aircraft through or over international straits overlapped by territorial waters or through or over archipelagic sea lanes may proceed with or without the consent of the coastal nation or nations, provided the pursuit is expeditious and direct and the transit passage rights of others are not unreasonably constrained in the process.[71]

This view is probably based on the understanding that the *purpose* of transit or archipelagic sea lanes passage is irrelevant to its legality, and that only the *manner* of such passage is so relevant. That interpretation may draw support from the ruling of the International Court of Justice to similar effect in the context of innocent passage in the *Corfu Channel* case.[72] Nonetheless, it does not necessarily overcome the objection that pursuit may constitute an "activity" additional to mere passage which would, under articles 39(1)(c) and 54 of the 1982 Convention, take the pursuing ship outside the scope of transit or archipelagic sea lanes passage. The United States view is, presumably, that pursuit is not another "activity" and that it does not result in the loss of transit rights. But if that be so, it is not immediately apparent why the same claim to a right to pursue through straits and archipelagic sea lanes is not made in the context of hot pursuit. The part of the *Handbook* dealing with that topic, however, states that the right of pursuit ceases as soon as the ship pursued enters its own or a third State's territorial sea.[73] While it may be thought that no State could wish to object to the pursuit of pirates, as the common enemies of mankind, some coastal States may yet be jealous of their sovereignty. If that point is unsettled, it is perfectly plain that the pirate vessels may not be *seized* in or over territorial or archipelagic waters. Such seizure would, if committed without the consent of the coastal State concerned, undoubtedly violate that State's sovereignty, and it is unfortunate that the *Handbook* does not make this clear.

As was noted above, the definition of piracy excludes mutinies and passenger hijackings. However, as the *Handbook* notes in a later section,

> International law, embodied in the doctrines of self-defense and protection of nationals, provides authority for the use of proportionate force by U.S. warships and military aircraft when necessary for the protection of U.S. flag vessels, U.S. citizens (whether embarked in U.S. or foreign vessels), and their property against unlawful violence in international waters.[74]

That claim, evident in the United States' action in the *Achille Lauro* affair,[75] puts in issue the current ambit of the right of self-defense and allied rights. Although the right to use force in peacetime to protect national flag vessels might be well established, the use of force to protect nationals on foreign

flag ships is much more controversial.[76] The *Handbook* notes the primary responsibility of the coastal State in internal, archipelagic and territorial waters for the protection of all persons and vessels lawfully within its territory, and cautions against interference with the exercise of jurisdiction by such coastal States.[77] But even in relation to action on the high seas or in the EEZ, it is at the very least arguable that forcible action to protect U.S. citizens on foreign flag ships cannot lawfully be taken unless the flag State concerned has requested or consented to such use of force, or is in violation of its duty to take all reasonable steps to secure the safety and release of the victims, or immediate action is required to protect human life. Indeed, those criteria are quite properly set out in the *Handbook* as governing the use of force to protect foreign flag vessels and foreign persons.[78]

The *Handbook* is, understandably, somewhat reticent on the detailed rules concerning the use of force to protect U.S. interests. It refers to the peacetime rules of engagement, which are "carefully constructed to ensure that the protection of U.S. flag vessels and U.S. citizens and their property at sea conforms with U.S. and international law and reflects national policy."[79] It may be that those rules of engagement impose strict limitations on the circumstances in which such protection is to be forcibly asserted. Without sight of them, there is little more that can be said by way of a critique of the position adopted in the *Handbook*.

4. Safeguarding of U.S. National Interests in the Maritime Environment. The fourth and final chapter in the part of the Law of Peacetime Naval Operations sets out the obligations under the United Nations Charter to use peaceful means to settle international disputes and to refrain from the threat or use of force against the territorial integrity or political independence of States or in any other manner inconsistent with the purposes of the United Nations, with the exception of the right to use force in self-defense preserved by article 51 of the Charter. It also emphasizes the requirements of necessity and proportionality which attend the use of force in self-defense.

The scope of the right of self-defense is, of course, one of the most debated issues in contemporary international law, and the comments offered here do not approach an exhaustive nor even comprehensive survey of the subject. As the debate continues, the tendency is for official formulations of the doctrine to retreat into the Delphic wisdom of the *Caroline* formula, and the *Handbook* is no exception to this tendency. Self-defense is dealt with in three paragraphs.[80] The first sets out the right in general terms, and cites a number of examples of protective action "premised on the broader principle of self-defense," among them the Cuban quarantine of 1962; the second lays claim to a right of anticipatory self defence; and the third, in effect, says that all the important rules are to be found outside the *Handbook*, in the peacetime Rules of Engagement.

The first of these paragraphs raises the question of the kinds of action justified under the doctrine of self-defense. The Cuban quarantine focused attention on the difficulties of using self-defense against threats which are neither threats of the use of armed force, nor threats of immediate and unlawful injuries to a State. Indeed, as Abram Chayes recalls in his excellent study of the Cuban Missile Crisis, even within the United States administration there were considerable misgivings concerning the applicability of the doctrine in that context, and attempts were made to rest the justification of the action on the supposed "authorization" of the action by the Organization of American States.[81] These difficulties have been increased by the decision of the International Court in the *Nicaragua* case, in which the majority (in passages open to serious criticism) appeared to hold that the right of self-defense exists only in the face of an armed attack, and not acts which do not amount to an armed attack.[82] It is inconceivable that the Court which delivered the *Nicaragua* judgment should have held the Cuban quarantine to be a lawful exercise of the right of self-defense. The *Handbook*'s assertion that the quarantine "has been widely approved as a legitimate exercise of the inherent right of individual and collective self-defense" may be true.[83] It is also true, but not stated, that the quarantine has been widely criticized as failing to meet the requirements for the invocation of that doctrine, and that such criticisms have received powerful support from the *Nicaragua* judgment.[84]

It requires but little prescience to see that, post-*Nicaragua*, States are likely to place greater reliance on the right of *anticipatory* self-defense, consideration of which was expressly excluded from the International Court's judgment in that case.[85] Although reputable commentators have questioned the existence of a right of anticipatory self-defense, their views are bewildering. One wonders what, exactly, they think defense is. Certainly, the idea that an attack must be suffered before a right of defense arises makes no sense. It is not the preceding attack that justifies the use of force, for that would be an essentially punitive response. The justification lies in the use of force to ward off a continuation of the attack, or further attacks. In that sense, the existence of an actual attack can have only an evidential role, putting beyond doubt the hostile intent of the aggressor. But if that intent can be otherwise established (as it must be if anticipatory action is to be lawful, since the right is one of anticipatory self-defense, not preemptive attack), there seems no earthly reason why the right of self-defense cannot be invoked. Regrettably, but for obvious reasons, the *Handbook* does not detail the circumstances in which hostile intent will be presumed by the United States Navy. Such matters are dealt with in the Rules of Engagement. There is little point in speculating on what those rules might be. However, it may be helpful to offer three general comments.

First, the *Handbook* follows the *Caroline* formula and requires that there be a "clear necessity that is instant, overwhelming, and leaving no reasonable choice of means."[86] The word "reasonable" is important. It is difficult to believe that Professor O'Connell was right in suggesting that "in the exercise of sea power one must expect to sustain an initial casualty before going into action under the cover of self-defense."[87] Such an attitude towards the determination of hostile intent cannot in all circumstances be realistic. If, for instance, the "initial casualty" suffered by the United Kingdom in the Falklands conflict had been one of its aircraft carriers, it is quite possible that the British action would have had to be aborted. If losing an initial casualty means losing the conflict, the right of self-defense can only mean that there is a right to use force to avert the initial casualty.

Second, the difficulty of establishing proportionality in the context of self-defense should be noted. To return to the Falklands example, the threat presented by the *General Belgrano* itself to the British fleet was limited; the threat presented by the entire Argentinian Navy was considerable. If sinking the *General Belgrano* was arguably a disproportionate response to the threat which it alone presented, could it not be argued also that the sinking was an economical and proportionate use of force to avert the threat presented by the entire Argentinian Navy (which did not, indeed, further threaten the British task force after the sinking)? Proportionality would be a beautifully clear test, if only it were clear what has to be counted in establishing the proportions.

A third, and related, point is that the right of anticipatory self-defense may exist in circumstances which appear close to reprisals. For example, the attack by the United States on an Iranian oil platform on October 19, 1987, three days after the United States merchant ship *Sea Isle City* had been hit by an Iranian missile, appears at first sight to be an act of reprisal, since the attack on the *Sea Isle City* (and other vessels around the same time) was over and done with. But here, as in other circumstances where there is a "pinprick" pattern of repeated attacks, each relatively limited in scope, it is surely legitimate to take action in order to avert future attacks of the same kind if (and only if) satisfactory evidence of the likelihood of future attacks can be adduced.[88]

The situation in the Gulf underlines the swiftness with which States can move from a situation of dealing with isolated violations of their rights to outright armed conflict. One of the most important passages in this chapter of the *Handbook* is the observation that, "[i]n recent years . . . the concepts of both 'war' and 'peace' have become blurred and no longer lend themselves to clear definition. Consequently, it is not always possible, or even useful, to try to draw neat distinctions between the two."[89] That observation is critical to an understanding of the significance of the second part of the

Handbook, which deals with the Law of Naval Warfare, and to that part attention will now be turned.

The Law of Naval Warfare

5. Principles and Sources of the Law of Armed Conflict. Nothing which is said subsequently must be allowed to detract from one crucial point which goes to the very heart of the defensibility of all of this part of the *Handbook*. Put simply, it is by no means clear that the traditional Laws of War retain their validity today. This point arises clearly in chapter five, which details the principles and sources of the "Law of Armed Conflict." The statement of principles, based on the use of minimum force and the distinction between combatants and non-combatants, is unremarkable. The statement of the sources from which those principles are distilled raises one of the most important controversies in contemporary international law.

The customary Law of War is treated with appropriate caution:

> It is frequently difficult to determine the precise point in time at which a usage or practice of warfare evolves into a customary rule of law. In a period marked by rapid developments in technology, coupled with the broadening of the spectrum of warfare to encompass insurgencies and state-sponsored terrorism, it is not surprising that nations often disagree as to the precise content of an accepted practice of warfare and as to its status as a rule of law. This lack of precision in the definition and interpretation of rules of customary law has been a principal motivation behind efforts to codify the law of armed conflict through written agreements (treaties and conventions).[90]

It is the reference in the last sentence to treaties and conventions which gives rise to difficulty. The *Handbook* proceeds to list the principal international agreements "reflecting the development and codification of the law of armed conflict." The list is headed by certain of the Hague Conventions of 1907,[91] which exemplify the traditional Laws of War. None of those Hague Conventions has more than about one-fifth of the States which presently constitute the world community as parties, and many of the parties have entered reservations to parts of those Conventions; and although there are isolated examples of States notifying in recent years the continued applicability of some of them,[92] there must be considerable doubt as to the extent to which the Conventions represent current law.

These doubts arise from a number of specifically legal considerations (quite apart from the doubts created by technical developments in weaponry and from widespread failures to comply with some of the supposed rules, such as those in the 1936 London Submarine Protocol)[93] which are familiar and can be briefly stated. First, there is the argument that since the outlawing of the use of force by the United Nations Charter, no state of "war" can lawfully arise. Accordingly the criterion for the applicability of the Laws of War cannot be met, the legality of all uses of force henceforth being judged by reference to the terms of the Charter. The *Handbook* disposes of this

argument by stating that "[w]hether or not resort to armed conflict in a particular circumstance is prohibited by the United Nations Charter (and therefore unlawful), the manner in which that armed conflict is conducted continues to be regulated by the law of armed conflict."[94] That proposition might command widespread assent, but does not wholly resolve the argument. Some of the provisions of the Hague Conventions, and rather more of the traditional customary Law of War, cannot easily be reconciled with the Charter. For example, article 1 of Hague Convention XI concerning the right of capture in naval war assumes the legality of the blockade of ports. On the other hand, the United Nations has taken the view that blockade constitutes an act of aggression, and that no consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.[95] Blockade could only be justified as an act of self-defense, but in that case the requirements of necessity and proportionality inherent in the doctrine of self-defense create substantial problems for the interdiction of third-State shipping by means of blockade.[96] Plainly, the Laws of War must be read in the light of the Charter, and the Charter itself requires that it prevail in the case of any inconsistency between them.[97] Only uses of force authorized by the United Nations or kept within the confines of the right of self-defense are lawful, and the rights and duties of States under the traditional Laws of War must be regarded as having been modified accordingly.[98]

The second consideration is that the Laws of War, as will be seen, conflict in many particulars with the rules set out in the 1958 and 1982 conventions on the Law of the Sea.[99] This conflict arises even at the most general level. Article 88 of the 1982 Convention reserves the high seas (and, by virtue of article 58, the EEZ) for peaceful purposes. Article 301 of the Convention requires States using the seas to refrain from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations. The combined effect is no more, and certainly no less, than to tie the legality of uses of the seas to compliance with the constraints on the use of force under the Charter. The natural inference is that the use of force, whether or not authorized under the Laws of War, could only be lawful under the 1982 Convention to the extent that it is justifiable under the Charter—*i.e.*, for practical purposes in this context, justifiable according to the rules on self-defense, embodied in article 51 of the Charter.

This in turn raises the question whether the 1982 (or 1958) conventions apply in case of armed conflict. While none of the 1958 conventions on the Law of the Sea expressly so provide, it is true that the International Law Commission, which prepared draft articles on the subject for consideration by the Geneva Conference, intended the articles to apply in time of peace.[100]

The 1982 Law of the Sea Convention is similarly silent, although here, too, it was understood that the Conference was concerned with the peacetime Law of the Sea. If the rules on self-defense are regarded as governing all uses of force, no problem arises, since the right of self-defense will (almost) always, as a matter of law, allow the use of force in violation of treaty obligations.[101] But if the Law of War is regarded as still operative, there arises the considerable problem of knowing when the peacetime conventional rules are overridden by the Law of War. This problem might be answered for practical purposes for the U.S. Navy by the invocation of the wartime rules of engagement,[102] but this does not dispose of the legal question: might the wartime rules of engagement, as a matter of international law, be incorrectly invoked?

That said, it must be admitted that the United States is not alone in referring to the old Laws of War as still operative.[103]

The significance of these issues can be illustrated with a single example. The traditional Law of War allows neutral coastal States to deny belligerents passage through the territorial sea. The 1958 and 1982 Conventions give a right of innocent passage, and even though that right may be suspended temporarily for security reasons, such suspension may not discriminate in fact or form between foreign ships.[104] May a coastal State deny passage to belligerent ships, but not to non-belligerent foreign ships? If so, at what point does the right to override the provisions of the Law of the Sea conventions arise, in cases where there is no express declaration of war or recognition of belligerency? Does it make any difference if either or both (or all) of the belligerents claim to be using force in self-defense, and does it further modify the position if the coastal State, or States generally, or the United Nations, or the International Court, have recognized that such claims of self-defense are legally valid? Would the coastal State's rights to suspend passage be any different if it sought to justify its own action under the rules of self-defense—would that permit a discriminatory denial of passage to the belligerents alone? There are no easy answers to such questions, and no answers at all which do not depend in large measure upon the position which is adopted concerning the relationship of the United Nations Charter, the Laws of War, and the peacetime Law of the Sea.

It is, moreover, apparent that there is no settled international consensus upon what that relationship might be. The issue is rarely addressed directly, but divergences in States' views may be inferred from their practice. To take one further example to contrast with the approach adopted in the *Handbook*, in the recent Iran-Iraq conflict, the United Kingdom clearly tied the question of the legality of the practice of the belligerent States in visiting and searching neutral flag merchant ships in the Persian/Arabian Gulf to article 51 of the United Nations Charter:

> [U]nder article 51 of the United Nations Charter a state such as Iran, actively engaged in an armed conflict, is entitled in exercise of its inherent right of self defence, to stop and search a foreign merchant ship on the high seas if there is reasonable ground for suspecting that the ship is taking arms to the other side for use in the conflict. This is an exceptional right: if the suspicions prove to be unfounded and if the ship has not committed acts calculated to give rise to suspicion, then the ship's owners have a good claim for compensation for loss caused by the delay.[105]

The language is permeated by the essence of self-defense: the particular ship must be suspicious; the suspicion must be one of carrying arms; and, must be one of carrying them to the other side. The right of action is tightly bound by the requirements of necessity and the imminence of the threat against which the State is defending itself.

Contrast that statement with the approach adopted in the *Handbook*:

> Visit and search is the means by which a belligerent warship or belligerent military aircraft may determine the true character (enemy or neutral) of merchant ships encountered outside neutral territory, the nature (contraband or exempt "free goods") of their cargo, the manner (innocent or hostile) of their employment, and other facts bearing on their relation to the armed conflict.[106]

The whole approach is quite different, the *Handbook* not ruling out the systematic, precautionary visit and search of foreign merchant ships. Indeed, the two passages illustrate what appears to be a significant difference between the approaches of the United States and the United Kingdom. Both in the Falklands conflict in 1982 and in its reactions to the recent Gulf conflict, the United Kingdom has striven to avoid any recourse to the language of the traditional Law of War or any other suggestion that those rules are applicable, and has sought to pin all questions of the legality of armed action to the doctrine of self-defense under article 51 of the Charter. The *Handbook*, on the other hand, freely uses the vocabulary of the Laws of War and appears to admit a considerable role for the traditional law.[107] If NATO has not yet attempted to resolve such differences, which could crucially affect the feasibility of joint NATO action in contexts such as the Gulf conflict, it should attach a high priority to doing so.

The remaining comments upon this second part of the *Handbook* must be understood against that background. The comments are made, for the most part, on the assumption that the United States' perception of the role of the Laws of War is correct, although that position is not one which commends itself to the present author, who prefers the view that those laws must be read in light of the constraints on the use of force imposed by the United Nations Charter.

6. Adherence and Enforcement. Chapter six of the *Handbook* is concerned with the responsibility of States and individuals to comply with the Laws of War. The most notable provisions concern reprisal, defined as "an enforcement measure under the law of armed conflict consisting of an act which would

otherwise be unlawful but which is justified as a response to the unlawful acts of an enemy."[108] The legal status of reprisals involving the use of force is not wholly settled. The United Nations Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, adopted by the General Assembly in 1970 by consensus, provides that "States have a duty to refrain from acts of reprisal involving the use of force."[109] This is difficult to reconcile with the traditional right of belligerents to take reprisals. Perhaps the most satisfactory justification of armed reprisals is to be gleaned from a statement in the *Handbook* itself: "[t]he sole purpose of a reprisal is to induce the enemy to cease its illegal activity and to comply with the law of armed conflict."[110] Reprisals are, on this view, emphatically not retaliatory: on the contrary, they are essentially defensive, being aimed at the prevention of further actions in violation of the Laws of War against the State taking reprisals. They may be reconciled with the Charter by regarding them as an aspect of the doctrine of self-defense,[111] and accordingly they must be confined to the action necessary to avert a real and imminent threat, and proportionate to the magnitude of the harm threatened. The criteria for valid reprisals given in the *Handbook* are consistent with the traditional rules and with the account given here, with one exception.[112] It is said that the reprisal must be proportional to the original violation. That may be quite different from the proportion which it would bear to the harm threatened in the future, against which the proportionality of defensive action should be measured. For example, the shooting down without warning of a civil aircraft known to be carrying key enemy politicians might occur in circumstances which make it plain that only that aircraft and the politicians on it were regarded as a military target. There might be no threat of repetitions of the action, and in that case "reprisals" would not be justified under article 51 of the Charter. In fact, since the *Handbook* criteria specify that reprisal action must desist as soon as the enemy is induced to desist from its unlawful activities, this point is probably covered. Furthermore, the *Handbook* notes that the United States has historically been reluctant to resort to reprisal because of the risk of triggering retaliatory escalation, and that the National Command Authorities alone may authorize the taking of reprisal action.[113] It may therefore be expected that the obligation to confine action taken by way of reprisal within the limits of proportionality and necessity will be a paramount factor in deciding upon the permissibility of any proposed reprisal action.

7. The Law of Neutrality. The most complex questions concerning the Laws of War at sea arise in the context of what used to be called—and is still called by the *Handbook*—the Law of Neutrality. Here there is a direct confrontation between the demands or expectations of States not involved in the conflict that they be allowed to enjoy their peacetime rights, and on the other hand

the demands or expectations of the combatants that they be allowed to engage in operations necessary for the protection of their security and their other rights under international law. The position is complicated from the outset by the fact that, both under the United Nations Charter and under treaties of collective self-defense, States may be obliged to intervene in a conflict on behalf of one of the combatant States, and to that extent neutrality is not an option.[114] However, as experience in the recent conflict between Iran and Iraq shows clearly, there is still an important role for the institution of neutrality.

Chapter seven of the *Handbook* sets out an account of the rights and duties of neutral States, in what is for the most part a clear and concise restatement of the traditional rules. Thus, for instance, the "24-hour rule" in Hague Convention XIII, requiring that belligerent vessels be given a day to leave neutral ports at the outbreak of armed conflict, and the rule limiting the number of warships of any belligerent allowed to be in a neutral port simultaneously (absent special legislation by the neutral State) to three, are repeated here.[115] It was noted above that there are some doubts as to the continuing validity of these rules, and as to their applicability in a post-Charter world. But the remaining comments on this chapter will deal with broader issues, in which the conflict between the Law of Neutrality and peacetime rights and duties under the Law of the Sea is most apparent.

The problem of reconciling the traditional neutral right to close territorial waters to belligerent warships[116] with the duty to suspend innocent passage only on a non-discriminatory basis was remarked upon above, in the comments on chapter five of the *Handbook*. Other problems arise in the same context. One of the most important of these is the uncertain relationship between acts of passing vessels which deprive them of their innocence, and acts which violate the neutrality of the coastal State. It is not difficult to imagine circumstances where the "mere" passage of a belligerent warship steps onto the borderline between mere passage and the use of neutral waters as a sanctuary or base of operations, but without prejudicing the peace, good order or security of the coastal State. This may be true, for instance, in cases where the duration of passage exceeds 24 hours.[117] What is the coastal State to do? It may feel obliged to apply the peacetime rule, relying upon its rights to suspend innocent passage, to terminate non-innocent passage and to act in self-defense in order to safeguard its rights and interests. On this basis, it may feel obliged to permit what it regards as innocent passage. The other belligerent may regard a more protracted passage as a violation of coastal neutrality, and assert a right to engage in self-help enforcement actions in cases where the neutral State cannot or will not enforce its neutrality.[118]

In the absence of an authoritative determination of the point at which the peacetime rules yield to the Laws of War and Neutrality, the dangers of disputes arising between the "neutral" and "belligerent" States (use of the

terms begs the question) is only too apparent.[119] If the Laws of War and Neutrality are to be invoked, there is no obvious solution to this problem. If, on the other hand, the actions of combatant and neutral States are judged by reference to the rules of self-defense, the legal significance of the transition from peace to war is greatly reduced, and the position somewhat more certain. The coastal State's rights remain as stated above; but the belligerents may not use self-help in response to every uncorrected breach of neutrality, but only in response to those breaches which threaten some immediate injury to themselves.

The assertion of the right to engage in self-help enforcement actions is itself controversial.[120] Certainly, the judgment of the International Court in the *Corfu Channel Case* suggests that forcible self-help is unlawful in international law.[121] There is, indeed, very little evidence, outside the cases of the use of force to protect nationals (which are better regarded as instances of the use of force in self-defense), of the international community accepting the legality of self-help actions.[122] However, the applicability of the view to cases of the enforcement of neutral duties might be doubted. Castren, writing in 1954, took the same view as that taken in the *Handbook*. He wrote that "If . . . a neutral State has neither the desire nor the power to interfere and the situation is serious, other belligerents may resort to self-help."[123] The question only becomes relevant where combatants violate the neutrality of another State which in turn is unable or unwilling to prevent such violation, and is therefore unlikely to arise commonly. But if such extreme cases do arise, it seems probable that where military considerations demand it, States will not shrink from taking such action in self-help, no matter how dubious its legality. It should also be recognized that in some cases justifications for action might be made on the broad ground of self-defense.

Similar difficulties attend the attempts to justify the traditional rules on visit and search and blockade. Exercise of visit and search interferes with the freedom of navigation on the high seas and innocent passage through the territorial sea. At what stage in a conflict, and in what circumstances, do the conventional rights of visit (which, under the 1958 and 1982 Conventions, do not extend to visit and search for the purpose of interdicting supplies to the enemy) give way to the traditional belligerent right of visit and search?[124] As was noted above, the British view appears to be that each individual instance of visit and search must be justified as an exercise in self-defense, whereas the *Handbook* appears to contemplate systematic visit and search. Pragmatism suggests that the difficulties of determining the nature of cargoes carried by merchant ships should tend to support a right of systematic visit and search, but it must be admitted that this is difficult to reconcile with the normal navigational rights of neutral States under the 1958 and 1982 Conventions (and, of course, under customary law).

Associated with the question of visit and search is the troubled question of contraband. It is often observed that because the war effort of a country is so inextricably rooted in its general economy, the distinction between materials which contribute to the war effort and those which do not simply cannot be drawn with anything approaching clarity. There has been a steady move in this century towards the extension of the category of contraband. To speak of contraband consisting in goods "susceptible to use in armed conflict" hardly narrows the field significantly, as those who recall the collection of domestic saucepans and park railings for use by the armaments industry in World War II will attest.[125] And if the list of goods the export of which has been embargoed on security grounds under the United States Export Administration Act is anything to go by, the list of contraband goods will be a long one.[126] The *Handbook* specifies medicines, clothing, shelter and food, etc., for the civilian population and sick and wounded combatants as exempt from capture as contraband, provided there is not serious reason to suppose that such goods will be diverted for military purposes or will release other goods for military use and give the enemy a definite military advantage.[127] This might compromise the notion of contraband in abstract, since all such goods can contribute to the war effort. But the humanitarian considerations are rightly to the fore in these cases, and these are more likely to be secured by clear statements of the goods exempt from capture than by attempting to formulate a coherent and comprehensive definition of contraband.

Consideration of contraband leads naturally to a consideration of blockade. Here again, the foremost question is whether the legality of blockade must be referred to article 51 of the United Nations Charter, or whether there is a more general right for combatants to use this tactic. If article 51 is the crucial provision then the blockade must be mounted against an imminent threat—and under the rules set out in the *Nicaragua* case, an imminent threat of an armed attack. Precautionary blockades of the kind used in the Cuban Missile Crisis are not lawful. Reference of the question to the Laws of War raises the general issue of the persistence of those rules and of the manner in which the expectation of the continued enjoyment of freedom of navigation and innocent passage under the 1958 and 1982 Conventions is to be accommodated, and the determination of the point, if any, at which those conventions are overridden by the Laws of War. That question has taken on an added significance in the light of the International Court's ruling in the *Nicaragua* case that the mining of Nicaraguan ports by the United States infringed third States' freedom of communication and maritime commerce.[128] That said, the account of blockade given in the *Handbook*[129] is, in terms of the traditional Laws of War, unexceptionable. There are some debatable points, such as the old chestnuts as to whether a blockade can lawfully be mounted by mining alone,[130] and whether the prohibition in Hague

Convention VIII on the use of naval mines "with the sole purpose of intercepting commercial shipping" in effect prohibits the use of mines for blockade. But such questions seem devoid of substance today.[131] There can be little doubt that mines will be used for the purposes for which they are designed, which include the interdiction of shipping bound for enemy ports, and that such uses are unlikely to be challenged on the basis of an alleged incompatibility with the Laws of War—although challenges might be based on interference with the freedom of navigation established in the (peacetime) Law of the Sea.[132]

The final matter for discussion in this chapter is the section on belligerent control of the immediate area of naval operations.[133] Put briefly, the *Handbook* asserts a right to establish zones around naval operations from which neutral ships may be excluded, so long as such ships are not thereby denied access to international straits or to neutral nations, and within which neutral ships are subject to control by the belligerent naval commander; neutral ships not complying with orders in the zone, or engaging in activities benefitting the enemy (such as the carriage of contraband, or communicating military information) are liable to capture or destruction. Such zones were established by both sides in the Second World War, but it must be noted that they are different in nature and justification from exclusion zones of the kind established by the United Kingdom during the Falklands conflict. The latter did not purport to exclude neutral shipping; rather, ships therein were regarded as operating in support of the Argentinian occupation of the islands, and therefore hostile and liable to attack, unless the ships had obtained the consent of the British Government to transit the zone.[134] The zones were conceived as a means of dealing with the problem of determining the "hostile intent" of foreign ships which would justify the British Navy in using force in self-defense: mere presence in the zone constituted *prima facie* evidence of hostile intent. The legality of any action against Argentinian or other ships would by this view still have to be judged under article 51 of the United Nations Charter. War zones, on the other hand, claim to draw their validity from the Laws of War, and to the extent that action is taken in them which goes beyond the limits of lawful self-defense under article 51, their legality must be regarded as being at best highly controversial. The crucial provisions are likely to be found in the Rules of Engagement which supplement the account given in the *Handbook*.

8. The Law of Naval Targeting

9. Conventional Weapons and Weapons Systems

10. Nuclear, Chemical and Biological Weapons

11. Noncombatant Persons

12. Deception During Armed Conflict

The remaining chapters of the *Handbook* raise few issues relating specifically to the Law of the Sea, and will be dealt with briefly. Chapter eight includes a valiant attempt to salvage some sane and humanitarian rules from the 1936 London Protocol after the savagery of submarine warfare during World War II. However, the obligation to place the crew of a merchant ship in a place of safety before destroying it is one which favors States with large navies at their disposal, and despite all the honorable intentions of the drafters of the *Handbook*, one is left with the suspicion that this is likely to be one of the first provisions to disappear in the downward spiral of violation and reprisals which has characterized all the major wars this century. Furthermore, the exceptions which the *Handbook* admits, allowing attack without warning of, *inter alia*, armed merchant ships,[135] are likely to increase the danger to merchantmen. The arming of merchant ships may well be seen as a necessary and prudent step at an early stage in a conflict, especially if (as is the case in the recent Gulf conflict) merchantmen have been subjected to surprise attacks by light surface vessels.

Chapter nine contains some interesting remarks on naval mines. Modern influence mines do not, of course, come within the literal wording of Hague Convention VIII, but the *Handbook* applies the principles enshrined in the Convention to them by analogy. The view that controlled mines may be freely laid during peacetime in a State's internal, archipelagic or territorial waters, or on the high seas or EEZ (provided that they do not unreasonably interfere with other uses of the high seas or EEZ) without notification, because they do not constitute a hazard to navigation, is noteworthy.[136]

As far as international waters are concerned, this view is controversial. It might be argued that the sowing of controlled mines constitutes a threat of force, to be justified under article 51 of the Charter. Certainly, it is difficult to see the mining of international waters as anything other than a preparation for the threat or use of force, and such preparation may itself be regarded as an unlawful threat of force under article 2(4) of the United Nations Charter, although there may be some difficulty in identifying the State against which the supposed threat is made. Such mining may also conflict with the peacetime Law of the Sea. The sowing of controlled mines in the EEZ of another State in peacetime gives rise to the argument rehearsed above concerning the extent of third-State rights in the EEZ; and if mining is regarded as an "unattributed" right under the 1982 Convention, the legality of which falls for decision under article 59, it is unlikely that a claim to a right to lay controlled mines could be supported except in cases where self-defense provides a justification. The laying of controlled mines on the high seas, with the proviso stated in the

Handbook, may also conflict with the Law of the Sea. If the argument concerning the breach of article 2(4) of the Charter sketched out above is accepted, such mining would violate article 301 of the 1982 Convention, which requires States using the seas to comply with obligations expressed in wording which follows the terms of article 2(4). Technically, this could be important. It might be argued that breach of article 301 allows other States to suspend the operation of the Convention in relation to the defaulting State.[137] However, even if this argument were to be accepted, it is unlikely to give States rights against the defaulting State which they would not otherwise enjoy under the doctrine of self-defense, the right to prevent non-innocent passage, and so on.[138]

These objections have little force in relation to the mining of a State's own waters, since laying controlled mines may be seen as a defensive measure which the State is entitled to take. Any such mines must not in fact constitute a hazard. If there is any real risk of injury to shipping from a controlled mine, once the mine is armed, notification would be necessary. Mines could, moreover, only be sown in a manner which did not have the practical effect of denying to foreign ships such rights of passage as they might have in the waters in question.

Sowing armed mines is a different matter. Coastal States are certainly entitled to mine their own waters, subject to the duty to notify their location and not to hamper the exercise of the right of innocent passage except temporarily and in limited areas for security reasons. Mining international waters is a different matter. The International Court in the *Nicaragua* case characterized the mining of Nicaraguan ports as an infringement of the freedom of communications and of maritime commerce, and condemned the failure to notify the existence of the minefields as a breach of the principles of humanitarian law.[139] It did not decide that the use of mines in peacetime as a measure of self-defense is *per se* unlawful. The statement in the *Handbook* that international waters may be mined before the outbreak of armed conflict only under the most demanding requirements of individual or collective self-defense, and subject to prior notification of the location and the anticipated date of removal, appears justifiable. Indeed, the tone of the passage in the *Handbook* is markedly more restrained than an earlier State Department paper on the subject.[140] If the threat or use of force implicit in the mining is justified on the grounds of self-defense, prior notification is given, and the areas mined are not so extensive or so important to third-State navigation as to amount to an unreasonable restraint on the freedom of navigation, then the mining of international waters should be regarded as a lawful use of the high seas.

The account of the legal limitations on mining in wartime, which follows closely the terms of Hague Convention VIII, is not controversial.[141] It will be noted that the *Handbook* regards the emplacement of nuclear mines on the

seabed beyond the territorial sea as prohibited by the Seabed Arms Control Treaty.[142]

By the time the lawyer gets to chapter ten, which deals with weapons with an unusual potential for causing indiscriminate and unnecessary suffering, he or she is likely to feel that the time for legal debate is fast drawing to an end. Experience of the wars since 1945 offers little encouragement to those who try to preserve in war at least the basic moral and humanitarian values, in whose name so many wars are fought. The prohibitions on the first use of lethal chemicals, and the use of biological weapons, are soberly recited, as is the prohibition on the targeting of civilian populations with nuclear weapons. The latter, in particular, will warm the hearts of those who find the targeting of enemy cities with long-range nuclear missiles morally repugnant and legally indefensible. The legality of the use of nuclear weapons against enemy combatants is, however, affirmed. Apart from expressing the fervent hope that these provisions remain of academic interest, and that some thought has been given as to ways of preserving in practice the distinction between combatants and noncombatants in nuclear exchanges, there is little that the lawyer can add.

Concluding Remarks

This paper has concentrated on the Law of the Sea in peacetime, because that is still the law most commonly relevant. Before closing, the central point made in relation to the section of the *Handbook* on the Law of War should once more be emphasized. The very idea that the Laws of War, in particular the eighty-year old Hague Conventions, remain binding is one which is open to serious doubt. The principles which underlie those laws and conventions no doubt remain valid, but there is much to be said for the view that there should be but one section in this *Handbook*, on the Law of the Sea, and that all questions concerning the use of armed force should be referred to the rules on the use of force and self-defense embodied in the United Nations Charter. The choice between these two approaches appears to be open, and the law unclear. The final decision in practice, which will in turn yield the authoritative answer in law as to which of the two is correct, lies in the hands of those in the United States and elsewhere who write and implement handbooks such as that reviewed here. Their practice will constitute the new customary law. As a matter of policy there is much to be said for the certainty and predictability which the detail of the Laws of War inject into armed conflict, minimizing the risk of unwanted escalations of the use of force. But there are problems in reconciling them with the Charter and with the peacetime Law of the Sea, and those problems must be attended to. Peace is fragile enough without the opening up of a body of law outside the Charter to which States may appeal when the constraints of article 51 do not suit

them. The *Handbook* is an excellent starting point for the task of revising the Laws of War to bring them in line with contemporary law and contemporary warfare. That task is an urgent one.

Notes

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1. U.S. Department of the Navy, *The Commander's Handbook on the Law of Naval Operations*, NWP 9 (Washington: 1987) [hereinafter referred to as the *Handbook*], superseding U.S. Department of the Navy, *Law of Naval Warfare* NWIP 10-2 (Washington: 1955).

2. *Handbook, supra* note 1, p. 27.

3. *See further* A. V. Lowe, "Do General Rules of International Law Exist?", *Review of International Studies*, v. 9, pp. 207-213 (1983) and *id.*, v. 10, pp. 183-87 (1984); Theodore Stein, "The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law," *Harvard International Law Journal*, v. 26, pp. 457-82 (1985).

4. *See* the 1958 Convention on the Territorial Sea and Contiguous Zone, *United Nations Treaty Series*, v. 561, p. 205, and the 1982 United Nations Convention on the Law of the Sea, U.N. Pub. Sales No. E.83.V.5, article 7; *cf. Anglo-Norwegian Fisheries Case*, [1951] I.C.J. Reports, p. 116. The Conventions may hereafter be referred to as the Territorial Sea Convention and the 1982 Convention respectively. References to the 1958 Conventions are to the legal regime established in the Territorial Sea Convention, the 1958 Convention on the High Seas, *United Nations Treaty Series*, v. 450, p. 82, and the 1958 Convention on the Continental Shelf, *United Nations Treaty Series*, v. 499, p. 311.

5. *Handbook, supra* note 1, par. 1.3.2.

6. *Handbook, supra* note 1, par. 1.3.2.

7. G. Francalani, et al. (eds.), *Atlas of the Straight Baseline Part I: Article 7 of the Convention of the United Nations on the Law of the Sea* (Milan, 1986).

8. *See* Francesco Francioni, "The Gulf of Sidra Incident (United States v. Libya) and International Law," *Italian Yearbook of International Law*, v. 5, pp. 85-109 (1980-81); and *see generally* "Symposium on Historic Bays of the Mediterranean," *Syracuse Journal of International Law and Commerce*, v. 11, pp. 205-415 (1984).

9. *Handbook, supra* note 1, par. 1.3.3.1.

10. [1951] I.C.J. Reports, p. 116, at pp. 138-39. Cf. L.F.E. Goldie, "Historic Bays in International Law," *Syracuse Journal of International Law and Commerce*, v. 11, p. 211, at pp. 222-23 and *passim* (1984).

11. Territorial Sea Convention, *supra* note 4, article 24; 1982 Convention, *supra* note 4, article 33.

12. *See* A. V. Lowe, "The Development of the Concept of the Contiguous Zone," *British Yearbook of International Law*, v. 52, p. 109 (1981); Sir Gerald Fitzmaurice, "Some Results of the Geneva Conference on the Law of the Sea," *International and Comparative Law Quarterly*, v. 8, p. 73 (1959). *Contra*, S, Oda, "The Concept of the Contiguous Zone," *id.*, v. 11, p. 131 (1962).

13. *United States v. Taiyo Maru*, 395 F.Supp. 413 (M. D. Maine 1975), *American Journal of International Law*, v. 70, pp. 138, 549, 554 (1976). The District Court for the District of Maine held that "[a]lthough Article 24 only affirmatively recognizes the right of a coastal State to create a contiguous zone for one of the four enumerated purposes, nothing in the Article precludes the establishment of such a zone for other purposes, including the enforcement of domestic fisheries law." 395 F.Supp. at 419.

14. *United States v. Gonzalez*, 776 F.2d 931 (11th Cir. 1985), *American Journal of International Law*, v. 80, p. 653 (1986). The United States Court of Appeals for the Eleventh Circuit held that foreign nationals on foreign ships outside the U.S. territorial sea could be prosecuted by the United States "under the 'protective principle' of international law . . . which permits a nation to assert jurisdiction over a person whose conduct outside the nation's territory threatens the nation's security or could potentially interfere with the operation of its governmental functions" and that "there is no fixed rule among the customs and usages of nations which prescribes the limits of jurisdictional waters other than the rule of reasonableness, that a nation may exercise authority upon the high seas to such an extent and to so great a distance as is reasonable and necessary to protect itself and its citizens from injury." 776 F.2d at 938-39 [citations omitted].

15. *See* U.S. Department of State, Office of the Geographer, *National Maritime Claims 1958-1985* (Washington: 1985), p. 25.

16. *Handbook, supra* note 1, par. 1.5.4. *But see* note 14 *supra*.

17. *Supra* note 15. The Geographer lists the following States as claimants to security zones: Bangladesh, Burma, Cambodia, Haiti, India, Pakistan, Sri Lanka, Vietnam and Yemen (Aden). *Cf. Handbook* par. 2.4.4.

18. *Handbook, supra* note 1, par. 1.5.2.

19. *See Handbook*, par. 4.3.1, where it is said that, "U.S. warships and military aircraft enjoy the full spectrum of the high seas freedoms of navigation and overflight, including the right to conduct naval maneuvers" in the waters beyond the territorial sea; and par. 2.4.2, where it is said that since such high seas rights exist, "the existence of an exclusive economic zone need not, of itself, be of operational concern to the naval commander." *See further, e.g.*, Horace B. Robertson, Jr., "Navigation in the Exclusive Economic Zone," *Virginia Journal of International Law*, v. 24, p. 865 (1984).

20. United Nations, Office of the Special Representative of the Secretary-General for the Law of the Sea, *Law of the Sea Bulletin*, No. 5 (New York: 1985), pp. 6-7, 8, 24.

21. Par. 9.2.2 of the *Handbook* regards the sowing of controlled mines in the EEZ as permissible so long as this does not unreasonably interfere with the interests of other high seas users.

22. *See* A. V. Lowe, "Some Legal Problems Arising from the Use of the Seas for Military Purposes," *Marine Policy*, v. 10, p. 171 (1986); Barbara Kwiatkowska, "Military Uses of the EEZ—a Reply," *id.*, v. 11, p. 249 (1987); A. V. Lowe, "Military Uses in the EEZ—a Rejoinder," *id.*, p. 250. Since the latter exchange, the Government of Uruguay has confirmed that my interpretation of its position set out in the rejoinder to Dr. Kwiatkowska is correct. Letter from the Ambassador, Embassy of the Oriental Republic of Uruguay, London, August 18, 1987. See also the materials cited *supra* note 19.

23. United States Statement made in exercise of the right of reply, March 8, 1983, UNCLOS III *Official Records*, v. XVII, pp. 243-44. *Cf.*, statements made by the Federal Republic of Germany and Italy. *Id.*, pp. 240-41, 241-42, respectively.

24. *Handbook, supra* note 1, par. 1.8; 1982 Convention, *supra* note 4, article 76. The actual position is rather more complicated, as article 76 and Annex II to the Final Act of UNCLOS III make clear.

25. *Handbook, supra* note 1, par. 1.8. Antarctica is "territory not subject to the sovereignty of any nation," at least in the view of the United States.

26. *See* the report to the Council of the International Civil Aviation Organization, *United Nations Convention on the Law of the Sea: Implications, if any, for the Application of the Chicago Convention, its Annexes and Other International Air Law Instruments*, ICAO Doc. No. C-WP/8077, October 1, 1985, pars. 10, 29. The Report is reprinted in *International Organizations and the Law of the Sea: Documentary Yearbook*, v. 1, 1985 (London/Dordrecht/Boston, 1987), p. 310.

27. Report to the Council of the International Civil Aviation Organization, *supra* note 26, pars. 26-33.

28. The *Handbook, supra* note 1, par. 2.5.2, states that "[m]ilitary aircraft may engage in flight operations, including ordnance testing and firing, surveillance and intelligence gathering" over the EEZ, a formula which touches upon Brazilian views on both military uses of the EEZ and overflight rights, and which might be argued to be subject to the "article 59" conflict resolution procedure under the 1982 Law of the Sea Convention. *See supra* text at note 20.

29. *Handbook, supra* note 1, pars. 2.1, 2.2; High Seas Convention, *supra* note 4, articles 8, 9; 1982 Convention, *supra* note 4, articles 29, 32, 96.

30. *Handbook, supra* note 1, par. 2.1.2.1.

31. U.S. Department of State, Office of the Geographer, *National Maritime Claims: 1958-1985* (Washington: 1985), p. 10. That report does not list Spain as making special provision for the passage of nuclear-powered ships, but Spanish Act No. 25/64, April 29, 1964, article 7, stated that the passage of nuclear-powered ships through the territorial sea was to be considered an exception to the right of innocent passage. *See* translation of the Act reprinted in United Nations, *United Nations Legislative Series*, U.N. Doc. ST/LEG/SER.B/16, p. 45.

32. *Handbook, supra* note 1, par. 2.3.1.

33. Text reprinted in *International Legal Materials*, v. 24, p. 1440 (1985) and United Nations, *Law of the Sea Bulletin*, No. 6 (New York: 1985), p. 24. The Treaty entered into force on December 11, 1986.

34. *See* J. C. Woodliffe, "Ports Visits by Nuclear Armed Naval Vessels: Recent State Practice," *International and Comparative Law Quarterly*, v. 35, p. 730 (1986); Hisakazu Fujita, "The South Pacific Nuclear Free Zone Treaty and the Anti-nuclear Policy of New Zealand," *Kansai University Review of Law and Politics*, v. 8, p. 1 (1987).

35. 1982 Convention, *supra* note 4, articles 22, 23, 41, 42, 54.

36. For the 1958 definition, *see* Territorial Sea Convention, *supra* note 4, article 14(4).

37. *Handbook, supra* note 1, par. 2.3.2.1.

38. South African Maritime Traffic Act, No. 2 of 1982, section 8, as amended by the Maritime Traffic Amendment Act, No. 5 of 1983. The automatic deprivation of innocence would be difficult to justify under any interpretation of the law. International law requires actual, not "deemed," prejudice to the peace, good order or security of the territorial State.

39. A good example occurred in Panama. General Noriega is reported to have "accused the United States of escalating its aggression against Panama by sending the helicopter carrier Okinawa through the Panama Canal. A U.S. spokesman said the ship's journey was routine, but General Noriega claimed that

U.S. military intervention was imminent." "Noriega Stands on Panama's 'dignity,' " *The Independent* (London), March 31, 1988, p. 6. The status of the waters is different, but the principle is the same.

40. Territorial Sea Convention, *supra* note 4, article 16(1); 1982 Convention, supra note 4, article 25(1).

41. For enactments of the provisions on innocent passage, *see* the law of France (Decree No. 85/185, reprinted in United Nations, *Law of the Sea Bulletin*, No. 6 (New York: 1985), p. 14) and Southern Yemen (Act No. 45 of 1977 concerning the Territorial Sea, Continental Shelf and other Marine Areas, reprinted in United Nations Legislative Series, *National Legislation and Treaties Relating to the Law of the Sea*, ST/LEG/SER.B/19 (New York: 1980), p. 21). *Cf.*, the 1984 Soviet Rules for Navigation and Sojourn of Foreign Warships in the Territorial Waters (Territorial Sea) of the U.S.S.R. and the Internal Waters and Ports of the U.S.S.R., reprinted in *International Legal Materials*, v. 24, p. 1715 (1985).

42. *Handbook, supra* note 1, par. 2.3.2.3.

43. Territorial Sea Convention, *supra* note 4, article 16(3); 1982 Convention, *supra* note 4, article 25(3).

44. *See* the Communication transmitted to the Permanent Missions of the States Members of the United Nations at the request of the Permanent Representative of the United States to the United Nations, July 10, 1985 (Reference NV/85/11), reprinted in United Nations, *Law of the Sea Bulletin*, No. 6 (New York: 1985), p. 40, where it is stated: "International law does not permit a coastal State to subject an area of its territorial sea to a permanent prohibition of navigation."

45. *See, e.g.*, Decree of 10 October 1951 concerning the Territorial Sea and Internal Waters of the People's Republic of Bulgaria (article 8), reprinted in United Nations Legislative Series, *Laws and Regulations on the Regime of the Territorial Sea*, ST/LEG/SER.B/6 (New York: 1957), p. 80; Decree No. 39 of January 28, 1956, concerning the regulation of the regime of territorial waters of the Republic of Romania (article 5), *id.*, p. 238. *See also* the Soviet Law on the State Frontier, November 24, 1982 (article 17), reprinted in United Nations, *Law of the Sea Bulletin*, No. 4 (New York: 1985), p. 24; and the Soviet Rules for Navigation and Sojourn of Foreign Warships in the Territorial Waters (Territorial Sea) of the U.S.S.R. and the Internal Waters and Ports of the U.S.S.R., *supra* note 41, at p. 1717.

46. North Atlantic Coast Fisheries Arbitration, *Proceedings*, v. II, p. 2007.

47. The figures are taken from United States Department of State, Office of the Geographer, *National Maritime Claims*: 1958-1985 (Washington: 1985), p. 10.

48. *See* D. P. O'Connell, *The Influence of Law on Sea Power* (Manchester: Manchester University Press, 1975), p. 140.

49. *Handbook, supra* note 1, par. 2.3.2.4.

50. 1982 Convention, *supra* note 4, articles 37-44, 53-54.

51. United Nations, *Law of the Sea Bulletin*, No. 5 (New York: 1985), p. 42.

52. House of Lords, *Parliamentary Debates*, v. 484, col. 382, February 5, 1987.

53. Treaty of Peace between the Arab Republic of Egypt and the State of Israel, reproduced in *International Legal Materials*, v. 28, p. 362 (1979). For academic argument on the point, *see e.g.*, W. Michael Reisman, "The Regime of Straits and National Security: An Appraisal of International Lawmaking," *American Journal of International Law*, v. 74, p. 48; John Norton Moore, "The Regime of Straits and the Third United Nations Conference on the Law of the Sea," *id.*, p. 77; D. P. O'Connell, *The International Law of the Sea* (Oxford: Oxford University Press, 1982), v. I, chapter 8.

54. Reproduced in Robin Churchill & Myron Nordquist, *New Directions in the Law of the Sea* (Dobbs Ferry, N.Y.: Oceana Publications, 1975), v. IV, p. 330.

55. *See* the British letter of January 2, 1973, to the Secretary General of the United Nations, quoted in United Nations, *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1985*, U.N. Doc. ST/LEG/SER.E/4, p. 682. The Law of the Sea Convention does provide for denunciation, on one year's written notice (article 317). *See* G. M. White, "UNCLOS and the Modern Law of Treaties," in W. E. Butler, (ed.), *The Law of the Sea and International Shipping: Anglo-Soviet Post-UNCLOS Perspectives* (New York/London/Rome: Oceana Publications, 1985), p. 15, at pp. 29-31.

56. *See* Lord McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961), p. 518.

57. *Handbook, supra* note 1, par. 2.3.3.1. Note the qualifications, which follow the provisions of articles 35, 36 and 45 of the 1982 Convention, in pars. 2.3.3.1, 2.3.3.2, and 7.3.5. The qualifications are not entirely comprehensive. Article 38(1) of the 1982 Convention excepts from the transit passage regime straits formed by the mainland and an offshore island of a state if there is a high seas or EEZ route of similar convenience seaward of the island, and article 35(c) preserves the validity of long-established treaty rules governing international straits, such as those in the 1921 Convention on the Non-Fortification and Neutrality of the Aaland Islands (*League of Nations Treaty Series*, v. IX, p. 212), the 1940 Finland-Soviet Union Agreement on the Demilitarization of the Aaland Islands (*United Nations Treaty Series*, v. 67, p. 139), the 1857 Treaty of Copenhagen (C. Parry, (ed.), *Consolidated Treaty Series*, v. 116, p. 357), and the 1881 Argentina-Chile Boundary Treaty, *id.*, v. 159, p. 45), in addition to the 1936 Montreux Convention on the Turkish Straits (*League of Nations Treaty Series*, v. 173, p. 213) which alone is cited in the *Handbook*.

58. *See* T. L. McDorman, "In the Wake of the *Polar Sea*," *Marine Policy*, v. 10, p. 243 (1986). Similar problems have arisen in relation to passage through controversial straits in the Soviet Arctic. *See* W. E. Butler, *The Northeast Arctic Passage* (Aalphen and den Rijn: Sijthoff & Nordhoff, 1978), *passim*.

59. *Handbook, supra* note 1, par. 2.3.3.1.

60. *Id.*

61. *Id.*

62. *Id.*, par. 2.3.4.1.

63. United Nations, *Law of the Sea Bulletin* No. 5 (New York: 1985), p. 19.

64. *See* objections made to the Philippine declaration by the following: Byelorussian Soviet Socialist Republic, reproduced in United Nations, *Law of the Sea Bulletin*, No. 6 (New York: 1985), p. 9; Czechoslovakia, *id.*, p. 10; Ukranian Soviet Socialist Republic, *id.*, pp. 11-12; Union of Soviet Socialist Republics, *id.*, pp. 12-13; Bulgaria, *id.*, No. 7 (New York: 1987), pp. 7-8.

65. *See, e.g.*, the controversy over the Greek Flight Information Region in Institute for Political Studies, *The Status Quo in the Aegean* (Athens: undated), pp. 14-15; association of Journalists, *The Aegean Realities . . .* Istanbul: undated), pp. 23-26.

66. *Handbook, supra* note 1, par. 2.4.3.1.

67. *Id.*, par. 2.4.5.1.

68. *Id.*, pars. 3.4 to 3.4.3.2. *Cf.*, High Seas Convention, *supra* note 4, articles 14-22; 1982 Convention, *supra* note 4, articles 100-07, 110.

69. *Handbook, supra* note 1, par. 3.4.2.4.

70. *See* Patricia W. Birnie, "Piracy: Past, Present and Future," *Marine Policy*, v. 11, p. 163 (1987). Note, for example, that the hijackers of the *Achille Lauro* were sought by the United States on charges of, *inter alia*, piracy. *See* the critical discussion of these charges in Dr. Birnie's paper. *Id.*, p. 177.

71. *Handbook, supra* note 1, par. 3.4.3.2.

72. *Corfu Channel Case*, Judgment of April 9, 1949, [1949] I.C.J. Reports, p. 4.

73. *Handbook, supra* note 1, par. 3.9. This accords with article 23 of the High Seas Convention and article 111 of the 1982 Law of the Sea Convention.

74. *Handbook, supra* note 1, par. 3.11.1.

75. *See* J. P. Pancracio, "L'affaire de l'*Achille Lauro* et le Droit International," *Annuaire Francaise de Droit International*, v. 31, p. 221 (1985).

76. *See, e.g.*, Natalino Ronzitti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity* (Boston: Martinus Nijhoff Publishers, 1985); C. J. Greenwood, "International Law and the United States Air Operation Against Libya," *West Virginia Law Review*, v. 89, p. 933 (1987), and references therein.

77. *Handbook, supra* note 1, par. 3.11.1.1.

78. *Id.*, par. 3.11.2. The position is rather different if the foreign flag ships are in a United States convoy. It is arguable that an attack on any ship is an attack on the convoy itself, so justifying the use of force in *self*-defense by the United States warships.

79. *Id.*, par. 3.11.1.

80. *Id.*, pars. 4.3.2. to 4.3.2.2.

81. Abram Chayes, *The Cuban Missile Crisis* (Oxford: Oxford University Press, 1974), pp. 15, 108-09 and *passim*. The present writer shares the view of Professor Henkin, annexed to the Chayes study at p. 149, that the "authorization" of the quarantine by the Organization of American States was not an adequate legal justification for it. The justification must be found in article 51 of the United Nations Charter, if it is to be found anywhere.

82. [1986] I.C.J. Reports, p. 12, at pp. 92-94, 109-11. *See* the criticisms made by Judge Schwebel, at pp. 347-48, with which the present writer has much sympathy.

83. *Handbook, supra* note 1, par. 4.3.2.

84. Objections need not be based on a reading of article 51. The British Government, questioned on its attitude to the mining of Nicaraguan ports by the United States, replied, "[W]e are committed to the principle of freedom of navigation and deplore the mining of Nicaraguan ports." House of Commons, *Parliamentary Debates*, v. 58, col. 470, April 13, 1984.

85. [1986] I.C.J. Reports, p. 12, at p. 93.

86. *Handbook, supra* note 1, par. 4.3.2.1.

87. D. P. O'Connell, *The Influence of Law on Sea Power* (Manchester: Manchester University Press, 1975), p. 83.

88. This was the basis of British support for the action. "[I]t is our view that the action taken by the United States on 19th October was entirely justifiable in exercise of their right of self-defence in the face of the imminent threat of future attacks." House of Lords, *Parliamentary Debates*, v. 490, col. 724, November 25, 1987. The statement would have held closer to the *Caroline* formula if it had referred to "the threat of imminent attacks."

89. *Handbook, supra* note 1, par. 4.1.

90. *Id.*, par. 5.4.1.

91. Hague Convention (IV) Respecting the Laws and Customs of War on Land, *Consolidated Treaty Series*, v. 205, p. 227; Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, *id.*, p. 299; Hague Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines, *id.*, p. 331; Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War, *id.*, p. 345; Hague Convention (X) for the Adaptation to Maritime War of the Principles of the Geneva Conventions, *id.*, p. 360; Hague Convention (XI) Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War, *id.*, p. 367; and Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, *id.*, p. 395.

92. For instance, notifications of the continued application of Hague Convention VIII (on Automatic Submarine Contact Mines) were made by Fiji in 1973 and South Africa in 1978.

93. *See* D.P. O'Connell, *The Influence of Law on Sea Power* (Manchester: Manchester University Press, 1975), pp. 44-52, 92-96.

94. *Handbook, supra* note 1, par. 5.1.

95. *See* articles 3 and 5 of the United Nations General Assembly Resolution 3314 (XXIX) on the Definition of Aggression, General Assembly, *Official Records*, 29th Session, Supp. 21, reprinted in *American Journal of International Law*, v. 69, p. 480 (1975). The resolution was adopted by consensus, without a vote.

96. *See* remarks of the International Court of Justice in the *Nicaragua* case. [1986] I.C.J. Reports, p. 12 at p. 112.

97. U.N. Charter, article 103.

98. For an interesting example of an argument recasting the requirements of the Hague Conventions (Convention VIII, on Automatic Submarine Contact Mines) in the light of the Charter, *see* U.S. Department of State, *Use of Naval Mines in the Exercise of Self Defense* (Washington: April 13, 1984).

99. The major conflicts are listed in a paper entitled, "The Impact of the Law of the Sea on Naval Warfare," presented by the present writer to the Preliminary Round Table of Experts on International Humanitarian Law Applicable to Armed Conflicts at Sea, San Remo, Italy, June 15-17, 1987, printed in *Syracuse Journal of International Law and Commerce*, v. 14, pp. 657-87, (1988).

100. United Nations, International Law Commission, *Yearbook of the International Law Commission 1956*, v. II (New York: 1957), p. 256.

101. There are exceptional cases, concerning the rules of humanitarian law, where this is not true.

102. *Handbook, supra* note 1, par. 5.5.

103. *See* Judgment of the International Court of Justice in the *Nicaragua* case, [1986] I.C.J. Reports, p. 12 at 112 (reference to Hague Convention VIII); and the Swedish declaration on signature of the 1982 Law of the Sea Convention, reproduced in United Nations, *Law of the Sea Bulletin*, No. 5 (New York: 1985), p. 22 (reference to Hague Convention XIII).

104. Territorial Sea Convention, *supra* note 4, article 16(3); 1982 Convention, *supra* note 4, article 25(3).

105. House of Commons, *Parliamentary Debates* (Weekly Hansard), v. 90, col. 428, January 28, 1986. The statement was repeated *verbatim* in response to a further Parliamentary question in 1988. *Id.*, v. 127, cols. 425-26, February 15, 1988.

106. *Handbook, supra* note 1, par. 7.6.

107. This position is by no means confined to the *Handbook. See, e.g.*, U.S. Department of State, Special Report No. 166, *U.S. Policy in the Gulf* (Washington: July 1987), *passim.*

108. *Handbook, supra* note 1, par. 6.2.3.

109. United Nations, General Assembly, Resolution 2625 (XXV).

110. *Handbook, supra* note 1, par. 6.2.3. An alternative explanation might be that reprisals in the context of armed conflict belong to the body of law concerning Unfriendly Relations and Non-Cooperation among States, and are not addressed by the Declaration.

111. *See* Robert W. Tucker, "Reprisals and Self-Defense: The Customary Law," *American Journal of International Law*, v. 66, p. 586 (1972).

112. *Handbook, supra* note 1, par. 6.2.3.1.

113. *Id.*, par. 6.2.3.3.

114. *Id.*, par. 7.2.1, 7.2.2.

115. *Id.*, par. 7.3 2, 7.3.2.1.

116. *Id.*, par. 7.3 4.1 to 7.3.6.

117. *Id.*, par. 7.3 4.1.

118. *Id.*, par. 7.3.4.

119. *See Correspondence between His Majesty's Government in the United Kingdom and the Norwegian Government respecting the German Steamer "Altmark"* (London: His Majesty's Stationery Office, 1950), Cmd. 8012.

120. *See, e.g.*, Julius Stone, *Legal Controls of International Conflict* (London: Stevens & Sons, Ltd., 1954), pp. 400-01 [hereinafter referred to as "Stone"].

121. *Corfu Channel Case, supra* note 72, p. 35.

122. *See, e.g.*, the comments of Christopher J. Greenwood, "International Law and the United States' Air Operation against Libya," *West Virginia Law Review*, v. 89, p. 933, at pp. 952-53 (1987).

123. Erik Castren, *The Present Law of War and Neutrality* (Helsinki: Suomalaisen Tiedeakatemian Toimituksia, 1954), p. 442.

124. High Seas Convention, *supra* note 4, article 22; 1982 Convention, *supra* note 4, article 110.

125. *Handbook, supra* note 1, par. 7.4.1.

126. *See, e.g.*, J. P. Murphy and A. T. Downey, "National Security, Foreign Policy and Individual Rights: The Quandary of U.S. Export Controls," *International and Comparative Law Quarterly*, v. 30, p. 791 (1981).

127. *Handbook, supra* note 1, par. 7.4.1.2.

128. [1986] I.C.J. Reports, p. 12 at p. 112. Curiously, the Court referred in the same place to Hague Convention VIII as if it were still operative "in time of war," although this comment was unaccompanied by any reasoning on the question and should be treated cautiously.

129. *Handbook, supra* note 1, pars. 7.7 to 7.7.5.

130. Ingrid Detter Delupis, *The Law of War* (Cambridge: Cambridge University Press, 1987), p. 268, asserts that the answer is no, but the authority which she cites (Hague Convention VIII, article 8) does not support her view.

131. Stone, *supra* note 120, p. 585, footnote 89, says of the latter question, "The incongruity in the contemporary context of the Convention's attempt to prevent the use of mines off the enemy's coast 'with the sole object of intercepting commercial navigation,' is a measure of the inevitable obsolescence in 1953 of any convention which could have been drawn up in 1907."

132. Note that the Soviet and Chinese objections to the mining of Haiphong were based on interference with the freedom of navigation under the 1958 High Seas Convention, and not on alleged violations of the Hague Conventions or Laws of War. D. P. O'Connell, *The Influence of Law on Sea Power* (Manchester: Manchester University Press, 1975), p. 95.

133. *Handbook, supra* note 1, pars. 7.8, 7.8.1.

134. For the relevant declarations, *see* House of Commons, *Parliamentary Debates*, v. 21, col. 1045, April 7, 1982 (Maritime Exclusion Zone); *id.*, v. 22, cols, 296-97, April 28, 1982 (Total Exclusion Zone); *id.*, v. 27, col. 235, July 22, 1982 (Falkland Islands Protection Zone).

135. *Handbook, supra* note 1, pars. 8.2.2.2.

136. *Id.*, par. 9.2.2.

137. *See* Vienna Convention on the Law of Treaties, article 60.

138. Article 60 of the Vienna Convention on the Law of Treaties allows unilateral suspension of a convention only in limited cases—essentially, where a State is specially affected by the breach, or the breach radically changes the position of all parties. Otherwise, suspension requires the unanimous agreement of all parties.

139. [1986] I.C.J. Reports, p. 12, at p. 112.

140. U.S. Department of State, *Use of Naval Mines in the Exercise of Self Defense* (Washington: April 13, 1984).

141. *Handbook, supra* note 1, par. 9.2.3.

142. *Id.*, par. 10.2.2.1.

Chapter VI
Neutrality

by
Mark W. Janis*

Neutrality, at least as a legal concept, existed neither in antiquity nor during the Middle Ages.[1] It may well be that some international practice hardened into a customary law of neutrality in the 18th and 19th centuries, a development owing much to the theory and practice of the United States,[2] but the traditional legal edifice, structurally uncertain at the best of times, was badly shaken by the contrary usages of the 20th century's two world wars and nowadays, in terms of practice, the neutrality laws have sunk into a condition of "chronic obsolescence."[3] In terms of theory, article 2(4) of the Charter of the United Nations makes war technically illegal,[4] and, there being neither formal "belligerents" nor "neutrals," the "rights and duties of the old law of neutrality have terminated with the Charter."[5]

What, then, to make of Chapter 7 of the new *Commander's Handbook on the Law of Naval Operations*: "The Law of Neutrality?"[6] There are good English-language accounts of the traditional rules of the law of neutrality in the treatises of Oppenheim,[7] Colombos,[8] and O'Connell.[9] A thoroughgoing account of the history of neutrality is to be found in Jessup's impressive four volumes.[10] The *Commander's Handbook* means to give a brief rendition of the traditional law.[11] How might it do better? Three ideas come to mind.

First, the *Commander's Handbook* ought to acknowledge that modern international theory and practice rarely deal with "belligerents" and "neutrals" in their traditional senses. Virtually every paragraph of Chapter 7 makes reference to "belligerents" and the introductory wording that "it has become increasingly difficult to determine with precision the point in time when hostilities have become a 'war' and to distinguish belligerent nations from those not participating in the conflict" only makes matters worse.[12] The point is that doctrine and practice no longer try to decide what is formally "war" and what is formally "peace." There are simply conflicts between nations which involve the use of force and/or economic sanctions. These conflicts usually entangle third states more or less uninterested in the outcome, but hopeful of remaining on friendly terms with both sides in the dispute. These third states are what we still call "neutrals," but they are no longer "neutrals" in the context of the traditional rules.

Second, Chapter 7 ought to abandon its more or less unskeptical treatment of the traditional law of neutrality. Its approach seems to be grounded on the commentary of observers like O'Connell and Baxter who have argued that, in theory at least, the old law of neutrality may still come into play if the United Nations fails to act at a time of armed conflict.[13] But this is a minority point-of-view. Most commentators agree that the technical abolition of "war" has also technically abolished the old laws of neutrality. Quincy Wright, for example, refutes Baxter simply and plainly: [N]eutrality in principle cannot exist."[14] Kussbach writes: "It seems clear that the rules of international law concerning neutral trading are applicable only when the state of neutrality itself is called into being, i.e., when a state of war exists."[15]

Moreover, whatever the outcome of the doctrinal debate about the legal effect of the U.N. Charter, even the most energetic proponents of the traditional elaboration must admit that there is little in modern practice to substantiate their theoretical preference. O'Connell himself observes respecting blockade (a topic which, along with its related rules respecting contraband and visit and search, absorbs most of Chapter 7's attention): "There has been practically no experience of blockade since 1945 to test the matter."[16] More realistically, Admiral Miller, dating the demise of traditional blockades to the uniform practice of the two world wars, has argued that it makes little sense to cling in theory to out-moded rules when "a new look is required at the legal framework by which the community seeks to regulate the conflict."[17] And McNulty makes good sense, not only about the rules of blockade specifically but about the laws of neutrality in general, when he writes about the legal and practical climate after 1945:

> In point of fact, it seems ludicrous to contemplate the possibility of any meaningful observance of the "legal" code of blockade in the current or predictable state of political reality. It is clear that the rules of blockade came into existence solely to protect the ordinary sea commerce of neutrals and to regulate the circumstances under which such trade could be interrupted. The rules derive out of a 19th century legal regime—a regime oriented toward *regulating* the conduct of states in war and peace. But modern international law, of which blockade is a part, no longer seeks to regulate war but to prevent its occurrence.[18]

Looking to recent events, Lauterpacht sees little modern practice of a traditional neutral-belligerent sort. In the Vietnam and Yemen conflicts, for example, there was no attempt "to require states not immediately involved to adopt positions of 'neutrality'."[19] And Norton, in a very helpful 1976 survey,[20] concludes that "[r]ecent armed conflicts have provided little cause to invoke the maritime rights and duties of the law of neutrality."[21] Looking at the United Nations naval blockade of North Korea in the Korean War and the Kuomintang blockade of the Communist Chinese, he decides the first "was only of marginal significance" because the North Korean supply routes were overland,[22] while the second was futile because the naval powers rejected it for being ineffective.[23] Norton does find three examples of visit and search:

Egypt's contraband system through the Suez Canal in the 1948 and 1956 Arab-Israeli wars, India's and Pakistan's contraband lists in their 1965 conflict, and France's searches of merchant ships in the Algerian War of Independence.[24] But he concludes that all three visit and search cases are "anomalous" since in France's case, "the rights were improperly invoked" and in the other two cases "the belligerents relying upon these rights had virtually no navies and therefore could only apply them to neutral vessels coming within the belligerents' own waters."[25]

In the Iran-Iraq war there has been a case made that traditional neutral rights and duties are still at stake. Shortly after the war began in September 1980, both Iran and Iraq declared war or "exclusion" zones.[26] Iraq's only major oil port was destroyed early in the fighting and it developed over-land pipeline routes, but Iran continued to rely on shipping oil. Beginning in 1984, Iraq began to strike at Iranian shipping and Iran at third country shipping, especially shipping of Iraq's friendly neighbors; altogether between 1984 and 1987, Iraq attacked 234 ships and Iran 163 ships.[27] Iran has also visited and searched a large number of ships in the Gulf.[28] Beginning in 1987, Iran mined shipping lanes in the Gulf.[29] Employing traditional law of neutrality concepts, it has been argued that:

> [T]he Persian Gulf belligerents, particularly Iran, have systematically violated the rights of neutral shipping. Nonbelligerent merchant vessels that are engaged in neutral commerce may not be attacked indiscriminately, as Iran has been doing.[30]

On the other hand, it has been pointed out that whether such shipping is "neutral" or not depends on how you decide the question of whether a country, such as Kuwait, whose vessels are attacked, is truly a non-belligerent when the country is a direct financial supporter of Iraq.[31] Furthermore, looking to the United Nations Charter and to the protection of reflagged Kuwaiti tankers by the United States, Professor Henkin has argued:

> In the Gulf, some spokesman said recently, the United States remains formally neutral. But even if the concept of neutrality can still apply in some cases, can the United States be neutral here? No one would accuse us of being a friend of Iran, but there is a strong case that Iraq is probably the aggressor. No one has mentioned that for some years now. It is true that the Security Council refrained from so holding, in part because the United States would not have permit [sic] it, or because the Russians would not permitted [sic] it. That raises some questions, but that doesn't change the law. In the absence of a Security Council determination that one party was the aggressor, do the laws of the Charter not apply? In the absence of such a finding by the Security Council, are states free to be neutral even if it is clear that one side had launched the war in violation of the Charter?. . . .
>
> Is Kuwait neutral, or is it, as the first speaker suggested, perhaps a co-belligerent? Is the United States supporting Kuwait, and, if so, are we also co-belligerents? If so, we may be not only supporting the aggressor—but if the old laws of war apply—we also may be violating the laws of war.
>
> I suggest we may not only have slipped into the war but, from the international lawyer's point of view, we seem to have slipped into a particular position on international law without much thought about it and without any thought to the long-term

> consequences. In fact, we seem to be taking seriously the outdated laws of war, but not the contemporary law against war. In the process we may have eroded both. At least, it cannot be said that the law on neutrality and belligerency is what it was before 1945.[32]

This is not to say that rules about neutrals might no longer be useful, only that a rendition of the traditional rules, whether they be read in full in Oppenheim or Colombos or in brief in the *Commander's Handbook*, no longer either describes practice or easily comports with theory. I agree that the object of the neutrality exercise should remain much what Chapter 7 says it ought to be: "to localize war, to limit the conduct of war on both land and sea, and to lessen the impact of war on international commerce."[33] But a faithful account of antique rules is simply not a realistic way to proceed.

Take, for example, the 1962 United States quarantine of strategic arms to Cuba. As Miller points out, "the United States could have declared war on Cuba, established a blockade, or announced lists of contraband items; although undoubtedly, many would have cried that the declaration of war, itself, was violative of article 2(4) of the U.N. Charter."[34] Rather, because "traditional 'blockade' implies and requires a state of belligerency or war, the United States did not seek to justify the quarantine as a blockade. There was no assertion of a state of war or belligerency."[35] Instead, the United States fashioned the quarantine as a regional security action under the Rio Treaty and in accord with article 53 of the U.N. Charter.[36] It might also have been justified as an exercise of a country's right of self-defense pursuant to Charter article 51.[37] In any case, the quarantine fell short of full-scale armed conflict. Indeed, the interference was intended to help establish a level of international conflict well below that of traditional legal "war" or the "war" more or less technically abolished by the United Nations' Charter.

If my second proposition is right, that given the doctrinal quandaries and practical problems besetting the "shadowy existence" of the law of neutrality,[38] the *Commander's Handbook* does not give that subject that "certain measure of scepticism" which most observers feel it deserves,[39] what is to be done? Booth has suggested that since "[w]ar is rarely declared . . . it is incumbent upon military organizations . . . to make officers conversant with the background to the general rules of law governing military operations short of war."[40] My third proposition is that Chapter 7 ought to explain that whatever we do have for rules respecting neutrality, even when they are invoked, they fall short of being the same sort of international law that is described in some other parts of the *Commander's Handbook*. Looking, for example, at the law about "Legal Divisions of the Oceans and Airspace,"[41] "International Status and Navigation of Warships and Military Aircraft,"[42] and "Protection of Persons and Property at Sea,"[43] one sees, in my opinion, a much "harder" law than one observes reviewing the law of neutrality. It is, I think, unrealistic to assume that all international law is of the same

certainty or of the same legally binding effect. To do so casts unwarranted shadows of uncertainty and ineffectiveness on the more successful forms of the law of nations.

It was John Austin, the English legal positivist, who wrote in 1832:

> [T]hat the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author. . . . [T]he law obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected.[44]

As early as 1836, international lawyers were having to cope with Austin's critique of their discipline as being merely a form of morality.[45] And, although some are satisfied as to the law-like quality of international law, others are doubtful. H.L.A. Hart, for example, in a modern reformulation of legal positivism, argues that international law is more like primitive law than like municipal law because international law lacks "the formal structure of . . . a legislature, courts with compulsory jurisdiction and officially organized sanctions. . . ."[46]

However, neither Austin's nor Hart's nor most other general jurisprudential characterizations of international law pay particular attention to the diversity of international law. That is, most discussions of the problems of the certainty and efficacy of international law assume that there is a system, uncertain and ineffective though it may be, of international law and suppose that there is something like a single general integrated, if not hierarchial, international legal process. Reality is otherwise.

Various forms of international law vary along what might be called a "structural spectrum," there being "a great variety of international legal systems, some more structured than others."[47] In some of its forms, for example, the system regulating nuclear weapons, international law may be so unstructured in terms of both rule-specificity and rule-enforcement as to be, at best, a sort of Hart's so-called "primitive law."[48] In some other of its emanations, for example, the systems pertaining to the European Economic Community and to European Human Rights Law, international law may be so well-structured in terms of rule-specificity and rule-enforcement as to be virtually as "hard" as any ordinary domestic law.[49]

Given the diversity of international legal systems, we should assume that there will be differences in the certainty of their rules and the efficacy of their enforcement processes. In analyzing the relationships between law and society, Max Weber, at the turn of the century, defined "law" as "an order system endowed with certain specific guaranties of the probability of its empirical validity."[50] Weber's necessary "guarantees" for law are more sophisticated than Austin's necessary "sovereigns" for law. Weber wrote of

a "coercive apparatus, i.e., that there are one or more persons whose special task it is to hold themselves ready to apply specially provided means of coercion (legal coercion) for the purpose of norm enforcement." The coercive apparatus" may use psychological as well as physical means of coercion and may operate directly or indirectly against the participants in the system.[51] Weber's conceptual framework is, I submit, a more useful and realistic way to understand the nature and diversity of international law than the theories provided by Austin and Hart.

Looking back to neutrality, it is helpful to remember that "the rules of neutrality are products of two forces pulling in opposite directions, the final result being determined by the relative bargaining power of the parties."[52] This is not a promising circumstance, either for the elaboration of certain rules or for the efficacious enforcement of those rules. Indeed, in great wars, whether they be the Napoleonic Wars or the World Wars, the legal system of neutrality has been apt to collapse altogether.[53]

It may be that there will be periods of time, such as that between 1815 and 1914, when, because of the conditions of international politics, there will be a sufficient consensus to generate generally accepted rules and a coercive apparatus for a law of neutrality.[54] Moreover, even in times of uncertainty and inefficacy, there may be occasional authorities which will pronounce an illegality under the law of neutrality.[55] However, for the most part, the rules respecting "neutrality" or what Fenwick preferred to call "non-participation"[56] will be rules tailor-made to fit particular conflicts and will neither be norms of general specificity nor will they be enforced by a coercive apparatus comparable to that available for "harder" forms of international law.

Notes

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1. L.Oppenheim, *International Law*, 5th ed. (London: Longmans, Green, 1935), v. 2, pp. 492-493 [hereinafter cited as "Oppenheim"].

2. Philip C. Jessup, "Diversity and Uniformity in the Law of Nations," *American Journal of International Law*, 1964, v. 58, pp. 344-345. James Kent, *Commentaries on American Law*, 2d ed. (New York: O. Halsted, 1832), v. 1, pp. 47-179.

3. Neill H. Alford, Jr., *Naval War College International Law Studies 1963* Vol. 56, *Modern Economic Warfare (Law and the Naval Participant)* (Newport, R.I.: Naval War College, 1967), p. 326.

4. Elihu Lauterpacht, "The Legal Irrelevance of the 'State of War,' " *Proceedings of the American Society of International Law*, 1968, pp. 62-63.

5. C.G. Fenwick, "Is Neutrality Still a Term of Present Law?" *American Journal of International Law*, v. 63, p. 102 (1969) [hereinafter cited as "Fenwick"].

6. U.S. Navy Dept., *The Commander's Handbook on the Law of Naval Operations*, NWP 9, 1987 (Newport: 1987), pp. 7-1 to 7-12 [hereinafter cited as *Commander's Handbook*].

7. Oppenheim, *supra* note 1, at pp. 492-738.

8. Constantine J. Colombos, *The International Law of the Sea*, 4th rev. ed. (London: Longmans, 1959), pp. 562-760.

9. Daniel P. O'Connell, *The International Law of the Sea*, (Oxford: Clarendon Press, 1984), v. 2, pp. 1141-1158 [hereinafter cited as "O'Connell"].

10. Philip C. Jessup and Francis Deak, *Neutrality: Its History, Economics and Law: Vol. 1, The Origins* (New York: Octagon Books, 1935); W. Alison Phillips and Arthur H. Reede, *Neutrality: Its History, Economics and Law: Vol. II, The Napoleonic Period* (New York: Octagon Books, 1936); Edgar Turlington, *Neutrality: Its History, Economics and Law: Vol. III, The World War Period* (New York: Octagon Books, 1936); Philip C. Jessup, *Neutrality: Its History, Economics and Law: Vol. IV, Today and Tomorrow* (New York: Octagon Books, 1936).

11. *Commander's Handbook, supra* note 6 at pp. 7-2 to 7-12; The doctrinal bulk of the traditional law is enormous. The Harvard international law reference catalogue dealing with "neutral" topics runs to 73 pages. Harvard Law School Library, *Catalog on International Law and Relations* (Cambridge, Mass., 1966), v. 14, pp. 8-80.

12. *Commander's Handbook, supra* note 6 at par. 7.1.

13. O'Connell, *supra* note 9, at pp. 1141-42; R.R. Baxter, "The Legal Consequences of the Unlawful Use of Force Under the Charter," *Proceedings of the American Society of International Law*, 1968, p. 73.

14. Quincy Wright, *Proceedings of the American Society of International Law*, 1968, p. 79; and *see* Lauterpacht, *supra* note 4, and Fenwick *supra* note 5.

15. Erick Kussbach, "Neutral Trading," *Encyclopedia of Public International Law* (Amsterdam: North-Holland, 1982), v. 4, p. 9.

16. O'Connell, *supra* note 9 at p. 1154. Virtually all of O'Connell's evidence of neutrality in general is pre-1945.

17. William O. Miller, "Belligerency and Limited War," Richard B. Lillich and John N. Moore, eds., *Naval War College International Law Studies*, Vol. 62, *Readings in International Law from the Naval War College Review 1947-1977* (Volume II of Readings) (Newport, R.I.: Naval War College, 1980), p. 168.

18. James F. McNulty, "Blockade: Evolution and Expectation," *id.*, p. 180.

19. Lauterpacht, *supra* note 4 at pp. 59-60.

20. Patrick M. Norton, "Between the Ideology and the Reality: The Shadow of the Law of Neutrality," *Harvard International Law Journal*, Spring 1976, v. 17, p. 249 [hereinafter cited as "Norton"].

21. *Id.* at p. 302.

22. *Id.* at pp. 302-03.

23. *Id.* at pp. 303-04.

24. *Id.* at pp. 304-06.

25. *Id.* at p. 306.

26. David L. Peace, "Major Maritime Events in the Persian Gulf War," paper presented at the 82d Annual Meeting of the American Society of International Law, April 21, 1988, p. 3.

27. *Id.* at pp. 4-5.

28. *Id.* at pp. 6-8.

29. *Id.* at pp. 13-16.

30. *Id.* at pp. 17-18.

31. McNaugher, "The Evolution of U.S. Policy in the Persian/Arabian Gulf," Council on Ocean Law and The Law of the Sea Institute, *Transcript of an Evening Panel Discussion on the Persian/Arabian Gulf Tanker War: International Law or International Chaos*, January 26, 1988 [hereinafter cited as "Transcript"], at pp. 1, 2.

32. Louis Henkin, "Commentary," *Transcript, supra* note 31, at 8, 9-10.

33. *Commander's Handbook, supra* note 6, par. 7.1.

34. Miller, *supra* note 17 at pp. 169-170.

35. Leonard C. Meeker, "Defensive Quarantine and the Law," *American Journal of International Law*, v. 57, p. 515 (1963).

36. *Id.* at pp. 516-524.

37. *See* Carl Q. Christol and Charles R. Davis, "Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Material to Cuba," *American Journal of International Law*, v. 57, p. 525 (1963).

38. Norton, *supra* note 20, at p. 310.

39. Yoram Dinstein, *Encyclopedia of Public International Law* (Amsterdam: North-Holland, 1982), v. 4, p. 27.

40. Ken Booth, *Law, Force and Diplomacy at Sea* (London: George Allen & Urwin, 1985), p. 200.

41. *Commander's Handbook, supra* note 6 at pp. 1-1 et seq.

42. *Id.* at pp. 2-1 et seq.

43. *Id.* at pp. 3-1 et seq.

44. John Austin, *The Province of Jurisprudence Determined* (London: John Murray, 1832; reprinted ed., Birmingham, Alabama: The Legal Classics Library, 1984), p. 208.

45. Henry Wheaton, *Elements of International Law with a Sketch of History of the Science* (Philadelphia: Carey, Lea & Blanchard, 1836; reprinted ed., New York: Da Capo Press, 1972), p. 47.

46. H.L.A. Hart, *The Concept of Law* (Oxford University Press, 1961), pp. 209, 226.

47. Mark W. Janis, "Do Laws Regulate Nuclear Weapons?," Istvan Pogany, ed., *Nuclear Weapons and International Law* (New York: St. Martin's Press, 1987), p. 60.

48. *See id.* at pp. 53-54, 59-61.

49. Mark W. Janis, *An Introduction to International Law* (Boston: Little, Brown, 1987), pp. 229-30; Mark W. Janis, "International Courts and the Efficacy of International Law," *Connecticut Journal of International Law*, 1987, v. 2, p. 261.

50. Max Weber, *Law in Economy and Society* (New York: Clarion; Rheinstein & Shills trans., 1954), p. 13.

51. *Id.* at p. 13.

52. Nils Orvik, *The Decline of Neutrality 1914-1941, with Special Reference to the United States and the Northern Neutrals*, 2d ed. (London: F. Cass, 1971), p. 13.

53. *Id.* at p. 16.

54. A good account is in Holland, "Neutral Duties in a Maritime War," *1905-1906 Proceedings of the British Academy*, p. 55.

55. For example, in the 1982 Falkland/Malvinas conflict, the United States Court of Appeals for the Second Circuit found Argentina guilty of violating international law for "attacking a neutral ship in international waters, without proper cause for suspicion or investigation." *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F. 2d 421, 424 (2d Cir. 1987), reversed 109 S.Ct. 683 (1989).

56. Fenwick, *supra* note 5 at p. 102.

Chapter VII
Maritime War Zones & Exclusion Zones

by
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I. Introduction

Questions of legality apart, nations' experience of maritime war zones or exclusion zones has demonstrated the utility of these juridical/strategic devices for both offensive and defensive purposes.[1] For example, in World War I and in World War II both sides created prohibited war zones for offensive reasons. On the other hand, in the Russo-Japanese War (1904-1905), the Japanese Government created defensive war zones.[2] Similarly, both Argentina and the United Kingdom created what each belligerent claimed to be its defensive war zones in the Falklands ("Malvinas") Islands Conflict of 1982.[3] States declare maritime exclusion zones offensively when they seek to interdict shipping into a target state or port in order to embargo that country's trade, especially its trade in war materiel and food. They declare them defensively when they seek to interdict shipping, or selected types of shipping (for example, warships and merchant ships carrying military supplies, or acting as auxiliary naval ships), from entering approaches to the territory they are defending from invasion.

With regard to offensively-oriented naval exclusion zones, the *Commander's Handbook on the Law of Naval Operations* (Naval Warfare Publication 9)[4] correctly points out that, while the traditional rules of blockade required a "relatively 'close-in' cordon of surface warships stationed in the immediate vicinity of the blockaded area,"[5] the contemporary development of weapons and tactics creates a situation which cannot be reconciled with this means of enforcement. NWP-9 continues:

> The so-called long-distance blockade of both World Wars departed materially from those traditional rules and were justified instead upon the belligerent right of reprisal against illegal acts of warfare on the part of the enemy.[6]

NWP-9 also points out the difficulties, indeed, impossibilities, of an in-shore blockade in light of modern weapon systems and platforms, "particularly nuclear-powered submarines, supersonic aircraft, and cruise missiles."[7]

Without committing itself as to whether contemporary methods and weapons for waging war at sea have brought about legal change in the context of the offensive use of restricted or prohibited war zones, NWP-9 concludes its discussion of this topic with the observation that:

> The [United States] blockade of Haiphong and other North Vietnamese ports [was] accomplished by the emplacement of mines, [and] was undertaken in conformity with traditional criteria of establishment, notification, effectiveness, limitation, and impartiality.[8]

While the mining of the North Vietnamese harbors may have observed some of the traditional, maritime, siege-type, requirements of blockade,[9] and complied with Hague Convention (VIII) Relative to the Laying of Automatic Submarine Mines[10] it did not entirely meet the traditional requirements of a close-in blockade since a blockading fleet "within visual range of the coast"[11] was not constantly present outside those ports. Indeed, the system of "Market-Time" (which related only to the coast of South Vietnam) apart, the United States tended to rely on the air arm as well as on surface warships (under Operation "Sea Dragon") for purposes of blockading North Vietnam.[12] Also the use of floating mines activated by such agencies as sound and vibration was not in compliance with Hague Convention VIII.

When reviewing the resort to maritime exclusion zones as instruments for justifying attacks against unarmed merchant ships, this paper will examine the strategies of the proclaiming states asserting rights to establish such zones. While both defensively and offensively used exclusion zones are instruments for logistical strategies,[13] that is, strategies directed to the denial of supplies, reinforcements, and replacements to the enemy, these may be conducted in terms of either "persisting" and "holding" or alternatively "raiding" strategies.[14] It will be a further thesis of this paper that to establish maritime exclusion zones merely for the purpose of implementing raiding strategies, whereby power is exercised not by the maintenance of control but by indicating an intention to engage in adventitious attacks on random shipping, is invalid. In addition, such a strategy involves a politically contradictory posture. Since the assumptions underlying policies of establishing exclusion zones include the need for effectiveness and persistence, the fortuitous nature of zones enforced only by raiding strategies reveal them as being only haphazardly enforced. Simply to enforce a zone at random times and engage in random attacks arises from the lack of an essential ratio of power to space and time which the sufficient mastery of the area and effective exclusion of the enemy require. Such a result can only be achieved by a persisting strategy. This calls for an adequate ratio of power to space and time such that control of the area can be completely assured. In addition to the issues of the strategies involved (that is, offensive/defensive; logistical/combat; raiding/persisting) there are, of course, other variables that need to be borne in mind: the

reasonableness of the zone both in size and in relation to the object(s) the proclamation(s) seek to achieve; its effectiveness in terms of contemporary weapons technology; and proportionality both in terms of the ratio of force to space and time and in terms of enforcement and sanctions.

This chapter will review, first, the legality or illegality of prohibited or exclusion zones in terms of persisting and raiding strategies, that is, resort to either or both strategies in order to deny the enemy's access to the economic resources; and, secondly, in terms of such zones when they are resorted to for defensive persisting strategies which reflect their use "as a moat defensive to a house".[15] In this latter mode, the commander's object is to exclude the enemy's shipping from an ocean area on the presumption that the excluded ships may otherwise attack the state through, or across, the proclaimed zone. In all cases where these strategies are used, the issue of military utility, targets, and means and methods will be treated as essential to the analysis. Furthermore, the importance of the principle of distinction and of the obligation to respect non-participating, neutral shipping, will be stressed. This final criterion is variable and dependent on a number of factors such as the geographical location of the zone proclaimed, the density and quantity of the traffic affected, and the geographical extent of the hostilities.

In the pages that follow a considerable emphasis will be laid on the use of maritime prohibited zones for purposes of carrying out, or attempting to carry out, logistical strategies. But, while there are possibly more striking examples of this (that is, logistical) use of the zones under review, it must be stressed that the zones are used for defensive and offensive combat strategies as well. In this latter (combat) connection they can be useful as adjuncts, rather like the use of mine fields on land or sea by an attacking force. Their function, in this last scenario, is that of diverting an adversary into a "killing ground."

II. A Review of State Assertions of Maritime Exclusion Zones in Times of War or Armed Conflict

A. The Russo-Japanese War, 1904-05

The investigator today, seeing the proliferation of exclusionary zones in conflicts which have arisen from very divergent and disparate circumstances, may be surprised that there was little cavil regarding what has been denominated as the earliest declaration of such a zone. In the Russo-Japanese War, 1904-05, Japan established maritime defense zones which Hall described in the following terms:

> Prior to the outbreak of war with Russia, the Japanese Government empowered the Minister of Marine, or the Commander-in-Chief, . . . to designate certain areas adjacent to the islands of the Japanese Empire as "Defense sea areas." . . . On and after

> the outbreak of war twelve or more of such areas were notified, the boundaries of which in some cases ran as far as ten miles from land.[16]

In enforcing these defensive zones by its persisting holding strategy, the Japanese Government evinced an adequate ratio of force to both time and space. This effectiveness enabled that country's naval forces to seize and condemn, as prize of war, the neutral French ship *Quang-Nam* on the ground of her presence within the prohibited area.[17] In addition to stressing the historical and legal importance of the Japanese Navy's persistently maintained and effective defense zones, note should also be taken of the establishment, in the Russo-Japanese War, of an early forerunner (created by the necessity of a then contemporary technological innovation of radio) of the 1982 British Moving Defensive Area (or "Bubble") concept[18] for the protection of her forces in the South Atlantic against both attack and intelligence-gathering. In the earlier conflict, namely the Russo-Japanese War, the British ship *Haiman* had been fitted with a DeForest wireless telegraph apparatus. She also had a representative of the *Times* of London on board. Messages were sent over this apparatus in cypher to Wei-Hai-Wei (at that time a British possession on the Shantung Peninsula of China and located close to the sea areas where both belligerents were conducting their naval operations). These messages were transmitted to London over a neutral cable and thus were available for newspaper publication.

The *Haiman* was visited several times by Japanese warships and once by the Russian cruiser *Bayan*. She was instructed not to engage in broadcasting naval operations. Subsequently, however, as a result of the concerns of Admiral Alexieff, the Russian authorities in the Far East promulgated, on April 5, 1904, an instruction to the effect that correspondents broadcasting within the zone of operations of the Russian fleet should be treated as spies. The severity of the sanction imposed in the promulgation was adversely criticized in the British House of Commons. In the House there was general agreement that the Russian Admiral and the Czar's Viceroy in the Far East should, rather, have had recourse to the remedies for unneutral service (confiscation of the ship, her cargo, etc.), rather than accusing and punishing the offender for the capital crime of espionage[19] even if the correspondent had been found, contrary to the tenets of his profession, to be transmitting information to the Japanese authorities. It should be noted, however, that the debate only criticized the threat to resort to the extreme penalty, and did not question the authority of both fleets to restrict news gathering and dissemination on the high seas, despite neutrals' expectations that the belligerents would respect their journalists' right to enjoy those freedoms. Clearly, the belligerents' encroachments on the neutral states' privileges were acceptable, provided they remained reasonable and balanced as between the interests in play. On the other hand, Admiral Alexieff remained unmoved

by the neutrals' protests. Hence, the Russian position, since it threatened the extreme sanction of death (probably by hanging),[20] rather than the penalty appropriate for non-neutral service, should be treated as failing the reasonableness and proportionality tests.

After declaring war on Germany in April 1917, the United States issued orders similar to the Japanese 1904 regulations. They controlled navigation in defined areas and around named American ports. These were maintained by an effective persistent holding and defensive strategy, despite the fact that, at some points the distance of the circumference of an area from a given center was as far as ten miles[21] (a similar distance to that in the Japanese orders). Regarding these orders, Hall observed that:

> The Japanese and American orders were based on the principle of defense, and it appears to be on such a principle that claims to establish war zones or areas of the high seas from which neutrals may be excluded can be supported. The legitimacy in any given case must be determined by circumstances.[22]

Hence it may be asserted that exclusionary zones created purely for defensive purposes, and provided they are persistently maintained and rendered effective by virtue of the ratio of power to space and time, and carry proportionate sanctions for breach, have for some time now, come to have been approved by the international community. This approval is testified to by the lack of protest or resistance to both the Japanese and American proclamations and an agreement among publicists that they fall within the test of reasonableness.[23] But today the types of exclusion zones calling for legal analysis involve more complex methods and tactics for enforcement, cover far larger sea areas, and are established for many more diverse ends than was the case with these early and relatively modest and straightforward forerunners.

B. World War I, 1914-18 and The Interwar Period

In World Wars I and II prohibited zones were set up by both sides for the purpose of staging a ruthless and almost effective aggressive logistical strategy.[24] Their objects were to blockade the enemy to bring him to his knees by starvation and the denial of war materiel. This is, of course, the complete opposite of the resort to exclusion zones for defensive purposes by the Japanese in 1904-05. As has already been pointed out, both of the blockades of World War I were denounced as illegal by their target (enemy) states. Indeed, while certain limited forms of maritime exclusion zones have, in recent years, been increasingly achieving recognition as lawful, in the period of the two World Wars and the interval between, only those maritime zones which were modest as to purpose and strictly limited as to area (such as those established by Japan in 1904 and the United States in 1917) were accepted as lawful. Hence the German unrestricted submarine warfare in the North Atlantic and the Anglo-

American "Starvation Blockade" were claimed to have been justified by their executants as constituting appropriate reprisals. Indeed, it should be noted that the accepted doctrine and practice regarding belligerent reprisals has long been predicated on the otherwise unlawfulness of the conduct constituting the reprisal. That conduct becomes justified only by the previous unlawfulness of the adversary's original act. Despite its intrinsic illegality, the act of reprisal is claimed to be justified as a sanction against that prior illegal act and becomes legitimate as a means of putting pressure on the target state to desist from continuing in its prior unlawful conduct.[25]

The maritime exclusion zones created by the belligerents started with the stigma of unlawfulness mitigated only by the previous unlawfulness of the adversary's conduct giving rise to the drastic response of resorting to reprisals. Neither party, however, claimed that new weapons and tactics had given rise, as a matter of necessity, to the emergence of a customary norm justifying their prohibited zones. Furthermore, each side argued that the other's reprisal (that is, maritime exclusion zone) was illegal even as a reprisal.[26] In addition, an assertion of customary international law justification would, most probably, have been met with outrage and derision by the neutral states (which, down to April 2, 1917, included the United States of America). But the purpose of this chapter is to learn whether, since 1918, subjects of the international legal order have come to recognize, as customary international law, and aside from the very questionable arguments based on reprisals, at least some maritime prohibited zones which are established in time of war. Such an inquiry calls for the substantiation of criteria for establishing the validity of certain of these tactical and strategic devices. The point of referring to justifications predicated on reprisals was to indicate merely that neither party, and especially the United Kingdom, was prepared to risk that its policy, if failing the test of legality on the basis of the emergence of a customary norm, would draw upon itself the stigma of illegal conduct based on a spurious argument. But nowadays such arguments in terms of reprisals are, in light of emerging customary norms, largely anachronistic.

(1) Traditional Blockade—A Time-Honored Logistical Strategy

Revisiting the older and well established rules, the investigation which follows will begin with reviewing the legal institution of blockade as it had evolved over some two centuries previous to World War I, and had been defined, in the nineteenth century and early twentieth century, by treaty. Originally, the requirement was that a blockade to be valid and opposable to neutral shipping, had to be "close-in and, of course, persisting in terms of the necessary ratio of force to space and time." While weapons did not render such a blockade suicidal (as today's military arsenal clearly would), it was, in the heyday of sail, not without considerable risks and challenges to the blockading commanders. This is illustrated in a British naval historian's review of the "close-in" blockade of Brest during the French Revolutionary

and Napoleonic Wars reflecting as it did both a persisting holding strategy and a necessary ratio of force to space and time:

> Brest, where the principal fleet of the French was lying, commanded by Admiral Ganteaume is in the north-east corner of the Bay. Outside it is a rocky coast and a wicked stretch of sea, foggy, cold and stormy. Strong tides set through the narrow sounds inside the Isle of Ushant, and the prevailing wind, southwesterly, blows onshore with the whole of the open Atlantic behind it to build up a sea and swell. Even the sailing ships of modern times, such as they are, are advised to keep well offshore. Collingwood, who commanded the blockade in the '90s, had said that this coast was more dangerous than a battle once a week.
>
> Yet to keep the approaches to Brest under observation, Collingwood had to be close. Ships of the line in those days were unhandy vessels, slow to windward and slow to go about. Embayed on a lee shore with an incoming swell, they could never be sure of clawing off again. Caught in a calm, they were helpless against a tide that might set them into unnavigable sounds. Yet night and day, summer and winter, Collingwood and his captains stood off and on that shore, estimating the tidal streams and currents, constantly solving the problems of navigation and ship-handling—and not merely in a single ship, but in a whole fleet of them. No modern sailor would dare to explain how they did it; the art of sailing such ships is long forgotten. Even then, the achievement amazed the French, who looked out in every dawn and saw the sails there. There was only a single exception. In heavy westerly gales, they ran for shelter in Plymouth Sound, a hundred and fifty miles across the Channel—because in a westerly gale, the French could not possibly beat out of harbour. But whenever the wind showed signs of moderating, they were back on station before the French could stir.[27]

But severe a challenge as the risks of winds, waves, tides and rocks were in the days of sail, they challenged, to a very high degree, proficiency in seamanship. They did not partake of the same order of inevitable destructiveness that would be the result if ships were to engage in a "close-in" blockade today, when modern-day airborne and submarine radar-directed, heat-seeking missiles, or other forms of the "smart" weapons of contemporary arsenals would doom the enterprise. The destruction wrought on *H.M.S. Sheffield* by an Exocet missile (even though the ship was not engaged in any "close-in" blockade) during the 1982 Falklands Conflict illustrates the vulnerability of modern warships to even rather obsolescent, cheap and easily made post-World War II missile-type weapons. Furthermore, the sad error of *U.S.S. Vincennes* in July 1988 underscores the difficulties of command that modern weaponry can create. (Although the *Vincennes* was not involved in an official blockade, she was operating in a populous and geographically restricted area with busy air and sea lanes. The incident illustrates the technological/moral/and social problems with which a commander in a close-in blockade situation of today would be faced.) Finally, it is suggested that a persisting effective blockade, reflecting an adequate ratio of force to both space and time, can be achieved without literally complying with the

nineteenth and earlier centuries' criterion for effectiveness of being "close-in."

Again, technology has changed the exercise of the right of visit and search quite basically, as McDougal and Feliciano have pointed out regarding the present-day difficulties:

> It scarcely needs demonstration to show that the successful exercise of these procedures at sea, in the context of modern naval and air warfare, presents the most formidable difficulties. The warship attempting to stop, board and search a suspected enemy or neutral vessel becomes, in the course of such an attempt, highly vulnerable to air and submarine attack. Moreover, the size of present-day ocean carriers and the volume of cargo carried make any inspection of the cargo that goes beyond the perfunctory examination of shipping manifests practically impossible without modern dock facilities.[28]

The authors argue, accordingly, that the practice of diverting suspected merchantmen to designated control points that has arisen in response to the challenge that the foregoing difficulties have posed, is reasonable and hence valid. They argue, further, that the same rationale applies to the diversion of suspect vessels before or without the formality of a boarding to effect the visit and search on the high seas.[29]

In comparison, the 1856 Declaration of Paris authoritatively asserted that a state, to ensure that its blockade was valid and opposable to neutral ships captured as prizes of war for breaching the blockade, was obliged to ensure that its blockade was "really effective."[30] This obligation was repeated in the Declaration of London, 1909,[31] which, however, was never ratified by Great Britain and never entered into force as a binding instrument for any of the states that negotiated it. But a number of countries did evince considerable sentiment in favor of its terms, as exemplified, for example, by the United States' proposal in August 1914 that the belligerents comply with it. The Entente Powers found, on analysis, however, that Germany and Austria could import unlimited quantities of foodstuffs and other conditional contraband through the neutral state of the Netherlands (which took the view that the combination of her declaration of neutrality, together with the Convention of Mannheim of 1868 regulating the navigation of the Rhine, completely tied her hands).

On the other hand, article 34 of the Declaration would permit an enemy of the United Kingdom to stop all exportation of food from a neutral state to that country. Indeed, it was prior to the outbreak of the First World War that intense public agitation in Great Britain against, *inter alia*, article 34, that had created so great an opposition to that country's signature, that it resulted in the United Kingdom Government's reversal of its position on the Declaration and in its refusal to ratify the agreement.[32]

This very serious departure by Great Britain and France in their statements of policy in August 1914[33] from the principles of the unratified convention

provided Imperial Germany with the basis for her claim to engage in her "long distance blockade" by means of indiscriminate submarine warfare, and of mining the approaches to the British Isles. The German submarine policies were stated to be reprisals against the British and French rejection of the 1909 Declaration.[34] In reality the German submarine logistical strategy, which began with a smaller submarine fleet, in 1914, than that of the United Kingdom (28 for Germany and 56 for Great Britain) at the outbreak of war,[35] never ceased, despite the concentration of her naval effort on submarine warfare, to be a raiding logistical strategy carried out, even at its height of success (March-August 1917[36]) by random attacks that were no better than raiding assaults and never could be effectively sustained by maintaining an adequate ratio of force to space and time.

Contrariwise, the Entente Powers, on November 4, 1914, justified their long distance blockade, not as a legally permitted logistical strategy, but only on the basis of their claim to resort to belligerent reprisals—namely in retaliation for Germany's sowing contact mines in the open sea around the British Isles contrary to the Hague Mining Convention (Convention VIII).[37] On the other hand, an alternative basis to the questionable one of belligerent reprisals might have been supported in terms of an emerging customary rule. The case for the Entente Powers' long distance blockade might have been argued in terms of the geographical expansion of the blockade owing to emerging technological exigencies coupled with a demonstration of its still being "truly effective," just as was the "close-in" blockade of the age of sail. Such a blockade could be shown to constitute a persisting logistical strategy with an adequate ratio of force to space and time. Hence it was effective within the meaning of paragraph 4 of the 1856 Paris Convention.[38]

(2) The Test of "Effectiveness"

Although becoming increasingly anachronistic, given changes in weapons technology, the test of effectiveness was seen, for example, in the diplomatic exchanges during World War I down to April 1917, as a term of art deriving from the Paris and other Declarations and international agreements. Hence, effectiveness was frequently represented as requiring the positioning of a naval force on station, so that it prevented access into and egress from the zone (port, estuary, coast, etc.) blockaded. It was out of this requirement, in a time before radar, radio, aircraft, and submarines, that the notion developed that the test of "effectiveness" could call for a cordon of anchored men-of-war. But, as the experience of World War I showed, an effective blockade could be maintained at a considerable distance from the enemy's ports. For example, the Anglo-American mine barrier across the northern end of the North Sea provided as effective a blockade as did the presence of the British Grand Fleet in Scapa Flow to bottle up the German High Seas Fleet in the Jade River.

If conduct which was regarded as impermissible becomes viewed as legally permissible, a new regime of customary international law must be shown to have come into being; provided that the twin requirements of a constant and "uniform usage practiced by the states in question, and that this usage is the expression of a right . . ."[39] are satisfied. In the case of a change in the detonations of the qualifier, "effective," such a new customary rule may well be justified on the basis of the confrontation of the reality of the new technology with traditional law, rendering obsolete the old rule of a close-in stationing of the blockading fleet. New situations and new weapons, through necessity, may be shown to have given rise to new practices that still satisfy the requirement of effectiveness, whose connotation remains unchanged; that is, it satisfies the requirement of being a persisting holding logistical strategy. In these circumstances necessity reinforces the mental element of determining the emergence of a customary rule. But, despite the resort by both sides in World War I to systems of prohibited zones in which neutral merchant ships would be controlled on the British and French side by surface forces (with an ever-increasing list of contraband being used to justify their seizure) and, on the other, by the threat of being sunk on sight, by the end of that war there was no consensus leading to any recognition of prohibited maritime zones as lawful. Indeed, a great negative reaction had set in, and while the British "Starvation Blockade" was widely denounced by publicists (and especially German scholars writing on the subject), the German indiscriminate submarine warfare was even more widely stigmatized for its ruthless inhumanity.

The diplomatic interventions of the United States, prior to her declaration of war (April 2, 1917) against Germany in World War I, both in terms of her suggestions and proposals to both belligerents, and in terms of the diplomatic protests she lodged with both sides, are of considerable interest in evaluating the possibility of the emergence of a customary international norm. It is also germane to arguments that contemporary diplomacy operated with a strong negative impact on such a possible development.

On August 6, 1914, the United States proposed to both of the belligerent coalitions that they should adopt the Declaration of London of 1909 as it stood. The Entente (in effect Great Britain and France)[40] announced that they would apply the Declaration, but with very serious departures from it regarding conditional contraband. Germany, on the other hand, notified the United States on August 22, 1914, that she was willing to apply the Declaration of London in its entirety.[41] On receipt of these replies the United States protested vigorously against the British Order in Council of August 20, 1914. Thus, on October 30, 1914, the August 20 Order in Council was cancelled and replaced by a further promulgation, making important concessions to the United States. But, on December 26, 1914, the United States made a further vigorous protest. While these early exchanges did not relate to "long distance

blockades" as such, they were soon followed up by United States proposals against that form of Allied control of neutral shipping suspected of trading with the Central Powers. On December 28, 1914, the United States became the spokesman of neutral powers and again protested against the systematic enforcement of the diversions of neutral ships which were required by the Entente's economic measures. The United States argued that those systematic diversions were tantamount to a general presumption that all diverted ships were carrying contraband, and that such a presumption was contrary to international law.

Taking advantage of the neutrals' angry reaction to the Entente's system of diverting neutral shipping, and the Allies' rejection of the key articles of the Declaration of London of 1909 (for example article 34), Germany on February 18, 1915, promulgated her first declaration of indiscriminate submarine warfare. She claimed that this form of warfare was permissible as a reprisal against the Entente's refusal to abide by the Declaration of London and their systematic deviation of neutral shipping. She declared that any hostile merchant ship encountered in British or Irish waters, including the English Channel, would be sunk without warning. Neutral ships navigating in those waters were stated to be at risk, on the ground that merchant ships of the Entente had, on several occasions, hoisted neutral colors and "mistakes could not be avoided."[42]

(3) The Effect of the United States Entry into World War I

In response to the German declaration of unrestricted submarine warfare in early 1915 the United Kingdom proclaimed the Order in Council of March 11, 1915 (which was followed by the French decree of March 11, 1915). Regarding those promulgations, Guichard tells us that:

> Up to that date indeed France and England had confined their attention to contraband alone; from 11th March 1915 they held themselves free to bring into their ports any goods the destination, ownership, or origin of which was presumed to be hostile. In other words all direct trade between Germany and the Powers overseas was put a stop to.[43]

Originally, this Order-in-Council was applied only to sea areas east of the 15th degree east longitude and north of the 30th degree north latitude. Subsequently this zone was extended to sea areas east of the 30th degree west longitude. In effect, despite British and French insistence to the contrary, they had, in effect, created a maritime prohibited zone in relation to neutral vessels that they (the Entente Powers) believed to be trading with, or carrying goods to and from, the Central Powers.[44] Furthermore, they were able to maintain this logistical strategy with a persisting ability to hold the area and maintain it effectively.

In March, April, and July 1915 the United States, in effect, charged the Entente Powers with illegally interfering with neutral commerce. On October 21, 1915, this country protested strongly against the steps that the

Entente Powers had taken to interdict neutral trade with the Central Powers.[45] On July 7, 1916, moreover, the Entente Powers, over France's misgivings, abandoned their voluntary acceptance of the principles of the Declaration of London. But the period of United States' protests against the Entente Powers' blockade ended after her entry, on April 2, 1917, into World War I. Indeed this country brought a much needed, added, strength and guiding force to the Allies' blockade. Guichard tells us that:

> The attempts made to bring unity of direction between France, Great Britain and Italy had hitherto been unsuccessful . . . . Unity of direction which France had early asked for and which had been so conspicuously lacking was forced upon the allies by the economic policy of the United States. . . .
>
> . . . . However just about the time that inter-Allied cooperation in the economic war really became effective the blockade ceased to occupy the first place in the economic anxieties of the Allies. The German counter-blockade . . ., [their] achieved unity of action . . . in respect of maritime transport, . . . [gave] them victory in the economic war.[46]

In the period 1914–17, and prior to the United States' entry into World War I, the Allied long distance blockade was in an evolving process. During that period it was the subject of diplomatic protests by the United States and other neutral countries such as the Netherlands, Denmark, Norway and Sweden. This latter group, consisting of minor powers having Germany as their neighbor, provided an economic protective arc around northern Germany. Their economic significance for Germany was greatly enhanced, as has already been noted, by the implications of the Declaration of London of 1909,[47] had the Entente Powers accepted the 1914 United States proposal to that effect.[48] While they supported the United States' position down to April 2, 1917, the Dutch and Scandinavian neutrals negotiated with the Allies prior to that date to ameliorate the impact of the blockade upon them in consideration for their limiting their exports to Germany.

