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Annotated Supplement to The Commander's Handbook on the Law of Naval Operations

A.R. Thomas and James C. Duncan
Editors

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FOREWORD

The International Law Studies "Blue Book" series was initiated by the Naval War College in 1901 to publish essays, treatises and articles that contribute to the broader understanding of international law. This, the seventy-third volume of that series, publishes the *Annotated Supplement* to *The Commander's Handbook on the Law of Naval Operations*. Originally prepared in soft cover in late 1997 for use by students at the Naval War College and by judge advocates and others responsible for advising operational commanders on the law, it has been so well received that we are pleased to be able to make it available to a wider audience through the "Blue Book" series.

The Commander's Handbook on the Law of Naval Operations provides guidance to operational commanders and supporting staff elements at all levels of command of the Navy, Marine Corps, and Coast Guard. As an official publication, it expresses the views of the United States with respect to the international norms governing the conduct of military operations in both time of peace and time of war. This encyclopedic *Annotated Supplement* provides a section-by-section analysis of the *Handbook* with full discussion of the concepts involved and the sources of the rules stated. As an unofficial publication, the positions and opinions expressed in the annotations are not necessarily those of the United States Navy or the Naval War College.

The *Annotated Supplement* was prepared under the leadership of Professor Emeritus Jack Grunawalt, while he served as Director of the Naval War College's Oceans Law and Policy Department. On behalf of the Secretary of the Navy, the Chief of Naval Operations, and the Commandant of the Marine Corps, I extend to Professor Grunawalt and the countless others who participated in the development of this publication my gratitude and thanks. I hope that it will prove as useful to those who study international law as it has to those who advise operational commanders on the complex and difficult issues associated with military operations.

A. K. Cebrowski
Vice Admiral, U.S. Navy
President, Naval War College

INTRODUCTION AND ACKNOWLEDGEMENTS

The *Commander's Handbook on the Law of Naval Operations* (NWP 1-14M/MCWP 5-2.1/COMDTPUB P5800.1) and the 1997 *Annotated Supplement* have been well received in the fleet, in the field, and at headquarters activities for both United States forces and those of other nations. We extend our appreciation to the Naval War College Foundation and their anonymous contributors for funding the publication of this volume of the International Law Studies ("Blue Book") series. As a result of their generous support, the *Annotated Supplement* will achieve a much wider distribution to academic institutions and military commands around the world. That distribution will facilitate research on the law of naval operations and will serve to promote the rule of law in the conduct of future operations.

Others also are deserving of special recognition:

Captain J. Ashley Roach, JAGC, USN (ret.) was the primary author of the first *Annotated Supplement.* Ash has been a tremendous asset to the JAG Corps and to the operational law community. Among his many accomplishments, he can be credited with setting the stage for the *Annotated Supplement* series.

Professor Emeritus and Captain Richard J. Grunawalt, JAGC, USN (ret.) was a primary drafter and the leader of the team that produced this iteration of the *Annotated Supplement.* Bravo Zulu to Jack for this and his many other operational law achievements.

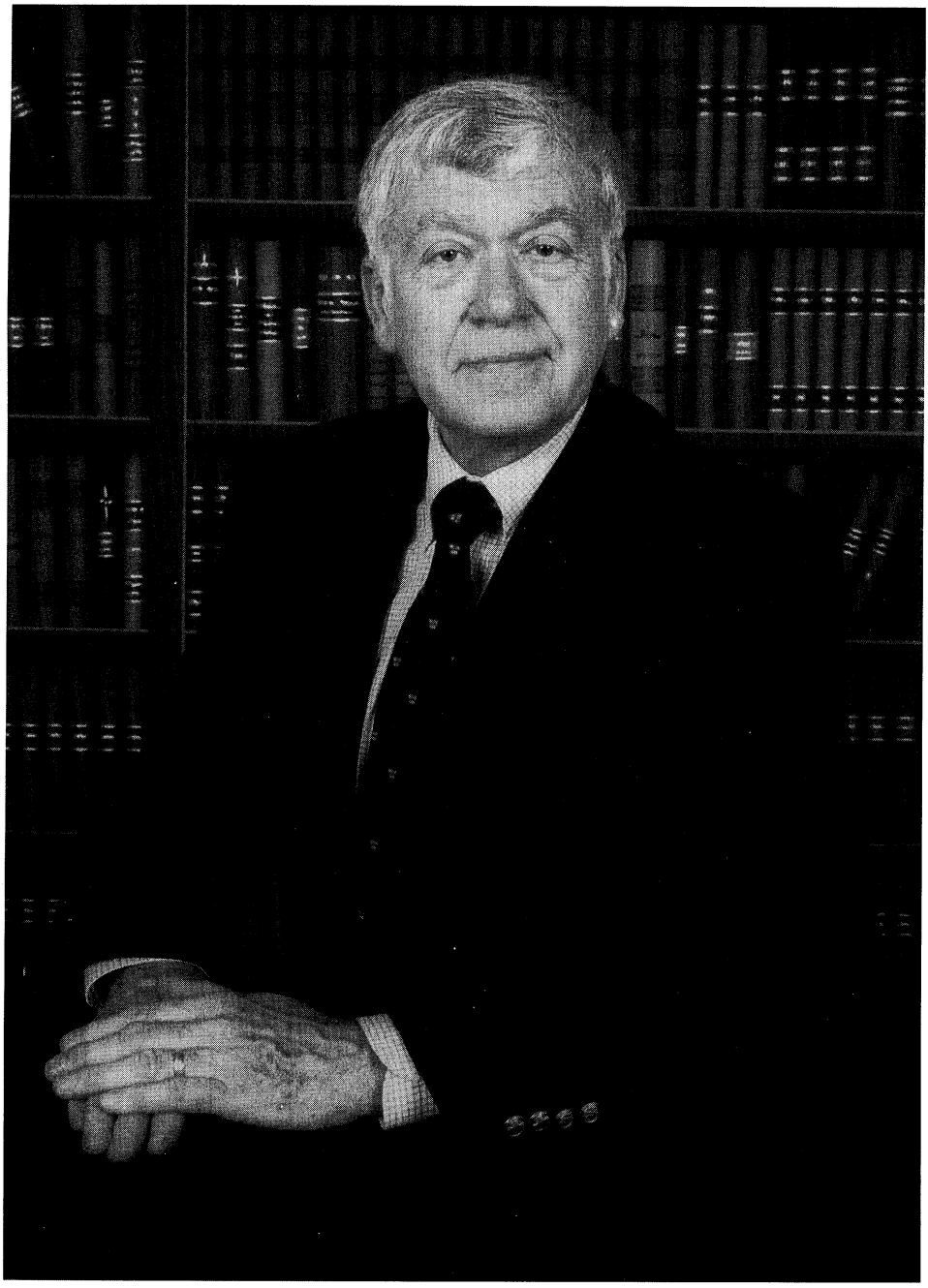
Lieutenant Colonel James Duncan, USMC of the Oceans Law and Policy Department has served as the editor for this Blue Book. Without his energy and enthusiasm, this Blue Book would not have been published.

Dr. Robert S. Wood, the Dean of the Center for Naval Warfare Studies, has provided leadership and constant support to the Oceans Law and Policy Department throughout its existence.

All those who have served in the Oceans Law and Policy Department and many other members of the operational law community have contributed to the *Commander's Handbook* and the *Annotated Supplement* over the years. Thank you all for your continuing support in updating and improving these manuals.

Both the *Commander's Handbook* and the *Annotated Supplement* are "works in progress." The Oceans Law and Policy Department has started the draft of the next iteration. We welcome inputs from all readers.

Dennis Mandsager
Professor of Law
Director, Oceans Law
and Policy Department



Dr. Robert S. Wood

This book, the seventy-third volume of the International Law Studies series, is dedicated to Dr. Wood in recognition of his devoted service to the Naval War College, his visionary leadership of the Center for Naval Warfare Studies, and his support for the rule of law.

ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS

NEWPORT, RI

1997

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INTRODUCTORY NOTE

The Commander's Handbook on the Law of Naval Operations (NWP 1-14M/MCWP 5-2.1/ COMDTPUB P5800.1), formerly NWP 9 (Rev. A)/FMFM 1-10, was promulgated to U.S. Navy, U.S. Marine Corps, and U.S. Coast Guard activities in October 1995. The Commander's Handbook contains no reference to sources of authority for statements of relevant law. This approach was deliberately taken for ease of reading by its intended audience—the operational commander and his staff. This Annotated Supplement to the Handbook has been prepared by the Oceans Law and Policy Department, Center for Naval Warfare Studies, Naval War College to support the academic and research programs within the College.

Although prepared with the assistance of cognizant offices of the General Counsel of the Department of Defense, the Judge Advocate General of the Navy, The Judge Advocate General of the Army, The Judge Advocate General of the Air Force, the Staff Judge Advocate to the Commandant of the Marine Corps, the Chief Counsel of the Coast Guard, the Chairman, Joint Chiefs of Staff and the Unified Combatant Commands, the annotations in this Annotated Supplement are not to be construed as representing official policy or positions of the Department of the Navy or the U.S. Government.

The text of the Commander's Handbook is set forth verbatim. Annotations appear as footnotes numbered consecutively within each Chapter. Supplementary Annexes, Figures and Tables are prefixed by the letter "A" and incorporated into each Chapter.

Comments, suggestions and recommendations for changes to this volume may be submitted to the undersigned.

Richard J. Grunawalt
Director, Oceans Law and
Policy Department

ANNOTATED SUPPLEMENT TO

THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS

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ABBREVIATIONS AND RECURRING CITATIONS

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ACDA	U.S. Arms Control and Disarmament Agency
AFP	Air Force Pamphlet
AFP 110-20	U.S. Air Force, Selected International Agreements (AFP 110-20, 1981) (with Navy Supplement)
AFP 110-31	U.S. Air Force, International Law—The Conduct of Armed Conflict and Air Operations (AFP 110-31, 1976)
AFP 110-34	U.S. Air Force, Commander's Handbook on the Law of Armed Conflict (AFP 110-34, 1980)
Alexander	Offshore Consultants, Inc., Navigational Restrictions Within the New LOS Context: Geographical Implications for the United States 8 (Alexander, ed. Final Report under Defense Supply Service Contract 903-84-C-0276, Dec. 1986)
AR	Army Regulation
ATP	Allied Tactical Publication
Bevans	Treaties and Other International Agreements of the United States of America, 1776-1949 (Bevans ed., 1968-76)
BFSP	British and Foreign State Papers
Bothe, Partsch & Solf	New Rules for Victims of Armed Conflicts (1982)

CDDH	Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 1974–1977
C.F.R.	Code of Federal Regulations
Chicago Convention	Convention on International Civil Aviation, Chicago, 7 December 1944, 59 Stat. 1693, 84 U.N.T.S. 389
Coll, Ord & Rose	Legal and Moral Constraints on Low-Intensity Conflict (U.S. Naval War College International Law Studies No. 67, Coll *et al.* eds., 1995)
COMDTINST	Commandant of the Coast Guard Instruction
Common article	Article common to all four Geneva Conventions of 12 August 1949 for the Protection of War Victims
Continental Shelf Convention	Convention on the Continental Shelf, Geneva, 29 April 1958, 15 U.S.T. 471, 499 U.N.T.S. 311
DA Pam	Department of the Army Pamphlet
DA Pam 27-1	Department of the Army, Treaties Governing Land Warfare (DA Pam 27-1, 1956)
DA Pam 27-1-1	Department of the Army, Protocols to the Geneva Conventions of 12 August 1949 (DA Pam 27-1-1, 1979)
DA Pam 27-161-1	Department of the Army, 1 International Law (DA Pam 27-161-1, 1979)
DA Pam 27-161-2	Department of the Army, 2 International Law (DA Pam 27-161-2, 1962)

Declaration of Brussels	Project of an International Declaration Concerning the Laws and Customs of War, Brussels, 27 August 1874, 65 B.F.S.P. 1005, *reprinted in* Schindler & Toman 25
Declaration of London	Declaration Concerning the Laws of Naval War, London, 26 February 1909, 104 B.F.S.P. 242, *reprinted in* Schindler & Toman 755
Declaration of Paris	Declaration Respecting Maritime Law, Paris, 16 April 1856, 115 Parry 1, 1 Am. J. Int'l L. (Supp.) 89, *reprinted in* Schindler & Toman 699
DODDIR	Department of Defense Directive
Doswald-Beck	San Remo Manual on International Law Applicable to Armed Conflicts at Sea, Prepared by International Lawyers and Naval Experts Convened by the International Institute of Humanitarian Law (Doswald-Beck ed., 1995)
Fed. Reg.	Federal Register
Fleck	The Handbook of Humanitarian Law in Armed Conflict (Fleck ed., 1995)
FM	U.S. Army Field Manual
FM 27-10	U.S. Army Field Manual 27-10, The Law of Land Warfare, 1956
FMFRP	Fleet Marine Force Reference Publications
GAOR	United Nations General Assembly, Official Records
GC	Convention Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287

GP I	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 16 I.L.M. 1391, *reprinted in* Schindler & Toman 551 [Additional Protocol I]
GP II	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 16 I.L.M. 1442 [Additional Protocol II]
GPW	Convention Relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135
GPW 1929	Convention Relative to the Treatment of Prisoners of War, Geneva, 27 July 1929, 47 Stat. 2021, 118 LNTS 343, *reprinted in* Schindler & Toman 271
Green	The Contemporary Law of Armed Conflict (1993)
Greenspan	The Modern Law of Land Warfare (1959)
Grunawalt	The Law of Naval Warfare: Targeting Enemy Merchant Shipping (U.S. Naval War College International Law Studies No. 65, Grunawalt ed., 1993)
Grunawalt, King & McClain	Protection of the Environment During Armed Conflict (U.S. Naval War College International Law Studies No. 69, Grunawalt *et al.* eds., 1996)
GWS 1929	Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 27 July 1929, 47 Stat. 2074, 118 L.N.T.S. 303, *reprinted in* Schindler & Toman 257

GWS	Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31
GWS-Sea	Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85
Hackworth	Digest of International Law (8 vols., 1940-44)
Hague III	Hague Convention No. III Relative to the Opening of Hostilities, The Hague, 18 October 1907, 36 Stat. 2259, 2 Am. J. Int'l L. (Supp.) 85
Hague IV	Hague Convention No. IV Respecting the Laws and Customs of War on Land, The Hague, 18 October 1907, 36 Stat. 2227, 2 Am. J. Int'l L. (Supp.) 90
HR	Regulations Respecting the Laws and Customs of War on Land, annex to Hague IV (*see* Hague IV)
Hague V	Hague Convention No. V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, The Hague, 18 October 1907, 36 Stat. 2310, 2 Am. J. Int'l L. (Supp.) 117
Hague VIII	Hague Convention No. VIII Relative to the Laying of Automatic Submarine Contact Mines, The Hague, 18 October 1907, 36 Stat. 2332, 2 Am. J. Int'l L. (Supp.) 138
Hague IX	Hague Convention No. IX Concerning Bombardment by Naval Forces in Time of War, The Hague, 18 October 1907, 36 Stat. 2351, 2 Am. J. Int'l L. (Supp.) 146

Hague X	Hague Convention No. X for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, [of 1906], The Hague, 18 October 1907, 36 Stat. 2371, 2 Am. J. Int'l L. (Supp.) 153
Hague XI	Hague Convention No. XI Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War, The Hague, 18 October 1907, 36 Stat. 2396, 2 Am. J. Int'l L. (Supp.) 167
Hague XIII	Hague Convention No. XIII Concerning the Rights and Duties of Neutral Powers in Naval War, The Hague, 18 October 1907, 36 Stat. 2415, 2 Am. J. Int'l L. (Supp.) 202
High Seas Convention	Convention on the High Seas, Geneva, 29 April 1958, 13 U.S.T. 2312, 450 U.N.T.S. 92
Hudson	International Legislation 1919-1945 (Hudson ed., 9 vols. 1939-49)
Hyde	International Law Chiefly as Interpreted and Applied by the United States (Hyde ed., 2d rev. ed., 1945-47)
ICAO	International Civil Aviation Organization
I.C.J.	International Court of Justice, Reports of Judgments, Advisory Opinions and Orders
ICRC	International Committee of the Red Cross
ICRC, Commentary ('49 Conventions)	Commentary on the Geneva Conventions of 12 August 1949 (Pictet *et al.* eds., 1952)
ICRC, Commentary (GP I & II)	Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Sandoz *et al.* eds., 1987)

IMO	International Maritime Organization (formerly International Maritime Consultative Organization (IMCO))
IMT	International Military Tribunal, Nuremberg
IMTFE	International Military Tribunal for the Far East
INCSEA	Agreement Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on the Prevention of Incidents On and Over the High Seas, Moscow, 25 May 1972, 23 U.S.T. 1168, 852 U.N.T.S. 151 [Incidents at Sea Agreement]
Int'l Leg. Mat'ls	International Legal Materials
JAG Manual	Manual of the Judge Advocate General of the Navy, JAG Instruction 5800.7C
JCS	U.S. Joint Chiefs of Staff
Joint Pub.	JCS Joint Publication
Joint Pub. 1-02	Dictionary of Military and Associated Terms
JSCP	JCS, Joint Strategic Capabilities Plan
Kelsen	Collective Security Under International Law (U.S. Naval War College International Law Studies No. 39, 1954)
Levie, Documents	Documents on Prisoners of War (U.S. Naval War College International Law Studies No. 60, Levie ed., 1979)
Levie, Prisoners of War	Prisoners of War in International Armed Conflict (U.S. Naval War College International Law Studies No. 59, 1978)

Lieber Code	U.S. Department of War, Instructions for the Government of the Armies of the United States in the Field, General Orders No. 100, 24 April 1863
Lillich & Moore	Readings in International Law from the Naval War College Review (U.S. Naval War College International Law Studies Nos. 61 & 62, Lillich & Moore eds., 1980)
L.N.T.S.	League of Nations Treaty Series
LOAC	Law of Armed Conflict
London Protocol	Proces-Verbal Relating to the Rules of Submarine Warfare set forth in Part IV of the Treaty of London of 22 April 1930, London, 6 November 1936, 173 U.N.T.S. 353, 31 Am. J. Int'l L. (Supp.) 137
LOS	Law of the Sea
LOS Bulletin	United Nations Office for Ocean Affairs and the Law of the Sea, Law of the Sea Bulletin
LOS Convention	United Nations Convention on the Law of the Sea *opened for signature* 10 December 1982, 21 I.L.M. 1261
LOS Glossary	Consolidated Glossary of Technical Terms used in the United Nations Convention on the Law of the Sea, International Hydrographic Bureau Special Pub. No. 51, A Manual on Technical Aspects of the United Nations Convention on the Law of the Sea, Part I (1982)
LOS Official Records	Official Records of the Third United Nations Conference on the Law of the Sea (1975-1984)
LRTWC	U.N. War Crimes Commission, Law Reports of Trials of War Criminals, 1948-49

MacChesney	Situation, Documents and Commentary on Recent Developments in the International Law of the Sea (U.S. Naval War College, International Law Studies No. 51 (1956))
Malloy	Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers, 1776-1909 (Malloy comp., 1910-38)
Mallison	Studies in the Law of Naval Warfare: Submarines in General and Limited War (U.S. Naval War College International Law Studies No. 58, 1966)
McDougal & Burke	The Public Order of the Oceans (1962)
McDougal & Feliciano	Law and Minimum World Public Order: The Legal Regulation of International Coercion (1961)
MCM, 1995	Manual for Courts-Martial, United States (1995 Edition)
MCRM	Maritime Claims Reference Manual, DoD 2005.1-M, 1997 (Available at http://www.dtic.dla.mil/defenselink)
MJCS	Memorandum from the Joint Chiefs of Staff
MLEM	U.S. Coast Guard, Maritime Law Enforcement Manual, COMDTINST 16247.1A
Moore	A Digest of International Law (1906)
Moore & Turner	Readings on International Law from the Naval War College Review 1978-1994 (U.S. Naval War College International Law Studies No. 68, Moore & Turner eds., 1995)
NCA	National Command Authorities

Nordquist	United Nations Convention on the Law of the Sea, 1982: A Commentary (Nordquist *et al.* eds., 1985-)
Nuremberg Principles	Principles of International Law Recognized in the charter of the Nuremberg Tribunal and in the Judgment of the Tribunal
NWIP	Naval Warfare Information Publication
NWIP 10-2	Law of Naval Warfare (NWIP 10-2, 1955)
NWP	Naval Warfare Publication
NWP 9	The Commander's Handbook on the Law of Naval Operations (NWP 9, 1987)
NWP 9 (Rev. A)	The Commander's Handbook on the Law of Naval Operations (NWP 9 (Rev. A)/FMFM 1-10, 1989)
O'Connell	The International Law of the Sea (Shearer ed., 2d ed., 2 vols. 1982)
Official Records	Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Geneva, 1974-1977 (1978)
1 Oppenheim-Lauterpacht	1 Oppenheim, International Law: A Treatise (Lauterpacht ed., 8th ed., 1955)
2 Oppenheim-Lauterpacht	2 Oppenheim, International Law: A Treatise (Lauterpacht ed., 7th ed., 1952)
Oxford Manual	Institute of International Law, The Laws of War on Land, 9 September 1880
Pictet	The Geneva Conventions of 12 August 1949 (Pictet ed., 1958)
PW	Prisoner of War

R.C.M.	Manual for Courts-Martial (MCM), United States (1995 Edition), Part II, Rules for Courts-Martial
Restatement (Third)	Restatement (Third) of The Foreign Relations Law of the United States (1987)
Roach & Smith	Excessive Maritime Claims (U.S. Naval War College International Law Studies No. 66, 1994)
Robertson	The Law of Naval Operations (U.S. Naval War College International Law Studies No. 64, Robertson ed., 1991)
ROE	Rules of engagement
Roerich Pact	Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, Washington, 15 April 1935, 49 Stat. 3267, T.S. 899
Ronzitti	The Law of Naval Warfare (Ronzitti ed., 1988)
Rubin	The Law of Piracy (U.S. Naval War College International Law Studies No. 63, 1988)
San Remo Manual	San Remo Manual on International Law Applicable to Armed Conflicts at Sea (1995)
Schindler & Toman	The Laws of Armed Conflict: A Collection of Conventions, Resolutions and Other Documents (Schindler & Toman eds., 3rd Rev. ed., 1988)
Schmitt & Green	Levie on the Law of War (U.S. Naval War College International Law Studies No. 70, Schmitt & Green eds., 1998) (Forthcoming)
Scott, Reports	The Reports to the Hague Conferences of 1899 and 1907 (Scott ed., 1917)
Sohn & Gustafson	The Law of the Sea in a Nutshell (1984)

Spaight	Air Power and War Rights (3d ed., 1947)
SROE	Joint Chiefs of Staff Standing Rules of Engagement for U.S. Forces, CJCSI 3121.01 (1994)
Stone	Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes War Law (1954)
Stat.	U.S. Statutes at Large
Swarztrauber	The Three-Mile Limit of Territorial Seas (1972)
Territorial Sea Convention	Convention on the Territorial Sea and Contiguous Zone, Geneva, 29 April 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205
T.I.A.S.	U.S. Treaties and Other International Agreements Series
T.I.F.	U.S. Department of State, Treaties in Force
Title V Report	Final Report to the Congress, Conduct of the Persian Gulf War, Pursuant to Title V of the Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991 (Pub. L. 102-25, April 1992)
T.S.	Treaty Series
Tucker	The Law of War and Neutrality at Sea (U.S. Naval War College International Law Studies No. 50, 1955)
TWC	Trials of War Criminals before the Nuremberg Military Tribunals Under Control Council Law No. 10: Nuremberg, October 1946-April 1949 (1949-53)
UCMJ	Uniform Code of Military Justice

UNCLOS III	Third United Nations Conference on the Law of the Sea, 1974–1982
U.N.G.A.	United Nations General Assembly
U.N.S.C.	United Nations Security Council
U.N.T.S.	United Nations Treaty Series
U.S.C.	United States Code
U.S.T.	United States Treaties and Other International Agreements
Whiteman	Digest of International Law (Whiteman ed., 1973)
Wiktor	Unperfected Treaties of the United States of America 1776-1976 (Wiktor ed., 1976-1994)

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.[1]

1. Although The Commander's Handbook on the Law of Naval Operations is a publication of the Department of the Navy, neither The Handbook nor its annotated supplement can be considered as a legislative enactment binding upon courts and tribunals applying the rules of war. However, their contents may possess evidentiary value in matters relating to U.S. custom and practice. *See The Hostages Trial (Wilhelm List et al.)*, 11 TWC 1237-38, 8 LRTWC 51-52 (U.S. Military Tribunal, Nuremberg, 8 July 1947-19 Feb. 1948); *The Peleus Trial*, 1 LRTWC 19 (British Military Ct., Hamburg, 1945); *The Belsen Trial*, 2 LRTWC 48-49 (British Military Ct., Luneburg, 1945); *The Abbage Ardenne Case (Trial of Brigadefurher Kurt Meyer)*, 4 LRTWC 110 (Canadian Military Ct., Aurich, Germany, 1945).

(continued...)

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 I also complements the more definitive guidance on maritime law enforcement promulgated by the U.S. Coast Guard.

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."[2] 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 United States is a nonparticipant in hostilities involving other nations. Part II complements the more definitive guidance on land and air warfare promulgated, respectively, by the U.S. Army and U.S. Air Force.

STANDING RULES OF ENGAGEMENT (SROE)

The National Command Authorities (i.e., the President and the Secretary of Defense or their duly deputized alternates or successors—commonly referred to as the NCA) approve and the Chairman of the Joint Chiefs of Staff promulgates SROE for U.S. forces (Chairman of the Joint Chiefs of Staff Instruction 3121.01 1 October 1994).[3] These rules delineate the circumstances under which U.S. forces will initiate and/or continue engagement with other forces encountered.

1.(...continued)
In the course of these cases, the question of the status of such official publications and the British and U.S. military manuals arose on various occasions. Although the courts recognized these publications as "persuasive statements of the law" and noted that, insofar as the provisions of military manuals are acted upon, they mold State practice, itself a source of international law, it was nevertheless stated that since these publications were not legislative instruments they possessed no formal binding power. Hence, the provisions of military manuals which clearly attempted to interpret the existing law were accepted or rejected by the courts in accordance with their opinion of the accuracy with which the law was set forth. NWIP 10-2, para. 100 n.1; FM 27-10, para. 1; 15 LRTWC, Digest of Law and Cases 21-22.

2. DODDIR 5100.77, Subj: DOD Law of War Program, implemented for the Department of the Navy by SECNAVINST 3300.1A, para 4a. Similar directions have been promulgated by the operational chain of command, *e.g.*, MJCS 0124-88 4 August 1988; USCINCLANTINST 3300.3A; CINCPACFLTINST 3300.9.

3. The unclassified portion of the SROE is at Annex A4-3 (p. 277).

Combatant commanders may augment the standing rules as necessary to reflect changing political and military policies, threats, and missions specific to their area of responsibility (AOR). Such augmentations to the standing rules are approved by the NCA and promulgated by the Joint Staff, J-3, as annexes to the standing rules.

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.[4] 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.[5]

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.[6]

International Agreements. An international agreement is a commitment entered into by two or more nations that reflects their intention to be bound by

4. Art. 38 of the Statute of the International Court of Justice (59 Stat. 1031, T.S. 993, 3 Bevans 1179) provides that, in adjudicating disputes brought before it, the Court shall apply international agreements, custom (as evidence of a general practice accepted as law), general principles of law recognized by civilized nations, decisions of national and international courts, texts on international law, and (where the parties to the dispute agree) general principles of equity. The Statute is set forth in AFP 110-20 at 5-19. Walker, The Sources of International Law and the Restatement (Revised) Foreign Relations Law of the United States, 37 Nav. L. Rev. 1 (1988) provides a comprehensive, yet basic, analysis of the sources of international law and their impact on the municipal law of the United States.

Countries are generally called "States" in international law. To avoid confusion with the states of the United States, the term "nation" is used in this publication to include countries and States in the international law sense of the term.

5. This concept is expanded upon in Joyner, The Reality and Relevance of International Law, *in* Kegley & Wittkopf, The Global Agenda: Issues and Perspectives 186-97 (2d ed. 1988).

6. *See also* paragraph 5.4.1 (p. 297).

its terms in their relations with one another. International agreements, whether bilateral treaties, executive agreements, or multilateral conventions, are the second principal source of international law. However, they bind only those nations that are party to them or that may otherwise consent to be bound by them.[7] 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 non-parties alike.[8]

U.S. Navy Regulations. U.S. Navy Regulations, 1990, require U.S. naval commanders to observe international law. Article 0705, Observance of International Law, states:

> *At all times, a commander shall observe, and require their command to observe, the principles of international law. Where necessary to fulfill this responsibility, a departure from other provisions of Navy Regulations is authorized.*[9]

7. The particular name assigned to the arrangement, *e.g.*, treaty, executive agreement, memorandum of understanding, exchange of notes or letters, technical arrangement or plan, does not alter the fact that it is an international agreement if the arrangement falls within the definition of international agreement provided in this paragraph. Procedures within the U.S. Government for negotiating international agreements may be found in State Department, DOD and Navy regulations which impose stringent controls on the negotiation, conclusion and forwarding of international agreements by organizational elements of the Department of the Navy. Those requirements are set forth in 22 C.F.R. part 181; DODDIR 5530.3, Subj: International Agreements, 11 June 1987. Implementing Navy instructions include SECNAV Instruction 5710.25 (series), Subj: International Agreements; OPNAV Instruction 5710.24, Subj: International Agreements Navy Procedures; and OPNAV Instruction 5710.25, Subj: International Agreements OPNAV Procedures. Questions regarding the definition and processing of international agreements should be referred to the Office of the Chief of Naval Operations (N3L/N5L) or the Office of the Deputy Assistant Judge Advocate General of the Navy (International and Operational Law (Code 10)).

8. Vienna Convention on the Law of Treaties, arts. 1, 26 & 38, *reprinted in* 8 Int'l Leg. Mat'ls 679 (1969) and AFP 110-20, at 7-2.

9. UCMJ, art. 92, provides that a violation of a lawful general regulation, such as art. 0705, Navy Regulations, 1990, is punishable by court-martial.

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 and Maritime Law Enforcement

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.[1] In recent years, new concepts have evolved, such as the exclusive economic zone and archipelagic waters, that 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).[2]

In 1983, the United States announced that it would neither sign nor ratify the 1982 LOS Convention due to fundamental flaws in its deep seabed mining

1. Space, or outer space, begins at the undefined upward limit of national or international airspace and extends to infinity. That undefined point of demarkation between airspace and outer space is generally regarded as occurring at that yet to be determined point where the atmosphere is incapable of sustaining aerodynamic flight and where artificial satellites cannot be sustained in orbit. Christol, The Modern International Law of Outer Space 522-33 (1982); Fawcett, Outer Space: New Challenges to Law and Policy 16-17 (1984).

2. The 1982 United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, U.N. Doc. A/CONF. 62/122 (1982), is *reprinted in* the Navy supplement to AFP 110-20 and *in* 21 Int'l Leg. Mat'ls 1261 (1982).

Each country has its own preference for maximizing the benefits of its relationships with the sea. Those without a strong maritime history tend to see their interests more exclusively as coastal nations than inclusively with the international community favoring maritime navigation and overflight. Alexander, 8. The interests of the United States reflect that apparent dichotomy: as a coastal nation the United States seeks to exploit its fisheries resources and offshore oil deposits; as a maritime power the United States is dependent on unencumbered navigation and overflight routes throughout the world and in outer space. Negroponte, Who Will Protect Freedom of the Seas?, Dep't St. Bull., Oct. 1986, at 42. However, an approach reflecting the inclusive interests of the international community actually benefits all nations, since the fundamental importance of the oceans lies in the equal and reasonable access to them for all nations. Harlow, Book Review, 18 J. Mar. L. & Comm. 150-51 (1987).

An understanding of the historical development of the law of the sea is necessary to appreciate the evolutionary nature of international law generally and the importance the actions and inactions of governments, including their navies, have in establishing and losing rights.

provisions. Although the Convention, by its terms, would not come into formal effect until one year following deposit with the United Nations of the 60th instrument of ratification, the United States considered that the provisions relating to navigation and overflight codified existing law and practice and reflected customary international law.[3]

On November 16, 1994, the 1982 LOS Convention came into force, with respect to those nations that are parties to it.[4] The concerns of the United States and other industrialized nations with respect to the deep seabed mining provisions of the Convention were successfully resolved by an Agreement adopted without dissent by the United Nations General Assembly on July 28, 1994.[5] That Agreement contains legally binding changes to the 1982 LOS Convention and is to be applied and interpreted together with the Convention as a single treaty.[6] On October 7, 1994, the President of the United States submitted the 1982 LOS Convention and the Agreement reforming its deep seabed mining provisions to the Senate for its advice and consent to accession and ratification, respectively.[7]

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 [in the 1982 LOS Convention]—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

3. *See* Statement by the President, Mar. 10, 1983, Annex A1-3 (p. 43).

4. *See* Table A1-1 (p. 87) for a listing of nations that have ratified or acceded to the 1982 LOS Convention as of 1 November 1997. *See* Annex A1-1 (p. 27) for the views of the United States as to the rights and duties of non-parties to the Convention as articulated in its 8 March 1983 Statement in Right of Reply, 17 LOS Official Records 243. Figure A1-1 (p. 85) illustrates the several regimes. International navigation and overflight and conduct by coastal nations in those areas are discussed in Chapter 2. The United States is a party to the Territorial Sea Convention, the Continental Shelf Convention, the High Seas Convention and the Fisheries Convention. *See* Table A1-2 (p. 90) for a listing of nations that are parties to these four 1958 Geneva Conventions.

5. U.N. General Assembly Resolution A/RES/48/263 of 17 Aug 1994 and accompanying Annex "Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982," *reprinted in* Nordquist, Vol. 1 at 471-91.

6. *Id.*, Agreement Art. 2 at 474.

7. Letter of Transmittal, Oct. 7, 1994, Senate Treaty Doc. 103-39, (*see* Annex A1-2 (p. 32)). For an excellent overview of the 1982 LOS Convention *see* Doran, An Operational Commander's Perspective of the 1982 LOS Convention, Int'l J. of Marine & Coastal L., Vol. 10, No. 3 (August 1995) at 335-47. On the national security aspects of the Convention *see* Department of Defense White Paper, National Security and the Law of the Sea, 2nd ed., January 1996.

the 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.[8]

The legal classifications ("regimes") of ocean and airspace areas directly affect naval operations by determining the degree of control that a coastal 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 nation control exercised in those areas, are set forth in the succeeding paragraphs of this chapter.[9] The DOD Maritime Claims Reference Manual (DoD 2005.1-M) contains a listing of the ocean claims of coastal nations.[10]

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.[11]

8. *See* Annex A1-3 (p. 43) for the full text of this statement. United States practice has been to recognize those provisions of maritime claims that are consistent with the 1982 LOS Convention and to diplomatically protest and assert its rights against those aspects that are inconsistent with internationally recognized rights and freedoms. For example, the United States will recognize a 12 nautical mile territorial sea claim, but not a restriction on warship innocent passage in those waters.

9. *See also* Figure A1-1 (p. 85).

10. The MCRM provides a description of the nature of the various claims and includes a system of charts depicting the baselines and seaward reach of the claimed areas of national jurisdiction. These claims also appear in certain issues of Notice to Mariners (*e.g.*, 1/97), U.S. Dep't State, Limits in the Seas No. 36, National Claims to Maritime Jurisdictions (7th rev. 1995), and U.S. Dep't State, Limits in the Seas No. 112, United States Responses to Excessive National Maritime Claims (1992). Publication of these lists does not constitute U.S. recognition or acceptance of the validity of any claim. The list of United States claims is reproduced in Annex A1-4 (p. 46). For a comprehensive analysis of excessive maritime claims, *see* Roach & Smith.

11. The current rules for delimiting baselines are contained in articles 5 through 14 of the 1982 LOS Convention. They distinguish between "normal" baselines (following the sinuosities of the coast) and "straight" baselines (which can be employed along certain irregular coasts). As noted by the I.C.J., delimitation of straight baselines "cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. . . . [T]he validity of the delimitation with regard to other States depends upon international law." *The Anglo-Norweigan Fisheries Case*, [1951] I.C.J.

(continued...)

11.(...continued)
Rep. 132. The baseline rules take into account most of the wide variety of physical conditions existing along the coastlines of the world. Alexander, at 13-14. The MCRM lists the baseline claims of the coastal nations. National legislation on baselines is compiled *in* U.N. Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Baselines: National Legislation With Illustrative Maps, U.N. Sales No. E.89.V.10 (1989). The baseline provisions of the 1982 LOS Convention are examined *in* U.N. Office for Oceans Affairs and the Law of the Sea, The Law of the Sea: Baselines, U.N. Sales No. E.88.V.5* (1989). *See also* Atlas of the Straight Baselines (T. Scovazzi *et al.* eds., 2d ed. 1989) and Roach & Smith, at 41-91.

The discussion of maritime zones in the text of this chapter assumes that the adjacent land area is within the undisputed sovereignty of the claimant nation. However, the legal title to some mainland and island territories is in dispute, thus affecting the offshore zones; for example: Essequibo region of western Guyana claimed by Venezuela; Western Sahara presently occupied by Morocco, but claimed by the Polisario supported by Algeria and Mauritania; the southern Kuriles, claimed by Japan and occupied by the U.S.S.R. (now Russia) since the end of World War II; various of the Spratly Islands claimed by China, Vietnam, Malayasia, the Philippines, Taiwan and Brunei; the Senkakus Islands disputed among China, Japan, and Taiwan; Liancourt Rock (or Takeshima) disputed between Japan and the Republic of Korea; Mayotte Island in the Indian Ocean disputed between France and Comoros; British Indian Ocean Territory (including Diego Garcia) where the United Kingdom's ownership is disputed by Mauritius; some small islands in the Mozambique Channel between Mozambique and Madagascar disputed between Madagascar and France; Persian Gulf islands of Abu Musa, Tunb al Sughra, and Tunb al Kabra disputed between Iran and the United Arab Emirates; Kubbar, Qaruh, and Umm al Maraden Islands disputed between Kuwait and Saudi Arabia; Hawar Islands disputed between Bahrain and Qatar; Falklands/Malvinas dispute between the United Kingdom and Argentina; and the two uninhabited islands of Hunter and Matthew, to the east of New Caledonia, disputed between France and Vanuatu.

Further, although there are close to 400 maritime boundaries, less than a quarter of them have been definitely resolved by agreement between the adjacent or opposing neighbors. Alexander, 41-44. Most of these agreements are collected *in* U.N. Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Maritime Boundary Agreements (1970-1984), U.N. Sales No. E.87.V.12 (1987); maritime boundary agreements concluded prior to 1970 are listed in an annex to this collection. *See also* U.S. Dep't State, Limits in the Seas No. 108, Maritime Boundaries of the World, (rev. 1990) and International Maritime Boundaries (Charney & Alexander eds., 1993 (2 Vols.). The Antarctic is discussed in paragraph 2.4.5.2.

U.S. maritime boundaries have been established with the *Soviet Union* (now *Russia*), Sen. Treaty Doc. 101-22 and Sen. Ex. Rep. 102-13, to which the Senate gave its advice and consent on 16 Sep. 1991; *Canada* in the Gulf of Maine, (see 1984 I.C.J. Rep. 345-46 and 23 Int'l Leg. Mats. 1247); *Mexico*, T.I.A.S. 8805 (*see* Dep't State, Limits in the Seas No. 45), *Cuba* (see Dep't State, Limits in the Seas No. 110); *Venezuela*, T.I.A.S. 9890 (*see* Dep't State, Limits in the Seas No. 91); and the *Cook Islands and Tokelau*, T.I.A.S. 10775 (*see* Dep't State, Limits in the Seas No. 100). The boundary with Cuba is established by executive agreement, pending advice and consent of the Senate to the treaties establishing these boundaries. Sen. Ex. H, 96th Cong. 1st Sess., T.I.A.S. 9732, 32 U.S.T. 840; T.I.A.S. 10,327; T.I.A.S. 10,913; T.I.A.S. 11,853 (Cuba). *See also* Feldman & Colson, The Maritime Boundaries of The United States, 75 Am. J. Int'l L. 729 (1981); Smith, The Maritime Boundaries of The United States, 71 Geographical Rev., Oct. 1981, at 395; and Maritime Boundary: Cuba-United States, Limits in the Seas No. 110 (1990). The United States has outstanding maritime boundary issues with Canada, including areas in the Beaufort Sea, Dixon Entrance, and Strait of Juan de Fuca. The U.S.-Canada dispute regarding the extension of the Gulf of Maine boundary was resolved in the *Gulf of Maine Case*, 1984 I.C.J. Regs. 347. *See* I

(continued...)

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 the nation's official large-scale charts.[12]

1.3.2 Straight Baselines. Where the coastline is deeply indented or where there is a fringe of islands along the coast in its immediate vicinity, the coastal nation may 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.[13] A coastal nation which uses straight baselines must either clearly indicate them on its charts or publish a list of

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11.(...continued)
International Maritime Boundaries (Charney, & Alexander eds., 1993 at 401-16. Negotiations continue to resolve the U.S.-Dominican Republic maritime boundary. Negroponte, Current Developments in U.S. Oceans Policy, Dep't St. Bull., Sep. 1986, at 86. The United States has established a provisional enforcement boundary between it and the Bahamas.

There has been considerable litigation between the United States and several states of the United States concerning the application of these rules. *United States v. California*, 332 U.S. 19, 67 S.Ct. 1658, 91 L.Ed. 1889 (1947); *United States v. California*, 381 U.S. 139, 85 S.Ct. 1401, 14 L.Ed.2d 296 (1965); *United States v. Louisiana*, 394 U.S. 11, 89 S.Ct. 773, 22 L.Ed.2d 44 (1969); *United States v. Alaska*, 422 U.S. 184, 95 S.Ct. 2240, 45 L.Ed.2d 109 (1975), on remand 519 F.2d 1376 (9th Cir. 1975); *United States v. California*, 432 U.S. 40, 97 S.Ct. 2915, 53 L.Ed.2d 94 (1977), modified 449 U.S. 408, 101 S.Ct. 912, 66 L.Ed.2d 619 (1981).

12. Territorial Sea Convention, art. 3; 1982 LOS Convention, art. 5. "Low-water line" has been defined as "the intersection of the plane of low water with the shore. The line along a coast, or beach, to which the sea recedes at low-water." The actual water level taken as low-water for charting purposes is known as the level of Chart Datum. LOS Glossary, definition 50, Annex A1-5 (p. 51). Since 1980, the United States has used a uniform, continuous Chart Datum of Mean Lower Low Water for all tidal waters of the United States, the Commonwealth of Puerto Rico, Guam, American Samoa, United States Virgin Islands, Commonwealth of Northern Mariana Islands, and its other territories and possessions. 45 Fed. Reg. 70296-97, 23 Oct. 1980; Hicks, Tide and Current Glossary 3 & 15 (NOAA 1989).

Normal baselines must be consistent with the rule set forth in the text. Excessive "normal" baseline claims include a claim that low-tide elevations wherever situated generate a territorial sea and that artificial islands generate a territorial sea (Egypt and Saudi Arabia). Churchill & Lowe, The Law of the Sea 46 (2d ed. 1988). On low-tide elevations, *see* 1.3.2.2; on artificial islands, *see* 1.4.2.2.

13. Territorial Sea Convention, art. 4; 1982 LOS Convention, art. 7.

Norway is an example of a country whose coastline is deeply indented and fringed with islands; in 1935 it was the first country to establish a baseline consisting of a series of straight lines between extended land points. In its decision, the International Court of Justice approved the system. *The Anglo-Norwegian Fisheries Case*, [1951] I.C.J. Rep. 116; MacChesney 65. The criteria laid down in the decision for delimiting straight baselines independent of the low-water line were copied almost verbatim in the 1958 Territorial Sea Convention, and continued, with some additional provisions, in the 1982 LOS Convention. *See* U.S. Dep't of State, Limits in the Seas No. 106, Developing Standard Guidelines for Evaluating Straight Baselines (1987).

(continued...)

geographical coordinates of the points joining them together.[14] See Figure 1-1. The United States, with few exceptions, does not employ this practice and interprets restrictively its use by others.[15]

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

13.(...continued)
Properly drawn straight baselines do not significantly push the seaward limits of the territorial sea away from the coast. Straight baselines are not authorized for the purpose of territorial sea expansion, which seizes property interests from other States in coastal adjacency or opposition, and from all other States of the world who share a common interest in the high seas and deep seabed. In viewing the 1982 LOS Convention as a whole, the U.S. position is that straight baseline segments must not exceed 24 NM in length. *See* note 15.

If the portion of the coast being examined does not meet either criterion (deeply indented or fringed with islands), then no straight baseline segment may lawfully be drawn in that locality, and the subordinate rules (on permissible basepoints, vector of the putative straight baseline in relation to the coast, and the requisite quality of the waters that would be enclosed), may not be invoked. Further, the coastal State must fulfill all the requirements of one test or the other, and may not mix the requirements. For example, a State may not claim that a locality is indented, though not deeply, and that it has some islands, though they do not constitute a fringe, and claim it may draw straight baselines in that locality. Either test selected must be met entirely on its own terms. If neither test is met, then the low-water mark must be used in that locality. However, failure to meet this preliminary geographical test in one locality does not preclude establishing it in another.

14. Territorial Sea Convention, art. 4(6); 1982 LOS Convention, art. 16.

15. Letters from Sec'y State to Dep't Justice, 13 Nov. 1951 and 12 Feb. 1952, *quoted in* 1 Shalowitz, Shore and Sea Boundaries 354-57 (1962) and 4 Whiteman 174-79. Straight baselines must be constructed strictly in accordance with international law to avoid unilateral attempts to diminish the navigational rights of all States. A concise description of the U.S. position on the use of straight baselines may be found in the Commentary in the Transmittal Message at pp. 8-10 (*see* note 7).

Several parts of the U.S. coast (*e.g.*, Maine and southeast Alaska) have the physical characteristics that would qualify for the use of straight baselines. Alexander, at 19. The U.S. Supreme Court has held that straight baselines could be applied in the United States only with the federal government's approval. *United States v. California*, 381 U.S. 139, 167-69, 85 S.Ct. 1401, 14 L.Ed.2d 296, 314-15 (1965); *Louisiana Boundary Case*, 394 U.S. 11, 36-38, 89 S.Ct. 773, 787-89, 22 L.Ed.2d 44 (1969); and *Alabama and Mississippi Boundary Case*, 470 U.S. 93, 99, 105 S.Ct. 1074, 84 L.Ed.2d 73, 79 (1985).

Seventy-five nations have delimited straight baselines along all or a part of their coasts. *See* Table A1-3 (p. 94). No maximum length of straight baselines is set forth in the 1982 LOS Convention. The longest line used by the Norwegians in 1935 was the 44-mile line across Lopphavet. Much longer lines have since been drawn, not in conformity with the law, such as Ecuador (136 nautical miles), Madagascar (123 nautical miles), Iceland (92 nautical miles), and Haiti (89 nautical miles). Alexander, Baseline Delimitations and Maritime Boundaries, 23 Va. J. Int'l L. 503, 518 (1983). Vietnam's baseline system departs to a considerable extent from the general direction of its coast. Alexander, *id.*, at 520. Other straight baselines that do not conform to the 1982 LOS Convention's provisions include Albania, Canada, Colombia, Cuba, Italy, Senegal, Spain, and the former-U.S.S.R. Alexander, at 37; U.S. Dep't of State, Limits in the Seas No. 103 (1985); and MCRM. Among the straight baselines that depart most radically from the criteria of the 1982 LOS Convention are the Arctic straight baselines drawn by Canada and the former-U.S.S.R. *See* Roach & Smith at 57-8.

(continued...)

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 nation.[16]

1.3.2.2 Low-Tide Elevations. A low-tide elevation is a naturally formed land area surrounded by water and which remains above water at low tide but is submerged at high tide. As a rule, straight baselines may 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.[17]

1.3.3 Bays and Gulfs. There is a complex formula for determining the baseline closing the mouth of a legal bay or gulf.[18] 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.[19] See Figure 1-2. Where the indentation has more than one mouth due to the presence

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15.(...continued)
Some of the Soviet straight baseline claims are analyzed in U.S. Dep't of State, Limits in the Seas No. 107 (1987) (Pacific Ocean, Sea of Japan, Sea of Okhotsk, Bering Sea) and No. 109 (1988) (Black Sea). The USS ARKANSAS (CGN-41) challenged the Soviet straight baseline drawn across Avacha Bay, the entrance to Petropavlovsk, Kamchatka Peninsula, on 17 and 21 May 1987. Washington Post, 22 May 1987, at A34; 39 Current Dig. Soviet Press, 24 June 1987, at 18; U.S. Naval Inst. Proc. Naval Review, May 1988, at 231.

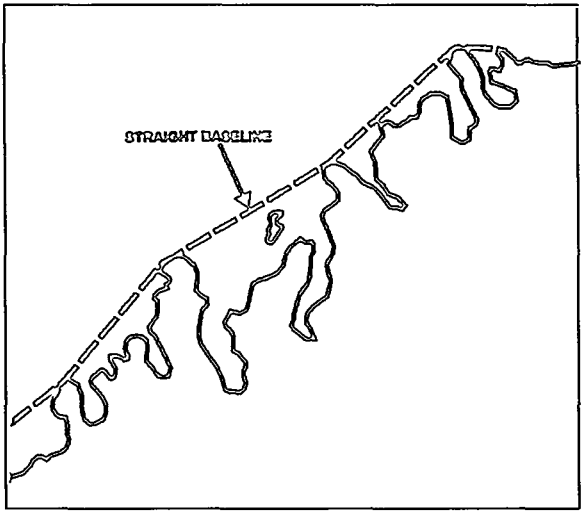
16. 1982 LOS Convention, art. 7(2). States making use of the delta provision must first meet the threshold test of art. 7(1) of the LOS Convention which permits the drawing of straight baselines by joining appropriate points along the coast in localities where the coastline is deeply indented and cut into or where a fringe of islands exists along the coast. Applicable deltas include those of the Mississippi and Nile Rivers, and the Ganges-Brahmaputra River in Bangladesh. Alexander, at 81 n.10.

17. Territorial Sea Convention, arts. 11 & 4(3); 1982 LOS Convention, arts. 13 & 7(4). Low-tide elevation is a legal term for what are generally described as drying banks or rocks. On charts they should be distinguishable from islands. International Hydrographic Organization (IHO) definition 49, Annex A1-5 (p. 51). The LOS Convention would also permit the use of low-tide elevations without lighthouses as basepoints for straight baselines if the usage "has received general international recognition." LOS Convention, art. 7(4). No low-tide elevation may be used as a basepoint for establishing straight baselines if it is located wholly outside the territorial sea measured from normal baselines. Where a low-tide elevation is situated at a distance not exceeding the breadth of the territorial sea measured from the mainland or an island, the low-tide elevation may also be used as the normal baseline. *See* Figure 1-5 (p. 17).

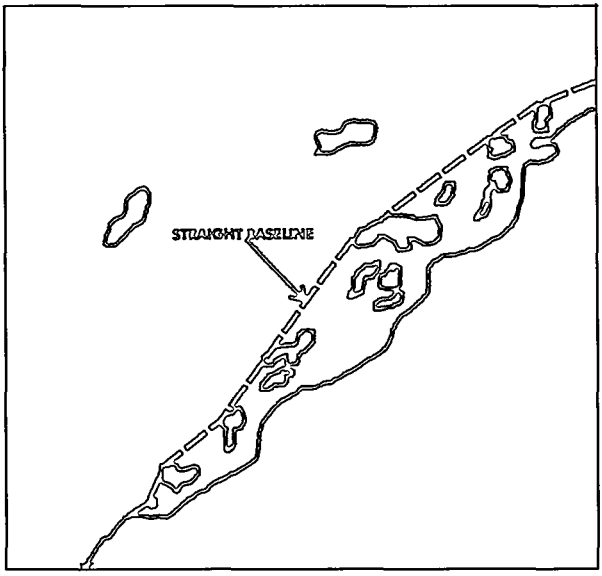
18. Many bodies of waters called "bays" in the geographical sense are not "bays" for purposes of international law. *See* Westerman, The Juridical Bay (1987).

19. Territorial Sea Convention, art. 7(2); 1982 LOS Convention, art. 10(2). Islands landward of the line are treated as part of the water area for satisfaction of the semicircle test. Territorial Sea Convention, art. 7(3); 1982 LOS Convention, art. 10(3).

FIGURE 1-1 STRAIGHT BASELINES



A. DEEPLY INDENTED COASTLINE



B. FRINGING ISLANDS

FIGURE 1-2. The Semicircle Test

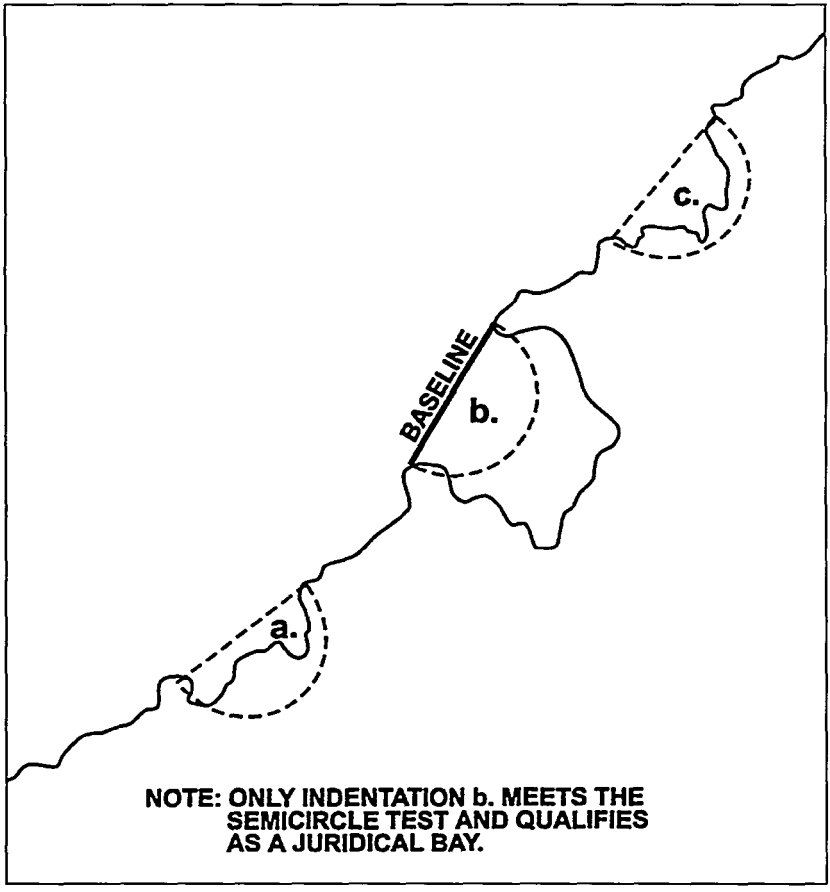


FIGURE 1-3. Bay with Islands

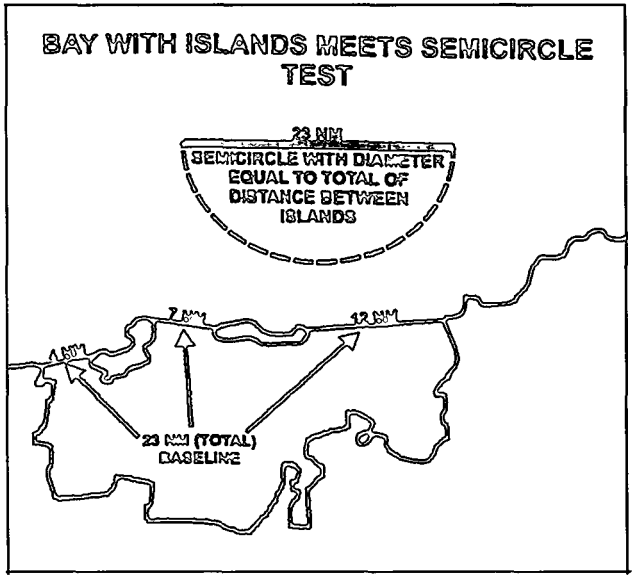
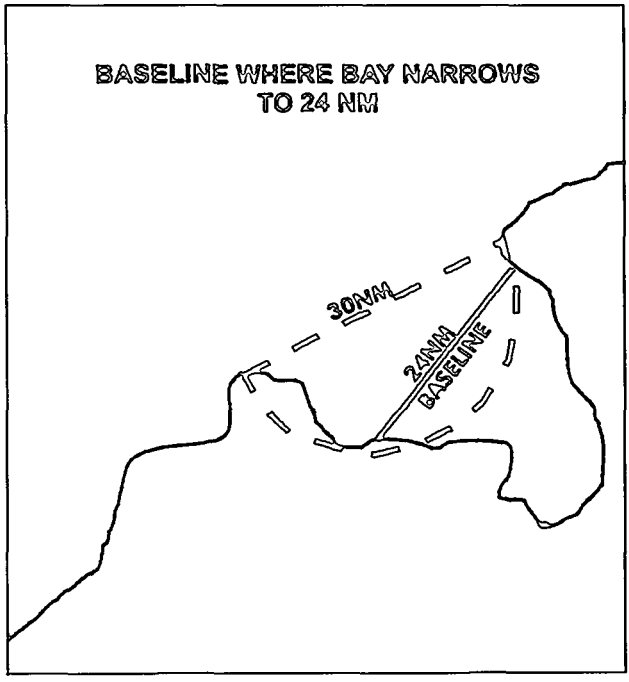


FIGURE 1-4. Bay with Mouth Exceeding 24 Nautical Miles



of islands, the diameter of the test semicircle is the sum of the lines across the various mouths.[20] 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.[21]

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.[22] 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.[23]

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20. Territorial Sea Convention, art. 7(3); 1982 LOS Convention, art. 10(3).

21. The waters enclosed thereby are internal waters. Territorial Sea Convention, art. 7(4)-(5); 1982 LOS Convention, art. 10(4)-(5).

If an indentation with a mouth wider than 24 nautical miles meets the semicircle test, it qualifies as a juridical bay. The waters landward of the 24 nautical mile "closure line" in such a bay need not meet the semicircle test. *See* Figure 1-4 (p. 10). Territorial Sea Convention, arts. 7(2) & (5); 1982 LOS Convention, arts. 10(2) & (5); Westerman, The Juridical Bay 170-76 (criticizing the contrary view in I Shalowitz, Shore and Sea Boundaries 223 (1962)). This "closure line" is described as a straight baseline in article 10(5) of the 1982 LOS Convention.

Closure lines for bays meeting the semicircle test must be given due publicity, either by chart indications or by listed geographic coordinates. Where the semicircle test is not met in the first instance, the coastal water area is not a "bay" in the legal sense, but a mere curvature of the coast. In this case, the territorial sea baseline must follow the low water line of the coastline, unless the coastal configuration justifies use of straight baselines (*see* paragraph 1.3.2) or the waters meet the criteria for an "historic bay" (*see* paragraph 1.3.3.1). Territorial Sea Convention, arts. 3 & 7(6); 1982 LOS Convention, arts. 16 & 10(6). The 1984 Soviet straight baseline decree along the Arctic coast specifically closed off at their mouths 8 bays wider than 24 nautical miles. Alexander, at 36. The unique Soviet claims of *closed seas* are discussed in paragraph 2.4.4, note 68 (p. 133) and Alexander, at 67-69.

The U.S. Supreme Court has held that Long Island and Block Island Sounds west of the line between Montauk Point, L.I., and Watch Hill Point, R.I., constitute a juridical bay. *United States v. Maine et al. (Rhode Island and New York Boundary Case)*, 469 U.S. 504 (1985).

22. Territorial Sea Convention, art. 7(6); 1982 LOS Convention, art. 10(6).

23. 1973 Digest of U.S. Practice in International Law 244-45 (1974); Goldie, Historic Bays in International Law—An Impressionistic Overview, 11 Syracuse J. Int'l L. & Comm. 205, 221-23, 248 & 259 (1984). Cf. *United States v. Alaska*, 422 U.S. 184, 200 (1975) (absence of foreign protest does not constitute acquiescence absent showing foreign nations knew or reasonably should have known that territorial sovereignty was being asserted); *but see Fisheries Case (U.K. v. Norway)*, 1951 I.C.J. Rep.

(continued...)

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.[24]

23.(...continued)
116, 138 & 139 (mere toleration is sufficient). See also Juridical Regime of Historic Waters, Including Historic Bays, U.N. Doc. A/CN.4/143, 9 March 1962, *in* 2 Y.B. Int'l L. Comm. 1 (1964).

The United States "has only very few small spots of historic waters, which are of no consequence to the international community and which could have been incorporated in a straight baseline system had it chosen to do so." Negroponte, Who Will Protect Freedom of the Seas?, Dep't St. Bull., Oct. 1986, at 42-43. Mississippi Sound, a shallow body of water immediately south of the mainland of Alabama and Mississippi, has been held by the U.S. Supreme Court to be an historic bay, *United States v. Louisiana et al. (Alabama and Mississippi Boundary Case)*, 470 U.S. 93 (1985), as has Long Island Sound, *United States v. Maine et al.*, 469 U.S. 509 (1985). The United States has held that certain other bodies of United States waters do not meet the criteria for historic waters. These include Cook Inlet, Alaska, (*United States v. Alaska*, 422 U.S. 184 (held to be high seas)); Santa Monica and San Pedro Bays, California (*United States v. California*, 381 U.S., at 173-75 (1965)); Florida Bay (*United States v. Florida*, 420 U.S. 531, 533 (1975)); numerous bays along the coast of Louisiana (*Louisiana Boundary Case*, 420 U.S. 529 (1975)); and Nantucket Sound, Massachusetts (*Massachusetts Boundary Case*, 475 U.S. 86 (1986)). The Supreme Court has also noted that no exceptions have been taken to the Master's finding that Block Island Sound was not a historic bay. *United States v. Maine et al.*, 469 U.S. 509 n.5. The Supreme Court also adopted the recommendations of its Special Masters in the Florida and Louisiana cases. Their Reports, containing the primary analyses of these waters, were not generally available until their publication in Reed, Koester and Briscoe, The Reports of the Special Masters of the United States Supreme Court in the Submerged Lands Cases, 1949-1987 (1992). In 1965, the U.S. Supreme Court declined to consider the claim that Monterey Bay, California, is historic, noting that it met the 24-nautical mile closing line test. *United States v. California*, 381 U.S., at 173. On the other hand, while the Chesapeake and Delaware Bays meet the criteria for historic bays, and have been so recognized by other nations (2 Restatement (Third), sec. 511 Reporters' Note 5, at 32), both now qualify as juridical bays and do not depend upon historic bay status for treatment as internal waters.

Table A1-4 (p. 96) lists claimed and potential historic bays, none of which are recognized by the United States. The status of some of these bays, and others, are discussed *in* 4 Whiteman 233-57, Churchill & Lowe, The Law of the Sea 36-38 (2d rev. ed. 1988); and Roach & Smith, at 23-40.

Hudson Bay, with a 50-mile closing line, is not conceded by the United States to be a historic bay, despite Canada's claim since 1906. Colombos, International Law of the Sea 186 (6th ed. 1967); Bishop, International Law 605 (3d ed. 1971); 1 Hackworth 700-01; 4 Whiteman 236-37.

The claim of Libya to historic status for the Gulf of Sidra (Sirte), with a closure line of about 300 miles, first advanced in 1973, has not been accepted by the international community and has been the subject of frequent protests and assertions (*see* paragraph 2.6 (p. 143)). 1974 Digest of U.S. Practice in International Law 293; U.N. Law of the Sea Bulletin No. 6, Oct. 1985, at 40 (U.S. protests). Many other nations also reject Libya's claim to the Gulf of Sidra, including Australia (Hayden press conference in Brisbane, 26 March 1986), France (FBIS Western Europe, 26 March 1986, at K1); Federal Republic of Germany (FBIS Western Europe 26 March 1986, at J1); Norway (FBIS Western Europe 7 April 1986, at P3-P4); and Spain (FBIS Western Europe, 26 March 1986, at N1). Only Syria, Sudan, Burkina Faso (formerly Upper Volta), and Romania have

(continued...)

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.[25]

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

23.(...continued)
publicly recognized the claim. U.N. Doc. S/PV.2670, at 12 (1986) (Syria); Foreign Broadcast Information Service (FBIS) Daily Report, Middle East & Africa, 27 Mar. 1986, at Q5 (Sudan); *id.*, 13 Dec. 1985, at T1 (Burkina Faso); FBIS Daily Report, Eastern Europe, 27 Mar. 1986, at H1 (Romania). The Libyan claim is carefully examined in Spinatto, Historic and Vital Bays: An Analysis of Libya's Claim to the Gulf of Sidra, 13 Ocean Dev. & Int'l L.J. 65 (1983); Francioni, The Status of The Gulf of Sirte in International Law, 11 Syracuse J. Int'l L. & Comm. 311 (1984); Blum, The Gulf of Sidra Incident, 80 Am. J. Int'l L. 668 (1986); Neutze, The Gulf of Sidra Incident: A Legal Perspective, U.S. Naval Inst. Proc., January 1982, at 26-31; and Parks, Crossing the Line, U.S. Naval Inst. Proc., November 1986, at 41-43.

The U.S., Japan, Great Britain, France, Canada, and Sweden have protested the Soviet Union's 1957 claim that Peter the Great Bay (102 nautical miles) is a historic bay. 4 Whiteman 250-57; 2 Japanese Ann. of Int'l L. 213-18 (1958); Darby, The Soviet Doctrine of the Closed Sea, 23 San Diego L. Rev. 685, 696 (1986). The operations of USS LOCKWOOD (FF-1064) on 3 May 1982 and USS OLDENDORF (DD-972) on 4 September 1987 challenged the Soviet historic bay and straight baseline claims in Peter the Great Bay. *See* Roach & Smith at 31.

Several countries have protested Vietnam's claims to portions of the Gulfs of Tonkin and Thailand as its historic waters. Protests of the claim in the Gulf of Thailand may be found *in* U.N. Law of the Sea Bulletin No. 10, Nov. 1987, at 23 (U.S.); U.N. LOS Office, Current Developments in State Practice 147 (Thailand); U.N. LOS Office, Current Developments in State Practice No. II 84-85 (Singapore); and of the claim in the Gulf of Tonkin in U.N. LOS Office, Current Developments in State Practice 146-47 (France and Thailand). *See also* Limits in the Seas No. 99, Straight Baselines Vietnam 9-10 (1983) and Roach & Smith at 33.

24. Territorial Sea Convention, art. 13; 1982 LOS Convention, art. 9. The Conventions place no limit on the length of this line. Since estuaries and bays are necessarily much wider than mouths of rivers, a straight baseline across the mouth of a river should not be longer than the maximum permitted for bays. This rule does not apply to estuaries. (An estuary is the tidal mouth of a river, where the tide meets the current of fresh water. IHO definition 30, Annex A1-5 (p. 51).) The baseline adopted for a river mouth must be given due publicity either by chart indication or by listed geographical coordinates. Territorial Sea Convention, art. 3; 1982 LOS Convention, art. 16.

If the river forms an estuary, the rule for bays should be followed in closing the river's mouth. IHO definition 54, Annex A1-5 (p. 51). Further, the Conventions do not state exactly where, along the banks of estuaries, the closing points should be placed. Some nations have sought to close off large estuaries at their seaward extent. For example, Venezuela has closed off the mouth of the Orinoco with a 99-mile closing line, although the principal mouth of the river is 22 miles landward from that baseline. Limits in the Seas No. 21. That claim was protested by the United States and the United Kingdom in 1956. 4 Whiteman 343; Roach & Smith at 74.