In reviewing the relations between the United States and the Entente Powers retrospectively from April 2, 1917, and comparing them, prospectively, with the United States' attitude after the German Emperor's second order of unrestricted submarine warfare on January 19, 1917, it must be said that the United States had a complete change of heart regarding the matter of the Entente's policy of imposing the long-distance blockade. Just prior to April 2, 1917, the United States' attitude toward Germany had been exacerbated by the German proposal to Mexico and Japan that they enter into an alliance against the United States (published on March 1, 1917).[49] With regard to the United States' wholehearted and energetic participation in the Allies' blockade of Germany and its reflecting a complete change of heart, Guichard wrote, regarding earlier American attitudes, "it is of course quite

true that in August 1914 the United States had exchanged some very tart notes with the Allies on the subject of economic war. . . ."[50]

After April 2, 1917, under the added pressure from the United States, the neutral states' adhesion to the Entente's economic policies became a matter of increased necessity. In addition, as a result of her economic pressures and deprivations, and of her sense of triumph as a result of her imposition of the Treaty of Brest-Litovsk on a prostrate Communist Russia,[51] Germany increased her demands, especially on the Netherlands. This had the result of European neutrals becoming more accommodating to the Allied and Associated Powers. Indeed, the famous affair of the "Dutch Convoy" in April-June 1918 clearly illustrated the Netherlands' acceptance of the Allied long distance blockade of Germany then in force.[52] The fact of the United States' participation in the long-distance blockade was all-important to the Netherlands' position. Without it her capacity to resist German demands would have been nil.

C. World War II, 1939-45

By contrast with the neutral protests, prior to April 2, 1917, against the Entente Powers' long distance blockade in World War I, the United States did not take a similarly adversarial position with respect to the Allied Powers' blockade of Germany in World War II. On the other hand, both the United States and the Soviet Union reserved their rights to claim compensation for possible future losses due to the Allied Powers' enforcement of their blockade.

Such possible claims for compensation do not necessarily indicate compensation for denials of the other party's rights, but only that the Allies should pay for injuries to persons or property incidentally inflicted in the exercise of their blockade rights. After some three months into World War II, Great Britain and France reinstated what were, in effect, the principles of their long-distance blockade of World War I. Thus, after waiting for approximately three months, Great Britain promulgated her Order-in-Council of November 27, 1939.[53] Other neutrals, for example, Italy, protested.[54] After Italy entered the war on June 11, 1940, the system was extended to her.[55] While the Scandinavian countries also lodged protests early in the war, events overcame their positions after Germany invaded and occupied Norway and Denmark and effectively held Sweden in a hammerlock.

Again, as in World War I, Great Britain justified her long distance blockade as a "retaliatory system." Additionally, in World War II, Great Britain felt her position regarding reprisals to be strengthened by the facts of Germany's violation of the London (Submarine) Protocol of 1936, her breach of Hague Convention VIII on minelaying, and her indiscriminate destruction of seaborne commerce between the Allies and neutral states. After Italy's entry into the War, Great Britain asserted the same right of reprisal against Italy

as against Germany—on the ground of Italy's becoming associated with German methods of warfare.[56] It should be noted that while British and pro-British jurists and commentators were already discussing the idea of a long distance blockade, and were asserting that "Britain could not be expected to fight another war without resort to"[57] that form of economic warfare, the United Kingdom did not rely on any notion that such a system had emerged as a separate category in the customary international law of war. Instead, she merely had recourse, once more, to her "retaliatory system." Her caution in this regard was, of course, largely due to her uncertainty about the attitudes of the United States and the Soviet Union and her policy of not encouraging those countries to challenge her system in the name of the freedom of the high seas. This delicacy was further motivated by the sobering realization of the strength of isolationism in the United States and the violent reversal of Soviet foreign policy to a much more pro-German stance, as evidenced by the fall of Litvinoff and the Molotov-Ribbentrop Non-Aggression Pact of August 1939, the Soviet partition of Poland with Germany, and the Soviet seizure of the Baltic States, as an outcome of Joseph Stalin's new pro-German orientation.

In comparing the diplomatic protests served against the Entente Powers regarding their long range blockades in World War I with those issued in World War II, there would appear to be, quantitatively and qualitatively, a considerable decline, on the part of the neutral states, in their resorting to this form of resisting or rejecting the Allies' retaliatory system. This raises the question of whether decreased reliance on strong diplomatic protests in World War II as compared to World War I, may arguably be seen as the beginning of an acknowledgment, albeit reluctant, of their decreasing utility and necessity. But, again in World War II, as in World War I, the factors leading to the emergence of a customary international law norm justifying the long-distance blockades were camouflaged by both sides' invocations of reprisal as justification for their actions.

D. Review of Developments Through World Wars I and II, and the Interwar Period

To whatever extent decisions of international tribunals, or of domestic tribunals applying international law, have credibility, the decisional law has thrown an ambiguous light on the issue of the acceptance of such zones.

First, it should be noted that the United Nations War Crimes Commission did not address the question of blockade by resort to aerial attacks on shipping. Aircraft, clearly, have limitations similar to those of submarines regarding any capability to visit, search, and seize ships. Possibly this omission could be explained by the fact that the Allied forces engaged in this activity to a greater extent than did the Axis Powers, largely due to their very much greater preponderance in the air.[58]

But the question must be asked whether the fact of non-prosecution at Nuremberg for the indiscriminate sinking of merchant ships by aircraft was due simply to the fact that the United Nations had themselves engaged in this activity in World War II, knowing it to be illegal, and the United Nations prosecutors did not wish to have the conduct of their own military planners stigmatized as war crimes? Or, alternatively, did they so plan their cases because they had felt that long distance blockades had become lawful through general practice and acceptance and, further, because such blockades could lawfully be enforced by aircraft notwithstanding its limitations with regard to ensuring the safety of target ships' papers, passengers, and crews?

The records of the Nuremberg proceedings regarding prosecution for the indiscriminate sinking of merchant ships by submarines to enforce maritime prohibited zones as war crimes are instructive. Although Admiral Doenitz was charged before the International Military Tribunal at Nuremberg with waging unrestricted submarine warfare contrary to the London Naval Treaty of 1930[59] and the 1936 Naval Protocol[60] (to which Germany had acceded), and although evidence was shown that, on September 3, 1939, the German U-boat arm began unrestricted submarine warfare, the Tribunal was not prepared to hold Doenitz guilty for his conduct of that form of submarine warfare against British armed merchant ships. In addition, after receiving evidence of British unrestricted submarine warfare in a maritime prohibited zone which the United Kingdom had established, namely the Skagerrak, following a British Admiralty announcement of May 8, 1940, and after noting Admiral Nimitz's answers to interrogatories which showed that the United States Navy had begun unrestricted submarine warfare against the Japanese in the Pacific Ocean immediately following the surprise attack on Pearl Harbor on December 7, 1941, the Tribunal announced that its sentence of Doenitz was not assessed on the ground of his "breaches of the international law of submarine warfare."[61] Thus the British diplomatic campaign, during the inter-War period, to outlaw the type of submarine warfare[62] to which the German Empire resorted in World War I, was not revived after World War II. It should be noted that while the British exclusionary zone in World War II was comparatively modest, being constituted by an arm of the North Sea, the Skagerrak,[63] the United States had declared the whole of the Pacific Ocean (one third of the Earth's surface) a prohibited zone in which Japanese ships, both naval and mercantile, would be sunk without warning.

Finally, it should also be noted that some aggravated types of submarine attacks on civilian shipping in both World Wars were punished as war crimes. But these always involved conduct that was more reprehensible than merely that act of sinking the victim ship without warning. The war crimes cases arising from both World Wars that spring to mind illustrate the types of aggravated circumstances giving rise to the charges. These cases are:

(1) The Llandovery Castle (World War I):[64] Submerged submarine U-boat 82 sank a hospital ship which was distinctly marked as such. The hospital ship was not carrying any military personnel other than sick and wounded soldiers and members of the Canadian Medical Corps. After torpedoing the hospital ship, the submarine's commander, one Patzig, ordered the U-boat to surface and, after questioning some of the survivors, fired on the survivors in lifeboats, massacring many of them. After the War Patzig was not found, but two of his officers were arrested, tried and convicted of their war crimes. The plea of superior orders was rejected because "killing defenceless people in life-boats could be nothing else but a breach of the law;"[65]

(2) The Peleus (World War II): The submarine commander ordered the massacre by machine-gun fire of the survivors who were clinging to pieces of wreckage from the sunken merchant ship;[66]

(3) Trial of Karl-Heinz Moehle (World War II): As in *The Peleus*, the accused had ordered the massacre of survivors of sunken ships and was convicted for that aggravated offense;"[67]

(4) Trial of Helmuth von Ruchtesschell (World War II):[68] The accused was the commander of an armed German surface raider. He was charged with committing, *inter alia*, the following offenses against Allied merchant ships: (a) continuing to fire after the target ship had signalled her surrender; (b) failure to make provision for the safety of survivors (despite having the facilities for taking prisoners on board his ship); and (c) firing at survivors in life rafts.[69]

E. The Falklands (Malvinas) Conflict, 1982

In each of two conflicts fought in the present decade, namely the Falkland Islands Conflict (1982)[70] and the Persian Gulf Tanker War (1982-1988),[71] both sides promulgated Maritime Exclusion Zones. But their various definitions and uses have been very different. In the 1982 Falkland Islands Conflict a number of exclusion zones (seven in all) were proclaimed. The British declarations and the first two Argentinian zones reflected the desire of both sides to limit the conflict to the combat forces that they had committed to the struggle, to the Islands, and to the seas around them. The British resort to maritime exclusion zones was to further their persisting combat strategy of retaking and defending the Islands. Their persisting strategy was, in part, executed by raiding combat tactics. On the other hand, the Argentinian invocation of such zones (except her third, her May 11, 1982, proclamation of a "South Atlantic War Zone")[72] was for the purpose of reinforcing her persisting tactics once her raiding strategy had netted her control over the Falkland Islands. This appeared to be a corollary of the claim that each of the parties asserted, namely that it was merely exercising its right of self-defense, and was limiting its use of force to expelling its adversary from the

Islands, or to preventing that adversary from permanently establishing its territorial sovereignty over them.

The first British announcement of a maritime exclusion zone (MEZ), took effect on April 12, 1982. It established the prohibited area as being two hundred nautical miles radius from a point approximately at the center of the Falkland Islands. Under this promulgation only Argentine warships and naval auxiliaries found within this zone were liable to be attacked.[73] On the following day Argentina responded by establishing a two hundred sea-mile zone off its coast and around the "Malvinas" (Falkland) Islands. Since the British fleet was still some distance from the Islands, the effectiveness, for the first week or so, of the declaration of the British Maritime Exclusion Zone had the effect, as a ruse of war, of reinforcing an unfounded Argentine belief that the Royal Naval nuclear submarine *H.M.S. Superb* was on station in the area of Puerto Belgrano and the Falklands. The fact that *Superb* was at Holy Loch, Scotland, at the time may give rise to the question whether the British "blockade" complied with the Declaration of Paris.[74] On this point Professor Levie has commented:

> The British declaration was not really a blockade, as merchant ships and neutral vessels were not barred from the exclusion zone; it only applied to enemy naval vessels. It was, therefore, nothing more than a gratuitous warning to Argentine naval forces.[75]

On April 23, 1982, the United Kingdom Government informed the Argentine Government that:

> Any approach on the part of Argentine warships, including submarines, naval auxiliaries or military aircraft, which could amount to a threat to interfere with the mission of the British forces in the South Atlantic, will encounter the appropriate response. All Argentine aircraft, including civil aircraft engaged in surveillance of these British forces, will be regarded as hostile and are liable to be dealt with accordingly.[76]

The zone enunciated in this second declaration has been referred to as "The Defensive Bubble." The Royal Navy, the British public and, indeed, the world, did not have long to wait to see this proclaimed "Defensive Bubble" put into lethal effect. On May 2, 1982, the British submarine *Conqueror* torpedoed and sank the Argentine cruiser *General Belgrano* some thirty miles outside the MEZ around the Falkland Islands. As a result, the British Government experienced some criticism in Parliament and in both the domestic and foreign press. In Parliament the responsible Minister (Mr. Nott) responded by pointing out that:

> That zone [that is, the MEZ proclaimed on April 12, 1982] is not relevant in this case. The "General Belgrano" was attacked under the terms of our warning to the Argentines some 10 days previously that any Argentine naval vessel or military aircraft which could amount to a threat to interfere with the mission of British forces in the South Atlantic would encounter the appropriate response.[77]

On April 28, 1982 the British Government announced its Total Exclusion Zone (TEZ),[78] to take effect on April 30, 1982. While occupying the same area as the MEZ of April 12, this zone also encompassed "any . . . aircraft, whether military or civil which is operating in support of the illegal occupation" of the Falkland Islands.[79] It continued with the further warning that:

> Any ship and any aircraft, whether military or civil, which is found within this zone without due authority from the Ministry of Defence in London will be regarded as operating in support of the illegal occupation and will therefore be regarded as hostile. . . .[80]

Finally, it should be noted that in all her announcements of the delimitations of her specific zones Great Britain still continued to insist that they were without prejudice to her general right of self-defense under Article 51 of the United Nations Charter. This provided a further legal justification for the sinking of the *General Belgrano*. Criticism of that attack may be further seen as paradoxical considering that, at the time of the sinking, the Argentinian forces were occupying the Islands and the British forces were forcibly attempting to terminate that possession.

The United Kingdom's Ministry of Defense announced an important policy statement on May 7, 1982, when it said that, because hostile forces "can cover, undetected, particularly at night and in bad weather,"[81] the distances involved in resupplying the Argentine forces on the Falkland Islands, or take other hostile action, "any Argentine warship or military aircraft which are found more than 12 miles from the Argentine coast will be regarded as hostile."[82] The Soviet Union, without protesting the creation of an exclusion zone in principle, advised the British government that it considered the latest statement of policy unlawful, "because it 'arbitrarily proclaim[ed] vast expanses of high seas closed to ships and craft of other countries.' "[83] On this Professor Levie has commented:

> Of course, a blockade always denies the use of part of the high seas to other countries. While the Soviet Union might have questioned the extent of the blockaded area as excessive, if the blockade was effective (and there seems little doubt that it was), it was a valid blockade under the 1856 Declaration of Paris, to which Russia was one of the original parties.[84]

On the other hand, if the Soviet criticism is directed against the proclamation on the basis of its ineffectiveness due to an insufficient ratio of force to space, a point not answered in Professor Levie's comment, it would appear to be factually inaccurate. Adequate force appeared to be present wherever needed to carry out the enforcement of the British maritime exclusion zones for effectuating that country's logistical strategy. Furthermore, the area was not so vast as to be unmanageable in fact, and

the proclamation appeared to have been enforced by persisting holding, rather than raiding, tactics.

After the Argentine forces on the Falkland Islands had surrendered, Great Britain lifted the Total Exclusion Zone (July 22, 1982), but, at the same time, asked the Argentine Government (*via* the Swiss Government) not to allow its military aircraft or warships within a zone measuring 150 sea miles radius around the Falkland Islands. Similarly Argentina was warned not to allow her civil aircraft and shipping within that zone without the prior agreement of the British Government.

In response to the British MEZ on April 8, 1982, Argentina proclaimed a similar Maritime Zone, and, on April 29, 1982, it strengthened its MEZ. Finally it proclaimed, on May 11, 1982, a "South Atlantic War Zone." This last declaration has been the occasion of well-known litigation. In *Amerada Hess Shipping Corp. v. Argentine Republic*[85] the plaintiff corporation sued Argentina for the loss of its very large oil tanker *Hercules* as a result of three successive air strikes by Argentine aircraft using bombs and air-to-surface missiles. At the time of the attack the *Hercules* was "about 600 miles off the Argentine coast and nearly 500 miles from the Falkland Islands."[86] The court added that she was "in international waters, well outside the "exclusion zones" declared by the warring parties."[87]

While that statement would have been true if it had referred to the British zones and those declared by Argentina on April 8 and April 29, 1982, it was of doubtful accuracy with regard to Argentina's "South Atlantic War Zone" which that country declared on May 11, 1982. It is a valid inference, therefore, that the court may have been prepared to recognize Argentina's first two declarations as creating valid exclusion zones, but it was not prepared to extend that recognition to the vaguely defined "South Atlantic War Zone."[88] Indeed, this last zone, regardless of the bombing of the *Hercules*, fails the tests of reasonableness, proportionality, clarity of definition, and self-defense. It merely proclaimed the basis for a random, raiding logistical strategy. It clearly failed to provide for an adequate ratio of power to space and time, and amounted to little more than an excuse for conducting indiscriminate attacks on neutral shipping, rather than formulating an effective logistical, persisting, holding strategy which could be integrated in a sea-keeping assertion of naval power utilized for rational ends.

F. The Persian Gulf "Tanker War" 1980-1988

Although the Iraq-Iran war began with the border clashes in June-August 1980, leading to full-scale land fighting on September 21, 1980,[89] the Persian Gulf Tanker War, as a specific logistical strategy in an array of means and methods for conducting hostilities in the Gulf, may be said to have begun with the Iraqi declaration on August 12, 1982, of a prohibited war zone

at the northern end of the Persian Gulf (north of 29° 03′ North).[90] In contrast with the Falklands (Malvinas) Conflict, which took place in an unfrequented and secluded part of the world, the Persian (or Arabian) Gulf is one of the world's busiest waterways. The original (August 12, 1982) Iraqi prohibited war zone contained the northern end of the Gulf. In reality, however, this zone was not so much one of exclusion, supported by a persisting logistical strategy, as the proclamation of an intention to engage, as opportunities offered, in random air raids to inhibit Iranian shipping in the Gulf. Subsequently, the zone's area was enlarged so as to include the key Iranian oil installations on Kharg Island. In February 1984, this was expanded to include a 50-mile radius around Kharg. Until early in 1984 the Iraqis concentrated their attacks on ships navigating in the northern zone and sailing to and from Bandar Khomeini and Bandar Manshar. But after early 1984 they concentrated their air strikes on ships sailing to and from Kharg.

The Iraqi logistical strategy was clear. Like Napoleon's Berlin and Milan Decrees against Great Britain (which were directed against British trade and that country's ability to wage war and subsidize her allies from her income from that trade), the object of the raids was to deny Iran the income she needed from oil exports in order to purchase war materiel abroad and, generally, defray her costs of waging the war.

Iran had a similar logistical end in view, namely that of suppressing her enemy's trade with third countries which enabled Iraq to earn the money needed in order to defray her cost of waging the war. This prevention of trade was executed by means of interdicting all and any navigation to and from Iraqi ports in the Gulf. But Iraq was able to export her oil, and so defray the costs of her belligerency, by pipelines across her western and southern neighbors. In addition, Iran also established prohibited zones off the shores of Iraq's backers in the war, for example, Kuwait and the United Arab Emirates, in the hope of reducing their oil revenues and hence their contributions to Iraq's war effort through limiting her purchasing power on the world arms markets.

Responses to Iranian attacks launched in support of this policy included the United States policy of reflagging Kuwaiti tankers, establishing convoys with United States, British, French, and Italian escorts, and bringing the issue of the unlawful interference with neutral flag shipping to the attention of the Security Council of the United Nations. All these steps did not prevent continued Iranian raids on neutral flag tankers. Nor, indeed, did the Saudi Arabian proclamation of a 12-mile safety corridor which, since it was within the territorial seas of the seven states of the Gulf Cooperation Council, was entitled to belligerent respect, and was intended to provide security for neutral shipping—especially the very large tankers carrying

oil from Kuwait and from other supporters of Iraq. But this raised no legal issues regarding its validity as a maritime zone, since it merely created a right-of-way for neutral ships in neutral states' territorial waters.

The legal issues involving the Iraqi and Iranian exclusion zones, and the attacks on shipping therein, depended very largely on the reasons for those promulgations. Clearly they were not promulgated, as were the Japanese proclamations of 1904 and those of the United States of 1917, for purposes of self-defense, nor for the furtherance of persisting or holding strategies. They were announced for purposes of inhibiting shipping in the Gulf from engaging in the oil export trade of each belligerent's adversaries and their supporters by means of random attacks. They reflected offensive raiding strategies having only adventitious impacts on possible target shipping.

Similar to the experience in World Wars I and II, especially early in World War I when neutral shipping was attacked, the neutral states protested and denounced the attackers. In contrast to those earlier conflicts however, it should be noted that both Iran and Iraq made neutral ships their main targets. Furthermore, Iran not only attacked neutral shipping which may have been suspected of earning revenues, either directly or indirectly, for Iraq, but also neutral ships when they were navigating between neutral ports or even fishing in the Gulf. This, indeed, places the Iranian policy well beyond what may possibly be seen as defensible by supporters of an emerging customary international law permitting the establishment of effective exclusionary zones maintained persistently by an adequate ratio of power to space and time. Even when satisfying these criteria, such a zone may be lawful only if it is, comparatively speaking, maintained effectively and complies with the rule of reasonableness. It may not provide an excuse for a raiding strategy directed randomly against any or all non-Iranian shipping found in the Zone without regard to their nationality or to their purpose for being in the Zone.

There is a further consideration: Although the belligerents have not been subjected to the severe and hostile criticism that may have been expected, or that was the experience of the belligerents in World War I, the neutral states' muted outrage may not be due to their tacit acceptance of a new customary rule exposing them to random, raiding attacks. Rather, their relative silence may be attributed to the fact that the very large tanker surplus fleet (and threat of an oil surplus as well) and the favorable conditions of insurance in the 1980's rendered such attacks relatively less unacceptable to the tanker fleets' owners than did such attacks during the World Wars, when they resulted in a great scarcity both of shipping and of the cargoes those sunken ships had carried.

III. Review of Some Relevant Concepts Relating to the Emergence of Customary Principles of International Law Governing the Establishment of Maritime Exclusion Zones in the Context of the Resort to the Use of Force

A. Custom and the Emergence of Belligerent Maritime Usages and Obligatory Rules

Customary international law is formed from a combination of "a constant and uniform usage practised by the States in question"[91] and the essential psychological element of *opinio juris sive necessitatis*.[92] Because, for so long maritime states have stressed, as fundamental to their survival, the freedom of the high seas, belligerents' claims to enforce maritime exclusion zones must be carefully balanced against the traditional and basal doctrine and the interests interpreting it. Assertions that the power to create such zones has emerged into customary international law demand rigorous criteria for justifying their promulgation by warring states. Indeed, a case-by-case approach is required. On the other hand, it should be observed that the creation of such zones has arisen, in part, from the development and deployment of new weapons, from the evolution of new tactics, and from the emergence of economic warfare as an important, indeed essential, weapon. Thus, they have been resorted to for the purposes of both combat and logistical strategies.

The dual essentials of usage and the actor's belief in the right or necessity of acting in the prescribed manner hold equal sway as criteria for determining the emergence of a customary law doctrine or privilege.[93] Furthermore, when these are consistent with the fundamental right of self-defense, and satisfy the rule of reasonableness, their potential interference with a neutral state's traditional rights under the freedom of the high seas may be justified. On the other hand, if they are implemented by raiding strategies, even if for the purpose of self-defense and even if they may satisfy the criteria of proportionality and the rule of reasonableness, they may not, *ceteris paribus*, be justifiable. Customary international law cannot recognize a belligerent right which is ineffective and which permits an actor to fail to lay an even hand on those regarding whom it has the right or privilege of imposing its regime. Thus a maritime exclusion zone which is only enforced sporadically or randomly merely by raiding tactics should not be seen as entitled to recognition as lawful under customary international law.

The practice of declaring maritime war zones or exclusion zones arose, as Professor Stone has pointed out, from the necessities of the situation confronting, not only the United Kingdom, as Stone argues, but Germany as well. The reliance by both sides on invoking belligerent reprisals

camouflaged the "long term transformation of the traditional laws of blockade."[94] The question, however, remains, what values apply to legitimate that transformation and what values will reject either or both claims to validity? It is, furthermore, a thesis of this paper, that these two disparate types of war zones are not utilized symmetrically. Indeed, while the former is based on an effective persisting holding logistical strategy the latter is based on a raiding logistical strategy. In contrast with positions such as those taken by Stone or Fenrick, this paper views these unlike devices in aid of strategy as not being entitled to be treated as alike juridically. Indiscriminate sinkings of merchant ships by the U-boat arm as the main means of pursuing a raiding logistical strategy cannot claim to fit under justifications which may uphold the legality of the persisting logistical strategies reflected in the Long Distance Blockades by, respectively, the Entente Powers (in World War I) and the United Nations (in World War II). The two modes of waging economic war and the strategies by which they were pursued were so different that it would be absurd to invoke arguments and evidences justifying the latter to validate the former.

Necessity is also reflected in the changed circumstances of modern economic warfare. Technological change, in the form of the ever-increasing destructiveness of modern weaponry, has created new challenges for the international law of armed conflict. Furthermore, the strategic challenges presented by the contemporary development of advanced nations' economic infrastructures have called for new responses in terms of economic warfare which, in turn, have created new challenges for the international humanitarian law relevant to their deployment and use. When the rules of blockade were first evolved, most European states relied quite heavily on the coastal maritime transportation of their goods, even for domestic and internal trade. At that time contraband and blockade control was relatively simple because goods would pass from port to port by sea and their destination would be revealed by their movement even if transshipments were involved. Today most states, even such states as Iraq and Argentina, have extensive waterways and railways for internal and international transportation. By rail Iran can be supplied from the Soviet Union and by highways from China and Pakistan. Writing of such an expansion of states' economic infrastructure as this factor existed back in the time of World War II, Julius Stone wrote:

> The expansion of alternative rail and inland waterway transport facilities, with which Germany was superlatively endowed, transformed this situation. "The conditions of modern commerce offer almost infinite opportunities for concealing the real nature of a transaction, and every device which the ingenuity of the persons concerned or their lawyers could suggest has been employed to give shipments intended for Germany the appearance of genuine transactions with a neutral country."[95]

B. "Necessity" in the Formation of Customary International Law

While some writers[96] tend to denigrate the role of "historical" or "social"

"necessity" as a possible alternative, or additional, element of *opinio juris*, the argument here is that changes in the technological and social infrastructure of a social relationship operate to bring about legal change, not so much under the rubric of *opinio juris*, as under that of its disjunctive[97] clause *sive necessitatis*. This disjunctive meaning would appear to be inherent (but to most writers latently so) in the traditional Latin formulation.

The second step, in reviewing the relevance of the criteria for determining the incremental effect on legal change of the technological and socio-economic substratum, is to observe that an emerging custom may tend to displace existing rights assured under international law. For example, the continental shelf doctrine was criticized, in its early years, as potentially displacing the traditional, and entrenched, freedom of the high seas—for example, the traditional rights of trawling, dredging and anchoring anywhere beyond states' territorial seas. Thus, Professor Humphrey Waldock, later President of the International Court of Justice, observed, on April 5, 1950, that: "[t]he suggested new doctrine of the continental shelf is not merely novel but involves a reversal of existing customary [international] law."[98] But this consideration did not prevent Waldock from arguing in favor of recognizing that now popularly accepted, but then emerging, doctrine as customary international law.

Even more significantly, and regardless of the strategies involved (i.e., persisting and hence "effective", or raiding, and hence, random and thus proportionately ineffective), the recognition of states' claims to establish Maritime Exclusionary Zones as lawful will always necessarily be effectuated at the expense of freedom of the high seas for all navigation including, to the extent necessity may limit them, the rights of neutral traders. In this regard, of course, belligerent maritime war zones, or exclusionary zones, which are usually intended to last the duration of the conflict, are to be distinguished from the usually more transient, maritime exclusion zones that states establish for bombing and gunnery exercises in times of peace. They (i.e., belligerent maritime exclusion zones) are also to be distinguished from those maritime zones which states announce for the testing of nuclear devices and weapons. These, with perhaps one exception, that of France[99] in recent years, have been predicated, not on an enclosure of an area of the oceans, but on the principle of a "Warning to Mariners." This device simply notifies aircraft and ships proposing to use the area of the dangers to them attending the notifying state's exercise of its own freedom of the high seas. It should be stressed, in this context, that such warnings may be brief, or may remain in place for indefinite periods of time.[100] Clearly, the task of establishing the emergence of a customary rule permitting belligerent states to impair, if not eliminate, the rights of neutrals to enjoy the freedom of the high seas is far more burdensome than defending the privilege of states, in the pursuit of their national security interests, to create temporary dangers for shipping in limited

sea areas, by testing weapons on the high seas or engaging in bombing and gunnery practice and by issuing warnings to others of the presence of those dangers.

C. The Legal Significance of Diplomatic Protest as an Inhibiting Factor in the Formation of a Customary Norm

Diplomatic protest has been seen as an inhibitor of custom, and writers have suggested that its absence can be strong evidence of acquiescence to a change in customary international law and, hence, to the emergence of a new norm supplanting and negating the old.[101] But, as D'Amato points out, states "do not issue notes of protest to the actions of other states that they regard as illegal under international law," and argues that "[f]oreign offices which did so would have little time for anything else."[102] He also maintains the interesting thesis that reliance on this procedure as a factor in the making or the restraining of the formation of customary international law is too narrow and more restrictive than necessary for the recognition and validation of new rules. He points out, on the contrary, that the sources and the flow of decisions in the process of forming a new customary norm of international law is much more flexible and pluralistic. He states, and this writer agrees fully with his argument, that:

> This diplomacy is usually conducted verbally by ambassadors, representatives, consuls, visiting businessmen, and so forth. The range of negotiating tactics is quite vast, including threats to corporate assets of the other country's nationals that are located in the complaining state, retaliation by raising tariff barriers, reduce foreign economic or military aid to the target state or its allies or dependents, support another country's hostility to the target state, vote against the target state in the United Nations, and related threats or warnings.[103]

The fact that the United States, the major protesting state against the creation of prohibited zones (or war zones) in both World Wars, embraced the policy of creating them after becoming a participant in both, tends greatly to undermine the significance of both sets of her protests. In any event, and, in addition, following the principle that "actions speak louder than words,"[104] the United States' affirmative policy regarding maritime exclusion (war) zones after she became a belligerent should carry more weight than her previously published protests as a neutral. It should be noted, too, that in World War II, while neutrals such as the Netherlands and Norway regarded the British resort to maritime exclusion zones as contrary to international law down to May 1940, thereafter these two countries, through their governments-in-exile, supported such zones, as did the United States after its entry into World War II. In light of the subsequent conduct of the states that engaged most vociferously in voicing their diplomatic protests against the declaration of maritime exclusion zones, the conclusion may be drawn that the diplomatic protests lodged against the declaration and enforcement

of exclusion zones established by the Entente Powers in World War I as well as the United Nations in World War II are of dubious efficacy and carry little or no weight in restraining the emergence of a customary international law norm legitimizing maritime exclusion zones. This is the case despite the fact that these regimes in their various forms, encroach upon the doctrine of freedom of the high seas and despite their effect of curtailing the traditional rights and immunities of neutrals.

With regard to the diplomatic reaction to the British Total Exclusionary Zone of April 30, 1982, the Soviet Union, as has been noted,[105] took a critical stance. But, because the Soviet Union was the only non-belligerent that complained about the TEZ and, furthermore, because the British did not attack any neutral ships within the zone, it would appear that most interested states acquiesced in it as reasonable. Nor did the Soviet Union have any more than a theoretical basis for its academic comment. That is, she engaged in the relatively unusual, according to Professor D'Amato, act of protesting without being injured and on the basis; merely, of a theoretical disagreement with the British announcement.[106] The Soviet Union had received no injury in fact, and hence the basis for its diplomatic protest may be questionable. Finally, because the Soviet Union's mode of characterizing the zone did not accurately reflect the British policy of ensuring safeguards for neutrals,[107] the Soviets' protest cannot be regarded as having significantly effective validity in restraining the emergence of customary international law norms on the subject.

IV. Customary Law and the Usages of War: the Substratum of Modification and The Relevance of Military Utility

A. Relativism, Military Economy[108] and the Role of Law

The Romans may have believed the maxim *inter arma silent leges*, but today, unless a contest becomes "absolute"[109] in the Clausewitzian sense or "total" in the nuclear holocaust sense, there are, necessarily, areas of common interest where the principles of humanity, reciprocity and utility have important functions. In addition, as has already been observed, the value of military economy,[110] which provides the sound basis for planning any campaign, gives rise to a second development, namely the mutual respect of common restraints as a matter of common interest. In his defense of the utility of international law, Sir Hersch Lauterpacht pointed out:

> At the same time, in view of the humanitarian character of a substantial part of the rules of war it is imperative that *during the war* these rules should be mutually observed regardless of the legality of the war. For it is these rules which, on the whole, have been generally observed in the past—for the reason perhaps that they do not seriously interfere with the achievement of the major purpose of the war.[111]

Indeed, building upon Lauterpacht's thesis, it is possible to say that in all wars, except those that Clausewitz identified as "absolute" (and considered, in the pre-nuclear age in which he lived, to be impossible to wage[112]), the interest of both or all belligerents is that rules which temper the ferocity of waging war, and especially those that confer a benefit in terms of military economy, should be observed. This prudential economy of force is not so much a matter of a warrior's self-image as being *sans peur et sans reproche*, as of military utility and each belligerent's self-interest in expending the minimum of force for achieving the object of the contest and of maintaining a reserve of force to meet further contingencies.[113] Furthermore, Clausewitz accepted the fact that the inherent "frictions,"[114] "checks," and "modifications" inherent in "the apparatus of War," and "the non-conducting medium which hinders the complete discharge"[115] of belligerent powers (energy), acted as restraints on focusing the complete direction of energy, without any diffusion, onto the object of the war itself. In addition, in our own day, we have come to call, not for the "utmost use of force,"[116] but "limited" applications of force in the sense that the whole power of the state is not concentrated into an all-consuming effort of will to which all other considerations are subordinated. For it is highly probable (or well-nigh inevitable) that the more intense becomes the focus of the will to win the greater will be the temptations to flout relevant rules of international law, especially if these are perceived as restraints on the will to victory. While soldiers and statesmen are mistaken in perceiving the rules of international law as adding to Clausewitz's "non-conducting medium" acting as a restraint on the complete direction of energy, the possibility of their doing so may render the atmosphere of all-out effort inimical to the observation of lawful conduct.

B. Limited War: When Militarily Viable and, at the Same Time, Receptive of Humanitarian Law

Von Clausewitz tells us that political ends may decree that a precise balance should be struck between means and ends.[117] While not resorting to the "utmost use of force," a country waging a limited war must yet master its enemy within the limiting frame of that type of warfare. The commander should act "to a certain extent upon the principle of only applying so much force and aiming at such an object in War as is just sufficient for the attainment of its political object."[118] Experience also illustrates this point. For example, Professor Levie has pointed out that the 1982 Falkland Islands Conflict provided an example in which the fighting was kept within bounds so that the future of the laws of war, having the traditional effect of *temperamenta belli*, remained quite bright, since in that conflict, the localization of the hostilities, which was assisted by the proclamations of six of the seven exclusion zones, kept the war "a gentlemen's war".[119] A geographically more diffuse conduct of the hostilities would have led to much more violent and destructive operations, indeed to those

political frenzies which undermine the will to observe the laws of war in an obsessive determination to triumph at all costs.

The thesis presented here is that, first, we should view the intensity of the war in which the issues of legality arise as a possible variable influencing the willingness of each of the combatants to see its own interest in abiding by the rules of war. Thus, for example, as Professor Levie tells us, a limited war at sea may be one in which the rules of war are observed and developed by new conditions. But some wars, for example such wars of national liberation as the Algerian revolt against French colonial rule, were, at least according to some writers, limited wars, yet were redolent with inhumane excesses. Thus a military commander present in Algeria during the uprising there that led eventually to independence, and who had a crucial counter-insurgency role to play, has confirmed that such wars are not, and cannot, of their nature be, "gentlemen's wars," but ones of terrorism, widespread atrocities and genocide. Those crimes were not (in the Algerian context) committed so much on the part of the incumbent government, which usually had to work under the eyes of the press, television news and the public, but rather by the insurgent groups. Thus, that officer (the author Roger Trinquier) wrote:

> In the month of September 1958, the forces of order took possession of the files of a military tribunal of one of the regions of the F.L.N. In the canton of Michelet alone, in the arrondissement (district) of Fort-National in Kabylie more than 2,000 inhabitants were condemned to death and executed between November 1, 1954 and April 17, 1957.[120]

In many wars, be they the "total" wars as exemplified by the two World Wars, or certain "local wars" such as, for example, the Iran-Iraq War (1980-1988), or wars in which terroristic insurgencies pit themselves against incumbent regimes, the parties' adherences to the laws of war become subordinated to their all-absorbing, indeed obsessive, struggle for survival. But in between the two extremes of "gentlemen's" limited wars on the one hand, and the self-imposed limitations of an incumbent regime in its fight against terrorism on the other, there do exist, owing to a possibly prevailing political climate between the adversaries, considerations for statesmen who see beyond the conflict itself to the post-war settlements. When such a prudential far-sightedness prevails, wars may be waged in truly limited modes and are subjected by their participants to the governance of the laws and usages of war. Of these the Sino-Japanese War of 1894-95, the Russo-Japanese War of 1904-04 and the 1982 Falklands Conflict provide practical models.

C. Emergence of the Maritime Exclusion Zones as Customary Law: A Matter of Contexts

(1) General Recapitulation

At the outset of this chapter the presentation was in terms of the emergence of maritime exclusion zones in the context of the famous long distance

blockades of World Wars I and II. These were reviewed in terms of the distinct, but frequently overlapping, criteria of defensive versus offensive objectives and of persisting versus raiding combat or logistical strategies and tactics. The survey of these regimes began with the Japanese defense zones in the Russo-Japanese War of 1904-05 and the United States defense zones which were established in April 1917 on the model of the earlier Japanese zones. While those defense zones may be regarded as having the status of accepted custom, the more controversial long-distance blockading, prohibited maritime zones or logistical strategies may not yet appear to have received unqualified, universal endorsement of legality. But, subject to the test of proportionality and reasonableness, and especially when created for purposes of maintaining a persisting logistical strategy supported by an adequate ratio of force to time and space, they may appear to be moving conditionally into the light of recognition as customary international law. Writing in 1952, Sir Hersch Lauterpacht stated:

> [M]easures regularly and uniformly repeated in successive wars in the form of reprisals and aiming at the economic isolation of the opposing belligerent must be regarded as a development of the latent principle of the law of blockade, namely, that the belligerent who possesses the effective command of the sea is entitled to deprive his opponent of the use thereof for the purpose either of navigation by his own vessels or conveying on neutral vessels such goods as are destined to or originate from him.[121]

In contradistinction from Sir Hersch Lauterpacht's thesis, the argument in this chapter is that, for the evolution of an even-handed, predictable system governing exclusion zones, it is necessary for scholars to be discriminating; otherwise a Panglossian position could evolve which merely states that the commander of the sea may dictate, merely by virtue of his power, what the law allows. Furthermore, the phrase "commander of the sea" is ambiguous. In World War I Great Britain held undisputed command of the surface of the sea. Yet this command did not command Germany's indiscriminate submarine warfare. After the United States entered the war new developments, as well as a far greater concentration of naval forces, narrowly defeated that almost overwhelming threat. Thus, the issue of legality should be tested by more discriminating criteria than upholding the strategies that combatants may view as necessary for their belligerent successes.

Aspects from the considerations already stressed reveal that due regard must always be had for the principles of humanity, proportionality, reciprocity, and utility. Humanitarian law imposes its standards, and they may be most effective when they can be shown to combine with the principle of military economy to moderate the ferocity of fighting's side effects and limit the violence of war's impact upon those drawn into its vortex.

(2) Exclusion Zones as Facultative Instruments

The point has already been made that Admiral Doenitz was not found guilty of the charges which arose from his orders to the German U-boat arm to

engage in unrestricted submarine warfare contrary to the London Navy Treaty of 1930 and the 1936 Naval Protocol. This decision was ambiguously reached, as to principle, after the Tribunal had received evidence of British and United States methods of waging unrestricted submarine warfare, respectively, in the Skagerrak and the Pacific Ocean.[122] A distinction should be drawn, however, between the British maritime exclusion zone (namely of the Skaggerak) and that proclaimed by the United States. This latter zone consisted of the whole Pacific Ocean. The question thus becomes one of reviewing Maritime Exclusion Zones in terms of both the strategies they facilitate and of the values they promote.

(a) The Exclusion Zone of the Skaggerak

The Skaggerak is an arm of the North Sea on its eastern side and lies between Denmark and Norway. It is some 150 nautical miles in length and 85 miles in width.[123] By contrast with this relatively restricted area, the Pacific Ocean covers approximately one-third of the Earth's surface. While both declarations may be found to be legally supportable, a basic distinction should be made between the grounds of their respective justifications. The argument vindicating the British proclamation of the Skaggerak as a maritime exclusion zone under emerging customary international law may be accepted, since the strategy for enforcing the exclusion of the adversary from the zone was an apparently successful one. It was a persisting logistical strategy enforced by both aircraft and submarines providing an adequate ratio of force to space. This proposition can be analyzed out into the following elements.

(i) The zone was reasonable in area, and despite German surface naval power, the logistical strategy was persistently maintained and was made effective through submarine and aerial warfare;

(ii) The object, while not primarily one of self-defense, was for the related purposes of:

(a) Hampering the German utilization of Norwegian territory as a base for attacking the British Isles and North Atlantic convoys (including, of course, those going to Murmansk with aid for Russia);

(b) encumbering Germany's reinforcements and supplies destined for its oppressive occupation of Norway—a victim of Nazi aggression;

(c) the target shipping had military objectives and purposes and could not be viewed as carrying supplies which had the object of benefitting the civilian population of Norway; and

(d) the ratio of the area to the force deployed was proportional to the military objective in hand.

(b) The Pacific Exclusion Zone

By contrast with the Skaggerak, the Pacific Ocean, the world's largest, has an area of 69,000,000 square miles and stretches from the Arctic Circle to Antarctica.[124] An announcement of indiscriminate sinking by submarines in such a vast area may not, it is suggested, reasonably be regarded as the

enforcement of a maritime exclusion zone, except by a naval service many times larger than the enormous force that the United States Navy deployed there. It is believed, furthermore, that the adjunct of a continuing presence of air power would have been a necessary adjunct for ensuring an effective persisting logistical strategy. For one thing, in so vast an area a submarine fleet of almost any size, on its own, cannot satisfy the requirement of "effectiveness." The sinking of ships thus becomes contingent on the presence, coincidentally, of a target ship and targeting submarine in proximity to one another.

Alternatively, as the case of the United States submarine service's operations in the Pacific illustrated, these coincidences tended to concentrate, before the liberation of the Philippines, in Philippine and Japanese home waters. Accordingly, although the United States Navy identified the whole Pacific as the exclusion zone, in fact the areas of actual attack tended to be where concentrations of Japanese shipping were to be found and where the submarines were ordered. Hence, in the zones of actual combat there was an adequate ratio of force to space and time. But the space so treated was far smaller than the Pacific Ocean.

Of course, strategic and intelligence issues created an advantage in leaving the defined zone as the larger area, since the element of surprise, which provides the submarine with its single most important asset, could be lost if, as the war progressed, different, more limited, and more proportionate exclusion zones were progressively announced as the Allied Forces approached the Japanese home islands. In effect, in the smaller sea areas where submarine tactics were effective, persisting logistical tactics maintained the necessary effective pressure on Japanese shipping; but the raiding strategy on which this mode of warfare was founded, by reason of the extent of the maritime prohibited zone, did not provide effectiveness.

On the other hand, while strategic convenience and utility may call for the announcement of the larger area, the legal rule of reasonableness does not reinforce the strategic consideration, since it is not reasonable to expect an effective enforcement, at all points of the Pacific Ocean, of the prohibition to shipping indicated in the proclamation or enunciation of such a zone. Rather, the U.S. submarines, like the German wolf-packs in the North Atlantic, tended to resemble more the "corsair" type of traditional maritime warfare (with the difference, of course, that the submarines were regular naval units, not privateers) rather than the enforcement of a specific maritime exclusion zone. On the other hand, while such an announcement as that of Admiral Nimitz of the vast maritime exclusion zone, which in itself was tantamount to a hunting license in the conduct of a raiding strategy, may not have found justification under any emerging customary norm—being more an analogy to a policy of worldwide indiscriminate submarine warfare than to the creation of a lawful maritime exclusion zone.

The United States Navy's submarine strategy may, alternatively, be justified as a reprisal against the Japanese methods of waging war, from the surprise attack on Pearl Harbor on December 7, 1941, to that country's inhumane treatment of prisoners of war and of civilian internees caught under their occupation and, hence, not participating, *pro tanto*, in the emergence of a customary norm of international law. In addition, it should be noted, the Japanese, on their part, waged an inhumane and indiscriminate, even if relatively ineffective and militarily inept, submarine warfare on their own part. This mode of warfare on the part of Japan clearly marked, despite its relative ineffectiveness, the reprisals the United States Navy enforced by the submarine arm. Thus, the surprise advantage accorded by the vastness of the Pacific Ocean, which might be seen as negating the reasonableness of the United States declaration under an emerging rule of customary international law, may not be abrogated. It should instead properly be justified under the law of belligerent reprisals rather than as participating in the emergence of a customary norm of international law permitting states, who comply with the necessary criteria, to establish maritime exclusion zones.

Again, the "exclusion zones" created by Iran and Iraq do not seem to have been relevant to those countries' attacks on each other's shipping or to attacks that they made on the shipping of third (neutral) parties. With regard to the Falklands Conflict, in light of the above argument it is believed that the exclusion zones established by both sides, including the "British Bubble," but excluding the last of the Argentine proclamations, namely of the "South Atlantic War Zone" on May 11, 1982, were valid, and testify to the emergence of the relevant customary norm. That last Argentine proclamation was both vague as to area, and random, and hence militarily ineffective, as to enforcement. Accordingly, it should be found to have failed in the test of reasonableness. Indeed, as the United States Court of Appeals for the Second Circuit pointed out in the *Amerada Hess* case[125] the sinking of the *Hercules* was an international wrong. In reaching this conclusion, the court ignored (correctly, it is suggested) any relevance that the Argentinian Declaration of the "South Atlantic War Zone" might have had as a justification, had it not resulted in a randomly chosen raiding action.

While, perhaps, the view already quoted from Professor Lauterpacht, and reiterated by Professor Julius Stone[126] may be overbroadly permissive, the opposing thesis recently expressed by Ross Leckow that "the implementation of war zones can be justified only in very restricted circumstances . . ."[127] and his restricted condonation of resort to this device in terms of "reasonableness"[128] is not supported without a necessary spelling out of the meaning of the word in terms of strategies and goals, and in terms of means and methods relative to those strategies and goals.

V. Summary Conclusion

At the present time, more than in Clausewitz's day, war has taken on a chameleon-like character. It now depends on politics both as to means and to ends. Thus law necessarily must adjust to the variable social and ideological substrata upon which its pursuit depends in all their protean forms. Accordingly, while the following quotation from the late Professor Julius Stone's magisterial work on the regulation and control of conflict situations is seen as uttering an important insight, it should be treated as an invitation to rethink the emerging rules, and to treat states' conduct in the area, and the consecration of allegedly emerging rules with discriminatory reservation, rather than the undiscriminating proposal of a new norm of customary international law covering most, if not all, of the relevant situations. Stone eloquently and perhaps even cogently wrote:

> It is idle to seek to reduce this matter to a *cri de coeur* of humanity. War law, even at its most merciful, is no expression of sheer humanity, save as adjusted to the exigencies of military success, a truth as bitter (but no less true) about attacks on merchant ships, as about target area saturation bombing. And it is also quite idle for Powers whose naval supremacy in surface craft enables them to pursue the aim of annihilating the enemy's seaborne commerce without "sink at sight" warfare, to expect that States which cannot aspire to such supremacy will refrain from seeking to annihilate that commerce by such naval means available to them as submarines, aircraft and mines. To refuse to face this will save neither life nor ship in any future war; and it will also forestall the growth of real rules for the mitigation and suffering under modern conditions.[129]

Stone's observation about practicalities and expectations is without doubt correct. The experience of two World Wars tells that legal change in the direction towards which the late Professor Stone points is becoming crystallized. On the other hand, while the insight and direction of the quotation reflects contemporary needs, it tells us little about testing the distinction between acceptable and unacceptable formulations for declaring maritime exclusion zones and resorting to submarine warfare to enforce them.

The preceding pages have sought to foreshadow and examine discriminating tests for determining whether a maritime prohibited zone is entitled to deference and compliance, as being lawful, or whether it should be resisted by third parties as unlawful. It is now useful to analyze and subsume models of the types of maritime prohibited zones that have been met in history, including very recent history, under the heads that have been developed in terms of goals and strategies. But before that analysis is presented, a general point should be made: while circumstances may dictate whether or not publicity, and the giving of a timely notice, may, or may not, be to the strategic advantage of a belligerent (as for example it was clearly so in the case of the British Falkland Islands proclamation that took effect on April 12, 1982[130]), publicity is clearly a necessary precondition for the legal validity

of every exclusion zone. In this context, Fenrick has correctly argued that the declaring state should:

> [P]ublicly declare the existence, location and duration of the zone, what is excluded from the zone, and the sanctions likely to be imposed on ships or aircraft entering the zone without permission, and also to provide enough lead time before the zone comes into effect to allow ships to clear the area.[131]

This paper will now summarize and review the arguments that have been developed in terms of ends and means, goals, strategies and methods, and tactics in resorting to maritime prohibited zones as instruments of waging war.

A. Defensive Goals and Persisting Logistical Strategies

First, it is suggested that purely defensive zones of reasonably limited extent, regarding which a timely and public notice to all affected ships and aircraft has been given, for example those established by Japan in the Russo-Japanese War, 1904-05 and by the United States in 1917,[132] have always been acceptable to other maritime powers, even though they did trespass onto the high seas as then delimited. Despite their far greater extent than those of 1904 and 1917, the British and Argentinian exclusion zones (except for that latter country's last proclamation of such a zone which sought to constitute the South Atlantic Ocean as a maritime prohibited zone) in the Falkland Islands Conflict of 1982, were lawful on the same grounds.[133] These may, accordingly, be justified on the basis of the publicity of their announcement, the specificity of their delineation, the fact that adequate time was given for affected shipping to quit the area, and the restraint (and proportionality) exercised in the enforcement.[134] Furthermore, after the arrival of the expeditionary force, the British zones reflected a defensive strategy (although, necessarily, they were part of their proponent's attacking tactics), were logistically persistent and involved an adequate ratio of force to space and time. Hence they also satisfied the traditional, but still prevailing, customary international law rule which requires effectiveness,[135] proportionality, reasonableness and, so far as the United Kingdom was concerned, appropriateness for advancing that country's lawful purpose, namely compliance of both sides with United Nations Security Council Resolution 502.[136]

At this point it may be noted in passing that "Operation Market Time," which was enforced by the United States Navy during the Vietnamese War was legally valid since it was a law-enforcement operation limited to a distance of twelve miles from the low water mark of South Vietnam (it did not extend north beyond the DMZ) and so within the domestic competence of South Vietnam, which legislated to empower the activity. Since that operation was conducted entirely within the territorial sea and contiguous

zone of South Vietnam, it does not come within the perspective of the present paper.[137] Similarly, the blockade of Haiphong and other North Vietnamese ports was justified in the *Naval Commander's Handbook* as being "in conformity with traditional criteria . . .,"[138] and should not be regarded as falling within the emerging concept of maritime prohibited zones, but rather of the traditional notions of blockade.

B. Defensive Goals Expressed in Raiding Logistical Strategies and Tactics

The establishment of unacceptable and hence invalid maritime defensive zones for the purpose of warning an enemy that shipping could be attacked without further warning, but which cannot be consistently sustained, was exemplified by all three of the Argentinian proclamations. Apart from Security Council Resolution 502,[139] which declared Argentine presence in the Falkland Islands (Malvinas) to be unlawful, the first two Argentine proclamations may be viewed as lawful in terms of *jus in bello* in contradistinction to any reference to arguments in terms of *jus ad bellum*. But that country's third legally indeterminate and ineffective proclamation of May 11, 1982, failed to comply with any criteria of validity.[140] On the other hand, it appeared that none of the three could be sustained by a persisting logistical strategy, so that, on the basis of effectiveness in terms of an adequate ratio of force to space and time, they all become questionable as only being sustained by raiding tactics. These tactics, and the strategy from which they were derived, are no more than the exploitation of the forces' nuisance value. While causing loss of life and supplies, they were too sporadic to affect the adversary's will, or the outcome of the contest. The criticism, in earlier paragraphs, of the United States' establishment of the Pacific Ocean as a maritime zone from which Japanese shipping was purported to be excluded during World War II, reflects the non-validating combination of the criteria of defensive goals expressed through logistical raiding strategies and tactics.

C. Aggressive Goals and Persisting Strategies

In the Indo-Pakistan War the Indian Navy established an exclusion or blockade zone outside the Pakistani port of Karachi. No specific zone was proclaimed, but any shipping, regardless of flag, was targetted on the high seas. India had a sufficient ratio of power to space to maintain its attacks on neutral shipping both within and without the zone of blockade. That is, while the purpose was aggressive, Indian power was sufficient to maintain a persisting and effective control of the zone affected as well as sea areas beyond it. The reasons that this persisting exercise of power did not become the target of angry repercussions in the rest of the world have been ascribed to the following factors:

(i) The conflict itself was "short-lived—about a week;"[141]

(ii) Because of the shortness of the time of the blockade, Professor Daniel O'Connell believed that there was little time for reaction. He observed that, "[h]ad the naval blockade been prolonged and strictly enforced, however, the situation might have become very different, especially if the important tanker traffic through the Straits of Hormuz had been incommoded;"[142]

(iii) Most of the shipowners who did suffer loss recovered through their insurance brokers under war risk clauses. In O'Connell's phrase, they "shrugged their shoulders" at the destruction that the Indian Navy inflicted. O'Connell did, however, also mention the case of the sinking of a Spanish ship. This ship's case "was taken up by the Spanish Government, which demanded compensation from the Indian Government."[143] He added: "This was refused."[144]

Although, from the lawyers' point of view, the issues raised by this conflict may have been left in an indeterminate and unresolved condition, their incompleteness provides an important invitation to resolve the facts left dangling in this way under international law. The Indian experience shows how the maintenance of an aggressive, persisting logistical strategy necessarily must be classified as illegal, despite its effectiveness, since the aggressive use of force against neutral shipping not concerned in the war is contrary to the basic principles of international law and the principles and purpose of the United Nations.

D. Offensive (Aggressive) Goals Supported by a Raiding Strategy

Although in both World Wars Germany proclaimed prohibited zones in which her submarines would sink merchant shipping, including neutral shipping on sight and without warning, the system was not one of maintaining a prohibited zone as such, but of creating hunting licenses for submarines. The zones were not predicated on the defensive requirements of the German homeland. Thus, they may be contrasted with the actions of Japan in 1904[145] and the United States in 1917[146]. In addition, they were carried out in fulfillment of a raiding strategy which depended on raiding tactics.[147] At no time was there any attempt to hold a sea area by means even of persisting tactics, let alone of an effective and persisting strategy. The idea of establishing and validating a prohibited zone simply by means of a raiding strategy implemented by the surprise excursions of submarines on sink-on-sight hunting missions constitutes a complete contradiction of the notion of maintaining, effectively, a prohibited maritime zone.

While the sea areas proclaimed as prohibited to their adversaries (such as those by Germany in both World Wars and the United States in World War II) may not qualify as lawful maritime exclusion zones they may, possibly, be justified under some alternative rubric. For example, the United States zone might well have been upheld, at the time of its proclamation, as a reprisal

for previous illegal acts or policies by the Japanese naval and military forces. Such zones, however by their very nature, cannot be classified as complying with the requirements of self-defense, proportionality, reasonableness, and effectiveness. Nor can they be seen as providing validating persistent logistical strategies through effective and comprehensive enforcement throughout the zones proclaimed. Hence, they may not be viewed as legitimated by any emerging rule of customary international law dependent on effectiveness and reasonableness.

An argument pointing, possibly, in favor of the validity of the German North Atlantic maritime exclusion zone and the United States zone of the Pacific may be founded on other, narrower, grounds, namely that the ships attacked were part of the enemy's war effort and were naval auxiliaries, not true merchant ships. This would leave as impermissible, however, attacks on neutral shipping. It would, further, lead to characterizing aggravated and unnecessary attacks on survivors in lifeboats, on lifeboats, or clinging to wreckage or other flotation gear as war crimes for which there would be neither excuse nor defense.[148] But this issue relates only to the limits imposed by humanity and necessity on the specific acts which a state or a commander undertakes when implementing a raiding strategy and faces the consequences of his immediate resort to raiding tactics. He runs a high risk of being stigmatized for engaging in the impermissible conduct that his actions may well entail. Such inhumane conduct as that attributed, for example, to Karl-Heinz Moehle,[149] and testified to in *The Peleus Case*[150] remain impermissible under the Nuremburg Principles and decisions.

E. Persisting Moveable Defense Maritime Zones Effectuated by Persisting Tactics

Reference has already been made to the defense "Bubble" established by the United Kingdom on April 23, 1982.[151] O'Connell has pointed out that prior to that war operational zones consisting of a moveable circle centering on a naval or amphibious task force, "have the benefit of the precedent of the Spanish Civil War".[152] This reference relates to the very interesting and largely forgotten Nyon Arrangements.[153] Such a "moveable war zone" will assuredly have a wide application in the future. When shown to be consistent with such criteria as reasonableness, self-defense, and proportionality between means and ends, these zones are within what may be legally permissible. Professor O'Connell wrote in support of them "that they would not have the characteristics of the war zones condemned at Nuremberg." He warned, however, that "[t]his is not to eliminate legal doubts about the matter, but rather to indicate that the law appears to be sufficiently malleable to give naval staffs a certain freedom of manoeuvre in their planning."[154]

F. Conclusion

This chapter has sought to relate the question of the possibly emerging

legality, under international law, of certain types of maritime prohibited zones as instruments of war strategy. They have been seen, largely, but not entirely, as involved with logistical strategies, although these zones may also of course, be used to redirect shipping at the belligerent's strategic and tactical battle convenience, provide an early warning defensive system, and limit the area of belligerent activities in any specific contest. It is, of course, true that the goals of the interdiction of supplies to an enemy, the redirection of shipping, the establishment of defensive zones and the limitation of the area of a contest, are all lawful goals. The means and methods, including the strategies and tactics that provide the modalities of achieving these goals, may not necessarily or inevitably be justifiable. Lawfulness will, of course, depend on their specific characteristics and objectives. Also, some goals for which maritime exclusion zones may be deployed, for example, waging an aggressive war or for facilitating an act of aggressive and surprise attack on an unsuspecting victim, or indiscriminately operating against neutral shipping and failing to observe the principle of distinction, are clearly unlawful and are to be avoided by states proposing to establish such zones.

With regard to lawfulness of the means and methods employed in furthering lawful ends, the attempt has been made to review the various strategies and tactics as they tend to be employed to facilitate the belligerent's goals. While some of those may be tainted with the unlawfulness of the ends for which they are used, others are, and should remain, unlawful *per se* on the grounds of their being tainted by their inherent wrongfulness. Their means alone are fatal to their legality. Examples of such tainting elements include their unreasonableness, their want of specificity of definition in space and time (including their failure to allow adequate time for neutral shipping to quit the proclaimed area), their ineffectiveness, and their lack of proportionality to the ends sought. Others may be invalidated by acts of specific inhumanity involved in their enforcement. They are also unlawful if they are simply used as means of giving further effectiveness to raiding strategies.

This paper's purpose in coupling strategies and tactics involved with their goals was to examine the possibility of consecrating some maritime prohibited zones, especially those that scrupulously observe the principle of distinction and respect the rights of neutral shipping and commercial activities, as becoming increasingly acceptable and hence lawful by distinguishing them from those that remain unlawful. This was done in terms of viewing the strategies and the tactics to which the belligerent power resorted for the purpose of implementing the zone as part of its overall maritime war strategy and as part of his obligation to respect the rights, privileges and immunities of third parties. That is, the relevant strategies and tactics employed were examined in terms of determining the lawfulness not only of ends, but also of means and methods. This study has reviewed the interfusion of means and ends, and the manner in which they inseparably color, condition, and

characterize one another. Finally, a basic theme of this paper has been the review of those criteria for appraising the emerging legality of at least those maritime prohibited zones which show effectiveness, persistence, the principle of distinction, respect for neutral rights, humanity, and proportionality.

Notes

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1. Sir Hersch Lauterpacht has defined maritime exclusion zones (or "war zones") as follows:

> [A] war zone in maritime operations may be said to comprise an area of water which a belligerent attempts to control, and within which it denies to foreign shipping generally the same measure of protection which the latter might elsewhere claim.

L. Oppenheim, *International Law: A Treatise*, H. Lauterpacht 7th ed. (London: Longmans Green & Co., 1952), v. 2, p. 681, note 1 [hereinafter cited as Lauterpacht's Oppenheim]. *See also*, to similar effect, Julius Stone, *Legal Controls of International Conflict* (New York: Rinehart & Co., Inc., 1954), p. 572 [hereinafter cited as Stone, *Legal Controls*]. Under certain circumstances, a maritime exclusion zone reflects a different method of waging war from that of conducting a traditional blockade. Such a zone may have merely the defensive object of keeping shipping, which might otherwise constitute a threat, away from an area, for example, of military operations. On the other hand, such zones may also be used for the purpose of denying an adversary access to resources, economic advantages of many kinds, and war materiel. In both cases, the object of the exclusion is logistical but may reflect a convergence of three distinct concepts: self-defense, blockade, and combat "killing grounds" (this last being a tactical rather than a legal concept). For a discussion of the various strategies involved, *see, infra* note 116 and accompanying text.

2. William Edward Hall, *A Treatise on International Law*, Pearce Higgins 8th ed. (London: Oxford Univ. Press, 1924) [hereinafter cited as Hall]. *See also* C.J.B. Hurst and F.E. Bray, eds., *Russian and Japanese Prize Cases* (Buffalo, N.Y.: William S. Hein Co., 1972), v. 2, pp. 343-53 [The "Quang Nam"] [hereinafter cited as Hurst and Bray]; T.J. Lawrence, *War and Neutrality in the Far East*, 2d ed. (London: Macmillan and Co., 1904), pp. 83-91. *See also, infra* § II A.

3. *See infra* § II E.

4. U.S. Navy Department, *The Commander's Handbook on the Law of Naval Operations*, NWP 9 (Washington: U.S. Govt. Print. Off., 1987) [hereinafter *Commander's Handbook* or NWP 9].

5. *Id.*, par. 7.7.5.

6. *Id.*

7. *Id.*

8. *Id.*

9. *See infra* notes 30-34, and the reference therein to the Declaration of Paris of 1856 and the Declaration of London of 1909. The text accompanying those notes discusses the treaty requirement of "effectiveness" for the purpose of establishing the validity of a blockade. For the practice of the United States with regard to the effectiveness requirement, and as reflected in the Civil War (or "War of Rebellion") 1861-65, *See* Dahlgren, *Maritime International Law*, Cowley ed., 1877, *passim*, and especially 25-61. The late Daniel P. O'Connell teaches us that the traditional concept (effectiveness) of the blockade required that it be "visible" and continued with the observation that it "required presence of the blockading force within visual range of the coast, although temporary withdrawal for reasons of stress of weather was not regarded as raising of the blockade." D.P. O'Connell, *The International Law of the Sea*, 2d ed. (Oxford: Clarendon Press, 1984), v. 2, p. 1150 [hereinafter cited as O'Connell, *Law of the Sea*]. Indeed some writers on the traditional concept of blockade, drawing an analogy with besieging a city, argued that the blockading ships should be at anchor. *See, e.g.*, Stone, *Legal Controls*, *supra* note 1, p. 508.

> It [*i.e.*, the traditional concept of blockade] presupposed that anchored ships could, with safety to themselves, maintain close physical surveillance of the blockaded ports. It also presupposed that a blockading vessel's sight and reach was limited by the human eye and the telescope and flag signal.

See also Lauterpacht's Oppenheim, supra note 1, v. 2, p. 779, where the author wrote:

> According to one opinion, the definition of an effective blockade pronounced by the First Armed Neutrality of 1780 is valid, and blockade is effective only when the approach to the coast is barred by a chain of men-of-war, anchored on the spot, and so near to one another that the line cannot be passed without obvious danger to the passing vessel. This corresponds to the practice followed before the First World War by France. (footnotes omitted)

It should be noted that this is not the only view. *See ibid.*, pp. 779-80, where we find a further statement regarding the second thesis concerning the requirement that the blockade must be effective: "According to this opinion, there need be no chain of anchored men-of-war to expose to a cross fire any vessels attempting to break the blockade; a real danger of capture suffices. . . ."

10. "Convention Relative to the Laying of Automatic Submarine Contact Mines," October 18, 1907, T.S. 54, Statutes at Large, v. 36, p. 2332, reprinted in *American Journal of International Law (Supp.)*, v. 2, p. 138 (1908). *See* especially, articles 2 and 3. It should be noted that in *Lauterpacht's Oppenheim, supra* note 1, v. 2, p. 781, we find article 2 to be stigmatized as "very unsatisfactory."

11. *See* quotation from O'Connell, *supra* note 9.

12. For a brief description of "Market Time" and "Sea Dragon," *see infra* text accompanying notes 137 and 138.

13. *See* Archer Jones, *The Art of War in the Western World* (1987), pp. 57-59 [hereinafter cited as Archer Jones], especially at p. 58, where the author illustrated the term (from the Persian response to Alexander the Great's campaign in Anatolia 334-333 B.C.) as follows:

> Instead of assaulting the enemy's (i.e., Alexander's) army to defeat a Greek advance, Mardonius, the shrewd Persian Commander, had used his superb cavalry to raid the Greek army's supply bases to compel a retreat from its strong position at Plataea.

As the rest of this chapter will testify, Professor Archer Jones's analysis and classification of the means and methods of waging war have been seminal to this writer's perception of the social and planning realities underlying the laws of war. It should be added that, following Professor Jones, this writer has also used the terms "strategy" and "tactics" in the traditional sense. *See id.*, at p. 1, where the author stated:

> An analytical approach to military operations permits one to divide the topic according to the three major components of the art of war: tactics, logistics, and strategy. Tactics should deal with combat and with the weapons, methods, and maneuvers on the battlefield. Logistics concerns providing the men themselves and the support of military operations, including the movement of armies and navies and the supply of weapons, food, clothing, and shelter for the soldiers and sailors. Strategy integrates tactics and logistics to determine the military objectives and the means of carrying them out. Naval warfare lends itself best to a separate treatment.

14. Professor Archer Jones, *id.*, at p. 55, also defines his seminal distinction between "raiding" and "persisting" strategies. He writes:

> Whereas the former [*i.e.*, the "raiding strategy"] used a temporary presence in hostile territory, a persisting offensive strategy envisioned a longer, even permanent, occupation of the territory of the adversary or his allies. A persisting defensive strategy sought to prevent such an occupation. On both the defensive, and the offensive, the persisting strategy envisioned the possibility of conflict between the principal hostile forces; raiders, on the other hand, often could attain their objective without significant military conflict and frequently sought to do so.

It also should be pointed out that Professor Archer Jones distinguished offensive and defensive tactics, so that a force, following an offensive or raiding strategy might occupy a strong position and then follow defensive tactics. Of course, he also envisioned the opposite—a defensive strategy enforced by offensive tactics. But, in this chapter the use of defensive tactics for the purpose of putting raiders in a defensive posture will be treated as engaging in offensive conduct.

15. William Shakespeare, *The Tragedy of King Richard II*, act II, scene 1, line 48.

16. Hall, *supra* note 2, p. 642.

17. Hurst & Bray, *supra* note 2, v. 2, pp. 343-53.

18. This concept was explained in a letter of April 23, 1982, from the Permanent Representative of the United Kingdom to the President of the United Nations Security Council (S/14997), which stated, *inter alia*, that:

> In this connection, Her Majesty's Government now wishes to make clear that any approach on the part of Argentine warships, including submarines, naval auxiliaries, or military aircraft which could amount to a threat to interfere with the mission of the British forces in the South Atlantic, will encounter the appropriate response. All Argentine aircraft including civil aircraft engaged in surveillnace of these British forces will be regarded as hostile and are liable to be dealt with accordingly.

Quoted in Geoffrey Marston, ed., "United Kingdom Materials on International Law 1982," *British Yearbook of International Law*, v. 53, p. 337 at pp. 540-41 (1981) [hereinafter cited as Marston].

19. *See* Lawrence, *supra* note 2, pp. 83-93.

20. *Id.*, pp. 86-87.

21. These United States orders were reproduced in *American Journal of International Law (Supp.)*, v. 12, pp. 13-22 (1918). *See* Hall, *supra* note 2, p. 642.

22. Hall, *supra* note 2, p. 642. *See also* Judgments of Lord Sumner in *The Stigstad*, 3 B & C. P.C. 347, 353, and *Ertel Bieber and Co. v. Rio Tinto Co., Ltd.*, [1918] A.C. 260, 287. Hall, *supra*, note 2, p. 643, at note 2, also refers to the early U.S. Naval War College Blue Book as approving of the Japanese orders. *See infra* note 23 and accompanying text.

23. Referring with approval to the *Quang Nam* case (which, of course, was prior to the Japanese orders), the influential Naval War College *Blue Book* offered the following solution to a problem based on the Japanese orders:

> The master appeals to the commander of a cruiser of the United States to escort him through this area [*i.e.*, a maritime exclusion zone similar to those proclaimed by Japan in 1904]. The voyage would not bring the vessels within 5 miles of the coast of State X [*i.e.*, the belligerent proclaiming the zone in question].
>
> What should the commander do?
>
> SOLUTION
>
> The commander should decline to escort the merchant vessel though the strategic area.
>
> He should advise the master of the merchant vessel to keep clear of the strategic area.

Naval War College, *International Law Situations with Solutions and Notes* (Washington: U.S. Govt. Print. Off., 1912), pp. 114, 129.

24. Archer Jones, *supra* note 13, points out, at p. 488, that:

> In former wars British blockades had hurt France's economy somewhat but had never had the effect that the [1914-18] blockade had on Germany, of reducing food consumption and handicapping industry because it had diminished or shut off the supply of such critical supplies as oil or copper. Never, too, had France's raiding strategy of attacking English ships come as near seriously menacing the British economy and ability to carry on the struggle as had the German submarine campaign against the allies. The navy's logistical strategy had acquired a new and perhaps decisive power in the industrial age.

25. *Lauterpacht's Oppenheim, supra* note 1, v. 2, pp. 561-62, characterized reprisals in the following terms:

> Whereas reprisals in time of peace are injurious acts committed for the purpose of compelling a State to consent to a satisfactory settlement of a difference created by an international delinquency, reprisals in time of war occur when one belligerent retaliates upon another, by means of otherwise illegitimate acts of warfare, in order to compel him . . . and members of his forces to abandon illegitimate acts of warfare. . . . They have often been used as a convenient cloak for violations of International Law.

26. For the British and Allied position in this regard, *see Lauterpacht's Oppenheim, supra* note 1, v. 2, pp. 791-97, and Stone, *Legal Controls, supra* note 1, pp. 504-07, 508-10. More generally, for the British and

German positions on their blockades as being justified by belligerent reprisals, *see* Robert W. Tucker, *The Law of War and Neutrality at Sea* (*Naval War College International Law Studies*, v. XLX) (Washington: U.S. Govt. Print. Off., 1957), p. 301 [hereinafter cited as Tucker]. *See also*, Clive Parry et al., eds., *Encyclopaedic Dictionary of International Law* (New York: Oceana Publications, Inc., 1986), p. 337; Basdevant, *Dictionnaire de la Terminologie du Droit International*, (1960), pp. 529-30.

27. Howarth, *Sovereignty of the Seas* (1974), pp. 283-84.

28. Myres S. McDougal and Florentino P. Feliciano, *Law and Minimum Public Order: The Legal Regulation of International Coercion* (New Haven: Yale Univ. Press, 1961), pp. 488-489 [hereinafter cited as McDougal & Feliciano].

29. *Id.*

30. *See* "Declaration Respecting Maritime Law," April 16, 1856, Martens, *Nouveau Recueil General*, v. 15, p. 791, art. 4 [hereinafter cited as Declaration of Paris of 1856]. Art. 4 of the Declaration provides:

> Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

31. Naval Conference of London, "Declaration Concerning the Law of Naval War," Feb. 26, 1909, *Proceedings of the International Naval Conference, held in London, December 1908-February 1909* (London: H.M. Stationery Office, 1909), Cd. 4555, pp. 381-93; reprinted in Dietrich Schindler & Jiri Toman, *The Law of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, 3d ed. (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1988), p. 845 [hereinafter cited as Declaration of London of 1909]. Note that the qualifier "really" in the Declaration of Paris of 1856 was repeated in article 2 of the Declaration of London of 1909.

32. *See* Guichard, *The Naval Blockade 1914-1918* (Turbet transl. 1930), pp. 16-18 [hereinafter cited as Guichard].

33. *See infra* note 40 and the accompanying text.

34. *See also supra* notes 25 and 26 and the accompanying texts.

35. *See* Archer Jones, *supra* note 12, at p. 499. On realizing the utility of the submarine as a raider carrying out a devastating logistical strategy, Germany began building an impressive submarine fleet as fast as possible. She was not, however, able, by developing an adequate ratio of power to the vast spaces of the Atlantic Ocean, to develop a persisting strategy. Her submarines were only able to fulfill raiding strategy and so, despite German calculations, enough food, materiel, equipment, and American troops were able to cross the Atlantic to ensure her defeat.

36. *Id.*, Table 8.3, p. 468.

37. "Convention Relative to the Laying of Automatic Submarine Contact Mines," *supra* note 10, arts. 2-3.

38. *See supra* note 30.

39. Columbian-Peruvian Asylum Case, Judgment of November 20th, 1950, I. C. J. Reports 1950, p. 266, at p. 276.

40. Great Britain: Order-in-Council of August 20, 1914; France: Proclamation of August 23, 1914.

41. *See supra* text accompanying note 32 for the outline of the facts showing that it was in Germany's interest that the Declaration would govern the maritime commerce of both sides.

42. Guichard, *supra* note 32, at pp. 40-41.

43. *Id.*, p. 42.

44. Guichard, *supra* note 32, argues that the term "blockade of the Central Empires" was a misnomer, since the Entente Powers, who "had a very proper respect for the Declaration of Paris of 1856" which "prohibits the confiscation of enemy goods sailing under a neutral flag," merely seized and either sequestrated or returned to their owners such goods and did not confiscate them. *Id.*, pp. 42-43. It may be noted, however, that Guichard also refers to "the blockade" and thereafter uses the word to describe the Entente's policy. *Id.*, p. 62.

45. *See supra* note 31 and texts accompanying notes 31-34; *See also*, Guichard, *supra* note 32, at pp. 13-19.

46. *Id.*, pp. 108-10. *See also* William S. Sims, *Victory at Sea* (1921), *passim.*

47. *See, supra* note 31 and accompanying text. *See also, supra* text accompanying notes 32-34 and Guichard, *supra* note 32, at pp. 13-19.

48. For a history of the negotiations of this affair, *see* Guichard, *supra* note 32, at pp. 196-202. Guichard there records the increasing cordiality of relations in the last months of World War I, including acceptance of the claims of the Allied and Associated Powers with regard to the long distance blockade.

49. *See* Guichard, *supra* note 32, at p. 97. For a history of this disastrously conceived piece of Hohenzollern diplomatic adventurism, *see* Barbara W. Tuchman, *The Zimmerman Telegram* (1958), *passim*, and especially chapters 11 and 12, entitled "The Telegram in Washington," and "Obliged to Believe It."

Tuchman believed that this latter activity on the part of Imperial Germany had a far stronger influence on the United States' entry into World War I than Germany's policy of unrestricted submarine warfare.

50. Guichard, *supra* note 32, at p. 96.

50. *Id.*, pp. 97-98.

51. March 3, 1918. Ratifications exchanged March 29, 1918. Denounced by the Russian Government, November 13, 1918. Abrogated by Articles 116 and 292 of the Treaty of Versailles, June 28, 1919, Martens, *Nouveau Recueil*, v. 9:I, 3 ieme Serie 323, British and Foreign State Papers, v. 112, p. 1 (1919).

52. *See* Guichard, *supra* note 32, at pp. 97-98.

53. "Order in Council Framing Reprisals for Restricting Further the Commerce of Germany," Stat. R. & O., 1939 No. 1709. Stone calls this " a very moderate measure." Stone, *Legal Controls, supra* note 1, p. 504. Writers and commentators have also expressed surprise at the three-month delay. *See*, for example, *id.*, p. 504, note 1, and the authors cited therein. Regulation of neutral trade with the enemy, however, became stricter under the Order-in-Council of June 11, 1940. "Order in Council Applying the Order in Council of November 27, 1939, to Italy," Stat. R & O, 1940 No. 979.

54. For the Italian protest and the United Kingdom's reply, *see* Cmd 6191 (1940) at pp. 2-7.

55. *See* "Order in Council Applying the Order in Council of November 27, 1939, to Italy," *supra* note 53.

56. The similar claims by the United Kingdom, and later the United Nations, of a right of reprisal because they associated themselves with Germany's methods of warfare at sea, were subsequently made against Finland, Hungary, and Rumania. *See* Stone, *Legal Controls, supra* note 1, p. 504.

57. *Id.*

58. United Nations, *History of the United Nations War Crimes Commission* (1948), p. 492.

59. "Treaty for the Limitation and Reduction of Naval Armament," April 22, 1930, U.S. Statutes at Large, v. 46, p. 2858, reprinted in Schindler & Toman, *supra* note 31, p. 881.

60. "*Proces-Verbal* Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of April 22, 1930," Nov. 6, 1936, *American Journal of International Law (Supp.)*, v. 31, p. 137 (1937), reprinted in Schindler & Toman, *supra* note 31, p. 883.

61. *Trial of the Major War Criminals Before the International Military Tribunal* (Nuremberg, Germany: International Military Tribunal, 1948), v. 22, pp. 556-61.

62. The case of the British auxiliary cruiser *Baralong* in 1916 illustrates the public outrage of that country at Germany's indiscriminate submarine warfare. *See*, [1916] British Parliamentary Papers, Misc. No. 1 [Cd. 8144], *reprinted in American Journal of International Law (Supp.)*, v. 10, pp. 79-86 (1916). Catching the officers and crew of a German U-boat in the act of sinking a British merchant ship, the captain of the *Baralong* ordered their summary execution on the spot. On the German Government's demand that the British Government prosecute the latter's commander and her ship's company for murder and punish them according to the law of war, the British Government, without admitting the facts, justified the executions as retaliation against the ruthlessness of Germany's U-boat policy of unrestricted sinking of merchant ships. On the other side of the coin, see the German condemnation of the British policy of arming merchantmen and instructing them, as a last resort, to ram U-boats, even if signalled to stop and submit to visitation. This escalation of outrage culminated in Germany's conviction and execution, in July 1916, of Captain Fryatt, the commander of the merchant ship *Brussels* for having attempted, in March 1915, to ram the German submarine U-33. *See Lauterpacht's Oppenheim, supra* note 1, v. 2, p. 468, where Germany's act was stigmatized as "nothing else than a judicial murder." *See also* James Brown Scott, "The Execution of Captain Fryatt," *American Journal of International Law*, v. 10, p. 865 (1916). In his article, Scott, a leading American international lawyer and Editor of the *Journal* at a time when the United States was still a neutral, stated categorically:

> Ramming is an effective method of defense against a submarine and the fact that a submarine is a frail thing and cannot stand this kind of warfare is its misfortune, not the merchantman's fault. . . .

Id., p. 877. Scott concluded his Editorial Comment with the following statement:

> If the views above expressed are correct that there is nothing in the law nor in the practice of nations which prevents a belligerent merchant vessel from defending itself from attack and capture, the execution of Captain Fryatt appears to have been without warrant in international law and illegal, whatever it may have been according to the municipal ordinances of Germany.

Id. See also "The Brussels: Captain Fryatt's Case," Pitt Cobbett, *Leading Cases in International Law*, Walker 5th ed. (1937), v. 2, p. 131 [hereinafter Pitt Cobbett]. The author commented:

> Germany seems to have been the first nation to question either the right of active self-defense or the legitimacy of defensively armed merchant ships. Practice appears to have been wholly against her contentions. With regard to war on land, however, different considerations apply.

Id., p. 132. This last distinction was made because the German Government justified Captain Fryatt's execution on the ground that he was a *franc tireur*, that is, a civilian non-member of any fighting force who, without orders, snipes from behind cover at his unsuspecting enemy. Pitt Cobbett pointed out that the justification of making the *franc tireur* liable to "the severest treatment" has solid military reasons. "The essence of the franc tireur is not his commission of hostilities, but the element of treachery—he is a civilian one moment, a soldier the next. Having, as a peaceful civilian, watched the enemy soldiers pass, he then snipes at them from his cottage window." Pitt Cobbett finally contrasted the *franc tireur* with Captain Fryatt by pointing out that the *franc tireur* is under no form of discipline; there is no official superior to whom appeal can be made should he fail to observe the usages of war. Captain Fryatt, on the other hand, "though not a member of the armed forces of the Crown, was the head of a disciplined body of men, and was . . . acting under the advice of the British Admiralty." *Id.* In fact, it should be pointed out that Germany, perhaps not incorrectly, had, in both World Wars, insisted on treating the British Merchant Marine as a naval auxiliary service, since those ships travelled in convoys under armed escorts, were defensively armed and, whether travelling in convoy or not, or defensively armed or not, were required by the British Admiralty to take active measures of self-defense if attacked, to radio the position of any German U-boat seen by them, and to give the position of any observed underwater attack. If Germany argued this characterization of British merchant ships as naval auxiliaries in order to approbate their attacks on merchant ships, they should not have reprobated it in order to execute Captain Fryatt, whom they punished for being a civilian sniper, not a uniformed member of the auxiliary service.

63. For a comment on both the limited size of the area and the German maritime activity (invasion and occupation of Norway), *see Lauterpacht's Oppenheim, supra* note 1, v. 2, p. 493, note 1.

64. This was one of the notorious "Leipzig War Crimes Trials" held in Germany in 1921. *See American Journal of International Law (Supp.)*, v. 16, p. 708 (1922). *See also* Pitt Cobbett, *supra* note 62, v. 2, pp. 156, 158.

65. *American Journal of International Law (Supp.), supra* note 64, p. 722. This case should be contrasted with the *Dover Castle* case, *id.*, p. 704. The *Dover Castle* was also one of the Leipzig War Crimes cases. The vessel was a British hospital ship. She was clearly marked as such and was carrying no military personnel, munitions, or stores other than sick and wounded soldiers, members of the medical corps, and necessary supplies connected with that service. The accused commander of the submarine, Karl Neumann, was acquitted because the *Dover Castle* was sunk "in obedience to a service order of his highest superiors." *Id.*, p. 708. It should be noted that his latter case was distinguished from the *Llandovery Castle* also on the ground that the commander did not, as did Patzig, order the massacre of the survivors in lifeboats, or those on, or clinging to, rafts and wreckage, and in the water. *See Lauterpacht's Oppenheim, supra* note 1, v. 2, p. 569. On the German Government's and High Command's policy, and order, of sinking hospital ships on sight, *see id.*, pp. 504-06, note 1. *See also* the British refusal to recognize the immunity of German seaplane ambulances in the English channel rescuing German airmen. *Id.* pp. 506-07.

66. The defenses of the "Laconia Order" (superior order commanding the killing of survivors of torpedoed ships) and of necessity were rejected. *See Law Report of Trials of War Criminals* (London: British Military Court, 1945), v. 1, p. 1 [hereinafter cited as War Crimes Reports].

67. War Crimes Reports, *supra* note 66, v. 9, p. 75. This case also involved the "Laconia Order."

68. *Id.*, v. 9, p. 82.

69. *See* Tucker, *supra* note 26, p. 72, note 55, where the author writes:

> According to S. W. Roskill, with the one exception noted above [*i.e.*, Helmuth von Ruchtesschell], the captains of German armed merchant raiders "generally behaved with reasonable humanity towards the crews of intercepted ships, tried to avoid causing unnecessary loss of life and treated their prisoners tolerably." (footnote omitted)

70. Clearly the conflict between Argentina and the United Kingdom was a limited war, as to the participants, the area, and the weapons employed. For a quite detailed discussion of the seven zones proclaimed by both sides, for their characterization as "unusual," and for the comment that "[t]he rationale for these is difficult to determine," *see* William J. Fenrick, "The Exclusion Zone Device in the Law of Naval Warfare," *Canadian Yearbook of International Law*, v. 24, p. 92, at p. 107 (1987) [hereinafter cited as Fenrick]. This writer believes that, at least in part, the proclamation of these zones (except for the ill-advised last one proclaimed by Argentina, which was implicated in the unnecessary bombing of the tanker *Hercules, see, Amerada Hess Shipping Corp v. Argentine Republic*, 830 F. 2d 421 (2d Cir. 1987), *reversed* 109 S. Ct. 683 (1989)), helped to restrict the conflict to the disputed territory and localize the conflict. This writer agrees completely with Professor Howard S. Levie's comment in his contribution, "The

Falklands Crisis and the Law of War," in Alberto R. Coll and Anthony C. Arend, eds. *The Falklands War: Lessons for Strategy, Diplomacy and International Law* (Boston: George Allen & Unwin, 1985), p. 64 at p. 76 [hereinafter cited as Levie], where he listed the reasons why, in his opinion, the laws of war were able to exert their restraining influence:

> First, this was a limited war, fought for limited ends with limited means. . . . The adversaries restricted their operations to the disputed territory, and refrained from military actions against the enemy's homeland; had it been conducted otherwise, the war would have been much more violent and destructive. . . .

71. The date 1982, shown in the text as that of the commencement of the Persian Gulf Tanker War, is predicated on the Iraqi attack on Kharg Island on April 29, 1982, and the Iraqi announcement of a Maritime Exclusion Zone in the Gulf on August 12, 1982. The Iran-Iraq War in general, although limited as to participants, and as to area (but note the so-called "War of the Cities"), was not limited as to weapons (note the substantiated resort to gas warfare by Iraq, the latest example of which at the time of writing was reported in "Gas Explosion in United Nations," *The Economist*, August 6, 1988, p. 31). One can be thankful that neither side had, apparently, nuclear devices. Unlike the Falklands Conflict, the Iran-Iraq war did not evidence restraints as to means and methods of warfare, nor in the treatment of prisoners.

72. *See infra* note 85 and accompanying text.

73. Marston, *supra* note 18, at p. 539.

74. *See supra* note 30 and the accompanying text.

75. Levie, *supra* note 70, p. 65.

76. Marston, *supra* note 18, pp. 540–41. *See also* the text accompanying note 18.

77. Marston, *supra* note 18, p. 549. *See* Levie, *supra*, note 70, p. 65. A further example of the British enforcement of "the Defensive Bubble" was the sinking of the Argentine "fishing vessel," the *Narwal*. She was shadowing the British forces and was "a spy ship with an Argentine Navy Lieutenant Commander on board sending back information about the [British] fleet's movements." Christopher Dobson et al., *The Falklands Conflict* (Falmouth, Cornwall: Coronet Books, 1982), p. 104. *See also*, Levie, *supra* note 70, p. 67 [hereinafter cited as Dobson et al.].

78. Marston, *supra* note 18, p. 542. *See also* for a discussion of the British MEZ of April 30, 1982, in light of the Doenitz Judgment, *supra* note 61, and the U.S. Navy Department's *Law of Naval Warfare* (NWIP 10-2) (Washington: U.S. Govt. Print. Off., 1955, as amended) [hereinafter cited as NWIP 10-2], in Fenrick, *supra* note 70.

79. Marston, *supra* note 18, p. 542.

80. *Id.*, p. 549. For enforcement of this zone, *see* letter dated May 1, 1982, addressed to the President of the Security Council from the Permanent Representative of the United Kingdom to the United Nations. Dobson et al., *supra* note 77, p. 546.

81. Marston, *supra* note 18, p. 549.

82. *Id.*

83. Levie, *supra* note 70, p. 66.

84. *Id.*

85. *Supra* note 70. The reversal of the Court of Appeals for the Second Circuit's judgment was on the ground that the Court of Appeals had erred in assuming jurisdiction over a foreign sovereign with regard to a claim that was not within the exceptions of the Foreign Sovereign Immunities Act of 1976. 28 U.S. Code § § 1330, 1332, 1391, 1441, and 1602, *et seq.*, especially § § 1604 and 1605. The Supreme Court also reversed the court below on the grounds: (1) That the United States' and Argentina's ratification of the Convention on the High Seas, Geneva, April 29, 1958, *United States Treaties and Other International Agreements*, T.I.A.S. No. 5200, v. 13, p. 2312, does not provide domestic United States courts with an independent basis of jurisdiction; and (2) the Alien Tort Statute of 1789, U.S. Code, Title 28, § 1750, does not provide an independent basis of jurisdiction. The Foreign Sovereign Immunities Act of 1976 provides the sole basis of jurisdiction in such cases.

86. *Amerada Hess, supra* note 70, p. 423.

87. *Id.*

88. It should be noted that the United States sought to protect the neutrality of the *Hercules*, and the Government emphasized her neutral status to the Argentine Government. The court stated that:

> On May 23, 1982, *Hercules* embarked from the Virgin Islands, without cargo but fully fueled, headed for Alaska. On June 3, in an effort to protect United States interest ships, the United States Maritime Administration telexed to both the United Kingdom and Argentina a list of United States flag vessels and United States interest Liberian tankers (like *Hercules*) to ensure that these neutral vessels would not be attacked. The list included *Hercules*.

Id. See also the court's comment that "it is beyond controversy that attacking a neutral ship in international waters, without cause for suspicion or investigation, violates international law." *Id.*, p. 424.

89. *See Keesing's Contemporary Archives*, Aug. 7, 1981, v. 27, p. 31006 [hereinafter cited as *Keesing's*].

90. It should be pointed out that damaging attacks by both sides on their opponent's oil installations began as early as September and October 1980. *Id.*, pp. 31015-16. *See also id.*, June 4, 1982, v. 28, p. 31517. For an outline of the events concerning the exclusion zones in the Persian Gulf Tanker War, *see* Fenrick, *supra* note 70, pp. 116-22; Ross Leckow, "The Iran-Iraq Conflict in the Gulf: The Law of War Zones," *International and Comparative Law Quarterly*, v. 37, p. 629 (1988) [hereinafter cited as Leckow].

91. Asylum Case (Colombia v. Peru), [1950] I. C. J., p. 266, at p. 276.

92. The Court added the requisite psychological element by saying "and . . . this usage is the expression of a right appertaining to the state granting asylum and a duty incumbent on the territorial state." *Id. See also* Charles De Visscher, *Theory and Reality in International Law*, P.E. Corbett trans. (Princeton, N.J.: Princeton Univ. Press, 1957), pp. 148-49 [hereinafter cited as De Visscher], where the former World Court Judge wrote:

> From the assimilation of custom to tacit convention, which in our judgment is quite fictitious, must be distinguished the requirement of *opinio juris sive necessitatis*, regarded here as reflecting the attitude of power in relation to a given practice. In its judgment of November 20, 1950, in the case of the right of asylum (Colombia-Peru)—a judgment which fixes its jurisprudence on this subject—the International Court of Justice clearly asserted the necessity of this psychological element of custom. (footnotes omitted)

93. *See* the quotation from De Visscher, *supra* note 92, and note 27 on that page in which the author discusses the definition in the *Asylum Case*. *See also* Statute of the International Court of Justice, art. 38, par. 1(b), which "recognizes the existence of a custom only if the practice which is its content has been 'accepted as law.'" De Visscher, *supra* note 92, at p. 441. Again, in the North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), [1969] I.C.J., at p. 44, the Court reinforced its thesis in the *Asylum Case* with the statement that:

> Not only must the acts concerned amount to a settled practice, but they must also be such, or carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of the subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.

94. Stone, *Legal Controls*, *supra* note 1, p. 508.

95. *Id.*, at pp. 508-09. Stone took his quotation from *Statement of the Measure Adopted to Intercept the Seaborne Commerce of Germany*, Misc. No. 2, 1916, Cmd. 8145, p. 4.

96. *See, e.g.*, Anthony A. D'Amato, *The Concept of Custom in International Law* (Ithaca, N.Y.: Cornell Univ. Press, 1971), p. 72, where he writes: "Kopelmanas, following the old theories of Puchta and Savigny, suggests that 'social necessity' is the basis of *opinio juris*." (Footnotes omitted)

97. Thus D. P. Simpson, *Cassell's New Latin Dictionary* (New York: Funk & Wagnalls Co., 1960), p. 778, tells us the use of *sive* "in an alternative conditional clause, whether . . . or . . ., *sive* (or *seu*) . . . *sive* (or *seu*))." *See also id.*, p. 558, for its use in a disjunctive sense.

98. C.H.M. Waldock, "The Legal Basis of Claims to the Continental Shelf," *Grotius Society Transactions*, v. 36, p. 115, at p. 143 (1951). *See also* H. Lauterpacht, "Sovereignty over Submarines Areas," *British Yearbook of International Law*, v. 27, p. 376, at pp. 393-420 [hereinafter cited as Lauterpacht, *Submarine Areas*]; Gilbert Gidel, "The Continental Shelf" (L.F.E. Goldie trans.), *Annual Law Review* (Univ. of West Australia), v. 3, p. 87, at pp. 102-103 (1954-56); L.F.E. Goldie, "Some Comments on Gidel's Views," *id.*, p. 108, at 115-21; L.F.E. Goldie, "Australia's Continental Shelf: Legislation & Proclamations," *International and Comparative Law Quarterly*, v. 3, p. 535, at pp. 557-59 (1954). *But see* "Report of the International Law Commission to the General Assembly Covering the Work of its Eighth Session, 23 April-4 July 1956," U.N. Doc. A/3159, [*1956*] *Yearbook of the International Law Commission*, v. 2, p. 253, at pp. 295-99. Note especially commentary (8) on draft article 68. *Id.*, p. 298.

99. D. P. O'Connell, *Influence of Law on Sea Power* (1975), p. 165 [hereinafter cited as O'Connell, *Sea Power*]:

> When France was threatened by a plague of protesting yachts (which largely failed to materialize) the theoretical problem was deliberately made actual. Eventually, in 1973, France's notice to mariners went beyond declaring a *zone dangereuse* and for the first time in the history of nuclear testing amounted to a temporary appropriation of an area of the high seas from which all shipping could be excluded. One yacht was, in fact, boarded; but to hustle away H.M.N.Z.S. *Taranaki* or

Canterbury was another matter. The outcome was a maritime pavane, executed with some grace and disparity, in which New Zealand made her point and France continued her testing.

Had the International Court of Justice at the Hague found that the enclosure of the seas for the purpose of French nuclear testing was illegal, this might have ended speculation upon the legality of naval operational zones; if it had found that the enclosure was not illegal, it would have put a premium upon it. (footnotes omitted)

100. Myres S. McDougal and Norbert A. Schlei, "The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security," in Myres S. McDougal et al., *Studies in World Public Order* (New Haven, Conn.: Yale Univ. Press, 1960), pp. 763, 766-68, 802-07, and note 172, where, at the last citation, the authors point out that:

The United States has established well over 400 such areas [that is, areas designated in "warnings to mariners" or similar notes of dangers to navigation either indefinitely or at certain times], ranging in size from less than a square mile to the vast area surrounding the Bikini and Eniwetok atolls, and in duration from a period of a few hours to many years. Other naval powers, including the United Kingdom, Canada, Australia, and the Soviet Union, have engaged in the same practice for similar purposes. Ordinarily, no claim is made to enforce warning areas by means of formal sanctions, and the normal responsibility for taking reasonable measures at the scene to avoid accidents is considered to rest with the authorities using the area for dangerous operations. Some danger areas are, however, announced in terms which make clear that the authorities using them are expected to *enforce* observance.

In rare instances, criminal penalties are provided for unauthorized intrusions. In the Defence (Special Undertakings) Act of 1952, the Commonwealth of Australia created a prohibited area of more than 6,000 square miles, most of it high seas, surrounding one of the Monte Bello Islands in Western Australia, where atomic tests have been conducted by the United Kingdom. (authors' emphasis; footnotes omitted)

See also O'Connell, *Sea Power, supra* note 99, and the reference to the more recent French policy of creating sanctions for breaches of its prohibitions against vessels intruding into its South Pacific nuclear testing area.

101. *See, e.g.*, Lauterpacht, *Submarine Areas, supra* note 98, pp. 393-98; J.D. MacGibbon, "Some Observations on the Part of Protests in International Law," *British Year Book of International Law*, v. 30, p. 293.

102. D'Amato, *supra* note 96, p. 99.

103. *Id.*

104. *Id.*

105. *See supra* text accompanying note 83.

106. *See* D'Amato, *supra* note 103, and quotation therefrom in accompanying text.

107. *See supra*, notes 84 and 85 and accompanying text.

108. The phrase "Military Economy" describes one of the "principles of war" (meaning, not legal rules but the prudential guides to waging a successful war) as prescribing that the commander should use enough force for the purpose of achieving his objective. It proscribes the alternative of squandering resources. Commanders, however, generally prefer to err on the side of "too much" rather than "too little, too late." Von Clausewitz writes, regarding this principle:

In this manner, he who undertakes War is brought back again into the middle course, in which he acts to a certain extent upon the principle of applying so much force and aiming at such an object in War as is just sufficient for the attainment of its political object.

Karl von Clausewitz, *On War*, Graham transl., 1908 Anatol Rapoport ed. (London: Penguin Classics, 1968), p. 375 [hereinafter cited as Clausewitz]. *See also id.* at p. 423, note 59, where the editor, Dr. Anatol Rapoport observes:

Here Clausewitz admits a rational basis for a limited war. Still, in his view, the limitation of military objectives depends entirely on the political objectives, that is, war effort is to be commensurate with what is demanded from the enemy and what can be achieved.

See also Archer Jones, *supra* note 13, at pp. 630-34 and 670-75.

109. Clausewitz always saw "absolute war" as being subject to "three modifying factors;" but he defined it for heuristic purposes as embodied in a contest that can "spring up quite suddenly and spread to the full in a moment" and consist of a "single absolute blow wreaking irreparable harm upon the enemy," that is, a harm in absolute terms "from which he may never recover." Such a blow is not "a passing evil." *See* Clausewitz, *supra* note 108, pp. 367-71. *See also* L.F.E. Goldie, "Book Review," *Southern California Law Review*, v. 36, p. 636, note 34 (1963). This review discussed, and at times compared, two annotated translations of General V.D. Sokolovskii, *Soviet Military Strategy*, Dinerstein et al. trans., Rand Corporation Research Study (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1963), and V.D. Sokolovskii, *Military Strategy*, Richard Garthoff trans. (New York: Frederick A. Prager, Inc., 1963). It should be noted that the accurate translation of the book's title from the Russian original is "Military Strategy."

110. *See supra* quotation accompanying note 108, *and especially* the reference to "military economy" at that place.

111. *Lauterpacht's Oppenheim, supra* note 1, v. 2, p. 218 (emphasis supplied).

112. The "three limiting factors" Clausewitz described in "real," as distinct from "philosophical," war were: (1) The "non-conducting medium which hinders the complete discharge" of the will to wage war. This includes "the number of interests, forces and circumstances of various kinds . . . which are affected by the War through the infinite ramification of which logical consequences cannot be carried out . . . ;" (2) "The natural inertia and friction" of the parts that go into making of a "real war" as distinct from Clausewitz's "philosophical war;" and (3) The "vagueness and hesitation (or timidity) of the human mind." Clausewitz, *supra* note 108, pp. 368-69. Note also Clausewitz's comment, "Activity in war is movement in a resistant medium." *Id.*, p. 165.

113. *Lauterpacht's Oppenheim, supra* note 1, v. 2, pp. 226-36; Stone, *supra* note 1, Discourse 18, "Ideological and Technological Factors in the Evolution of the Law of War," pp. 335-41.

114. Clausewitz, *supra* note 108, at 267-70.

115. *Id.*

116. *Id.*, pp. 102-03. Here Clausewitz defines his thesis of the "utmost use of force" with the conclusion that, "We therefore repeat our proposition, that War is an act of violence pushed to its utmost bounds; as one side dictates the law to the other, there arises a sort of reciprocal action."

117. *Id.*

118. *Id.*

119. Levie, *supra* note 70, p. 76. *See also* Clausewitz, *supra* note 108, p. 403, where that famous author gives us the following interesting metaphor:

> Thus policy makes out of the all-overpowering element of War a mere instrument, changes the tremendous battle-sword, which should be lifted with both hands and the whole power of the body to strike one and for all, into a light handy weapon, which is even sometimes nothing more than a rapier to exchange thrusts and feints and parries.

120. Roger Trinquier, *Modern Warfare*, Daniel Lee trans. 1964, (first published in French in 1961), pp. 19-20 and *passim*. Indeed Trinquier quoted Clausewitz's stigmatization of "self-imposed restrictions" as equally applying in guerilla warfare where Clausewitz's maxim "to introduce into the philosophy itself a principle of moderation would be an absurdity" also applies. *Id.*, p. 22.

121. *Lauterpacht's Oppenheim, supra* note 1, v. 2, pp. 796-97. *See also* S. W. D. Rowson, "British Prize Law, 1939-1944," *Law Quarterly Review*, v. 61, p. 49 at p. 57 (1945), where the author states:

> In this war, except in the case of Germany, reprisals were instituted immediately war was declared, and in effect it was the outbreak of the war that was the breach of international law which gave His Majesty the right to initiate reprisals. One cannot help feeling that the time has come to remove any notion that such measures, by being termed reprisals, are extraordinary. Rather should it be made clear to the world in time of peace that in the event of this country being involved in war, the whole system of economic warfare as in force in this war will be reintroduced. It is now clear to all that neutrals cannot carry on during a major war without any interference whatsoever, and it is suggested that the certainty that these measures would be adopted if occasion required would be a valuable addition to the sanctions behind any new international order. In this connection it is interesting to recall that in both the last and the present wars the neutral nations who were most vociferous in their complaints of the British exercise of belligerent rights at sea have ultimately become allied to Great Britain and shared in the advantages of her system of waging economic warfare.

122. *See supra* § II.D.

123. James Mitchell, ed., *The Random House Encyclopedia* (New York: Random House, 1977), p. 2576.

124. *Id.*, p. 2463.

125. *Supra*, note 70. *See also*, text accompanying notes 85-87.

126. *See supra* note 121 and accompanying text. *See also*, Stone, *Legal Controls, supra* note 1, at p. 510, and quotation from Stone accompanying note 129, *infra*.

127. Leckow, *supra* note 90, at pp. 635-36.

128. *Id.*, p. 635.

129. Stone, *supra* note 1, pp. 606-07 (footnote omitted).

130. *See supra* text accompanying note 73.

131. Fenrick, *supra* note 70, p. 124.

132. *See supra* text accompanying notes 21-23.

133. *See supra* quotation in text accompanying note 75. *See also* Levie, *supra* note 70, at p. 65, where he also wrote of this early proclamation, "However, this was a perfectly valid and successful piece of 'disinformation' by the British;" and more generally, the permissible use of misinformation as a *ruse de Guerre*. O'Connell, *Law of the Sea, supra* note 9, v. 2, p. 1140.

134. *See* Leckow, *supra* note 90, p. 634, where he demonstrated that the British forces satisfied the proportionality requirement. He wrote:

> Ships regarded as hostile were subject to attack without warning. In order to claim the status of "non-hostile", vessels required the authorisation of the Ministry of Defence in London. Adopting a very balanced approach, Britain sought to apply the measures primarily against craft engaging in military operations. Argentinian merchant ships were permitted to enter the zone with British approval. Refining the procedures of the two world wars, Britain precisely defined the limits of the area and provided ample notification to all parties. Further, Britain was careful to observe proportionality, the system being enforced with a minimum of violence. Thus, British forces avoided any conflict with neutral ships. Even unauthorised Argentinian merchant craft were merely compelled to leave the area with no incidents of direct attack occurring. (footnotes omitted)

135. *See supra* notes 18, 76-80, 125 and accompanying texts.

136. United Nations, Security Council, Resolution 502, April 3, 1982, *reprinted in International Legal Materials*, May 1982, v. 51, p. 679.

137. *See* O'Connell, *Law of the Sea, supra* note 9, pp. 1097-98. *See also* O'Connell, *Sea Power, supra* note 99, at pp. 76-77.

138. *Commander's Handbook, supra* note 4, par. 7.7.5. *See also* text accompanying note 8 *supra*.

139. *Supra* note 136.

140. *See supra* text accompanying notes 85-88.

141. O'Connell, *Law of the Sea, supra* note 9, v. 2, p. 1099.

142. *Id.*

143. *Id.*

144. *Id.* In commenting on the situation, O'Connell also states:

> The naval operations conducted by India against the port of Karachi and in the Gulf of Bengal took no account of international law, which was, indeed deliberately put to one side by the Indian naval staff.

145. *See supra* text accompanying notes 16-18.

146. *See supra* text accompanying notes 21-23.

147. *See supra* text accompanying notes 35-36.

148. *See supra* notes 64-69 and accompanying text.

149. *See supra* text accompanying note 67.

150. *See supra* text accompanying note 66.

151. *See supra* text accompanying note 76.

152. O'Connell, *Sea Power, supra* note 99, p. 168.

153. "The Nyon Agreement," Sept. 14, 1937, *League of Nations Treaty Series*, v. 181, p. 137, *reprinted in American Journal of International Law (Supp.)*, v. 31, p. 183 (1937); and "Agreement Supplementary to the Nyon Agreement," Sept. 14, 1937, *League of Nations Treaty Series*, v. 181, p. 151, *reprinted in American Journal of International Law (Supp.)*, v. 31, p. 183 (1937). For a history and commentary on the Nyon Agreements, *see*, L.F.E. Goldie, "Commentary [on the 1937 Nyon Agreements]," in N. Ronzitti, *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries* (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1988), p. 489.

154. O'Connell, *Sea Power, supra* note 116, p. 168.

Chapter VIII
The Law of Submarine Warfare Today

by
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Introduction

The roles of military submarines have evolved throughout the twentieth century. In wartime, these roles have included coastal defense, harassment of enemy fleets, and, especially in World War II, hunting and destroying the seaborne commerce that supported the enemy's war efforts. Today, two principal roles for U.S. submarines, at least in any future war with the Soviet Union, are probably as anti-submarine weapons (attack submarines) and as strategic weapons platforms (ballistic missile submarines). Other missions, however, could include coastal defense, attacks on the enemy's surface fleet, projection of force ashore, and commerce warfare.[1]

The laws of war have never been comfortable with the submarine's unique combination of stealth and vulnerability. As will be explained below, it is this peculiar mix of strength and weakness that can be blamed as the root cause of the legal dilemma, particularly as it relates to the submarine's role as a commerce raider. The legal responses to this twentieth-century weapons platform have ranged from early proposals for its abolition to justification of its use under the rules of reprisal to tolerance of it as an effective war machine with characteristics that regrettably require some adjustments in the traditional laws of war.

The U.S. Navy's new *Commander's Handbook on the Law of Naval Operations* (NWP 9) includes references to the laws of naval warfare that specifically address the submarine weapons system and also rules that apply, or can apply, to submarines and their roles in wartime. The ultimate purpose of this chapter is to analyze these direct and some of the indirect references to the law of submarine warfare. Before that discussion, however, the chapter will first briefly review the history of both the submarine as a weapons system and earlier approaches to the legal dilemma presented by the submarine and its wartime uses. Next, today's submarines and their wartime roles will be described. This will be followed by a discussion of the present state of the law of submarine warfare. Finally, the chapter will point out and analyze the submarine references in the *Commander's Handbook*.

History[2]

The submarine is a war machine of the twentieth century. Although documented uses of submersible devices against the enemy in wartime occurred as early as the American Revolutionary War, and in fact the submarine's legality was considered at the 1899 Hague Peace Conference, deployment of submarines as a significant part of a nation's naval forces began only in the early years of the present century. Certainly the international law issues that form the core of the current chapter achieved real significance only with the conduct of naval warfare during the First World War.

The main advantage of a submarine over a surface warship is, of course, its underwater capability. Militarily, this translates into the ability to hide from the enemy and the ability to approach a target from its hidden position to carry out surprise attacks. The disadvantages of the submarine can be viewed as the price it must pay for the principal advantage of stealth, and these disadvantages, especially for earlier submarines, have been considerable. Submarines used by the belligerents in both world wars were small and cramped. They were slow when running submerged on batteries, which they could not do for long periods of time without coming to the surface to recharge, and were not all that fast when running on the surface under diesel power. Moreover, unlike heavily armed surface warships, the submarines of the world wars were vulnerable on the surface to attacks, even from lightly armed merchant vessels, and to rammings. While these submarines were armed with deck guns and were also capable of laying mines, their principal weapon was the self-propelled torpedo.

At the start of the First World War, submarines were assigned the roles of coastal defense against enemy warships and harassment of enemy warship fleets. Partly because of their disadvantages—low escape speeds, limited submerged times, vulnerability to attack on the surface—they were soon assigned the task of interdicting the seaborne commerce traffic that supported the enemy's war effort. This role of commerce raider then became the main wartime assignment for German submarines in World War I and the submarines of most of the belligerents in World War II. As we shall see, it is the anti-commerce role that has created the largest set of legal controversies concerning the military uses of submarines.

Since the Second World War, the evolution of the military submarine has proceeded in giant strides. With new developments have come new projected wartime roles and reconsideration of some of the earlier roles. The harnessing of nuclear energy, for propulsion and for weapons, has probably affected the nature and role assignments of the submarine more than any other preexisting war machine. Nuclear powered submarines are relieved of the necessity to surface or come to shallow snorkel depth to recharge batteries and can consequently remain in submerged hiding for extremely long time periods

and underwater transits. And, because the undersea remains an excellent place of concealment despite improved anti-submarine-warfare (ASW) devices and techniques, modern nuclear powered submarines have proved effective in their postwar deterrent role as roving submerged platforms for nuclear-armed ballistic missiles.

Other new developments in the design and construction of submarines have provided them with greater underwater speed, enough speed to match that of most surface warships (although this comparison probably says as much or more about the development of surface fleets as it does about submarine advances). Weaponry for submarines has also expanded in variety and range. While presumably only strategic missile submarines (SSBNs) are armed with ballistic missiles for their special deterrent role, the other principal category of submarines, attack submarines (SSNs, if nuclear powered, almost exclusively the case in the U.S. Navy today; SSs, if diesel-electric powered) have had their weapons array and targeting systems enhanced in recent years. Torpedoes have been greatly improved, of course, but modern attack submarines are now capable of launching a variety of anti-ship, anti-submarine, and land-target missiles, including cruise missiles, with conventional or nuclear warheads. Moreover, most of these weapons can be launched at much greater distances from the targets—even over the horizon—than was true for submarine weapons during the world wars. Today's submarines are also capable of sophisticated mine-laying.

Because of these advances, today's fighting submarines are in many respects as different from those that fought in World War I as those early submarines were different from the surface naval vessels that preceded and coexisted with them. But it is this earlier distinction that caused the initial legal controversy, a dispute that continues to this day. Indeed, the entire twentieth-century history of the submarine as a major implement of naval warfare has occurred in the face of attempts to apply to submarines laws of war that were essentially devised to regulate the use of latter-nineteenth-century surface warships, and in particular the interaction of these surface vessels with merchant shipping of the same time period. It is not surprising that some legal friction has resulted.

Arising out of the closely related principles of military necessity and humanity, the relevant laws of war were, and are, designed to protect noncombatant crews and passengers aboard merchant ships where circumstances make these vessels legitimate objects for destruction by a belligerent in wartime. The 1908 Declaration of London stated the rule that a neutral merchant vessel (assuming it was otherwise lawful to sink it) could be sunk by a belligerent ship only after the warship had provided for the safety of the passengers and crew.[3] This might be accomplished by taking the protected persons on board the warship or another vessel and later transporting them to an appropriate port or, where geography and sea

conditions were favorable, placing the passengers and crew members in the merchant ship's lifeboats with some good assurance that they could safely reach a nearby shore. Although this rule said nothing about enemy merchant ships, other rules of naval warfare of course generally allowed the sinking of an enemy warship in non-neutral waters without warning or removal of combatant crew members.[4]

The First World War provided the test for compliance with these rules by submarines. As noted above, the main advantage of the submarine is its capability for surprise attack from its underwater hiding place. Because of its slow underwater speed, its limited submerged time, and its vulnerability on the surface, however, the World War I submarine was usually not much of a match for the warships of the enemy's surface fleet. Surface warships were too fast for a submarine running submerged, and the most important targets—battleships—were very difficult to sink. Even if a submarine was successful in striking a legitimate warship target, other ships in the enemy fleet were likely to detect and chase down the submarine and attack it with depth charges or force it to the surface, where its destruction or capture was virtually assured. Isolated, older second-line warships and, then, merchant ships thus became the preferred targets for submarines.

In accordance with the traditional rules reflected at least in part by the London Declaration of 1909,[5] a merchant vessel that was found to be in some way supporting the enemy's war effort—for example by carrying a cargo of contraband arms to the enemy—and which could not safely be escorted to port for adjudication as a prize of war, could be sunk after the safety of the passengers and crew had been provided for. The rules allowed a belligerent warship to stop a suspect merchant ship and conduct a visit and search to determine its involvement in the enemy war effort and then, if circumstances warranted, either capture it as a prize or take the noncombatants off board and sink it.[6] This scenario was, of course, somewhat unrealistic if the warship was a submarine. Surfacing to conduct visit and search procedures not only sacrificed the submarine's main advantage of surprise attack but also made it vulnerable to ramming even by an unarmed merchant vessel. Furthermore, surface escort of the merchant to port for prize adjudication was obviously dangerous for the submarine and generally interfered with its military mission, while the alternative of sinking was made impracticable by the inability of the already cramped submarine to provide space for the merchant ship's crew and any passengers, and, where another suitable vessel was not available to take these persons to port, weather and geography did not often combine to allow them to be left safely in the ship's lifeboats.

Despite these difficulties, Germany directed its submarines to comply with the traditional prize rules during the early part of the First World War, and in fact German commanders made efforts to comply. However, by January, 1917, the difficulties already noted had combined with other circumstances

to cause Germany to rescind its earlier directive and institute unrestricted submarine warfare, including the sinking without warning of neutral merchant ships, in a self-declared war zone. These "other circumstances" included a British directive to its merchant ships to disguise themselves as neutrals and to ram submarines. Britain also apparently armed its merchant ships and ordered them to open fire on German submarines. Thus, Germany attempted to justify its decision to wage unrestricted submarine warfare in its war zone on the ground that it was carrying out a reprisal against these British violations of the traditional laws of naval warfare.[7]

Whatever the merits of this German justification (and it probably had some technical merit),[8] German U-boat attacks on merchant vessels without prior warning or provision for the safety of crew and passengers led not only to United States entry into the First World War but also to widely felt consternation over the submarine as a military weapon, consternation that continued beyond the conclusion of the war. The naval warfare experience of the war led to renewed proposals for the submarine's abolition in the postwar period. To some—especially the British, joined at times by the United States—the submarine had proved itself a horrifying offensive weapon, generally ineffective except when used against merchant shipping in violation of the humanitarian principles that rightly formed the core of the international laws of war, a use for which pronounced tendencies developed, and therefore an instrumentality of war that must be outlawed.[9] While not condoning German behavior during the war, others contended that the submarine had demonstrated its efficiency as a defensive weapon even when confined to "honorable warfare" and should consequently be restricted but not abolished.[10] In the naval conferences that followed World War I, the abolitionists failed to achieve their goal, but the submarine, along with other naval warships, was eventually the subject of limitation and restriction. Thus, article 22 of the 1930 London Naval Treaty,[11] reaffirmed in the London Protocol of 1936,[12] states:

> The following are accepted as established rules of International Law:
>
> (1) In their action with regard to merchant ships, submarines must conform to the rules of international law to which surface vessels are subject.
>
> (2) In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board.

The 1936 Protocol maintains this provision in effect. The United States remains a party to the Protocol, as do the Soviet Union and over 40 other

states,[13] despite the article's seeming inconsistency with the practices of belligerents, including the United States, in the Second World War.

At the beginning of World War II, Germany again attempted to abide by the submarine warfare rules, as then and now set forth in the London Protocol. Again, however, this attempt was thwarted by the arming of British merchant vessels and the practice of convoying merchant ships under the protection of surface warships and aircraft, and the order from the British government to its merchant ships directing them to fire on or ram submarines on the surface. Moreover, Britain ordered its merchant vessels to provide intelligence on the positions of any sighted submarines. In many other respects, it can be said that the British government, by these directives and by otherwise exercising effective wartime control over the British merchant fleet, largely incorporated all of its merchant ships into its war-fighting efforts. Under these circumstances, it became possible to argue that these vessels were no longer "merchant vessels" or "merchant ships" as those terms were used in the Protocol to describe the ships entitled to the protections there set forth.[14] In response to the British practices, Germany soon directed its U-boats to wage unrestricted warfare in broadening ocean zones. As in the case of Germany's First War practices, some analysts have suggested that this Second War response was a legitimate reprisal.[15]

As World War II continued, other belligerents also adopted unrestricted submarine warfare methods against enemy merchant ships (though most also achieved greater success in pitting their submarines against enemy warships than was true for the belligerents in the First World War).[16] The most prominent example is that of the United States, which ordered unrestricted submarine attacks against all Japanese shipping in the Pacific at the very beginning of its involvement in the war.[17] United States submarines in fact waged unrestricted war against the Japanese, including the sinking of merchant ships without warning, throughout the war. Justifications for the U.S. departure from the traditional law of naval warfare in this respect remain unclear. The U.S seemingly justified these attacks not on the ground of reprisal but on the fact that Japanese merchant ships were usually armed, provided intelligence to the Japanese military, and were otherwise integrated into Japan's war efforts and therefore were not entitled to the protections afforded to the "merchant ships" of the 1936 Protocol. The fact remains, however, that unrestricted submarine warfare was ordered by the U.S. against Japan throughout the Pacific Ocean within hours after the 7 December 1941 bombing of Pearl Harbor, before the U.S. could know whether Japan would enlist its merchant fleet in the war effort. The initial order was fairly clearly given in response to and in retaliation for the surprise Japanese attack on Pearl Harbor and therefore carries more than a little implication of reprisal as its justification.[18]

Germany's submarine warfare practices in the Second World War were the subject of the principal adjudication of the legal rules under discussion: the trial of Admiral Karl Doenitz by the International Military Tribunal at Nuremberg. Admiral Doenitz commanded Germany's submarine forces and later in the war became commander of all German naval forces. He was charged at Nuremberg with "waging unrestricted submarine warfare contrary to the Naval Protocol of 1936."[19] Doenitz's counsel argued in his behalf that German U-boat attacks on British merchantmen were justified by the facts that these ships were armed or convoyed, provided intelligence to the British military, and in other ways contributed to the British and Allied war efforts.[20] While this argument can perhaps be characterized as one based on the law of reprisal, it more clearly rests on the notion that merchant vessels actively participating in the enemy's conduct of warfare are thereby removed from the protections afforded to true merchantmen by the laws of naval warfare as, in this case, embodied in the Protocol. The Nuremberg Tribunal did indeed accept Admiral Doenitz's defense to the extent that it refused to find that he was guilty of Protocol violations in authorizing unrestricted submarine attacks against *British* merchant ships *that were armed*.[21] In this respect, the Tribunal's judgment might be interpreted to mean that enemy merchant vessels *and their passengers and crews* are legitimate targets of destruction, without warning and without provision for the safety of the people on board, if these vessels have become meaningfully integrated into the enemy's warfighting capabilities. Critics of this broad a reading of the Tribunal's judgment can protest that the result too heavily discounts the humanity side of the balance that the laws of war attempt to strike between military necessity and humanity. A more accurate analysis of the Tribunal's ruling would perhaps emphasize the immediate threat to a submarine's safety posed by the arming of enemy merchant ships or other real and imminent threats to the submarine's safety that would result from the attempt to abide by the Protocol's provisions. Cargo and passenger carriers that were armed with weapons and the intent to engage an enemy submarine might be properly viewed as combatant vessels and thus subject to surprise attack. On the other hand, the mere fact that an enemy merchant vessel was assisting the enemy's war effort in other ways would not necessarily provide justification for the destruction of the vessel without warning if compliance with the protocol would not expose the submarine to serious risk of harm.

The International Military Tribunal did find Doenitz guilty of violating the London Protocol by declaring submarine operational areas within which German U-boats could attack *neutral* merchant ships without prior warning.[22] Professor Mallison has criticized the Tribunal for failing to distinguish between those neutral vessels that were helping the Allied cause and consequently, in Mallison's view, were legal targets and those that were genuinely engaged in innocent international commerce and therefore

protected from attack.[23] In any case, the Tribunal was careful to note that it was not imposing punishment for this particular violation in its sentencing of Admiral Doenitz because the British and the Americans had declared and enforced similar operational zones with like risks to neutral shipping.[24] Some military analysts have suggested that the Tribunal's judgment thereby recognized the legitimacy of unrestricted submarine warfare against merchant shipping and therefore that the London Protocol was no longer, or never had been, binding.[25] This analysis is clearly erroneous. The Tribunal without question ruled that Doenitz had violated the Protocol. Because of the Allied practices, however, his *sentence* was "not assessed on the ground of his *breaches* of the international law of submarine warfare," including among these "breaches" unrestricted submarine warfare against neutral shipping.[26] The clear implication is not that the Tribunal had found some sort of customary practice changing the rules of the Protocol but that all parties had violated these rules. The partial clemency granted Doenitz was due to its application of a version of the "unclean hands" doctrine and not to any recognition of the lawfulness of unrestricted commerce warfare.

The Tribunal also found Admiral Doenitz guilty of ordering his submarine commanders to refuse to rescue survivors of their sunken targets unless "their statements would be of importance for your boat."[27] Accepted rules of naval warfare plainly imposed on warship commanders the duty to use considerable efforts to search for and rescue survivors (including combatants),[28] and Doenitz was found guilty of violating these rules.[29] It has been pointed out that the admiral's order was in response to an unwarranted and probably illegal air attack on German submarines attempting to carry out their duty to rescue survivors of a torpedoed troopship.[30] It is, however, questionable whether the law of reprisal would justify such an anti-humanitarian measure.

The Tribunal refused, on the ground of insufficient evidence, to find that Admiral Doenitz was guilty of the more serious crimes of ordering German commanders to kill survivors of U-boat attacks.[31] Helpless survivors and other shipwrecked persons, even if enemy military crews, are not lawful objects of attack, since they are not or are no longer combatants.[32]

The rescue issue is complicated again by the fact that submarines of the world wars did not have adequate space for taking on board rescued persons. Further, submarines surfacing for rescue operations in World War II were vulnerable to air attack. The International Military Tribunal at Nuremberg, in fact, received evidence that the U.S. directed its submarines in the Pacific during that war to attempt survivor rescue only if this did not endanger the submarines or interfere with their military missions.[33] And, because of the limited space in the submarines, U.S. rescue efforts often consisted only of supplying survivors with rubber rafts or provisions.[34]

What can be said of the state of the law of submarine warfare as it emerged from the experiences of the two world wars? First, it can be said that the

submarine was a lawful weapon of war and was to be treated by the laws of naval warfare generally like any other warship. Thus, in wartime it could attack an enemy warship without warning and despite the stealth element that was part of the early abolitionist reactions against this undersea weapon. On the other hand, targets that were immune from attack by any means—hospital ships and coastal fishing vessels, for example— were also illegal targets for submarines. Survivors and shipwrecked persons could not be killed.

The rules concerning merchant ship targets were, as already shown, more complicated and became considerably more so as a result of the world wars. This was true for all warships but especially for submarines because of their unique characteristics. Developments and perceptions that came about particularly during the Second World War added to the list of complexities that the nature of the submarine had already created. The distinction between merchant ships and combatants, a relatively easy one in the nineteenth century, became confused in the big wars of the twentieth century, both because belligerent governments armed their merchant fleets and took other steps to integrate them into the overall warfighting effort, and because of the new perception that entire societies, and not just their military forces, were at war. Related to this perception was the notion that a broader range of civilians were necessarily, even appropriately, exposed to the weapons of war, which probably led to a dilution of the strength of the previously felt horror at the maiming and killing of non-military crews and passengers of targetable merchant ships. The distinction between belligerent and neutral merchant vessels also became difficult to draw because of practices that developed during the world wars. Warships and belligerent merchant ships would disguise themselves as neutrals, and supposed neutrals in fact participated in various ways in the war efforts of the belligerent states.[35] In addition, World War II brought the real threat of air attack to add to the vulnerability of surfaced submarines.

These practices and complications placed considerable stress on the nineteenth-century-based rules reflected in the 1936 London Protocol and undoubtedly induced some significant qualifications, if not outright changes, of those rules. The major law-of-war issues raised by submarine warfare against merchant ships were, and are, three: (1) Is a merchant ship a lawful target for sinking? (2) If so, what, if any, provisions must be made for the safety of crew and any passengers? (3) Is the submarine that sinks a merchant ship required to rescue survivors? Note the dilemma posed for submarines by each of these questions: (1) Visit and search to determine targetability deprives the submarine of its stealth advantage and renders it vulnerable to attack, and determination of the legitimacy of the target by other means is often difficult or impossible. (2) Surface vulnerability and lack of space for passengers make it dangerous and nonfeasible for submarines to provide for

the safety of persons on board merchant vessels or (3) to effect rescue of survivors.

As a result of the experiences of the two world wars, including the subsequent trial of Admiral Doenitz, the post-World War II law of submarine warfare against merchant ships might be summarized as follows:

As a sort of benchmark rule, it can be noted again that submarines, like other warships, could attack *enemy warships* without warning. The successful attacker, surface or submarine, was then required to search for and provide as best as it could for the safety of survivors, although the practice of the belligerents in World War II, especially those of the United States in the Pacific, indicates for reasons already noted that submarines might not have been held to as stringent a standard for survivor rescue as surface warships.

Enemy merchant ships that were armed and ordered to fight back or attack submarines or that were convoyed under the protection of enemy warships or aircraft were arguably not true merchants and thus could be sunk without warning and without first providing for the safety of crew and passengers. But rescue of survivors was required if rescue was consistent with the safety of the submarine and its military mission.

Unarmed enemy merchant ships not under convoy protection posed a trickier targeting situation for submarines. Because the practice of the belligerents in World War II was, apparently, consistently to arm or convoy, a post-war rule might be lacking because of insufficient evidence upon which to base a rule determination. The traditional rule suggests that unprotected enemy merchant ships in wartime could be captured by a belligerent warship without the necessity of visit and search and escorted to port for adjudication as a prize. The warship could probably sink the merchant vessel if the steps required for prize adjudication would seriously endanger the warship or interfere with its military mission—but only after the safety of the merchant's crew and passengers had been provided for.

Following World War II, the notion of capture of enemy merchant vessels for prize adjudication seemed almost quaint and old-fashioned, especially for submarine warships. Enemy merchantmen were apparently presumed, because of the usual practice, to be armed or protected by enemy warships or aircraft and thus almost automatically subject to destruction or disablement. And belligerents tended to view, with some justification, all enemy merchant ships, whether or not armed or convoyed, as part of the enemy's total war effort, supporting at least the war-focused economy of the enemy nation. In addition, capture and escort to port was often infeasible, or judged infeasible, in the conduct of naval warfare in the world wars, again in particular for submarines. It might therefore be said that the law of naval warfare then allowed submarines to sink even unarmed and unprotected enemy merchant ships without much consideration in many situations for the alternative course of capture. The more difficult question concerns the duty,

if any, to provide for the safety of the civilian crews and any passengers. The International Military Tribunal gave strong indication in the Doenitz judgment that the London Protocol's rules in this regard must be observed. If the submarine commander found himself unable to provide for the safety of the persons on board a merchant ship, said the Tribunal, then he "should allow it to pass harmless before his periscope."[36]

It should be remembered that the 1936 London Protocol itself sets forth two situations authorizing the destruction or incapacitation of a merchant vessel (enemy or neutral) without the necessity of first removing passengers and crew: "[I]n the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search."[37] The language of the Protocol, however, makes it clear that these are narrow exceptions; note the words "persistent," "duly," and "active."

Even if circumstances allowed a submarine commander to sink an enemy ship without warning—for example, where it was armed for attack on submarines—post-war rules still undoubtedly required that the submarine make every feasible effort to rescue survivors.

The post-war rules regarding *neutral merchant vessels* engaged in international trade and not in any way assisting the enemy war effort made them immune from attack by belligerent warships, surface or submarine. Neutral ships suspected of carrying contraband or otherwise helping the enemy, however, were subject to visit and search by belligerent warships. If the suspicions turned out, upon visit and search, to have been well founded, the warship could capture the neutral vessel as a prize of war according to traditional rules of naval warfare. Again, however, belligerent state practices in the two world wars blurred the lines not only between combatants and merchants but also between neutrals and enemies, and traditional capture and prize procedures fell somewhat out of fashion.[38] As a consequence, it might be said that neutral merchant ships, at least where there was evidence, by visit and search or otherwise, that they were assisting the enemy's war efforts were in general treated like enemy merchant ships. Again, the 1936 Protocol makes no distinction between enemy and neutral merchant ships in authorizing the destruction or incapacitation of merchant ships in cases of "persistent" refusal to stop when "duly" summoned or of "active" resistance to visit or search.

The most disturbing practice of belligerents in the world wars that affected neutral shipping was the declaration of *war zones or operational areas* within which, they warned, even neutral vessels were subject to destruction, without visit and search or warning. Remember that the International Military Tribunal condemned Admiral Doenitz for ordering this practice but refused to impose a sentence specifically for it because of similar practices by other belligerents in the Second War. This seeming contradiction has made it somewhat difficult to assess the state of the post-war law concerning the validity of using war zones as a means of rendering neutral (and enemy)

merchant shipping vulnerable to unwarned attack by submarines.[39] If a zone was given wide publicity and its size and location would not seriously interfere with innocent merchant shipping, would it be consistent with the humanitarian aspects of the laws of war to allow submarine commanders to presume that merchantmen of any flag found within the zone are legitimate targets for attack?[40] The Tribunal's judgment, read carefully, would say no, while the practice of the belligerents in World War II would seem to say yes. Certainly the efficiency of the submarine as a commerce raider would be hampered by the Tribunal's answer, since compliance with the Tribunal's strict reading of the 1936 Protocol would require the submarine commander to choose between subjecting his boat to considerable risk and allowing a possible, but not proved, instrument of the enemy's war effort to escape. Yet, when stated this way, the issue seems better resolved by the Tribunal's approach. Almost by definition, noncombatants should be entitled to greater freedom from risk of harm than are combatants, and the Tribunal's judgment seems to affirm this choice.

Submarines as Weapons Platforms Today[41]

Submarine and submarine-related developments in the 45 years since the end of World War II have extended the list of wartime roles for underwater weapons systems. The technological evolution has resulted in two principal categories of U.S. submarines: attack submarines, the more-or-less direct descendant of the world war submarines; and the ballistic missile submarine, a creature of the post-war nuclear age.

Increased submerged speeds, combined with the underwater staying power granted by nuclear propulsion, have made the attack submarine (SSN) a warship much more capable of operating effectively against enemy fleets. Its expanded array of weapons, complemented by long-range targeting systems, have added to this capability by allowing the submarine to launch sub-horizon or over-the-horizon attacks on surface ships, other submarines, and land targets. It can, in fact, send sea-launched cruise missiles (SLCMs), with conventional or nuclear warheads, far inland to strike selected targets. And their speed, underwater duration, increased diving depth, and silenced running have rendered today's submarines less vulnerable than their world war counterparts to destruction by enemy warships in spite of advances in ASW capabilities. In sum, most of the reasons that the submarines of the world wars were relatively ineffective weapons against most targets other than merchant ships no longer exist or are disappearing. It should be noted, however, that the new relative invulnerability is basically due to better abilities to escape and hide underwater. A surfaced submarine is still no match for a surface warship—and, for that matter, probably not much of a match for an armed merchant ship—because the modern submarine's weapons are

apparently designed almost exclusively for underwater launching. There is indeed no indication that the advances in submarine technology and design assume any important combat role for a submarine on the surface. There is no suggestion, for example, that the experiences of the two world wars have led to submarine designs that add onboard accommodations for crews and passengers of targeted merchant ships or deck-mounted weapons that will give the submarine an adequate sense of security against attack while it carries out survivor rescue operations on the surface.

The other principal category of U.S. submarines, the ballistic missile submarine (SSBN), was of course nonexistent in the world wars. The main role of SSBNs is, in reality, a peacetime role: that of deterring nuclear attack on the United States or its allies by assuring devastating retaliatory nuclear ballistic missile attack. Nuclear powered submarines, roving undersea over broad ocean areas, are excellent platforms for this role because it is effectively impossible for a potential enemy to detect and destroy them, or enough of them, as part of a first strike. The Soviet Union also deploys ballistic missile submarines.

Although this deterrence role can continue from peacetime into wartime, a presumable wartime role of a nuclear ballistic missile submarine is actually to launch its nuclear-warhead missiles against enemy military targets—principally land-based launch sites for the enemy's strategic nuclear weapons—and against population centers in the enemy's homeland. While the target accuracy of submarine-launched ballistic missiles is improving, it probably does not yet match the accuracy of strategic missiles launched from land.

Added together, the basic naval warfare roles of both major categories of modern underwater weapons—attack submarines and ballistic missile submarines—currently number six, according to a recent study: (1) coast defense; (2) attrition attacks on enemy naval forces; (3) commerce warfare; (4) projection of power ashore; (5) engagement of enemy fleets; and (6) assured destruction (SSBNs).[42] According to the author of the study, the last three roles came to fruition only in the 1960s, "after a long period of relative equilibrium in submarine technology that lasted well into World War II."[43] The author also asserts that submarine developments in the near future will probably include "a decline in the capacity to wage commerce warfare" but increased capabilities against other warships, surface and submarine, and other military targets.[44]

In the war most contemplated by U.S. military strategists, one against the Soviet Union, the main assignment for U.S. attack submarines, at least in the early stages, will probably be to attempt quickly to destroy Soviet ballistic missile submarines and also Soviet attack submarines that threaten our own SSBNs and other naval forces.[45] If such a war were not terminated early by strategic nuclear exchange but were to continue with conventional weapons

and possibly tactical or intermediate-range nuclear weapons, other roles for U.S attack submarines would be likely to emerge. These would certainly include coastal defense, projection of force ashore against military targets, and operations against the enemy's surface fleet.[46] The submarine role that presented the most troublesome legal issues in the two world wars—that of commerce raider—will probably not be nearly as significant in the future, at least in the contemplated war with the Soviet Union.[47] For one thing, NATO forces will probably be much more dependent on merchant shipping than the opposing forces, which suggests the possibility that Soviet attack submarines could be assigned a major anti-commerce role in such a protracted war.[48] For a complex of other reasons, however, submarines will be much less effective as commerce warfare weapons in the foreseeable future.[49] To the extent that submarines of either side are given missions to attack merchant shipping, the experience of World War II can lead us to expect that merchantmen targets will be armed and convoyed and otherwise protected by highly sophisticated ASW technology and techniques, including aircraft and attack submarines of the protecting forces.

As the 1982 United Kingdom-Argentina war for the Falklands has demonstrated, exclusion zones or war zones are a likely part of any future war, perhaps especially a limited war.[50] The prominent practice by the world war belligerents of declaring war zones suggests that these will also be a component of any future global war—at least a protracted world-wide war fought with conventional weapons. Although the purposes of declaring such zones in wartime can be several, an apparently intended effect of the zones for the warships, including submarines, of the declaring belligerent party is to shift or ease the burden of proof under the rules of engagement. In the absence of the zone, or outside it, the warship commander bears the heavy burden of establishing the legitimacy of his contemplated target, while the terms of the zone declaration usually purport to allow him to more readily presume targetability. As already noted, the Nuremberg Tribunal refused to condone the practice of declaring a war zone insofar as its effect was to relieve the burden of complying with the laws of naval warfare protecting neutral shipping. The Falklands War showed, however, that a war zone may also have as its purpose, or one of its purposes, the shifting of the burden of identifying a proper target and showing imminently hostile intent of another state's warship or aircraft.[51] Thus the controversial sinking of the Argentine cruiser, the *General Belgrano*, by a U.K. submarine outside the British-declared exclusion zone[52] was not necessarily illegal, though the submarine commander's burden of showing hostile intent was the normally heavy one. Whether the declaration of a war zone is a lawful means of shifting the burden remains an open question. Still, it can be assumed that future belligerents will engage in the zone-declaring practice and that the terms of the zones will affect the engagement decisions of their submarine commanders.

The Current State of the Law of Submarine Warfare

It has been said that the laws of warfare attempt to achieve proper balance between military necessity and humanity.[53] This approach generally translates into, *inter alia*, rules designed to protect noncombatants—civilians, prisoners of war, survivors of attacks on ships, and so on—and restrictions against excessive force and inhumane weapons. Difficult legal questions surround decisions on whether or to what extent it is permissible to inflict civilian casualties in attacks on military targets. It is perhaps ironic that the humanity side of the military necessity/humanity formula was considerably degraded in the very war that gave rise to the still-current and widespread declaration of support for individual human rights and freedoms.[54] In World War II, civilian populations in enemy cities became legitimate targets for aerial bombardment, at least in reprisal or as "incidental" casualties of targeting military installations. And, as we have seen, noncombatant crews and passengers of merchant ships, even neutral ships, became acceptable victims of submarines' torpedoes. The habit of justifying the killing and maiming of civilians in wartime, for example, by reason of the circumstance that they happened to be in the vicinity of almost any military target has, to some extent, continued from World War II to present times, even in limited wars where the objective is not national survival. The idea that entire societies participate in the militaristic schemes of their political and military leaders, another Second World War notion, has also undoubtedly made it possible for today's military planners to contemplate the intended destruction of an enemy's population centers. To some, apparently, almost any characterization of military necessity rationalizes the disregard or discounting of any humanity considerations. This is an unfortunate twentieth-century trend. It is understandable that military commanders will in general prefer a broader rather than narrower range of legitimacy for their actions and the easing of the tremendous burden that often comes with engagement decisions where humanitarian and military considerations intermingle. Decision dilemmas are, however, the essence of command, and military officers necessarily bear the brunt of these terrible dilemmas of their national governments.

The government of the United States has, especially in the years since the Second World War, consistently placed itself in the forefront of those governments promoting humanitarian values and the rights and freedoms of individuals everywhere. Most governments of the international community subscribe to these values (by words if somewhat haphazardly by deeds),[55] and these are essentially the same values that account for the humanity side of the laws of war formulations. Can it be said, therefore, that the international community, led by the U.S and others, has implicitly indicated that humanitarian factors are now entitled to renewed weight in the military decision process despite the degradation of these factors in the world wars?

Or have the modern warfighting conditions and perceptions that developed during those wars continued to affect military decisions that might put civilians at risk?

These are questions that raise important matters, the full analysis of which is beyond the scope of this chapter but which are nevertheless central to the discussion of at least some of the issues in this part of the chapter: the present state of the law of submarine warfare. All belligerents in World War II justified in some manner surprise submarine attacks on merchant ships without the necessity of providing for the safety of crews and passengers who were not formally part of the armed forces of an enemy. To what extent these practices are justified under current law will be one of the questions discussed in the following paragraphs. Other issues will include the legality of submarines as such, other targets of submarines and their modern weapons, the lawfulness of their weaponry itself, and the effects of declaring operational areas or exclusion zones. This section will then set forth a brief note on submerged navigation under current law. It will also refer, where appropriate, to three distinctions that the previous discussions have alluded to: between belligerent and neutral vessels; between combatant and merchant ships; and between general (but conventionally fought) wars and limited wars.

Are submarines legal? This question, one that concerned delegations to conferences on the laws of war earlier in the century, can now be answered. Like other warships, submarines are legal weapons but, like other warships, are subject to some restrictions.[56] The best evidence for their legality is the Nuremberg Tribunal's judgment in the case of Admiral Doenitz where the Tribunal necessarily assumed the basic legality of submarines, while condemning certain uses of them in wartime.[57]

Targeting other warships. As a basic proposition, enemy warships found outside neutral waters are legitimate targets for a belligerent warship, including a submarine, and can lawfully be attacked by the latter without either warning or precautions for the safety of the combatant crew members.[58] It is not among the purposes of this chapter to examine the problems for this rule caused by the practice in recent decades of entering into hostilities without formal declarations of war, declarations that formerly assisted considerably the process of deciding who is the "enemy." Once that decision has been made, by whatever process, "warships" ought to mean those clearly designated as such by their weaponry, their operation by uniformed members of an enemy's armed forces, and their required markings.

The conduct of warfare in the post-World War II years, however, has called into question even the basic proposition, thus defined. There has not been a global war, with national survival as an objective, since the Second World War. Limited war has been the recent warfighting experience. This has usually meant limited in objective or geographical scope or both.[59] For example, the belligerents in the war for the Falklands expressly and implicitly

limited both the objectives and the geographical scope of their conflict. Each state seemed to concede that an attack on one of the other's warships outside the zone of conflict was not permissible in the absence of factors giving rise to the right of self defense, such as an initial attack or other indication of imminent hostile intent on the part of the enemy's warship. Moreover, the negative international community reaction to the sinking of the *General Belgrano*, an Argentine warship, outside the United Kingdom's self-declared exclusion zone seemingly supported this legal effect of limiting hostilities.[60] This reaction can probably be attributed in part not only to the geographical limitation inherent in the nature of the war, as well as in the U.K.'s declaration, but in the perception of disproportion between the U.K.'s military objective—the retaking of the islands—and the loss to Argentina—368 lives.[61] It is also possible that the negative reaction is attributable in part to the fact that the *Belgrano* was sunk in a stealthy surprise attack by a submarine rather than in open combat with a U.K. surface ship.

The practices of belligerent states in the limited wars of this half-century provide indications, therefore, that enemy warships are not always and everywhere lawful targets for a belligerent's surface warships or its submarines. Formulators of rules of engagement for limited hostilities should give consideration to restrictions arising from geographical scope and proportionality to the military objective or objectives. The practices of belligerents in a war fought on a global scale and with national survival among the objectives are not necessarily appropriate precedents for the laws of naval warfare in a limited war.

Only in such a global war, therefore, might it be said without qualification that enemy warships in non-neutral waters are open, unrestricted targets for submarines (or other belligerent warships). But where circumstances allow submarine attack on an enemy warship, the submarine commander can pursue his attack without warning and without first providing for the safety of the target's crew. For example, shortly after the commencement of a war between the United States and the Soviet Union (something fortunately not likely at the present stage of U.S.-U.S.S.R. relations and, it is hoped, something that will never occur), American submarines will be able lawfully to carry out their presumed ASW and anti-surface-fleet roles through surprise attacks.

But what of survivors of submarine attacks on enemy warships? The implication (somewhat confused) of the judgment of the International Military Tribunal in the *Doenitz* case would require submarine commanders to make substantial efforts to search for and rescue the survivors of the ships they have sunk, at least if such efforts would not expose rescuing submariners to undue danger. Even in World War II it was risky and often impracticable for submarines (as contrasted to larger and more heavily armed surface ships) to effect rescue of survivors, although evidence presented to the Tribunal

indicated that some efforts were made. Presumably, over-the-horizon targeting today makes it both less practicable and more dangerous for submarines to attempt to rescue survivors of their attacks: the sinking is more likely to occur at some distance from the position of the attacking submarine and the surfaced submarine engaged in rescue would itself be vulnerable to surprise (even if unlawful) attack. Another consideration should be an assessment of the enemy's capabilities to effect rescue of its own people.

The best that can be said for the current rule on the obligation to rescue survivors is that such an obligation still exists, with new circumstances qualifying—and, especially in the case of submarines, probably effectively reducing—the extent of the duty. In situations where it is feasible and not unreasonably dangerous to rescue, either by taking survivors on board the submarine or other vessel or by supplying them with life rafts and provisions (in accordance with U.S. precedent in the Pacific in World War II), the current law of submarine warfare probably requires that these steps be taken.

Targeting merchant ships. This, of course, presented the major legal issue concerning the use of submarines in the two world wars. As stated above, the law of submarine warfare after the Second World War remained based on the London Protocol of 1936, but with some practical qualifications attributable to nontraditional practices of the belligerents in their conduct of that war. These practices, it will be recalled, resulted in the blurring of distinctions between merchant ships and warships, between neutral merchant ships and enemy merchant ships, and, in general, between combatants and noncombatants. It must be noted, though, that these practices were in large measure a consequence of the correct perception by each belligerent state that it was engaged in a global-scale war and fighting for its national survival. Thus all segments of a belligerent's society were in some manner engaged in the fighting, including its merchant fleet and, where it could enlist or intimidate them, the merchant fleets of technically neutral states. While we can expect the same to be true for the belligerents in any future general war of similar or greater magnitude, it will not necessarily be true for the wars of lesser scale that have constituted the belligerency experiences since the Second World War.

What, then, can be said for the current state of the law of submarine warfare regarding the targeting of merchant vessels? In general, submarines are undoubtedly subject to the same rules as surface warships in this regard. The practices of World War II suggest that in a war on a global scale with national survival of the belligerents at stake, it is permissible for belligerent warships to capture or, where capture is not feasible, to sink enemy merchant vessels on the assumption, in such a war, that these vessels are part of the enemy's warfighting efforts. This is probably the rule for general war today (assuming it would proceed for a time without resort to strategic nuclear weapons). It is by no means clear, however, that this is the rule for today's

popular *limited* wars. Outside the area of any legitimate blockade or legal exclusion area, visit and search should be the rule for unarmed and unconvoyed enemy merchant ships. If visit and search discloses that an enemy merchant vessel is then and there supporting the enemy's conduct of the limited war, it is subject to capture or, where appropriate, sinking or incapacitation. As a basic proposition, a neutral merchant ship must, according to the International Military Tribunal, be visited and searched to determine its susceptibility to capture or sinking even in a general war and even in a declared war zone. This should certainly be the rule for neutral shipping in a limited war. (Whether the declaration of an exclusion zone or other war zone affects the operation of this rule is an issue addressed below.)

In any case, because of the risk that perceived mistreatment of neutral vessels might lead neutral states to enter the conflict on the other side, belligerents can probably be expected to treat neutrals with better regard than that accorded to enemy merchant ships.

The status of merchant crews and passengers is of course the critical consideration. It should be recalled that the London Protocol of 1936 is technically still in force for nearly 50 States, including the United States and the Soviet Union. These States are thus arguably bound by the terms of the Protocol to provide for the safety of the crew and any passengers of a merchant ship (enemy or neutral) prior to its destruction or incapacitation unless the merchant either persistently refuses to stop after being duly summoned or actively resists visit or search. Both the *Doenitz* judgment and the practices of belligerents in World War II, however, stand for the proposition that the enemy's armed or convoyed merchant ships are lawful targets of surprise submarine attacks without the necessity of visit and search or provision for the safety of the crew and passengers. This is probably still the case under the current law of submarine warfare, at least in a general (but conventional) war, because such merchantmen are effectively part of the enemy's warfighting force. In a limited war with limited objectives, on the other hand, humanitarian principles and proportionality should require a determination by the submarine commander that even an armed or convoyed merchant ship found outside the war's geographical area is, then and there, actively and significantly a part of the enemy's pursuit of that war as a prerequisite to the merchant's destruction without warning.

Publicists who have previously analyzed the rules of submarine warfare have frequently noted the "unreality" of a requirement that submarines, as contrasted to surface warships, provide for the safety of merchant ship crews and passengers under virtually any circumstances.[62] There is no question but that submarines, even today's relatively larger ones, have little space for taking these people on board and remain vulnerable while on the surface in an attempt to comply with the obligation. To this suggestion that submarines should therefore be exempt from the rule, the International Military Tribunal

provided a response in the *Doenitz* judgment: Comply or allow the merchant vessel to pass unharmed. The humanitarian principles that prompted this response should be no less applicable today, particularly in the case of a limited war.

The comparatively restricted capability of submarines for protecting the crews and passengers of merchant ship targets also affects their responsibility to search for and rescue the survivors of their attacks on merchant ships. Nevertheless, the duty to rescue survivors, one of the clearest obligations in the rules of naval warfare, undoubtedly applies to an even greater degree for merchant ship survivors, and submarine commanders should be expected to do everything in their power to comply with this responsibility.

Any submarine commander reading the above complex of rules, qualifications and exceptions will probably raise a legitimate and crucial question. He might well ask what he should or can do in case of doubt. What if, for example, he cannot determine whether an enemy merchant ship is armed or not? How can he tell whether a convoyed merchant ship is actively and significantly contributing to the enemy's conduct of the limited war between the belligerents, and what does he do if he suspects it is but cannot know for sure? It is common for law to provide presumptions for doubtful cases. In this case, especially for commanders of the United States military, the presumption should be clear. Any state that strongly defends and promotes humanitarian values, as does the U.S., should nearly always erase such doubts in favor of the humanity side of the military necessity/humanity formula for laws of war. The apparent fact that the presumption often went the other way, even for the U.S., in the last world war does not necessarily mean that it should do likewise in a future limited war or, for that matter, a conventional general war. (Besides, a rule giving broad protection for merchant ships against unwarned submarine attack is in the greater interest of the United States in a future war with the Soviet Union since, as already noted, the potential merchant targets will most often be assisting NATO forces.) Where belligerents perceive that their national survival is at stake, however, their practices will undoubtedly vary from the letter of many rules of warfare, including those under consideration.

The question concerning presumptions in cases of doubt raises another issue related to the targetability of merchant ships, especially neutral ships, and the responsibility for the safety of their crews and passengers. This issue is the validity of self-declared war zones or exclusion zones, a topic that will now be addressed prior to proceeding to consideration of other potential targets of submarine weapons.

Exclusion zones. Despite the International Military Tribunal's condemnation of Admiral Doenitz's declaration of unrestricted submarine warfare in operational areas or war zones, it seems clear that such zones were in World War II and continue to be established components of warfighting

practices at sea. One analyst has proposed revisions of the 1936 London Protocol that would include the following provision on exclusion zones:

> Within clearly announced and defined war zones, limited by a line extending 200 miles outside the coastline of a belligerent state, 200 miles outside the coastline of an area where land hostilities are in progress, or 200 miles outside the coastline of any territory occupied by a belligerent state, all vessels, belligerent or neutral, excepting marked hospital ships and coastal fishing vessels, are subject to sinking upon sight.
>
> . . . If a declared war zone blocks ingress to and egress from neutral territory, the belligerent declaring the zone must, upon request, provide a means of safe passage through the war zone for neutral vessels calling at and leaving the blocked neutral territory.[63]

While it is true that an effect of declaring such a war zone or exclusion zone might very well be to warn neutral shipping away from dangerous sea areas, this is certainly not the principal reason for the zone. A clear purpose of such a zone, perhaps its main purpose, is to relieve the burden on warship commanders in a hot war area to take the difficult and often dangerous steps otherwise required to determine the legitimacy of firing on vessels of doubtful status.[64] The current popularity of exclusion zones is evidenced by their use by both sides in the Iran-Iraq war in the Persian Gulf[65] and by the United Kingdom in the 1982 war for the Falkland Islands. The U.K.'s use of exclusion zones in the latter war is especially relevant to the present discussion because it may be the only limited war since World War II in which the submarine has played a significant role.[66] However, in that case, the declaration of an exclusion zone in at least one respect operated against the interests of the declaring belligerent state by giving the impression (falsely) that no attacks would be carried out by the British outside the zone, thereby contributing to the negative reaction to the torpedoing of the *General Belgrano* just beyond the zone's outer limits.

Nevertheless, exclusion zones are indeed popular and, moreover, are apparently part of U.S. naval war plans.[67] If they are legal, they are especially valuable for submarine commanders, who have the greatest difficulty in determining targetability without sacrificing their advantage of stealth and subjecting themselves to the dangers of the sea's surface. Are exclusion zones legal? This unfortunately remains an unanswered question. Their popularity suggests that precedent is building in their favor. Yet it should be recalled that one of the principal purposes of declaring an exclusion zone is, in law of war terms, to shift the presumption in favor of military necessity and away from humanitarian considerations—at least to the extent that shifting the presumption in doubtful cases more often places civilian crews and passengers at risk of death and injury in exchange for lessening the risk to warship crews. No state that places real value in the recognition of humanitarian principles should lightly promote or easily accept a significant shift in this direction.

Exclusion zones, if they continue to be used by belligerents, should either be limited (usually in limited war situations) in placement and scale so as not greatly to inconvenience genuinely neutral shipping or include reasonable provision for safe passage for neutral vessels. As the war in the Persian Gulf clearly demonstrated, it is not in the interest of the United States or other seafaring nations to tolerate the use by belligerents of exclusion zones or other practices that unduly interfere with freedom of the seas for neutral traffic or to abide the seriously heightened risk of harm to noncombatants that can accompany the enforcement of these claimed war zones.

Other targets of submarines. There is no suggestion in current trends that hospital ships, clearly marked as such and not otherwise in violation of the relevant rules for hospital status, have lost any of their traditional immunity from attack by belligerent warships, including submarines.[68] Coastal fishing vessels that are unarmed and not otherwise assisting an enemy's war effort are probably still similarly immune.[69]

As noted above, the expanded roles for today's more capable and versatile submarine weapons systems include attacks against objectives on land. In general, the lawfulness of strikes against land targets is the same whether the attacks are launched from surface warships, land-based weapons systems, aircraft, or submarines. Consequently, the legality of projection of force ashore by submarines will not be discussed in detail in the present chapter. If the land target is a legitimate one, a submarine bombardment will, in the main, be as lawful as any other attack—and, of course, the converse is true. Particular weapons in the modern submarine's arsenal and the targeting systems employed in their use, however, have been the subject of some concern and discussion, often whether the target is at sea or on land. These weapons problems are analyzed in the next section.

Submarine weaponry. The laws of war include rules designed to prohibit the employment of weapons in such a manner as to cause excessive suffering or disproportionate risk of harm to noncombatants. Thus self-propelled torpedoes, the principal weapons of submarines in the two world wars, must disarm if they miss their targets,[70] and the rules concerning the laying of stationary mines forbid their use in areas or manners that unduly endanger commercial shipping.[71] Like other platforms that use these weapons, submarines must comply with the laws of war that govern them.

The legality of the tactical use of sea launched cruise missiles in naval warfare, especially those launched from submerged submarines, has been the subject of some debate. Challengers to the legality of these weapons have emphasized the risks posed to merchant ships, both neutral and protected belligerent vessels, by imperfect target identification and acquisition systems.[72] As one of those urging the outlawing of submarine launched cruise missiles asserted in 1977:

> The primary danger is that the missiles will fix on a ship other than the intended target. The threat is increased when the missile is subjected to electronic countermeasures (ECM) and other diversionary tactics employed by the target. A similar increase in threat level arises primarily from inherent design shortcomings, which at present are thought to be great.[73]

The same writer suggested that underwater launching, using sonar detection, would heighten the chance for error.[74] Basically, the argument against the legality of the weapon focused on the disproportionality of the risk of harm to noncombatants, particularly in crowded sea lanes, compared to the military necessity of striking at the intended combatant target. A response to this position, also in 1977, contended that the proportionality of the risk to noncombatants could be controlled by rules of engagement cautioning against the use of submarine launched cruise missiles where the risk was too great.[75] This is probably an appropriate approach. Moreover, the problem should decrease in significance with (presumed) increase in the accuracy and dependability of the targeting systems.

It is beyond the scope of this chapter to discuss the lawfulness of nuclear weapons as such, as that topic is the subject of a separate chapter in the present volume as well as much intense discussion elsewhere.[76] Ballistic missile submarines provide, of course, one important type of launch platform for strategic nuclear weapons, and attack submarines are capable of launching nuclear strikes against targets at sea or on land. It can be said generally that if the use or threatened use of nuclear weapons is illegal, it is illegal for submarines to launch them or to threaten to launch them. If, on the other hand, they are legal—even though, as in the case of other weapons, their use is restricted—then submarines can use them—within the bounds of the restrictions.

Claims of illegality of nuclear weapons rely on the proposition that they are either intended for use against noncombatant civilian populations or that their awesome destructive power, combined with their radiation effects, means that their use, even against military objectives, necessarily entails disproportionate harm to noncombatants and excessive human suffering. These claims can be met in part by improvements in the accuracy of targeting systems that would minimize the risk to civilians where the target is a military objective. To the extent that subsea launches of nuclear missiles rely on targeting systems that are less accurate than those of air- or land-based platforms, the asserted legality problem is a larger one for submarines than for other platforms. The indications are that the accuracy of submarine systems is improving. If so, the legality issue may be essentially the same for all launch systems. Of course, the question of whether it is lawful to target civilian population centers as a deterrent measure or actually to launch strikes intentionally at these targets in wartime is the same for submarines as it is for land or air systems.

A Note on Submerged Navigation. On the high seas and within exclusive economic zones (EEZs), submerged navigation is a freedom of the high seas.[77] Although traditional law of the sea rules require submarines to navigate on the surface and show their flags as part of their innocent passage responsibilities in foreign coastal state territorial seas,[78] the United States takes the position that customary law of the sea allows submerged transit through straits used for international navigation, such as the Strait of Gibraltar, even if these straits are blanketed by up-to-twelve-mile territorial seas. Consistent with this position, the U.S. contends that the straits transit passage provisions of the 1982 United Nations Convention on the Law of the Sea—a treaty the U.S. has so far rejected in no uncertain terms because of its deep seabed mining rules—are merely reflections or articulations of custom.[79] Most nations probably disagree, asserting that the straits passage provisions of the 1982 Convention are not reflective of custom but are treaty law exceptions to the general rule of surface passage, negotiated by the U.S. in the Third World U.N. Conference on the Law of the Sea in exchange for, among other things, the deep seabed mining regime that the U.S. now finds unacceptable.[80] And because treaties bind and benefit only the parties to them, say these States, the U.S. will not have the right of submerged straits transit unless it becomes a party to the 1982 treaty. These States have a good case.

This controversy could be significant for U.S. submarines in wartime. While submerged passage or transit through the territorial seas of belligerents is no doubt lawful in wartime, submarines will be required to obey the general law of the sea restrictions in territorial seas of neutrals. Whatever the true state of the law on this subject, it would certainly be wise for the United States in any wartime situation, especially a limited war, to take the wishes of significant neutral States into consideration and consult with them before transiting their territorial seas in submerged modes.

The concept of "archipelagic waters," recognized as such for the first time in the 1982 Convention,[81] presents a somewhat more complex, but at the same time less controversial, issue. The treaty in general allows States composed completely of archipelagoes (island groups), such as Indonesia and the Philippines, to enclose their islands and the waters between them by a series of straight baselines, but also provides for these States to establish sea lanes through their thus-created archipelagic waters for international traffic, including submerged passage by submarines.[82] The United States, though rejecting the 1982 treaty, expresses a willingness to recognize the establishment of archipelagic waters in accordance with the treaty's rules.[83] Again, in wartime the issue would arise only with respect to the rights of neutral archipelagic States. In fact, current law of the sea, in the absence of the 1982 treaty (which is as yet not in force for any State), probably does not recognize the concept of archipelagic waters at all and would thus allow

submerged passage in any high seas areas between the islands of an archipelagic State.

The New Commander's Handbook on the Law of Naval Operations

The new *Handbook* (NWP 9)[84] appears to be a basically sound, readable guide for naval commanders. The discussion of the *Handbook* in the present chapter will be limited to the topics addressed in the preceding section of the chapter on the current state of the law of submarine warfare and will be treated in the same order. The purpose of the discussion is, of course, to assess the handbook's consistency or lack of consistency with the suggested current state of the law.

Are submarines legal? The *Handbook* does not mention this question and properly so. It is today a non-issue. Submarines as such are now clearly lawful weapons of war and the *Handbook*, by the implication of its omission, recognizes this conclusion.

Targeting other warships. The *Handbook* states that "[e]nemy warships . . . , including naval and military auxiliaries, are subject to attack, destruction, or capture anywhere beyond neutral territory."[85] It goes on to state that "[s]ubmarines may employ their conventional weapons systems to attack, capture, or destroy enemy surface targets wherever located beyond neutral territory," and that "[e]nemy warships and naval auxiliaries may be attacked and destroyed without warning."[86] It was suggested above, however, that the allowance reflected in the latter quotation, if taken literally, might not be consistent with the present law of *limited* war. Even enemy warships, if not directly supporting the enemy's fighting of a limited war and if found outside the area of hot water, especially a war with limited objectives, might not be lawful objects of unrestricted attack in the absence of grounds for self defense. Certainly, the rule stated in the *Handbook* is appropriate for the global wars of this century, but not all of those rules would necessarily be appropriate or applicable to wars limited in geographical scope and in objectives falling short of a fight for national survival. It is by no means clear, for example, that the international community would have viewed it as lawful for an Argentine submarine to have attacked without direct provocation a British warship on a routine mission thousands of miles from the Falklands during the course of the limited war over possession of those islands. Perceptions of military necessity and proportionality in limited war may demand restraints on the use of force not called for in a world war.

The *Handbook* clearly states the obligation of our naval forces to search for and rescue the survivors of their attacks on enemy warships, in accordance with U.S. duties under the 1949 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed

Forces at Sea.[87] This obligation is to be carried out "consistent with the security of their forces,"[88] a phrase that could be interpreted to have special meaning for submarine commanders, since their boats are particularly vulnerable while attempting to effect rescue on the surface. Consistent with this suggestion, the *Handbook* proposes the following qualification of the obligation for submarines:

> To the extent that military exigencies permit, submarines are also required to search for and collect the shipwrecked, wounded, and sick following an engagement. If such humanitarian efforts would subject the submarine to undue additional hazard or prevent it from accomplishing its military mission, the location of possible survivors should be passed at the first opportunity to a surface ship, aircraft, or shore facility capable of rendering assistance.[89]

The only troublesome aspect of this interpretation is its lack of a direction to assess the proportionality of the importance of the "military exigency" or the "military mission" that will, according to the statement, authorize the departure from the general humanitarian rule of rescue. Clearly, not all military missions are so necessary or imperative that they cannot be eliminated or postponed in order to carry out the important humanitarian duty to rescue survivors. It would be better if the *Handbook* tied its special regard for submarines more closely to the safety of the submarine and its crew under the circumstances rather than the continuance of its military mission.

Of course, the *Handbook* strongly admonishes commanders against the killing, wounding or mistreating of survivors and the shipwrecked, treating them as noncombatants,[90] and in fact correctly reminds its readers that these are major war crimes.[91]

Targeting merchant vessels. This has been the principal issue in the law of submarine warfare. Whether it is today a major issue, in light of the expanded wartime roles for U.S. submarines, is in question. By most assessments, it will remain a significant issue for Soviet submarines.[92]

In general, the authors of the *Commander's Handbook* have done an excellent job of restating the complex and often confusing state of the law on this difficult topic. Contrary to the view of some publicists, but consistent with the approach of this chapter, the *Handbook* considers the 1936 London Protocol as continuing to bind the parties to it, including the U.S., but suggests that the conduct of the Second World War (and unspecified practices following that war) have led to some modifications of the Protocol in its application to submarine warfare today.

According to the *Handbook*, "[t]he conventional rules of naval warfare pertaining to submarine operations against enemy merchant shipping constitute one of the least developed areas of the law of armed conflict."[93] Unfortunately, the *Handbook* itself contributes a bit of confusion to this already perplexing subject. In addressing the issue of targeting enemy merchant ships, it purports to excuse submarines from the constraints imposed on belligerent

surface warships because of "impracticality,"[94] but does not make clear what exactly are the constraints that submarines are excused from. By comparing the book's designated section on submarine warfare with other provisions on surface warfare, one is led to assume that submarines are not required to make the efforts required of surface warships to determine enemy character or to capture enemy merchantmen as prizes, but this assumption is by no means obvious. The modifications to the London Protocol that the *Handbook* discovers in the "customary practice of belligerents during and following World War II" seem to be just about the same for surface warships as for submarines.[95] For submarines, the book states that the general rule, based on the Protocol, imposes on submarines the duty to provide for the safety of an enemy merchant ship's passengers, crew and papers prior to destruction. The Protocol and the asserted subsequent practice, however, are said to provide four exceptions to this general rule.

The first exception occurs where the enemy merchant ship "refuses to stop when summoned to do so or otherwise resists capture."[96] The Protocol itself would require for its similar exception "*persistent* refusal to stop upon being *duly* summoned" or "*active* resistance to visit or search."[97] It is unclear why the authors of the *Handbook* would omit the emphasized qualifiers, except perhaps in the interest of saving space. The modifying adjectives and adverb, though themselves not capable of precise definition, are important for their communication of the narrowness of the exception and should not be omitted. As it stands, the *Handbook's* statement of the exception seems to authorize destruction of a merchant ship without providing for the safety of its crew and passengers in circumstances, not unlikely to occur in wartime, where an initial warning, perhaps a confusing unorthodox order, from a submarine is met at first by an instinctive, half-hearted resistance. There appears to be no reason in post-1936 practice to lessen the stringency of this exception to the general rule of saving the civilian crews and passengers.

The second exception to this general rule set forth by the *Handbook* occurs when an enemy merchant ship "is sailing under armed convoy or is itself armed."[98] The practice of the World War II belligerents and the International Military Tribunal's judgment in the *Doenitz* case do indicate that this is indeed now an exception to the Protocol's general rule regarding the safety of passengers and crew and would further allow surprise attack on enemy merchant vessels so convoyed or armed— at least in a general war. Limited warfare may require limitations of location and proportionality in favor of the humanitarian principles supporting the general rule. It should be noted again that, even where it applies, this "exception" is not necessarily a real exception. It could just as well be a legitimate interpretation of the literal words of the London Protocol: an enemy merchant ship armed or convoyed against submarines might be considered for this context an enemy warship and no longer a "merchant ship" protected by the terms of the Protocol.

The *Handbook's* third exception to the Protocol's general rule occurs when the enemy merchant ship "is assisting in any way the enemy's military intelligence system or is acting in any capacity as a naval auxiliary to the enemy's armed forces."[99] At first glance, this exception might appear to be simply a corollary of or variation on the second exception regarding armed or convoyed enemy merchantmen. But there is, or can often be, an important distinction between the two. A merchant ship armed against submarines is not only part of the enemy's fighting force but actively intends to fight submarines and, because of the submarine's vulnerability on the surface, is capable of successfully doing so. Such a merchantman is purposely prepared to prevent the submarine from carrying out the responsibilities that the Protocol otherwise requires. On the other hand, an enemy merchant ship that is "in any way" assisting the enemy's intelligence (as contrasted to, for example, calling in an air or over-the-horizon attack on the submarine) does not necessarily pose a threat of imminent harm to a surfaced submarine. The important humanitarian concerns reflected in the Protocol should not be sacrificed in order to avoid minor risks to the submarine, even if it can be established that the merchant is or has been providing intelligence in some manner not immediately threatening the safety of the submarine. And, again, this should be especially true in a limited war with limited objectives, in which proportionality considerations should allow greater relative weight for the humanity side of the balance between military necessity and humanity.

Finally, the *Handbook* would allow deviation from the Protocol's general rule where

> [t]he enemy has integrated its merchant shipping into its war-fighting/war-sustaining effort and compliance with this rule would, under the circumstances of the specific encounter, subject the submarine to imminent danger or would otherwise preclude mission accomplishment.[100]

There is much to be said for the proposition that the practices of World War II belligerents provide substantial precedent for this exception, particularly for any future general war, the sort of war in which a belligerent does integrate all assets within its control into its war efforts. In this sense, the rule exception implicitly recognizes a pertinent and valuable distinction between general war and limited war. Again, however, the last clause concerning preclusion of mission should perhaps be modified by requiring a proportionality consideration.

Despite the World War II claims threatening unwarned attacks on neutral shipping in broad war zones, the *Handbook's* rules are generally protective of neutral merchant ships. Neutrals that have not taken on enemy character—in which case they are to be treated either as enemy warships or enemy merchant ships, depending on the nature of their support for the enemy—[101] can be captured as prizes, but only after visit and search to establish their susceptibility to capture. Moreover, captured neutral vessels can be sunk only

after every reasonable effort has been made to avoid their destruction and only after the capturing officer is "entirely satisfied that the prize can neither be sent into a belligerent port . . . nor, in his opinion, properly released."[102] In any case where destruction of a neutral ship is ordered, the capturing officer must provide for the safety of the ship's passengers and crew.[103] The *Handbook's* discussion of treatment of neutral ships makes no distinction between the obligations owed by surface warships and those owed by submarines. It could be said, therefore, that in some respects the *Handbook* provides more protection for neutral shipping—in a general war, at any rate— than the current law of submarine warfare provides.

The *Handbook's* statement of the law of naval warfare on the rescue of survivors of attack, discussed above, applies equally to survivors of attacks on merchant ships and attacks on enemy warships. Although a reasonable argument can be made for requiring even greater efforts in the case of merchant ship survivors, this is probably an accurate statement of the current rule.

Exclusion zones. As noted, the lawfulness of unilaterally declared war zones or exclusion zones or areas of operation is debatable. Such zones were used in both world wars in part to claim justification for surprise submarine attacks on merchant shipping, including neutral shipping, found within the zones. The Nuremberg Tribunal clearly ruled that such zones did not provide the right of a belligerent, even in the all-out war with which it was concerned, to wage unrestricted submarine warfare against neutral merchant ships. Perhaps in partial consequence, the *Handbook* takes a careful approach to the subject. In its discussion of the law of blockade, the *Handbook* notes attempts by belligerents in both world wars to assert "so-called long-distance blockades" that were not in conformity with the law of naval warfare allowing close-in blockade but which were justified, says the *Handbook*, upon the right of reprisal. Whatever the asserted justification (and, as pointed out above, reprisal was not the only one), these "blockades" supposedly often authorized unannounced submarine attacks on neutral shipping in the declared areas. While the *Handbook* correctly describes the difficulty, especially in current times and in a general war, to impose an effective close-in blockade, it nevertheless does not endorse the legitimacy of the extended blockades of the world wars.[104]

Yet the *Handbook* does assert the validity of zones or operational areas "[w]ithin the immediate area or vicinity of naval operations" where a belligerent may impose "special restrictions" on neutral traffic, including prohibition from entering the areas.[105] The belligerent cannot, however, "purport to deny access to neutral nations, or to close an international strait to neutral shipping, pursuant to this authority unless another route of similar convenience remains open to neutral traffic."[106] Although the *Handbook* rules state that a neutral merchant ship is liable to capture for, among other

activities, violating the regulations established by the belligerent for such a zone, it is, apparently, not liable to sinking without warning *unless* it fails to conform to the belligerent's instructions concerning communications, in which case it "may thereby assume enemy character and risk being fired upon or captured."[107] It is by no means clear that these asserted rules, though admirable in their restraint, are consistent with the current law of naval warfare. To the extent that such areas of operation would ever purport to authorize the sinking of neutral merchant ships without warning, they would run up against the judgment of the International Military Tribunal in the *Doenitz* case.

Because we can expect that exclusion zones or zones of operation will continue to be asserted, in particular in limited wars, perhaps it would be worth the effort to attempt to provide by treaty a set of negotiated rules that balance the perceived needs for protection of belligerent forces in the modern age of long-distance targeting, the interests of neutral shipping, and the humanitarian principles that led the Nuremberg Tribunal to condemn unrestricted naval warfare zones.

Other targets of submarines. The *Handbook's* rules on enemy vessels that are immune or exempt from targeting are the same for surface warships and submarines and therefore receive no detailed discussion here. The *Handbook* does make it clear that enemy hospital ships complying with the appropriate rules on marking and behavior are not lawful targets for surface warships or submarines. Other enemy vessels immune from attack, according to the *Handbook*, include coastal fishing vessels and small coastal traders. Civilian passenger vessels are said to be subject to capture but exempt from destruction.[108]

The *Handbook's* treatment of the law of conventional-weapon naval bombardment of land targets again makes no distinction between surface ships and submarines (or, for that matter, aircraft).[109] In general, the stated rules set forth the particular prohibitions on targeting civilian populations, inflicting unnecessary suffering, and wanton destruction of property. There is no suggestion that these rules present special issues for submarines.

Submarine weaponry. The *Handbook* also makes no distinction between surface ships and submarines in discussing the law of mine-laying. It basically sets forth the rules derived from the Hague Convention (VIII) of 1907,[110] to which the U.S. remains a party. In order to comply with the rule that torpedoes disarm after missing their intended targets, the *Handbook* states that "[a]ll U.S. Navy torpedoes are designed to sink to the bottom and become harmless upon completion of their propulsion run."[111] It would seem that the duration of the propulsion runs of the array of modern torpedo weapons would be an important consideration for promulgating rules of engagement for submarines.

The *Handbook* contains only one sentence that might be deemed a specific response to the above-noted debate on the lawfulness of submarine-launched cruise missiles. It states in full:

> Missiles and projectiles dependent upon over-the-horizon or beyond-visual-range guidance systems are lawful, provided they are equipped with sensors, or are employed in conjunction with external sources of targeting data, that are sufficient to ensure effective target discrimination.[112]

This sentence, however, purports to be an extension of the general obligation of belligerents, recognized in the *Handbook*, to avoid weapons that are indiscriminate in their effect. But a weapon is not indiscriminate "simply because it may cause incidental or collateral civilian casualties, provided such casualties are not foreseeably excessive in light of the military advantage expected to be gained."[113] This is apparently another reference to the military necessity/humanity formula and perhaps deserves a little more explanation, including the concept of proportionality and doubt-erasing presumptions. Otherwise, the discussion is probably an accurate restatement of the general rules on conventional weapons and weapons systems.

Nuclear weapons present quite another problem, one which the *Handbook*, like the author of this chapter, largely avoids. It does, however, state a position, unlike the author. It states that "[t]here are no rules of customary or conventional international law prohibiting nations from employing nuclear weapons in armed conflict."[114] Thus, the *Handbook* concludes that the use of nuclear weapons "against enemy combatants and other military objectives" is legal. But launch of attacks against civilian populations "as such" is not lawful.[115] Because United States submarines are among our most important launching platforms for nuclear weapons, this issue is one of importance to the law of submarine warfare. It is to be expected that a U.S. Navy guidebook on the law of naval warfare would take the position that these awesome weapons, so significant in the very definition of our defensive forces if not our nation itself, are legal weapons of war. But, of course, the question is far more complex and confused than the *Handbook* suggests.[116] The full analysis of the question is, however, beyond the scope of the present chapter.

Submerged passage. On this, another controversial issue, the *Handbook* again takes the expected position: submerged transit through neutral territorial seas that form all or part of a strait used for international navigation is permitted in accordance with the customary rules articulated in the 1982 Convention on the Law of the Sea.[117] As noted above, this is not necessarily the rule; instead, the general innocent passage requirement that a submarine surface and show its flag in neutral territorial seas could well be the current law.

Regarding archipelagic sealanes passage, the *Handbook* restates the U.S. position that it is willing to recognize the right of archipelagic states to establish archipelagic waters, provided they do so in accordance with the

provisions of the 1982 treaty, which, in the U.S. view, allow submerged passage, even in wartime, through designated sea lanes.[118] This position does not seem to be inconsistent with international law.

Conclusion

Naval command in modern wartime unquestionably carries a terrible burden of responsibility—to superior officers, to those commanded, to the ship, to the mission, to the nation, and to those innocent persons who somehow might come within the broad zones of danger posed by today's weapons systems. Many rules guide the commander's decisions as he attempts to cope with his tremendous burden. Not all of these rules are called "law," but even those that are so designated are recognized because they are in the national or military interest or both. The nature of the submarine as a weapons system makes the submarine commander's wartime task of attempting to comply with the traditional law of naval warfare an especially difficult one. As this chapter has tried to explain, the submarine's nature and the experiences of the two world wars have led to some modifications of the traditional law, particularly regarding the submarine's role as commerce raider.

The U.S. Navy's new *Commander's Handbook on the Law of Naval Operations* presents an impressive exposition of the law of naval warfare as it relates to submarines. It is concise, readable, and, for the most part, an accurate reflection of the current law. The few specific comments and criticisms set forth in this chapter are not, in light of the overall scope of the book's treatment of the topic, highly significant. Two larger matters, however, remain bothersome, though they each go beyond the submarine topic.

First, the *Handbook* seldom refers to any clear distinction between rules that apply in total wars, such as World War II, and today's more likely armed confrontation, a war that is limited in geographical scale or objectives or both. The distinction is particularly critical for the issues that surround the conduct of submarine warfare. Warfighting conduct that might be expected, even appropriate (perhaps even lawful), during a global conflagration in which warring nations struggle for their very existence does not necessarily provide precedent for the conduct of limited war, as recent events probably confirm. Some aspects of the traditional laws of naval warfare that seemed so outmoded or obsolete in the context of World War II—for example, the provisions of the 1936 London Protocol—might make sense again in the context of limited war.

The second problem is one that naval commanders, including especially submarine commanders, must anticipate: what to do in cases of doubtful targetability. Where the hard choice is between military necessity and humanity, which side wins? Where lies the presumed answer? The rules that attempt to balance military necessity and humanity are many and complex.

It is obviously one thing to state them or even know them in all their exception- and qualification-festooned glory; it is undoubtedly quite another actually to attempt to apply them in instant decision under the stress of imminent hostile engagement. As suggested in earlier discussion, anticipation of the dilemma calls for a presumption or set of presumptions designed to guide decision in doubtful cases, and the *Handbook* could benefit from the inclusion of a section on this problem.

Notes

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1. Karl Lautenschlager, "The Submarine in Naval Warfare, 1901-2001." *International Security*, Winter 1986-87 (v. 11, no. 3), pp. 94-140.

2. Sources for the general historical and technical background contained in this section include *Jane's Fighting Ships 1987-88* (London: Jane's Publishing Company, Ltd., 1988), pp. 696-718; Norman Friedman, *Submarine Design and Development* (Annapolis: Naval Institute Press, 1984); W.T. Mallison, Jr., "Studies in the Law of Naval Warfare: Submarines in General and Limited War," *International Law Studies 1966* (Washington: U.S. Govt. Print. Off., 1968), v. 58; Lautenschlager, *supra* note 1; Horace B. Robertson, Jr., "Submarine Warfare," *JAG Journal*, November 1956, pp. 3-9; Jane Gilliland, "Submarines and Targets: Suggestions for New Codified Rules of Submarine Warfare," Georgetown Law Journal, v. 73, pp. 975-1005 (1985).

3. *See* Mallison, *supra* note 2, pp. 104-05; Gilliland, supra note 2, pp. 976-77.

4. Mallison, *supra* note 2, p. 106.

5. Naval Conference of London, "Declaration (II) Concerning the Law of Naval War," reprinted in Dietrich Schindler & Jiri Toman, ed., *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, 3rd ed. (Dordrecht, Netherlands: Martinus Nijhoff Publishers, 1988), ch. IV., pp. 852-53 (hereinafter Schindler & Toman). The Declaration was not ratified by any of the ten signatories, but the rules contained in it were recognized by several of the belligerents in World War I.

6. Mallison, *supra* note 2, pp. 103-05; Gilliland, *supra* note 2, pp. 976-77.

7. Mallison, *supra* note 2, pp. 62-74; Gilliland, *supra* note 2, pp. 984-85.

8. *See* Mallison, *supra* note 2, pp. 65-69.

9. *Id.*, pp. 31-51; Gilliland, *supra* note 2, pp. 976-77.

10. Mallison, *supra* note 2, p. 38.

11. U.S. Laws, Statutes, etc., "Treaty for the Limitation and Reduction of Naval Armaments," art. 22, *U.S. Statutes at Large*, 71st Congress (Washington: U.S. Govt. Print. Off., 1931), v. 46, pt. 2, pp. 2881-2882; reprinted in Schindler & Toman, *supra* note 5, pp. 881-82.

12. See "Process-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of April 22, 1930," *American Journal of International Law, Supp., Official Docs.*, v. 31, pp. 137-39 (1937), reprinted in Schindler & Toman, *supra* note 5, pp. 74-75; Mallison, *supra* note 2, pp. 79-80.

13. U.S. Dept. of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 1989* (Washington: U.S. Govt. Print. Off., 1989), p. 365.

14. Mallison, *supra* note 2, pp. 80, 117-21; Gilliland, *supra* note 2, p. 984; Charles J. Weiss, "Problems of Submarine Warfare Under International Law," *Intramural Law Review of New York University*, v. 22, 1967, pp. 136, 137-138.

15. Mallison, *supra* note 2, p. 78; Gilliland, *supra* note 2, p. 985.

16. Lautenschlager, *supra* note 1, p. 107.

17. According to Professor Mallison, "On December 7, 1941 the United States Chief of Naval Operations sent a secret message to the Commander in Chief, U.S. Pacific Fleet which stated: "EXECUTE AGAINST JAPAN UNRESTRICTED AIR AND SUBMARINE WARFARE." Mallison, *supra* note 2, p. 87.

18. *See* International Military Tribunal, "Testimony of Fleet Admiral Nimitz, U.S. Navy, 11 May 1946, Regarding Naval Warfare in the Pacific from 7 December 1941, Including the Principles Governing the Rescue of Survivors of Sunk Enemy Ships (Exhibit Doenitz-100)," *Trial of the Major War Criminals Before the International Military Tribunal* (Nuremberg: International Military Tribunal, 1949), v. 40, pp. 108-111 (hereinafter cited as International Military Tribunal).

19. *Id.*, v. 1, p. 311.

20. *Id.*, v. 18, pp. 312-23.

21. *Id.*, v. 1, p. 312.

22. *Id.*, pp. 312-13.

23. Mallison, *supra* note 2, p. 81.

24. International Military Tribunal, *supra* note 18, v. 1, p. 313. It has been suggested, however, that in fact the risk to neutral vessels as a result of the U.S. declaration of unrestricted submarine warfare in the Pacific was not as great because of the relative scarcity of neutral shipping in the Pacific zones during World War II. Robertson, *supra* note 2, p. 8.

25. W. Hays Parks, "Submarine-Launched Cruise Missile and International Law: A Response," *U.S. Naval Institute Proceedings*, September 1977, p. 120; Alex A. Kerr, "International Law and the Future of Submarine Warfare," *U.S. Naval Institute Proceedings*, October 1955, p. 1107.

26. International Military Tribunal, *supra* note 18, v. 1, p. 313.

27. This was the infamous "*Laconia* Order." Mallison, *supra* note 2, p. 137.

28. International Military Tribunal, *supra* note 18, v. 1, p. 313. The source of the rule on rescue of survivors is the "Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, *United States Treaties and Other International Agreements*, T.I.A.S. No. 3363 (Washington: U.S. Dept. of State, 1955), v. 6, pt. 3, pp. 3217-3693.

29. The Tribunal's judgment is confusing on this point. In its short discussion of the charge that Doenitz, by the "*Laconia* Order," forbade submarine commanders from complying with the international law duty to rescue survivors of sunken ships, the Tribunal ends up again referring to the 1936 Protocol's provisions on the "rescue" of merchant ship crews and passengers prior to sinking, clearly a separate issue. International Military Tribunal, *supra* note 18, v. 1, p. 313.

30. Mallison, *supra* note 2, pp. 84-86, 137-38.

31. International Military Tribunal, *supra* note 18, v. 1, p. 313.

32. Mallison, *supra* note 2, pp. 139-43.

33. Nimitz Testimony, International Military Tribunal, *supra* note 18, p. 110.

34. *Id.*

35. Robert W. Tucker, "The Law of War and Neutrality at Sea," *International Law Studies 1955* (Washington: U.S. Govt. Print. Off., 1957), v. 50, pp. 181-195.

36. International Military Tribunal, *supra* note 18, v. 1, p. 313.

37. The Protocol is quoted in the text accompanying note 12, above.

38. Tucker, *supra* note 35, pp. iv-v; Mallison, *supra* note 2, pp. 129-32.

39. *See* Gilliland, *supra* note 2, p. 989.

40. *See* Weiss, *supra* note 14, p. 149; Gilliland, *supra* note 2, p. 1002.

41. General sources for this section include *Jane's Fighting Ships, supra* note 2, pp. 696-718; Friedman, *supra* note 2; Mallison, *supra* note 2; Lautenschlager, *supra* note 1; Gilliland, *supra* note 2; Jon Boyes and W.J. Ruhe, "The Role of U.S. Submarines," *The Submarine Review*, October 1987, pp. 15-23; Admiral Ronald Hayes, USN, "CINCPAC's Submarine Views," *The Submarine Review*, January 1987, pp. 44-48.

42. Lautenschlager, *supra* note 1, p. 95.

43. *Id.*

44. *Id.*

45. Boyes and Ruhe, *supra* note 41, pp. 15-16.

46. *Id.*, pp. 19-23; Lautenschlager, *supra* note 1, p. 95.

47. Lautenschlager, *supra* note 1, pp. 134-38.

48. *Id.*, p. 134; Robertson, *supra* note 2, pp. 8-9.

49. For a presentation and analysis of these reasons, *see* Lautenschlager, *supra* note 1, pp. 134-38.

50. *See* Samuel L. Morison, "Falklands (Malvinas) Campaign: A Chronology," *U.S. Naval Institute Proceedings*, June 1983, pp. 119-24.

51. Gilliland quotes from remarks made by Captain Louis Chelton, former Chief Naval Judge Advocate of the Royal Navy (U.K.), in confirming that British exclusion zones in the Falklands War were designed to allow Royal Navy commanders "to engage a militarily important target without undue hesitation, or the need for the sort of position [*sic*; positive?] identification criteria, the obtaining of which could have hazarded unduly the ship's safety." Gilliland, *supra* note 2, p. 1003, note 182.

52. Morison, *supra* note 50, p. 121.

53. *E.g.*, Mallison, *supra* note 2, p. 16; Gilliland, *supra* note 2, p. 979.

54. The United Nations Charter (1945), the Universal Declaration of Human Rights (1948), and at least 16 subsequent human rights treaties, to most of which a majority of the world's states are parties, attest to this. See the list set forth in Louis Henkin et al., *International Law: Cases and Materials*, 2nd ed. (St. Paul: West Publishing Co., 1987), pp. 991-92.

55. *See Id.*, pp. 991-992.

56. Mallison, *supra* note 2, pp. 29-53.

57. International Military Tribunal, *supra* note 18, v. 1, pp. 311-13.

58. Mallison, *supra* note 2, p. 106.

59. The contrast is, of course, to the two great wars of this century, each fought on a global scale, with national survival an objective of the belligerents. In a global war on our ocean planet, true neutral shipping is both less likely to exist and, where it does exist, more understandably subject to belligerent restriction and risk of harm. In a war fought for national survival, belligerents are more likely to commit and justify actions that cause injury and death to civilian populations of their enemies. Clearly, a limited war can be one of limited geography, but in which national survival of the belligerents is at stake; the Iran-Iraq War is a current example. This chapter makes no special effort to attempt to draw distinctions between types of limited wars as grounds for differing rules of submarine warfare. Perhaps such distinctions are appropriate. The main purpose of this chapter in contrasting general wars and limited wars is to suggest that conduct during the World Wars, which were both global and fought for national survival, is not necessarily a precedential basis for formulation of warfare rules for today's limited wars regardless of the nature of the limitation.

60. *The New York Times* reported the reaction as one of "shock and dismay." William Borders, "Falklands Casualties Bring Dismay in Europe," *The New York Times*, 5 May 1982, p. A1: 4-6. *See* also Gilliland, *supra* note 2, p. 994, note 130.

61. Morison, *supra* note 50, p. 121.

62. *E.g.*, Weiss, *supra* note 14, pp. 148-49; Gilliland, *supra* note 2, pp. 978-79.

63. Weiss, *supra* note 14, pp. 148-49. Gilliland, *supra* note 2, discusses Weiss' proposal at pp. 996-1005.

64. *See* Gilliland, *supra* note 2, p. 1003, note 182.

65. *See* Thomas M. Daly, "The Enduring Gulf War," *U.S. Naval Institute Proceedings*, May 1985, pp. 148-61.

66. *See* Mallison, *supra* note 2, pp. 52-53.

67. The United States has claimed exclusion zones during the Korean War and during the Cuban Missile Crisis. Gilliland, *supra* note 2, p. 992; John W. Robertson, "Blockade to Quarantine in International Law," JAG Journal, June 1963, v. 17, p. 87.

68. Mallison, *supra* note 2, pp. 124-25. Hospital ship markings are designated in the 1949 "Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea," *United States Treaties and Other International Agreements* (U.S. Govt. Print. Off., 1955), v. 6, p. 3217, T.I.A.S. No. 3363, reprinted in Schindler & Toman, *supra* note 5, p. 401.

69. Mallison, *supra* note 2, pp. 126-28. The leading case supporting the immunity of coastal fishing vessels from capture or destruction remains *The Paquete Habana*, 175 U.S. 677 (1900).

70. This rule is found in the 1907 "Convention Relative to the Laying of Automatic Submarine Contact Mines (Hague VIII)," Oct. 18, 1907, art. 1, par. 3, U.S. Statutes at Large, v. 36, p. 2332, reprinted in Schindler & Toman, *supra* note 5, p. 803.

71. *See* Howard S. Levie, "Mine Warfare and International Law," Richard B. Lillich and John Norton Moore, eds., *Readings in International Law from the Naval War College Review 1947-1977*, v. II (International Law Studies v. 62, Newport, R.I.: Naval War College Press, 1980), pp. 271-79.

72. D.P. O'Connell, "The Legality of Naval Cruise Missiles," *American Journal of International Law*, v. 66, p. 785 (1972); Scott C. Truver, "The Legal Status of Submarine-Launched Cruise Missiles," *U.S. Naval Institute Proceedings*, August 1977, pp. 82-84.

73. Truver, *supra* note 72, p. 83.

74. *Id.*

75. Parks, *supra* note 25, pp. 120-22.

76. See Howard S. Levie, "Nuclear, Chemical, and Biological Weapons," *infra*, Chapter 11. *See also, e.g.*, Istvan Pogany, ed., *Nuclear Weapons and International Law* (New York: St. Martin's Press, 1987); Arthur Selwyn Miller and Martin Feinrider, eds., Nuclear Weapons and the Law (Westport, Conn.: Greenwood Press, 1984); Ian Brownlie, "Some Legal Aspects of the Use of Nuclear Weapons," *International & Comparative Law Quarterly*, v. 14, p. 437 (1965).

77. *See* the 1958 Geneva "Convention on the High Seas," *United States Treaties and Other International Agreements*, T.I.A.S. No. 5200 (Washington: U.S. Dept. of State, 1962), v. 13, pt. 2, p. 2312, art. 2. The current customary law concerning freedom of navigation within exclusive economic zones is probably reflected in the United Nations Conference on the Law of the Sea, 3d, *United Nations Convention on the*

Law of the Sea, A/CONF. 62/122 (n.p.: 1982), art. 58. This treaty was adopted in 1982 but is not yet in force.

78. *See* "Convention on the High Seas," *supra* note 77, art. 6.

79. *See e.g.*, "Discussion," John M. Van Dyke, ed., *Consensus and Confrontation: The United States and the Law of the Sea Convention* (Honolulu: Law of the Sea Institute, 1985), pp. 292-311; Jon L. Jacobson, "Law of the Sea—What Now?" *Naval War College Review*, March -April 1984, p. 96. The 1982 treaty's provisions on straits transit are found in *United Nations Convention on the Law of the Sea, supra* note 77, arts. 37-44.

80. See sources cited in the preceding note.

81. *United Nations Convention on the Law of the Sea, supra* note 77, arts. 46-54.

82. *Id.*, arts. 47, 53-54.

83. *See* "Discussion," *supra* note 79, p. 293.

84. U.S. Navy Dept., *The Commander's Handbook on the Law of Naval Operations*, NWP 9 (Washington: 1987).

85. *Id.*, par. 8.2.1.

86. *Id.*, par. 8.3.

87. *Id.*, pars. 5.4.2 and 11.6.

88. *Id.*, par. 11.6.

89. *Id.*, par. 8.3.

90. *Id.*, pars. 5.4.2, 6.2.3.2, 11.6.

91. *Id.*, par. 6.2.5.

92. *See, e.g.*, Gilliland, *supra* note 2, p. 987, note 77 and sources there cited.

93. NWP 9, *supra* note 84, par. 8.3.1.

94. *Id.*

95. *Compare id.*, par. 8.3.2 with par. 8.2.3.

96. *Id.*, par. 8.3.1. By contrast, the *Handbook*, in paragraph 8.2.2.2, states that the comparable exception occurs for *surface* warships when the merchant vessel is "[a]ctively resisting visit and search or capture," or "[r]efusing to stop upon being summoned to do so." It is probable that the differences in wording result because the *Handbook's* authors were in each case attempting merely to restate the Protocol's rules in a general way and that, therefore, the differences are not in themselves significant. It might be preferable to quote the Protocol's words verbatim.

97. The Protocol is quoted in the text accompanying note 12 *supra*.

98. NWP 9, *supra* note 84, par. 8.3.1.

99. *Id.*

100. *Id.*

101. *Id.*, par. 7.5.

102. *Id.*, par. 7.9.1.

103. *Id.*

104. *Id.*, par. 7.7.5.

105. *Id.*, par. 7.8.

106. *Id.*

107. *Id.*, par. 7.8.1.

108. *Id.*, par. 8.2.3.

109. *Id.*, par. 8.5.

110. "Convention Relative to the Laying of Automatic Submarine Contact Mines," *supra* note 70.

111. NWP 9, *supra* note 84, par. 9.3.

112. *Id.*, par. 9.7.

113. *Id.*, par. 9.1.2.

114. *Id.*, par. 10.2.1.

115. *Id.*

116. *See* Pogany, *supra* note 76; Miller and Feinrider, *supra* note 76; Brownlie, *supra* note 76.

117. NWP 9, *supra* note 84, par. 7.3.5.

118. *Id.*, pars. 1.4.3, 7.3.6. The *Handbook* does recognize that "[t]he balance of neutral and belligerent rights and duties with respect to neutral waters is, however, at its most unsettled in the context of archipelagic waters." *Id.*, par. 7.3.6.

Chapter IX
Naval Targeting: Lawful Objects of Attack

by
Sally V. Mallison* and W. Thomas Mallison**

I. Naval Operations and Law

International law comprises both customary and treaty components.[1] Customary law is based upon the incident-by-incident and case-by-case development through practical experience and an implicit acceptance by a preponderance of governments. Treaty law is the express agreement of states on particular subjects. International law is made and developed by governments in order to protect governmental interests, and among these interests is the efficient and lawful use of armed forces. Since the time of *The Prize Cases*,[2] decided by the U.S. Supreme Court during the Civil War, the law of armed conflict has applied to any situation where international armed conflict exists factually. Consequently, it is not necessary that there be a declaration of war or a so-called technical "state of war" to make the law applicable. This is codified in a common provision which appears in each of the four Geneva Conventions for the Protection of War Victims (1949) which states that the Conventions shall apply "to all cases of declared war or of any other armed conflict" between the state parties "even if the state of war is not recognized by one of them."[3]

The binding force of international law is stated directly in Navy Regulations:

> At all times a commander shall observe, and require his command to observe, the principles of international law. Where necessary to fulfillment of this responsibility, a departure from other provisions of Navy Regulations is authorized.[4]

The Chief of Naval Operations has the responsibility to ensure that the obligations of the Navy under the law of armed conflict are observed and enforced. Alleged violations of the law of armed conflict are to be promptly reported and thoroughly investigated. Corrective action is to be taken whenever required.[5] At the present time officers of the Judge Advocate General's Corps provide legal advice concerning Navy responsibilities under international law including the law of armed conflict. In the early history of the Navy, when

such legal advice was not provided, naval officers were held to a high standard of compliance with law, both international and domestic. An example is provided by *Little v. Barreme*,[6] a unanimous decision of the U.S. Supreme Court written by Chief Justice John Marshall. In the limited naval war with France, the Congress provided by statute for the capture of vessels meeting certain criteria engaged in commerce with France. The President issued instructions to the Navy to capture particular vessels including, as found by the Supreme Court, vessels not covered by the statute. Captain Little, USN, captured *The Flying Fish* in compliance with the instructions of the President and sent it in for adjudication in the prize court which determined that the capture was not authorized by the statute. The owners of the vessel incurred damages of $8,504.00 as a result of the unlawful capture and detention and they sued Captain Little personally for this amount. The Supreme Court, while expressing sympathy for Captain Little, who had acted in good faith, held that he was personally liable for the damages caused by the unlawful act. The breadth of the holding in this case is accurately summarized in the headnote which appears in the official U.S. Supreme Court *Reports*:

> The commander of a ship of war of the United States, in obeying his instructions from the President of the United States, acts at his peril: if those instructions are not strictly warranted by law, he is answerable in damages to any person injured by their execution.

At the time that judgment was entered against Captain Little, he was required by statute to obey the orders of his superiors without any qualification concerning the lawful or unlawful character of the order.[7] At the present time officers of the armed services are only required to obey "lawful" orders as prescribed by article 92 of the Uniform Code of Military Justice, entitled "Failure to obey order or regulation." This article provides:

> Any person subject to this chapter who—
> (1) violates or fails to obey any lawful general order or regulation;
> (2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or
> (3) is derelict in the performance of his duties; shall be punished as a court-martial may direct.[8]

The law of naval targeting is based upon three fundamental principles which are stated in the U.S. Navy's *Commander's Handbook on the Law of Naval Operations*:

1. The right of belligerents to adopt means of injuring the enemy is not unlimited.
2. It is prohibited to launch attacks against the civilian population as such.
3. Distinctions must be made between combatants and non-combatants, to the effect that non-combatants be spared as much as possible.[9]

Because the law of armed conflict (LOAC) is an eminently practical law which takes into account military efficiency, these basic legal principles are consistent with the military principles of objective, mass, and economy of force. The law requires that only militarily significant objectives be attacked,

but it permits the use of sufficient mass to destroy those objectives. Economy of force requires that no more effort should be directed against a military objective than is necessary to accomplish it. In addition, the law of naval targeting provides that all reasonable precautions must be taken to ensure that only military objectives are targeted and that non-combatants and civilian objects are spared as much as possible from the effects of armed conflict.

The most important treaties which are applicable to naval targeting and lawful objects of attack or capture are the following:

Declaration of Paris Concerning Maritime Law (1856)[10]

Hague Convention (IV) Respecting the Laws and Customs of War on Land (1907)[11]

Hague Convention (VI) Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities (1907)[12]

Hague Convention (VII) Relating to the Conversion of Merchant Ships into War-Ships (1907)[13]

Hague Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines (1907)[14]

Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War (1907)[15]

Hague Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention (1907)[16]

Hague Convention (XI) Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War (1907)[17]

Process-Verbal Relating to the Rules of Submarine Warfare (London, 1936)[18]

Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949)[19]

The listed treaties to which the United States is a state party remain in effect and are a part of the supreme law of the land under Article VI of the Constitution. The others, Hague Conventions VI and VII and the Declaration of Paris, are important also because they contain some binding principles of the customary law of naval warfare. In spite of the title of Hague Convention IV, concerning land warfare, it states basic principles equally applicable to naval targeting. For example, it prohibits the employment of "arms, projectiles, or material calculated to cause unnecessary suffering."[20] Because of changes in the technology of naval warfare, some of the treaties are less applicable to contemporary naval targeting than when they were written.

II. The Law Prior to the World Wars

In the historic era when privateering and piracy were widespread, merchant ships were armed for defensive purposes. After the substantial

abandonment of privateering and the near elimination of piracy, it became unusual for a merchant ship to be armed. Following the development of armored warships in the U.S. Civil War, such ships became further specialized in offensive and defensive capabilities and were consequently very different from merchant ships. The military weakness of the merchant ship entitled it to special protection and the customary principle that it could not be lawfully attacked without warning was adopted.[21] The procedures of visit and search by warships were used in naval warfare to enable boarding officers to determine the existence of probable grounds for capture and adjudication in prize. The intrinsic value of merchant ships made their capture rather than their destruction advantageous to the capturing state. The determination of whether or not a capture was lawful under the then criteria of international law was made by prize courts. These courts were domestic courts which applied the widely agreed upon international law criteria.[22] The effective enforcement method which ensured a high degree of uniformity in the decisions of diverse national courts was mutuality and reciprocity. The judges of each national prize court recognized that the standards it applied to enemy merchant ships and neutral ships charged with violating the law would be the same standards which foreign prize courts would apply to its merchant ships.[23] Elaborate rules concerning enemy and neutral ships and the cargoes they carried were developed in the customary law. The Declaration of Paris (1856),[24] the first multilateral treaty on the law of naval warfare covered privateering and blockades as well as the basic rules of naval economic warfare. It provided:

1. Privateering is, and remains, abolished;
2. The neutral flag covers enemy's goods, with the exception of contraband of war;
3. Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag;
4. Blockades, in order to be binding, must be effective: that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

The original state parties to the Declaration of Paris were the major European naval powers of the time and Turkey.[25] The United States was not a party and regarded the prohibition of privateering as opposed to the interest of the minor naval powers including itself.[26] At the beginning of the Civil War the United States attempted to become an adherent to the Declaration because of the threat presented by the Confederate privateers, but the Declaration was closed and it was too late for further accessions. Article 1 of the Declaration of Paris has long been technologically obsolete, whereas article 4 has been universally accepted as customary law. Articles 2 and 3 no longer address contemporary realities and they have been swept away by the comprehensive economic warfare practices of each of the major belligerents in the two World Wars.

III. The Development of the Law of Naval Targeting During the World Wars

A. Beginning of Submarine Warfare: World War I. In 1914 the potential of the submarine warship as an efficient combatant unit, and in particular its ability to conduct economic warfare against enemy merchant ships, was not understood. It was assumed that submarines, like surface warships, would follow the time-honored procedures of visit and search.[27] Great Britain, as the predominant surface naval power, instituted the long-distance blockade and the use of the navicert system with the objective that merchant ships including neutral ones would not be able to assist the enemy war effort. During the First World War the traditional doctrine that enemy merchant ships may not be the object of direct attack was eroded because of the integration of such merchant ships into the naval forces of the enemy. In addition, the integration of some neutral ships into the war effort of the enemy required that a distinction be made between them and neutral ships participating in genuine inter-neutral trade. Those neutral ships which were participating in the Allied naval war effort were functionally no different from participating belligerent merchant ships and, therefore, contrary to the traditional doctrine, would appear logically to be lawful objects of attack.

The arming of British merchant ships, even though it was stated to be for "defensive purposes" only, made it impractical for submarines to use the traditional visit and search techniques. In the nineteenth century merchant ships were privately owned and their voyages and cargoes were privately controlled. During the World Wars private ownership existed nominally, but the effective control was in the governments and it was exercised with the single objective of advancing the war effort.[28] A further consideration which made visit and search impossible was the employment of the British Q-ships, which appeared to be innocent merchantmen but were actually heavily armed warships employed to lure submarines to the surface and destroy them.[29] In addition, the adoption of the convoy system by Great Britain and the United States in 1917 integrated merchant ships into belligerent naval operations with the result that they became functional warships.[30]

Enemy warships remained lawful objects of attack without warning in the World Wars as they have always been historically. Because of the functional equivalency of participating merchant ships with warships, it would appear to be logically required that they also be lawful objects of attack without warning. This view was advanced by Germany as the preeminent submarine naval power. In the German view the proclamation of large submarine operational areas in the Atlantic Ocean where "unrestricted submarine warfare" was conducted provided adequate notice to neutrals to keep their merchant ships out of the proscribed area.[31] In a functional sense, Germany was conducting the same comprehensive methods of economic warfare which

were utilized by the Allied naval powers except that the German technique was enforced by submarines rather than by surface warships. There is no reason to believe that gunfire by surface warships, the ultimate sanction of the long-distance blockade, was more humanitarian than torpedoes fired by submarines.

The views just summarized, however logical, were decisively rejected by Great Britain and the United Stated which claimed that the traditional procedures of visit and search were still required of submarines.[32] The only possible exception, in the view of the Allied naval powers, would be armed enemy merchant ships sailing in convoys escorted by warships. International conferences between the World Wars provided the opportunity for them to advance their claims in international law.

B. Legal Developments Between the World Wars. During the Washington Naval Conference (1921-1922) Great Britain proposed the abolition of the submarine and Lord Lee made clear at the outset that in doing so "the British Empire had no unworthy or selfish motives."[33] He continued in reference to the submarine:

> It was a weapon of murder and piracy, involving the drowning of noncombatants. It had been used to sink passenger ships, cargo ships, and even hospital ships. Technically the submarine was so constructed that it could not be utilized to rescue even women and children from sinking ships and that was why he hoped that the conference would not give it a new lease of life.[34]

The French, Italian, Japanese, and United States delegations joined with the British in deploring the claimed inhumane and illegal use of submarines by Germany in the World War but favored their retention.[35] Secretary of State Charles Evans Hughes, the chairman of the conference, read into the record the full report on submarines which was prepared by the Advisory Committee of the United States delegation. It contained the following:

> The United States would never desire its Navy to undertake unlimited submarine warfare. In fact, the spirit of fair play of the people would bring about the downfall of the administration which attempted to sanction its use.[36]

Senator Elihu Root, a former secretary of state, proposed, in Article I of the draft treaty concerning submarines, certain rules of naval warfare, which were stated to be "an established part of international law." These rules required visit and search of merchant vessels by submarines as well as by surface warships. Article I further provided:

> Belligerent submarines are not under any circumstances exempt from the universal rules above stated; and if a submarine cannot capture a merchant vessel in conformity with these rules the existing law of nations requires it to desist from attack and from capture and to permit the merchant vessel to proceed unmolested.[37]

Article III stated the necessity for enforcement of the above rules and provided that:

> any person in the service of any Power who shall violate any of these rules, whether or not such person is under orders of a government superior, shall be deemed to have violated the laws of war and shall be liable to trial and punishment as if for an act of piracy. . . .[38]

The quoted provisions never became effective in spite of the support of the other participants in the Washington Conference because initially France, and then the others, refused to ratify the draft treaty.

Article 22 of the London Naval Treaty of 1930[39] contained rules applicable to both surface and submarine warships. This 1930 treaty was terminated in 1936 except for article 22 which was continued in effect as the *Proces-Verbal* Relating to the Rules of Submarine Warfare (1936) "without limitation of time." It provides:

> The following are accepted as established rules of International Law:
>
> (1) In their action with regard to merchant ships, submarines must conform to the rules of International Law to which surface vessels are subject.
>
> (2) In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board.[40]

The interpretation and application of these binding rules of law were left to the Second World War and its aftermath. The principal ambiguities concerning naval targeting which appear in the text are the meanings of the terms "merchant ships," and "a merchant vessel."

C. Continuation of Submarine Warfare: World War II. Writing at the beginning of the Second World War, Professor H. A. Smith pointed out the dramatic difference between trading practices at the time of the Declaration of Paris in 1856 and those in 1939:

> If we are again confronted with the facts for which the Declaration laid down the law, then that law must be applied to those facts. That is to say, if we can discover a genuine enemy private merchant carrying on his own trade in his own way for his own profit, then we must admit that his non-contraband goods carried in neutral ships are immune from capture at sea. Under the conditions of the modern socialistic world, such a person is not easily to be found. . . . Today he has become a disciplined individual mobilized in the vast military organization of the totalitarian State.[41]

At the beginning of the Second World War, the naval belligerents on both sides continued the practices which had been started in the First World War and made every effort to improve upon them. Great Britain had such complete control of the surface of the oceans that it was able to force neutral merchant shipping to participate in the Allied war effort. Ms. Behrens, writing in the

official British history of the Merchant Navy, described the intensification of the system in 1940:

> In the summer of 1940, the ship warrant scheme was launched, both to further the purposes of economic warfare and in order to force neutral ships into British service or into trades elsewhere that were held to be essential. No ship, it was ordained . . . was to be allowed any facilities in any port of the British Commonwealth unless the British had furnished her with a warrant.[42]

During the Second World War the United States, first as a neutral and then as a belligerent, cooperated fully with the British methods.[43] As a matter of theory neutral states did not have to cooperate with the Allied naval powers, but they realized that failure to cooperate would result in the application of much more stringent economic warfare measures against them. The result of this integration of neutral merchant ships into the Allied war effort is that they became lawful objects of attack like similarly employed belligerent merchant ships.[44] Only those few neutral merchant ships engaged in genuine inter-neutral trade were immune from attack.

The British *Defense of Merchant Shipping Handbook* (1938) was distributed to the masters of the Merchant Navy ships in 1938. On the subject of "conditions under which fire may be opened" the *Handbook* stated that if the enemy adopts a policy of sinking merchant ships without warning

> it will then be permissible to open fire on an enemy surface vessel, submarine or aircraft, even before she has attacked or demanded surrender, if to do so will tend to prevent her gaining a favourable position for attacking.[45]

Subsequent instructions stated that the enemy had adopted such a policy of sinking without warning.

At the outset of the Second World War, the German Navy incorporated the *Proces-Verbal* Relating to the Rules of Submarine Warfare, also known as the Protocol of 1936, into the German Prize Code which was distributed to submarine commanders.[46] By October 17, 1939 Germany issued the order to attack all enemy merchant ships without warning.[47] Thus, early in the conflict, merchant ships and submarines of the opposing belligerents were attacking one another without warning. Germany followed its operational area declarations of the First World War by providing that vast areas of the North Atlantic Ocean were a submarine operational zone in which Germany could assume no responsibility for either damage to ships or injury to personnel.[48]

On December 7, 1941, immediately following the attack on Pearl Harbor, the U.S. Chief of Naval Operations sent a secret message to the Commander-in-Chief, Pacific Fleet which stated:

> EXECUTE AGAINST JAPAN UNRESTRICTED AIR AND SUBMARINE WARFARE.[49]

Even though the "unrestricted" warfare was directed against Japan, it could nevertheless present a possible danger to neutral shipping in the vast Pacific

Ocean areas. Because the message was secret, it could not have provided notification to neutral states. However, the almost complete absence of neutral shipping in the Pacific made this problem more theoretical than real. The only shipping which Japan treated as neutral consisted of Russian ships sailing across the North Pacific between Siberian ports and Canadian and United States ports in the Pacific Northwest. While the Soviet Union was a belligerent in the European War, it remained technically neutral in the Pacific War until a few days before the Japanese surrender.

Throughout the Pacific War,the merchant ships of both the United States and Japan were fully integrated into the naval war effort. As a practical matter, such ships were indistinguishable from formally commissioned naval auxiliary warships,[50] and such merchant ships, like warships, were lawfully subject to attack without warning. The United States reversed its prior position and, along with Japan, and the other naval belligerents in the Pacific War, it recognized that such merchant ships were functional warships and were subject to the same rules of international law.

There are inconsistent analyses concerning the interpretation of the Protocol of 1936 as applied to the events of the Second World War. Professor Robert Tucker, writing in a Naval War College "Blue Book," has stated concerning the Atlantic War:

> Despite this reaffirmation of the traditional law in the 1936 London Protocol, the record of belligerent measures with respect to enemy merchant vessels during World War II fell far below the standards set in the preceding conflict. In the Atlantic Germany resorted to unrestricted submarine and aerial warfare against British merchant vessels almost from the very start of hostilities. . . .[51]
> In the final stages of the conflict, the measures taken by Great Britain against enemy shipping wherever encountered were only barely distinguishable from a policy of unrestricted submarine warfare.[52]

Professor Tucker has also commented on the legal situation in the Pacific War:

> In the Pacific War no attempt was made by either of the major naval belligerents to observe the obligations laid down by the 1936 London Protocol. Immediately upon the outbreak of war the United States initiated a policy of unrestricted aerial and submarine warfare against Japanese merchant vessels, and consistently pursued this policy throughout the course of hostilities. Japan, in turn, furnished no evidence of a willingness to abide by the provisions of the Protocol. . . .[53]

Another "Blue Book" contains a different analysis of this subject:

> Professor Tucker has apparently assumed that the Protocol is designed to protect merchant vessels which are participating in the naval war effort. This does not take adequate account of the close relationship between the performance of combatant functions and the ensuing liability to attack without warning. In addition, it is inconsistent with the legislative history concerning the interpretation of "merchant vessel" as used in the Protocol.[54]

The ambiguity concerning the terms "merchant ships" and "a merchant vessel" used in article 22 of the London Naval Treaty of 1930 and in the

identically worded Protocol of 1936 is considerably clarified by the Report of the Committee of Jurists of April 3, 1930 written by the lawyers who drafted the text.

> The Committee wish to place it on record that the expression "merchant vessel," where it is employed in the Declaration, is not to be understood as including a merchant vessel which is at the moment participating in hostilities in such a manner as to cause her to lose her right to the immunities of a merchant vessel.[55]

This stated criterion is more realistic than a test which attempts to distinguish between armed and unarmed merchant vessels. It is probably more important for the efficient conduct of anti-submarine warfare in particular contexts to have merchant ships make radio reports of submarine contacts than to have such ships armed. In addition, the great unarmed British passenger liners *Queen Mary* and *Queen Elizabeth* each had the capability of transporting an entire infantry division and its equipment at a high sustained speed without naval escort and consequently provided a significant contribution to the Allied naval war effort. Because of their effective participation, it cannot be doubted that they were lawful objects of attack.

Although the 1936 Protocol is sometimes referred to as the "Submarine Protocol," its second paragraph refers to "a warship, whether surface vessel or submarine." Consequently, the identical legal regime concerning attacks on merchant ships applies to both surface and submarine warships. Gunfire from surface warships is the ultimate sanction of the long-distance blockade employed by the Allied naval powers in both world wars. A surface warship may lawfully attack a belligerent or neutral vessel which is attempting to breach the blockade or resist visit and search.

One of the factors considered in treaty interpretation is the working interpretation given to the treaty by the state-parties.[56] The original state-parties to the 1936 Protocol included the great naval powers of the time: Great Britain, United States, Japan, France, and Italy.[57] Germany became a state-party shortly thereafter.[58] The working interpretation given to the Protocol by all six of these state-parties which were naval belligerents in the Second World War was that belligerent and neutral merchant ships participating in the naval war effort were not entitled "to the immunities of a merchant vessel" to use the wording employed by the Committee of Jurists who drafted the text. Therefore, the Protocol of 1936 is accurately interpreted as applying only to merchant ships which were not part of the war effort of the naval belligerents. In the Second World War there were but few merchant ships entitled to this protection. This legal situation is not a drastic departure from the traditional law which was applied prior to the World Wars. In that pre-existing law the immunity of a merchant ship was also conditioned upon its not participating in any way in the naval hostilities. The long-established principle of customary law that a unit or ship may not exercise belligerent functions without simultaneously becoming a lawful object of attack remains

valid. There is no evidence to show that the Protocol of 1936 was designed to change this.

A conclusion written several years ago appears to be equally applicable now:

> In summary, the juridical criteria to determine whether or not a merchant vessel is participating in the war or hostilities in a way which results in losing "the immunities of a merchant vessel" should be determined by the fact of such participation and not by the particular method of participation.[59]

The most important category of ships immune from attack is hospital ships. Customary law was first codified in the 1899 Hague Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864,[60] which adapted the principles of the law of land warfare for the protection of wounded in armies in the field, to the maritime environment. Hague Convention (X) (1907)[61] revised and enlarged the 1899 Hague Convention. It was applicable in both world wars. The first Geneva Convention (1864)[62] for the protection of war victims comprised only ten articles and was limited to the protection of wounded personnel of armies in the field and to attending hospital and ambulance personnel.[63] The 1907 Hague Convention prescribed the legal regime for hospital ships in more detail than did the Hague Convention of 1899, specifying the external distinctive markings of hospital ships and requiring such ships to provide medical assistance to the wounded, sick, and shipwrecked personnel of the belligerents without distinction of nationality. Military interests were protected by the requirement that hospital ships must not be used for any military purpose. As a general rule, the immunity of hospital ships was respected in both World Wars with the exception of an incident in the First World War in which a German submarine sank a British hospital ship.[64]

Cartel ships are also immunized from attack. The term "cartel" traditionally referred to an agreement between enemy belligerents concerning the exchange of prisoners of war. It is now used to refer to any non-hostile interaction of the belligerents governed by special agreement. In 1945 the Japanese merchant ship *Awa Maru* undertook a voyage for a prescribed purpose and upon a specified route agreed to by the United States and Japan.[65] The principal purpose was to carry relief supplies furnished by the United States to United States and Allied nationals held in Japanese custody upon the Asian mainland. On the return voyage to Japan, the ship was sunk without warning by a U.S. submarine. The commanding officer of the submarine, who had not seen the message immunizing the vessel, was subsequently relieved of his command and convicted by court martial of negligence in carrying out orders.[66] In the ensuing diplomatic interchange, the United States apologized and offered to provide Japan with a vessel of similar size and characteristics to replace the *Awa Maru*.[67]

The U.S. Supreme Court held in *The Paquete Habana*,[68] a decision arising from the Spanish-American War, that coastal fishing boats were not liable to capture and condemnation in prize. The ruling in this case is codified in Hague Convention No. XI (1907),[69] which provides that vessels "used exclusively for fishing along the coast or small boats employed in local trade are exempt from capture." The Convention further provides that they cease to be exempt whenever they take part in hostilities.

IV. The Application of the Law of Naval Targeting to War Crimes; and Post Second World War Humanitarian Law Treaties

A. War Crimes Trials

1. The Trial of Admiral Doenitz

The only war crimes trials conducted by international tribunals were those before the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East at Tokyo. The International Military Tribunal at Nuremberg conducted the trial of the principal leaders of the former German Government who were accused of war crimes or crimes against humanity. The case in which the Tribunal directly addressed the law of naval warfare was that of Admiral Doenitz, who initially commanded the German submarine force and was subsequently commander-in-chief of the navy. Admiral Doenitz was charged with planning aggressive war (count one), conducting aggressive war (count two), and with war crimes (count three) by "waging unrestricted submarine warfare contrary to the Naval Protocol of 1936."[70] Sir Hartley Shawcross, the chief British prosecutor, stated to the Tribunal:

> Nor need we take time to examine the astonishing proposition that the sinking of neutral shipping was legalized by the process of making a paper order excluding such neutral ships not from some definite war zone over which Germany exercised control but from vast areas of the seas.[71]

The judgment of the Tribunal, after stating that it "is not prepared to hold Doenitz guilty for his conduct of submarine warfare against British armed merchant ships," continued:

> However, the proclamation of operational zones and the sinking of neutral merchant vessels which enter those zones presents a different question. This practice was employed in the war of 1914-1918 by Germany and adopted in retaliation by Great Britain. The Washington Conference of 1922, the London Naval Agreement of 1930, and the Protocol of 1936 were entered into with full knowledge that such zones had been employed in the First World War. Yet the Protocol made no exception for operational zones. The order of Doenitz to sink neutral ships without warning when found within these zones was, therefore, in the opinion of the Tribunal, a violation of the Protocol.[72]

The unreasonable and unworkable result of the holding here is that the Tribunal accepts the legality of German operational or exclusion zones as applied to belligerent merchant vessels but regards the same zones as unlawful

when applied to neutral merchant vessels. In doing this, the Tribunal ignored the fact that in the Second World War many neutral merchant vessels were sailing in the same convoys with belligerent merchant vessels and the two were functionally indistinguishable from one another.