No special baseline rules have been established for rivers entering the sea through deltas, such as the Mississippi, (*i.e.*, either the normal or straight baseline principles may apply) or for river entrances dotted with islands.

25. 1982 LOS Convention, art. 6. A reef is "a mass of rock or coral which either reaches close to the sea surface or is exposed at low tide." A fringing reef is "a reef attached directly to the shore or
(continued...)

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 adjacent to the coast to provide anchorage and shelter.[26]

1.4 NATIONAL WATERS[27]

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 nations, with certain navigational rights reserved to the international community. The second part includes contiguous zones, waters of the exclusive economic zone,[28] 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.

25.(continued...)
continental land mass, or located in their immediate vicinity." IHO definition 66, Annex A1-5 (p. 51). An atoll is "a ring-shaped reef with or without an island situated on it surrounded by the open sea, that encloses or nearly encloses a lagoon." IHO definition 9, Annex A1-5 (p. 51). While the LOS Convention does not state how a closing line is to be drawn across the opening of an atoll, waters inside the lagoon of an atoll are internal waters. *See* paragraph 1.4.1 (p. 15) and Beazley, Reefs and the 1982 Convention on the Law of the Sea, 6 Int'l J. Estuarine & Coastal L. 281 (1991). In warm water areas, where atolls and reefs are prevalent, navigators may thus have difficulty in precisely determining the outer limits of a nation's territorial sea. Alexander, at 14.

26. Territorial Sea Convention, art. 8; 1982 LOS Convention, art. 11. Other harbor works include moles, quays and other port facilities, as well as coastal terminals, wharves and sea walls built along the coast at inlets or rivers for protective purposes or for enclosing sea areas adjacent to the coast to provide anchorage and shelter. IHO definition 38, Annex A1-5 (p. 51).

Offshore installations and artificial islands are not considered permanent harbor works for baseline purposes. Notwithstanding suggestions that there are uncertainties relating to monobuoys (single point mooring systems for tankers), which may be located some distance offshore, Alexander, at 17, the U.S. Government rejects the use of monobuoys as valid base points. The U.S. Supreme Court has held that "dredged channels leading to ports and harbors" are not "harbor works." *United States v. Louisiana*, 394 U.S. 11, 36-38, 89 S.Ct. 773, 787-89, 22 L.Ed.2d 44 (1969).

Further, the Conventions do not address ice coast lines, where the ice coverage may be permanent or temporary. The U.S. Government considers that the edge of a coastal ice shelf does not support a legitimate baseline. Navigation in polar regions is discussed in paragraph 2.4.5 (p. 134).

27. Although "national waters" are not words of art recognized in international law as having a specialized meaning, their use in the text to distinguish such waters from "international waters" is considered a useful aid to understanding the contrasting operational rights and duties in and over the waters covered by these two terms.

28. The high seas rights of navigation in and over the waters of the exclusive economic zone are examined in paragraph 2.4.2 (p. 129).

1.4.1 Internal Waters. Internal waters are *landward* of the baseline from which the territorial sea is measured.[29] Lakes, rivers,[30] 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 (see paragraph 2.3.1), ships and aircraft may not enter or overfly internal waters without the permission of the coastal nation. Where the establishment of a straight baseline has the effect of enclosing as internal waters areas which had previously not been considered as such, a right of innocent passage exists in those waters.[31]

1.4.2 Territorial Seas. The territorial sea is a belt of ocean which is measured seaward from the baseline of the coastal nation and subject to its sovereignty.[32] The U.S. claims a 12-nautical mile territorial sea[33] and recognizes territorial sea claims of other nations up to a maximum breadth of 12 nautical miles.[34]

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29. Territorial Sea Convention, art. 5(1); 1982 LOS Convention, arts. 2(1) & 8(1). Nordquist, Vol. II at 104-8.

30. It should be noted that rivers that flow between or traverse two or more nations are generally regarded as international rivers (e.g., St. Lawrence, Rhine, Elbe, Meuse, Oder, Tigrus, Euphrates). 3 Whiteman 872-1075; Berber, Rivers in International Law (1959); Vitanyi, The International Regime of River Navigation (1979).

31. Territorial Sea Convention, art. 5(2); 1982 LOS Convention, art. 8(2).

32. Territorial Sea Convention, arts. 1-2; 1982 LOS Convention, art. 2. Nordquist, Vol. II at 49-86.

33. By Presidential Proclamation 5928, 27 December 1988, the United States extended its territorial sea, for international purposes, from 3 to 12 nautical miles. 54 Fed. Reg. 777, 9 Jan. 1989; 24 Weekly Comp. Pres. Doc. 1661, 2 Jan. 1989; 83 Am. J. Int'l L. 349; 43 U.S.C.A. sec. 1331 note; Annex A1-6 (p. 78). *See also* Schachte, The History of the Territorial Sea From a National Security Perspective, 1 Terr. Sea J. 143 (1990). The 3-nautical mile territorial sea had been established by Secretary of State Jefferson in his letters of 8 Nov. 1793 to the French and British Ministers, 6 The Writings of Thomas Jefferson 440-42 (Ford ed. 1895) ("reserving . . . the ultimate extent of this for future deliberation the President gives instructions to the officers acting under his authority to . . . [be] restrained for the present to the distance of one sea-league, or three geographical miles from the sea-shore"); Act of 5 June 1794, for the punishment of certain crimes against the United States, sec. 6, 1 Stat. 384 (1850) (granting jurisdiction to the Federal District Courts in certain cases "within a marine league of the coasts or shores" of the United States); Dep't of State Public Notice 358, 37 Fed. Reg. 11,906, 15 June 1972. *See* Swarztrauber, generally.

By its terms, Proclamation 5928 does not alter existing state or Federal law. As a result, the 9 nautical mile natural resources boundary off Texas, the Gulf coast of Florida, and Puerto Rico, and the 3 nautical mile line elsewhere, remain the inner boundary of Federal fisheries jurisdiction and the limit of the states' jurisdiction under the Submerged Lands Act, 43 U.S.C. sec. 1301 *et seq.* The Puerto Rico natural resources boundary is the limit of that commonwealth's jurisdiction under 48 U.S.C. sec. 749. *See* Arruda, The Extension of the United States Territorial Sea: Reasons and Effects, 4 Conn. J. Int'l L. 698 (1989); Kmiec, Legal Issues Raised by the Proposed Presidential Proclamation to Extend the Territorial Sea, 1 Terr. Sea J. 1 (1990); Office of NOAA General Counsel, Effect of the Territorial Sea Proclamation on the Coastal Zone Management Act, *id.* 169; Archer and Bondareff, The Role of Congress in Establishing U.S. Sovereignty Over the Expanded Territorial Sea, *id.* 117.

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.[35] 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.[36] A low-tide elevation (above water at low tide but submerged at high tide[37]) 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.[38] 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.[39]

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

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34. *See* paragraph 2.6 (p. 143) regarding the U.S. Freedom of Navigation and Overflight Program.

The history of claims concerning the breadth of the territorial sea reflects the lack of any international agreement prior to the 1982 LOS Convention, either at the Hague Codification Conference of 1930 or UNCLOS I and II, on the width of that maritime zone. Today, most nations claim no more than a 12 nautical mile territorial sea. This practice is recognized in the 1982 LOS Convention, art. 3, which provides that "every [nation] has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from the baseline." Table A1-5 (p. 97) lists the territorial sea claims including those few coastal nations that presently claim territorial sea breadths greater than 12 nautical miles in violation of art. 3 of the 1982 LOS Convention. Table A1-6 (p. 100) shows the expansion of territorial sea claims since 1945.

35. Territorial Sea Convention, art. 10; 1982 LOS Convention, art. 121(1). The *travaux préparatoires* of art. 121 may be found in U.N. Office for Oceans Affairs and the Law of the Sea, The Law of the Sea: Regime of Islands (1988). *See also* Nordquist, Vol. III, at 319-39.

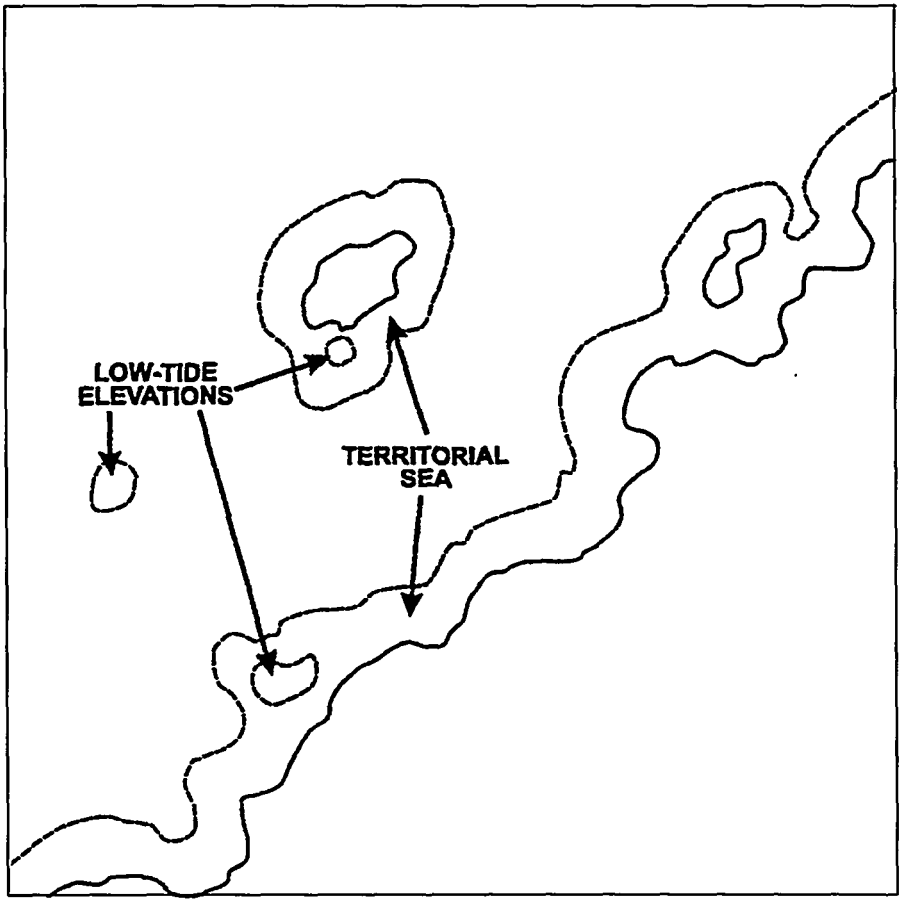
36. Rocks, however, have no exclusive economic zone or continental shelf. Territorial Sea Convention, art. 10; 1982 LOS Convention, art. 121(3); *see also* paragraph 1.3 (p. 1-3) and Kwiatkowska & Soons, Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, 21 Neth. Yb. Int'l L. 139 (1990).

37. *See* paragraph 1.3.2.2 (p. 7).

38. Territorial Sea Convention, art. 11; 1982 LOS Convention, art. 13. "Low-tide" is not defined in the Conventions. Various measures of low tide exist, including mean low water and mean lower low water. *See* paragraph 1.3.1, note 12 (p. 5) regarding low-water line.

39. 1982 LOS Convention, arts. 11 & 60(8). These terms are defined in IHO definitions 8 & 41, Annex A1-5 (p. 51). "Offshore terminals" and "deepwater ports" are defined in U.S. law as "any fixed or floating man-made structures other than a vessel, or any group of such structures, located beyond the territorial sea . . . and which are used or intended for use as a port or terminal for the loading or unloading and further handling of oil for transportation to any State." Deepwater Port Act of 1974, as amended, 33 U.S.C. sec. 1501 & 1502(10).

FIGURE 1-5. Territorial Sea of Islands and Low-Tide Elevations



beyond the outer limits of the territorial sea, are included ***in*** the territorial sea. Roadsteads must be clearly marked on charts by the coastal nation.[40]

1.4.3 Archipelagic Waters. An archipelagic nation is a nation. that is constituted wholly of one or more groups of islands.[41] 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.[42] The waters enclosed within the archipelagic baselines are called

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40. Territorial Sea Convention, art. 9; 1982 LOS Convention, arts. 12 & 16. Only the roadstead itself is territorial sea; roadsteads do not generate territorial seas around themselves. *See* McDougal & Burke 423-27. Accordingly, the United States does not recognize Germany's claim to extend its territorial sea at one point in the Helgoland Bight of the North Sea to 16 nautical miles.

41. 1982 LOS Convention, art. 46. Art. 46 defines an archipelagic nation as being constituted wholly by one or more archipelagos, and provides that it may include other islands. The article also defines "archipelago" as "a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that [they] form an intrinsic geographical, economic, and political entity, or which historically have been regarded as such." A number of nations fall within the scope of this definition, including Antigua and Barbuda, The Bahamas, Cape Verde, Comoros, Fiji, Indonesia, Papua New Guinea, Philippines, Sao Tome and Principe, the Solomon Islands, Trinidad and Tobago, and Vanuatu. *See* Table A1-7 (p. 101).

Other nations fall outside the Convention's definition. Continental countries possessing island archipelagos which are not entitled to archipelagic status under the Convention include the United States (Hawaiian Islands and Aleutians), Canada (Canadian Arctic Islands), Greece (the Aegean archipelago), Ethiopia (Dahlak), Ecuador (the Galapagos Islands) and Portugal (the Azores Islands). These islands, although archipelagos in a geographical sense, are not archipelagos in the political-legal sense under the Convention. *See* Table A1-8 (p. 104) for a complete list.

The concept of archipelagos is examined in detail in Churchill & Lowe, The Law of the Sea 98-111 (2d rev. ed. 1988); Herman, The Modern Concept of the Off-Lying Archipelago in International Law, Can. Y.B. Int'l L. 1985 at 172; 1 O'Connell 236-258; Rodgers, Midocean Archipelagos and International Law (1981); Symmons, The Maritime Zones of Islands in International Law 68-81 (1979); Dubner, The Law of Territorial Waters of Mid-Ocean Archipelagos and Archipelagic States (1976); and O'Connell, Mid-ocean Archipelagos, 45 Br. Y.B. Int'l L. 1 (1971). The *travaux preparatoires* of the archipelagic articles of the LOS Convention may be found in U.N. Office for Ocean Affairs and the Law of the Sea, Archipelagic States: Legislative History of Part IV of the United Nations Convention on the Law of the Sea (U.N. Sales No. E.90.V.2, 1990); and in a series of articles by the principal U.S. negotiators: Stevenson & Oxman, The Preparations for the Law of the Sea Conference, 68 Am. J. Int'l L. 1, 12-13 (1974); The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session, 1, 21-22 (1975); *id.*, The Third United Nations Conference on the Law of the Sea: The 1975 Geneva Session, 69 Am. J. Int'l L. 763, 784-85 (1975); Oxman, The Third United Nations Conference on the Law of the Sea: The 1977 New York Session, 72 Am. J. Int'l L. 57, 63-66 (1978). *See also* Nordquist, Vol. II at 397-487.

42. 1982 LOS Convention, art. 47. The ratio is that of the area of the water to the area of the land, including atolls, within the baselines. Art. 47 also requires that the length of such baselines not exceed 100 nautical miles (with limited exceptions up to 125 nautical miles); that the baselines do not depart to any appreciable extent from the general configuration of the archipelago; and that the

(continued...)

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.)[43] 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.

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.[44]

1.5 INTERNATIONAL WATERS

For operational purposes, 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.

42.(...continued)
system of baselines does not cut off, from the high seas or EEZ, the territorial sea of another nation. If part of the archipelagic waters lies between two parts of an immediately adjacent neighboring nation, the existing rights and all other legitimate interests which the latter nation has traditionally exercised in such waters will survive and must be respected.

The 1:1 - 9:1 water-land area ratio serves to exclude large land area island nations such as Great Britain and New Zealand where the ratio is less than 1:1, and scattered island nations such as Kiribati and Tuvalu where the ratio is greater than 9:1. *See* Table A1-8A (p. 104). Table A1-9 (p. 105) lists those nations with an acceptable water:land ratio.

Several nations have drawn straight baselines around non-independent archipelagos, in violation of art. 7 of the 1982 LOS Convention: Canada (Canadian Arctic Islands), Denmark (Faeroe Islands), Ecuador (Galapagos Islands), Ethiopia (Dahlak Archipelago), Norway (Svalbard) and Portugal (Azores and Madeira Islands). *See* Table A1-8 (p. 104).

43. 1982 LOS Convention, art. 49. Archipelagic waters are subject, along with the airspace over such waters and the subjacent seabed and subsoil, to archipelagic national sovereignty, excepting, *inter alia,* certain historical rights preserved for existing fisheries agreements and submarine cables. *Id.* at art. 51. *See* paragraph 2.3.4 (p. 127) regarding navigation in and overflight of archipelagic waters.

44. 1982 LOS Convention, art. 53. Air routes may be designated for the passage of aircraft. The axis of the sea lanes (and traffic separation schemes) are to be clearly indicated on charts to which due publicity shall be given.

1.5.1 Contiguous Zones. A contiguous zone is an area extending seaward from the territorial sea in which the coastal 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 paragraph 1.5.4).[45] The U.S. claims a contiguous zone extending 12 nautical miles from the baselines used to measure the territorial sea.[46] The U.S. will respect, however, contiguous zones extending up to 24 nautical miles from the baseline, provided the coastal nation recognizes U.S. rights in the zone consistent with the provisions of the 1982 LOS Convention.[47]

1.5.2 Exclusive Economic Zones. An exclusive economic zone (EEZ) is a resource-related zone adjacent to the territorial sea. An EEZ may not extend beyond 200 nautical miles from the baseline.[48] As the name suggests, its central purpose is economic. The U.S. recognizes the sovereign rights of a coastal nation to prescribe and enforce its laws in the exclusive economic zone for the purposes of exploration, exploitation, management, and conservation of the natural

45. Territorial Sea Convention, art. 24; 1982 LOS Convention, art. 33; Restatement (Third) Foreign Relations Law of the United States, sec. 513 Comment f, sec. 511 Comment k. The term "sanitary," a literal translation from the French "*sanitaire*," refers to "health and quarantine" matters. *See* Lowe, The Development of the Concept of the Contiguous Zone, 1981 Br. Y.B. Int'l L. 109 (1982) and Oda, The Concept of the Contiguous Zone, 11 Int'l & Comp. L.Q. 31 (1962). *See also*, Nordquist, Vol. II at 266-75.

46. Dep't of State Public Notice 358, 37 Fed. Reg. 11,906, 15 June 1972. This is now also the outer limit of the U.S. territorial sea for international purposes; for U.S. domestic law purposes the U.S. territorial sea remains at 3 nautical miles. *See* paragraph 1.4.2, note 33 (p. 15).

47. White House Fact Sheet, Annex A1-7 (p. 80). A list of those nations claiming contiguous zones beyond their territorial sea appears as Table A1-10 (p. 106).

Contiguous zones may be proclaimed around both islands and rocks following appropriate baseline principles. 1982 LOS Convention, art. 121(2).

Low-tide elevations (which are not part of the baseline) and man-made objects do not have contiguous zones in their own right. 1982 LOS Convention, arts. 11 & 60(8). Man-made objects include oil drilling rigs, light towers, and off-shore docking and oil pumping facilities.

48. 1982 LOS Convention, arts. 55 & 86; Sohn & Gustafson 122-23 (pointing out that some nations insist that the exclusive economic zone is a special zone of the coastal nation subject to the freedoms of navigation and overflight). Japan is of the view that "the rights and jurisdiction of the coastal states over the 200 nautical mile exclusive economic zone are yet to be established as principles of general international law." Japanese Embassy ltr to U.S. Dep't of State (OES/OLP), 15 June 1987.

The broad principles of the exclusive economic zone reflected in the LOS Convention, art. 55-75, were established as customary international law by the broad consensus achieved at UNCLOS III and the practices of nations. *Continental Shelf Tunisia/Libya Judgment*, [1982] I.C.J. Rep. 18; *Case Concerning Delimitation of the Maritime Boundary of the Gulf of Maine (Canada/United States)*, [1984] I.C.J. Rep. 246, 294; Sohn & Gustafson 122; 2 Restatement (Third), sec. 514 Comment a & Reporters' Note 1, at 56 & 62. *See also*, Nordquist, Vol. II at 489-821.

resources of the waters, seabed, and subsoil of the zone, as well as for the production of energy from the water, currents, and winds.[49] The coastal 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 (including implementation of international vessel-source pollution control standards).[50] However, in the EEZ all nations

49. 1982 LOS Convention, arts. 56(1)(a) & 157; White House Fact Sheet, Annex A1-7 (p. 80). These "sovereign rights" are functional in character and are limited to the specified activities; they do not amount to "sovereignty" which a nation exercises over its land territory, internal waters, archipelagic waters (subject to the right of innocent passage for foreign vessels and archipelagic sea lanes passage for foreign vessels and aircraft), and territorial sea (subject to the rights of innocent passage for foreign vessels and transit passage for foreign ships and aircraft). International law also grants to coastal States limited "jurisdiction" in the exclusive economic zone for the other purposes mentioned in the text at note 50. 2 Restatement (Third), sec. 511 Comment b at 26-27. Article 3(3) of the 1990 U.S.-Soviet Maritime Boundary Agreement provides that the exercise by either Party of sovereign rights and jurisdiction in the "special areas" does not constitute unilateral extension of coastal State EEZ jurisdiction beyond 200 nm of its coasts. Sen. Treaty Doc. 101-22, p.VII.

50. 1982 LOS Convention, art. 56(1)(b). The United States rejects Brazil's assertion that no nation has the right to place or to operate any type of installation or structure in the exclusive economic zone or on the continental shelf without the consent of the coastal nation. 17 LOS Official Records, para. 28, at 40 and U.S. Statement in Right of Reply, 17 LOS Official Records 244, Annex A1-1 (p. 27).

Marine scientific research (MSR). MSR is addressed in Part XIII of the LOS Convention but is not specifically defined. The United States accepts that MSR is the general term most often used to describe those activities undertaken in the ocean and coastal waters to expand scientific knowledge of the marine environment. MSR includes oceanography, marine biology, fisheries research, scientific ocean drilling, geological/geophysical scientific surveying, as well as other activities with a scientific purpose. *See* paragraph 2.4.2.1 (p. 130). It may be noted, however, that "survey activities," "prospecting" and "exploration" are primarily dealt with in other parts of the LOS Convention, notably Parts II, III, XI and Annex III, rather than Part XIII. "This would indicate that those activities do not fall under the regime of Part XIII." U.N. Office for Oceans Affairs and the Law of the Sea, Law of the Sea: Marine Scientific Research: A Guide to the Implementation of the Relevant Provisions of the United Nations Convention on the Law of the Sea 1 para. 2 (U.N. Sales No. E.91.V.3 (1991)). *See also*, Law of the Sea: National Legislation, Regulations and Supplementary Documents on Marine Scientific Research in Areas under National Jurisdiction, (U.N. Sales No. E.89.V.9 (1989)). The United States does not claim jurisdiction over MSR in its EEZ but recognizes the right of other nations to do so, provided they comply with the provisions of the 1982 LOS Convention. *See* the President's Ocean Policy Statement, 10 March 1983, and accompanying Fact Sheet, Annexes A1-3 (p. 43) & A1-7 (p. 80), respectively.

When activities similar to those mentioned above as MSR are conducted for commercial resource purposes, most governments, including the United States, do not treat them as MSR. Additionally, activities such as hydrographic surveys (*see* IHO definition 40, Annex A1-5 (p. 51)), the purpose of which is to obtain information for the making of navigational charts, and the collection of information that, whether or not classified, is to be used for military purposes, are not considered by the United States to be MSR and, therefore, are not subject to coastal State

(continued...)

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.[51] The United States established a 200-nautical mile exclusive economic zone by Presidential Proclamation on 10 March 1983.[52]

50.(...continued)
jurisdiction. 1989 State telegram 122770; *see also* paragraph 2.4.2.2 (p. 130). In Part XII of the Convention regarding protection and preservation of the marine environment, art. 236 provides that the environmental provisions of the Convention do not apply to warships, naval auxiliaries, and other vessels and aircraft owned or operated by a nation and used, for the time being, only on government non-commercial service. The provisions of Part XIII regarding marine scientific research similarly do not apply to military activities. Oxman, The Regime of Warships Under the United Nations Convention on the Law of the Sea, 24 Va. J. Int'l L. 809, 844-47 (1984). *See also* Negroponte, Current Developments in U.S. Oceans Policy, Dep't St. Bull., Sep. 1986, at 86. U.S. policy is to encourage freedom of MSR. *See* Statement by the President, Annex A1-3 (p. 43).

51. 1982 LOS Convention, art. 58. The United States rejects Brazil's assertion that other nations "may not carry out military exercises or manoeuvres within the exclusive economic zone, particularly when these activities involve the use of weapons or explosives, without the prior knowledge and consent" of the coastal nation. 17 LOS Official Records, para. 28, at 40, and U.S. Statement in Right of Reply, 17 LOS Official Records 244, Annex A1-1 (p. 27).

52. Presidential Proclamation No. 5030, 48 Fed. Reg. 10,601, 16 U.S.C.A. sec. 1453n, 10 March 1983, Annex A1-8 (p. 83). The U.S. thereby acquired the world's largest EEZ (2,831,400 square nautical miles). Alexander, 88 (Table 5). Although the nations with the next 9 largest actual or potential EEZs are all developed nations, the EEZ was proposed by the developing nations. A useful compilation of national legislation on the EEZ appears in U.N. Office of the Special Representative of the Secretary-General for the Law of the Sea, The Law of the Sea: National Legislation on the Exclusive Economic Zone, the Economic Zone and the Exclusive Fishery Zone (U.N. Sales No. E.85.V.10 (1986)). Other national EEZ legislation appears in later editions of the LOS Bulletin.

Fishery and other resource-related zones adjacent to the coast and extending to a distance of 200 nautical miles from the baseline from which the territorial sea is measured are accepted in customary international law. The U.S. claims and recognizes broad and exclusive fisheries jurisdiction to a limit of 200 nautical miles. 16 U.S.C. sec. 1811-61. *See* Hay, Global Fisheries Regulations in the First Half of the 1990s, 11 Int'l J. of Marine & Coastal L. 459 (Nov. 96), for a discussion of recent international efforts to regulate fishing activities beyond the EEZ including the U.N. General Assembly Driftnet Regulations, the Food and Agriculture Organization (FAO) Compliance Agreement, the Straddling Stocks Agreement, the FAO Code of Conduct and the Biodiversity Convention. For a comprehensive analysis of the Canadian-Spanish Fisheries dispute of 1995 (the "Turbot War"), *see* Joyner & v. Gustedt, The 1995 Turbot War: Lessons for the Law of the Sea, 11 Int'l J. Marine & Coastal L. 425 (Nov. 96).

Islands capable of supporting human habitation or economic life may have an exclusive economic zone. 1982 LOS Convention, art. 121. Such an island located more than 400 nautical miles from the nearest land can generate an EEZ of about 125,000 square nautical miles. Rocks, low-tide elevations and man-made objects, such as artificial islands and off-shore installations, are not independently entitled to their own EEZs. 1982 LOS Convention, arts. 60(8) & 121(3).

1.5.3 High Seas. The high seas include all parts of the ocean seaward of the exclusive economic zone. When a coastal nation has not proclaimed an exclusive economic zone, the high seas begin at the seaward edge of the territorial sea.[53]

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.[54] International law does not recognize the right of coastal nations to establish zones that would restrict the exercise of non-resource-related high seas freedoms beyond the territorial sea. Accordingly, the U.S. does not recognize the 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.[55] (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 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

53. 1982 LOS Convention, art. 86. Navigation in the high seas is discussed in paragraph 2.4.3 (p. 131).

54. Sixteen nations claim security zones seaward of their territorial seas. Most such claims are designed to control matters of security within a contiguous zone geographically no broader than that permitted under the 1982 LOS Convention. However, security has never been an interest recognized in the Conventions as subject to enforcement in the contiguous zone. *See* Table A1-11 (p. 108). North Korea, on the other hand, has claimed no contiguous zone, but claims a security zone extending 50 nautical miles beyond its claimed territorial sea off its east coast and a security zone to the limits of its EEZ off its west coast. Park, The 50-Mile Military Boundary Zone of North Korea, 72 Am. J. Int'l L. 866 (1978); Park, East Asia and the Law of the Sea 163-76 (1983); N.Y. Times, 2 Aug. 1977, at 2; MCRM. The United States protest of this claim may be found *in* U.N., Law of the Sea Bulletin, No. 15, May 1990, at 8-9; the Japanese protest may be found *in* 28 Jap. Ann. Int'l L. 122-23 (1985). *See also* Boma, Troubled Waters off the Land of the Morning Calm: A Job for the Fleet, Nav. War Col. Rev., Spring 1989, at 33.

Greece's claim to restrict the overflight of aircraft out to 10 nautical miles while claiming only a 6 nautical mile territorial sea has been protested by the United States; Greece also does not claim a contiguous zone. Schmitt, Aegean Angst: The Greek-Turkish Dispute, Nav. War Coll. Rev., Summer 1996, at 42. Brazil claims a security zone out to 200 nautical miles as part of its 200 nautical mile territorial sea claim; Indonesia likewise, but to an area 100 nautical miles seaward of its territorial sea. MCRM *passim*; Notice to Mariners 39/86, pages III-2.31 to III-2.34.

55. N.Y. Times, 3 Aug. 1977, at 3 (State Dep't statement regarding the North Korean zone); U.N., LOS Bulletin No. 15, at 8-9 (May 1990). The Government of Japan is of the same view. 28 Jap. Ann. Int'l L. 123 (1985) (testimony in House Foreign Affairs Comm., Sept. 16, 1977).

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.[56] Although the coastal 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.[57]

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56. *See* Figure A1-2 (p. 86). The geologic definition of a continental shelf differs from the juridical definition. Geologically, the continental shelf is the gently-sloping platform extending seaward from the land to a point where the downward inclination increases markedly as one proceeds down the continental slope. The depth at which the break in angle of inclination occurs varies widely from place to place. At the foot of the slope begins the continental rise, a second gently-sloping plain which gradually merges with the floor of the deep seabed. The shelf, slope, and rise, taken together, are geologically known as the continental margin. Alexander, 22-23. The outer edge of any juridical (as opposed to geophysical) continental margin extending beyond 200 nautical miles from the baseline is to be determined in accordance with *either* the depth of sediment test (set forth in art. 76(4)(a)(i) of the 1982 LOS Convention and illustrated in Figure A1-2), *or* along a line connecting points 60 nautical miles from the foot of the continental slope (art. 76(4)(a)(ii), illustrated in Figure A1-3 (p. 86)), *or* the 2500 meter isobath plus 100 nautical miles (art. 76(5)). The broad principles of the continental shelf regime reflected in the 1982 LOS Convention, arts. 76-81, were established as customary international law by the broad consensus achieved at UNCLOS III and the practices of nations. *Case Concerning Delimitation of the Maritime Boundary of the Gulf of Maine (Canada/United States)*, [1984] I.C.J. Rep. 246, 294; *Case Concerning the Continental Shelf (Libya/Malta)*, [1985] I.C.J. Rep. 13, 55; 2 Restatement (Third), sec. 515 Comment a & Reporters' Note 1, at 66-69; Sohn & Gustafson 158. *See also*, Nordquist, Vol. II at 837-90.

In the case of opposite or adjacent shelves, delimitation shall be based on equitables principles. LOS Convention, art. 83. *See also, e.g.*, North Sea Continental Shelf Cases (W. Germ. v. Denmark; W. Germ. v. Netherlands), 1969 I.C.J. Rep. 3; The United Kingdom-French Continental Shelf (U.K. v. France), 54 I.L.R. 6, 1977; Continental Shelf (Tunisia v. Libya), 1982 I.C.J. Rep. 18; Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau, 25 I.L.M. 251 (1985).

The United States made its first claim to the resources of the continental shelf in the Truman Presidential Proclamation No. 2667, 28 Sep. 1945, 3 C.F.R. 67 (1943-48 Comp.); 13 Dep't St. Bull. 484-85; 4 Whiteman 752-64.

A recent compilation of national legislation on the continental shelf appears in U.N. Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: National Legislation on the Continental Shelf (U.N. Sales No. E.89.V.5 (1989)). *See also* Roach & Smith, at 121-9.

57. Continental Shelf Convention, arts. 1-3 & 5; 1982 LOS Convention, arts. 60(7), 76-78 & 80-81. *See* paragraph 2.4.3, note 64 (p. 131) for further information regarding cables and pipelines.

It should be noted that the coastal nation does not have sovereign rights *per se* to that part of its continental shelf extending beyond the territorial sea, only to the exploration and exploitation of its natural resources. U.S. Statement in Right of Reply, 8 March 1983, 17 LOS Official Records 244, Annex A1-1 (p. 27). Shipwrecks lying on the continental shelf are not considered to be "natural resources." *Cf.* LOS Convention, arts. 33 and 303.

(continued...)

1.7 SAFETY ZONES

Coastal 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.[58]

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).[59] Subject to a right of overflight of international straits (see paragraph

57.(...continued)
The U.S. position regarding Part XI (The Area) of the 1982 LOS Convention, as that Part was originally formulated, was that:

> [T]he Convention's deep seabed mining provisions are contrary to the interests and principles of industrialized nations and would not help attain the aspirations of developing countries.
>
> . . . .
>
> . . . [T]he United States will continue to work with other countries to develop a regime, free of unnecessary political and economic restraints, for mining deep seabed minerals beyond national jurisdiction. Deep seabed mining remains a lawful exercise of the freedom of the high seas open to all nations. The United States will continue to allow its firms to explore for and, when the market permits, exploit these resources.

Statement by the President, 10 March 1983, Annex A1-3 (p. 43). *See also* the United States' 8 March 1983 statement in right of reply, 17 LOS Official Records 243, Annex A1-1 (p. 27). The changes desired by the United States to Part XI were set out in the President's statement of 23 January 1982 on U.S. Participation in the Third United Nations Conference on the Law of the Sea, 1 Public Papers of President Reagan, 1982, at 92. The U.S. Congress had, however, approved the legal principle, reflected in art. 136 of the LOS Convention, that the resources of the deep seabed are the common heritage of mankind. Sec. 3(b)(1) of the Deep Seabed Minerals Resources Act, Pub.L. 96-283, 94 Stat. 555, 30 U.S.C. sec. 1402(a)(1). The 1994 Agreement Relating to the Implementation of Part XI of the 1982 United Nations Convention on the Law of the Sea addressed and corrected the flawed provisions. *See* paragraph 1.1 and accompanying notes (p. 1).

58. Continental Shelf Convention, art. 5; 1982 LOS Convention, art. 60. Safety zones may not cause any interference with the use of recognized sea lanes essential to international navigation.

59. Territorial Sea Convention, art. 2; High Seas Convention, art. 2; 1982 LOS Convention, arts. 2(2), 49(2), 58(1) & 87(1).

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.[60] Except as nations 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.[61]

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.[62]

60. Convention on International Civil Aviation (Chicago Convention), 7 December 1944, 61 Stat. 1180, T.I.A.S. 1591, 15 U.N.T.S. 295, 3 Bevans 944, AFP 110-20, chap. 6, arts. 1-2. The U.S. declaration of its sovereignty in national airspace is set forth in 49 U.S.C. sec. 1508(a) (1982).

61. *See* paragraphs 2.5.2.2 (p. 141) and 2.5.2.3 (p. 142) regarding flight information regions and air defense identification zones, respectively. *See* 54 Fed. Reg. 264, 4 Jan. 1989, for FAA regulations applying to the airspace over waters between 3 and 12 nautical miles from the U.S. coast, occasioned by the extension of the U.S. territorial sea to 12 nautical miles.

62. AFP 110-31, para. 2-1h, at 2-3. *See also* paragraph 1.1, note 1 (p. 1). Military activities in outer space are addressed in paragraph 2.9 (p. 149).

ANNEX A1-1

United States of America
Statement in Right of Reply

[*Original English*]
[*8 March 1983*]

Rights and duties of non-parties

Some speakers discussed the legal question of the rights and duties of States which do not become party to the Convention adopted by the Conference. Some of these speakers alleged that such Sates must either accept the provisions of the Convention as a "package deal" or forgo all of the rights referred to in the Convention. This supposed election is without foundation or precedent in international law. It is a basic principle of law that parties may not, by agreement among themselves, impair the rights of third parties or their obligations to third parties. Neither the Conference nor the States indicating an intention to become parties to the Convention have been granted global legislative power.

The Convention includes provision, such as those related to the regime of innocent passage in the territorial sea, which codify existing rules of international law which all States enjoy and are bound by. Other provisions, such as those relating to the exclusive economic zone, elaborate a new concept which has been recognized in international law. Still others, such as those relating to deep sea-bed mining beyond the limits of national jurisdiction, are wholly new ideas which are binding only upon parties to the Convention. To blur the distinction between codification of customary international law and the creation of new law between parties to a convention undercuts the principle of the sovereign equality of States.

The United States will continue to exercise its rights and fulfill its duties in a manner consistent with international law, including those aspects of the Convention which either codify customary international law or refine and elaborate concepts which represent an accommodation of the interests of all States and form part of international law.

Deep sea-bed mining

Some speakers asserted that existing principles of international law, or the Convention, prohibit any State, including a non-party, from exploring for and exploiting the mineral resources of the deep sea-bed except in accordance with the Convention. The United States does not believe that such assertions have any merit. The deep sea-bed mining regime of the Convention adopted by the Conference is purely contractual in character. The United States and other non-parties do not incur the obligations provided for therein to which they object.

Article 137 of the Convention may not as a matter of law prohibit sea-bed mining activities by non-parties to the Convention: nor may it relieve a party from the duty to respect the exercise of high seas freedoms, including the exploration for and exploitation of deep sea-bed minerals, by non-parties. Mining of the sea-bed is a lawful use of the high seas open to all States. United States participation in the Conference and its support for certain General Assembly resolutions concerning sea-bed mining do not constitute acquiescence by the United States in the elaboration of the concept of the common heritage of mankind contained in Part XI, nor in the concept itself as having any effect on the lawfulness of deep sea-bed mining. The United States has consistently maintained that the concept of the common heritage of mankind can only be given legal content by a universally acceptable regime for its implementation, which was not achieved by the Conference. The practice of the United States and the other States principally interested in sea-bed mining makes it clear that sea-bed mining continues to be a lawful use of the high seas within the traditional meaning of the freedom of the high seas.

The concept of the common heritage of mankind contained in the Convention adopted by the Conference is not *jus cogens*. The Convention text and the negotiating record of the Conference demonstrate that a proposal by some delegations to include a provision on *jus cogens* was rejected.

Innocent passage in the territorial sea

Some speakers spoke to the right of innocent passage in the territorial sea and asserted that a coastal State may require prior notification or authorization before warships or other governmental ships on non-commercial service may enter the territorial sea. Such assertions are contrary to the clear import of the Convention's provisions on innocent passage. Those provisions, which reflect long-standing international law, are clear in denying coastal State competence to impose such restrictions. During the eleventh session of the Conference, formal amendments which would have afforded such competence were withdrawn. The withdrawal was accompanied by a statement read from the Chair, and that statement clearly placed coastal State security interests within the context of articles 19 and 25. Neither of those articles permits the imposition of notification or authorization requirements on foreign ships exercising the right of innocent passage.

Exclusive economic zone

Some speakers described the concept of the exclusive economic zone in a manner inconsistent with the text of the relevant provisions of the Convention adopted by the Conference.

The International Court of Justice has noted that the exclusive economic zone "may be regarded as part of modern international law" (Continental Shelf Tunisia Libya Judgement (*I.C.J. Reports 1982*, p. 18), para. 100). This concept, as set forth in the Convention, recognizes the interest of the coastal State in the resources of the zone and authorizes it to assert jurisdiction over resource-related activities therein. At the same time, all States continue to enjoy in the zone traditional high seas freedoms of navigation and overflight and the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, which remain qualitatively and quantitatively the same as those freedoms when exercised seaward of the zone. Military operations, exercises and activities have always been regarded as internationally lawful uses of the sea. The right to conduct such activities will continue to be enjoyed by all States in the exclusive economic zone. This is the import of article 58 of the Convention. Moreover, Parts XII and XIII of the Convention have no bearing on such activities.

In this zone beyond its territory and territorial sea, a coastal State may assert sovereign rights over natural resources and related jurisdiction, but may not claim or exercise sovereignty. The extent of coastal State authority is carefully defined in the Convention adopted by the Conference. For instance, the Convention, in codifying customary international law, recognizes the authority of the coastal State to control all fishing (except for the highly migratory tuna) in its exclusive economic zone, subject only to the duty to maintain the living resources through proper conservation and management measures and to promote the objective of optimum utilization. Article 64 of the Convention adopted by the Conference recognizes the traditional position of the United States that highly migratory species of tuna cannot be adequately conserved or managed by a single coastal State and that effective management can only be achieved through international cooperation. With respect to artificial islands, installations and structures, the Convention recognizes that the coastal State has the exclusive right to control the construction, operation and use of all artificial islands, of those installations and structures having economic purposes and of those installations and structures that may interfere with the coastal State's exercise of its resource rights in the zone. This right of control is limited to those categories.

Continental shelf

Some speakers made observations concerning the continental shelf. The Convention adopted by the Conference recognizes that the legal character of the continental shelf remains the natural prolongation of the land territory of the coastal State wherein the coastal State has sovereign rights for the purpose of exploring and exploiting its natural resources. In describing the outer limits of

the continental shelf, the Convention applies, in a practical manner, the basic elements of natural prolongation and adjacency fundamental to the doctrine of the continental shelf under international law. This description prejudices neither the existing sovereign rights of all coastal States with respect to the natural prolongation of their land territory into and under the sea, which exists *ipso facto* and *ab initio* by virtue of their sovereignty over the land territory, nor freedom of the high seas, including the freedom to exploit the sea-bed and subsoil beyond the limits of coastal State jurisdiction.

Boundaries of the continental shelf and exclusive economic zone

Some speakers directed statements to the boundary provisions found in articles 4 and 83 of the Convention adopted by the Conference. Those provisions do no more than reflect existing law in that they require boundaries to be established by agreement in accordance with equitable principles and in that they give no precedence to any particular delimitation method.

Archipelagic sea lanes passage and transit passage

A small number of speakers asserted that archipelagic sea lanes passage, or transit passage, is a "new" right reflected in the Convention adopted by the Conference. To the contrary, long-standing international practice bears out the right of all States to transit straits used for international navigation and waters which may be eligible for archipelgic status. Moreover, these rights are well established in international law. Continued exercise of these freedoms of navigation and overflight cannot be denied a State without its consent.

One speaker also asserted that archipelagic sea lanes passage may be exercised only in sea lanes designated and established by the archipelagic States. This assertion fails to account for circumstances in which all normal sea lanes and air routes have not been designated by the archipelagic State in accordance with Part IV, including articles 53 and 54. In such circumstances, archipelagic sea lanes passage may be exercised through all sea lanes and air routes normally used for international navigation. The United States regards these rights as essential components of the archipelagic regime if it is to find acceptance in international law.

Consistency of certain claims with provisions of the Convention adopted by the Conference

Some speakers also called attention to specific claims of maritime jurisdiction and to the application of certain provisions of the Convention adopted by the Conference to specific geographical areas. These statements included assertions that certain claims are in conformity with the Convention, that certain claims are

not in conformity with the Convention but are nevertheless consistent with international law, that certain baselines have been drawn in conformity with international law, and that transit passage is not to be enjoyed in particular straits due to the purported applicability of certain provisions of the Convention.

The lawfulness of any coastal State claim and the application of any Convention provision or rule of law to a specific geographic area or circumstance must be analyzed on a case-by-case basis. Except where the United States has specifically accepted or rejected a particular claim or the application of a rule of law to a specific area, the United States reserves its judgement. This reservation of judgement on such questions does not constitute acquiescence in any unilateral declaration or claim. In addition, the United States reserves its judgement with respect to any matter addressed by a speaker and not included in this right of reply, except where the United States has specifically, indicated its agreement with the position asserted.

Source: 17 OFFICIAL RECORDS 244, U.N. Doc. A/Conf. 62/WS/37.

ANNEX A1-2

Letter of Transmittal and Letter of Submittal Relating
to the UN Convention on the Law of the Sea and the "Agreement."

LETTER OF TRANSMITTAL

The White House, *October 7, 1994.*

To the Senate of the United States:

I transmit herewith, for the advice and consent of the Senate to accession, the United Nations Convention on the Law of the Sea, with Annexes, done at Montego Bay, December 10, 1982 (the "Convention"), and, for the advice and consent of the Senate to ratification, the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, with Annex, adopted at New York, July 28, 1994 (the "Agreement"), and signed by the United States, subject to ratification, on July 29, 1994. Also transmitted for the information of the Senate is the report of the Department of State with respect to the Convention and Agreement, as well as Resolution II of Annex I and Annex II of the Final Act of the Third United Nations Conference on the Law of the Sea.

The United States has basic and enduring national interests in the oceans and has consistently taken the view that the full range of these interests is best protected through a widely accepted international framework governing uses of the sea. Since the late 1960s, the basic U.S. strategy has been to conclude a comprehensive treaty on the law of the sea that will be respected by all countries. Each succeeding U.S. Administration has recognized this as the cornerstone of U.S. oceans policy. Following adoption of the Convention in 1982, it has been the policy of the United States to act in a manner consistent with its provisions relating to traditional uses of the oceans and to encourage other countries to do likewise.

The primary benefits of the Convention to the United States include the following:

— The Convention advances the interests of the United States as a global maritime power. It preserves the right of the U.S. military to use the world's oceans to meet national security requirements and of commercial vessels to carry sea-going cargoes. It achieves this, *inter alia*, by stabilizing the breadth of the territorial sea at 12 nautical miles; by setting forth navigation regimes of innocent passage in the territorial sea, transit passage in straits used for international navigation, and archipelagic sea lanes passage; and by reaffirming the traditional

freedoms of navigation and overflight in the exclusive economic zone and the high seas beyond.

— The Convention advances the interests of the United States as a coastal State. It achieves this, *inter alia*, by providing for an exclusive economic zone out to 200 nautical miles from shore and by securing our rights regarding resources and artificial islands, installations and structures for economic purposes over the full extent of the continental shelf. These provisions fully comport with U.S. oil and gas leasing practices, domestic management of coastal fishery resources, and international fisheries agreements.

— As a far-reaching environmental accord addressing vessel source pollution, pollution from seabed activities, ocean dumping, and land-based sources of marine pollution, the Convention promotes continuing improvement in the health of the world's oceans.

— In light of the essential role of marine scientific research in understanding and managing the oceans, the Convention sets forth criteria and procedures to promote access to marine areas, including coastal waters, for research activities.

— The Convention facilitates solutions to the increasingly complex problems of the uses of the ocean—solutions that respect the essential balance between our interests as both a coastal and a maritime nation.

— Through its dispute settlement provisions, the Convention provides for mechanisms to enhance compliance by Parties with the Convention's provisions.

Notwithstanding these beneficial provisions of the Convention and bipartisan support for them, the United States decided not to sign the Convention in 1982 because of flaws in the regime it would have established for managing the development of mineral resources of the seabed beyond national jurisdiction (Part XI). It has been the consistent view of successive U.S. Administrations that this deep seabed mining regime was inadequate and in need of reform if the United States was ever to become a Party to the Convention.

Such reform has now been achieved. The Agreement, signed by the United States on July 29, 1994, fundamentally changes the deep seabed mining regime of the Convention. As described in the report of the Secretary of State, the Agreement meets the objections the United States and other industrialized nations previously expressed to Part XI. It promises to provide a stable and internationally recognized framework for mining to proceed in response to future demand for minerals.

Early adherence by the United States to the Convention and the Agreement is important to maintain a stable legal regime for all uses of the sea, which covers

more than 70 percent of the surface of the globe. Maintenance of such stability is vital to U.S. national security and economic strength.

I therefore recommend that the Senate give early and favorable consideration to the Convention and to the Agreement and give its advice and consent to accession to the Convention and to ratification of the Agreement. Should the Senate give such advice and consent, I intend to exercise the options concerning dispute settlement recommended in the accompanying report of the Secretary of State.

WILLIAM J. CLINTON

LETTER OF SUBMITTAL

DEPARTMENT OF STATE,
Washington, September 23, 1994.

The President,
The White House.

THE PRESIDENT: I have the honor to submit to you the United Nations Convention on the Law of the Sea, with Annexes, done at Montego Bay, December 10, 1982 (the Convention), and the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, with Annex, adopted at New York, July 28, 1994, (the Agreement), and signed by the United States on July 29, 1994, subject to ratification. I recommended that the Convention and the Agreement be transmitted to the Senate for its advice and consent to accession and ratification, respectively.

The Convention sets forth a comprehensive framework governing uses of the oceans. It was adopted by the Third United Nations Conference on the Law of the Sea (the Conference), which met between 1973 and 1982 to negotiate a comprehensive treaty relating to the law of the sea.

The Agreement, adopted by United Nations General Assembly Resolution A/RES/48/263 on July 28, 1994, contains legally binding changes to that part of the Convention dealing with the mining of the seabed beyond the limits of national jurisdiction (Part XI and related Annexes) and is to be applied and interpreted together with the Convention as a single instrument. The Agreement promotes universal adherence to the Convention by removing obstacles to acceptance of the Convention by industrialized nations, including the United States.

I also recommend that Resolution II of Annex I, governing preparatory investment in pioneer activities relating to polymetallic nodules, and Annex II, a statement of understanding concerning a specific method to be used in establishing the outer edge of the continental margin, of the Final Act of the Third United Nations Conference of the Law of the Sea be transmitted to the Senate for its information.

THE CONVENTION

The Convention provides a comprehensive framework with respect to uses of the oceans. It creates a structure for the governance and protection of all marine areas, including the airspace above and the seabed and subsoil below. After decades of dispute and negotiation, the Convention reflects consensus on the

extent of jurisdiction that States may exercise off their coasts and allocates rights and duties among States.

The Convention provides for a territorial sea of a maximum breadth of 12 nautical miles and coastal State sovereign rights over fisheries and other natural resources in an Exclusive Economic Zone (EEZ) that may extend to 200 nautical miles of the coast. In so doing the Convention brings most fisheries under the jurisdiction of coastal States. (Some 90 percent of living marine resources are harvested within 200 nautical miles of the coast.) The Convention imposes on coastal States a duty to conserve these resources, as well as obligations upon all States to cooperate in the conservation of fisheries populations on the high seas and such populations that are found both on the high seas and within the EEZ (highly migratory stocks, such as tuna, as well as "straddling stocks"). In addition, it provides for special protective measures for anadromous species, such as salmon, and for marine mammals, such as whales.

The Convention also accords the coastal State sovereign rights over the exploration and development of non-living resources, including oil and gas, found in the seabed and subsoil of the continental shelf, which is defined to extend to 200 nautical miles from the coast or, where the continental margin extends beyond that limit, to the outer edge of the geological continental margin. It lays down specific criteria and procedures for determining the outer limit of the margin.

The Convention carefully balances the interests of States in controlling activities off their own coasts with those of all States in protecting the freedom to use ocean spaces without undue interference. It specifically preserves and elaborates the rights of military and commercial navigation and overflight in areas under coastal State jurisdiction and on the high seas beyond. It guarantees passage for all ships and aircraft through, under and over straits used for international navigation and archipelagos. It also guarantees the high seas freedoms of navigation, overflight and the laying and maintenance of submarine cables and pipelines in the EEZ and on the continental shelf.

For the non-living resources of the seabed beyond the limits of national jurisdiction (i.e., beyond the EEZ or continental margin, whichever is further seaward), the Convention establishes an international regime to govern exploration and exploitation of such resources. It defines the general conditions for access to deep seabed minerals by commercial entities and provides for the establishment of an international organization, the International Seabed Authority, to grant title to mine sites and establish necessary ground rules. The system was substantially modified by the 1994 Agreement, discussed below.

The Convention sets forth a comprehensive legal framework and basic obligations for protecting the marine environment from all sources of pollution, including pollution from vessels, from dumping, from seabed activities and from

land-based activities. It creates a positive and unprecedented regime for marine environmental protection that will compel parties to come together to address issues of common and pressing concern. As such, the Convention is the strongest comprehensive environmental treaty now in existence or likely to emerge for quite some time.

The essential role of marine scientific research in understanding and managing the oceans is also secured. The Convention affirms the right of all States to conduct marine scientific research and sets forth obligations to promote and cooperate in such research. It confirms the rights of coastal States to require consent for such research undertaken in marine areas under their jurisdiction. These rights are balanced by specific criteria to ensure that coastal States exercise the consent authority in a predictable and reasonable fashion to promote maximum access for research activities.

The Convention establishes a dispute settlement system to promote compliance with its provisions and the peaceful settlement of disputes. These procedures are flexible, in providing options as to the appropriate means and fora for resolution of disputes, and comprehensive, in subjecting the bulk of the Convention's provisions to enforcement through binding mechanisms. The system also provides parties the means of excluding from binding dispute settlement certain sensitive political and defense matters.

Further analysis of provisions of the Convention's 17 Parts, comprising 320 articles and nine Annexes, is set forth in the Commentary that is enclosed as part of this Report.

THE AGREEMENT

The achievement of a widely accepted and comprehensive law of the sea convention—to which the United States can become a Party—has been a consistent objective of successive U.S. administrations for the past quarter century. However, the United States decided not to sign the Convention upon its adoption in 1982 because of objections to the regime it would have established for managing the development of seabed mineral resources beyond national jurisdiction. While the other Parts of the Convention were judged beneficial for U.S. ocean policy interest, the United States determined the deep seabed regime of Part XI to be inadequate and in need of reform before the United States could consider becoming Party to the Convention.

Similar objections to Part XI also deterred all other major industrialized nations from adhering to the Convention. However, as a result of the important international political and economic changes of the last decade—including the end of the Cold War and growing reliance on free market principles—widespread recognition emerged that the seabed mining regime of

the Convention required basic change in order to make it generally acceptable. As a result, informal negotiations were launched in 1990, under the auspices of the United Nations Secretary-General, that resulted in adoption of the Agreement on July 28, 1994.

The legally binding changes set forth in the Agreement meet the objections of the United States to Part XI of the Convention. The United States and all other major industrialized nations have signed the Agreement.

The provisions of the Agreement overhaul the decision-making procedures of Part XI to accord the United States, and others with major economic interests at stake, adequate influence over future decisions on possible deep seabed mining. The Agreement guarantees a seat for the United States on the critical executive body and requires a consensus of major contributors for financial decisions.

The Agreement restructures the deep seabed mining regime along free market principles and meets the U.S. goal of guaranteed access by U.S. firms to deep seabed minerals on the basis of reasonable terms and conditions. It eliminates mandatory transfer of technology and production controls. It scales back the structure of the organization to administer the mining regime and links the activation and operation of institutions to the actual development of concrete commercial interest in seabed mining. A future decision, which the United States and a few of its allies can block, is required before the organization's potential operating arm (the Enterprise) may be activated, and any activities on its part are subject to the same requirements that apply to private mining companies. States have no obligation to finance the Enterprise, and subsidies inconsistent with GATT are prohibited.

The Agreement provides for grandfathering the seabed mine site claims established on the basis of the exploration work already conducted by companies holding U.S. licenses on the basis of arrangements "similar to and no less favorable than" the best terms granted to previous claimants; further, it strengthens the provisions requiring consideration of the potential environmental impacts of deep seabed mining.

The Agreement provides for its provisional application from November 16, 1994, pending its entry into force. Without such a provision, the Convention would enter into force on that date with its objectionable seabed mining provisions unchanged. Provisional application may continue only for a limited period, pending entry into force. Provisional application would terminate on November 16, 1998, if the Agreement has not entered into force due to failure of a sufficient number of industrialized States to become Parties. Further, the Agreement provides flexibility in allowing States to apply it provisionally in accordance with their domestic laws and regulations.

In signing the Agreement on July 29, 1994, the United States indicated that it intends to apply the Agreement provisionally pending ratification. Provisional application by the United States will permit the advancement of U.S. seabed mining interests by U.S. participation in the International Seabed Authority from the outset to ensure that the implementation of the regime is consistent with those interests, while doing so consistent with existing laws and regulations.

Further analysis of the Agreement and its Annex, including analysis of the provisions of Part XI of the Convention as modified by the Agreement, is also set forth in the Commentary that follows.

STATUS OF THE CONVENTION AND THE AGREEMENT

One hundred and fifty-two States signed the Convention during the two years it was open for signature. As of September 8, 1994, 65 States had deposited their instruments of ratification, accession or succession to the Convention. The Convention will enter into force for these States on November 16, 1994, and thereafter for other States 30 days after deposit of their instrument of ratification or accession.

The United States joined 120 other States in voting for adoption of the Agreement on July 28, 1994; there were no negative votes and seven abstentions. As of September 8, 1994, 50 States and the European Community have signed the Agreement, of which 19 had previously ratified the Convention. Eighteen developed States have signed the Agreement, including the United States, all the members of the European Community, Japan, Canada and Australia, as well as major developing countries,such as Brazil, China and India.

RELATION TO THE 1958 GENEVA CONVENTIONS

Article 311(1) of the LOS Convention provides that the Convention will prevail, as between States Parties, over the four Geneva Conventions on the Law of the Sea of April 29, 1958, which are currently in force for the United States: the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 16-6, T.I.A.S. No. 5639, 516 U.N.T.S. 205 (entered into force September 10, 1964); the Convention on the High Seas, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (entered into force September 30, 1962); Convention on the Continental Shelf, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 (entered into force June 10, 1964); and the Convention on Fishing and Conservation of Living Resources of the High Seas, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285 (entered into force march 20, 1966). Virtually all of the provisions of these Conventions are either repeated, modified, or replaced by the provisions of the LOS Convention.

DISPUTE SETTLEMENT

The Convention identifies four potential fora for binding dispute settlement:

- The International Tribunal for the Law of the Sea constituted under Annex VI;
- The International Court of Justice;
- An arbitral tribunal constituted in accordance with Annex VII; and
- A special arbitral tribunal constituted in accordance with Annex VIII for specified categories of disputes.

A State, when adhering to the Convention, or at any time thereafter, is able to choose, by written declaration, one or more of these means for the settlement of disputes under the Convention. If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree. If a Party has failed to announce its choice of forum, it is deemed to have accepted arbitration in accordance with Annex VII.

I recommend that the United States choose special arbitration for all the categories of disputes to which it may be applied and Annex VII arbitration for disputes not covered by the above, and thus that the United States make the following declaration:

> The Government of the United States of America declares, in accordance with paragraph 1 of Article 287, that it chooses the following means for the settlement of disputes concerning the interpretation or application of the Convention:
>
> (A) a special arbitral tribunal constituted in accordance with Annex VIII for the settlement of disputes concerning the interpretation or application of the articles of the Convention relating to (1) fisheries, (2) protection and preservation of the marine environment, (3) marine scientific research, and (4) navigation, including pollution from vessels and by dumping, and
>
> (B) an arbitral tribunal constituted in accordance with Annex VII for the settlement of disputes not covered by the declaration in (A) above.

Subject to limited exceptions, the Convention excludes from binding dispute settlement disputes relating to the sovereign rights of coastal States with respect to the living resources in their EEZs. In addition, the Convention permits a State to opt out of binding dispute settlement procedures with respect to one or more enumerated categories of disputes, namely disputes regarding maritime boundaries between neighboring States, disputes concerning military activities

and certain law enforcement activities, and disputes in respect of which the United Nations Security Council is exercising the functions assigned to it by the Charter of the United Nations.

I recommend that the United States elect to exclude all three of these categories of disputes from binding dispute settlement, and thus that the United States make the following declaration:

> The Government of the United States of America declares, in accordance with paragraph 1 Article 298, that it does not accept the procedures provided for in section 2 of Part XV with respect to the categories of disputes set forth in subparagraphs (a), (b) and (c) of that paragraph.

RECOMMENDATION

The interested Federal agencies and departments of the Untied States have unanimously concluded that our interests would be best served by the United States becoming a Party to the Convention and the Agreement.

The primary benefits of the Convention to the United States include the following:

• The Convention advances the interests of the United States as a global maritime power. It preserves the right of the U.S. military to use the world's oceans to meet national security requirements and of commercial vessels to carry sea-going cargoes. It achieves this, *inter alia*, by stabilizing the breadth of the territorial sea at 12 nautical miles; by setting forth navigation regimes of innocent passage in the territorial sea, transit passage in straits used for international navigation, and archipelagic sea lanes passage; and by reaffirming the traditional freedoms of navigation and overflight in the EEZ and the high seas beyond.

• The Convention advances the interests of the United States as a coastal State. It achieves this, *inter alia*, by providing for an EEZ out to 200 nautical miles from shore and by securing our rights regarding resources and artificial islands, installations and structures for economic purposes over the full extent of the continental shelf. These provisions fully comport with U.S. oil and gas leasing practices, domestic management of coastal fishery resources, and international fisheries agreements.

• As a far-reaching environmental accord addressing vessel source pollution, pollution from seabed activities, ocean dumping and land-based sources of marine pollution, the Convention promotes continuing improvement in the health of the world's oceans.

• In light of the essential role of marine scientific research in understanding and managing the oceans, the Convention sets forth criteria and procedures to promote access to marine areas, including coastal waters,for research activities.

- The Convention facilitates solutions to the increasingly complex problems of the uses of the ocean—solutions which respect the essential balance between our interests as both a coastal and a maritime nation.
- Through its dispute settlement provisions, the Convention provides for mechanisms to enhance compliance by Parties with the Convention's provisions.
- The Agreement fundamentally changes the deep seabed mining regime of the Convention. It meets the objections the United States and other industrialized nations previously expressed to Part XI. It promises to provide a stable and internationally recognized framework for mining to proceed in response to future demand for minerals.

The United States has been a leader in the international community's effort to develop a widely accepted international framework governing uses of the seas. As a Party to the Convention, the United States will be in a position to continue its role in this evolution and ensure solutions that respect our interests.

All interested agencies and departments, therefore, join the Department of State in unanimously recommending that the Convention and Agreement be transmitted to the Senate for its advice and consent to accession and ratification respectively. They further recommend that they be transmitted before the Senate adjourns *sine die* this fall.

The Department of State, along with other concerned agencies, stands ready to work with Congress toward enactment of legislation necessary to carry out the obligations assumed under the Convention and Agreement and to permit the United States to exercise rights granted by the Convention.

Respectfully submitted,

WARREN CHRISTOPHER

ANNEX A1-3

United States Oceans Policy [*]

Statement by the President, March 10, 1983

The United States has long been a leader in developing customary and conventional law of the sea. Our objectives have consistently been to provide a legal order that will, among other things, facilitate peaceful, international uses of the oceans and provide for equitable and effective management and conservation of marine resources. The United States also recognizes that all nations have an interest in these issues.

Last July, I announced that the United States will not sign the United Nations Law of the Sea Convention that was opened for signature on December 10. We have taken this step because several major problems in the Convention's deep seabed mining provisions are contrary to the interests and principles of industrialized nations and would not help attain the aspirations of developing countries.

The United States does not stand alone in those concerns. Some important allies and friends have not signed the convention. Even some signatory states have raised concerns about these problems.

However, the Convention also contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all states.

Today I am announcing three decisions to promote and protect the oceans interest of the United States in a manner consistent with those fair and balanced results in the Convention and international law.

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 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

* Reproduced from the weekly Compilation of Presidential Documents, Volume 19, Number 10 (March 14, 1983), pp. 383-85.

and freedoms of the international community in navigation and overflight and other related high seas uses.

Third, I am proclaiming today an Exclusive Economic Zone in which the United States will exercise sovereign rights in living and nonliving resources within 200 nautical miles of its coast. This will provide United States jurisdiction for mineral resources out to 200 nautical miles that are not on the continental shelf. Recently discovered deposits there could be an important future source of strategic minerals.

Within this Zone all nations will continue to enjoy the high seas rights and freedoms that are not resource related, including the freedoms of navigation and overflight. My proclamation does not change existing United States policies concerning the continental shelf, marine mammals, and fisheries, including highly migratory species of tuna which are not subject to United States jurisdiction. The United States will continue efforts to achieve international agreements for the effective management of these species. The proclamation also reinforces this government's policy of promoting the United States fishing industry.

While international law provides for a right of jurisdiction over marine scientific research within such a zone, the proclamation does not assert this right. I have elected not to do so because of the United States interest in encouraging marine scientific research and avoiding any unnecessary burdens. The United States will nevertheless recognize the right of other coastal states to exercise jurisdiction over marine scientific research within 200 nautical miles of their coasts, if that jurisdiction is exercised reasonably in a manner consistent with international law.

The Exclusive Economic Zone established today will also enable the United States to take limited additional steps to protect the marine environment. In this connection, the United States will continue to work through the International Maritime Organization and other appropriate international organizations to develop uniform international measures for the protection of the marine environment while imposing no unreasonable burdens on commercial shipping.

The policy decisions I am announcing today will not affect the application of existing United States law concerning the high seas or existing authorities of any United States Government agency.

In addition to the above policy steps, the United States will continue to work with other countries to develop a regime, free of unnecessary political and economic restraints, for mining deep seabed minerals beyond national jurisdiction. Deep seabed mining remains a lawful exercise of the freedom of the high seas open to all nations. The United States will continue to allow its firms to explore for and, when the market permits, exploit these resources.

The administration looks forward to working with the Congress on legislation to implement these new policies.

Source: 22 International Legal Materials 464 (1983).

ANNEX A1-4
MARITIME CLAIMS OF THE UNITED STATES
(As of 1 January 1997)

TYPE	DATE	SOURCE	LIMITS	NOTES
I. TERRITORIAL SEA	1793		3nm	
	Apr 61		3nm	Became party to the 1958 Convention on the Territorial Sea and the Contiguous Zone.
	Jun 72	Public Notice No. 358, Fed. Reg. Vol. 37, No. 116	3nm	Reaffirmed U.S. claim.
	Dec 88	Presidential Proclamation No. 5928	12nm	Territorial Sea extension also applies to Commonwealth of Puerto Rico, Guam, American Samoa, U.S. Virgin Islands and the Commonwealth of the Northern Mariana Islands and other territories and possessions.
II. CONTIGUOUS ZONE	1930	Tariff Act	12nm	Customs regulations.
	Jun 72	Public Notice N. 358, Fed. Reg. Vol. 37, No. 116	12nm	Reaffirmed U.S. claim; for purposes of customs, fiscal, immigration and sanitary controls.
III. CONTINENTAL SHELF	Sep 45	Proclamation No. 2667		White House press release issued on same date described 100-fathom depth as outer limit.
	Aug 53	Outer Continental Shelf Lands Act, 43 U.S.C. 1331		Seabed and subsoil appertaining
	Apr 61			Became party to the 1958 Convention on the Continental Shelf.

Source: DoD 2005.1-M, Maritime Claims Reference Manual, pp. 2-552 to 2-554 (1997); U.S. Dep't of State, Limits in the Sea No. 36 (7th Revision).

TYPE	DATE	SOURCE	LIMITS	NOTES
IV. FISHING/ EXCLUSIVE ECONOMIC ZONE	Oct 66	Law No. 89-658	12nm	
	Mar 77	P.L. No. 94-265 (Magnuson Fishery Conservation and Management Act of 1976)	200nm	Fishing zone: claimed exclusive management authority; applied to American Samoa, Guam, Puerto Rico, U.S. Virgin Islands, and other possessions and territories.
	Jan 78		200nm	Fishery law applied to Northern Marianas.
	Mar 83	Presidential Proclamation No. 5030	200nm	EEZ: applied to Puerto Rico, Northern Marianas and overseas possessions; no claim to jurisdiction over scientific research.
	Jul 94	Exchange of Notes with Japan		Confirms with Japan that the "line of delimitation" of Japan's fishing zone is identical to the US EEZ limits north of the Northern Marianas.
	Aug 95	Federal Register Pub. Not. No. 2237		Published limits of the EEZ.