The term "neutral merchant vessels" used by the Tribunal is more precise than the wording concerning merchant vessels in the Protocol, but it remains ambiguous and comprises at least two distinct categories: those engaged in genuine inter-neutral trade which does not contribute to the economic warfare resources of a belligerent, and those neutral vessels which through acquiescence or coercion, participate in the naval war effort of a belligerent. The factual reality was that there were no immune neutral vessels in the Atlantic Ocean proscribed areas. The Tribunal's invocation of the normatively ambiguous term, "neutral merchant vessels," enabled it to avoid facing the facts concerning the integration of neutral shipping into the Allied naval war effort. The Tribunal applied the Protocol to Admiral Doenitz as if it were a criminal statute. He was found innocent on count one (planning aggressive war), guilty on count two (conducting aggressive war), and guilty on count three (war crimes). However, the ten year sentence imposed upon Doenitz was claimed not to be based upon count three because the United States also conducted "unrestricted submarine warfare" in the Pacific.[73] The result of this is that the sentence was based only on count two, according to the Tribunal, which involved nothing more than Doenitz carrying out his regularly assigned duties as a line officer.

The principal criticism concerning the Doenitz Case, however, is properly directed at Sir Hartley Shawcross and the other British prosecution lawyers. They either knew, or should have known, in the exercise of at least minimum standards of professional responsibility, the factual reality of the integration of almost all neutral shipping into the Allied naval war effort.[74] As it was, they permitted the Tribunal to make a determination of guilt based on an erroneous factual assumption even though the Tribunal stated that the sentence was not based on this count.

2. Other War Crimes Trials

The war crimes trials other than the major trials at Nuremberg and Tokyo took place before national military tribunals which applied the international law of armed conflict. Captain Roskill, the official British historian of the naval war 1939-1945, has written:

> It is fair to mention there that, with one conspicuous exception, the captains of the German disguised raiders conducted their operations, which were a perfectly legitimate form of warfare, with due regard to international law.[75]

The exception referred to by Captain Roskill was the commander of a surface raider charged in the *Trial of Von Ruchteschell*[76] before a British military tribunal with failure to give quarter during an attack on a British merchant ship. The

facts involved a daylight attack against the ship in which its wireless aerial was destroyed with the raider's first salvo. The raider maintained heavy fire and signaled that the ship attacked was not to use its radio. The case report states: "The captain of the *Davisian* stopped his engines, hoisted an answering pennant and acknowledged the signal." The raider's gunfire continued, however, for another fifteen minutes and wounded several crew members while they were trying to abandon ship. Captain Von Ruchteschell was convicted on the apparent basis that the ship attacked had given an unequivocal indication of surrender. After this manifestation of surrender, the *Davisian* was no longer a lawful object of attack.

In addition to the trial of Admiral Doenitz before the International Miliary Tribunal at Nuremberg, there were two other cases involving the "*Laconia* order" which was issued by Admiral Doenitz on September 17, 1942 while he was serving as commander of the German submarine force. This order provided:

> (1) No attempt of any kind must be made at rescuing members of ships sunk, and this includes picking up persons in the water and putting them in life boats, righting capsized lifeboats and handing over food and water. Rescue runs counter to the rudimentary demands of warfare for the destruction of enemy ships and crews.
>
> (2) Orders for bringing in captains and chief engineers still apply.
>
> (3) Rescue the shipwrecked only if their statements would be of importance for your boat.
>
> (4) Be harsh, having in mind that the enemy has no regard for women and children in his bombing attacks on German cities.[77]

The *Laconia* order immediately followed Admiral Doenitz' attempt to establish a rescue zone of immunity during the period September 12-16, 1942, Captain Roskill has described the facts:

> In September 1942, a group of [four] U-boats and a "milch cow" (as the Germans called their supply submarines) arrived south of the equator, and there on the 12th U.156 sank the homeward-bound troop ship *Laconia*, which had 1,800 Italian prisoners on board. On learning from survivors what he had done, Hartenstein, the U-boat's captain, sent a series of messages *en clair* calling for help in the rescue work and promising immunity to ships sent to the scene, provided that he himself was not attacked.[78]

Admiral Doenitz ordered other U-boats to the rescue and the Vichy French Government was asked to send help from Dakar. The U-boats then took the principal role in the rescue operations which included towing lifeboats toward the African coast. This, of course, diverted the submarines from their regular wartime missions. Captain Roskill's account continues:

> All went well until the next afternoon [September 16] when an American Army aircraft from the newly established base on Ascension Island arrived, flew around the surfaced U-boats for about an hour, and then attacked U.156 with bombs. It is as impossible to justify that act as it is difficult to explain why it was committed.[79]

In 1960 the Historical Division of the U.S. Air Force stated concerning this incident:

> A summary of operations from Ascension Island states that on the morning of 16 September 1942, a B-24 of the U.S. Army Air Forces sighted a submarine at 5 degrees South, 11 degrees 40 minutes West. The sub, which was towing two lifeboats and was in the process of picking up two more, was displaying a white flag with a red cross. The sub did not show any national flag when challenged by the B-24. The plane left the scene and contacted Ascension. Since no friendly subs were known to be in the area, the plane was instructed to attack.[80]

The person who issued the order to attack and the aircraft commander who carried it out are both *prima facie* guilty of a war crime. The conduct of the aircraft commander appears to be entirely inexcusable since he must have observed the rescue operation. During the time that they are engaged in such an operation, enemy submarines are no longer lawful objects of attack. The fact that the U.S. Army Air Forces took no action to investigate this incident and that no trials took place under the then-effective domestic military code, the Articles of War, is a serious reflection on the entire chain of military command. The attempt by Doenitz and Hartenstein to establish a rescue zone of immunity would have been effective if it had not been for the bombing. As it was, many of the personnel of the *Laconia*, including Italian prisoners of war and British civilian passengers, were rescued in an attempt which exemplifies the highest humanitarian traditions. The rescue attempt was entirely consistent with the central objective of the law of armed conflict to avoid unnecessary destruction of human values. Admiral Doenitz was charged with violating the rescue provisions of the Protocol of 1936 by issuing the order. There is, unfortunately, no evidence that the International Military Tribunal gave appropriate consideration to the rescue zone of immunity as the indispensable context in which the *Laconia* order was issued. The Tribunal did not find him guilty on this charge but it stated that the ambiguous terms of the order deserved the "strongest censure."[81]

The second case, the *Trial of Moehle*[82] before a British military tribunal, involved a German U-boat flotilla commander who was charged with a war crime in reading the *Laconia* order to captains of U-boats in his flotilla and of resolving the ambiguity in the order by providing examples in which the killing of survivors was approved. In convicting the defendant, the Tribunal accepted the contention of the prosecution that the examples used amounted to an order to kill.

Although the third case, the *Trial of Eck* ("The Peleus Trial")[83] is widely regarded as an implementation of the *Laconia* order, it is significant that the defense in it did not invoke the order as a superior order which mandated the killing of survivors. In this case, also before a British military tribunal, the captain, two officers, and a rating of the German submarine U-852 were charged with:

> Committing a war crime in that you in the Atlantic Ocean on the night of 13-14th March 1944, when Captain and members of the crew of Unterseeboot 852 which had sunk the steamship *Peleus* in violation of the laws and usages of war were concerned in the killing of members of the crew of the said steamship, Allied nationals, by firing and throwing grenades at them.[84]

The prosecution resolved the ambiguity in the charge by stating that the defendants were not accused of sinking a merchant ship without warning, but of killing its survivors. The *Peleus* was of Greek registration and under charter to the British Ministry of War Transport. Following the sinking, the accused spent approximately five hours attacking the survivors and the floating wreckage with machine gun fire and hand grenades. All of the survivors except three were either killed or subsequently died of wounds. The three were rescued about a month later and recounted the grim events. The evidence indicated that the captain, Eck, ordered the shooting and that the others carried out his orders. The principal defense claim was that the actions were necessary to eliminate all traces of the sinking. An experienced U-boat commander, who was called on behalf of the defense, testified that the approved method of evading Allied anti-submarine attack following a sinking was to leave the scene at high speed. All of the accused were found guilty and Eck and the other two officers were condemned to death.[85]

The Judgment of the International Military Tribunal for the Far East states:

> Inhumane, illegal warfare at sea was waged by the Japanese Navy in 1943 and 1944. Survivors of passengers and crews of torpedoed ships were murdered.[86]

The commander of the Japanese First Submarine Force at Truk issued an order on March 20, 1943 which is translated and quoted by the Far East Tribunal:

> All submarines shall act together in order to concentrate their attacks against enemy convoys and shall totally destroy them. Do not stop with the sinking of enemy ships and cargoes; at the same time, you will carry out the complete destruction of the crews of the enemy's ships; if possible, seize part of the crew and endeavor to secure information about the enemy.[87]

Several examples of the carrying out of this flagrantly unlawful order are referred to in the judgment of the Tribunal.[88] One which is described in detail involved the sinking of the United States flag Liberty-type merchant ship *Jean Nicolet*, which had an armament manned by a U.S. Navy armed guard, and the brutal murder of most of the survivors of the sinking.[89] The Tribunal stated, *inter alia*, that the ship's boats were smashed by gunfire and that some of the crew members, with their hands tied behind their backs, had to run a gauntlet on the deck of the submarine before being forced into the water. The remainder of the crew were left on the deck of the submarine when it submerged. Twenty-two crew members who survived these grim events were rescued the next day and provided the testimony upon which the Tribunal's findings of fact were based.

Although aircraft attacked merchant vessels engaged in a belligerent's war effort during the Second World War, no trials took place involving such attacks. If such trials had taken place, they should have been conducted under the same legal criteria which would be properly applied in the trials concerning surface and submarine warfare.

B. Events Following the Battle of the Bismarck Sea

Unfortunately, it was not only Germans and Japanese who murdered survivors of ships they had attacked and sunk. In March 1943 the Japanese attempted to move about 7,000 soldiers by ship from Rabaul, New Britain where their military situation was increasingly precarious, to reinforce the Japanese Army in Lae, New Guinea.[90] This involved the transit of the Bismarck Sea by a convoy of eight transports escorted by eight destroyers.

The U.S. Army Air Forces in the Pacific had had a poor record for accurately targeting small islands, much less targeting moving ships, up to this time. The new commander of the Fifth Air Force under General Douglas MacArthur, the Commander-in-Chief Southwest Pacific, was Lieutenant General George C. Kenney, who changed the situation by having his medium bombers practice low-level attacks so that this capacity was added to the existing capability of heavy bombers in high-level bombing. The result was apparent in the Battle of the Bismarck Sea where the B-25 bombers sank every transport in the convoy (except one sunk by high-level heavy bombers) and half of the destroyers. Once the ships were sunk, the U.S. Armed Forces followed practices, much criticized when the offenders were German or Japanese, of killing as many of the helpless survivors in the water as possible. Professor Samuel Eliot Morrison, the official historian of the U.S. Navy during the Second World War, provides the following account:

> Meanwhile planes and PTs went about the sickening business of killing survivors in boats, rafts or wreckage. Fighters mercilessly strafed anything on the surface. On 5 March the two PTs which had sunk Oigawa Maru put out to rescue a downed pilot and came on an enemy submarine receiving survivors from three large landing craft. Torpedoes missed as the U-boat crash-dived. The PTs turned their guns on, and hurled depth charges at the three boats—which, with over a hundred men on board, sunk. It was a grisly task, but a military necessity since Japanese soldiers do not surrender and, within swimming distance of shore, they could not be allowed to land and join the Lae garrison.
>
> Japanese submarines and destroyers saved 2,734 men from the convoy, but over 3,000 were missing.[91]

It is difficult to accept Professor Morrison's facile statement that Japanese soldiers do not surrender and his conclusion that a legitimate military necessity was involved. Some members of the Japanese Armed Forces, including the highly motivated Kamikaze pilots who participated in the Philippine and Okinawa operations, did surrender. It is not credible that Japanese soldiers without weapons who, it is assumed, could have made it to the New Guinea

shore would have become a military asset to the Japanese Army there. The greater probability concerning a then-unknown future is that they would have become an additional burden upon the supply and medical resources of that army.[92] Another historian, Professor Ronald H. Spector, has provided a substantially similar factual account of the events following the Battle of the Bismarck Sea but has indicated some skepticism concerning the claim of military necessity.[93]

If the same legal standards applied to Germans and Japanese who killed helpless survivors are followed in evaluating the actions of the U.S. Army Air Forces and the U.S. Navy following the Battle of the Bismarck Sea, there is no way they can be described as other than flagrant violations of customary and treaty law. It is a serious reflection on the entire chain of command that there was no investigation and no charges were brought against those who issued the orders. Justice Robert H. Jackson, the chief United States prosecutor before the International Military Tribunal at Nuremberg, stated the basic legal principle in 1945:

> If certain acts in violation of treaties are crimes, they are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us.[94]

Hague Convention X for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention (1907), a treaty of the United States, provides in relevant part:

> After each engagement, the two belligerents, so far as military interests permit, shall take steps to look for the shipwrecked, sick and wounded, and to protect them, as well as the dead, against pillage and ill-treatment.[95]

The limitation in the treaty concerning "military interests" refers to legitimate military interests which are recognized as including only lawful objects of attack and therefore prohibits attacks on helpless survivors.

C. Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked members of Armed Forces at Sea (1949)

The four 1949 Geneva Conventions for the protection of war victims[96] were written in the shadow of the Second World War and were designed to prevent repetition of some practices associated with that conflict. Geneva Convention II sets forth more detail than Hague Convention X (1907) and in article 18 (1) provides:

> After each engagement, Parties to the conflict shall without delay take all possible measures to search for and collect the shipwrecked, wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled.

The significance of this provision is that in addition to making "the shipwrecked, wounded and sick" unlawful objects of attack, it imposes

affirmative duties in terms of their protection and care on a non-discriminatory basis. Articles 22-35 provide more effective immunization from attack for hospital ships while prohibiting their use "for any military purpose" or for any acts "harmful to the enemy." Such ships may not possess or use secret communication codes and must be appropriately marked and notified to the enemy belligerent so as to facilitate their identification as hospital ships. Articles 36-40 provide enhanced protection for medical personnel and for medical transports including aircraft.

D. Geneva Protocol I Concerning International Armed Conflicts (1977)

The Geneva Diplomatic Conference on Humanitarian Law, which met for a period of several weeks in each of the four years from 1974 to 1977, produced Protocol I concerning international armed conflicts and Protocol II concerning internal armed conflicts. These Protocols deal with both the methods of armed conflict (known traditionally as "the Hague Law") and the protection of war victims (known traditionally as "the Geneva Law"). The Protocols are designed to supplement the Geneva Conventions of 1949 by adding provisions which have become necessary as a result of more recent developments in the methods of armed conflict.

Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts[97] deals with both the methods of armed conflict and the protection of war victims in land combat situations, including those involving aircraft, as well as lawful objects of attack. Protocol I is a treaty in force with 86 state-parties currently, including several middle level military powers and allies of the United States.[98] This constitutes more than half of the states in the world community and accords the Protocol a significant status as law through the agreement of states. In addition, many of the provisions of the Protocol are codifications of customary law.[99] The two major military powers which are state parties are the Peoples Republic of China and the Soviet Union. The position of the Reagan Administration was that Protocol I, which the United States has signed, will not be submitted to the ratification process.[100]

Articles 48-67 of the Protocol comprise a section which provides certain protections for the civilian population from the effects of hostilities including attack by aerial bombardment. Article 49(3) refers specifically to "sea warfare" and provides:

> The provisions of this Section apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.

Other provisions specify methods and objects of attack which are unlawful. Article 51(4) prohibits indiscriminate attacks and describes them as attacks

"of a nature to strike military objectives and civilians or civilian objects without distinction." Article 51(5) provides in full:

> Among others, the following types of attacks are to be considered as indiscriminate:
>
> (a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and
>
> (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.[101]

Sub-section (b) above is a codification of long-standing customary law. Article 51(6) provides in comprehensive terms that attacks "against the civilian population or civilians by way of reprisals are prohibited," supplementing the prohibition on reprisals against protected civilian persons in Geneva Convention IV for the Protection of Civilian Persons in Time of War.[102] Article 54(1) of the Protocol states: "Starvation of civilians as a method of warfare is prohibited." This appears to prohibit the comprehensive economic blockades imposed by the major Allied naval powers in both World Wars because one of the principal effects of such blockades was the starvation of civilians. A question of fact arises as to what extent particular segments of the civilian population are incorporated into the war effort.

Articles 21-31 concern medical transportation. Article 22 provides a more comprehensive protection for hospital ships and coastal rescue craft than that provided in Geneva Convention II. For example, this article extends the protections of Convention II beyond hospital ships provided by a party to the conflict to also include hospital ships provided by a neutral or other state which is not a party to the conflict or by an impartial international humanitarian organization. The most obvious example of the latter category is the International Committee of the Red Cross. Article 23 provides protection to medical ships and craft whether they are located "at sea or in other waters," thereby covering territorial waters and internal waters such as ports, lakes and rivers.

V. The Application of the Law of Targeting to Selected Situations Since 1945

A. The Korean Armed Conflict

The naval aspects of the Korean conflict were characterized by the overwhelming superiority of the United Nations naval forces.[103] The operational command at sea was exercised by the Commander of the U.S. Seventh Fleet and comprised ships and aircraft of the United States Navy, British Commonwealth navies, and several allied navies. The exercise of

complete control of the seas made it possible to conduct a close-in naval blockade of the Korean coasts which was similar to the blockades in use in the nineteenth century. The North Korean government had no significant naval forces and there was no evidence of successful attempts to breach the blockade. Operational plans provided for the use of visit and search of any enemy or neutral vessels which were encountered. The intercepted vessels consisted largely of North Korea deep-sea fishing vessels equipped with radio transmitters and receivers. There was evidence that a number of these vessels were employed to obtain intelligence concerning the location and disposition of warships under the United Nations Command. These vessels were captured and where appropriate, their crews were made prisoners of war. None of them was entitled to status as immunized objects under the holding in *The Paquete Habana*[104] concerning the immunity of small coastal fishing boats which were not involved in the enemy armed conflict effort.

Fish was a main staple of the Korean diet, particularly for coastal villages, in both the north and the south. It was decided, nevertheless, that fish would be declared contraband and that the elimination of even coastal fishing would add to the enemy logistic problems and provide an inducement to turn civilians against the North Korean regime. Leaflets in the Korean language with the following text were made available to as many North Korean fishermen as could be reached in September 1950:

> The Communists brought this terrible war down upon you. You cannot fish from your boats until the Communists are killed or thrown out. The United Nations Forces are human and do not desire to harm innocent victims of the war, but if you try to fish again before the Communists are completely defeated, you must suffer the consequences. A legal blockade has been declared and is enforced by United Nations Forces.[105]

When fishing was attempted thereafter, coastal boats were confiscated, and in some instances destroyed, and the fishermen were returned to the beach. No evidence was produced which indicated that North Korean military forces suffered significant logistical harm as the result of the ban on fishing. In contrast, there is evidence that North Korean fishing villages were reduced to starvation. Apparently, some of the fishermen were so desperate that they were reduced to attempting to spear fish in shallow water.[106] There is no doubt that this ban constituted a violation of the customary law immunizing coastal fishing boats enunciated in *The Paquete Habana* and codified in Hague Convention XI Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War (1907).[107]

Shore bombardment and aerial bombing in support of United States and allied land forces were conducted in the same way that the U.S. Pacific Fleet operated during the Second World War.[108] In any area where civilian persons and objects were present, every effort was made to confine the bombardment to military targets. An example concerning the bombardment at Inchon prior to and during the famous amphibious landing behind enemy lines which

changed the course of the conflict was provided by the orders of Commander, Seventh Fleet:

> Vice Admiral Struble's orders to the bombardment forces clearly specified that there should be no promiscuous firing at the city itself or at civilian installations. To achieve this, the entire objective area had been divided [in target area maps] into 60 sub-areas. Known military targets had been previously assigned, and those which offered the greatest potential hazard to our landing forces were circled in red. It had been agreed that any ship could fire into a red circle area with or without a "spot" [by observer aircraft]. In the uncircled areas, however, firing was permitted only if definite targets were found and an air spot was available. This differentiation between types of areas was adopted to reduce destruction of non-military targets to a minimum, to save the city of Inchon for occupation forces, and to avoid injury to civilian personnel.[109]

There is substantial evidence that this same systematic distinction between civilians and civilian objects and military personnel and objects was made when the bombardment objectives were located in North Korea in proximity to civilians there. The result was that shore bombardment was conducted in substantial compliance with Hague Convention IX Concerning Bombardment by Naval Forces (1907).[110]

B. The Cuban Missile Crisis: Self-Defense and Targeting

The issue of the lawfulness of naval targeting is usually considered apart from the issue of self-defense or aggression in situations of ongoing armed conflict. Where there is no ongoing armed conflict, it is necessary to comply with the international law of self-defense in order to provide authority for the use of naval targeting. There are three indispensable requirements to justify in law military measures involving naval targeting which are based upon a claim of self-defense.[111] They are: (1) A good faith attempt to use peaceful procedures; (2) actual necessity (as opposed to a sham or pretense) in the context of either an existing armed aggression or a threat of armed aggression against the defending state which is both credible and imminent; and (3) proportionality in responding defensive measures. The elements of these requirements, which were developed over a long period of time in customary international law, are now codified in the United Nations Charter, a treaty of the United States.

Article 2(3) of the Charter provides:

> All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

Article 2(4) provides:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

The complementary article 51 provides in relevant part:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs. . . .

The "inherent right," which is the customary law, requires both actual necessity for and proportionality in responding defensive measures. The English language text of article 51 is neither well-drafted nor consistent with the negotiating history at the San Francisco Conference which reveals that reasonable and necessary anticipatory self-defense was retained and that self-defense is not limited only to the situation of an "armed attack." The wording cannot be read as if it stated: "if, and only if, an armed attack occurs." The more carefully drafted and equally authentic French text of article 51 uses the term "aggression armee" which includes, but is not limited to, armed attack, and this is consistent with the negotiating history. The view of Committee I at San Francisco that article 2(4) does not impair the customary law of self-defense is set forth in the words of its rapporteur, "The use of arms in legitimate self-defense remains admitted and unimpaired."[112] The words "inherent right" in the English text refer to the preexisting customary law and, therefore, include anticipatory self-defense. Because the doctrines concerning anticipatory self-defense may be even more subject to abuse than the doctrines concerning an existing armed aggression, the three criteria are applied with greater stringency where anticipatory self-defense is claimed.[113]

A preeminent example of the application of these principles is the famous *Caroline* incident of 1837 which involved a river steamer of that name employed by U.S. nationals to aid the rebels in the then civil war in Canada.[114] The British Government (then the sovereign in Canada) had attempted unsuccessfully to have the U.S. Government prevent assistance to the rebels. Thereafter, Canadian troops came into United States territory and destroyed the *Caroline* to prevent its imminent further use. The British Government claimed reasonable and necessary anticipatory self-defense. The diplomatic exchange is best known for Secretary of State Webster's formulation of the requirements of self-defense as involving a "necessity of that self-defense [which] is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."[115] This statement is too restrictive since a credible threat may be imminent without being "instant" and more than a "moment for deliberation" is required to make a lawful choice of means. The most important of Mr. Webster's words carefully specified the requirements of proportionality as follows:

> [N]othing unreasonable or excessive [is permitted], since the act justified by the necessity of self-defense, must be limited by that necessity and kept clearly within it.[116]

The legal significance of the *Caroline* incident is that it illustrates compliance with the three requirements of international law. The British attempted to use peaceful procedures, were confronted with an imminent danger of attack,

and employed coercion in response which was strictly proportional, and the incident was resolved on this basis.

On October 16, 1962 President Kennedy received the "first preliminary hard information" showing the establishment of missile bases with an offensive targeting capability in Cuba.[117] Aerial surveillance of Cuba was increased and conclusive photographic evidence of the inter-continental capability of the emplacements was obtained in the next few days. On October 18, 1962, Soviet Foreign Minister Gromyko visited the President and assured him that Soviet assistance to Cuba "pursued solely the purpose of contributing to the defense capabilities of Cuba."

President Kennedy and his advisers met in a group that subsequently became known as the "Executive Committee." A wide range of responses, from so-called "pin-point bombing" and invasion to doing nothing, was considered. Because there was no Soviet armed attack, lesser military responses were considered with full realization that if they were ineffective, more coercive uses of military power including naval targeting would be employed.

In the decade of the 1950s, much emphasis was placed upon plans involving "massive retaliation" with nuclear weapons or, as it was put informally, "a bigger bang for a buck." In contrast, some naval officers and civilians at the Naval War College in Newport and in the Navy Department in Washington continued to manifest an interest in limited uses of naval power. Among them was Rear Admiral Robert D. Powers, USN, who in 1958 wrote an influential article in the Naval Institute *Proceedings* entitled "Blockade: For Winning Without Killing."[118] The article emphasized the potential uses in the nuclear age of a limited naval blockade with characteristics quite different from the comprehensive economic blockades conducted successfully by the Allied powers in two World Wars. In October 1962, when Admiral Powers was serving as the Deputy Judge Advocate General of the Navy, he wrote the initial draft of a proposal for a limited naval blockade of Cuba to interdict further missiles and components and to remove the existing ones. Following consultations with Rear Admiral Mott, the Navy JAG, Admiral Anderson, the Chief of Naval Operations, and General Maxwell Taylor, the Chairman of the Joint Chiefs of Staff, some changes were made in the draft and General Taylor took it to the "Executive Committee" where it was considered along with other recommendations in formulating the President's proclamation of October 23 entitled "Interdiction of the Delivery of Offensive Weapons to Cuba."[119] In the text, as in the title, the term "blockade" was avoided so that there could be no confusion between the limited measures taken and the comprehensive economic blockades of the World Wars. The effectuation of the quarantine-interdiction, nevertheless, involved a limited naval blockade with offensive missiles having nuclear capability and inter-continental range classified as "prohibited material" which was functionally equivalent to contraband.

The President announced the measures to be taken in a radio and television address on October 22 which, in substance, made a claim of necessary and reasonable anticipatory national self-defense. On October 23 the prevailing opinion in the United Nations Security Council, which was initially skeptical about the factual claims made by the United States, changed drastically with the circulation by Ambassador Stevenson of copies of the aerial photographs showing the clandestinely established missile launching sites in Cuba. Also on October 23 the Organ of Consultation of the Organization of American States made the claim of anticipatory collective self-defense. Beginning on October 24, the ships carrying further offensive weapons to Cuba turned back rather than encounter the blockading naval forces. What had appeared at times to be a potential nuclear confrontation between the United States and the Soviet Union was resolved by the Kennedy-Kruschev Agreement which resulted in the removal of the existing missile emplacements.[120]

The United States' responding measures in the Cuban Missile Crisis met each of the legal requirements for anticipatory self-defense. In view of the misleading statements made to the President by Soviet Foreign Minister Gromyko, it was deemed that the requirement of attempted peaceful procedures had been met and that it was futile to attempt further communications on the subject at that time. The drastic change in the nuclear balance of forces which would have resulted from the emplacement of Soviet missiles with nuclear capability in Cuba constituted the most serious kind of imminent danger to the United States and the Western Hemisphere. The character of the danger required that action be taken before the missiles were armed and operational. If delay had taken place until the missiles could be fired or used as the basis for "nuclear blackmail," it would have been too late. For these reasons, the requirement of an actual and imminent danger was met. The limited naval blockade amounted to the least possible use of military force in response and easily met the requirement of proportionality.

The operational planning for the limited naval blockade of Cuba included consideration of the lawful objects of naval targeting and the methods which should be employed against them. If the ships carrying further offensive weapons had not turned back on October 24, the contingency plans would have been acted on and the traditional procedures applicable to ships attempting to breach a blockade would have been used. The penultimate paragraph of the Presidential Proclamation provided:

> Any vessel or craft which may be proceeding toward Cuba may be intercepted and may be directed to identify itself, its cargo, equipment and stores, and its ports of call, to stop, to lie to, to submit to visit and search, or to proceed as directed. Any vessel or craft which fails or refuses to respond to or comply with directions shall be subject to being taken into custody.[121]

The ultimate sanction was reserved for ships which refused to submit to visit and search or attempted to run the blockade. Such ships would have

become lawful objects of attack and after failure to respond to warning could be sunk by naval gunfire. The final paragraph of the Presidential Proclamation stated:

> In carrying out this order, force shall not be used except in case of failure or refusal to comply with directions, or with regulations or directives of the Secretary of Defense issued hereunder, after reasonable efforts have been made to communicate them to the vessel or craft, or in case of self-defense. In any case, force shall be used only to the extent necessary.[122]

The Cuban Missile Crisis, in addition to providing a modern model of the criteria for lawful anticipatory national and collective self-defense, illustrates the flexibility of naval force in achieving national objectives without the destruction of human or material values through its presence at the blockade line and without employing the full range of coercive measures which it possesses. The compliance with the international law criteria of self-defense provided legal authority for the use of the blockade and the necessary measures of naval coercion to enforce it.

C. The Attack on the U.S.S. Liberty

The 1967 attack on the *Liberty* has been summarized as follows:

> At 1403 on Thursday, 8 June 1967 the U.S. electronics intelligence ship *Liberty* (AGTR 5) was steaming at a leisurely five knots, 14 miles offshore from the Egyptian town of El Arish on the Mediterranean coast of Sinai, when she was attacked by Israeli fighter-bombers. The attack continued for seven minutes, leaving eight of the ship's crew dead or dying, more than 100 wounded, and the ship riddled and burning.
>
> Fourteen minutes later, the *Liberty* was attacked by three Israeli torpedo boats which raked the ship with gunfire—killing another four men—and then launched torpedoes. One torpedo hit a communications compartment, multiplying the *Liberty's* dead to a total of 34. Within 30 minutes of the torpedo attack, two helicopters carrying armed troops appeared alongside, and two jet fighters loitered in the sky astern as if poised for strikes. As suddenly as it had started, everything stopped. Israel said it was a "mistake."[123]

It should be added that the attacks took place on a sunny day in international waters following a long period of Israeli aerial surveillance of the vessel.[124] The *Liberty's* flag at the mainmast was clearly visible and its white hull identification markings as well as its physical appearance made it very different from any Egyptian warship or Egyptian flag merchant ship. Following the torpedo attack, life rafts were dropped over the side of the ship, secured by a heavy line so that they would be available readily in case the order to abandon ship had to be given. The torpedo boats attacked the life rafts with gunfire, sinking two and cutting the line on the third. The Israeli torpedo boats then sped away taking the third life raft with them.

There are two inescapable conclusions which follow from the facts involved in the attack. First, the facts show that the attack was deliberate. The Government of Israel offered a number of unpersuasive excuses for the attack including that the ship was mistaken for the Egyptian naval coastal transport

El Quseir which was a ship half the size of the *Liberty* and of distinctly different appearance. The six hours of close-in aerial surveillance of the ship prior to the initial aerial attack combined with the ideal visual conditions rule out the possibility of a mistake.[125]

The second necessary conclusion is that the law applicable to objects of attack was violated. The *Liberty* was a neutral ship sailing in international waters and it was apparent that it was not participating directly or indirectly in any belligerent state's naval war effort. As such, it was a ship lawfully immune from attack. In addition, the life rafts would have been illegal objects of attack in any circumstances. The attack on the life rafts, which was the last attack when the *Liberty* was afire and listing heavily, was a violation of the Geneva Convention II for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea of 1949.[126] Whatever the Israeli motivation for the attack may have been, the conclusion of its illegality remains.[127]

D. The Vietnam Armed Conflict

One of the problems confronted by the government of the Republic of Vietnam (South Vietnam) in the course of the ongoing hostilities in 1965 was the infiltration by small craft of enemy weapons and supplies through its territorial and contiguous waters. Operation Market Time, a cooperative endeavor of the U.S. Navy and the South Vietnam Navy, was designed to provide surveillance and inspection to prevent such infiltration in the three-mile territorial sea and in a nine-mile contiguous zone.[128] The time-honored procedures of visit and search were employed. Gunfire from naval vessels was the ultimate sanction, but it was not employed unless visit and search was resisted.[129] Because the operation was conducted within territorial waters where sovereign authority existed and within a reasonable contiguous zone, there was no conflict with international law. The measures employed were an aspect of the overall South Vietnamese claim to self-defense and the only objects of attack were lawful since they were limited to craft participating in the enemy war effort and resisting visit and search.

By 1972 most of the United States Army and Marine Corps forces had been withdrawn from Vietnam. In late March and early April of that year, the Democratic Republic of Vietnam (North Vietnam) launched a major attack across the "Demilitarized Zone" into South Vietnam. The U.S. Government responded with air attacks and a mining campaign directed against the port of Haiphong and other North Vietnamese ports.[130] The great majority of weapons and other military supplies imported by North Vietnam arrived by sea, and about 40 cargo ships called at these ports each month. President Nixon announced the mining May 8, 1972. Thereafter, it was announced that the ports, including internal and territorial waters, would be mined commencing at 0900 Saigon time on May 9 and that the mines were set to activate

automatically at 1800 hours Saigon time on May 11. This was done to permit vessels then in North Vietnamese ports ample time to depart before the mines were activated. The mines were laid by aircraft from U.S. Navy carriers and the interdiction resulted in no foreign merchant ships being sunk. Even though the United States did not use the blockade terminology, the mining campaign complied with the historic criteria for a close-in blockade. The announcement of the mining was widely publicized so that neutrals were informed in advance. It was limited to North Vietnam and did not block access to neutral ports. The blockade appears to have been effective and easily met the criteria of the Declaration of Paris that a blockade "must be effective, that is to say maintained by a force sufficient really to prevent access to the coast of the enemy."[131] In addition, the mines were passive weapons and no ship was made an object of attack unless it activated the mines by entering or leaving one of the North Vietnamese ports. In comparison with the aerial bombing campaign where military objects were attacked with the possibility of ancillary civilian destruction,[132] the mining was a very restrained response to the North Vietnamese attack.[133] For all of these reasons, the mining complied with both the historic and contemporary criteria of international law concerning objects of attack.

The available evidence indicates that the U.S. Navy conducted shore bombardment of military objectives under the same limitations which were observed during the Korean conflict.[134] The bombardment was sometimes conducted in support of United States and South Vietnamese ground force operations. The objects of attack were lawful for the same reasons that the objects of attack were lawful in the shore bombardments during the Korean conflict.[135]

E. The Falklands/Malvinas Armed Conflict

Following the Argentinian invasion and conquest of the Falklands/Malvinas Islands in early April 1982 (which was accomplished without bloodshed due to the Argentine avoidance of civilian casualties), Great Britain sent a naval task force to regain the islands.[136] The task force was comprised of two small aircraft carriers with V/STOL (vertical short take off and landing) aircraft, five nuclear-powered attack submarines, eight guided missile destroyers, fifteen general purpose frigates, and a number of smaller combatant vessels including minesweepers and landing craft. The task force also contained several Royal Fleet Auxiliaries and a number of requisitioned commercial vessels including the liners *Canberra* and *Queen Elizabeth II*, used as troop transports, and the liner *Uganda*, used as a hospital ship. The entire task force, except for the *Uganda* which was not made an object of attack by Argentina,[137] consisted of vessels which were lawful objects of attack. Argentine Air Force and Navy aircraft inflicted substantial damage on ships of the task force and sank the destroyers *Sheffield* and *Coventry*, the frigates *Antelope* and *Ardent*, and

the landing craft *Sir Galahad*.[138] An aircraft-launched missile, apparently intended for one of the British aircraft carriers, sank the merchant ship *Atlantic Conveyor* which had participated in the naval war effort by carrying a cargo of helicopters and other military equipment.

On May 1 the nuclear submarine HMS *Conqueror* shadowed an Argentine Navy task force consisting of the large light cruiser *General Belgrano*[139] and two destroyers equipped with Exocet anti-ship missiles. The task force was operating south of a British exclusion zone of April 12 which covered a circle from the center of the islands with a 200 mile radius. On May 2 the *Conqueror* received permission from the British Cabinet to attack and it sank the *Belgrano* with two torpedoes, causing the death of more than 300 members of the crew.[140] There can be no doubt but that this was the sinking of a lawful object of attack. The British maritime exclusion zone was, however, interpreted by some as not extending to objects of attack outside of the zone.[141] The apparent outcome was a British naval victory followed by a substantial political defeat in world public opinion. After the sinking of the *Belgrano*, Argentine surface combatants remained within the Argentine territorial and internal waters.

On June 6 the U.S. Maritime Administration informed both Great Britain and Argentina of a list of United States flag vessels and United States interest vessels (owned by U.S. nationals but flying a foreign flag of convenience) traversing the South Atlantic to ensure that these neutral vessels would not be attacked. The U.S. interest Liberian flag tanker *Hercules* was sailing from the East Coast of the United States to Alaska via Cape Horn.[142] On June 8, when it was approximately 600 nautical miles off the Argentine coast and 500 miles from the Falkland Islands, it was attacked by Argentine aircraft in three different strikes using bombs and air-to-surface rockets. It proceeded to Rio de Janeiro harbor and, following a survey by Brazilian Navy authorities who determined that the damage was extensive and that unexploded bombs could not be removed safely, it was taken out to deep water and sunk. As a neutral vessel not participating in the British naval effort, the *Hercules* was clearly not a lawful object of attack. Following the refusal of the Government of Argentina to pay compensation, the owner brought an unsuccessful suit against that country under the Federal Alien Tort Act in the United States.[143]

F. The Iran-Iraq Armed Conflict

The Iranian war effort was supported financially almost entirely by the export of its oil.[144] The "Tanker War" of 1980-1988 was carried on by Iraq exclusively through air attacks, and the targets of the substantial majority of Iraqi attacks were tankers transporting Iranian oil. Both Iran and Iraq proclaimed exclusion zones in which shipping was subject to attack. Approximately one half of the Iraqi attacks were within the Iraqi prescribed exclusion zones, and the other half were within the Iranian exclusion zone.[145]

The available information indicates that most of the Iraqi attacks were not preceded by visual identification of the target. Apparently Iraqi Air Force planes targeted radar location of ships on the assumption that such identification of targets within one of the exclusion zones must be a tanker carrying Iranian oil or a tanker in ballast which was scheduled to take on Iranian oil. Because of the location of the targets in the exclusion zones and the usual absence of immune vessels from such zones, the Iraqi attacks cannot be appraised as indiscriminate even though carried out without visual identification.

The lack of visual identification was a cause of the Iraqi accidental attack on the guided-missile frigate *U.S.S. Stark* (FFG-31) on May 17, 1987, in international waters outside of any of the exclusion zones.[146] The air-to-surface missiles struck the ship, killing 37 crew members and wounding a substantial number of others. Published reports indicate that the *Stark* personnel and equipment were not ready to defend the ship even though the attacking aircraft was identified before the missiles were fired. Efficient damage control procedures prevented the *Stark* from sinking. It is apparent that the *Stark*, as a neutral warship in international waters, was not a lawful object of attack and the Iraqi Government apologized, assumed full responsibility, and agreed to pay damages.

The analysis of the lawfulness of the Iraqi air attacks is clearly applicable to the targeting of Iranian flag tankers. In addition, a general rule is that neutral ships acquire the character of an enemy merchant vessel when they are participating directly or indirectly in the enemy war effort.[147] Consequently, neutral flag tankers involved in the export of Iranian oil were equally lawful objects of attack by the Iraqi Air Force. Iran could not lawfully immunize its export of oil from attack by simply placing it on neutral ships.

Early in the war, Iranian air attacks knocked out Iraqi oil terminals in the Gulf and effectively prevented access to Iraqi ports. Thereafter, Iraq exported its oil overland by pipeline and received some of its war sustaining material through Kuwaiti and Saudi ports.[148] The six neutral states which comprised the Gulf Cooperation Council were increasingly concerned about the Iranian attacks on neutral shipping. In partial response to this concern, the United Nations Security Council adopted Resolution 552 on June 1, 1984. It reaffirmed "the right of free passage in international waters and sea lanes for shipping en route to and from all ports and installations of the littoral States that are not parties to the hostilities," condemned the Iranian attacks on "commercial ships en route to and from the ports of Kuwait and Saudi Arabia," demanded that such attacks "cease forthwith," and that there "be no interference with ships en route to and from States that are not parties to the hostilities." This amounts to a clear statement of the right of neutral shipping to be free from attack in international waters. The Security Council took this position even though the facts showed that both Kuwait and Saudi Arabia were providing

significant assistance to the Iraqi war effort by the overland transport of supplies and in other ways. The Council apparently was convinced that, on balance, the Gulf Cooperation Council states and their shipping retained neutral status. This decision seems to have been influenced by the fact that the neutral ships of the Gulf Cooperation Council states, including the Kuwaiti reflagged tankers, were not engaged in assisting the Iraqi war effort by carrying Iraqi oil. It should be added that Resolution 552 does not condemn the Iraqi attacks.

Iran's air and surface attacks on shipping typically followed visual identification. The selected targets were indiscriminate in that they included unlawful attacks on ships engaged in genuine inter-neutral trade. Some of the targets selected were ships carrying Iraqi war-sustaining material to Kuwaiti or Saudi ports for overland transport to Iraq. While the attacks caused damage to ships and personnel, they did not usually bring about sinkings because of the lack of efficient anti-ship missiles.[149] Although Iran had sufficient surface combatant ships to conduct visit and search, there is no evidence that it did so on a regular basis. Consequently, the contraband or immune character of particular cargoes was usually unknown to Iranian attackers. Iran claimed that its actions were in reprisal to the Iraqi attacks, but since these Iraqi attacks were lawful, there is no basis for the claim. The indiscriminate Iranian attacks must be appraised as unlawful.

Iran also laid moored mines, many of which broke their cables, in the international waters of the Gulf. Unlike the mining of North Vietnamese ports, where the location of the mines in territorial and internal waters and the notice to neutral shipping resulted in no damage to neutral ships, the Iranian mining was not announced and was apparently directed at neutral shipping.[150] This unlawful activity was substantially curtailed following the United States helicopter attack and capture of the Iranian minelayer *Iran Ajr* on September 21, 1987.[151] The minelaying was taking place about 50 miles northeast of Bahrain in an area used by ships before moving to oil-loading terminals.

The U.S. Middle East Force which had previously consisted of only three to five ships was substantially augmented during 1987.[152] In early 1987 the Government of Kuwait was increasingly concerned about Iranian attacks on tankers transporting Kuwaiti oil and it approached both the Soviet Union and the United States for assistance. Kuwait chartered three Soviet-flag long-hull tankers.[153] In May of the same year the Kuwaiti and United States Governments agreed that the United States would reflag eleven Kuwaiti tankers consistent with recognized international legal procedures.[154] The plans and procedures for U.S. Navy escort of these neutral tankers were agreed upon by the Middle East Force and the Kuwaiti Oil Tanker Company. In the initial convoy of reflagged tankers in July 1987, the lead tanker, the 401,382 ton *Bridgeton* struck a mine.[155] It successfully completed the voyage at reduced

speed, although it was subsequently out of use for several months while the damage was repaired. Since the hull of the *Bridgeton* was substantially thicker than the hulls of the escorting warships, its master recommended that the escorts fall in astern of his ship, which they did.[156] The *Bridgeton* as a neutral tanker not participating in the war effort of either belligerent, was an unlawful object of attack.

A number of small Iranian combatant vessels became lawful objects of attack by approaching the neutral vessels convoyed by the U.S. Navy in a hostile manner and were driven off or sunk by U.S. Navy vessels or helicopters. Meanwhile, because of the danger to other neutral shipping, including attacks by small Iranian combatant vessels using machine guns and rocket-propelled grenades, the British, French, Italian, Dutch and Belgian navies sent a number of small combatant vessels, including minesweepers, to the Gulf and escorted neutral vessels under their flags.[157]

On October 16, 1987, the U.S.-reflagged former Kuwaiti tanker *Sea Isle City* located about ten miles off Mina al-Ahmadi was hit and damaged by a Silkworm missile fired by Iran from Fao Peninsula with the result of damage to the ship and injuries to personnel.[158] Three days later the U.S.Navy shelled and blew up an Iranian oil platform east of Bahrain and destroyed the electronic equipment on a nearby platform. Prior to the shelling, the United States gave notice of the impending action so that personnel would have the opportunity to evacuate the platforms, and it was believed that they did so. This attack on what was considered a lawful target was a limited and proportionate response to the attack on the *Sea Island City*. It should be added that there were no further attacks using Silkworm missiles on U.S. flagged vessels.

G. *The April 1986 Attack on Libya: Self-Defense and Targeting*

Authors' note:

> This section was written based on the best information the authors were able to obtain from the available unclassified sources. They have been reliably informed that there is also classified material which contributed to the decisions made and actions taken in the planning and carrying out of this attack. Neither of the authors has access to such information and such access would not be consistent with their independent professional work. The present analysis emphasizes the law applicable to targeting.

The Reagan Administration claimed that the attacks on Benghazi and Tripoli on April 15, 1986 (April 14, Washington, D.C. time), were justified on the basis of self-defense. It is therefore necessary to apply the international law of self-defense (as in the analysis of the Cuban Missile Crisis) and other possible legal grounds for the attack to the events. The law of targeting will then be applied to determine the compliance with its requirements by the U.S. Navy and Air Force in the attack.The factual background which will be examined initially is essential to an understanding of the law.

1. The Factual Background

Attacks took place at the El Al Israel airline counters in the Rome and Vienna airports on December 27, 1985, resulting in 19 civilian casualties including five United States nationals, and among them, Natasha Simpson, an 11 year old girl.[159] President Reagan commented on those grim events in the opening statement at his press conference on January 7, 1986:

> It's clear that the responsibility for these latest attacks lies squarely with the terrorist known as Abu Nidal and his organization. . . . But these murderers could not carry out their crimes without the sanctuary and support provided by regimes such as Col. Qadhafi's in Libya. Qadhafi's longstanding involvement in terrorism is well-documented, and there's irrefutable evidence of his role in these attacks. . . . By providing material support to terrorist groups which attack U.S. citizens, Libya has engaged in armed aggression against the United States under established principles of international law, just as if he [*sic*] had used its own armed forces.[160]

In response to a question at the press conference, the President stated, *inter alia*, "I can assure you that we have the evidence. . . . Abu Nidal has more or less moved his headquarters there into Libya."[161] The President issued an Executive Order on the same day, which stated:

> I, RONALD REAGAN, President of the United States of America, find that the policies and actions of the Government of Libya constitute an unusual and extraordinary threat to the national security and foreign policy of the United States and hereby declare a national emergency to deal with that threat. . . .[162]

Secretary of State Schultz' address to the National Defense University on January 15, 1986, considered recent episodes of terrorism under the title, "Low-Intensity Warfare: The Challenge of Ambiguity."[163] He recommended military responses to such "warfare" conducted against the United States while pointing out, "The law requires that such actions be necessary and proportionate."[164] Apparently the Libyan connection with the airport murders was that some of the perpetrators carried passports which had belonged to Tunisians who had worked in Libya.[165] This information is equivocal and consequently may or may not indicate Libyan support for these terrorist actions. Professor Richard E. Rubenstein, in his study of contemporary terrorism, states:

> In fact, no evidence demonstrating Libyan complicity in these attacks was ever produced. Calling this episode of terrorism "war" was primarily a frustrated response, signifying acceptance of the principle of collective responsibility: if we cannot find and punish the perpetrators, we will punish their suppliers and sympathizers. . . . Militarily, it reflects the questionable premise that drying up the terrorists' external sources of supply will terminate their activities. Morally, it is intended to justify retaliation in which innocent civilians get hurt. And politically, it ends the search for indigenous social causes of terrorism, preferring to view local violence as a product of policies formulated in some foreign capital.[166]

While it is very important to search for, identify and attempt to ameliorate or correct the "indigenous social causes of terrorism," the role of the suppliers of terrorism should not be overlooked. On February 8, 1988, *The Washington*

Post reported an interview with Qaddafi by Katherine Graham, chairman of The Washington Post Company, and correspondents of the *Post* and *Newsweek* under the headline, "Gadhafi: Terrorism is Response to U.S. Policies."[167] The article stated, *inter alia*:

> Asked about Libyan involvement in supplying weapons to groups that carry out terrorist actions, Gadhafi did not directly deny such involvement but appeared to defend it on the grounds that it balanced U.S. intervention elsewhere:
>
> "Why is Reagan involved with the contras in Nicaragua, with UNITA in Angola, with Afghanistan? This is the same question. Let's all agree that everyone concern himself only with things in his own borders."[168]

It is also significant that the political causes of terrorism in the Middle East include the United States Government's comprehensive military and economic support for the State of Israel.[169]

The Gulf of Sidra is bounded by Libyan territory except for an opening to the Mediterranean on the north which is approximately ten times the width of the opening permitted for a "juridical bay" (24 nautical miles or less) under the jurisdiction of the adjoining state.[170] The Government of Libya has, nevertheless, claimed that the Gulf of Sidra is a part of its internal waters, and its principal domestic airline traverses the northern part of the Gulf between the two largest Libyan cities, Benghazi and Tripoli. Freedom of the seas in the Gulf of Sidra outside of the 12 mile limit has been successfully maintained for many years by diplomatic protest[171] and by task forces of small combatant vessels of the British, French and U.S. Navies. In contrast, from late January until late March 1986, a 30 ship task force of the U.S. Sixth Fleet conducted surface and aerial operations in and adjacent to the Gulf of Sidra. From March 23 until March 26 three carrier battle groups, the *Coral Sea*, the *Saratoga*, and the *America*, operated in the same area, sinking Libyan missile boats and downing Libyan fighter aircraft which were claimed to approach with "hostile intent."[172] The Reagan Administration claimed publicly that this was a routine maintenance of the right of freedom of navigation, but accounts in the media stated that it was privately conceded to include a possible provocation. For example, Messrs. Hoffman and Cannon, writing in *The Washington Post* on March 25, 1986 stated:

> Although the White House claimed yesterday that the purpose of the naval exercise was solely to demonstrate freedom of navigation in an international waterway, officials said privately that the exercise was planned with a realization that it might provoke a military confrontation with Qaddafi and a chance to underscore Reagan's determination to deal firmly with international terrorism.[173]

Previously the exercise of freedom of navigation in this area had not been provocative because it was maintained by small naval task forces. Such an exercise can become provocative, however, by using a larger force than that which is routine and necessary.

The bombing of the La Belle discotheque in West Berlin which followed on April 5, 1986, caused the immediate deaths of a U.S. Army enlisted man and a young Turkish woman and injury to many others including U.S. military personnel. On the evening of April 14, the White House issued a statement that "In light of this reprehensible act of violence and clear evidence that Libya is planning future attacks, the United States has chosen to exercise its right of self-defense."[174] In an address to the nation on the same evening, President Reagan stated:

> This monstrous brutality is but the latest act in Colonel Qadhafi's reign of terror. The evidence is now conclusive that the terrorist bombing of La Belle discotheque was planned and executed under the direct orders of the Libyan regime. . . . Our evidence is direct; it is precise; it is irrefutable. We have solid evidence about other attacks Qadhafi has planned against the U.S. installations and diplomats and even American tourists. . . . Self-defense is not only our right, it is our duty. . . . We Americans are slow to anger. We always seek peaceful avenues before resorting to the use of force—and we did.[175]

Seymour M. Hersh, an investigative reporter for the *New York Times*, wrote in February 1987:

> There was widespread concern and anger inside the National Security Agency over the Administration's handling of the Libyan messages intercepted immediately after the April 5 terrorist bombing of a West Berlin discotheque. The White House's reliance on these messages as "irrefutable" evidence that Libya was behind that bombing was immediately challenged by some allies, most notably West Germany. Some NSA experts now express similar doubts because the normal intelligence channels for translating and interpreting such messages were purposely bypassed. As of this month, the NSA's North African specialists had still not been shown these intercepts.[176]

As an example of doubts expressed in Western Europe, the German source, *Der Spiegel*, published an article in April 1986 entitled "A Complexity of Findings—Secret Service Dispute Over Libyan Radio Messages." The article stated that the "U.S. National Security Agency" and its German equivalent had reached opposite conclusions as to the meaning of the radio intercepts. One of its conclusions stated:

> Radio messages of such clarity which document a direct responsibility of the Libyan revolutionary leader Col. Muammar el Ghaddafi for the Berlin bombing were never recorded.[177]

Mr. Hersh, in the article quoted above, also stated:

> William J. Casey, then Director of Central Intelligence, personally served as the intelligence officer for a secret task force on Libya set up in mid-1981, and he provided intelligence that could not be confirmed by his subordinates. Some task force members suspected that much of Casey's information, linking Qaddafi to alleged "hit teams" that were said to be targeting President Reagan and other senior White House aides, was fabricated by him.[178]

In early 1986 a report, entitled *Libya Under Qadhafi: A Pattern of Aggression* and covering alleged Libyan terrorism through the December 1985 attacks

at the Rome and Vienna airports, set forth the State Department's understanding of the facts:

> The main targets of direct Libyan terrorist activities have been expatriate Libyan dissidents and leading officials of moderate Arab and African governments.[179]

The report also states that these attacks have taken place in many countries and that Libya has planned anti-exile attacks in the United States, but only one example is provided.[180] There is a "Chronology of Libyan Support for Terrorism 1980-85"[181] in the report which lists a total of 58 incidents, but only eight were alleged to involve direct action by Libya and of these none were stated to be directed against United States nationals. Two of the others referred to Libyan armed forces actions against Chad and one referred to the August 1981 incident in which two Libyan SU-22s were shot down by U.S. Navy aircraft. Some of the incidents appear to be based upon hearsay evidence which would not be admissible in a law court, although some are consistent with possible Libyan support for terrorism. A more recent State Department report issued in 1989[182] accuses Libya of "Reaching for Respectability"[183] and of conducting a "Drive for Influence,"[184] but neither is in violation of international law and both are activities of most national states. The report contains a "Chronology of Libyan Support for Terrorism, 1986-1988"[185] with many of the incidents reported stated to be "believed" or "suspected." Like the earlier report, this one contains some statements which are consistent with possible Libyan support for terrorism.

In summary, the State Department reports fail to produce factual evidence of direct Libyan terrorism against United States nationals, and the information provided concerning Libyan support for terrorism is equivocal. Consequently, the Reagan Administration's claims against the Libyan Government are not substantiated by the State Department's reports.

The Vice President's Report on combating terrorism issued in early 1986 refers to "the uncovering of a pro-Qaddafi conspiracy to carry out three assassinations and to bomb strategic locations in the United States"[186] by the Federal Bureau of Investigation in 1985. The Report contains no details on this subject and the only other reference to Libya reports that Qaddafi stated that Libyans will attack "American citizens in their own streets."[187] If this were to happen, it would be within domestic jurisdiction and police power. Concerning international responses to terrorism, the Report states, *inter alia*:

> Political or economic sanctions directed against sponsoring states offer the least direct danger to lives and property and are more likely than military force to gain international support.[188]

The United States has used such economic sanctions against Libya and has applied the International Emergency Economic Powers Act.[189]

On April 14, 1986 the twelve ministers of foreign affairs of the European community issued an announcement at The Hague which stated, *inter alia*:

> The Twelve have decided to act according to the following lines regarding Libya and, where necessary, regarding other states clearly implicated in supporting terrorism:
>
> — restrictions on the freedom of movement of diplomatic and consular personnel;
>
> — reduction of the staff of diplomatic and consular missions;
>
> — stricter visa requirements and procedures.[190]

The announcement added that no arms or other military equipment will be exported to Libya and that further measures will be considered as necessary.

The Western Economic Summit meeting in Tokyo, May 4–6, 1986 issued "Declarations and statements by the seven Heads of State of Government and the representatives of the European Communities."[191] Concerning international terrorism, it was stated, *inter alia*:

> We specify the following as measures open to any government concerned to deny to international terrorists the opportunity and the means to carry out their aims, and to identify and deter those who perpetrate such terrorism. We have decided to apply these measures within the framework of international law and in our own jurisdictions in respect of any state which is clearly involved in sponsoring or supporting international terrorism, and in particular of Libya, until such time as the state concerned abandons its complicity in, or support for, such terrorism.[192]

The "measures" included refusal to export arms, strict limits on the size of diplomatic missions, denial of entry to suspected persons including diplomatic personnel, improved extradition procedures, stricter immigration and visa requirements, and close bilateral and multilateral cooperation.

A negotiating history of the Tokyo Summit which appeared in the *New York Times*[193] stated that the specific mention of Libya was a last minute change inserted by the Summit leaders after the final draft declaration was presented to them. The European position was reported to be that terrorism could only be combatted effectively by understanding that it arose from legitimate political grievances but, nevertheless, the final text included the declaration that "terrorism has no justification."[194] An informal working paper stated to have been prepared by staff members of the United States delegation conceded that one thing which might well motivate other countries to fight terrorism "is the need to do something so that the crazy Americans won't take matters into their own hands again."[195]

Whatever the motivations, it is clear that the European community's official position is that state supported terrorism exists and that Libya is one offender. Nothing in the community's position, however, provides support for military as opposed to economic and diplomatic sanctions. The *New York Times* reported that President Reagan stated on April 21, 1986, that President Mitterrand of France privately suggested that the United States make an all-out military attack against Libya.[196] This is not consistent with the French President's public position denying overflight rights for the aircraft flying from the United Kingdom to Libya. Apparently the Reagan Administration

did plan a comprehensive military attack upon Libya to be effectuated in cooperation with Egypt. An article in *The Washington Post* of April 2, 1986, by Bob Woodward stated, under the headline "U.S. Unable to Persuade Egypt to Back Plan for Joint Anti-Qaddafi Move":

> Eight months of secret U.S. efforts to win Egyptian approval for a U.S.-Egyptian military operation designed to overthrow Libyan leader Muammar Qaddafi appear to have foundered following public disclosure and rejection of the plan by Cairo, informed sources said yesterday.[197]

2. Application of the International Law Requirements for Self-Defense

The same three basic requirements considered in the analysis of the Cuban Missile Crisis are applicable.[198] They are: the use of peaceful procedures if possible; actual necessity for defense of the national state against an existing armed aggression or an imminent one; and proportionality in responding defensive measures.

The media reported on the Libyan attempts to use peaceful procedures and the United States reaction. For example, two weeks before the U.S. bombing attacks, David H. Ottaway reported on the Libyan attempts to open diplomatic discussions with the U.S. Government:

> In advance of Vice President Bush's trip to Saudi Arabia, Libyan leader Muammar Qaddafi sent two emissaries to Riyadh in an apparent attempt once again to open a dialogue with Washington in the wake of the U.S.-Libyan confrontation last week in the Gulf of Sidra.
>
> Administration officials said they had no intention of responding to Qaddafi's latest overture through the Saudis. They added that they have also rebuffed half a dozen other attempts by Libya to make contact with the United States through various European and Arab channels following the December 27 terrorist attacks on the Rome and Vienna airports. . . .
>
> The would-be European and Arab mediators, including King Fahd himself, were firmly told in January that the administration was not interested either in "a direct or indirect dialogue" with Qaddafi, according to the sources.[199]

The Ottaway article also reports:

> The administration has also told various would-be mediators that it is not interested in striking any "deal" with Qaddafi whereby the Libyan leader would promise to end terrorist attacks against U.S. interests in return for improved relations with the United States, the official said. . . .
>
> In addition to King Fahd, Qaddafi also tried in January to enlist the support of the leaders of Greece, Austria, Malta, Italy and Morocco to open a dialogue with Washington.[200]

Unfortunately, it is necessary to conclude from the events summarized that the Reagan Administration failed to take advantage of the several opportunities presented to it for peaceful resolution of the controversy in spite of President Reagan's statement to the contrary.[201] Consequently, the United

States Government failed to comply with the first requirement to justify a claim of self-defense.

The second requirement of the law of self-defense is that there be an existing armed aggression against the United States or an imminent one which is reasonably anticipated in the near future.[202] The entire law of national self-defense has been developed to protect a national state from armed aggression or an imminent threat of such aggression to its most basic values including its continued national existence and independence. Other legal doctrines, including the recognized right of a state to take limited measures to protect its nationals abroad, have been developed to deal with lesser injuries.[203] The Japanese attack on Pearl Harbor provides an example of a then-existing armed aggression against the United States. An example of a reasonably anticipated imminent armed aggression is the threat to the United States from the clandestine attempted emplacement of Soviet inter-continental missiles with nuclear capability in Cuba.

Both of these examples involved action by major military powers which was directed at the United States as a national entity. In contrast, the claims of President Reagan set forth above[204] refer to injury or threatened injury from a state which has a trivial military capacity in comparison with that of the United States and only concern alleged past and future attacks on individual U.S. citizens rather than the United States as a whole. If a basis for the claim of self-defense can be the probability of future Libyan terrorism, then one is forced to consider possible future acts which are much harder to ascertain than the alleged unclear past events. In evaluating past events, even if it were assumed that Libya was responsible for the bombing at the La Belle discotheque, the attack on Benghazi and Tripoli several days later could not be self-defense to that bombing as an imminent threat.[205]

The determination of whether or not Libyan actions constituted a meaningful threat to the United States should also consider the role of other states in activities termed "terrorism." George C. Wilson and Fred Hiatt, writing on March 26, 1986, stated that:

> U.S. intelligence showed that Iran and Syria probably were more involved in the recent acts of terrorism, but those countries were not the visible symbols of evil that Qaddafi presented. A demonstration of U.S. resolve was necessary and Libya was singled out.[206]

The persistence of such reports was reflected in an interview with Secretary of State Shultz. Lesley Stahl interviewed the Secretary on CBS-TV's "Face the Nation" on January 12, 1986:

> Q. There are reports now that investigators in Europe believe that the terrorists who perpetrated the bombing in Rome and Vienna did not come from training camps in Libya, but came from camps in the Syrian-controlled Bekaa Valley, and then came through Syria into Europe. Are there second thoughts within our government about just exactly how much Libya is to blame for this latest terrorist act?[207]

Secretary Shultz replied, in part, "No. Libya is clearly supporting terrorism in general." In the balance of a long answer he did not mention Syria. The questioner persisted:

> Q. Now, what about Syrian involvement? Just how much is that government responsible?
> A. Syria's picture is a rather different one. I would remind you that Syria has long been on our terrorist list, but Syria's behavior toward all of these things is rather different from Libya's.
> Q. In what sense? How is it different?
> A. In their public attitudes, and because we are working with Syria on a number of fronts in a constructive way.[208]

In Secretary Shultz' news conference on January 9, 1986, he was asked a question about the Iranian role:

> Q. Why the narrow focus on Libya when our own intelligence community has singled out Iran, for example, as a country that trains terrorists, a country that has taken American lives over the past several years in places like Lebanon? Why the lashing out on this one subject and not tackling the others?
> A. Libya is a country that has been, is, and no doubt will continue to be involved in terrorist activities. . . . Insofar as Iran is concerned, we are as concerned anywhere about terrorist activities. We are talking about Libya in this instance. We have very little trade with Iran. . . .[209]

Secretary Shultz did not state that the "little trade" he referred to was principally the Reagan Administration's then secret weapons shipments to Iran.[210] The supply of weapons to Iran, of course, made it unrealistic to treat that country as Libya was being treated. There were also compelling reasons to treat Syria differently. During the Israeli armed attack on the Palestine Liberation Organization and Lebanon in 1982, Israel attacked and destroyed a large part of the Syrian Air Force and the Syrian air defense system. Thereafter, the Soviet Union reinforced its ties with Syria and rebuilt the air defense system.[211] The result was that in 1986 Syria possessed a much more significant defense system than it did in 1982 and an attack on Syria would be much more costly to the attacker than would an attack on Libya. In addition to other reasons, Libya was apparently selected for its military weakness which made it a less credible threat to the United States than either Iran or Syria.

While it is not unlawful to select a weak target in order to minimize casualties to one's own forces, the matter must also be evaluated in terms of the proportionality of probable ancillary civilian casualties. It is impossible to support the finding of President Reagan in his Executive Order of January 7, 1986, that the Government of Libya constitutes "an unusual and extraordinary threat to the national security and foreign policy of the United States."[212] There was simply no threat to the national security, and if there were a threat to foreign policy, it would not justify responding military measures. Because of these considerations, it is impossible to conclude that

the United States complied with the legal requirement of an existing or imminently anticipated armed aggression against it.

The third essential element of a valid claim of national self-defense is proportionality in responding measures. Because of the failure to use available peaceful procedures and the absence of actual necessity, it would be unnecessary to consider the issue of proportionality. Even if the first two requirements for self-defense had been met, there is considerable doubt that the intense use of military coercion in a responding bombing attack could be appraised as proportional. One reason for this doubt is that following the bombing attacks it became clear that the United States had killed and injured many more Libyans (both civilian and military personnel with no indication that any of the victims were involved in any acts of terrorism) than the number of Americans that Libya was accused of either killing or providing support for their killing.

U.S. Navy Regulations, which are routinely treated as law in many contexts including court martial proceedings, are issued by the Secretary of the Navy following the approval of the President.[213] Article 0915 entitled "Use of Force Against Another State" provides in relevant part:

> The right of self-defense must be exercised only as a last resort, and then only to the extent which is absolutely necessary to accomplish the end required.
>
> Force must never be used with a view to inflicting punishment for acts already committed.[214]

In summary, it is very difficult to find legal support for the Reagan Administration's claim that the bombing attack is justified as self-defense.

3. Application of the International Law of Reprisal

It is sometimes suggested that the law of self-defense is inadequate to provide protection against contemporary acts and threats of terrorism and that the law concerning reprisals is more relevant.[215] The traditional law on the subject has three requirements for an act of reprisal to be justified: (1) a response to a violation of international law; (2) an unsatisfied demand for termination of the violation; and (3) a proportion between the original violation and the act of the reprisal.[216] There is some evidence that there may have been a violation of international law by Libyan support for terrorism, and apparently the Reagan Administration carried out the bombing on the basis that the original violation had not been terminated, although they did not at any time claim that the raids were reprisals. The most serious difficulty with application of the law of reprisal is the third requirement of proportionality.

The Geneva Convention for the Protection of Civilian Persons (1949)[217] prohibits reprisals against protected civilian persons. In addition, the well-established customary law prohibits attacks upon civilians. It is clear that the United States bombing attacks were not directed at civilians as such.

Nevertheless, it must have been apparent that the selection of claimed military targets in such close proximity to civilian residences and the French Embassy presented the gravest danger to civilians. The results of the bombing in civilian casualties raise substantial doubt as to whether the requirement of proportionality for reprisals was met.

4. Application of the Law of Targeting

The failure of the claim of self-defense and the serious doubts concerning justification as reprisal mean that there is no clear legal authority for attacking Libyan objectives. It is essential, nevertheless, to examine the bombing attacks under the criteria of the law of targeting.

The operational plan for the bombing of Libya was termed El Dorado Canyon. Because of the denial of over-flight rights by European countries, except Great Britain, the Air Force F-111 aircraft from Lakenheath Air Base in England flew around the west coast of the Iberian Peninsula, entering the Mediterranean at the Strait of Gibraltar, and after repeated refuelings, attacked targets in Tripoli. The Navy aircraft from the carriers attacked targets in Benghazi.

There were five targets specified for the bombing attack: (1) Benina air field at Benghazi where some Libyan military aircraft were on the ground; (2) Benghazi Barracks—the site of Qaddafi's alternate headquarters and command post; (3) Tripoli International Airport where some Libyan military transport aircraft were on the ground; (4) Sidi Bilal military facility in Tripoli—claimed to be a terrorist training school (Libya claimed that it is a school for naval cadets); and (5) Azziziyah compound in Tripoli—Qaddafi's main headquarters and his family's home.[218] Following interviews over a period of three months with more than 70 of the officials planning the attack, Seymour Hersh concludes that Col. Qaddafi was the primary target.[219] Qaddafi was not hit, but Hersh reports concerning his family:

> All eight of Qaddafi's children, as well as his wife, Safiya, were hospitalized, suffering from shock and various injuries. His 15-month-old adopted daughter, Hanna, died several hours after the raid.[220]

President Reagan's executive order number 12,333, section 2.11, entitled "Prohibition on Assassination" states that "No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination."[221] Referring to this order in the context of the Libyan attacks, and particularly the bombing of the Qaddafi family living quarters, one commentator stated:

> If the raid was in fact a veiled execution attempt, it would pit the Reagan Administration against a specific presidential order and substantial legal precedent. In 1976, after public discontent over the revelations of CIA assassination attempts in Chile, Guatemala and Iran, President Ford issued an Executive Order forbidding the Government from authorizing the assassination of world leaders. Both Presidents Carter and Reagan have reaffirmed that ban.[222]

Aviation Week & Space Technology reported under the headline, "U.S. Demonstrates Advanced Weapons Technology in Libya," that a senior military official stated shortly after the attack:

> "Understandably, after the all-Navy action in Libya last month, the Air Force wanted a piece of the action." The official added, "The fact that the Defense Dept. budget is under consideration—and here was an opportunity to show how well the money is being spent on aircraft and weapons—was not overlooked by both services as a side benefit to the mission. Another reason to include the F-111s in the operation was that it showed the support of Great Britain for our antiterrorist activities."[223]

At his joint press conference with Secretary Shultz the evening of April 14, 1986, Secretary of Defense Weinberger said in his introductory comment:

> We used a combination of 500-pound and 2,000-pound laser-guided weapons and precision-guided delayed gravity bombs. All of the Navy planes have returned without casualty. All of the F-111s with one exception, have been accounted for and are returning. . . . The attack was carried out precisely as planned, and it was, as the President said, evidence of very great skill, both navigational as well as the organization of the attack which was a difficult one from the professional point of view and done with great effectiveness. . . .[224]

During the ensuing question period, the following took place:

> Q. There was also a report that you hit part of the French Embassy in Libya. Do you know anything about that report?
> A. Secretary Weinberger. That would be, I think, virtually impossible.[225]

David Blundy and Andrew Lycett, have reported on both the rules of engagement and the civilian casualties.[226]

> The rules of engagement for Operation Eldorado Canyon had been strictly formulated, or so it was claimed in the official U.S. explanation to the British Cabinet: the planes should strike only targets that could be precisely defined and shown to be related to terrorist and military activity. The weapons officer in each plane had to have a 'double lock-on' before he could release his bombs, which meant that he had to fix the target, not only with his forward looking infra-red night sight, but also with his Pave Track radar. Any plane which failed to achieve this was under orders to leave the target area and jettison its bombs over the sea. . . .
>
> At least a dozen bombs and missiles fell in the area of Bin Ashur a [suburb of Tripoli], making craters ten feet deep, knocking out the front of an apartment building and scoring direct hits on private villas. The house next to the French embassy was destroyed and the embassy itself severely damaged. One bomb or missile landed in the center of a park and children's playground. A child's foot was sticking out of the rubble of one building. The body of an old man was fixed in a crouch as if he had been getting out of bed when the bombs hit. Another old man lay on a stretcher outside his villa, killed by falling rubble. It was a gruesome sight.[227]

In another account, David C. Martin and John Walcott report similar civilian damage and conclude that: "Measured by the bomb-damage assessment, the raid was less than impressive."[228] The newspapers reported various inaccuracies in the bombing. For example, Edward Schumacher, reported in the *New York Times*:

> More than a dozen bombs and missiles from the American air raids early Tuesday appear to have missed an air base and hit two farms about two miles away according to evidence seen by reporters on visits to the farms today.[229]

Unfortunately, aerial bombardment even with the most advanced technology remains a very blunt instrument. Operational planners of "surgical strikes," employing "pin-point accuracy," and "precision delivered munitions," should recognize that results consistent with such plans are seldom manifested in an actual bombardment.

Even though there was no prior armed conflict between the United States and Libya, the armed attack brought into effect the law of armed conflict. Ever since the *Prize Cases*,[230] decided by the U.S. Supreme Court during the Civil War, the law of armed conflict has been applicable to the fact of an international armed conflict including episodes of hostilities without requiring a so-called technical state of war. Therefore, Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War (1907),[231] is applicable to the bombing of Tripoli and Benghazi. It prohibits bombing of undefended locations, and military targets in Tripoli and Benghazi were defended even though the Libyan defenses were weak in comparison with the military technology and the weight of the ordnance employed against them. Article 6 of the Convention provides:

> If the military situation permits, the commander of the attacking naval force, before commencing the bombardment, must do his utmost to warn the authorities.

In the bombardment of the Iranian oil platforms in the Persian Gulf, considered previously,[232] prior notice was given so that the personnel would evacuate the platform. In the attacks on Tripoli and Benghazi a probable objective was to kill Libyan personnel alleged to be involved in terrorist training activities and so no warning was given. In view of the ambiguous language concerning "[i]f the military situation permits," it is not clear that Hague Convention IX required a warning. The unfortunate result, however, in addition to the killing of Libyan military personnel who possibly had no connection with terrorism, was the killing of a substantial number of civilians.[233]

The Navy *Commander's Handbook on the Law of Naval Operations* ("NWP 9") under the heading "Incidental Injury and Collateral Damage" provides the legal criteria of the well-established customary international law:

> It is not unlawful to cause incidental injury or death to civilians, or collateral damage to civilian objects, during an attack upon a legitimate military objective. Incidental injury or collateral damage should not, however, be excessive in light of the military advantage anticipated by the attack. Naval commanders must take all practicable precautions, taking into account military and humanitarian considerations, to keep civilian casualties and damage to the absolute minimum consistent with mission accomplishment and the security of the force.[234]

This legal standard is easier to apply in an on-going international conflict than it is to the attacks on Tripoli and Benghazi. The first difficulty here is to determine whether the military objectives which were targeted constituted "a legitimate military objective." It is also difficult to identify the lawful "military advantage" which was anticipated by this attack. Consequently, it is impossible to relate incidental "injury or collateral damage" to civilian persons or objects to such a "military advantage." Rather than seeking military advantage in the attack, the stated objective of the Reagan Administration was to deter claimed Libyan terrorism against U.S. citizens and the hard fact remained that no such direct terrorism was credibly proven to exist either before or after the bombing attack.[235]

A State Department "Fact Sheet" entitled *Libya's Qaddafi Continues Support for Terrorism* contains charges against Libya for the years 1986-1988.[236] It states Qaddafi conducts terrorism against Libyan dissidents[237] and that Libya's foreign policy and diplomatic objectives are inconsistent with those of the United States.[238] It includes a "Chronology of Libyan Support for Terrorism 1986-1988," which details thirty incidents in which "Libyan involvement" was often stated to be "suspected" but without a single incident involving a direct Libyan attack on U.S. citizens, although several attacks conducted by others against U.S. citizens or interests are stated to be supported by Libya but without any evidence.[239] Of the thirty incidents, four are listed as involving "Americans." Concerning the bombing at the La Belle discotheque, the "Fact Sheet" states: "The U.S. Government announced it had direct evidence of Libyan complicity in the attack."[240] There can be no question but that this was "announced," but the evidence of complicity is, on the most favorable view, equivocal. Of course, it is possible that there was secret evidence which cannot be considered in this analysis.[241]

In summary, even if there had been clear legal authority to bomb Benghazi and Tripoli, and full acknowledgment is accorded to the tactical effort to engage only in "precision bombing," the results achieved in the killing of civilians probably violate the law. The existence of ancillary civilian casualties which occur as a result of the lawful targeting of military objectives is not unlawful. The key issue concerns proportionality. On the basis of the information about the attacks on Benghazi and Tripoli, it is not possible to conclude with assurance that the customary law standard of avoiding excessive, that is, disproportionate, injury or death to civilians was met by the targeting.[242]

Authors' Postscript Concerning Subsequent Possible Evidence of Libyan Involvement in the Bombing of LaBelle Discotheque

Since the completion of the text on this subject there have been some references in the media to possible Libyan involvement in the bombing. Most

of the reports indicate that some agents of the former East German secret police, "Stasi", state the existence of a Libyan connection. Among the examples are accounts in *Time* magazine of July 23, 1990 ("World Notes" at p. 54, cols. 1-2), the *Washington Post* of June 21, 1990 (p. A27, cols. 4-5 cont. at p. A30, col. 1) and the *New York Times* of July 15, 1990 (p. 6, cols. 1-6) and July 28, 1990 (p. A4, cols. 4-5).

Two facts must be established to provide legal justification for the military response by the Reagan Administration. The first is unequivocal evidence of significant Libyan involvement. The second is equally unequivocal evidence of knowledge of this before the decision to respond militarily was made. Since most of the reports emanate from the former Stasi, this would require that the Reagan Administration was privy to Stasi sources.

In the event that both were to be established, significant major issues concerning the law of self-defense and of targeting would remain.

VI. The Basic Principles of the Law of Naval Targeting

It is now practicable to set forth the contemporary rules of law concerning naval targeting based upon the development of the customary law in the World Wars and subsequently and upon the treaty law including the London Protocol (1936) and Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949). Because the law applies equally to surface and submarine warships and military aircraft, a single set of basic rules may be formulated. *The Commander's Handbook on the Law of Naval Operations* (NWP 9) adopts a different approach by setting forth separate targeting rules for "Surface Warfare,"[243] "Submarine Warfare"[244] and "Air Warfare at Sea."[245] Although the rules are substantially similar,the separate treatment is apparently designed to indicate that different weapons platforms operate in distinct tactical environments.

The general principles of the law of armed conflict are, of course, applicable to naval targeting. In addition to the basic principles of military necessity and humanity conceived as a single principle of avoiding unnecessary destruction of human and material values,[246] and the Martens Clause[247] which specifies that when the situation is not covered by an existing rule the parties to the conflict remain bound by the customary international law and the usages established by the community of states, the following are applicable:

1. The right of belligerents to adopt means of injuring the enemy is not unlimited.
2. It is prohibited to direct attacks against the civilian population as such.
3. The basic distinction between combatants and non-combatants must be made.[248]

A. Enemy Warships and Military Aircraft

Enemy warships and military aircraft (including naval and military auxiliaries) may lawfully be the objects of attack, destruction, or capture anywhere outside of neutral territory. Since such warships and aircraft are valuable military assets, their capture is always desirable if tactically possible. It is unlawful to refuse quarter to an enemy attempting to surrender in good faith.[249] When an enemy warship has clearly indicated the intention to surrender by hauling down its flag or hoisting a white flag, or by stopping engines, or by responding to the attacker's directions, or by taking to lifeboats, or in any other manner, the attack must be stopped. In many tactical situations a submarine indicates surrender by coming to the surface. Manifestation of surrender by an aircraft is especially difficult. However, if a good faith offer to surrender is made, it must be accepted. One such manifestation would be a willingness to land the aircraft in the territory of the attacker. It is not necessary to formally adjudicate the transfer of title of a captured enemy warship or military aircraft since such ownership vests immediately in the captor's government by the act of capture.[250]

B. Enemy Merchant Vessels and Civilian Aircraft and Neutral Merchant Vessels and Civilian Aircraft which are Participating in the Enemy Armed Conflict Effort

Such merchant vessels and civilian aircraft are valuable assets and should be captured if possible whenever they are located outside of neutral territory. The use of visit and search is not required if identification of status can be made by electronic or other means. If the military situation following a capture prevents the sending or taking in of such a vessel or aircraft for adjudication, it may be destroyed after adequate measures are taken for the safety of crew and passengers.[251] All documents and papers relating to the captured vessels or aircraft should be safeguarded and each case of destruction should be reported promptly to higher command.[252] If capture is militarily impracticable, the vessel or aircraft may be attacked and destroyed if it falls under one of the following categories:[253]

1. Refusing to stop or follow directions upon being ordered to do so;
2. Actively resisting visit and search or capture;
3. Sailing under convoy of enemy warships or enemy military aircraft;
4. If incorporated into or assisting the intelligence system of the enemy armed forces;
5. If acting as a naval or military auxiliary to the enemy armed forces;
6. If participating in the enemy war effort.[254]

C. Certain Enemy and Neutral Merchant Vessels and Civil Aircraft Which are Immune from Attack

The characterization of particular merchant vessels and civil aircraft as

"enemy" does not, without more, make them lawful objects of attack. Neutral merchant vessels and civil aircraft comprise two distinct categories: those participating in and those not participating in the enemy war effort.[255] The following categories of vessels and aircraft are immune from attack:

1. Enemy merchant vessels and civil aircraft which are not participating directly in the enemy armed conflict effort;

Example: Such a vessel or aircraft which is away from the main area of combat operations in a location where visit and search, electronic or other identification, or orders to land may be employed.

2. Neutral merchant vessels and civil aircraft which are not participating in the enemy armed conflict effort;

Example: A neutral merchant ship or civil aircraft engaged in genuine inter-neutral trade or the transportation of civilian passengers.

3. Vessels and aircraft designated for and engaged in the exchange of prisoners (cartel vessels);

4. Vessels and aircraft guaranteed safe conduct by agreement of the parties to the conflict;

5. Properly designated and marked hospital ships, medical transports, and medical aircraft;

6. Vessels and civil aircraft engaged in philanthropic or non-military scientific missions;

7. Small coastal fishing boats and small boats engaged in local coastal trade. Such boats are subject to reasonable order of the naval commander in control of the area as, for example, an order to depart from the immediate area of combat operations.[256]

D. Naval Bombardment

"Bombardment" is used here to refer to naval bombardment by surface or submarine warships or by naval or military aircraft of enemy targets on land. All contemporary methods of bombardment including gunfire, rockets, missiles, and bombs are included. Prior to the World Wars, bombardment of shore objects by naval gunfire was an incident of many armed conflicts. It was employed again in both World Wars, and from 1939 to 1945 naval gunfire was used as the spearhead of Allied amphibious operations. The basic rules of naval targeting considered above are also applicable here.[257]

The United States is a party to Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War (1907).[258] Its article 1(1) provides: "The bombardment by naval forces of undefended ports, towns, villages, dwellings, or buildings is forbidden." Article 2 states that military objectives, even in undefended locations, are not immunized from naval bombardment. Although aviation was in a primitive stage of development

in 1907, this Hague Convention applies comprehensively to bombardment and therefore includes aerial bombardment. Of course, the customary law rule of proportionality, that incidental civilian casualties and damage must be limited to that which is proportional to the military advantage to be expected from the attack, is applicable to naval bombardment as it is to all armed conflict. Consequently, the deliberate or wanton destruction of areas of concentrated civilian habitation is prohibited.

The parties to a conflict may immunize particular demilitarized zones by specific agreement. Medical personnel and facilities are always immunized unless they are used in violation of law for military purposes. It is also well established customary law that buildings devoted to religious, cultural and charitable purposes are not lawful objects of attack.[259] The following rules are based upon customary law and the established practices of the community of states, portions of which have been codified in treaties:

1. Bombardment for the purpose of terrorizing the civilian population is prohibited.
2. The wanton or deliberate destruction of areas of civilian habitation including cities, towns, villages, dwellings or buildings is prohibited.
3. A demilitarized zone agreed to by the parties to the conflict is exempt from bombardment.
4. Medical facilities including medical establishments and units, medical vehicles, equipment and stores may not be made the objects of bombardment. The distinctive medical emblem, either a red cross, a red crescent or the red lion and sun, should be clearly displayed in order to facilitate immunity. Any object identified otherwise as a medical facility is also immune from bombardment even if it is not marked with the protective symbol.
5. Hospital zones established by agreement of the parties to the conflict are immune.
6. All religious, cultural or charitable facilities or buildings are not lawful objects of bombardment.[260] The distinctive emblem to protect such facilities or buildings is a rectangle divided diagonally into two triangular halves with the upper portion black and the lower portion white.[261] Any object identified otherwise as such a facility is also immune from bombardment even if it is not marked with the protective symbol.
7. It is prohibited to bomb installations which if destroyed would release forces harmful to the civilian population if the probable harm to civilians would be excessive in relation to the military advantage to be achieved by bombardment. Such installations include nuclear and other power plants as well as dams, dikes, and similar objects.[262]
8. Whenever the military situation permits, commanders are obligated to make every effort to warn the civilian population located in proximity to a military objective which is the target of bombardment. Warnings should

be specific, if possible, but a general warning is permissible if a more specific one would jeopardize the mission of the bombarding force.[263]

E. Enforcement of the Law

The law of targeting illustrates the practicality of the law of armed conflict, promoting military efficiency by designating military personnel and objects as lawful targets while minimizing unnecessary destruction of human and material values through prohibiting attacks on civilian persons and objects. The basic principles of the law of naval targeting have remained constant while being applied to changing technology including the development of submarines, aircraft and nuclear weapons. These principles apply to contemporary over-the-horizon weapons systems which must be employed so as to protect civilian persons and objects from disproportionate ancillary casualties and damage. A thoughtful naval historian has recently concluded that future armed conflict at sea will be conducted almost exclusively under water by diverse types of submarine warships.[264]

It is sometimes suggested that a law of armed conflict of ideal doctrinal content would emphasize the principle of humanity over considerations of military necessity. Such a law would break down in actual practice and would be much less effective in protecting human and material values than the existing law which takes account of the full range of legitimate military interests. A basic sanction of the law of armed conflict is the common self-interest of the participants that more is to be gained by adhering to the law than by violating it. There is also an important element of reciprocity and mutuality in observance.[265] The alternative to enforcement of the law is not only the unnecessary destruction of human and material values in armed conflict, but a chaotic international system which requires the entire world community to live under the threat of impending nuclear disaster.

The United States has, throughout its history with few exceptions, been a leader in the development and enforcement of international law including the law of armed conflict. Because military necessity has been taken into account in formulating the legal rules such claimed necessity cannot be invoked as a device to repeal or modify them. It is not possible to ascertain a military advantage, much less a military necessity, in four of the examples considered in this study: the bombing of a submarine engaged in rescue operations, the killings following the Battle of the Bismarck Sea, the prohibition of North Korean coastal fishing, and the April 1986 bombing of Libya.

In spite of these instances, the United States Government, and the Navy, as well as the other Armed Services, continue to emphasize the importance of the entire law of armed conflict and the key enforcement role of line officers. The mandatory instructions requiring observance of the law, the manuals explaining the law, including the legally accurate and militarily

practical *Commander's Handbook on the Law of Naval Operations*,[266] and the reliance on officers of the Judge Advocate General's Corps who are specialists in international law all facilitate the line officer's role.

Notes

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The authors express appreciation to alumni of the George Washington University Law School, including military lawyers on active duty, who provided constructive criticisms of a preliminary draft of this study. The authors alone are responsible for its contents and analyses.

1. The widely accepted sources of international law are set forth in art. 38 of the Statute of the International Court of Justice. They also include "general principles," "judicial decisions" and the writings of the "most highly qualified" scholars.

2. 67 U.S. 635 (1862). The Court held that President Lincoln's blockade of Confederate ports applied to the reality of existing naval conflict and was valid without a declaration of war.

3. Common art. 2 of each of the Conventions: Convention I for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, 12 August 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362; Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked members of Armed Forces at Sea, 12 August 1949, 6 U.S.T. 3217, T.I.A.S. 3363; Convention III Relative to the Treatment of Prisoners of War, 12 August 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364; Convention IV Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365. These Conventions will hereinafter be referred to as the 1949 Geneva Conventions.

4. Art 0605, *U.S. Navy Regulations* (1973).

5. *See* U.S. Department of Defense, Department of Defense Law of War Program, DOD Directive 5100.77 (Washington: 10 July 1979); U.S. Department of the Navy, Law of Armed Conflict Program to Ensure Compliance by the Naval Establishment, SECNAVINST 3300.1A (Washington: 2 May 1980); U.S. Office of Naval Operations, Law of Armed Conflict Program to Ensure Compliance by U.S. Navy and Naval Reserve, OPNAVINST 3300.52 (Washington: 18 March 1983); Headquarters, U.S. Marine Corps, Marine Corps Law of War Program, MCO 3300.3 (Washington: 2 August 1984). The Army and Air Force have analogous instructions.

6. 6 U.S. (2 Cranch) 170 (1804). Justice Clark relied on this case in his concurring opinion in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 at 660 (1952).

7. Act for the Government of the Navy, ch. 24, 1 Stat. 709, 711 (1799).

8. 10 U.S.C. 892 (1983).

9. *The Commander's Handbook on the Law of Naval Operations* (NWP 9), para. 8.1 (hereinafter *Commander's Handbook* or NWP 9).

10. Schindler & Toman, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, 3rd ed. (Dordrecht, Netherlands: Martinus Nijhoff Publishers, 1988), p. 787 (hereinafter Schindler & Toman).

11. 36 Stat. 2277 (1909); Schindler & Toman, *supra* note 10, p. 63.

12. Schindler & Toman, *supra* note 10, p. 791.

13. *Id.*, p. 797.

14. 36 Stat. 2332 (1909); Schindler & Toman, *supra* note 10, p. 803.

15. 36 Stat. 2351 (1909); Schindler & Toman, *supra* note 10, p. 811.

16. 36 Stat. 2371 (1909); Schindler & Toman, *supra* note 10, p. 313. Based on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (1906), Schindler & Toman, *supra* note 10, p. 301.

17. 36 Stat. 2396 (1909); Schindler & Toman, *supra* note 10, p. 819.

18. The "Proces-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of April 22, 1930" (known informally as the "Protocol of 1936") contains the identical rules set forth in the London Naval Treaty Part IV (art. 22). Art. 23 of the London Navy Treaty provided, "Part IV shall remain in force without limit of time." The rest of the Treaty expired on Dec. 31, 1936. In the Proces-Verbal the parties to the London Naval Treaty invited other states to agree to Part IV (art. 22). There are 49 state-parties including France, Germany, Italy, Japan, Soviet Union, United Kingdom, and the United States. Schindler & Toman, *supra* note 10, p. 883.

The London Naval Treaty Part IV (art. 22) is in 46 Stat. 2858 at 2881-82 (1931).

19. *Supra* note 3.

20. Hague Convention IV, *supra* note 11, Annexed Regulations, art. 23(e).

21. The historic law of naval warfare is considered in C. John Colombos, *The International Law of the Sea, passim*, 66th rev. ed. (New York: David McKay Co., 1967).

22. L. Oppenheim, *International Law: Vol. II, Disputes, War and Neutrality* 7th ed., Lauterpacht ed., (New York: Longmons Green, 1952), pp. 869-79.

23. *See generally* C. John Colombos, *A Treatise on the Law of Prize* 3rd ed. (New York: David McKay Co., 1949).

24. Schindler & Toman, *supra* note 10.

25. Several minor naval powers acceded to the Declaration, *id.* at pp. 789-80.

26. W. Thomas Mallison, Jr., *Studies in the Law of Naval Warfare: Submarines in General and Limited Wars, U.S. Naval War College: International Law Studies-1966* (Washington: U.S. Govt. Print. Off., 1968), p. 133.

27. The textual paragraph is based upon *id.* at pp. 106-13.

28. *See* the text accompanying *infra* note 41.

29. *See* Gordon Campbell, *My Mystery Ships* (Garden City, N.Y.: Doubleday, Doran & Co., 1929); R. W. Smith, "The Q-Ship—Cause and Effect," *U.S. Naval Institute Proceedings*, May 1953, v. 79, p. 533.

30. The role of Admiral W. S. Sims in obtaining adoption of the convoy system is described in Elting E. Morison, *Admiral Sims and the Modern American Navy* (Cambridge: The Riverside Press, 1942), pp. 337-63.

31. Germany based its claim on reprisals rather than on legal right. Mallison, *supra* note 26 at pp. 61-74.

32. *Id.* at pp. 109-11.

33. Naval War College *International Law Documents: Conference on the Limitation of Armament-1921* (Washington: U.S. Govt. Print. Off., 1923), p. 49.

34. *Id.* at p. 53.

35. *Id., passim.*

36. *Id.* at pp. 58, 61.

37. *Id.* at pp. 115-16.

38. *Id.* at p. 116.

39. Treaty for the Reduction and Limitation of Naval Armaments, 46 Stat. 2858 at 2881-82 (1930); Schindler & Toman, *supra* note 10 at p. 881.

40. Schindler & Toman, *supra* note 10 at 883. An analysis of article 22 following its adoption appears in "London Naval Treaty, Article 22, and Submarines," *Naval War College, International Law Situation—1930* (Washington: U.S. Govt. Print. Off., 1931), pp. 1-65.

41. "The Declaration of Paris in Modern War," *Law Quarterly Review*, April 1959, v. 55, p. 237 at p. 249.

42. C. B. A. Behrens, *Merchant Shipping and the Demands of War* (London: H. M. Stationery Office and Longmans Green, 1955), p. 96.

43. See S. W. Roskill, "*Capros* not Convoy: Counter-Attack and Destroy!" *U.S. Naval Institute Proceedings*, October 1956, p. 1042. CAPROS= Counter Attack Protection and Routing of Shipping.

44. On the liability of armed merchant ships to attack, see Edwin Borchard, "Armed Merchantmen," *American Journal of International Law*, January 1940, v. 34, p. 110.

45. Portions of the *Handbook* are reprinted in *Proceedings of the International Military Tribunal at Nuremberg* v. 40, p. 88 at p. 89 (42 vols., 1947-1949) (cited hereinafter as IMT).

46. *See* the text accompanying note 40. Article 74 of the Prize Code, which reproduces the 1936 Protocol, appears in Green Hackworth, *Digest of International Law*, (Washington: U.S. Govt. Print. Off., 1944) v. 7, ch. 23, p. 248.

47. This was stated by Fleet Judge Advocate Kranzbuhler in his argument in behalf of Admiral Doenitz, IMT, *supra* note 45, v. 18, pp. 312, 323.

48. Mallison, *supra* note 26 at pp. 75-84.

49. The text of the message is taken from a photographic copy of the original which was declassified on December 2, 1960.

50. Mallison, *supra* note 26, at pp. 121-22.

51. Robert W. Tucker, *The Law of War and Neutrality at Sea, Naval War College, International Law Studies-1955* (Washington: U.S. Govt. Print. Off., 1957), p. 64.

52. *Id.* at p. 66.

53. *Id.*

54. Mallison, *supra* note 26 at p. 121.

55. Report of the Committee of Jurists, *Proceedings of the London Naval Conference of 1930 and Supplementary Documents, State Department Conference Series No. 6* (Washington: U.S. Govt. Print. Off., 1931), Appx. 2, p. 189.

56. *See* Harvard Research in International Law, "Draft Convention on the Law of Treaties," *American Journal of International Law (Supplement)*, October 1935, v. 29, p. 653, 937; McDougal, Lasswell & Miller, *The Interpretation of Agreements and World Public Order, passim* (New Haven: Yale Univ. Press, 1967).

57. Schindler & Toman, *supra* note 10, at p. 884.

58. *Id.* at p. 885.

59. Mallison, *supra* note 26, at p. 120.

60. Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, July 29, 1899, 32 Stat. 1827 (1903), Schindler & Toman, *supra* note 10, p. 289.

61. Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, October 18, 1907, 36 Stat. 2371 (1909), Schindler & Toman, *supra* note 10, p. 313.

62. Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, August 22, 1864, 22 Stat. 940 (1888), Schindler & Toman, *supra* note 10, p. 279.

63. Henri Dunant, a Swiss business man, was the principal founder of the International Committee of the Red Cross and urged the adoption of the 1864 Convention as the result of his seeing the tragic condition of the wounded soldiers following the Battle of Solferino in Italy. He was the author of *A Memoir of Solferino* (original French text 1862; American Red Cross English transl. 1939) which, along with the code of the law of land warfare prepared by Professor Francis Lieber of Columbia College and entitled *Instructions for the Government of Armies of the United States in the Field*, promulgated as General Order No. 100 by President Lincoln on 24 April 1863 (Schindler & Toman, *supra* note 10 at p. 3), had a great influence in the development of the international humanitarian law of armed conflict.

64. "Judgment in Case of Lieutenants Dithmur and Boldt," reprinted in *American Journal of International Law*, October 1922, v. 16, pp. 708-724.

65. *See* R. G. Voge, "Too Much Accuracy," *U.S. Naval Institute Proceedings*, March 1950, v. 76. p. 257.

66. *Id.*

67. The diplomatic interchange and other documentation is in "Sinking of the 'Awa Maru,'" Naval War College *International Law Documents 1944-45*, (Washington: U.S. Govt. Print. Off., 1946), pp. 126-38.

68. 175 U.S. 677 (1900).

69. *Supra* note 17.

70. IMT, *supra* note 45, v. 1, p. 311. In the case of Admiral Raeder, who was also charged with war crimes in connection with Germany's submarine campaign, the Tribunal made "the same finding on Raeder on this charge [war crimes—count three] as it did as to Doenitz. . . ." *Id.*, v. 1, p. 315 at p. 317.

71. *Id.*, v. 19, p. 469.

72. *Id.*, v. 1, pp. 312-13.

73. The draft treaty on submarines produced by the Washington Naval Conference (1921-1922) contained a provision for criminal trials for its violation, but it was not ratified. See the text accompanying *supra* note 38.

74. Behrens, *supra* note 42 and accompanying text.

75. S. W. Roskill, *White Ensign: The British Navy at War 1939-1945* (Annapolis: U.S. Naval Institute, 1960), p. 97.

76. "Case No. 55: Trial of Helmuth Van Ruchteschell," *Reports of Trials of War Criminals* (London: H. M. Stationery Office, 1949), v. 9, p. 82 (hereinafter *Trials of War Criminals*).

77. Text of Order is in "Case No. 54: Trial of Moehle," *Trials of War Criminals, supra* note 76, v. 9, p. 75.

78. Roskill, *supra* note 75 at p. 224.

79. *Id.*, at pp. 224-25.

80. Excerpt of letter from Historical Division, U.S. Air Force to Mr. David D. Lewis (April 12, 1960). The excerpted letter appears as an enclosure to letter from Director, Research Studies Institute, Air University, Maxwell Air Force Base to President, Naval War College (April 19, 1961).

81. IMT, *supra* note 45, v. 1, p. 313.

82. *Trials of War Criminals, supra* note 76, v. 9, p. 75.

83. *Id.*, v. 1, p. 1; also reported in David Maxwell Fyfe, general ed., *War Crimes Trials*, v. 1, John Cameron, ed., *Trial of Heinz Eck et al. (The Peleus Trial)* (London/Edinburgh/Glasgow: William Hodge & Co., Ltd., 1948), which contains the entire record of proceedings in the trial.

84. *Trials of War Criminals, supra* note 76, v. 1, p. 2.

85. *Id.*, at p. 13.

86. Judgment and Proceedings of the International Military Tribunal for the Far East (April 29, 1946-April 16, 1948 with sequential numbering of typewritten pages and separate volume for each day of the trial). Hereinafter FEIMT Judg. or FEIMT Proc. The textual quotation is from FEIMT Judg. at page 1,072.

87. FEIMT Judg., *supra* note 86 at p. 1073.

88. *Id.*, at pp. 1,073-74.

89. The textual account of the sinking is based upon FEIMT Proc., pp. 15,095-148 and FEIMT Judg., pp. 1,074-75.

90. The factual account in the text is based upon Samuel Eliot Morison, *History of the United States Naval Operations in World War II*, v. 6 (*Breaking the Bismarck Barrier*) (Boston: Little, Brown & Co., 1950), pp. 62 et seq., and Ronald H. Spector, *Eagle Against the Sun: The American War with Japan* (New York: Free Press, 1985), pp. 226-28. Professor Spector served as the Director of Naval History, Department of the Navy, 1986-1989.

91. Morison, *supra* note 90, p. 62.

92. Professor Spector has reported the actual event: "by spring [1943] about 40 percent of Japanese front-line troops in New Guinea were suffering from disease or malnutrition." Spector, *supra* note 90, p. 228.

93. *Id.*

94. Report of Justice Robert H. Jackson, U.S. Representative to the International Conference on Military Trials, Document XLIV, Minutes of Conference session of July 23, 1945 *International Conference on Military Trials, London* (Washington: U.S. Govt. Print. Off., 1949), p. 330.

95. *Supra* note 16, art. 16(1).

96. 1949 Geneva Conventions, *supra* note 3.

97. Schindler & Toman, *supra* note 10 at p. 621. Protocol II is in *id.* at p. 689.

98. Information provided by the International Committee of the Red Cross concerning ratifications and accessions to the Additional Protocols of 8 June 1977, as of 8 August 1989. The I.C.R.C. Press Release of 8 August 1989 stated that the Soviet Union ratified both Protocols without reservations or statements of interpretation on 4 August 1989.

99. The U.S. Joint Chiefs of Staff unclassified memorandum of 18 March 1986 contains a listing of many Protocol I articles which they consider are now, or are becoming, customary law.

100. One of the arguments supporting the position of the Reagan Administration is Douglas J. Feith, "Law in the Service of Terror—The Strange Case of Additional Protocol I," *The National Interest*, v. 1, p. 36 (1985). It is answered decisively by the late COL Waldemar A. Solf, JAGC, U.S. Army [a senior member of the U.S. Delegation to the Geneva Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts] in "A Response to Douglas J. Feith's Law in the Service of Terror—The Strange Case of the Additional Protocol,' " *Akron Law Review*, Fall 1986, v. 20, p. 261.

101. Schindler & Toman, *supra* note 10, p. 651.

102. Schindler & Toman, *supra* note 10, p. 495. Art. 33(3) provides: "Reprisals against protected persons and their property are prohibited."

103. The textual account of the Korean conflict is based upon Cagle & Manson, *The Sea War in Korea* (Annapolis: U.S. Naval Institute, 1957), *passim*.

104. *Supra* note 68.

105. Cagle & Manson, *supra* note 103, pp. 296-97.

106. *Id.*, p. 357.

107. *Supra* note 17.

108. The old battleships were the spearhead of the amphibious assaults and they used target area mapping combined with careful aerial observation (typically in slow OS2U seaplanes which were sitting ducks for Japanese fighter aircraft) in order to distinguish military targets from civilian persons and objects. See the reference to the accurate character of their targeting in Spector, *supra* note 90, p. 303. The new high speed battleships which joined the fleets immediately prior to and during World War II typically provided anti-aircraft protection to the fast carrier task forces.

109. Cagle & Manson, *supra* note 103, p. 97.

110. *Supra* note 15.

111. A more comprehensive analysis of the international law of self-defense is in W. Thomas Mallison & Sally V. Mallison, *Armed Conflict in Lebanon, 1982: Humanitarian Law in a Real World Setting*, Chap. 2 entitled "Aggression and Self-Defense in the World Legal Order," 2nd rev. ed. (Washington: American Educational Trust, 1985).

112. Report of Rapporteur of Committee 1/1 to Commission I, *U.N. Conference on International Organization*, Dept. of State Conference Series No. 83 (Washington: U.S. Govt. Print. Off., 1946), p. 498.

113. *Supra* note 111 at p. 16. The doctrine of anticipatory self-defense is examined in the Judgment, 1 IMT 205-09, and in Marjorie Whiteman, *Digest of International Law* (Washington: U.S. Govt. Print. Off., 1971), v. 12, pp. 47-51.

114. John Bassett Moore, *Digest of International Law* (Washington: U.S. Govt. Print. Off., 1906), v. 2, pp. 409-14.

115. Mr. Webster to Mr. Fox, April 24, 1841, *British & Foreign State Papers (1840-1841)*, v. 29, p. 1129 at p. 1138.

116. *Id.*

117. The textual account of the facts, as well as the legal analysis, is based upon W. Thomas Mallison, "Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defense Claims Valid Under International Law," *George Washington L. Rev.*, December 1962, v. 31, pp. 335-98 (reprinted as a booklet).

See Graham T. Allison, *Essence of Decision: Explaining the Cuban Missile Crisis* (Boston: Little Brown Co., 1971).

118. Robert D. Powers, Jr., "Blockade: For Winning Without Killing," *U.S. Naval Institute Proceedings*, August 1958, p. 61.

119. Proclamation No. 3504, 3 C.F.R. 232 (1959-1963), *reprinted in* 50 U.S.C.A. Appendix 1 at 15. Theodore Sorensen (Special Counsel to the President) also wrote a blockade draft. Allison, *supra* note 117 at p. 208.

120. "United States and Soviet Union Agree on Formula for Ending Cuban Crisis: Exchange of Messages," *Dept. of State Bulletin*, Nov. 12, 1962, v. 47, pp. 741-46.

121. Proclamation No. 3504, *supra* note 119.

122. *Id.*

123. R. K. Smith, "The Violation of the 'Liberty,'" *U.S. Naval Institute Proceedings*, June 1978, p. 65.

124. The textual account is based upon: James M. Ennes, *Assault on the Liberty*, 5th ed., (New York: Random House 1979), *passim*, and especially chapters 6 and 7. [LCDR Ennes, USN (Ret.) served in the *Liberty* at the time of that attack]; Stephen Green, *Taking Sides: American's Secret Relations with a Militant Israel* (New York: Morrow & Co., 1984), ch. 9, "Remember the Liberty . . . " [This source points out at page 230 that Israeli forces almost succeeded in jamming all of the *Liberty's* radio circuits.]; and record of Proceedings [U.S. Navy] Court of Inquiry to inquire into the circumstances surrounding the armed attack on USS LIBERTY (AGTR-5) on 8 June 1967 [This source states some of the same facts, in less detail, as those set forth in LCDR Ennes' book].

125. The very limited response of the U.S. Government to the attack is set forth in Ennes, *supra* note 124, chap. 9 entitled "Cover-up." Chap. 10 concerns the Navy Court of Inquiry. Commander, U.S. Sixth Fleet launched aircraft to protect the *Liberty* but they were immediately recalled by order of Secretary of Defense McNamara. *Id.*, Appendix D at pp. 237-38.

The Israeli response may be contrasted with the unequivocal Japanese acceptance of responsibility in the sinking in the Yangtze River of the gunboat U.S.S. *Panay* by Japanese aircraft. See the diplomatic correspondence in "The Case of the U.S.S. 'Panay,' December 12, 1937," Naval War College, *International Law Situations-1938* (Washington: U.S. Govt. Print. Off., 1940) pp. 129-50.

126. *Supra* note 3. Jacobson, "A Juridical Examination of Israeli Attack of the U.S.S. *Liberty*," *Naval Law Review*, Winter 1986, v. 36, p. 1, is an authoritative and comprehensive legal analysis of the attack.

127. The probable motive is that the communications messages arising from Israel's armed attack on Syria, following the attacks on Egypt and Jordan, could have been monitored and recorded by *Liberty* if its electronic listening equipment had not been destroyed. See Jacobson, *id.*, at pp. 16-17.

128. "Vietnam Decree on Sea Surveillance, of 27 April 1965," *International Legal Materials*, May 1965, v. 4, no. 3, p. 461.

129. The textual account is based upon R. L. Schreadley, "The Naval War in Vietnam, 1950-1970," *U.S. Naval Institute Proceedings*, May 1971, p. 188.

130. *See* Ulrik Luckow, "Victory Over Ignorance and Fear: The U.S. Minelaying Attack on North Vietnam," *Naval War College Review*, Jan-Feb 1982, p. 17. *See* also W. Thomas Mallison and Sally V. Mallison, "A Survey of the International Law of Blockade," *U.S. Naval Institute Proceedings*, February 1976, p. 44, at pp. 50-51.

131. Declaration Respecting Maritime Law, Paris, April 16, 1856, Schindler & Toman, *supra* note 10, p. 787.

132. *See* Air War Study Group of Cornell University, *The Air War in Indochina*, rev. ed. (Boston: Beacon Press, 1971), *passim*.

133. It may be contrasted with the use of mines against Japan in the Second World War. See Johnson & Kratcher, *Mines Against Japan* (U.S. Naval Ordnance Laboratory, 1973), *passim*.

134. The U.S. Navy gunfire operation against North Vietnamese land targets and vessels was termed Operation Sea Dragon. See generally Schreadley, "The Naval War in Vietnam, 1950-1970," *U.S. Naval Institute Proceedings*, May 1971, p. 188.

135. *See* the text accompanying *supra* notes 108-110.

136. The textual account is based upon Robert L. Scheina, "The Malvinas Campaign," *U.S. Naval Institute Proceedings*, May 1983, p. 98, and John Nott [British Minister of Defense at the time of the conflict], "The Falklands Campaign," *id.* at p. 118.

Security Council resolution 502 (3 April 1982) called for a cessation of hostilities and Argentine withdrawal from the islands to reestablish the prior status quo.

137. The Argentine Antarctic supply ship *Bahia Paraiso* was converted into a hospital ship and was not made an object of attack. Scheina, *supra* note 136 at p. 98.

138. Nott, *supra* note 136 at p. 130.

139. Ex-*U.S.S. Phoenix* (CL-46).

140. Nott, *supra* note 136 at p. 121.

141. *See* Scheina, *supra* note 136 at p. 106; Fenrick, "The Exclusion Zone Device in the Law of Naval Warfare," *Canadian Yearbook of International Law-1986*, v. 24, p. 91, contains a careful analysis of exclusion zones in the Falklands/Malvinas conflict at pp. 109-16.

142. The facts summarized in the text are based on the opinion of the U.S. Supreme Court in *Argentine Republic v. Amerada Hess Shipping Corp.*, 109 S. Ct. 683 (1989).

143. The decision of the U.S. Supreme Court, *id.*, employed a broad interpretation of the Foreign Sovereign Immunities Act, 28 U.S. Code 1330 *et seq.*, which resulted in the Argentine Republic having sovereign immunity from this suit and the holding that the Alien Tort Statute, 28 U.S. Code 1350 (a statute of the First Congress enacted in 1789), did not apply.

144. The facts set forth in the textual section are based on Ronald O'Rourke, "The Tanker War," *U.S. Naval Institute Proceedings*, May 1988, p. 30; and Raphael Danziger, "The Persian Gulf Tanker War," *id.*, May 1985, p. 160.

145. Address by CAPT J. A. Roach, JAGC, USN, "Missiles on Target: The Law of Targeting and the Tanker War" (20 April 1988), to be published in the 1988 *Proceedings of the American Society of International Law*. Fenrick, *supra* note 141 at pp. 116-22 analyzes the exclusion zones in this conflict.

146. The specific facts concerning this attack are based upon Michael Vlahos, "The Attack on the Stark," *U.S. Naval Institute Proceedings*, May 1988, p. 64.

147. Mallison, *supra* note 26 at pp. 129-32.

148. The facts in the textual paragraph are based on Danziger, *supra* note 144 at pp. 163-64.

149. *Id.* at p. 165.

150. *See* the text accompanying *supra* note 130.

151. O'Rourke, *supra* note 144 at pp. 32-33.

152. Wesley L. McDonald, "The Convoy Mission," *U.S. Naval Institute Proceedings*, May 1988, p. 36.

153. *Id.* at p. 37.

154. *Id.*

155. Interview with Captain Seitz, the Master of the *Bridgeton*, "SS Bridgeton: The First Convoy," *U.S. Naval Institute Proceedings*, May 1988, p. 52.

156. *Id.*

157. McDonald, *supra* note 152 at p. 43.

158. The facts in the textual paragraph are based on O'Rourke, *supra* note 144 at pp. 32-33.

159. "Libyan Sanctions," *Dept. of State Bulletin*, March 1986, v. 86, no. 2108, p. 36.

160. *Id.*

161. *Id.* at p. 12.

162. Executive Order No. 12543, 3 C.F.R. 181, *reprinted in* 50 U.S.C.A. 1701 and *Dept. of State Bulletin*, March 1986, p. 37.

163. *Dept. of State Bulletin*, March 1986, v. 86, no. 2108, p. 15.

164. *Id.* at p. 17.

165. "Libya Under Qadhafi: A Pattern of Aggression," *Dept. of State Special Report No. 138*, January 1986, p. 4.

166. Richard E. Rubenstein, *Alchemists of Revolution: Terrorism in the Modern World* 36 (New York: Basic Books, 1987). Contrast the political method in Benjamin Netanyahu, ed., *Terrorism: How the West Can Win* (New York: Farrar, Straus & Giroux, 1986).

167. *The Washington Post*, April 8, 1988 p. A1:3-6.

168. *Id. The New York Times*, Oct. 26, 1989, p. A8:1, reported that Qaddafi conceded past acts of terrorism.

169. Concerning the consistent violations by Israel of the Geneva Convention for the Protection of Civilian Persons (a treaty of both Israel and the United States) in its military occupations of Lebanese, Palestinian and Syrian territories, *see inter alia*, W. Thomas Mallison & Sally V. Mallison, *the Palestine Problem in International Law and World Order* (London: Longmans, 1986), chaps. 6 and 7.

170. Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, art. 7(4)(5), 15 U.S.T. 1606, T.I.A.S. No. 5639.

171. *See, e.g.*, [1974] *Digest of U.S. Practice in International Law*, p. 293 (1975).

172. *See, inter alia*, George C. Wilson, "U.S. Planes Retaliate for Libyan Attack: Missile Site, Two Patrol Boats Fired on in Gulf of Sidra Incident," *The Washington Post*, March 25, 1986, pp. 1A:1-5, 13A:1-3; Bernard

Weinraub, "2 More Libyan Vessels Sunk and Base Hit Again, U.S. Says, Vowing to Keep up Patrols," *New York Times*, March 26, 1986, pp. A1:4-6, A8:1-4.

173. David Hoffman and Lou Cannon, "Terrorism Provided Catalyst," *The Washington Post*, p. A12:1.

174. "U.S. Exercises Right of Self-Defense Against Libyan Terrorism, *Dept. of State Bulletin*, June 1986, v. 88, p. 1.

175. *Id.* at pp. 1-2. Ambassador Walters, the Permanent Representative of the United States, substantially repeated President Reagan's position in the U.N. Security Council on April 15, 1986, S/PV.2674, at pp. 13-19.

176. Seymour M. Hersh, "Target Qaddafi," *New York Times Magazine*, Feb. 22, 1987, p. 17 at p. 19.

177. Translation of *Der Spiegel*, April 21, 1986, p. 17.

178. Hersh, *supra* note 176. Following the April 1986 attack on Libya, subsequent reports in the media referred to the "disinformation" campaign. See, *e.g.*, Bob Woodward, "Gadafi Target of Secret U.S. Deception Plan: Elaborate Campaign Included Disinformation That Appeared as Fact in American Media," *The Washington Post*, Oct. 2, 1986, pp. A1:1-5, A12:1-5, A13:1-2. Admiral William J. Crowe, Jr., Chairman of the Joint Chiefs of Staff, expressed concern about the disinformation. *Id.* See also Leslie Gelb, "Administration is Accused of Deceiving Press on Libya," *New York Times*, Oct. 3, 1986, pp. A1-1, A6:1.

179. *Supra* note 165 at p. 1.

180. *Id.*

181. *Id.* at pp. 5-8.

182. U.S. Department of State, *Fact Sheet: Libya's Qadhafi Continues Support for Terrorism*, January 1989.

183. *Id.* at p. 6.

184. *Id.* at p. 7.

185. *Id* at pp. 12-19.

186. *Public Report of the Vice President's Task Force on Combatting Terrorism*, February 1986, p. 5.

187. *Id.* at p. 6.

188. *Id.* at p. 14.

189. 50 U.S. Code 1701-1706 (1981, with 1986 Supp.). The Libyan Sanctions Regulations are in 51 Fed. Reg. 1,354 (1986) as amended by 51 *id.* 22,802 (1986) codified in 31 C.F.R. 550.207.

190. European Community News, No. 14/1986, April 14, 1986, (distributed by European Community Information Service, Washington, D.C.).

191. *Bulletin of the European Communities Commission*, vol. 19, no. 5, pp. 106-110 (1986).

192. *Id.* at p. 109.

193. R. W. Apple, Jr., "Reagan Wins the Day as Libya is Denounced," *New York Times*, May 6, 1986, p. A12:1-4.

194. *Id.*

195. *Id.*

196. Bernard Weinraub, "U.S. Says Allies Asked for More in Libya Attack," *New York Times*, April 22, 1986, pp. A1:7, A8:1-3.

197. *The Washington Post*, April 2, 1986, pp. A1:6, A17:1-4.

198. *See* the text accompanying *supra* notes 111-113.

199. David H. Ottaway, "Qaddafi Overtures Rejected by U.S., *The Washington Post*, April 2, 1986, pp. A1:5, A17:5-6.

200. *Id.*

201. *See* the President's statement in the text accompanying *supra* note 175.

202. *See* the text accompanying *supra* notes 114-116.

203. Marjorie Whiteman, *Digest of International Law* (Washington: U.S. Govt. Print. Off., 1971), v. 12, chap. 36, pp. 187-204; L. Oppenheim, *International Law, Vol. I, Peace*, 8th ed., H. Lauterpacht, ed. (New York: David McKay, 1955), pp. 687-90.

204. *See* the text accompanying *supra* note 175.

205. Contrast the imminence of attack in the *Caroline* incident in the text accompanying *supra* notes 114-116.

206. *The Washington Post*, March 26, 1986, pp. A1:5, A22:1.

207. Leslie Stahl, Interview of Secretary Shultz, *Dept. of State Bulletin*, March 1986, p. 20.

208. *Id.* at pp. 20-21.

209. *Id.* at p. 23.

210. "Part III: The Arms Sales to Iran," Report of the Congressional Committees Investigating the Iran-Contra Affair, H. R. Rep. No. 433, S. Rep. No. 216, 100th Cong., 1st Sess. (1987), pp. 157-234.

211. *See* Cordesman, "The Middle East and the Cost of the Politics of Force," *Middle East Journal*, Winter 1986, v. 40, pp. 13-15.

212. *See* the text accompanying *supra* note 162.

213. 10 U.S. Code 6011 (1989).

214. U.S. Navy Regulations, art. 0915 (2) and (3) (1973).

215. *See, e.g.*, Guy B. Roberts, "Self-Help in Combatting State-Sponsored Terrorism: Self-Defense and Peacetime Reprisals," *Case Western Reserve Journal of International Law*, Spring 1987, v. 19, p. 243; and Jeffrey A. McCredie, "The April 14, 1986 Bombing of Libya: Act of Self-Defense or Reprisal?" *Id.*, p. 215. Both articles appear in a symposium concerning the April 1986 bombing of Libya, *id.*, pp. 121-293. The symposium also contains an incisive article by Professor Rex J. Zedalis concerning the basic values involved in the doctrines of anticipatory self-defense entitled, "Preliminary Thoughts on Some Unresolved Questions Involving the Law of Anticipatory Self-Defense," *id.* at p. 129.

216. *Naulilaa Incident Arbitration,* Portuguese-German Arbitral Tribunal, 1928, Rec. des decis, des trib. arb. mixtes, v. 8, p. 409, *reprinted in* William W. Bishop, Jr., *International Law: Cases and Materials* (Boston: Little, Brown & Co., 1971), 3rd ed., p. 903.

217. Convention (IV) Relative to the Protection of Civilian Persons in Time of War, *supra* note 3, art. 33.

218. This factual account is derived from "U.S. Demonstrates Advanced Weapons Technology in Libya," *Aviation Week & Space Technology*, April 21, 1986, pp. 19-20; Russell Watson, "Reagan's Raiders," *Newsweek*, April 28, 1986, pp. 26-27; George L. Church, "Hitting the Source," *Time*, April 28, 1986, p. 17.

219. Hersh, *supra* note 176 at pp. 17-19.

220. *Id.* at p. 22.

221. 46 C.F.R. 59952 (Dec. 4, 1981).

222. *Time, supra* note 218 at p. 20.

223. *Aviation Week, supra* note 218 at p. 19.

224. "Joint Press Conference with Secretary Schultz and Secretary Weinberger," *Dept. of State Bulletin*, June 1986, pp. 3-4.

225. *Id.* at p. 4.

226. *Qaddafi and the Libyan Revolution* (Boston: Little, Brown & Co., 1986).

227. *Id* at pp. 10-11.

228. *Best Laid Plans: The Inside Story of America's War Against Terrorism* (New York: Harper & Row, 1988), pp. 310-11.

229. "U.S. Bombs, Missing Target, Struck Farms Near Base," *New York Times*, April 20, 1986, p. A12:5, 6. See, *e.g.*, "A Raid that Went Awry," *U.S. News and World Report*, June 20, 1988, p. 36.

230. 67 U.S. 635 (1862).

231. *Supra* note 15. The Convention will be considered in detail in Section VI D *infra*.

232. *See* the text accompanying *supra* note 158.

233. The Libyan Government stated that there were 37 deaths and 93 wounded in civilian neighborhoods. Martin & Walcott, *supra* note 228 at p. 310. Western newspaper and book sources which have been referred to above indicate a substantial number of civilian casualties. Because of the military character of the targets set forth in the text accompanying *supra* note 218, it is presumed that there were a substantial, but unknown, number of military casualties as well who may or may not have been involved in terrorist support.

234. NWP 9, para. 8.1.2.1. A similar formulation of the customary law is in Geneva Protocol I. art. 51(5)(b), in the text accompanying *supra* note 101.

235. Concerning the allegations of attacks against U.S. citizens prior to the U.S. attack, see the text accompanying notes 160-162 and 179-181, *supra*, which refers to direct attacks upon Libyan dissidents and alleged support for other terrorism.

See Warriner, "The Unilateral Use of Coercion Under International Law: A Legal Analysis of the United States Raid on Libya on April 14, 1986," *Naval Law Review*, v. 37, p. 49 (1988), which concludes that the attack was lawful. A defect in the analysis is the ready acceptance that "intelligence reports indicated that it [the attack on La Belle discotheque] was planned and executed on the direct orders of the Libyan regime." *Id*, at p. 82. The article deems it "doubtful" that Libya "posed a threat to the security or political independence of the United States." *Id.* at p. 92.

236. Office of the Secretary of State, Ambassador-at-Large for Counter-Terrorism (Jan. 1989).

237. *Id*, at p. 5.

238. *Id.* at pp. 6-9.

239. *Id.* at pp. 12-19.

240. *Id.* at p. 19.

241. Admiral Stansfield Turner, USN (Ret.), has provided examples of excessive secrecy resulting in over-classification in *Secrecy and Democracy: The CIA in Transition* (Boston: Houghton Mifflin, 1985), *passim.*

242. Concerning issues of constitutional and statutory law relating to the April, 1986 attack on Libya, see *War Powers, Libya, and State-Sponsored Terrorism*, Hearings before the Sub-Committee on Arms Control, International Security and Science of the House of Representatives Committee on Foreign Affairs, 99th Cong., 2nd Sess. (April 29, May 1 and 15, 1986).

243. Par. 8.2.

244. Par. 8.3.

245. Par. 8.4.

246. Myres S. McDougal & Florentino P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (New Haven: Yale Univ. Press, 1961), p. 530.

247. The Martens Clause is named after the chief Russian delegate at the 1899 and 1907 Hague Conferences who inserted the clause into the Preambles of Hague Convention (II) with Respect to the Laws and Customs of War on Land (1899) and Hague Convention (IV) Respecting the Laws and Customs of War on Land (1907).

Geneva Convention (II) Concerning Armed Forces at Sea, *supra* note 3, incorporates the Martens Clause in art. 62(4). It states that even in the event that a state-party terminates its adherence to the Convention (this cannot be done in time of armed conflict or military occupation and until the release and repatriation of persons protected by the Convention has been accomplished), "It [the termination] shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfill by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience."

248. The basic principles considered in the present Section VI are well stated in NWP 9, chapter 8, entitled "The Law of Naval Targeting."

249. The rules concerning surrender in the text are based upon the customary law and its codification in various treaties including those concerning naval warfare.

250. Oppenheim, *supra* note 22, at p. 475.

251. *Id.*, at pp. 487-88. See NWP 9, *supra* note 9, par. 8.2.2.2.

252. Oppenheim, *supra* note 22, at p. 488.

253. The traditional law concerning visit, search and capture is described in *supra* note 26 at pp. 99-100.

254. The categories in the text are similar to those in the predecessor to NWP 9, *Law of Naval Warfare*, NWIP 10-2, sec. 503 (1955) and in *The Commander's Handbook on the Law of Naval Operations*, NWP 9, par. 8.2.2.2 (1987).

255. *See* the text accompanying *supra* notes 72-74.

256. *Compare* the consideration of immune vessels and aircraft in Oppenheim, *supra* note 22 at pp. 476-81.

257. *See* the text at *supra* note 246.

258. *Supra* note 15.

259. *See* Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, U.N. Treaty Series, v. 249, pp. 240, Schindler & Toman, *supra* note 10, p. 745, which codifies some of the customary law.

260. *See id.*, art. 5(1).

261. *See* NWP 9, par. 8.5.1.6.

262. *See* Geneva Protocol I, *supra* note 97, art. 56.

263. Hague IX, *supra* note 15, art. 6.

264. John Keegan, *The Price of Admiralty: The Evolution of Naval Warfare* (New York: Viking, 1988), pp. 266-75.

265. *See* Mallison, *supra* note 26, at pp. 19-22.

266. *See also* Air Force Pamphlet 110-31, *International Law—The Conduct of the Armed Conflict and Air Operations* (1976) and Department of the Army Field Manual 27-10, *The Law of Land Warfare* (1956) (This manual is being updated and revised).

Chapter X
Noncombatant Persons

A Comment to Chapter 11 of the Commander's Handbook on the Law of Naval Operations

by
Frits Kalshoven*

Introduction

In the history of the development of the law of armed conflict, the year 1987 stood out in more than one respect. It was the 10th anniversary of the adoption, on 8 June 1977, of two Protocols Additional to the Geneva Conventions of 12 August 1949, one (Protocol I) relating to the protection of victims of international armed conflicts and the other (Protocol II) relating to the protection of victims of non-international armed conflicts.[1] The Netherlands ratified both Protocols, thus joining the growing number of states parties to these instruments.[2] President Reagan announced his decision to submit only Protocol II for Senatorial advice and consent.[3] Last but not least, all U.S. naval commanders received as Naval Warfare Publication 9, 1987, a brand-new *Commander's Handbook on the Law of Naval Operations*.

Among the many recent publications about the state of and developments in the law of armed conflict, the *Handbook* is of special interest because, as an official U.S. publication following so shortly the President's announcement, it may be expected to reflect the views of the present U.S. administration on the state of the law. This is not merely a matter of academic interest; the law of armed conflict relies for its continued existence and further development as much on custom as on the conclusion of treaties, and the part of the *Handbook* relating to the law of armed conflict may be taken to represent United States *opinio juris* in this regard.

As we shall see, the "views of the present U.S. administration" are a mixture of rules in treaties to which the United States is a party, rules of international customary law, and those new rules in Protocol I which the present U.S. administration has chosen to consider as positive developments. Obviously, the United States is not legally bound to apply any rule of the last-mentioned category. Conversely, its unilateral espousal of such new rules cannot effectuate a legal obligation upon its potential adversaries, whether

parties to Protocol I or otherwise, to respect these rules in their relations with the United States.

The focus in the present comment is on Chapter 11 of the *Handbook*, with its deceptively simple title "Noncombatant Persons." Like the rest of the *Handbook*, Chapter 11 earns high marks for brevity; it is, in effect, a great deal shorter than the relevant provisions of treaties in force taken together. This exercise in abbreviation carried a double risk: for one thing, the drafters may have left out subject matter that might be regarded as of vital importance to U.S. naval commanders; for another thing, the necessary condensation of often complex treaty language into simpler, ostensibly clearer phrases may at times have resulted in what an outsider might consider an inadmissible loss of legal precision. The question needs to be examined as to what extent the drafters have succeeded in avoiding these risks.

Section II of this essay takes a first look at the term "noncombatant persons" as used in the *Handbook*; it introduces the applicable treaties and goes into the question of what appears to be the scope of application of Chapter 11. In sections III and IV, the various categories of "noncombatant persons" pass in review, in the same order as they appear in the *Handbook*: the civilian population in general in section III; other categories of persons in section IV. Focal points are: conditions for recognition and protection as a "noncombatant person," factors entailing loss of protection, and the treatment of the persons in question. Also in section IV, some attention is devoted to protective signs and symbols, the use of distinctive signals and means and methods of identification in general. A brief concluding section rounds off these comments.

II. "Noncombatant Persons"[4]

The Term "Noncombatant"

Although the term used in the title of Chapter 11 of the *Handbook* may appear simple enough, surely a "noncombatant" does not represent a simple notion at all. The term is used to indicate a broad range of people with very different characteristics. This is apparent from the introductory paragraph 11.1 of the chapter, which states in part:

> Noncombatants are those individuals who do not form a part of the armed forces and who otherwise refrain from the commission of hostile acts. Noncombatants also include those members of the armed forces who enjoy special protected status, such as medical personnel and chaplains, or who have been rendered incapable of combat by wounds, sickness, shipwreck, or capture.

When a lawyer is told that something "is" this but "also includes" something else, alarm-bells start ringing in his mind: are the notions thus brought together under one heading really similar in all relevant respects? His alertness grows when he notices that an earlier chapter of the *Handbook*

(Chapter 5, to which paragraph 11.1 refers) uses much more cautious language. Paragraph 5.3, on Combatants and Noncombatants, begins by stating, in much the same words as those used in paragraph 11.1, that: "The term noncombatant is primarily applied to those individuals who do not form a part of the armed forces and who otherwise refrain from the commission or direct support of hostile acts." It then explains that, "[i]n this context, noncombatants and, generally, the civilian population are synonymous." Paragraph 11.3 adds that, "[t]he civilian population consists of all persons not serving in the armed forces, militia, or paramilitary forces and not otherwise taking a direct part in the hostilities."

After this elucidation of what is offered as the primary meaning of the term, paragraph 5.3 informs the reader that "noncombatants" may also have entirely different connotations:

> The term noncombatants may, however, also embrace certain categories of persons who, although attached to or accompanying the armed forces, enjoy special protected status, such as medical officers, corpsmen, chaplains, and war correspondents. The term is also applied to armed forces personnel who are unable to engage in combat because of wounds, sickness, shipwreck, or capture.

Treaties Relating to "Noncombatant Persons"

Without entering for the moment into the details of the various statements in paragraphs 5.3, 11.1 and 11.3, it appears useful to identify at the outset the treaties especially relevant to the present inquiry. It is surely a trite observation that, unfortunately, the law of armed conflict does not provide just one set of rules governing the position of all "noncombatants" as "people not involved in the fighting," in the sense as used in the *Handbook*. Indeed, with one exception, the treaties in force do not use the term at all.[5]

The majority of the treaties concerned belong to what is commonly known as the "law of Geneva," that is, the long list of conventions starting, modestly enough, with the ten articles of the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, of 22 August 1864,[6] which over the course of time came to provide for the protection of an ever-widening circle of war victims. The Convention on the wounded and sick soldiers in the field of 1864 was followed by the wounded, sick and shipwrecked at sea in 1899;[7] prisoners of war in 1929;[8] and last but not least, civilians, mainly though not exclusively those in enemy or enemy-occupied territory, in 1949.[9]

While the "law of Geneva" knew this regular, step-by-step development, another part of the law of armed conflict, governing conduct during hostilities and commonly referred to as the "law of The Hague," was codified in a rather distant past, by the Hague Peace Conferences of 1899 and 1907.[10] After this feat the "law of The Hague" was for a long while left alone (and to customary development). Major parts of this body of Hague law eventually came to be included in the "reaffirmation and development of international humanitarian

law applicable in armed conflicts" of the 1970s that resulted in the adoption, in 1977, of the two Additional Protocols referred to above.

For purposes of the present comment the following treaties are of particular significance:

- the four Geneva Conventions of 1949 for the protection of war victims, viz., the First Convention (wounded and sick on land); the Second Convention (wounded, sick and shipwrecked at sea); the Third Convention (prisoners of war); and the Fourth Convention (civilians);
- the Hague Regulations on land warfare, of 1899/1907, together with the Hague Convention (IX) on naval bombardment; and
- the Additional Protocols of 1977.

Examination of the relations between the various types of "noncombatant persons" listed in the *Handbook* and the categories of persons specified in the relevant treaties will be the main purpose of the next sections.

Scope of Application of Chapter 11

A preliminary point is the scope of application of Chapter 11 (and presumably, of the entire Part II of the *Handbook*, on the "Law of Naval Warfare"), both as regards time and place.

Part II of the *Handbook* refers throughout to "armed conflict," without any attempt at definition. In the law of armed conflict, the term encompasses both international and internal armed conflicts. Since 1949, Art. 3, common to the four Geneva Conventions, makes separate provision for the latter type of armed conflict. In 1977, Art. 3 was supplemented by Protocol II. While the conduct of hostilities in an internal armed conflict need not be very different from the same sort of activities in an international one, the law differs significantly. One such difference is that the law relating to internal armed conflicts, whether in its 1949 or 1977 versions, does not recognize a separate category of "combatants," as those persons who, in contradistinction to the rest of the population, "have the right to participate directly in hostilities."[11]

Chapter 11 and Part II in general do not differentiate between the two types of armed conflict and appear to have been written with an eye to international armed conflicts in particular. Yet, the U.S. Navy may become involved in an internal armed conflict in two different situations: when the United States itself becomes the scene of such a conflict, or when it steps into an internal conflict elsewhere. The first case is probably so purely hypothetical that provision need not be made for it in a *Commander's Handbook on the Law of Naval Operations*. On the other hand, in United States practice, active involvement in other nations' conflicts is not a rare occurrence at all.

Outside intervention in an internal armed conflict habitually gives rise to interesting legal questions: when does this or the other part of the law of armed conflict apply, and to whom? Does it matter whether the intervention

is on the side of the incumbent authorities or on the other side? Refreshingly, the *Handbook* leaves all these more or less pedantic questions for what they are and confines itself to one maximum solution: when the U.S. Navy is involved in a shooting war, it shall apply the rules governing international armed conflict. One can only be gratified with such an outright choice for the rules providing greatest protection to "noncombatant persons" and other war victims.[12]

Another matter is the territorial scope of application. Part II being concerned with "Naval Warfare," one might think of the sea as the natural theatre of naval operations. Yet, a perusal of the text leaves little doubt that it is designed to be applied on a far broader basis and, in effect, on land and in the air as much as at sea. A case in point is Chapter 11, which gives a good deal of attention to the protection of the civilian population against the effects of hostilities, as well as to the situation of persons parachuting from disabled aircraft and who may or may not land in territory controlled by their own forces. Conversely, the whole of Part II pays surprisingly little attention to hospital ships.

One may perceive in this wide scope of application of Part II, and of Chapter 11 in particular, a recognition that "naval operations" include those of the naval air arm, amphibious forces and the marines, and that these do quite often extend to land. It remains to be seen whether the chapter has not thereby come to include details that might be regarded as superfluous, and to neglect issues that could be vital.

III. The Civilian Population

General Protection against Effects of Hostilities

As related in the previous section, paragraphs 5.3, 11.1 and 11.3 of the *Handbook* introduce the civilian population as the "noncombatant persons" of choice. The phrase "civilian population," as defined in paragraph 11.3, represents the broad mass of all those who, although themselves in no way directly involved in the fighting, are likely to be adversely affected by it. These people stand in need of "general protection against the effects of hostilities," no matter when and where these evil effects occur.

In the traditional dichotomy between the "law of The Hague" and the "law of Geneva," general protection of the civilian population belongs to the former. Yet, the treaties adopted by the Hague Peace Conferences of 1899 and 1907 deal with the subject in a rather stepmotherly fashion. They provide two sets of rules, one of which deals summarily with certain military operations likely to affect the civilian population (notably, bombardments and sieges).[13] The other set of rules defines the legal character and effects of belligerent occupation and goes into the relations between the occupying power and the authorities and inhabitants of occupied territory.[14]

A striking feature of the old rules on sieges and bombardments is their silence on the plight of the civilians themselves as human beings exposed to the effects of such warlike activities. This wall of silence surrounding the civilian population as potential victims of hostilities suffered a first, modest, breach in 1949 with the adoption of the Fourth Convention Relative to the "Protection of Civilian Persons in Time of War." For present purposes, it may suffice to refer to Part II, General Protection of Populations Against Certain Consequences of War, that serves to provide some protection, in particular, to certain specially vulnerable categories of civilians. The "consequences" in question may arise as much from the conduct of war on land as from activities at sea as, for example, naval blockade.[15]

While "general protection of the civilian population against the effects of hostilities" long remained a neglected and, hence, somewhat indeterminate notion in the past, its contours became more sharply defined after World War II. The first occasion was the XXth International Conference of the Red Cross, held in 1965 in Vienna. It adopted a resolution which "solemnly declares" four "general principles of the Law of War." Of relevance here are the twin principles "that it is prohibited to launch attacks against the civilian populations as such," and "that distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible."[16]

The United Nations General Assembly subsequently affirmed three of the four principles, including the two principles on protection of the civilian population, by a unanimously adopted resolution of 19 December 1968.[17] As this commentator wrote earlier:

> Although the General Assembly of the United Nations does not possess any formal legislative powers in matters of international law, the unanimous reaffirmation of the principles in question as valid norms of international law can certainly be regarded as an authoritative statement of the law. From this moment it has become very difficult for a Member of the United Nations to deny the validity of the principles spelt out in the Resolution, and of the principle of distinction in particular.[18]

As the drafting history of the 1977 Additional Protocols shows, no "Member of the United Nations" nor, for that matter, any other state has ventured to deny the validity of the principles. On the contrary, Protocol I enshrines them. Moreover, the Protocol expands them into a set of detailed rules.[19]

The *Handbook* reiterates the three principles of December 1968 in paragraph 8.1, Principles of Lawful Targeting, of Chapter 8, The Law of Naval Targeting. In order to examine what it has to say in detail about the protection of the civilian population, it is necessary to pay somewhat closer attention to the two principles concerned, beginning with the principle prohibiting attacks on the civilian population.

Civilian Population Not the Object of Attack

Clearly, this prohibition is not, on principle, subject to any considerations of policy, opportunity, or whatever. The only conceivable exception might perhaps lie in acts of reprisal against the enemy civilian population, a form of action that customary international law cannot with certainty be stated to forbid. Protocol I aims to seal this gap by categorically prohibiting reprisals against civilians, civilian objects in general (Arts. 51, 52) and a long list of specially protected civilian objects in particular (Arts. 53-56). These prohibitions are the outcome of difficult negotiations at the Diplomatic Conference of 1974-1977, and they have since remained the subject of sharp criticism from some quarters.

None of the states becoming party to Protocol I has made an express reservation to the provisions at issue. Close to a formal reservation comes the "understanding" of Italy, to the effect that it shall react to grave and systematic violations of Arts. 51 and 52 by all permissible means under international law, with a view to preventing further violations. Fortunately, this poorly masked threat of reprisal is preceded by a formal acceptance of the competence of the International Fact-Finding Commission, to be established in accordance with Art. 90, to "enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol."[20]

It is a matter of some considerable regret that the *Handbook* states bluntly, in subparagraph 6.2.3 (Reprisal) of Section 6.2 (Enforcement of the Law of Armed Conflict), that "[r]eprisals may be taken against enemy armed forces; *enemy civilians, other than those in occupied territory*; and enemy property." It is not at all certain that this statement is in conformity with customary international law. While the prohibition of such acts cannot be stated with certainty either, the most that can be said is that the law is in a state of indecision. In these circumstances, the blunt affirmation in a brand-new military manual of a major military power of an unquestioned right of reprisal against the civilian population represents a most unwelcome contribution to the "development of international humanitarian law applicable in armed conflicts."

An additional point of criticism is that the list in paragraph 6.2 of the "various means available to belligerents under international law for inducing the observance of legitimate warfare" does not include recourse to an outside fact-finding mechanism. Evidently, as the United States is not presently becoming a party to Protocol I, it is not in a position to accept the competence of the Art. 90 Commission. Yet, the road to *ad hoc* neutral enquiry is always open, and the *Handbook* should make the point explicit. Instead, it simply lists as the first available means of law enforcement: "Publicize the facts with a view toward influencing world public opinion against the offending nation." This may be quite a useful means against the offender once the facts have

been established, but this is precisely where the shoe pinches. Giving publicity to non-established facts is no more than making allegations.

After this short excursion into the field of reprisals, as a possible exception to the principle that the civilian population shall not be the object of attack, we return to the main principle. Application of the principle may in practice be thwarted by the practical difficulty of determining civilian status. As will be seen hereafter, Art. 50 (1) of Protocol I prescribes that whenever there is "doubt whether a person is a civilian, that person shall be considered to be a civilian."

While this rule, if faithfully applied, may largely solve the problem with respect to individuals, another matter altogether is the character of "the civilian population" as a group of persons. Will, for instance, the inhabitants of a town or village continue to enjoy immunity from attack when they have some few soldiers quartered among them? And what of a refugee camp where a good number of the inhabitants are found to be combatants, fully equipped as such?

In an attempt to resolve this issue, Art. 50 (3) of Protocol I provides that: "The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character." This may be the correct solution when, in such a mixed situation, civilians constitute the overwhelming majority. But what if the balance between civilians and combatants is less evidently in their favor? From a military point of view, the immunity of some few civilians cannot forever shield an important military objective from attack.

Protocol I tackles this dilemma in more than one way. First, Art. 51 (7) issues a stern warning against misusing the civilian population to "render certain points or areas immune from military operations."[21] The point is reinforced by the obligation of belligerent parties to protect civilians under their control by taking "precautions against the effects of attacks." Art. 58 (which bears this caption) requires, as self-evident measures, that each party shall take, "to the maximum extent feasible," the removal of civilians from the vicinity of military objectives, and, the other way round, military objectives from civilians.[22]

Obviously, there can be no firm guarantee that this will be done. What, therefore, if one side disregards the prohibitions set forth in Art. 51 (7), so that the other side cannot carry out an attack on a military objective without at the same time seeming to perpetrate an "attack on the civilian population?" To this pressing question, Art. 51 (8) gives a rather evasive reply. The crux of the matter is that "the parties" are reminded of their "obligation to take the precautionary measures provided for in Article 57."[23]

Civilian Population to Be Spared As Much As Possible

This brings us to the other fundamental principle at stake, viz., the

obligation of belligerent parties, in carrying out military operations, to spare the civilian population as much as possible. Art. 57 (1) states the principle: "In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects." Art. 57 (2) to (4) demonstrates clearly that the protection offered by this principle is, in contrast with the first principle, essentially relative in nature, as situations may arise where civilians simply cannot be spared.[24]

The order of preference in Art. 57 is, however, clear: first, try to avoid any incidental loss or collateral damage; if this is impossible, then at least try to minimize it; and in the last resort, refrain from pressing an attack that would cause excessive, that is, disproportionate damage to the civilian population.

These are no mean requirements to put to the military. Yet, they do not appear to be beyond the capacities of a well-trained, well-disciplined armed force, and they doubtless represent the right attitude of mind for any self-respecting soldier. They are even entirely commendable from the point of view of economical use of military means. At the same time, translation of the juridical phraseology of the Protocol into practical, easily understandable terms is of course necessary.

The Handbook on General Protection

In the *Handbook* the detailed rules on protection of the civilian population are spread over several sections. Confining ourselves for the moment to Chapter 11, the relevant paragraphs are 11.2 and 11.3. Paragraph 11.2, Protected Status, purports to deal with general aspects of the protection of all "noncombatant persons." Whether this is correct for all categories shall be examined *infra*. Applied to civilians, the rules it contains fairly accurately reflect some main aspects of the law as codified in Protocol I. It mentions the requirement of advance warning, adding that: "Such warnings are not required, however, if mission accomplishment, including the security of attacking forces, is premised on the element of surprise." It places on record the "affirmative duty" of "a party to an armed conflict that has control over civilians . . . to remove them from the vicinity of targets of likely enemy attack and to otherwise separate military activities and facilities from areas of [civilian] concentration." It affirms that: "Deliberate use of [civilians] to shield military objectives from enemy attack is prohibited." And it concludes that: "The presence of [civilians] within or adjacent to a legitimate target does not, however, preclude its attack."

Although all this may appear acceptable enough, it is far from giving the full story. In effect, the opening sentence of paragraph 11.2 sets the wrong tone, in that it provides:

> The law of armed conflict prohibits making noncombatant persons the object of intentional attack and requires that they be safeguarded against injury not incidental to military operations directed against combatant forces and other military objectives.

While this is a correct statement as far as it goes, the point is that it does not go far enough. Lacking is the recognition that civilians must be "safeguarded," first and foremost, against injury that *is* "incidental to military operations directed against combatant forces and other military objectives." Paragraph 11.2, in short, does not take up, or even refer to, the problem of incidental loss and collateral damage, let alone recognize proportionality as the ultimate standard of justifiable injury to civilians.

For this, the reader must look elsewhere in the *Handbook*, notably in paragraph 8.1.2.1, Incidental Injury and Collateral Damage, of Chapter 8, The Law of Naval Targeting. Here, the naval commander is urged to "take all practicable precautions, taking into account military and humanitarian considerations, to keep civilian casualties and damage to the absolute minimum consistent with mission accomplishment and the security of the force," and he is required to "determine whether incidental injuries and collateral damage would be excessive, on the basis of an honest and reasonable estimate of the facts available to him." The commander is moreover required to "decide, in light of all the facts known or reasonably available to him, including the need to conserve resources and complete the mission successfully, whether to adopt an alternative method of attack, if reasonably available, to reduce civilian casualties and damage."

This represents a clear attempt to summarize the law relating to protection of the civilian population. The text is open to the criticism that it lays too heavy an accent on "mission accomplishment." This undefined concept, that has no place in positive international law, may all too easily be misused as an excuse for otherwise unjustifiable acts of war affecting the civilian population.

This being said, the inclusion of the paragraph in a part of the law that came to be clarified only with the adoption of Protocol I, is warmly welcomed. The same goes for paragraph 8.1.2, Civilian Objects, specifying certain limitations on the right to attack objects of special importance to the civilian population. The present commentator merely wishes to add that he would have preferred to see both paragraphs repeated in Chapter 11; after all, the distinction between "naval targeting" and "noncombatant persons" is not rigidly maintained elsewhere either.

Returning once again to Chapter 11, paragraph 11.3 states:

> Unlike military personnel . . . civilians are immune from attack unless they are acting in direct support of the enemy's war-fighting or war-sustaining effort. Civilians providing command, administrative, or logistic support to military operations are subject to attack while so engaged. Similarly, civilian employees of naval shipyards, merchant seamen in ships carrying military cargoes, and laborers engaged in the construction of military fortifications, may be attack [sic] while so employed.

This statement too, is open to criticism. First, it creates the erroneous impression that in given situations, civilians may be deliberately chosen as the target of attack even though they are not taking a direct part in hostilities. A more accurate statement would be that in such situations, civilians are more than normally exposed to the risks of war because they happen to be in, on, under, or near an object that is open to attack as a military objective.[25] In such situations, the applicable principle is that they "must be spared as much as possible"—not that they provide fair game.

Over and above this fundamental criticism, the above phrases suffer from an apparent tendency to construe the law—and thereby to influence practice—in a sense that goes to the detriment of the civilian population. One can accept use of the phrase, activities "in direct support of the enemy's war-fighting effort." To add "war-sustaining effort" is going too far, however, as this might easily be interpreted to encompass virtually every activity in the enemy country.

"Civilians" and "Civilian Population"

In the above, the notions of "civilian" and "civilian population" were taken for granted. Internationally accepted definitions for each of these notions were introduced in Protocol I. According to Art. 50 (2), "[t]he civilian population comprises all persons who are civilians." A civilian is, according to Art. 50 (1), "any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol." This definition-by-reference may be reduced to the statement that the civilian population comprises all those persons who are not members of the armed forces. (The latter notion is taken here in a broad sense, including armed groups such as militias, volunteer corps and organized resistance movements that, although not forming part of the regular armed forces, respect certain specificied conditions, with recognizability as a most essential one among them).[26]

The second sentence of Art. 50 (1) emphasizes that: "In case of doubt whether a person is a civilian, that person shall be considered to be a civilian." It is a matter of some regret that this important provision is not reflected in the *Handbook*. Not that the rule represents any great innovation in the law of armed conflict; surely, it could hardly be otherwise. Yet to remind military commanders of this necessary premise in their contacts with unknown persons remains extremely useful.

Up to a point, the definition in Art. 50 (2) is accurately reflected in the text of paragraph 11.3 (as quoted in section II *infra*). The most obvious deviation resides in the qualifying phrase "and not otherwise taking a direct part in hostilities." Paragraph 11.3, sub para. 2, is even more explicit:

> Civilians who take a direct part in hostilities by taking up arms or otherwise trying to kill, injure, or capture enemy persons or destroy enemy property lose their immunity and may be attacked. Similarly, civilians serving as lookouts, guards, or intelligence agents for military forces may be attacked.

Similar language is not found in Art. 50. On the other hand, Art. 51 (3) provides that: "Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities."

This sentence differs in more than one respect from the language in paragraph 11.3 of the *Handbook*. First, while the latter text carries the suggestion of a permanent loss of status and protection, Art. 51 (3) makes abundantly clear that the loss of protection is dependent on, and does not outlast, the activities at issue. In other words, the law is that a civilian who participated directly in hostilities but who has terminated his participation, is once again fully entitled to protection as a civilian and, hence, immune from attack (although he is liable to be punished for his hostile acts).

To be in accordance with the rule in Protocol I, the loss of immunity in paragraph 11.3 should not be understood as a permanent loss of status but, rather, as a temporary suspension of protection. The *Handbook* could be clearer on this score.

Another notable aspect is the terms by which paragraph 11.3 sets out to make the abstract notion of "direct participation in hostilities" more tangible. That "taking up arms or otherwise trying to kill, injure, or capture enemy persons" are listed under this heading may seem acceptable enough. Yet, the "enemy persons" may themselves be engaged in an unlawful act against civilian life or property, thereby justifying an act in self-defense on the part of the threatened civilians. Does the *Handbook* simply assume that U.S. naval personnel will not engage in such evil ways? A stern warning against any such conduct justifying forceful counter-measures on the part of the victims might be in order.

The next specific act mentioned in paragraph 11.3, "trying to destroy enemy property," is altogether too broad and vague to justify, in all cases, loss of protection as a civilian. It is just about as easy to think of instances where this consequence is justified, as of other ones where this is certainly not the case. The phrase should either be specified or deleted.

Is it correct to assert, as paragraph 11.3 does, that "civilians serving as lookouts, guards, or intelligence agents for military forces may be attacked"? This is yet another example of a statement that is simply too sweeping to guarantee that civilians shall not be attacked without just cause.

The present commentator regrets the apparent tendency in Chapter 11 to construe "direct participation in hostilities" in such wide terms. It is, of course, acknowledged that the concept is notoriously difficult to construe, and that the task of doing so falls to the competent national authorities. As the late Professor Waldemar A. Solf wrote, "As the interpretation of these

terms may affect matters of life or death, it is indeed regrettable that the ambiguities are left for resolution to the practice of States in future conflicts."[27]

A good starting point for a narrower construction might be in the following quotation: " 'Direct' participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces."[28]

Levee en masse

Reference should be made here to the *levee en masse* as a special case warranting attacks on civilians. Ever since the Hague Regulations on land warfare, 1899, the law has recognized that: "Inhabitants of a nonoccupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units" are not liable to punishment for their warlike acts and, when captured, are entitled to prisoner-of-war status, "provided they carry arms openly and respect the laws and customs of war."[29]

The difference between participants in a *levee en masse* and the civilians of Art. 51 (3) lies not so much in the treatment they will get while engaged in active hostilities. They are all equally open to attack. However, when they fall into enemy hands while so engaged, members of the former category are not liable to be punished for their warlike acts and are entitled to prisoner-of-war status, whereas persons of the latter type are not entitled to either prerogative. Again, when the enemy gets hold of persons of either category only after they returned to normal "civilian" life, he must leave the participants in the *levee en masse* untouched but may still put the other individuals on trial.

In view of the apparent broad scope of application of the *Handbook*, and keeping in mind the possibility of U.S. forces taking part, for example, in an amphibious operation that the inhabitants of the territory concerned may be expected to regard as an invasion, the *levee en masse* should not remain unnoticed.

Protection under the Fourth Convention

As noted earlier in this chapter, a separate Convention for the protection of civilians saw the light in 1949. Part II of this Fourth Convention deals, as its title indicates, with the "general protection of populations against certain consequences of war." The consequences envisaged here are not, however, the effects of hostilities on the civilian population in general but, rather, the risks threatening certain especially vulnerable categories of civilians, such as wounded, sick and aged persons, children under fifteen, expectant mothers, and mothers of children under seven. The risks in question

may arise as much from the conduct of war on land as from activities at sea as, for example, naval blockade.

In this respect, reference may be made once again to Art. 23.[30] This Article outlaws the infliction of a total blockade in complete disregard of the fate of the civilian population. In the *Handbook*, subparagraph 7.7.3, Special Entry and Exit Authorization, of paragraph 7.7, Blockade, briefly refers to this matter, stating that "neutral vessels and aircraft engaged in the carriage of qualifying relief supplies for the civilian population and the sick and wounded should be authorized to pass through the blockade cordon."

Another fleeting reference to a subject dealt with in Part II of the Fourth Convention is found in subparagraph 6.2.2, The International Committee of the Red Cross (ICRC). It mentions the task assigned to the ICRC under the Geneva Conventions, *inter alia*, of "offering its 'good offices' to facilitate establishment of hospitals and safety zones." This reflects the possibility, recognized in Art. 14, for parties to a conflict to establish hospital and safety zones, so organized as to protect especially vulnerable categories of people from the effects of war.

Part III of the Fourth Convention, entitled "Status and Treatment of Protected Persons," provides for the protection of those civilians who are considered "protected persons" under Art. 4.[31] The protection of this Part extends to persons who find themselves, for whatever reason, in enemy territory or in territory under enemy occupation. For either situation, Part III contains elaborate sets of rules. One section deals at length with the treatment of internees, laying down rules that closely resemble those applicable to prisoners of war.

While the *Handbook* does not pay express attention to belligerent occupation, Chapter 11 does contain a paragraph 11.9 on Interned Persons. Rigorously condensing the vast mass of treaty provisions to a few clear lines, it succeeds remarkably well in bringing out the essence of the "humane treatment" due such "protected persons."

Civilians Under Special Protection

The law of armed conflict singles out for special protection certain specified categories of civilians, either because they are regarded as especially vulnerable or on account of the functions they perform. The *Handbook* also, in various chapters, pays occasional attention to the situation of these persons.

As the rules relating to the protection of these diverse categories of civilians are closely linked to those on the status and protection of members of the armed forces who qualify for special protection, they are dealt with in the next section.

IV. Other "Noncombatant Persons"

Medical Personnel and Chaplains

After the civilian population, paragraph 11.1 lists "medical personnel and chaplains" as a first category of "members of the armed forces who enjoy special protected status." Paragraph 11.5 enlarges upon the point: "Medical and dental officers, technicians and corpsmen, nurses, and medical service personnel, have special protected status when engaged exclusively in medical duties and may not be attacked." As regards chaplains, the Section specifies that in order to "enjoy protected status equivalent to that of medical personnel," they must be "engaged in ministering to the armed forces."

While paragraph 11.5 provides an undivided list of the medical personnel who all qualify for the same protected status, the treaties in force recognize certain distinctions. For present purposes, importance attaches to the distinction between permanent and temporary personnel. Art. 24 of the First Convention defines the position of the permanent military medical staff and chaplains, as follows:

> Medical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease, staff exclusively engaged in the administration of medical units and establishments, as well as chaplains attached to the armed forces, shall be respected and protected in all circumstances.

As regards the situation at sea, Arts. 22 and 36 of the Second Convention provide similar protection for "the religious, medical and hospital personnel" of military hospital ships.

The above persons are, so to speak, "noncombatants" by profession. They are, by virtue of their function, permanently precluded from taking an active part in hostilities. There can be little doubt that the term "noncombatants" in Art. 3 of the Hague Regulations ("The armed forces of the belligerent parties may consist of combatants and noncombatants") refers to the medical personnel and chaplains of the armed forces in the first place.

Almost but not entirely on a par with these prototypical "noncombatants" are the temporary paramedical personnel. Art. 25 of the First Convention provides that:

> Members of the armed forces specially trained for employment, should the need arise, as hospital orderlies, nurses or auxiliary stretcher-bearers, in the search for or the collection, transport or treatment of the wounded and sick shall likewise be respected and protected if they are carrying out these duties at the time when they come into contact with the enemy or fall into his hands.

While a strong preference for non-violent behavior or even a sense of vocation may have prompted these "members of the armed forces" to apply for such special training, they enjoy noncombatant status only on a temporary basis, when they are actually employed in one or other of the above functions.

At other moments they may be occupied in a normal combatant capacity, and may then act as such with impunity.

Comparing the above treaty provisions with paragraphs 11.1 and 11.5 of the *Handbook*, it appears that the *Handbook* unacceptably oversimplifies matters. Mention of the permanent and temporary medical personnel in one breath leaves the reader with the false impression that like the auxiliary personnel, members of the permanent medical staff depend for their protected status on "being engaged exclusively in medical duties," a misunderstanding that could and should be avoided.

The ground-rule for the treatment of (permanent or temporary) medical personnel and chaplains is already given in the above treaty texts: they must be "respected and protected." It follows that they shall not be the object of attack. An obvious precondition is that they are recognized in their quality as medical personnel or chaplains. As to this, a surgeon who performs an operation in a military field hospital without wearing the "armlet bearing the distinctive emblem" prescribed by Art. 40 of the First Convention, will not lightly be mistaken for someone who is "taking a direct part in hostilities." On the other hand, uniformed auxiliary medical personnel searching for wounded in the field run a serious risk of being mistaken for unprotected combatants if they fail to wear the "white armlet bearing in its centre the distinctive sign in miniature" as prescribed in Art. 41 of the First Convention. Subparagraph 11.10.6 correctly reflects this point.

The Conventions do not state in so many words that permanent military medical personnel and chaplains, and the temporary personnel while engaged in a paramedical function, shall themselves refrain from taking an active part in hostilities. Yet this is an evident condition for effective immunity from attack. A chaplain who, arms in hand, leads an attack (as seems to have happened in Viet Nam) cannot (and probably does not) expect to be respected as a "noncombatant." On the contrary, his active participation in hostilities constitutes an unlawful act of war and, hence, a war crime.

Medical or paramedical personnel who perpetrate a similar act under the cover of the red cross or red crescent may, under the terms of Art. 85 (3) (f) of Protocol I, be guilty of an act of perfidy amounting to a grave breach of the Protocol. This point is stated in paragraph 12.2 (Misuse of Protective Signs, Signals and Symbols) of Chapter 12 (Deception During Armed Conflict) of the *Handbook*. The paragraph explains that acts of the above type "undermine the effectiveness of protective signs, signals, and symbols and thereby jeopardize the safety of noncombatants and the immunity of protected structures and activities."

Another matter altogether is that medical personnel may be armed and "use the arms in their own defence, or in that of the wounded and sick in their charge" (Art. 22, First Convention). Paragraph 11.5 correctly specifies that the arms must be "small arms." It adds that the arms may also serve

"for protection from marauders and others violating the law of armed conflict." One senses here a typical reflection of the asserted constitutional right of all Americans to carry a weapon in self-defense. While "protection from marauders" seems all right, the present commentator has some difficulty with the added category of "others violating the law of armed conflict." His fear would be that such a vague phrase might easily lead to confusion.

Upon capture, permanent military medical personnel and chaplains "shall be retained only in so far as the state of health, the spiritual need and the number of prisoners of war require;" thus retained, they shall not themselves be deemed prisoners of war (Art. 28 of the First Convention). Those who are not retained "shall be returned to the Party to the conflict to whom they belong, as soon as a road is open for their return and military requirements permit" (Art. 30). Temporary personnel, on the other hand, "shall be prisoners of war, but shall be employed on their medical duties in so far as the need arises" (Art. 29).

As against all this, paragraph 11.5 simply states that: "Medical personnel and chaplains falling into enemy hands do not become prisoners of war." And the next sentence draws the equally sweeping conclusion that, "[u]nless their retention by the enemy is required to provide for the medical or religious needs of prisoners of war," they all "must be repatriated at the earliest opportunity."

Not specifically mentioned in the *Handbook*, but falling in the same class and under the same protections as the permanent military medical personnel, are their civilian colleagues on the staff of duly recognized Red Cross, Red Crescent or other voluntary aid societies (Art. 26 of the First Convention), the religious, medical and hospital personnel of other than military hospital ships (Arts. 24 and 36 of the Second Convention), and, according to Art. 20 of the Fourth Convention "persons regularly and solely engaged in the operation and administration of civilian hospitals, including the personnel engaged in the search for, removal and transporting of and caring for wounded and sick civilians, the infirm and maternity cases." As for the Red Cross and other civilian personnel, they "may not be detained" and "shall have permission to return to their country, or if this is not possible, to the territory of the Party to the conflict in whose service they were, as soon as a route for their return is open and military considerations permit" (Art. 32 of the First Convention).

Combatants in Various Situations of Distress

Of a different character altogether are the next class of "noncombatant persons" listed in paragraphs 5.3 and 11.1: members of the armed forces "who have been rendered incapable of combat by wounds, sickness, shipwreck, or capture." Such persons differ from medical personnel and chaplains in that they find themselves in a noncombatant position, not as a matter of vocation,

profession or preference but by accident, or indeed by a stroke of bad luck. They are first and foremost combatants and, as such, are not precluded in principle from taking up arms against the enemy. A wounded soldier is fully entitled to open fire on an adversary, provided he does not do so while feigning to be incapacitated by his wounds. Even when taken prisoner, a soldier retains his capacity and status as a combatant; thus, he may escape with impunity, and his national legislation may even oblige him to attempt to do this.

Paragraph 11.4, The Wounded and Sick, states the principle that "[m]embers of the armed forces incapable of participating in combat due to injury or illness may not be the subject of attack." Paragraph 11.8, Prisoners of War, adds the equally important principle that when they are given medical treatment, "no distinction among them will be based on any grounds other than medical ones."

Paragraph 11.6, The Shipwrecked, extends similar protection to all "[s]hipwrecked persons, whether military or civilian." Persons belonging to the category of the shipwrecked "include those in peril at sea or in other waters as a result of either the sinking, grounding, or other damage to a vessel in which they are embarked, or of the downing or distress of an aircraft."

Obviously, the above comments about "noncombatants against their will" do not apply to the civilians among the shipwrecked. That they are placed on the same footing as the military shipwrecked is easily understood in the light of the situation at sea, where shipwreck means the same extreme danger for everyone and where rescue without discrimination has become more or less the natural thing to do.

Equally self-evident, although phrased in such complicated "legal" terms as to be open to interpretation in practice, are the exceptions made in the second subparagraph of paragraph 11.6:

> Shipwrecked persons do not include combatant personnel engaged in amphibious, underwater, or airborne attacks who are proceeding ashore, unless they are clearly in distress and require assistance. In the latter case they qualify as shipwrecked persons only if they cease all active combat activity and the enemy has an opportunity to recognize their condition of distress.

The first sentence of paragraph 11.8, Prisoners of War, contemplates situations of distress combatants may find themselves in just moments before they are taken prisoner:

> Combatants cease to be subject to attack when they have individually laid down their arms to surrender, when they are no longer capable of resistance, or when the unit in which they are serving or embarked has surrendered or been captured.

This language corresponds in the main with the provision in Art. 41 (1) of Protocol I, that "[a] person who is recognized or who, in the circumstances, should be recognized to be *hors de combat* shall not be made the object of attack." One missing element is, of course, the affirmative duty of the adversary to recognize the person in question as being *hors de combat*.

For the rest, the specific situations where paragraph 11.8 considers a combatant to be *hors de combat* do not markedly differ from those set forth in Art. 41 (2) of Protocol I.[32]

A situation comparable to that of the combatant *hors de combat* is dealt with in paragraph 11.7, Parachutists. It provides in part:

> Parachutists descending from disabled aircraft may not be attacked while in the air and, unless they land in territory controlled by their own forces or engage in combatant acts while descending, must be provided an opportunity to surrender upon reaching the ground.

This is a more or less faithful reflection of the rules laid down in Art. 42 (1) and (2) of Protocol I. The inclusion of this provision in paragraph 11.7 may be taken as a sign that the United States regards the position of these persons as being governed by customary law.[33]

Section 11.7 deviates from the language of Art. 42, notably, in the reference to the performance of "combatant acts while descending." At the Diplomatic Conference of 1974-1977, in the course of the debate on the draft Article, some urged that a clause to that effect be included, whereas others asserted that it would be an empty phrase as performance of such acts in the course of a descent by parachute was impossible. In the end, a Philippine amendment to add "unless he commits a hostile act during such descent" failed to obtain the required two-thirds majority.[34]

While Art. 42 (3) provides, by way of exception, that "Airborne troops are not protected by this Article," paragraph 11.7 also excludes from protection "special warfare infiltrators and intelligence agents." This sounds reasonable enough. Yet it may not be easy in practice to ascertain that a person who is parachuting from an airplane that may or may not be in distress actually belongs to one of these sinister categories.

Prisoners of War

As provided in paragraph 11.8, Prisoners of War, "combatants that have surrendered or otherwise fallen into enemy hands are entitled to prisoner-of-war status." Subparagraph 2 defines the persons entitled in principle to such status. They "include members of the regular armed forces, the militia and volunteer units fighting with the regular armed forces, and civilians accompanying the armed forces." While the *Handbook* poses no further conditions for members of the regular armed forces, subparagraph 2 specifies in a second sentence:

> Militia, volunteers, guerrillas, and other partisans not fighting in association with the regular armed forces qualify for prisoner-of-war status upon capture, provided they are commanded by a person responsible for their conduct, are uniformed or bear a fixed distinctive sign recognizable at a distance, carry their arms openly and conduct their operations in accordance with the law of armed conflict.

This sentence provides a slightly simplified version of the traditional law, while at the same time supplementing it with embellishments and explanatory elements of its own. In doing so, it largely relies on the treaties to which the United States is a party. For the rest, it appears to borrow elements from Protocol I or, indeed, from its drafting history.

The applicable pre-Protocol treaty law is found mainly in Art. 13 common to the First and Second Geneva Conventions and in Art. 4 of the Third Convention. As far as relevant here, these Articles list in identical terms, first, the members of regular armed forces, including "members of militias or volunteer corps forming part of such armed forces," and secondly:

> Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
>
> (a) that of being commanded by a person responsible for his subordinates;
>
> (b) that of having a fixed distinctive sign recognizable at a distance;
>
> (c) that of carrying arms openly;
>
> (d) that of conducting their operations in accordance with the laws and customs of war.

Like the quoted phrase in paragraph 11.8, these Articles distinguish between the regular armed forces and other armed groups, and specify a number of conditions the latter groups have to meet in order to qualify for prisoner-of-war status. The main difference is in the definition of the not-so-regular armed groups, with the treaty provisions specifically mentioning resistance movements, as a *species* of the *genus* "other volunteer corps." That resistance movements were mentioned at all was a great victory in 1949, after the failure of the Hague Peace Conferences of 1899 and 1907 to resolve the problem of armed resistance in occupied territory in a satisfactory manner.

At the same time, it was but half a victory, because the 1949 text maintained the four conditions as adopted in 1907 (including the element that the distinctive sign had to be "fixed"—a rather unfortunate German addition of that year to the text established in 1899). Even in 1949 it was a well-known fact that resistance movements are rarely able to meet all four conditions. It also became clear that even regular armed forces very often rely on cover and camouflage rather than, as in the days of yore, on the splendor and brilliance of their uniforms and arms. On the other hand, irregular fighters were often treated in practice as combatants and prisoners of war, even if they had not met all four conditions all the time.

These facts eventually led to the adoption of Art. 43 (1) of Protocol I, providing a completely new definition of "armed forces." The new text does

away with the distinction between "regular" and "irregular" armed forces, as also with the list of stringent conditions of 1907. Instead, it requires organization, responsible command, and discipline.[35] The obligation of combatants "engaged in an attack or in a military operation preparatory to an attack" to "distinguish themselves from the civilian population" is laid down in Art. 44 (3), leaving open how they will discharge this obligation.[36] One obvious means remains the uniform. As specified in para. 7, Art. 44 "is not intended to change" the practice of regular armed forces with respect to the wearing of the uniform - no matter what that practice may be.

The definition of "armed forces" in Art. 43 (1) doubtless constitutes new law, and the United States is therefore legally entitled to disregard it. At the same time, one cannot but feel a sense of regret at this posture, which contradicts not only the stand taken by its delegation at the Diplomatic Conference of 1974–1977 but, perhaps even more strikingly, its own practice in the Vietnam War, a practice that served as an example to the rest of the world and was a source of inspiration for the negotiators at the Conference. In particular, after all that has happened, it is difficult to accept as serious propositions that a distinction should still be maintained between regular and other armed forces and that the latter would be required at all times to "be uniformed or bear a fixed distinctive sign recognizable at a distance" and "carry their arms openly."

Given the rather retrograde posture of the *Handbook* on the matter of qualification as prisoners of war, the reference in paragraph 11.8 to "guerrillas" and "partisans" is all the more surprising. Such catchwords may have been used in the debate preceding the adoption of Art. 43 (1) of Protocol I, but they were no more included in the text than other comparable, equally undefined terms, if only because they are as open to subjective interpretation as, for example, the word "terrorist."[37]

The third and last subparagraph of paragraph 11.8 provides, in accordance with the rule in Art. 5 of the Fourth Convention, that in case of doubt, a captive is entitled to "prisoner-of-war treatment until a competent tribunal convened by the captor determines the status to which that individual is properly entitled."

While the "competent tribunal" is expected to determine a person's entitlement to prisoner-of-war status, it will usually have to do so on the basis of a finding concerning that person's combatant status. In this respect, subparagraph 12.7.1, Illegal Combatants, is of interest. It provides that "Persons who take part in combat operations without distinguishing themselves clearly from the civilian population during battle are illegal combatants and are subject to punishment upon capture." Then, referring to the above rule on determination of status, it asserts that if a competent tribunal finds them to be "illegal combatants," they "may be denied prisoner-of-war status and be tried and punished for falsely claiming noncombatant

status during combat." This is followed by the somewhat reassuring conclusion that: "It is the policy of the United States, however, to accord illegal combatants prisoner-of-war status if they were carrying their arms openly at the time of capture."

All of this can hardly go without a few words in comment. While the closing part of the first sentence is doubtless correct, the assertion that such persons are "illegal combatants" is, to say the least, highly controversial. As the modern law stands, a person either is a member of the armed forces and, hence, a "combatant," or he does not belong to an armed force and, hence, is a "civilian." For this, it is immaterial whether the person in question, while engaged in combat activities, has distinguished himself from the civilian population. If he failed to do so, he is liable to be punished. In other words, the better view is that a category of "illegal combatants" simply does not exist.

As regards the general rule of distinction, the "new law" of Art. 44 (3) and (4) of Protocol I admits one exception. It concerns the armed combatant who finds himself in a situation where, "owing to the nature of the hostilities" he cannot properly distinguish himself from the civilian population while "engaged in an attack or in a military operation preparatory to an attack." If this man then fails to meet even the minimum requirement of carrying his arms openly, (a) during a 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," he forfeits "his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol."

This exception to the principle of distinction is among the points most strongly objected to by the United States.[38] To some extent, the quoted phrases of subparagraph 12.7.1 reflect these objections, in that they disqualify as "illegal combatants" all those who take part in combat operations without proper distinction. At the same time, one senses a reluctant (or audacious?) attempt to meet the "new law" half-way in the closing sentence, where it is declared to be U.S. policy to accord prisoner-of-war status (not merely treatment) even to persons who have been found to be "illegal combatants" - this on the condition that they were carrying arms openly at the time of capture, rather than during the periods of activity and visibility indicated above. This is surprising, because the moment of capture may occur days after the aforesaid combat activities. Perhaps the sentence is intended to mean exactly the same as the rule in Art. 44 (4), the assumption being that capture will take place in the course of the combat activities.

As for the treatment of prisoners of war, it may suffice to note that while this is dealt with in minute detail in the Fourth Convention, the *Handbook* obviously does not repeat all of this. Paragraph 11.8 states the principle that

they "must be treated humanely and protected against violence, intimidation, insult, and public curiosity," as well as the main rules on interrogation, including the prohibition of "[t]orture, threats, or other coercive acts." After some basic facts about "trial and punishment," "labor," and "escape" (subparagraphs 11.8.1 to 11.8.3), subparagraph 11.8.4 lays down some sensible rules for the "Temporary Detention of Prisoners of War, Civilian Internees, and Other Detained Persons Aboard Naval Vessels." None of this needs special comment.

War Correspondents and Other Persons Accompanying the Armed Forces

While section III of this essay dealt with civilians as members of very broad categories (the entire civilian population, or large segments, such as inhabitants of occupied territory), a totally different approach consists in singling out specified classes of civilians for special protection. A case in point is the war correspondent, mentioned in paragraph 5.3 of the *Handbook*. He belongs, in the terms of Art. 4 A (4) of the Third Convention, to the "[p]ersons who accompany the armed forces without actually being members thereof." As distinct from the information officer (who is a member of the armed forces), the war correspondent, although officially accredited with the armed forces, is a civilian and must in principle be treated as such. Yet his work exposes him to the risk of falling into enemy hands.

Accordingly, it was provided in Art. 13 of the Hague Regulations that in case this happened and if the enemy considered it "expedient to detain" war correspondents they were then "entitled to be treated as prisoners of war, provided they [were] in possession of a certificate from the military authorities of the army which they were accompanying." Art. 81 of the 1929 Prisoners-of-War Convention used more or less the same language. The most important innovation was that the requirement of a certificate had been replaced by a requirement of authorization from the same military authorities. Art. 4 A (4) of the present Third Convention differs from the 1929 text in this one respect that the text no longer refers to the expediency of detaining the persons in question. This does not, however, materially affect the situation; they are and remain civilians and the enemy will still be fully entitled to let them go if he so prefers.

The rule of Art. 4 A (4) applies not only to war correspondents but likewise to all "[p]ersons who accompany the armed forces without actually being members thereof." The Article gives as further examples: "civilian members of military aircraft crews, . . . supply contractors, members of labour units or of services responsible for the welfare of the armed forces." As with the war correspondents, a condition for prisoner-of-war status of all these groups is "that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model." And once again, they all are and remain

civilians, even though the enemy might think fit to detain them temporarily or, if he so prefers, for the duration of the armed conflict.

In the *Handbook*, the second subparagraph of paragraph 11.8 refers in passing to the general category of "civilians accompanying the armed forces."

Journalists on Dangerous Missions

In recent years, a great deal of attention has been given to the risks run by journalists who report on an ongoing armed conflict without being accredited as war correspondents with the armed forces of one of the parties. The result is Art. 79 of Protocol I, on "measures of protection for journalists." The Article aims to provide a modicum of protection to journalists who are "engaged in dangerous professional missions in areas of armed conflict." Obviously, such journalists often put their lives at risk in their news-gathering activities. So long as they roam freely through an area of actual combat, the law can do little more than remind the belligerent Parties, as Art. 79 does, that they are civilians and thus are entitled to "general protection" (the Article states erroneously that they "shall be considered as" civilians).[39]

While, as explained above, the officially accredited war correspondent who is captured and detained by the enemy is entitled to treatment as a prisoner of war despite his status as a civilian, this rule does not apply to other journalists. Art. 79 of Protocol I does not modify the situation; it merely makes clear that even in this eventuality, the "journalist engaged in a dangerous professional mission in an area of armed conflict" is and should be treated as a civilian.

The "journalists on dangerous missions" have not found a place in the *Handbook*.

Crew Members of Merchant Marine and Civil Aircraft

By virtue of Art. 4 A (5) of the Third Convention, and for similar reasons as war correspondents, the "[m]embers of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft" qualify as prisoners of war when detained by the enemy. This rule, although not mentioned in Chapter 11, is duly reflected in Chapter 8, Naval Targeting, notably in subparagraph 8.2.2.1.

Protective Signs and Symbols and Other Means of Identification

Paragraph 11.10, Protective Signs and Symbols, sums up the main rules on use of protective means of identification. With respect to the use Israel makes of the Red Star of David, instead of the red cross or red crescent as the two internationally accepted and commonly used symbols, subparagraph 11.10.1 states that the United States "has not agreed that it is a protective symbol." While this is indubitably correct, perhaps even more important is that the other 160-odd states of the world equally, and quite emphatically, refuse to

include it amongst the recognized protective symbols. A U.S. agreement to recognize the Red Star of David as such could not alter this fact and, with that, the state of the law.

The paragraph provides a remarkably complete list of protective symbols. It includes, "for informational purposes only," two symbols established by Protocol I: one for the protection of dams, dikes and nuclear power plants, and the other protecting civil defense facilities and personnel. Curiously, it also mentions, as "of special interest to naval officers," the sign established by Hague Convention IX of 1907 and, according to the letter of Art. 5, designed to be used by the inhabitants of towns, etc. open to naval bombardment, to "indicate" "sacred edifices, buildings used for artistic, scientific or charitable purposes, historic monuments, hospitals, and places where the sick or wounded are collected." The "visible signs" prescribed in Art. 5 and consisting of "large, stiff rectangular panels divided into two colored triangular portions, the upper portion black, the lower portion white," can hardly be regarded as well-known. They may even be said to have fallen into desuetude.[40]

In striking contrast to express reference to these obsolete signs is the total silence on the rules concerning the distinctive marking of hospital ships. In effect, the only reference to these ships is in paragraph 8.2.3, where they are listed among the "enemy vessels and aircraft exempt from capture or destruction." This is all the more astounding as hospital ships are a common feature of naval warfare and as, both during and after the Diplomatic Conference of 1974–1977, much has been said and done about the improved identification of such vessels, also by other than visual means.

V. Conclusions

A good part of the commentary in the preceding sections deals with civilians and the civilian population, notably on land. This is a consequence not of a predilection on the part of the present commentator but, rather, of the organization and contents of Chapter 11, that puts these people in a frontline position - in more than one respect. It should be stated straightaway that, even though much of a commendable nature was found in the relevant parts of Chapter 11, its overall impression as regards the protection of the civilian population was not entirely satisfactory.

The most important point is perhaps a question of "turn of mind." Civilians are not just "noncombatant persons;" they constitute a human society and, in the event of an international armed conflict, the enemy society. It is first and foremost in their societal existence that they must be respected and protected. It is a trite observation that in the practice of contemporary armed conflicts, members of the civilian population are far more likely to fall victim

to unjustifiable acts of war than to justifiable ones. Military manuals should serve to curb this tendency rather than encourage it.

More specifically, the present commentator ventures to suggest that the paragraphs dealing with the distinction between civilians and combatants and the fate of civilians taking a direct part in hostilities be rephrased and brought more in line with the humanitarian spirit of the modern law of war. The principle that the civilian population be spared as much as possible, now hidden in a corner of Chapter 8, should be given a more prominent place, preferably in Chapter 11.

Always in the context of protection of the civilian population, the express claim of a right of reprisal is deeply regretted.

It was stated at the outset of section II of this essay that the term "noncombatant" as used in the *Handbook* does not represent a simple notion at all. The discussion in sections III and IV may have made clear that the phrase is not just deceptively simple; it can hardly be regarded as adequate to cover the great variety of persons who at a given moment, and for one reason or another, are not actively engaged in the conduct of military operations. They range from the "innocent civilian" whose only hope is to remain unaffected by the hostilities, through the journalist who out of professional curiosity seeks out the danger areas, the military doctor who by profession and probably out of idealism will often have to confront the same types of danger, the wounded soldier who for the time being is incapacitated by his wounds, to the fighter pilot who has abandoned his disabled aircraft and parachutes to his own territory where he may hope soon to resume his combatant handiwork.

This being the case, the question arises whether the treatment of all these widely different categories of persons in one chapter is really justified. The present commentator entertains serious doubts in this respect.

Perhaps the point where these doubts become most poignant is with regard to paragraph 11.2, purporting to lay down a series of general principles applicable to all "noncombatant persons" without exception. Without going once again into the details of law relating to specified categories of persons, it may simply be stated here that unmodified application of the generalities of paragraph 11.2 to all of these categories may result in serious encroachments of the law.

There remains the question of the scope of Chapter 11, and of Part II of the *Handbook* in general. As set forth in the second section of the present comments, Part II is apparently designed for global application, on land, at sea, and in the air. This raises the tremendous difficulty of condensing into fairly brief paragraphs a great mass of legal provisions of varying age. While one may admire in principle the manner in which the authors of the *Handbook* have performed this task, some surprising features remain to be noted.

To this commentator, the most surprising aspect is the scant attention given in Part II to hospital ships. In our day and age, one would hardly expect an express reference to Art. 28 of the Second Convention, providing that "[s]hould fighting occur on board a warship, the sick-bays shall be respected and spared as far as possible." In contrast, the hospital ship is an extremely useful and important element in present-day naval operations, and it deserved a more prominent place in the *Handbook*.

In more general terms, a somewhat more extensive treatment of the rules relating to the wounded, sick, and shipwrecked would appear no exaggerated luxury in a "Commander's Handbook on the Law of Naval Operations." As the text stands, and with all due respect for the remarkable achievement it represents, it suffers from a certain imbalance between the commendable attention given to civilians and other "noncombatant persons" on land, and a decidedly less extensive and intensive attention to specific problems of protection of "noncombatant persons" at sea.

Notes

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1. *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva 1974-1977*, (Bern: Federal Political Department, 1978) v. I, part 1, p. 12. [hereafter cited as *Official Records*].

2. On 26 June 1987, the Government of the Netherlands deposited its instruments of ratification of the two Protocols, with annexed declarations of understanding and a declaration accepting the competence of the International Fact-Finding Commission provided for by Art. 90 of Protocol I, thus becoming the 68th State Party to Protocol I and the 62nd to Protocol II, and the 10th State to make the declaration under Art. 90 of Protocol I; see *Revue internationale de las Croix-Rouge*, 1987, p. 444 (English ed. no. 259, 1987, p. 425).

3. Letter of Transmittal from President Ronald Reagan, PROTOCOL II ADDITIONAL TO THE 1949 GENEVA CONVENTIONS AND RELATING TO THE PROTECTION OF VICTIMS OF NONINTERNATIONAL ARMED CONFLICTS, S. Treaty Doc. No. 2, 100th Cong., 1st Sess., at III (1987), reprinted in *American Journal of International Law*, October 1987, p. 910; see also Hans-Peter Gasser, "An Appeal for Ratification by the United States", *American Journal of International Law*, October 1987, p. 912.

4. Hereafter, in addition to the official sources, the reader is directed to a compilation of international agreements by Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflicts*, (Alphen aan den Rijn, The Netherlands: Sijthoff and Nordhoff, 1981) [hereafter cited as Schindler and Toman].

5. The exception is Article 3 of the Regulations on land warfare annexed to the Hague Convention (IV) of 18 October 1907; *see infra* note 10.

6. The Geneva Convention of 22 August 1864 on the relief of the wounded in the field (1 Bevans 7) was superseded by the Geneva Convention of 6 July 1906 (35 Stat. 1885), which was replaced by the Geneva Convention of 27 July 1929 (47 Stat. 2074) and this, in turn, by the Geneva Convention (I) of 12 August 1949 (6 UST 3114) [hereafter cited as Geneva I]; Schindler and Toman, *supra* note 4 at pp. 213, 233, 257, 305.

7. The Hague Convention (III) of 29 July 1899 adapting the Geneva Convention of 1864 to maritime warfare (32 Stat. 1827) was replaced by the Hague Convention (X) of 18 October 1907 (36 Stat. 2371) which, in turn, was replaced by the Geneva Convention (II) of 12 August 1949 (6 UST 3217) [hereafter cited as Geneva II]; Schindler and Toman, *supra* note 4 at pp. 221, 245, 333.

8. The Geneva Convention of 27 July 1929 on the treatment of prisoners of war (47 Stat. 2021) was replaced by the Geneva Convention (III) of 12 August 1949 (6 UST 3316) [hereafter cited as Geneva III]; Schindler and Toman, *supra* note 4 at pp. 271, 355.

9. The Geneva Convention (IV) of 12 August 1949 on protecting civilians (6 UST 3516) has not been replaced [hereafter cited as Geneva IV]; Schindler and Toman, *supra* note 4 at p. 427.

10. The Hague Convention (II) of 29 July 1899, with annexed Regulations on land warfare (32 Stat. 1803) was replaced as between contracting Powers by the Hague Convention (IV) of 18 October 1907, with annexed Regulations (36 Stat. 2277) [hereafter cited as Hague IV Regulations]; Schindler and Toman, *supra* note 4 at p. 57.

The Second Hague Peace Conference (1907) produced a series of conventions relating to matters of naval warfare: Convention VI - the status of enemy merchant vessels at the outbreak of hostilities; Convention VII - the conversion of merchant vessels into warships; Convention IX - bombardment by naval forces of land targets (36 Stat. 2351) [hereafter cited as Hague IX]; Convention XI - restrictions on exercising the right of capture (36 Stat. 2396). Schindler and Toman, *supra* note 4 at pp. 703, 709, 723, 731.

11. The quoted phrase is in Art. 43, paragraph 2 of Protocol I. *Official Records*, *supra* note 1 at p. 143; Schindler and Toman, *supra* note 4 at p. 577.

12. For a modern, thoroughly researched discussion of the question of the law applicable in mixed conflicts, see M. Hess, *Die Anwendbarkeit des humanitaren Volkerrechts, insbesondere in gemischten Konflikten* (Zurich, 1985).

13. Rules of this type are found in Articles 25-27 of the Hague IV Regulations: prohibiting the "attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended;" recognizing a duty of the "officer in command of an attacking force . . . before commencing a bombardment, except in cases of assault, [to] do all in his power to warn the authorities;" and also a duty to take "all necessary steps . . . to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes." 36 Stat. 2302-03; Schindler and Toman, *supra* note 4 at p. 77-78.

With respect to naval bombardments, Article 2 of Hague IX lists targets that, although located within undefended ports, towns, villages, dwellings, or buildings, are excluded from the general prohibition and may be bombarded as military objectives: "military works, military or naval establishments, depots of arms or war *materiel*, workshops or plant which could be utilized for the needs of the hostile fleet or army, and the ships of war in the harbour." 36 Stat. 2363; Schindler and Toman *supra* note 4 at p. 724.

14. Rules of this type are found in Section III of the Hague IV Regulations (Military Authority over the Territory of the Hostile State). 36 Stat. 2306; Schindler and Toman, *supra* note 4 at p. 82.

15. Of special importance is Art. 23 of Geneva IV. It provides for "the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians" of the adversary, as well as of "all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases." 6 UST 3532-34; Schindler and Toman, *supra*, note 4 at 440-41. *See infra* text under the subsection entitled "Protection under the Fourth Convention."

16. The full text of Resolution XXVIII, protecting civilians from indiscriminate warfare, appears in Schindler and Toman, *supra* note 4 at 195. In relevant part the resolution states that "indiscriminate warfare constitutes a danger to the civilian population and the future civilization," and

> solemnly declares that all Governments and other authorities responsible for action in armed conflicts should conform at least to the following principles:
> - that the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited;
> - that it is prohibited to launch attacks against the civilian populations as such;
> - that distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible;
> - that the general principles of the Law of War apply to nuclear and similar weapons.

17. United Nations, General Assembly, *Official Records: Resolutions Adopted by the General Assembly During its Twenty-Third Session, 24 September- 21 December 1968*. Resolution 2444, A/7218 (New York: 1969) pp. 50-51.

18. Frits Kalshoven, *The Law of Warfare, A Summary of its Recent History and Trends in Development* (Leiden: Sijthoff, 1973), p. 44.

19. Article 48 of Protocol I lays down the basic rule: "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives." *Official Records*, *supra* note 1 at 146; Schindler and Toman, *supra* note 4 at p. 580. Articles 51 and 52 provide detailed rules elaborating the prohibition to attack the civilian population or civilian objects.

Subsection (1) of Art. 57 states the second principle: "In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects." *Official Records*, *supra*

note 1 at p. 150; Schindler and Toman, *supra* note 4 at 584–85. Subsections (2)–(5) elaborate this principle into a set of detailed provisions.

Protocol II, on the one hand, reaffirms in Art. 13 the principle of general protection and the prohibition against making the civilian population the object of attack. On the other hand, it provides no definition of military objectives (and contains only one reference to this concept (in Art. 15 on the protection of works and installations containing dangerous forces)). Nor does it expressly refer to the principle of distinction.

20. *Revue internationale de la Croix-Rouge*, 1986, p. 115 (English ed. no. 251, 1986, p. 114). On the matter of wartime reprisals in general see Frits Kalshoven, *Belligerent Reprisals* (Leyden: Sijthoff, 1971). On the negotiations in the Diplomatic Conference of 1974–1977, an article by the same author "Reprisals in the CDDH" in Robert J. Akkerman et. al., eds., *Declarations on Principles, A Quest for Universal Peace* (Leyden: Sijthoff, 1977) pp. 195-216; see also Stanislaw E. Nahlik, "Belligerent Reprisals as Seen in the Light of the Diplomatic Conference on Humanitarian Law, Geneva 1974–1977", *Law and Contemporary Problems*, no. 2, 1978, p. 36.

21. Article 51 (7) provides that:

> The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations. [*Official Records*, *supra* note 1 at p. 147; Schindler and Toman, *supra* note 4 at pp. 581–82.]

22. The following measures are listed:

> (a) without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;
> (b) avoid locating military objectives within or near densely populated areas;
> (c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations. [*Official Records*, *supra* note 1 at p. 151: Schindler and Toman, *supra* note 4 at p. 585.]

23. Article 51 (8) reads: "Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57." *Official Records*, *supra* note 1 at p. 147; Schindler and Toman, *supra* note 4 at p. 582.

24. Article 57 (2) (a) provides that those who plan or decide upon an attack shall:

> (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;
> (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. [*Official Records*, *supra* note 1 at p. 150; Schindler and Toman, *supra* note 4 at pp. 584–85.]

25. As the late Professor Waldemar Solf wrote in Michael Bothe et. al., *New Rules for Victims of Armed Conflicts, Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (The Hague: Martinus Nijhoff, 1982), p. 303:

> [C]ivilians providing only indirect support to the armed forces, such as workers in the defense plants or those engaged in distribution or storage of military supplies in rear areas, do not pose an immediate threat to the adversary and therefore would not be subject to deliberate individual attack. It is obvious, however, that they assume the risk of incidental injury as a result of attacks against their places of work or transport.

26. Subparagraphs (1) and (2) of Article 4(A) appear *infra* in Section IV on "other 'noncombatant persons;'" *see infra* in subsection entitled, "Prisoners of War." Subparagraphs (3) and (6) read as follows:

> A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

Geneva III, 6 UST 3320-22; Schindler and Toman, *supra* note 4 at p. 362-63. Article 43 of Protocol I reads as follows:

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.
2. Members of the armed forces of a Party to the conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.
3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict. [*Official Records*, *supra* note 1 at p. 143; Schindler and Toman, *supra* note 4 at 577.]

27 M. Bothe et. al., *supra* note 25 at p. 302.

28. International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, (Geneva: Martinus Nijhoff, 1987), p. 619.

29. The quoted text is from Art. 4(A) 6 of Geneva III. *See supra* note 26. This does not materially differ from the earlier text of Art. 2 of the Hague IV Regulations. 36 Stat. 2296; Schindler and Toman, *supra* note 4, at p. 69.

30. *See supra* note 15.

31. Protected persons are "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation in the hands of a Party to the conflict or Occupying Power of which they are not nationals," but excludes, among others, persons who are protected under Geneva I, II and III. 6 UST 3520; Schindler and Toman, *supra* note 4 at pp. 434-35.

32. Article 41(2) provides that a person is hors de combat if:

(a) he is in the power of an adverse Party;
(b) he clearly expresses an intention to surrender; or
(c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself; provided that in any of these cases he abstains from any hostile act and does not attempt to escape. [*Official Records*, *supra* note 1 at p. 142; Schindler and Toman, *supra* note 4 at p. 576.]

33. While no treaty prior to Protocol I provides for the protection of persons descending from disabled aircraft, a rule to this effect was included in Art. 20 of the Rules of Air Warfare, drafted by a commission of jurists at The Hague, December 1922 - February 1923, that convened at the instigation of the Washington Conference of 1922 on the Limitation of Armaments. See Schindler and Toman, *supra* note 4 at p. 147 for text.

34. The amendment (CDDH/413), when put to the vote in the plenary meeting of 25 May 1977, obtained 29 votes in favour, 27 votes against and 34 abstentions. *Official Records*, *supra* note 1, v. VI, p. 93 at 106.

35. The text of Art. 43(1) reads as follows:

The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict. [*Official Records*, *supra* note 1 at p. 143; Schindler and Toman, *supra* note 4 at p. 577.]

36. Article 44(3) is among the most hotly contested provisions of Protocol I. *See infra* text accompanying note 38.

37. Given the express reference in Section 11.8 to "guerrillas" and "partisans," one would not have been surprised equally to find a reference to President Reagan's preferred "freedom fighters," better known as the contras.

38. See *supra* note 36.

39. With respect to the status and protection of journalists see International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff, 1987), pp. 917-24.

40. In Article 1012.1 of *The Code of International Armed Conflict* (New York: Oceana, 1986), v. 2, p. 652, H.S. Levie mentions the signs of the 1907 Hague (IX) Convention, but leaves no doubt that they are for all practical purposes obsolete.

Chapter XI
Nuclear, Chemical, and Biological Weapons

by
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Introduction

Chapter 10 of *The Commander's Handbook on the Law of Naval Operations*[1] is concerned with nuclear, chemical, and biological weapons. While the extent that the use of these weapons, other than nuclear, will impinge on naval warfare (except in connection with naval surface and naval air bombardment of land objectives, riverine operations, etc.) is probably fairly limited, the draftsmen of the *Handbook* have deemed it appropriate to include a full chapter on these subjects - and rightly so. In addition to discussing the evolution and present status of the applicable rules of the international law of war with respect to each of those categories of weapons, this commentary will discuss the extent to which those rules affect naval warfare *qua* naval warfare and the extent to which they affect the operations of naval units against objectives on land.

Nuclear Weapons

When the first atom bomb exploded over Hiroshima on August 6, 1945, it began a new (and perilous) era for the planet Earth. It also began a controversy which has yet to be resolved to the satisfaction of a great many people.

Not unexpectedly, sometime after the facts with respect to the nature of the atom bomb and the extent of the casualties and damage inflicted at Hiroshima and Nagasaki became generally known, an issue was raised as to the legality or illegality of the use of the atom bomb - and, subsequently, the same issue was, of course, raised as to the use of its far more powerful and devastating successors. In the discussion which follows it must be borne in mind that while there are a number of conventions placing various types of restrictions on nuclear weapons,[2] there is no convention which specifically outlaws their use.[3] In light of the complete failure of all of the practically endless efforts undertaken since 1945 to accomplish this result, to argue that

the use of such weapons is prohibited by inference derived from the provisions of international agreements dating from 1868, from 1899, or from 1907, appears to be the equivalent of tilting at windmills. In view of the foregoing this writer concurs with the statement contained in the *Handbook* to the effect that, "There are no rules of customary or conventional international law prohibiting nations from employing nuclear weapons in armed conflict."[4] Nevertheless, a brief analysis of the arguments pro and con appears to be warranted.

The 1868 St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight[5] contained a number of humanitarian preambular clauses:

> That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;
>
> That for this purpose it is sufficient to disable the greatest possible number of men;
>
> That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;
>
> That the employment of such arms would, therefore be contrary to the laws of humanity.

During the course of the drafting of what became the 1899 Hague Convention (II) With Respect to the Laws and Customs of War on Land[6] and its annexed *Regulations*, several provisions were included which have often been cited as affecting the subject under discussion. These provisions were:

> Art. 22. The right of belligerents to adopt means of injuring the enemy are not unlimited.
>
> Art. 23. In addition to the prohibitions provided by special Conventions, it is especially forbidden:
>
> (a) To employ poison or poisoned weapons; . . .
>
> (e) To employ arms, projectiles, or material of a nature to cause superfluous injury; . . .

The cognate provisions of the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and its annexed *Regulations* are essentially identical with those quoted above.[7]

Realizing, however, that these and the other provisions that were to be included in the *Regulations* could not possibly cover all of the contingencies that might arise during the course of a war, the Russian representative at the 1899 Peace Conference, Martens, a noted international lawyer, proposed, and the Conference agreed, that a paragraph be included in the preamble which would read:

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.[8]

Assuming that these preambular provisions are law-making in nature, a number of questions arise. Did the use of the atomic bombs in 1945 weaken the military forces of the enemy? Did it uselessly aggravate the sufferings of disabled men, or render their death inevitable? Did it exceed the limits which a belligerent may adopt as a means of injuring the enemy? Did it constitute the use of "poison"? Did it represent the employment of a weapon "calculated to cause unnecessary suffering"? Did it constitute a failure to give the populations and belligerents "the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience" to which they were entitled? And, most important, if one or more of these questions is answered in the affirmative, does the particular principle apply if the alternative would have resulted in a million American military casualties and an even greater number of Japanese casualties, military and civilian? In other words, was the principle of proportionality applicable?[9] While all of those questions have been posed here with respect to Hiroshima and Nagasaki, they will likewise have to be asked - and answered - before any future use of nuclear weapons.

Literally hundreds of books and articles have been written on both sides of the questions posed and it is doubtful that any proponent of either side of the argument has been successful in convincing anyone who disagrees with his position that it is correct and that the other person's position is incorrect. The present writer does not propose to draw himself into that quagmire. Suffice it to say that nuclear weapons are with us and at the present time there does not appear to be any possibility that they will disappear, at least in the foreseeable future. Under those circumstances we can only hope that neither side will make the mistake of using them and thus bring an end to civilization, and to life itself, on this planet.

There is, of course, an area of nuclear warfare in which navies would play an important role. A preemptive first strike by one side might possibly eliminate much of the other side's land-based nuclear deterrent force - but it could not reach the deployed naval-based force, the submarines of which are the ever-mobile carriers of nuclear ballistic missiles. Thus, this potential naval retaliatory force, maintained by both parties involved in the eyeball-to-eyeball confrontation which has more or less existed since shortly after the end of World War II, is a major factor in the policy of deterrence. Moreover, the strength and speed of these nuclear-powered and nuclear-armed submarines are reputedly such that there are experts who believe that

they can only be destroyed by nuclear weapons, such as nuclear-armed depth charges or nuclear-armed torpedoes. If such is the case, the use of these latter nuclear weapons becomes almost inevitable as during a period of active hostilities, whether we call it war or armed conflict, no nation and no navy is going to permit enemy nuclear-powered submarines armed with nuclear ballistic missiles to roam the seas unchallenged.

One problem which arises is whether successful conventional-weapons attacks on nuclear-powered and nuclear-armed submarines (and surface vessels) would adversely affect the waters of the oceans and the air of the atmosphere. While the United States has lost two nuclear submarines with no such adverse effects, this is far from conclusive as the two crews would probably have shut down the nuclear reactors and any nuclear weapons aboard the submarines would not have been armed; accordingly, the amount of radioactivity released by each of those vessels would have been minimal. How much environmental damage would be caused by the sinking of a nuclear-armed and nuclear-powered submarine with its reactor in operation appears to be a relative unknown. Moreover, should a war reach the nuclear stage, it is a virtual certainty that any naval engagement would include the use of nuclear weapons against the opposing enemy fleets. When this occurs the extent of the contamination of the oceans and of the atmosphere is incalculable as nuclear explosions would be taking place both in the atmosphere and in the water and nuclear-powered ships would be sunk with their reactors in operation.[10] Of course, should a war reach the nuclear stage, such matters would be a small, and comparatively unimportant, part of the overall picture.

The ballistic missiles carried by nuclear-powered submarines, referred to above, would, of course, if used, be directed against objectives on land. It is doubtful, but not inconceivable, that in a nuclear war a naval bombardment of objectives on land might include nuclear-armed shells and missiles. However, should a war reach that stage, the results of any such bombardment would be miniscule compared to the results that could be expected from land-based nuclear ballistic missiles, from the nuclear ballistic missiles released from below the surface of the seas, and from the nuclear weapons dropped from the air.

It is probably necessary to conclude that if and when an armed conflict approaches the nuclear stage, law will play a very small role in determining the actions of the belligerents.

Chemical Weapons

Chemical warfare agents have been defined as "chemical substances, whether gaseous, liquid, or solid, which might be employed because of their direct toxic effects on man, animals and plants."[11]

The earliest formal international attempt to prohibit the use of chemicals in warfare occurred at the 1899 Hague Peace Conference which drafted and adopted a Declaration stating, "The Contracting Parties agree to abstain from the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases."[12] This Declaration was of unlimited duration. All of the major European Powers, including France, Germany, Russia, and the United Kingdom, signed and ratified it. The United States neither signed nor ratified it.

The 1899 Declaration was in force during World War I. Despite this, Germany used gas against the Russians in Poland in January 1915. The gas was delivered by artillery shells but, because of the sub-zero weather, had little effect and the incident passed almost unnoticed.[13] The first major, and well-documented, use of gas occurred in France, on April 22, 1915, when the Germans opened containers of compressed chlorine, permitting a favoring wind to blow the gas towards the Allied Ypres salient.[14] The success of the operation far exceeded expectations[15] and before the war was brought to an end more than three years later many other chemical weapons were being used by both sides and were being delivered by artillery, mortars, projectors, etc.[16] The Treaty of Versailles, which legally terminated World War I as between Germany and the Allies, contained the following provision:

Article 171

> The use of asphyxiating, poisonous or other gases and all analogous liquids, materials or devices being prohibited, their manufacture and importation are strictly forbidden in Germany.
>
> The same applies to materials specially intended for the manufacture, storage and use of the said products or devices.[17]

The 1922 Washington Conference on the Limitation of Armaments, consisting of representatives of France, Italy, Japan, the United Kingdom, and the United States, drafted a treaty which was primarily concerned with submarine warfare but which included the following provisions:

> Art. 5. The use in war of asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, having been justly condemned by the general opinion of the civilized world and a prohibition of such use having been declared in treaties to which a majority of the civilized Powers are parties,
>
> The signatory Powers, to the end that this prohibition shall be universally accepted as a part of international law binding alike the conscience and practice of nations, declare their assent to such prohibition, agree to be bound thereby as between themselves and invite all other civilized nations to adhere thereto.[18]

To become effective this treaty required the ratification of all of the participants in the Conference. France refused to ratify it because of objections to some of the provisions with respect to submarine warfare.

Accordingly, the treaty never entered into force. However, three years later another conference, this one concerned with international trade in weapons and ammunition, drafted the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.[19] While much of its wording was taken almost verbatim from the prior draftings, its importance warrants the setting forth of its operative provisions in their entirety:

> Whereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, has been justly condemned by the general opinion of the civilized world; and
>
> Whereas the prohibition of such use has been declared in Treaties to which the majority of Powers of the world are Parties; and
>
> To the end that this prohibition shall be universally accepted as a part of International Law, binding alike the conscience and the practice of nations;
>
> Declare:
>
> That the High Contracting Parties, so far as they are not already Parties to Treaties prohibiting such use, accept this prohibition, agree to extend this prohibition to the use of bacteriological methods of warfare and agree to be bound as between themselves according to the terms of this declaration.

Strange to relate, while the United States had ratified the Washington Treaty, with its provision prohibiting the use of poisonous gases, just two years earlier, and was the chief proponent of the 1925 Geneva Protocol, it did not ratify the latter until 50 years later, in 1975!

Many of the states which have ratified the 1925 Geneva Protocol have done so with a so-called "first use" reservation. Typical of those reservations is that of the United Kingdom: "The said Protocol shall cease to be binding on His Britannic Majesty toward any Power at enmity with him whose armed forces, or the armed forces of whose allies, fail to respect the prohibitions laid down in the Protocol."[20] It does not appear that this "first use" reservation has ever been invoked despite the not-infrequent use of the prohibited gases. For example, Italy, a party to the Protocol (as was Ethiopia), admittedly used poison gas in its 1935-1936 war with Ethiopia. Japan, although a party to the 1899 Declaration, did not ratify the Protocol until after World War II. On June 5, 1942, President Roosevelt warned the Japanese against the use of poisonous gas.[21] While at that time Japan denied using such gas in China,[22] it has never officially denied such use since the end of the war. Egypt, a Party to the 1925 Protocol (as was the Yemen Arab Republic), is alleged to have used gas in the civil war in Yemen. Iraq, also a party to the Protocol (as is Iran), has been accused of using gas in its recent war with Iran.[23] In none of these cases is there evidence of retaliation in

kind, probably because the victim of the gas attack was not in possession of a stock of chemical weapons.

During World War II Hitler on occasion considered the use of chemical weapons against England. However, he apparently realized, or his military advisers were able to convince him, that Germany's opponents were well able to reply in kind and that, in the long run, the use of such weapons would be self-defeating to Germany.[24] On June 5, 1943, President Roosevelt warned Germany that the use of chemical weapons by any Axis country against any one of the United Nations would result in "swift retaliation in kind," specifying that the targets would be "munition centers, seaports, and other military objectives throughout the whole extent of the territory of such Axis country."[25] With the possible exception of Japanese use in China, chemical weapons were not used by any belligerent during World War II.[26]

The General Assembly of the United Nations has adopted a number of resolutions on the subject of chemical warfare.[27] A resolution adopted in 1968, among other things, requested the Secretary-General to prepare, with the assistance of experts, a report on chemical and bacteriological (biological) weapons.[28] This report, which was submitted to the General Assembly in 1969, found that "because of the scale and intensity of the potential effects of their use, they are considered as weapons of mass destruction."[29] The report contained the following statement:

> The general conclusion of the report can thus be summed up in a few lines. Were these weapons ever to be used on a large scale in war, no one could predict how enduring the effects would be, and how they would affect the structure of society and the environment in which we live.[30]

Upon the receipt of that report the General Assembly adopted a resolution to the effect that the 1925 Geneva Protocol "embodies the generally recognized rules of international law prohibiting the use in international armed conflict of all biological and chemical methods of warfare."[31] Of course, this merely represented the political judgment of those nations which voted in favor of the resolution.

The need to maintain a supply of chemical weapons for use in retaliation against a violator of the provisions of the 1925 Geneva Protocol, or any other "first user," has created the longtime problem of finding a safe method for the disposition of overage gas, with leaky containers adding to the difficulties of the possessor. One technical advance in this field, the so-called "binary" gases, will considerably alleviate this problem. These gases consist of two non-toxic chemicals which only become toxic when mixed, an action which is accomplished while, for example, an artillery shell is in flight. A representative of the Chemical Corps of the United States Army listed the advantages of binary weapons as including "improved safety during

production, transportation and storage; no requirement for high-cost toxic production facilities; and simplified low-cost demilitarization procedures."[32]

A number of problems have arisen with respect to the interpretation of the 1925 Geneva Protocol. One such problem is whether it includes within its prohibitions the use of smoke, sometimes a major weapon in naval warfare, and the use of riot control agents, such as lachrymatories, or tear gas. The argument against the use of smoke, that it at least temporarily incapacitates due to a type of asphyxia, is weak and is not very frequently advanced. Originally the British interpreted the provisions of the 1925 Geneva Protocol as covering lachrymatories.[33] However, deeming it an essential weapon for use in Northern Ireland, in 1970 the British Government took the position that "CS and other such gases" were not prohibited by the 1925 Geneva Protocol.[34] Practically all governments use lachrymatories domestically for the suppression of such events as riots and other civil disturbances. Nevertheless, the propriety of their use in armed conflict remains a matter of dispute.

A further problem of interpretation is whether the Protocol includes within its prohibitions the use of herbicides. This problem arose during World War II when the question was raised as to whether it would be in accordance with international law to use "crop-destroying chemicals" on the gardens being grown by Japanese units located on by-passed islands of the Pacific. Although the Judge Advocate General of the Army found no legal impediment to such action,[35] no action was taken, probably because it would have been a waste of resources. During the hostilities in Vietnam herbicides were used extensively, both for crop destruction and as a defoliant.[36] When the issue was raised in the Senate during the consideration by that body of the 1925 Geneva Protocol, the General Counsel of the Department of Defense arrived at the same conclusion the Army had reached in 1945.[37] Nevertheless, as will be noted below, the United States has renounced the first use of herbicides except for certain extremely limited purposes.[38]

Another such problem of interpretation is whether incendiary weapons are within the prohibitions of the Protocol. The United States has long taken the position that there is no rule of international law prohibiting the use of incendiary weapons.[39] At a conference of experts convened in 1969 by the International Committee of the Red Cross, some of the experts were of the opinion that the use of incendiary weapons, and particularly napalm, was prohibited by the 1925 Geneva Protocol because, by burning the oxygen, it "causes a sort of asphyxia." Others took the position that incendiary weapons were not prohibited but were subject to "discriminating" use. The ICRC concluded that "more extensive studies should be made of the consequences of incendiary weapons in order to reach a clear legal solution as to their employment."[40] The U.N. Report with respect to chemical and

bacteriological (biological) weapons, published that same year, contains the following relevant statement:

> We also recognize that there is a dividing line between chemical agents of warfare, in the sense in which we use the terms, and incendiary substances, such as napalm and smoke, which exercise their effects through fire, temporary deprivation of air or reduced visibility. We regard the latter as weapons which are better classified with high explosives than with the substances with which we are concerned. They are therefore not dealt with further in this report.[41]

Studies were subsequently made by a group of experts appointed by the Secretary-General of the United Nations, by the Stockholm Peace Research Institute (SIPRI), and by the ICRC itself in 1973, in 1974, and in 1976; and probably by other organizations and institutions. The U.N. experts found it appropriate "to bring to the attention of the General Assembly the necessity of working out measures for the prohibition of the use, production, development and stockpiling of napalm and other incendiary weapons"[42]—a clear indication of their understanding that there was no such prohibition then extant. The author of the SIPRI report stated that "there was never any positive indication that the intention of the [1925] Geneva Protocol was to prohibit incendiaries."[43] The ICRC studies were inconclusive.[44] Finally, the subject was discussed by the *Ad Hoc* Committee on Conventional Weapons of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts[45] and the Diplomatic Conference adopted a resolution in which it recommended the convening of a conference to draft agreements on certain conventional weapons.[46] Such a conference was held in 1980 and resulted in, among others, a Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons.[47] This Protocol does not prohibit the use of incendiaries; it merely places certain restrictions on the manner in which they may be used. The sum total to be derived from the foregoing survey is, of course, that incendiary weapons do not come within the purview of the prohibitions of the 1925 Geneva Protocol or, for that matter, of any other international agreement on the law of war.

The 1980 Protocol provides that it is prohibited "to make the civilian population, individual civilians or civilian objects the object of attack by incendiary weapons." (Of course, the law of war generally prohibits such attacks by *any* weapon!) Such a prohibition, and the accompanying restrictions on the use of air-delivered and other types of incendiary weapons intended to implement that prohibition, would obviously have no effect on naval engagements at sea. However, they would be applicable with respect to naval bombardments of land targets, either by warships or by aircraft, and with respect to the use of incendiaries by marines ashore.

Now let us see where the United States stands generally on the question of chemical warfare. It has already been mentioned that the United States did not ratify the 1899 Declaration and that the 1925 Geneva Protocol was

not ratified by it until 1975. During that 50-year interim period the position of the United States with respect to chemical warfare was well summed up in the predecessor to the *Handbook*, which contained the following statement:

> The United States is not a party to any treaty now in force that prohibits or restricts the use in warfare of poisonous or asphyxiating gases or of bacteriological weapons. Although the use of such weapons frequently has been condemned by states, including the United States, *it remains doubtful that, in the absence of a specific restriction established by treaty a state legally is prohibited at present from resorting to their use.* However, it is clear that the use of poisonous gas or bacteriological weapons may be considered justified against an enemy who first resorts to the use of these weapons. [Footnotes omitted][48]

The United States has almost uniformly taken the position that there is no customary law prohibiting the use of these weapons.[49] During the hostilities in Vietnam the United States used two controversial types of chemical weapons - tear gas and herbicides.[50] Tear gas was originally used for humanitarian purposes[51] but its utility as a non-lethal gas quickly became apparent and it was widely used for a number of purposes.[52] This created considerable discussion both in the United States and elsewhere in the world with the result that on November 25, 1969, President Nixon issued a statement in which he said that he was resubmitting the 1925 Geneva Protocol to the Senate for its advice and consent to ratification and that the United States "Reaffirms its oft-repeated renunciation of the first use of lethal chemical weapons" and "Extends this renunciation to the first use of incapacitating chemicals."[53]

After extensive hearings and further commitments by the Executive Branch, the Senate gave its advice and consent to the ratification of the 1925 Geneva Protocol[54] and President Ford ratified it on January 22, 1975. The ratification was deposited, and the Protocol became binding on the United States, on April 10, 1975. On April 8, 1975, President Ford signed Executive Order 11,850 which provides:

> The United States renounces, as a matter of national policy, first use of herbicides in war except use, under regulations applicable to their domestic use, for control of vegetation within U.S. bases and installations or around their immediate defensive perimeters, and first use of riot control agents in war except in defensive military modes to save lives such as:
>
> (a) Use of riot control agents in riot control situations in areas under direct and distinct U.S. military control, to include controlling rioting prisoners of war.
>
> (b) Use of riot control agents in situations in which civilians are used to mask or screen attacks and civilian casualties can be reduced or avoided.
>
> (c) Use of riot control agents in rescue missions in remotely isolated areas, of downed aircrews and passengers, and escaping prisoners.

> (d) Use of riot control agents in rear echelon areas outside the zone of immediate combat to protect convoys from civil disturbances, terrorists and paramilitary organizations.[55]

Fortunately, since the issuance of that Executive Order, the United States has not been involved in any armed conflict which would make its application appropriate. However, the *Handbook*, issued in 1987, further illuminates the United States position with respect to the use of chemical weapons. It will be recalled that its predecessor, *The Law of Naval Warfare*, stated that it would be difficult to hold that use of such weapons was prohibited by customary international law.[56] In a complete turnabout, the *Handbook* says:

> The United States considers the prohibition against first use of lethal and incapacitating chemical weapons to be part of customary international law and, therefore, binding on all nations whether or not they are parties to the 1925 Gas Protocol.[57]

It will be interesting to record the reactions to this position of states which are still not parties to the 1925 Protocol and which have not committed themselves in the General Assembly of the United Nations.[58]

As we shall see, there is in existence a Convention which supplements the 1925 Geneva Protocol by prohibiting the development, production, and stockpiling of biological agents and their delivery weapons.[59] Although separate proposals made in 1962 by both the Soviet Union and the United States included similar provisions with respect to chemical weapons,[60] both the United Kingdom and the United States later insisted on separating chemical weapons from the others. As a result, despite fairly continuous efforts, the only restriction on chemical weapons at the present time is the 1925 Geneva Protocol which prohibits *use* only.

In 1984 then Vice President Bush went to Geneva to attend a meeting of the Conference on Disarmament (CD) and to table a United States proposal which sought to accomplish for chemical weapons what had already been accomplished for biological weapons.[61] It has since been under consideration in the CD, which subsequently drafted and studied a 1987 revision.[62] In January 1989 a conference hosted by the French Government in Paris adopted a resolution calling for reaffirmation of the 1925 Geneva Protocol and stressed "the necessity of concluding, at an early date, a convention on the prohibition of the development, production, stockpiling and use of all chemical weapons and on their destruction."[63] In July 1989 the United States and the Soviet Union reached agreement on the key remaining issues[64] and currently (December 1989) the CD is working on a May 1989 version[65] with changes made up to 15 October 1989.[66] In view of the insistence of the United States on "anywhere-anytime" inspections, it is of interest to know that the Soviet Union has agreed to permit "surprise inspections" and that it is now the United States which has a problem in this respect in view of the Fourth

Amendment to the Constitution, prohibiting "unreasonable searches and seizures."[67]

The wheels of diplomacy grind slowly (witness the years of discussion of the 1982 U.N. Law of the Sea Convention and of the 1977 Protocols[68]), so there is still the possibility that in the not-too-distant future there will be agreement on a Convention which will prohibit the development, production, and stockpiling of chemical agents and their delivery systems, as well as providing for the destruction of all such chemical agents now in the arsenals of parties to such a Convention.[69]

Bacteriological (Biological) Weapons

Bacteriological (biological)[70] weapons have been defined as "living organisms, whatever their nature, or infective material derived from them, which are intended to cause disease or death in man, animals or plants, and which depend for their effects on their ability to multiply in the person, animal or plant attacked."[71] International restrictions on the use of biological weapons present far fewer legal problems than do those on the use of chemical weapons. In fact, the legal situation is so clear that the major problem is, once again, that of ensuring compliance.

It will be recalled that by the declaration contained in the 1925 Geneva Protocol the Parties agreed "to extend the prohibition [against the use of poisonous gas] to the use of bacteriological methods of warfare."[72] The League of Nations Disarmament Conference discussed the matter and attempted, albeit unsuccessfully, to draft a treaty which would have prohibited the production and stockpiling of both chemical and biological weapons. During World War II considerable scientific research was done on biological weapons. However, no such weapons were used by either side, with one possible exception. The Soviet Union has long contended that during World War II the Japanese had a unit called "Bacteriological Detachment 731" located at Harbin in China and that this unit had conducted bacteriological experiments on several thousand Chinese, Koreans, Russians, and, perhaps, Americans. When the war ended, many of the senior officers of this unit were taken into Soviet custody and in December 1949 twelve of them were tried by a Soviet court at Khabarovsk, were found guilty of engaging in bacteriological warfare, and received sentences of confinement in a labor correction camp for terms varying from two to twenty-five years.[73] In 1982 the Japanese Government acknowledged that such a unit had existed during the war.[74] Assuming that the Soviet charges are correct, it would appear that the activities of the Japanese unit never passed the experimental stage, that it never reached the stage of actual use of biologicals against enemy military forces as a weapon of war.

In 1962 the Soviet Union tabled at the meeting of the Eighteen Nation Disarmament Committee (ENDC) a proposal for general and complete disarmament which included the following provision: "The prohibition, and destruction of all stockpiles, and the cessation of the production of all kinds of weapons of mass destruction, including atomic, hydrogen, chemical, biological and radiological weapons."[75]

A few weeks later the United States submitted its counterproposal with a provision which called for "Elimination of all stockpiles of nuclear, chemical, bacteriological, and other weapons of mass destruction and cessation of the production of such weapons."[76]

In view of the close similarity of the two proposals, it would seem that agreement with respect at least to chemical and biological weapons could have been quickly attained.[77] However, such was not the case. There were those who took the position that chemical and biological weapons should not be joined in the same treaty as there was experience with chemical weapons, but none with biologicals. While the relevance of this argument is far from clear, it was sufficient to delay the affirmative action which might otherwise have been taken. Finally, in 1969 the United Kingdom submitted a proposal which called for a complete ban on "microbial or other biological agents," but made no mention of chemical weapons.[78] When, in 1971, the United States and the Soviet Union tabled identical drafts[79] relating to biologicals only, the result was a foregone conclusion. Using that draft as a working document the Conference of the Committee on Disarmament (CCD, which had replaced ENDC) produced a Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction.[80] Its most important provision states:

> Article 1
>
> Each State Party to this Convention undertakes never in any circumstances to develop, produce, stockpile, or otherwise acquire or retain:
>
> (1) Microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes;
>
> (2) Weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.

It also contains provisions requiring each State Party to destroy all of the items specified in Article 1 within nine months of the Convention coming into force (presumably, for the State concerned); and an undertaking not to transfer to any recipient, or to encourage the manufacture of, any of the prohibited items.

It is thus evident that States Parties to the 1925 Geneva Protocol and to the 1972 Bacteriological Convention are prohibited from *developing, manufacturing, stockpiling, acquiring, retaining,* or *using* biological weapons. In view of the coverage of the Convention, nations have not made "first use" reservations. The two international agreements were intended to, and should, eliminate biologicals from the arsenals of all such Parties and should mean that in any future war, large or small, limited or unlimited, conventional or unconventional, biologicals would not be a factor. Unfortunately, events have already demonstrated that these expectations will not be met.

A catastrophe occurred in Sverdlovsk in the Soviet Union in 1980 in which more than 1,000 people died as a result of what appears to have been anthrax poisoning, although Soviet officials claimed that the deaths had been caused by meat contaminated by hoof-and-mouth disease.[81] In addition, the United States has contended that the Soviet Union, either directly or through surrogates, has used biological (as well as chemical) weapons in Southeast Asia and in Afghanistan.[82] If, as is generally believed, the Sverdlovsk incident involved anthrax, and if, as the United States contends, biologicals have been used by the Vietnamese in Kampuchea and Laos and by the Soviet Union in Afghanistan, then the Soviet Union is manufacturing and using biologicals, contrary to the provisions of the two agreements to which it is a party. Unfortunately, the 1925 Geneva Protocol contains no provision for verification and the only provision for verification contained in the 1972 Convention is a meaningless one providing for resort to the Security Council.