TYPE	DATE	SOURCE	LIMITS	NOTES
V. ENVIRON-MENTAL REGULATION	Oct 72	Marine Protection, Research and Sanctuaries Act, Title I & II (33 U.S.C. §§1401 et seq., as amended)		Regulated transportation of wastes for ocean dumping in waters adjacent to the U.S.
	Oct 72	Clean Water Act, (33 U.S.C. §§1321 et seq., as amended)		Regulated pollution which may affect resources under the exclusive management authority of the U.S. or which is caused by activities under the Outer Continental Shelf Lands Act.
	Feb 74	Intervention on the High Seas Act P.L. 93-248		
	Jun 78	Intervention on the High Seas Act Amendment		
	Sep 78	Outer Continental Shelf Lands Act		Liability for spills from any facility or vessel operated in conjunction with an OCS lease.

TYPE	DATE	SOURCE	LIMITS	NOTES
VI. MARITIME BOUNDARIES	Apr 72	Agreement		Maritime boundary agreement with Mexico entered into force.
	Dec 77	Agreement		Maritime boundary agreement with Cuba signed. (*See* U.S. Dep't of State, Limits in the Sea, No. 110).
	May 78	Agreement		Maritime boundary agreement with Mexico (Caribbean Sea and Pacific) signed.
	Nov 80	Agreement		Maritime boundary agreement with Venezuela (Puerto Rico and U.S. Virgin Islands) entered into force.
	Sep 83	Agreement		American Samoa: maritime boundary agreement with Cook Islands entered into force.
	Sep 83	Agreement		American Samoa: maritime boundary agreement with New Zealand (Tokelau) entered into force.
	Oct 84	I.C.J. Judgement		Maritime boundary with Canada (Gulf of Maine and Georges Bank) delimited.
	Jun 90	Agreement		Maritime boundary agreement with USSR (Bering Sea) signed.
	Jun 95	Agreement		Agreement with the UK (for the British Virgin Islands) entered into force. (*See* U.S. Dep't of State, Limits in the Sea, No. 115.)
	Jun 95	Agreement		Agreement with the UK (for Anguilla) entered into force.

VII. LAW OF THE SEA CONVENTION	Signed Part XI Agreement July 29, 1994, subject to ratification. Submitted Convention to Senate for advice and consent to accession, October 6, 1994, along with Part XI Agreement.

ANNEX A1-5

CONSOLIDATED GLOSSARY OF TECHNICAL TERMS USED IN THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

INTRODUCTION

The 1982 United Nations Convention on the Law of the Sea includes terms of a technical nature that may not always be readily understood by those seeking general information or those called upon to assist in putting the Convention articles into effect. Such readers could vary from politicians and lawyers to hydrographers, land surveyors, cartographers and other geographers. The need to understand such terms may become of particular concern to those involved in maritime boundary delimitation. Accordingly, the Technical Aspects of the Law of the Sea Working Group of the International Hydrographic Organization has endeavored to produce this glossary to assist all readers of the Convention in understanding the hydrographic, cartographic and oceanographic terms used.

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2 Aid to navigation
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6 Archipelagic waters
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8 Artificial island
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12 Basepoint
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48 Longitude
49 Low-tide elevation
50 Low-water line/ Low-water mark
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52 Mile
53 Mouth (bay)
54 Mouth (river)
55 Nautical chart
56 Nautical mile
57 Navigational aid
58 Navigational chart

INDEX OF GLOSSARY TERMS (cont'd)

59 Oceanic plateau
60 Oceanic ridge
61 Opposite coasts
62 Outer limit
63 Parallel of latitude
64 Platform
65 Port
66 Reef
67 Rise
68 River
69 Roadstead
70 Rock
71 Routing system
72 Safety aids
73 Safety zone
74 Scale
75 Sea-bed
76 Sedimentary rock
77 Semi-enclosed sea
78 Shelf
79 Size of area
80 Slope
81 Spur
82 Straight baseline
83 Straight line
84 Strait
85 Structure
86 Submarine cable
87 Submarine pipelines
88 Submarine ridge
89 Subsoil
90 Superjacent waters
91 Territorial sea
92 Tide
93 Traffic separation scheme
94 Water column

Adapted from International Hydrographic Bureau Special Pub. No. 51, and UN Office for Ocean Affairs and the Law of the Sea, Baselines, 46-62 (1989)

1 Adjacent coasts

The coasts lying either side of the land boundary between two adjoining States.

2 Aid to navigation

Visual, acoustical or radio device external to a craft designed to assist in the determination of a safe course or of a vessel's position, or to warn of dangers and obstructions.

See: Navigational aid.

3 Archipelagic baselines

See: Baseline.

4 Archipelagic sea lane

As defined in article 53.

See: Routing system; traffic separation scheme.

5 Archipelagic State

As defined in article 46.

See: Archipelagic waters; baseline; islands.

6 Archipelagic waters

The waters enclosed by archipelagic baselines

See: Articles 46, 47 and 49.

See: Archipelagic State; baseline; internal waters.

7 Area

As defined in article 1.1.(1).

See: Baseline; continental shelf; deep ocean floor; exclusive economic zone; sea-bed; subsoil.

8 Artificial island

See: Installation (off-shore).

9 Atoll

A ring-shaped reef with or without an island situated on it surrounded by the open sea, that encloses or nearly encloses a lagoon.

Where islands are situated on atolls the territorial sea baseline is the seaward low-water line of the reef as shown by the appropriate symbol on charts officially recognized by the coastal State (article 6).

For the purpose of computing the ratio of water to land when establishing archipelagic waters, atolls and the waters contained within them may be included as part of the land area (article 47.7).

See: Archipelagic waters; baseline; island; low-water line; reef.

10 Bank

An elevation of the sea floor located on a continental (or an island) shelf, over which the depth of water is relatively shallow.

A shallow area of shifting sand, gravel, mud, etc., as a sand bank, mud bank, etc., usually constituting a danger to navigation and occurring in relatively shallow waters.

See: Continental shelf.

11 Baseline

The line from which the seaward limits of a State's territorial sea and certain other maritime zones of jurisdiction are measured.

The term usually refers to the baseline from which to measure the breadth of the territorial sea; the seaward limits of the contiguous zone (article 33.2), the

exclusive economic zone (article 57) and, in some cases, the continental shelf (article 76) are measured from the same baseline.

See: Internal waters.

The territorial sea baseline may be of various types depending on the geographical configuration of the locality.

The "normal baseline" is the low-water line along the coast (including the coasts of islands) as marked on large-scale charts officially recognized by the coastal State (article 5 and 121.2).

See: Low-water line.

In the case of islands situated on atolls or of islands having fringing reefs, the baseline is the seaward low-water line of the reef, as shown by the appropriate symbol on charts officially recognized by the coastal State (article 6).

Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation, may be used as part of the baseline (article 13).

See: Low-tide elevation.

Straight baselines are a system of straight lines joining specified or discrete points on the low-water line, usually known as straight baseline turning points, which may be used only in localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity (article 7.1).

See: Straight line.

Archipelagic baselines are straight lines joining the outermost points of the outermost islands and drying reefs which may be used to enclose all or part of an archipelago forming all or part of an archipelagic State (article 47).

12 Basepoint

A basepoint is any point on the baseline. In the method of straight baselines, where one straight baseline meets another baseline at a common point,

one line may be said to "turn" at that point to form another baseline. Such a point may be termed a "baseline turning point" or simply "basepoint".

13 Bay

For the purposes of this Convention, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation (article 10.2).

This definition is purely legal and is applicable only in relation to the determination of the limits of maritime zones. It is distinct from and does not replace the geographical definitions used in other contexts.

This definition does not apply to "historic" bays (article 10.6).

See: Historic bays.

14 Cap

Feature with a rounded cap-like top. Also defined as a plateau or flat area of considerable extent, dropping off abruptly on one or more sides.

15 Chart

A nautical chart specially designed to meet the needs of marine navigation. It depicts such information as depths of water, nature of the sea-bed, configuration and nature of the coast, dangers and aids to navigation, in a standardized format; also called simply "chart".

See: Baseline; coast; danger to navigation; geodetic datum; low-water line; navigation aid; sea-bed; tide.

16 Closing line

A line that divides the internal waters and territorial seas of a coastal State or the archipelagic waters of an archipelagic State. It is most often used in the context of establishing the baseline at the entrance to rivers (article 9), bays (article 10), and harbours (article 11).

See: Archipelagic State; baseline; bay; harbour works; internal waters, low-water line.

17 Coast

The sea-shore. The narrow strip of land in immediate contact with any body of water, including the area between high- and low-water lines.

See: Baseline; low-water line.

18 Contiguous zone

1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:

(a) Prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;

(b) Punish infringements of the above laws and regulations committed within its territory or territorial sea.

2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured (article 33)).

See: Baseline; exclusive economic zone; high seas.

19 Continental margin

As defined in article 76.3, as follows: "The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the sea-bed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.

See: Continental rise; continental shelf; continental slope, foot of the continental slope; deep ocean floor; sea-bed subsoil.

20 Continental rise

A submarine feature which is that part of the continental margin lying between the continental slope and the abyssal plain.

It is usually a gentle slope with gradients of 1/2 degree or less and a generally smooth surface consisting of sediments.

See: Continental margin; continental slope; deep ocean floor; foot of the continental slope.

21 Continental shelf

As defined in article 76.1, as follows:

"The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baseline from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance."

The limits of the continental shelf or continental margin are determined in accordance with the provisions of article 76 of the Convention. If the continental margin extends beyond a 200 nautical mile limit measured from the appropriate baselines the provisions of article 76.4 to 76.10 apply.

See: Continental margin; outer limit.

22 Continental slope

That part of the continental margin that lies between the shelf and the rise. Simply called the slope in article 76.3.

The slope may not be uniform or abrupt, and may locally take the form of terraces. The gradients are usually greater than 1.5 degrees.

See: Continental margin; continental shelf; continental rise; deep ocean floor, foot of the continental slope.

23 Danger to navigation

A hydrographic feature or environmental condition that might operate against the safety of navigation.

24 Deep ocean floor

The surface lying at the bottom of the deep ocean with its oceanic ridges, beyond the continental margin.

The continental margin does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.

See: Continental margin; oceanic ridge; sea-bed; submarine ridge; subsoil.

25 Delimitation

See: Line of delimitation.

26 Delta

A tract of alluvial land enclosed and traversed by the diverging mouths of a river.

In localities where the method of straight baselines is appropriate, and where because of the presence of a delta and other natural conditions the coastline is highly unstable, appropriate basepoints may be selected along the furthest seaward extent of the low-water line and, notwithstanding subsequent regression of the low-water line, the straight baselines shall remain effective until changed by the coastal State in accordance with the Convention (article 7.2).

See: Baseline; low-water line.

27 Due publicity

Notification of a given action for general information through appropriate authorities within a reasonable amount of time in a suitable manner.

Under the provisions of the Convention, States shall give due publicity, *inter alia*, to charts or lists of geographical co-ordinates defining the baselines and some limits and boundaries (articles 16.2, 47.9, 75.2 and 84.2), to laws and regulations pertaining to innocent passage (article 21.3), and to sea lanes and

traffic separation schemes established in the territorial sea (article 22.4) and archipelagic waters (article 53.10).

In addition to notification to concerned States through diplomatic channels, more immediate dissemination to mariners may be achieved by passing the information directly to national Hydrographic Offices for inclusion in their Notices to Mariners.

See: Baseline; chart; geographical co-ordinates; traffic separation scheme.

28 Enclosed sea

As defined in article 122, as follows:

"For the purposes of this Convention, 'enclosed or semi-enclosed sea' means a gulf, basin, or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States".

29 Equidistance line

See: Median line.

30 Estuary

The tidal mouth of a river, where the tide meets the current of fresh water.

See: Bay; river; delta.

31 Exclusive economic zone (EEZ)

As defined in article 55.

The zone may not be extended beyond 200 nautical miles from the territorial sea baselines (article 57).

The rights and jurisdictions of a coastal State in the EEZ are detailed in article 56. Other aspects of the EEZ are to be found in Part V of the Convention.

32 Facility (navigational)

See: Aid to navigation.

33 Facility (port)

See: Harbour works.

34 Foot of the continental slope

"In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base" (article 76.4 (*b*)).

It is the point where the continental slope meets the continental rise or, if there is no rise, the deep ocean floor.

To determine the maximum change of gradient requires adequate bathymetry covering the slope and a reasonable extent of the rise, from which a series of profiles may be drawn and the point of maximum change of gradient located.

The two methods laid down in article 76.4 for determining the outer limit of the continental shelf depend upon the foot of the continental slope.

See: Continental rise; continental shelf; continental slope.

35 Geodetic data

Information concerning points established by a geodetic survey, such as descriptions for recovery, co-ordinate values, height above sea-level and orientation.

See: Geodetic datum.

36 Geodetic datum

A datum defines the basis of a co-ordinate system. A local or regional geodetic datum is normally referred to an origin whose co-ordinates are defined. The datum is associated with a specific reference ellipsoid which best fits the surface (geoid) of the area of interest. A global geodetic datum is now related to the center of the earth's mass, and its associated spheroid is a best fit to the known size and shape of the whole earth.

The geodetic datum is also known as the horizontal datum or horizontal reference datum.

The position of a point common to two different surveys executed on different geodetic datums will be assigned two different sets of geographical co-ordinates. It is important, therefore, to know what geodetic datum has been used when a position is defined.

The geodetic datum must be specified when lists of geographical co-ordinates are used to define the baselines and the limits of some zones of jurisdiction (articles 16.1, 47.8, 75.1 and 84.1).

See: Baseline; geographical co-ordinates; geodetic data.

37 Geographical co-ordinates

Units of latitude and longitude which define the position of a point on the earth's surface with respect to the ellipsoid of reference.

Latitude is expressed in degrees(°), minutes(') and seconds(") or decimals of a minute, from 0° to 90° north or south of the equator. Lines or circles joining points of equal latitude are known as "parallels of latitude" (or just "parallels").

Longitude is expressed in degrees, minutes and seconds or decimals of a minute from 0° to 180° east or west of the Greenwich meridian. Lines joining points of equal longitude are known as "meridians".

Examples: 47° 20' 16" N, 20° 18' 24" E, or 47° 20.27' N, 20° 18.4' E

See: Geodetic datum.

38 Harbour works

Permanent man-made structures built along the coast which form an integral part of the harbour system such as jetties, moles, quays or other port facilities, coastal terminals, wharves, breakwaters, sea walls, etc. (article 11).

Such harbor works may be used as part of the baseline for the purposes of delimiting the territorial sea and other maritime zones.

See: Baseline; port.

39 Historic bay

See article 10.6. This term has not been defined in the Convention. Historic bays are those over which the coastal State has publicly claimed and exercised jurisdiction and this jurisdiction has been accepted by other States. Historic bays need not meet the requirements prescribed in the definition of "bay" contained in article 10.2.

40 Hydrographic survey

The science of measuring and depicting those parameters necessary to describe the precise nature and configuration of the sea-bed and coastal strip, its geographical relationship to the land-mass, and the characteristics and dynamics of the sea.

Hydrographic surveys may be necessary to determine the features that constitute baselines or basepoints and their geographical positions.

During innocent passage, transit passage, and archipelagic sea lane passage, foreign ships, including marine scientific research and hydrographic survey ships, may not carry out any research or survey activities without the prior authorization of the coastal States (article 19.2 (*j*), 40 and 54).

See: Baseline; geographical co-ordinates.

41 Installation (off-shore)

Man-made structure in the territorial sea, exclusive economic zone or on the continental shelf usually for the exploration or exploitation of marine resources. They may also be built for other purposes such as marine scientific research, tide observations, etc.

Off-shore installations or artificial islands shall not be considered as permanent harbour works (article 11), and therefore may not be used as part of the baseline from which to measure the breadth of the territorial sea.

Where States may establish straight baselines or archipelagic baselines, low-tide elevations having lighthouses or similar installations may be used as basepoints (articles 7.4 and 47.4).

Artificial islands, installations and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf (article 60.8).

Article 60 provides, *inter alia*, for due notice to be given for the construction or removal of installations, and permanent means for giving warning of their presence must be maintained. Safety zones, not to exceed 500 metres, measured from their outer edges, may be established. Any installations abandoned or disused shall be removed, taking into account generally accepted international standards.

42 Internal waters

As defined in article 8.1; the relevant straits regime applies in a strait enclosed by straight baselines (article 35 (*a*)).

A State exercises complete sovereignty over its internal waters with the exception that a right of innocent passage exists for foreign vessels in areas that had not been considered as internal waters prior to the establishment of a system of straight baselines (article 8.2).

See: Baseline; bay; coastline; low-water line; historic bay; installations (off-shore); river.

43 Islands

As defined in article 121.1.

Maritime zones of islands are referred to in article 121.2.

See: Atoll; baseline, contiguous zone; continental margin, exclusive economic zone; rock; tide.

44 Isobath

A line representing the horizontal contour of the sea-bed at a given depth.

See: Article 76.5.

45 Land territory

A general term in the Convention that refers to both insular and continental land masses that are above water at high tide (articles 2.1 and 76.1).

See: Tide.

46 Latitude

See: Geographical co-ordinates.

47 Line of delimitation

A line drawn on a map or chart depicting the separation of any type of maritime jurisdiction.

A line of delimitation may result either from unilateral action or from bilateral agreement and, in some cases, the State(s) concerned may be required to give due publicity.

See: Due publicity.

The term "maritime boundary" may sometimes be used to describe various lines of delimitation.

See: Baseline; chart; coast; continental margin; geographical co-ordinates; exclusive economic zone; median line; opposite coasts; outer limit; territorial sea.

48 Longitude

See: Geographical co-ordinates.

49 Low-tide elevation

A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide (article 13.1).

Low-tide elevation is a legal term for what are generally described as drying banks or rocks. On nautical charts they should be distinguishable from islands.

Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the territorial sea (article 13.1).

Articles 7.4 and 47.4 refer to the use of low-tide elevations as basepoints in a system of straight baselines or archipelagic baselines.

See: Baseline; island; low-water line; chart; territorial sea; installation (off-shore).

50 Low-water line / low-water mark

The intersection of the plane of low water with the shore. The line along a coast, or beach, to which the sea recedes at low water.

It is the normal practice for the low-water line to be shown as an identifiable feature on nautical charts unless the scale is too small to distinguish it from the high-water line or where there is no tide so that the high-and low water lines are the same.

The actual water level taken as low-water for charting purposes is known as the level of chart datum (document A/CONF. 62/L7.6).

See: Baseline; chart; tide.

51 Median line/equidistance line

A line every point of which is equidistant from the nearest points on the baselines of two or more States between which it lies.

See: Adjacent coasts; baseline; opposite coasts; territorial sea.

52 Mile

See: Nautical mile.

53 Mouth (bay)

Is the entrance to the bay from the ocean.

Article 10.2 states "a bay is a well-marked indentation," and the mouth of that bay is "the mouth of the indentation". Articles 10.3, 10.4 and 10.5 refer to "natural entrance points of a bay". Thus is can be said that the mouth of a bay lies between its natural entrance points.

In other words, the mouth of a bay is its entrance.

Although some States have developed standards by which to determine natural entrance points to bays, no international standards have been established.

See: Baseline; bay; closing line; estuary; low-water line.

54 Mouth (river)

The place of discharge of a stream into the ocean.

If a river flows directly into the sea, the baseline shall be a straight line across the mouth of the river between points on the low-water line of its banks (article 9). Note that the French text of the Convention is "si un fleuve se jette dans la mer sans former d'estuaire. . ." (underlining added).

No limit is placed on the length of the line to be drawn.

The fact that the river must flow "directly into the sea" suggests that the mouth should be well marked, but otherwise the comments on the mouth of a bay apply equally to the mouth of a river.

See: Baseline; closing line; estuary; low-water line; river.

55 Nautical chart

See: Chart.

56 Nautical mile

A unit of distance equal to 1,852 metres.

This value was adopted by the International Hydrographic Conference in 1929 and has subsequently been a adopted by the International Bureau of Weights and Measures. The length of the nautical mile is very close to the mean value of the length of 1' of latitude, which varies from approximately 1,843 metres at the equator to 1,861 2/3 metres at the pole.

See: Geographical co-ordinates.

57 Navigational aid

See: Aid to navigation.

58 Navigation chart

See: Aid to navigation.

59 Oceanic plateau

A comparatively flat-topped elevation of the sea-bed which rises steeply from the ocean floor on all sides and is of considerable extent across the summit.

For the purpose of computing the ratio of water to land enclosed within archipelagic baselines, land areas may, *inter alia*, include waters lying within that part of a steep-sided oceanic plateau which is enclosed or nearly enclosed by a chain of limestone islands and drying reefs lying on its perimeter (article 47.7).

See: Archipelagic State; baseline.

60 Oceanic ridge

A long elevation of the ocean floor with either irregular or smooth topography and steep sides.

Such ridges are excluded from the continental margin (article 76.3).

See: Deep ocean floor.

61 Opposite coasts

The geographical relationship of the coasts of two States facing each other.

Maritime zones of States having opposite coasts may require boundary delimitation to avoid overlap.

62 Outer limit

The extent to which a coastal State claims or may claim a specific jurisdiction in accordance with the provisions of the Convention.

In the case of the territorial sea, the contiguous zone and the exclusive economic zone, the outer limits lie at a distance from the nearest point of the territorial sea baseline equal to the breadth of the zone of jurisdiction being measured (articles 4, 33.2 and 57).

In the case of the continental shelf, where the continental margin extends beyond 200 nautical miles from the baseline from which the territorial sea is measured, the extent of the outer limit is described in detail in article 76.

See: Baseline; contiguous zone; continental margin; continental shelf; exclusive economic zone; isobath; territorial sea.

63 Parallel of latitude

See: Geographical co-ordinates.

64 Platform

See: Installation (off-shore).

65 Port

A place provided with various installations, terminals and facilities for loading and discharging cargo or passengers.

66 Reef

A mass of rock or coral which either reaches close to the sea surface or is exposed at low tide.

Drying reef. That part of a reef which is above water at low tide but submerged at high tide.

Fringing reef. A reef attached directly to the shore or continental land mass, or located in their immediate vicinity.

In the case of islands situated on atolls or of islands having fringing reefs, the baseline . . . is the seaward low-water line of the reef, as shown by the appropriate symbol on charts officially recognized by the coastal State (article 6).

See: Atoll; baseline; island; low-water line.

67 Rise

See: Continental rise.

68 River

A relatively large natural stream of water.

69 Roadstead

An area near the shore where vessels are intended to anchor in a position of safety; often situated in a shallow indentation of the coast.

"Roadsteads which are normally used for loading, unloading and anchoring of ships, and which would otherwise be situated wholly or partly outside the outer limit of the territorial sea, are included in the territorial sea" (article 12).

In most cases roadsteads are not clearly delimited by natural geographical limits, and the general location is indicated by the position of its geographical name on charts. If article 12 applies, however, the limits must be shown on charts or must be described by a list of geographical co-ordinates.

See: Line of delimitation; chart; geographical co-ordinates; territorial sea.

70 Rock

A solid mass of limited extent.

There is no definition given in the Convention. It is used in article 121.3, which states:

"Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."

See: Island; low-tide elevation.

71 Routing system

Any system of one or more routes and/or routing measures aimed at reducing the risk of casualties; it includes traffic separation schemes, two-way routes, recommended tracks, areas to be avoided, inshore traffic zones, roundabouts, precautionary areas and deep-water routes.

72 Safety aids

See: Aid to navigation.

73 Safety zone

Zone established by the coastal State around artificial islands, installations and structures in which appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures are taken. Such zones shall not exceed a distance of 500 metres around them, except as authorized by generally accepted international standards or as recommended by the competent international organization (articles 60.4 and 60.5).

See: Installation (off-shore).

74 Scale

The ratio between a distance on a chart or map and a distance between the same two points measured on the surface of the Earth (or other body of the universe).

Scale may be expressed as a fraction or as a ratio. If on a chart a true distance of 50,000 metres is represented by a length of 1 metre the scale may be expressed as 1:50,000 or as 1/50,000. The larger the divisor the smaller is the scale of the chart.

See: Chart.

75 Sea-bed

The top of the surface layer of sand, rock, mud or other material lying at the bottom of the sea and immediately above the subsoil.

The sea-bed may be that of the territorial sea (article 2.2), archipelagic waters (article 49.2), the exclusive economic zone (article 56), the continental shelf (article 76), the high seas (article 112.1) or the area (articles 1 1 (1) and 133). It may be noted, however, that in reference to the surface layer seaward of the continental rise, article 76 uses the term "deep ocean floor" rather than "sea-bed."

See: Area; continental shelf; deep ocean floor; exclusive economic zone; subsoil.

76 Sedimentary rock

Rock formed by the consolidation of loose sediments that have accumulated in layers in water or in the atmosphere. (The term sedimentary rock is used in article 76.4.(a) (i)).

The sediments may consist of rock fragments or particles of various sizes (conglomerate, sandstone, shale), the remains or products of animals or plants (certain limestones and coal), the product of chemical action or of evaporation (salt, gypsum, etc.) or a mixture of these materials.

77 Semi-enclosed sea

See: Enclosed sea (article 122).

78 Shelf

Geologically an area adjacent to a continent or around an island and extending from the low-water line to the depth at which there is usually a marked increase of slope to greater depth.

See: Continental shelf.

79 Size of area

The general requirements are laid down in annex III, articles 8 and 17.2 (*a*) of the Convention. The first of these articles requires that the applicant shall indicate the co-ordinates dividing the area.

The most common system of co-ordinates are those of latitude and longitude, although rectangular co-ordinates on the Universal Transverse Mercator Grid (quoting the appropriate zone number), Marsden Squares, Polar Grid Co-ordinates, etc. are also unambiguous. The Preparatory Commission has under consideration that applications for plans of work should define the areas by reference to the global system WGS (article 2.12 of Draft Regulations on Prospecting, Exploration and Exploitation of Ploymetallic Nodules in the Area, document LOS/PCN/SCN.3/WP 6).

See: Geographical co-ordinates.

80 Slope

See: Continental slope.

81 Spur

A subordinate elevation, ridge or projection outward from a larger feature.

The maximum extent of the outer limit of the continental shelf along submarine ridges is 350 nautical miles from the baselines. This limitation however "does not apply to submarine elevations that are natural components of the continental margin, such as plateaux, rises, caps, banks and spurs" (article 76.6).

See: Bank; cap; continental shelf; submarine ridge.

82 Straight baseline

See: Baseline.

83 Straight line

Mathematically the line of shortest distance between two points.

See: Baseline; continental margin; continental shelf.

84 Strait

Geographically, a narrow passage between two land masses or islands or groups of islands connecting two larger sea areas.

Only straits "used for international navigation" are classified as "international straits", and only such straits fall within the specific regime provided in part III, sections 2 and 3, of the Convention.

85 Structure

See: Installation (off-shore).

86 Submarine cable

An insulated, waterproof wire or bundle of wires or fibre optics for carrying an electric current or a message under water.

They are laid on or in the sea-bed, and the most common are telegraph or telephone cables, but they may also be carrying high voltage electric currents for national power distribution or to off-shore islands or structures.

They are usually shown on charts if they lie in an area where they may be damaged by vessels anchoring or trawling.

All States are entitled to lay submarine cables on the continental shelf subject to the provisions of article 79.

Articles 113, 114 and 115 provide for the protection of submarine cables and indemnity for loss incurred in avoiding injury to them.

See: Submarine pipelines.

87 Submarine pipelines

A line of pipes for conveying water, gas, oil, etc., under water.

They are laid on or trenched into the sea-bed, and they could stand at some height above it. In areas of strong tidal streams and soft sea-bed material the

sea-bed may be scoured from beneath sections of the pipe leaving them partially suspended.

They are usually shown on charts if they lie in areas where they may be damaged by vessels anchoring or trawling.

The delineation of the course for the laying of such pipelines on the continental shelf is subject to the consent of the coastal State.

Articles 113, 114 and 115 provide for the protection of submarine pipelines and indemnity for loss incurred in avoiding injury to them.

All States are entitled to lay submarine pipelines on the continental shelf subject to the provisions of article 79.

See: Submarine cables.

88 Submarine ridge

An elongated elevation of the sea floor, with either irregular or relatively smooth topography and steep sides, which constitutes a natural prolongation of land territory.

On submarine ridges the outer limits of the continental shelf shall not exceed 350 nautical miles from the territorial sea baselines, subject to a qualification in the case of submarine elevations which are natural components of the continental margin of a coastal State (article 76.6).

See: Continental shelf.

89 Subsoil

All naturally occurring matter lying beneath the sea-bed or deep ocean floor.

The subsoil includes residual deposits and minerals as well as the bedrock below.

The area and a coastal State's territorial sea, archipelagic waters, exclusive economic zone and continental shelf all include the subsoil (articles 1.1(1), 2.2, 49.2, 56.1 (*a*) and 76.1).

See: Area; continental shelf; exclusive economic zone; sea-bed.

90 Superjacent waters

The waters lying immediately above the sea-bed or deep ocean floor up to the surface.

The Convention only refers to the superjacent waters over the continental shelf and those superjacent to the area in articles 78 and 135 respectively.

See: Area; continental shelf; exclusive economic zone; sea-bed; water column.

91 Territorial sea

A belt of water of a defined breadth but not exceeding 12 nautical miles measured seaward from the territorial sea baseline.

The coastal State's sovereignty extends to the territorial sea, its sea-bed and subsoil, and to the air space above it. This sovereignty is exercised subject to the Convention and to other rules of international law (articles 2 and 3).

The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea (article 4).

Article 12 provides that certain roadsteads wholly or partly outside the territorial sea are included in the territorial sea; no breadth limitation is expressed.

The major limitations on the coastal State's exercise of sovereignty in the territorial sea are provided by the rights of innocent passage for foreign ships and transit passage and archipelagic sea lanes passage for foreign ships and aircraft (part II, section 3, part III, section 2, and part IV of the Convention).

See: Archipelagic sea lanes; baseline; islands; low-tide elevations; nautical mile; roadsteads.

92 Tide

The periodic rise and fall of the surface of the oceans and other large bodies of water due principally to the gravitational attraction of the Moon and Sun on a rotating Earth.

Chart datum: The tidal level to which depths on a nautical chart are referred to constitutes a vertical datum called chart datum.

While there is no universally agreed chart datum level, under an International Hydrographic Conference Resolution (A 2.5) it "shall be a plane so low that the tide will seldom fall below it".

See: Chart; low-water line.

93 Traffic separation scheme

A routing measure aimed at the separation of opposing streams of traffic by appropriate means and by the establishment of traffic lanes.

See: Routing system.

94 Water column

A vertical continuum of water from sea surface to sea-bed.

See: Sea-bed; superjacent waters.

ANNEX A1-6

Presidential Documents

Federal Register
Vol. 54. No. 5

Monday, January 9, 1989

Title 3— Proclamation 5928 of December 27, 1988

The President Territorial Sea of the United States of America

By the President of the United States of America

A Proclamation

International law recognizes that coastal nations may exercise sovereignty and jurisdiction over their territorial seas.

The territorial sea of the United States is a maritime zone extending beyond the land territory and internal waters of the United States over which the United States exercises sovereignty and jurisdiction, a sovereignty and jurisdiction that extend to the airspace over the territorial sea, as well as to its bed and subsoil.

Extension of the territorial sea by the United States to the limits permitted by international law will advance the national security and other significant interests of the United States.

NOW, THEREFORE, I, RONALD REAGAN, by the authority vested in me as President by the Constitution of the United States of America, and in accordance with international law, do hereby proclaim the extension of the territorial sea of the United States of America, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Mariana Islands, and any other territory or possession over which the United States exercises sovereignty.

The territorial sea of the United States henceforth extends to 12 nautical miles from the baselines of the United States determined in accordance with international law.

In accordance with international law, as reflected in the applicable provisions of the 1982 United Nations Convention on the Law of the Sea, within the territorial sea of the United States, the ships of all countries enjoy the right of innocent passage and the ships and aircraft of all countries enjoy the right of transit passage through international straits.

Nothing in this Proclamation:

(a) extends or otherwise alters existing Federal or State law or any jurisdiction, right, legal interests, or obligations derived therefrom; or

(b) impairs the determination, in accordance with international law, of any maritime boundary of the United States with a foreign jurisdiction.

IN WITNESS WHEREOF, I have hereunto set my hand this 27th day of December, in the year of our Lord nineteen hundred and eighty-eight, and of the Independence of the United States of American the two hundred and thirteenth.

RONALD REAGAN

ANNEX A1-7

THE WHITE HOUSE
Office of the Press Secretary

March 10, 1983

EMBARGOED FOR RELEASE AT 4:00 PM EST

FACT SHEET

UNITED STATES OCEANS POLICY

Today the president announced new guidelines for U.S. oceans policy and proclaimed an Exclusive Economic Zone (EEZ) for the United States. This follows his consideration of a senior interagency review of these matters.

The EEZ Proclamation confirms U.S. sovereign rights and control over the living and non-living natural resources of the seabed, subsoil and superjacent waters beyond the territorial sea but within 200 nautical miles of the United States coasts. This will include, in particular, new rights over all minerals (such as nodules and sulphide deposits) in the zone that are not on the continental shelf but are within 200 nautical miles. Deposits of polymetallic sulphides and cobalt/manganese crusts in these areas have only been recently discovered and are years away from being commercially recoverable. But they could be a major future source of strategic and other minerals important to the U.S. economy and security.

The EEZ applies to waters adjacent to the United States, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands (consistent with the Covenant and UN Trusteeship Agreement), and United States overseas territories and possessions. The total area encompassed by the EEZ has been estimated to exceed two million square nautical miles.

The President's statement makes clear that the proclamation does not change existing policies with respect to the outer continental shelf and fisheries within the U.S. zone.

Since President Truman proclaimed U.S. jurisdiction and control over the adjacent continental shelf in 1945, the U.S. has asserted sovereign rights for the purpose of exploration and exploitation of the resources of the continental shelf. Fundamental supplementary legislation, the Outer Continental Shelf Lands Act, was passed by Congress in 1953. The President's proclamation today incorporates existing jurisdiction over the continental shelf.

Since 1976 the United States has exercised management and conservation authority over fisheries resources (with the exception of highly migratory species

of tuna) within 200 nautical miles of the coasts, under the Magnuson Fishery Conservation and Management Act. The U.S. neither recognizes nor asserts jurisdiction over highly migratory species of tuna. Such species are best managed by international agreements with concerned countries. In addition to confirming the United States sovereign rights over mineral deposits beyond the continental shelf but within 200 nautical miles, the Proclamation bolsters U.S. authority over the living resources of the zone.

The United States has also exercised certain other types of jurisdiction beyond the territorial sea in accordance with international law. This includes, for example, jurisdiction relating to pollution control under the Clean Water Act of 1977 and other laws.

The President has decided not to assert jurisdiction over marine scientific research in the U.S. EEZ. This is consistent with the U.S. interest in promoting maximum freedom for such research. The Department of State will take steps to facilitate access by U.S. scientists to foreign EEZ's under reasonable conditions.

The concept of the EEZ is already recognized in international law and the President's Proclamation is consistent with existing international law. Over 50 countries have proclaimed some form of EEZ; some of these are consistent with international law and others are not.

The concept of an EEZ was developed further in the recently concluded Law of the Sea negotiations and is reflected in that Convention. The EEZ is a maritime area in which the coastal state may exercise certain limited powers as recognized under international law. The EEZ is not the same as the concept of the territorial sea, and is beyond the territorial jurisdiction of any coastal state.

The President's proclamation confirms that, without prejudice to the rights and jurisdiction of the United States in its EEZ, all nations will continue to enjoy non-resource related freedoms of the high seas beyond the U.S. territorial sea and within the U.S. EEZ. This means that the freedom of navigation and overflight and other internationally lawful uses of the sea will remain the same within the zone as they are beyond it.

The President has also established clear guidelines for United States oceans policy by stating that the United States is prepared to accept and act in accordance with international law as reflected in the results of the Law of the Sea Convention that relate to traditional uses of the oceans, such as navigation and overflight. The United States is willing to respect the maritime claims of others, including economic zones, that are consistent with international law as reflected in the Convention, if U.S. rights and freedoms in such areas under international law are respected by the coastal state.

The President has not changed the breadth of the United States territorial sea. It remains at 3 nautical miles. The United States will respect only those territorial sea claims of others in excess of 3 nautical miles, to a maximum of 12 nautical

miles, which accord to the U.S. its full rights under international law in the territorial sea.

Unimpeded commercial and military navigation and overflight are critical to the national interest of the United States. The United States will continue to act to ensure the retention of the necessary rights and freedoms.

By proclaiming today a U.S. EEZ and announcing other oceans policy guidelines, the President has demonstrated his commitment to the protection and promotion of U.S. maritime interests in a manner consistent with international law.

END

Source: 22 International Legal Materials 461 (1983).

ANNEX A1-8

Proclamation 5030 of March 10, 1983

Exclusive Economic Zone of the United States of America

48 F.R. 10605

By the President of the United States of America

A Proclamation

WHEREAS the Government of the United States of America desires to facilitate the wise development and use of the oceans consistent with international law;

WHEREAS international law recognizes that, in a zone beyond its territory and adjacent to its territorial sea, known as the Exclusive Economic Zone, a coastal State may assert certain sovereign rights over natural resources and related jurisdiction; and

WHEREAS the establishment of an Exclusive Economic Zone by the United States will advance the development of ocean resources and promote the protection of the marine environment, while not affecting other lawful uses of the zone, including the freedoms of navigation and overflight, by other States;

NOW, THEREFORE, I, RONALD REAGAN, by the authority vested in me as President by the Constitution and laws of the United States of America, do hereby proclaim the sovereign rights and jurisdiction of the United States of America and confirm also the rights and freedoms of all States within an Exclusive Economic Zone, as describe herein.

The Exclusive Economic Zone of the United States is a zone contiguous to the territorial sea, including zones contiguous to the territorial sea of the United States, the commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands (to the extent consistent with the Covenant and the United Nations Trusteeship Agreement), and United States overseas territories and possessions. The Exclusive Economic Zone extends to a distance 200 nautical miles from the baseline from which the breadth of the territorial sea is measured. In cases where the maritime boundary with a neighboring State remains to be determined, the boundary of the Exclusive Economic Zone shall be determined by the United States and other State concerned in accordance with equitable principles.

Within the Exclusive Economic Zone, the United States has, to the extent permitted by international law, (a) sovereign rights for the purpose of exploring, exploiting, conserving and managing natural resources, both living and non-living, of the seabed

and subsoil and the superjacent waters and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; and (b) jurisdiction with regard to the establishment and use of artificial islands, and installations and structures having economic purposes, and the protection and preservation of the marine environment.

This Proclamation does not change existing United States policies concerning the continental shelf, marine mammals and fisheries, including highly migratory species of tuna which are not subject to United States jurisdiction and require international agreements for effective management.

The United States will exercise these sovereign rights and jurisdiction in accordance with the rules of international law.

Without prejudice to the sovereign rights and jurisdiction of the United States, the Exclusive Economic Zone remains an area beyond the territory and territorial sea of the United States in which all States enjoy the high seas freedoms of navigation, overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the sea.

IN WITNESS WHEREOF, I have hereunto set my hand this tenth day of March, in the year of our Lord nineteen hundred and eighty-three, and of the Independence of the United States of America the two hundred and seventh.

RONALD REAGAN

FIGURE A1-1

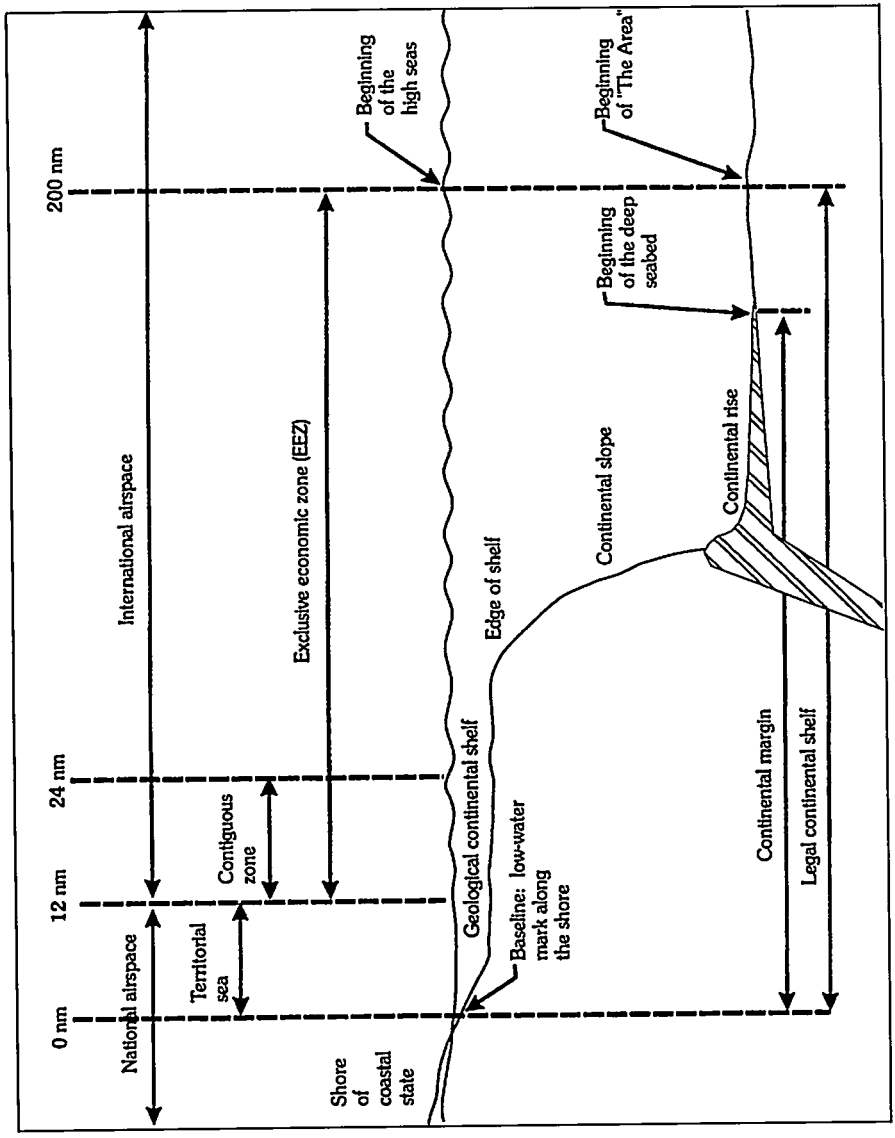

0 nm
12 nm
24 nm
200 nm
National airspace
Territorial sea
Contiguous zone
International airspace
Exclusive economic zone (EEZ)
Shore of coastal state
Baseline: low-water mark along the shore
Geological continental shelf
Edge of shelf
Continental slope
Beginning of the high seas
Beginning of the deep seabed
Beginning of "The Area"
Continental rise
Continental margin
Legal continental shelf

FIGURE A1-2

CONTINENTAL SHELF DELIMITATION

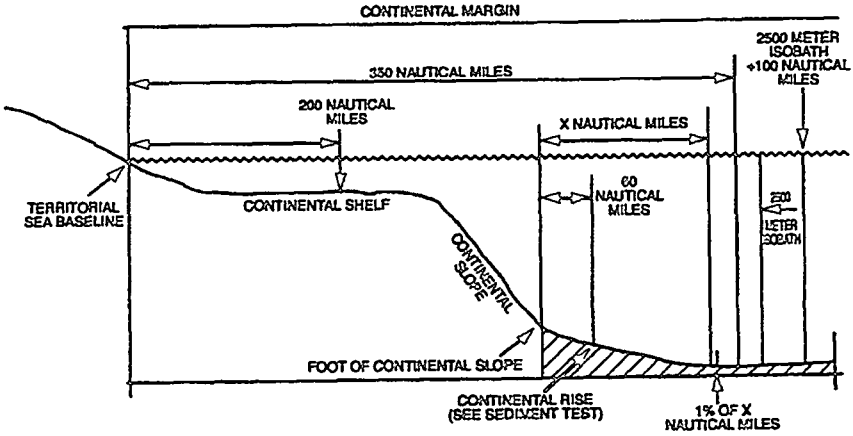
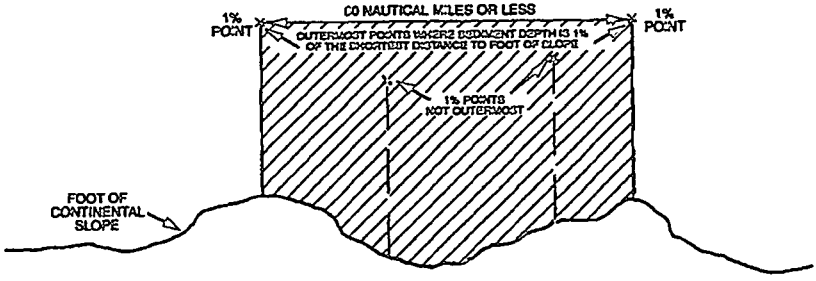


FIGURE A1-3

DEPTH OF SEDIMENT TEST



Source: Roach & Smith

TABLE A1-1

PARTIES TO THE 1982 UN CONVENTION ON THE LAW OF THE SEA

As of 1 November 1997, the following nations had deposited their instruments of ratification or accession:

Nations	*Dates of Ratification/Accession/Succession*
Algeria	11 June 1996
Angola	5 December 1990
Antigua and Barbuda	2 February 1989
Argentina	1 December 1995
Australia	5 October 1994
Bahamas	29 July 1983
Bahrain	30 May 1985
Barbados	12 October 1993
Belize	13 August 1983
Benin	16 October 1997
Bosnia & Herzegovina	12 January 1994
Brazil	22 December 1988
Brunei Darussalam	5 November 1996
Bulgaria	15 May 1996
Cameroon	19 November 1985
Cape Verde	10 August 1987
Chile	25 August 1997
China	7 June 1996
Comoros	21 June 1994
Congo	17 February 1989
Cook Islands	15 February 1995
Costa Rica	21 September 1992
Croatia	5 April 1995
Cuba	15 August 1984
Cyprus	12 December 1988
Czech Republic	21 June 1996
Djibouti	8 October 1991
Dominica	24 October 1991
Egypt	26 August 1983
Equatorial Guinea	21 July 1997
Fiji	10 December 1982
Finland	21 June 196
France	11 April 1996
Gambia	22 May 1984
Georgia	21 March 1996
Germany	14 October 1994
Ghana	7 June 1983
Greece	21 July 1995
Grenada	25 April 1991
Guatemala	11 February 1977
Guinea	6 September 1985

TABLE A1-1 (cont'd)

Guinea-Bissau	25	August 1986
Guyana	16	November 1993
Haiti	31	July 1995
Honduras	5	October 1993
Iceland	21	June 1985
India	29	June 1995
Indonesia	3	February 1986
Iraq	30	July 1985
Ireland	21	June 1996
Italy	13	January 1995
Ivory Coast	26	March 1984
Jamaica	21	March 1983
Japan	30	June 1996
Jordan	27	November 1995
Kenya	2	March 1989
Korea (Rep. of)	29	January 1996
Kuwait	2	May 1986
Lebanon	5	January 1995
Macedonia	19	August 1994
Malaysia	14	October 1996
Malta	20	May 1993
Marshall Islands	9	August 1991
Mauritania	17	July 1996
Mauritius	4	November 1994
Mexico	18	March 1983
Micronesia, Federated States of	29	April 1991
Monaco	20	March 1996
Mozambique	13	March 1997
Myanmar	21	May 1996
Namibia (U.N. Council for)	18	April 1983
Nauru	23	January 1996
Netherlands	28	June 1996
New Zealand	19	July 1996
Nigeria	14	August 1986
Norway	24	June 1996
Oman	17	August 1989
Pakistan	26	February 1997
Palau	30	September 1996
Panama	1	July 1996
Philippines	8	May 1984
Romania	17	December 1996
Russia	12	March 1997
St. Kitts and Nevis	7	January 1993
Saint Lucia	27	March 1985
Saint Vincent and the Grenadines	1	October 1993
Samoa	14	August 1995
Sao Tome and Principe	3	November 1987
Saudi Arabia	24	April 1996
Senegal	25	October 1984
Seychelles	16	September 1991
Sierra Leone	14	December 1994

TABLE A1-1 (cont'd)

Singapore	17	November 1994
Slovenia	16	June 1995
Solomon Islands	23	June 1997
Somalia	24	July 1989
Spain	15	January 1997
Sri Lanka	19	July 1994
Sudan	23	January 1985
Sweden	25	June 1996
Tanzania, United Republic of	30	September 1985
Togo	16	April 1985
Tonga	2	August 1995
Trinidad and Tobago	25	April 1986
Tunisia	24	April 1985
United Kingdom	25	July 1997
Uruguay	10	December 1992
Vietnam	25	July 1994
Yemen	21	July 1987
Yugoslavia	5	May 1986
Zimbabwe	24	February 1993

Land-Locked Nations	*Dates of Ratification/Accession*	
Austria	14	July 1995
Bolivia	28	April 1995
Botswana	2	May 1990
Mali	16	July 1985
Mongolia	9	August 1996
Paraguay	26	September 1986
Slovakia	8	May 1996
Uganda	9	November 1990
Zambia	7	March 1983

Source: U.N. Office for Ocean Affairs and the Law of the Sea (the current listing of parties to the 1982 LOS Convention can be found on the Internet at: http://www.un.org/Depts/Los/

TABLE A1-2
PARTIES TO THE 1958 GENEVA CONVENTIONS

Convention on the territorial sea and contiguous zone. Done at Geneva April 29, 1958; entered into force September 10, 1964.
15 UST 1606; TIAS 5639; 516 UNTS 205.

States which are parties:
Australia[1]
Belgium
Belarus[2]
Bosnia-Herzegovina
Bulgaria[2]
Cambodia
Croatia
Czech Rep.[3]
Czechoslovakia[2,4]
Denmark[1]
Dominican Rep.
Fiji[1]
Finland
German Dem. Rep.[2,5]
Haiti
Hungary[2]
Israel[1]
Italy[2]
Jamaica
Japan[1]
Kenya
Latvia
Lesotho
Lithuania
Madagascar[1]
Malawi
Malaysia
Malta
Mauritius
Mexico[2]
Netherlands[1,6]
Nigeria
Portugal[1]
Romania[2]
Sierra Leone[3]
Slovak Rep.[2]
Slovenia
Solomon Islands
South Africa
Spain[3]
Swaziland
Switzerland
Thailand[1]
Tonga[1]
Trinidad & Tobago
Uganda
Ukraine[2]
Union of Soviet Socialist Reps.[2,7]
United Kingdom[1]
United States[1]
Venezuela[2]
Yugoslavia[8]

NOTES:
[1] With a statement.
[2] With reservation.
[3] With a declaraton.
[4] Czechoslovakia was succeeded by the Czech Republic and the Slovak Republic on 31 Dec 1992.
[5] The Federal Republic of Germany acceded the German Democratic Republic on 3 Oct 1995.
[6] Applicable to Netherlands Antilles and Aruba.
[7] The Union of Soviet Socialist Republics desolved on 25 Dec 1991.
[8] Yugoslavia has desolved.

Convention on the high seas. Done at Geneva April 29, 1958; entered into force September 30, 1962.
13 UST 2312; TIAS 5200; 450 UNTS 82.

States which are parties:
Afghanistan
Albania[1,2]
Australia[3]
Austria
Belarus[1,2]
Belgium
Bosnia-Herzegovina
Bulgaria[1,2]
Burkina Faso
Cambodia
Central African Rep.

TABLE A1-2 (cont'd)

Costa Rica
Croatia
Cyprus
Czech Rep.[3]
Czechoslovakia[1,2,4]
Denmark[3]
Dominican Rep.
Fiji[3]
Finland
German Dem. Rep.[1,2,5]
Germany, Fed. Rep.[3,5]
Guatemala
Haiti
Hungary[1,2]
Indonesia[1]
Israel[3]
Italy
Jamaica
Japan[3]
Kenya
Latvia
Lesotho
Madagascar[3]
Malawi
Malaysia
Mauritius
Mexico[1]
Mongolia[2]
Nepal
Netherlands[3,6]
Nigeria
Poland[1,2]
Portugal[3]
Romania[1,2]
Senegal
Sierra Leone
Slovak Rep.[1,2]
Slovenia
Solomon Islands
South Africa
Spain[2]
Swaziland
Switzerland
Thailand[3]
Tonga[3]
Trinidad & Tobago
Uganda
Ukraine[1,2]
Union of Soviet Socialist Reps.[1,7]
United Kingdom[3]
United States[3]
Venezuela
Yugoslavia[8]

NOTES:
[1] With reservation.
[2] With declaration.
[3] With a statement.
[4] See note on Czechoslovakia under Territorial Sea Convention.
[5] See note on Germany under Territorial Sea Convention.
[6] Applicable to Netherlands Antilles and Aruba.
[7] See note on the Union of Soviet Socialist Republics under Territorial Sea Convention.
[8] See note on Yugoslavia under Territorial Sea Convention.

Convention on the continental shelf. Done at Geneva April 29, 1958; entered into force June 10, 1964.
15 UST 471; TIAS 5578; 499 UNTS 311.

States which are parties:
Albania
Australia
Belarus
Bosnia-Herzegovina
Bulgaria
Cambodia
Canada[1,2]
China (Taiwan)[3,4]
Colombia
Costa Rica
Croatia
Cyprus
Czech Rep.
Czechoslovakia[5]
Denmark
Dominican Rep.
Fiji[2]
Finland
France[1,3]

TABLE A1-2 (cont'd)

German Dem. Rep.[6]
Greece[3]
Guatemala
Haiti
Israel
Jamaica
Kenya
Latvia
Lesotho
Madagascar
Malawi
Malaysia
Malta
Mauritius
Mexico
Netherlands[2,7]
New Zealand
Nigeria
Norway[2]
Poland
Portugal
Romania
Sierra Leone
Slovak Rep.
Solomon Is.
South Africa
Spain[1,2]
Swaziland
Sweden
Switzerland
Thailand[2]
Tonga[2]
Trinidad & Tobago
Uganda
Ukraine
Union of Soviet Socialist Reps.[8]
United Kingdom[2]
United States[2]
Venezuela[3]
Yugoslavia[2,3,9]

NOTES:
[1] With declaration.
[2] With a statement.
[3] With reservation.
[4] The United States does not recognize China (Taiwan) as a sovereign State.
[5] See note on Czechoslovakia under Territorial Sea Convention.
[6] See note on Federal Republic of Germany under Territorial Sea Convention.
[7] Applicable to Netherlands Antilles and Aruba.
[8] See note on Union of Soviet Socialist Republics under Territorial Sea Convention.
[9] See note on Yugoslavia under Territorial Sea Convention.

Convention on fishing and conservation of living resources of the high seas. Done at Geneva April 29, 1958; entered into force March 20, 1966.
17 UST 138; TIAS 5969; 559 UNTS 285.

States which are parties:
Australia
Belgium
Bosnia-Herzegovina
Burkina Faso
Cambodia
Colombia
Denmark[1]
Dominican Rep.
Fiji
Finland
France
Haiti
Jamaica
Kenya
Lesotho
Madagascar
Malawi
Malaysia
Mauritius
Mexico
Netherlands[2]
Nigeria
Portugal
Sierra Leone
Solomon Is.
South Africa
Spain[3]
Switzerland
Thailand

TABLE A1-2 (cont'd)

Tonga
Trinidad & Tobago
Uganda
United Kingdom[3]
United States[4]
Venezuela
Yugoslavia[5]

NOTES:
[1] With reservation.
[2] Applicable to Netherlands Antilles and Aruba.
[3] With a statement.
[4] With an understanding.
[5] See note on Yugoslavia under Territorial Sea Convention.

Source: U.S. Dep't of State, Treaties in Force, 1 Jan. 1995.

TABLE A1-3
STATES DELIMITING STRAIGHT BASELINES ALONG ALL OR PART OF THEIR COASTS
(As of 1 November 1997)

[Absence of protest or assertion should not be inferred as acceptance or rejection by the United States of the straight baseline claims.]

State	U.S. Protest	U.S. Assertion of Right
Albania	1989	
Algeria		
Angola		
Argentina	1967	
Australia		
Bangladesh	1978	1996
Barbados		
Brazil		
Bulgaria		
Burma	1982	1985[a]
Cambodia		1986[a]
Cameroon	1963	
Canada		
Labrador & Newfoundland	1967	
Nova Scotia, Vancouver & Queen Charlotte Island		
Arctic	1986[a]	
Chile		
China	1996	1996[a]
Colombia	1988	1988[a]
Costa Rica	1989	
Cote D'Ivoire		
Cuba	1983[a]	
Cyprus		1985[a]
Denmark		
Faroe Islands	1991	1991
Greenland		
Djibouti	1989	1992[a]
Dominica		
Dominican Republic		1987[a]
Ecuador	1986	1997
Egypt	1991	1996
Estonia		
Finland		
France		
French Departments and Dependencies:		
Fr. Guiana		
Mayotte		
St. Pierre & Miquelon		
Fr. Southern & Antarctic Lands		
Germany		
Guinea	1964	1981
Guinea-Bissau		1989[a]
Haiti	1973	1986[a]
Iceland		
Iran	1994	1994[a]
Ireland		
Italy	1986[a]	
Japan		

TABLE A1-3 (cont'd)

State	U.S. Protest	U.S. Assertion of Right
Kenya		
Korea, South		
Lithuania		
Madagascar		
Malta	1981	
Mauritania	1989	1981[a]
Mauritius		
Mexico	1969	
Morocco		
Mozambique		
Netherlands		
Norway		
Norwegian Dependencies:		
Jan Mayen		
Svalbard		
Oman	1991	1991[a]
Pakistan		
Portugal	1986	
Romania		
Saudi Arabia		
Senegal	1989	
Somalia		
Soviet Union (now Russia)	1984[a]	1982[a]
Spain		
Sudan	1989	
Sweden		
Syria		
Tanzania		
Thailand		1995
Tunisia		
Turkey		
United Arab Emirates		
United Kingdom		
UK Dependencies:		
Turks & Caicos		
Falkland Islands		
So. Georgia Islands		
Venezuela	1956[a]	
Vietnam	198?[a]	1996
Yemen		
Yugoslavia[b]		

[a] Multiple protests or assertions.

[b] Serbia and Montenegro have asserted the formation of a joint independent state, but this entity has not been recognized as a state by the U.S.

Sources: U.N. Office for Oceans and Law of the Sea, Baselines: National Legislation With Illustrations (1989); U.S. Dep't of State, National Claims to Jurisdiction, Limits in the Seas No. 36 (rev. 6, 1990); Roach & Smith at 44-8; U.S. Dep't of State, Office of Ocean Affairs.

TABLE A1-4

CLAIMED HISTORIC BAYS

A. Bays directly claimed as historic

Hudson Bay[a] (Canada)
Mississippi Sound[c] (USA)
Long Island Sound[b,c] (USA)
Santo Domingo Bay[d] (Dominican Republic)
Bay of Escocesa[d] (Dominican Republic)
Gulf of Fonseca (El Salvador, Honduras)
Gulf of Panama[a,d] (Panama)
Rio de la Plata[a] (Argentina, Uruguay)
Gulf of Taranto[a] (Italy)
Gulf of Sidra[a,d] (Libya)
Gulf of Riga[a] (USSR)
White Sea (USSR)
Bay of Cheshsk (USSR)
Bay of Bajdaratsk (USSR)
Bay of Penzhirisk (USSR)
Peter the Great Bay[a,d] (USSR)
Gulf of Tonkin[a] - western portion (Vietnam)
Gulf of Thailand[a] - eastern portion (Vietnam)
Bight of Bangkok (Thailand)
Gulf of Thailand[a,d] (Cambodia)
Palk Bay[a] (India, Sri Lanka)
Gulf of Manaar[a,d] (India, Sri Lanka)
Ungwana Bay (Kenya)
Anxious Bay[a] (Australia)
Rivoli Bay[a] (Australia)
Encounter Bay[a] (Australia)
Lacepede Bay[a] (Australia)

B. Bays previously claimed as historic

Delaware Bay[b] (USA)
Chesapeake Bay[b] (USA)
Ocoa Bay[b] (Dominican Republic)
Samana Bay[b] (Dominican Republic)
Neyba Bay[b] (Dominican Republic)
Bay d'Amatique[b] (Guatemala)
Bay of el Arab[a] (Egypt)
Sea of Azov[b] (USSR)
Shark Bay[b] (Australia)
Spencer Bay[b] (Australia)
St. Vincent Gulf[b] (Australia)

[a] Claim protested by the United States.

[b] Qualifies as a juridical bay.

[c] Per U.S. Supreme Court decision.

[d] U.S. assertion of right against claim.

Note: None of these bays have been officially recognized by the United States as historic, including those of the U.S. identified as such by the Supreme Court.

Sources: Dep't of State (L/OES) files; Atlas of the Straight Baselines (Scovazzi ed., 2d ed. 1989); Roach & Smith, at 23-4.

TABLE A1-5
TERRITORIAL SEA
(As of 1 November 1997)

Three nautical miles (4)

Denmark[b,c,d]
Jordan[a]
Singapore[a]
Palau

Four nautical miles (1)

Norway[a]

Six nautical miles (3)

Dominican Republic[c,d]
Greece[a,e]
Turkey[f]

Twelve nautical miles (122)

Albania[d]
Algeria[a]
Antigua and Barbuda[a]
Argentina[a]
Australia[a,c,d]
Bahamas[a]
Bahrain[a]
Bangladesh
Barbados[a]
Belgium[c]
Belize[a,g]
Brazil[a]
Brunei
Bulgaria[a,c,d]
Burma[a]
Cambodia[c,d]
Canada
Cape Verde[a,h]
Chile[a]
China[a]
Colombia
Comoros[a,h]
Cook Islands[a]
Costa Rica[a,d]
Cote d'Ivoire[a,d]
Croatia[a]
Cuba[a]
Cyprus[a,d]
Djibouti[a]
Dominica[a]
Egypt[a]
Equatorial Guinea[a]
Estonia
Fiji[a,c,d,h]
Finland[a,b,c,d]
France[a,i]
Gabon
Gambia, The[a]
Germany[a,c,d]
Ghana[a]
Grenada[a]
Guatemala[a,d]
Guinea[a]
Guinea-Bissau[a]
Guyana[a]

TABLE A1-5 (cont'd)

Haiti[a,c,d]
Honduras[a]
Iceland[a]
India[a]
Indonesia[a,d,h]
Iran
Iraq[a]
Ireland[a]
Israel[c,d]
Italy[a,c,d]
Jamaica[a,c,d]
Japan[a,c,d,j]
Kenya[a,c,d]
Kiribati
Korea, Norh
Korea, South[a,k]
Kuwait[a]
Latvia
Lebanon[a]
Libya
Lithuania
Madagascar[c,d]
Malaysia[a,c,d]
Maldives
Malta[a,c]
Marshall Islands[a]
Mauritania[a]
Mauritius[a,c,d]
Mexico[a,c,d]
Micronesia, Fed. States of[a]
Monaco[a]
Morocco
Mozambique[a]
Namibia[a]
Nauru[a]
Netherlands[a,c,d]
New Zealand[a,l]
Niue
Oman[a]
Panama[a]
Pakistan[a]
Papua New Guinea[a,h]
Poland[d]
Portugal[c,d]
Qatar
Romania[a,c,d]
Russia[a,c,d]
Saint Kitts and Nevis[a]
Saint Lucia[a]
Saint Vincent
and the Grenadines[a]
Samoa[a]
Sao Tome & Principe[a,h]
Saudi Arabia[a]
Senegal[a,d]
Seychelles[a]
Solomon Islands[a,c,d,h]
South Africa[c,d]
Spain[a,c,d]
Sri Lanka[a]
Sudan[a]
Suriname
Sweden[a]
Tanzania[a]
Thailand[c,d]
Tonga[a,c,d]
Trinidad & Tobago[a,c,d,h]
Tunisia[a,c]
Tuvalu
Ukraine
United Arab Emirates
United Kingdom[a,c,d,m]
United States[c,d,n]
Vanuatu[h]
Venezuela[c,d]
Vietnam[a]
Yemen[a]
Yugoslavia, Former[a,c,d]
Zaire[a]

Twenty nautical miles (1)

Angola[a]

Thirty nautical miles (2)

Nigeria[a,c,d]
Togo[a]

Thirty-five nautical miles (1)

Syria

Fifty nautical miles (1)

Cameroon[a]

TABLE A1-5 (cont'd)

Two hundred nautical miles (10)		
Benin	Liberia	Sierra Leone[a,c,d]
Congo	Nicaragua	Somalia[a]
Ecuador	Peru	Uruguay[a,o]
El Salvador[o]		

Rectangular claim (1)
Philippines[a,h]

Notes

[a] Party to the 1982 Convention.
[b] Includes Greenland and the Faroe Islands.
[c] Party to the 1958 Territorial Sea Convention.
[d] Party to the 1958 High Seas Convention.
[e] Greece claims a 10-mile territorial air space.
[f] In the Aegean Sea. Turkey claims a 12-mile territorial sea off its coast in the Black Sea and the Mediterranean.
[g] From the mouth of the Sarstoon River to Ranguana Caye, Belize's territorial sea is 3 miles; according to Belize's Maritime Areas Act, 1992, the purpose of this limitation is "to provide a framework for the negotiation of a definitive agreement on territorial differences with the Republic of Guatemala."
[h] Maritime limits are measured from claimed "archipelagic baselines" which generally connect the outermost points of outer islands or drying reefs.
[i] Includes all French overseas departments and territories.
[j] Japan's territorial sea remains 3 miles in five "international straits", i.e., Soya (LaPerouse), Tsugaru, Osumi, and the eastern and western channels of Tsushima.
[k] South Korea's territorial sea remains 3 miles in the Korea Strait.
[l] Includes Tokelau.
[m] Includes Bermuda, Cayman Islands, Falkland Islands, St. Helena, Ascension, Triston de Cunha, Gough Island, Nightengale Island, Inaccessible Island, South Georgia, South Sandwich Islands, and the Turks and Caicos Islands.
[n] Includes Puerto Rico, U.S. Virgin Islands, Navassa Island, American Samoa, Guam, Johnston Atoll, Palmyra Atoll, Midway Island, Wake Island, Jarvis Island, Kingman Reef, Howland Island, Baker Island, Northern Marianas.
[o] Overflight and navigation permitted beyond 12 n.m.

Source: U.S. Department of State, Office of Ocean Affairs; Roach & Smith.

TABLE A1-6

THE EXPANSION OF TERRITORIAL SEA CLAIMS								
National Claims	1945	1958	1965	1974	1979	1983	1994	1997
3 NM	46	45	32	28	23	25	5	4
4-11 NM	12	19	24	14	7	5	5	4
12 NM	2	9	26	54	76	79	119	122
Over 12 NM	0	2	3	20	25	30	17	15
Number of Coastal Nations	60	75	85	116	131	139	146	151*

* As of 1 November 1997, information was not available on the territorial sea claims of Bosnia-Herzegovina, Eritrea, Georgia or the Federal Republic of Yugoslavia (Serbia & Montenegro).

Sources: Office of Ocean Affairs, U.S. Department of State; DOD Maritime Claims Reference Manual; Roach & Smith, at 94.