The predecessor to the *Handbook*, published at a time when the United States was not a party to the 1925 Geneva Protocol and when the 1972 Bacteriological Convention had not yet been drafted, stated:

> The United States is not a party to any treaty now in force that prohibits or restricts the use in warfare . . . of bacteriological weapons. Although the use of such weapons frequently has been condemned by states, including the United States, it remains doubtful that, in the absence of a specific restriction established by treaty, a state legally is prohibited at present from resorting to their use. [Footnotes omitted.][83]

This was probably a fair statement of the United States position until November 25, 1969, when President Nixon, on behalf of the United States, renounced the use of biological weapons by this country.[84] Three months later he included toxins in this renunciation.[85] Then this country became a party to the 1972 Bacteriological Convention and in 1975 it finally ratified the 1925 Geneva Protocol with its ban on the use of biologicals. Once again, however, it appears that the *Handbook* may be going too far when it asserts:

> The United States considers the prohibition against the use of biological weapons during armed conflict to be part of customary international law and thereby binding on all nations whether or not they are parties to the 1925 Gas Protocol or the 1972 Biological Weapons Convention.[86]

Can it be that while at a particular point in time a principle may not necessarily be a binding rule of customary international law, it becomes such as soon as the United States ratifies a treaty containing that principle? Certainly, the United States did not consider itself bound by any rule of customary international law prohibiting the use of biologicals when it issued its military manuals in 1955 and 1956; nor did it consider itself so bound at any time thereafter, even when (and until) President Nixon made his 1969 and 1970 statements unilaterally renouncing the use of biologicals and toxins. Would the 50 or more nations which are not parties to the 1925 Geneva Protocol and the 50 or more nations which are not parties to the 1972 Bacteriological Convention agree with the quoted statement? Or is this statement, and the similar one with respect to chemical weapons quoted above, inserted in order to convince non-parties that they might just as well ratify the agreements as they are bound by them in any event?

In view of the mobility of naval forces, it has always been considered unlikely, but not impossible, that naval vessels at sea will have to meet the problem of defending themselves against an attack using biological (or chemical) weapons. Should such an attack occur, for example by guided missiles which succeed in penetrating the vessel's defenses and dispense the lethal item, the attack would have a devastating effect because air-intake systems would quickly disseminate it throughout the interior of the vessel, or because concurrent high-explosive ordnance would have pierced the shell of the ship. Items such as masks, special clothing, etc., available for the protection of the individual members of the crew, would greatly impede the functioning of the crew, even if there was time to don them. In addition, naval vessels, naval guns and naval aircraft might well be among the weapons systems used for the delivery of biologicals against land targets, should biologicals ever be used in wartime. Thus, in a field trial, a ship sailing 16 kilometers offshore travelled a distance of 260 kilometers parallel to the coastline discharging a harmless powder. The resulting aerosol covered an area of over 75,000 square kilometers. Had the material disseminated been a biological "depending on the organism and its degree of hardiness, areas from 5,000 to 20,000 square kilometers could have been effectively attacked, infecting a high proportion of unprotected people in the area."[87]

Conclusions

There is no law in force, conventional or customary, which prohibits the use of nuclear weapons. However, there can be no winners, but only losers, no victors, but only vanquished, in the event of a nuclear war. Whether or not a war in which nuclear powers are involved becomes a nuclear war will depend upon the wisdom and leadership of the political leaders of those powers and upon the extent to which the desire to win the war outweighs a reluctance

to bring disaster not only upon the enemy, but also upon their own people and upon the peoples of neutral nations.

Chemical and biological weapons, like nuclear weapons, are weapons of mass destruction. Once released they are beyond the control of the user and, like nuclear weapons, their effects can come back to haunt the user. The use of certain chemicals can have widespread, long-lasting, and severe consequences for the environment and for the populations. This is even more true with respect to the use of many biologicals. The use of either of these types of weapons is prohibited by an international agreement to which more than two-thirds of the nations of the world community are parties. The very existence of biological weapons is prohibited by an international agreement with a similar amount of participation. Hopefully, there will, in due course, be an identical prohibition with respect to chemical weapons.

In view of the tremendous lethal and destructive capabilities of nuclear, chemical, and biological weapons one might almost regret our inability to turn the clock back to the nineteenth century, when nuclear, chemical, and biological weapons, as we now know them, were not even a gleam in a scientist's eyes.

Notes

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1. *The Commander's Handbook on the Law of Naval Operations*, Naval Warfare Publication 9 (NWP 9) (1987) [hereinafter cited as *Handbook*]. It replaces the *Law of Naval Warfare*, Naval Warfare Information Publication 10-2 (NWIP 10-2) (1955).

2. *See, e.g.*, Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, August 5, 1963, *United States Treaties and Other International Agreements* [hereinafter U.S.T.], v. 14, p. 1313, T.I.A.S. No. 5433, *United Nations Treaty Series* [hereinafter U.N.T.S.], v. 480, p. 43, reprinted in *International Legal Materials* [hereinafter I.L.M.], v. 2., p. 883 (1963); Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, U.S.T., v. 18, p. 2410, T.I.A.S. No. 6347, U.N.T.S., v. 610, p. 205, I.L.M., v. 6, p. 386 (1967); Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, Feb. 11, 1971, U.S.T., v. 23, p. 701, T.I.A.S. No. 7337, I.L.M., v. 10, p. 145 (1971). The *Handbook*, par. 10.2., lists six multilateral treaties and a number of bilateral treaties on the subject.

3. Resolutions of the General Assembly of the United Nations, such as Res. 1653 and Res. 2936 (United Nations, General Assembly, *Official Records: Resolutions adopted by the General Assembly during its Sixteenth Session 19 September 1961 - 23 February 1962*, Resolution 1653, A/5100 (New York: 1962), p. 4 and *id.*, *Twenty-Seventh Session 19 September - 19 December 1972*, Res. 2936, A/8730 (New York: 1973), p. 5) are nothing more than pious, and sometimes self-serving, declarations having no legal significance.

4. *Handbook*, par. 10.2.1. In Myres S. McDougal and Florentino P. Feliciano, *Law and Minimum World Public Order* (New Haven: Yale University Press, 1961), p. 659, the authors state, "The continuing attempts, however, by various governments and groups to 'outlaw' nuclear weapons tend to sustain the impression that such weapons are regarded as permissible pending the achievement of agreement to the contrary."

5. *American Journal of International Law (Supp.)* [hereinafter A.J.I.L. (Supp.)], v. 1, p. 95 (1907); Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, 3rd ed. (Dordrecht, Netherlands: Martinus Nijhoff Publishers, 1988), p. 101 [hereinafter cited as Schindler & Toman]. The United States is not a party to this Declaration and apparently does not consider that it has become customary international law. In the U.S. Army's FM 27-10, *The Law of Land Warfare* (Washington: U.S. Govt. Print. Off., 1956), par. 34, there is a list of various illegal weapons.

Those covered by this Declaration are not included in that list. Nevertheless it would be difficult to quarrel with the quoted preambular provisions.

6. U.S. Statutes at Large, v. 32, p. 1803, reprinted in A.J.I.L. (Supp.), v. 1, p. 129 (1907).

7. U.S. Statutes at Large, v. 36, p. 2277, reprinted in A.J.I.L. (Supp.), v. 2, p. 90 (1908). Unfortunately, when the Department of State made its official translation from French to English in 1907, the translators did not refer back to the 1899 translation, with the result that there are some small but unimportant differences in wording between the two English versions.

8. *See supra* notes 6 and 7. When preparing the working document for the Diplomatic Conference which was to meet in 1974 in an attempt to bring the 1907 Hague Convention (IV) and the 1949 Geneva Conventions up to date, the International Committee of the Red Cross [hereinafter referred to as ICRC] included a version of the Martens clause in the preamble. *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (Bern: Federal Political Department, 1978), v.1, part III, p. 3 [hereinafter *Official Records*]. The Diplomatic Conference moved this provision to a more prominent place, as Article 1(2) of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (Protocol I). *Official Records*, v. 1, part I, p. 126, reprinted in I.L.M., v. 6, p. 1396 (1977), and Schindler & Toman, *supra* note 5, p. 621 at p. 628 [hereinafter cited as Protocol I].

9. There were an estimated 80,000 casualties at Hiroshima and 65,000 at Nagasaki. The potential casualties referred to in the penultimate question were the estimates of what would occur in the event of armed landings on the home islands of Japan. These estimates appear, among other places, in Henry L. Stimson, "The Decision to Use the Atomic Bomb," *Bulletin of Atomic Scientists*, v. 3, no. 2, p. 40 (1947), and in Winston S. Churchill, *The Second World War*, v. VI, *Triumph and Tragedy* (Boston: Houghton Miflin, 1953), p. 638, where he estimates one million American dead and one-half million British dead.

10. Such an engagement would, of course, be fought in an area isolated from the civilian population and civilian objects—but the reactor accident at Chernobyl, in the Ukraine, in April 1986 demonstrated the distance which radioactivity can travel. It was detected in the Scandinavian countries a few days after it had occurred (Serge Schmemann, "Soviet Announces Nuclear Accident at Electric Plant," *New York Times*, April 29, 1986, p. A1:6) and was subsequently detected as far west as the United Kingdom (Francis X. Clines, "Chernobyl Cloud Keeps Welsh Lamb Off Table," *id.*, July 3, 1986, p. A1:2). In addition, one recent newspaper article states that "many studies indicate the radiation released by a nuclear anti-aircraft missile would disable the radar gear on which the U.S. surface navy increasingly relies, and the shock waves sent through the sea from a nuclear antisubmarine rocket could disable any U.S. subs in the area." *Boston Globe*, Dec. 18, 1989, p.3:8.

11. United Nations, *Chemical and Bacteriological (Biological) Weapons and the Effects of Their Possible Use: Report of the Secretary-General*, A/7575/Rev. 1 (New York: 1969), par. 19 [hereinafter cited as *U.N. Report*]. There are many types of poisonous and asphyxiating gases (choking, blister, nerve, blood, etc.) and many different such gases within each type (chlorine and phosgene are both choking gases; mustard and lewisite are both blister gases). Nerve gases were developed by Germany before World War II but, happily, were never used. Since then even more effective nerve gases have been developed.

12. A.J.I.L. (Supp.), v. 1, p. 157 (1907); Schindler & Toman, *supra* note 5, p. 105.

13. S.L.A. Marshall, *World War I* (New York: American Heritage, 1971), p. 157.

14. *Id.*, pp. 163-66. Actually, the reason for the rather unusual method of delivery was that the amount of gas that could be delivered by the available types of artillery shells was so small that they could only be used for very limited objectives. The effect of gas as an offensive weapon was probably not fully appreciated because of the lack of results three months earlier in Poland.

15. It has sometimes been argued that the German action at Ypres did not violate the 1899 Declaration because no projectiles were used. The Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties established by the Diplomatic Conference, which was drafting the Treaty of Versailles, refused to accept this thesis and listed the use of poison gas as one of the war crimes committed by Germany during the course of the war. *See* A.J.I.L. (Supp.), v. 14, p. 115 (1920).

16. According to the *U.N. Report, supra* note 11, par. 3, during World War I "gas casualties numbered about 1,300,000, of which about 100,000 were fatal."

17. A.J.I.L. (Supp.), v. 13, p. 151 at p. 230 (1919).

18. Treaty Relating to the Use of Submarines and Noxious Gases in Warfare, Feb. 6, 1922, A.J.I.L. (Supp.), v. 16, p. 59 (1922); Schindler & Toman, *supra* note 5, p. 877 at p. 878.

19. U.S.T., v. 26, p. 571, T.I.A.S. No. 8061, *League of Nations Treaty Series* [hereinafter L.N.T.S.], v. 94, p. 65, Schindler & Toman, *supra* note 5, p. 115.

20. L.N.T.S., v. 94, p. 69; Schindler & Toman, *supra* note 5, p. 126. As of January 1, 1989, there were 135 parties to the 1925 Geneva Protocol, of which 50 had made reservations, many of the "first use" variety. U.S. Department of State, *Treaties in Force - January 1, 1989*, pp. 311-12.

21. "Warning to Japan Regarding the Use of Poisonous Gases," *Department of State Bulletin*, June 6, 1942, v. 6, p. 506.

22. "Tokyo Denies Using Gas," *New York Times*, June 9, 1942, p. 2:3.

23. A list of the "Instances and Allegations of CBW, 1914–1970" will be found in Stockholm International Peace Research Institute, *The Problem of Chemical and Biological Warfare*, v. 1, *The Rise of CB Weapons* (Stockholm: Stockholm International Peace Research Institute, 1971), pp. 125-230.

24. In a conference with a number of American officials and military officers in October 1941 concerning a possible German landing in England, Churchill said, "The enemy may use gas, but if so it will be to his own disadvantage, since we have arranged for immediate retaliation and would have admirable concentrated targets in any lodgments he might make on the coast. Gas warfare would also be carried home to his own country." Winston S. Churchill, *The Second World War*, v. III, *The Grand Alliance* (Boston: Houghton Miflin, 1950), p. 425. *See also* Marjorie M. Whiteman, *Digest of International Law* (Washington: U.S. Govt. Print. Off., 1968), v. 10, pp. 464–65.

25. "Use of Poison Gas," *Department of State Bulletin*, June 12, 1943, v. 8, p. 507.

26. Lynwood B. Lennon, "Defense Planning for Chemical Warfare," in Matthew Meselson, ed., *Chemical Weapons and Chemical Arms Control* (New York: Carnegie Endowment for International Peace, 1978), p. 1; Barton J. Bernstein, "Why We Didn't Use Poison Gas in World War II," *American Heritage*, August-September 1985, p. 40.

27. *E.g.*, United Nations, General Assembly, *Official Records: Resolutions adopted by the General Assembly during its Twenty-First Session 20 September - 20 December 1966*, Res. 2162 B, A/6316 (New York: 1967), pp. 10–11.

28. United Nations, General Assembly, *Official Records: Resolutions adopted by the General Assembly during its Twenty-Third Session 24 September - 21 December 1968*, Res. 2454 A, A/7218 (New York: 1969), p. 11.

29. *U.N. Report, supra* note 11, par. 369.

30. *Id.*, par. 375.

31. United Nations, General Assembly, *Official Records: Resolutions adopted by the General Assembly during its Twenty-Fourth Session 16 September - 17 December 1969*, Res. 2603 A, A/7630 (New York: 1970), p. 16. The vote was 80-3-36 with the United States casting one of the three negative votes. United Nations Office of Public Information, *1969 Yearbook of the United Nations* (New York: 1970), p. 30.

32. U.S. Congress, House, Committee on Foreign Affairs, Subcommittee on National Security Policy and Scientific Developments, *U.S. Chemical Warfare Policy*, Hearings, 93rd Cong., 2nd Sess. (Washington: U.S. Govt. Print. Off., 1974), p. 29.

33. *Memorandum on Chemical Warfare Presented to the Preparatory Commission for the Disarmament Conference by the Delegation of the United Kingdom*, Cmd. 4, no. 3747 (1930).

34. Anthony Lewis, "Britain Asserts CS Gas is not Banned," *New York Times*, Feb. 3, 1970, p. 3:6. "CS" was the tear gas originally used by the United States in Vietnam. It has been the standard tear gas used by police throughout the world. Presumably the term "other such gases" as used by the British refers to CS-1 and CS-2, the later versions of CS.

35. Judge Advocate General Myron C. Cramer to the Secretary of War, SPJGW 1945/164, March 1945, "Memorandum concerning Destruction of Crops by Chemicals," I.L.M., v. 10, p. 1304 (1971). It should be borne in mind that at the time this memorandum was written, the United States was not a party to the 1925 Geneva Protocol.

36. Howard S. Levie, "Weapons of War," in Peter D. Trooboff, ed., *Law and Responsibility in Warfare: The Vietnam Experience* (Chapel Hill, N.C.: University of North Carolina Press, 1975), p. 153 at p. 158 [hereinafter cited as Trooboff].

37. Letters from the General Counsel, Department of Defense, to the Chairman, Senate Committee on Foreign Relations, April 5, 1971, reprinted in I.L.M., v. 10, pp. 1300 and 1303 (1971).

38. *See* Executive Order 11,850, *infra* note 55 and accompanying text.

39. The predecessor to the *Handbook, supra* note 1, stated, "Weapons of chemical types *which are at times asphyxiating in nature*, such as white phosphorus, smoke, and flame throwers, may be employed." *The Law of Naval Warfare* (NWIP 10-2), par. 612a (emphasis added), reprinted in the appendix to Robert W. Tucker, *Naval War College International Law Studies, 1955: The Law of War and Neutrality at Sea* (Washington: U.S. Govt. Print. Off., 1957), p. 410. To the same effect, *see* the U.S. Army's Field Manual, *The Law of Land Warfare*, FM 27-10 (1956), par. 36.

40. ICRC, *Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflict: Report to the XXIst International Conference of the Red Cross* (Geneva: 1969), pp. 61–62.

41. *U.N. Report, supra* note 11, par. 19.

42. United Nations, Department of Political and Security Council Affairs, *Napalm and Other Incendiary Weapons and All Aspects of their Possible Use: Report of the Secretary-General*, A/8303/Rev.1 (New York: 1973), par. 193. *See also* United Nations Secretariat, *Respect for Human Rights in Armed Conflicts: Existing Rules of*

International Law Concerning the Prohibition or Restriction of Use of Specific Weapons, A/9215 (New York: 1973), v. 1, pars. 20-21 and 59-86.

43. Stockholm International Peace Research Institute, *Incendiary Weapons* (Cambridge, Mass.: Massachusetts Institute of Technology Press, 1975), p. 24.

44. ICRC, *Weapons that May Cause Unnecessary Suffering or Have Indiscriminate Effects: Report on the Work of Experts* (Geneva: 1973), pars. 182-223; *Conference of Government Experts on the Use of Certain Conventional Weapons: Lucerne, 1974* (Geneva: 1975), pars. 43-117; *Conference of Government Experts on the Use of Certain Conventional Weapons: Lugano, 1976* (Geneva: 1976), pars. 9-12 and 104-112.

45. *Official Records, supra* note 8, v. 16, *passim*.

46. *Id.*, v. 1, part II, p. 52.

47. *United Nations Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects: Final Report of the Conference to the General Assembly*, A/CONF.95/15 (1980), Annex I, Appendix D, Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Schindler & Toman, *supra* note 5, p. 190. The United States has, as yet, taken no steps towards the ratification of the Convention to which this Protocol is attached.

48. *The Law of Naval Warfare* (NWIP 10-2), *supra* note 39, par. 612b (emphasis added). The footnote to that statement is even more definite, stating, "[I]t is difficult to hold that the use of these [chemical] weapons is prohibited to all states according to customary international law."

49. "Almost" because of such occasional statements like that contained in the 1945 Memorandum of the Judge Advocate General of the Army, *supra* note 35, to the effect that, "An exhaustive study of the source materials, however, warrants the conclusion that a customary rule of international law has developed by which poisonous gases and those causing unnecessary suffering are prohibited."

50. "Controversial" because, as we have seen, there is no general agreement as to whether lachrymatories and herbicides are included within the prohibitions of the 1925 Geneva Protocol.

51. Stewart Blumenfeld and Matthew Meselson, "The Military Value and Political Implications of the Use of Riot Control Agents in Warfare," in Carnegie Endowment for International Peace, *The Control of Chemical and Biological Weapons* (New York: 1971), pp. 64, 67-68.

52. Howard S. Levie, "Weapons of Warfare," in Trooboff, *supra* note 36, p. 154. During the conflict in Vietnam the North Vietnamese took the position that all chemical warfare, including both tear gas and herbicides, was prohibited by international law. Nguyen Khac Vien, ed., *Chemical Warfare*, Vietnamese Studies No. 29 (Hanoi: 1971), *passim*. They appear to have departed from this position in recent years, at least insofar as it applies to their own use of both chemical weapons and toxins. U.S. Department of State, *Chemical Warfare in Southeast Asia and Afghanistan: Report to the Congress from Secretary of State Alexander M. Haig, Jr.*, Special Report No. 98, March 22, 1982; U.S. Department of State, *Chemical Warfare in Southeast Asia and Afghanistan: An Update: Report from Secretary of State George P. Shultz*, Special Report No. 104, November 1982.

53. "Statement by President Nixon," *Department of State Bulletin*, Dec. 15, 1969, v. 61, p. 541. A correction to this statement containing omitted paragraph appears at *Department of State Bulletin*, March 2, 1970, v. 62, p. 272, reprinted in A.J.I.L., v. 64, p. 386 (1970).

54. For a brief summary of the legislative history of this action, *see* "Introduction," in Trooboff, *supra* note 36, pp. 242-43, note 37. The U.S. ratification included the typical "first use" reservation.

55. Gerald R. Ford, Executive Order 11,850, "Renunciation of Certain Uses in War of Chemical Herbicides and Riot control Agents," *Federal Register*, April 8, 1975, p. 16,187, reprinted in I.L.M., v. 14, p. 794 (1975).

56. *See supra* note 48 and accompanying text.

57. *Handbook, supra* note 1, par. 10.3.2.1.

58. It will be recalled that U.N. Resolution 2603 A, *supra* note 31, was adopted with three votes against (including the United States) and 36 abstentions.

59. *See infra* note 80.

60. *See infra* text accompanying notes 75 and 76.

61. "Bush, in Geneva, Offers Chemical Arms Ban," *New York Times*, Apr. 19, 1984, p. A13:1; "U.S. Proposes Banning Chemical Weapons," *Department of State Bulletin*, June 1984, v. 84, p. 40.

62. Draft of April 27, 1987, *1987 Arms Control Reporter* 704.D.105.

63. *1989 Arms Control Reporter*, 704.B.338.2.

64. Robert Pear, "U.S. and Moscow Settle Key Issues on Chemical Arms: Agree on Ban in 10 Years, but Constitutional Questions Are Raised by Accord on Surprise Inspections," *New York Times*, July 18, 1989, p. A1:6. This sudden agreement may well have been prompted by the public reaction to the construction by a West German chemical concern at Rabta, Libya, of a plant capable of manufacturing large quantities of mustard gas. *1989 Arms Control Reporter*, 705.B.339-354.2.

65. "Outline of the Rolling Text and Principal Remaining Issues—1 May 1989," *1989 Arms Control Reporter*, 704.D.131-137.

66. "Changes of the Rolling Text and Principal Remaining Issues—15 October 1989," *id.*, 704.3.139-144.

67. Pear, "U.S. and Moscow Settle Key Issues on Chemical Arms," *supra* note 64. For a discussion of the constitutional problem, see, Dennis S. Aronowitz, *Legal Aspects of Arms Control Verification in the United States* (Dobbs Ferry: Oceana Publications, 1965), pp. 104-14.

68. United Nations Convention on the Law of the Sea (New York: United Nations, 1983), Sales No. E.83.V.5. The negotiation of this Convention took from 1973 to 1982; Protocols Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Armed Conflicts, I.L.S., v. 16, p. 1391 (1977), Schindler & Toman, *supra* note 5, pp. 621 and 689. The negotiation of these Protocols took from 1974 to 1977, preceded by several years of preliminary negotiations.

69. In September 1989 an International Government-Industry Conference Against Chemical Weapons, consisting of representatives of more than 65 Governments and of the world's major chemical manufacturers, meeting in Canberra, Australia, endorsed a chemical warfare convention and sought ways to assist in bringing the Geneva negotiations to a successful conclusion. Department of State, *GIST*, November 1989. On September 23, 1989, at Jackson Hole, Wyoming, the Soviet Union and the United States signed an *Agreement Regarding a Bilateral Verification Experiment and Data Exchange Related to Prohibition of Chemical Weapons*, reprinted in I.L.S., v. 28, p. 1438.

70. For the sake of brevity, the broader term "biological" is hereinafter used alone. It is intended to include toxins.

71. *U.N. Report, supra* note 11, par. 17.

72. *See supra* text accompanying note 19.

73. *Materials on the Trial of Former Servicemen of the Japanese Army Charged with Manufacturing and Employing Bacteriological Weapons* (Moscow: Foreign Languages Publishing House, 1950).

74. Henry Scott Stokes, "Japan Looks at Grisly Side of its Past," *New York Times*, July 13, 1982, p. A3:1. *See also* John W. Powell, "Japan's Biological Weapons, 1930-1945," *Bulletin of Atomic Scientists*, Oct. 1981, v. 37, pp. 44-52; "Japan's Biological Weapons, 1930-1945: An Update," *Bulletin of Atomic Scientists*, Oct. 1982, v. 38, p. 62. The Germans may well have engaged in similar experimentation or employment during World War II, but, if so, the usage was not for military purposes, their victims being German or Jewish civilians.

75. United States Arms Control and Disarmament Agency, *Documents on Disarmament* (Washington: U.S. Govt. Print. Off., 1962), p. 104 [hereinafter cited as *Documents on Disarmament*].

76. *Id.*, p. 279.

77. One might question the seriousness of the two proposals as far as they related to nuclear weapons.

78. *Documents on Disarmament, supra* note 75, pp. 324-25 (1969).

79. *Documents on Disarmament, supra* note 75, pp. 456-57 (1971).

80. U.S.T., v. 26, p. 583, T.I.A.S. No. 8062, reprinted in I.L.M., v. 11, p. 310 (1972). This Convention was opened for signature in Washington, London and Moscow on April 10, 1972. As of January 1, 1989, 110 states had either ratified or acceded to it, including all of the major powers. U.S. Department of State, *Treaties in Force - January 1, 1989* (Washington: U.S. Govt. Print. Off., 1989), pp. 284-85.

81. Bernard Gwertzman, "Soviet Mishap Tied to Germ-War Plant," *New York Times*, March 19, 1980, p. A1:6; Bernard Gwertzman, "Soviet Lays Outbreak of Illness to Bad Meat not Germ-War Plant," *id.*, March 21, 1980, p. A1:1; "Soviet Now Mentioning Foot and Mouth Disease," *id.*, March 27, 1980, p. A11:1.

82. *See* Department of State Special Reports, *supra* note 52.

83. *The Law of Naval Warfare, supra* note 39, par. 612B. The Army's *The Law of Land Warfare, supra* note 39, par. 38, is to the same effect.

84. Statement of President Nixon, "Chemical and Biological Defense Policies and Programs," November 25, 1969, *Weekly Compilation of Presidential Documents*, December 1, 1969, *Department of State Bulletin*, December 15, 1969, v. 61, p. 541. (A correction to this statement containing omitted paragraphs appears at *id.*, March 2, 1970, v. 62, p. 272.)

85. White House Press Release, "U.S. Renounces Use of Toxins as a Method of Warfare," February 14, 1970, *Department of State Bulletin*, March 2, 1970, v. 62, p. 226.

86. *Handbook, supra* note 1, par. 10.4.2.

87. *U.N. Report, supra* note 11, pars. 39-41. Chemical weapons used in the same way would have to be disseminated in much greater quantities and, even so, would cover a considerably smaller area. However, the result would still be devastating and would establish beyond doubt that they are, indeed, weapons of mass destruction.

Chapter XII
Submarine Mines In International Law

by
Thomas A. Clingan, Jr.*

The extensive and organized use of explosive submarine mines is primarily a creature of the twentieth century, although more primitive devices date back to far earlier times. During the Russo-Japanese war of 1904-1905, the establishment of a Russian minefield outside Port Arthur generated much criticism.[1] It was this outcry that led to the negotiation of the Hague Convention (VIII) of 1907 Relative to the Laying of Automatic Submarine Mines.[2] Since that time, both the pattern of usage of submarine mines, and the technology involved, have changed, and these changes have raised issues concerning the state of international law on this subject. The question is whether evolution in mine warfare technology requires modification of traditional rules of international law, and, if so, what changes are required?

There has always been an internal tension inherent in the law of mine warfare. Two important underlying principles are at stake. On the one hand, the doctrine of the freedom of navigation is one of the hoariest and most fundamental in the law of the sea. On the other, the long-recognized principle of self-defense has great force. The international law of mine warfare brings into play an attempt, under varying circumstances, to balance these fundamental norms. In seeking to strike an appropriate balance, many different factors and elements must be taken into consideration. In various situations, certain elements, such as the existence of a state of war, the nature of the interests of the mining state, the location of the proposed mining, and the type or category of mine involved, among others, play a role.

The Commander's Handbook on the Law of Naval Warfare (NWP 9)[3] initiates its discussion of naval mines with the following statement: "The general principles of law embodied in the 1907 Convention continue to serve as a guide to lawful employment of naval mines."[4] In examining this statement, one must first note that the Hague Convention deals with the use of mines by belligerents, which traditionally meant in time of war. In order to accept the Hague Convention as a guide to the employment of mines, it is necessary first to do away with the argument that since the Charter of the United Nations has "done away" with aggressive warfare as a legal concept, there no longer exist such corollary concepts as "belligerency" and "neutrality."

If one were to accept this neat theory, then the Convention, being contrary to the spirit of the Charter, could not be a legal basis for the employment of submarine mines. Advocates of this position have argued that reference must be made, to support the Convention's rules, to humanitarian law[5] or to reliance upon the right of self-defense authorized by the Charter.[6]

To my mind, the argument is specious and could bring about undesirable consequences. To argue that war no longer exists flies in the face of reality. Armed conflict continues, though not on the scale of the two World Wars. One would have to be blind to the facts, indeed, to claim that the Charter has in fact eliminated war in the sense of the use of armed force, or to paper over the issue by calling war by a different name.

It must also be recognized that not permitting the rules of war for regulating conduct in "in-between" situations such as conflict involving a limited use of force would, in most cases, result either in formal declarations of war before such concepts as blockade or limitations on mine warfare could be called into play, or the acceptance of unregulated violence. This idea is inconsistent with the entire theory of the humanitarian law of armed conflict, whose principles are applicable irrespective of whether a formal state of war exists or the "rightness" or "wrongness" of the parties to the conflict.[7] This is clearly not a desirable outcome. Thus, Thorpe[8] has noted that a consequence of this position is that no assistance can be derived from these older rules at times when operational commanders most need that assistance. He says, "It is very important to remember that the actual practice of states, if generally accepted or even tolerated, is a most potent force in shaping the law, and in the twilight area between the traditional concept of peace and war it is clearly sensible to draw assistance where one can from the traditional law of war, and this, I suggest, states have done."[9] This is compelling reasoning.

Thorpe gives some examples of the state practice to which he refers. These examples demonstrate that in certain special situations, particularly those that involve some aspects of national security, the international community has not objected to interferences with the use of the high seas.

Thorpe's first example is the case of the *West Breeze*. This ship, a British merchantman, was stopped on the high seas en route to Casablanca by a French warship. The French believed she carried arms and contraband for Algerian rebels. When stopped and searched, she was within a 32-mile security zone that the French had established off the Algerian coast. After being searched, with no contraband discovered, the vessel was permitted to proceed on its way.[10] Thorpe's second example, more familiar to us all, was the interdiction of offensive weapons destined for Cuba in 1962.[11]

Each of the examples illustrates an interference with the freedom of the high seas, and in both instances the objective was the protection of the security of the state carrying out an act which otherwise would be in violation of international law.[12] In the Algerian situation, it is clear that the boarding and

searching of the British vessel in peacetime would have been contrary to international law. The right of a warship to visit and search is a right confined, on the high seas, to belligerents. In the Cuban interdiction, normally referred to as "quarantine," the activities undertaken by the U.S. Navy resembled, but were not identical to, a blockade. The right of blockade, like the right of visit, is a right of a belligerent. In this regard, they both are similar to the right to lay mines. That the activity was conducted in a limited way is suggestive of application of the laws of war. Thorpe's point, therefore, is that state practice continues to support the application of the laws of war, and thus it is legitimate to say that the Hague Convention remains a valid set of guidelines with respect to the employment of mines, unless it can be shown that these rules do not adequately serve the newer technologies that have been developed.

There is no doubt that the Hague rules were developed to be utilized in time of war.[13] These rules do not render the use of naval mines illegal. Rather, they provide for certain restrictions for the purpose of protecting neutral shipping. While regarding mining as legal in proper circumstances, one must be mindful of the provisions of other relevant conventions. For example, Additional Protocol 1 to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts prohibits weapons "of a nature to cause superfluous injury or unnecessary suffering."[14] Given that this Protocol comes some 70 years after the Hague Convention, and taking account of the state practice and attitudes of maritime states in the interim, it can hardly be argued that the Protocol was aimed at mines. The Hague rules themselves were designed to limit the effect of mines on neutral shipping. Likewise, the similar language used in Hague Convention No. IV of 1907 Respecting the Laws and Customs of War on Land[15] should not be viewed as limiting the Hague rules regarding mines. As was argued above, state practice seems to support the principle that the rules have certain applicability in conditions short of formal war, such as periods of high tensions, where the need to protect neutral shipping is just as strong as in wartime. Accordingly, I shall examine first what the rules provide for in wartime, and then move to questions of restrictions during peacetime and periods of high tension or undeclared hostilities, such as the Vietnam conflict. It will be necessary, in each case, to address the question of the impact of new technologies, today and in the future, on the application of rules structured to deal with mines as they were known at the time the Convention was negotiated.

To begin with, the Hague rules do not by their terms differentiate between various zones of the oceans, except that article 2 proscribes the laying of "automatic contact mines off the coast and ports of the enemy, with the sole object of intercepting commercial shipping."[16] Obviously, the qualification contained in that phrase creates a yawning loophole in the prohibition, since

it could easily be circumvented by arguing that the mines were laid for another purpose, *e.g.*, a legitimate blockade. Thus, belligerents have the right to lay mines in their own territorial seas and internal waters, and in many instances in those of the enemy. While the Convention does not expressly refer to the high seas, and thus mines may also be sown there, a reasonable inference is that such laying should not be done indiscriminately and should be restricted to reasonably limited areas. Article 3 requires "every possible precaution" to protect peaceful shipping and, when the minefield is no longer under surveillance, notification of the danger zones as soon as military exigencies permit.[17] Neutral powers are permitted to mine their own waters[18] and, by implication, belligerents may not do so because such mining would be a violation of the neutral's sovereignty. The Convention applies to anchored automatic contact mines, and also to unanchored contact mines, which are prohibited except when constructed to become harmless one hour at most after control is lost over them.[19] Anchored mines must also become harmless if they should break their moorings.[20]

How should these rules be interpreted with respect to more modern devices not envisaged at the time they were adopted? The principles they embody give us some guidance.

As previously noted, the Hague rules were not designed to prohibit mines as a weapon, but rather to place limitations upon their use that relate to maintaining control over them to protect neutral shipping. This is implicit in rules requiring anchored mines to neutralize themselves should they break loose from their moorings, rules prohibiting unanchored mines that do not neutralize within an hour, rules requiring belligerents to do their utmost to remove mines at the cessation of hostilities,[21] and rules regarding notice. Thus it can be inferred that new, high technology mines should be acceptable if they satisfy the same objectives. New weapons that are under an acceptable level of control by the party laying them, or which do not threaten neutral surface shipping, would seem to be acceptable. One such weapon referred to by Thorpe is the continental-shelf mine. He notes that this mine will be a "short tethered rocket-propelled warhead" that is designed to be remotely activated by acoustic link telemetry.[22] Given the degree of control over this device, it is likely that its use would not create the kind of hazards which the Hague rules were conceived to prevent. Since these mines would likely be deployed beyond the territorial sea, however, the proscriptions requiring localization and notice would seem to be applicable.

But should one speculate that it is possible that these rocket-propelled devices could be deployed with nuclear capability, then I believe the conclusion should be otherwise. This prospect raises the question whether such devices would be prohibited by the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and Subsoil Thereof.[23] While it could

be argued that tethered mines are not "emplaced" on the ocean floor, that argument is transparently thin. A nuclear-tipped continental-shelf mine clearly violates the spirit if not the letter of that treaty. Nor does it help the issue much to argue that since these rockets might be directed only at belligerent submarines, and thus pose little if any risk to surface shipping, they are not precluded. By the better logic, keeping in mind the probable reaction of neutrals to the emplacement of such weapons, the Hague rules seem to exclude them from use. Other conceivable new technologies could be examined along similar lines.

Are the same rules applicable in peacetime? In examining this question, it is necessary to distinguish between time of unquestioned peace, that is, the complete lack of hostilities in the area, and time of peace in which there are nonetheless existing hostilities. This is the situation that obtains in an "undeclared war" where the rules of belligerency and neutrality do not apply, at least in the formal sense. Some insight can be gained in this latter category by examining the *Corfu Channel Case*[24] decided by the International Court of Justice in 1949. It can be recalled that the major issue in that case was whether states in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal state, provided that the passage is innocent. The court held in the affirmative. But a second issue arose as a result of the fact that at one point two British destroyers struck mines in the Albanian portion of the channel causing considerable damage and loss of life. The Court agreed with the British contention that Albania was responsible. It held that this responsibility rested on the basis of elementary principles of humanity, and the principle that every state has an obligation not knowingly to permit acts in its territory contrary to the rights of other states. The holding, therefore, recognized a customary international law right to mine one's own territorial sea, but also a duty to notify of the presence and location of those mines.

Rules concerning the peaceful uses of the oceans are governed by treaty law. Both the Geneva Conventions of 1958[25] and the 1982 U.N. Convention on the Law of the Sea[26] address such questions. Although the 1982 treaty is not yet in force,[27] there are relevant provisions representing at least emerging rules of customary international law prior to the Convention's entry into force.

What are the implications of its provisions with respect to the question of peacetime mining of the territorial sea? Article 17 accords the right of innocent passage to all vessels navigating in the territorial sea.[28] Article 24 proscribes the coastal state from hampering that right. Initially, then, one might argue that emplacement of mines in the territorial sea by the coastal State would hamper the right of innocent passage. However, article 25 makes it clear that the coastal State may suspend that right for reasons of security,

at least temporarily, in specified areas of its territorial sea. It would thus seem that mines could be laid in such areas or other areas in which there might be no substantial vessel traffic. Article 24(2) places an obligation on the coastal state to give appropriate publicity to any danger to navigation. Furthermore, article 22 permits a coastal state, for safety of navigation, to restrict passage of foreign vessels to certain specified sea lanes or traffic separation schemes. Reading these together, it would appear that a coastal state in peacetime could mine its territorial sea, provided that the notice required by article 24 is given. Limiting passage to safe areas and times would hardly be considered "hampering" the general right of innocent passage in such circumstances, because that term means actions of a coastal state that would discriminate among foreign ships, or restrict vessels in the territorial sea that would virtually deprive them of their legal right to innocent passage. It does not proscribe reasonable regulation.

Article 38 of the treaty, in what some believe to be new law, provides for the right of transit passage for vessels passing through straits used for international navigation. This right, unlike innocent passage, is not suspendable. Like innocent passage, however, littoral states must give publicity to known dangers.[29] Because these passageways are sometimes only a mile or less wide, and because they often are vital waterways for international trade and military use, it is more than likely that any attempt to mine them would meet with instant protests from major maritime nations. I would conclude, therefore, that mining of international straits in peacetime would not be acceptable under customary rules. The same would hold true for routes designated as archipelagic sea lanes, subject to archipelagic sea lanes passage.[30]

It would seem difficult, in general, to justify the laying of mines on the high seas, beyond national jurisdiction, absent some strong showing that would engage a coastal state's traditional right to defend itself. In peacetime, a claim of self-defense justifying such a strong measure would be difficult to demonstrate. Again, laying of high seas mines would most likely be viewed by maritime states as an unreasonable interference with the freedom of navigation on the high seas guaranteed by article 87. The navigation rights contained in that article are incorporated into the exclusive economic zone rules by a cross-reference in article 58, while the rights of the coastal State in that zone are limited by article 56 to those that are essentially economic in nature. Thus the rules in the EEZ should be the same, as regards peacetime minelaying, as for the high seas beyond. This conclusion is reinforced by article 88, also applicable in the EEZ, which specifies that the high seas are reserved for peaceful purposes.[31] Finally, attention should be called to article 300, that calls upon all state parties to the Convention to exercise their rights, freedoms, and jurisdiction in a manner that would not amount to an abuse of rights. It would seem that mining other than in restricted areas of the

territorial sea in peacetime would raise that issue.[32] Arguably, however, the emplacement of such weapons as the continental-shelf mine, previously referred to, in the high seas or the EEZ might be distinguished on the grounds that they are controlled and inert until activated, thus posing no threat to surface shipping. Technically, these devices are not mines at all while inert, and thus their emplacement in peacetime would not be proscribed, nor would notice of that emplacement be required. Such emplacement arguably could be justified on the ground referred to by Myers McDougal as a "preparation for self-defense."[33]

Returning once again to the special "peacetime" situation where tensions or even hostilities not amounting to a formal war exist in an area, the question is whether a different set of rules do or ought to apply.[34] The most recent and classic example of this situation was the Viet Nam "war." During that conflict the United States mined Haiphong Harbor. Thorpe calls this "the most interesting [mining] case since 1945."[35] Mining of the harbor was first considered in 1968, but was rejected on the grounds that there was in fact no great military need to cut off military supplies flowing from the Soviet Union to North Viet Nam. At the time, the Director of the International Law Division, U.S. Navy Office of the Judge Advocate General, said: "If a legal state of war existed between the United States and North Vietnam we could immediately blockade the port of Hai-phong as a belligerent right of warfare. Without a state of war such a blockade would be of doubtful legality. A similar analysis could be made with respect to mining harbors, contraband, neutrality, and the right of visit and search on the high seas."[36] Note that this statement seems to rest on the traditional notions of war and peace. But by 1972, conditions had changed considerably. A major North Vietnamese offensive had been mounted and it was now necessary for purposes of military defense to stem the flow of Soviet weapons to the south. Thorpe describes the situation as follows:

> The solution to the tactical problems of the mining had to allow the objectives to be achieved without unnecessary risk to international shipping. If Hague Convention No. VIII applied to unmoored influence mines and if instant notification was required, the mine-laying aircraft in subsequent waves would be at risk. In fact the decision was taken to lay in the internal waters and territorial seas of North Vietnam inactive mines that would become active after a period of 3 days, and give warning to all shipping once the aircraft had all returned. Of the 36 ships in harbor at Hai-Phong at the time of the announcement over one-quarter were under way within 3 hr. No ships were lost, the traffic to and from Hai-Phong was effectively disrupted and, of course, the departures from Vietnam and the release of prisoners of war followed shortly thereafter. The mining was justified and reported in accordance with Article 51 of the UN Charter by the U.S.A. as an exercise of the right of self-defense in view of the attack against South Vietnam and the need to protect the 60,000 remaining U.S. Troops.[37]

What was the reaction of the international community? Very little. In a letter from the representative of the U.S.S.R. to the President of the Security Council, the Soviets protested the mining, saying that the U.S. action was

a violation of the freedom of the high seas (even though the mines were in internal waters and the territorial sea), and rejected the U.S. claim of self-defense. The letter stated "that no aggression has been committed against the United States. On the contrary, the United States itself is acting as an aggressor in Viet-Nam."[38] A similar letter was submitted by the People's Republic of China.[39] Neither protest made any mention whatsoever of the Hague Convention or the customary law of mine warfare.

Reference again should be made to the analogous use of the belligerent right of blockade. As previously noted, the Cuban quarantine was not a traditional blockade because it did not fulfill the formal requirements. Nor was there a state of war in existence between the United States and Cuba. That event represents a modified rule of blockade responsive to and justified by the needs of the situation at the time. The justification was on the ground of collective self-defense under the Rio Pact of 1947. The widespread support among members of the Organization of American States supplied the necessary *opinio juris*. One commentator noted that "the Cuban situation illustrates that where the circumstances are right, a state will insist, even in a peacetime situation, to what was traditionally known as a belligerent right. The question today really is not a purely legal one, and it never really was."[40] Dean Acheson went further in a comment to the American Society of International Law, when he said: "I must conclude that the propriety of the Cuban quarantine is not a legal issue. . . . No law can destroy the state creating the law. The survival of states is not a matter of law."[41] To me, however, basing the quarantine on raw power, and not the law, is a most dangerous proposition.

The foregoing examples indicate a growing state practice embodying some of the rules regarding the law of war in a situation short of war. These examples are buttressed by the ruling of the International Court of Justice in the Nicaragua Case.[42] In that case, the Court found that on a date late in 1983 or early 1984, the President of the United States authorized a United States government agency to lay mines in Nicaraguan ports; that in early 1984, mines were laid in or close to the ports of El Bluff, Corinto and Puerto Sandino, either in Nicaraguan internal waters or in its territorial sea or both, by persons in the pay of that agency. It found that at no time did the United States issue any public warning to international shipping of the existence and location of the mines. It found further that personal and material injury was caused by the explosion of the mines. The Court decided that by laying these mines, the United States acted in breach of its obligations under customary international law not to use force against another state, not to intervene in its affairs, not to violate its sovereignty, and not to interrupt peaceful maritime commerce. While the holding does not deal with the law of mine warfare as discussed here, a plea of self-defense was rejected. Clearly, even under the Hague rules, such mining cannot be defended.

Before concluding this commentary, some attention should be devoted to the operations that have recently taken place in the Persian Gulf. The author is not privy to any facts not appearing in the public media, so the underlying assumption is that they are fairly reported, which may indeed not be the case. The reflagging by the U.S. of eleven Kuwaiti tankers brought about a number of responses from Iran, including the indiscriminate laying of mines in various areas of the Persian Gulf. Assuming that some, if not most, of these areas lie outside of anyone's territorial sea, did Iran have the right to lay these mines under the rules that we have examined? First of all, the activities under examination took place during a limited conflict. This introduces more vividly the element of self-defense. But the question is whether Iran's targeting of shipping owned by a neighboring, but only arguably neutral, state under the flag of a noncombatant can be supported by the concept of self-defense. The answer depends upon how one views that traditional international right. Professor Jack Grunawalt of the Naval War College views self-defense as broader than traditional approaches would have us believe. It is his contention that the experiences of the two World Wars demonstrate that much of the law of neutrality has been ignored, and that in time of war, one of the weapons utilized was the all-out attack on the movement of goods to and from a belligerent, whether carried in neutral hulls or not. The objective was to destroy the enemy's economic capacity to maintain the war. If one perceives the destruction of Iraqi oil (or that of its supporters) in the same light, the argument can be made on Iran's behalf in the Persian Gulf. In reference to the Persian Gulf, Professor Grunawalt has said: "I would suggest to you that the law ought to recognize that neutral shipping that sustains a belligerent's warfighting capability may be subject to interdiction by whatever platforms and weapons system are available to the other side to accomplish that purpose. I would also suggest that the modern law of neutrality, as reflected in the customary practice of nations in this century, does in fact support that result."[43] Given the prior analysis of the mining of Haiphong harbor by the United States, it would appear that his argument has a basis in practice, and, if properly carried out, is acceptable to most maritime powers. I must confess that, while I am drawn to the logic of the argument, I am deeply concerned that if carried to extremes it could destroy the very concept of neutrality and in large part the freedom of the seas. No ship, no cargo would be safe in an area of conflict. But even if the premise is accepted, the differences between the existing situation and that in Viet Nam are notable in the manner in which the mining was carried out. As we have previously noted, mining beyond the limits of national jurisdiction can be supported where there is a legitimate national security objective. Even then, the rules regarding localization and notification must be followed, as they were in Haiphong. Thus the indiscriminate, non-notified mining by Iran cannot be found to be

within the rules. Whether the U.S. response in attacking and sinking the mine-laying vessel is within the bounds of reasonable response is a separate issue.

In conclusion, a good argument can be made that the Hague Convention rules continue to be viable in this age of new technology, that they provide reasonable rules of conduct, and that these rules seem to be recognized and followed. Thus the rules remain good guidelines for the operational commander, and the *Handbook* under discussion correctly sets them forth for the purpose.

Notes

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1. H.A. Smith, *The Law and Custom of the Sea*, 3d ed. (London: Stevens & Sons Limited, 1959), p. 119.

2. Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines, Oct. 18, 1907, *U.S. Statutes at Large*, v. 36, p. 2332, Treaty Series No. 541 [hereinafter Hague VIII].

3. U.S. Navy Dept., *The Commander's Handbook on the Law of Naval Operations*, NWP 9 (Washington: 1987) [hereinafter the *Commander's Handbook*].

4. *Id.*, par. 9.2.

5. Humanitarian principles have been used to require notification of mining apart from the Hague Convention. In the *Corfu Channel Case*, the Court referred to the obligation on Albania to notify of the existence of mines, saying, "Such obligations are based not on the Hague Convention No. VIII of 1907 which is applicable in time of war but to certain general and well-recognized principles, namely elementary considerations of humanity, even more exacting in peace than in war, the principle of the freedom of maritime communications and every state's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states." Hague, International Court of Justice, *Corfu Channel Case* ([The Hague]: The Court, 1949), v. 4.

6. Article 51 of the United Nations Charter provides: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations." Professor Janis, in commenting, notes that "concommitant with Article 51's right to self-defense is Article 2(4)'s prohibition against 'the threat or use of force against the territorial integrity or political independence of any state.'" Mark W. Janis, *An Introduction to International Law* (Boston: Little Brown, 1988), p. 124; *see also*, Janis, "Neutrality," Chapter VI herein.

7. *See, for example*, common Article 2 of the four 1949 Geneva Conventions. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, *United States Treaties and Other International Agreements* [hereinafter U.S.T.] v. 6, p. 3114, T.I.A.S. No. 3362; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, U.S.T., v. 6, p. 3217, T.I.A.S. No. 3363; Convention (III) Relative to the Treatment of Prisoners of War, August 12, 1949, U.S.T., v. 6, p. 3316, T.I.A.S. No. 3364; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, U.S.T., v. 6, p. 3516, T.I.A.S. No. 3365. See also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), June 8, 1977, art. 1, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977)*, v. 1, p. 115, reproduced in Dietrich Shindler & J. Toman (eds.), *The Laws of Armed Conflict: A Collection of Conventions, Resolutions and Other Documents*, 3rd ed. (Dordrecht, Netherlands: Martinus Nijhoff Publishers, 1988), p. 621 (hereinafter Additional Protocol I).

8. A.G.Y. Thorpe, "Mine Warfare at Sea - Some Legal Aspects for the Future," *Ocean Development and International Law*, v. 18, p. 255 at p. 256 (1987).

9. *Id.*, p. 257.

10. *See*, Anna Van Zwanenberg, "Interference with Ships on the High Seas," *International and Comparative Law Quarterly*, v. 10, p. 785 at p. 791 (1961).

11. For details, *see*, Marjorie M. Whiteman, *Digest of International Law* (Washington: U.S. Govt. Print. Off. 1963), v. 4, pp. 523-24.

12. Article 22 of the Geneva Convention of the High Seas prohibits boarding a foreign merchant ship on the high seas unless there is reasonable ground for suspecting that the ship is engaged in piracy or the slave trade, or is of the same nationality as the boarding ship though showing a different flag. Convention on the High Seas, April 29, 1958, U.S.T. v. 13, p. 2312, T.I.A.S. No. 5200.

13. The Hague Convention applies to belligerents. Article 7 states that "The provisions of the present Convention do not apply except between contracting powers, and then only if all the belligerents are parties to the Convention." Hague VIII, *supra* note 2.

14. Additional Protocol I, *supra* note 7, art. 35, para. 2.

15. Convention (IV) Respecting Laws and Customs of War on Land, Regulations Annex, Oct. 18, 1907, art. 23(e), *U.S. Statutes at Large*, v. 36, p. 2227, Malloy, v. 2, p. 2269.

16. Hague VIII, *supra* note 2, art. 2.

17. *Id.*, art. 3, second paragraph.

18. *Id.*, art. 4.

19. *Id.*, art. 1 (1).

20. *Id.*, art. 1 (2).

21. *Id.*, art. 5.

22. He elaborates: "Modern technology allows for the possibility of interrogating the weapon remotely to ascertain its state of arming. If the weapon breaks loose, it will become sterilized. The mine will have sensors that could have discriminatory devices built in. The remote arming devices have a high reliability factor that transforms the mine into a highly discriminatory weapon, and, if designated as an antisubmarine warfare weapon, will pose no dangers to nonbelligerent surface shipping." Thorpe, *supra* note 8, pp. 263–264.

23. Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor in the Subsoil Thereof, Feb. 11, 1971, U.S.T. v. 23, p. 701, T.I.A.S. No. 7337.

24. Hague, International Court of Justice, *Corfu Channel Case* ([The Hague]: The Court, 1949), v. 4.

25. Primarily, the Convention on the High Seas, April 29, 1958, U.S.T. v. 13, p. 2312, T.I.A.S. No. 5200.

26. United Nations Conference on the Law of the Sea, 3d, United Nations Convention on the Law of the Sea, A/CONF. 62/122 (n.p.: 1982) [hereinafter LOS Convention].

27. At the time of writing, 42 ratifications of the needed 60 have been filed. It should not be overlooked, however, that some of the provisions of the treaty represent rules of customary international law and thus may have binding force on that ground.

28. This right is defined in article 19 of the LOS Convention, *supra* note 26, as passage which is not prejudicial to the peace, good order, or security of the coastal State. The article specifies a number of activities which could bring the innocence of a vessel's passage into question.

29. LOS Convention, *supra* note 26, art. 44.

30. *See* LOS Convention, *supra* note 26, Part IV.

31. This expression is a term of art, which does not preclude all military activities.

32. Article 301, LOS Convention, *supra* note 26, requires states to refrain from any threat or use of force in any manner incompatible with international law. It would seem that mining might engage this provision, as well, except in legitimate cases of self-defense.

33. Editorial Comment, Myres McDougal, "The Hydrogen Bomb Tests and the International Law of the Sea," *American Journal of International Law*, v. 49, p. 356 at p. 361 (1955).

34. *See*, generally, William O. Miller, "Belligerency and Limited War," in Richard B. Lillich and John Norton Moore, eds., *U.S. Naval War College International Law Studies*, Volume 62, *The Use of Force, Human Rights and General International Legal Issues* (Newport, Rhode Island: Naval War College Press, 1980), v. 62, p. 164. Miller stresses the problems relating to classifying activities in strict categories of "war" and "peace."

35. Thorpe, *supra* note 8, p. 269.

36. Geoffrey E. Carlisle, "The Interrelationship of International Law and U.S. Naval Operations in Southeast Asia," *JAG Journal*, v. 22, p. 8 at pp. 11–12 (1967).

37. Thorpe, *supra* note 8, p. 270.

38. Letter dated 11 May 1972, Doc. S/10643. United Nations, Security Council, *Official Records: Security Council*, 27th Year, Special Supplement No. 1 (New York: 1972), p. 55.

39. Letter dated 12 May 1972, Doc. S/10644, *id.*, pp. 55-56.

40. William O. Miller, "Law of Naval Warfare," in Lillich & Moore, *supra* note 34, p. 263 at p. 269.

41. Quoted in Miller, *supra* note 34, pp. 170–171.

42. The judgment in the case of "Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)" can be found in: Hague, *International Court of Justice Yearbook 1985-1986* ([The Hague]: The Court, 1987), pp. 142-160.

43. Richard Grunawalt, "The Rights of Neutrals and Belligerents," Council on Ocean Law and The Law of the Sea Institute, *Transcript of an Evening Panel Discussion on the Persian/Arabian Gulf Tanker War: International Law or International Chaos*, January 26, 1988.

Chapter XIII
Modern Technology and the Law of Armed Conflict at Sea

by
Horace B. Robertson, Jr.*

Most of the existing written legal rules for the conduct of armed conflict at sea were adopted before the development of oil propulsion for warships, radar, electric torpedoes, naval aircraft, aircraft carriers, nuclear-propulsion submarines and many other modern naval platforms and systems. These systems and weapons have been in naval inventories for decades. A comprehensive discussion of how these elements of modern technology interact with the law of armed conflict at sea would necessarily involve an analysis of each of these developments and its impact on the relevant norms of the law of armed conflict. It is not the purpose of this chapter, however, to examine each of these in detail. The weapons systems and naval platforms that found their way into naval inventories prior to and during World War II have found an uneasy peace with the traditional rules. It is rather the purpose of this chapter to review the norms for the conduct of armed conflict at sea as they may affect and be affected by technological development, and to examine briefly how current norms may impact on some of the more exotic systems that have become a part of naval inventories within recent decades or are under development and likely to become part of them in the near future.

The occasion for this review is the recent publication of *The Commander's Handbook on the Law of Naval Operations* (NWP 9),[1] the U.S. Navy's official manual on operational law, including the law of naval warfare. As such, the *Handbook* represents the official position of the United States with respect to the legality of the deployment and employment of weapons in armed conflicts at sea. The principal provisions of the *Handbook* relevant to this issue are found in Chapter 8, "The Law of Naval Targeting," Chapter 9, "Conventional Weapons and Weapons Systems," Chapter 10, "Nuclear, Chemical and Biological Weapons," and Chapter 11, "Noncombatant Persons." Several aspects of these subjects are addressed in detail in other chapters of this book—naval targeting in Chapter IX by Sally V. and W. Thomas Mallison, nuclear, chemical and biological weapons by Howard S. Levie in Chapter XI, and noncombatant persons by Frits Kalshoven in Chapter

X. Jon L. Jacobson addresses the particular problem of submarine compliance with the law of armed conflict in Chapter VIII, and Thomas Clingan addresses mine warfare in Chapter XII. It is not the purpose of this chapter to repeat what is said in those chapters but rather to attempt to synthesize the impact that internationally accepted rules have on the acquisition, retention, or employment of weapons using exotic or innovative technology. In order to do so I shall first determine the content of the applicable rules. I shall then proceed to analyze specific weapons and weapons systems in light of these rules.

History and Content of the Rules

The basic norm of the humanitarian law of armed conflict is that the right of parties to adopt means and methods of warfare is not unlimited. This norm is included in several international instruments[2] and, additionally, has been generally recognized as having attained binding force as customary international law.[3]

Flowing from this basic norm are a number of more specific rules setting forth the limits which are generally applicable to the means and methods of armed conflict. Like the basic norm, they are a part of customary international law and in most cases have also been included in one or more international instruments. Although stated somewhat differently from instrument to instrument, they include the following principles:

- The distinction between combatants and non-combatants must be recognized.[4]
- Non-combatants may not be made the object of direct attack.[5]
- The methods or means of attack of a combatant (or legitimate military target) may not have indiscriminate effect.[6]
- As a necessary corollary to the preceding principle, weapons which by their nature are incapable of being directed specifically against military targets and therefore put combatants and non-combatants at equal risk are forbidden because of their indiscriminate effect.[7]
- Even where an attack is directed specifically at a legitimate military target, if the incidental effect on non-combatants is disproportional to the value of the military target, then the attack may not be made.[8]
- The methods and means of attack may not be such as to cause superfluous injury or unnecessary suffering.[9]
- A combatant may not kill or wound an enemy who has surrendered, laid down his arms or no longer has a means of defense.[10]
- The methods and means may not include treachery or perfidy.[11]

Some would include in this list the employment "of methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment."[12] This principle made its first appearance in humanitarian law in Additional Protocol I in 1977, and can hardly be said at this time to represent customary international law. The

Government of the United States does not recognize this prohibition as part of customary international law.[13]

Section 8.1 of Chapter 8 of the *Handbook* states these general principles in slightly different terms, as follows:

> 1. The right of belligerents to adopt means of injuring the enemy is not unlimited.
> 2. It is prohibited to launch attacks against the civilian population as such.
> 3. Distinctions must be made between combatants and noncombatants, to the effect that noncombatants be spared as much as possible.[14]

The *Handbook* then admonishes:

> These legal principles governing targeting generally parallel the military principles of object, mass, and economy of force. The law requires that only objectives of military importance be attacked but permits the use of sufficient mass to destroy those objectives. At the same time, unnecessary (and wasteful) collateral destruction must be avoided to the extent possible and, consistent with mission accomplishment and the security of the force, unnecessary human suffering prevented. The law of naval targeting, therefore, requires that all reasonable precautions must be taken to ensure that only military objectives are targeted so that civilians and civilian objects are spared as much as possible the ravages of war.[15]

During the period of the last century and a quarter there has been a series of attempts in the international arena to translate these general norms into specific prohibitions against the development or employment of particular weapon systems that advancing technology has brought into the armaments of the armed forces of many nations. These efforts have met with only limited success.

The first attempt was in the St. Petersburg Declaration of 1868,[16] which contained a prohibition on the use, in time of war, of any projectile of less than 400 grams which "is either explosive or charged with fulminating or inflammable substances."[17] In other words, only artillery shells, not small caliber bullets, which presumably would only be directed against humans, may contain an explosive or incendiary charge. The possibility of future prohibitions was contemplated.[18]

This initiative was followed up in 1899 at the Hague by three Declarations, the first prohibiting the use of bullets that expand or flatten on piercing the human body ("dum-dum" bullets).[19] The second prohibited the discharge of projectiles and explosives from balloons.[20] The third prohibited projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases.[21] The first of these implemented the general norm against weapons that caused superfluous injury or unnecessary suffering. The second implemented the general principle against weapons having an indiscriminate effect, and the third was under the umbrella of both of these general principles.

The Hague Conference of 1907 dealt explicitly with several aspects of naval warfare. The conventions adopted at the conference included one governing the conduct of naval bombardment.[22] A second, dealing with contact mines,[23]

required, *inter alia*, that unanchored contact mines should automatically disarm themselves within one hour of the time the person launching the mine ceases to control them and that anchored contact mines should become harmless when they have broken loose from their moorings.[24] Included within the contact-mine Convention was a requirement that torpedoes should be rendered harmless when they have missed their target.[25] These restrictions were acceptable to the conferees because they were obviously in the interest of the powers that had the technology to develop such weapons since free-floating mines and torpedoes were just as much a hazard to friendly forces as enemy. Also the technology to implement these prohibitions was in hand.

The technologically advanced nations were, however, unwilling to renounce the benefits of technology which might be of benefit to them. As stated by Antonio Cassese, "Whenever it has turned out that a means of destruction was really effective, states have refrained from outlawing it."[26] He echoes a statement by the United States representative at the 1899 Peace Conference, who said:

> The general spirit of the proposals that have received the favorable support of the subcommission is a spirit of tolerance with regard to methods tending to increase the efficacy of means of making war and a spirit of restriction with regard to methods which, without being necessary from the standpoint of efficiency, have seemed needlessly cruel. . . .
>
> [I]t is the efficacy that we have wished to safeguard, even at the risk of increasing suffering, were that indispensable.[27]

This remains the prevailing attitude among technologically advanced states and has been reflected in their negotiating positions in more recent conferences.

In the period between World Wars I and II, diplomatic attempts to prohibit or restrict specific weapons were limited to two weapons or methods of warfare—poison gas and the submarine[28]—not surprisingly means and methods of warfare employed first and most effectively by the defeated powers. The 1925 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare[29] prohibits the use of asphyxiating, poisonous or other gases and extends that prohibition to the use of bacteriological methods of warfare. The Protocol has received wide acceptance, currently being in effect for 135 states.[30]

The force of these prohibitions is somewhat weakened by the large number of reservations which declare that the Protocol shall cease to be binding on the reserving state as to enemy states whose armed forces or allies fail to respect the prohibition.[31] The United States is among those reserving.[32] In light of the combined effect of the large number of parties and the large number of reservations, it is generally accepted that this Protocol bars only the "first use" of poisonous gas or bacteriological weapons.[33]

The efforts to deal with the legality of employment of submarines in naval warfare are the subject of a separate chapter in this volume and will not be dealt with in this essay.[34]

The post-World War II efforts to put limitations on the use of certain weapons have to a large extent been conducted within the context of disarmament, which is beyond the scope of this essay, but one of them resulted in a convention prohibiting bacteriological weapons. That is the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction.[35] Drafted by the Committee on Disarmament, this convention, going beyond the prohibitions of use included in the 1925 Geneva Protocol, obligates each State Party:

> [N]ever in any circumstances to develop, produce, stockpile or otherwise acquire or retain:
> 1. microbial or other biological agents or toxins whatever their origins or method of production of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes;
> 2. weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.[36]

Parties are also required to destroy or divert to peaceful purposes any stocks they may already have and may not transfer such agents to any recipient or "assist, encourage, or induce any state, group of states, or international organization" to manufacture or acquire them.[37]

The Committee on Disarmament's initial approach was to include chemical weapons in the prohibition, but this proved impossible.[38]

The Convention entered into force in 1975 and has been rapidly and widely accepted. As of January 1, 1989, it had 110 parties.[39]

The most significant recent demonstration of the reluctance of states to commit to specific bans was in the Geneva Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, convened under the sponsorship of the Government of Switzerland, which met in annual sessions from 1974 through 1977. At that conference, although one of the standing committees was charged with examining proposals for restrictions on specific weapons, and the ICRC attempted to assist the process by convening conferences of experts in 1974 and 1976, no specific bans emerged. Subsequently, a United States spokesman stated:

> [T]here was a considerable measure of agreement on a detailed set of regulations to govern the recording of [land] minefields, the use of [land] mines in populated areas, and the prohibition of certain types of especially inhumane booby trap devices.
>
> Useful work was also done on the subject of napalm and other incendiary weapons. However, it was clear at the end of the conference that large gaps still remained between those who wanted to prohibit incendiaries generally, and those (including the major

> Western military powers) who were prepared to accept substantial restrictions on the use of flame weapons in populated areas but were not prepared to give up battlefield uses of the weapons.[40]

The conference did, however, take two actions that might be considered useful with respect to specific bans. The first was the adoption of an article of additional Protocol I mandating a system of national legal reviews of new weapons systems before they are produced or acquired.[41] The second was the adoption of a resolution calling on the United Nations to convene a follow-up conference on the prohibition or restriction of certain conventional weapons by 1979.[42]

The requirement for the system of national legal review is found in article 36 of Additional Protocol I, which provides:

> In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or any other rule of international law applicable to the High Contracting Party.

Several important points should be noted about article 36. First, the article applies only to "new" weapons. It may, however, also apply to a "new use" (method) of an old system. Second, the state party's determination that a new weapon, means or method of warfare is prohibited would not mean that the state is prohibited from acquiring or possessing the weapon. A nation may, for example, stockpile weapons it determines to be prohibited for use as an instrument of reprisal (provided, of course, that weapon is not absolutely prohibited by some absolute rule against acquisition or retention (*e.g.*, biological weapons)). Third, the state is to examine whether a weapon would be prohibited either because it is inherently unlawful in any form of employment (*e.g.*, indiscriminate effect) or only in "some" circumstances. The conferees recognized that any weapon could be misused in a way that is illegal. The purpose of the national evaluation is to analyze the weapon in terms of its "normal or expected use."[43] Fourth, the applicable standards for review are the terms of Additional Protocol I itself (primarily article 35) or "any other rule of international law applicable to the High Contracting Party." This presumably includes the customary rules of the law of armed conflict as well as treaties. And finally, the determination of legality *vel non* is a *national* determination. It does not establish a standard that must be applied by other states; there is no requirement that it be published.[44]

Article 36 might be regarded as a bridge between the general prescriptive norms established by Article 35 and the enforcement of prohibitions or restrictions on specific weapons or methods of warfare. Some states wished to establish an international body with authority to monitor and draw up lists of weapons or methods of use that fell within the proscription of article 35.[45]

Other states felt that this would put the Conference into the field of disarmament, a subject beyond its competence.[46]

The article as adopted is a compromise between these two points of view. It was an international application of procedures already in place in several states, and for that reason it could command wide support from Western military powers. Under Department of Defense Instruction 5500.15 the United States, for example, had established a program in 1974 that stated a policy that:

> All actions of the Department of Defense with respect to the acquisition and procurement of weapons, and their intended use in armed conflict, shall be consistent with the obligations assumed by the United States Government under all applicable treaties, with customary international law, and, in particular, with the laws of war.[47]

The Instruction placed responsibility on each Military Department to ensure that the Judge Advocate General of the Department would review all weapons intended to meet a military requirement to determine whether they were consistent with the above-quoted criteria. This review was to be conducted "prior to the award of an initial contract for production" and "at such subsequent stages in acquisition or procurement as the Judge Advocate General concerned determines it is appropriate."[48] The Judge Advocates General are required to maintain permanent files of opinions issued by them.[49] Each of the military departments has implemented this Instruction by internal regulations detailing how and when these reviews shall be conducted.[50]

As to the second outcome of the 1977 Conference dealing with specific bans (the Resolution calling for the United Nations to convene a follow-up conference), the United Nations responded by convening two sessions of a Preparatory Conference in 1978 and 1979 and a United Nations Diplomatic Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, which met in 1979 and 1980. The latter produced a Convention on Prohibitions or Restrictions on the use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects.[51] The operative portions of the convention are contained in three Protocols, the first prohibiting use "of any weapon the primary effect of which is to injure by any fragments which in the human body can escape detection by x-rays."[52] The second contains prohibitions and restrictions on the use of land mines, booby traps and other devices.[53] The third deals with incendiary weapons.[54] It does not prohibit the use of incendiary weapons such as napalm against military objectives, but it prohibits making "the civilian population as such, individual civilians or civilian objects the object of attack by incendiary weapons."[55] It also prohibits making a military objective within a concentration of civilians the object of attack by air-delivered incendiary weapons; and prohibits such attacks by non-air-

delivered weapons except when the objective is clearly separated from the non-military objects and "all feasible precautions" are taken to limit the incidental harm to civilians and civilian objects.[56]

The Conference, although unable to agree on a protocol on the subject of small calibre weapons, adopted a resolution calling for further research on the wounding effects of small calibre weapon systems and urging governments "to exercise the utmost care in the development of small-calibre weapons systems, so as to avoid an unnecessary escalation of the injurious effects of such systems."[57]

The Convention entered into force in 1983, but the United States has not become a party to it. In a statement made at signature, the United States made a Declaration which included the following statement:

> As indicated in the negotiating record of the 1980 Conference, the prohibitions and restrictions contained in the Convention and its Protocols are of course new contractual rules (with the exception of certain provisions which restate existing international law) which will only bind States upon their ratification of, or accession to, the Convention and their consent to be bound by the Protocols in question.[58]

The second Protocol, dealing only with methods of land warfare, is beyond the scope of this essay. The first Protocol, of course, is a specific ban of a particular weapon, and, if applicable, would bar employment of such a weapon by a combatant. It is interesting to note that despite the U.S. declaration that the prohibitions and restrictions of the Protocols are contractual and bind states only upon their becoming parties to them, the *Handbook* takes the position that "using materials that are difficult to detect or are undetectable by field x-ray equipment, such as glass or clear plastic, as the injuring mechanism in military ammunition is prohibited, since they unnecessarily inhibit the treatment of wounds."[59] The *Annotation*[60] does not cite the 1980 Protocol I as authority for this proposition, and since it is included in a paragraph entitled "Unnecessary Suffering," it must be presumed that the authors of the *Commander's Handbook* considered the use of such materials as contrary to the general principle against inflicting unnecessary suffering.

Some commentators have been critical that the conferences held in the decade of the 70's did not make more progress in establishing prohibitions on specific weapons, means or methods of warfare. Antonio Cassese, for example, has said that confining the prohibitions to general principles has two major disadvantages: first, "they are couched in very vague terms" and second, "[t]heir application is left to the belligerents concerned."[61] As a result, he says, a belligerent who believes his enemy is using an illegal means, can only resort to reprisals or a threat of prosecution of those responsible as war criminals.[62] Echoing the comments at and after the Hague Conferences, he concludes that the ultimate question then comes down to one of power. He says:

> [W]hether this kind of reaction can produce any real effect actually depends on how strong the belligerent resorting to it is. Ultimately, therefore, the implementation of the general principles on weapons turns on the military strength of the belligerent; strong States can dodge the bans without fear. The only "sanction" against them is to resort to world public opinion.[63]

But Cassese also recognizes the inadequacies of specific bans. The principal one he points out is that prohibitions always lag behind new weapon development. Thus, a technologically advanced nation can always develop a new weapon, perhaps equally or more cruel, to replace one that is specifically banned.[64] "As a result," he says, "the gap between technologically developed States and less advanced countries could be widened. . . ."[65]

What can we then conclude from this review of authority as to the limitations that will apply to a state, particularly a technologically advanced state such as the United States, when it makes a decision as to the acquisition or employment of a naval weapon that its technology is capable of producing or in evaluating the legality of one produced or used by an adversary?

Of the general principles listed earlier, it is to be noted that most of them apply to the manner of employment of weapons—that is, targeting, which is dealt with in another chapter of this book.[66] Only three would prohibit use of the weapon itself, irrespective of how it is used. These three are:

- a weapon may not have indiscriminate effect;[67]
- a weapon may not be such as to cause superfluous injury or unnecessary suffering;[68] and
- a weapon may not be one that could only be used in a treacherous or perfidious mode.[69]

Specific bans are applicable in a few cases:

- unanchored automatic contact mines must be designed so as to be rendered harmless one hour after they are no longer under control;[70]
- anchored contact mines must be designed so as to become harmless when they break away from their moorings;[71]
- torpedoes must be designed to become harmless when they have missed their mark;[72]
- a state may not resort to "first use" of poisonous gas;[73]
- bacteriological weapons, or their means of delivery, cannot be developed, produced, stockpiled or otherwise acquired or retained.[74]
- a state may not use any weapon the primary effect of which is to injure by fragments which in the human body can escape detection by x-rays.[75]

Having reviewed both the general and specific limitations that may apply when new technology is converted into weapons, we can now proceed to analyze the effect these limitations may have on the acquisition, retention or employment of specific weapons systems that have recently come into national armament stocks or that are under development. In conducting this analysis, I shall single out a few weapon systems that have, in the minds of some, raised questions of their legality without attempting to be comprehensive. In addition, I shall use as primary exemplars American

systems. I shall also, where appropriate, see how these weapons are treated in the *Commander's Handbook on the Law of Naval Operations* (NWP 9) and express at least a tentative opinion as to whether NWP 9's position on the issue is justified. As a predicate for the latter task, I might reiterate what I stated in the Preface to this volume.[76]

NWP 9 is what it states itself to be—a "*commander's*" handbook, meant for the guidance of operational commanders and their staffs to assist them to conform their operations—peacetime as well as wartime—to the dictates of international law. It is therefore written in terms understandable to the lay person. Some might say it paints the picture too much in black and white, not recognizing the delicate shadings that reflect the actual state of the law that are so dear to the hearts of international-law scholars. It contains no footnotes for the benefit of scholars who may wish to know the source of the "rule" stated. But, as pointed out in its Preface, it is not a "substitute for the definitive legal guidance provided by judge advocates and others responsible for advising commanders on the law."[77]

For the benefit of these "judge advocates and others" who will provide fuller guidance, there is an encyclopedic "Annotated Supplement"[78] to NWP 9, prepared under the auspices of the Naval War College and the Judge Advocate General of the Navy for distribution to judge advocates having responsibility for advice to operational commanders. The *Annotated Supplement* gives a section-by-section analysis of NWP 9 with full discussion of the concepts involved and the sources of the rules stated. It will be an invaluable resource to persons who will provide advice to commanders at all levels of command as well as to scholars engaged in research.

Specific Weapons Systems[79]

Over-the-Horizon Weapons Systems. One of the most significant weapon-system developments in the post-World War II era is the over-the-horizon projectile. There are many variations of such systems which are now operational or in development in the United States and other navies. Typically, in the marine environment, such weapon systems consist of a turbofan- or turbojet-propelled cruise missile armed with either a nuclear or high-explosive warhead and the associated shipboard or aircraft installations for launching and initial guidance. The missile may be launched from aircraft, or when equipped with a rocket booster motor, from surface ships and submarines. It may follow a preprogrammed cruise flight path or may be controlled during flight from the launching platform or pre-positioned guidance vessel or aircraft. Its terminal guidance may be heat-seeking, active radar homing, television monitoring, or some other system.

The two most prominent guided-missile systems currently in the United States Navy's inventory are the Tomahawk Sea-Launched Cruise Missile and

the Harpoon Surface-to-Surface Missile. The former of these is a long-range (over 450 kilometer) turbofan-propelled cruise missile designed for submarine or surface ship launching against ships or land targets. The latter is a shorter range (over 90 kilometer) turbojet-propelled cruise missile designed primarily for attacks on surface ships. For land-target attacks the Tomahawk uses an inertial guidance system with advanced terrain contour matching (TERCOM) for course corrections and target acquisition. For attacks on ships, both the Tomahawk and Harpoon use inertial guidance to the vicinity of the target where active radar is switched on to detect and lock on the target.

In his 1972 article, "The Legality of Cruise Missiles,"[80] D. P. O'Connell observed that:

> [T]he specific questions that should be posed [as to the legality of naval cruise missiles] are whether the existing rules of international law respecting discrimination between military and civilian targets can be observed in practice . . ., and whether the immunity of neutral shipping from attack can be respected.[81]

The questions remain the same today. The questions suggest, and correctly so, that the weapon itself is not *per se* illegal, but rather that the legality of its use depends on the particular circumstances prevailing at the time of the intended employment. Where the conflict is being conducted in an area where there is small likelihood that anything but legitimate targets will be present, the use of long-range surface-to-surface or air-to-surface missiles would be entirely legitimate. But as the recent experience in the Persian-Arabian Gulf war between Iran and Iraq has shown, the risk of error in identification of targets is high when the naval conflict takes place in an area in which neutral warships and shipping are intermingled in close proximity with the naval forces and merchant shipping of the contending powers. In all long-range systems of which I am aware, the initial guidance system only takes the missile to the general vicinity of the target, at which point the terminal guidance system takes over, picks out the target and self-guides the missile to it, usually through an infrared homing device or active radar acquisition and tracking. In either event, the missile's ability to discriminate between legitimate and illegitimate targets that may be in the area is limited. The legality of using such long-range weapons would depend on a balancing of the risk of harm to non-legitimate targets with the importance of the legitimate target to the accomplishment of the military mission.[82]

The Commander's Handbook recognizes these limitations. With respect to over-the-horizon weapons, it provides:

> Missiles and projectiles dependent upon over-the-horizon or beyond-visual-range guidance systems are lawful, provided they are equipped with sensors, or are employed in conjunction with external sources of targeting data, that are sufficient to ensure effective target discrimination.[83]

CAPTOR Mine. Although mine warfare is the subject of a separate chapter herein,[84] it is appropriate to consider the CAPTOR mine briefly in this chapter as well, since it is a technologically sophisticated weapon system which has made its appearance in the last decade or so.

CAPTOR is an American antisubmarine weapon consisting of an encapsulated Mark 46 torpedo, which is anchored to the ocean floor in the same manner as a naval mine, and can be laid by either submarines or aircraft. When its acoustic detection system determines that an enemy submarine is within range, it launches the torpedo, which homes on the target.

CAPTOR thus has some of the characteristics of a mine and some of a torpedo. It would thus be subject to any specific restrictions applicable to torpedoes or mines, as well as any more general restrictions.

As we have seen, the only specific limitation on mines and torpedoes are those contained in Hague VIII.[85] Since, however, Hague VIII deals only with "automatic contact mines," its specific prohibitions and restrictions are inapplicable to CAPTOR. Its provision with respect to torpedoes is limited to a prohibition against use of "torpedoes which do not become harmless when they have missed their mark."[86] This latter provision poses no problem to the legality of CAPTOR, since all United States-designed torpedoes are designed to sink to the bottom and become harmless when they have completed their propulsion run.[87]

With respect to the general prohibitions, the only one that could possibly be applicable is that prohibiting a weapon which may have indiscriminate effect. Although once laid, the CAPTOR mine is not within the control of the party that has planted it, its design incorporates features that prevent it from having indiscriminate effect. Its sensors permit it to recognize the "signatures" of enemy submarines, thus preventing it from being activated by an unintended target vessel. Once launched, the torpedo itself is "gated" to prevent it from straying outside pre-set depth parameters and becoming a danger to surface shipping that may be in the area. CAPTOR thus does not appear to fall within the prohibition against weapons having indiscriminate effect.

Although the *Commander's Handbook* does not single out CAPTOR for specific comment in its sections on naval mines[88] and torpedoes,[89] its discussion of the limitations and prohibitions on the employment of mines appears to comply with the prohibitions discussed. The *Handbook* acknowledges that "[t]echnological developments have created weapons systems obviously not contemplated by the drafters of [the 1907 Hague] rules."[90] It then adds, "Nonetheless, the general principles of law embodied in the 1907 Hague Convention continue to serve as a guide to lawful employment of naval mines."[91]

Directed Energy Devices. Of all the weapons systems brought forth by modern technology, the most exotic are those using directed energy devices. While evoking images of "Buck Rogers in the 25th Century" and "Star Wars," the fact is that some of these devices are already incorporated into a number of current weapon systems, primarily for such functions as range-finding, target-designating or target-illuminating. But the energy stream they emit may also directly disable enemy materiel or injure or kill enemy personnel. Because they are particularly effective in space, where their energy is not scattered or attenuated by the atmosphere or pollutants, they will comprise essential components of the United States' Strategic Defense Initiative. The United States Department of Defense has reported that the Soviet Union is developing high-energy lasers for strategic air defense, space-based anti-satellite missions, and possibly for anti-ballistic-missile defense.[92]

"Directed energy" is a generic term embracing three technologies: lasers, high-powered microwave devices, and particle beams. All have in common the production and emission of a stream or beam of concentrated electromagnetic energy or atomic or sub-atomic particles.

Lasers emit a focused, very narrow beam of energy. In their low-energy versions, they may be used for range-finding, target-designating or target illuminating for a variety of weapon systems or to dazzle or distract an approaching watercraft or aircraft by creating a flash of light when the beam strikes the windscreen of the craft. The effect is much like that of attempting to drive an automobile directly into a rising or setting sun. Even a low-energy laser can cause retinal damage and temporary or permanent visual impairment to a person who is looking directly at the emitter, since the eye focuses the beam on a small spot on the retina. The harm is aggravated and the range of harm is extended if the person is using binoculars. In their high-energy versions, lasers can physically damage enemy materiel by the rapid buildup of intense heat on the target. They can jam or cause permanent damage to optical, electro-optical, or infrared systems.

Microwave devices propagate much like light beams but are absorbed and reflected differently. They can pass through glass, plastic and fabric with little or no energy loss and can guide on metallic objects such as wires. These devices can jam or cause permanent damage to materiel components either by disrupting electric or electromagnetic circuits or causing physical damage by rapid heat buildup.

Particle beam devices differ from lasers and microwave devices in that they actually transmit matter rather than energy. The absorption of the matter by the target creates intense heating, which can cause meltdown or destruction of components. Impact with the target may also create secondary emissions of gamma and x-rays. These devices do not appear to have much capability for current tactical application because they require an extremely high power accelerator and power source, which cannot be made

transportable. They will probably find application in anti-ballistic-missile and anti-satellite systems, a discussion of which is beyond the scope of this paper.

Most of the discussion on the legality of directed energy devices has centered on lasers. At the 1974–77 Diplomatic Conference on Humanitarian Law, several nations attempted to bring the matter forward, but were unsuccessful. Again, at the follow-on U.N. Conference on Certain Conventional Weapons in Geneva in 1978, the subject was raised but not dealt with. At the XXV International Conference of the Red Cross in 1986, Sweden and Switzerland offered a resolution condemning the blinding effect of laser weapons, but it did not gain much support and was not adopted by the Conference. The most recent attempt of Sweden to raise the issue is summarized by the Judge Advocate General of the Army as follows:

> In April 1988 Sweden again endeavored to raise the issue, though in substantially modified form. It acknowledged the legality of the use of lasers to produce flash effects to combatants; accepted the lawfulness of the use of lasers for rangefinding, target acquisition, and similar military purposes; and also accepted the legality of blinding of enemy combatants incidental to the use of a laser for the above-cited purposes. Sweden's most recent effort proposed to prohibit use of lasers as antipersonnel weapons *per se*. This proposal, offered first on an informal basis to delegates to the United Nations Committee on Disarmament in Geneva on 18 April 1988, and subsequently to the United Nations Special Session on Disarmament III in New York in June, 1988, met with no success in either instance.[93]

Pursuant to Department of Defense Instruction 5500.15,[94] the Judge Advocate General (JAG) of the Army reviewed the legality of the use of lasers as antipersonnel weapons. In a memorandum of law, concurred in by the Judge Advocates General of the other military departments,[95] the JAG concluded that "the use of lasers as antipersonnel weapons would not cause unnecessary suffering nor otherwise constitute a violation of the international legal obligations of the United States. Accordingly, the use of a laser as an antipersonnel weapon is lawful." The rationale for the conclusion was that blinding was "no stranger to the battlefield," since it already occurred from multiple causes; "potential laser injuries can be minimized with the utilization of appropriate protective equipment and defensive actions;" although lasers may cause permanent blindness, many injuries caused by admittedly lawful weapons also result in permanent disabling effects; the prohibition against employment of "arms, projectiles, or material calculated to cause unnecessary suffering" (Hague IV, art. 23 (e)) must be balanced against "the necessity for destructive power adequate to meet a variety of threats at a variety of ranges and in a variety of circumstances;" and finally, that prohibiting direct laser attacks on enemy combatant personnel would lead to the anomaly "that a soldier legally could be blinded ancillary to the lawful use of a laser rangefinder or target acquisition lasers but could not be attacked individually."[96]

Lasers and other directed energy devices must be examined for their legality on the basis of the same criteria we have used in looking at the other weapons systems discussed earlier.[97] Of those criteria, only two appear to have possible applicability. These are that a weapon may not have indiscriminate effect, and a weapon may not be such as to cause superfluous injury or unnecessary suffering.

As to the first of these—indiscriminate effect—it would appear that directed energy devices have a higher order of discrimination than almost any other weapon, current or projected, in military arsenals. The streams of energy are highly focused and narrow; they travel at or near the speed of light and thus "hit" the target essentially at the same time they are launched, eliminating the problem of "leading" the target to obtain a hit; and since they travel in a straight line, they are essentially limited to line of sight, drastically reducing the danger to objects or persons not being targeted.

The Army JAG memorandum of law focused on the second criterion—superfluous injury or unnecessary suffering. The most severe effects on personnel produced by lasers are blindness, temporary or permanent, and, at high powers, severe skin burns. As to the former of these, the Army memorandum states:

> The human eye is particularly susceptible to laser light in the visible and near infrared portions of the electromagnetic spectrum because of the focussing properties of the human cornea and lens. Laser light incident on the cornea . . . is focussed to a very small retinal spot increasing the energy per unit area on the retina by a factor of 100,000 times. At these levels the high concentration of light is sufficient to produce irreversible damage by a mechanism known as photocoagulation. At these high levels of laser irradiation the effects on the human eye may be the appearance of a large retinal burn with accompanying hemorrhage into the portion of the eye behind the lens. As the incident laser energy is reduced, the hemorrhage is no longer a factor and the size of the retinal burn diminishes. As the laser exposure level falls below the threshold for retinal burn, the effect is one of bright light exposure producing a dazzle or glare phenomenon. In general the factors of importance in laser-induced trauma of the eye follow those of exposure to any intense light source, including the sun.[98]

The Army memorandum concludes that neither blindness nor permanent disablement on the battlefield are unique to laser weapons. The mere fact that a particular weapon causes one form of disablement rather than another is no justification for concluding that one is legal while the other is not. Further, according to the Army memorandum:

> Proposals to conclude that the use of a laser to intentionally blind would result in unnecessary suffering would lead to a contradiction in the law in that a soldier legally could be blinded ancillary to the lawful use of a laser rangefinder or target acquisition lasers against materiel targets, but could not be attacked individually.[99]

This final argument seems somewhat specious to me. The principle of distinction underlies many of the norms of the humanitarian law of armed

conflict. The most notable, of course, is the prohibition against making direct attacks on civilians and civilian objects while permitting injury or damage to civilian and civilian objects as an inevitable incident of attacks on legitimate military objectives. I see no anomaly in allowing incidental eye damage from use of laser range-finding or target acquisition while prohibiting lasers for the sole purpose of permanently blinding enemy combatants. It may be difficult to police the distinction made, but there is no theoretical basis for not making such a distinction.

The Army JAG memorandum only mentions skin burns in passing, pointing out that, "Incendiary weapons have been in use by most nations throughout the history of war." The memorandum also rightly points out that attempts to enjoin their use against military personnel foundered at the 1978-80 United Nations Conference on Certain Conventional Weapons. In this respect, the Army memorandum is undoubtedly correct, and there is no reason to believe that burns caused by lasers or other directed-energy weapons are any more horrible than burns caused by napalm bombs, flame-throwers or other incendiary weapons.

The *Commander's Handbook* does not specifically address directed energy devices or weapons. It does include a paragraph on incendiary weapons, stating that they are lawful provided they are employed "in a manner that minimizes uncontrolled or indiscriminate effects on the civilian population consistent with mission accomplishment and force security."[100]

Depleted Uranium Ammunition. Depleted uranium is the metal that remains after the fissile, highly radioactive uranium has been removed to make nuclear weapons. Its high atomic weight and its extreme hardness make it the ideal material for a number of commercial applications, such as machine tool boring bars, gyroscope rotors and oil well drill collars as well as counterweights in military and commercial aircraft and keel ballast for high performance sailing yachts. Its great mass also makes it an ideal material for projectiles intended to destroy or disable the target by physical impact. The Navy's Phalanx close-in weapon system, which is designed for last-ditch defense against attacking high speed aircraft or guided missiles, uses a five-barrel Gatling gun firing several thousand 20mm depleted uranium projectiles per minute. The U.S. Air Force also uses a 30mm version as its main anti-tank weapon for its A-10 aircraft.

The question of whether the use of such projectiles breaches any norm of the law of armed conflict depends on whether they are "poisoned weapons," prohibited by article 23 of the Hague (IV) Regulations for land warfare[101] and by the customary law of warfare at sea.[102]

Depleted uranium can hardly be considered as poison, however. The radioactivity it emits is said to be less than one-seventh that of the luminous dial of a wristwatch. An Air Force source states that a man could hold a 30mm

round of depleted uranium ammunition for four and one-half hours per day forever and not exceed the permissible radiation dose. Further, its chemical toxicity is less than lead, which is a commonly used component of ballistic projectiles.

Conclusion

This admittedly selective review of some of the weapons systems brought forth under advancing technology has shown that none of the weapons reviewed can be said to be unlawful *per se*, although, like all other weapons systems, they can be employed in such a way as to make their use unlawful. Furthermore, if current technological trends continue, weapons will become more discriminating, although more highly destructive. The *Commander's Handbook*, although not dealing with each of these systems explicitly, sets forth principles that are adequate to provide guidance to commanders employing such weapons so that they may avoid using them in an unlawful manner. In addition, the legal review processes established by the Secretary of Defense and implemented by each of the Military Departments provide a mechanism for continuing oversight of the development, deployment, and employment of new, technologically advanced systems to ensure that the legal restraints on their development and use are considered by appropriate officials.

Notes

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1. *The Commander's Handbook on the Law of Naval Warfare* (NWP 9) (1987) (hereinafter *The Commander's Handbook* or *Handbook*).

2. *See, e.g.*, Institute of International Law, *The Laws of Land Warfare*, Manual Published by the Institute of International Law (Oxford Manual), September 9, 1880, art. 4, *Annuaire de l'Institut de Droit International*, v. 5, p. 156 (1880), D. Schindler & J. Toman, *The Laws of Armed Conflict: A Collection of Conventions, Resolutions and Other Documents*, 3rd ed. (Dordrecht, Netherlands: Martinus Nijhoff Publishers, 1988), p. 35 (hereinafter Schindler & Toman); Hague Convention (II) with Respect to the Laws and Customs of War on Land, July 29, 1899, Annexed Regulations, art. 22, *United States Statutes at Large*, v. 32, p. 1803 (hereinafter Hague II); Hague Convention (IV) Respecting the Laws and Customs of War on Land, October 18, 1907, Annexed Regulations, art. 22, *United States Statutes at Large*, v. 36, p. 2227 (hereinafter Hague IV); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 35, para. 1, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977)*, v. I, p. 115 (hereinafter Additional Protocol I), Schindler & Toman, pp. 621, 644.

3. Cassese, "Means of Warfare: The Present and the Emerging Law," *Revue Belge de Droit Internationale*, v. 12, p. 143 at p. 144 (1976); International Committee of the Red Cross (Y. Sandoz et al., eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff Publishers, 1987), p. 390 (hereinafter *Commentary*); General Counsel, U.S. Department of Defense Letter of September 22, 1972, excerpts reprinted in *American Journal of International Law*, v. 67, p. 122 (1973) (hereinafter General Counsel, DOD, letter).

4. According to the ICRC's Commentary on Additional Protocol I, "The entire system established in The Hague in 1899 and 1907 and in Geneva from 1864 to 1977 is founded on this rule of customary law." *Commentary, supra* note 3, p. 598 (footnotes omitted). The rule is specifically codified in article 48 of the Additional Protocol as follows:

> In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

See also General Counsel, DOD, letter, *supra* note 3, p. 123; *Commentary, supra* note 3, p. 615.

5. This principle was codified for the first time in Additional Protocol I, *supra* note 2, art. 51, para. 2; *see also* art. 57, para. 1. Although the United States has not become a party to Protocol I and has expressed its intention not to do so, the United States regards many of its provisions as codifications of binding customary law. *See* Remarks of Michael J. Matheson, Deputy Legal Adviser, Department of State, "The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions," *American University Journal of International Law and Policy*, v. 2, no. 2 (Fall 1987), pp. 419-436. Mr. Matheson, in his remarks, indicated that one way the United States may indicate its agreement that a particular provision of Protocol I has attained the status of customary international law is by inclusion of the principle in a military manual. *Id.*, p. 421. It should therefore be noted that the *Handbook* prohibits launching "attacks against the civilian population as such." *Commander's Handbook, supra* note 1, para. 8.1.

In an unclassified memorandum to the Deputy Assistant Secretary of Defense for Negotiations Policy, the United States Joint Chiefs of Staff forwarded a list of the articles of Additional Protocol I that should be "Recognized or Supported as Customary International Law." This list included, *inter alia*, articles 32-34 (basic principles), art. 45 (persons who have taken part in hostilities), art. 51, para. 2, and art. 52, paras. 1 and 2, except for the reference to reprisals, and art. 57, paras. 1, 2 (c), 4, and 5 (civilians). JCS memorandum MJCS-49-86, of March 18, 1986, subj: "1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications" (copy in files of author).

6. This rule of customary law is codified in article 51 para. 4 (c) of Additional Protocol I, *supra* note 2.

7. Although accepted as a principle of customary international law, *see* General Counsel, DOD, letter, *supra* note 3, it is codified in a treaty for the first time as article 51, paragraph 4, of Additional Protocol I, *supra* note 2.

8. This principle is now codified in Additional Protocol I, *supra* note 2, art. 51, para. 5 (b).

9. Hague II, *supra* note 2, art. 23 (e); Hague IV, *supra* note 2, art. 23 (e); Additional Protocol I, *supra* note 2, art. 35, para. 2. Although Hague II and Hague IV apply explicitly only to war on land, the general principles included in those Conventions are generally regarded as a part of the customary law of the sea, and, of course, "to the extent that naval hostilities may involve the use of weapons whose principal employment is in land warfare, it is clear that the rules applicable to land forces are equally applicable to naval forces." Robert W. Tucker, *International Law Studies: The Law of War and Neutrality at Sea* (Washington: U.S. Govt. Print. Off., 1957), p. 50 and note 12.

10. Hague II, *supra* note 2, art. 23 (c); Hague IV, *supra* note 2, art 23 (c); Additional Protocol I, *supra* note 2, art. 41. See also common article 3 of the four 1949 Geneva Conventions, which lays down minimum conditions of humanitarian conduct in cases of armed conflict "not of an international character." The texts of these Conventions are published in numerous publications. For ready reference only the U.S. Treaty Series and Schindler & Toman are listed. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, *United States Treaties and Other International Agreements* (hereinafter cited as *U.S.T.*) v. 6, pp. 3114-3216, T.I.A.S. 3362, Schindler & Toman, *supra* note 2, pp. 373-399 (hereinafter 1949 Geneva Convention I); Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *U.S.T.*, v. 6, pp. 3217-3315, T.I.A.S. 3363, Schindler & Toman, *supra* note 2, pp. 401-422 (hereinafter 1949 Geneva Convention II); Convention (III) Relative to the Treatment of Prisoners of War, *U.S.T.* v. 6, pp. 3316-3515, T.I.A.S. 3364, Schindler & Toman *supra* note 2, pp. 423-493 (hereinafter 1949 Geneva Convention III); Convention (IV) Relative to the Protection of Civilian Persons in Time of War, *U.S.T.*, v. 6, pp. 3516-3695, T.I.A.S. 3365, Schindler & Toman, *supra* note 2, pp. 495-562 (hereinafter 1949 Geneva Convention IV).

11. Hague II, *supra* note 2, art. 23 (b) and (f); Hague IV, *supra* note 2, art. 23 (b) and (f); Additional Protocol I, *supra* note 2, art. 37.

12. This prohibition is found in article 35, para. 3, of Additional Protocol I, *supra* note 2.

13. Remarks of Michael J. Matheson, *supra* note 5, at p. 424. Mr. Matheson stated that the provision "is too broad and ambiguous and is not a part of customary law." *Id.*

14. *Commander's Handbook, supra* note 1, para. 8.1.

15. *Id.*

16. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight. St. Petersburg, December 11, 1868. *American Journal of International Law (Supp.)*, v. 1, pp. 95-96 (1907), Schindler & Toman, *supra* note 2, pp. 101-103.

17. *Id.*

18. *Id.*

19. Declaration (IV, 3) Concerning Expanding Bullets. The Hague, July 29, 1899, James B. Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907*, 3rd ed. (3rd ed., Carnegie Endowment for International Peace, 1918), pp. 227-28 (hereinafter, Scott, *Hague Conventions*), Schindler & Toman, *supra* note 2, pp. 109-10.

20. Declaration (IV, 1) to Prohibit, for the Term of Five Years, the Launching of Projectiles and Explosives from Balloons, and Other New Methods of Similar Nature. The Hague. July 29, 1899. Scott, *Hague Conventions, supra* note 19, pp. 220-23, Schindler & Toman, *supra* note 2, pp. 201-05. A similar Declaration (but with the time limit extended "for a period extending to the close of the Third Peace Conference") was adopted at the 1907 Hague Conference. The latter, Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons, but not the former, was ratified by the United States. *United States Statutes at Large*, v. 36, pp. 2439-43, Schindler & Toman, *supra* note 2, pp. 201-06. All three of the Declarations, like the Conventions themselves, were only binding if *all* parties to the conflict were contracting parties. This constituted a substantial drawback to their effectiveness unless the principles adopted constituted customary international law.

21. Declaration (IV, 2) Concerning Asphyxiating Gases, The Hague, July 29, 1899. Scott, *Hague Conventions, supra* note 19, pp. 225-26, Schindler & Toman, *supra* note 2, pp. 105-07.

22. Convention (IX) Concerning Bombardment by Naval Forces in Time of War. The Hague. October 18, 1907. *United States Statutes at Large*, v. 36, pp. 2351-70, Schindler & Toman, *supra* note 2, pp. 811-17.

23. Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines, The Hague, October 18, 1907. *United States Statutes at Large*, v. 36, pp. 2332-50, Schindler & Toman, *supra* note 2, pp. 803-09.

24. *Id.*, art. 1, pars. 1 and 2.

25. *Id.*, art. 1, para. 3.

26. Cassese, *supra* note 3, at p. 149.

27. Statement of the representative of the United States, Third Subcommission, James B. Scott, ed., *The 1899 Hague Peace Conference, Proceedings of the Hague Peace Conferences, Conference of 1899* (Translation of Official Text) (New Edition) (The Hague: Martinus Nijhoff, 1920), p. 354, quoted by Cassese, *supra* note 3, at p. 149.

28. Outside the field of disarmament, the other attempt at regulation of the means or methods of warfare during this inter-war period was directed to air warfare. The Hague Rules of Air Warfare, drafted by a Commission of Jurists in 1922-23 did not attempt to prohibit or restrict specific weapons but rather confined themselves to reiteration of the general principles reflected in other instruments or in customary international law. The only reference to specific weapons is in article 18, which provides that, "The use of tracer, incendiary or explosive projectiles by or against aircraft is *not* prohibited." (Emphasis added.) It adds that this provision "applies equally to states which are parties to the Declaration of St. Petersburg, 1868, and to those which are not." Presumably this would free a state to use explosive projectiles of less than 400 grams in its combat aircraft attacking human targets on the ground, a retrogression from the humanitarian rule of the St. Petersburg Declaration.

The Hague Rules of Air Warfare were never incorporated into a legally binding international instrument but are regarded "as an authoritative attempt to clarify and formulate rules of law governing the use of aircraft in war." Schindler & Toman, *supra* note 2, at p. 207, quoting L. Oppenheim, H. Lauterpacht, ed., *International Law: A Treatise*, 7th ed. (London: Longmans. Green & Co., 1952), p. 519. The Hague Rules may be found in a number of sources, including *American Journal of International Law (Supp.)*, v. 17, pp. 245-260 (1923), and Schindler & Toman, *supra* note 2, at pp. 207-17.

29. Geneva, June 17, 1925, *U.S.T.*, v. 26, pp. 571-82, T.I.A.S. 8061, Schindler & Toman, *supra* note 2, pp. 115-27.

30. *See* list of parties in U.S. Dept. of State Publication 9433, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 1989*, p. 311-12 (U.S. Govt. Print. Off., Washington, 1989) (hereinafter *Treaties in Force*).

31. *See* Schindler & Toman, *supra* note 2, pp. 121-27 for a tabulation of reservations by states.

32. *See U.S.T.*, v. 26, p. 571, T.I.A.S. 8061.

33. *The Commander's Handbook, supra* note 1, para. 10.3.1.

34. *See* Jon L. Jacobson, "The Law of Submarine Warfare Today," *supra* Chapter VIII herein.

35. April 10, 1972, *U.S.T.*, v. 26, pp. 583-665, Schindler & Toman, *supra* note 2, pp. 137-157.

36. *Id.*, art. I.

37. *Id.*, art. III.

38. *See* Schindler & Toman, *supra* note 2, p. 137.

39. *See Treaties in Force, supra* note 30, pp. 284-85.

40. Statement of Michael J. Matheson, Assistant Legal Adviser for Political-Military Affairs, U.S. Department of State, April 27, 1978, in a panel, "Should Weapons of Dubious Legality Be Developed," *Proceedings of the 72d Annual Meeting of the American Society of International Law*, p. 26 at p. 28 (1978).

41. Additional Protocol I, *supra* note 2, art. 36.

42. Resolution 22 (IV), Follow-up Regarding Prohibition or Restriction of Use of Certain Conventional Weapons, annexed to the Final Act of the Conference, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974-1977), v. 1, pp. 51-52; Schindler & Toman, *supra* note 2, p. 605 at pp. 729-30.

43. *See* Commentary, *supra* note 3, at p. 424. quoting the Report of Committee III on this article. *See also* M. Bothe et al., *New Rules for Victims of Armed Conflicts* (The Hague: Martinus Nijhoff Publishers, 1982), p. 200 (hereinafter Bothe et al.).

44. *Commentary, supra* note 3, p. 424.

45. *Id.*, p. 422; Bothe et al., *supra* note 43 at p. 200.

46. *Id.*

47. U.S. Department of Defense Instruction 5500.15, Oct. 16, 1974, *Review of Legality of Weapons Under International Law*, p. 1.

48. *Id.*, p. 2.

49. *Id.*

50. Army: Army Regulation 27-53, Jan. 1, 1979; Navy: Secretary of the Navy Instruction 5711.8A, Jan. 29, 1988 (superseding previous Instruction 5711.8); Air Force: AF Regulation 110-29, Sep. 10, 1981.

51. Geneva, Oct. 10, 1980. Final Report of the Conference to the General Assembly, A/CONF.95/15, October 27, 1980, Annex I, Final Act of the Conference (hereinafter Final Report); reprinted in American Society of International Law, *International Legal Materials*, v. 19, pp. 1524-35 (1980) (hereinafter ILM), and Schindler & Toman, *supra* note 2, pp. 177-96.

52. Protocol on Non-Detectable Fragments (Protocol I), Final Report, *supra* note 51, Annex I, Appendix B, p. 9, ILM *supra* note 51, at p. 1529, Schindler & Toman, *supra* note 2, at p. 185.

53. Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (Protocol II), Final Report, *supra* note 51, Annex I, Appendix C, pp. 10-15, ILM, *supra* note 51, at pp. 1529-34, Schindler & Toman, *supra* note 2, at p. 185-89.

54. Protocol on Prohibitions or Restriction on the Use of Incendiary Weapons (Protocol III). Final Report, *supra* note 51, Annex I, Appendix D, pp. 16-17, ILM, *supra* note 51, at pp. 1534-35, Schindler & Toman supra note 2, at pp. 190-192.

55. The Protocol defines "military objective, . . . so far as objects are concerned" as "any object which by its nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage." Protocol III, art. 1, para. 3. Final Report, *supra* note 51, Annex I, Appendix D, p. 16 ILM, *supra* note 51, p. 1534, Schindler & Toman, *supra* note 2, p. 190.

56. Protocol III, article 2. The prohibition against using air-delivered weapons against military targets in concentrations of civilians is based on the assumption that such weapons are less accurate than weapons delivered by other systems. One wonders, however, whether this assumption holds true in all cases with the development of so-called "smart bombs," which can be guided with great precision to their targets.

57. Final Act of the United Nations Conference on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed To Be Excessively Injurious or To Have Indiscriminate Effects, Appendix E, Resolution on Small-Calibre Weapon Systems, Geneva, October 10, 1980. Final Report, *supra* note 51, at p. 18, ILM, *supra* note 51, at p. 1536, Schindler & Toman, *supra* note 2, at pp. 197-98.

58. Schindler & Toman, *supra* note 2, p. 196.

59. *Commander's Handbook, supra* note 1, para. 9.1.1.

60. U.S. Department of the Navy, Office of the Judge Advocate General, *Annotated Supplement to The Commander's Handbook on the Law of Naval Operations* (Washington: 1989) (hereinafter *Annotated Supplement*). para. 9.1.1. This *Annotated Supplement* has been drafted for the guidance of Judge Advocates and others who might be required to provide detailed guidance on the interpretation and application of the rules set forth in the Handbook.

61. Cassese, *supra* note 3, at p. 147.

62. *Id.* One may wonder what action might be possible in any event.

63. *Id.*

64. *Id.*, p. 152. A good example of this is the Hague (VIII) restriction on "contact" mines. Technology has made the contact mine obsolete. Most modern mines are detonated by magnetic influence or other forms of non-contact influence. *See* discussion of "Captor" *infra*.

65. *Id.*

66. *See* Sally V. Mallison & W. Thomas Mallison, "Naval Targeting: Lawful Objects of Attack," *infra* chapter IX.

67. *See supra* note 6 and accompanying text.

68. *See supra* note 9 and accompanying text.

69. *See supra* note 11 and accompanying text.

70. *See supra* notes 23-25 and accompanying text.

71. *Id.*

72. *See supra* note 25 and accompanying text.

73. *See supra* notes 28-33 and accompanying text.

74. *See supra* notes 36-37 and accompanying text.

75. *See supra* note 52 and accompanying text.

76. Preface, *supra* p. viii.

77. "Preface," *Commander's Handbook, supra* note 1, p. 27.

78. *See Annotated Supplement, supra* note 60.

79. The descriptions of weapons and weapons systems found in the following sections have been taken from several unclassified sources, including Norman Polmar, The Ships and Aircraft of the U.S. Navy, 14th ed. (Annapolis, Md.: Naval Institute Press, 1987), Jane's Weapon Systems 1988-89 (Coulsdon, Surrey, U.K.: Jane's Information Group, 1988) and Office of Information, U.S. Navy, Navy Fact File, 8th ed. (NAVSO P-3002), an official publication of the U.S. Department of the Navy. No attempt will be made to identify the specific source of each description.

80. D. P. O'Connell, "The Legality of Cruise Missiles," *American Journal of International Law*, v. 66, pp. 785-794 (1972).

81. *Id.*, at p. 785.

82. The Iraqi Government has accepted responsibility for its attack on USS STARK (FFG-31) on May 17, 1987, by two Exocet missiles fired by a Mirage F-1 aircraft. It has agreed to pay compensation to the United States for the damage to the ship and deaths and injuries to its crew. *See* U.S. Department of State statement of March 28, 1989, Department of State Bulletin, May 1989, v. 89, no. 2146, p. 67. The case was apparently not one of the missile being unable to discriminate between targets; rather it appears to have been a targeting error, perhaps caused by a navigation error by the pilot causing him to believe that STARK was within the declared Iranian war zone. *See* Staff of House of Representatives Committee on Armed Services, 100th Cong., 1st sess., Report on the Staff Investigation into the Iraqi Attack on the USS STARK, p. 10 (Comm. Print 1987). In the tanker war in the Persian-Arabian Gulf, it is generally conceded that the attacking units usually hit the targets at which they were aiming. The relevant question in that circumstance was generally, therefore, not whether the weapon could not discriminate, but rather whether the targets (tankers) were legitimate targets.

83. *The Commander's Handbook, supra* note 1, para. 9.7. Indiscriminate effect is defined in paragraph 9.1.2. of the *Handbook*.

84. *See supra* chapter 12.

85. Hague VIII, *supra* note 23.

86. *Id.*, art. 1 (3).

87. *The Commander's Handbook, supra* note 1, para. 9.3.

88. *Commander's Handbook, supra* note 1, para. 9.2.

89. *Id.*, para. 9.3.

90. *Id.*, para. 9.2.

91. *Id.*

92. U.S. Department of Defense, Soviet Military Power: An Assessment of the Threat 1988, p. 59.

93. Judge Advocate General of the U.S. Army, Memorandum of Law, "Use of Lasers as Antipersonnel Weapons," September 29, 1988, reprinted in *The Army Lawyer*, November 1988 (DA PAM 27-50-191), p. 3.

94. *Supra* note 47.

95. Army JAG memorandum, *supra* note 93. The Army JAG's memorandum also refers to previous opinions of the Judge Advocates General of the Navy and Army concluding that "injury to combatants secondary or ancillary to the use of a laser for rangefinding, target acquisition, or other antimateriel purposes is lawful, and the blindness *per se* could not be a basis for concluding that a laser violates the law of war prohibition against weapons that may cause unnecessary suffering" (citing Navy JAG 5710 Ser. 103/572, dated September 4, 1984 (Confidential) and Army JAG DAJA-IA 1984/0116, dated December 24, 1984 (Secret)). The memorandum also refers to opinions by the Navy and Air Force JAGs that "the use of lasers to produce flash effects (the temporary induction of a visual impairment) to combatants would not violate the law of war obligations of the United States" (citing Air Force JAG JACI, dated November 21, 1985 (Secret) and Navy JAG 5800 Ser 103/5356, dated February 19, 1986 (Secret)). It has been reported

that the Navy used lasers to produce flash effects to warn away approaching surface and aircraft in the Persian Gulf during the Iran-Iraq war.

96. *Id.*, p. 4.

97. *See supra* notes 65-73 and accompanying text.

98. Army JAG memorandum, *supra* note 93.

99. *Id.*

100. *Commander's Handbook, supra* note 1, para. 9.6.

101. Regulations Respecting the Laws and Customs of War on Land, annexed to Convention (IV) Respecting the Laws and Customs of War on Land, October 18, 1907, *United States Statutes at Large*, v. 36, pp. 2227-2309, reprinted in Schindler & Toman, *supra* note 2, pp. 63-98 at 82.

102. *See* Robert W. Tucker, *International Law Studies: The Law of War and Neutrality at Sea* (Washington: U.S. Govt. Print. Off., 1957), p. 50, no. 12. The *Commander's Handbook* states in paragraph 9.1.1., under the heading, "Unnecessary Suffering," that, "Poisoned projectiles . . . fall into this category [*i.e.*, causing unnecessary suffering], because there is little military advantage to be gained by ensuring the death of wounded personnel through poisoning. . . ."

APPENDIX

The Commander's Handbook on the Law of Naval Operations

NWP 9 (Rev. A)
FMFM 1-10

PREFACE

SCOPE

This publication sets out those fundamental principles of international and domestic law that govern U.S. naval operations at sea. Part I, Law of Peacetime Naval Operations, provides an overview and general discussion of the law of the sea, including definitions and descriptions of the jurisdiction and sovereignty exercised by nations over various parts of the world's oceans; the international legal status and navigational rights of warships and military aircraft; protection of persons and property at sea; and the safeguarding of national interests in the maritime environment. Part II, Law of Naval Warfare, sets out those principles of law of special concern to the naval commander during any period in which U.S. naval forces are engaged in armed conflict. Although the primary emphasis of Part II is upon the rules of international law concerned with the conduct of naval warfare, attention is also directed to relevant principles and concepts common to the whole of the law of armed conflict.

PURPOSE

This publication is intended for the use of operational commanders and supporting staff elements at all levels of command. It is designed to provide officers in command and their staffs with an overview of the rules of law governing naval operations in peacetime and during armed conflict. The explanations and descriptions in this publication are intended to enable the naval commander and his staff to comprehend more fully the legal foundations upon which the orders issued to them by higher authority are premised and to understand better the commander's responsibilities under international and domestic law to execute his mission within that law. This publication sets forth general guidance. It is not a comprehensive treatment of the law nor is it a substitute for the definitive legal guidance provided by judge advocates and others responsible for advising commanders on the law.

Officers in command of operational units are encouraged to utilize this publication as a training aid for assigned personnel.

APPLICABILITY

Part I of this publication is applicable to U.S. naval operations during time of peace. Part II applies to the conduct of U.S. naval forces during armed

conflict. It is the policy of the United States to apply the law of armed conflict to all circumstances in which the armed forces of the United States are engaged in combat operations, regardless of whether such hostilities are declared or otherwise designated as "war." Relevant portions of Part II are, therefore, applicable to all hostilities involving U.S. naval forces irrespective of the character, intensity, or duration of the conflict. Part II may also be used for information and guidance in situations in which the U.S. is a nonparticipant in hostilities involving other nations.

RULES OF ENGAGEMENT (ROE)

The Joint Chiefs of Staff and the commanders of the unified and specified commands have the authority to exercise the right of national self-defense and declare forces hostile. Incident to this authority, the commanders of the unified and specified commands may issue directives, e.g., rules of engagement, that delineate the circumstances and limitations under which the forces under their command will initiate and/or continue engagement with other forces encountered. These directives are definitive within the commander's area of responsibility. *This publication provides general information, is not directive, and does not supersede guidance issued by such commanders or higher authority.*

INTERNATIONAL LAW

For purposes of this publication, international law is defined as that body of rules that nations consider binding in their relations with one another. International law derives from the practice of nations in the international arena and from international agreements. International law provides stability in international relations and an expectation that certain acts or omissions will effect predictable consequences. If one nation violates the law, it may expect that others will reciprocate. Consequently, failure to comply with international law ordinarily involves greater political and economic costs than does observance. In short, nations comply with international law because it is in their interest to do so. Like most rules of conduct, international law is in a continual state of development and change.

Practice of Nations. The general and consistent practice among nations with respect to a particular subject, which over time is accepted by them generally as a legal obligation, is known as customary international law. Customary international law is the principal source of international law and is binding upon all nations.

International Agreements. An international agreement is a commitment entered into by two or more nations which reflects their intention to be bound by its terms in their relations with one another. International agreements, whether bilateral treaties, executive agreements, or multilateral conventions, bind only those nations that are a party to them or that may otherwise consent to be bound by them. To the extent that multilateral conventions of broad application codify existing rules of customary law, they may be regarded as evidence of international law binding upon parties and nonparties alike.

U.S. Navy Regulations. U.S. Navy Regulations, 1973, require U.S. naval commanders to observe international law. Article 0605, Observance of International Law, states:

> *At all times, a commander shall observe and require his command to observe the prinicples of international law. Where necessary to fulfillment of this responsibility, a departure from other provisions of Navy Regulations is authorized.*

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Revised text is indicated by a black vertical line in either margin of the page, like the one printed next to this paragraph. The change symbol shows where there has been a change. The change might be material added or information restated. A change symbol in the margin by the chapter number and title indicates a new or completely revised chapter.

[Editor's note: We have omitted change symbols in this appendix. Instead, as noted in the Preface to this volume, we have underlined the changes. In many cases, the only changes which occurred betweeen the original NWP 9 and this revised edition have been the italicization of certain words for emphasis. In such cases we have underlined the italicized words.]

USE OF ITALICS

Italics are used for emphasis within the text.

Part I
Law of Peacetime Naval Operations

Chapter 1—Legal Divisions of the Oceans and Airspace

Chapter 2—International Status and Navigation of Warships and Military Aircraft

Chapter 3—Protection of Persons and Property at Sea

Chapter 4—Safeguarding of U.S. National Interests in the Maritime Environment

Chapter 1
Legal Divisions of the Oceans and Airspace

1.1 INTRODUCTION

The oceans of the world traditionally have been classified under the broad headings of internal waters, territorial seas, and high seas. Airspace has been divided into national and international airspace. In recent years, new concepts have evolved, such as the exclusive economic zone and archipelagic waters, which have dramatically expanded the jurisdictional claims of coastal and island nations over wide expanses of the oceans previously regarded as high seas. The phenomenon of expanding maritime jurisdiction and the rush to extend the territorial sea to 12 nautical miles and beyond were the subject of international negotiation from 1973 through 1982 in the course of the Third United Nations Conference on the Law of the Sea. That Conference produced the 1982 United Nations Convention on the Law of the Sea (1982 LOS Convention). Although not signed by the United States and not yet in formal effect, the provisions of the 1982 LOS Convention relating to navigation and overflight codified existing law and practice and are considered by the United States to reflect customary international law.

1.2 RECOGNITION OF COASTAL NATION CLAIMS

In a statement on U.S. oceans policy issued 10 March 1983, the President stated:

> "First, the United States is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans — such as navigation and overflight. In this respect, the United States will recognize the rights of other States in the waters off their coasts, as reflected in the [1982 LOS] Convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal States.
>
> "Second, the United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the Convention. The United States will not, however, acquiesce in unilateral acts of other States designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses."

The legal classifications ("regimes") of ocean and airspace areas directly affect naval operations by determining the degree of control that a coastal or island nation may exercise over the conduct of foreign merchant ships, warships, and aircraft operating within these areas. The methods for measuring maritime jurisdictional claims, and the extent of coastal or island nation control exercised in those areas, are set forth in the succeeding paragraphs of this chapter. The DOD Maritime Claims Reference Manual (DoD 2005.1-M) contains a listing of the ocean claims of coastal and island nations.

1.3 MARITIME BASELINES

The territorial sea and all other maritime zones are measured from baselines. In order to calculate the seaward reach of claimed maritime zones, it is first necessary to comprehend how baselines are drawn.

1.3.1 Low-Water Line

Unless other special rules apply, the baseline from which maritime claims of a nation are measured is the low-water line along the coast as marked on that nation's official large-scale charts.

1.3.2 Straight Baselines. Where it would be impracticable to use the low-water line, as where the coastline is deeply indented or where there is a fringe of islands along the coast in its immediate vicinity, the coastal or island nation may instead employ straight baselines. The general rule is that straight baselines must not depart from the general direction of the coast, and the sea areas they enclose must be closely linked to the land domain. A coastal or island nation which uses straight baselines must either clearly indicate them on its charts or publish a list of geographical coordinates of the points joining them together. See Figure 1-1. The United States, with few exceptions, does not employ this practice and interprets restrictively its use by others.

1.3.2.1 Unstable Coastlines. Where the coastline is highly unstable due to natural conditions, e.g., deltas, straight baselines may be established connecting appropriate points on the low-water line. These straight baselines remain effective, despite subsequent regression or accretion of the coastline, until changed by the coastal or island nation.

1.3.2.2 Low-Tide Elevations. A low-tide elevation is a naturally formed land area surrounded by water that remains above water at low tide but is submerged at high tide. Straight baselines may generally not be drawn to

or from a low-tide elevation unless a lighthouse or similar installation, which is permanently above sea level, has been erected thereon.

1.3.3 Bays and Gulfs. There is a complex formula for determining the baseline closing the mouth of a legal bay or gulf. For baseline purposes, a "bay" is a well-marked indentation in the coastline of such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. The water area of a "bay" must be greater than that of a semicircle whose diameter is the length of the line drawn across the mouth. See Figure 1-2. Where the indentation has more than one mouth due to the presence of islands, the diameter of the test semicircle is the sum of the lines across the various mouths. See Figure 1-3.

The baseline across the mouth of a bay may not exceed 24 nautical miles in length. Where the mouth is wider than 24 nautical miles, a baseline of 24 nautical miles may be drawn within the bay so as to enclose the maximum water area. See Figure 1-4. Where the semicircle test has been met, and a closure line of 24 nautical miles or less may be drawn, the body of water is a "bay" in the legal sense.

1.3.3.1 Historic Bays. So-called historic bays are not determined by the semicircle and 24-nautical mile closure line rules described above. To meet the international standard for establishing a claim to a historic bay, a nation must demonstrate its open, effective, long term, and continuous exercise of authority over the bay, coupled with acquiescence by foreign nations in the exercise of that authority. The United States has taken the position that an actual showing of acquiescence by foreign nations in such a claim is required, as opposed to a mere absence of opposition.

1.3.4 River Mouths. If a river flows directly into the sea, the baseline is a straight line across the mouth of the river between points on the low-water line of its banks.

1.3.5 Reefs. The low-water line of a reef may be used as the baseline for islands situated on atolls or having fringing reefs.

1.3.6 Harbor Works. The outermost permanent harbor works which form an integral part of the harbor system are regarded as forming part of the coast for baseline purposes. Harbor works are structures, such as jetties, breakwaters and groins, erected along the coast at inlets or rivers for protective purposes or for enclosing sea areas directly adjacent to the coast to provide anchorage and shelter.

1.4 NATIONAL WATERS

For operational purposes, the world's oceans are divided into two parts. The first includes internal waters, territorial seas, and archipelagic waters. These "national waters" are subject to the territorial sovereignty of coastal and island nations, with certain navigational rights reserved to the international community. The second part includes contiguous zones, waters of the exclusive economic zone, and the high seas. These are "international waters" in which all nations enjoy the high seas freedoms of navigation and overflight. International waters are discussed further in paragraph 1.5.

1.4.1 Internal Waters. Internal waters are *landward* of the baseline from which the territorial sea is measured. Lakes, rivers, some bays, harbors, some canals, and lagoons are examples of internal waters. From the standpoint of international law, internal waters have the same legal character as the land itself. There is no right of innocent passage in internal waters, and, unless in distress, ships and aircraft may not enter or overfly internal waters without the permission of the coastal or island nation.

1.4.2 Territorial Seas. The territorial sea is a belt of ocean which is measured seaward from the baseline of the coastal or island nation and subject to its sovereignty. The U.S. claims a 12-nautical mile territorial sea and recognizes territorial sea claims of other nations up to a maximum breadth of 12 nautical miles.

1.4.2.1 Islands, Rocks, and Low-Tide Elevations. Each island has its own territorial sea and, like the mainland, has a baseline from which it is calculated. An island is defined as a naturally formed area of land, surrounded by water, which is above water at high tide. Rocks are islands which cannot sustain human habitation or economic life of their own. Provided they remain above water at high tide, they too possess a territorial sea determined in accordance with the principles discussed in the paragraphs on baselines. A low-tide elevation (above water at low tide but submerged at high tide) situated wholly or partly *within* the territorial sea may be used for territorial sea purposes as though it were an island. Where a low-tide elevation is located entirely *beyond* the territorial sea, it has no territorial sea of its own. See Figure 1-5.

1.4.2.2 Artificial Islands and Off-Shore Installations. Artificial islands and off-shore installations have no territorial sea of their own.

1.4.2.3 Roadsteads. Roadsteads normally used for the loading, unloading, and anchoring of ships, and which would otherwise be situated wholly or

partly beyond the limits of the territorial sea, are included within the territorial sea. Roadsteads included within the territorial sea must be clearly marked on charts by the coastal or island nation.

1.4.3 Archipelagic Waters. An archipelagic nation is a nation that is constituted wholly of one or more groups of islands. Such nations may draw straight archipelagic baselines joining the outermost points of their outermost islands, provided that the ratio of water to land within the baselines is between 1 to 1 and 9 to 1. The waters enclosed within the archipelagic baselines are called *archipelagic waters*. (The archipelagic baselines are also the baselines from which the archipelagic nation measures seaward its territorial sea, contiguous zone, and exclusive economic zone.) The U.S. recognizes the right of an archipelagic nation to establish archipelagic baselines enclosing archipelagic waters provided the baselines are drawn in conformity with the 1982 LOS Convention and that the U.S. is accorded navigation and overflight rights and freedoms under international law in the enclosed archipelagic and adjacent waters.

1.4.3.1 Archipelagic Sea Lanes. Archipelagic nations may designate archipelagic sea lanes through their archipelagic waters suitable for continuous and expeditious passage of ships and aircraft. All normal routes used for international navigation and overflight are to be included. If the archipelagic nation does not designate such sea lanes, the right of archipelagic sea lanes passage may nonetheless be exercised by all nations through routes normally used for international navigation and overflight.

1.5 INTERNATIONAL WATERS

International waters include all ocean areas not subject to the territorial sovereignty of any nation. All waters seaward of the territorial sea are international waters in which the high seas freedoms of navigation and overflight are preserved to the international community. International waters include contiguous zones, exclusive economic zones, and high seas.

1.5.1 Contiguous Zones. A contiguous zone is an area extending seaward from the territorial sea in which the coastal or island nation may exercise the control necessary to prevent or punish infringement of its customs, fiscal, immigration, and sanitary laws and regulations that occur within its territory or territorial sea (but not for so-called security purposes - see 1.5.4). The U.S. claims a contiguous zone extending 12 nautical miles from the baselines used to measure the territorial sea. The U.S. will respect, however, contiguous zones extending up to 24 nautical miles in breadth provided the coastal or

island nation recognizes U.S. rights in the zone consistent with the provisions of the 1982 LOS Convention.

1.5.2 Exclusive Economic Zones. Exclusive economic zones (EEZs) are resource-related zones adjacent to the coast and extending beyond the territorial sea. As the name suggests, its central purpose is economic. The U.S. recognizes the sovereign rights of a coastal or island nation to prescribe and enforce its laws in the exclusive economic zone, extending up to 200 nautical miles from the baselines used to measure the territorial sea, for the purposes of exploration, exploitation, management, and conservation of the natural resources of the waters, seabed, and subsoil of the zone, as well as for the production of energy from the water, currents, and winds. The coastal or island nation may exercise jurisdiction in the zone over the establishment and use of artificial islands, installations, and structures having economic purposes; over marine scientific research (with reasonable limitations); and over some aspects of marine environmental protection (primarily implementation of international vessel-source pollution control standards). However, in the EEZ all nations enjoy the right to exercise the traditional high seas freedoms of navigation and overflight, of the laying of submarine cables and pipelines, and of all other traditional high seas uses by ships and aircraft which are not resource related. The United States established a 200-nautical mile exclusive economic zone by Presidential Proclamation on 10 March 1983.

1.5.3 High Seas. The high seas include all parts of the ocean seaward of the exclusive economic zone. When a coastal or island nation has not proclaimed an exclusive economic zone, the high seas begin at the seaward edge of the territorial sea.

1.5.4 Security Zones. Some coastal nations have claimed the right to establish military security zones, beyond the territorial sea, of varying breadth in which they purport to regulate the activities of warships and military aircraft of other nations by such restrictions as prior notification or authorization for entry, limits on the number of foreign ships or aircraft present at any given time, prohibitions on various operational activities, or complete exclusion. International law does not recognize the right of coastal nations to establish zones in peacetime that would restrict the exercise of non-resource-related high seas freedoms beyond the territorial sea. Accordingly, the U.S. does not recognize the peacetime validity of any claimed security or military zone seaward of the territorial sea which purports to restrict or regulate the high seas freedoms of navigation and overflight. (See paragraph 2.3.2.3 for a discussion of temporary suspension of innocent passage in territorial seas.)

1.6 CONTINENTAL SHELVES

The juridical continental shelf of a coastal or island nation consists of the seabed and subsoil of the submarine areas that extend beyond its territorial sea to the outer edge of the continental margin, *or* to a distance of 200 nautical miles from the baseline used to measure the territorial sea where the continental margin does not extend to that distance. The continental shelf may not extend beyond 350 nautical miles from the baseline of the territorial sea *or* 100 nautical miles from the 2,500 meter isobath, whichever is greater. Although the coastal or island nation exercises sovereign rights over the continental shelf for purposes of exploring and exploiting its natural resources, the legal status of the superjacent water is not affected. Moreover, all nations have the right to lay submarine cables and pipelines on the continental shelf.

1.7 SAFETY ZONES

Coastal and island nations may establish safety zones to protect artificial islands, installations, and structures located in their internal waters, archipelagic waters, territorial seas and exclusive economic zones, and on their continental shelves. In the case of artificial islands, installations, and structures located in the exclusive economic zones or on the continental shelf beyond the territorial sea, safety zones may not extend beyond 500 meters from the outer edges of the facility in question, except as authorized by generally accepted international standards.

1.8 AIRSPACE

Under international law, airspace is classified as either *national* airspace (that over the land, internal waters, archipelagic waters, and territorial seas of a nation) or *international* airspace (that over contiguous zones, exclusive economic zones, the high seas, and territory not subject to the sovereignty of any nation). Subject to a right of overflight of international straits (see paragraph 2.5.1.1) and archipelagic sea lanes (see paragraph 2.5.1.2), each nation has complete and exclusive sovereignty over its national airspace. Except as they may have otherwise consented through treaties or other international agreements, the aircraft of all nations are free to operate in international airspace without interference by other nations.

1.9 OUTER SPACE

The upper limit of airspace subject to national jurisdiction has not been authoritatively defined by international law. International practice has

established that airspace terminates at some point below the point at which artificial satellites can be placed in orbit without free-falling to earth. Outer space begins at that undefined point. All nations enjoy a freedom of equal access to outer space and none may appropriate it to its national airspace or exclusive use.

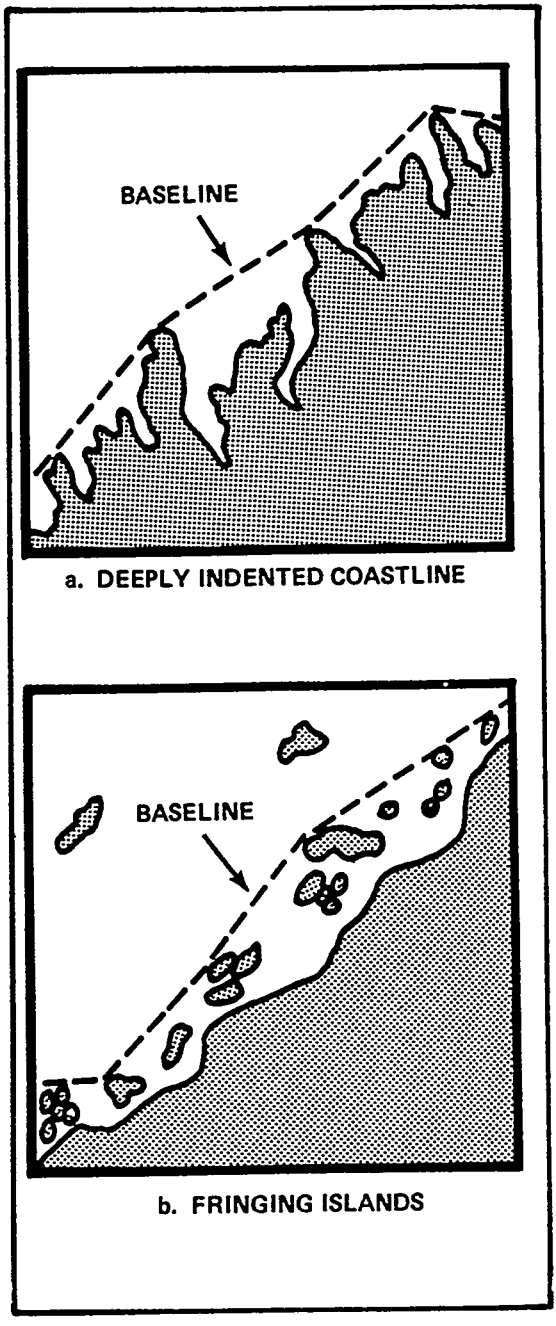


Figure 1-1. Straight Baselines

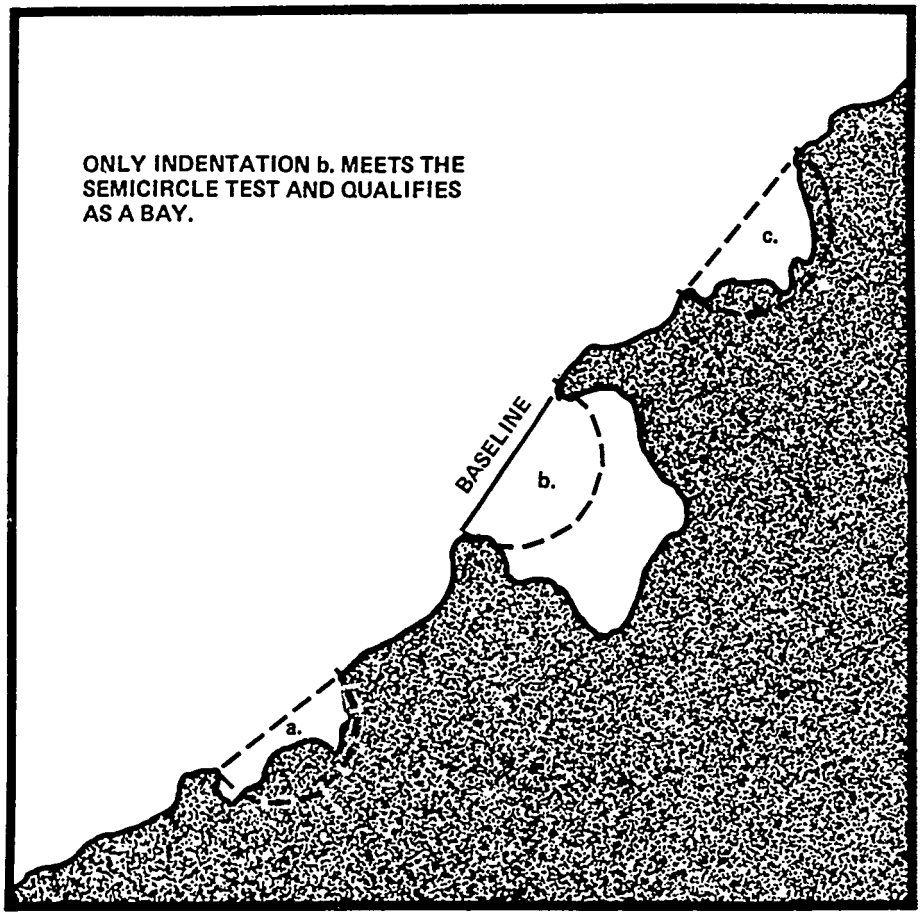


Figure I-2. The Semicircle Test

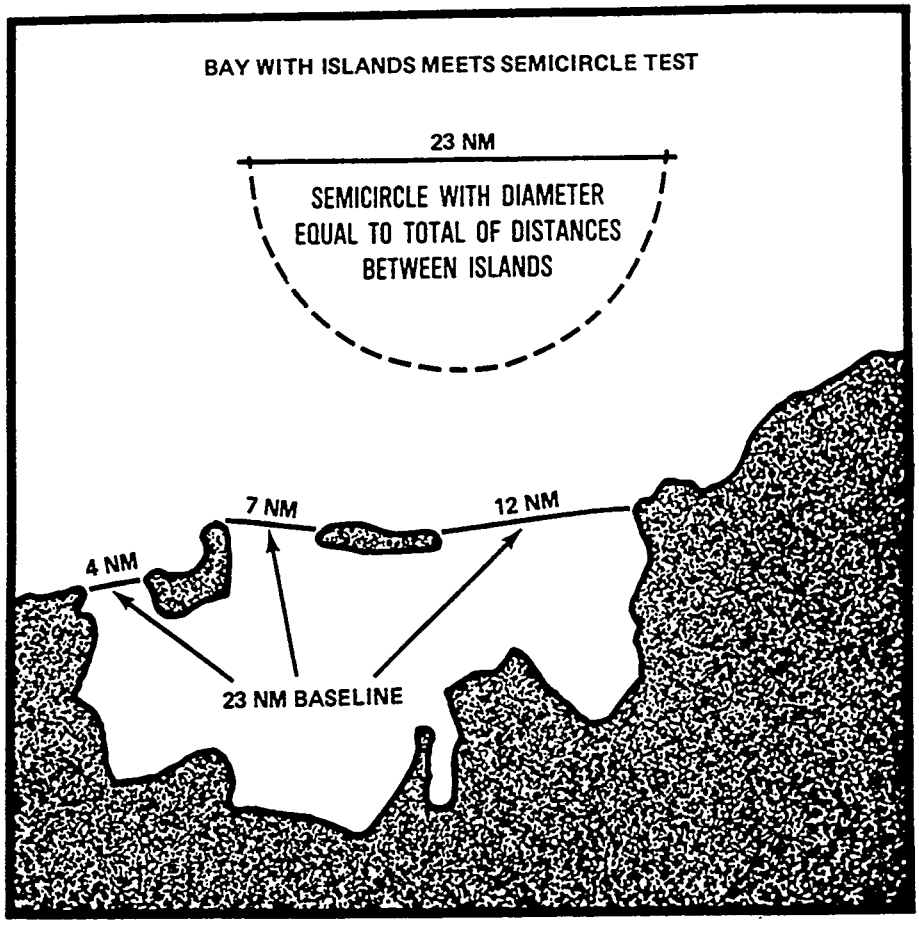


Figure 1-3. Bay With Islands

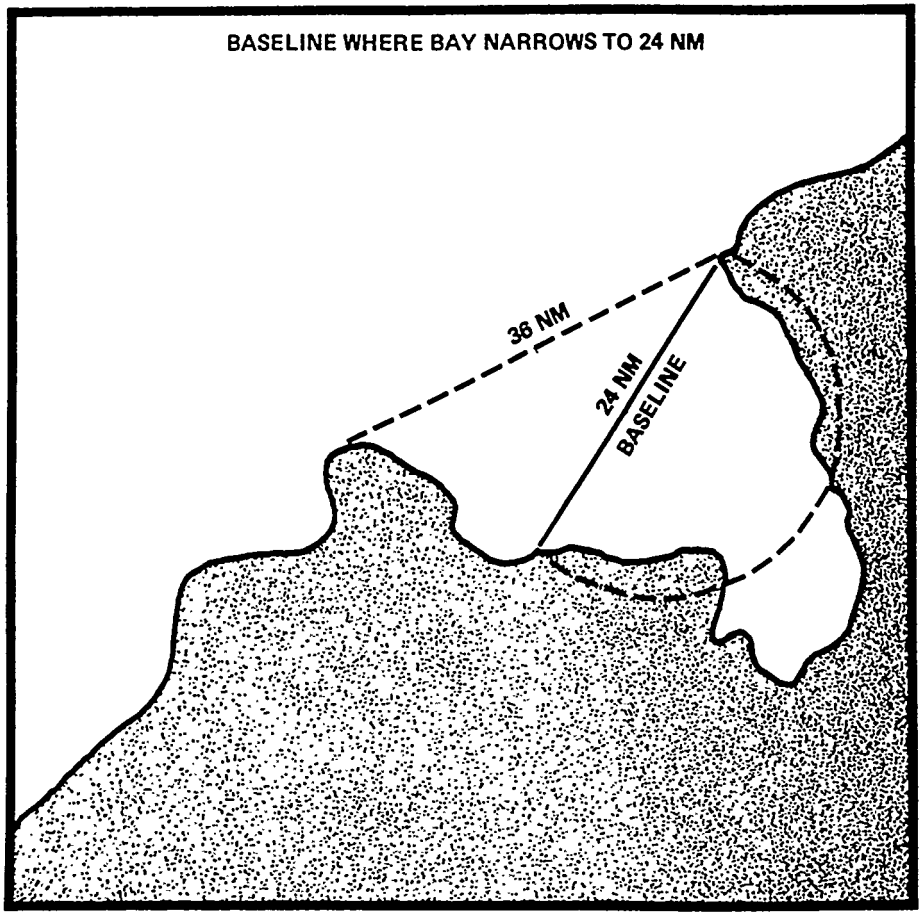


Figure 1-4. Bay With Mouth Exceeding 24 Nautical Miles

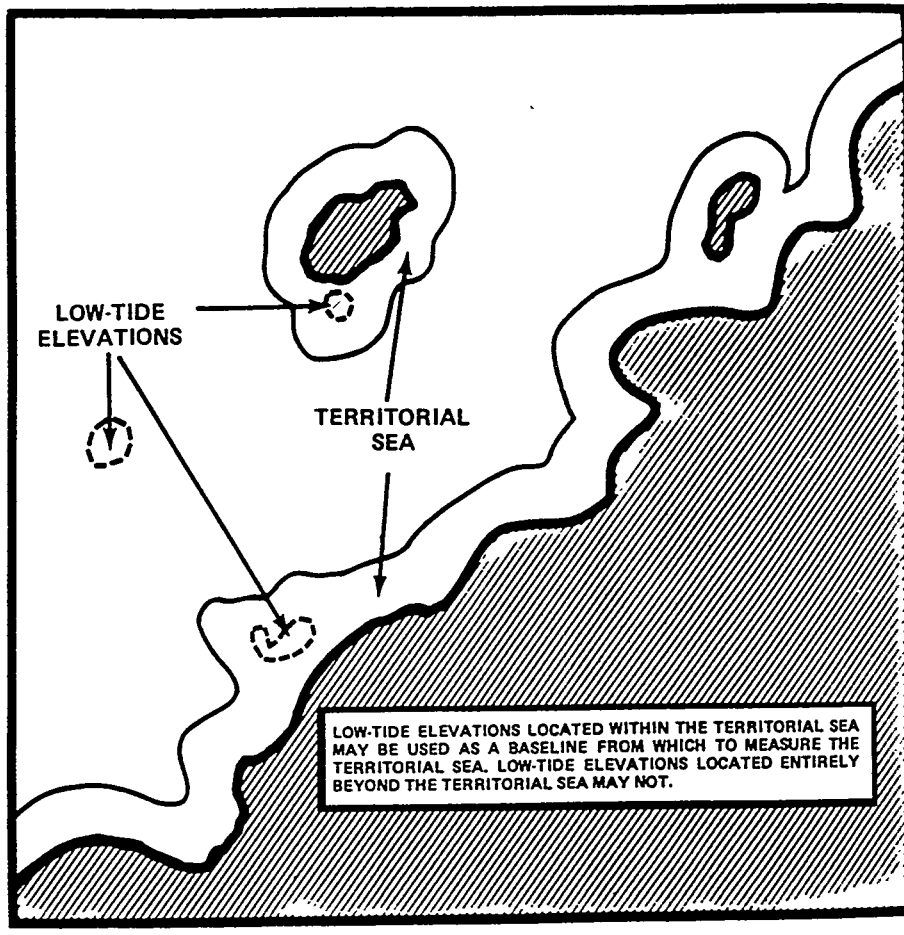


Figure 1-5. Territorial Sea of Islands and Low-Tide Elevations

Chapter 2
International Status and Navigation of Warships and Military Aircraft

2.1 STATUS OF WARSHIPS

2.1.1 Warship Defined. International law defines a warship as a ship belonging to the armed forces of a nation bearing the external markings distinguishing the character and nationality of such ships, under the command of an officer duly commissioned by the government of that nation and whose name appears in the appropriate service list of officers, and manned by a crew which is under regular armed forces discipline. In the U.S. Navy, those ships designated "USS" are "warships" as defined by international law. U.S. Coast Guard vessels designated "USCGC" are also "warships" under international law.

2.1.2 International Status. A warship enjoys sovereign immunity from interference by the authorities of nations other than the flag nation. Police and port authorities may board a warship only with the permission of the commanding officer. A warship cannot be required to consent to an onboard search or inspection, nor may it be required to fly the flag of the host nation. Although warships are required to comply with coastal nation traffic control, sewage, health, and quarantine restrictions instituted in conformance with the 1982 LOS Convention, a failure of compliance is subject only to diplomatic complaint or to coastal nation orders to leave its territorial waters immediately. Moreover, warships are immune from arrest and search, whether in national or international waters, are exempt from foreign taxes and regulation, and exercise exclusive control over all passengers and crew with regard to acts performed aboard.

2.1.2.1 Nuclear Powered Warships. Nuclear powered warships and conventionally powered warships enjoy identical international legal status.

2.1.2.2 Sunken Warships and Military Aircraft. Sunken warships and military aircraft remain the property of the flag nation until title is formally relinquished or abandoned, whether the cause of the sinking was through

accident or enemy action (unless the warship or aircraft was captured before it sank). As a matter of policy, the U.S. Government does not grant permission to salvage sunken U.S. warships or military aircraft that contain the remains of deceased service personnel or explosive material. Requests from foreign countries to have their sunken warships or military aircraft, located in U.S. waters, similarly respected by salvors, are honored.

2.1.2.3 Auxiliaries. Auxiliaries are vessels, other than warships, that are owned by or under the exclusive control of the armed forces. Because they are state owned or operated and used for the time being only on government noncommercial service, auxiliaries enjoy sovereign immunity. This means that, like warships, they are immune from arrest and search, whether in national or international waters. Like warships, they are exempt from foreign taxes and regulation, and exercise exclusive control over all passengers and crew with respect to acts performed on board.

U.S. auxiliaries include all vessels which comprise the Military Sealift Command (MSC) Force. The MSC Force includes: (1) United States Naval Ships (USNS) (i.e., U.S. owned vessels or those under bareboat charter, and assigned to MSC); (2) the National Defense Reserve Fleet and the Ready Reserve Force (RRF) (when activated and assigned to MSC); (3) privately owned vessels under time charter assigned to the Afloat Prepositioned Force (APF); and (4) those vessels chartered by MSC for a period of time or for a specific voyage or voyages. The U.S. claims full rights of sovereign immunity for all USNS, APF, NRDF and RRF vessels. As a matter of policy, however, the U.S. claims only freedom from arrest and taxation for those MSC Force time and voyage charters not included in the APF.

2.2 STATUS OF MILITARY AIRCRAFT

2.2.1 Military Aircraft Defined. International law defines military aircraft to include all aircraft operated by commissioned units of the armed forces of a nation bearing the military markings of that nation, commanded by a member of the armed forces, and manned by a crew subject to regular armed forces discipline.

2.2.2 International Status. Military aircraft are "state aircraft" within the meaning of the Convention on International Civil Aviation of 1944 (the "Chicago Convention"), and, like warships, enjoy sovereign immunity from foreign search and inspection. Subject to the right of transit passage and archipelagic sea lanes passage, state aircraft may not fly over or land on the territory (including the territorial sea) of another nation without authorization by special agreement or otherwise. Host nation officials may

not board the aircraft without the consent of the aircraft commander. Should the aircraft commander fail to certify compliance with host nation customs, immigration or quarantine requirements, the aircraft may be directed to leave the territory and national airspace of that nation immediately.

2.2.2.1 Military Contract Aircraft. Civilian owned and operated aircraft, the full capacity of which has been contracted by the Military Airlift Command (MAC) and used in the military service of the United States, qualify as "state aircraft" if they are so designated by the United States. In those circumstances they too enjoy sovereign immunity from foreign search and inspection. As a matter of policy, however, the United States normally does not designate MAC-charter as "state aircraft."

2.3 NAVIGATION IN AND OVERFLIGHT OF NATIONAL WATERS

2.3.1 Internal Waters. As discussed in the preceding chapter, coastal and island nations exercise the same jurisdiction and control over their internal waters and superjacent airspace as they do over their land territory. Because most ports and harbors are located landward of the baseline of the territorial sea, entering a port ordinarily involves navigation in internal waters. Because entering internal waters is legally equivalent to entering the land territory of another nation, that nation's permission is required. To facilitate international maritime commerce, many nations grant foreign merchant vessels standing permission to enter internal waters, in the absence of notice to the contrary. Warships and auxiliaries, and all aircraft, on the other hand, require specific and advance entry permission, unless other bilateral or multilateral arrangements have been concluded.

Exceptions to the rule of non-entry into *internal* waters without coastal nation permission, whether specific or implied, arise when rendered necessary by *force majeure* or by distress, or when straight baselines are established that have the effect of enclosing, as internal waters, areas of the sea previously regarded as territorial waters or high seas. In the latter event, international law provides that the right of innocent passage (see paragraph 2.3.2.1) or that of transit passage in an international strait (see paragraph 2.3.3.1) may be exercised by all nations in those waters.

2.3.2 The Territorial Sea

2.3.2.1 Innocent Passage. International law provides that ships (but not aircraft) of all nations enjoy the right of innocent passage for the purpose of continuous and expeditious traversing of the territorial sea or for

proceeding to or from internal waters. Innocent passage includes stopping and anchoring, but only insofar as incidental to ordinary navigation, or as rendered necessary by *force majeure* or distress. Passage is *innocent* so long as it is not prejudicial to the peace, good order, or security of the coastal or island nation. Among the military activities considered to be *prejudicial* to peace, good order, and security, and therefore inconsistent with innocent passage, are:

1. Any threat or use of force against the sovereignty, territorial integrity, or political independence of the coastal or island nation

2. Any exercise or practice with weapons of any kind

3. The launching, landing, or taking on board of any aircraft or any military device

4. Intelligence collection activities detrimental to the security of that coastal or island nation

5. The carrying out of research or survey activities.

The coastal or island nation may take affirmative actions in its territorial sea to prevent passage that is not innocent, including, where necessary, the use of force. Foreign ships, including warships, exercising the right of innocent passage are required to comply with the laws and regulations enacted by the coastal or island nation in conformity with established principles of international law and, in particular, with such laws and regulations relating to the safety of navigation. Innocent passage does *not* include a right of overflight.

2.3.2.2 Permitted Restrictions. For purposes such as resource conservation, environmental protection, and navigational safety, a coastal or island nation may establish certain restrictions upon the right of innocent passage of foreign vessels. Such restrictions upon the right of innocent passage through the territorial sea are not prohibited by international law, provided that they are reasonable and necessary; do not have the practical effect of denying or impairing the right of innocent passage; and do not discriminate in form or in fact against the ships of any nation or those carrying cargoes to, from, or on behalf of any nation. The coastal or island nation may, where navigational safety dictates, require foreign ships exercising the right of innocent passage to utilize designated sea lanes and traffic separation schemes.

2.3.2.3 Temporary Suspension of Innocent Passage. A coastal or island nation may suspend innocent passage temporarily in specified areas of its territorial sea, when it is essential for the protection of its security. Such a suspension must be preceded by a published notice to the international community and may not discriminate in form or in fact among foreign ships.

2.3.2.4 Warships and Innocent Passage. All warships, including submarines, enjoy the right of innocent passage on an unimpeded and unannounced basis. Submarines, however, are required to navigate on the surface and to show their flag when passing through foreign territorial seas. If a warship does not comply with coastal or island nation regulations that conform to established principles of international law and disregards a request for compliance which is made to it, the coastal or island nation may require the warship immediately to leave the territorial sea.

2.3.2.5 Assistance Entry. All ship and aircraft commanders have an obligation to assist those in danger of being lost at sea. This long recognized duty of mariners permits assistance entry into the territorial sea by ships or, under certain circumstances, aircraft without permission of the coastal or island nation to engage in *bona fide* efforts to render emergency assistance to those in danger or distress at sea. This right applies only when the location of the danger or distress is reasonably well known. It does not extend to entering the territorial sea or airspace to conduct a search.

2.3.3 International Straits

2.3.3.1 International Straits Overlapped by Territorial Seas. Straits used for international navigation through the territorial sea between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone are subject to the legal regime of *transit passage*. Under international law, the ships and aircraft of all nations, including warships and military aircraft, enjoy the right of unimpeded transit passage through such straits. Transit passage is defined as the exercise of the freedoms of navigation and overflight solely for the purpose of continuous and expeditious transit in the normal modes of operation utilized by ships and aircraft for such passage. This means that submarines are free to transit international straits submerged, since that is their normal mode of operation, and that surface warships may transit in a manner consistent with sound navigational practices and the security of the force, including formation steaming and the launching and recovery of aircraft. All transiting ships and aircraft must proceed without delay; must refrain from the threat or the use of force against the sovereignty, territorial integrity, or political independence of nations bordering the strait; and must otherwise refrain from any activities other than those incident to their normal modes of continuous and expeditious transit.

Transit passage through international straits cannot be suspended by the coastal or island nation for any purpose during peacetime. This principle of international law also applies to transiting ships (including warships) of

nations at peace with the bordering coastal or island nation but involved in armed conflict with another nation.

Coastal or island nations bordering international straits overlapped by territorial seas may designate sea lanes and prescribe traffic separation schemes to promote navigational safety. However, such sea lanes and separation schemes must be approved by the competent international organization in accordance with generally accepted international standards. Ships in transit must respect properly designated sea lanes and traffic separation schemes.

The regime of *innocent passage* (see paragraph 2.3.2.1), rather than transit passage, applies in straits used for international navigation that connect a part of the high seas or an exclusive economic zone with the territorial sea of a coastal or island nation. There may be no suspension of innocent passage through such straits.

2.3.3.2 International Straits Not Completely Overlapped by Territorial Seas. Ships and aircraft transiting through or above straits used for international navigation which are *not* completely overlapped by territorial seas and through which there is a high seas or exclusive economic zone corridor suitable for such navigation, enjoy the high seas freedoms of navigation and overflight while operating in and over such a corridor. Accordingly, so long as they remain beyond the territorial sea, all ships and aircraft of all nations have the unencumbered right to navigate through and over such waters subject only to due regard for the right of others to do so as well.

2.3.4 Archipelagic Waters

2.3.4.1 Archipelagic Sea Lanes Passage. All ships and aircraft, including warships and military aircraft, enjoy the right of archipelagic sea lane passage while transiting through, under, or over the waters of archipelagos and adjacent territorial seas via designated archipelagic sea lanes. Archipelagic sea lanes include all routes normally used for international navigation and overflight, whether or not designated by the archipelagic nation. Each sea lane is defined by a continuous line from the point of entry into the archipelago to the point of exit. Ships and aircraft engaged in archipelagic sea lanes passage are required to remain within 25 nautical miles to either side of the axis line and must approach no closer to the coastline than 10 percent of the distance between the nearest islands. See Figure 2-1. Archipelagic sea lanes passage is defined under international law as the exercise of the freedom of navigation and overflight for the sole purpose of continuous and expeditious transit

through archipelagic waters, in the normal modes of operation, by the ships and aircraft involved. This means that submarines may transit while submerged, and that surface warships may carry out those activities normally undertaken during passage through such waters, including activities necessary to their security, such as formation steaming and the launching and recovery of aircraft. The right of archipelagic sea lanes passage cannot be impeded, or suspended by the archipelagic nation for any reason.

2.3.4.2 Innocent Passage. Outside of archipelagic sea lanes, all surface ships, including warships, enjoy the more limited right of innocent passage throughout archipelagic waters just as they do in the territorial sea. Submarines must remain on the surface and fly their national flag. Any threat or use of force directed against the sovereignty, territorial integrity, or political independence of the archipelagic nation is prohibited. Launching and recovery of aircraft are not allowed, nor may weapons exercises be conducted. The archipelagic nation may promulgate and enforce reasonable restrictions on the right of innocent passage through its archipelagic waters for customs, fiscal, immigration, fishing, pollution, and sanitary purposes. Innocent passage may be suspended temporarily by the archipelagic nation in specified areas of its archipelagic waters when essential for the protection of its security, but it must first promulgate notice of its intentions to do so and must apply the suspension in a nondiscriminatory manner. There is no right of overflight through airspace over archipelagic waters outside of archipelagic sea lanes.

2.4 NAVIGATION IN AND OVERFLIGHT OF INTERNATIONAL WATERS

2.4.1 The Contiguous Zone. The contiguous zone is comprised of international waters in and over which the ships and aircraft, including warships and military aircraft, of all nations enjoy the high seas freedoms of navigation and overflight as described in paragraph 2.4.3. Although the coastal or island nation may exercise in those waters the control necessary to prevent and punish infringement of its customs, fiscal, immigration, and sanitary laws that may occur within its territory (including its territorial sea), it cannot otherwise interfere with international navigation and overflight in and above the contiguous zone.

2.4.2 The Exclusive Economic Zone. The coastal or island nation's jurisdiction and control over the exclusive economic zone are limited to matters concerning the exploration, exploitation, management, and conservation of the resources of those international waters. The coastal or island nation may also exercise in the zone jurisdiction over the establishment

and use of artificial islands, installations, and structures having economic purposes; over marine scientific research (with reasonable limitations); and over some aspects of marine environmental protection. Accordingly, the coastal or island nation cannot unduly restrict or impede the exercise of the freedoms of navigation in and overflight of the exclusive economic zone. Since all ships and aircraft, including warships and military aircraft, enjoy the high seas freedoms of navigation and overflight and other internationally lawful uses of the sea related to those freedoms, in and over those waters, the existence of an exclusive economic zone in an area of naval operations need not, of itself, be of operational concern to the naval commander.

2.4.3 The High Seas. All ships and aircraft, including warships and military aircraft, enjoy complete freedom of movement and operation on and over the high seas. For warships, this includes task force maneuvering, flight operations, military exercises, surveillance, intelligence gathering activities, and ordnance testing and firing. All nations also enjoy the right to lay submarine cables and pipelines on the bed of the high seas as well as on the continental shelf beyond the territorial sea, with coastal or island nation approval for the course of pipelines on the continental shelf. All of these activities must be conducted with due regard for the rights of other nations and for the safe conduct and operation of other ships and aircraft.

2.4.3.1 Closure or Warning Areas. Any nation may declare a temporary closure or warning area on the high seas to advise other nations of the conduct of activities that, although lawful, are hazardous to navigation and/or overflight. The U.S. and other nations routinely declare such areas for missile testing, gunnery exercises, space vehicle recovery operations, and other purposes entailing some danger to lawful uses of the high seas by others. Notice of the establishment of such areas must be promulgated in advance, usually in the form of a Notice to Mariners (NOTMAR) and/or a Notice to Airmen (NOTAM). Ships and aircraft of other nations are *not* required to remain outside a declared closure or warning area, but are obliged to refrain from interfering with activities therein. Consequently, U.S. ships and aircraft may operate in a closure area declared by a foreign nation, collect intelligence and observe the activities involved, subject to the requirement of due regard for the rights of the declaring nation to use the high seas for such lawful purposes, as may the ships and aircraft of other nations in a U.S. declared closure area.

2.4.4 Declared Security and Defense Zones. International law does not recognize the right of any nation to restrict the navigation and overflight of foreign warships and military aircraft beyond its territorial sea. Although several coastal nations, including North Korea and Vietnam, have asserted

claims that purport to prohibit warships and military aircraft from operating in so-called security zones extending beyond the territorial sea, such claims have no basis in international law in time of peace and are not recognized by the United States.

The Charter of the United Nations and general principles of international law recognize that a nation may exercise measures of individual or collective self-defense against an imminent threat of armed attack or an actual attack directed at that nation or at the regional defense organization of which it is a member. Those measures may include the establishment of "defensive sea areas" or "maritime control areas" in which the threatened nation seeks to enforce some degree of control over foreign entry into its territory. Historically, the establishment of such areas extending beyond the territorial sea has been restricted to periods of war or of declared national emergency involving the outbreak of hostilities. International law does not determine the geographic limits of such areas or the degree of control that a coastal or island nation may lawfully exercise over them, beyond laying down the general requirement of reasonableness in relation to the needs of national security and defense.

2.4.5 Polar Regions

2.4.5.1 Arctic Region. The U.S. considers that the waters, icepack, and airspace of the Arctic region beyond the lawfully claimed territorial seas of littoral nations have international status and are open to navigation by the ships and aircraft of all nations. Although several nations, including Canada and the U.S.S.R., have, at times, attempted to claim sovereignty over the Arctic on the basis of discovery, historic use, contiguity (proximity), or the so-called "sector" theory, those claims are not recognized in international law. Accordingly, all ships and aircraft enjoy the freedoms of high seas navigation and overflight on, over, and under the waters and ice pack of the Arctic region beyond the lawfully claimed territorial sea.

2.4.5.2 Antarctic Region. A number of nations have asserted conflicting and often overlapping claims to portions of Antarctica. These claims are premised variously on discovery, contiguity, occupation and, in some cases, the "sector" theory. The U.S. does not recognize the validity of the claims of other nations to any portion of the Antarctic area.

2.4.5.2.1 The Antarctic Treaty of 1959. The U.S. is a party to the multinational treaty of 1959 governing Antarctica. Designed to encourage the scientific exploration of the continent and to foster research and experiments in Antarctica without regard to conflicting assertions of

territorial sovereignty, the 1959 accord provides that no activity in the area undertaken while the treaty is in force will constitute a basis for asserting, supporting, or denying such claims.

The treaty also provides that Antarctica "shall be used for peaceful purposes only," and that "any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons" shall be prohibited. All stations and installations, and all ships and aircraft at points of discharging or embarking cargo or personnel in Antarctica, are subject to inspection by designated foreign observers. Therefore, classified activities are not conducted by the U.S. in Antarctica, and all classified material is removed from U.S. ships and aircraft prior to visits to the continent. In addition, the treaty prohibits nuclear explosions and disposal of nuclear wastes anywhere south of 60° South Latitude. The treaty does not, however, affect in any way the high seas freedoms of navigation and overflight in the Antarctic region. Antarctica has no territorial sea or territorial airspace.

2.4.6 Nuclear Free Zones. The 1968 Nuclear Weapons Non-Proliferation Treaty, to which the United States is a party, acknowledges the right of groups of nations to conclude regional treaties establishing nuclear free zones. Such treaties or their provisions are binding only on parties to them or to protocols incorporating those provisions. To the extent that the rights and freedoms of other nations, including the high seas freedoms of navigation and overflight, are not infringed upon, such treaties are not inconsistent with international law. The 1967 Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco) is an example of a nuclear free zone arrangement that is fully consistent with international law, as evidenced by U.S. ratification of its two protocols. This in no way affects the exercise by the U.S. of navigational rights and freedoms within waters covered by the Treaty of Tlatelolco.

2.5. AIR NAVIGATION

2.5.1 National Airspace. Under international law, every nation has complete and exclusive sovereignty over its national airspace, that is, the airspace above its territory, its internal waters, its territorial sea, and, in the case of an archipelagic nation, its archipelagic waters. *There is no customary right of innocent passage of aircraft through the airspace over the territorial sea or archipelagic waters analogous to the right of innocent passage enjoyed by surface ships.* Accordingly, unless party to an international agreement to the contrary, all nations have complete discretion in regulating or prohibiting flights within their national airspace (as opposed to a Flight Information Region - see paragraph 2.5.2.2),

with the sole exception of overflight of international straits and archipelagic sea lanes. Aircraft wishing to enter national airspace must identify themselves, seek or confirm permission to land or to transit, and must obey all reasonable orders to land, turn back, or fly a prescribed course and/or altitude. Aircraft in distress are entitled to special consideration and should be allowed entry and emergency landing rights. Concerning the right of assistance entry, see paragraph 2.3.2.5.

2.5.1.1 International Straits Which Connect EEZ/High Seas to EEZ/ High Seas and are Overlapped by Territorial Seas. All aircraft, including military aircraft, enjoy the right of unimpeded transit passage through the airspace above international straits overlapped by territorial waters. Such transits must be continuous and expeditious, and the aircraft involved must refrain from the threat or the use of force against the sovereignty, territorial integrity, or political independence of the nation or nations bordering the strait. The exercise of the right of overflight by aircraft engaged in the transit passage of international straits cannot be suspended in peacetime for any reason. (See paragraph 2.5.2 for a discussion of permitted activities over international straits *not* completely overlapped by territorial seas.)

2.5.1.2 Archipelagic Sea Lanes. All aircraft, including military aircraft, enjoy the right of unimpeded passage through the airspace above archipelagic sea lanes. The right of overflight of such sea lanes is essentially identical to that of transit passage through the airspace above international straits overlapped by territorial seas.

2.5.2 International Airspace. International airspace is the airspace over the contiguous zone, the high seas, the exclusive economic zone, and territories not subject to national sovereignty (e.g., Antarctica). All international airspace is open to the aircraft of all nations. Accordingly, aircraft, including military aircraft, are free to operate in international airspace without interference from coastal or island nation authorities. Military aircraft may engage in flight operations, including ordnance testing and firing, surveillance and intelligence gathering, and support of other naval activities. All such activities must be conducted with due regard for the rights of other nations and the safety of other aircraft and of vessels. (Note, however, that the Antarctic Treaty prohibits military maneuvers and weapons testing in Antarctic airspace.) These same principles apply with respect to the overflight of high seas or EEZ corridors through that part of international straits *not* overlapped by territorial seas.

2.5.2.1 Convention on International Civil Aviation. The United States is a party to the 1944 Convention on International Civil Aviation (as are most

all nations). That multilateral treaty, commonly referred to as the "Chicago Convention," applies to civil aircraft. It does *not* apply to military aircraft or to MAC-charter aircraft designated as "state aircraft" (see paragraph 2.2.2.1), other than to require that they operate with "due regard for the safety of navigation of civil aircraft." The Chicago Convention established the International Civil Aviation Organization (ICAO) to develop international air navigation principles and techniques and to "promote safety of flight in international air navigation."

Various operational situations do not lend themselves to ICAO flight procedures. These include military contingencies, classified missions, politically sensitive missions, or routine aircraft carrier operations. Operations not conducted under ICAO flight procedures are conducted under the "due regard" or "operational" prerogative of military aircraft. (For additional information see DOD Dir. 4540.1 and OPNAVINST 3770.4.)

2.5.2.2 Flight Information Regions. A Flight Information Region (FIR) is a defined area of airspace within which flight information and alerting services are provided. FIRs are established by ICAO for the safety of civil aviation and encompass both national and international airspace. Ordinarily, but only as a matter of policy, U.S. military aircraft on routine point-to-point flights through international airspace follow ICAO flight procedures and utilize FIR services. As mentioned above, exceptions to this policy include military contingency operations, classified or politically sensitive missions, and routine aircraft carrier operations or other training activities. When U.S. military aircraft do not follow ICAO flight procedures, they must navigate with "due regard" for civil aviation safety.

2.5.2.3 Air Defense Identification Zones in International Airspace. International law does not prohibit nations from establishing Air Defense Identification Zones (ADIZ) in the international airspace adjacent to their territorial airspace. The legal basis for ADIZ regulations is the right of a nation to establish reasonable conditions of entry into its territory. Accordingly, an aircraft approaching national airspace can be required to identify itself while in international airspace as a condition of entry approval. ADIZ regulations promulgated by the U.S. apply to aircraft bound for U.S. territorial airspace and require the filing of flight plans and periodic position reports. Some nations, however, purport to require all aircraft penetrating an ADIZ to comply with ADIZ procedures, whether or not they intend to enter national airspace. The U.S. does not recognize the right of a coastal or island nation to apply its ADIZ procedures to foreign aircraft in such circumstances. Accordingly, U.S. military aircraft not intending to enter national airspace need not identify themselves or otherwise comply with

ADIZ procedures established by other nations, unless the U.S. has specifically agreed to do so.

It should be emphasized that the foregoing contemplates a peacetime or nonhostile environment. In the case of imminent or actual hostilities, a nation may find it necessary to take measures in self-defense that will affect overflight in international airspace.

2.6 EXERCISE AND ASSERTION OF NAVIGATION AND OVERFLIGHT RIGHTS AND FREEDOMS

As announced in the President's United States Oceans Policy statement of 10 March 1983,

> "The United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the [1982 LOS] convention. The United States will not, however, acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses."

When maritime nations appear to acquiesce in excessive maritime claims and fail to exercise their rights actively in the face of constraints on international navigation and overflight, those claims and constraints may, in time, be considered to have been accepted by the international community as reflecting the practice of nations and as binding upon all users of the seas and superjacent airspace. Consequently, it is incumbent upon maritime nations to protest through diplomatic channels all excessive claims of coastal or island nations, and to exercise their navigation and overflight rights in the face of such claims. The President's Oceans Policy Statement makes clear that the United States has accepted this responsibility as a fundamental element of its national policy.

2.7 RULES FOR NAVIGATIONAL SAFETY FOR VESSELS AND AIRCRAFT

2.7.1 International Rules. Most rules for navigational safety governing surface and subsurface vessels, including warships, are contained in the International Regulations for Preventing Collisions at Sea, 1972, known informally as the "International Rules of the Road" or "72 COLREGS." These rules apply to all international waters (i.e., the high seas, exclusive economic zones, and contiguous zones) and, except where a coastal or island nation has established different rules, in that nation's territorial sea, archipelagic waters, and internal waters as well. Article 1120, U.S. Navy Regulations, 1973, directs that all persons in the naval service responsible for

the operation of naval ships and craft "shall diligently observe" the 1972 COLREGS.

2.7.2 National Rules. Many nations have adopted special rules for waters subject to their territorial sovereignty (i.e., internal waters, archipelagic waters, and territorial seas). Violation of these rules by U.S. Navy vessels may subject the U.S. to lawsuit for collision or other damage, provide the basis for diplomatic protest, result in limitation on U.S. access to foreign ports, or provide the basis for other foreign action.

2.7.2.1 U.S. Inland Rules. The U.S. has adopted special Inland Rules applicable to navigation in U.S. waters landward of the demarcation line established by U.S. law for that purpose. (See U.S. Coast Guard publication CG 169, title 33 Code of Federal Regulations part 80, and title 33 U.S. Code sections 2001 to 2073.) The 1972 COLREGS apply seaward of the demarcation line in U.S. national waters, in the U.S. contiguous zone and exclusive economic zone, and on the high seas.

2.7.3 Navigational Rules for Aircraft. Rules for air navigation in international airspace applicable to civil aircraft may be found in Annex 2 (Rules of the Air) to the Chicago Convention, DOD Flight Information Publication (FLIP) General Planning, and OPNAVINST 3710.7 (series) NATOPS Manual. The same standardized technical principles and policies of ICAO that apply in international and most foreign airspace are also in effect in the continental United States. Consequently, U.S. pilots can fly all major international routes following the same general rules of the air, using the same navigation equipment and communication practices and procedures, and being governed by the same air traffic control services with which they are familiar in the United States.

2.8 U.S.-U.S.S.R. AGREEMENT ON THE PREVENTION OF INCIDENTS ON AND OVER THE HIGH SEAS

In order better to assure the safety of navigation and flight of their respective warships and military aircraft during encounters at sea, the United States and the Soviet Union in 1972 entered into the U.S.-U.S.S.R. Agreement on the Prevention of Incidents On and Over the High Seas. This Navy-to-Navy agreement, popularly referred to as the "Incidents at Sea" or "INCSEA" agreement, has been highly successful in minimizing the potential for harassing actions and navigational one-upmanship between U.S. and Soviet units operating in close proximity at sea. Although the agreement applies to warships and military aircraft operating on and over the "high seas," it is understood to embrace such units operating in all international

waters and international airspace, including that of the exclusive economic zone and the contiguous zone.

Principal provisions of the INCSEA agreement include:

1. Ships will observe strictly both the letter and the spirit of the International Rules of the Road.

2. Ships will remain well clear of one another to avoid risk of collision and, when engaged in surveillance activities, will exercise good seamanship so as not to embarrass or endanger ships under surveillance.

3. Ships will utilize special signals for signalling their operations and intentions.

4. Ships of one party will not simulate attacks by aiming guns, missile launchers, torpedo tubes, or other weapons at the ships of the other party, and will not launch any object in the direction of passing ships nor illuminate their navigation bridges.

5. Ships conducting exercises with submerged submarines will show the appropriate signals to warn of submarines in the area.

6. Ships, when approaching ships of the other party, particularly those engaged in replenishment or flight operations, will take appropriate measures not to hinder maneuvers of such ships and will remain well clear.

7. Aircraft will use the greatest caution and prudence in approaching aircraft and ships of the other party, in particular ships engaged in launching and landing aircraft, and will not simulate attacks by the simulated use of weapons or perform aerobatics over ships of the other party nor drop objects near them.

The INCSEA agreement was amended in a 1973 protocol to extend certain provisions of the agreement to include nonmilitary ships. Specifically, U.S. and Soviet military ships and aircraft shall not make simulated attacks by aiming guns, missile launchers, torpedo tubes, and other weapons at nonmilitary ships of the other party nor launch or drop any objects near nonmilitary ships of the other party in such a manner as to be hazardous to these ships or to constitute a hazard to navigation.

The agreement also provides for an annual review meeting between Navy representatives of the two parties to review its implementation.

2.9 MILITARY ACTIVITIES IN OUTER SPACE

2.9.1 Outer Space Defined. As noted in paragraph 2.5.1, each nation has complete and exclusive control over the use of its national airspace. Except when exercising transit passage or archipelagic sea lanes passage overflight in national airspace by foreign aircraft is not authorized without the consent of the territorial sovereign. However, man-made satellites and other objects in earth orbit may overfly foreign territory freely. Although there is no legally defined boundary between the upper limit of national airspace and the lower

limit of outer space, international law recognizes freedom of transit by man-made space objects at earth orbiting altitude and beyond.

2.9.2 The Law of Outer Space. International law, including the United Nations Charter, applies to the outer space activities of nations. Outer space is open to exploration and use by all nations. However, it is not subject to national appropriation, and must be used for peaceful purposes. The term "peaceful purposes" does *not* preclude military activity. While acts of aggression in violation of the United Nations Charter are precluded, space-based systems may lawfully be employed to perform essential command, control, communications, intelligence, navigation, environmental, surveillance and warning functions to assist military activities on land, in the air, and on and under the sea. Users of outer space must have due regard for the rights and interests of other space nations to do so as well.

2.9.2.1 General Principles of the Law of Outer Space. International law governing space activities addresses both the nature of the activity and the location in space where the specific rules apply. As set out in paragraph 2.9.1, outer space begins at the undefined upper limit of the earth's airspace and extends to infinity. In general terms, outer space consists of both the earth's moon and other natural celestial bodies, and the expanse between these natural objects.

The rules of international law applicable to outer space include the following:

1. Access to outer space is free and open to all nations.

2. Outer space is free from claims of sovereignty and not otherwise subject to national appropriation.

3. Outer space is to be used for peaceful purposes.

4. Each user of outer space must show due regard for the rights of others.

5. No nuclear or other weapons of mass destruction may be stationed in outer space.

6. Nuclear explosions in outer space are prohibited.

7. Exploration of outer space must avoid contamination of the environment of outer space and of the earth's biosphere.

8. Astronauts must render all possible assistance to other astronauts in distress.

2.9.2.2 Natural Celestial Bodies. Natural celestial bodies include the earth's moon, but not the earth. Under international law, military bases, installations and forts may not be erected nor may weapons tests or maneuvers be undertaken on natural celestial bodies. Moreover, all equipment, stations

and vehicles located there are open to inspection on a reciprocal basis. There is no corresponding right of physical inspection of man-made objects located in the expanse between celestial bodies. Military personnel may be employed on natural celestial bodies for scientific research and for other activities undertaken for peaceful purposes.

2.9.3 International Agreements on Outer Space Activities. The key legal principles governing outer space activities are contained in four widely ratified multilateral agreements: the 1967 Outer Space Treaty; the 1968 Rescue and Return of Astronauts Agreement; the Liability Treaty of 1972; and the Space Objects Registration Treaty of 1975. A fifth, the 1979 Moon Treaty, has not been widely ratified. The United States is a party to all of these agreements except the Moon Treaty.

2.9.3.1 Related International Agreements. Several other international agreements restrict specific types of activity in outer space. The US-USSR Anti-Ballistic Missile (ABM) Treaty of 1972 prohibits the development, testing, and deployment of space-based ABM systems or components. Also prohibited is any interference with the surveillance satellites both nations use to monitor ABM Treaty compliance.

The 1963 Limited Test Ban Treaty (a multilateral treaty) includes an agreement not to test nuclear weapons or to carry out any other nuclear explosions in outer space.

The 1977 Environmental Modification Convention (also a multilateral treaty) prohibits military or other hostile use of environmental modification techniques in several environments, including outer space.

The 1982 International Telecommunication Convention and the 1979 Radio Regulations govern the use of the radio frequency spectrum by satellites and the location of satellites in the geostationary-satellite orbit.

2.9.4 Rescue and Return of Astronauts. Both the Outer Space Treaty and the Rescue and Return of Astronauts Agreement establish specific requirements for coming to the aid of astronauts. The treaties do not distinguish between civilian and military astronauts.

Astronauts of one nation engaged in outer space activities are to render all possible assistance to astronauts of other nations in the event of accident or distress. If a nation learns that spacecraft personnel are in distress or have made an emergency or unintended landing in its territory, the high seas, or other international area (e.g., Antarctica), it must notify the launching nation

and the Secretary-General of the United Nations, take immediate steps to rescue the personnel if within its territory, and, if in a position to do so, extend search and rescue assistance if a high seas or other international area landing is involved. Rescued personnel are to be safely and promptly returned.

Nations also have an obligation to inform the Secretary-General of the United Nations if they discover outer space phenomena which constitute a danger to astronauts.

2.9.5 Return of Outer Space Objects. A party to the Rescue and Return of Astronauts Agreement must also notify the Secretary-General of the United Nations if it learns of an outer space object's return to earth in its territory, on the high seas, or in another international area. If the object is located in sovereign territory and the launching authority requests the territorial sovereign's assistance, the latter must take steps to recover and return the object. Similarly, such objects found in international areas shall be held for or returned to the launching authority. Expenses incurred in assisting the launching authority in either case are to be borne by the launching authority. Should a nation discover that such an object is of a "hazardous or deleterious" nature, it is entitled to immediate action by the launching authority to eliminate the danger of harm from its territory.

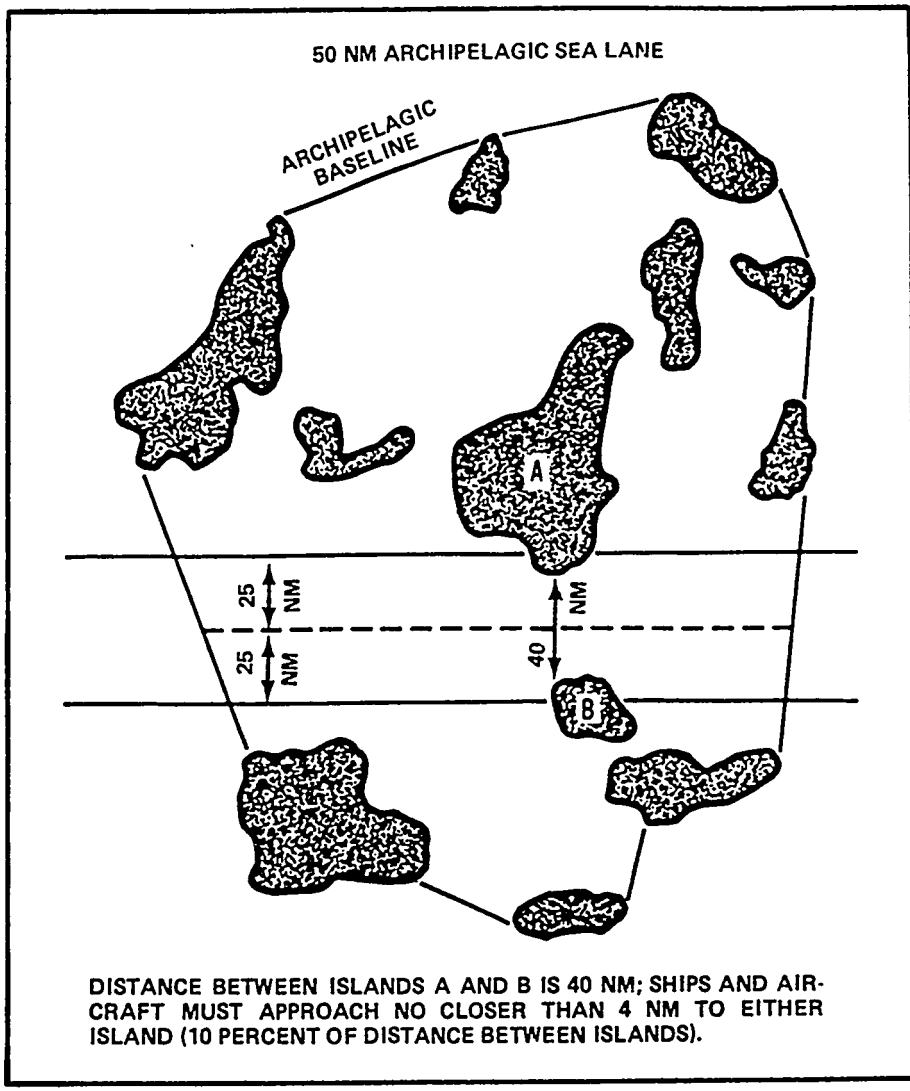


Figure 2-1. Archipelagic Sea Lanes

Chapter 3
Protection of Persons and Property at Sea

3.1 INTRODUCTION

The protection of both U.S. and foreign persons and property at sea by U.S. naval forces in peacetime involves international law, domestic U.S. law and policy, and political considerations. Vessels and aircraft on and over the sea, and the persons and cargo embarked in them, are subject to the hazards posed by the ocean itself, by storm, by mechanical failure, and by the actions of others such as pirates, terrorists, and insurgents. In addition, foreign authorities and prevailing political situations may affect a vessel or aircraft and those on board by involving them in refugee rescue efforts, political asylum requests, regulatory enforcement actions, or applications of unjustified use of force against them.

Given the complexity of the legal, political, and diplomatic considerations that may arise in connection with the use of naval forces to protect civilian persons and property at sea, operational plans, operational orders, and, most importantly, the *applicable peacetime rules of engagement* promulgated by the operational chain of command ordinarily require the on-scene commander to report immediately such circumstances to higher authority and, whenever it is practicable under the circumstances to do so, to seek guidance prior to the use of armed force.

3.2 RESCUE, SAFE HARBOR, AND QUARANTINE

Mishap at sea is a common occurrence. The obligation of mariners to provide material aid in cases of distress encountered at sea has long been recognized in custom and tradition. A right to enter and remain in a safe harbor without prejudice, at least in peacetime, when required by the perils of the sea or *force majeure* is universally recognized. At the same time, a coastal nation may lawfully promulgate quarantine regulations and restrictions for the port or area in which a vessel is located.

3.2.1 Assistance to Persons, Ships, and Aircraft in Distress. Both the 1958 Geneva Convention on the High Seas and the 1982 UN Convention on the Law of the Sea (1982 LOS Convention) provide that every nation shall require the master of a ship flying its flag, insofar as he can do so without serious danger to his ship, crew, or passengers, to render assistance to any person found at sea in danger of being lost and to proceed with all possible speed to the rescue of persons in distress if informed of their need of assistance, insofar as it can reasonably be expected of him. He is also to be required, after a collision, to render assistance to the other ship, its crew, and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry, and the nearest port at which it will call. (See paragraph 2.3.2.5 for a discussion of "Assistance Entry.")

3.2.1.1 Duty of Naval Commanders. Article 0925, U.S. Navy Regulations, 1973, requires that, insofar as he can do so without serious danger to his ship or crew, the commanding officer or senior officer present, as appropriate, shall proceed with all possible speed to the rescue of persons in distress if informed of their need for assistance (insofar as this can reasonably be expected of him); render assistance to any person found at sea in danger of being lost; and, after a collision, render assistance to the other ship, her crew and passengers, and, where possible, inform the other ship of his identity.

3.2.1.2 Duty of Masters. In addition, the U.S. is party to the 1974 London Convention on Safety of Life at Sea, which requires the master of every merchant ship and private vessel not only to speed to the assistance of persons in distress, but to broadcast warning messages with respect to dangerous conditions or hazards encountered at sea.

3.2.2 Safe Harbor. Under international law, no port may be closed to a foreign ship seeking shelter from storm or bad weather or otherwise compelled to enter it in distress, unless another equally safe port is open to the distressed vessel to which it may proceed without additional jeopardy or hazard. The only condition is that the distress must be real and not contrived and based on a well-founded apprehension of loss of the vessel, cargo, or crew. In general, the distressed vessel may enter a port without being subject to local regulations concerning any incapacity, penalty, prohibition, duties, or taxes in force at that port.

3.2.2.1 Innocent Passage. Innocent passage through territorial seas and archipelagic waters includes stopping and anchoring when necessitated by *force majeure* or by distress. Stopping and anchoring in such waters for the purpose of rendering assistance to others in similar danger or distress is also permitted by international law.

3.2.3 Quarantine. Article 0763, U.S. Navy Regulations, 1973, requires that the commanding officer or aircraft commander of a ship or aircraft comply with quarantine regulations and restrictions. While not required under any circumstances to permit inspection of his vessel or aircraft, commanding officers shall afford every other assistance to health officials, U.S. or foreign, and shall give all information required, insofar as permitted by the requirements of military necessity and security.

3.3 ASYLUM

International law recognizes the right of a nation to grant asylum to foreign nationals already present within or seeking admission to its territory. The U.S. defines "asylum" as:

> *Protection and sanctuary granted by the United States Government within its territorial jurisdiction or in international waters to a foreign national who applies for such protection because of persecution or fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.*

3.3.1 Territories Under the Exclusive Jurisdiction of the United States and International Waters. Any person requesting asylum in international waters or in territories under the exclusive jurisdiction of the United States (including the U.S. territorial sea, the Commonwealth of Puerto Rico, territories under U.S. administration, and U.S. possessions) will be received on board any naval aircraft or vessel or any Navy or Marine Corps activity or station. Persons seeking asylum are to be afforded every reasonable care and protection permitted by the circumstances. Under no circumstances will a person seeking asylum in U.S. territory or in international waters be surrendered to foreign jurisdiction or control, unless at the personal direction of the Secretary of the Navy or higher authority. (See Article 0940, U.S. Navy Regulations, 1973, and SECNAVINST 5710.22 for specific guidance.)

3.3.2 Territories Under Foreign Jurisdiction. Commanders of U.S. warships, military aircraft, and military installations in territories under foreign jurisdiction (including foreign territorial seas, archipelagic waters, internal waters, ports, territories, and possessions) are not authorized to receive on board foreign nationals seeking asylum. Such persons should be referred to the American Embassy or nearest U.S. Consulate in the country, foreign territory, or foreign possession involved, if any, for assistance in coordinating a request for asylum with the host government insofar as practicable. Because warships are extensions of the sovereignty of the flag nation and because of their immunity from the territorial sovereignty of the foreign nation in whose waters they may be located, they have often been looked to as places of asylum. The U.S., however, considers that asylum is

generally the prerogative of the government of the territory in which the warship is located.

However, if exceptional circumstances exist involving imminent danger to the life or safety of the person, temporary refuge may be provided. (See paragraph 3.3.4.)

3.3.3 Expulsion or Surrender. Article 33 of the 1951 Convention Relating to the Status of Refugees provides that a refugee may not be expelled or returned in any manner whatsoever to the frontier or territories of a nation where his life or freedom would be threatened on account of his race, religion, nationality, political opinion, or membership in a particular social group, unless he may reasonably be regarded as a danger to the security of the country of asylum or has been convicted of a serious crime and is a danger to the community of that country. This obligation applies only to persons who have entered territories under the exclusive jurisdiction of the United States. It does not apply to temporary refuge granted abroad.

3.3.4 Temporary Refuge. International law and practice have long recognized the humanitarian practice of providing temporary refuge to anyone, regardless of nationality, who may be in imminent physical danger for the duration of that danger. (See Article 0940, U.S. Navy Regulations, 1973, and SECNAVINST 5710.22.)

SECNAVINST 5710.22 defines "temporary refuge" as:

Protection afforded for humanitarian reasons to a foreign national in a Department of Defense shore installation, facility, or military vessel or aircraft within the territorial jurisdiction of a foreign nation or in international waters, under conditions of urgency in order to secure the life or safety of that person against imminent danger, such as pursuit by a mob.

It is the policy of the United States to grant temporary refuge in a foreign country to nationals of that country, or nationals of a third nation, solely for humanitarian reasons when extreme or exceptional circumstances put in imminent danger the life or safety of a person, such as pursuit by a mob. The officer in command of the ship, aircraft, station, or activity must decide which measures can prudently be taken to provide temporary refuge. The safety of U.S. personnel and security of the unit must be taken into consideration.

3.3.4.1 Termination or Surrender of Temporary Refuge. Although temporary refuge should be terminated when the period of active danger is ended, the decision to terminate protection will not be made by the commander. Once temporary refuge has been granted, protection may be terminated only when directed by the Secretary of the Navy or higher

authority. (See Article 0940, U.S. Navy Regulations, 1973, and SECNAVINST 5710.22.)

A request by foreign authorities for return of custody of a person under the protection of temporary refuge will be reported in accordance with SECNAVINST 5710.22 (series). The requesting foreign authorities will then be advised that the matter has been referred to higher authorities.

3.3.5 Inviting Requests for Asylum or Refuge. Personnel of the Department of the Navy shall neither directly nor indirectly invite persons to seek asylum or temporary refuge.

3.3.6 Protection of U.S. Citizens. The limitations on asylum and temporary refuge are not applicable to U.S. citizens. U.S. citizens are entitled to protection from persecution or danger to life or safety in all circumstances. See the peacetime rules of engagement for applicable guidance.

3.4 REPRESSION OF PIRACY

International law has long recognized a general duty of all nations to cooperate in the repression of piracy. This traditional obligation is included in the 1958 Geneva Convention on the High Seas and the 1982 LOS Convention, both of which provide:

> *[A]ll States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any state.*

3.4.1 U.S. Law. The U.S. Constitution (Article I, Section 8) provides that:

> *The Congress shall have Power . . . to define and punish piracies and felonies committed on the high seas, and offenses against the Law of Nations.*

Congress has exercised this power by enacting title 18 U.S. Code section 1651 which provides that:

> *Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.*

U.S. law authorizes the President to employ "public armed vessels" in protecting U.S. merchant ships from piracy and to instruct the commanders of such vessels to seize any pirate ship that has attempted or committed an act of piracy against any U.S. or foreign flag vessel in international waters.

3.4.2 Piracy Defined. Piracy is an international crime consisting of illegal acts of violence, detention, or depredation committed for private ends by the crew or passengers of a private ship or aircraft in or over international waters

against another ship or aircraft or persons and property on board. (Depredation is the act of plundering, robbing or pillaging.)

3.4.2.1 Location. In international law piracy is a crime that can only be committed in or over international waters, including the high seas, exclusive economic zone, the contiguous zone, in international airspace, and in other places at sea beyond the territorial jurisdiction of any nation. The same acts committed in the territorial sea, archipelagic waters, or national airspace of a nation do not constitute piracy in international law but are, instead, crimes within the jurisdiction and sovereignty of the littoral nation.

3.4.2.2 Private Ship or Aircraft. Acts of piracy can only be committed by private ships or private aircraft. A warship or other public vessel or a military or other state aircraft cannot be treated as a pirate unless it is taken over and operated by pirates or unless the crew mutinies and employs it for piratical purposes. By committing an act of piracy, the pirate ship or aircraft, and the pirates themselves, lose the protection of the nation whose flag they are otherwise entitled to fly.

3.4.2.3 Private Purpose. To constitute the crime of piracy, the illegal acts must be committed for private ends. Consequently, an attack upon a merchant ship at sea for the purpose of achieving some criminal end, e.g., robbery, is an act of piracy as that term is currently defined in international law.

3.4.2.4 Mutiny or Passenger Hijacking. If the crew or passengers of a ship or aircraft, including the crew of a warship or military aircraft, mutiny or revolt and convert the ship, aircraft or cargo to their own use, that act is not piracy. If, however, the ship or aircraft is thereafter used to commit acts of piracy, it becomes a pirate ship or pirate aircraft and those on board voluntarily participating in such acts become pirates.

3.4.3 Use of Naval Forces to Repress Piracy. Only warships, military aircraft, or other ships or aircraft clearly marked and identifiable as being on governmental service and authorized to that effect may seize a pirate ship or aircraft.

3.4.3.1 Seizure of Pirate Vessels and Aircraft. When a pirate vessel or aircraft is encountered in or over U.S. or international waters it may be seized and detained by any U.S. Navy warship or aircraft. The pirate vessel or aircraft, and all persons on board, should be taken, sent, or directed to the nearest U.S. port or airfield and delivered to U.S. law enforcement authorities for disposition according to U.S. law. Alternatively, higher authority may arrange with another nation to accept and try the pirates and dispose of the

pirate vessel or aircraft, since every nation has jurisdiction under international law over any act of piracy.

3.4.3.2 Pursuit into Foreign Territorial Sea, Archipelagic Waters, or Airspace. If a pirate vessel or aircraft fleeing from pursuit by a warship or military aircraft proceeds from international waters or airspace into the territorial sea, archipelagic waters, or superjacent airspace of another country, every effort should be made to obtain the consent of the nation having sovereignty over the territorial sea, archipelagic waters, or superjacent airspace to continue pursuit. The inviolability of the territorial integrity of sovereign nations makes the decision of a warship or military aircraft to continue pursuit into these areas without such consent a serious matter. However, the international nature of the crime of piracy may allow continuation of pursuit, if contact cannot be established in a timely manner with the coastal nation to obtain its consent. In such a case, pursuit must be broken off immediately upon request of the coastal nation, and, in any event, the right to seize the pirate vessel or aircraft and to try the pirates devolves on the nation to which the territorial seas, archipelagic waters, or airspace belong.

Pursuit of a pirate vessel or aircraft through or over international straits overlapped by territorial waters or through or over archipelagic sea lanes may proceed with or without the consent of the coastal nation or nations, provided the pursuit is expeditious and direct and the transit passage rights of others are not unreasonably constrained in the process.

3.5 PROHIBITION OF THE TRANSPORT OF SLAVES

International law strictly prohibits use of the seas for the purpose of transporting slaves. The 1982 LOS Convention requires every nation to prevent and punish the transport of slaves in ships authorized to fly its flag. Commanders should request guidance from higher authority if confronted with this situation.

3.6 SUPPRESSION OF INTERNATIONAL NARCOTICS TRAFFIC

The 1982 LOS Convention provides that all nations shall cooperate in the suppression of the illicit traffic in narcotic drugs and psychotropic substances by ships in international waters. The 1982 Convention also provides that any nation which has reasonable grounds for believing that a ship flying its flag is engaged in such traffic may request the cooperation of other nations in effecting its seizure. Foreign flag vessels are regularly seized by U.S. Coast

Guard ships pursuant to such bilateral arrangements. (See paragraph 3.12.5 regarding utilization of U.S. Navy assets in the support of U.S. drug-interdiction efforts.)

3.7 SUPPRESSION OF UNAUTHORIZED BROADCASTING

The 1982 LOS Convention provides that all nations shall cooperate in the suppression of unauthorized broadcasting from international waters. Unauthorized broadcasting involves the transmission of radio or television signals from a ship or offshore facility intended for receipt by the general public, contrary to international regulation. Commanders should request guidance from higher authority if confronted with this situation.

3.8 WARSHIP'S RIGHT OF APPROACH AND VISIT

As a general principle, vessels in international waters are immune from the jurisdiction of any nation other than the flag nation. However, under international law, a warship may *approach* any vessel in international waters to verify its nationality. Unless the vessel encountered is itself a warship or government vessel of another nation, it may be stopped, boarded, and the ship's documents examined, *provided* there is reasonable ground for suspecting that it is:

1. Engaged in piracy.
2. Engaged in the slave trade.
3. Engaged in unauthorized broadcasting.
4. Without nationality.
5. Though flying a foreign flag, or refusing to show its flag, the vessel is, in reality, of the same nationality as the warship.

Vessels without nationality (also referred to as "stateless vessels") are vessels not entitled to fly the flag of any nation and vessels falsely assuming a nationality. Because these vessels are not entitled to the protection of any nation, they are subject to the jurisdiction of all nations. The procedure for exercising the right of approach and visit is similar to that used in exercising the belligerent right of visit and search described in paragraph 7.6.1. See Article 630.23 of OPNAVINST 3120.32B for further guidance.

3.9 HOT PURSUIT

The hot pursuit of a foreign ship may be undertaken as a law enforcement action when the coastal or island nation has reason to believe that the ship

has violated the laws and regulations of that nation. The pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea, or the contiguous zone of the pursuing nation, and may only be continued outside the territorial sea or contiguous zone if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone. If the foreign ship is within a contiguous zone, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own nation or of a third nation. The right of hot pursuit may be exercised only by warships, military aircraft or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect. The right of hot pursuit applies also to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal or island nation applicable to the exclusive economic zone or the continental shelf, including such safety zones.

3.9.1 Commencement of Hot Pursuit. Hot pursuit is not deemed to have begun unless the pursuing ship is satisfied by such practicable means as are available that the ship pursued, or one of its boats or other crafts working as a team and using the ship pursued as a mother ship, is within the limits of the territorial sea, within the contiguous zone or the exclusive economic zone, or above the continental shelf. Pursuit may be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

3.9.2 Hot Pursuit by Aircraft. Where hot pursuit is effected by aircraft:

1. The provisions of paragraphs 3.9 and 3.9.1 apply.

2. The aircraft giving the order to stop must itself actively pursue the ship until a ship or another aircraft of the coastal or island nation, summoned by the aircraft, arrives to take over the pursuit, unless the aircraft itself is able to arrest the ship. The aircraft must do more than merely sight the offender or suspected offender to justify an arrest outside the territorial sea. It must first order the suspected offender to stop. Should the suspected offender fail to comply, pursuit may be commenced alone or in conjunction with other aircraft or ships. Pursuit must continue without interruption.

3.10 RECOVERY OF U.S. GOVERNMENT PROPERTY LOST AT SEA

The property of a sovereign nation lost at sea remains vested in that sovereign until title is formally relinquished or abandoned. Aircraft wreckage,

sunken vessels, practice torpedoes, test missiles, and target drones are among the types of U.S. Navy property which may be the subject of recovery operations. Should such U.S. property be recovered at sea by foreign entities, it is U.S. policy to demand its immediate return. Specific guidance for the on-scene commander in such circumstances is contained in the applicable operation order (e.g., CINCPACFLT OPORD 201, CINCLANTFLT OPORD 2000).

3.11 PROTECTION OF PRIVATE AND MERCHANT VESSELS AND AIRCRAFT, PRIVATE PROPERTY, AND PERSONS

In addition to the obligation and authority of warships to repress international crimes such as piracy, international law also contemplates the use of force in peacetime in certain circumstances to protect private and merchant vessels, private property, and persons at sea from acts of unlawful violence. The legal doctrines of self-defense and protection of nationals provide the authority for U.S. naval forces to protect both U.S. and foreign flag vessels, aircraft, property and persons from violent and unlawful acts of others. Consult the JCS Peacetime Rules of Engagement for U.S. Forces or applicable theater CINC ROE for detailed guidance.

3.11.1 Protection of U.S. Flag Vessels, Aircraft, U.S. Citizens and Property. International law, embodied in the doctrines of self-defense and protection of nationals, provides authority for the use of proportionate force by U.S. warships and military aircraft when necessary for the protection of U.S. flag vessels and aircraft, U.S. citizens (whether embarked in U.S. or foreign flag vessels), and their property against *unlawful* violence in and over international waters. Peacetime rules of engagement promulgated by the Joint Chiefs of Staff (JCS) to the operational chain of command and incorporated into applicable operational orders, operational plans, and contingency plans, provide guidance to the naval commander for the exercise of this inherent authority. Those rules of engagement are carefully constructed to ensure that the protection of U.S. flag vessels and U.S. citizens and their property at sea conforms with U.S. and international law and reflects national policy.

3.11.1.1 Foreign Internal Waters, Archipelagic Waters, and Territorial Seas. Unlawful acts of violence directed against U.S. flag vessels and aircraft and U.S. citizens within and over the internal waters, archipelagic waters, or territorial seas of a foreign nation present special considerations. The coastal or island nation is primarily responsible for the protection of all vessels, aircraft and persons lawfully within and over its sovereign territory. However, when that nation is unable or unwilling to do so effectively or when the circumstances are such that immediate action is required to protect

human life, international law recognizes the right of another nation to direct its warships and military aircraft to use proportionate force in or over those waters to protect its flag vessels and its citizens. Because the coastal or island nation may lawfully exercise jurisdiction and control over foreign flag vessels, aircraft and citizens within its internal waters, archipelagic waters, territorial seas and national airspace, special care must be taken by the warships and military aircraft of other nations not to interfere with the lawful exercise of jurisdiction by that nation in those waters.

3.11.1.2 Foreign Contiguous Zones and Exclusive Economic Zones. The primary responsibility of coastal or island nations for the protection of foreign shipping and aircraft off their shores ends at the seaward edge of the territorial sea. Beyond that point, each nation bears the primary responsibility for the protection of its own flag vessels and aircraft and its own citizens and their property. On the other hand, the coastal or island nation may properly exercise jurisdiction over foreign vessels, aircraft and persons in and over its contiguous zone to enforce its customs, fiscal, immigration, and sanitary laws, and in its exclusive economic zone to enforce its resource-related rules and regulations. When the coastal or island nation is acting lawfully in the valid exercise of such jurisdiction, or is in hot pursuit (see discussion in paragraph 3.9) of a foreign vessel or aircraft for violations that have occurred in or over those waters or in its sovereign territory, the flag nation should not interfere. U.S. naval commanders should consult applicable peacetime rules of engagement for specific guidance.

3.11.2 Protection of Foreign Flag Vessels, Aircraft and Persons. International law, embodied in the concept of collective self-defense, provides authority for the use of proportionate force necessary for the protection of foreign flag vessels and aircraft and foreign persons from *unlawful* violence, including terrorist or piratical attacks, at sea. In such instances, consent of the flag nation should first be obtained unless prior arrangements are already in place or the necessity to act immediately to save human life does not permit obtaining such consent. Should the attack or other unlawful violence occur within or over the internal waters, archipelagic waters, or territorial sea of a third nation, or within or over its contiguous zone or exclusive economic zone, the considerations of paragraphs 3.11.1.1 and 3.11.1.2 would also apply.

3.12 AID TO DOMESTIC CIVIL LAW ENFORCEMENT OFFICIALS

Except when expressly authorized by the Constitution or act of Congress, the use of U.S. Army or U.S. Air Force personnel or resources as a *posse comitatus*—a force to aid civilian law enforcement authorities in keeping the

peace and arresting felons' — or otherwise to execute domestic law, is prohibited by the Posse Comitatus Act, title 18 U.S. Code section 1385. As a matter of policy, the Posse Comitatus Act is made equally applicable to the U.S. Navy and U.S. Marine Corps. The prohibitions of the Act are not applicable to the U.S. Coast Guard, even when operating as a part of the Department of the Navy. (See SECNAVINST 5820.7 (series).)

Although the *posse comitatus* concept forbids military authorities from enforcing, or being directly involved with the enforcement of civil law, some military activities in aid of civil law enforcement may be authorized under the military purpose doctrine. For example, indirect involvement or assistance to civil law enforcement authorities which is incidental to normal military training or operations is not a violation of the Posse Comitatus Act. Additionally, Congress has specifically authorized the limited use of military facilities, platforms, and equipment to assist Federal authorities in the interdiction at sea of narcotics and other controlled substances.

3.12.1 Providing Information to Law Enforcement Agencies. It is ordinarily permissible to provide Federal, State or local law enforcement officials with information acquired during the course of military operations that may be relevant to a violation of any law within the jurisdiction of those officials. However, such operations may not be undertaken with the purpose of acquiring such information for law enforcement officials, unless specifically authorized by applicable law or regulation.

3.12.2 Use of Military Equipment and Facilities. Consistent with mission requirements, available equipment (including shipboard or aircraft systems), base facilities, and research facilities may be made available upon request to Federal, State, or local law enforcement authorities subject to approval of higher authority.

3.12.3 Use of DOD Personnel. The use of U.S. Army or U.S. Air Force personnel for purposes of providing direct assistance to law enforcement authorities is generally prohibited. Absent a waiver from the Secretary of the Navy or other approval authority, that prohibition is applicable to the U.S. Navy and U.S. Marine Corps personnel as well.

3.12.4 DOD Mission in Drug Interdiction. The National Defense Authorization Act of 1989 assigned DOD as single lead agency responsible for coordinating all detection and monitoring of aerial and maritime transit of illegal drugs into the United States. It also directed DOD to integrate U.S. command, control, communications and intelligence (C3I) assets dedicated to drug interdiction into an effective communications network.

3.12.5 Use of U.S. Navy Ships in Support of Drug-Interdiction Operations. Consistent with Congressional direction, U.S. Navy ships operating in waters designated by the Secretary of Defense (in consultation with the Attorney General) as a drug-interdiction area are required to have embarked a Coast Guard officer who is trained in law enforcement and who has power to arrest, search, and seize property or persons suspected of violations of U.S. law. In consonance with the right of the flag state under international law to exercise jurisdiction over vessels flying its flag, a U.S. Navy ship with an appropriately authorized Coast Guard officer on board may approach and stop, anywhere in international waters or in U.S. national waters, any *U.S.* flag vessel which, on reasonable grounds, is believed to be engaged in the illicit traffic of narcotics or psychotropic substances. In such circumstances, any resultant search, seizure or arrest will be accomplished by the embarked Coast Guard officer.

Foreign flag vessels encountered by U.S. Navy ships in the U.S. territorial sea or contiguous zone (see paragraph 1.5.1) under circumstances indicating that the vessel may be engaged in the illicit traffic of narcotics or psychotropic substances may be similarly approached and stopped, and boarded by the embarked Coast Guard officer. In international waters, foreign flag vessels may be boarded and, if warranted, seized for drug-interdiction purposes only under one or more of the following circumstances: with flag state consent; in hot pursuit originating in the U.S. territorial sea or contiguous zone; or if the vessel is the mother ship of one or more craft operating in the U.S. territorial sea or contiguous zone. In addition, a vessel in international waters may be boarded with the consent of the master, but seizure may only occur under one of the foregoing circumstances. Foreign flag nation consent may consist of a bilateral agreement covering all such encounters or may be granted by that nation for the particular occasion. In all drug interdiction cases involving seizure of a foreign flag vessel beyond 12 nautical miles from the U.S. coast, concurrence must be obtained through the Department of State.

Chapter 4
Safeguarding of U.S. National Interests in the Maritime Environment

4.1 INTRODUCTION

This final chapter of Part I — Law of Peacetime Naval Operations examines the broad principles of international law that govern the conduct of nations in protecting their interests at sea during time of peace. *As noted in the preface, this publication provides general information, is not directive, and does not supersede guidance issued by the commanders of the unified and specified commands, within the scope of their authority, and in particular any guidance they may issue that delineate the circumstances and limitations under which the forces under their command will initiate and/or continue engagement with other forces encountered.*

Historically, international law governing the use of force between nations has been divided into rules applicable in peacetime and rules applicable in time of war. In recent years, however, the concepts of both "war" and "peace" have become blurred and no longer lend themselves to clear definition. Consequently, it is not always possible, or even useful, to try to draw neat distinctions between the two. Full scale hostilities continue to break out around the world, but few are accompanied by a formal declaration of war. At the same time, the spectrum of armed conflict has widened and become increasingly complex. At one end of that spectrum is total nuclear war; at the other, insurgencies and state-sponsored terrorism. For the purposes of this publication, however, the conduct of armed hostilities involving U.S. forces, irrespective of character, intensity or duration, is addressed in Part II — Law of Naval Warfare.

4.1.1 Charter of the United Nations. Article 2, paragraph 3 of the Charter of the United Nations provides that:

> *All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.*

Article 2, paragraph 4 provides that:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

In combination, these two provisions establish the fundamental principle of modern international law that nations will not use force or the threat of force to impose their will on other nations or to otherwise resolve their international differences.

Article 39 of the Charter looks to the Security Council to enforce this prohibition by providing:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of transgression and shall . . . decide what measures shall be taken . . . to maintain or restore international peace and security.

Article 51 of the Charter provides, however, that:

Nothing in the . . . Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member . . . until the Security Council has taken measures necessary to maintain international peace and security. . . .

The following paragraphs discuss some of the measures that nations, acting in conformity with the Charter of the United Nations, may take in pursuing and protecting their national interests at sea during peacetime.

4.2 NONMILITARY MEASURES

4.2.1 Diplomatic. As contemplated by the United Nations Charter, nations generally rely on peaceful means to resolve their differences and to protect their interests. Diplomatic measures include all those political policy actions taken by one nation to influence the behavior of other nations within the framework of international law. They may involve negotiation, conciliation or mediation, and may be cooperative or coercive (e.g., severing of diplomatic relations). The behavior of an offending nation may be curbed by appeals to world public opinion as in the General Assembly, or, if their misconduct involves a threat to or breach of the peace, by bringing the issue before the Security Council. Ordinarily, however, differences that arise between nations are resolved or accommodated through the normal day-to-day, give-and-take of international diplomacy. The key point is that disputes between the U.S. and other nations arising out of conflicting interests in the maritime environment, or having their origin elsewhere but impacting on U.S. uses of the seas, are normally addressed and resolved through diplomatic channels and do not involve resort to the threat or use of force.

4.2.2 Economic. Nations often utilize economic measures to influence the actions of others. The granting or withholding of "most favored nation" status

to another country is an often used measure of economic policy. Similarly, trade agreements, loans, concessionary credit arrangements and other aid, and investment opportunity are among the many economic measures that nations extend, or may withhold, as their national interests dictate. Examples of the coercive use of economic measures to curb or otherwise seek to influence the conduct of other nations include the suspension of U.S. grain sales and the embargo on the transfer of U.S. technology to the offending nation, boycott of oil and other export products from the offending nation, and suspension of "most favored nation" status and the assertion of other economic sanctions.

4.2.3 Judicial. Nations may also seek judicial resolution of their peacetime disputes, both in national courts and before international tribunals. A nation or its citizens may bring a legal action against another nation in its own national courts, provided the court has jurisdiction over the matter in controversy (such as where the action is directed against property of the foreign nation located within the territorial jurisdiction of the court) *and* provided the foreign nation does not interpose a valid claim of sovereign immunity. Similarly, a nation or its citizens may bring a legal action against another nation in the latter's courts, or in the courts of a third nation, provided jurisdiction can be found and sovereign immunity is not interposed.

Nations may also submit their disputes to the International Court of Justice for resolution. Article 92 of the United Nations Charter establishes the International Court of Justice as the principal judicial organ of the United Nations. No nation may bring another before the Court unless the latter nation first consents. That consent can be general and given beforehand or can be given in regard to a specific controversy.

In 1946, the U.S. formally accepted compulsory jurisdiction of the Court, in relation to any other nation that had accepted the same obligation, for all disputes involving interpretation of a treaty, a question of international law, or the breach of an international obligation. In doing so, however, the U.S. reserved the right to refuse to accept the jurisdiction of the International Court in any matter that is "essentially within the domestic jurisdiction of the United States as determined by the United States." On 7 October 1985, the United States announced the termination of its acceptance of compulsory jurisdiction effective 7 April 1986. Of the 157 nations that are parties to the International Court of Justice by virtue of their membership in the United Nations, only 45 accept compulsory jurisdiction of the Court. All but six of those 45 nations have reservations similar to that which had been asserted by the U.S.

4.3 MILITARY MEASURES

The mission of all U.S. military forces is to deter aggression and, should deterrence fail, to engage and defeat the aggressor in armed conflict so as to restore international peace and security. In order to deter aggression, U.S. military forces must be both capable and ready, and must be perceived to be so by potential aggressors. Equally important is the perception of other nations that, should the need arise, the U.S. has the will to use its forces in individual or collective self-defense.

4.3.1 Naval Presence. U.S. naval forces constitute a key and unique element of our national military capability. The mobility of forces operating at sea combined with the versatility of naval force composition — from units operating individually to multi-battle-group formations — provide the National Command Authorities with the flexibility to tailor U.S. military presence as circumstances may require.

Naval presence, whether as a showing of the flag during port visits or as forces deployed in response to contingencies or crises, can be modulated to exert the precise influence best suited to U.S. interests. Depending upon the magnitude and immediacy of the problem, naval forces may be positioned near areas of potential discord as a show of force or as a symbolic expression of support and concern. Unlike land-based forces, naval forces may be so employed without political entanglement and without the necessity of seeking littoral nation consent. So long as they remain in international waters and international airspace (i.e., beyond the territorial sea or archipelagic waters), U.S. warships and military aircraft enjoy the full spectrum of the high seas freedoms of navigation and overflight, including the right to conduct naval maneuvers, subject only to the requirement to observe international standards of safety, to recognize the rights of other ships and aircraft that may be encountered, and to issue NOTAMs and NOTMARs as the circumstances may require. Deployment of a carrier battle group into the vicinity of areas of tension and augmentation of U.S. naval forces to deter interference with U.S. commercial shipping in an area of armed conflict provide graphic illustrations of the use of U.S. naval forces in peacetime to deter violations of international law and to protect U.S. flag shipping.

4.3.2 The Right of Self-Defense. The Charter of the United Nations recognizes that all nations enjoy the inherent right of individual and collective self-defense against armed attack. U.S. doctrine on self-defense, set forth in the JCS Peacetime Rules of Engagement for U.S. Forces, provides that the use of force in self-defense against armed attack, or the threat of imminent armed attack, rests upon two elements:

1. Necessity — The requirement that a use of force be in response to a hostile act or hostile intent.

2. Proportionality — The requirement that the use of force be in all circumstances limited in intensity, duration, and scope to that which is reasonably required to counter the attack or threat of attack and to ensure the continued safety of U.S. forces.

Customary international law has long recognized that there are circumstances during time of peace when nations must resort to the use of armed force to protect their national interests against unlawful or otherwise hostile actions by other nations. A number of legal concepts have evolved over the years to sanction the limited use of armed forces in such circumstances (e.g., intervention, embargo, maritime quarantine). To the extent that such concepts have continuing validity under the Charter of the United Nations, they are premised on the broader principle of self-defense.

The concept of maritime quarantine provides a case in point. Maritime quarantine was first invoked by the United States as a means of interdicting the flow of Soviet strategic missiles into Cuba in 1962. That action involved a limited coercive measure on the high seas applicable only to ships carrying offensive weaponry to Cuba and utilized the least possible military force to achieve that purpose. That action, formally ratified by the Organization of American States (OAS), has been widely approved as a legitimate exercise of the inherent right of individual and collective self-defense recognized in Article 51 of the United Nations Charter.

4.3.2.1 Anticipatory Self-Defense. Included within the inherent right of self-defense is the right of a nation (and its armed forces) to protect itself from imminent attack. International law recognizes that it would be contrary to the purposes of the United Nations Charter if a threatened nation were required to absorb an aggressor's initial and potentially crippling first strike before taking those military measures necessary to thwart an imminent attack. Anticipatory self-defense involves the use of armed force where there is a clear necessity that is instant, overwhelming, and leaving no reasonable choice of peaceful means.

4.3.2.2 JCS Peacetime Rules of Engagement (ROE). The JCS Peacetime Rules of Engagement for U.S. Forces are the primary means by which competent military authority in peacetime authorizes commanders to take those actions necessary for the self-defense of the forces they command, the self-defense of the nation and its citizens, and the protection of national assets worldwide. Although they do not, and cannot cover all possible situations that may be encountered by the naval commander at sea, the JCS Peacetime ROE provide definitive guidance for U.S. military commanders for the use

of armed force in self-defense commensurate with international law and U.S. national security objectives. A principal tenet of those ROE is the responsibility of the commander to take all necessary and appropriate action for his unit's self-defense. Subject to that overriding responsibility, the full range of options are reserved to the National Command Authorities to determine the response that will be made to hostile acts and demonstrations of hostile intent. As noted in the preceding paragraphs of this chapter, those options may involve nonmilitary as well as military measures.

4.4 INTERCEPTION OF INTRUDING AIRCRAFT

All nations have complete and exclusive sovereignty over their national airspace, i.e., the airspace above their land territory, internal waters, archipelagic waters (if any), and territorial seas (see paragraph 1.8). With the exception of transit overflight of international straits and archipelagic sea lanes (see paragraphs 2.3.3 and 2.3.4.1), and assistance entry to assist those in danger of being lost at sea (see paragraph 2.3.2.5), authorization must be obtained for any intrusion by a foreign aircraft (military or civil) into national airspace (see paragraph 2.5). That authorization may be flight specific, as in the case of diplomatic clearance for the visit of a military aircraft, or general, as in the case of commercial air navigation pursuant to the 1944 Convention on International Civil Aviation (the "Chicago Convention").

Customary international law provides that a foreign aircraft entering national airspace without permission due to distress (e.g., air hijacking) or navigational error may be required to comply with orders to turn back or to land. In this connection the Chicago Convention has been amended to provide:

1. That all nations must refrain from the use of weapons against civil aircraft, and, in the case of the interception of intruding civil aircraft, that the lives of persons on board and the safety of the aircraft must not be endangered. (This provision does not, however, detract from the right of self-defense recognized under Article 51 of the United Nations Charter.)

2. That all nations have the right to require intruding aircraft to land at some designated airfield and to resort to appropriate means consistent with international law to require intruding aircraft to desist from activities in violation of the Convention.

3. That all intruding civil aircraft must comply with the orders given to them and that all nations must enact national laws making such compliance by their civil aircraft mandatory.

4. That all nations shall prohibit the deliberate use of their civil aircraft for purposes (such as intelligence collection) inconsistent with the Convention.

The amendment was approved unanimously on 10 May 1984 and will come into force upon ratification by 102 of ICAO's members in respect of those nations which have ratified it. The Convention, by its terms, does not apply to intruding military aircraft. The U.S. takes the position that customary international law establishes similar standards of reasonableness and proportionality with respect to military aircraft that stray into national airspace through navigational error or that are in distress.

Part II
Law of Naval Warfare

Chapter 5—Principles and Sources of the Law of Armed Conflict

Chapter 6—Adherence and Enforcement

Chapter 7—The Law of Neutrality

Chapter 8—The Law of Naval Targeting

Chapter 9—Conventional Weapons and Weapons Systems

Chapter 10—Nuclear, Chemical, and Biological Weapons

Chapter 11—Noncombatant Persons

Chapter 12—Deception During Armed Conflict

Chapter 5
Principles and Sources of the Law of Armed Conflict

5.1 WAR AND THE LAW

Article 2 of the United Nations Charter requires all nations to settle their international disputes by peaceful means and to refrain from the threat or use of force against the territorial integrity or political independence of other nations. The United Nations Charter prohibits resort to war except as an enforcement action taken by or on behalf of the United Nations (as in the Korean conflict) or as a measure of individual or collective self-defense. It is important to distinguish between resort to war, or armed conflict, and the conduct of armed conflict. Whether or not resort to armed conflict in a particular circumstance is prohibited by the United Nations Charter (and therefore unlawful), the manner in which that armed conflict is conducted continues to be regulated by the law of armed conflict. (For purposes of this publication, the term "law of armed conflict" is synonymous with "law of war.")

5.2 GENERAL PRINCIPLES OF THE LAW OF ARMED CONFLICT

The law of armed conflict seeks to prevent unnecessary suffering and destruction by controlling and mitigating the harmful effects of hostilities through minimum standards of protection to be accorded to "combatants" and to "noncombatants." To that end, the law of armed conflict provides that:

1. Only that degree and kind of force, not otherwise prohibited by the law of armed conflict, required for the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources may be applied.

2. The employment of any kind or degree of force not required for the purpose of the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources, is prohibited.

3. Dishonorable (treacherous) means, dishonorable expedients, and dishonorable conduct during armed conflict are forbidden.

The law of armed conflict is not intended to impede the waging of hostilities. Its purpose is to ensure that the violence of hostilities is directed toward the enemy's forces and is not used to cause purposeless, unnecessary human misery and physical destruction. In that sense, the law of armed conflict complements and supports the principles of warfare embodied in the military concepts of objective, mass, economy of force, surprise, and security. Together, the law of armed conflict and the principles of warfare underscore the importance of concentrating forces against critical military targets while avoiding the expenditure of personnel and resources against persons, places, and things that are militarily unimportant.

5.3 COMBATANTS AND NONCOMBATANTS

The law of armed conflict is based largely on the distinction to be made between combatants and noncombatants. In accordance with this distinction, the population of a nation engaged in armed conflict is divided into two general classes: armed forces (combatants) and the civilian populace (noncombatants). Each class has specific rights and obligations in time of armed conflict, and no single individual can be simultaneously a combatant and a noncombatant.

The term "noncombatant" is primarily applied to those individuals who do not form a part of the armed forces and who otherwise refrain from the commission or direct support of hostile acts. In this context, noncombatants and, generally, the civilian population are synonymous. The term noncombatants may, however, also embrace certain categories of persons who, although attached to or accompanying the armed forces, enjoy special protected status, such as medical officers, corpsmen, chaplains, and civilian war correspondents. The term is also applied to armed forces personnel who are unable to engage in combat because of wounds, sickness, shipwreck, or capture.