TABLE A1-7

ARCHIPELAGOS
(As of 1 November 1997)

Nation	Status of Claim to be an Archipelago	Reference
ANTIGUA AND BARBUDA	Claimed archipelagic status. Straight baselines drawn. Ratified 1982 LOS Convention.	MCRM, p. 2-9 (1997) UN, Baselines: Legislation pp. 13-15
BAHAMAS	Claimed archipelagic status. Not drawn baselines. Ratified 1982 LOS Convention.	MCRM, p. 2-36 (1997)
CAPE VERDE	Claimed archipelagic status. Archipelagic baselines drawn. Ratified 1982 LOS Convention.	MCRM, p. 2-78 (1997) UN, Baselines: Legislation pp. 99-100
COMOROS	Claimed archipelagic status. Not drawn baselines. Ratified 1982 LOS Convention.	MCRM, p. 2-97 (1997)
FIJI	Claimed archipelagic status. Drawn archipelagic baselines. Ratified 1982 LOS Convention.	Limits in the Seas No. 101 (1984) MCRM, p. 2-166 (1997)
GRENADA	Claimed archipelagic status. Not drawn baselines. Ratified 1982 LOS Convention.	MCRM, p. 2-205 (1997)
INDONESIA	Claimed archipelagic status. Drawn archipelagic baselines. Ratified 1982 LOS Convention.	Limits in the Seas No. 35 (1971) MCRM, p. 2-223 (1997)

TABLE A1-7 (cont'd)

Nation	Status of Claim to be an Archipelago	Reference
JAMAICA	Claimed archipelagic status. Drawn archipelagic baselines. Ratified 1982 LOS Convention.	MCRM, p. 2-255 (1997)
KIRIBATI	Claimed archipelagic status. Not drawn baselines. Not signed 1982 LOS Convention.	MCRM, p. 2-273 (1997)
MARSHALL ISLANDS	Claimed archipelagic status. Not drawn baselines. Ratified 1982 LOS Convention.	MCRM, p. 2-306 (1997)
PAPUA NEW GUINEA	Delimited interim archipelagic waters. Ratified 1982 LOS Convention.	MCRM, p. 2-363 (1997) UN, Ocean Affairs & Law
PHILIPPINES	Claimed archipelagic status. Drawn archipelagic baselines. Ratified 1982 LOS Convention.	MCRM, p. 2-369 (1997) Limits in the Sea No. 33 (1971)
ST. VINCENT AND THE GRENADINES	Claimed archipelagic status. Not drawn archipelagic baselines. Ratified 1982 LOS Convention.	MCRM, p. 2-434 (1997)
SAO TOME AND PRINCIPE	Claimed archipelagic status. Drawn archipelagic baselines. Ratified 1982 LOS Convention.	MCRM, p. 2-435 (1997) UN, Baselines: Legislation pp. 271-73; Limits in the Seas No. 98
SOLOMON ISLANDS	Claimed archipelagic status. Established archipelagic baselines. Ratified 1982 LOS Convention.	MCRM, p. 2-453 (1997) UN, Baselines: Legislation pp. 277-280 UN, Ocean Affairs & Law of the Sea

TABLE A1-7 (cont'd)

Nation	Status of Claim to be an Archipelago	Reference
TRINIDAD AND TOBAGO	Claimed archipelagic status. Not drawn archipelagic baselines. Ratified 1982 LOS Convention.	LOS Bulletin No. 9 MCRM, p. 2-511 (1997)
TUVALU	Claimed archipelagic status. Not drawn archipelagic baselines. Not ratified 1982 LOS Convention.	UN Law of the Sea: Practice of Archipelagic States 124-130
VANUATU	Claimed archipelagic status. Established archipelagic baselines. Not reatified 1982 LOS Convention.	MCRM, p. 2-584 (1997) UN, Baselines: Legislation pp. 376-380

See also Roach & Smith, at 131-40.

TABLE A1-8

A. Multi-Island States Not Physically Qualified for Archipelagic Status

Mauritius		
Samoa	St. Lucia	New Zealand
Singapore	Japan	United Kingdom

B. Dependent Territories Which, If Independent, Would Qualify for Archipelagic Status

American Samoa (USA)	Faroe Islands (Denmark)[a]	Jan Mayen Island (Norway)
Anguilla (UK)	Falkland & South Georgia	Madeiras Islands (Portugal)[a]
Azores (Portugal)[a]	Isl..[a] (UK)	New Caledonia (France)
Dahlak Archipelago	Galapagos Islands (Ecuador)[a]	Svalbard (Norway)[a]
(Ethiopia)[a]	Guadeloupe (France)	Turks and Caicos Islands[a]
Canary Islands (Spain)		(UK)

[a] Straight baseline system illegally proclaimed about island group.

Sources: U.S. Department of State (L/OES); Alexander, at 91; Roach & Smith, at 131-40.

TABLE A1-9
STATES WITH ACCEPTABLE WATER/LAND RATIOS
FOR CLAIMING ARCHIPELAGIC STATUS

Antigua & Barbuda[a]	Indonesia[a]	St. Vincent and the Grenadines[a]
The Bahamas[a]	Jamaica	Sao Tome & Principe[a]
Cape Verde Islands[a]	Maldives[b]	Seychelles
Comoro Islands[a]	Malta	Solomon Islands[a]
Fiji[a]	Papua New Guinea[a]	Tonga
Grenada[a]	The Philippines[a,b]	Trinidad and Tobago[a]
		Vanuatu[a]

[a] Archipelagic status has been declared.

[b] Baseline system does not conform to LOS Convention provisions.

Sources: U.S. Department of State (L/OES); Alexander, at 91; Roach & Smith, at 131-40.

TABLE A1-10
NATIONS CLAIMING A CONTIGUOUS ZONE
BEYOND THE TERRITORIAL SEA
(As of 1 November 1997)

	CZ nm	TS nm
Antigua	24	12
Argentina	24	12
Australia	24	12
Bahrain	24	12
Bangladesh	18	12
Brazil	24	12
Bulgaria	24	12
Burma	24	12
Cambodia	24	12
Cape Verde	24	12
Chile	24	12
China	24	12
Denmark	4	3
Djibouti	24	12
Dominica	24	12
Dominican Republic	24	6
Egypt	24	12
Finland	6	4
France	24	12
Gabon	24	12
Gambia	18	12
Ghana	24	12
Haiti	24	12
Honduras	24	12
India	24	12
Iran	24	12
Iraq	24	12
Jamaica	24	12
Korea, Republic of	24	12
Madagascar	24	12
Malta	24	12
Marshall Islands	24	12
Mauritania	24	12
Mexico	24	12
Morocco	24	12
Namibia	24	12
New Zealand	24	12
Norway	10	4
Oman	24	12
Pakistan	24	12
Qatar	24	12
Romania	24	12
St. Kitts and Nevis	24	12
Saint Lucia	24	12

TABLE A1-10 (cont'd)

	CZ nm	TS nm
St. Vincent & The Grenadines	24	12
Saudi Arabia	18	12
Senegal	24	12
Spain	24	12
Sri Lanka	24	12
Sudan	18	12
Syria	41[1]	35
Trinidad and Tobago	24	12
Tunisia	24	12
Tuvalu	24	12
United Arab Emirates	24	12
Vanuatu	24	12
Venezuela	15	12
Vietnam	24	12
Yemen	24	12
Total of Nations: 59		

[1] Claim protested by the United States.

Sources: U.S. Department of State (L/OES) files; Roach & Smith, at 103-4.

TABLE A1-11
ILLEGAL SECURITY ZONES BEYOND THE TERRITORIAL SEA
(As of 1 November 1997)

[Absence of protest or assertion should not be inferred as acceptance or rejection by the United States of the security zone claims.]

Nation	Breadth	U.S. Protest	U.S. Assertion of Right
Bangladesh	18 nm	1982	1995[a]
Burma	24 nm	1982	1985[a]
Cambodia	24 nm		1992
China	24 nm	1992	
Egypt	24 nm		
Haiti	24 nm	1989	1986[a]
India	24 nm		
Iran	24 nm	1994	1995
Korea, North	50 nm	1990	1990
Nicaragua	25 nm		1993
Pakistan	24 nm	1997	1986[a]
Saudi Arabia	18 nm		
Sri Lanka	24 nm	1986	
Sudan	18 nm	1989	1979[a]
Syria	41 nm	1989	1981[a]
United Arab Emirates	24 nm		
Venezuela	15 nm	1989	
Vietnam	24 nm	1982[a]	1982[a]
Yemen	24 nm	1982[a]	1979[a]

[a] Multiple protests.

Source: U.S. Department of State (L/OES) files.

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.[1] In the U.S. Navy, those ships designated "USS" are "warships" as defined by international law.[2] U.S. Coast Guard vessels designated "USCGC" under the command of a commissioned officer are also "warships" under international law.[3]

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1. High Seas Convention, art. 8(2); 1982 LOS Convention, art. 29; Hague Convention No. VII Relating to the Conversion of Merchant Ships into Warships, The Hague, 18 October 1907, 2 Am. J. Int'l L. (Supp.) 133, Schindler & Toman 591, arts. 2-5; GP I, art. 43. The service list for U.S. naval officers is the Register of Commissioned and Warrant Officers of the United States Navy and Naval Reserve on the active duty list (NAVPERS 15018); the comparable list for the U.S. Coast Guard is COMDTINST M1427.1 (series), Subj: Register of Officers.

2. U.S. Navy Regulations, 1990, art. 0406; SECNAVINST 5030.1 (series), Subj: Classification of Naval Ships and Aircraft. It should be noted that neither the High Seas Convention nor the LOS Convention requires that a ship be armed to be regarded as a warship. Under the LOS Convention, however, a warship no longer need belong to the "naval" forces of a nation, under the command of an officer whose name appears in the "Navy list" and manned by a crew who are under regular "naval" discipline. The more general reference is now made to "armed forces" to accommodate the integration of different branches of the armed forces in various countries, the operation of seagoing craft by some armies and air forces, and the existence of a coast guard as a separate unit of the armed forces of some nations. Oxman, The Regime of Warships Under the United Nations Convention on the Law of the Sea, 24 Va. J. Int'l L. 813 (1984).

3. The U.S. Coast Guard is an armed force of the United States. 10 U.S.C. sec. 101 (1988), 14 U.S.C. sec. 1 (1988). U.S. Coast Guard cutters are distinguished by display of the national ensign and the union jack. The Coast Guard ensign and Coast Guard commission pennant are displayed whenever a USCG vessel takes active measures in connection with boarding, examining, seizing, stopping, or heaving to a vessel for the purpose of enforcing the laws of the United States. U.S. Coast Guard Regulations, 1985, secs. 10-2-1, 14-8-2 & 14-8-3; 14 U.S.C. secs. 2 & 638 (1988); 33 C.F.R. part 23 (distinctive markings for USCG vessels and aircraft).

2.1.2 International Status. A warship enjoys sovereign immunity from interference by the authorities of nations other than the flag nation.[4] 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,[5] nor may it be required to fly the flag of the host nation.[6] 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 sea immediately.[7] Moreover, warships are immune from arrest and seizure, 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 on board.[8]

2.1.2.1 Nuclear Powered Warships. Nuclear powered warships and conventionally powered warships enjoy identical international legal status.[9]

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4. High Seas Convention, art. 8; 1982 LOS Convention, arts. 32, 58(2), 95 & 236. The rules applicable in armed conflict are discussed in Part II, particularly Chapters 7 and 8. The historic basis of this rule of international law is evidenced in *The Schooner Exchange v. McFaddon*, 7 Cranch 116 (1812).

5. U.S. Navy Regulations, 1990, art. 0828. CNO Washington DC message 032330Z MAR 88, NAVOP 024/88, regarding foreign port visits, points out that the United States also will not respond to host nation requests for specific information on individual crew members including crew lists and health records, and will not undertake other requested actions upon which the Commanding Officer's certification is definitive. *See also* Annex A2-1 (p. 155) for a more recent summary of U.S. sovereign immunity policy regarding U.S. warships, auxiliaries and military aircraft promulgated as ALPACFLT message 016/94, 020525Z Jun 94.

6. The U.S. Navy has provided, as a matter of policy and courtesy, for the display of a foreign flag or ensign during certain ceremonies. *See* U.S. Navy Regulations, 1990, arts. 1276-78.

7. Territorial Sea Convention, art. 23; 1982 LOS Convention, art. 30; U.S. Navy Regulations, 1990, art. 0832, 0859, & 0860. Quarantine is discussed in paragraph 3.2.3 (p. 216). As stated in paragraph 2.3.2.1 (p. 116), force may also be used, where necessary, to prevent passage which is not innocent.

8. Territorial Sea Convention, art. 22; High Seas Convention, art. 8(1); 1982 LOS Convention, arts. 32, 95 & 236. While on board ship in foreign waters, the crew of a warship are immune from local jurisdiction. Their status ashore is the subject of SECNAVINST 5820.4 (series), Subj: Status of Forces Policies, Procedure, and Information. Under status of forces agreements, obligations may exist to assist in the arrest of crew members and the delivery of them to foreign authorities. *See* AFP 110-20, chap. 2; U.S. Navy Regulations, 1990, art. 0822; and JAG Manual, sec. 0609.

9. Cf. 1982 LOS Convention, arts. 21(1), 22(2) and 23, and U.S.-U.S.S.R. Uniform Interpretation of Rules of International Law Governing Innocent Passage, Annex A2-2 (p. 161), para. 2. For further information and guidance *see* OPNAVINST C3000.5 (series), Subj: Operation of Naval Nuclear Powered Ships (U). *See also* Roach & Smith, at 160-1.

The Department of State has noted that:

(continued...)

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

9.(...continued)

> [I]n recognition of the sovereign nature of warships, the United States permits their [nuclear powered warships] entry into U.S. ports without special agreements or safety assessments. Entry of such ships is predicated on the same basis as U.S. nuclear powered warships' entry into foreign ports, namely, the provision of safety assurances on the operation of the ships, assumption of absolute liability for a nuclear accident resulting from the operation of the warship's reactor, and a demonstrated record of safe operation of the ships involved. . . .

1979 Digest of U.S. Practice in International Law 1084 (1983). Exec. Order 11,918, 1 June 1976, 3 C.F.R. part 120 (1976), 42 U.S.C. sec. 2211n (1988), was issued pursuant to 42 U.S.C. sec. 2211 to provide prompt, adequate, and effective compensation in the unlikely event of injury or damage resulting from a nuclear incident involving the nuclear reactor of a U.S. warship. 1976 Digest of U.S. Practice in International Law 441-42 (1977).

Although nuclear powered warships frequently pass through the Panama Canal, they have transitted the Suez Canal only infrequently. The transit by USS ARKANSAS (CGN 41) on 3 November 1984 was the first (U.S. Naval Inst. Proc., May 1985, at 48); the transit by USS ENTERPRISE (CVN 65) from the Indian Ocean to the Mediterranean via the Suez Canal on 28 April 1986 was the second (U.S. Naval Inst. Proc., May 1987, at 38). A request for ENTERPRISE to return to the Pacific via the Suez Canal was denied by Egypt "because it is reviewing its new rules governing passage." Washington Post, 4 July 1986, at A21. The Egyptian President noted in a newspaper interview that safety of the waterway and residents on both banks had to be considered, along with a possible surcharge for the passage of nuclear ships, as well as a guarantee for compensation in case of nuclear accidents. USS EISENHOWER (CVN-69) on 7 August 1990 and USS THEODORE ROOSEVELT (CVN-71) on 14 January 1991 transited the Suez Canal into the Red Sea in response to Iraq's attack on Kuwait on 2 August 1990. *See* paragraph 2.3.3.1, note 36 (p. 124) for a discussion of canals.

With regard to nuclear armed warships and aircraft, U.S. policy is to neither confirm nor deny the presence of nuclear weapons on board specific U.S. ships and aircraft. The firmness of the U.S. policy is illustrated by the U.S reaction to the February 1985 decision of the Government of New Zealand to deny permission for USS BUCHANAN (DDG 14) to enter Auckland Harbor since the U.S. would not confirm the absence of nuclear weapons in BUCHANAN. The U.S. suspended all military cooperation with New Zealand, including the ANZUS agreement, training, foreign military sales, and intelligence exchange. Dep't St. Bull., Sep. 1986, at 87; Note, The Incompatibility of ANZUS and a Nuclear-Free New Zealand, 26 Va. J. Int'l L. 455 (1986); Woodlife, Port Visits by Nuclear Armed Naval Vessels: Recent State Practice, 35 Int'l & Comp. L.Q. 730 (1986); Recent Developments, International Agreements: United States' Suspension of Security Obligations Toward New Zealand, 28 Harv. Int'l L.J. 139 (1987); Chinkin, Suspension of Treaty Relationship: The ANZUS Alliance, 7 UCLA Pac. Bas. L.J. 114 (1990). *Cf.* Flacco, Whether to Confirm or Deny?, U.S. Naval Inst. Proc., Jan. 1990, at 52. *See also* Thies & Harris, An Alliance Unravels: The United States and Anzus, Nav. War Coll. Rev., (Spring 1993), at 98. On 27 September 1991, President Bush ordered the removal of all tactical nuclear weapons from all U.S. surface ships, tactical submarines and land-based naval aircraft bases, reserving the right to return them during a crisis. The President also ordered the elimination of ground-launched tactical nuclear weapons, stood down strategic bombers from alert and stood down all ICBM's scheduled for deactivation under START. *See* N.Y. Times, 28 Sept. 1991, at A1; *id.* 29 Sept. 1991, sec. 1, at 1 & 10; Dep't State Dispatch, 30 Sep. 1991, at 715.

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. national waters, similarly respected by salvors, are honored.[10]

2.1.3 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,

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10. 9 Whiteman 221 & 434; Deputy Legal Adviser, U.S. Dep't of State letter to Deputy General Counsel, Maritime Administration, 30 December 1980, *reprinted in* 1980 Digest of U.S. Practice in International Law 999-1006; Roach, France Concedes United States Has Title to CSS ALABAMA, 85 Am. J. Int'l L. 381 (1991); 29 Jap. Ann. Int'l L. 114-15, 185-87 (1986); 30 *id.* 182-83 (1987). Under analogous reasoning, on 12 November 1976 Japan returned a MiG-25 Foxbat flown by LT Victor I. Belenko from Chuguyevka, U.S.S.R., to Hakodate Airport, Hokkaido, Japan on 4 September 1976, albeit the Foxbat was returned disassembled. Barron, MiG Pilot: The Final Escape of LT. Belenko 129, 180 (1980); 28 Jap. Ann. Int'l L. 142-43, 146-47 (1985). *See* paragraph 3.9 (p. 228) regarding attempts by other nations to recover U.S. government property at sea, and paragraph 4.3.2 (p. 259) regarding the right of self-defense.

The procedures for abandonment of sunken U.S. warships and aircraft located outside the territory of the United States are set forth in 40 U.S.C. sec. 512 (1987 Supp. V), and its implementing regulation, 41 CFR sec. 101-45.9 (1989). *Hatteras, Inc. v. The U.S.S. Hatteras, her engines, etc., in rem, and the United States of America, in personam,* 1984 AMC 1094 (S.D. Tex. 1981) (failure to follow disposal procedures renders null purported abandonment by the Secretary of the Navy), *aff'd w/o opinion* 698 F.2d 1215 (5th Cir.), *cert. denied* 464 U.S. 815 (1983). Government and military vessels are exempt from the International Convention for the Unification of Certain Rules Relating to Salvage of Vessels at Sea, 23 September 1910, 37 Stat. 1658, T.I.A.S 576, art. 14; the 1989 International Convention on Salvage, art. 4; and 46 U.S.C. sec. 731 (1982). 46 U.S.C. App. sec. 316(d) (1988) forbids foreign vessels from engaging in salvaging operations within the territorial or inland waters of the United States, except pursuant to treaty or 46 U.S.C. App. sec. 725. However, the United States is subject to claims for salvage outside U.S. territorial waters. *Vernicos Shipping Co. v. United States,* 223 F. Supp. 116 (S.D.N.Y. 1963), *aff'd,* 349 F.2d 465 (2d Cir. 1965) (tugs prevented USS ALTAIR and USS MERCHANT from sinking in Piraeus harbor, Greece); *B. V. Bureau Wijsmuller v. United States,* 487 F. Supp. 156 (S.D.N.Y. 1979), *aff'd* 633 F.2d 202 (2d Cir. 1980); 8 J. Mar. L. & Com. 433 (1977) (tugs pulled USS JULIUS A. FURER from a sandbar off the Dutch coast). The Abandoned Shipwreck Act of 1987, 43 U.S.C. sec. 2101 et seq. (1988), is not applicable to sunken warships which have not been affirmatively abandoned. H. Rep. 100-514(I), at 3, 4 U.S.C.C.A.A.N. 367-68 (1988); H. Rep. 100-514(II), at 5, 4 U.S.C.C.A.A.N. 374 & 381.

Control over shipwrecks and sunken aircraft is distinguished from control over the environs surrounding a wreck. When a sovereign immune vessel or aircraft lies within what is or becomes the territorial sea or internal waters of a foreign nation, the flag State retains control over the disposition of the vessel or aircraft, while the coastal nation controls access to its situs. As a practical matter, such situations may be the subject of cooperative arrangements for the preservation or exploration of the site. *See,* for example, the U.S.-French agreement concerning the CSS ALABAMA, 3 Oct. 1989, 85 Am. J. Int'l L. 381 (1991).

See also Roach, Sunken Warships and Military Aircraft, 20 Marine Policy 351 (1996).

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.[11]

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 (NDRF) 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.[12] The United States 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.[13]

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11. Territorial Seas Convention, art. 22; High Seas Convention, art. 9; 1982 LOS Convention, arts. 32, 96 & 236. The right of self-defense, explained in paragraph 4.3.2 (p. 259), applies to auxiliaries as well as to warships. Auxiliaries used on commercial service do not enjoy sovereign immunity. *See* Territorial Sea Convention, arts. 21-22; High Seas Convention, art. 9; 1982 LOS Convention, arts. 27-28, 32 & 236.

12. Commander Military Sealift Command Force Inventory, MSC Rep. 3110-4, Pub. 8 (8 Aug. 1988); Whitehurst, The U.S. Merchant Marine 113-27 (1983) (describing U.S. government-owned shipping).

13. 1985 SECSTATE Washington DC message 317062, Subj: Status of MSC vessels. The United States also claims sovereign immunity for the ships belonging to the National Oceanic and Atmospheric Administration (NOAA) of the Department of Commerce. *See* Leonard, NOAA and the Coast Guard Ark, U.S. Naval Inst. Proceedings, Dec. 1990, at 81.

Merchant Ships. In international law, a merchant ship is any vessel, including a fishing vessel, that is not entitled to sovereign immunity, *i.e.*, a vessel, whether privately or publicly owned or controlled, which is not a warship and which is engaged in ordinary commercial activities. For an excellent discussion on the distinction between commercial and non-commercial service, *see* Knight & Chiu, The International Law of the Sea: Cases, Documents, and Readings at 364-69 (1991).

In International Waters (*i.e.*, beyond the territorial sea). Merchant ships, save in exceptional cases expressly provided for in international treaties, are subject to the flag nation's exclusive jurisdiction in international waters. High Seas Convention, art. 6(1); 1982 LOS Convention, art. 92(1). Unless pursuant to hot pursuit (*see* paragraph 3.11.2.2.1 (p. 235)), merchant vessels in international waters may not be boarded by foreign warship personnel without the master's or flag nation consent, unless there is reasonable ground for suspecting that the ship is engaged in piracy, unauthorized broadcasting, or the slave trade, that the ship is without nationality, or that, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship, High Seas Convention, art. 22; 1982 LOS Convention, art. 110. Warship's right of approach and visit is discussed in paragraph 3.4 (p. 221). The belligerent right of visit and search is discussed in paragraph 7.6 (p. 387). On *flags of convenience*, *see* 1982 LOS Convention, art. 91, and Mertus, The Nationality of Ships and International Responsibility: The Reflagging of the Kuwaiti Oil Tankers, 17 Den. J. Int'l L. & Pol'y 207 (1988).

(continued...)

U.S. Navy and U.S. Coast Guard vessels which, except for the lack of a commissioned officer as commanding officer would be warships, also are auxiliaries.

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.[14]

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, archipelagic sea lanes passage, and entry in distress (see paragraph 2.5.1), state aircraft may not enter national airspace (see paragraph 1.8) or land in the sovereign territory of another nation without its authorization.[15] Foreign officials may not board the

13.(...continued)

The coastal nation may, in the exercise of its economic resource rights in the EEZ, take such measures, including boarding, inspection, arrest, and judicial proceedings against foreign flag merchant vessels as are necessary to ensure compliance with coastal nation rules and regulations adopted in conformity with the Convention. 1982 LOS Convention, art. 73. *Compare id.*, art. 220.

In the Territorial Sea. Foreign merchant vessels exercising the right of innocent passage through the territorial sea have the duty to comply with coastal nation rules and regulations, as discussed in paragraph 2.3.2.2 (p. 118). On board the transiting vessel, the coastal nation may exercise its criminal jurisdiction, if a crime is committed on board the ship during its passage *and*:

a. the consequences of the crime extend to the coastal nation;

b. the crime is a kind which disturbs the peace of the coastal nation or the good order of the territorial sea;

c. assistance of local authorities has been requested by the flag nation or the master of the ship transiting the territorial sea; or

d. such measures are necessary for the suppression of illicit drug trafficking.

The above circumstances do not affect the broader right of the coastal nation to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign merchant ship passing through the territorial sea after leaving that coastal nation's internal waters. Territorial Sea Convention, art. 19; 1982 LOS Convention, art. 27. *See* Nordquist, Vol. II, at 237-43.

14. AFP 110-31, para. 2-4b, at 2-4 to 2-5. Commissioned units of U.S. military aircraft are called squadrons and are established pursuant to the authority of the chief of service concerned. All aircraft, like ships, assume the nationality of the nation in which they are registered, and are marked with symbols or designations of their nationality. The markings of military aircraft should differ from those of other state aircraft and of civil aircraft. AFP 110-31, para. 2-4d.

15. "State aircraft" include aircraft used in "military," "customs" and "police" service. Chicago Convention, art. 3(b). Transit passage through international straits and archipelagic sea lanes passage are discussed in paragraphs 2.3.3 (p. 121) and 2.3.4.1 (p. 127) respectively. *See also* paragraph 2.3.2.5 (p. 120) regarding the right of assistance entry.

aircraft without the consent of the aircraft commander. Should the aircraft commander fail to certify compliance with local customs, immigration or quarantine requirements, the aircraft may be directed to leave the territory and national airspace of that nation immediately.[16]

2.2.3 Military Contract Aircraft. Civilian owned and operated aircraft, the full capacity of which has been contracted by the Air Mobility Command (AMC) 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.[17] As a matter of policy, however, the United States normally does not designate AMC-charter aircraft as state aircraft.

2.3 NAVIGATION IN AND OVERFLIGHT OF NATIONAL WATERS

2.3.1 Internal Waters.[18] As discussed in the preceding chapter, coastal 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.[19]

16. AFP 110-31, paras. 2-2a & 2-5a, at 2-3 & 2-5. CNO Washington DC message 032330Z MAR 88, NAVOP 024/88, reinforced the U.S. position that detailed lists of personnel embarked in military aircraft visiting foreign airfields may not be released to foreign governments. *See also* Annex A2-1 (p. 155). *See* paragraph 2.3.1 (p. 115) regarding entry in distress. Quarantine is discussed in paragraph 3.2.3 (p. 216). Self-defense is discussed in paragraph 4.3.2 (p. 259).

17. Taylor, Fed. B.J., Winter 1968, at 48. The Civil Reserve Air Fleet is distinguished from military contract aircraft and discussed in Bristol, CRAF: Hawks in Doves Clothing? 20 A.F. L. Rev. 48 (1978).

18. Territorial Sea Convention, art. 5, 1982 LOS Convention, art. 8.

19. For further information and guidance, *see* OPNAVINST 3128.3 (series), Subj: Visits by U.S. Navy Ships to Foreign Countries, and OPNAVINST 3128.10 (series), Subj: Clearance Procedures for Visits to United States Ports by Foreign Naval Vessels.

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,[20] or when straight baselines are established that have the effect of enclosing, as internal waters, areas of the sea previously regarded as territorial seas or high seas.[21] In the latter event, international law provides that the right of innocent passage (see paragraph 2.3.2.1)[22] or that of transit passage in an international strait[23] (see paragraph 2.3.3.1) may be exercised by all nations in those waters.

2.3.2 Territorial Seas[24]

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 by distress.[25] Passage is *innocent* so long as it is not prejudicial to the peace, good order, or security of the coastal nation.[26] Military activities considered to be *prejudicial* to the peace, good order, and security of the coastal nation, 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 nation
2. Any exercise or practice with weapons of any kind
3. The launching, landing, or taking on board of any aircraft or of any military device
4. Intelligence collection activities detrimental to the security of that coastal nation

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20. *Force majeure* includes a ship forced into internal waters by distress or bad weather. The distress must be caused by an uncontrollable event which creates an overwhelming or grave necessity to enter port or risk loss of the vessel or her cargo. *See* paragraph 3.2, note 1 (p. 213). *See also The New York*, 3 Wheat. 59 (16 U.S. 59) (1818); *see also* O'Connell 853-58; Restatement (Third) sec. 48. *See* paragraph 3.2.2 (p. 215) regarding safe harbor, and paragraph 4.4 (p. 265) regarding interception of intruding aircraft.

21. 1982 LOS Convention, art. 8(2).

22. *Id.*

23. 1982 LOS Convention, art. 35(a).

24. Navigation by foreign vessels in the territorial sea is regulated by the regimes of innocent passage, assistance entry, transit passage and archipelagic sea lanes passage which are discussed in paragraphs 2.3.2.1 (p. 116), 2.3.2.5 (p. 120), 2.3.3.1 (p. 121), and 2.3.4.1 (p. 127), respectively.

25. Territorial Sea Convention, art. 14(2), (3) & (6); 1982 LOS Convention, art. 18. Stopping or anchoring is also permitted to assist those in danger or distress.

26. What constitutes prejudice under art. 14(4) of the Territorial Sea Convention was left undefined. The 1982 LOS Convention endeavors to eliminate the subjective interpretative difficulties that have arisen concerning the innocent passage regime of the Territorial Sea Convention.

5. The carrying out of research or survey activities

6. Any act aimed at interfering with any system of communication of the coastal nation

7. Any act of propaganda aimed at affecting the defense or security of the coastal nation

8. The loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal nation

9. Any act of willful and serious pollution contrary to the 1982 LOS Convention

10. Any fishing activities

11. Any other activity not having a direct bearing on passage.[27]

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27. 1982 LOS Convention, art. 19. This is an "exhaustive list of activities that would render passage not innocent." Joint Interpretation of the Rules of International Law Governing Innocent Passage, attached to the Joint Statement by the United States of America and the Union of Soviet Socialist Republics, Jackson Hole, Wyoming, 23 September 1989, Dep't St. Bull., Nov. 1989, at 25, 28 Int'l Leg. Mat'ls 1445 (1989), 84 Am. J. Int'l L. 239 (1990), Annex A2-2, para. 3 (p. 161). On the other hand, 1 O'Connell 270 suggests the list may not be complete since the list does not say "only" the listed actions are prejudicial. The Territorial Sea Convention contains no comparable listing. *See* Stevenson & Oxman, The Third United Nations Conference on the Law of the Sea: the 1975 Geneva Session, 69 Am. J. Int'l L. 763, 771-72 (1975); Froman, Uncharted Waters: Non-innocent Passage of Warships in the Territorial Sea, 21 San Diego L. Rev. 625, 659 (1984); Grammig, The Yoron Jima Submarine Incident of August 1980: A Soviet Violation of the Law of the Sea, 22 Harv. Int'l L.J. 331, 340 (1981). *See also* Nordquist, Vol. II, at 164-178.

Since these activities must occur "in the territorial sea" (LOS Convention, art. 19(2)), any determination of noninnocent passage by a transiting ship must be made on the basis of acts committed while in the territorial sea. Thus cargo, destination, or purpose of the voyage can not be used as a criterion in determining that passage is not innocent. Professor H.B. Robertson testimony, House Merchant Marine & Fisheries Comm., 97th Cong., hearing on the status of the law of the sea treaty negotiations, 27 July 1982, Ser. 97-29, at 413-14. *Accord* Oxman, paragraph 2.1.1, note 2 (p. 109), at 853 (possession of passive characteristics, such as the innate combat capabilities of a warship, do not constitute "activity" within the meaning of this enumerated list).

The 1983 Soviet "Rules for Navigation and Sojourn of Foreign Warships in the Territorial Waters and Internal Waters and Ports of the USSR," *translation in* 24 Int'l Leg. Mat'ls 1717 (1985), were not entirely consistent with the relevant provisions of the 1982 LOS Convention. Butler, Innocent Passage and the 1982 Convention: The Influence of Soviet Law and Policy, 81 Am. J. Int'l L. 331 (1987). In particular, the Soviet claim to limit the innocent passage of warships to five "routes ordinarily used for international navigation" was inconsistent with the Convention's terms and negotiating history, and prior Soviet support therefor. Neubauer, The Right of Innocent Passage for Warships in the Territorial Sea: A Response to the Soviet Union, Nav. War Coll. Rev., Spring 1988, at 49; Franckx, Further Steps in the Clarification of the Soviet Position on the Innocent Passage of Foreign Warships through its Territorial Waters, 19 Ga. J. Int'l & Comp. L. 535 (1990). That portion of the 1983 Rules was amended effective 23 September 1989 to conform to the Uniform Interpretation, Annex A2-2 (p. 161). *See* paragraph 2.6, note 105 (p. 143) regarding U.S. challenges to this and other excessive maritime claims.

Since coastal nations are competent to regulate fishing in their territorial sea, passage of foreign fishing vessels engaged in activities that are in violation of those laws or regulations is not innocent. Territorial Sea Convention, art. 14(5); 1982 LOS Convention, art. 21(1)(e).

Foreign ships, including warships, exercising the right of innocent passage are required to comply with the laws and regulations enacted by the coastal nation in conformity with established principles of international law and, in particular, with such laws and regulations relating to the safety of navigation.[28] Innocent passage does *not* include a right of overflight.

The coastal nation may take affirmative actions in its territorial sea to prevent passage that is not innocent, including, where necessary, the use of force. If a foreign ship enters the territorial sea and engages in non-innocent activities, the appropriate remedy, consistent with customary international law, is first to inform the vessel of the reasons why the coastal nation questions the innocence of the passage, and to provide the vessel a reasonable opportunity to clarify its intentions or to correct its conduct in a reasonably short period of time.[29]

2.3.2.2 Permitted Restrictions. For purposes such as resource conservation, environmental protection, and navigational safety, a coastal 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 nation may, where navigational safety dictates, require foreign ships exercising the right of innocent passage to utilize designated sea lanes and traffic separation schemes.[30]

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28. Territorial Sea Convention, arts. 16(1) & 17; 1982 LOS Convention, art. 21(1) & 21(4).

29. This concept of customary international law was incorporated into the U.S.-U.S.S.R. Uniform Interpretation of the Rules of International Law Governing Innocent Passage. *See* Annex A2-2, para. 4 (p. 161). *See also* Kinley, The Law of Self-Defense, Contemporary Naval Operations, and the United Nations Convention on the Law of the Sea, 19 L. Sea Inst. Proc. 10, 12-15 (1987) discussing coastal nation enforcement options in light of the U.N. Charter and the law of the sea, particularly articles 25, 27, 28 and 30 of the 1982 LOS Convention.

30. 1982 LOS Convention, art. 21. Tankers, nuclear powered vessels, and ships carrying dangerous or noxious substances may be required, for safety reasons, to utilize designated sea lanes. 1982 LOS Convention, art. 22(2). These controls may be exercised at any time.

Art. 21 of the 1982 LOS Convention empowers a coastal nation to adopt, with due publicity, laws and regulations relating to innocent passage through the territorial sea in respect of all or any of the following eight subject areas (which do not include security, *but see* art. 25(3) re temporary closure of the territorial sea for security purposes):

1. The safety of navigation and the regulation of marine traffic (including traffic separation schemes).

2. The protection of navigational aids and facilities and other facilities or installations.

3. The protection of cables and pipelines.

4. The conservation of living resources of the sea.

(continued...)

2.3.2.3 Temporary Suspension of Innocent Passage. A coastal 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.[31]

2.3.2.4 Warships and Innocent Passage. All warships, including submarines, enjoy the right of innocent passage on an unimpeded and unannounced basis.[32] Submarines, however, are required to navigate on the surface and to show their

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30.(...continued)

5. The prevention of infringement of the fisheries regulations of the coastal nation.

6. The preservation of the environment of the coastal nation and the prevention, reduction and control of pollution thereof.

7. Marine scientific research and hydrographic surveys.

8. The prevention of infringement of the customs, fiscal, immigration or sanitary regulations of the coastal nation.

This list is exhaustive and inclusive.

The coastal nation is required to give appropriate publicity to any dangers to navigation of which it has knowledge within its territorial sea. Territorial Sea Convention, art. 15; 1982 LOS Convention, art. 24. The U.S. Inland Rules are discussed in paragraph 2.7.2.1 (p. 146).

31. Territorial Sea Convention, art. 16(3); 1982 LOS Convention, art. 25(3). Authorization to suspend innocent passage in the U.S. territorial sea during a national emergency is given to the President in 50 U.S.C. sec. 191 (1988). *See also* 33 C.F.R. part 127. "Security" includes suspending innocent passage for weapons testing and exercises.

For instances in which innocent passage has been suspended, *see* 4 Whiteman 379-86.

The Conventions do not define how large an area of territorial sea may be temporarily closed off. The 1982 LOS Convention does clearly limit the maximum breadth of the territorial sea to 12 nautical miles, and thus any nation claiming to close areas beyond 12 NM during such a suspension would be in violation of international law. The Conventions do not explain what is meant by "protection of its security" beyond the example of "weapons exercises" added in the 1982 LOS Convention. Further, how long "temporarily" may be is not defined, but it clearly may not be factually permanent. Alexander, 39-40; McDougal & Burke 592-93. The prohibition against "discrimination in form or fact among foreign ships" clearly refers to discrimination among flag nations, and, in the view of the United States, includes direct and indirect discrimination on the basis of cargo, port of origin or destination, or means of propulsion. This position is strengthened by the provisions of the LOS Convention explicitly dealing with nuclear powered and nuclear capable ships (arts. 22(2) & 23).

See the last subparagraph of paragraph 2.3.3.1 (p. 126) regarding the regime of nonsuspendable innocent passage in international straits.

32. Territorial Sea Convention, art. 14(1); 1982 LOS Convention, art. 17. Some nations view the mere passage of foreign warships through their territorial sea *per se* prejudicial (e.g., because of the military character of the vessel, the flag it is flying, its nuclear propulsion or weapons, or its destination), and insist on prior notice and/or authorization before foreign warships transit their territorial sea. *See* the list of such nations at Table A2-1 (p. 204). The United States' position,

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flag when passing through foreign territorial seas.[33] If a warship does not comply with coastal nation regulations that conform to established principles of international law and disregards a request for compliance which is made to it, the coastal nation may require the warship immediately to leave the territorial sea in which case the warship shall do so immediately.[34]

2.3.2.5 Assistance Entry. All ship and aircraft commanders have an obligation to assist those in danger of being lost at sea. See paragraph 3.2.1. 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 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

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32.(...continued)
consistent with the *travaux preparatoires* of the Territorial Sea Convention and the 1982 LOS Convention, is that warships possess the same right of innocent surface passage as any other vessel in the territorial sea, and that right cannot be conditioned on prior coastal nation notice or authorization for passage. Oxman, paragraph 2.1, note 2 (p. 109), at 854; Froman, paragraph 2.3.2.1, note 27 (p. 117), at 625; Harlow, Legal Aspects of Claims to Jurisdiction in Coastal Waters, JAG J., Dec. 1969-Jan. 1970, at 86; Walker, What is Innocent Passage?, Nav. War Coll. Rev., Jan. 1969, at 53 & 63, *reprinted in* 1 Lillich & Moore, at 365 & 375. The Soviet Union (now Russia) has accepted the United States' position. *See* para. 2 of the Uniform Interpretation of the Rules of International Law Governing Innocent Passage, Annex A2-2 (p. 161), and Franckx, Innocent Passage of Warships: Recent Developments in US-Soviet Relations, Marine Policy, Nov. 1990, at 484-90. For the earlier Soviet views, *see* Franckx, The U.S.S.R. Position on the Innocent Passage of Warships Through Foreign Territorial Waters, 18 J. Mar. L. & Com. 33 (1987), and Butler, Innocent Passage and the 1982 Convention: The Influence of Soviet Law and Policy, 81 Am. J. Int'l L. 331 (1987). Attempts to require prior authorization or notification of vessels in innocent passage during the Third LOS Conference were focused on warships. All attempts were defeated: 3d session, Geneva 1975; 4th session, New York 1976; 9th session, New York 1980; 10th session 1981; 11th session, New York 1982; and 11th resumed session, Montego Bay 1982. The United States' views on innocent passage in the territorial sea were set forth in its 8 March 1983 statement in right of reply, 17 LOS Documents 243-44, Annex A1-1 (p. 27).

33. Territorial Sea Convention, art. 14(6); 1982 LOS Convention, art. 20. Unless the coastal nation has consented to submerged passage, which none has done publicly to date (January 1997). For discussions of the incident in which the Soviet Whiskey-class submarine U-137 grounded outside the Swedish naval base of Karlskrona, after having entered Swedish territorial and internal waters submerged without Swedish permission, *see* Sweden and the Soviet Submarine—A Diary of Events, 112 Army Q. & Def. J. 6 (1982); Leitenberg, Soviet Submarine Operations in Swedish Waters 1980-1986 (1987); Bildt, Sweden and the Soviet Submarines, Survival, Summer 1983, at 168; Lofgren, Soviet Submarines Against Sweden, Strategic Review, Winter 1984, at 36; Delupis, Foreign Warships and Immunity for Espionage, 78 Am. J. Int'l L. 53 (1984); Amundsen, Soviet Submarines in Scandinavian Waters, The Washington Quarterly, Summer 1985, at 111.

34. Territorial Sea Convention, art. 23; 1982 LOS Convention, art. 30. A warship required to leave for such conduct shall comply with the request to leave the territorial sea immediately. Uniform Interpretation of the Rules of International Law Governing Innocent Passage, para. 7, Annex A2-2 (p. 161).

(continued...)

territorial sea or superjacent airspace to conduct a search, which requires the consent of the coastal nation.[35]

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.*[36]

34.(...continued)
Under art. 23 of the 1982 LOS Convention, foreign nuclear-powered ships, and ships carrying nuclear or other inherently dangerous or noxious substances, exercising the right of innocent passage must "carry documents and observe special precautionary measures established for such ships by international agreements," such as Chap. VIII of the 1974 International Convention for the Safety of Life at Sea (SOLAS), 32 U.S.T. 275-77, 287-91, T.I.A.S. 9700 (nuclear passenger ship and nuclear cargo ship safety certificates). These provisions of the 1974 SOLAS are specifically *not* applicable to warships.

35. Art. 0925, U.S. Navy Regulations, 1990; COMDTINST 16100.3, Subj: Search and Rescue in Foreign Territory and Territorial Seas, 3 December 1987; National Search and Rescue Manual, vol. I, COMDTINST M16120.5A, para. 1222 (1991). The U.S. Department of State is of the view that the right of assistance entry for aircraft is not as fully developed as that for vessels. The efforts to render emergency assistance must be undertaken in good faith and not as a subterfuge. *See* Statement of Policy by The Department of State, the Department of Defense, and the United States Coast Guard Concerning Exercise of the Right of Assistance Entry, Annex A2-3 (p. 163). That Statement of Policy, extended to include assistance entry into archipelagic waters, is implemented within the Department of Defense by CJCSI 2410.01A, Subj: Guidance for the Exercise of Right of Assistance Entry, of 23 April 1997. Annex A2-4 (p. 165).

36. Under the 1958 Territorial Sea Convention, international straits overlapped by territorial seas were subject to a regime providing only *nonsuspendable* innocent surface passage. Territorial Sea Convention, arts. 14 & 16(4). Part III of the 1982 LOS Convention establishes the regime of transit passage for international straits overlapped by territorial seas. Transit passage also applies in those straits where the high seas or exclusive economic zone corridor is not suitable for international navigation. *See* 1982 LOS Convention, arts. 36 & 37. *See also* Nordquist, Vol. II at 279-396.

The United States' view regarding the status of the transit passage regime as existing law is reflected in its 3 March 1983 Statement in Right of Reply, Annex A1-1 (p. 27), and Presidential Proclamation 5928, Annex A1-6 (p. 78). The right of transit passage was fully recognized in art. 4 of the Treaty of Delimitation between Venezuela and the Netherlands, 21 March 1978, an English translation of which is set out in Annex 2 to U.S. Dep't of State, Limits in the Seas No. 105, Maritime Delimitations, and in Art. VI of the Agreement on the Delimitation of Maritime and Submarine Areas between Venezuela and Trinidad and Tobago, 18 April 1990, *reprinted in* U.N. LOS Bull., No. 19, Oct. 1991, at 24. Although the term "transit passage" was not used in the statement in connection with extension of Great Britain's territorial sea to 12 NM (apparently to preclude any implication of incorporation by reference of the entire straits regime, 37 Int'l & Comp. L.Q. 415 (1988)), the "transit passage" regime was used in a Declaration issued by France and Great Britain setting out the governing regime of navigation in the Dover Straits in

(continued...)

36.(...continued)
conjunction with signature on 2 November 1988 of an Agreement establishing a territorial sea boundary in the Straits of Dover. U.K. White Paper, France No. 1, Cm. 557 (1989); FCO Press Release No. 100, 2 Nov. 1988.

Straits used for international navigation: In the opinion of the International Court of Justice in the *Corfu Channel Case*, 1949 I.C.J. 4, *reprinted in* U.S. Naval War College, International Law Documents 1948-1949, "Blue Book" series, 1950, v. 46, at 108 (1950), the decisive criterion in identifying international straits was not the volume of traffic flowing through the strait or its relative importance to international navigation, but rather its geographic situation connecting, for example, the two parts of the high seas, and the fact of its being "used for international navigation." *Id.* at 142. This geographical approach is reflected in both the Territorial Sea Convention (art. 16(4)) and the 1982 LOS Convention (arts. 34(1), 36 & 45). The geographical definition appears to contemplate a natural and not an artificially constructed canal, such as the Suez Canal. Efforts to define "used for international navigation" with greater specificity have failed. Alexander, 153-54. The United States holds that all straits *susceptible* of use for international navigation are included within that definition. Grunawalt, United States Policy on International Straits, 18 Ocean Dev. & Int'l L.J. 445, 456 (1987).

Part III of the 1982 LOS Convention addresses five different kinds of straits used for international navigation, each with a distinct legal regime:

1. Straits connecting one part of the high seas/EEZ and another part of the high seas/EEZ (art. 37, governed by transit passage, *see* paragraph 2.3.3.1 (p. 121)).

2. Straits connecting a part of the high seas/EEZ and the territorial sea of a foreign nation (art. 45(1)(b), regulated by nonsuspendable innocent passage, *see* paragraph 2.3.3.1, last subparagraph (p. 126)).

3. Straits connecting one part of the high seas/EEZ and another part of the high seas/EEZ where the strait is formed by an island of a nation bordering the strait and its mainland, if there exists seaward of the island a route through the high seas/EEZ of similar convenience with regard to navigation and hydrographical characteristics (art. 38(1), regulated by nonsuspendable innocent passage). (Table A2-2 (p. 204) lists 22 such straits, including the Strait of Messina (between the Italian mainland and Sicily). Difficulties in defining "mainland" and alternate routes are discussed in Alexander, 157-61.)

4. Straits regulated in whole or in part by international conventions (art. 35(c)). The 1982 LOS Convention does not alter the legal regime in straits regulated by long-standing international conventions in force specifically relating to such straits. While there is no agreed complete list of such straits, the Turkish Straits and the Strait of Magellan are generally included:

- the *Turkish Bosphorus and Dardanelles Straits*, governed by the Montreux Convention of 20 July 1936, 173 L.N.T.S. 213, 31 Am. J. Int'l L. Supp. 4; and

- the *Straits of Magellan*, governed by article V of the Boundary Treaty between Argentina and Chile, 23 July 1881, 82 Brit. Foreign & State Papers 1103, 159 Parry's T.S. 45 (Magellan Straits are neutralized forever, and free navigation is assured to the flags of all nations), and article 10 of the Treaty of Peace and Friendship between Argentina and Chile, 29 November 1984, 24 Int'l Leg. Mat'ls 11, 13 (1985) ("the delimitation agreed upon herein, in no way affects the provisions of the Boundary Treaty of 1881, according to which the Straits of Magellan are perpetually neutralized and freedom of navigation is assured to ships of all flags under the terms of Art.5° of said Treaty").

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36.(...continued)
Alexander 140-50 and Moore, The Regime of Straits and the Third United Nations Conference on the Law of the Sea, 74 Am. J. Int'l L. 77, 111 (1980) also list in this category *The Oresund and the Belts*, governed by the Treaty for the Redemption of the Sound Dues, Copenhagen, 14 March 1857, 116 Parry's T.S. 357, 47 Brit. Foreign & State Papers 24, granting free passage of the Sound and Belts for all flags on 1 April 1857, and the U.S.-Danish Convention on Discontinuance of Sound Dues, 11 April 1857, 11 Stat. 719, T.S. 67, 7 Miller 519, 7 Bevans 11, guaranteeing "the free and unencumbered navigation of American vessels, through the Sound and the Belts forever" (*see* Figure A2-1 (p. 190)). Warships were never subject to payment of the so-called "Sound Dues," and thus it can be argued that no part of these "long-standing international conventions" are applicable to them. 7 Miller 524-86; 2 Bruel, International Straits 41 (1947). The U.S. view is that warships and State aircraft traverse the Oresund and the Belts based either under the conventional right of "free and unencumbered navigation" or under the customary right of transit passage. The result is the same: an international right of transit independent of coastal nation interference. The Danish view is, however, to the contrary. Alexandersson, The Baltic Straits 82-86 & 89 (1982). Both Denmark and Sweden (Oresund) maintain that warship and State aircraft transit in the Baltic Straits are subject to coastal nation restrictions. They argue that the "longstanding international conventions" apply, as "modified" by longstanding domestic legislation. The United States does not agree. *See* Table A2-3 (p. 205) (listing the Bosporus, Dardanelles, Magellan, Oresund and Store Baelt) and Alexander, 140-50.

Sweden and Finland claim *Aland's Hav*, the 16 NM wide entrance to the Gulf of Bothnia, as an exception to the transit passage regime, since passage in that strait is regulated in part by the Convention relating to the Non-fortification and Neutralization of the Aaland Islands, Geneva, 20 Oct. 1921, 9 L.N.T.S. 211, art. 5 ("The prohibition to send warships into [the waters of the Aaland Islands] or to station them there shall not prejudice the freedom of innocent passage through the territorial waters. Such passage shall continue to be governed by the international rules and usage in force.") Declarations on signature of the 1982 LOS Convention, 10 December 1982. It should be noted that under art. 4.II of the 1921 Convention, the territorial sea of the Aaland Islands extends only "three marine miles" from the low-water line and in no case extends beyond the outer limits of the straight line segments set out in art. 4.I of that convention. The 1921 Convention is therefore not applicable to the remaining waters that form the international strait. The United States, which is not a party to this Convention, has never recognized this strait as falling within art. 35(c) of the LOS Convention. The parties to the 1921 Convention include Denmark, Finland, Germany, Italy, Poland, Sweden, the United Kingdom, Estonia and Latvia.

It may be noted that free passage of the *Strait of Gibraltar* was agreed to in a series of agreements between France, Spain and Great Britain in the early 20th Century. Article VII of the Declaration between the United Kingdom and France respecting Egypt and Morocco, London, 8 April 1904, 195 Parry's T.S. 198, acceded to by Spain in the Declaration of Paris, 3 Oct. 1904, 196 Parry's T.S. 353; Declarations on Entente on Mediterranean Affairs, Paris, 16 May 1907, 204 Parry's T.S. 176 (France and Spain) and London, 16 May 1907, 204 Parry's T.S. 179 (United Kingdom and Spain); and art. 6 of the France-Spain Convention concerning Morocco, Madrid, 27 Nov. 1912, 217 Parry's T.S. 288.

5. Straits through archipelagic waters governed by archipelagic sea lanes passage (art. 53(4) (*see* paragraph 2.3.4.1 (p. 127)). For a listing of nations claiming the status of archipelagic States in accordance with the 1982 LOS Convention *see* Table A1-7 (p. 101).

There are a number of straits connecting the high seas/EEZ with claimed historic waters (*see* Table A2-4 (p. 206)). The validity of those claims is, at best, uncertain (*see* paragraph 1.3.3.1 (p. 11)). The regime of passage through such straits is discussed in Alexander, at 155.

(continued...)

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.*[36] Transit passage exists throughout the entire strait and not just the area overlapped by the territorial sea of the coastal nation(s).

36.(...continued)
Canals. Man-made canals used for international navigation by definition are not "straits used for international navigation," and are generally controlled by agreement between the countries concerned. They are open to the use of all vessels, although tolls may be imposed for their use. They include:

- the *Panama Canal,* governed by the 1977 Panama Canal Treaty, 33 U.S.T. 1, T.I.A.S. 10,029, ("in time of peace and in time of war it shall remain secure and open to peaceful transit by the vessels of all nations on terms of entire equality . . . . Vessels of war and auxiliary vessels of all nations shall at all times be entitled to transit the Canal, irrespective of their internal operation, means of propulsion, origin, destination or armament");

- the *Suez Canal,* governed by the Convention respecting the Free Navigation of the Suez Canal, Constantinople, 29 October 1888, 79 Brit. Foreign & State Papers 18, 171 Parry's T.S. 241, 3 Am. J. Int'l L. Supp. 123 (1909) ("the Suez maritime canal shall always be free and open, in time of war and in time of peace, to every vessel of commerce or war, without distinction of flag"), reaffirmed by Egypt in its Declaration on the Suez Canal, 24 April 1957, U.N. Doc. A/3576 (S/3818), and U.N. Security Council Res. 118, S/3675, 13 Oct. 1956 ("There should be free and open transit through the Canal without discrimination, overt or covert—this covers both political and technical aspects"), Dep't St. Bull., 22 Oct. 1956, at 618; and

- the *Kiel Canal,* governed by art. 380 of the Treaty of Versailles, 28 June 1919, T.S. 4, 13 Am. J. Int'l L. 128, Malloy 3329, 2 Bevans 43, 225 Parry's T.S. 188 ("the Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality"). The Federal Republic of Germany does not consider the Treaty of Versailles to apply to the Kiel Canal. Alexander, at 181. *See also The SS Wimbledon,* P.C.I.J., Ser. A, No. 1, 1923.

The passage of nuclear powered warships through the Suez Canal is discussed in paragraph 2.1.2.1, note 9 (p. 110). Canals are further discussed in Alexander, at 174-81. Other canals may involve internal waters only, such as the U.S. Intracoastal Waterway, and the Cape Cod and Erie Canals.

37. The great majority of strategically important straits, *i.e.,* Gibraltar (Figure A2-2 (p. 191)), Bab el Mandeb (Figure A2-3 (p. 192)), Hormuz (Figure A2-4 (p. 193)), and Malacca (Figure A2-5 (p. 194)) fall into this category. Transit passage regime also applies to those straits less than six miles wide previously subject to the regime of nonsuspendable innocent passage under the Territorial Sea Convention, *e.g.,* Singapore and Sunda. *See* Table A2-5 (p. 207). It should be noted that transit passage exists throughout the entire strait and not just the area overlapped by the territorial seas of the littoral nation(s). Navy JAG message 061630Z JUN 88 (Annex A2-5, (p. 175)). *See, e.g.,* Figure A2-4 (p. 193).

38. 1982 LOS Convention, arts. 38(2) & 39(1)(c); Moore, The Regime of Straits and The Third United Nations Conference on the Law of the Sea, 74 Am. J. Int'l L. 77, 95-102 (1980); 1 O'Connell 331-37. *Compare* art. 53(3) which defines the parallel concept of archipelagic sea lanes
(continued...)

Under international law, the ships and aircraft of all nations, including warships, auxiliaries, and military aircraft, enjoy the right of unimpeded transit passage through such straits and their approaches.[37] 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.[38] 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.[39] 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.[40]

Transit passage through international straits cannot be hampered or suspended by the coastal nation for any purpose during peacetime.[41] This principle of international law also applies to transiting ships (including warships) of nations at peace with the bordering coastal nation but involved in armed conflict with another nation.[42]

Coastal 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

38.(...continued)
passage as "the exercise . . . of the rights of navigation and overflight *in the normal mode* solely for the purpose of continuous, expeditious and unobstructed transit 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 emphasized words do not appear in art. 38(2), but rather in the plural in art. 39(1)(c); art. 39 also applies *mutatis mutandis* to archipelagic sea lanes passage.

39. Burke, Submerged Passage Through Straits: Interpretations of the Proposed Law of the Sea Treaty Text, 52 Wash. L. Rev. 193 (1977); Robertson, Passage Through International Straits: A Right Preserved in the Third United Nations Conference on the Law of the Sea, 20 Va. J. Int'l L. 801 (1980); Clove, Submarine Navigation in International Straits: A Legal Perspective, 39 Naval L. Rev. 103 (1990). *But see* Reisman, The Regime of Straits and National Security: An Appraisal of International Lawmaking, 74 Am. J. Int'l L. 48 (1980). *See also* Nordquist, Vol. II at 342.

40. 1982 LOS Convention, art. 39(1).

41. *Id.*, at art. 44.

42. Warships and other targetable vessels of nations in armed conflict with the bordering coastal nation may be attacked within that portion of the international strait overlapped by the territorial sea of the belligerent coastal nation, as in all high seas or exclusive economic zone waters that may exist within the strait itself.

43. 1982 LOS Convention, arts. 41(1) & 41(3). Traffic separation schemes have been adopted for the Bab el Mandeb (Figure A2-3, (p. 192)), Hormuz (Figure A2-4, (p. 193)), Gibraltar (Figure A2-2, p. (191)), and Malacca-Singapore straits (Figure A2-5, (p. 194)).

44. Merchant ships and government ships operated for commercial purposes must respect properly designated sea lanes and traffic separation schemes. Warships, auxiliaries and government ships operated for non-commercial purposes, *e.g.*, sovereign immune vessels (*see* paragraph 2.1
(continued...)

competent international organization (the International Maritime Organization) in accordance with generally accepted international standards.[43] Ships in transit must respect properly designated sea lanes and traffic separation schemes.[44]

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 nation. There may be no suspension of innocent passage through such straits.[45]

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

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44.(...continued)
(p. 109)) are not legally required to comply with such sea lanes and traffic separation schemes while in transit passage. Sovereign immune vessels must, however, exercise due regard for the safety of navigation. Warships and auxiliaries may, and often do, voluntarily comply with IMO-approved routing measures in international straits when practicable and compatible with the military mission. When voluntarily using an IMO-approved traffic separation scheme, such vessels must omply with applicable provisions of the 1972 International Regulations for Preventing Collision at Sea (COLREGS). (Annex A2-6 (p. 179)).

45. 1982 LOS Convention, art. 45. These so-called "dead-end" straits include Head Harbour Passage, the Bahrain-Saudi Arabia Passage, and the Gulf of Honduras. Moore, The Regime of Straits and the Third United Nations Conference on the Law of the Sea, 74 Am. J. Int'l L. 112 (1980). Alexander, 154-55 & 186 n.46, asserts the Strait of Juan de Fuca, which is capable of shallow water passage, would belong in this list when the U.S. claims a 12 NM territorial sea, as it now does.

As between Israel and Egypt at least, the Strait of Tiran (Figure A2-6, (p. 195)) is governed by the Treaty of Peace between Egypt and Israel, 26 March 1979, 18 Int'l Leg. Mat'ls 362, art. V(2) ("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"). *See* the list at Table A2-4 (p. 206). Israel did not object to Part III of the LOS Convention "to the extent that particular stipulations and understandings for a passage regime for specific straits, giving broader rights to their users, are protected, as is the case for some of the straits in my country's region, or of interest to my country." 17 LOS Official Records 84, para. 19. Egypt's declaration accompanying its ratification of the LOS Convention on 26 August 1983 stated "[t]he provisions of the 1979 Peace Treaty Between Egypt and Israel concerning passage though the Strait of Tiran and the Gulf of Aqaba come within the framework of the general regime of waters forming straits referred to in part III of the Convention, wherein it is stipulated that the general regime shall not affect the legal status of waters forming straits and shall include certain obligations with regard to security and the maintenance of order in the State bordering the strait." At a 29 January 1982 press conference, U.S. LOS Ambassador Malone said, "the U.S. fully supports the continuing applicability and force of freedom of navigation and overflight for the Strait of Tiran and the Gulf of Aqaba as set out in the Peace Treaty between Egypt and Israel. In the U.S. view, the Treaty of Peace is fully compatible with the LOS Convention and will continue to prevail. The conclusion of the LOS Convention will not affect these provisions in any way." 128 Cong. Rec. S4089, 27 April 1982. *Compare* Lapidoth, The Strait of Tiran, the Gulf of Aqaba, and the 1979 Treaty of Peace Between Egypt and Israel, 77 Am. J. Int'l L. 84 (1983) *with* El Baradei, The Egyptian-Israeli Peace Treaty and Access to the Gulf of Aqaba: A New Legal Regime, 76 *id.* 532 (1982).

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.[46]

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 lanes passage while transiting through, under or over archipelagic waters and adjacent territorial seas via all routes normally used for international navigation and overflight. 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, expeditious and unobstructed transit through archipelagic waters, in the normal modes of operations, by the ships and aircraft involved.[47] This means that submarines may transit while submerged[48] 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 is substantially identical to the right of transit passage through international straits (see paragraph 2.3.3.1).[49] When archipelagic sea lanes are properly designated by the archipelagic nation, the following additional rules apply:

1. Each such designated sea lane is defined by a continuous axis line from the point of entry into the territorial sea adjacent to the archipelagic waters, through those archipelagic waters, to the point of exit from the territorial sea beyond.[50]

2. Ships and aircraft engaged in archipelagic sea lanes passage through such designated sea lanes are required to remain within 25 nautical miles either side of the axis line and must approach no closer to the coast line than 10 percent of the distance between the nearest islands. See Figure 2-1.[51]

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46. 1982 LOS Convention, art. 36. *See* Table A2-5 (p. 207). Table A2-6 (p. 209) lists other straits less than 24 NM wide which could have a high seas route if the littoral nations continue to claim less than a 12 NM territorial sea. While theoretically the regime of transit passage would apply if the corridor is not suitable for passage, Alexander found no such strait. Alexander at 151-52. *Compare*, however, the suitability for the passage of deep draft tankers through the waters in the vicinity of Abu Musa Island in the southern Persian Gulf.

47. 1982 LOS Convention, art. 53(3).

48. Nordquist, Vol. II at 342 (para. 39.10(e)) and 476-77 (paras. 53.9(c) & 53.9(d)).

49. 1982 LOS Convention, art. 54. *See* discussion at paragraph 2.3.4.2, note 56 (p. 128).

50. 1982 LOS Convention, art. 53(5).

51. *Id.*

52. *Id.*, art 53(3). *See also* Nordquist, Vol. II at 476-77.

This right of archipelagic sea lanes passage, through designated sea lanes as well as through all normal routes, cannot be hampered or suspended by the archipelagic nation for any purpose.[52]

2.3.4.2 Innocent Passage. Outside of archipelagic sea lanes, all ships, including warships, enjoy the more limited right of innocent passage throughout archipelagic waters just as they do in the territorial sea.[53] 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 reasons of navigational safety and for customs, fiscal, immigration, fishing, pollution, and sanitary purposes.[54] 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 nondiscriminating manner.[55] There is no right of overflight through airspace over archipelagic waters outside of archipelagic sea lanes.[56]

53. 1982 LOS Convention, art. 52(1).

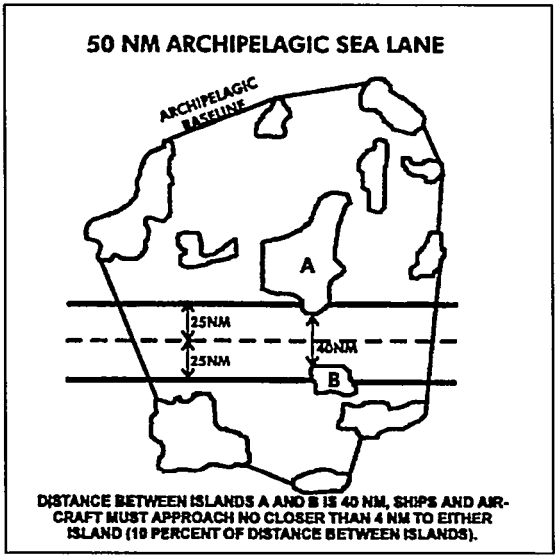
54. *Id.*, arts. 52(1), 53 & 21.

55. *Id.*, art. 52(2).

56. Most of the essential elements of the transit passage regime in non-archipelagic international straits (paragraph 2.3.4.1 (p. 127)) apply in straits forming part of an archipelagic sea lane. 1982 LOS Convention, art. 54, applying *mutatis mutandis* art. 39 (duties of ships and aircraft during transit passage), 40 (research and survey activities), and 42 and 44 (laws, regulations and duties of the bordering State relating to passage). This right exists regardless of whether the strait connects high seas/EEZ with archipelagic waters (e.g., Lombok Strait) or connects two areas of archipelagic waters with one another (e.g., Wetar Strait). Alexander, 155-56. Although theoretically only the regime of innocent passage exists in straits within archipelagic waters not part of an archipelagic sea lane (paragraph 2.3.4.2 (p. 128); 1982 LOS Convention, art. 52(1); Alexander, 156), since archipelagic sea lanes "shall include all normal passage routes . . . and all normal navigational channels . . ." (art. 53(4)), the regime of archipelagic sea lanes passage effectively applies to these straits as well.

If a nation meets all the criteria but has not claimed archipelagic status, then high seas freedoms exist in all maritime areas outside the territorial seas of the individual islands; transit passage applies in straits susceptible of use for international navigation; and innocent passage applies in other areas of the territorial sea. *See also* U.S. Statement in Right of Reply, Annex A1-1 (p. 27).

FIGURE 2-1. A Designated Archipelagic Sea Lane



2.4 NAVIGATION IN AND OVERFLIGHT OF INTERNATIONAL WATERS

2.4.1 Contiguous Zones. 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 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.[57]

2.4.2 Exclusive Economic Zones. The coastal 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 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

57. Territorial Sea Convention, art. 24; 1982 LOS Convention, art. 33. *See* paragraph 2.4.4 (p. 132) regarding security zones.

protection. Accordingly, the coastal 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.[58]

2.4.2.1 Marine Scientific Research. Coastal nations may regulate marine scientific research conducted in marine areas under their jurisdiction. This includes the EEZ and the continental shelf.[59] Marine scientific research includes activities undertaken in the ocean and coastal waters to expand knowledge of the marine environment for peaceful purposes, and includes: oceanography, marine biology, geological/geophysical scientific surveying, as well as other activities with a scientific purpose. The United States does not require that other nations obtain its consent prior to conducting marine scientific research in the U.S. EEZ.[60]

2.4.2.2 Hydrographic Surveys and Military Surveys. Although coastal nation consent must be obtained in order to conduct marine scientific research in its exclusive economic zone, the coastal nation cannot regulate hydrographic surveys or military surveys conducted beyond its territorial sea, nor can it require notification of such activities.[61]

A hydrographic survey is the obtaining of information in coastal or relatively shallow areas for the purpose of making navigational charts and similar products to support safety of navigation. A hydrographic survey may include measurements of the depth of water, configuration and nature of the natural bottom, direction and force of currents, heights and times of tides, and hazards to navigation.[62]

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58. 1982 LOS Convention, arts. 56, 58 & 60; *see* paragraph 1.5.2, note 49 (p. 21). A few nations explicitly claim the right to regulate the navigation of foreign vessels in their EEZ beyond that authorized by customary law reflected in the LOS Convention: Brazil, Guyana, India, Maldives, Mauritius, Nigeria, Pakistan and the Seychelles. *See* Tables A2-7 (p. 210) and A2-8 (p. 211); Attard, The Exclusive Economic Zone in International Law 51-52, 81 & 85-86 (1987); Rose, Naval Activity in the EEZ—Troubled Waters Ahead?, 39 Naval L. Rev. 67 (1990). The United States rejects those claims. U.S. Statement in Right of Reply, Annex A1-1 (p. 27), and 1983 Oceans Policy Statement, Annex A1-3 (p. 43).