Under the law of armed conflict, noncombatants must be safeguarded against injury not incidental to military operations directed against combatant forces and other military objectives. In particular, it is forbidden to make noncombatants the object of attack.

5.4 SOURCES OF THE LAW OF ARMED CONFLICT

As is the case with international law generally, the principal sources of the law of armed conflict are custom, as reflected in the practice of nations, and international agreements.

5.4.1 Customary Law. The customary international law of armed conflict derives from the practice of military and naval forces in the field, at sea, and in the air during hostilities. When such a practice attains a degree of regularity and is accompanied by the general conviction among nations that behavior in conformity with that practice is obligatory, it can be said to have become a rule of customary law binding upon all nations. It is frequently difficult to determine the precise point in time at which a usage or practice of warfare evolves into a customary rule of law. In a period marked by rapid developments in technology, coupled with the broadening of the spectrum of warfare to encompass insurgencies and state-sponsored terrorism, it is not surprising that nations often disagree as to the precise content of an accepted practice of warfare and to its status as a rule of law. This lack of precision in the definition and interpretation of rules of customary law has been a principal motivation behind efforts to codify the law of armed conflict through written agreements (treaties and conventions.)

5.4.2 International Agreements. International agreements, whether denominated as treaties or conventions, have played a major role in the development of the law of armed conflict. Whether codifying existing rules of customary law or creating new rules to govern future practice, international agreements are a source of the law of armed conflict. Rules of law established through international agreements are ordinarily binding only upon those nations that have ratified or adhered to them. Moreover, rules established through the treaty process are binding only to the extent required by the terms of the treaty itself as limited by the reservations, if any, that have accompanied its ratification or adherence by individual nations. Conversely, to the extent that such rules codify existing customary law or otherwise come, over time, to represent a general consensus among nations of their obligatory nature, they are binding upon party and nonparty nations alike.

Principal among the international agreements reflecting the development and codification of the law of armed conflict are the Hague Regulations of 1907, the Gas Protocol of 1925, the Geneva Conventions of 1949 for the Protection of War Victims, the 1954 Hague Cultural Property Convention, the Biological Weapons Convention of 1972, and the Conventional Weapons Convention of 1980. Whereas the 1949 Geneva Conventions and the 1977 Protocols Additional thereto address, for the most part, the protection of victims of war, the Hague Regulations, the Geneva Gas Protocol, Hague Cultural Property Convention, Biological Weapons Convention and the Conventional Weapons Convention are concerned, primarily, with controlling the means and methods of warfare. The most significant of these

agreements (for purposes of this publication) are listed chronologically as follows:

1. 1907 Hague Convention Respecting the Laws and Customs of War on Land (Hague IV)

2. 1907 Hague Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague V)

3. 1907 Hague Convention Relative to the Laying of Automatic Submarine Contact Mines (Hague VIII)

4. 1907 Hague Convention Concerning Bombardment by Naval Forces in Time of War (Hague IX)

5. 1907 Hague Convention Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War (Hague XI)

6. 1907 Hague Convention Concerning the Rights and Duties of Neutral Powers in Naval War (Hague XIII)*

7. 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare*

8. 1936 London Protocol in Regard to the Operations of Submarines or Other War Vessels with Respect to Merchant Vessels (Part IV of the 1930 London Naval Treaty)

9. 1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*

10. 1949 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea

11. 1949 Geneva Convention (III) relative to the Treatment of Prisoners of War

12. 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War*

13. 1954 Hague Cultural Property Convention

14. 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction

15. 1977 Protocol Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I)*

16. 1977 Protocol Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II)*

17. 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects.

An asterisk (*) indicates that signature or ratification of the United States was subject to one or more reservations or understandings. The United States is a signatory and party to all of the foregoing conventions and protocols, except it has not ratified and, therefore, is not a state party to, numbers 13 and 15 to 17. The United States has decided not to ratify Additional Protocol I.

5.5 RULES OF ENGAGEMENT

U.S. rules of engagement are the means by which the National Command Authorities (NCA) and the U.S. military chain of command authorize subordinate commanders to employ military force. Rules of engagement delineate the circumstances and limitations under which U.S. naval, ground, and air forces will initiate and/or continue combat engagement with enemy forces. At the national level, wartime rules of engagement are promulgated by the NCA, through the Joint Chiefs of Staff, to unified and specified commanders to guide them in the employment of their forces toward the achievement of broad national objectives. At the tactical level, wartime rules of engagement are task-oriented and frequently mission-oriented. At all levels, U.S. wartime rules of engagement are influenced by, and are consistent with, the law of armed conflict. The law of armed conflict provides the general legal framework within which U.S. rules of engagement during hostilities are formulated. Because rules of engagement also reflect operational, political, and diplomatic factors, they often restrict combat operations far more than do the requirements of international law.

5.5.1 Peacetime and Wartime Rules of Engagement Distinguished. Chapter 4 addresses the JCS Peacetime Rules of Engagement for U.S. Forces and notes that they provide the authority for and limitations on actions taken in self-defense during peacetime and periods short of prolonged armed conflict, for the defense of U.S forces, the self-defense of the nation and its citizens, and the protection of U.S. national assets worldwide. Wartime rules of engagement, on the other hand, reaffirm the right and responsibility of the operational commander generally to seek out, engage, and destroy enemy forces consistent with national objectives, strategy, and the law of armed conflict.

Chapter 6
Adherence and Enforcement

6.1 ADHERENCE TO THE LAW OF ARMED CONFLICT

Nations adhere to the law of armed conflict not only because they are legally obliged to do so but for the very practical reason that it is in the best interest of belligerents to be governed by consistent and mutually acceptable rules of conduct. The law of armed conflict is effective to the extent that it is obeyed by the belligerents. Occasional violations do not substantially affect the validity of a rule of law, provided routine compliance, observance, and enforcement continue to be the norm. However, repeated violations not responded to by protests, reprisals, or other enforcement actions may, over time, indicate that a particular rule of warfare is no longer regarded by belligerents as valid.

6.1.1 Adherence by the United States. Pursuant to the Constitution of the United States, treaties to which the U.S is a party constitute a part of the "supreme law of the land" with a force equal to that of law enacted by the Congress. Moreover, the Supreme Court of the United States has consistently ruled that where there is no treaty and no controlling executive, legislative, or judicial precedent to the contrary, customary international law and the common law are fundamental elements of U.S. national law. The law of armed conflict is, therefore, binding upon the United States, its citizens, and its armed forces. (See DOD Dir. 5100.77.)

6.1.2 Department of the Navy Policy. SECNAVINST 3300.1A states that the Department of the Navy will comply with the law of armed conflict in the conduct of military operations and related activities in armed conflicts. Article 0605, U.S. Navy Regulations, 1973, provides that:

> *At all times a commander shall observe, and require his command to observe, the principles of international law. Where necessary to fulfillment of this responsibility, a departure from other provisions of Navy Regulations is authorized.*

It is the responsibility of the Chief of Naval Operations and the Commandant of the Marine Corps (see OPNAVINST 3300.52 and MCO 3300.3) to ensure that:

1. The obligations of the United States under the law of armed conflict are observed and enforced by the U.S. Navy and Marine Corps in the conduct of military operations and related activities in armed conflict, regardless of how such conflicts are characterized.

2. Alleged violations of the law of armed conflict, whether committed by or against United States or enemy personnel, are promptly reported, thoroughly investigated, and where appropriate, remedied by corrective action.

3. All service members of the Department of the Navy, commensurate with their duties and responsibilities, receive, through publications, instructions, training programs and exercises, training and education in the law of armed conflict.

Navy and Marine Corps judge advocates responsible for advising operational commanders are specially trained to provide officers in command with advice and assistance in the law of armed conflict on an independent and expeditious basis. The Chief of Naval Operations and the Commandant of the Marine Corps have directed officers in command of the operating forces to ensure that their judge advocates have appropriate clearances and access to information to enable them to carry out that responsibility (see CNO Washington DC message 111021Z Oct 85 and MCO 3300.3).

6.1.3 Command Responsibility. Officers in command are not only responsible for ensuring that they conduct all combat operations in accordance with the law of armed conflict; they are also responsible for the proper performance of their subordinates. While a commander may delegate some or all of his authority, he cannot delegate responsibility for the conduct of the forces he commands. The fact that a commander did not order, authorize, or knowingly acquiesce in a violation of the law of armed conflict by a subordinate will not relieve him of responsibility for its occurrence, if it is established that he failed to exercise properly his command authority or failed otherwise to take reasonable measures to discover and correct violations that may already have occurred.

6.1.4 Individual Responsibility. All members of the naval service have a duty to comply with the law of armed conflict and, to the utmost of their ability and authority, to prevent violations by others. Members of the naval service, like military members of all nations, must obey readily and strictly all lawful orders issued by a superior. Under both international law and U.S. law, an order to commit an obviously criminal act, such as the wanton killing of a noncombatant or the torture of a prisoner, is an unlawful order and will not relieve a subordinate of his responsibility to comply with the law of armed conflict. Only if the unlawfulness of an order is not known by the individual, and he could not reasonably be expected under the circumstances to recognize the order as unlawful, will the defense of obedience of an order protect a subordinate from the consequences of violation of the law of armed conflict.

6.2 ENFORCEMENT OF THE LAW OF ARMED CONFLICT

Various means are available to belligerents under international law for inducing the observance of legitimate warfare. In the event of a clearly established violation of the law of armed conflict, the aggrieved nation may:

1. Publicize the facts with a view toward influencing world public opinion against the offending nation

2. Protest to the offending nation and demand that those responsible be punished and/or that compensation be paid

3. Seek the intervention of a neutral party, particularly with respect to the protection of prisoners of war and other of its nationals that have fallen under the control of the offending nation

4. Execute a reprisal action

5. Punish individual offenders either during the conflict or upon cessation of hostilities.

6.2.1 The Protecting Power. Under the Geneva Conventions of 1949, the treatment of prisoners of war, interned civilians, and the inhabitants of occupied territory is to be monitored by a neutral nation known as the Protecting Power. Due to the difficulty of finding a nation which the opposing belligerents will regard as truly neutral, international humanitarian organizations, such as the International Committee of the Red Cross, have been authorized by the parties to the conflict to perform at least some of the functions of a Protecting Power.

6.2.2 The International Committee of the Red Cross (ICRC). The ICRC is a nongovernmental, humanitarian organization based in Geneva, Switzerland. The ruling body of the ICRC is composed entirely of Swiss citizens and is staffed mainly by Swiss nationals. (The ICRC is distinct from and should not be confused with the various national Red Cross societies such as the American National Red Cross.) Its principal purpose is to provide protection and assistance to the victims of armed conflict. The Geneva Conventions recognize the special status of the ICRC and have assigned specific tasks for it to perform, including visiting and interviewing prisoners of war, providing relief to the civilian population of occupied territories, searching for information concerning missing persons, and offering its "good offices" to facilitate the establishment of hospital and safety zones. Under its governing statute, the ICRC is dedicated to work for the faithful application of the Geneva Conventions, to endeavor to ensure the protection

of military and civilian victims of armed conflict, and to serve as a neutral intermediary between belligerents.

6.2.3 Reprisal. A reprisal is an enforcement measure under the law of armed conflict consisting of an act which would otherwise be unlawful but which is justified as a response to the unlawful acts of an enemy. The sole purpose of a reprisal is to induce the enemy to cease its illegal activity and to comply with the law of armed conflict. Reprisals may be taken against enemy armed forces; enemy civilians, other than those in occupied territory; and enemy property.

6.2.3.1 Requirements for Reprisal. To be valid, a reprisal action must conform to the following criteria:

1. Reprisal must be ordered by the highest authority of the belligerent's government.

2. It must respond to illegal acts of warfare committed by an adversary government, its military commanders, or combatants for which the adversary is responsible. Anticipatory reprisal is not authorized.

3. When circumstances permit, reprisal must be preceded by a demand for redress by the enemy of his unlawful acts.

4. Its purpose must be to cause the enemy to cease its unlawful activity. Therefore, acts taken in reprisal should be brought to the attention of the enemy in order to achieve maximum effectiveness. Reprisal must never be taken for revenge.

5. Reprisal must only be used as a last resort when other enforcement measures have failed or would be of no avail.

6. Each reprisal must be proportional to the original violation.

7. A reprisal action must cease as soon as the enemy is induced to desist from its unlawful activities and to comply with the law of armed conflict.

6.2.3.2 Immunity From Reprisal. Reprisals are forbidden to be taken against:

1. Prisoners of war and interned civilians

2. Wounded, sick, and shipwrecked persons

3. Civilians in occupied territory

4. Hospitals and medical facilities, personnel, and equipment, including hospital ships, medical aircraft, and medical vehicles.

6.2.3.3 Authority to Order Reprisals. The National Command Authorities (NCA) alone may authorize the taking of a reprisal action by U.S. forces. Although reprisal is lawful when the foregoing requirements are met, there is always the risk that it will trigger retaliatory escalation (counter-

reprisals) by the enemy. The United States has historically been reluctant to resort to reprisal for just this reason.

6.2.4 Reciprocity. Some obligations under the law of armed conflict are reciprocal in that they are binding on the parties only so long as both sides continue to comply with them. A major violation by one side will release the other side from all further duty to abide by that obligation. The concept of reciprocity is not applicable to humanitarian rules of law that protect the victims of armed conflict, that is, those persons protected by the 1949 Geneva Conventions. The decision to consider the United States released from a particular obligation following a major violation by the enemy will ordinarily be made by the NCA.

6.2.5 War Crimes Under International Law. For the purposes of this publication, war crimes are defined as those acts which violate the law of armed conflict, that is, the rules established by customary and conventional international law regulating the conduct of warfare and which have been designated as war crimes. Acts constituting war crimes may be committed by the armed forces of a belligerent or by individuals belonging to the civilian population. Belligerents have the obligation under international law to punish their own nationals, whether members of the armed forces or civilians, who commit war crimes. International law also provides that belligerents have the right to punish enemy armed forces personnel and enemy civilians, who fall under their control, for such offenses.

The following acts are representative war crimes:

1. Offenses against prisoners of war, including killing without just cause; torture or inhuman treatment; unhealthy, dangerous, or otherwise prohibited labor; infringement of religious rights; and denial of fair trial for offenses

2. Offenses against civilian inhabitants of occupied territory, including killing without just cause, torture or inhuman treatment, forced labor, deportation, infringement of religious rights, and denial of fair trial for offenses

3. Offenses against the sick and wounded, including killing, wounding, or mistreating enemy forces disabled by sickness or wounds

4. Denial of quarter (i.e., denial of the clemency of not killing a defeated enemy) and offenses against combatants who have laid down their arms and surrendered

5. Offenses against the survivors of ships and aircraft lost at sea, including killing, wounding, or mistreating the shipwrecked; and failing to provide for the safety of survivors as military circumstances permit

6. Wanton destruction of cities, towns, and villages or devastation not justified by the requirements of military operations; and bombardment, the sole purpose of which is to attack and terrorize the civilian population

7. Deliberate attack upon medical facilities, hospital ships, medical aircraft, medical vehicles, or medical personnel

8. Plunder and pillage of public or private property

9. Mutilation or other mistreatment of the dead

10. Employing forbidden arms or ammunition

11. Misuse, abuse, or firing on flags of truce or on the Red Cross device, and similar protective emblems, signs, and signals

12. Treacherous request for quarter (i.e., feigning surrender in order to gain a military advantage).

Chapter 7
The Law of Neutrality

7.1 INTRODUCTION

The law of neutrality defines the legal relationship between nations engaged in an armed conflict (belligerents) and nations seeking to avoid direct involvement in such hostilities (neutrals). The law of neutrality serves to localize war, to limit the conduct of war on both land and sea, and to lessen the impact of war on international commerce.

Developed at a time when nations customarily issued declarations of war before engaging in hostilities, the law of neutrality contemplated that the transition between war and peace would be clear and unambiguous. With the advent of international efforts to abolish "war," coupled with the proliferation of collective security arrangements and the extension of the spectrum of warfare to include insurgencies and counterinsurgencies, armed conflict is now seldom accompanied by formal declarations of war. Consequently, it has become increasingly difficult to determine with precision the point in time when hostilities have become a "war" and to distinguish belligerent nations from those not participating in the conflict. Notwithstanding these uncertainties, the law of neutrality continues to serve an important role in containing the spread of hostilities, in regulating the conduct of belligerents with respect to nations not participating in the conflict, and in reducing the harmful effects of such hostilities on international commerce.

For purposes of this publication, a belligerent nation is defined as a nation engaged in an international armed conflict, whether or not a formal declaration of war has been issued. Conversely, a neutral nation is defined as a nation that has proclaimed its neutrality or has otherwise assumed neutral status with respect to an ongoing conflict.

7.2 NEUTRAL STATUS

Customary international law contemplates that in the absence of an international commitment to the contrary, all nations have the option to

refrain from participation in an armed conflict by declaring or otherwise assuming neutral status. The law of armed conflict reciprocally imposes duties and confers rights upon neutral nations and upon belligerents. The principal right of the neutral nation is that of *inviolability*; its principal duties are those of *abstention* and *impartiality*. Conversely, it is the duty of a belligerent to respect the former and its right to insist upon the latter.

Neutral status, once established, remains in effect unless and until the neutral nation abandons its neutral stance and enters into the conflict or is itself the subject of attack by a belligerent.

7.2.1 Neutrality Under the Charter of the United Nations. The Charter of the United Nations imposes upon its members the obligation to settle international disputes by peaceful means and to refrain from the threat or use of force in their international relations. In the event of a threat to or breach of the peace, the Security Council is empowered to take enforcement action on behalf of all member nations, involving or not involving the use of force, in order to maintain or restore international peace. When called upon by the Security Council to do so, the member nations are obligated to provide assistance to the United Nations in any action it takes and to refrain from aiding any nation against whom such action is directed. Consequently, member nations may be obliged to support a United Nations action with elements of their armed forces, a result incompatible with the abstention requirement of neutral status. Similarly, a member nation may be called upon to provide assistance to the United Nations in an enforcement action not involving its armed forces and thereby assume a partisan posture inconsistent with the impartiality necessary to a valid assertion of neutrality. Should the Security Council determine not to institute an enforcement action, or is unable to do so due to the imposition of a veto by one or more of its permanent members, each United Nations member remains free to assert neutral status.

7.2.2 Neutrality Under Regional and Collective Self-Defense Arrangements. The obligation in the United Nations Charter for member nations to refrain from the threat or use of force is qualified by the right of individual and collective self-defense, which member nations may exercise until such time as the Security Council has taken measures necessary to restore international peace. This inherent right of self-defense may be implemented individually or through regional and collective security arrangements. The possibility of asserting and maintaining neutral status under such arrangements depends upon the extent to which the parties are obligated to provide assistance in a regional action, or in the case of collective self-defense, to come to the aid of a victim of an armed attack. The practical effect of such treaties is to transform the right of the parties to assist one of their number

under attack into a duty to do so. This duty may assume a variety of forms ranging from economic assistance to the commitment of armed forces.

7.3 NEUTRAL TERRITORY

As a general rule of international law, all acts of hostility in neutral territory, including neutral lands, neutral waters, and neutral airspace, are prohibited. A neutral nation has the duty to prevent the use of its territory as a place of sanctuary or a base of operations by belligerent forces of any side. If the neutral nation is unable or unwilling to enforce effectively its right of inviolability, an aggrieved belligerent may resort to acts of hostility in neutral territory against enemy forces, including warships and military aircraft, making unlawful use of that territory. Belligerents are also authorized to act in self-defense when attacked or threatened with attack while in neutral territory or when attacked or threatened from neutral territory.

7.3.1 Neutral Lands. Belligerents are forbidden to move troops or war materials and supplies across neutral land territory. Neutral nations may be required to mobilize sufficient armed forces to ensure fulfillment of their responsibility to prevent belligerent forces from crossing neutral borders. Belligerent troops that enter neutral territory must be disarmed and interned until the end of the armed conflict.

A neutral may authorize passage through its territory of wounded and sick belonging to the armed forces of either side on condition that the vehicles transporting them carry neither combatants nor materials of war. If passage of sick and wounded is permitted, the neutral nation assumes responsibility for providing for their safety and control. Prisoners of war that have escaped their captors and made their way to neutral territory may be either repatriated or left at liberty in the neutral nation, but must not be allowed to take part in belligerent activities while there.

7.3.2 Neutral Ports and Roadsteads. Although neutral nations may, on a nondiscriminatory basis, close their ports and roadsteads to belligerents, they are not obliged to do so. In any event, Hague Convention XIII requires that a 24-hour grace period in which to depart must be provided to belligerent vessels located in neutral ports or roadsteads at the outbreak of armed conflict. Thereafter, belligerent vessels may visit only those neutral ports and roadsteads that the neutral nation may choose to open to them for that purpose. Belligerent vessels, including warships, retain a right of entry in distress whether caused by *force majeure* or damage resulting from enemy action.

7.3.2.1 Limitations on Stay and Departure. In the absence of special provisions to the contrary in the laws or regulations of the neutral nation, belligerent warships are forbidden to remain in a neutral port or roadstead in excess of 24 hours. This restriction does not apply to belligerent vessels devoted exclusively to humanitarian, religious, or nonmilitary scientific purposes. (Vessels engaged in the collection of scientific data of potential military application are not exempt.) Belligerent warships may be permitted by a neutral nation to extend their stay in neutral ports and roadsteads on account of stress of weather or damage involving seaworthiness. It is the duty of the neutral nation to intern a belligerent warship, together with its officers and crew, that will not or cannot depart a neutral port or roadstead where it is not entitled to remain.

Unless the neutral nation has adopted laws or regulations to the contrary, no more than three warships of any one belligerent nation may be present in the same neutral port or roadstead at any one time. When warships of opposing belligerent nations are present in a neutral port or roadstead at the same time, not less than 24 hours must elapse between the departure of the respective enemy vessels. The order of departure is determined by the order of arrival unless an extension of stay has been granted.

7.3.2.2 War Materials, Supplies, Communications, and Repairs. Belligerent warships may not make use of neutral ports or roadsteads to replenish or increase their supplies of war materials or their armaments, or to erect any apparatus for communicating with belligerent forces. Although they may take on food and fuel, the law is unsettled as to the quantities that may be allowed. In practice, it has been left to the neutral nation to determine the conditions for the replenishment and refueling of belligerent warships, subject to the principle of nondiscrimination among belligerents and to the prohibition against the use of neutral territory as a base of operations.

Belligerent warships may carry out such repairs in neutral ports and roadsteads as are absolutely necessary to render them seaworthy. They may not add to or repair weapons systems or enhance any other aspect of their war fighting capability. It is the duty of the neutral nation to decide what repairs are necessary to seaworthiness and to insist that they be accomplished with the least possible delay.

7.3.2.3 Prizes. A prize (i.e., a captured neutral or enemy merchant ship) may only be brought into a neutral port or roadstead because of unseaworthiness, stress of weather, or want of fuel or provisions, and must leave as soon as such circumstances are overcome or cease to prevail. It is the duty of the neutral nation to release a prize, together with its officers

and crew, and to intern the offending belligerent's prize master and prize crew, whenever a prize is unlawfully brought into a neutral port or roadstead or, having entered lawfully, fails to depart as soon as the circumstances which justified its entry no longer pertain.

7.3.3 Neutral Internal Waters. Neutral internal waters encompass those waters of a neutral nation that are landward of the baseline from which the territorial sea is measured. The rules governing neutral ports and roadsteads apply as well to neutral internal waters.

7.3.4 Neutral Territorial Seas. Neutral territorial seas, like neutral territory generally, must not be used by belligerent forces either as a sanctuary from their enemies or as a base of operations. Belligerents are obliged to refrain from all acts of hostility in neutral territorial waters except those necessitated by self-defense or undertaken as self-help enforcement actions against enemy forces that are in violation of the neutral status of those waters when the neutral nation cannot or will not enforce their inviolability.

7.3.4.1 Mere Passage. A neutral nation may, on a nondiscriminatory basis, close its territorial waters, except in international straits, to belligerent vessels. When properly notified of its closure, belligerents are obliged to refrain from entering a neutral territorial sea except to transit through international straits or as necessitated by distress. A neutral nation may, however, allow the "mere passage" of belligerent vessels, including warships and prizes, through its territorial waters. To qualify, such passage must be innocent in nature and, in the absence of special laws or regulations of the neutral nation to the contrary, must not exceed 24 hours in duration. While in neutral territorial waters, a belligerent warship must also refrain from adding to or repairing its armaments or replenishing its war materials. Although the general practice has been to close neutral territorial waters to belligerent submarines, a neutral nation may elect to allow mere passage of submarines, either surfaced or submerged. Neutral nations customarily authorize passage through their territorial sea of ships carrying the wounded, sick, and shipwrecked, whether or not those waters are otherwise closed to belligerent vessels.

7.3.4.2 The 12-Nautical Mile Territorial Sea. When the law of neutrality was codified in the Hague Conventions of 1907, the 3-nautical mile territorial sea was the accepted norm, aviation was in its infancy, and the submarine had not yet proven itself as a significant weapons platform. The rules of neutrality applicable to territorial waters were designed primarily to regulate the conduct of surface warships in a narrow band of water off neutral coasts. The 1982 Law of the Sea Convention provides that coastal nations may

lawfully extend the breadth of claimed territorial waters to 12 nautical miles. Because of provisions concerning seabed mining (Part XI) the U.S. has not signed the Convention; nonetheless the U.S. is committed to recognizing the rights of nations in the waters off their coasts, as reflected in the Convention. The U.S. claims a 12-nautical mile territorial sea and recognizes the right of all coastal and island nations to do likewise.

In the context of a universally recognized 3-nautical mile territorial sea, the rights and duties of neutrals and belligerents in neutral territorial waters were balanced and equitable. Although extension of the breadth of the territorial sea from 3 to 12 nautical miles removes over 3,000,000 square miles of ocean from the arena in which belligerent forces may conduct offensive combat operations and significantly complicates neutral nation enforcement of the inviolability of its neutral waters, the 12-nautical mile territorial sea is not, in and of itself, incompatible with the law of neutrality. Belligerents continue to be obliged to refrain from acts of hostility in neutral waters and remain forbidden to use the territorial sea of a neutral nation as a place of sanctuary from their enemies or as a base of operations. Should belligerent forces violate the neutrality of those waters and the neutral nation demonstrate an inability or unwillingness to detect and expel the offender, the other belligerent retains the right to undertake such self-help enforcement actions as are necessary to assure compliance by his adversary with the law of neutrality.

7.3.5 Neutral Straits. Customary international law as reflected in the 1982 Law of the Sea Convention provides that belligerent and neutral surface ships, submarines, and aircraft have a right of transit passage through, over, and under all straits used for international navigation. Neutral nations cannot suspend, hamper, or otherwise impede this right of transit passage through international straits. Belligerent forces transiting through international straits overlapped by neutral waters must proceed without delay, must refrain from the threat or use of force against the neutral nation, and must otherwise refrain from acts of hostility and other activities not incident to their transit. Belligerent forces in transit may, however, take defensive measures consistent with their security, including the launching and recovery of aircraft, screen formation steaming, and acoustic and electronic surveillance. Belligerent forces may not use neutral straits as a place of sanctuary nor a base of operations, and belligerent warships may not exercise the belligerent right of visit and search in those waters. (Note: The Turkish Straits are governed by special rules articulated in the Montreux Convention of 1936, which limit the number and type of warships which may use the Straits, both in times of peace and during armed conflict.)

7.3.6 Neutral Archipelagic Waters. The United States recognizes the right of qualifying island nations to establish archipelagic baselines enclosing archipelagic waters, provided the baselines are drawn in conformity with the 1982 LOS Convention and the U.S. and other nations are accorded their full rights under international law, including the law of armed conflict, in those waters. The balance of neutral and belligerent rights and duties with respect to neutral waters is, however, at its most unsettled in the context of archipelagic waters.

Belligerent forces must refrain from acts of hostility in neutral archipelagic waters and from using them as a sanctuary or a base of operations. Belligerent ships or aircraft, including submarines, surface warships, and military aircraft, retain the right of unimpeded archipelagic sea lanes passage through, over, and under neutral archipelagic sea lanes. Belligerent forces exercising the right of archipelagic sea lanes passage may engage in those activities that are incident to their normal mode of continuous and expeditious passage and are consistent with their security. Visit and search is not authorized in neutral archipelagic waters.

A neutral nation may close its archipelagic waters (other than archipelagic sea lanes whether designated or those routes normally used for international navigation or overflight) to the mere passage of belligerent ships but it is not obliged to do so. The neutral archipelagic nation has an affirmative duty to police its archipelagic waters to ensure that the inviolability of its neutral waters is respected. If a neutral nation is unable or unwilling effectively to detect and expel belligerent forces unlawfully present in its archipelagic waters, the opposing belligerent may undertake such self-help enforcement actions as may be necessary to terminate the violation of neutrality. Such self-help enforcement may include surface, subsurface, and air penetration of archipelagic waters and airspace and the use of proportional force as necessary.

7.3.7 Neutral Airspace. Neutral territory extends to the airspace over a neutral nation's lands, internal waters, archipelagic waters (if any), and territorial sea. Belligerent military aircraft are forbidden to enter neutral airspace with the following exceptions:

1. The airspace above neutral international straits and archipelagic sea lanes remains open at all times to belligerent aircraft, including armed military aircraft, engaged in transit or archipelagic sea lanes passage. Such passage must be continuous and expeditious and must be undertaken in the normal mode of flight of the aircraft involved. Belligerent aircraft must refrain from acts of hostility while in transit but may engage in activities that are consistent with their security and the security of accompanying surface and subsurface forces.

2. Unarmed military aircraft may enter neutral airspace under such conditions and circumstances as the neutral nation may wish to impose impartially on the belligerents. Should such unarmed aircraft penetrate neutral airspace without permission, or otherwise fail to abide by the entry conditions imposed upon them by the neutral nations, they may be interned together with their crews.

3. Medical aircraft may overfly neutral territory, may land therein in case of necessity, and may use neutral airfield facilities as ports of call, subject to such restrictions and regulations as the neutral nation may see fit to apply equally to all belligerents.

4. Belligerent aircraft in evident distress are permitted to enter neutral airspace and to land in neutral territory under such safeguards as the neutral nation may wish to impose. The neutral nation may require such aircraft to land, may intern both aircraft and crew, or may impose nondiscriminatory conditions upon their stay or release.

7.3.7.1 Neutral Duties In Neutral Airspace. Neutral nations have an affirmative duty to prevent violation of neutral airspace by belligerent aircraft, to compel offending aircraft to land, and to intern both aircraft and crew. Should a neutral nation be unable or unwilling to prevent the unlawful entry or use of its airspace by belligerent aircraft, belligerent forces of the other side may undertake such self-help enforcement measures as the circumstances may require.

7.4 NEUTRAL COMMERCE

A principal purpose of the law of neutrality is the regulation of belligerent activities with respect to neutral commerce. For purposes of this publication, neutral commerce comprises all commerce between one neutral nation and another not involving materials of war or armaments destined for a belligerent nation, and all commerce between a neutral nation and a belligerent that does not involve the carriage of contraband or otherwise sustain the belligerent's war-fighting capability. Neutral merchant vessels and nonpublic civil aircraft engaged in legitimate neutral commerce are subject to visit and search, but may not be captured or destroyed by belligerent forces.

The law of neutrality does not prohibit neutral nations from engaging in commerce with belligerent nations; however, a neutral government cannot supply materials of war or armaments to a belligerent without violating its neutral duties of abstention and impartiality and risking loss of its neutral status. Although a neutral may forbid its citizens from carrying on non-neutral commerce with belligerent nations, it is not obliged to do so. In effect, the law establishes a balance of interests that protects neutral commerce from unreasonable interference on the one hand and the right of belligerents to interdict the flow of war materials to the enemy on the other.

7.4.1 Contraband. Contraband consists of goods which are destined for the enemy of a belligerent and which may be susceptible to use in armed conflict. Traditionally, contraband has been divided into two categories: absolute and conditional. Absolute contraband consisted of goods whose character made it obvious that they were destined for use in armed conflict, such as munitions, weapons, uniforms, and the like. Conditional contraband were goods equally susceptible to either peaceful or warlike purposes, such as foodstuffs, construction materials, and fuel. Belligerents often declared contraband lists at the initiation of hostilities to notify neutral nations of the type of goods considered to be absolute or conditional contraband as well as those not considered to be contraband at all, i.e., exempt or "free goods." The precise nature of a belligerent's contraband list varied according to the circumstances of the conflict.

The practice of belligerents in World War II has cast doubt on the relevance, if not the validity, of the traditional distinction between absolute and conditional contraband. Because of the involvement of virtually the entire population in support of the war effort, the belligerents of both sides during the Second World War tended to exercise governmental control over all imports. Consequently, it became increasingly difficult to draw a meaningful distinction between goods destined for an enemy government and its armed forces and goods destined for consumption by the civilian populace. As a result, belligerents considered goods as absolute contraband which in earlier conflicts were considered to be conditional contraband.

7.4.1.1 Enemy Destination. To the extent that the distinction between absolute and conditional contraband has continuing relevance, it is with respect to the rules pertaining to the presumption of ultimate enemy destination. Goods consisting of absolute contraband are liable to capture at any place beyond neutral territory, if their destination is the territory belonging to or occupied by the enemy. It is immaterial whether the carriage of absolute contraband is direct, involves transshipment, or requires overland transport. When absolute contraband is involved, a destination of enemy owned or occupied territory may be presumed when:

1. The neutral vessel is to call at an enemy port before arriving at a neutral port for which the goods are documented.

2. The goods are documented to a neutral port serving as a port of transit to an enemy, even though they are consigned to a neutral.

3. The goods are consigned "to order" or to an unnamed consignee, but are destined for a neutral nation in the vicinity of enemy territory.

These presumptions of enemy destination of absolute contraband render the offending cargo liable to seizure by a belligerent from the time the neutral

merchant vessel leaves its home or other neutral territory until it arrives again in neutral territory. Although conditional contraband is also liable to capture if ultimately destined for the use of an enemy government or its armed forces, enemy destination of conditional contraband must be factually established and cannot be presumed.

7.4.1.2 Exemptions to Contraband. Certain goods are exempt from capture as contraband even though destined for enemy territory. Among them are:

1. Exempt or "free goods," i.e., goods not susceptible for use in armed conflict.

2. Articles intended exclusively for the treatment of wounded and sick members of the armed forces and for prevention of disease.

3. Medical and hospital stores, religious objects, clothing, bedding, essential foodstuffs, and means of shelter for the civilian population in general, and women and children in particular, provided there is not serious reason to believe that such goods will be diverted to other purpose, or that a definite military advantage would accrue to the enemy by their substitution for enemy goods that would thereby become available for military purposes.

4. Items destined for prisoners of war, including individual parcels and collective relief shipments containing food, clothing, medical supplies, religious objects, and educational, cultural, and athletic articles.

5. Goods otherwise specifically exempted from capture by international convention or by special arrangement between belligerents.

It is customary for neutral nations to provide belligerents of both sides with information regarding the nature, timing, and route of shipments of goods constituting exceptions to contraband and to obtain approval for their safe conduct and entry into belligerent owned or occupied territory.

7.4.2 Certificate of Noncontraband Carriage. A certificate of noncontraband carriage is a document issued by a belligerent consular or other designated official to a neutral vessel (navicert) or neutral aircraft (aircert) certifying that the cargo being carried has been examined, usually at the initial place of departure, and has been found to be free of contraband. The purpose of such a navicert or aircert is to facilitate belligerent control of contraband goods with minimal interference and delay of neutral commerce. The certificate is not a guarantee that the vessel or aircraft will not be subject to visit and search or that cargo will not be seized. (Changed circumstances, such as a change in status of the neutral vessel, between the time of issuance of the certificate and the time of interception at sea may cause it to be invalidated.) Conversely, absence of a navicert or aircert is not, in itself, a valid ground for seizure of cargo. Navicerts and aircerts issued by one

belligerent have no effect on the visit and search rights of a belligerent of the opposing side.

7.5 ACQUIRING ENEMY CHARACTER

All vessels operating under an enemy flag, and all aircraft bearing enemy markings, possess enemy character. However, the fact that a merchant ship flies a neutral flag, or that an aircraft bears neutral markings, does not necessarily establish neutral character. Any vessel or aircraft, other than a warship or military aircraft, owned or controlled by a belligerent possesses enemy character, regardless of whether it is operating under a neutral flag or bears neutral markings. Vessels and aircraft acquiring enemy character may be treated by an opposing belligerent as if they are enemy vessels and aircraft. (Paragraphs 8.2.1 and 8.2.2 set forth the actions that may be taken against enemy vessels and aircraft.)

7.5.1 Acquiring the Character of an Enemy Warship or Military Aircraft. Neutral vessels and aircraft, other than warships and military aircraft, acquire enemy character and may be treated by a belligerent as enemy warships and military aircraft when engaged in the following acts:

1. Taking a direct part in the hostilities on the side of the enemy
2. Acting in any capacity as a naval or military auxiliary to the enemy's armed forces.

(Paragraph 8.2.1 describes the actions that may be taken against enemy warships and military aircraft.)

7.5.2 Acquiring the Character of an Enemy Merchant Vessel or Aircraft. Neutral vessels and aircraft, other than warships and military aircraft, acquire enemy character and may be treated by a belligerent as enemy merchant vessels or aircraft when engaged in the following acts:

1. Operating directly under enemy control, orders, charter, employment, or direction
2. Resisting an attempt to establish identity, including visit and search.

(Paragraph 8.2.2 describes the actions that may be taken against enemy merchant ships and civilian aircraft.)

7.6 VISIT AND SEARCH

Visit and search is the means by which a belligerent warship or belligerent military aircraft may determine the true character (enemy or neutral) of merchant ships encountered outside neutral territory, the nature (contraband or exempt "free goods") of their cargo, the manner (innocent or hostile) of

their employment, and other facts bearing on their relation to the armed conflict. Warships are not subject to visit and search. The prohibition against visit and search in neutral territory extends to international straits overlapped by neutral territorial seas and archipelagic sea lanes. Neutral vessels engaged in government noncommercial service may not be subjected to visit and search. Neutral merchant vessels under convoy of neutral warships of the same nationality are also exempt from visit and search, although the convoy commander may be required to provide in writing to the commanding officer of an intercepting belligerent warship information as to the character of the vessels and of their cargoes which could otherwise be obtained by visit and search. Should it be determined by the convoy commander that a vessel under his charge possesses enemy character or carries contraband cargo, he is obliged to withdraw his protection of the offending vessel, making it liable to visit and search, and possible capture, by the belligerent warship.

7.6.1 Procedure for Visit and Search. *In the absence of specific rules of engagement or other special instructions* issued by the operational chain of command during a period of armed conflict, the following procedure should be carried out by U.S. Navy warships exercising the belligerent right of visit and search:

1. Visit and search should be exercised with all possible tact and consideration.

2. Before summoning a vessel to lie to, the warship should hoist its national flag. The summons is made by firing a blank charge, by international flag signal (SN or SQ), or by other recognized means. The summoned vessel, if a neutral merchant ship, is bound to stop, lie to, display her colors, and not resist. (If the summoned vessel is an enemy ship, it is not so bound and may legally resist, even by force, but thereby assumes all risk of resulting damage or destruction.)

3. If the summoned vessel takes flight, she may be pursued and brought to by forcible measures if necessary.

4. When a summoned vessel has been brought to, the warship should send a boat with an officer to conduct the visit and search. If practicable, a second officer should accompany the officer charged with the examination. The officer(s) and boat crew may be armed at the discretion of the commanding officer.

5. If visit and search at sea is deemed hazardous or impracticable, the neutral vessel may be escorted by the summoning of another U.S. Navy warship or by a U.S. military aircraft to the nearest place (outside neutral territory) where the visit and search may be conveniently and safely conducted. The neutral vessel is not obliged to lower her flag (she has not been captured) but must proceed according to the orders of the escorting warship or aircraft.

6. The boarding officer should first examine the ship's papers to ascertain her character, ports of departure and destination, nature of cargo, manner of employment, and other facts deemed pertinent. Papers to be examined will ordinarily include a certificate of national registry, crew list, passenger list, logbook, bill of health clearances, charter party (if chartered), invoices or manifests of cargo, bills of lading, and on occasion,

a consular declaration or other certificate of noncontraband carriage certifying the innocence of the cargo.

7. Regularity of papers and evidence of innocence of cargo, employment, or destination furnished by them are not necessarily conclusive, and, should doubt exist, the ship's company may be questioned and the ship and cargo searched.

8. Unless military security prohibits, the boarding officer will record the facts concerning the visit and search in the logbook of the visited ship, including the date and position of the interception. The entry should be authenticated by the signature and rank of the boarding officer, but neither the name of the visiting warship nor the identity of her commanding officer should be disclosed.

7.6.2 Visit and Search by Military Aircraft. Although there is a right of visit and search by military aircraft, there is no established international practice as to how that right is to be exercised. Ordinarily, visit and search of a vessel by an aircraft is accomplished by directing and escorting the vessel to the vicinity of a belligerent warship, which will carry out the visit and search, or to a belligerent port. Visit and search of an aircraft by an aircraft may be accomplished by directing the aircraft to proceed under escort to the nearest convenient belligerent landing area.

7.7 BLOCKADE

7.7.1 General. Blockade is a belligerent operation to prevent vessels and/or aircraft of all nations, enemy as well as neutral, from entering or exiting specified ports, airfields, or coastal areas belonging to, occupied by, or under the control of an enemy nation. A belligerent's purpose in establishing a blockade is to deny the enemy the use of enemy and neutral vessels or aircraft to transport personnel and goods to or from enemy territory. Unlike the belligerent right of visit and search, which is designed to interdict the flow of contraband goods into enemy territory and which may be exercised anywhere outside of neutral territory, the belligerent right of blockade is intended to prevent vessels and aircraft from crossing an established and publicized cordon separating the enemy from international waters and/or airspace.

7.7.2 Traditional Rules. In order to be valid under the traditional rules of international law, a blockade must conform to the following criteria.

7.7.2.1 Establishment. A blockade must be established by the government of the belligerent nation. This is usually accomplished by a declaration of the belligerent government or by the commander of the blockading force acting on behalf of his government. The declaration should include, as a minimum, the date the blockade is to begin, its geographic limits, and the

grace period granted neutral vessels and aircraft to leave the area to be blockaded.

7.7.2.2 Notification. It is customary for the belligerent nation establishing the blockade to notify all affected nations of its imposition. Because knowledge of the existence of a blockade is an essential element of the offenses of breach and attempted breach of blockade (see 7.7.4), neutral vessels and aircraft are always entitled to notification. The commander of the blockading forces will usually also notify local authorities in the blockaded area. The form of the notification is not material so long as it is effective.

7.7.2.3 Effectiveness. In order to be valid, a blockade must be effective. To be effective, it must be maintained by a surface, air, or subsurface force or other mechanism that is sufficient to render ingress or egress of the blockaded area dangerous. The requirement of effectiveness does not preclude temporary absence of the blockading force, if such absence is due to stress of weather or to some other reason connected with the blockade (e.g., pursuit of a blockade runner). Nor does effectiveness require that every possible avenue of approach to the blockaded area be covered.

7.7.2.4 Impartiality. A blockade must be applied impartially to the vessels and aircraft of all nations. Discrimination by the blockading belligerent in favor of or against the vessels and aircraft of particular nations, including those of its own or those of an Allied nation, renders the blockade legally invalid.

7.7.2.5 Limitations. A blockade must not bar access to or departure from neutral ports and coasts. Neutral nations retain the right to engage in neutral commerce that does not involve trade or communications originating in or destined for the blockaded area.

7.7.3 Special Entry and Exit Authorization. Although neutral warships and military aircraft enjoy no positive right of access to blockaded areas, the belligerent imposing the blockade may authorize their entry and exit. Such special authorization may be made subject to such conditions as the blockading force considers to be necessary and expedient. Neutral vessels and aircraft in evident distress should be authorized entry into a blockaded area, and subsequently authorized to depart, under conditions prescribed by the commander of the blockading force. Similarly, neutral vessels and aircraft engaged in the carriage of qualifying relief supplies for the civilian population and the sick and wounded should be authorized to pass through the blockade cordon.

7.7.4 Breach and Attempted Breach of Blockade. Breach of blockade is the passage of a vessel or aircraft through a blockade without special entry or exit authorization from the blockading belligerent. Knowledge of the existence of the blockade is essential to the offenses of breach of blockade and attempted breach of blockade. Knowledge may be presumed once a blockade has been declared and appropriate notification provided to affected governments. Attempted breach of blockade occurs from the time a vessel or aircraft leaves a port or airfield with the intention of evading the blockade. It is immaterial that the vessel or aircraft is at the time of interception bound for neutral territory, if its ultimate destination is the blockaded area. There is a presumption of attempted breach of blockade where vessels or aircraft are bound for a neutral port or airfield serving as a point of transit to the blockaded area. Capture of such vessels is discussed in paragraph 7.9.

7.7.5 Contemporary Practice. The traditional rules of blockade, as set out above, are for the most part customary in nature, having derived their definitive form through the practice of maritime powers during the nineteenth century. The rules reflect a balance between the right of a belligerent possessing effective command of the sea to close enemy ports and coastlines to international commerce, and the right of neutral nations to carry out neutral commerce with the least possible interference from belligerent forces. The law of blockade is, therefore, premised on a system of controls designed to effect only a limited interference with neutral trade. This was traditionally accomplished by a relatively "close-in" cordon of surface warships stationed in the immediate vicinity of the blockaded area.

The increasing emphasis in modern warfare on seeking to isolate completely the enemy from outside assistance and resources by targeting enemy merchant vessels as well as warships, and on interdicting all neutral commerce with the enemy, is not furthered substantially by blockades established in strict conformity with the traditional rules. In World Wars I and II, belligerents of both sides resorted to methods which, although frequently referred to as measures of blockade, cannot be reconciled with the traditional concept of the close-in blockade. The so-called long-distance blockade of both World Wars departed materially from those traditional rules and were justified instead upon the belligerent right of reprisal against illegal acts of warfare on the part of the enemy. Moreover, recent developments in weapons systems and platforms, particularly nuclear-powered submarines, supersonic aircraft, and cruise missiles, have rendered the in-shore blockade exceedingly difficult, if not impossible, to maintain during anything other than a local or limited armed conflict.

Notwithstanding this trend in belligerent practices (during general war) away from the establishment of blockades that conform to the traditional rules, blockade continues to be a useful means to regulate the competing interests of belligerents and neutrals in more limited armed conflict. The experience of the United States during the Vietnam Conflict provides a case in point. The blockade of Haiphong and other North Vietnamese ports, accomplished by the emplacement of mines, was undertaken in conformity with traditional criteria of establishment, notification, effectiveness, limitation, and impartiality.

7.8 BELLIGERENT CONTROL OF THE IMMEDIATE AREA OF NAVAL OPERATIONS

Within the immediate area or vicinity of naval operations, a belligerent may establish special restrictions upon the activities of neutral vessels and aircraft and may prohibit altogether such vessels and aircraft from entering the area. The immediate area or vicinity of naval operations is that area within which hostilities are taking place or belligerent forces are actually operating. A belligerent may not, however, purport to deny access to neutral nations, or to close an international strait to neutral shipping, pursuant to this authority unless another route of similar convenience remains open to neutral traffic.

7.8.1 Belligerent Control of Neutral Communications at Sea. The commanding officer of a belligerent warship may exercise control over the communication of any neutral merchant vessel or civil aircraft whose presence in the immediate area of naval operations might otherwise endanger or jeopardize those operations. A neutral merchant ship or civil aircraft within that area that fails to conform to a belligerent's directions concerning communications may thereby assume enemy character and risk being fired upon or captured. Legitimate distress communications should be permitted to the extent that the success of the operation is not prejudiced thereby. Any transmission to an opposing belligerent of information concerning military operations or military forces is inconsistent with the neutral duties of abstention and impartiality and renders the neutral vessel or aircraft liable to capture or destruction.

7.9 CAPTURE OF NEUTRAL VESSELS AND AIRCRAFT

Neutral merchant vessels and civil aircraft are liable to capture by belligerent warships and military aircraft if engaged in any of the following activities:

1. Avoiding an attempt to establish identity

2. Resisting visit and search

3. Carrying contraband

4. Breaking or attempting to break blockade

5. Presenting irregular or fraudulent papers; lacking necessary papers; or destroying, defacing, or concealing papers

6. Violating regulations established by a belligerent within the immediate area of naval operations

7. Carrying personnel in the military or public service of the enemy

8. Communicating information in the interest of the enemy.

Captured vessels and aircraft are sent to a port or airfield under belligerent jurisdiction as prize for adjudication by a prize court. Ordinarily, a belligerent warship will place a prize master and prize crew on board a captured vessel for this purpose. Should that be impracticable, the prize may be escorted into port by a belligerent warship or military aircraft. In the latter circumstances, the prize must obey the instructions of its escort or risk forcible measures. (Article 630.23 of OPNAVINST 3120.32B, Standard Organization and Regulations of the U.S. Navy, sets forth the duties and responsibilities of commanding officers and prize masters concerning captured vessels.)

Neutral vessels or aircraft attempting to resist proper capture lay themselves open to forcible measures by belligerent warships and military aircraft and assume all risk of resulting damage.

7.9.1 Destruction of Neutral Prizes. Every reasonable effort should be made to avoid destruction of captured neutral vessels and aircraft. A capturing officer, therefore, should not order such destruction without being entirely satisfied that the prize can neither be sent into a belligerent port or airfield nor, in his opinion, properly be released. Should it become necessary that the prize be destroyed, the capturing officer must provide for the safety of the passengers and crew. In that event, all documents and papers relating to the prize should be saved. If practicable the personal effects of passengers should also be safeguarded.

7.9.2 Personnel of Captured Neutral Vessels and Aircraft. The officers and crews of captured neutral merchant vessels and civil aircraft who are nationals of a neutral nation do not become prisoners of war and must be repatriated as soon as circumstances reasonably permit. This rule applies equally to the officers and crews of neutral vessels and aircraft which have assumed the character of enemy merchant vessels or aircraft by operating

under enemy control or resisting visit and search. If, however, the neutral vessels or aircraft had taken a direct part in the hostilities on the side of the enemy or had served in any way as a naval or military auxiliary for the enemy, it thereby assumed the character of an enemy warship or military aircraft and, upon capture, its officers and crew may be interned as prisoners of war.

Enemy nationals found on board neutral merchant vessels and civil aircraft as passengers who are actually embodied in the military forces of the enemy, who are en route to serve in the enemy's armed forces, who are employed in the public service of the enemy, or who may be engaged in or suspected of service in the interests of the enemy may be made prisoners of war. All such enemy nationals may be removed from the neutral vessel or aircraft whether or not there is reason for its capture as a neutral prize. Enemy nationals not falling within any of these categories are not subject to capture or detention.

7.10 BELLIGERENT PERSONNEL INTERNED BY A NEUTRAL GOVERNMENT

International law recognizes that neutral territory, being outside the region of war, offers a place of asylum to members of belligerent forces and as a general rule requires the neutral government concerned to prevent the return of such persons to their own forces. The neutral nation must accord equal treatment to the personnel of all the belligerent forces.

With respect to aircrews of belligerent aircraft that land in neutral territory, whether intentionally or inadvertently, the neutral nation should usually intern them.

Chapter 8
The Law of Naval Targeting

8.1 PRINCIPLES OF LAWFUL TARGETING

The law of naval targeting is premised upon the three fundamental principles of the law of armed conflict:

1. The right of belligerents to adopt means of injuring the enemy is not unlimited.

2. It is prohibited to launch attacks against the civilian population as such.

3. Distinctions must be made between combatants and noncombatants, to the effect that noncombatants be spared as much as possible.

These legal principles governing targeting generally parallel the military principles of objective, mass and economy of force. The law requires that only objectives of military importance be attacked but permits the use of sufficient mass to destroy those objectives. At the same time, unnecessary (and wasteful) collateral destruction must be avoided to the extent possible and, consistent with mission accomplishment and the security of the force, unnecessary human suffering prevented. The law of naval targeting, therefore, requires that all reasonable precautions must be taken to ensure that only military objectives are targeted so that civilians and civilian objects are spared as much as possible from the ravages of war.

8.1.1 Military Objective. Only combatants and other military objectives may be attacked. Military objectives are those objects which, by their nature, location, purpose, or use, effectively contribute to the enemy's war-fighting or war-sustaining capability *and* whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack. Military advantage may involve a variety of considerations including the security of the attacking force.

Proper targets for naval attack include such military objectives as enemy warships and military aircraft, naval and military auxiliaries, naval and military bases ashore, warship construction and repair facilities, military depots and warehouses, POL storage areas, docks, port facilities, harbors,

bridges, airfields, military vehicles, armor, artillery, ammunition stores, troop concentrations and embarkation points, lines of communication and other objects used to conduct or support military operations. Proper naval targets also include geographic targets, such as a mountain pass, and buildings and facilities that provide administrative and personnel support for military and naval operations such as barracks, communications and command and control facilities, headquarters buildings, mess halls, and training areas.

Proper economic targets for naval attack include enemy lines of communication used for military purposes, rail yards, bridges, rolling stock, barges, lighters, industrial installations producing war-fighting products, and power generation plants. Economic targets of the enemy that indirectly but effectively support and sustain the enemy's war-fighting capability may also be attacked.

8.1.2 Civilian Objects. Civilian objects may not be made the object of attack. Civilian objects consist of all civilian property and activities other than those used to support or sustain the enemy's war-fighting capability. Attacks on installations such as dikes and dams are prohibited if their breach or destruction would result in the loss of civilian lives disproportionate to the military advantage to be gained. (See also paragraph 8.5.1.7.) Similarly, the intentional destruction of food, crops, livestock, drinking water, and other objects indispensable to the survival of the civilian population, for the specific purpose of denying the civilian population of their use, is prohibited.

8.1.2.1 Incidental Injury and Collateral Damage. It is not unlawful to cause incidental injury or death to civilians, or collateral damage to civilian objects, during an attack upon a legitimate military objective. Incidental injury or collateral damage should not, however, be excessive in light of the military advantage anticipated by the attack. Naval commanders must take all practicable precautions, taking into account military and humanitarian considerations, to keep civilian casualties and damage to the absolute minimum consistent with mission accomplishment and the security of the force. In each instance, the commander must determine whether incidental injuries and collateral damage would be excessive, on the basis of an honest and reasonable estimate of the facts available to him. Similarly, the commander must decide, in light of all the facts known or reasonably available to him, including the need to conserve resources and complete the mission successfully, whether to adopt an alternative method of attack, if reasonably available, to reduce civilian casualties and damage.

8.2 SURFACE WARFARE

As a general rule, surface warships may employ their conventional weapons systems to attack, capture, or destroy enemy surface, subsurface, and air targets at sea wherever located beyond neutral territory. (Special circumstances in which enemy warships and military aircraft may be attacked in neutral territory are discussed in Chapter 7 The Law of Neutrality.) The law of armed conflict pertaining to surface warfare is concerned primarily with the protection of noncombatants through rules establishing lawful targets of attack. For that purpose, all enemy vessels and aircraft fall into one of three general classes, i.e., warships and military aircraft, merchant vessels and civilian aircraft, and exempt vessels and aircraft.

8.2.1 Enemy Warships and Military Aircraft. Enemy warships and military aircraft, including naval and military auxiliaries, are subject to attack, destruction, or capture anywhere beyond neutral territory. It is forbidden, however, to refuse quarter to any enemy who has surrendered in good faith. Once an enemy warship has clearly indicated a readiness to surrender by hauling down her flag, by hoisting a white flag, by surfacing (in the case of submarines), by stopping engines and responding to the attacker's signals, or by taking to lifeboats, the attack must be discontinued. Disabled enemy aircraft in air combat are frequently pursued to destruction because of the impossibility of verifying their true status and inability to enforce surrender. Although disabled, the aircraft may or may not have lost its means of combat. Moreover, it still may represent a valuable military asset. Accordingly, surrender in air combat is not generally offered. However, if surrender is offered in good faith so that circumstances do not preclude enforcement, it must be respected. Officers and crews of captured or destroyed enemy warships and military aircraft should be made prisoners of war. (See Chapter 11, Noncombatant Persons.) As far as military exigencies permit, after each engagement all possible measures should be taken without delay to search for and collect the shipwrecked, wounded, and sick and to recover the dead.

Prize procedure is not used for captured enemy warships and naval auxiliaries because their ownership vests immediately in the captor's government by the fact of capture.

8.2.2 Enemy Merchant Vessels and Civilian Aircraft

8.2.2.1 Capture. Enemy merchant vessels and civil aircraft may be captured at sea wherever located beyond neutral territory. Prior exercise of visit and search is not required, provided positive determination of enemy status can

be made by other means. When military circumstances preclude sending or taking in such vessel or aircraft for adjudication as an enemy prize, it may be destroyed after all possible measures are taken to provide for the safety of passengers and crew. Documents and papers relating to the prize should be safeguarded and, if practicable, the personal effects of passengers should be saved. Every case of destruction of a captured enemy prize should be reported promptly to higher command.

Officers and crews of captured enemy merchant ships and civilian aircraft may be made prisoners of war. Other enemy nationals on board such captured ships and aircraft as private passengers are subject to the discipline of the captor. Nationals of a neutral nation on board captured enemy merchant vessels and civilian aircraft are not made prisoners of war unless they have participated in acts of hostility or resistance against the captor.

8.2.2.2 Destruction. Prior to World War II, both customary and conventional international law prohibited the destruction of enemy merchant vessels by surface warships unless the safety of passengers and crew was first assured. This requirement did not apply, however, if the merchant vessel engaged in active resistance to capture or refused to stop when ordered to do so. Specifically, the London Protocol of 1936, to which almost all of the belligerents of World War II expressly acceded, provides in part that:

> *In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to taken them on board.*

During World War II, the practice of attacking and sinking enemy merchant vessels by surface warships, submarines, and military aircraft without prior warning and without first providing for the safety of passengers and crew was widespread on both sides. Rationale for these apparent departures from the agreed rules of the 1936 London Protocol varied. Initially, such acts were justified as reprisals against illegal acts of the enemy. As the war progressed, however, merchant vessels were regularly armed and convoyed, participated in intelligence collection, and were otherwise incorporated directly or indirectly into the enemy's war-fighting/war-sustaining effort. Consequently, enemy merchant vessels were widely regarded as legitimate military targets subject to destruction on sight.

Although the rules of the 1936 London Protocol continue to apply to surface warships, they must be interpreted in light of current technology, including

satellite communications, over-the-horizon weapons, and antiship missile systems, as well as the customary practice of belligerents that evolved during and following World War II. Accordingly, enemy merchant vessels may be attacked and destroyed by surface warships, either with or without prior warning, in any of the following circumstances:

1. Actively resisting visit and search or capture

2. Refusing to stop upon being duly summoned to do so

3. Sailing under convoy of enemy warships or enemy military aircraft

4. If armed

5. If incorporated into, or assisting in any way, the intelligence system of the enemy's armed forces

6. If acting in any capacity as a naval or military auxiliary to an enemy's armed forces

7. If integrated into the enemy's war-fighting/war-sustaining effort and compliance with the rules of the 1936 London Protocol would, under the circumstances of the specific encounter, subject the surface warship to imminent danger or would otherwise preclude mission accomplishment.

Rules relating to surrendering and to the search for and collection of the shipwrecked, wounded, and sick and the recovery of the dead, set forth in paragraph 8.2.1, apply also to enemy merchant vessels and civilian aircraft that may become subject to attack and destruction.

8.2.3 Enemy Vessels and Aircraft Exempt from Destruction or Capture. Certain classes of enemy vessels and aircraft are exempt under the law of naval warfare from capture or destruction provided they are innocently employed in their exempt category. These specially protected vessels and aircraft must not take part in the hostilities, must not hamper the movement of combatants, must submit to identification and inspection procedures, and may be ordered out of harm's way. These specifically exempt vessels and aircraft include:

1. Vessels and aircraft designated for and engaged in the exchange of prisoners (cartel vessels).

2. Properly designated and marked hospital ships, medical transports, and known medical aircraft.

3. Vessels charged with religious, non-military scientific, or philanthropic missions. (Vessels engaged in the collection of scientific data of potential military application are not exempt.)

4. Vessels and aircraft guaranteed safe conduct by prior arrangement between the belligerents.

5. Small coastal (not deep-sea) fishing vessels and small boats engaged in local coastal trade. Such vessels and boats are subject to the regulations of a belligerent naval commander operating in the area.

6. Civilian passenger vessels at sea and civil airliners in flight are subject to capture but are exempt from destruction. Although enemy lines of communication are generally legitimate military targets in modern warfare, civilian passenger vessels at sea, and civil airliners in flight, are exempt from destruction unless at the time of the encounter they are being utilized by the enemy for a military purpose (e.g., transporting troops or military cargo) or refuse to respond to the directions of the intercepting warship or military aircraft. Such passenger vessels in port and airliners on the ground are not protected from destruction.

If an enemy vessel or aircraft assists the enemy's military effort in any manner, it may be captured or destroyed. Refusal to provide immediate identification upon demand is ordinarily sufficient legal justification for capture or destruction. All nations have a legal obligation not to take advantage of the harmless character of exempt vessels and aircraft in order to use them for military purposes while preserving their innocent appearance. For example, the utilization by North Vietnam of innocent appearing small coastal fishing boats as logistic craft in support of military operations during the Vietnam Conflict was in violation of this obligation.

8.3 SUBMARINE WARFARE

The law of armed conflict imposes essentially the same rules on submarines as apply to surface warships. Submarines may employ their conventional weapons systems to attack, capture, or destroy enemy surface or subsurface targets wherever located beyond neutral territory. Enemy warships and naval auxiliaries may be attacked and destroyed without warning. Rules applicable to surface warships regarding enemy ships that have surrendered in good faith, or that have indicated clearly their intention to do so, apply as well to submarines. To the extent that military exigencies permit, submarines are also required to search for and collect the shipwrecked, wounded, and sick, following an engagement. If such humanitarian efforts would subject the submarine to undue additional hazard or prevent it from accomplishing its military mission, the location of possible survivors should be passed at the first opportunity to a surface ship, aircraft, or shore facility capable of rendering assistance.

8.3.1 Interdiction of Enemy Merchant Shipping by Submarines. The conventional rules of naval warfare pertaining to submarine operations against enemy merchant shipping constitute one of the least developed areas of the law of armed conflict. Although the submarine's effectiveness as a weapons system is dependent upon its capability to remain submerged (and

thereby undetected) and despite its vulnerability when surfaced, the London Protocol of 1936 (paragraph 8.2.2.2) makes no distinction between submarines and surface warships with respect to the interdiction of enemy merchant shipping. The London Protocol specifies that except in case of persistent refusal to stop when ordered to do so, or in the event of active resistance to capture, a warship "whether surface vessel or submarine" may not destroy an enemy merchant vessel "without having first placed passengers, crew and ship's papers in a place of safety." The impracticality of imposing upon submarines the same targeting constraints as burden surface warships is reflected in the practice of belligerents of both sides during World War II when submarines regularly attacked and destroyed without warning enemy merchant shipping. As in the case of such attacks by surface warships, this practice was justified either as reprisal in response to unlawful acts of the enemy or as a necessary consequence of the arming of merchant vessels, of convoying, and of the general integration of merchant shipping into the enemy's war-fighting/war-sustaining effort.

The United States considers that the London Protocol of 1936, coupled with the customary practice of belligerents during and following World War II, imposes upon submarines the responsibility to provide for the safety of passengers, crew, and ship's papers before destruction of an enemy merchant vessel unless:

1. The enemy merchant vessel refuses to stop when summoned to do so or otherwise resists capture.

2. The enemy merchant vessel is sailing under armed convoy or is itself armed.

3. The enemy merchant vessel is assisting in any way the enemy's military intelligence system or is acting in any capacity as a naval auxiliary to the enemy's armed forces.

4. The enemy has integrated its merchant shipping into its war-fighting/war-sustaining effort and compliance with this rule would, under the circumstances of the specific encounter, subject the submarine to imminent danger or would otherwise preclude mission accomplishment.

8.3.2 Enemy Vessels Exempt From Submarine Interdiction. Rules of naval warfare regarding enemy vessels that are exempt from capture and/or destruction by surface warships apply as well to submarines. (See paragraph 8.2.3.)

8.4 AIR WARFARE AT SEA

Military aircraft may employ conventional weapons to attack and destroy warships and military aircraft, including naval and military auxiliaries, anywhere at sea beyond neutral territory. Enemy merchant vessels and civil

aircraft may be attacked and destroyed by military aircraft only under the following circumstances:

1. When refusing to comply with directions from the intercepting aircraft

2. When assisting in any way the enemy's military intelligence system or acting in any capacity as auxiliaries to the enemy's armed forces

3. When sailing under convoy of enemy warships, escorted by enemy military aircraft, or armed

4. When otherwise integrated into the enemy's war-fighting or war-sustaining effort.

To the extent that military exigencies permit, military aircraft are required to search for the shipwrecked, wounded, and sick following an engagement at sea. The location of possible survivors should be passed at the first opportunity to a surface vessel, aircraft, or shore facility capable of rendering assistance.

Historically, instances of surrender of enemy vessels to aircraft are rare. If, however, an enemy has surrendered in good faith, under circumstances that do not preclude enforcement of the surrender, or has clearly indicated an intention to do so, the enemy must not be attacked.

8.4.1 Enemy Vessels and Aircraft Exempt From Aircraft Interdiction. Rules of naval warfare regarding enemy vessels and aircraft that are exempt from capture and/or destruction by surface warships apply as well to military aircraft. (See paragraph 8.2.3.)

8.5 BOMBARDMENT

For purposes of this publication, the term "bombardment" refers to naval and air bombardment of enemy targets on land with conventional weapons, including naval guns, rockets and missiles, and air-delivered ordnance. Bombardment by land forces is not included in this text. Engagement of targets at sea is discussed in paragraphs 8.2 to 8.4.

8.5.1 General Rules. The United States is a party to Hague Convention No. IX (1907) Respecting Bombardment by Naval Forces in Time of War. That convention establishes the general rules of naval bombardment of land targets. These rules have been further developed by customary practice in World Wars I and II, Vietnam, and the Falklands. Underlying these rules are the broad principles of the law of armed conflict that belligerents are forbidden to make noncombatants the target of direct attack, that superfluous injury and unnecessary suffering are to be avoided, and that wanton

destruction of property is prohibited. To give effect to these humanitarian concepts, the following general rules governing bombardment must be observed.

8.5.1.1 Destruction of Civilian Habitation. The wanton or deliberate destruction of areas of concentrated civilian habitation, including cities, towns, and villages, is prohibited. A military objective within a city, town, or village may, however, be bombarded if required for the submission of the enemy with the minimum expenditure of time, life, and physical resources.

8.5.1.2 Terrorization. Bombardment for the sole purpose of terrorizing the civilian population is prohibited.

8.5.1.3 Undefended Cities or Agreed Demilitarized Zones. Belligerents are forbidden to bombard a city or town that is undefended and that is open to immediate entry by their own or allied forces. A city or town behind enemy lines is, by definition, neither undefended nor open and military targets therein may be destroyed by bombardment. An agreed demilitarized zone is also exempt from bombardment.

8.5.1.4 Medical Facilities. Medical establishments and units (both mobile and fixed), medical vehicles, and medical equipment and stores may not be deliberately bombarded. Belligerents are required to ensure that such medical facilities are, as far as possible, situated in such a manner that attacks against military targets in the vicinity do not imperil their safety. If medical facilities are used for military purposes inconsistent with their humanitarian mission, and if appropriate warnings that continuation of such use will result in loss of protected status are unheeded, the facilities become subject to attack. The distinctive medical emblem, a red cross or red crescent, should be clearly displayed on medical establishments and units in order to identify them as entitled to protected status. Any object recognized as being a medical facility may not be attacked whether or not marked with a protective symbol.

8.5.1.5 Special Hospital Zones and Neutralized Zones. When established by agreement between the belligerents, hospital zones and neutralized zones are immune from bombardment in accordance with the terms of the agreement concerned.

8.5.1.6 Religious, Cultural, and Charitable Buildings and Monuments. Buildings devoted to religion, the arts, or charitable purposes; historic monuments; and other religious, cultural, or charitable facilities should not be bombarded, provided they are not used for military purposes. It is the responsibility of the local inhabitants to ensure that such buildings and

monuments are clearly marked with the distinctive emblem of such sites — a rectangle divided diagonally into two triangular halves, the upper portion black and the lower white. (See paragraph 11.10.)

8.5.1.7 Dams and Dikes. Dams, dikes, levees, and other installations, which if breached or destroyed would release flood waters or other forces dangerous to the civilian population, should not be bombarded if the potential for harm to noncombatants would be excessive in relation to the military advantage to be gained by bombardment. Conversely, installations containing such dangerous forces that are used by belligerents to shield or support military activities are not so protected.

8.5.2 Warning Before Bombardment. Where the military situation permits, commanders should make every reasonable effort to warn the civilian population located in close proximity to a military objective targeted for bombardment. Warnings may be general rather than specific warnings lest the bombarding force or the success of its mission be placed in jeopardy.

Chapter 9
Conventional Weapons and Weapons Systems

9.1 INTRODUCTION

This chapter addresses the legal considerations pertaining to the use of conventional weapons and weapons systems. It is a fundamental tenet of the law of armed conflict that the right of nations engaged in armed conflict to choose methods or means of warfare is not unlimited. This rule of law is expressed in the concept that the employment of weapons, material, and methods of warfare that are designed to cause superfluous injury or unnecessary suffering is prohibited. A corollary concept is that weapons which by their nature are incapable of being directed specifically against military objects, and therefore that put noncombatants at equivalent risk, are forbidden due to their indiscriminate effect. A few weapons, such as poisoned projectiles, are unlawful, no matter how employed. Others may be rendered unlawful by alteration, such as by coating ammunition with a poison. Still others may be unlawfully employed, such as setting armed contact naval mines adrift so as to endanger innocent as well as enemy shipping. And finally, any weapon may be set to an unlawful purpose when it is directed against noncombatants and other protected persons and property.

Of particular interest to naval officers are law of armed conflict rules pertaining to naval mines, torpedoes, cluster and fragmentation weapons, incendiary weapons, and over-the-horizon and beyond-visual-range weapons systems. Each of these weapons or systems will be assessed in terms of their potential for causing unnecessary suffering and superfluous injury or indiscriminate effect.

9.1.1 Unnecessary Suffering. Antipersonnel weapons are designed to kill or disable enemy combatants and are lawful notwithstanding the death, pain, and suffering they inflict. Weapons that are designed to cause unnecessary suffering or superfluous injury are, however, prohibited because the degree of pain or injury, or the certainty of death, they produce is needlessly or clearly disproportionate to the military advantage to be gained by their use. Poisoned

projectiles and dum-dum bullets fall into this category, because there is little military advantage to be gained by ensuring the death of wounded personnel through poisoning or the expanding effect of soft-nosed or unjacketed lead ammunition. Similarly, using materials that are difficult to detect or undetectable by field x-ray equipment, such as glass or clear plastic, as the injuring mechanism in military ammunition is prohibited, since they unnecessarily inhibit the treatment of wounds. Use of such materials as incidental components in ammunition, e.g., as wadding or packing, is not prohibited.

9.1.2 Indiscriminate Effect. Weapons that are incapable of being controlled so as to be directed against a military target are forbidden as being indiscriminate in their effect. Drifting armed contact mines and long-range unguided missiles (such as the German V-1 and V-2 rockets of World War II) fall into this category. A weapon is not indiscriminate simply because it may cause incidental or collateral civilian casualties, provided such casualties are not foreseeably excessive in light of the expected military advantage to be gained. An artillery round that is capable of being directed with a reasonable degree of accuracy at a military target is not an indiscriminate weapon simply because it may miss its mark or inflict collateral damage. Conversely, uncontrolled balloonborne bombs, such as those released by the Japanese against the west coast of the United States and Canada in World War II lack that capability of direction and are, therefore, unlawful.

9.2 NAVAL MINES

Naval mines have been effectively employed for area denial, coastal and harbor defense, antisurface and antisubmarine warfare, and blockade. Naval mines are lawful weapons, but their potential for indiscriminate effects has led to specific regulation of their deployment and employment by the law of armed conflict. The extensive and uncontrolled use of naval mines by both sides in the Russo-Japanese War of 1904–5 inflicted great damage on innocent shipping both during and long after that conflict, and led to Hague Convention No. VIII of 1907 Relative to the Laying of Automatic Submarine Contact Mines. The purpose of the Hague rules was to ensure to the extent practicable the safety of peaceful shipping by requiring that naval mines be so constructed as to become harmless should they break loose from their moorings or otherwise cease to be under the affirmative control of the belligerents that laid them. The Hague rules also require that shipowners be warned of the presence of mines as soon as military exigencies permit.

Although the Hague provisions date from 1907, they remain the only codified rules specifically addressing the emplacement of conventional naval

mines. Technological developments have created weapons systems obviously not contemplated by the drafters of these rules. Nonetheless, the general principles of law embodied in the 1907 Convention continue to serve as a guide to lawful employment of naval mines.

9.2.1 Current Technology. Modern naval mines are versatile and variable weapons. They range from relatively unsophisticated and indiscriminate contact mines to highly technical, target-selective devices with state-of-the-art homing guidance capability. Today's mines may be armed and/or detonated by physical contact, acoustic or magnetic signature, or sensitivity to changes in water pressure generated by passing vessels and may be emplaced by air, surface, or subsurface platforms. For purposes of this publication, naval mines are classified as armed or controlled mines. Armed mines are either emplaced with all safety devices withdrawn, or are armed following emplacement, so as to detonate when preset parameters (if any) are satisfied. Controlled mines have no destructive capability until affirmatively activated by some form of controlled arming order (whereupon they become armed mines).

9.2.2 Peacetime Mining. Consistent with the safety of its own citizenry, a nation may emplace both armed and controlled mines in its own internal waters at any time with or without notification. A nation may also mine its own archipelagic waters and territorial sea during peacetime when deemed necessary for national security purposes. If armed mines are emplaced in archipelagic waters or the territorial sea, appropriate international notification of the existence and location of such mines is required. Because the right of innocent passage can be suspended only temporarily, armed mines must be removed or rendered harmless as soon as the security threat that prompted their emplacement has terminated. Emplacement of controlled mines in a nation's own archipelagic waters or territorial sea is not subject to such notification or removal requirements.

Naval mines may not be emplaced in the internal, territorial, or archipelagic waters of another nation in peacetime without that nation's consent. Controlled mines, however, may be emplaced in international waters beyond the territorial sea subject only to the requirement that they do not unreasonably interfere with other lawful uses of the oceans. The determination of what constitutes an "unreasonable interference" involves a balancing of a number of factors including the rationale for their emplacement (i.e., the self-defense requirements of the emplacing nation), the extent of the area to be mined, the hazard (if any) to other lawful ocean uses, and the duration of their emplacement. Because controlled mines do

not constitute a hazard to navigation, international notice of their emplacement is not required.

Armed mines may not be emplaced in international waters prior to the outbreak of armed conflict, except under the most demanding requirements of individual or collective self-defense. Should armed mines be emplaced in international waters under such circumstances, prior notification of their location must be provided and the anticipated date of their complete removal must be clearly stated. The nation emplacing armed mines in international waters during peacetime also assumes responsibility to maintain on-scene presence in the area sufficient to ensure that appropriate warning is provided to ships approaching the danger area. All armed mines must be expeditiously removed or rendered harmless when the imminent danger that prompted their emplacement has passed.

9.2.3 Mining During Armed Conflict. Naval mines may be lawfully employed by parties to an armed conflict subject to the following restrictions:

1. International notification of the location of emplaced armed mines must be made as soon as military exigencies permit.

2. Mines may not be emplaced by belligerents in neutral waters.

3. Anchored mines must become harmless as soon as they have broken their moorings.

4. Unanchored mines not otherwise affixed or imbedded in the bottom must become harmless within an hour after loss of control over them.

5. The location of minefields must be carefully recorded to ensure accurate notification and to facilitate subsequent removal and/or deactivation.

6. Naval mines may be employed to channelize neutral shipping, but not in a manner to impede the transit passage of international straits or archipelagic sea lanes passage of archipelagic waters by such shipping.

7. Naval mines may not be emplaced off the coasts and ports of the enemy with the sole objective of intercepting commercial shipping, but may otherwise be employed in the strategic blockade of enemy ports, coasts, and waterways.

8. Mining of areas of indefinite extent in international waters is prohibited. Reasonably limited barred areas may be established by naval mines, provided neutral shipping retains an alternate route around or through such an area with reasonable assurance of safety.

9.3 TORPEDOES

Torpedoes which do not become harmless when they have missed their mark constitute a danger to innocent shipping and are therefore unlawful. All U.S. Navy torpedoes are designed to sink to the bottom and become harmless upon completion of their propulsion run.

9.4 CLUSTER AND FRAGMENTATION WEAPONS

Cluster and fragmentation weapons are projectiles, bombs, missiles, and grenades that are designed to fragment prior to or upon detonation, thereby expanding the radius of their lethality and destructiveness. These weapons are lawful when used against combatants. When used in proximity to noncombatants or civilian objects, their employment should be carefully monitored to ensure that collateral civilian casualties or damage are not excessive in relation to the legitimate military advantage sought.

9.5 DELAYED ACTION DEVICES

Booby traps and other delayed action devices are not unlawful, provided they are not designed or employed to cause unnecessary suffering. Devices that are designed to simulate items likely to attract and injure noncombatants (e.g., toys and trinkets) are prohibited. Attaching booby traps to protected persons or objects, such as the wounded and sick, dead bodies, or medical facilities and supplies, is similarly prohibited.

9.6 INCENDIARY WEAPONS

Incendiary devices, such as tracer ammunition, thermite bombs, flame throwers, napalm, and other incendiary weapons and agents, are lawful weapons. Where incendiary devices are the weapons of choice, they should be employed in a manner that minimizes uncontrolled or indiscriminate effects on the civilian population consistent with mission accomplishment and force security.

9.7 OVER-THE-HORIZON WEAPONS SYSTEMS

Missiles and projectiles dependent upon over-the-horizon or beyond-visual-range guidance systems are lawful, provided they are equipped with sensors, or are employed in conjunction with external sources of targeting data, that are sufficient to ensure effective target discrimination.

Chapter 10
Nuclear, Chemical, and Biological Weapons

10.1 INTRODUCTION

Nuclear, chemical, and biological weapons present special law-of-armed-conflict problems due to their potential for indiscriminate effects and unnecessary suffering. This chapter addresses legal considerations pertaining to the development, possession, deployment and employment of these weapons.

10.2 NUCLEAR WEAPONS

10.2.1 General. There are no rules of customary or conventional international law prohibiting nations from employing nuclear weapons in armed conflict. In the absence of such an express prohibition, the use of nuclear weapons against enemy combatants and other military objectives is not unlawful. Employment of nuclear weapons is, however, subject to the following principles: the right of the parties to the conflict to adopt means of injuring the enemy is not unlimited; it is prohibited to launch attacks against the civilian population as such; and the distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible. The decision to authorize employment of nuclear weapons must emanate from the highest level of government. For the United States, that authority resides solely in the President.

10.2.2 Treaty Obligations. Nuclear weapons are regulated by a number of arms control agreements restricting their development, deployment, and use. Some of these agreements (e.g., the 1963 Nuclear Test Ban Treaty) may not apply during time of war.

10.2.2.1 Seabed Arms Control Treaty. This multilateral convention prohibits emplacement of nuclear weapons on the seabed and the ocean floor beyond a 12-nautical mile coastal zone measured from the baseline of the

territorial sea. The prohibition extends to structures, launching installations, and other facilities specifically designed for storing, testing, or using nuclear weapons. This treaty prohibits emplacement of nuclear mines on the seabed and ocean floor or in the subsoil thereof. It does not, however, prohibit the use of nuclear weapons in the water column that are not so affixed to the seabed (e.g., nuclear armed depth charges and torpedoes).

10.2.2.2 Outer Space Treaty. This multilateral convention prohibits the placement, installation, or stationing of nuclear weapons or other weapons of mass destruction in earth orbit, on the moon or other celestial bodies, or in outer space. Suborbital missile systems are not included in this prohibition.

10.2.2.3 Antarctic Treaty. The Antarctic Treaty is a multilateral convention designed to ensure that Antarctica, defined to include the area south of 60° South Latitude, is used for peaceful purposes only. The treaty prohibits in Antarctica "any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons." Nuclear explosions are specifically prohibited. Ships and aircraft at points of discharging personnel or cargoes in Antarctica are subject to international inspection. Ships and aircraft operating on and over the high seas within the treaty area are not subject to these prohibitions.

10.2.2.4 Treaty of Tlatelolco. This treaty is an agreement among the Latin American countries not to introduce nuclear weapons into Latin America. The treaty does not, however, prohibit Latin American nations from authorizing nuclear armed ships and aircraft of nonmember nations to visit their ports and airfields or to transit through their territorial seas or airspace. The treaty is not applicable to the power system of any vessel.

Protocol I to the treaty is an agreement among non-Latin American nations that exercise international responsibility over territory within the treaty area to abide by the denuclearization provisions of the treaty. The Netherlands, the U.K., and the U.S. are parties to Protocol I. U.S. territory within the Latin America treaty area includes Guantanamo Bay in Cuba, the Virgin Islands, and Puerto Rico. Consequently the U.S. cannot maintain nuclear weapons in those areas. Protocol I nations retain, however, competence to authorize transits and port visits by ships and aircraft of their own or other armed forces in their Protocol I territories, irrespective of armament or cargo.

Protocol II is an agreement among nuclear-armed nations (China, France, the U.S.S.R., the U.K., and the U.S.) to respect the denuclearization aims of the treaty, to not use nuclear weapons against Latin American nations party

to the treaty, and to refrain from contributing to a violation of the treaty by the Latin American nations.

10.2.2.5 Nuclear Test Ban Treaty. This multilateral treaty prohibits the testing of nuclear weapons in the atmosphere, in outer space, and underwater. Over 100 nations are party to the treaty, including the U.S.S.R., the U.K., and the U.S. (France and China are not parties.) Underground testing of nuclear weapons is not included within the ban.

10.2.2.6 Non-Proliferation Treaty. This multilateral treaty obligates nuclear-weapons-nations to refrain from transferring nuclear weapons or nuclear weapons technology to non-nuclear-weapons nations, and obligates non-nuclear-weapons nations to refrain from accepting such weapons from nuclear-weapons-nations or from manufacturing nuclear weapons themselves. The treaty does not apply in time of war.

10.2.2.7 Bilateral Nuclear Arms Control Agreements. The United States and the U.S.S.R. have concluded a number of bilateral agreements designed to restrain the growth of nuclear warheads and launchers and to reduce the risk of miscalculation that could trigger a nuclear exchange. Among these agreements are the Hotline Agreements of 1963 and 1971, the Accidents Measures Agreement of 1971, the 1973 Agreement on Prevention of Nuclear War, the Anti-Ballistic Missile Treaty of 1972 and its Protocol of 1974, the Threshold Test Ban Treaty of 1974, the 1976 Treaty on Peaceful Nuclear Explosions, the SALT Agreements of 1972 and 1977 (SALT I—Interim Agreement has expired; SALT II was never ratified), and the INF Treaty of 1988.

10.3 CHEMICAL WEAPONS

Both customary and conventional international law prohibit the "first use" of lethal chemical weapons in armed conflict.

10.3.1 Treaty Obligations. The United States is a party to the 1925 Geneva Gas Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare ("the 1925 Gas Protocol"). All other NATO nations and all Warsaw Pact nations are also parties. The United States, the U.S.S.R., and most other NATO and Warsaw Pact nations conditioned their adherence to the 1925 Gas Protocol on the understanding that the prohibition against use of chemical weapons ceases to be binding with respect to nations whose armed forces, or the armed forces of their allies, fail to respect that prohibition. This, in effect, restricts the

prohibition to the "first use" of such munitions, with parties to the Protocol reserving the right to employ chemical weapons for retaliatory purposes.

The 1925 Gas Protocol does not prohibit the development, production, testing, or stockpiling of chemical weapons, nor does it prevent equipping and training military forces for chemical warfare.

10.3.2 United States Policy Regarding Chemical Weapons. The United States categorizes chemical weapons under three headings of lethal and incapacitating agents, riot control agents, and herbicidal agents. United States policy with respect to these three categories is summarized in the following paragraphs.

10.3.2.1 Lethal and Incapacitating Agents. The United States considers the prohibition against first use of lethal and incapacitating chemical weapons to be part of customary international law and, therefore, binding on all nations whether or not they are parties to the 1925 Gas Protocol. Lethal chemical agents are those asphyxiating, poisonous, or other gases; analogous liquids; or materials that cause immediate death. Incapacitating agents are those producing symptoms that persist for appreciable periods of time after exposure to the agent has terminated. Because the 1925 Gas Protocol effectively prohibits only first use of such weapons, the United States maintains a lethal and incapacitating chemical weapons capability for deterrence and possible retaliatory purposes only. National Command Authorities (NCA) approval is required for retaliatory use of lethal or incapacitating chemical weapons by U.S. Forces. Retaliatory use of lethal or incapacitating chemical agents must be terminated as soon as the enemy use of such agents that prompted the retaliation has ceased and any tactical advantage gained by the enemy through unlawful first use has been redressed.

10.3.2.2 Riot Control Agents. Riot control agents are those gases, liquids, and analogous substances that are widely used by governments for civil law enforcement purposes. Riot control agents, in all but the most unusual circumstances, cause merely transient effects that disappear within minutes after exposure to the agent has terminated. Tear gas and Mace are examples of riot control agents in widespread use by law enforcement officials. The United States considers that use of riot control agents in wartime is not prohibited by the 1925 Gas Protocol. However, the United States has formally renounced first use of riot control agents in armed conflict except in defensive military modes to save lives. Examples of authorized use of riot control agents in time of armed conflict include:

1. Riot control situations in areas under effective U.S. military control, to include control of rioting prisoners of war

2. Rescue missions involving downed aircrews or escaping prisoners of war

3. Protection of military supply depots, military convoys, and other military activities in rear echelon areas from civil disturbances, terrorist activities, or paramilitary operations.

Use of riot control agents by U.S. forces in armed conflict requires NCA approval.

Employment of riot control agents in peacetime may be authorized by the Secretary of Defense, or in limited circumstances, by the commanders of the unified and specified commands. Examples of authorized use of riot control agents in peacetime include:

1. Civil disturbances and other law enforcement activities in the United States, its territories and possessions

2. On U.S. bases, posts, embassy grounds, and installations overseas for protection and security purposes, including riot control

3. Offbase overseas for law enforcement purposes specifically authorized by the host government

4. Humanitarian evacuation operations involving U.S. or foreign nationals.

10.3.2.3 Herbicidal Agents. Herbicidal agents are gases, liquids, and analogous substances that are designed to defoliate trees, bushes, or shrubs, or to kill long grasses and other vegetation that could shield the movement of enemy forces. The United States considers that use of herbicidal agents in wartime is not prohibited by the 1925 Gas Protocol, but has formally renounced the first use of herbicides in time of armed conflict except for control of vegetation within U.S. bases and installations or around their immediate defensive perimeters. Use of herbicidal agents during armed conflict requires NCA approval. Use of herbicidal agents in peacetime may be authorized by the Secretary of Defense or, in limited circumstances, by the commanders of the unified and specified commands.

10.4 BIOLOGICAL WEAPONS

International law prohibits all biological weapons or methods of warfare whether directed against persons, animals, or plant life. Biological weapons include microbial or other biological agents or toxins whatever their origin (i.e., natural or artificial) or methods of production.

10.4.1 Treaty Obligations. The 1925 Gas Protocol prohibits the use in armed conflict of biological weapons. The 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (the "1972 Biological Weapons Convention") prohibits the production, testing, and stockpiling of biological weapons. Weapons Convention obligates nations that are a party thereto not to develop, produce, stockpile, or acquire biological agents or toxins "of types and in quantities that have no justification for prophylactic, protective, or other peaceful purposes," as well as "weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict." All such material were to be destroyed by 26 December 1975. The United States, the U.S.S.R., and most other NATO and Warsaw Pact nations are parties to both the 1925 Gas Protocol and the 1972 Biological Weapons Convention.

10.4.2 United States Policy Regarding Biological Weapons. The United States considers the prohibition against the use of biological weapons during armed conflict to be part of customary international law and thereby binding on all nations whether or not they are parties to the 1925 Gas Protocol or the 1972 Biological Weapons Convention. The United States has, therefore, formally renounced the use of biological weapons under any circumstances. Pursuant to its treaty obligations, the United States has destroyed all its biological and toxin weapons and restricts its research activities to development of defensive capabilities.

Chapter 11
Noncombatant Persons

11.1 INTRODUCTION

As discussed in Chapter 5, the law of armed conflict is premised largely on the distinction to be made between combatants and noncombatants. Noncombatants are those individuals who do not form a part of the armed forces and who otherwise refrain from the commission of hostile acts. Noncombatants also include those members of the armed forces who enjoy special protected status, such as medical personnel and chaplains, or who have been rendered incapable of combat by wounds, sickness, shipwreck, or capture. This chapter reviews the categories of noncombatants and outlines the general rules of the law of armed conflict designed to protect them from direct attack.

11.2 PROTECTED STATUS

The law of armed conflict prohibits making noncombatant persons the object of intentional attack and requires that they be safeguarded against injury not incidental to military operations directed against combatant forces and other military objectives. When circumstances permit, advance warning should be given of attacks that might endanger noncombatants in the vicinity. Such warnings are not required, however, if mission accomplishment, including the security of attacking forces, is premised on the element of surprise. On the other hand, a party to an armed conflict that has control over civilians and other noncombatants has an affirmative duty to remove them from the vicinity of targets of likely enemy attack and to otherwise separate military activities and facilities from areas of noncombatant concentration. Deliberate use of noncombatants to shield military objectives from enemy attack is prohibited. The presence of noncombatants within or adjacent to a legitimate target does not, however, preclude its attack.

11.3 THE CIVILIAN POPULATION

The civilian population as such, as well as individual civilians, may not be the object of attack or of threats or acts of intentional terrorization. The

civilian population consists of all persons not serving in the armed forces, militia, or paramilitary forces and not otherwise taking a direct part in the hostilities. Women and children are entitled to special respect and protection. Unlike military personnel (other than those in a specially protected status such as medical personnel and the sick and wounded) who are always subject to attack whether on duty or in a leave capacity, civilians are immune from attack unless they are acting in direct support of the enemy's war-fighting or war-sustaining effort. Civilians providing command, administrative, or logistic support to military operations are subject to attack while so engaged. Similarly, civilian employees of naval shipyards, merchant seamen in ships carrying military cargoes, and laborers engaged in the construction of military fortifications, may be attacked while so employed.

Civilians who take a direct part in hostilities by taking up arms or otherwise trying to kill, injure, or capture enemy persons or destroy enemy property lose their immunity and may be attacked. Similarly, civilians serving as lookouts, guards, or intelligence agents for military forces may be attacked.

11.4 THE WOUNDED AND SICK

Members of the armed forces incapable of participating in combat due to injury or illness may not be the subject of attack. Moreover, parties to any armed engagement must, without delay, take all possible measures to search for and collect the wounded and sick on the field of battle, protect them from harm, and ensure their care. When circumstances permit, an armistice or cease-fire should be arranged to enable the wounded and sick to be located and removed to safety and medical care. Wounded and sick personnel falling into enemy hands must be treated humanely and cared for without adverse distinction along with the enemy's own casualties. Priority in order of treatment may only be justified by urgent medical considerations. The physical or mental well-being of enemy wounded and sick personnel may not be unjustifiably endangered, nor may they be subjected to any medical procedure not called for by their condition or inconsistent with accepted medical standards.

11.5 MEDICAL PERSONNEL AND CHAPLAINS

Medical personnel, including medical and dental officers, technicians and corpsmen, nurses, and medical service personnel, have special protected status when engaged exclusively in medical duties and may not be attacked. Possession of small arms for self-protection, for the protection of the wounded and sick, and for protection from marauders and others violating the law of armed conflict does not disqualify medical personnel from protected status.

Medical personnel may not use such arms against enemy forces acting in conformity with the law of armed conflict. Chaplains engaged in ministering to the armed forces enjoy protected status equivalent to that of medical personnel. Medical personnel and chaplains should display the distinctive emblem of the Red Cross or Red Crescent when engaged in their respective medical and religious activities. Failure to wear the distinctive emblem does not, by itself, justify attacking a medical person or chaplain, recognized as such. Medical personnel and chaplains falling into enemy hands do not become prisoners of war. Unless their retention by the enemy is required to provide for the medical or religious needs of prisoners of war, medical personnel and chaplains must be repatriated at the earliest opportunity.

11.6 THE SHIPWRECKED

Shipwrecked persons, whether military or civilian, may not be attacked. Shipwrecked persons include those in peril at sea or in other waters as a result of either the sinking, grounding, or other damage to a vessel in which they are embarked, or of the downing or distress of an aircraft. It is immaterial whether the peril was the result of enemy action or nonmilitary causes. Following each naval engagement at sea, the belligerents are obligated to take all possible measures, consistent with the security of their forces, to search for and rescue the shipwrecked.

Shipwrecked persons do not include combatant personnel engaged in amphibious, underwater, or airborne attacks who are proceeding ashore, unless they are clearly in distress and require assistance. In the latter case they may qualify as shipwrecked persons only if they cease all active combat activity and the enemy has an opportunity to recognize their condition of distress. Shipwrecked combatants falling into enemy hands become prisoners of war.

11.7 PARACHUTISTS

Parachutists descending from disabled aircraft may not be attacked while in the air and, unless they land in territory controlled by their own forces or engage in combatant acts while descending, must be provided an opportunity to surrender upon reaching the ground. Airborne troops, special warfare infiltrators, and intelligence agents parachuting into combat areas or behind enemy lines are not so protected and may be attacked in the air as well as on the ground. Such personnel may not be attacked, however, if they clearly indicate their intention to surrender.

11.8 PRISONERS OF WAR

Combatants cease to be subject to attack when they have individually laid down their arms to surrender, when they are no longer capable of resistance, or when the unit in which they are serving or embarked has surrendered or been captured. Combatants that have surrendered or otherwise fallen into enemy hands are entitled to prisoner-of-war status and, as such, must be treated humanely and protected against violence, intimidation, insult, and public curiosity. When prisoners of war are given medical treatment, no distinction among them will be based on any grounds other than medical ones. (See paragraph 11.4 for further discussion of the medical treatment to be accorded captured enemy wounded and sick personnel.) Prisoners of war may be interrogated upon capture but are only required to disclose their name, rank, date of birth, and military serial number. Torture, threats, or other coercive acts are prohibited.

Persons entitled to prisoner-of-war status upon capture include members of the regular armed forces, the militia and volunteer units fighting with the regular armed forces, and civilians accompanying the armed forces. Militia, volunteers, guerrillas, and other partisans not fighting in association with the regular armed forces qualify for prisoner-of-war status upon capture, provided they are commanded by a person responsible for their conduct, are uniformed or bear a fixed distinctive sign recognizable at a distance, carry their arms openly, and conduct their operations in accordance with the law of armed conflict.

Should a question arise regarding a captive's entitlement to prisoner-of-war status, that individual should be accorded prisoner-of-war treatment until a competent tribunal convened by the captor determines the status to which that individual is properly entitled. Individuals captured as spies or as illegal combatants have the right to assert their entitlement to prisoner-of-war status before a judicial tribunal and to have the question adjudicated. Such persons have a right to be fairly tried for violations of the law of armed conflict and may not be summarily executed.

11.8.1 Trial and Punishment. Prisoners of war may not be punished for hostile acts directed against opposing forces prior to capture, unless those acts constituted violations of the law of armed conflict. Prisoners of war prosecuted for war crimes committed prior to or after capture are entitled to be tried by the same courts as try the captor's own forces and are to be accorded the same procedural rights. At a minimum, these rights must include the assistance of lawyer counsel, an interpreter, and a fellow prisoner.

Although prisoners of war may be subjected to disciplinary action for minor offenses committed during captivity, punishment may not exceed 30 days confinement. Prisoners of war may not be subjected to collective punishment nor may reprisal action be taken against them.

11.8.2 Labor. Enlisted prisoners of war may be required to engage in labor having no military character or purpose. Noncommissioned officers may only be required to perform supervisory work. Officers may not be required to work.

11.8.3 Escape. Prisoners of war may not be punished for attempting to escape, unless they cause death or injury to someone in the process. Prisoners of war who make good their escape by rejoining friendly forces or leaving enemy controlled territory, may not be punished if recaptured for offenses committed during their previous escape.

11.8.4 Temporary Detention of Prisoners of War, Civilian Internees, and Other Detained Persons Aboard Naval Vessels. International treaty law expressly prohibits "internment" of prisoners of war other than in premises on land, but does not address temporary stay on board vessels. U.S. policy, however, permits detention of prisoners of war, civilian internees, and detained persons (PW/CI/DET) on naval vessels as follows:

1. PW/CI/DET picked up at sea may be temporarily held on board as operational needs dictate, pending a reasonable opportunity to transfer them to a shore facility or to another vessel for evacuation to a shore facility.

2. PW/CI/DET may be temporarily held on board naval vessels while being transported between land facilities.

3. PW/CI/DET may be temporarily held on board naval vessels if such detention would appreciably improve their safety or health prospects.

Detention on board vessels must be truly temporary, limited to the minimum period necessary to evacuate such persons from the combat zone or to avoid significant harm such persons would face if detained on land. Use of immobilized vessels for temporary detention of prisoners of war, civilian internees, or detained persons is not authorized without NCA approval.

11.9 INTERNED PERSONS

Enemy civilians falling under the control of a belligerent may be interned if security considerations make it absolutely necessary to do so. Civilians sentenced for offenses committed in occupied territory may also be ordered into internment in lieu of punishment. Enemy civilians may not be interned as hostages. Interned persons may not be removed from the occupied territory

in which they reside unless their own security or imperative military reason demands. All interned persons must be treated humanely and may not be subjected to collective punishment nor reprisal action.

11.10 PROTECTIVE SIGNS AND SYMBOLS

11.10.1 The Red Cross and Red Crescent. A red cross on a white field (Figure 11-1a) is the internationally accepted symbol of protected medical and religious persons and activities. Moslem countries utilize a red crescent on a white field for the same purpose (Figure 11-1b). A red lion and sun on a white field, once employed by Iran, is no longer used. Israel employs the Red Star of David, which it reserved the right to use when it ratified the 1949 Geneva Conventions (Figure 11-1c). The United States has not agreed that it is a protected symbol. Nevertheless, all medical and religious persons or objects recognized as being so marked are to be treated with care and protection.

11.10.2 Other Protective Symbols. Other protective symbols specially recognized by international law include an oblique red band on a white background to designate hospital zones and safe havens for noncombatants (Figure 11-1d). Prisoner-of-war camps are marked by the letters "PW" or "PG" (Figure 11-1e); civilian internment camps with the letters "IC" (Figure 11-1f). A royal-blue diamond and royal-blue triangle on a white shield is used to designate cultural buildings, museums, historic monuments, and other cultural objects that are exempt from attack (Figure 11-1g). In the Western Hemisphere, a red circle with triple red spheres in the circle, on a white background (the "Roerich Pact" symbol) is used for that purpose (Figure 11-1h).

Two protective symbols established by the 1977 Protocols Additional to the Geneva Conventions of 1949, to which the United States is not a party, are described as follows for informational purposes only. Works and installations containing forces potentially dangerous to the civilian population, such as dams, dikes, and nuclear power plants, may be marked by three bright orange circles of equal size on the same axis (Figure 11-1i). Civil defense facilities and personnel may be identified by an equilateral blue triangle on an orange background (Figure 11-1j).

11.10.3 The 1907 Hague Symbol. A protective symbol of special interest to naval officers is the sign established by the 1907 Hague Convention Concerning Bombardment by Naval Forces in Time of War (Hague IX). The 1907 Hague symbol is used to mark sacred edifices, hospitals, historic monuments, cultural buildings, and other structures protected from naval

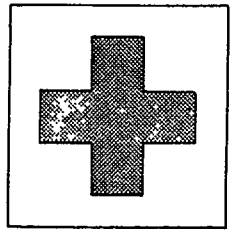
bombardment. The symbol consists of a rectangular panel divided diagonally into two triangles, the upper black, the lower white (Figure 11-1k).

11.10.4 The White Flag. Customary international law recognizes the white flag as symbolizing a request to cease-fire, negotiate, or surrender. Enemy forces displaying a white flag should be permitted an opportunity to surrender or to communicate a request for cease-fire or negotiation.

11.10.5 Permitted Use. Protective signs and symbols may be used only to identify personnel, objects, and activities entitled to the protected status which they designate. Any other use is forbidden by international law.

11.10.6 Failure to Display. When objects or persons are readily recognizable as being entitled to protected status, the lack of protective signs and symbols does not render an otherwise protected object or person a legitimate target. Failure to utilize internationally agreed protective signs and symbols may, however, subject protected persons and objects to the risk of not being recognized by the enemy as having protected status.

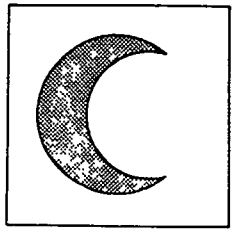
a.



The Red Cross

Symbol of medical and religious activities.

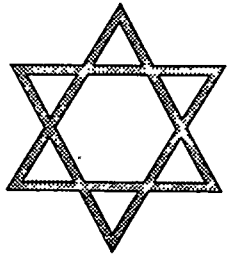
b.



The Red Crescent

Symbol of medical and religious activities.

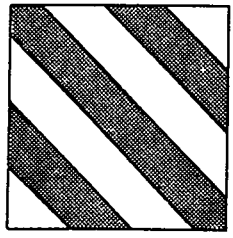
c.



The Red Star of David

Israeli emblem for medical and religious activities. Israel reserved the right to use the Red Star of David when it ratified the 1949 Conventions.

d.



Marking for Hospital and Safety Zones for Civilians and Sick and Wounded (Three Red Stripes)

(Noncombatants)

Figure II-1. Protective Signs and Symbols (Sheet 1 of 3)

e.

PW

PG

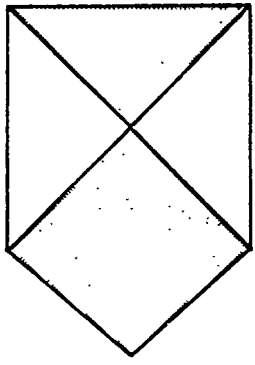
Symbols for Prisoner of War Camps

f.

IC

Civilian Internment Camps

g.

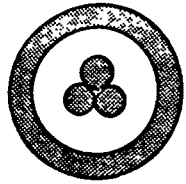


Symbol for Cultural Property Under the 1954 Hague Convention (Blue and White)

(Also used in a group of three to indicate special protection.)

Figure II-1. Protective Signs and Symbols (Sheet 2 of 3)

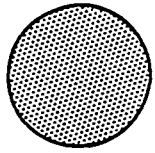
h.

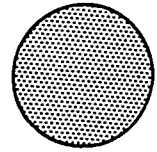


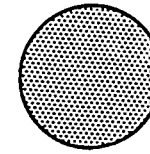
Roerich Pact (Red and White)

Symbol used for historical, artistic, education, and cultural institutions, among Western Hemisphere nations.

i.



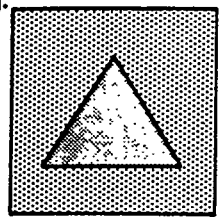




Special Symbol for Works and Installations Containing Dangerous Forces (Three Orange Circles)

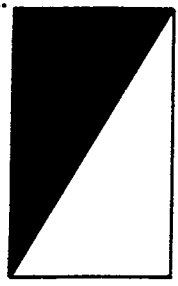
(Dams, dikes, and nuclear power stations)

j.



Symbol designating Civil Defense Activities
(Blue triangle in an orange square)

k.



The 1907 Hague Sign

Naval bombardment symbol designating cultural, medical, and religious facilities.

Figure 11-1. Protective Signs and Symbols (Sheet 3 of 3)

Chapter 12
Deception During Armed Conflict

12.1 GENERAL

The law of armed conflict permits deceiving the enemy through stratagems and ruses of war intended to mislead him, to deter him from taking action, or to induce him to act recklessly, provided the ruses do not violate rules of international law applicable to armed conflict.

12.1.1 Permitted Deceptions. Stratagems and ruses of war permitted in armed conflict include such deceptions as camouflage, deceptive lighting, dummy ships and other armament, decoys, simulated forces, feigned attacks and withdrawals, ambushes, false intelligence information, electronic deceptions, and utilization of enemy codes, passwords and countersigns.

12.1.2 Prohibited Deceptions. The use of unlawful deceptions is called "perfidy." Acts of perfidy are deceptions designed to invite the confidence of the enemy to lead him to believe that he is entitled to, or is obliged to accord, protected status under the law of armed conflict, with the intent to betray that confidence. Feigning surrender in order to lure the enemy into a trap, is an act of perfidy.

12.2 MISUSE OF PROTECTIVE SIGNS, SIGNALS, AND SYMBOLS

Misuse of protective signs, signals, and symbols in order to injure, kill, or capture the enemy constitutes an act of perfidy. Such acts are prohibited because they undermine the effectiveness of protective signs, signals, and symbols and thereby jeopardize the safety of noncombatants and the immunity of protected structures and activities. For example, using an ambulance or medical aircraft marked with the red cross or red crescent to carry armed combatants, weapons, or ammunition with which to attack or elude enemy forces is prohibited. Similarly, use of the white flag to gain a military advantage over the enemy is unlawful.

12.3 NEUTRAL FLAGS, INSIGNIA, AND UNIFORMS

12.3.1 At Sea. Under the customary international law of naval warfare, it is permissible for a belligerent warship to fly false colors and disguise its outward appearance in other ways in order to deceive the enemy into believing the vessel is of neutral nationality or is other than a warship. However, it is unlawful for a warship to go into action without first showing her true colors. Use of neutral flags, insignia, or uniforms during an actual armed engagement at sea is, therefore, forbidden.

12.3.2 In the Air. Use of false or deceptive markings to disguise belligerent military aircraft as being of neutral nationality is prohibited.

12.3.3 On Land. The law of armed conflict applicable to land warfare has no rule of law analogous to that which permits belligerent warships to display neutral colors. Belligerents engaged in armed conflict on land are not permitted to use the flags, insignia, or uniforms of a neutral nation to deceive the enemy.

12.4 THE UNITED NATIONS FLAG AND EMBLEM

The flag of the United Nations and the letters "UN" may not be used in armed conflict for any purpose without the authorization of the United Nations.

12.5 ENEMY FLAGS, INSIGNIA, AND UNIFORMS

12.5.1 At Sea. Naval surface and subsurface forces may fly enemy colors and display enemy markings to deceive the enemy. Warships must, however, display their true colors prior to an actual armed engagement.

12.5.2 In the Air. The use in combat of enemy markings by belligerent military aircraft is forbidden.

12.5.3 On Land. The law of land warfare does not prohibit the use by belligerent land forces of enemy flags, insignia, or uniforms to deceive the enemy either before or following an armed engagement. Combatants risk loss of entitlement to prisoner-of-war status, however, if they are captured while displaying enemy colors or insignia or wearing enemy uniforms in combat.

Similarly, combatants caught behind enemy lines wearing the uniform of their adversaries are not entitled to prisoner-of-war status or protection and, historically, have been subjected to severe punishment. It is permissible,

however, for downed aircrews and escaping prisoners of war to use enemy uniforms to evade capture, so long as they do not attack enemy forces, gather military intelligence, or engage in similar military operations while so attired. As a general rule, enemy markings should be removed from captured enemy equipment before it is used in combat.

12.6 FEIGNING DISTRESS

It is unlawful to feign distress through the false use of internationally recognized distress signals such as SOS and MAYDAY. In air warfare, however, it is permissible to feign disablement or other distress as a means to induce the enemy to break off an attack. Consequently, there is no obligation in air warfare to cease attacking a belligerent military aircraft that appears to be disabled. However, if one knows the enemy aircraft is disabled such as to permanently remove it from the conflict (e.g., major fire or structural damage) there is an obligation to cease attacking to permit possible evacuation by crew or passengers.

12.7 FALSE CLAIMS OF NONCOMBATANT STATUS

It is a violation of the law of armed conflict to kill, injure, or capture the enemy by false indication of an intent to surrender or by feigning shipwreck, sickness, wounds, or civilian status (but see paragraph 12.3.1). A surprise attack by a person feigning shipwreck, sickness, or wounds undermines the protected status of those rendered incapable of combat. Similarly, attacking enemy forces while posing as a civilian puts all civilians at hazard. Such acts of perfidy are punishable as war crimes.

12.7.1 Illegal Combatants. Persons who take part in combat operations without distinguishing themselves clearly from the civilian population are illegal combatants and are subject to punishment upon capture. If determined by a competent tribunal of the captor nation to be illegal combatants, such persons may be denied prisoner-of-war status and be tried and punished for falsely claiming noncombatant status during combat. It is the policy of the United States, however, to accord illegal combatants prisoner-of-war status if they were carrying arms openly at the time of capture.

12.8 SPIES

A spy is someone who, while in territory under enemy control, seeks to obtain information while operating under a false claim of noncombatant or friendly forces status with the intention of passing that information to an opposing belligerent. Members of the armed forces who penetrate enemy-

held territory in civilian attire or enemy uniform to collect intelligence are spies. Conversely, personnel conducting reconnaissance missions behind enemy lines while properly uniformed are not spies. Crew-members of warships and military aircraft engaged in intelligence collection missions in enemy waters or airspace are not spies unless the ship or aircraft displays false civilian, neutral, or enemy marking.

12.8.1 Legal Status. Spying during armed conflict is not a violation of international law. Captured spies are not, however, entitled to prisoner of war status. The captor nation may try and punish spies in accordance with its national law. Should a spy succeed in eluding capture and return to friendly territory, liability to punishment terminates. If subsequently captured during some other military operation, the former spy cannot be tried or punished for the earlier act of espionage.

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