59. 1982 LOS Convention art. 246.

60. *See* Annex A1-7 (p. 80).

61. *See* Commentary accompanying Letter of Transmittal, Oct. 7, 1994, Senate Treaty Doc. 103-39 (Annex A1-2 (p. 32)), at 80. The Commentary may be found *in* U.S. State Department, Dispatch, Vol. 6, Supp. No. 1 (Feb. 1995).

62. Roach, Research and Surveys in Coastal Waters, Vol. 20 Center for Oceans Law and Policy, UVA, Annual Seminar (1996), at 187.

A military survey is the collecting of marine data for military purposes. A military survey may include collection of oceanographic, marine geological, geophysical, chemical, biological, acoustic, and related data.[63]

2.4.3 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 nation approval for the course of pipelines on the continental shelf.[64] All of these activities must be conducted with due regard for the rights of other nations and the safe conduct and operation of other ships and aircraft.[65]

63. *Id.*, at 187-88. *See also* Roach, Marine Scientific Research and the New Law of the Sea, 27 Ocean Dev. & Int'l L. 59 (1996) at 61.

64. Submarine cables include telegraph, telephone and high-voltage power cables. Commentary of the International Law Commission on draft arts. 27 and 35 on the law of the sea, U.N. GAOR Supp. 9, U.N. Doc. A/3159, II Int'l L. Comm. Y.B. 278 & 281 (1956). *See also* Commentary accompanying Letters of Transmittal and Submittal in U.S. Department of State, Dispatch, Vol. 6, Supp. No. 1 (Feb. 1995) at 19. All nations enjoy the right to lay submarine cables and pipelines on the bed of the high seas as well as on their own and other nations' continental shelves. Consequently, SOSUS arrays can be lawfully laid on other nations' continental shelves beyond the territorial sea without notice or approval. 1982 LOS Convention, art. 79.

Willfully or with culpable negligence damaging a submarine cable or pipeline, except in legitimate life-saving or ship-saving situations, is a punishable offense under the laws of most nations. In addition, provisions exist for compensation from a cable owner for an anchor, net or other fishing gear sacrificed in order to avoid injuring the cable. Warships may approach and visit a vessel, other than another warship, suspected of causing damage to submarine cables in investigation of such incidents. Convention on the Protection of Submarine Cables, Paris, 14 March 1884, 24 Stat. 989, T.S. No. 380, as amended, 25 Stat. 1414, T.S. Nos. 380-1, 380-2, 380-3, *reproduced in* AFP 110-20 at 36-1; Franklin, The Law of the Sea: Some Recent Developments 157-178 (U.S. Naval War College, International Law Studies 1959-1960, v. 53, 1961) (discussing the boarding of the Soviet trawler NOVOROSSIISK by USS ROY O. HALE on 26 February 1959, 40 Dep't St. Bull. 555-58 (1959)). The 1884 Submarine Cables Convention is implemented in 47 U.S.C. sec. 21 *et seq.* (1982).

65. High Seas Convention, art. 2; Continental Shelf Convention, art. 4; 1982 LOS Convention, arts. 79 & 87; Chicago Convention, art. 3(d) (military aircraft). The exercise of any of these freedoms is subject to the conditions that they be taken with "reasonable regard", according to the High Seas Convention, or "due regard", according to the 1982 LOS Convention, for the interests of other nations in light of all relevant circumstances. The "reasonable regard" or "due regard" standards are one and the same and require any using nation to be cognizant of the interests of others in using a high seas area, and to abstain from nonessential, exclusive uses which substantially interfere with the exercise of other nations' high seas freedoms. Any attempt by a nation to impose its sovereignty on the high seas is prohibited as that ocean space is designated open to use by all nations. High Seas Convention, art. 2; 1982 LOS Convention, arts. 87 & 89. *See* MacChesney 610-29. Section 101(c) of the Deep Seabed and Hard Minerals Resources Act, 30 U.S.C. sec. 1411(c) (1988), requires U.S. citizen licensees to exercise their rights on the high seas with reasonable regard for the interests of other States in their exercise of the freedom of the high

(continued...)

2.4.3.1 Warning Areas. Any nation may declare a temporary warning area in international waters and airspace 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 other 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 warning area, but are obliged to refrain from interfering with activities therein. Consequently, ships and aircraft of one nation may operate in a warning area within international waters and airspace declared by another nation, collect intelligence and observe the activities involved, subject to the requirement of due regard for the rights of the declaring nation to use international waters and airspace for such lawful purposes.[66]

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

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65.(...continued)
seas. Section 111, codified at 30 U.S.C. sec. 1421, requires licensees to act in a manner that does not unreasonably interfere with interests of other States in their exercise of freedom of the high seas, as recognized under general principles of international law.

A legislative history of the articles of the 1982 LOS Convention regarding navigation on the high seas (arts. 87, 89-94 and 96-98) may be found *in* U.N. Office for Oceans Affairs and the Law of the Sea, The Law of the Sea: Navigation on the High Seas, U.N. Sales No. E.89.V.2 (1989). *See also* Commentary, paragraph 2.4.2.2, note 61 (p. 130) at 17-19; Nordquist, Vol. III at 72-86.

66. Franklin, paragraph 2.4.3, note 64 (p. 131), at 178-91; SECNAVINST 2110.3 (series), Subj: Special Warnings to Mariners; OPNAVINST 3721.20 (series), Subj: The U.S. Military Notice to Airmen (NOTAM) System.

For example, in response to the terrorist attacks on U.S. personnel in Lebanon on 18 April and 23 October 1983, involving the use of extraordinarily powerful gas-enhanced explosive devices light enough to be carried in cars and trucks, single engine private aircraft, or small high-speed boats, U.S. forces in the Mediterranean off Lebanon and in the Persian Gulf took a series of defensive measures designed to warn unidentified ships and aircraft whose intentions were unknown from closing within lethal range of suicide attack. Warnings were promulgated through NOTMARS and NOTAMS requesting unidentified contacts to communicate on the appropriate international distress frequency and reflected NCA authorization of commanders to take the necessary and reasonable steps to prevent terrorist attacks on U.S. forces. *See* 78 Am. J. Int'l L. 884 (1984).

The effectiveness of such attacks was firmly established by the 23 October 1983 levelling of the USMC BLT 1/8 Headquarters building at Beirut International Airport by a truck bomb generating the explosive power of at least 12,000 pounds effective yield equivalent of TNT. Report of the DOD Commission on Beirut International Airport Terrorist Act, October 23, 1983 (Long Commission Report), 20 Dec. 1983, at 86; Frank, U.S. Marines in Lebanon 1982-1984, at 152 (1987); Navy Times, 15 Dec. 1986, at 11.

foreign warships and military aircraft beyond its territorial sea. Although several coastal nations 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.[67]

The Charter of the United Nations and general principles of international law recognize that a nation may exercise measures of individual and collective self-defense against an armed attack or imminent threat of armed attack. 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 those areas. Historically, the establishment of such areas extending beyond the territorial sea has been restricted to periods of war or to 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 nation may lawfully exercise over them, beyond laying down the general requirement of reasonableness in relation to the needs of national security and defense.[68]

67. Leiner, Maritime Security Zones: Prohibited Yet Perpetuated, 24 Va. J. Int'l L. 967, 980 & 984-88 (1984). *See* paragraph 1.5.4, note 54 (p. 23). U.S. protest of the "restricted area" established by Libya within 100 NM radius of Tripoli is recorded in 1973 Digest of U.S. Practice in International Law 302-03. *See also* 1975 *id.* 451-52; 1977 *id.* 636; Note-Air Defense Zones, Creeping Jurisdiction in the Airspace, 18 Va. J. Int'l L. 485 (1978). Roach & Smith discuss so-called "security zones" at 104-106.

68. *Defense Zones.* Measures of protective jurisdiction referred to in this paragraph may be accompanied by a special proclamation defining the area of control and describing the types of control to be exercised therein. Typically, this is done where a state of belligerence exists, such as during World War II. In addition, so-called "defensive sea areas," though usually limited in past practice to the territorial sea, occasionally have included areas of the high seas as well. *See* U.S. Naval War College, International Law Documents, "Blue Book" series, 1948-49, v. 46 (1950) at 157-76, MacChesney 603-04 & 607.

The statute authorizing the President to establish defensive sea areas by Executive Order (18 U.S.C. sec. 2152 (1988)) does not restrict these areas to the territorial sea. Executive Orders establishing defensive sea areas are promulgated by the Department of the Navy in OPNAVINST 5500.11 (series) and 32 C.F.R. part 761. It should also be noted that establishment of special control areas extending beyond the territorial sea, whether established as "defensive sea areas" or "maritime control areas," has been restricted in practice to periods of war or of declared national emergency. On the other hand, in time of peace the United States has exercised, and continues to exercise, jurisdiction over foreign vessels in waters contiguous to its territorial sea consistent with the authority recognized in art. 24 of the 1958 Territorial Sea Convention and art. 33 of the 1982 LOS Convention. This limited jurisdiction has, of course, been exercised without establishing special defensive sea areas or maritime control areas covering such waters. NWIP 10-2, art. 413d n.21. *See* Woods, State and Federal Sovereignty Claims Over the Defensive Sea Areas in Hawaii, 39 Nav. L. Rev. 129 (1990).

Closed Seas and Zones of Peace. Proposals have been advanced at various times to exclude non-littoral warships from "closed" seas such as the Black Sea or Baltic Sea, where water access is limited, or from the entire Indian Ocean as a designated "zone of peace." These claims have not gained significant legal or political momentum or support and are not recognized by the United

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2.4.5 Polar Regions

2.4.5.1 Arctic Region. The U.S. considers that the waters, ice pack, 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 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 seas of littoral states.[69]

68.(...continued)
States. Views of the former-Soviet Union on closed seas are discussed in Darby, The Soviet Doctrine of the Closed Sea, 23 San Diego L. Rev. 685 (1986). *See also* paragraph 1.3.3.1, note 23 (p. 11). The proposed Indian Ocean Zone of Peace is discussed in Alexander, at 339-40. Nuclear free zones are discussed in paragraph 2.4.6 (p. 136).

69. Arctic operations are described *in* Lyon, Submarine Combat in the Ice, U.S. Naval Inst. Proc., Feb. 1992, at 33; Allard, To the North Pole!, U.S. Naval Inst. Proc., Sept. 1987, at 56; LeSchack, ComNavForArctic, U.S. Naval Inst. Proc., Sept. 1987, at 74; Atkeson, Fighting Subs Under the Ice, U.S. Naval Inst. Proc., Sept. 1987, at 81; Le Marchand, Under Ice Operations, Nav. War Coll. Rev., May-June 1985, at 19; and Caldwell, Arctic Submarine Warfare, The Submarine Rev., July 1983, at 5. Alexander, Navigational Restrictions 311-19 & 358-59, notes the following unilateral claims that adversely impact on navigational freedoms through Arctic straits:

- The [former] U.S.S.R. claims the White Sea and Cheshskaya Gulf to the east as historic waters, and has delimited a series of straight baselines along its Arctic coast closing off other coastal indentations, as well as joining the coastal islands and island groups with the mainland, thereby purporting to close off the major straits of the Northeast Passage. *See* Franckx, Non-Soviet Shipping in the Northeast Passage, and the Legal Status of Proliv Vil'kitskogo, 24 Polar Record 269 (1988).

- Norway has delimited straight baselines about the Svalbard Archipelago that do not conform to art. 7 of the 1982 LOS Convention.

- Canada purports to close off its entire Arctic archipelago with straight baselines and declares that the waters within the baselines — including the Northwest Passage — are internal waters. 24 Int'l Leg. Mat'ls 1728 (1985). *See* Figures A2-7 (p. 196) and A2-8 (p. 197). The United States has not accepted that claim. *See* the Agreement between the Government of Canada and the Government of the United States of America on Arctic Cooperation, 11 January 1988, 28 Int'l Leg. Mat'ls 142 (1989). The negotiation of this agreement is discussed in Howson, Breaking the Ice: The Canadian-American Dispute over the Arctic's Northwest Passage, 26 Colum. J. Trans. L. 337 (1988). The October 1988 transit by the icebreaker USCGC POLAR STAR pursuant to this agreement is discussed *in* 83 Am. J. Int'l L. 63 and 28 Int'l Leg. Mat'ls 144-45 (1989); the POLAR STAR's August 1989 transit is summarized *in* West, Breaking Through the Arctic, U.S. Naval Inst. Proc., Jan. 1990, at 57. The Canadian claim is discussed *in* Pullen, What Price Canadian Sovereignty?, U.S. Naval Inst. Proc., Sept. 1987, at 66 (Captain Pullen, Canadian Navy retired, argues that the Northwest Passage is the sea route

(continued...)

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.[70]

2.4.5.2.1 The Antarctic Treaty of 1959. The U.S. is a party to the multilateral treaty of 1959 governing Antarctica.[71] 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.[72]

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.[73] 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.[74] 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.[75] In addition, the treaty prohibits nuclear explosions and disposal of nuclear waste anywhere south of 60° South Latitude.[76] The treaty does not, however, affect in any way the high seas freedoms of navigation

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69.(...contined)
that links the Atlantic and the Pacific oceans north of America, and lists the 36 transits of the Passage from 1906 to 1987). *See* Figure A2-8 (p. 197). *See also* MacInnis, Braving the Northwest Passage, Nat'l Geog., May 1989, at 584-601 and Roach & Smith, at 207-215.

Other Arctic straight baselines not drawn in conformity with the 1982 LOS Convention include those around Iceland and Danish-drawn lines around Greenland and the Faeroe Islands.

70. Although the United States would be fully justified in asserting a claim to sovereignty over one or more areas of Antarctica on the basis of its extensive and continuous scientific activities there, it has not done so. *See* Joyner, Maritime Zones in the Southern Ocean: Problems concerning the Correspondence of Natural and Legal Maritime Zones, 10 Applied Geog. 307 (1990); Hinckley, Protecting American Interests in the Antarctic: The Territorial Claims Dilemma, 39 Naval L. Rev. 43 (1990).

71. Antarctic Treaty, Washington, 1 December 1959, 12 U.S.T. 794; 402 U.N.T.S. 71; T.I.A.S. 4780; text *reprinted in* AFP 110-20 at 4-21. Its provisions apply south of 60° South Latitude.

72. Art. IV.2.

73. Art. I.1.

74. Art. VII.3.

75. For further information and guidance, *see* DOD Directive 2000.6, Subj: Conduct of Operations in Antarctica, and OPNAVINST 3120.20 (series), Subj: Navy Policy in Antarctica and Support of the U.S. Antarctic Program.

76. Arts. V and VI.

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,[77] to which the United States is a party, acknowledges the right of groups of nations to conclude regional treaties establishing nuclear free zones.[78] 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.[79] The 1967 Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco)[80] 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.[81] This in no way affects the exercise by

77. Treaty on the Non-proliferation of Nuclear Weapons, Washington, London & Moscow, 1 July 1968, 21 U.S.T. 483; 729 U.N.T.S. 161; T.I.A.S. 6839.

78. *Id.*, Art. VII.

79. The United States, therefore, does not oppose the establishment of nuclear free zones provided certain fundamental rights are preserved in the area of their application. These include non-interference with the high seas freedoms of navigation and overflight beyond the territorial sea, the right of innocent passage in territorial seas and archipelagic waters, the right of transit passage of international straits and the right of archipelagic sea lanes passage of archipelagic waters. Parties to such agreements may, however, grant or deny transit privileges within their respective land territory, internal waters and national airspace, to nuclear powered and nuclear capable ships and aircraft of non-party nations, including port calls and overflight privileges. Dept St. Bull., Aug. 1978, at 46-47; 1978 Digest of U.S. Practice in International Law 1668; 1979 Digest of Practice in International Law 1844. *See also* Rosen, Nuclear-Weapon-Free Zones, Nav. War Coll. Rev., Autumn 1996, at 44.

80. Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlateloco), Mexico City, 14 February 1967, 22 U.S.T. 762; 64 U.N.T.S. 281, T.I.A.S. 7137; AFP 110-20 at 4-9, entered into force 22 April 1968. The Treaty of Tlateloco consists of the Treaty and two Additional Protocols. The parties to the Treaty are listed *in* 28 Int'l Leg. Mat'ls 1404 (1989). By its terms, the United States cannot be a party to the Treaty of Tlateloco since the United States does not lie within the zone of its application. *See* Figure A2-9 (p. 198). The United States is, however, a party to both Additional Protocols.

81. Additional Protocol I to the Treaty of Tlateloco, 33 U.S.T. 1972; T.I.A.S. 10147; 634 U.N.T.S. 362, entered into force 11 December 1969 (for the U.S., 23 November 1981), and calls upon nuclear-weapons nations outside the treaty zone to apply the denuclearization provisions of the Treaty to their territories in the zone. As of 1 January 1997, France, the Netherlands, the United Kingdom, and the United States are parties to Additional Protocol I. Within the Latin American nuclear-weapons free zone lie the Panama Canal, Guantanamo Naval Base in Cuba, the Virgin Islands, and Puerto Rico. Since Addition Protocol I entered into force for the United States on 23 November 1981, the U.S. may not store or deploy nuclear weapons in those areas, but its ships and aircraft may still visit these ports and airfields, and overfly them, whether or not these ships and aircraft carry nuclear weapons. In this regard, *see also* Articles III.1(e) and VI.1 of the 1977 Treaty Concerning the Permanent Neutrality and Operations of the Panama Canal, 33 U.S.T. 1; T.I.A.S. 10,029, which specifically guarantee the right of U.S. military vessels to transit the Canal regardless of their cargo or armament. This includes submarines as well as surface ships. The United

(continued...)

the U.S. of navigational rights and freedoms within waters covered by the Treaty of Tlatelolco.[82]

81.(...continued)
States also has the right to repair and service ships carrying nuclear weapons in ports in the Virgin Islands, Puerto Rico and Guantanamo when incident to transit through the area. Further, the United States retains the right to off-load nuclear weapons from vessels in these ports in the event of emergency or operational requirements if such off-loading is temporary and is required in the course of a transit through the area.

The U.S. ratification of Protocol I (and of Protocol II discussed below) was subject to understandings and declarations that the Treaty of Tlateloco does not affect the right of a nation adhering to Protocol I to grant or deny transit and transport privileges to its own or any other vessels or aircraft irrespective of cargo or armaments, and that the treaty does not affect the rights of a nation adhering to Protocol I regarding exercise of the freedoms of the seas, or regarding passage through or over waters subject to the sovereignty of a Treaty nation. *See* 28 Int'l Leg. Mat'ls 1410-12 (1989).

The terms "transit and transport" are not defined in the Treaty. These terms should be interpreted on a case-by-case basis, bearing in mind the basic idea that the Treaty was not intended to inhibit activities reasonably related to the passage of nuclear weapons through the zone. No Latin American party to the Treaty objected when the United States and France made formal statements confirming transit and transport rights when ratifying Protocol II. No Latin American party has denied transit or transport privileges on the basis of the Treaty or its Protocols, notwithstanding the fact that U.S. military vessels and aircraft frequently engage in transit, port calls and overflights in the region, and that it is U.S. policy neither to confirm nor deny the presence of nuclear weapons in such cases. 1978 Digest at 1624; Prohibition of Nuclear Weapons in Latin America, Hearing before Sen. For. Rel. Comm., 97th Cong., 1st Sess., 22 Sept. 1981, at 18-20.

Additional Protocol II to the Treaty of Tlateloco, 22 U.S.T. 754; T.I.A.S. 7137; 634 U.N.T.S. 364; AFP 110-20 at 4-18, entered into force 11 December 1969 (for the U.S., 12 May 1971) and obligates nuclear-weapons nations to respect the denuclearized status of the zone, not to contribute to acts involving violation of obligations of the parties, and not to use or threaten to use nuclear weapons against the contracting parties (*i.e.*, the Latin American countries). The United States ratified Protocol II subject to understandings and declarations, 22 U.S.T. 760; 28 Int'l Leg. Mat'ls at 1422-23 (1989), that the Treaty and its Protocols have no effect upon the international status of territorial claims; the Treaty does not affect the right of the Contracting Parties to grant or deny transport and transit privileges to non-Contracting Parties; that the United States would "consider that an armed attack by a Contracting Party, in which it was assisted by a nuclear-weapon State, would be incompatible with the contracting Party's corresponding obligations under Article I of the Treaty;" and, although not required to do so, the United States will act, with respect to the territories of Protocol I adherents that are within the Treaty zone, in the same way as Protocol II requires it to act toward the territories of the Latin American Treaty parties. China, France, the former-Soviet Union, the United Kingdom, and the United States are parties to Protocol II. 28 Int'l Leg. Mat'ls 1413 (1989). *See also id.* at 1414-23.

82. Both the 1985 South Pacific Nuclear Free Zone Treaty and the 1995 African Nuclear-Weapon-Free Zone Treaty seek the same goals as the Treaty of Tlateloco. The South Pacific Nuclear Free Zone Treaty (Treaty of Rarotonga), Rarotonga, 6 August 1985, 24 Int'l Leg. Mat'ls 1442 (1985) entered into force 11 December 1986. The Treaty of Rarotonga consists of the Treaty and three Protocols. The Treaty itself is open only to members of the South Pacific Forum (Australia, Cook Islands, Fiji, Kiribati, Marshall Islands, Micronesia, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Solomon Islands, Tonga, Tuvalu, Vanuatu and Western Samoa, all but four of whom (Marshall Islands, Micronesia, Palau and Tonga) are parties. Modeled after the
(continued...)

2.5. AIR NAVIGATION

2.5.1 National Airspace.[83] Under international law, every nation has complete and exclusive sovereignty over its national airspace, that is, the airspace

82.(...continued)
Treaty of Tlateloco, the Treaty of Rarotonga does not impinge on international freedoms of navigation and overflight in the area of its application (*See* Figure A2-10 (p. 199)).

- Protocol I to the Treaty of Rarotonga (not in force as of 1 January 1997) calls upon parties to apply the prohibitions of the Treaty to the territories for which they are internationally responsible within the zone. Protocol 1 is open to France, the United Kingdom and the United States, all of whom are signatories. U.S. ratification of Protocol I was awaiting Senate advice and consent as of 1 November 1997.

- Protocol II to the Treaty of Rarotonga (not in force for the U.S. as of 1 January 1997) calls upon the parties not to use or threaten to use nuclear weapons against any party of the Treaty. Protocol II is open to China, France, the former-Soviet Union, the United Kingdom and the United States, all of whom are signatories. U.S. ratification of Protocol II was awaiting Senate advice and consent as of 1 November 1997.

- Protocol III to the Treaty of Rarotonga (not in force for the U.S. as of 1 January 1997) calls upon the parties not to test any nuclear explosive device within the zone. Protocol III is open to China, France, the former-Soviet Union, the United Kingdom and the United States, all of whom are signatories. U.S. ratification of Protocol III was awaiting Senate advice and consent as of 1 November 1997.

African Nuclear-Weapon-Free Zone Treaty (Treaty of Pelindaba), (Cairo), 11 April 1996, 35 Int'l Leg. Mat'ls 698 (1996) (not in force as of 1 January 1997). The Treaty of Pelindaba consists of the Treaty and three Protocols. The Treaty is open to all African nations. As of 1 January 1997, Mauritius was the only African nation to have ratified the Treaty. The Treaty of Pelindaba explicitly upholds the freedoms of navigation and overflight of the international community in its area of application (*see* Figure A2-11 (p. 200).

- Protocol I to the Treaty of Pelindaba (not in force as of 1 January 1997) calls upon its parties not to use or threaten the use of nuclear weapons within the African zone (*see* Figure A2-11 (p. 200). Protocol I is open to China, France, Russia, the United Kingdom and the United States, all of whom are signatories except Russia. U.S. ratification of Protocol I was awaiting the advice and consent of the Senate as of 1 November 1997.

- Protocol II to the Treaty of Pelindaba (not in force as of 1 January 1997) calls upon its parties to refrain from testing any nuclear explosive device within the zone. Protocol II is open to China, France, Russia, the United Kingdom and the United States, all of whom are signatories except Russia. U.S. ratification of Protocol II was awaiting the advice and consent of the Senate as of 1 November 1997.

- Protocol III to the Treaty of Pelindaba (not yet in force) applies to nations with dependent territories in the zone (*e.g.*, France and Spain) and calls upon them to observe certain provisions of the Treaty in those territories. Although France is a signatory, neither France nor Spain are parties as of 1 November 1997.

83. Under international law, airspace is classified under two headings: national airspace (airspace over the land, internal waters, archipelagic waters, and territorial sea of a nation) and international airspace (airspace over a contiguous zone, an exclusive economic zone, and the high
(continued...)

above its territory, its internal waters, its territorial sea, and, in the case of an archipelagic nation, its archipelagic waters.[84] *There is no 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 ships of all nations.*[85] 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.[86] Concerning the right of assistance entry, see paragraph 2.3.2.5. For jurisdiction over aerial intruders, see paragraph 4.4.

2.5.1.1 International Straits Which Connect EEZ/High Seas to EEZ/High Seas. All aircraft, including military aircraft, enjoy the right of unimpeded transit passage through the airspace above international straits overlapped by territorial seas.[87] 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.[88] The exercise of the right of overflight by aircraft engaged in the transit passage of international straits cannot be impeded or suspended in peacetime for any purpose.[89]

In international straits not completely overlapped by territorial seas, all aircraft, including military aircraft, enjoy high seas freedoms while operating in the high seas corridor beyond the territorial sea. (See paragraph 2.5.2 for a

83.(...continued)
seas, and over unoccupied territory (*i.e.*, territory not subject to the sovereignty of any nation, suchas Antarctica)). Airspace has, in vertical dimension, an upward (but undefined) limit, above which is outer space (*see* paragraph 1.1, note 1 (p. 1) and paragraph 2.9.2 (p. 149)).

84. Territorial Sea Convention, art. 2; Chicago Convention, art. 1; 1982 LOS Convention, art. 2. Effective upon the extension of the U.S. territorial sea on 27 December 1988, the Federal Aviation Administration extended seaward the limits of controlled airspace and applicability of certain air traffic rules. Amendment 91-207, 54 Fed. Reg. 265, 4 Jan. 1989, amending 14 C.F.R. parts 71 and 91, and 54 Fed. Reg. 34292, 18 Aug. 1989.

85. There is also no right of overflight of internal waters and land territory.

86. Chicago Convention, arts. 5-16.

87. 1982 LOS Convention, art. 38(1).

88. *Id.*, art. 38(2). All aircraft must, however, monitor the internationally designated air-traffic control circuit or distress radio frequency while engaged in transit passage. Art. 39.

89. *Id.*, art. 44.

discussion of permitted activities in international airspace.) If the high seas corridor is not of similar converience (e.g., to stay within the high seas corridor would be inconsistent with sound navigational practices), such aircraft enjoy the right of unimpeded transit passage through the airspace of the strait.[90]

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.[91]

2.5.2 International Airspace. International airspace is the airspace over the contiguous zone, the exclusive economic zone, the high seas, and territories not subject to national sovereignty (e.g., Antarctica). All international airspace is open to the aircraft of all nations.[92] Accordingly, aircraft, including military aircraft, are free to operate in international airspace without interference from coastal 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.[93] (Note, however, that the Antarctic Treaty prohibits military maneuvers and weapons testing in Antarctic airspace.[94]) 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.[95]

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 nations). That multilateral treaty, commonly referred to as the "Chicago Convention," applies to civil aircraft.[96] It does *not* apply to military aircraft or AMC-charter aircraft designated as "state aircraft" (see paragraph 2.2.2), other than to require that they operate with "due regard for the safety of navigation of civil aircraft."[97] The Chicago Convention established the International Civil Aviation Organization (ICAO) to develop international air navigation principles

90. 1982 LOS Convention, art. 38(1). *See also*, Nordquist, Vol. II at 312-315.

91. 1982 LOS Convention, art. 53. As in the case of transit passage, all aircraft overflying archipelagic sea lanes must monitor the internationally designated air-traffic control circuit or distress radio frequency. 1982 LOS Convention, arts. 39 & 54.

92. High Seas Convention, art. 2; Territorial Sea Convention, art. 24; 1982 LOS Convention, arts. 87, 58 & 33.

93. 1982 LOS Convention, art. 87(2), Chicago Convention, art. 3(d).

94. *See* paragraph 2.4.5.2.1 (p. 135).

95. 1982 LOS Convention, arts. 35(b), 87 & 58.

96. Art. 3(a); text *reprinted in* AFP 110-20, at 6-3.

97. Art. 3(d).

and techniques and to "promote safety of flight in international air navigation."[98]

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" standard. (For additional information see DOD Dir. 4540.1 and OPNAVINST 3770.4 (series) and the Coast Guard Air Operations Manual, COMDTINST M3710.1 (series).)

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.[99]

Some nations, however, purport to require all military aircraft in international airspace within their FIRs to comply with FIR procedures, whether or not they utilize FIR services or intend to enter national airspace.[100] The U.S. does not recognize the right of a coastal nation to apply its FIR procedures to foreign military aircraft in such circumstances. Accordingly, U.S. military aircraft not intending to enter national airspace need not identify themselves or otherwise

98. Art. 44(h).

99. Chicago Convention, art. 3(d); DOD Directive 4540.1; 9 Whiteman 430-31; AFP 110-31, at 2-9 to 2-10 n.29. Acceptance by a government of responsibility in international airspace for a FIR region does not grant such government sovereign rights in international airspace. Consequently, military and State aircraft are exempt from the payment of en route or overflight fees, including charges for providing FIR services, when merely transiting international airspace located in the FIR. The normal practice of nations is to exempt military aircraft from such charges even when operating in national airspace or landing in national territory. The only fees properly chargeable against State aircraft are those which can be related directly to services provided at the specific request of the aircraft commander or by other appropriate officials of the nation operating the aircraft. 1993 State message 334332.

100. The United States has protested such claims by Cuba, Ecuador, Nicaragua and Peru, and has asserted its right to operate its military aircraft in the international airspace of their FIRs without notice to or authorization from their Air Traffic Control authorities. *See* Roach & Smith at 231-34.

comply with FIR procedures established by other nations, unless the U.S. has specifically agreed to do so.[101]

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.[102] The U.S. does not recognize the right of a coastal nation to apply its ADIZ procedures to foreign aircraft not intending to enter national airspace nor does the U.S. apply its ADIZ procedures to foreign aircraft not intending to enter U.S. airspace. 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.[103]

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.[104]

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101. Chicago Convention, arts. 3(a), 11, 28; OPNAVINST 3770.4 (series), promulgating DOD Directive 4540.1, Subj: Use of Airspace by U.S. Military Aircraft and Firings Over the High Seas. Applicable ROE should also be consulted. *See also* ALLANTFLT 016/97 (CINCLANTFLT MSG 101900Z OCT 97).

102. United States air defense identification zones have been established by Federal Aviation Administration (FAA) regulations, 14 C.F.R. part 99. (The ADIZs for the contiguous U.S. are set out in 14 C.F.R. part 99.42; for Alaska in 99.43; for Guam in 99.45 and for Hawaii in 99.47.) In order that the Administrator may properly carry out the responsibilities of that office, the authority of the Administrator has been extended into the airspace beyond the territory of the United States. U.S. law (49 U.S.C. sec. 1510) grants the president the power to order such extraterritorial extension when requisite authority is found under an international agreement or arrangement; the president invoked this power by Exec. Order 10,854, 27 November 1959, 3 C.F.R. part 389 (1959-1963 Comp.). *See also* MacChesney 579-600; NWIP 10-2, art. 422b.

103. Chicago Convention, art. 11; OPNAVINST 3770.4 (series), promulgating DOD Directive 4540.1, Subj: Use of Airspace by U.S. Military Aircraft and Firings Over the High Seas; OPNAVINST 3772.5 (series), Subj: Identification and Security Control of Military Aircraft; General Planning Section, DoD Flight Information publications. Appropriate ROE should also be consulted.

104. *See also* paragraph 2.4.4, note 68 (p. 133).

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 diplomatically all excessive claims of coastal 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.[105]

105. Annex A1-3 (p. 43). *See* U.S. Dep't State, GIST: US Freedom of Navigation Program, Dec. 1988, Annex A2-7 (p. 186); and DOD Instruction C2005.1, Subj: U.S. Program for the Exercise of Navigation and Overflight Rights at Sea (U). *See also* Roach & Smith, at 255; National Security Strategy of the United States, August 1991, at 15; and Rose, Naval Activity in the Exclusive Economic Zone—Troubled Waters Ahead?, 39 Naval L. Rev. 67, 85-90 (1990). On 23 September 1989 the United States and the former-Soviet Union issued a joint statement (Annex A2-2 (p. 161)) in which they recognized "the need to encourage all States to harmonize their internal laws, regulations and practices" with the navigational articles of the 1982 LOS Convention.

The 1982 LOS Convention was designed in part to halt the creeping jurisdictional claims of coastal nations, or ocean enclosure movement. While that effort appears to have met with some success, it is clear that many nations currently purport to restrict navigational freedoms by a wide variety of means that are neither consistent with the 1982 LOS Convention nor with customary international law. *See* Negroponte, Who Will Protect the Oceans?, Dep't St. Bull., Oct. 1986, at 41-43; Smith, Global Maritime Claims, 20 Ocean Dev. & Int'l L. 83 (1989). Alexander warns of a continuation of the ocean enclosure movement. He particularly sees more unauthorized restrictions on the movement of warships, military aircraft and "potentially polluting" vessels in the territorial seas and EEZ, and on transit passage in international straits. Alexander 369-70. The United States' view regarding the consistency of certain claims of maritime jurisdiction with the provisions of the LOS Convention is set forth in its 3 March 1983 Statement in Right of Reply, Annex A1-1 (p. 27).

(continued...)

105.(...continued)
Since 1948, the Department of State has issued approximately 150 protest notes to other nations concerning their excessive maritime claims, as well as engaging in numerous bilateral discussions with many countries. Negroponte, Current Developments in U.S. Oceans Policy, Dep't St. Bull., Sept. 1986, at 84, 85; Navigation Rights and the Gulf of Sidra, Dep't St. Bull., Feb. 1987, at 70; Roach, Excessive Maritime Claims, 1990 Proc. Am. Soc. Int'l L. 288, 290; Roach & Smith, at 4. United States responses to excessive maritime claims are discussed in Limits in the Seas No. 112 (1992).

See 1 O'Connell 38-44 for a discussion of the significance of protest in the law of the sea. *Compare* Colson, How Persistent Must the Persistent Objector Be?, 61 Wash. L. Rev. 957, at 969 (1986):

> First, States should not regard legal statements of position as provocative political acts. They are a necessary tool of the international lawyer's trade and they have a purpose beyond the political, since, occasionally, States do take their legal disputes to court.
>
> Second, there is no requirement that a statement of position be made in a particular form or tone. A soft tone and moderate words may still effectively make the necessary legal statement.
>
> Third, action by deed probably is not necessary to protect a State's legal position as a persistent objector when that State has otherwise clearly stated its legal position. Action by deed, however, promotes the formation of law consistent with the action and deeds may be necessary in some circumstances to slow erosion in customary legal practice.
>
> Fourth, not every legal action needs an equal and opposite reaction to maintain one's place in the legal cosmos.
>
> Fifth, the more isolated a State becomes in its legal perspective, the more active it must be in restating and making clear its position.

"The exercise of rights—the freedoms to navigate on the world's oceans—is not meant to be a provocative act. Rather, in the framework of customary international law, it is a legitimate, peaceful assertion of a legal position and nothing more." Negroponte, Who Will Protect the Oceans?, Dep't St. Bull., Oct. 1986, at 42. In exercising its navigational rights and freedoms, the United States "will continue to act strictly in conformance with international law and we will expect nothing less from other countries." Schachte, The Black Sea Challenge, U.S. Naval Inst. Proc., June 1988, at 62.

"Passage does not cease to be innocent merely because its purpose is to test or assert a right disputed or wrongfully denied by the coastal State." Fitzmaurice, The Law and Procedure of the International Court of Justice, 27 Br. Y.B. Int'l L. 28 (1950), commenting on the Corfu Channel Case in which the Court held that the United Kingdom was not bound to abstain from exercising its right of innocent passage which Albania had illegally denied. 1949 ICJ Rep. 4, 4 Whiteman 356. The Special Working Committee on Maritime Claims of the American Society of International Law has advised that

> programs for the routine exercise of rights should be just that, "routine" rather than unnecessarily provocative. 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. Those responsible for relations with particular coastal states should recognize that, so long as a program of exercise of rights is deemed necessary to protect underlying legal positions, delay for the sake of immediate political concerns may invite a deeper dispute at a latter [sic] time.

(continued...)

105.(...continued)
Am. Soc. Int'l L. Newsletter, March-May 1988, at 6.

The United States has exercised its rights and freedoms against a variety of objectionable claims, including: unrecognized historic waters claims; improperly drawn baselines for measuring maritime claims; territorial sea claims greater than 12 NM; and territorial sea claims that impose impermissible restrictions on the innocent passage of any type of vessel, such as requiring prior notification or authorization. Since the policy was implemented in 1979, the United States has exercised its rights against objectionable claims of over 35 nations, including the former-Soviet Union, at the rate of some 30-40 per year. Department of State Statement, 26 March 1986, Dep't St. Bull., May 1986, at 79; Navigation Rights and the Gulf of Sidra, Dep't St. Bull., Feb. 1987, at 70. *See also*, Roach & Smith, at 6.

Perhaps the most widely publicized of these challenges has occurred with regard to the Gulf of Sidra (closing line drawn across the Gulf at 30°30'N). *See* Figure A2-12 (p. 201) and Annex A2-8 (p. 188). The actions of the United States are described in Spinatto, Historic and Vital Bays: An Analysis of Libya's Claim to the Gulf of Sidra, 13 Ocean Dev. & Int'l L.J. 65 (1983); N.Y. Times, 27 July 1984, at 5; and Parks, Crossing the Line, U.S. Naval Inst. Proc., Nov. 1986, at 40.

Other publicized examples include the transits of the Black Sea in November 1984 and March 1986 (Washington Post, 19 March 1986, at 4 & 21; Christian Science Monitor, 20 March 1986, at 1, 40) and in February 1988 (N.Y. Times, 13 Feb. 1988, at 1 & 6) challenging the Soviet limitations on innocent passage, *see* paragraph 2.3.2.1, note 27 (p. 117), and of Avacha Bay, Petropavlovsk in May 1987 (straight baseline) (Washington Post, 22 May 1987, at A34). Most challenges, however, have occurred without publicity, and have been undertaken without protest or other reaction by the coastal nations concerned.

Some public commentary on the Black Sea operations has incorrectly characterized the passage as being not innocent. Rubin, Innocent Passage in the Black Sea? Christian Sci. Mon., 1 Mar. 1988, at 14; Carroll, Murky Mission in the Black Sea, Wash. Post Nat'l Weekly Ed., 14-20 Mar. 1988, at 25; Carroll, Black Day on the Black Sea, Arms Control Today, May 1988, at 14; Arkin, Spying in the Black Sea, Bull. of Atomic Scientists, May 1988, at 5. Authoritative responses include Armitage, Asserting U.S. Rights On the Black Sea, Arms Control Today, June 1988, at 13; Schachte, The Black Sea Challenge, U.S. Naval Inst. Proc., June 1988, at 62; and Grunawalt, Innocent Passage Rights, Christian Sci. Mon., 18 Mar. 1988, at 15. *See also*, Note, Oceans Law and Superpower Relations: The Bumping of the Yorktown and the Caron in the Black Sea, 29 Va. J. Int'l L. 713 (1989); Franckx, Innocent Passage of Warships, Marine Policy, Nov. 1990, at 484-90; Rolph, Freedom of Navigation and the Black Sea Bumping Incident: How "Innocent" Must Innocent Passage Be? 135 Mil. L. Rev. 137 (1992); and Aceves, Diplomacy at Sea: U.S. Freedom of Navigation Operations in the Black Sea, Nav. War Coll. Rev., Spring 1993, at 59. Mere incidental observation of coastal defenses could not suffice to render noninnocent a passage not undertaken for that purpose. Fitzmaurice, this note, 27 Br. Y.B. Int'l L. 29, n.1, *quoted in* 4 Whiteman 357.

Other claims not consistent with the 1982 LOS Convention that adversely affect freedoms of navigation and overflight and which are addressed by the U.S. FON program include:

- claims to jurisdiction over maritime areas beyond 12 NM which purport to restrict non-resource related high seas freedoms, such as in the EEZ (paragraph 2.4.2 (p. 129)) or security zones (paragraph 2.4.4 (p. 132));

- archipelagic claims that do not conform with the 1982 LOS Convention (paragraph 2.3.4 (p. 127)), or do not permit archipelagic sea lanes passage in

(continued...)

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."[106] These rules apply to all international waters (i.e., the high seas, exclusive economic zones, and contiguous zones) and, except where a coastal nation has established different rules, in that nation's territorial sea, archipelagic waters, and inland waters as well. The 1972 COLREGS have been adopted as law by the United States. (See Title 33 U.S. Code, Sections 1601 to 1606). Article 1139, U.S. Navy Regulations, 1990, directs that all persons in the naval service responsible for the operation of naval ships and craft "shall diligently observe" the 1972 COLREGS. Article 4-1-11 of U.S. Coast Guard Regulations (COMDTINST M5000.3 (series)) requires compliance by Coast Guard personnel with all Federal law and regulations.

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. government vessels, including warships, 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 prompt other foreign action.[107]

2.7.2.1 U.S. Inland Rules. The U.S. has adopted special Inland Rules[108] applicable to navigation in U.S. waters landward of the demarcation lines

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105.(...continued)

conformity with the 1982 LOS Convention, including submerged passage of submarines and overflight of military aircraft, and transit in a manner of deployment consistent with the security of the forces involved (paragraph 2.3.4.1 (p. 127)); and

- territorial sea claims that overlap international straits, but do not permit transit passage (paragraph 2.3.3.1 (p. 121)), or that require advance notification or authorization for warships and auxiliaries, or apply discriminatory requirements to such vessels (paragraph 2.3.2.4 (p. 119)), or apply requirements not recognized by international law to nuclear powered warships or nuclear capable warships and auxiliaries (paragraph 2.3.2.4, note 32 (p. 119)).

See also Boma, Troubled Waters off the Land of the Morning Calm: A Job for the Fleet, Nav. War Coll. Rev., Spring 1989, at 33.

106. 28 U.S.T. 3459, T.I.A.S. 8587, 33 U.S.C. sec. 1602 note (1988), 33 C.F.R. part 81, app. A.

107. *See* U.S. Navy Regulations, 1990, art. 1139.

108. 33 U.S.C. sec. 2001 *et seq.* (1988), implemented in 33 C.F.R. parts 84-90.

established by U.S. law for that purpose.[109] (See U.S. Coast Guard publication Navigational Rules, International — Inland, COMDTINST M16672.2 (series), 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 lines 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. 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. Although ICAO has not yet established an "International Language for Aviation," English is customarily used internationally for air traffic control.

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 former 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 former 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.[110]

109. Such demarcation lines do not necessarily coincide with the boundaries of internal waters or the territorial sea. For the U.S., they are indicated on navigational charts issued by the United States Coast and Geographic Survey.

110. OPNAVINST C5711.94 (series), Subj: US/USSR Incidents at Sea and Dangerous Military Activities Agreements; and U.S. Addendum to volume II of ATP 1. The 1972 INCSEA Agreement, 23 U.S.T. 1168, T.I.A.S. 7379, and its 1973 Protocol, 24 U.S.T. 1063, T.I.A.S. 7624, are *reproduced in* AFP 110-20, at 36-4.

(continued...)

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 operation and intentions.

4. Ships of one party will not simulate attacks by aiming guns, missile launchers, torpedo tubes, or other weapons at the ships and aircraft 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.

110.(...continued)
The INCSEA Agreement does not prescribe minimum fixed distances between ships or aircraft; rules of prudent seamanship and airmanship apply.

Similar agreements, incorporating the provisions and special signals from the U.S.-U.S.S.R. INCSEA Agreement, entered into force between the former-Soviet Union and the United Kingdom on 15 July 1986 (U.K.T.S. No. 5 (1987)), the Federal Republic of Germany on 28 October 1988; Canada on 20 November 1989; France on 4 July 1989; and Italy on 30 November 1989.

An agreement on the prevention of dangerous military activities between the armed forces of the United States and the former-Soviet Union operating in proximity to each other during peacetime entered into force on 1 January 1990. The agreement provides procedures for resolving incidents involving entry into the national territory, including the territorial sea, of the other nation "owing to circumstances brought about by *force majeure*, or as a result of unintentional actions by such personnel;" using a laser in such a manner that its radiation could cause harm to the other nation's personnel or equipment; hampering the activities of the other nation in Special Caution Areas in a manner which could cause harm to its personnel or damage to its equipment; and interference with the command and control networks of the other party in a manner which could cause harm to its personnel or damage to its equipment. The text of the agreement, entitled Agreement Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on the Prevention of Dangerous Military Activities, which was signed in Moscow, 12 June 1989, *appears in* 28 Int'l Leg. Mat'ls 879 (1989); *see also* Leich, Contemporary Practice of the United States Relating to International Law—Prevention of Dangerous Military Activities, 83 Am. J. Int'l L. 917 (1989).

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 of its provisions to include nonmilitary ships. Specifically, the 1973 protocol provided that 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.[111] The INCSEA agreement continues to apply to U.S. and Russian ships and military aircraft.[112]

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.[113]

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.[114] The term "peaceful

111. The results of each annual review meeting are promulgated by the Chief of Naval Operations to the operational commanders. Consult appropriate Fleet Commander instructions and OPORDS for detailed guidance.

112. The INCSEA Agreement is also in force between the U.S. and Ukraine. Treaties in Force 266 (1995).

113. *See* paragraph 1.1, note 1 (p. 1) and Schwetje, The Development of Space Law and a Federal Space Law Bar, Fed. B. News & J., Sep. 1988, at 316.

114. Although a number of nations maintain that "peaceful purposes" excludes military measures, the United States has consistently interpreted "peaceful purposes" to mean *nonaggressive* purposes. Military activity not constituting the use of armed force against the sovereignty, territorial integrity, or political independence of another nation, and not otherwise inconsistent

(continued...)

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.[115] Users of outer space must have due regard for the rights and interests of other users.

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.[116]

2. Outer space is free from claims of sovereignty and not otherwise subject to national appropriation.[117]

3. Outer space is to be used for peaceful purposes.[118]

4. Each user of outer space must show due regard for the rights of others.[119]

114.(...continued)
with the U.N. Charter, is permissible. The right of self-defense applicable generally in international law also applies in space. For a discussion of the U.S. interpretation of "peaceful purposes" and related issues *see*, De Saussure & Reed, Self-Defense—A Right in Outer Space, 7 AF JAG L. Rev. (No. 5) 38 (1985), and Reed, The Outer Space Threaty: Freedoms—Prohibitions—Duties, 9 AF JAG L. Rev. (No. 5) 26 (1967).

115. Naval operations in support of national security objectives are increasingly dependent upon space systems support services. Today, virtually every fleet unit relies to some extent on space systems for support, and the military applications of space technology are steadily increasing. *See* Holland, The Challenge in Space: The Navy's Case, U.S. Naval Inst. Proc., Feb. 1990, at 37; Skolnick, The Navy's Final Frontier, *id.* Jan. 1989, at 28; Howard, Satellites and Naval Warfare, *id.* April 1988, at 39; Jones, Photographic Satellite Reconnaissance, *id.*, June 1980, at 41; U.S. Naval Space Command: Supporting the Fleet, Aviation Week & Space Technology, March 21, 1988, at 38-51; Burrows, Deep-Black: Space Espionage and National Security (1986); Yost, Spy-Tech (1985); Karas, The New High Ground: Strategies and Weapons of Space-Age War (1983); Canan, War in Space (1982); Stine, Confrontation in Space (1981); and Jane's Spaceflight Directory (annual).

116. Art. I, Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 27 January 1967, 18 U.S.T. 2411; T.I.A.S. 6347; 610 U.N.T.S. 205; AFP 110-20 at 6-2 [hereinafter "Outer Space Treaty"].

117. *Id.*, art. II.

118. *Id.*, arts. III & IV.

119. *Id.*, art. IX.

5. No nuclear or other weapons of mass destruction may be stationed in outer space.[120]

6. Nuclear explosions in outer space are prohibited.[121]

7. Exploration of outer space must avoid contamination of the environment of outer space and of the earth's biosphere.[122]

8. Astronauts must render all possible assistance to other astronauts in distress.[123]

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.[124]

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;[125] the 1968 Rescue and Return of Astronauts Agreement;[126] the Liability Treaty of

120. *Id.*, art. IV.

121. Art. I, Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space, and Under Water, 5 August 1963, 14 U.S.T. 1313; T.I.A.S. 5433; 480 U.N.T.S. 43; AFP 110-20 at 4-3.

122. Note 116, Outer Space Treaty, art. IX.

123. *Id.*, art. V.

124. *See* paragraph 2.9.2, note 114 (p. 149) for the U.S. interpretation of "peaceful purposes."

125. *See* paragraph 2.9.2.1, note 116 (p. 150), regarding the Outer Space Treaty.

126. Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space, 22 April 1968, 19 U.S.T. 7570; T.I.A.S. 6599; 672 U.N.T.S. 119; AFP 110-20 at 6-34.

127. Convention on International Liability for Damage Caused by Space Objects, 29 June 1971, 24 U.S.T. 2389; T.I.A.S. 7762, AFP 110-20 at 6-37. The "launching nation" is responsible for damage. The launching nation is, for purposes of international liability, the nation launching, procuring the launch, or from whose territory the launch is made. Thus, with respect to any particular space object, more than one nation may be liable for the damage it causes. The launching nation is internationally liable for damages even if the launch is conducted entirely by a private, commercial undertaking.

The launching nation is said to be absolutely liable for space-object damage caused on earth or to an aircraft in flight. Liability can be avoided only if it can be shown that the claimant was grossly negligent. The question of liability for space object damage to another space object, at any location

(continued...)

1972;[127] and the Space Objects Registration Treaty of 1975.[128] A fifth, the 1979 Moon Treaty,[129] has not been widely ratified. The United States is a party to all of these agreements except the Moon Treaty.[130]

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,

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127.(...continued)
other than the surface of the earth, is determined by the relative negligence or fault of the parties involved. The Liability Convention elaborates the general principle of international liability for damage set forth in Art. VII of the Outer Space Treaty in Arts. Ia, II, III and VI. Arts. IV and V address joint and several liability. The crash of COSMOS 954 in the Canadian Arctic on 24 January 1978 is discussed *in* Galloway, Nuclear Powered Satellites: The U.S.S.R. Cosmos 954 and the Canadian Claim, 12 Akron L. Rev. 401 (1979), and Christol, International Liability for Damage Caused by Space Objects, 74 Am. J. Int'l L. 346 (1980). The Canadian claim is set forth *in* 18 Int'l Leg. Mat'ls 899-930 (1979); its resolution is at 20 Int'l Leg. Mat'ls 689 (1981) wherein the USSR agreed to pay C$3M in settlement. *See also* Lee & Sproule, Liability for Damage Caused by Space Debris: The Cosmos 954 Claim, 26 Can. YB. Int'l L. 273 (1988).

There are no "rules of the road" for outer space to determine which spacecraft has the right of way.

The Liability Convention does not distinguish between civil and military space objects. If military weapons are involved, the injured nation may take the view that the principle of self-defense, rather than the Liability Convention, applies. Advice and consent to U.S. ratification of the Convention came only after the Department of State provided assurances to the Senate that it was inapplicable to intentionally caused harm. Christol at 367 *citing* Senate Comm. on Foreign Relations, Convention on International Liability for Damage Caused by Space Objects, S. Exec. Rep. 92-38, 92d Cong., 2d Sess. 10 (1972).

128. Convention on Registration of Objects Launched into Outer Space, 14 January 1975, 28 U.S.T. 695; T.I.A.S. 8480; 1023 U.N.T.S. 15; AFP 110-20 at 6-42. In order to enhance safety of space operations, a dual system for registering space objects launched from earth has been established in the Registration Treaty.

The first obligation is for each launching nation to maintain a registry containing certain information about every space object launched.

The second obligation is to pass this basic information to the Secretary-General of the United Nations "as soon as practicable," and to advise the Secretary-General when the object is no longer in earth orbit. A United Nations registry is thereby maintained for all space objects launched from earth. Objects in space remain subject to the jurisdiction and control of the nation of registry. Arts. II(1), II(2), III, IV & VIII, Outer Space Treaty, (paragraph 2.9.2.1, note 116 (p. 150). If more than one nation is involved in a launch, one of those nations must agree to act as the nation of registry (article II(2)). The term "as soon as practicable" is not defined in the Registration Treaty. State practice has established that the extent and timeliness of information given concerning space missions may be limited as required by national security.

129. Agreement Governing the Activities of States on the Moon and other Celestial Bodies, 18 December 1979, 18 Int'l Leg. Mat'ls 1434 (1979), *reprinted in* AFP 110-20 at 6-45.

130. The United States' objections to the Moon Treaty include those advanced regarding the deep seabed provisions of the 1982 LOS Convention. *See* paragraph 1.6, note 57 (p. 24). *See also* Hosenball, Relevant Treaties Governing Space Activities: A Summary of World Wide Agreements, Fed. Bar News & J., April 1991, at 128.

is any interference with the surveillance satellites both nations use to monitor ABM Treaty compliance.[131] The ABM Treaty continues in force between the U.S. and Russia.

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.[132]

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.[133]

The 1982 International Telecommunication Convention[134] and the 1979 Radio Regulations[135] 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

131. Treaty Between the United States and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, 26 May 1972, 23 U.S.T. 3435; T.I.A.S. 7503, *reprinted in* AFP 110-20 at 4-29. Sofaer, The ABM Treaty and the Strategic Defense Initiative, 99 Harv. L. Rev. 1972, and Chayes & Chayes, Testing and Development of 'Exotic' Systems Under the ABM Treaty: The Great Reinterpretation Caper, 99 Harv. L. Rev. 1956 (1986), discuss the interpretation of the scope of the obligation in article V of the ABM Treaty not to "develop, test or deploy space-based ABM systems or components." *See* 26 Int'l Leg. Mat'ls 282 (1987), *id.* 1130, and *id.* 1743 for additional debates on this issue, as well as 133 Cong. Rec. S6623 (19 May 1987), *id.* S12181 (16 Sep. 1987) (State Department Legal Adviser's report to Congress), and *id.* S6809 (20 May 1987) (fourth part of Sen. Nunn's restrictive view). *See also* the series of articles and commentaries *in* Arms Control Treaty Reinterpretation, 137 U. Pa. L. Rev. 1351-1558 (1989).

132. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, 5 August 1963, 14 U.S.T. 1313, T.I.A.S. 5433, 480 U.N.T.S. 43, *reprinted in* AFP 110-20, at 4-3. *See* paragraph 10.2.2.5, note 9 (p. 463).

133. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 18 May 1977, 31 U.S.T. 333; T.I.A.S. 9614, *reprinted in* AFP 110-20 at 4-74.

134. Sen. Treaty Doc. 99-6, Sen. Ex. Rep. 99-4, entered into force for the United States 10 January 1986.

135. Sen. Treaty Doc. 97-21, entered into force for the United States 27 October 1983.

rescue assistance if a high seas or other international area landing is involved. Rescued personnel are to be safely and promptly returned.[136]

Nations also have an obligation to inform the other parties to the Outer Space Treaty or the Secretary-General of the United Nations if they discover outer space phenomena which constitute a danger to astronauts.[137]

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 incurre 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.[138]

136. Outer Space Treaty, paragraph 2.9.2.1, note 116 (p. 150), art. V; Rescue and Return Agreement, paragraph 2.9.3, note 126 (p. 151), arts. 1 - 4. If the astronauts land during an armed conflict between the launching nations and the nations in which they land, the law of armed conflict would likely apply and permit retention of the astronauts under the 1949 Geneva Conventions. *See* Part II, Chapter 11 of this publication.

137. Outer Space Treaty, art. V.

138. Rescue and Return Agreement, art. 5.

ANNEX A2-1

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FM CINCPACFLT PEARL HARBOR HI
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INFO USCINCPAC HONOLULU HI
CINCLANTFLT NORFOLK VA
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SUBJ/SOVEREIGN IMMUNITY POLICY
REF/A/DOC/OPNAV/05OCT89
REF/B/DOC/SECNAV/14SEP90
REF/C/DOC/CINCPACFLT/24JAN85
REF/D/DOC/SECNAV/24JAN92
NARR/REF A IS PARAS 2.1.2 AND 3.2.3 OF NWP-9A. REF B IS ARTS
0828, 0859, AND 0860 OF U.S. NAVY REGULATIONS 1990. REF C IS
CINCPACFLTINST 5440.3H, ART. 2605. REF D IS SECNAVINT 6210.2,
QUARANTINE REGULATIONS OF THE ARMED FORCES, PARA I.5.

RMKS/1. PURPOSE. TO PROVIDE PERIODIC EMPHASIS ON UNITED STATES
SOVEREIGN IMMUNITY POLICY. REFS A THROUGH D ARE PERTINENT POLICY DIRECTIVES.
2. U.S. MILITARY AIRCRAFT, WARSHIPS, AND AUXILIARIES (INCLUDING USNS VESSELS AND AFLOAT PREPOSITIONED FORCE SHIPS) ENJOY SOVEREIGN IMMUNITY FROM INTERFERENCE BY FOREIGN GOVERNMENTAL AUTHORITIES (E.G., POLICE, HEALTH, CUSTOMS, IMMIGRATION, MILITARY, ETC.) WHETHER WITHIN FOREIGN TERRITORY, FOREIGN TERRITORIAL SEAS/AIRSPACE, OR INTERNATIONAL WATERS/AIRSPACE. THIS IMMUNITY PRECLUDES FOREIGN GOVERNMENTAL ACTIONS SUCH AS SEARCH, INSPECTION, OR DETENTION; AND ALSO PROHIBITS FOREIGN GOVERNMENTAL OFFICIALS FROM EXERCISING AUTHORITY OVER PASSENGERS OR CREW WHEN EMBARKED, OR WITH RESPECT TO OFFICIAL OR PRIVATE ACTS PERFORMED ON BOARD.
3. ALTHOUGH IMMUNE FROM LAW ENFORCEMENT ACTIONS BY FOREIGN AUTHORITIES, U.S. MILITARY SHIPS AND AIRCRAFT PROCEEDING TO AND FROM A FOREIGN PORT UNDER DIPLOMATIC CLEARANCE SHALL COMPLY WITH REASONABLE HOST COUNTRY REQUIREMENTS AND/OR RESTRICTIONS ON TRAFFIC, HEALTH,

CUSTOMS, IMMIGRATION, QUARANTINE, ETC. NONCOMPLIANCE, HOWEVER, IS SUBJECT ONLY TO BEING ASKED TO COMPLY, PURSUING DIPLOMATIC PROTEST, OR TO BEING ORDERED TO LEAVE THE HOST COUNTRY'S TERRITORY OR TERRITORIAL SEA/AIRSPACE, NOT TO LAW ENFORCEMENT ACTIONS.
4. WHILE ENFORCEMENT ACTIONS BY FOREIGN OFFICIALS TO ENSURE COMPLIANCE WITH HOST COUNTRY LEGAL REQUIREMENTS ARE NOT PERMITTED, COMMANDING OFFICERS, MASTERS, AND AIRCRAFT COMMANDERS MAY THEMSELVES, OR THROUGH THEIR REPRESENTATIVES, CERTIFY COMPLIANCE WITH HOST COUNTRY LAWS/REQUIREMENTS. IF REQUESTED BY HOST COUNTRY AUTHORITIES, CERTIFICATION MAY INCLUDE A GENERAL DESCRIPTION OF MEASURES TAKEN BY U.S. OFFICIALS TO COMPLY WITH REQUIREMENTS. AT THE DISCRETION OF THE COMMANDING OFFICER, MASTER, OR AIRCRAFT COMMANDER, FOREIGN AUTHORITIES MAY BE RECEIVED ON BOARD FOR PURPOSE OF ACCEPTING CERTIFICATION OF COMPLIANCE, BUT UNDER NO CIRCUMSTANCES MAY THEY BE PERMITTED TO EXERCISE GOVERNMENTAL AUTHORITY, NOR MAY THEY INSPECT THE SHIP/AIRCRAFT OR ACT AS AN OBSERVER WHILE U.S. PERSONNEL CONDUCT SUCH INSPECTIONS.
5. BEFORE ENTERING THE TERRITORY, TERRITORIAL SEA, OR AIRSPACE OF A FOREIGN COUNTRY, COMMANDING OFFICERS, MASTERS, OR AIRCRAFT COMMANDERS SHOULD DETERMINE THE NATURE AND EXTENT OF LOCAL LAWS/REQUIREMENTS BY REVIEWING APPLICABLE SOURCES OF INFORMATION, E.G., FOREIGN CLEARANCE GUIDE, PORT DIRECTORY, OPORDS, LOGREQ RESPONSES, NCIS SUMMARIZES OF LOCAL LAW ENFORCEMENT ISSUES, OR OTHER PERTINENT REFERENCE SOURCES.
6. GUIDANCE FOR SPECIFIC SITUATIONS IS PROVIDED BELOW:

	SITUATION	GUIDANCE
A.	FOREIGN AUTHORITIES REQUEST PERMISSION/DEMAND TO SEARCH SHIP, AIRCRAFT, OR ANY PART THEREOF, INCLUDING PERSONAL EFFECTS OR LOCKERS, FOR CONTRABAND, EVIDENCE OF CRIME, ETC.	DO NOT PERMIT THE SHIP/AIRCRAFT TO BE SEARCHED FOR ANY REASON BY FOREIGN AUTHORITIES. EXPLAIN U.S. SOVEREIGN IMMUNITY POLICY. U.S. AUTHORITIES MAY THEMSELVES CONDUCT CONSENT, COMMAND AUTHORIZED, OR OTHER LAWFUL SEARCHES OR INSPECTIONS AND PRESERVE EVIDENCE WITHOUT

		FOREIGN OFFICIALS BEING PRESENT, BUT EVIDENCE SEIZED SHALL NOT BE TURNED OVER TO FOREIGN AUTHORITIES ABSENT SPECIFIC DIRECTION BY HIGHER AUTHORITY.
B.	FOREIGN AGRICULTURAL OR HEALTH INSPECTIONS DEMAND/ REQUEST TO COME ON BOARD U.S. AIRCRAFT OR SHIP TO CONDUCT SPRAYING/INSPECTION IAW FOREIGN COUNTRY REGULATIONS.	U.S. AUTHORITIES SHALL REFUSE FOREIGN OFFICIALS ACCESS TO INSPECT OR SPRAY, BUT MAY AGREE TO CONDUCT REQUIRED INSPECTION/SPRAYING THEMSELVES AND CERTIFY THAT APPROPRIATE REQUIREMENTS HAVE BEEN MET.
C.	FOREIGN AUTHORITIES REQUEST/ DEMAND CREW LIST, PERSONNEL RECORDS OR PERSONAL INFORMATION ON MILITARY PERSONNEL.	COMPLY WITH APPLICABLE STATUS OF FORCE AGREEMENTS (SOFA), OR OTHER INTERNATIONAL AGREEMENT. ABSENT AN INTERNATIONAL AGREEMENT REQUIRING DISCLOSURE, U.S. AUTHORITIES MAY NOT PROVIDE SUCH INFORMATION, BUT MAY CERTIFY COMPLIANCE WITH INOCULATION OR OTHER PUBLIC HEALTH REQUIREMENTS THAT CREW IS FREE OF COMMUNICABLE DISEASE. WITH RESPECT TO HOST COUNTRY INQUIRIES ABOUT HIV INFECTION, THE FOLLOWING CERTIFICATION MAY BE OFFERED: U.S. POLICY REQUIRES ALL MILITARY PERSONNEL TO BE SCREENED FOR SEROLOGICAL EVIDENCE OF HIV INFECTION. THOSE TESTING POSITIVE FOR HIV ARE ASSIGNED WITHIN THE

		UNITED STATES AND NOT TO DEPLOYING UNITS.
D.	FOREIGN AUTHORITIES REQUEST/ DEMAND CREW LISTS, PERSONNEL RECORDS OR PERSONAL INFORMATION ABOUT NON-MILITARY PERSONNEL, INCLUDING CREWMEMBERS (CIVIL SERVICE AND COMMERCIAL MARINERS), OTHER CIVIL CONTRACTOR PERSONNEL (E.G. TECH REPS).	COMPLY WITH APPLICABLE SOFA OR OTHER INTERNATIONAL AGREEMENT. ABSENT AN INTERNATIONAL AGREEMENT REQUIRING DISCLOSURE, A LIST LIMITED TO NAMES AND PASSPORT NUMBERS OF NON-MILITARY PERSONNEL ON BOARD USN SHIPS (VESSELS)/ AIRCRAFT MAY BE PROVIDED TO FOREIGN AUTHORITIES. OTHER INFORMATION CONCERNING EMBARKED NON-MILITARY PERSONNEL, SUCH AS HEALTH RECORDS, JOB DESCRIPTION, OR EMPLOYER, MAY NOT BE PROVIDED.
E.	FOREIGN AUTHORITIES REQUEST/ DEMAND A LIST OF STORES OR FIREARMS ON BOARD VESSELS/ ACFT.	DO NOT PROVIDE LIST OF STORES/ FIREARMS WHICH ARE TO REMAIN ON BOARD VESSEL/ACFT. LIST OF ITEMS TO BE TAKEN OFF VESSEL/ACFT MAY BE PROVIDED.
F.	FOREIGN AUTHORITIES ATTEMPT TO LEVY FINE OR TAX ON VESSEL/ACFT.	PAYMENT OF ANY FINES OR TAXES IS PROHIBITED REGARDLESS OF REASONS OFFERED FOR IMPOSITION. APPROPRIATE CHARGES FOR PILOTS, TUGBOATS, SEWER, WATER, POWER AND OTHER REQUIRED GOODS OR SERVICES MAY BE PAID.
G.	FOREIGN AUTHORITIES REQUIRE VESSELS TO FLY FOREIGN COUNTRY'S FLAG WHILE IN PORT.	FLYING FOREIGN COUNTRY'S FLAG IS PROHIBITED EXCEPT IN SPECIAL CIRCUMSTANCES AS PROVIDED IN NAVY

		REGULATIONS. WHEN IN DOUBT CONSULT HIGHER AUTHORITY.
H.	IN A COUNTRY WHICH DOES NOT HAVE A SOFA WITH THE U.S., FOREIGN AUTHORITIES DEMAND/ REQUEST THAT AN INDIVIDUAL (MILITARY OR EMBARKED CIVILIAN) SUSPECTED OF AN OFFENSE BE TURNED OVER FOR ARREST OR INVESTIGATION PURPOSES.	IF AN INDIVIDUAL (MILITARY OR EMBARKED CIVILIAN) SUSPECTED OF AN OFFENSE ASHORE IS ON BOARD, EITHER BECAUSE HE HAS RETURNED TO THE VESSEL/ACFT BEFORE BEING APPREHENDED, OR BECAUSE HE WAS RETURNED BY LOCAL POLICE OR SHORE PATROL BEFORE FORMAL DEMAND FOR CUSTODY WAS MADE BY FOREIGN AUTHORITIES, DO NOT TURN OVER INDIVIDUAL WITHOUT PERMISSION FROM HIGHER AUTHORITY. IF FOREIGN OFFICIALS RETURN SOMEONE TO U.S. JURISDICTION, U.S. OFFICIALS MAY NOT PROMISE TO RETURN THE INDIVIDUAL UPON LATER DEMAND BY FOREIGN AUTHORITIES.
I.	IN A COUNTRY WHICH HAS A SOFA WITH THE U.S., FOREIGN AUTHORITIES REQUEST AN INDIVIDUAL WHO IS SUSPECTED OF AN OFFENSE BE TURNED OVER TO THEM FOR ARREST OR INVESTIGATION.	IAW SOFA, U.S. OFFICIALS MAY BE REQUIRED TO SURRENDER AN INDIVIDUAL SUSPECTED OF COMMITTING AN OFFENSE IN THE FOREIGN JURISDICTION; TO TURN OVER EVIDENCE OBTAINED BY VESSEL/ACFT INVESTIGATORS; OR TO PROVIDE SUSPECTED PERSONNEL TO PARTICIPATE IN OFF SHIP/ACFT IDENTIFICATION OR LINE-UP. IF ANY DOUBT EXISTS AS TO SOFA TERMS, GUIDANCE SHOULD BE SOUGHT FROM HIGHER AUTHORITY.

J.	DURING GENERAL PUBLIC VISITING IN FOREIGN PORTS, VISITORS ENGAGE IN PROTEST AND/OR DISRUPTIVE ACTIVITY, OR OTHERWISE VIOLATE CONDITIONS OF ACCESS TO SHIP OR AIRCRAFT.	RESTORE ORDER, ESCORT OFFENDERS OFF SHIP OR AIRCRAFT AND TURN OVER TO LOCAL AUTHORITIES. DO NOT ALLOW/ INVITE FOREIGN POLICE ON BOARD TO ARREST OR TAKE CUSTODY OF THE OFFENDERS.

7. ALL CINCPACFLT PERSONNEL WHO ARE LIKELY TO DEAL WITH FOREIGN OFFICIALS (E.G., CO, MASTER OF A SHIP, ACFT COMMANDER, SUPPLY OFFICER, SHORE PATROL OFFICER, MEDICAL DEPT REPRESENTATIVE, LIAISON PERSONNEL, ETC.) SHOULD UNDERSTAND U.S. SOVEREIGN IMMUNITY POLICY AND COMPLY WITH REQUIREMENTS. IF IN DOUBT ABOUT APPLICATION OF PRINCIPLES OF SOVEREIGN IMMUNITY TO SPECIFIC SITUATIONS, CONSULT A JUDGE ADVOCATE FOR ADVICE OR ASSISTANCE, AND/OR SEEK GUIDANCE FROM HIGHER AUTHORITY.

8. ADM R. J. KELLY, USN.

ANNEX A2-2

JOINT STATEMENT BY THE UNITED STATES OF AMERICA AND THE UNION OF SOVIET SOCIALIST REPUBLICS

Since 1986, representatives of the United States of America and the Union of Soviet Socialist Republics have been conducting friendly and constructive discussions of certain international legal aspects of traditional uses of the oceans, in particular, navigation.

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 interests of all States. They recognize the need to encourage all States to harmonize their international laws, regulations and practices with those provisions.

The Governments consider it useful to issue the attached Uniform Interpretation of the Rules of International Law Governing Innocent Passage. Both Governments have agreed to take the necessary steps to conform their internal laws, regulations and practices with this understanding of the rules.

FOR THE UNITED STATES OF AMERICA:

James A. Baker, III

FOR THE UNION OF SOVIET SOCIALIST REPUBLICS:

E.A. Shevardnadze

Jackson Hole, Wyoming
September 23, 1989

UNIFORM INTERPRETATION OF RULES OF INTERNATIONAL LAW GOVERNING INNOCENT PASSAGE

1. The 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 (Convention of 1982), particularly in Part II, Section 3.

2. 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 prior notification nor authorization is required.

3. Article 19 of the Convention of 1982 sets out in paragraph 2 an exhaustive list of activities that would render passage not innocent. A ship passing through the territorial sea that does not engage in any of those activities is in innocent passage.

4. A coastal State which questions whether the particular passage of a ship through its territorial sea is innocent shall inform the ship of the reason why it questions the innocence of the passage, and provide the ship an opportunity to clarify its intentions or correct its conduct in a reasonably short period of time.

5. Ships exercising the right of innocent passage shall comply with all laws and regulations of the coastal State adopted in conformity with relevant rules of international law as reflected in Articles 21, 22, 23 and 25 of the Convention of 1982. These include the laws and regulations requiring ships exercising the right of innocent passage through its territorial sea to use such sea lanes and traffic separation schemes as it may prescribe where needed to protect safety of navigation. In areas where no such sea lanes or traffic separation schemes have been prescribed, ships nevertheless enjoy the right of innocent passage.

6. Such laws and regulations of the coastal State may not have the practical effect of denying or impairing the exercise of the right of innocent passage as set forth in Article 24 of the Convention of 1982.

7. If a warship engages in conduct which violates such laws or regulations or renders its passage not innocent and does not take corrective action upon request the coastal State may require it to leave the territorial sea, as set forth in Article 30 of the Convention of 1982. In such case the warship shall do so immediately.

8. Without prejudice to the exercise of rights of coastal and flag States, all differences which may arise regarding a particular case of passage of ships through the territorial sea shall be settled through diplomatic channels or other agreed means.

ANNEX A2-3

STATEMENT OF POLICY BY THE DEPARTMENT OF STATE, THE DEPARTMENT OF DEFENSE, AND THE UNITED STATES COAST GUARD CONCERNING EXERCISE OF THE RIGHT OF ASSISTANCE ENTRY

I. Purpose. To establish a uniform policy for the exercise of the right of assistance entry by United States military ships and aircraft.

II. Background. For centuries, mariners have recognized a humanitarian duty to rescue others, regardless of nationality, in danger or distress from perils of the sea. The right to enter a foreign territorial sea to engage in bona fide efforts to render emergency assistance to those in danger or distress from perils of the sea (hereinafter referred to as the right of assistance entry) has been recognized since the development of the modern territorial sea concept in the eighteenth century. Acknowledgment of the right of assistance entry is evidenced in customary international law. The right of assistance entry is independent of the rights of innocent passage, transit passage, and archipelagic sea lanes passages.

III. Right of Assistance Entry. The right of assistance entry is not dependent upon seeking or receiving the permission of the coastal State. While the permission of the coastal State is not required, notification of the entry should be given to the coastal State both as a matter of comity and for the purpose of alerting the rescue forces of that State. The right of assistance entry extends only to rescues where the location of the danger or distress is reasonably well known. The right does not extend to conducting searches within the foreign territorial sea without the permission of the coastal State. The determination of whether a danger or distress requiring assistance entry exists properly rests with the operational commander on scene.

IV. Policy.

a. Assistance Entry by Military Vessels. When the operational commander of a United States military vessel determines or is informed that a person, ship, or aircraft in a foreign territorial sea (12nm or less) is in danger or distress from perils

of the sea, that the location is reasonably well known, and that the United States military vessel is in a position to render assistance, assistance may be rendered. Notification of higher authority and the coastal State will be as specified in applicable implementing directives. Implementing directives will provide for prompt notification of the Department of State.

b. Assistance Entry by Military Aircraft. In accordance with applicable implementing directives, when the appropriate operational commander determines or is informed that a person, ship, or aircraft in a foreign territorial sea is in danger or distress from perils of the sea, that the location is reasonably well known, and that he is in a position to render assistance by deploying or employing military aircraft, he shall request guidance from higher authority by the fastest means available. Implementing directives will provide for consultation with the Department of State prior to responding to such requests. If, in the judgment of the operational commander, however, any delay in rendering assistance could be life-threatening, the operational commander may immediately render the assistance. Notification of higher authority and the coastal State will be as specified in applicable implementing directives. Implementing directives will provide for prompt notification of the Department of State.

V. Application. This statement of policy applies only in cases not covered by prior agreement with the coastal State concerned. Where the rendering of assistance to persons, ships, or aircraft in a foreign territorial sea is specifically addressed by an agreement with that coastal State, the terms of the agreement are controlling.

VI. Implementation. The parties to this statement of policy will implement the policy in directives, instructions, and manuals promulgated by them or by subordinate commands and organizations.

June 27, 1986 Date	/S/ for the Department of State Abraham Sofaer, Legal Adviser
July 20, 1986 Date	/S/ for the Department of Defense Hugh O'Neill, Oceans Policy Adviser
Aug 8, 1986 Date	/S/ for the U.S. Coast Guard P.A. Yost Admiral, U.S. Coast Guard Commandant

ANNEX A2-4

CHAIRMAN OF THE JOINT
CHIEFS OF STAFF
INSTRUCTION

J-5 CJCSI 2410.01A
DISTRIBUTION: A,C,S 23 APRIL 1997

GUIDANCE FOR THE EXERCISE OF RIGHT OF
ASSISTANCE ENTRY

References: a. "Statement of Policy by the Department of State, the Department of Defense, and the United States Coast Guard Concerning Exercise of the Right of Assistance Entry," 8 August 1986

b. Joint Pub 3-50/COMDTINST M1620.5 (Coast Guard), 1 February 1991, "National Search and Rescue Manual," Volume 1

c. DOD 2500.1M, 6 January 1997, "Maritime Claims Reference Manual"

d. CJCSI 3121.01, "Standing rules of Engagement for US Forces," Enclosure A, subpragraph 8(e)

1. Purpose. This instruction establishes uniform policy for the exercise of the right of assistance entry (RAE) by US ships or aircraft within the territorial seas or archipelagic waters of foreign states.

2. Cancellation. CJCSI 2410.01, 20 July 1993, "Guidance for the Exercise of right of Assistance Entry" is hereby canceled.

3. Applicability. This instruction applies to the CINCs, Services, and the Directors for Operations and Strategic Plans and Policy, Joint staff. Copies are provided to the Secretary of State and the Commandant of the Coast Guard for information and use as appropriate.

4. Background.

a. For centuries, mariners have recognized a humanitarian duty to rescue persons in distress due to perils of the sea, regardless of their nationality or

location. The international community has long accepted the right of vessels of any nation to enter a foreign state's territorial sea to engage in good faith efforts to render emergency assistance. RAE is independent of the customary international legal rights of innocent passage, transit passage, and archipelagic sea lanes passage.

b. Following incidents in which US vessels on scene failed to assist ships in distress because of excessive concern about entry into the territorial sea of another state, the Department of Defense, DOS and US Coast Guard reviewed US Government policy. The result was a unified statement of policy concerning RAE within the territorial sea of another state, issued in August 1986 (reference a).

c. The UN Law of the Sea Convention provides that ships of all states enjoy the right of innocent passage through the territorial sea of other states. Article 18 of the Convention provides that passage includes stopping and anchoring for the purpose of rendering assistance to persons, ships, or aircraft in danger or distress. As the regime of innocent passage now applies in archipelagic waters, and given the longstanding duty of mariners to render assistance to persons in distress due to perils of the sea, it follows that the right of assistance entry is equally applicable to archipelagic waters.

d. This instruction implements the 1986 statement of policy and extends it to include archipelagic waters. This instruction applies in all cases except those specifically covered by prior agreements with foreign states that address assistance to persons, ships, or aircraft in their territorial seas or archipelagic waters. The enclosure discusses bilateral RAE agreements with Canada and Mexico.

5. Policy.

a. RAE applies only to rescues in which the location of the persons or property in danger or distress is reasonably well known. The right does not extend to conducting area searches for persons or property in danger or distress when their location is not yet reasonably well known. US forces will conduct area searches within a U.S. recognized foreign territorial sea or archipelagic waters only with the permission of the coastal state. Such permission may be by international agreement, such as a search and rescue (SAR) agreement with that state, as listed in Appendix B of reference b. When considering or conducting area searches within a claimed or U.S. recognized foreign territorial sea or archipelagic waters, commanders should inform those agencies listed in Enclosure A, subparagraph 4a.

b. RAE into the territorial sea or archipelagic waters of a foreign state involves two conflicting principles: (1) the right of nations to regulate entry into and the operations within territory under their sovereignty, and (2) the time-honored mariners' imperative to render rapid and effective assistance to persons, ships, or aircraft in imminent peril at sea without regard to nationality or location.

c. The operational commander on the scene must determine whether RAE is appropriate under the circumstances. The test is whether a person, ship, or aircraft, whose position within the territorial sea or archipelagic waters of another state is reasonably well known, is in danger or distress due to perils of the sea and requires emergency assistance.

d. In determining whether to undertake RAE actions, commanders must consider the safety of the military ships and aircraft they command, and of their crews, as well as the safety of persons, ships, and aircraft in danger or distress.

e. Commanders should also consider whether other rescue units, capable and willing to render timely and effective assistance, are on the scene or immediately en route.

f. The customary international law of RAE is more fully developed for vessels than for aircraft. Therefore, the military commander must consider the possible reaction of the coastal or archipelagic state, especially if the commander intends to employ military aircraft within its territorial sea or its archipelagic waters.

g. Although exercise of RAE does not require the permission of the foreign coastal or archipelagic state, US commanders should notify the state's authorities of the entry in order to promote international comity, avoid misunderstanding, and alert local rescue and medical assets.

h. Because of the implications for international relations and for US security, commanders should keep appropriate authorities and the NMCC informed. See subparagraph 8d(1) below.

i. RAE actions should comply with any applicable bilateral RAE and SAR agreements (Enclosure B), including those listed in Appendix B of reference b.

j. Reference c is the DOD source document for determining the scope of a particular maritime claim (e.g., extent of a claimed territorial sea) and whether or not that particular maritime claim is recognized by the United States. The fact that the United States has conducted an operational freedom of navigation assertion or sent a protest note regarding a particular coastal state claim can be taken as nonrecognition of the claim in question. Otherwise, the territorial sea of a coastal state or the archipelagic waters of an archipelagic state will be regarded as presumptively valid for the purpose of this instruction. The DOS "Limits of the Seas" series and the Naval War College "Blue Book, Vol. 66," are secondary sources for determining whether and to what extent a particular country's maritime claims are considered excessive by the United States.

k. The policy set forth in this instruction is consistent with the current standing rules of engagement for US forces pursuant to reference d.

6. Definitions.

a. Operational commander on the scene. The senior officer in tactical command of the unit(s) capable of rendering meaningful and timely assistance; this commander is responsible for coordinating rescue efforts at the site.

b. Territorial sea. The belt of ocean measured seaward up to 12 nm from a state's baselines determined in accordance with international law and subject to the state's sovereignty. The U.S. does not recognize the portions of claimed territorial sea more than 12 nm from properly drawn baselines.

c. Archipelagic waters. An archipelagic state is a state that is constituted wholly of one or more groups of islands. Such states may draw straight archipelagic baselines joining the outermost points of their outermost islands, providing the ratio of water to land within the baselines is between 1 to 1 and 9 to 1. The waters enclosed within properly drawn archipelagic baselines are called archipelagic waters and are subject to the archipelagic state's sovereignty.

d. Danger or distress. A clearly apparent risk of death, disabling injury, loss, or significant damage.

e. Perils of the sea. Accidents and dangers peculiar to maritime activities, including storms, waves, and wind; grounding; fire, smoke and noxious fumes; flooding, sinking, and capsizing; loss of propulsion or steering; and other hazards of the sea.

f. Emergency assistance. Rescue action that must be taken without delay to avoid significant risk of death or serious injury or the loss of or major damage to a ship or aircraft.

g. Military ships and aircraft. For the purposes of this instruction, a US military ship is either a warship designated "USS" or an auxiliary in the Military Sealift Command (MSC) force. For the purposes of this instruction, a US military aircraft is an aircraft operated by a unit of the US Armed Forces, other than the Coast Guard (except when operating as part of the Navy), bearing military markings and commanded and manned by personnel of the Armed Forces.

7. Responsibilities.

a. The Chairman of the Joint Chiefs of Staff will monitor the exercise of RAE and develop further procedural guidance for the CINCs and the Chiefs of the Services under the overall DOD policy guidance.

b. The combatant commanders will issue policy guidance and specific procedural reporting requirements tailored to their areas of regional responsibility and the forces under their operational control.

c. The NMCC will follow routine procedures to coordinate with cognizant DOS and US Coast Guard officials to ensure timely notification, review, and response to CINCs and operational commanders in RAE situations.

d. The Military Services will provide training on RAE operations, coordination, and communications procedures.

e. Guidance for operational commanders is contained in Enclosure A.

8. Summary of Changes. This revision updates CJCSI 2410.01 to include the right of assistance entry within archipelagic waters, clarifies that RAE only applies within a foreign state's US-recognized territorial sea or archipelagic waters and clarifies that the instruction applies to auxiliaries in the MSC Force.

9. Effective Date. This instruction is effective upon receipt.

For the Chairman of the Joint Chiefs of Staff:

/s/
Dennis C. Blair
Vice Admiral, U.S. Navy
Director, Joint Staff

Enclosures:
A—Guidance for Operational Commanders
B—Bilateral Agreements Affecting Right of Assistance Entry

ENCLOSURE A

GUIDANCE FOR OPERATIONAL COMMANDERS

1. The operational commander of a US military ship should exercise RAE and immediately enter a foreign state's US-recognized territorial sea or archipelagic waters when all three following conditions are met:

a. A person, ship, or aircraft within the foreign territorial sea or archipelagic waters is in danger or distress from perils of the sea and requires emergency assistance.

b. The location is reasonably well known.

c. The US military ship is in a position to render timely and effective assistance.

Although not a required condition, the operational commander should also consider whether other rescue units, capable and willing to render timely and effective assistance, are on the scene or immediately en route. Military ships conducting RAE operations will not deploy aircraft (including helicopters) within a US-recognized foreign territorial sea or archipelagic waters unless paragraphs 2 or 3 below apply.

2. An operational commander may render emergency assistance employing US military aircraft in a US recognized foreign territorial sea or archipelagic waters under RAE only when the commander determines that all four following conditions apply:

a. A person, ship, or aircraft in the foreign territorial sea or archipelagic waters is in danger or distress from perils of the sea and requires emergency assistance.

b. The location is reasonably well known.

c. The US military aircraft is able to render timely and effective assistance. If available, unarmed aircraft will be used to conduct RAE activities.

d. Any delay in rendering assistance could be life threatening.

Although not a required condition, the operational commander should also consider whether other rescue units, capable and willing to render timely and effective assistance, are on the scene or immediately en route.

3. An operational commander may render assistance in non-life-threatening situations employing US military aircraft in a US-recognized foreign territorial sea or archipelagic waters under RAE when the following two conditions are met:

a. The Conditions in subparagraphs 2a, b, and c above are met.

b. The cognizant CINC or other appropriate authority in the operational chain of command has specifically authorized the exercise of RAE employing aircraft. Before authorizing RAE employing aircraft, such higher authority will consult with the DOS (Operations Center) by contacting the NMCC.

4. When a commander enters or authorizes entry into the claimed or US-recognized territorial sea or archipelagic waters of a foreign state under RAE, the commander will immediately notify:

a. Appropriate authorities and the NMCC by an OPREP-3 PINNACLE. The OPREP-3 PINNACLE will describe location; unit(s) involved; nature of the emergency assistance; reaction by the coastal or archipelagic state, including efforts to deny entry or offers of assistance; and estimated time to complete the mission. The NMCC will immediately inform the DOS (Operations Center) and Headquarters, US Coast Guard (Flag Plot). (USCG HQ is prepared to facilitate contacting foreign state rescue authorities to notify them of the RAE operation, as appropriate.) The cognizant Chief of Mission and US Defense Attache Office (USDAO) will be information addresses.

b. The coastal or archipelagic state, by the fastest means available, of the location, unit(s) involved, nature of the emergency and assistance required, whether any assistance is needed from that government, and estimated time of departure from the territorial sea or archipelagic waters. Contact will normally be with the Rescue Coordination Center of the foreign state involved.

ENCLOSURE B

BILATERAL AGREEMENTS AFFECTING RIGHT OF ASSISTANCE ENTRY

International agreements to which the United States is a party and that modify the application of this guidance are discussed below. (For more information, see Appendix B of reference b.)

a. Canada. "Memorandum of Understanding Between the United States Coast Guard, the United States Air Force, the Canadian Forces and the Canadian Coast Guard on Search and Rescue," 24 March 1995.

(1) This understanding states that in accordance with customary international law, solely for the purposes of rendering emergency rescue assistance to persons, vessels, or aircraft in danger or distress, when the location is reasonably well known, SAR units of either country may immediately enter onto or over the territory or the territorial seas of the other country, with notification of such entry made as soon as practicable.

(2) Pursuant to this understanding, commanders should notify the nearest Canadian Rescue Coordination Centre (RCC). (Upon receipt by the NMCC of the OPREP-3 required in subparagraph 4a, Enclosure A of this instruction, the NMCC will notify US Coast Guard Headquarters, which will arrange contact with the appropriate Canadian RCC.)

b. Mexico. Treaty to Facilitate Assistance to and Salvage of Vessels in Territorial Waters," 13 June 1935, T.I.A.S. No. 905, 49 Stat. 3359.

(1) This treaty permits vessels and rescue equipment of either country to assist vessels (and crews) of their own nationals that are disabled or in distress within the territorial waters or on the shores of the other country:

(a) Within a 720-nm radius of the intersection of the international boundary line and the Pacific Coast.

(b) Within a 200-nm radius of the intersection of the international boundary line and the coast of the Gulf of Mexico.

(2) The treaty requires the commander to send notice of entry to assist a distressed vessel to appropriate authorities of the other country at the earliest possible moment. Assistance efforts may proceed unless the authorities advise that such assistance is unnecessary.

(3) In this treaty, assistance means any act that helps prevent injury arising from a marine peril to persons or property, and the term vessel includes aircraft.

ANNEX A2-5

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SUBJ: GUIDANCE FOR JUDGE ADVOCATES CONCERNING THE TRANSIT PASSAGE REGIME IN INTERNATIONAL STRAITS

1. PASS TO ASSIGNED JUDGE ADVOCATES.

2. THIS MESSAGE PROVIDES GUIDANCE AND AMPLIFYING INFORMATION CONCERNING THE RIGHT OF TRANSIT PASSAGE THROUGH INTERNATIONAL STRAITS AS IT EXISTS IN CUSTOMARY INTERNATIONAL LAW AS REFLECTED IN THE 1982 U.N. CONVENTION ON THE LAW OF THE SEA (HEREINAFTER REFERRED TO AS "THE 1982 CONVENTION"). THE US IS NOT A SIGNATORY TO THE 1982 CONVENTION DUE TO ITS SEABED MINING PROVISIONS. HOWEVER, IN HIS STATEMENT ON UNITED STATES OCEANS POLICY OF MARCH 10, 1983, PRESIDENT REAGAN ANNOUNCED THAT THE US CONSIDERS THE NON-SEABED PROVISIONS OF THE 1982 CONVENTION AS REFLECTIVE OF EXISTING MARITIME LAW AND PRACTICE AND THAT THE US WOULD ACT ACCORDINGLY.

3. THE REGIME OF TRANSIT PASSAGE IS DEFINED IN PART III (ARTICLES 34 THROUGH 45) OF THE 1982 CONVENTION. TRANSIT PASSAGE MEANS THE EXERCISE OF THE FREEDOM OF NAVIGATION AND OVERFLIGHT, SOLELY FOR THE PURPOSE OF CONTINUOUS AND EXPEDITIOUS TRANSIT OF A STRAIT. THERE IS NO REQUIREMENT OF PRIOR NOTIFICATION TO OR AUTHORIZATION OF THE STATE OR STATES BORDERING A STRAIT. WITH VERY FEW EXCEPTIONS, SOME NOTED IN PARAGRAPH 8 BELOW, THE REGIME APPLIES TO ALL STRAITS USED FOR INTERNATIONAL NAVIGATION BETWEEN ONE PART OF THE HIGH SEAS OR AN EXCLUSIVE ECONOMIC ZONE (EEZ) AND ANOTHER PART OF THE HIGH SEAS OR AN EEZ, IF EITHER OF THE FOLLOWING CONDITIONS EXIST: (A) THE TERRITORIAL SEA CLAIMS (OF 12 NM OR LESS) OF THE STATE OR STATES BORDERING THE STRAIT OVERLAP SO THAT THERE IS

NO HIGH SEAS OR EEZ ROUTE THROUGH THE STRAIT, OR (B) THERE IS NO OVERLAP, BUT THE RESULTING CORRIDOR BETWEEN THE AREAS OF TERRITORIAL SEA IS UNSUITABLE FOR SURFACE OR SUBSURFACE TRANSIT BECAUSE OF ITS NAVIGATIONAL AND HYDROGRAPHIC CHARACTERISTICS.

4. THE GEOGRAPHICS OF STRAITS VARY. THE AREAS OF OVERLAPPING TERRITORIAL SEAS IN MANY CASES DO NOT ENCOMPASS THE ENTIRE AREA OF THE STRAIT IN WHICH THE TRANSIT PASSAGE REGIME APPLIES. THE REGIME APPLIES NOT ONLY IN OR OVER THE WATERS OVERLAPPED BY TERRITORIAL SEAS BUT ALSO THROUGHOUT THE STRAIT AND IN ITS APPROACHES, INCLUDING AREAS OF THE TERRITORIAL SEA THAT ARE OVERLAPPED. THE STRAIT OF HORMUZ PROVIDES A CASE IN POINT; ALTHOUGH THE AREA OF OVERLAP OF THE TERRITORIAL SEAS OF IRAN AND OMAN IS RELATIVELY SMALL, THE REGIME OF TRANSIT PASSAGE APPLIES THROUGHOUT THE STRAIT AS WELL AS IN ITS APPROACHES INCLUDING AREAS OF THE OMANI AND THE IRANIAN TERRITORIAL SEAS NOT OVERLAPPED BY THE OTHER. (NOTE: THE ESSENCE OF TRANSIT PASSAGE IS THAT A VESSEL OR AIRCRAFT IN A STRAIT CONTINUOUSLY AND EXPEDITIOUSLY MOVING BETWEEN TWO BODIES OF WATER (IN WHICH THE FREEDOM OF NAVIGATION AND OVERFLIGHT IS THE APPLICABLE REGIME) NEED NOT BECOME SUBJECT TO THE REGIME OF INNOCENT PASSAGE WHEN REQUIRED TO ENTER A TERRITORIAL SEA IN THE STRAIT OR ITS APPROACHES.)

5. SHIPS AND AIRCRAFT ENGAGED IN TRANSIT PASSAGE ARE SUBJECT TO THE RESTRICTIONS AND OBLIGATIONS DESCRIBED IN ARTICLE 39 OF THE 1982 CONVENTION. THEY MUST REFRAIN FROM ACTIVITIES OTHER THAN THOSE INCIDENT TO THEIR "NORMAL MODES" OF CONTINUOUS AND EXPEDITIOUS TRANSIT. THUS, SHIPS AND AIRCRAFT MAY PROCEED IN THEIR NORMAL MODES, I.E., SUBMARINES MAY TRANSIT SUBMERGED, SHIPS MAY DEPLOY AIRCRAFT, AND NAVAL/AIR FORCES GENERALLY MAY BE DEPLOYED IN A MANNER CONSISTENT WITH THE NORMAL SECURITY NEEDS OF THOSE FORCES WHILE IN THE STRAIT. ALSO, THEY MUST PROCEED WITHOUT DELAY, REFRAIN FROM ANY THREAT OR USE OF FORCE, COMPLY WITH ACCEPTED INTERNATIONAL (I.E., IMO-TYPE) REGULATIONS, ETC. THERE IS NO REQUIREMENT FOR STATE (INCLUDING MILITARY) AIRCRAFT (ARTICLE 39) OR FOR SUBMERGED NAVIGATION TO FOLLOW ANY PARTICULAR ROUTE WHILE EXERCISING THE RIGHT OF TRANSIT PASSAGE.

6. THE REGIME OF TRANSIT PASSAGE DOES NOT IN OTHER RESPECTS AFFECT THE LEGAL STATUS OF THE WATERS FORMING THE STRAITS (ARTICLE 34.1). JURIDICALLY, INTERNAL WATERS REMAIN INTERNAL WATERS; TERRITORIAL SEAS REMAIN TERRITORIAL SEA; EEZ'S AND HIGH SEAS AREAS REMAIN EEZ'S AND HIGH SEAS. (ARTICLE 35). ANY ACTIVITY WHICH IS NOT AN EXERCISE OF THE RIGHT OF TRANSIT PASSAGE REMAINS SUBJECT TO WHATEVER LEGAL REGIME IS APPLICABLE UNDER THE 1982 CONVENTION TO THE WATER AREA OF THE STRAIT IN WHICH THE ACTIVITY OCCURS. (ARTICLE 38.3). THUS, IF NOT ENGAGED IN TRANSIT PASSAGE, E.G., IF THE SHIP IS NOT TRANSITING CONTINUOUSLY AND EXPEDITIOUSLY THROUGH THE STRAIT, THE SHIP IS SUBJECT TO THE RULES FOR NAVIGATING IN INTERNAL WATERS, TERRITORIAL SEAS, EEZ'S, AND HIGH SEAS, AS THE CASE MAY BE.

7. IN SUMMARY, THE REGIME OF TRANSIT PASSAGE CONFERS CERTAIN RIGHTS AND IMPOSES CERTAIN DUTIES ON SHIPS AND AIRCRAFT EXERCISING THE RIGHT OF TRANSIT PASSAGE. THESE RIGHTS AND DUTIES COMMENCE AS SOON AS THE SHIP OR AIRCRAFT ENTERS THE APPROACHES TO AN INTERNATIONAL STRAIT FOR THE PURPOSE OF CONTINUOUS AND EXPEDITIOUS TRANSIT OF THE STRAIT, AND THEY CEASE AS SOON AS THE SHIP OR AIRCRAFT DEPARTS THE APPROACHES ON THE OTHER SIDE. HOWEVER, THE PROVISIONS FOR TRANSIT PASSAGE DO NOT ALTER THE UNDERLYING JURIDICAL NATURE OF THE WATERS WHICH MAKE UP THE STRAIT.

8. AS NOTED IN PARAGRAPH 3, ABOVE, THE 1982 CONVENTION PROVIDES THAT THERE ARE A FEW STRAITS USED FOR INTERNATIONAL NAVIGATION IN WHICH THE REGIME OF TRANSIT PASSAGE DOES NOT APPLY. ONE CATEGORY (ARTICLE 35(C)) IS STRAITS SPECIFICALLY REGULATED BY LONG-STANDING CONVENTIONS, FOR EXAMPLE, THE BOSPORUS AND DARDANELLES, WHICH ARE GOVERNED BY PROVISIONS OF THE MONTREUX CONVENTION. ANOTHER CATEGORY (ARTICLE 38.1) IS STRAITS FORMED BY AN ISLAND AND THE MAINLAND OF A STATE, IF THERE EXISTS, SEAWARD OF THE ISLAND, A HIGH SEAS OR EEZ ROUTE OF SIMILAR NAVIGATIONAL AND HYDROGRAPHIC CONVENIENCE. THE PRIME EXAMPLE OF THIS LATTER CATEGORY IS THE STRAIT OF MESSINA; IN SUCH A STRAIT, THE REGIME OF NON-SUSPENDABLE INNOCENT PASSAGE APPLIES. (ARTICLE 45.1(A)).

9. THIS MESSAGE HAS BEEN COORDINATED WITH THE DEPARTMENT OF STATE AND REFLECTS OFFICIAL US POLICY. QUESTIONS SHOULD BE REFERRED TO CODE 10 (DSN: 227-9161, COMMERCIAL: 202-697-9161).
BT

ANNEX A2-6
(In draft as of 1 November 1997)

FM

TO

INFO

BT

UNCLAS//N00000//
MSGID/GENADMINXXXXXXXXX/-//

SUBJ/TRANSIT PASSAGE IN INTERNATIONAL STRAITS POLICY//

REF/A/DOD 4500.54-G/-/NOTAL//
NARR/REF A IS DOD FOREIGN CLEARANCE GUIDE. CHAPTER FIVE CONTAINS JOINT STAFF GUIDANCE ON MILITARY FLIGHTS IN INTERNATIONAL AIRSPACE, INTERNATIONAL STRAITS AND ARCHIPELAGIC SEA LANES.//

RMKS/1. SUMMARY. RECENT CHALLENGES TO U.S. TRANSIT RIGHTS THROUGH THE STRAIT OF HORMUZ BY OMAN AND IRAN HAVE MADE IT NECESSARY TO CLARIFY GUIDANCE ON POLICY AND PROCEDURES FOR U.S. SOVEREIGN IMMUNE VESSELS ENGAGED IN TRANSIT PASSAGE THROUGH INTERNATIONAL STRAITS. U.S. SOVEREIGN IMMUNE VESSELS ENJOY A RIGHT OF TRANSIT PASSAGE THROUGHOUT THE STRAIT (SHORELINE TO SHORELINE), AS WELL AS ITS APPROACHES (INCLUDING THE TERRITORIAL SEA OF ADJACENT COASTAL STATES). ALTHOUGH U.S. SOVEREIGN IMMUNE VESSELS WILL NORMALLY USE INTERNATIONAL MARITIME ORGANIZATION (IMO)-APPROVED TRAFFIC SEPARATION SCHEMES (TSS) AND COMPLY WITH RULE 10 OF COLREGS WHILE TRANSITING AN INTERNATIONAL STRAIT, THERE IS NO LEGAL REQUIREMENT TO DO SO IF SUCH VESSELS DO NOT ELECT TO VOLUNTARILY USE THE TSS. TRANSITS THAT DO NOT MAKE USE OF A TSS SHALL BE CONDUCTED WITH DUE REGARD FOR THE SAFETY OF NAVIGATION. IF CHALLENGED BY COASTAL STATE AUTHORITIES, A U.S. SOVEREIGN IMMUNE VESSEL SHOULD RESPOND THAT IT IS A U.S. WARSHIP OR OTHER SOVEREIGN IMMUNE VESSEL AND STATE, "I AM ENGAGED IN TRANSIT PASSAGE IN ACCORDANCE WITH INTERNATIONAL LAW." A DETAILED LEGAL ANALYSIS FOLLOWS IN PARAGRAPHS 3 THROUGH 6 FOR USE BY COMMAND JUDGE ADVOCATES.

2. PURPOSE.

A. TO CLARIFY GUIDANCE AND PROVIDE AMPLIFYING INFORMATION ON U.S. POLICY AND PROCEDURES FOR U.S. SOVEREIGN IMMUNE VESSELS ENGAGED IN TRANSIT PASSAGE THROUGH INTERNATIONAL STRAITS CONNECTING ONE PORTION OF THE HIGH SEAS/EXCLUSIVE ECONOMIC ZONE (EEZ) WITH ANOTHER PORTION OF THE HIGH SEAS/EEZ.

B. THIS GUIDANCE DOES NOT APPLY TO STRAITS SPECIFICALLY REGULATED BY LONG-STANDING CONVENTIONS (SUCH AS THE TURKISH STRAITS), TO STRAITS FORMED BY AN ISLAND AND THE MAINLAND OF A STATE, IF THERE EXISTS, SEAWARD OF THE ISLAND, A HIGH SEAS/EEZ ROUTE OF SIMILAR NAVIGATIONAL AND HYDROGRAPHIC CONVENIENCE (SUCH AS THE STRAIT OF MESSINA) OR TO STRAITS IN WHICH THERE EXISTS A HIGH SEAS/EEZ CORRIDOR OF SIMILAR NAVIGATIONAL AND HYDROGRAPHIC CONVENIENCE (SUCH AS THE FEMER BELT).

C. GUIDANCE ON MILITARY FLIGHTS IN INTERNATIONAL STRAITS IS PROVIDED IN REF A.

D. NOTHING IN THIS GUIDANCE IS INTENDED TO IMPAIR THE ABILITY TO CONDUCT OPERATIONS CONSISTENT WITH SAFETY OF NAVIGATION OR THE COMMANDER'S INHERENT AUTHORITY AND OBLIGATION TO USE ALL NECESSARY MEANS AVAILABLE AND TO TAKE ALL APPROPRIATE ACTION IN SELF-DEFENSE OF THE COMMANDER'S UNIT AND OTHER U.S. FORCES IN THE VICINITY.

3. BACKGROUND/REGULATORY REGIME.

A. THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (1982 LOS CONVENTION).

(1) THE UNITED STATES IS NOT YET A PARTY TO THE 1982 LOS CONVENTION. HOWEVER, IN HIS STATEMENT ON U.S. OCEAN POLICY OF MARCH 10, 1983, PRESIDENT REAGAN ANNOUNCED THAT THE UNITED STATES CONSIDERS THE NON-SEABED PROVISIONS OF UNCLOS AS REFLECTIVE OF EXISTING MARITIME LAW AND PRACTICE AND THAT THE UNITED STATES WOULD ACT ACCORDINGLY. THIS VIEW HAS BEEN REITERATED BY EVERY SUCCESSIVE ADMINISTRATION.

(2) THE REGIME OF TRANSIT PASSAGE IS SET OUT IN PART III OF THE 1982 LOS CONVENTION (ARTICLES 37 THROUGH 44). TRANSIT PASSAGE IS DEFINED AS THE FREEDOM OF NAVIGATION AND OVERFLIGHT SOLELY FOR THE PURPOSE OF CONTINUOUS AND EXPEDITIOUS TRANSIT OF THE STRAIT IN THE NORMAL MODE OF OPERATION. THIS MEANS THAT SUBMARINES MAY TRANSIT SUBMERGED; MILITARY AIRCRAFT MAY OVERFLY IN COMBAT FORMATION AND WITH NORMAL EQUIPMENT OPERATION; AND SURFACE SHIPS MAY TRANSIT IN A MANNER NECESSARY FOR THEIR SECURITY, INCLUDING FORMATION STEAMING AND THE LAUNCHING AND RECOVERY OF AIRCRAFT, WHERE CONSISTENT WITH SOUND NAVIGATIONAL PRACTICES. ALL SHIPS AND AIRCRAFT, REGARDLESS OF CARGO, ARMAMENT OR MEANS OF PROPULSION, ENJOY THIS NONSUSPENDABLE RIGHT OF TRANSIT PASSAGE, WITHOUT PRIOR APPROVAL BY OR NOTIFICATION TO THE COASTAL STATES BORDERING THE STRAIT.

(3) COASTAL STATES BORDERING INTERNATIONAL STRAITS MAY DESIGNATE SEA LANES AND TRAFFIC SEPARATION SCHEMES (TSS) FOR NAVIGATION IN STRAITS WHERE NECESSARY TO PROMOTE THE SAFE PASSAGE OF SHIPS. SUCH ROUTING MEASURES SHALL CONFORM TO IMO STANDARDS (I.E., REGULATION V/8 OF THE 1974 INTERNATIONAL CONVENTION FOR THE SAFETY OF LIFE AT SEA (SOLAS) AND ITS ASSOCIATED GUIDELINES AND CRITERIA) AND SHALL BE REFERRED TO THE IMO FOR ADOPTION PRIOR TO THEIR DESIGNATION. SHIPS IN TRANSIT PASSAGE SHALL RESPECT APPLICABLE SEA LANES AND TSS ESTABLISHED IN ACCORDANCE WITH IMO STANDARDS. (NOTE: IMO-APPROVED ROUTING MEASURES APPLICABLE IN INTERNATIONAL STRAITS ARE SET OUT IN IMO PUBLICATION "SHIPS' ROUTEING" (SIXTH EDITION), AS AMENDED.)

(4) SHIPS IN TRANSIT PASSAGE SHALL COMPLY WITH GENERALLY ACCEPTED INTERNATIONAL REGULATIONS, PROCEDURES AND PRACTICES FOR SAFETY AT SEA, INCLUDING THE 1972 INTERNATIONAL REGULATIONS FOR PREVENTING COLLISIONS AT SEA (COLREGS). SHIPS IN TRANSIT PASSAGE SHALL ALSO PROCEED WITHOUT DELAY THROUGH THE STRAIT, REFRAIN FROM ANY THREAT OR USE OF FORCE AGAINST THE SOVEREIGNTY, TERRITORIAL INTEGRITY OR POLITICAL INDEPENDENCE OF THE STATES BORDERING THE STRAIT; AND REFRAIN FROM ANY ACTIVITIES OTHER THAN THOSE INCIDENT TO THEIR NORMAL MODE OF CONTINUOUS AND EXPEDITIOUS TRANSIT UNLESS RENDERED NECESSARY BY FORCE MAJEURE OR BY DISTRESS.

B. THE 1974 INTERNATIONAL CONVENTION FOR THE SAFETY OF LIFE AT SEA (SOLAS), AS AMENDED.

(1) REGULATION V/8 OF SOLAS RECOGNIZES THE INTERNATIONAL MARITIME ORGANIZATION (IMO) AS THE ONLY INTERNATIONAL BODY RESPONSIBLE FOR ESTABLISHING AND ADOPTING SHIPS' ROUTING MEASURES, INCLUDING TSS, ON AN INTERNATIONAL LEVEL.

(2) RULES GOVERNING THE ESTABLISHMENT OF SHIPS' ROUTING MEASURES ARE CONTAINED IN REGULATION V/8 OF SOLAS AND ITS ASSOCIATED GUIDELINES AND CRITERIA (I.E., IMO ASSEMBLY RESOLUTION A.572(14), AS AMENDED). REGULATION V/8 AND RESOLUTION A.572(14) DO NOT APPLY TO WARSHIPS, NAVAL AUXILIARIES OR OTHER GOVERNMENT-OWNED OR OPERATED VESSELS USED ONLY FOR NON-COMMERCIAL SERVICE. HOWEVER, SUCH SHIPS ARE ENCOURAGED TO PARTICIPATE IN IMO-APPROVED SHIPS' ROUTING SYSTEMS.

(3) ADDITIONALLY, NOTHING IN REGULATION V/8 NOR ITS ASSOCIATED GUIDELINES AND CRITERIA SHALL PREJUDICE THE RIGHTS AND DUTIES OF STATES UNDER INTERNATIONAL LAW OR THE LEGAL REGIMES OF STRAITS USED FOR INTERNATIONAL NAVIGATION AND ARCHIPELAGIC SEA LANES.

(4) THE UNITED STATES IS A PARTY TO SOLAS.

C. THE 1972 INTERNATIONAL REGULATIONS FOR PREVENTING COLLISIONS AT SEA (COLREGS), AS AMENDED.

(1) PURSUANT TO RULE 1, COLREGS APPLY TO ALL VESSELS ON THE HIGH SEAS AND IN ALL WATERS CONNECTED THEREWITH NAVIGABLE BY SEAGOING VESSELS, INCLUDING VESSELS ENTITLED TO SOVEREIGN IMMUNITY.

(2) RULE 10 OF COLREGS PRESCRIBES THE CONDUCT OF VESSELS WITHIN OR NEAR TSS ADOPTED BY THE IMO IN ACCORDANCE WITH REGULATION V/8 OF SOLAS. PURSUANT TO RULE 10 OF COLREGS, A VESSEL USING A TSS SHALL NOT USE AN INSHORE TRAFFIC ZONE WHEN IT CAN SAFELY USE THE APPROPRIATE TRAFFIC LANE WITHIN THE ADJACENT TSS, EXCEPT THAT A VESSEL MAY USE AN INSHORE TRAFFIC ZONE WHEN EN ROUTE TO OR FROM A PORT, OFFSHORE INSTALLATION OR STRUCTURE, PILOT STATION OR ANY OTHER PLACE SITUATED WITHIN THE INSHORE TRAFFIC ZONE, OR TO AVOID IMMEDIATE DANGER. VESSELS NOT USING A TSS SHALL AVOID THE SEPARATION SCHEME BY AS WIDE A MARGIN AS IS PRACTICABLE. (NOTE: A VESSEL RESTRICTED IN HER ABILITY TO MANEUVER

WHEN ENGAGED IN AN OPERATION (1) FOR THE MAINTENANCE OF SAFETY OF NAVIGATION IN A TSS OR (2) FOR THE LAYING, SERVICING OR PICKING UP OF A SUBMARINE CABLE, WITHIN A TSS IS EXEMPT FROM COMPLYING WITH RULE 10 TO THE EXTENT NECESSARY TO CARRY OUT THE OPERATION.)

(3) THE UNITED STATES IS A PARTY TO COLREGS.

D. U.S. NAVY REGULATIONS (1990).

(1) PURSUANT TO ARTICLE 1139, ALL PERSONS IN THE NAVAL SERVICE RESPONSIBLE FOR THE OPERATION OF NAVAL SHIPS AND CRAFT SHALL DILIGENTLY OBSERVE COLREGS AND THE INLAND NAVIGATION RULES, WHERE SUCH RULES AND REGULATIONS ARE APPLICABLE TO NAVAL SHIPS.

(2) IN THOSE SITUATIONS WHERE SUCH RULES OR REGULATIONS ARE NOT APPLICABLE TO NAVAL SHIPS OR CRAFT, THEY SHALL BE OPERATED WITH DUE REGARD FOR THE SAFETY OF OTHERS.

4. ANALYSIS.

A. FOR TRANSIT PASSAGE TO HAVE ANY MEANING, SURFACE, SUBSURFACE AND OVERFLIGHT NAVIGATION OF WATERS CONSTITUTING THE APPROACHES TO THE STRAIT MUST BE INCLUDED. IF THE RIGHT OF OVERFLIGHT OR SUBMERGED TRANSIT APPLIED ONLY WITHIN THE GEOGRAPHICAL DELINEATION OF A CERTAIN STRAIT, BUT NOT TO AREAS LEADING INTO/OUT OF THE STRAIT, IT WOULD EFFECTIVELY PREVENT THE EXERCISE OF THE RIGHT OF OVERFLIGHT AND SUBMERGED TRANSIT. MOREOVER, REQUIRING SHIPS AND AIRCRAFT TO CONVERGE AT THE HYPOTHETICAL ENTRANCE TO THE STRAIT WOULD BE INCONSISTENT WITH SOUND NAVIGATIONAL PRACTICES. THE RIGHT OF TRANSIT PASSAGE THEREFORE APPLIES NOT ONLY TO THE WATERS OF THE STRAIT ITSELF, BUT ALSO TO ALL NORMALLY USED APPROACHES TO THE STRAIT.

B. THE 1982 LOS CONVENTION RECOGNIZES THE AUTHORITY OF COASTAL STATES TO DESIGNATE, AND REQUIRES SHIPS IN TRANSIT PASSAGE TO RESPECT, IMO-APPROVED TSS IN INTERNATIONAL STRAITS, PROVIDED SUCH ROUTING MEASURES CONFORM TO IMO STANDARDS SET OUT IN REGULATION V/8 OF SOLAS AND RESOLUTION A.572(14). HOWEVER, AS DISCUSSED ABOVE, ROUTING MEASURES ADOPTED PURSUANT TO REGULATION

V/8 AND ITS ASSOCIATED GUIDELINES AND CRITERIA (I.E., RESOLUTION A.572(14)) DO NOT APPLY TO SOVEREIGN IMMUNE VESSELS. HENCE, COMPLIANCE WITH AN IMO-APPROVED TSS IN AN INTERNATIONAL STRAIT IS NOT LEGALLY REQUIRED OF SOVEREIGN IMMUNE VESSELS.

C. SIMILARLY, RULE 1 OF COLREGS PROVIDES THAT TSS MAY BE ADOPTED BY THE IMO FOR THE SAFETY OF NAVIGATION. RULE 10 OF COLREGS APPLIES TO ANY TSS ADOPTED BY THE IMO, PURSUANT TO ITS AUTHORITY UNDER REGULATION V/8 OF SOLAS AND ITS ASSOCIATED GUIDELINES. HOWEVER, AS PREVIOUSLY DISCUSSED, SOVEREIGN IMMUNE VESSELS ARE SPECIFICALLY EXEMPT FROM COMPLIANCE WITH IMO-APPROVED ROUTING MEASURES. SOVEREIGN IMMUNE VESSELS ARE ENCOURAGED TO COMPLY VOLUNTARILY WITH SUCH MEASURES, BUT THERE IS NO LEGAL REQUIREMENT TO DO SO. HENCE, COMPLIANCE WITH RULE 10 OF COLREGS, WHICH PROHIBITS THE USE OF AN INSHORE TRAFFIC ZONE WHEN A SHIP CAN SAFELY USE THE APPROPRIATE TRAFFIC LANE WITHIN THE ADJACENT TSS AND REQUIRES SHIPS NOT USING THE TSS TO AVOID IT BY AS WIDE A MARGIN AS IS PRACTICABLE, IS NOT LEGALLY REQUIRED OF SOVEREIGN IMMUNE VESSELS THAT HAVE ELECTED NOT TO USE THE TSS. ACCORDINGLY, TRANSIT PASSAGE APPLIES THROUGHOUT THE STRAIT, SHORELINE TO SHORELINE.

5. POLICY.

A. FOR SOVEREIGN IMMUNE VESSELS, THE RIGHT OF TRANSIT PASSAGE APPLIES THROUGHOUT THE STRAIT (SHORELINE TO SHORELINE), AS WELL AS IN ITS APPROACHES (INCLUDING THE TERRITORIAL SEA OF AN ADJACENT COASTAL STATE).

B. ALTHOUGH U.S. SOVEREIGN IMMUNE VESSELS WILL NORMALLY USE IMO-APPROVED TSS (WHEN PRACTICABLE AND COMPATIBLE WITH THE MILITARY MISSION) AND COMPLY WITH RULE 10 OF COLREGS (INCLUDING ITS PROHIBITION ON THE USE OF INSHORE TRAFFIC ZONES) WHILE TRANSITING AN INTERNATIONAL STRAIT, THERE IS NO LEGAL REQUIREMENT TO DO SO IF SUCH VESSELS DO NOT ELECT TO VOLUNTARILY USE THE TSS. WHEN VOLUNTARILY USING AN IMO-APPROVED TSS, RULE 10 OF COLREGS MUST BE OBSERVED.

C. SITUATIONS WHICH MAY NOT LEND THEMSELVES TO COMPLIANCE WITH AN IMO-APPROVED ROUTING MEASURE INCLUDE: MILITARY CONTINGENCIES; CLASSIFIED MISSIONS; POLITICALLY

SENSITIVE AREA MISSIONS; FREEDOM OF NAVIGATION ASSERTIONS; ROUTINE AIRCRAFT CARRIER OPERATIONS; MINE CLEARANCE OPERATIONS; SUBMERGED OPERATIONS; OR VARIOUS OTHER LEGITIMATE PURPOSES/MISSIONS. SUCH OPERATIONS SHALL BE CONDUCTED WITH DUE REGARD FOR THE SAFETY OF NAVIGATION.

D. IF CHALLENGED BY AUTHORITIES OF A COASTAL STATE WHILE TRANSITING AN INTERNATIONAL STRAIT, U.S. SOVEREIGN IMMUNE VESSELS SHOULD ADVISE COASTAL STATE AUTHORITIES THAT IT IS A U.S. WARSHIP OR OTHER SOVEREIGN IMMUNE VESSEL AND STATE, "I AM ENGAGED IN TRANSIT PASSAGE IN ACCORDANCE WITH INTERNATIONAL LAW." THE VESSEL SHOULD THEN CONTINUE ON ITS PLANNED TRACK.

6. CONCLUSION. THE REGIME OF TRANSIT PASSAGE CONFERS CERTAIN RIGHTS AND IMPOSES CERTAIN DUTIES ON SHIPS AND AIRCRAFT EXERCISING THE RIGHT OF TRANSIT PASSAGE. THESE RIGHTS AND DUTIES COMMENCE AS SOON AS THE SHIP OR AIRCRAFT ENTERS THE APPROACHES TO AN INTERNATIONAL STRAIT FOR THE PURPOSE OF CONTINUOUS AND EXPEDITIOUS TRANSIT OF THE STRAIT, AND THEY CEASE AS SOON AS THE SHIP OR AIRCRAFT DEPARTS THE APPROACHES ON THE OTHER SIDE. THERE IS NO LEGAL REQUIREMENT FOR SOVEREIGN IMMUNE VESSELS TO COMPLY WITH IMO-APPROVED ROUTING MEASURES IN INTERNATIONAL STRAITS. SOVEREIGN IMMUNE VESSELS ARE ONLY LEGALLY OBLIGATED TO EXERCISE DUE REGARD FOR THE SAFETY OF NAVIGATION WHILE ENGAGED IN TRANSIT PASSAGE. HOWEVER, SUCH VESSEL MAY VOLUNTARILY COMPLY WITH IMO-APPROVED ROUTING MEASURES IN INTERNATIONAL STRAITS WHEN PRACTICABLE AND COMPATIBLE WITH THE MILITARY MISSION. WHILE VOLUNTARILY USING AN IMO-APPROVED TSS, RULE 10 OF COLREGS MUST BE OBSERVED.

7. THIS MESSAGE HAS BEEN COORDINATED WITH THE DEPARTMENT OF STATE AND REFLECTS OFFICIAL U.S. POLICY. QUESTIONS SHOULD BE REFERRED TO DOD REPOPA (DSN 227-9161, COMM 703-697-9161) OR N3L/N5L (DSN 227-0835, COMM 703-697-0835).

ANNEX A2-7

gist

A quick reference aid on U S foreign relations
Not a comprehensive policy statement
Bureau of Public Affairs • Department of State

US Freedom of Navigation Program December 1988

Background: US interests span the world's oceans geopolitically and economically. US national security and commerce depend greatly upon the internationally recognized legal rights and freedoms of navigation and overflight of the seas. Since World War II, more than 75 coastal nations have asserted various maritime claims that threaten those rights and freedoms. These "objectionable claims" include unrecognized historic waters claims; improperly drawn baselines for measuring maritime claims; territorial sea claims greater than 12 nautical miles; and territorial sea claims that impose impermissible restrictions on the innocent passage of military and commercial vessels, as well as ships owned or operated by a state and used only on government noncommerical service.

US policy: The US is committed to protecting and promoting rights and freedoms of navigation and overflight guaranteed to all nations under international law. One way in which the US protects these maritime rights is through the US Freedom of Navigation Program. The program combines diplomatic action and operational assertion of our navigation and overflight rights by means of exercises to discourage state claims inconsistent with international law and to demonstrate US resolve to protect navigational freedoms. The Departments of State and Defense are jointly responsible for conducting the program.

The program started in 1979, and President Reagan again outlined our position in an ocean policy statement in 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 UN Convention on the Law of the Sea]. 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 US considers that the customary rules of international law affecting maritime navigation and overflight freedoms are reflected and stated in the applicable provisions of the 1982 UN Convention on the Law of the Sea.

Nature of the program: The Freedom of Navigation Program is a peaceful exercise of the rights and freedoms recognized by international law and is not intended to be provocative. The program impartially rejects excessive maritime claims of allied, friendly, neutral, and unfriendly states alike. Its objective is to preserve and enhance navigational freedoms on behalf of all states.

Diplomatic action: Under the program, the US undertakes diplomatic action at several levels to preserve its rights under international law. It conducts bilateral consultations with many coastal states stressing the need for and obligation of all states to adhere to the international law customary rules and practices reflected in the 1982 convention. When appropriate,the Department of State files formal diplomatic protests addressing specific maritime claims that are inconsistent with international law. Since 1948, the US has filed more than 70 such protests, including more than 50 since the Freedom of Navigation Program began.

Operational assertions: Although diplomatic action provides a channel for presenting and preserving US rights, the operational assertion by US naval and air forces of internationally recognized navigational rights and freedoms complements diplomatic efforts. Operational assertions tangibly manifest the US determination not to acquiesce in excessive claims to maritime jurisdiction by other countries. Although some operations asserting US navigational rights receive intense public scrutiny (such as those that have occurred in the Black Sea and the Gulf of Sidra), most do not. Since 1979, US military ships and aircraft have exercised their rights and freedoms in all oceans against objectionable claims of more than 35 nations at the rate of some 30-40 per year.

Future intentions: The US is committed to preserve traditional freedoms of navigation and overflight throughout the world, while recognizing the legitimate rights of other states in the waters off their coasts. The preservation of effective navigation and overflight rights is essential to maritime commerce and global naval and air mobility. It is imperative if all nations are to share in the full benefits of the world's oceans.

For further information: See also GISTs, "Law of the Sea," June 1986, and "Navigation Rights and the Gulf of Sidra," December 1986.

Harriet Culley, Editor (202) 647-1208

ANNEX A2-8

Navigation Rights and the Gulf of Sidra

Background

In October 1973, Libya announced that it considered all water in the Gulf of Sidra south of a straight baseline drawn at 32° 30' north latitude to be internal Libyan waters because of the gulf's geographic location and Libya's historic control over it. The United States and other countries, including the U.S.S.R., protested Libya's claim as lacking any historic or legal justification and as illegally restricting freedom of navigation on the high seas. Further, the U.S. Navy has conducted many operations within the gulf during the past 12 years to protest the Libyan claim. These exercises have resulted in two shooting incidents between Libyan and U.S. forces. The first was in 1981, when two Libyan aircraft fired on U.S. aircraft and were shot down in air-to-air combat, and the second in March 1986, when the Libyans fired several missiles at U.S. forces and the United States responded by attacking Libyan radar installations and patrol boats.

Barbary Coast History

This is not the first time that the United States has contended with navigational hindrances imposed by North African states. After the American Revolution, the United States adhered to the

[See map at Figure A2-12 (p. 2-82)]

then common practice of paying tribute to the Barbary Coast states to ensure safe passage of U.S. merchant vessels. In 1796, the United States paid a one-time sum (equal to one-third of its defense budget) to Algiers with guarantees of further annual payments. In 1801, the United States refused to conclude a similar agreement with Tripoli, and the Pasha of Tripoli declared war on the United States. After negotiations failed, the United States blockaded Tripoli, in the autumn of 1803 Commodore Edward Preble led a squadron, including the U.S.S. *Constitution* ("Old Ironsides"), to the Mediterranean to continue the blockade. Shortly after the squadron arrived off Tripoli, a U.S. frigate, the *Philadelphia*, ran aground and was captured. Lt. Stephen Decatur led a team into Tripoli harbor and successfully burned the *Philadelphia*. In June 1805, the Pasha agreed to terms following a ground assault led by U.S. marines that captured a port near Tripoli. In 1810 Algiers and Tripoli renewed raids against U.S. shipping, and in 1815, Commodore Decatur's squadron caught the Algerian fleet at sea and forced the Dey of Algiers to agree to terms favorable to the United States. Decatur then proceeded to Tunis and Tripoli and obtained their consent to similar treaties. A U.S. squadron remained in the Mediterranean for several years to ensure compliance with the treaties.

Current Law and Custom

By custom, nations may lay historic claim to those bays and gulfs over which they have exhibited such a degree of open, notorious, continuous, and unchallenged control for an extended period of time as to preclude traditional high seas freedoms within such waters. Those waters (closed off by straight baselines) are treated as if they were part of the nation's land mass, and the navigation of foreign vessels is generally subject to complete control by the nation. Beyond lawfully closed-off bays and other areas along their coasts, nations may claim a "territorial sea" of no more than 12 nautical miles in breadth (measured 12 miles out from the coast's low water line—or legal straight baseline) within which foreign vessels enjoy the limited navigational "right of innocent passage." Beyond the

Since Libya cannot make a valid historic waters claim and meets no other international law criteria for enclosing the Gulf of Sidra, it may validly claim a 12-nautical-mile territorial sea as measured from the normal low-water line along its coast (see map).
Libya also may claim up to a 200-nautical-mile exclusive economic zone in which it may exercise resource jurisdiction, but such a claim would not affect freedom of navigation and overflight. (The United States has confined its exercises to areas beyond 12 miles from Libya's coast.)

U.S. Position

The United States supports and seeks to uphold the customary law outlined above, and it has an ongoing global program of protecting traditional navigation rights and freedoms from encroachment by illegal maritime claims. This program includes diplomatic protests (delivered to more than 50 countries since 1975) and ship and aircraft operations to preserve those navigation rights. Illegal maritime claims to which the United States responds include:

- Excessive territorial sea claims;
- Improperly drawn baselines for measuring maritime claims; and
- Attempts to require notification or permission before foreign vessels can transit a nation's territorial sea under the right of innocent passage.

Thus Libya has not been singled out for special consideration but represents simply one instance in the continuing U.S. effort to preserve worldwide navigational rights and freedoms. The fact that Libya chose to respond militarily to the U.S. exercise of traditional navigation rights was regrettable and without any basis in international law.

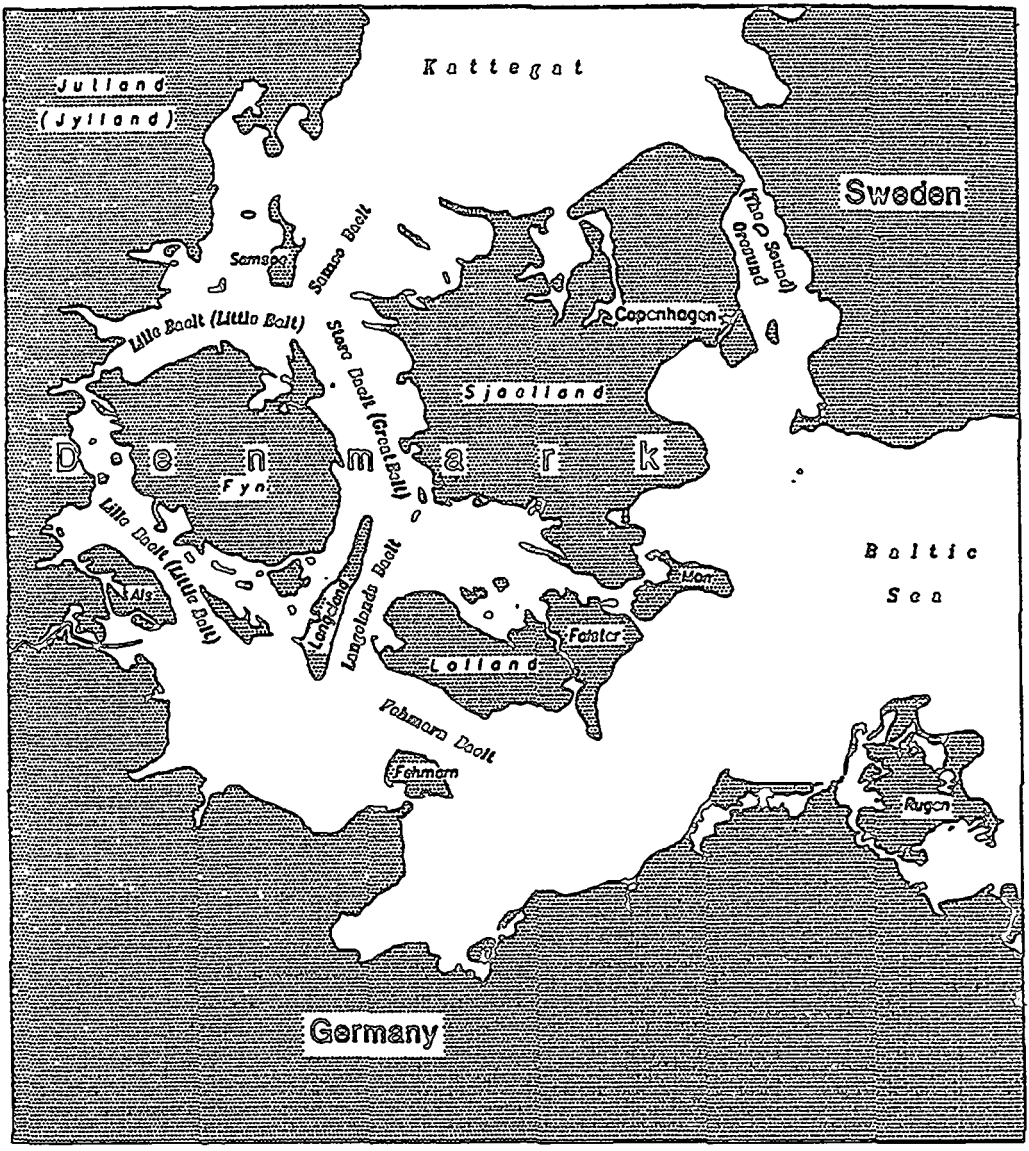
U.S. Intentions

The United States will pursue actively its efforts to preserve traditional navigation rights and freedoms that are equally guaranteed to all nations. The preservation of rights is essential to maritime commerce and global naval and air mobility and is imperative if all nations are to share equally in the benefits of the world's oceans. As always, the United States will exercise its rights and freedoms fully in accord with international law and hopes to avoid further military confrontations, but it will not acquiesce in unlawful maritime claims and is prepared to defend itself if circumstances so require.

Taken from the GIST series of December 1986, published by the Bureau of Public Affairs, Department of State.

FIGURE A2-1

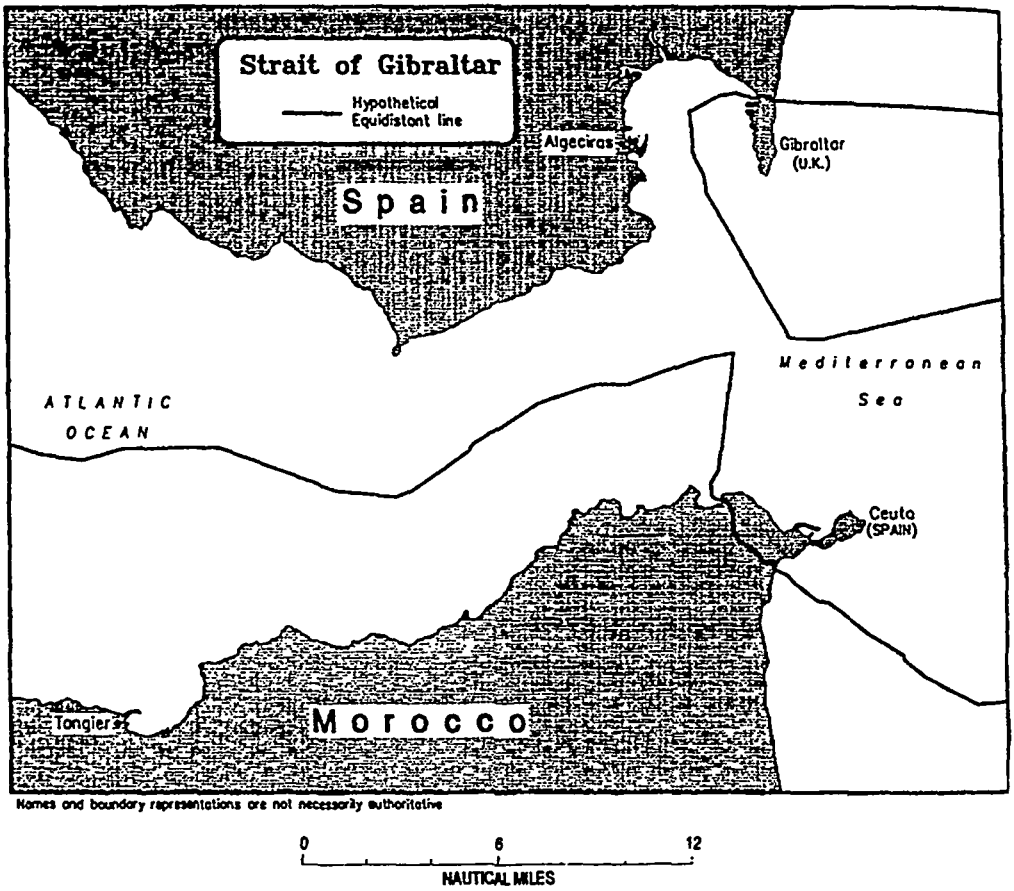
DANISH STRAITS



Source: Roach & Smith, at 216.

FIGURE A2-2

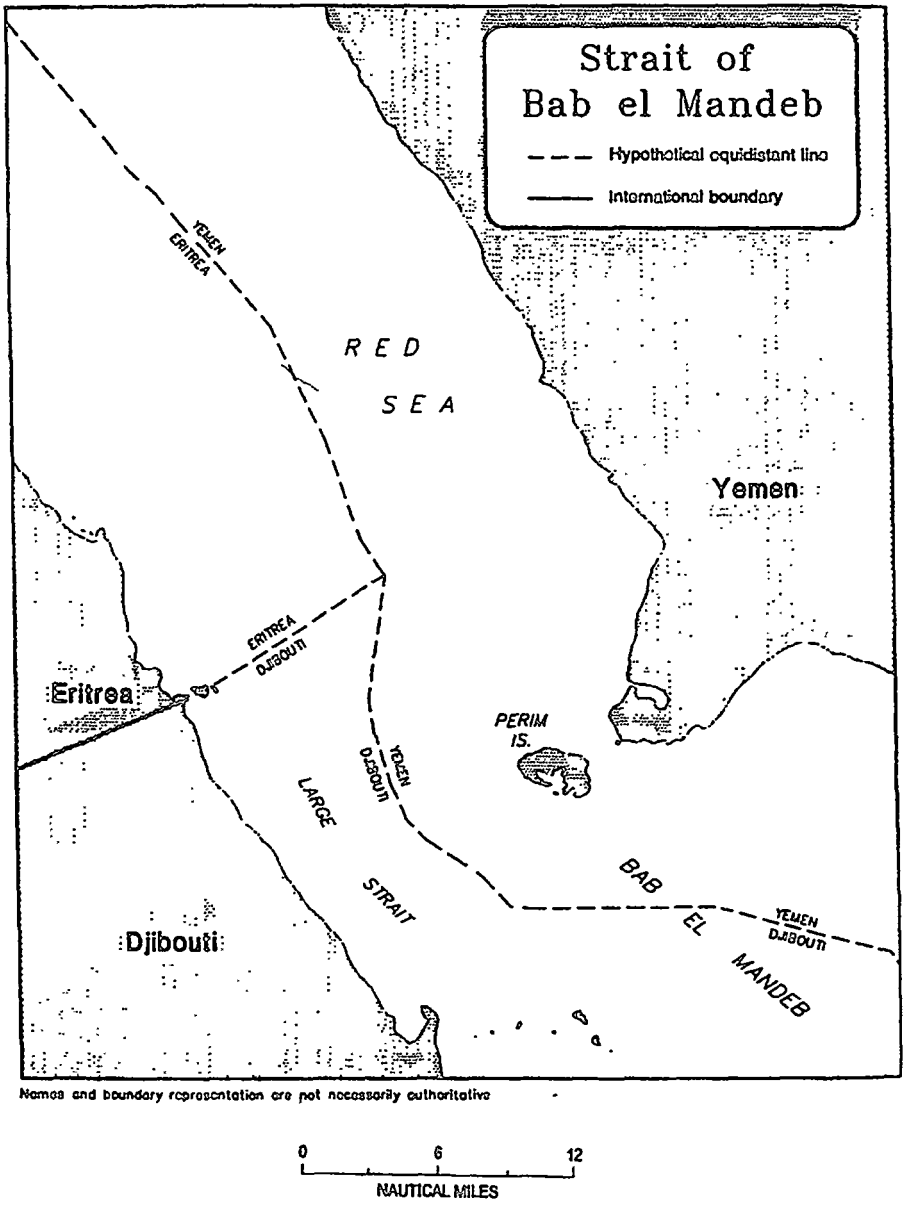
STRAIT OF GIBRALTER



Source: Roach & Smith, at 186.

FIGURE A2-3

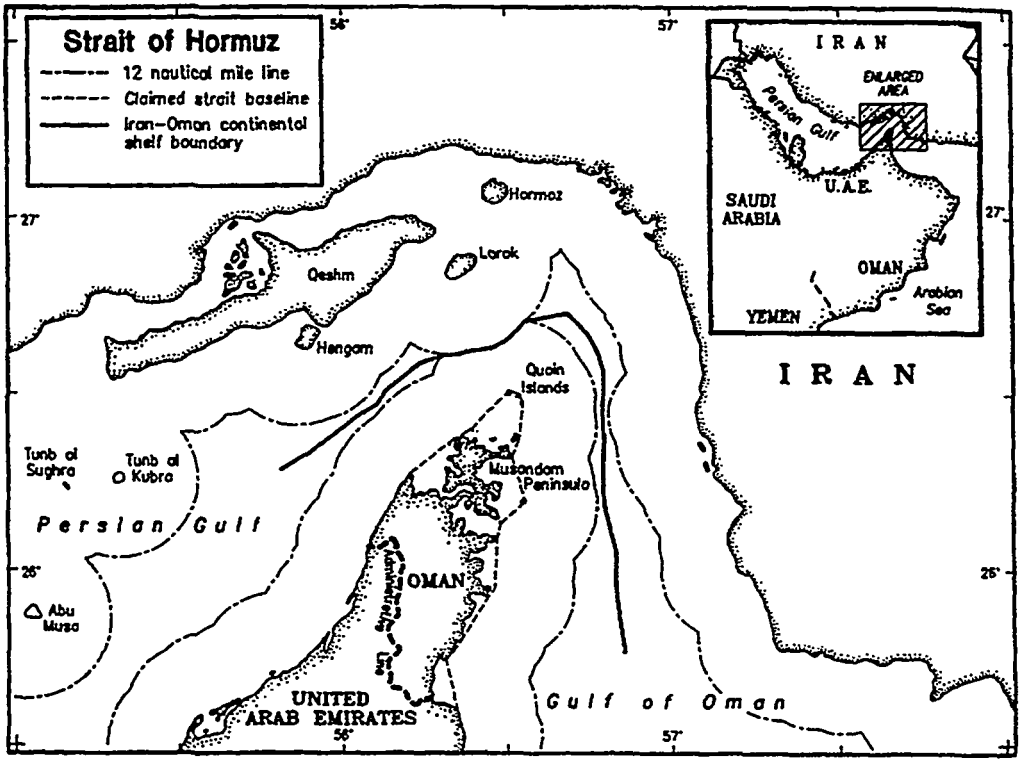
STRAIT OF BAB EL MANDEB



Source: Roach & Smith, at 184.

FIGURE A2-4

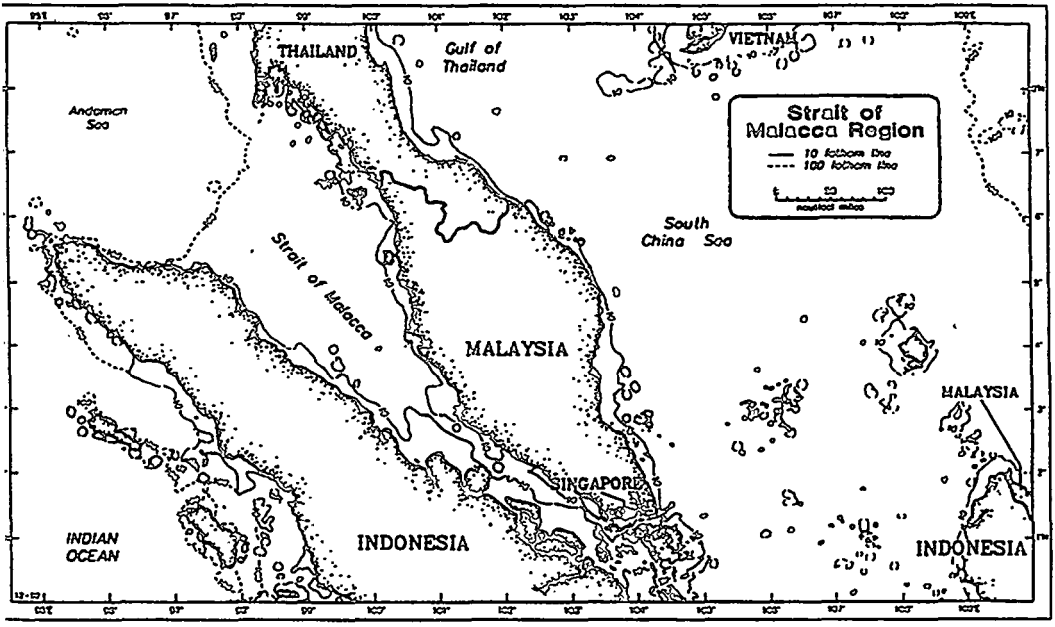
STRAIT OF HORMUZ



Source: Roach & Smith, at 190.

FIGURE A2-5

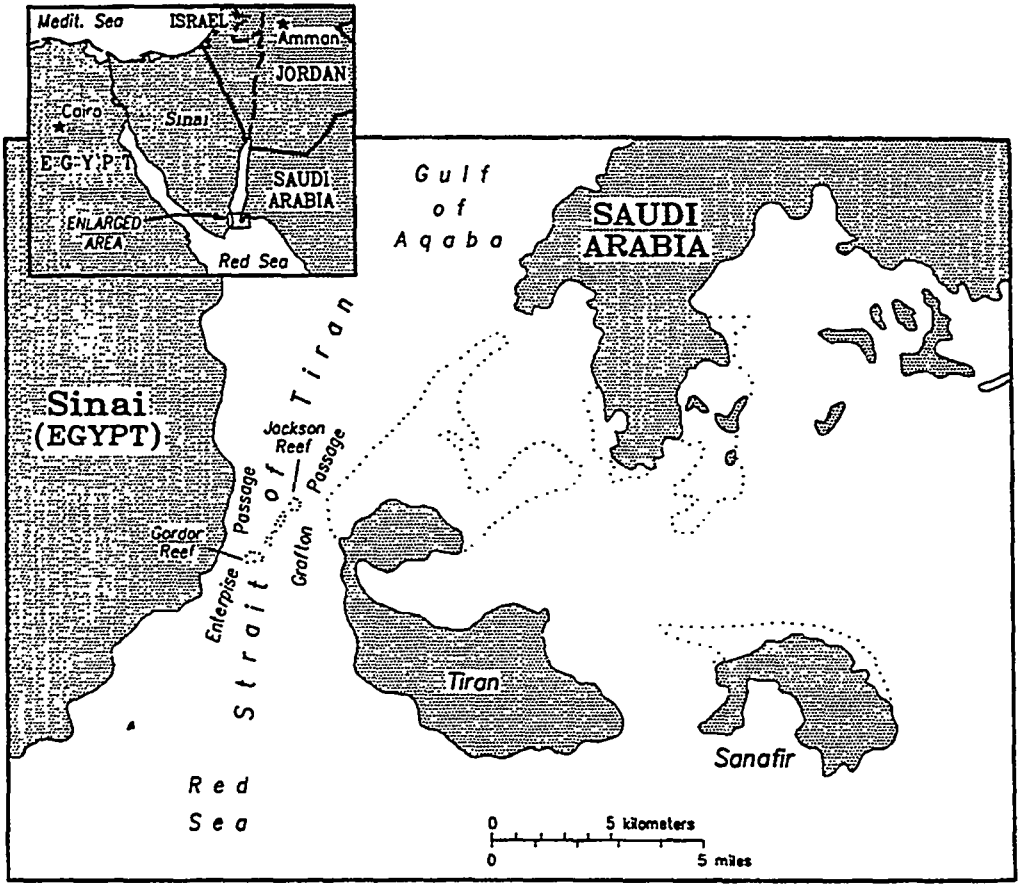
STRAIT OF MALACCA



Source: Roach & Smith, at 195.

FIGURE A2-6

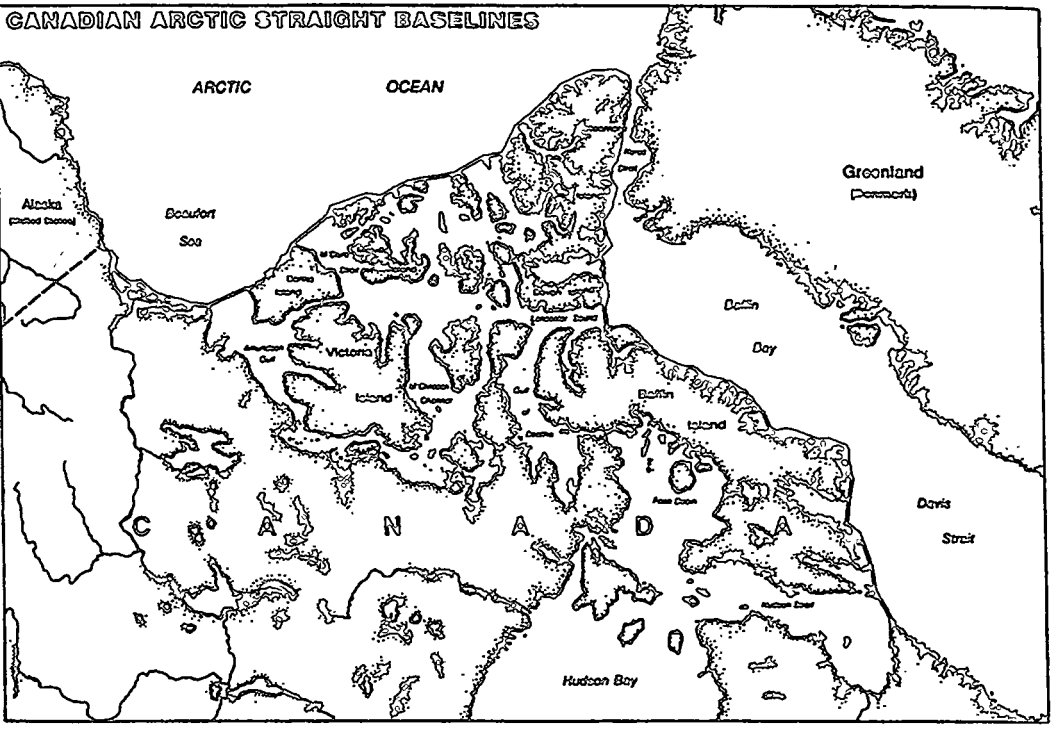
STRAIT OF TIRAN



Source: Roach & Smith, at 220.

FIGURE A2-7

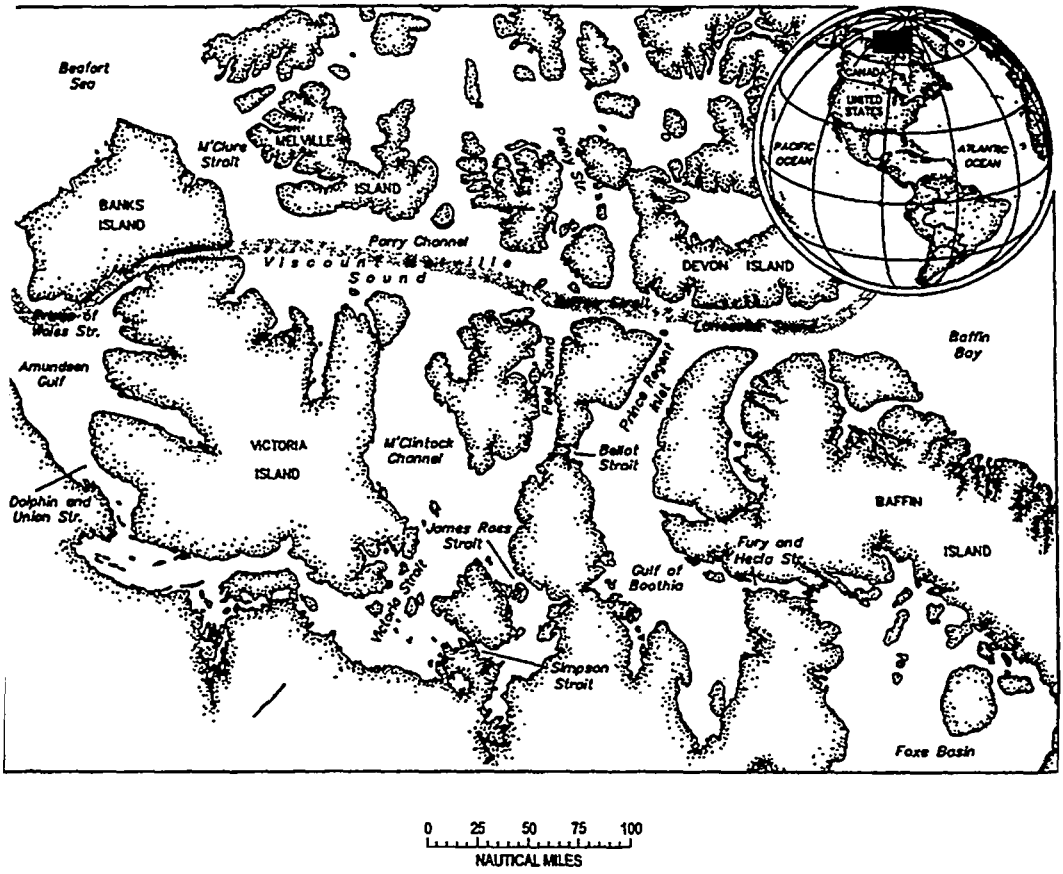
CANADIAN ARCTIC



Source: Roach & Smith, at 66.

FIGURE A2-8

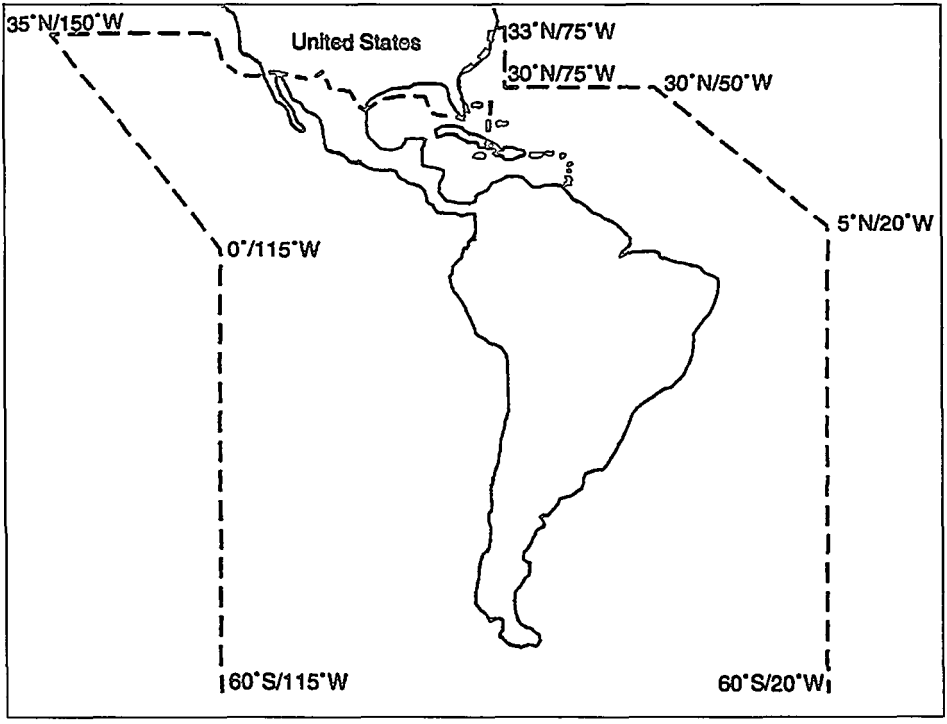
THE NORTHWEST PASSAGE



Source: Roach & Smith, at 208.

FIGURE A2-9

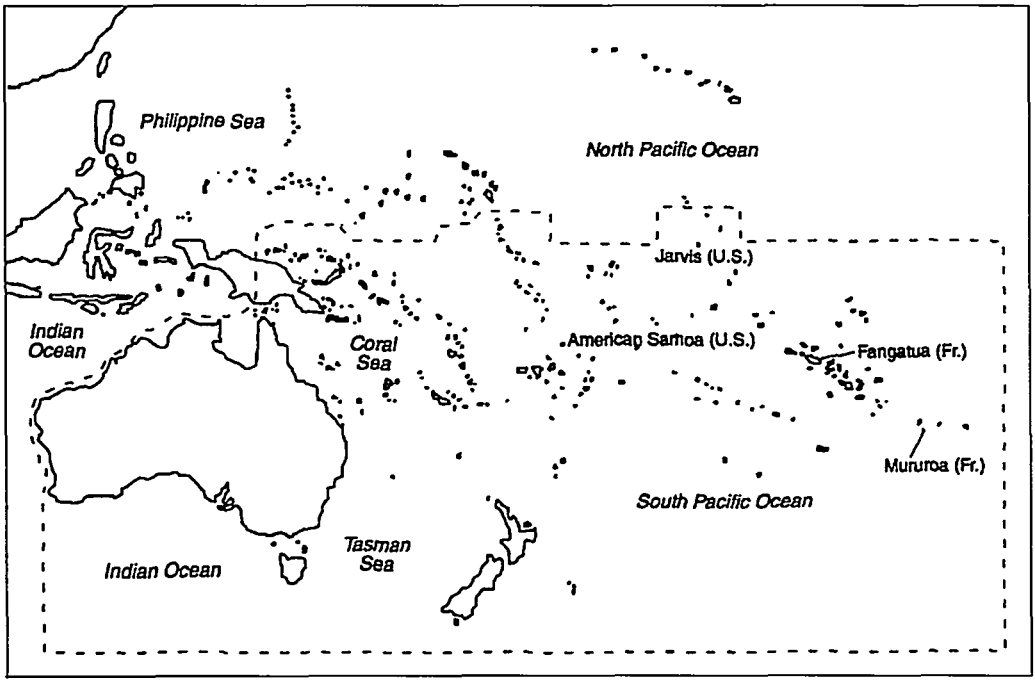
LATIN AMERICA NUCLEAR FREE ZONE



Source: Rosen, Nav. War Coll. Rev., Autumn 1996 at 46.

FIGURE A2-10

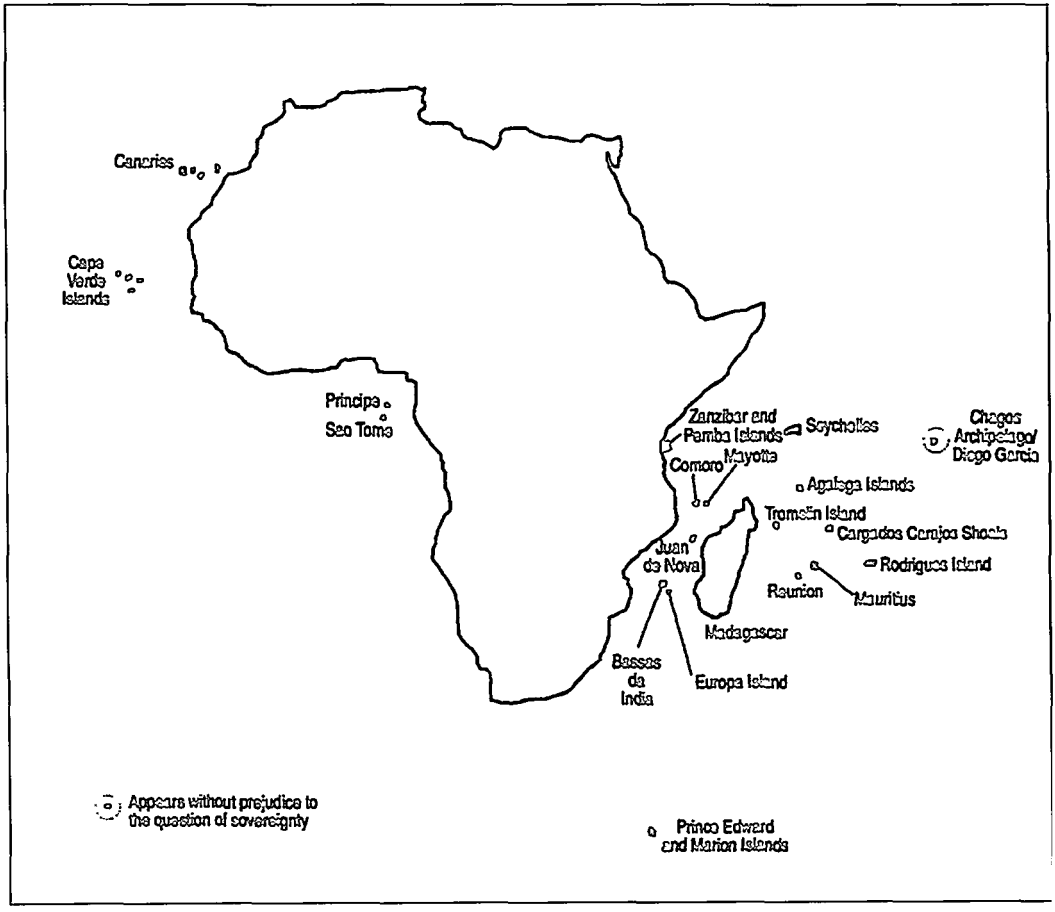
SOUTH PACIFIC NUCLEAR-FREE ZONE



Source: Rosen, Nav. War Coll. Rev., Autumn 1996 at 49.

FIGURE A2-11

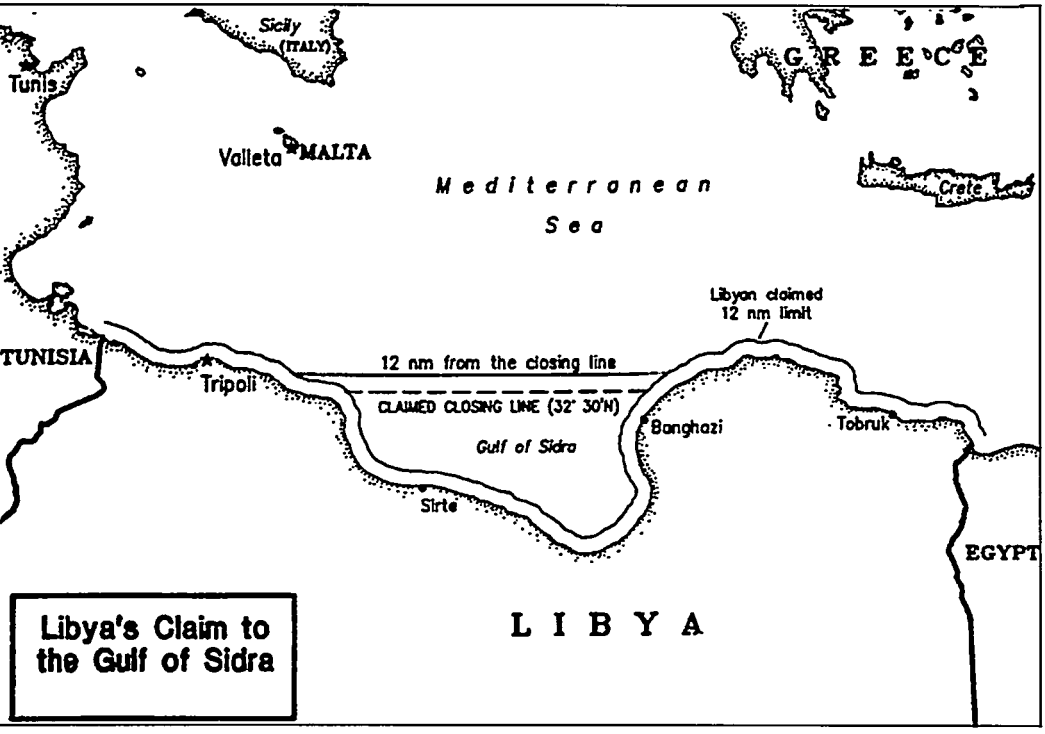
AFRICAN NUCLEAR-WEAPON-FREE ZONE



Source: Rosen, Nav. War Coll. Rev., Autumn 1996 at 50.

FIGURE A2-12

GULF OF SIDRA



Source: Roach & Smith, at 30.

TABLE A2-1

Restrictions on Warship Innocent Passage (As of 1 January 1997)

Nation	Restriction, Year of Claim	U.S. Protest	U.S. Assertion of Right of Innocent Passage
Albania	Special permission; 1946	1989	1985[a]
Algeria	Prior permission; 1963	1964[a]	1979[a]
Antigua & Barbuda	Prior permission; 1982	1987	1987
Bangladesh	Prior permission; 1974	1982	1996
Barbados	Prior permission; 1979	1982	1982[a]
Brazil	Prior permission; 1954		
Bulgaria	Limited to sea lanes; 1987	1982	
Burma	Prior permission; 1977	1982	1985[a]
Cambodia	Prior permission; 1982		1986[a]
Cape Verde	Prior permission; 1982	1989	1991
China (PRC)	Prior permission; 1958; 1992, 1996	1992[a]	1986[a]
Congo	Prior permission; 1977	1987	
Croatia	Prior notification; 1995		
Denmark	Prior permission; 1976	1991	
Djibouti	Nuclear power/materials; 1979	1989	
Egypt	Prior notification; 1983	1985	1993[a]
	Nuclear power/materials; 1982	1983	
Finland	Prior notification; 1981	1989	
Grenada	Prior permission; 1978	1982[a]	1988
Guyana	Prior notification; 1977	1982	1988
India	Prior notification; 1976	1976[a]	1985[a]
Indonesia	Prior notice; 1962		
Iran	Prior permission; 1982, 1994	1987[a]	1989[a]
Korea, South	Prior notification; 1978	1977[a]	
Libya	Prior notice; 1985	1985	
Maldives	Prior permission; 1976	1982	1981[a]
Malta	Prior notification; 1981	1981[a]	
Mauritius	Prior notification; 1977	1982	
Oman	Prior permission; 1989	1991	1991[a]
	Nuclear power/materials; 1989	1991	
Pakistan	Prior permission; 1976	1982	1986[a]
	Nuclear power/materials; 1976	1982	
Philippines	Prior permission; 1968	1969	1994

TABLE A2-1 (cont.)

Nation	Restriction, Year of Claim	U.S. Protest	U.S. Assertion of Right of Innocent Passage
Poland	Prior permission; 1968	1989	
Romania	Prior permission; 1956	1989	1985[a]
St. Vincent & the Grenadines	Prior permission; 1983		
Seychelles	Prior notification; 1977	1982	
Somalia	Prior permission; 1972	1982	1979[a]
Sri Lanka	Prior permission; 1977	1986	1985[a]
Sudan	Prior permission; 1970	1989	1979[a]
Syria	Prior permission; 1963	1989	1984[a]
United Arab Emirates	Prior permission; 1993		1995
Vietnam	Prior permission; 1980	1982	1982[a]
	Limit on number; 1980	1982	
Yemen	Prior permission (PDRY); 1967	1982	1982[a]
	Nuclear power/materials (PDRY); 1977	1982	
	Prior notification (YAR); 1978	1986	1979[a]
	Nuclear power (YAR); 1982	1986	
Yugoslavia, Former	Prior notification; 1965	1986[a]	1990
	Limit on number; 1986	1986	

[a] Multiple protests or assertions

Source: U.S. Department of State, Office of Ocean Affairs; Roach & Smith, at 158-9.

TABLE A2-2

Straits Formed by an Island of a Nation and the Mainland Where There Exists Seaward of the Island a Route Through the High Seas or an Exclusive Economic Zone of Similar Convenience

Coastal Nation	Strait	Island	Alternative Route
Argentina	Estrecho de la Maire	Isla de los Estados	high seas/eez route east of Isla de los Estados
Canada	Canso	Cape Breton	Cabot Strait
Canada	Georgia	Vancouver	high seas/eez route west of Vancouver Island
Canada	Jacques Cartier Passage	Anticosti	Cabot Strait
Canada	Johnstone	Vancouver	high seas/eez route west of Vancouver Island
Canada	Northumberland	Prince Edward	high seas/eez route north of Prince Edward Island
Canada	Queen Charlotte	Vancouver	high seas/eez route west of Vancouver Island
China	Hainan	Hainan	high seas/eez route south of Hainan Island
France	Ile d'Yeu	Ile d'Yeu	high seas/eez route west of Ile d'Yeu
Greece	Elafonisou[1]	Kithira	Kithira or Andirkithiron Straits
Italy	Messina	Sicily	high seas/eez route south of Sicily
Japan	Okushiri-kaikyo	Okushiri	high seas/eez route west of Okushiri Island
Japan	Rishiri-suido	Rishiri	high seas/eez route west of Rishiri Island
Japan	Sado-kaikyo	Sado	high seas/eez route west of Sado Island
New Zealand	Foveaux	Stewart	high seas/eez route south of Stewart Island
Russia	Provirv Litke	Karaginsky	high seas/eez route east of Ostov Karaginsky
Sweden	Kalmar Sund	Oland	high seas/eez route east of Oland Island
Tanzania	Mafia	Mafia	high seas/eez route east of Mafia Island

TABLE A2-2 (cont.)

Coastal Nation	Strait	Island	Alternative Route
Tanzania	Zanzibar Channel	Zanzibar	high seas/eez route east of Zanzibar Island
Turkey	Imroz	Imroz	high seas/eez route west of Imroz Island
United Kingdom	Pentland Firth	Orkney Islands	high seas/eez route north of the Orkneys
United Kingdom	The Solent	Isle of Wight	high seas/eez route south of the Isle of Wight

[1] Andikithiron Strait has a least width of 16 miles. Given Greece's 6-mile territorial sea claim, this leaves a high seas/eez corridor of 4 miles through the strait.

Source: Alexander, at 206-7.

TABLE A2-3

Straits in Which Passage is Regulated by Long-Standing Conventions in Force

Bosorus	Magellan	Store Baelt
Dardanelles	Oresund	

Source: Alexander, Navigational Restrictions, at 205.

TABLE A2-4

Straits Which do not Connect Two Parts of the High Seas or an Exclusive Economic Zone with One Another

(1) Straits Connecting the High Seas or an Exclusive Economic Zone with the Territorial Sea of a Foreign State

Bahran-Qatar Passage
Bahrain-Saudi Arabia Passage
Head Harbour Passage
Strait of Tiran

(2) Straits Connecting the High Seas or an Exclusive Economic Zone with Claimed Historic Waters

Strait	State	Claimed Historic Waters
Amundsen Gulf	Canada	Arctic Archipelago
Barrow Strait	Canada	Arctic Archipelago
Entrance to the Bay D'Amatique	Guatemala	Bay D'Amatique
Geographe Channel	Australia	Shark Bay
Hainan Strait*	China	Gulf of Tonkin
Hudson Strait	Canada	Hudson Bay
Investigator Strait	Australia	Gulf of St. Vincent
Kerch Strait	USSR	Sea of Azov
Lancaster Sound	Canada	Arctic Archipelago
M'Clure Strait	Canada	Arctic Archipelago
Naturaliste Channel	Australia	Shark Bay
Palk Strait	India	Gulf of Manaar
Pohai Strait	China	Gulf of Pohai
Prince of Wales Strait	Canada	Arctic Archipelago
Viscount Melville Sound	Canada	Arctic Archipelago

*China Claims the strait itself as historic, rather than the gulf with which it connects.

(3) Straits Connecting with Claimed "Special Status" Waters

Provliv Blagoveshchenskiy
Provliv Dmityra Lapteva
Provliv Karskiye Vorota
Provliv Longa
Provliv Sannikova
Provliv Shokal'skogo
Provliv Vilkit'skogo

Source: Alexander, at 207-8.

TABLE A2-5
International Straits: Least Width

Less than Six Miles in Width (52)

Alalakeiki Channel
Apolima Strait
Bali Channel
Beagle Channel
Bonifacio, Strait of
Bosporus
Canso Strait
Chatham Strait
Clarence Strait [U.S.]
Corfu Channel
Dardanelles
Dragon's Mouths
Durian Strait
Elafonisou Strait
Gaspar Strait
Georgia, Strait of
Goschen Strait
Head Harbour Passage
Icy Strait
Johnstone Strait
Kalmar Sund
Kerch Strait
Kuchinoshima-suido
Lamma Channel
Langeland Belt
Little Belt
Magellan, Strait of
Maqueda Channel
Massawa Strait
Messina, Strait of
Oresund
Palk Strait
Pentland Firth
Prince of Wales Strait
Provliv Nevel'skogo
Queen Charlotte Strait
Rosario Strait
Roti Strait
Saipan Channel
San Bernardino Strait
Sape Strait
Serpent's Mouth
Singapore Strait
The Solent
Store Baelt
Sumner Strait
Sunda Strait
Tiran, Strait of
Torees Strait
Vatu-I-Ra Channel
Verde Island Passage
Vieques Passage

Between Six and Twenty-four Miles in Width (153)

Adak Strait
Agattu Strait
Aland's Hav
Alas Strait
Andikithiron Strait
Api Passage
Aruba-Paraguana Passage
Auau Channel
Bab el Mandeb
Babuyan Channel (Luzon Strait)
Bahrain-Qatar Passage
Bahrain-Saudi Arabia Passage
Balabac Strait
Balintang Channel (Luzon Strait)
Bangka Passage
Bangka Strait
Banks Strait
Barrow Strait
Basilan Strait
Bass Strait
Belle Isle, Strait of
Berhala Strait
Bering Strait, East
Bering Strait, West
Boeton Passage
Bornholmsgat
Bougainville Strait
Bristol Channel
Cameroon Strait
Cheju Strait
Clarence Strait [Australia]
Coco Channel
Cook Strait
Dampier Strait
Dominica Channel
Dover Strait
Dundas Strait
Entrance to Bay d'Amatique
Entrance to the Gulf of Finland
Entrance to Gulf of Fonseca
Estrecho de la Maire
Etolin Strait
Etorofu-kaikyo
Fehmarn Belt
Foveaux Strait
Freu de Menorca
Galleons Passage
Geographe Channel
Gibraltar, Strait of
Greyhound Strait
Hainan Strait
Herbert Pass
Hecate Strait
The Hole
Huksan Jedo
Ile d'Yeu
Imroz Strait
Indispensable Strait
Investigator Strait
Isumrud Strait
Jacques Chartier Passage
Jailolo Passage
Juan de Fuca, Strait of
Jubal, Strait of
Kadet Channel
Kafireos Strait
Kaiwi Channel
Kalohi Channel
Kandavu Strait
Karpathos Strait
Kasos Strait
Kasos Strait
Kaulakahi Channel
Kealaikahiki Channel
Keas Strait
Kennedy Channel
Kithira Strait
Korea Strait, West
Koti Passage
Kunashiri-suido
Little Minch
Lombok Strait
Maemel Sudo
Mafia Strait

TABLE A2-5 (cont.)

Between Six and Twenty-four Miles in Width (cont.)

Malacca Strait
Manipa Strait
Manning Strait
Martinique Channel
Mayaguana Passage
Mindoro Strait
Mouchoir Passage
Nakanoshima-suido
Nanuku Passage
Nares Strait
Naturaliste Channel
Neumuro-kaikyo
North Channel
North Minch
Northumberland Strait
Notsuke-suido
Obi Strait
Okushiri-kaikyo
Old Bahama Channel
Ombai Strait
Osumi-kaikyo
Pailolo Channel
Pervyy Kuril'sky Provliv
Pescadores Channel
Pohai Strait
Polillo Strait
Provliv Alaid
Provliv Diany
Provliv Blagoveschenskiy
Provliv Golovnina
Provliv Krenitsyna
Provliv Litke
Provliv Luzhinka
Provliv Nadezhedy
Provliv Rikorda
Provliv Severgina
Provliv Shokal'skogo
Provliv Urup
Provliv Yevreinova
Rishiri-suido
Robeson Channel
Sado-kaikyo
St. George's Channel
St. Lucia Channel
St. Vincent Passage
Samalga Pass
Samsoe Belt
Santa Barbara Channel
Sapudi Strait
Seguam Pass
Serasan Passage
Shelikof Strait
Shikotan-siudo
Sibutu Passage
Soya-kaikyo
Surigao Strait
Suwanose-suido
Tanaga Pass
Tanegashima-kaikyo
Taraku-suido
Tokara-kaikyo
Tsugaru-kaikyo
Turks Island Passage
Unimak Pass
Virgin Passage
Vitiaz Strait
Wetar Strait
Yakushima-kaikyo
Yunaska Pass
Zanzibar Channel

More than Twenty-four Miles in Width (60)

Alenuihaha Channel
Amami Passage
Amchitka Pass
Amundsen Gulf
Amutka Pass
Anegada Passage
Balut Channel
Bashi Channel (Luzon Strait)
Cabot Strait
Caicos Passage
Chetvertyy Kuril'sky Provliv
Corsica-Elba Passage
Crooked Island Passage
Davis Strait
Denmark Strait
Detroit d'Honguedo
Dixon Entrance
Eight Degree Channel
Florida, Straits of, East
Florida, Straits of, South
Formosa Strait
Gorlo Strait
Great Channel
Grenada-Tobago Passage
Guadeloupe Passage
Hormuz, Strait of
Hudson Strait
Jamaica Passage
Kamchatsky Provliv
Karimata Strait
Kauai Channel
Korea Strait,East
Lancaster Sound
Makassar Strait
Malta Channel
M'Clure Strait
Mona Passage
Moxambique Channel
Otranto, Strait of
Pemba Channel
Preparis North Channel
Preparis North Channel
Preparis South Channel
Providence Channel, Northeast
Providence Channel, Northwest
Provliv Bussol
Provliv Dmitrya Lapteva
Provliv Karskiye Vorota
Provliv Kruzenshterna
Provliv Longa
Provliv Sannikova
Provliv Tatarskiy
Provliv Vil'kitskogo
St. George's Channel [U.K.-Ireland]
Sicily, Strait of
Silver Bank Passage
Sumba Strait
Ten Degree Channel
Viscount Melville Sound
Windward Passage
Yucatan Channel

Source: Alexander, at 202-3.

TABLE A2-6

Straits, Less Than 24 Miles in Least Width, in Which There Exists a Route Through the High Seas or an Exclusive Economic Zone of Similar Convenience With Respect to Navigational or Hydrographical Characteristics

Andikithiron Strait—4 (Greece)
Bahrain-Qatar Passage—13 (Bahrain/Qatar)
Banks Strait—3 (Australia)
Bass Strait—17 (Australia)
Bornholmsgat—6.5 (Denmark)
Bristol Channel—4 (U.K.)
Dover Strait—6 (U.K.)
Entrance to Gulf of Finland—3.4 (Finland)
Fehmarn Belt—4 (Denmark/Germany)
The Hole—14 (U.K.)
Kadet Channel—12 (Denmark/F.R.G.)
Karpathos Strait—11 (Greece)
Kasos Strait—11.8 (Greece)
Kennedy Channel—4.5 (Denmark)
Korea Strait West—7 (South Korea/Japan)
Little Minch—3 (U.K.)
Mayaguana Passage—14 (The Bahamas)
Mouchoir Passage—17 (U.K.)
Nares Strait—4 (Denmark)
North Channel—5 (U.K.)
Old Bahama Channel—3 (Bahamas)
Osumi-kaikyo—11 (Japan)
Robeson Channel—2 (Denmark)
Samsoe Belt—1 (Denmark)
Soya-kaikyo—7.5 (Japan/Russia)
Tsugaru-kaikyo—4 (Japan)
Turks Island Passage—12 (U.K.)

Distance given is for least width of the belt of high seas/EEZ, assuming current breadths claimed for territorial seas continue. Countries named are those off whose coasts the belt of high seas/EEZ exists.

Source: Alexander, at 206.

TABLE A2-7

States Whose EEZ Proclamations and/or National Laws Appear Inconsistent with the Convention Provisions Regarding Freedoms of Navigation and Overflight

Bangladesh—a, c, f
Burma—e
Cape Verde—b, c, f
Colombia—a, c, e
Comoros—a, c
Cook Islands—a, c, f
Costa Rica—a
Cuba—a
Dominican Republic—a
Fiji—a
France—c
Guinea-Bissau—a, c
Guyana—a, d, e
Haiti—b
Iceland—c
India—d, e
Indonesia—c
Ivory Coast—f
Kampuchea—c
Kenya—c
Malaysia—a, c
Maldives—a, d
Mauritania—d
Mauritius—d, e
Mexico—a
Mozambique—a, c
New Zealand—a, c
Nigeria—a, d
Norway—a, f
Oman—a, c
Pakistan—d, e, f
Portugal—f
Russia—d
Samoa—c, f
Sao Tome & Principe—a
Seychelles—d, e, f
Spain—f
Sri Lanka—c
Suriname—a, f
Togo—a, c
Trinidad & Tobago—a
United Arab Emirates—a
Uruguay—b
Vanuatu—c, e
Venezuela—a
Vietnam—c
Yemen (Aden)—e

a. States silent on the question of residual rights in their EEZ.
b. States claiming possession of residual rights in their EEZ.
c. States whose EEZ proclamations and/or national laws are silent on foreign rights to navigation and overflight in their EEZ.
d. States whose EEZ proclamations and/or national laws allow the government to regulate the navigation of foreign vessels in the EEZ or in nationally designated zones of the EEZ (see Table A2-8 (p. 2-89)).
e. States claiming "exclusive jurisdiction" over environemtnal protection in their EEZ.
f. States having special formulations with respect to environmental protection in their EEZ.

Source: Alexander, at 91.

TABLE A2-8

State Proclamations Regarding Navigation and Overflight in and over the EEZ

A. States whose EEZ proclamations and/or laws explicitly recognize the right of foreign navigation through and overflight over their national EEZ.

Barbados	Guatemala	Spain
Burma	Ivory Coast	Suriname
Cuba	Mexico	Thailand
Democratic Yemen	Norway	Trinidad and Tobago
Dominica	Philippines	United Arab Emirates (1)
Dominican Republic	Portugal	United States
Grenada	Sao Tome and Principe	Venezuela

(1) The UAE legislation provides that national rights in the EEZ "shall not prejudice international navigation rights exercised by states in accordance with the rules of international law." It is not clear if this provision applies to aircraft.

B. States whose EEZ proclamations and/or laws are silent on foreign navigation through and overflight over their national EEZ.

Bangladesh	Iceland	Oman
Cape Verde	Indonesia	Sri Lanka
Colombia	Kampuchea	Togo
Comoros	Kenya	Vanuatu
Cook Islands	Malaysia	Vietnam
France	Mozambique	Western Samoa
Guinea-Bissau	New Zealand	

C. States whose EEZ proclamations and/or laws explicitly allow the government to regulate the navigation of foreign vessels in the EEZ or nationally designed zones of the EEZ (article citations refers to the respective national legislation).

Guyana: The President may declare any area of the EEZ to be a designated area and make provisions he deems necessary with respect to "entry into and passage through the designated area of foreign ships by the establishment of fairways, sealanes, traffic separation schemes or any other mode of ensuring freedom of navigation which is not prejudicial to the interests of Guyana." [article 18(a) and (b) (vi)]

India: The government may provide for regulation of entry passage through designated area "by establishment of fairways, sealanes, traffic separation schemes or any other mode of ensuring freedom of navigation which is not prejudicial to the interests of India." [article 7(6) (Explanation)]

Maldives: "Ships of all States shall enjoy the right of innocent passage through the territorial waters and other exclusive economic zone of the Republic of the Maldives. . . [No] foreign fishing vessel shall enter its economic zone without prior consent of the Government of the Maldives." [article 1]

Mauritania: In its EEZ the rights and freedoms of States with respect to navigation, overflight, the laying of cables and pipelines, as provided for on the high seas, shall not be amended unless they adversely affect the provisions of Article 185 above [treating Mauritania's sovereign rights and jurisdiction in the EEZ] and the security of the Mauritanian State." [article 186]

Mauritius: The Prime Minister may provide in designated areas of the EEZ or continental shelf necessary provisions with respect to "the regulation of entry into the passage of foreign ships through the designated area" and "the establishment of fairways, sealanes, traffic separation schemes or any other mode of ensuring freedom of navigation which is not prejudicial to the interest of Mauritius." [article 9(a) and (b) (vi)]

TABLE A2-8 (cont.)

Nigeria: The government "may, for the purpose of protecting any installation in a designated area. . . prohibit ships. . . from entering without its consent such part of that area as may be specified." [article 392)]

Pakistan: The government may declare any area of the EEZ to be a designated area and make provisions as it deems necessary with respect to "the regulation of entry into the passage through the designated area of foreign ships by the establishment of fairways, sealanes, traffic separation schemes or any other mode of ensuring freedom of navigation which is not prejudicial to the interest of Pakistan." [article 6(a) and (b) (vi)]

Seychelles: The President may declare any area of the continental shelf or EEZ to be a designated area and make provisions as he considers necessary with respect to "the regulation of entry into and passage of foreign ships through the designated area [and] the establishment of fairways, sealanes, traffic separation schemes or any mode of ensuring freedom of navigation which is not prejudicial to the interest of Seychelles." [article 9(a) and (b) (vii)]

Russia: "In connection with certain specifically bounded regions of the economic zone of the USSR in which, for technical reasons connected with oceanographic and ecological conditions, as well as for the use of these regions or for the protection of their resources, or because of the special requirements for navigation in them, it is necessary that special obligatory measures shall be taken to prevent pollution from vessels, such measures, including those connected with navigation practices, may be established by the Council of Ministers of the USSR in regions determined by it. The borders of these special regions should be noted in 'Notification to Mariners'. ." [article 13]

Source: Alexander, at 91-92.

CHAPTER 3

Protection of Persons and Property at Sea and Maritime Law Enforcement

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, law 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 standing 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.

A nation may enforce its domestic laws at sea provided there is a valid jurisdictional basis under international law to do so. Because U.S. naval commanders may be called upon to assist in maritime law enforcement actions, or to otherwise protect persons and property at sea, a basic understanding of maritime law enforcement procedures is essential.

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.[1] 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.[2]

3.2.1 Assistance to Persons, Ships, and Aircraft in Distress. Customary international law has long recognized the affirmative obligation of mariners to go to the assistance of those in danger of being lost at sea. Both the 1958 Geneva Convention on the High Seas and the 1982 LOS Convention codify this custom by providing 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,[3] and its

1. *See* 2 O'Connell 853-58, MLEM 2-9, and paragraph 3.2.2 (p. 215). *Force majeure*, or Act of God, involves distress or stress of weather. Distress may be caused, *inter alia*, by equipment malfunction or navigational error, as well as by a shortage of food or water, or other emergency. Distress is further discussed in paragraph 2.3.2.1, note 25 (p. 116).

2. International Health Regulations, Boston, 1969, 21 U.S.T. 3003, T.I.A.S. 7026, 764 U.N.T.S. 3, as amended at Geneva, 1973, 25 U.S.T. 197, T.I.A.S. 7786. *See* paragraph 3.2.3 (p. 216) regarding the duty of commanders to comply with quarantine regulations.

3. High Seas Convention, art. 12; 1982 LOS Convention art. 98. "Article 98 [1982 LOS Convention] gives expression to the general tradition and practice of all seafarers and of maritime law regarding the rendering of assistance to persons or ships in distress at sea, and the elementary considerations of humanity." Nordquist, Vol. III at 571.

> "The duty to render assistance is also addressed in article 18 (Meaning of Passage). Under paragraph 2 of that article, a ship exercising its right of innocent passage through the territorial sea may stop and anchor if it is necessary for the purpose of rendering assistance to persons, ships or aircraft in danger or distress" ..... Article 98, paragraph 1(a) sets out the general obligation to render assistance to persons in distress 'at sea' (i.e., anywhere in the oceans). Article 98 is applicable in the exclusive economic zone in accordance with article 58, paragraph 2. Therefore, in combination with article 18, the duty to render assistance exists throughout the ocean, whether in the territorial sea, in straits used for international navigation, in archipelagic waters, in the exclusive economic zone or on the high seas."

Id., at 176-77.

See also International Convention for the Unification of Certain Rules of Law with Respect to Assistance and Salvage at Sea, Brussels, 23 September 1910, 37 Stat. 1658, T.I.A.S. 576; (to be superseded for States Party by the 1989 Salvage Convention, Chap. 2, art. 10.); and 46 U.S.C. sec. 2304 (1994). The United States ratified the 1989 International Convention on Salvage on 27 March 1992. *See* Senate Treaty Doc. 12, 102d Cong., 1st Sess. (1991). Further, the 1979 International Convention on Search and Rescue, T.I.A.S. 11093, requires parties to ensure that persons and property in distress at sea are provided assistance. This obligation has been fulfilled domestically through creation of a National Search and Rescue System. *See* National Search and Rescue Manual, U.S. Coast Guard, COMDTINST M16120.5A and .6A (vols. 1 & 2). *Compare*

(continued...)

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.[4] (See paragraph 2.3.2.5 for a discussion of "Assistance Entry.")

3.2.1.1 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.[5]

3.2.1.2 Duty of Naval Commanders. Article 0925, U.S. Navy Regulations, 1990, 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.[6] Article 4-2-5, U.S. Coast Guard Regulations (COMDTINST M5000.3 (series)) imposes a similar duty for the Coast Guard.

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

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3.(...continued)
art. 21 of the Second Geneva Convention of 1949 regarding the right of belligerents to appeal to the "charity of commanders of neutral merchant vessels, yachts or other craft, to take on board and care for the wounded, sick or shipwrecked persons, and to collect the dead" and the special protection accorded those who respond to such appeals. *See* paragraph 3.2.2.1 (p. 216) regarding the right of ships transiting territorial seas in innocent passage to render assistance to persons, ships or aircraft in danger or distress.

4. 46 U.S.C. sec. 2303 (1994).

5. 1974 International Convention for Safety of Life at Sea (SOLAS), Regulations 10 and 2, Chapter V, 32 U.S.T. 47, T.I.A.S. 9700. The failure of masters or persons in charge of vessels to render assistance so far as they are able (absent serious danger to their own vessel) to every person found at sea in danger of being lost is a crime under U.S. law punishable by a fine not exceeding $1,000 and/or imprisonment for up to two years (46 U.S.C. sec. 2304 (1994)). This section does not apply to public vessels (*see* 46 U.S.C. sec. 2109 (1994)).

6. In addition to these obligations explicitly required by the law of the sea conventions, U.S. Navy Regulations, 1990, art. 0925, also requires that ships and aircraft in distress be afforded all reasonable assistance. Actions taken pursuant to art. 0925 are to be reported promptly to the Chief of Naval Operations and other appropriate superiors. *See* Harry, Failure to Render Aid, U.S. Naval Inst. Proc., Feb. 1990, at 65.

well-founded apprehension of loss of or serious damage or injury to 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.[7] (See paragraph 4.4 for a discussion of aircraft in distress.)

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.[8]

3.2.3 Quarantine. Article 0859, U.S. Navy Regulations, 1990, requires that the commanding officer or aircraft commander of a ship or aircraft comply with quarantine regulations and restrictions. While commanding officers and aircraft commanders shall not permit inspection of their vessel or aircraft, they 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.[9] To avoid restrictions imposed by quarantine regulations, the commanding officer should request *free pratique*[10] in accordance with the Sailing Directions for that port.

3.3 ASYLUM AND TEMPORARY REFUGE

3.3.1 Asylum. International law recognizes the right of a nation to grant asylum to foreign nationals already present within or seeking admission to its territory.[11] The U.S. defines "asylum" as:

7. 2 O'Connell 853-58. *See also* paragraph 2.3.1, note 20 (p. 116).

8. Territorial Sea Convention, art. 14; 1982 LOS Convention, arts. 18 & 52. Innocent passage is discussed in greater detail in paragraph 2.3.2 (p. 116). *See also* paragraph 3.2.1, note 3 (p. 214).

9. *See also* SECNAVINST 6210.2 (series), Subj: Medical and Agricultural Foreign and Domestic Quarantine Regulations for Vessels, Aircraft, and Other Transports of the Armed Forces, and paragraph 3.2 (p. 213). The sovereign immunity of warships and military aircraft is discussed in paragraphs 2.1.2 (p. 110) and 2.2.2 (p. 114), respectively.

10. Clearance granted a ship to proceed into a port after compliance with health or quarantine regulations.

11. Sometimes referred to as "political asylum," the right of asylum recognized by the U.S. Government is territorial asylum. Christopher, Political Asylum, Dep't St. Bull., Jan. 1980, at 36. The 1948 U.N. Universal Declaration of Human Rights declares that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution," *see* Declaration on Territorial Asylum, 22 U.N. GAOR, Supp. No. 16, at 81, U.N. Doc. A/6716 (1968). The decision to grant asylum remains within the discretion of the requested nation. The Refugee Act of 1980, Pub. L.

(continued...)

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.[12]

Whether to grant asylum is a decision reserved to higher authority.

3.3.1.1 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

11.(...continued)
No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S. Code), for the first time created substantial protections for aliens fleeing persecution who are physically present in U.S. territory. The Act is carefully examined in Anker, Discretionary Asylum: A Protection Remedy for Refugees Under the Refugee Act of 1980, 28 Va. J. Int'l L. 1 (1987). With regard to illegal Haitian migrants, see the Agreement Relating to Establishment of a Cooperative Program of Interdiction and Selective Return of Persons Coming from Haiti, 33 U.S.T. 3559; T.I.A.S. 10,241, *reprinted in* 20 Int'l Leg. Mat'ls 1198 (1981), entered into force 23 Sept. 1981. *See also* Leich, Contemporary Practice of the United States Relating to International Law—Illegal Haitian Migrants, 83 Am. J. Int'l L. 906 (1989); paragraph 3.3.1.3, note 14 (p. 218).

12. This definition is derived from art. 1 of the 1951 Convention Relating to the Status of Refugees, 19 U.S.T. 6260, 189 U.N.T.S. 150 (in respect to refugees resulting from pre-1951 events), arts. 2 to 34 of which are incorporated in the 1967 Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. 6577, 606 U.N.T.S. 267, AFP 110-20 (Navy Supp.) at 37-2, which makes its provisions applicable without time reference. The United States is party to the latter instrument. Refugees are defined in 8 U.S.C. sec. 1101(42)(A) (1982) in substantially similar terms.

Asylum responsibility rests with the government of the country in which the seeker of asylum finds himself or herself. The U.S. Government does not recognize the practice of granting "diplomatic asylum" or long-term refuge in diplomatic missions or other government facilities abroad or at sea and considers it contrary to international law (*but see* paragraph 3.3.2 (p. 219)). However, exceptions to this policy have been made. For example, the United States received Cardinal Mindszenty in the U.S. Embassy in Budapest in 1956, and accorded him a protected status for some six years. 6 Whiteman 463-64. Several Pentacostals spent five years in the U.S. Embassy in Moscow between 1978 and 1983. 1 Restatement (Third), sec. 466 Reporters' Note 3, at 488-89. In 1989 two Chinese dissidents were received in the U.S. Embassy in Beijing. Wash. Post, 13 June 1989, at A25; Wall St. J., 13 June 1989, at A20.

Guidance for military personnel in handling requests for political asylum and temporary refuge (*see* paragraph 3.3.2 (p. 219)) is found in DODDIR. 2000.11; SECNAVINST 5710.22 (series), Subj: Procedures for Handling Requests for Political Asylum and Temporary Refuge; U.S. Navy Regulations, 1990, art. 0939; and applicable operations orders. These directives were promulgated after the Simas Kurdika incident. *See* Mann, Asylum Denied: The Vigilant Incident, Nav. War Coll. Rev., May 1971, at 4, *reprinted in* Lillich & Moore, Vol. 60 (1980) at 598; Goldie, Legal Aspects of the Refusal of Asylum by U.S. Coast Guard on 23 November 1970, Nav. War Coll. Rev., May 1971, at 32, *reprinted in* Lillich & Moore, Vol 60 (1980) at 626; Fruchterman, Asylum: Theory and Practice, 26 JAG J. 169 (1972). Special procedures, held locally, apply to Antarctica and Guantanamo Bay.

(continued...)

(including the U.S. territorial sea, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, territories under U.S. administration, and U.S. possessions), will be received on board any U.S. armed forces aircraft, vessel, 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 0939, U.S. Navy Regulations, 1990; SECNAVINST 5710.22 (series), and U.S. Coast Guard Maritime Law Enforcement Manual, COMDTINST M16247.1 (series) (MLEM), Enclosure 17, for specific guidance.)

3.3.1.2 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,[13] 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 granted. (See paragraph 3.3.2.)

3.3.1.3 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

12.(...continued)
On the other hand, some refugees may seek resettlement and not specifically request asylum, such as some of the Indochinese refugees encountered by U.S. naval vessels in the South China Sea since 1975. Guidance for handling refugee resettlement requests may be found in cognizant operations orders, such as CINCPACFLT OPORD 201, Tab E to Appendix 6 to Annex C, para. 3(b).

The legal protection of refugees and displaced persons are discussed in the following four articles appearing in 1988 Int'l Rev. Red Cross 325-78: Hacke, Protection by Action, at 325; Krill, ICRC Actions in Aid of Refugees, at 328; Mumtarbhorn, Protection and Assistance for Refugees in Ground Conflicts and Internal Disturbances, at 351; and Patrnogic, Thoughts on the Relationship Between International Humanitarian Law and Refugee Law, their Protection and Dissemination, at 367.

13. *See* paragraph 2.2.2 (p. 114) and Annex A2-1 (p. 155).

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.[14] 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.

3.3.2 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 0939, U.S. Navy Regulations, 1990, SECNAVINST 5710.22 (series), and the Coast Guard's MLEM.)

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 within the territorial jurisdiction of a foreign nation*[15] or [in international waters],[16] under conditions of urgency in order to secure the life or safety of that person against imminent danger, such as pursuit by a mob.

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14. This obligation, known as *non-refoulement*, is implemented by 8 U.S.C. sec. 1231(b)(3) (1997). *See* 2 Restatement (Third), sec. 711 Reporters' Note 7, at 195-96, and 1 *id.*, sec. 433, Reporters' Note 4, at 338-39.

This obligation does not apply to Haitian migrants intercepted at sea under the Haitian Migration Interdiction Program. Under this executive agreement between the United States and Haiti, 23 September 1981, 33 U.S.T. 3559, T.I.A.S. 10241, Haiti authorized U.S. Coast Guard personnel to board any Haitain flag vessel on the high seas or in Haitian territorial waters which the Coast Guard has reason to believe may be involved in the irregular carriage of passengers outbound from Haiti, to make inquiries concerning the status of those on board, to detain the vessel if it appears that an offense against U.S. immigration laws or appropriate Haitian laws has been or is being committed, and to return the vessel and the persons on board to Haiti. Under this agreement the United States "does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status." *See* Presidential Proclamation 4865, 3 C.F.R. 50 (1981 Comp.) (suspending the entry of undocumented aliens from the high seas); Executive Order 12324, 3 C.F.R. 180 (1981 Comp.) (prohibiting the return of a refugee without his consent and requiring observance of our international obligations); 5 Op. Off. Legal Counsel 242, 248 (1981) (discussing U.S. obligations under the Protocol); and *Haitian Refugee Center, Inc. v. Baker, Sec. of State*, 953 F.2d 1498 (11th Cir. 1991) (art. 33 not self-executing; interdiction at sea not judicially reviewable), *cert. denied*, 112 S. Ct. 1245 (1992). *See also Sale v. Haitian Centers Council*, 113 S. Ct. 2549 (1993).

15. Including foreign territorial seas, archipelagic waters, internal waters, ports, territories and possessions. *See* paragraph 3.3.1 (p. 216) regarding asylum in international waters

16. This definition derives from DODDIR 2000.11 of 3 Mar. 1972 (*see* paragraph 3.3, note 12 (p. 217)). The language of the actual definition provides, in pertinent part, "on the high seas." The

(continued...)

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.[17]

3.3.2.1 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 0939, U.S. Navy Regulations, 1990, and SECNAVINST 5710.22 (series), and the Coast Guard's MLEM.)

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).[18] The requesting foreign authorities will then be advised that the matter has been referred to higher authorities.

3.3.3 Inviting Requests for Asylum or Refuge. U.S. armed forces personnel shall neither directly nor indirectly invite persons to seek asylum or temporary refuge.[19]

3.3.4 Protection of U.S. Citizens. The limitations on asylum and temporary refuge are not applicable to U.S. citizens. See paragraph 3.10 and the standing rules of engagement for applicable guidance.

16.(...continued)
substituted language "[in international waters]" equates to that area of the oceans beyond the territorial sea which was regarded as high seas prior to the 1982 LOS Convention and advent of the exclusive economic zone. *See* paragraph 1.5 (p. 19).

17. All requests for asylum or temporary refuge received by Navy or Marine Corps units and activities will be reported immediately and by the most expeditious means to CNO or CMC in accordance with SECNAVINST 5710.22 (series). Coast Guard units and activities will report such requests through the chain of command for coordination with the Department of State in accordance with the MLEM. No information will be released by Navy or Marine Corps units or activities to the public or the media without the prior approval of the Assistant Secretary of Defense for Public Affairs or higher authority. Coast Guard units and activities are similarly constrained by the MLEM, E-17-8.

18. Coast Guard units and activities will report such requests in accordance with the MLEM, E-17-6.

19. U.S. Navy Regulations, 1990, art. 0939; SECNAVINST 5710.22 (series); MLEM, 12-3.

3.4 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, military aircraft, or other duly authorized ship or aircraft may *approach* any vessel in international waters to verify its nationality.[20] 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 (see paragraph 3.5).

2. Engaged in the slave trade (see paragraph 3.6).

3. Engaged in unauthorized broadcasting (see paragraph 3.7).

4. Without nationality (see paragraphs 3.11.2.3 and 3.11.2.4).

5. Though flying a foreign flag, or refusing to show its flag, the vessel is, in reality, of the same nationality as the warship.[21]

The procedure for ships exercising the right of approach and visit is similar to that used in exercising the belligerent right of visit and search during armed conflict described in paragraph 7.6.1. See Article 630.23, OPNAVINST 3120.32B, and paragraph 2.9 of the Coast Guard's MLEM for further guidance.

3.5 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:

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20. *Mariana Flora*, 24 U.S. (11 Wheaton) 1, 43-44 (1826); 4 Whiteman 515-22; 2 O'Connell 802-03. *See also* Zwanenberg, Interference with Ships on the High Seas, 10 Int'l & Comp. L.Q. 785 (1961); 1 Oppenheim-Lauterpacht 604; McDougal & Burke 887-93; 2 Moore 886; and 1 Hyde sec. 227. This customary international law concept is codified in art. 110, 1982 LOS Convention.

21. 1982 LOS Convention, art. 110. Sovereign immunity of warships is discussed in paragraph 2.1.2 (p. 110); the belligerent right of visit and search is discussed in paragraph 7.6 (p. 387).

[A]ll States shall cooperate to the fullest possible extent in the repression of piracy on the high seas[22] *or in any other place outside the jurisdiction of any State.*[23]

3.5.1 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 offences against the Law of Nations.[24]

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.[25]

3.5.2 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

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22. The international law of piracy also applies within the exclusive economic zone. 1982 LOS Convention, art. 58(2). Art. 19 of the High Seas Convention and art. 105 of the 1982 LOS Convention permit any nation to seize a pirate ship or aircraft, or a ship or aircraft taken by and under the control of pirates, and to arrest the persons and seize the property on board. The courts of the seizing nation may also decide upon the penalties to be imposed and the disposition of the ship, aircraft or property, subject to the rights of third parties acting in good faith.

23. High Seas Convention, art. 14; 1982 LOS Convention, art. 100.

24. Congressional exercise of this power is set out in 18 U.S.C. sections 1651-61 (1988) (piracy), 33 U.S.C. sections 381-84 (1988) (regulations for suppression of piracy), and 18 U.S.C. section 1654 (privateering). While U.S. law makes criminal those acts proscribed by international law as piracy, other provisions of U.S. municipal law proscribe, as criminal, related conduct. For example, U.S. law makes criminal arming or serving on privateers (18 U.S.C. sec. 1654), assault by a seaman on a captain so as to prevent him from defending his ship or cargo (18 U.S.C. sec. 1655), running away with a vessel within the admiralty jurisdiction (18 U.S.C. sec. 1656), corruption of seamen to run away with a ship (18 U.S.C. sec. 1657), receipt of pirate property (18 U.S.C. sec. 1660), and robbery ashore in the course of a piratical cruise (18 U.S.C. sec. 1661). *See* Menefee, "Yo Heave Ho!": Updating America's Piracy Laws, 21 Cal. West. Int'l L.J. 151 (1990).

25. 33 U.S.C. secs. 381 & 382 (1988). These sections also authorize issuance of instructions to naval commanders to send into any U.S. port any vessel which is armed or the crew of which is armed, and which shall have "attempted or committed any piratical aggression, search, restraint, depredation, or seizure, upon any vessel," U.S. or foreign flag, or upon U.S. citizens; and to retake any U.S. flag vessel or U.S. citizens unlawfully captured in international waters.

another ship or aircraft or persons and property on board. (Depredation is the act of plundering, robbing, or pillaging.)[26]

3.5.2.1 Location. In international law piracy is a crime that can be committed only on or over international waters (including the high seas, exclusive economic zone, and the contiguous zone), in international airspace, and in other places beyond the territorial jurisdiction of any nation. The same acts committed in the internal waters, 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.[27]

3.5.2.2 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

26. The 1982 LOS Convention defines piracy as follows:

> Piracy consists of any of the following acts:
>
> (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or or the passengers of a private ship or a private aircraft, and directed:
>
> (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
>
> (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
>
> (b) any act of voluntary participation in the operation of a ship or of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
>
> (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

1982 LOS Convention, art. 101. The High Seas Convention, art. 15, defines piracy in essentially identical terms. Municipal law definitions, however, vary. *Compare* paragraph 3.5.1, note 24 (p. 222). The international law of piracy is neither clearly nor completely set forth in the law of the sea conventions. See the discussions in 2 O'Connell 966-83; Rubin, The Law of Piracy; and Essays on Piracy, 21 Cal. West. Int'l L.J. 105-79 (1990).

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing an act of piracy. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act. High Seas Convention, art. 17; 1982 LOS Convention, art. 103.

O'Connell correctly notes that "it is the repudiation of all authority that seems to be the essence of piracy." 2 O'Connell 970.

27. In recent years, piracy has been prevalent in the Strait of Malacca, Singapore Strait, Gulf of Thailand, South China Sea, coastal waters off West Africa and Baja California, the Persian Gulf, and the Caribbean. The impact of modern piracy on the U.S. Navy is described *in* Petrie, Pirates and Naval Officers, Nav. War Coll. Rev., May-June 1982, at 15. *See also* Ellen, Contemporary Piracy, 21 Cal. West. Int'l L.J. 123 (1990).

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.[28] 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.[29]

3.5.2.3 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. Conversely, acts otherwise constituting piracy done for purely political motives, as in the case of insurgents not recognized as belligerents, are not piratical.[30]

3.5.2.4 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, the act is not piracy.[31] If, however, the ship or aircraft is thereafter used to commit acts of piracy, it

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28. High Seas Convention, art. 16; 1982 LOS Convention, art. 102.

29. However, the nationality of the vessel is not affected by its piratical use unless such is specifically provided for in the law of the country of the vessel's nationality. High Seas Convention, art. 18; 1982 LOS Convention, art. 104. It should be noted that it is not a precondition for a finding of piracy that the ship in question does not have the right to fly the flag, if any, which it displays. Additionally, the mere fact that a ship sails without a flag is not sufficient to give it the character of a pirate ship, although it could be treated as a ship without nationality. 2 O'Connell 755-57; 9 Whiteman 35-37.

30. "So long as the acts are those which are normally incidental to belligerent activity they would not be characterized as piracy, even though the actors may have only the most slender claims to international authority. . . . [I]t would be a false characterization of illicit acts to describe them as piracy when the intention of the insurgents is to wage war as distinct from committing random depredation." 2 O'Connell 975 & 976; 2 Restatement (Third), sec. 522, Reporters' Note 2, at 85. *See also*, Green, The Santa Maria: Rebels or Pirates, 37 Brit. Y.B. Int'l L. 465 (1961). Therefore, terrorist attacks on shipping for the sole purpose of achieving some political end are arguably not piracy under current international law. *See* paragraph 3.10 (p. 228). Terrorist acts committed on board or against a vessel are proscribed by the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (Rome Convention), 10 March 1988, 27 I.L.M. 668 (1988), (entered into force for the United States on 6 March 1995), codified at 18 U.S.C. sec. 2280 (1994). Acts of terrorism against an oil rig or platform anchored on the continental shelf are addressed in the Protocol to the Rome Convention. *See* Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf, 10 March 1988, 27 Int'l Leg. Mat'ls 685 (1988), implemented by the United States in 18 U.S.C. sec 2281 (1994). *See also* Omnibus Diplomatic Security and Anti Terrorism Act of 1986, Pub. L. No. 99-399, Title IX, sec. 906, codified at 33 U.S.C. sec. 1226 (1994), authorizing the Secretary of Transportation to take action including establishing safety and security zones on U.S. waters including the EEZ to prevent or respond to acts of terrorism.

31. Although it is a crime if it occurs on a U.S. flag vessel or aircraft under 18 U.S.C. sec. 1656. *See also* paragraph 3.5.2.3. (p. 224).

becomes a pirate ship or pirate aircraft and those on board voluntarily participating in such acts become pirates.[32]

3.5.3 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.[33]

3.5.3.1 Seizure of Pirate Vessels and Aircraft. A pirate vessel or aircraft encountered in or over U.S. or international waters may be seized and detained by any of the U.S. vessels or aircraft listed in paragraph 3.5.3. 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.[34]

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32. In international law certain types of acts, perhaps technically falling within the definition of piracy in paragraph 3.5.2 (p. 222), are generally recognized as not being piracy. Their general character is simply not of a nature so offensive and harmful to international maritime commerce and to the community of all nations as to warrant the designation of the perpetrators as enemies of the human race. Here a rule of reason is applied. For example, a mere quarrel followed by acts of violence or depredations occurring between fishermen in international waters ought not be regarded as an incident of piracy. Likewise, efforts (however unlawful) of conservationists to detain or disrupt whaling vessels on their high seas operations ought not generally be treated as piracy, but may violate U.S. criminal laws. *See also* Gehring, Defense Against Insurgents on the High Seas: The Lyla Express and Johnny Express, 27 JAG J. 317 (1973).

33. High Seas Convention, art. 21; 1982 LOS Convention, art. 107. U.S. Coast Guard cutters are warships. Paragraph 2.1.1, note 3 (p. 109).

In many cases, circumstances may be such that there is no reason to doubt the piratical nature of a ship or aircraft. Where, however, the situation is not so clear, before action may be taken against "pirates" it must first be ascertained that they are in fact pirates. A warship may exercise the right of approach and visit (*see* paragraph 3.4 (p. 221)) at any time to verify the nationality of another vessel and, if there are reasonable grounds to do so, to determine if it is engaged in piracy.

It is within the general authority of the naval commander to protect innocent shipping in international waters from piratical attack. This authority, with respect to U.S. citizens and U.S. flag vessels is specified in U.S. Navy Regulations, 1990, arts. 0914 and 0920; authority is derived from an amalgam of customary international law, treaty obligation, statute and Navy Regulations with respect to foreign flag vessels. Guidance for dealing with piracy is contained in the fleet commanders' basic operational orders, and for Coast Guard units, in the MLEM 12-13. The commander's specific authority to use force in such circumstances is derived from the standing rules of engagement promulgated by the operational chain of command. When circumstances permit, higher authority should be consulted. *See* para. 8c(5), Standing Rules of Engagement for U.S. Forces, Annex A4-3 (p. 277).

34. High Seas Convention, art. 19; 1982 LOS Convention, art. 105; 1 Restatement (Third), secs. 404 & 423 (an exercise of universal jurisdiction to prescribe and to enforce), and sec. 404 Reporters' Note 1, at 255. *See also* paragraph 3.11.1.5 (p. 234).

3.5.3.2 Pursuit of Pirates into Foreign Territorial Seas, 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 (see paragraphs 3.11.2.2. and 3.11.3.3). 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 seas or through archipelagic sea lanes or air routes, may proceed with or without the consent of the coastal nation or nations, provided the pursuit is expeditious and direct and the transit passage or archipelagic sea lanes passage rights of others are not unreasonably constrained in the process.[35]

3.6 PROHIBITION OF THE TRANSPORT OF SLAVES

International law strictly prohibits use of the seas for the purpose of transporting slaves.[36] The 1982 LOS Convention requires every nation to prevent and punish the transport of slaves in ships authorized to fly its flag.[37] If confronted with this situation, commanders should maintain contact, consult applicable standing rules of engagement and Coast Guard use of force policy, and request guidance from higher authority.

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35. *But see* Lowe, The Commander's Handbook on the Law of Naval Operations and the Contemporary Law of the Sea, *in* Robertson at 126.

36. Convention to Suppress the Slave Trade and Slavery, Geneva, 25 September 1926, 46 Stat. 2183, T.S. No. 778, 2 Bevans 607, 60 L.N.T.S. 253; Protocol Amending the Slavery Convention of 25 September 1926, New York, 7 December 1953, 7 U.S.T. 479, T.I.A.S. 3532, 182 U.N.T.S. 51; Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, Geneva, 5 September 1956, 18 U.S.T. 3201, T.I.A.S. 6418, 266 U.N.T.S. 3. This obligation is implemented in 18 U.S.C. sec. 1581-88 (1988). *See* 1 Restatement (Third), secs. 404 & 423, and Reporters' Note 1, at 253; and Sohn, Peacetime Use of Force on the High Seas, *in* Robertson at 39-59.

37. 1982 LOS Convention, art. 99. The Slavery Convention, Amending Protocol, and Supplementary Convention, note 36, do not authorize nonconsensual high seas boarding by foreign flag vessels. Nevertheless, such nonconsensual boarding was generally authorized in art. 22(1) of the 1958 High Seas Convention and reaffirmed in art. 110(1)(b) of the 1982 LOS Convention.

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 off-shore facility intended for receipt by the general public, contrary to international regulation.[38] Commanders should request guidance from higher authority if confronted with this situation.

3.8 SUPPRESSION OF INTERNATIONAL NARCOTICS TRAFFIC

All nations are required to cooperate in the suppression of the illicit traffic in narcotic drugs and psychotropic substances in international waters. International law permits any nation which has reasonable grounds to suspect that a ship flying its flag is engaged in such traffic to request the cooperation of other nations in effecting its seizure. International law also permits a nation which has reasonable grounds for believing that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying the marks of registry of another nation is engaged in illegal drug trafficking to request confirmation of registry and, if confirmed, request authorization from the flag nation to take appropriate action with regard to that vessel. Coast Guard personnel, embarked on Coast Guard cutters or U.S. Navy ships, regularly board, search and take law enforcement action aboard foreign-flagged vessels pursuant to such special arrangments or standing, bilateral agreements with the flag state.[39] (See paragraph 3.11.3.2 regarding utilization of U.S. Navy assets in the support of U.S. counterdrug efforts.)

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38. 1982 LOS Convention, art. 109. This provision supports the Regulations annexed to the International Telecommunications Convention, Malaga-Torremolinos, 25 October 1973, 28 U.S.T. 2495, T.I.A.S. 8572, and the Radio Regulations, Geneva, 6 December 1979. Unauthorized broadcasting from international waters is made a crime in the U.S. by 47 U.S.C. sec. 502 (1988). These rules are designed to aid in the suppression of "pirate broadcasting" which had become a problem to European countries within range of international waters in the North Sea in the 1960s, 2 O'Connell 814-19, and thus was not addressed in art. 22(1) of the 1958 High Seas Convention. The Malaga-Torremolinos Convention was replaced by the 1982 International Telecommunications Convention, Nairobi, 6 November 1982 (entered into force for the United States on 10 January 1986). *See also* Robertson, The Suppression of Pirate Broadcasting: A Test Case of the International System for Control of Activities Outside National Territory, 45.1 Law & Contemp. Problems 73 (1982).

39. 1982 LOS Convention, art. 108; U.N. Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, December 20, 1988, art. 17, entered into force 11 November 1990, 28 Int'l Leg. Mat'ls 497 (1989), and implemented by the United States in 46

(continued...)

3.9 RECOVERY OF 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. Government 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 standing rules of engagement and applicable operation order (e.g., CINCPACFLT OPORD 201, CINCLANTFLT OPORD 2000).[40]

3.10 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 individual and collective self-defense and protection of nationals provide the authority for U.S. armed forces to protect U.S. and, in some circumstances, foreign flag vessels, aircraft, property, and persons from violent and unlawful acts of others. U.S. armed forces should not interfere in the legitimate law enforcement actions of foreign authorities even when directed against U.S. vessels, aircraft, persons or property. Consult the JCS Standing Rules of Engagement for U.S. Forces for detailed guidance.[41]

39.(...continued)
U.S.C. App. sec. 1901-04 (1988), 49 U.S.C. App. sec. 781-789 (1988) and 14 U.S.C. sec. 89 (1988). The Single Convention on Narcotic Drugs, 1961, New York, 30 March 1961, 18 U.S.T. 1407, T.I.A.S. 6298, 520 U.N.T.S. 204, including the protocol amending the Single Convention on Narcotic Drugs, 1961, Geneva, 25 March 1972, 26 U.S.T. 1439, T.I.A.S. 8118, 976 U.N.T.S. 3, is implemented by the United States in 22 U.S.C. sec. 2291 (1988). *See also* Convention on Psychotropic Substances, Vienna, 21 February 1971, 32 U.S.T. 543, T.I.A.S. 9725, 1019 U.N.T.S. 175; Innis, The U.N. Convention, Fed. Bar News & J., March/April 1990, at 118-19; 2 Restatement (Third), sec. 522 comment d & Reporters' Notes 4 & 8; 1 *id.*, sec. 433, Reporters' Note 4, at 337-39; 2 *id.*, sec. 513, comment f; 1 *id.*, sec. 403, Reporters' Note 9, at 253-54 (special maritime and territorial jurisdiction of the United States). *See* Sohn, Peacetime Use of Force on the High Seas, *in* Robertson at 59-79.

40. *See also* paragraph 2.1.2.2 (p. 111) and Annex A2-3 (p. 163); regarding self-defense, *see* paragraph 4.3.2 (p. 259).

41. International law regards these doctrines as exceptional relief measures that are permitted, under certain pressing circumstances, to override interests protected by the countervailing principles of noninterference with foreign flag ships and aircraft and inviolability of foreign territory (including territorial seas). *See generally*, Chapter 4.

3.10.1 Protection of U.S. Flag Vessels and Aircraft, U.S. Nationals 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. nationals (whether embarked in U.S. or foreign flag vessels or aircraft), and their property against *unlawful* violence in and over international waters. Standing 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 aircraft and U.S. nationals and their property at sea conforms with U.S. and international law and reflects national policy.[42]

3.10.1.1 Foreign Internal Waters, Archipelagic Waters, and Territorial Seas. Unlawful acts of violence directed against U.S. flag vessels and aircraft and U.S. nationals within and over the internal waters, archipelagic waters, or territorial seas of a foreign nation present special considerations. The coastal nation is primarily responsible for the protection of all vessels, aircraft and persons lawfully within 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, its flag aircraft, and its nationals.[43] Because the coastal 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

42. High Seas Convention, arts. 4-5, and the 1982 LOS Convention, arts. 91-92, vest nationality of ships in the nation whose flag they fly, and reserve to that flag nation the exclusive right, in peacetime, to exercise jurisdiction over that ship on the high seas. U.S. Navy Regulations, 1990, arts. 0914, 0915 and 0920, also reflect this authority. It must be recognized that, for policy reasons, the U.S. Government may choose to protect only those vessels flying the U.S. flag notwithstanding the existence of other vessels flying foreign flags of convenience which are beneficially owned by U.S. persons or corporations.

43. 22 U.S.C. section 1732 (1988) requires the President to seek the release of U.S. nationals unjustly deprived of liberty by or under the authority of any foreign government by such means, not amounting to acts of war, as are necessary and proper to obtain or effectuate their release. The purpose of this statute, when it was enacted in 1868, was to ensure that naturalized citizens who return to their country of origin would be protected from unwarranted arrest to the same exent as native born Americans. The statute thus relates to the act of confinement, rather than to treatment after confinement, and not protection of their lives. 1975 Digest of U.S. Practice in International Law 253-54. Protection of nationals in the sense of this statute is among the duties of U.S. consular officers. *See* U.S. Consular Officers' Arrests Handbook, 1977 Digest of U.S. Practice in International Law 297-307.

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 and superjacent airspace.[44] U.S. naval commanders should consult applicable standing rules of engagement for specific guidance as to the exercise of this authority.

3.10.1.2 Foreign Contiguous Zones and Exclusive Economic Zones and Continental Shelves. The primary responsibility of coastal 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 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, in its exclusive economic zone to enforce its natural resource-related rules and regulations, and on its continental shelf to enforce its relevant seabed resources-related rules and regulations. When the coastal nation is acting lawfully in the valid exercise of such jurisdiction, or is in hot pursuit (see discussion in paragraph 3.11.2.2) 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. commanders should consult applicable standing rules of engagement for specific guidance as to the exercise of this authority.

3.10.2 Protection of Foreign Flag Vessels and 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 nationals and their property 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.[45] 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,

44. If a prior arrangement has been made with a coastal nation for U.S. forces to protect shipping in the waters of that nation, protective measures may be taken by U.S. warships and military aircraft for these purposes and subject to the limitations of that agreement. So doing would constitute the exercise of collective self-defense consistent with art. 51 of the United Nations Charter.

45. Such consent could be embodied in an agreement with the flag nation made in advance or may be considered inherent in a request from the vessel's master for assistance. If a prior arrangement has been made, protective measures may be taken for the purposes and subject to the

the considerations of paragraphs 3.10.1.1 and 3.10.1.2, respectively, would also apply. U.S. commanders should consult applicable standing rules of engagement for specific guidance.

3.10.3 Noncombatant Evacuation Operations (NEO).[46] The Secretary of State is responsible for the safe and efficient evacuation of U.S. Government personnel, their family members and private U.S. citizens when their lives are endangered[47] by war, civil unrest,[48] man-made or natural disaster.[49] The Secretaries of State and Defense are assigned lead and support responsibilities, respectively,[50] and, within their general geographic areas of responsibility, the combatant commanders are prepared to support the Department of State to conduct NEOs.[51]

3.11 MARITIME LAW ENFORCEMENT

As noted in the introduction to this Chapter, U.S. naval commanders may be called upon to assist in the enforcement of U.S. laws at sea, principally with respect to the suppression of the illicit traffic in narcotic drugs and psychotropic

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45.(...continued)
limitations of that agreement. The U.S. offer of distress assistance to friendly innocent neutral vessels in the Persian Gulf and Strait of Hormuz flying a nonbelligerent flag, outside declared war/exclusion zones, that were not carrying contraband or resisting legitimate visit and search by a Persian Gulf belligerent, is an example from the Iran-Iraq tanker war. Dep't St. Bull., July 1988, at 61.

46. *See generally* DoD Dir. 3025.14, Subj: Protection and Evacuation of U.S. Citizens and Designated Aliens in Danger Areas Abroad; JAGMAN sec. 1013; and FMFM 8-1, Special Operations, chap. 7.

47. 22 U.S.C. sec. 2671(b)(2(A) (emergency expenditure authority).

48. Where the lives of U.S. nationals are threatened, the United States has intervened in internal conflicts. *See* paragraph 4.3.2 and note 29 (p. 260). Regarding the Indochina evacuations, *see* 1975 Digest of U.S. Practice in International Law 875-79. On the evacuation of Somalia on 5 January 1991, *see* Wash. Post, 5 Jan. 1992, at A21.

49. Sec. 102(b) of the Diplomatic Security Act of 1986, as amended by sec. 115 of the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, Pub. L. 101-246, 104 Stat. 22, codified at 22 U.S.C. sec. 4801(b) (1994).

50. Executive Order 12656, Assignment of Emergency Preparedness Responsibilities, 18 Nov. 1988, 3 C.F.R. 585 (1988), secs. 502(2) & 1301(2)(f).

51. *See, e.g.*, USCINCEUR NEOPLAN 4310-90 (U). Para. 18 of SM-712-89, Unified Command Plan (UCP), 16 Aug. 1989, assigns USCINCCENT, USCINCEUR, USCINCLANT (now USACOM), USCINCPAC and USCINCSO responsibilities to the NCA for "[p]lanning and implementing the evacuation of US noncombatant and certain non-US persons abroad . . . in accordance with the provisions of [DoD Directive 3025.14]." NEOs and NEO planning for areas not included in these CINCs' AORs will be assigned as necessary by CJCS. UCP, para. 21. *See also* the JCS Standing Rules of Engagement. Annex A4-3 (p. 277). For an excellent analysis of legal issues associated with the conduct of a NEO *see* Day, Legal Considerations in Noncombatant Evacuation Operations, 40 Nav. L. Rev. 45 (1992).

substances into the United States. Activities in this mission area involve international law, U.S. law and policy, and political considerations. Because of the complexity of these elements, commanders should seek guidance from higher authority whenever time permits.

A wide range of U.S. laws and treaty obligations pertaining to fisheries, wildlife, customs, immigration, environmental protection, and marine safety are enforced at sea by agencies of the United States. Since these activities do not ordinarily involve Department of Defense personnel, they are not addressed in this publication.[52]

3.11.1 Jurisdiction to Proscribe. Maritime law enforcement action is premised upon the assertion of jurisdiction over the vessel or aircraft in question. Jurisdiction, in turn, depends upon the nationality, the location, the status, and the activity of the vessel or aircraft over which maritime law enforcement action is contemplated.[53]

International law generally recognizes five bases for the exercise of criminal jurisdiction: (a) territorial, (b) nationality, (c) passive personality, (d) protective, and (e) universal. It is important to note that international law governs the rights and obligations between nations. While individuals may benefit from the application of that body of law, its alleged violation cannot usually be raised by an individual defendant to defeat a criminal prosecution.[54]

3.11.1.1 Territorial Principle. This principle recognizes the right of a nation to proscribe conduct within its territorial borders, including its internal waters, archipelagic waters, and territorial sea.

3.11.1.1.1 Objective Territorial Principle. This variant of the territorial principle recognizes that a nation may apply its laws to acts committed beyond its territory which have their effect in the territory of that nation.[55] So-called "hovering vessels" are legally reached under this principle as well under the protective principle.[56] The extra-territorial application of U.S. anti-drug statutes is based largely on this concept. (See paragraphs 3.11.2.2.2 and 3.11.4.1.)

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52. *See* the MLEM for details.

53. *See* Paust, International Law as Law of the United States 387-404 (1996) (providing an excellent discussion of each of the internationally recognized bases of jurisdiction).

54. *See* 1 Restatement (Third), secs 402 & 404. Nor can an individual ordinarily assert a breach of international law as the basis for, or in defense of, a civil action, without the intervention of the State of which he or she is a national. *See* Henkin, Pugh, Schachter & Smit, International Law (1993) at 374-78.

55. *United States v. Postal*, 589 F.2d 862, 885 (5th Cir. 1979).

56. *See* the Hovering Vessels Act of 1935, codified at 19 U.S.C. secs. 1401(k), 1432a, 1436, 1455, 1581, 1584, 1586, 1587, 1615, 1709(d) and 46 U.S.C. sec. 91; *Ford v. United States*, 273 U.S. 593, 618-19, 623 (1927) (alcohol); *United States v. Gonzalez*, 875 F.2d 875 (D.C. Cir. 1989) (drugs); and *United States v. Cariballo-Tamayo*, 865 F.2d 1179 (11th Cir. 1989) (drugs).

3.11.1.2 Nationality Principle. This principle is based on the concept that a nation has jurisdiction over objects and persons having the nationality of that nation. It is the basis for the concept that a ship in international waters is, with few exceptions, subject to the exclusive jurisdiction of the nation under whose flag it sails. Under the nationality principle a nation may apply its laws to its nationals wherever they may be[57] and to all persons, activities, and objects on board ships and aircraft having its nationality. As a matter of international comity and respect for foreign sovereignty, the United States refrains from exercising that jurisdiction in foreign territory.[58]

3.11.1.3 Passive Personality Principle. Under this principle, jurisdiction is based on the nationality of the victim, irrespective of where the crime occurred or the nationality of the offender.[59] U.S. courts have upheld the assertion of jurisdiction under this principle in cases where U.S. nationals have been taken hostage by foreigners abroad on foreign flag ships and aircraft,[60] and where U.S. nationals have been the intended target of foreign conspiracies to murder.[61] This principle has application to the apprehension and prosecution of international terrorists.[62]

3.11.1.4 Protective Principle. This principle recognizes the right of a nation to prosecute acts which have a significant adverse impact on its national security or governmental functions. Prosecution in connection with the murder of a U.S. Congressman abroad on official business was based upon this principle.[63]

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57. Active duty U.S. military members, for example, are subject to the Uniform Code of Military Justice (UCMJ) at all times and in all places. *See* UCMJ, Art. 2.

58. UCMJ jurisdiction over U.S. military members is exercised in foreign territory pursuant to status of forces agreements (SOFAs) with host nations. For example, article VII 1(a) of the NATO SOFA provides:

> (a) the military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the Sending State over all persons subject to the military law of that State.

Art. VII 1(a), Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Forces, Washington, 19 June 1951, 4 U.S.T. 1792, 119 U.N.T.S. 67, T.I.A.S. 2846, *reprinted in* AFP 110-20 at 2-2.

59. The passive personality principle has been disputed as a permissible basis of jurisdiction, "although no objections to its exercise have been made in recent years." Henkin, Pugh, Schachter & Smit, International Law (1993) at 1067.

60. *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991) (*Yunis III*); 18 U.S.C. sec. 1203.

61. *United States v. Layton*, 855 F.2d 1388 (9th Cir. 1988) (U.S. citizen defendant); *United States v. Benitez*, 741 F.2d 1312, 1316 (11th Cir. 1984), *cert. denied* 471 U.S. 1137 (1985) (Colombian defendant).

62. *See Yunis III*, note 60.

63. *United States v. Layton*, 855 F.2d 1388 (9th Cir. 1988).

Foreign drug smugglers apprehended on non-U.S. flag vessels on the high seas have been successfully prosecuted under this principle of international criminal jurisdiction.[64]

3.11.1.5 Universal Principle. This principle recognizes that certain offenses are so heinous and so widely condemned that any nation may apprehend, prosecute and punish that offender on behalf of the world community regardless of the nationality of the offender or victim.[65] Piracy and the slave trade have historically fit these criteria.[66] More recently, genocide,[67] certain war crimes,[68] hostage taking,[69] and aircraft hijacking[70] have been added to the list of such universal crimes.[71]

3.11.2 Jurisdiction to Enforce

3.11.2.1 Over U.S. Vessels. U.S. law applies at all times aboard U.S. vessels as the law of the flag nation and is enforceable on U.S. vessels by the U.S. Coast Guard anywhere in the world.[72] As a matter of comity and respect of foreign sovereignty, enforcement action is not undertaken in foreign territorial seas, archipelagic waters, or internal waters without the consent of the coastal nation.

For law enforcement purposes, U.S. vessels are those which:

1. Are documented or numbered under U.S. Law;

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64. *United States v. Alomia-Riascos*, 825 F.2d 769 (4th Cir. 1987); *United States v. Romero-Galue*, 757 F.2d 1147, 1154 (11th Cir. 1985).

65. *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582 (6th Cir. 1985).

66. *See* paragraphs 3.5 (p. 221) and 3.6 (p. 226).

67. Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948, 78 U.N.T.S. 277; Restatement (Third) sec. 404; *Demjanjuk v. Petrovsky*, note 65.

68. Adolf Eichman was tried by Israel under the universal principle of jurisdiction for war crimes and crimes against humanity committed in Germany during the course of World War II. Henkin, *et al.*, paragraph 3.11.1.3, note 59 (p. 233), at 1085. *See also* paragraph 6.2.5 (p. 343).

69. International Convention Against the Taking of Hostages, New York, 17 December 1979, T.I.A.S. 11081. *See also* 18 U.S.C. sec. 1203 (1994).

70. Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Tokyo, 14 September 1963, 20 U.S.T. 2941, T.I.A.S. 6768, 704 U.N.T.S. 219; Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), The Hague, 16 December 1970, 22 U.S.T. 1641, T.I.A.S. 7192; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), Montreal, 23 September 1971, 24 U.S.T. 564, T.I.A.S. 7570; Protocol Extending the Montreal Convention to Cover Acts of Violence at Airports Serving Civil Aviation, 27 I.L.M. 67 (1988). *See also* 49 U.S.C. App., sec. 1472 (1994).

71. *See also* 1 Restatement (Third), sec. 404 RN1, at 255-57.

72. 14 U.S.C. sec. 89 (1994).

2. Are owned in whole or in part by a U.S. citizen or national (including corporate entities) and not registered in another country; or

3. Were once documented under U.S. law and, without approval of the U.S. Maritime Administration (MARAD) have been either sold to a non-U.S. citizen or placed under foreign registry or flag.[73]

3.11.2.2 Over Foreign Flag Vessels. The ability of a coastal nation to assert jurisdiction legally over non-sovereign immune foreign flag vessels depends largely on the maritime zone in which the foreign vessel is located and the activities in which it is engaged. The internationally recognized interests of coastal nations in each of these zones are outlined in Chapter 2.

Maritime law enforcement action may be taken against a flag vessel of one nation within the national waters of another nation when there are reasonable grounds for believing that the vessel is engaged in violation of the coastal nation's laws applicable in those waters, including the illicit traffic of drugs.[74] Similarly, such law enforcement action may be taken against foreign flag vessels without authorization of the flag nation in the coastal nation's contiguous zone (for fiscal, immigration, sanitary and customs violations), in the exclusive economic zone (for all natural resources violations), and over the continental shelf (for seabed resource violations). In the particular case of counter-drug law enforcement (of primary interest to the Department of Defense), coastal nation law enforcement can take place in its internal waters, archipelagic waters, territorial sea, or contiguous zone without the authorization of the flag nation. Otherwise, such a vessel is generally subject to the exclusive jurisdiction of the nation of the flag it flies.[75] Important exceptions to that principle are:

3.11.2.2.1 Hot Pursuit. Should a foreign ship fail to heed an order to stop and submit to a proper law enforcement action[76] when the coastal nation has good reason to believe that the ship has violated the laws and regulations of that nation,

73. 46 U.S.C. App. sec. 1903(b) (1994).

74. 1982 LOS Convention, art. 108(2); 1988 Vienna Drug Convention, art. 7(2) & (3).

75. 1958 High Seas Convention, art. 6(1); 1982 LOS Convention, art. 92(1).

76. Hot pursuit is extensively discussed *in* 2 O'Connell 1075-93 and Knight & Chiu, The International Laws of the Sea 385 (1991). *See also* Maidmont, Historic Aspects of the Doctrine of Hot Pursuit, 46 Br. Y.B. Int'l L. 365 (1972-1973); Poulantzas, The Right of Hot Pursuit in International Law (1969); and Nordquist, Vol. III 247-260.

Hot pursuit is to be distinguished from the right to take pursuing action, as necessary to ensure the safety of threatened forces or territory, under the fundamental principle of self-defense (*see* paragraph 4.3.2 (p. 259)). The latter is a much broader concept, not dependent upon whether the threat occurs within territorial waters or the contiguous zone. This concept is frequently referred to as "immediate pursuit" or "self-defense pursuit."

hot pursuit may be initiated.[77] 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.[78] 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.[79] 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.[80] 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.[81] 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.[82] 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 nation applicable to the exclusive economic zone or the continental shelf, including such safety zones.[83]

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77. High Seas Convention, art. 23(1); 1982 LOS Convention, art. 111(1). Both the High Seas Convention and the 1982 LOS Convention require that there be "good reason" to believe such a violation has occurred. It is therefore clear that while mere suspicion does not trigger the right, actual knowledge of an offense is not required. 2 O'Connell 1088.

78. High Seas Convention, art. 23(1); 1982 LOS Convention, art. 111(1). The reference to "one of its boats" reflects the doctrine of constructive presence recognized in the High Seas Convention, art. 23(1) & (4), and the 1982 LOS Convention, art. 111(1) & (4). *See* paragraph 3.11.2.2.2 (p. 237). *See also* 2 O'Connell 1092-93.

79. High Seas Convention, art. 23(4); 1982 LOS Convention, art. 111(5).

80. High Seas Convention, art. 23(1); 1982 LOS Convention, art. 111(1). The doctrine applies to all violations within the territorial sea and to violations of customs, fiscal, sanitary, and immigration laws and regulations in the contiguous zone. However, some contend hot pursuit commenced in the contiguous zone may be only for offenses committed in the territorial sea, and not for offenses in the contiguous zone. 2 O'Connell 1083-84. The contiguous zone is defined in paragraph 2.4.1 (p. 129).

81. High Seas Convention, art. 23(2); 1982 LOS Convention, art. 111(3); 2 Restatement (Third), sec. 513 Comment g, at 49.

82. High Seas Convention, art. 23(4); 1982 LOS Convention, art. 111(5); Restatement (Third), sec. 513, Comment g. Because of *posse comitatus* limitations (*see* paragraph 3.11.3.1 (p. 241)), the right of hot pursuit is not normally exercised by the U.S. Navy or U.S. Air Force but rather by U.S. Coast Guard forces. However, while U.S. practice is to utilize Coast Guard forces for that purpose, under international law, all warships and military aircraft, regardless of service affiliation, may properly exercise the right of hot pursuit. *Id.*; Allen, Doctrine of Hot Pursuit: A Functional Interpretation Adaptable to Emerging Technologies and Practices, 20 Ocean Dev. & Int'l L. 309, 37 (1989).

83. 1982 LOS Convention, art. 111(2). *See also* Nordquist, Vol. III 249-260.

a. 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 craft 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 only 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.[84]

b. Hot Pursuit by Aircraft. Where hot pursuit is effected by aircraft:

(1) The preceding provisions apply.

(2) 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.[85]

c. Requirement for Continuous Pursuit. Hot pursuit must be continuous, either visually or through electronic means. The ship or aircraft giving the order to stop must itself actively pursue the ship until another ship or aircraft of or authorized by the coastal nation, summoned by the ship or aircraft, arrives to take over the pursuit, unless the ship or aircraft is itself able to arrest the ship.[86]

3.11.2.2.2 Constructive Presence. A foreign vessel may be treated as if it were actually located at the same place as any other craft with which it is cooperatively engaged in the violation of law. This doctrine is most commonly used in cases involving mother ships which use contact boats to smuggle contraband into the coastal nation's waters. In order to establish constructive presence for initiating hot pursuit, and exercising law enforcement authority, there must be:

1. A foreign vessel serving as a mother ship beyond the maritime area over which the coastal nation may exercise maritime law enforcement jurisdiction;

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84. High Seas Convention, art. 23(3); 1982 LOS Convention, art. 111(4).

Where a ship has been stopped or arrested beyond the territorial seas in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained. High Seas Convention, art. 23(7); 1982 LOS Convention, art. 111(8).

85. High Seas Convention, art. 23(5); 1982 LOS Convention, art. 111(6). *See also* Knight & Chiu, paragraph 3.11.2.2.1, note 76 (p. 235), at 385-86.

86. Allen, note 82 (p. 236) at 319-20; McDougal & Burke at 897.

2. A contact boat in a maritime area over which that nation may exercise jurisdiction (i.e., internal waters, territorial sea, archipelagic waters, contiguous zone, EEZ, or waters over the continental shelf) and committing an act subjecting it to such jurisdiction; and

3. Good reason to believe that the two vessels are working as a team to violate the laws of that nation.[87]

3.11.2.2.3 Right of Approach and Visit. See paragraph 3.4.

3.11.2.2.4 Special Arrangements and International Agreements. International law has long recognized the right of a nation to authorize the law enforcement officials of another nation to enforce the laws of one or both on board vessels flying its flag. The 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances specifically recognizes and encourages such arrangements and agreements to aid in the suppression of this illegal traffic. Special arrangements may be formalized in written agreements or consist of messages or voice transmissions via diplomatic channels between appropriate representatives of the requesting and requested nations. International agreements authorizing foreign officials to exercise law enforcement authority on board flag vessels take many forms. They may be bilateral or multilateral; authorize in advance the boarding of one or both nations' vessels; and may permit law enforcement action or be more limited. Typically, the flag nation will verify (or refute) the vessel's registry claim, and authorize the boarding and search of the suspect vessel. If evidence of a violation of law is found, the flag nation may then authorize the enforcement of the requesting nation's criminal law (usually with respect to narcotics trafficking) or may authorize the law enforcement officials of the requesting nation to act as the flag nation's agent in detaining the vessel for eventual action by the flag nation itself. The flag nation may put limitations on the grant of law enforcement authority and these restrictions must be strictly observed.[88]

87. 1958 High Seas Convention, art. 23(3); 1982 LOS Convention, art. 111(4); 19 U.S.C. secs. 1401(k), 1581(g) & 1587 (1994) (customs law violations by hovering vessels); McDougal & Burke 909-18; Lowe 172-73; *The I'm Alone* (Canada v. U.S.) 3 R.I.A.A. v. 09 (1941). *But see* 2 O'Connell 1092-93.

88. Art. 17, U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 20 December 1988, *reprinted in* 28 Int'l Leg. Mat'ls 493 (1989); 46 U.S.C. App. sec. 1903(c); 19 U.S.C. sec. 1581(h); *United States v. Quemener*, 789 F.2d 145 (2d Cir.), *cert. denied*, 479 U.S. 829 (1986) (US-UK agreement of 13 Nov. 1981, 33 U.S.T. 4224, T.I.A.S. 10296); *United States v. Williams*, 589 F.2d 210, *rehearing en banc*, 617 F.2d 1063 (5th Cir. 1980) (special arrangement with Panama). *See also* 2 Restatement (Third), sec. 522 RN 8, at 88; and Gilmore, Narcotics Interdiction at Sea: UK-US Cooperation, 13 Marine Policy 218-30 (1989).

(continued...)

3.11.2.3 Over Stateless Vessels. Vessels which are not legitimately registered in any one nation are without nationality and are referred to as "stateless vessels". They are not entitled to fly the flag of any nation and, because they are not entitled to the protection of any nation, they are subject to the jurisdiction of all nations.[89] Accordingly, stateless vessels may be boarded upon being encountered in international waters by a warship or other government vessel and subjected to all appropriate law enforcement actions.[90]

3.11.2.4 Over Vessels Assimilated to Statelessness. Vessels may be assimilated to a ship without nationality, that is, regarded as a stateless vessel, in some circumstances. The following is a partial list of factors which should be considered in determining whether a vessel is appropriately assimilated to stateless status:

No claim of nationality

Multiple claims of nationality (e.g., sailing under two or more flags)

Contradictory claims or inconsistent indicators of nationality (i.e., master's claim differs from vessel's papers; homeport does not match nationality of flag)

Changing flags during a voyage

Removable signboards showing different vessel names and/or homeports

Absence of anyone admitting to be the master; displaying no name, flag or other identifying characteristics

Refusal to claim nationality.[91]

88.(...continued)
The United States has entered into numerous bilateral agreements addressing counterdrug and alien migrant interdiction law enforcement operations with nations around the world. Many of the agreements, particularly those with Caribbean nations, provide U.S. Coast Guard law enforcement officers with authority to stop, board and search the vessels of the other party seaward of their territorial seas; to embark U.S. law enforcement officials on their vessels and to enforce certain of their laws; to pursue fleeing vessels or aircraft into the waters or airspace of the other party; and to fly into their airspace in support of counterdrug operations. *See generally* MLEM, encl. 4 and the listing of bilateral maritime counterdrug/alien migrant interdiction operations agreements at Table A3-1 (p. 247).

89. 1982 LOS Convention, art. 110(1)(d).

90. 2 Restatement (Third), sec. 522(2)(b) & Reporters' Note 7, at 87-88.

91. 1958 High Seas Convention, art. 6(2); 1982 LOS Convention, art. 92(2); 46 U.S.C. App. sec. 1903(c)(1) (1994); *United States v. Passos-Paternina*, 918 F.2d 979 (1st Cir.), *cert. denied*, 499 U.S. 982 (1990).

Determinations of statelessness or assimilation to statelessness usually require utilization of the established interagency coordination procedures (see paragraph 3.11.3.4).

3.11.2.5 Other Actions. When operating in international waters, warships, military aircraft, and other duly authorized vessels and aircraft on government service (such as auxiliaries), may engage in two other actions in conjunction with maritime law enforcement, neither of which constitute an exercise of jurisdiction over the vessel in question. However, such actions may afford a commander with information which could serve as the basis for subsequent law enforcement.

3.11.2.5.1 Right of Approach. See paragraph 3.4 for a discussion of the exercise of the right of approach preliminary to the exercise of the right of visit.

3.11.2.5.2 Consensual Boarding. A consensual boarding is conducted at the invitation of the master (or person-in-charge) of a vessel which is not otherwise subject to the jurisdiction of the boarding officer. The plenary authority of the master over all activities related to the operation of his vessel while in international waters is well established in international law and includes the authority to allow anyone to come aboard his vessel as his guest, including foreign law enforcement officials.

The voluntary consent of the master permits the boarding, but it does not allow the assertion of law enforcement authority (such as arrest or seizure). A consensual boarding is not, therefore, an exercise of maritime law enforcement jurisdiction *per se*. Nevertheless, such boardings have utility in allowing rapid verification of the legitimacy of a vessel's voyage by obtaining or confirming vessel documents, cargo, and navigation records without undue delay to the boarded vessel.[92]

3.11.3 Limitations on the Exercise of Maritime Law Enforcement Jurisdiction. Even where international and domestic U.S. law would recognize certain conduct as a criminal violation of U.S. law, there are legal and policy restrictions on U.S. law enforcement actions that must be considered. Outside of the U.S., a commander's greatest concerns will be: limitations on DOD assistance to civilian law enforcement agencies; the requirement for coastal nation authorization to conduct law enforcement in that nation's national waters; and the necessity for interagency coordination. Similarly, a fourth restriction, the concept of posse comitatus, limits U.S. military activities within the U.S.

92. 2 Restatement (Third), sec. 522 RN 4, at 86.

3.11.3.1 Posse Comitatus. 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.[93] As a matter of policy, the Posse Comitatus Act is made equally applicable to the U.S. Navy and U.S. Marine Corps.[94] 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.[95] (See SECNAVINST 5820.7 (series).) The Justice Department has opined that the Posse Comitatus Act itself does not apply outside the territory of the United States. (Memorandum from the Office of Legal Counsel to National Security Council re: Extraterritorial Effect of the Posse Comitatus Act (Nov. 3, 1989)).

3.11.3.2 DOD Assistance. Although the Posse Comitatus Act 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.[96] Additionally, Congress has specifically authorized the limited use of military personnel, facilities, platforms, and equipment, to assist Federal law enforcement authorities in the interdiction at sea of narcotics and other controlled substances.[97]

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93. The Posse Comitatus Act was originally enacted by the Act of June 18, 1878, sec. 15, 20 Stat. 152 (codified in 18 U.S.C. sec. 1385 (1994)) in reaction to the excessive use of, and resulting abuses by, the U.S. Army in the southern states while enforcing the reconstruction laws. *See* Furman, Restrictions Upon Use of the Army Imposed by the Posse Comitatus Act, 7 Mil. L. Rev. 85, 92-96 (1960).

94. DODDIR 3025.12 (Subj: Military Assistance for Civil Disturbances), secs. V.B & X.A.2, and DODDIR 5525.5, sec. C of encl. 4. *See also* SECNAVINST 5820.7B (Subj: Cooperation with Civilian Law Enforcement Officials), para. 9a(1). SECNAV may waive that policy. DODDIR 5525.5 (Subj: DOD Cooperation with Civilian Law Enforcement Officials), encl. 4, sec. C, and SECNAVINST 5820.7B, para. 9c.

95. 14 U.S.C. sec. 89 (1994).

96. Rice, New Laws and Insights Encircle the Posse Comitatus Act, 104 Mil. L. Rev. 109 (1984); Meeks, Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act, 70 Mil. L. Rev. 83 (1975). *See also* DODDIR. 5525.5 (series) Subj: DOD Cooperation with Civilian Law Enforcement Officials; Posse Comitatus Act, and relevant OPORDERS/ OPLANS for current policy and procedures. Policy waivers may be granted on a case by case basis by the Secretary of the Navy.

97. 10 U.S.C. secs. 371-78 (1994). The law authorizes DOD to provide support to federal civilian counterdrug efforts provided that doing so does not adversely affect military preparedness. 10 U.S.C. sec. 376 (1994). Notwithstanding this limitation, the Secretary of Defense may still

(continued...)

3.11.3.2.1 Use of DOD Personnel. Although Congress has enacted legislation in recent years expanding the permissible role of the Department of Defense in assisting law enforcement agencies, DOD personnel may not directly participate in a search, seizure, arrest or similar activity unless otherwise authorized by law.[98] Permissible activities presently include training and advising Federal, State and local law enforcement officials in the operation and maintenance of loaned equipment.[99] DOD personnel made available by appropriate authority may also maintain and operate equipment in support of civil law enforcement agencies for the following purposes:

1. Detection, monitoring, and communication of the movement of air and sea traffic;

2. Aerial reconnaissance;

3. Interception of vessels or aircraft detected outside the land area of the United States for the purposes of communicating with them and directing them to a location designated by law enforcement officials;

4. Operation of equipment to facilitate communications in connection with law enforcement programs;

5. The transportation of civilian law enforcement personnel; and

6. The operation of a base of operations for civilian law enforcement personnel.[100]

3.11.3.2.2 Providing Information to Law Enforcement Agencies. The Department of Defense may provide Federal, State or local law enforcement

97.(...continued)
provide such support if the Secretary determines that the importance of providing support outweighs the short-term adverse effect doing so will have on military readiness. *See* National Defense Authorization Act of Fiscal Year 1991, Pub. L. No. 101-510, sec. 1004(d), 104 Stat. 1630, codified at 10 U.S.C. sec. 374 note (1994). This waiver of limitation was initially only authorized for operations occurring in 1991 but has been extended through Fiscal Year 1999. *See* National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-337, sec. 1011(a), 108 Stat. 2836, codified at 10 U.S.C. sec. 374 note (1994).

98. 10 U.S.C. sec. 375 (1994).

99. 10 U.S.C. sec. 373 (1994). The Secretary of Defense, in cooperation with the Attorney General, is also required to conduct annual briefing of state and local law enforcement personnel regarding information, training, technical support, and equipment and facilities available from DOD. 10 U.S.C. sec. 380 (1994). The Secretary of Defense is further required to establish procedures under which states and local government units can purchase law enforcement equipment suitable for counterdrug activities from DOD. 10 U.S.C. sec. 381 (1994).

100. 10 U.S.C. sec. 374 (1994). *See* SECNAVINST 5820.7 (series) and enclosures 3 and 4 to DODDIR 5525.5. The cognizant OPLAN/OPORDER may provide additional guidance.

officials with information acquired during the normal course of military training or operations that may be relevant to a violation of any law within the jurisdiction of those officials. Present law provides that the needs of civilian law enforcement officials for information should, to the maximum extent practicable, be taken into account in planning and executing military training or operations.[101] Intelligence information held by DOD and relevant to counterdrug or other civilian law enforcement matters may be provided to civilian law enforcement officials, to the extent consistent with national security.[102]

3.11.3.2.3 Use of DOD Equipment and Facilities. The Department of Defense may make available equipment (including associated supplies or spare parts), and base or research facilities to Federal, State, or local law enforcement authorities for law enforcement purposes.[103] Designated platforms (surface and air) are routinely made available for patrolling drug trafficking areas with U.S. Coast Guard law enforcement detachments (LEDETs) embarked. LEDET personnel on board any U.S. Navy vessel have the authority to search, seize property and arrest persons suspected of violating U.S. law.[104]

3.11.3.3 Law Enforcement in Foreign National Waters. Law enforcement in foreign national waters may be undertaken only to the extent authorized by the coastal nation. Such authorization may be obtained on an ad hoc basis or be the subject of a written agreement. (See paragraph 3.5.3.2. for exceptions related to the pursuit of pirates.)

3.11.3.4 Interagency Coordination. Presidential Directive NSC 27 (PD-27) requires coordination within the Executive Branch of the government for non-military incidents which could have an adverse impact on U.S. foreign relations. This coordination includes consultation with the Department of State and other concerned agencies prior to taking actions that could potentially have such an impact. The Coast Guard has developed an internal notification mechanism that results in the provision, or denial, of a Statement of No Objection (SNO) from the appropriate superior authority which constitutes authorization to conduct the specific action requested. Interagency coordination initiated for law enforcement actions on naval vessels will be made through

101. 10 U.S.C. sec. 371(b) (1994). *See also* 10 U.S.C. sec. 374 note (1994).

102. 10 U.S.C. sec. 371 (1994). *See* SECNAVINST 5820.7 (series) and enclosure 2 to DODDIR 5525.5.

103. 10 U.S.C. sec. 372 (1994). *See also* 10 U.S.C. sec. 374 note (1994).

104. 10 U.S.C. sec. 379 (1994). *See* SECNAVINST 5820.7 (series) and para. A of encl. 3 to DODDIR 5525.5. The cognizant OPLAN/OPORDER may provide additional guidance. For U.S. Coast Guard authority, *see* 14 U.S.C. 89 (1994).

appropriate law enforcement agency channels by the embarked Coast Guard LEDET.[105]

3.11.4 Counterdrug Operations

3.11.4.1 U.S. Law. It is unlawful for any person who is on board a vessel subject to the jurisdiction of the United States, or who is a U.S. citizen or resident alien on board any U.S. or foreign vessel, to manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.[106] This law applies to:

1. U.S. vessels anywhere (see paragraph 3.11.2.1)

2. Vessels without nationality (see paragraph 3.11.2.3)

3. Vessels assimilated to a status without nationality (see paragraph 3.11.2.4)

4. Foreign vessels where the flag nation authorizes enforcement of U.S. law by the United States (see paragraph 3.11.2.2.4)

5. Foreign vessels located within the territorial sea or contiguous zone of the United States (see paragraph 1.5.1)

6. Foreign vessels located in the territorial seas or archipelagic waters of another nation, where that nation authorizes enforcement of U.S. law by the United States (see paragraph 3.11.2.2.4).

3.11.4.2 DOD Mission in Counterdrug Operations. The Department of Defense has been designated by statute as lead agency of the Federal Government for the detection and monitoring of aerial and maritime transit of illegal drugs into the United States, including its possessions, territories and commonwealths.[107] DoD is further tasked with integrating the command, control, communications and technical intelligence assets of the United States that are dedicated to the interdiction of illegal drugs into an effective communications network.[108]

3.11.4.3 U.S. Coast Guard Responsibilities in Counterdrug Operations. The Coast Guard is the primary maritime law enforcement agency of the United

105. *See* MLEM, encl. 3.
106. Maritime Drug Enforcement Act of 1986, codified at 46 U.S.C. App. secs. 1901-04 (1994).
107. 10 U.S.C. sec. 124 and note (1994).
108. *Id.*

States. It is also the lead agency for maritime drug interdiction and shares the lead agency role for air interdiction with the U.S. Customs Service. The Coast Guard may make inquiries, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection and suppression of violations of the laws of the United States, including maritime drug trafficking. Coast Guard commissioned, warrant and petty officers may board any vessel subject to the jurisdiction of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect and search the vessel and use all necessary force to compel compliance. When it appears that a violation of U.S. law has been committed, the violator may be arrested and taken into custody. If it appears that the violation rendered the vessel or its cargo liable to fine or forfeiture, the vessel or offending cargo may be seized.[109]

Coast Guard commissioned, warrant and petty officers are also designated customs officers providing them additional law enforcement authority.[110]

3.11.5 Use of Force in Maritime Law Enforcement. In the performance of maritime law enforcement missions, occasions will arise where resort to the use of force will be both appropriate and necessary. U.S. armed forces personnel engaged in maritime law enforcement actions may employ only such force, pursuant to U.S. Coast Guard Use of Force Policy, as is reasonable and necessary under the circumstances.[111]

3.11.5.1 Rules of Engagement Distinguished. U.S. rules of engagement delineate the circumstances and limitations under which U.S. naval, ground and air forces will initiate and/or continue the combat engagement with other forces encountered. (See paragraph 4.3.2.2). Use of force in the context of law enforcement is also permitted to be used to terminate criminal activities and to effect the apprehension of those engaged in such unlawful conduct. DOD and Coast Guard units performing law enforcement duties will be guided by the U.S. Coast Guard Use of Force Policy (Coast Guard MLEM) which details the

109. 14 U.S.C. sec. 89 (1994). *See also* paragraph 3.4 (p. 221) (right of approach); 46 U.S.C. App. secs. 1901-04 (1994); U.N. Convention Against Illicit Traffic in Narcotics Drugs and Psychotropic Substances, Vienna, 20 Dec. 1988, art. 17 (codifying customary law and practice on illicit traffic by sea), 28 Int'l Leg. Mat'ls 493 (1989), 518-20 (1989) (entered into force 11 November 1990); Trainor, Coping with the Drug Runners at Sea, Nav. War Coll. Rev., Summer 1987, at 77; Young, Griffes & Tomaselli, Customs or Coast Guard?, U.S. Naval Inst. Proc., Aug. 1987, at 67; Lahneman, Interdicting Drugs in the Big Pond, U.S. Naval Inst. Proc., July 1990, at 56. *See also* Survey of United States Jurisdiction over High Seas Narcotics Trafficking, 19 Ga. J. Int'l & Comp. L. 119 (1989) (survey ends in 1987). Applicable guidance may be found in CINCLANTFLT OPORD 2120 and COMTHIRDFLT OPORD 230.

110. 19 U.S.C. secs. 1401(1) & 1581 (1994), and 14 U.S.C. sec. 143 (1994).

111. *See* MLEM.

specific circumstances and limitations under which force may be used to terminate criminal activity and to apprehend those committing such acts. Neither the rules of engagement nor the rules for the use of force in law enforcement limit a commander's inherent authority and obligation to use all necessary means available and to take all appropriate action in self-defense of the commander's unit and other U.S. forces in the vicinity.[112]

3.11.5.2 Warning Shots. A warning shot is a signal—usually to warn an offending vessel to stop or maneuver in a particular manner or risk the employment of disabling fire or more severe measures.[113] Under international law, warning shots do not constitute a use of force. Disabling fire is firing under controlled conditions, when warning shots and further warnings are unheeded, into the steering gear or engine room of a vessel in order to cause the vessel to stop.[114] U.S. armed forces personnel employing warning shots and disabling fire in a maritime law enforcement action will comply with the U.S. Coast Guard Use of Force Policy.

3.11.6 Other Maritime Law Enforcement Assistance. In addition to the direct actions and dedicated assistance efforts discussed above, the naval commander may become involved in other activities supporting law enforcement actions, such as providing towing and escort services for vessels seized by the U.S. Coast Guard. Naval commanders may also be called upon to provide assistance to law enforcement agencies in the return of apprehended drug traffickers and terrorists to the United States for prosecution. Activities of this nature usually involve extensive advance planning and coordination.

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112. *See* paragraph 4.3.2.2 (p. 263), Annex A4-3 (p. 277), and Annex B (Counterdrug Support Operations) to Appendix A to Enclosure A of the JCS Standing Rules of Engagement.

113. *See* MLEM, para. 4.J.

114. *See id.*, para. 4.K.

TABLE A3-1
MARITIME COUNTERDRUG/ALIEN MIGRANT INTERDICTION AGREEMENTS
(as of 1 September 1997)

	Shipboarding	Shiprider	Pursuit	Entry-to-Investigate	Overflight	Order-to-Land	AMIO
Antigua & Barbuda[1]	X	X	X	X	X	X	
Bahamas[2]		X			X		
Barbados[3]	X	X	X	X	X	X	
Belize[4]	X	X	X	X			
Colombia[5]	*						
Cuba[6]							X
Dominica[7]	X	X	X	X			
Dominican Republic[8]	X	X	X	X	*		
France (incl. FWI)[9]							
Grenada[10]	X	X	X	X	X	X	
Haiti[11]			X	X	X		
Jamaica[12]	X	X	X	X	X	X	
Mexico[13]							
Netherlands Antilles[14]		X	X	X	X		
Panama[15]		X					
St. Kitts & Nevis[16]	X	X	X	X	X	X	
St. Lucia[17]	X	X	X	X	X	X	
St. Vincent/ Grenadines[18]	X	X	X	X			
Trinidad & Tobago[19]	X	X	X	X	X	X	
Turks & Caicos[20]		X (air only)					
United Kingdom[21]	X	X					
Venezuela[22]	X		X (air only)				

"Shipboarding": Standing authority for the USCG to stop, board and search foreign vessels suspected of illicit traffic located seaward of the territorial sea of any nation.

"Shiprider": Standing authority to embark law enforcement (L/E) officials on platforms of the parties, which officials may then authorize certain law enforcement actions.

"Pursuit": Standing authority for USG L/E assets to pursue fleeing vessels or aircraft suspected of illicit traffic into foreign waters or airspace. May also include authority to stop, board and search pursued vessels.

"Entry-to-Investigate": Standing authority for USG L/E assets to enter foreign waters or airspace to investigate vessels or aircraft located therein suspected of illicit traffic. May also include authority to stop, board and search such vessels.

"Overflight": Standing authority for USG L/E assets to fly in foreign airspace when in support of CD operations.

"Order-to-Land": Standing authority for USG L/E assets to order to land in the host nation aircraft suspected of illicit traffic.

"AMIO": An agreement to facilitate maritime alien migrant interdiction operations, including repatriation authority.

As of 1 September 1997, similar agreements were in the process of negotiation with Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, and Nicaragua.

Notes:

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1 Four part (shipboarding, shiprider, pursuit, entry-to-investigate) "model" counterdrug (CD) agreement signed 4/19/95. Overflight and order-to-land provisions added by amendment 6/3/96. All parts in force.

2 General MLE shiprider & overflight agreement reflected by exchange of notes May 1 and 6, 1996. In force. Other agreements in force; OPBAT Tripart agreement (w/TCI, U.S.), Grey agreement.

3 Shipboarding, shiprider, pursuit, entry-to-investigate, overflight signed but not yet in force.

4 Four part model CD agreement signed 12/23/92. In force.

5 *Operational procedures for shipboarding special arrangements effective 5 Nov 96. In force.

6 AMIO IAW 2 May 95 agreement. In force.

7 Four part model CD agreement signed 4/19/95. In force.

8 Four part model CD agreement signed 3/23/95. In force. *Temporary overflight authority periodically granted.

9 4/96 French law delegated to Prefect Martinique power to authorize shipboarding, pursuit, entry-to-investigate, and to Martinique General Prosecutor power to authorize waiver of prosecutorial jurisdiction on case-by-case basis.

10 Four part model CD agreement signed 5/16/95. Overflight and order-to-land added by amendment. All in force.

11 CD pursuit and entry-to-investigate agreements from 1988 and 1991. All in force.

12 Six part agreement signed but not yet in force.

13 US/MX CD agreements have no maritime component.

14 Shiprider, pursuit, entry-to-investigate, overflight in force.

15 General maritime support & assistance agreement. In force. CGCs operating in PN territorial sea must do so w/GOP shiprider and GOP vsl escort.

16 Four part model CD agreement signed 4/13/95. Overflight and order-to-land provisions added by amendment 6/27/96. All in force.

17 Four part model CD agreement signed 4/20/95. Overflight and order-to-land provisions added by amendment 6/5/96. All in force.

18 Four part model CD agreement signed 7/4/95. In force.

19 Six part model CD agreement signed 3/4/96. In force.

20 CD OPBAT Tripart agreement.

21 CD shipboarding for vsls flagged in UK & UK dependent territories located in Westlant, Caribbean & Gulf of Mexico; MOU for USCG LEDET embarkation in UK WIGS; reciprocal USCG/BVI shiprider MOU. In force.

22 1991 CD reciprocal shipboarding agreement; MOU setting out procedures for pursuit of air TOIs by USG aircraft. In force.

Source: USCG COMDT (G-OPL)

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. It is not directive, and does not supersede guidance issued by the commanders of the combatant commands, and in particular any guidance they may issue that delineates 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.[1] In recent years, however, the concepts of both "war" and "peace" have become blurred and no longer lend themselves to clear definition.[2] Consequently, it is not always possible 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.[3] At the same time, the spectrum of armed conflict has widened and become increasingly complex.[4] At one end of that spectrum is total nuclear war; at the other, insurgencies and state-sponsored terrorism.[5] For the purposes of this publication, however, the conduct of armed

1. 2 Grotius, De Jure Belli Ac Pacis 832 (Kelsey, transl. 1925).

2. McDougal & Feliciano 7-9.

3. A number of reasons have been advanced as to why nations conduct hostilities without a formal declaration of war: (1) a desire to avoid being branded as aggressors and later being compelled to pay reparations; (2) a desire to avoid triggering the sanctions and peace enforcement provisions of Chapters VI and VII of the U.N. Charter; (3) the "outlawry" of war by art. 2 of both the Kellogg-Briand Pact of 1928 and the U.N. Charter of 1945; (4) the post-World War II war crimes trials in Nuremberg and Tokyo; (5) the fear of embargo on war supplies under national legislation of neutral countries; and (6) the fear held by an attacked weaker nation of widening localized hostilities. Stone 311. *See also* von Glahn, Law Among Nations 712-715 (6th ed. 1992); and paragraph 7.1 and note 6 (p. 366).

4. Kidron & Smith, The War Atlas: Armed Conflict—Armed Peace (1983); McDougal & Feliciano 97-120.

5. Terry, Countering State-Sponsored Terrorism: A Law-Policy Analysis, 36 Nav. L. Rev. 159 (1986); Terry, An Appraisal of Lawful Military Response to State-Sponsored Terrorism, Nav. War Coll. Rev., May-June 1986, at 59; Sofaer, Terrorism, The Law, and the National Defense,

(continued...)

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[6] 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.*[7]

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.

Under Chapter VI of the Charter, the Security Council has a number of measures short of the use of force available to it to facilitate the peaceful settlement of disputes. If, however, the dispute constitutes a threat to the peace, breach of the peace, or act of aggression, Article 39 of the Charter provides:

> *The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be*

5.(...continued)
126 Mil. L. Rev. 89 (1989); and Joyner, In Search of an Anti-Terrorism Policy: Lessons from the Reagan Era, 11 Terrorism 29 (1988). *See also* U.N.G.A. Res. A/49/60, Measures to Eliminate International Terrorism, 17 Feb. 1995, *reprinted in* 10 Terrorism/Documents of International and Local Control (Levie ed. 1996) at 13.

6. Charter of the United Nations, 26 June 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, as amended in 1963 (16 U.S.T. 1134, T.I.A.S. 5857), 1965 (19 U.S.T. 5450, T.I.A.S. 6529) and 1971 (24 U.S.T. 2225, T.I.A.S. 7739) *reprinted in* AFP 110-20 at 5-2.1. As of 1 November 1997, 186 nations were members of the United Nations. The few nations not members of the United Nations include Kiribati, Nauru, Switzerland, Tonga, and Tuvalu.

7. The purposes of the U.N. Charter are set forth in art. 1. They include:

> To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.[8]

Such decisions of the Security Council are implemented under Article 41 or Article 42 of the Charter. Article 41 provides:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members . . . to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

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8. The key provisions of the Charter relating to the role of the Security Council in the maintenance of international peace and security are as follows:

CHAPTER V. *The Security Council*

Article 24

1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf. . . .

Article 25

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

CHAPTER VII. *Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression*

Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communications, and the severance of diplomatic relations.

Article 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

(continued...)

8.(...continued)
Article 43

1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the prupose of maintaining international peace and security.

2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided. . . .

Article 45

In order to enable the United Nations to take urgent military measures, Members shall hold immediately available national air-force contingents for combined international enforcement action shall be determined, within the limits laid down in the special agreement or agreements referred to in Article 43, by the Security Council with the assistance of the Military Staff Committee.

Article 46

Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee.

Article 47

1. There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.

2. The Military Staff Committee shall consist of the Chiefs of Staff of the permanent members of the Security Council or their representatives. . . .

3. The Military Staff Committee shall be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council. . . .

Article 48

1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.

2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.

Article 49

The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.

The members of the United Nations have not yet been able to conclude agreements in accordance with art. 43 and related Charter provisions. Instead, the United Nations, acting through the Secretary General, has from time to time requested members to voluntarily constitute emergency international U.N. peacekeeping forces as the need arose. In this way, the United Nations has sent peacekeeping forces to trouble spots around the world on 46 occasions. *See* Annex A4-1 (p. 267) for a current listing of all U.N. peacekeeping operations since 1947. *See* U.N., The Blue Helmets: A Review of United Nations Peace-keeping (1985); New Zealand Ministry of Foreign Affairs, United Nations Handbook (1991); and Fact Sheet: UN Peace-keeping Operations, U.S. Dep't of

(continued...)

Article 42 provides that:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members. . . .

These provisions do not, however, extinguish a nation's right of individual and collective self-defense. Article 51 of the Charter provides, 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. . . .[9]

8.(...continued)
State Dispatch, Sept. 30,1991, at 722. *See also* Bowett, United Nations Forces (1964); Boyd, United Nations Peace-Keeping Operations: A Military and Political Appraisal (1971); Siekmann, Basic Documents on United Nations and Related Peace-Keeping Forces (1985), and Daniel & Hayes, Securing Observance of UN Mandates through the Employment of Military Forces, Strategic Research Department Report 3-95, Nav. War Coll. (1995); Daniel & Hayes, Beyond Traditional Peacekeeping (1995); Nordquist, What Color Helmet?: Reforming Security Council Peacekeeping Mandates, The Newport Papers, No. 12, U.S. Nav. War Coll. 1997. The U.N. Dep't of Peacekeeping maintains a useful website at WWW.UN.ORG/DEPTS/DPKO/.

9. With the exception of the Korean War (*see* Stone at 228-37) and various peacekeeping activities (*see* note 8) armed forces have not been assigned to U.N. Command. Until August 1990, the veto power exercised by the permanent members of the Security Council prevented the Council from being able to carry out effectively, or in the manner contemplated by the framers of the Charter, its role in the maintenance of international peace and security. As a result, member nations have relied upon their inherent right of individual and collective self-defense to deter aggression and maintain international peace and security. The Security Council's authorization to use force to expel Iraq from Kuwait is recounted in Walker, The Crisis over Kuwait, August 1990-February 1991, 1991 Duke J. Int'l L. 25; and Moore, Crisis in the Gulf (1992). Self-defense is discussed in paragraph 4.3.2 (p. 259). Nations continue to act in their own self-interest in a horizontally structured world in which sovereignty plays an extremely important role. Accordingly, recourse to individual and collective self-defense, as reflected in art. 51 of the Charter, has become the norm. Secretary of State John Foster Dulles, in testifying before the Senate Committee on Foreign Relations on the Mutual Defense Treaty with Korea (Hearings, 83d Cong., 2d Sess., 13 Jan. 1954, at 21), explained: "All of the security treaties which we have made have been conceived of as falling under Article 51." The full text of that art. provides:

Article 51

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, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

(continued...)

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 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

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9.(...continued)
Secretary Dulles testified further that:

> [I]n the main, the arrangement that we have made has been under article 51, which is one of broad and not necessarily regional scope, because the article which deals with regional associations [article 53], as such, has a provision that no forcible action shall be taken under thos regional agreements except with the consent of the Security Council, and in view of the Soviet vto powr in the Security Council, it would result, if you operated directly nder that regional-pact clause, you would not have the right to resort to force or use force except with the consent of the Soviet Union.

"Regional arrangements" are specifically addressed in articles 52 and 53 of the Charter:

Article 52

1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations. . . .

Article 53

1. The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council. . . .

Secretary of State Rusk testified before the Senate Preparedness Subcommittee on 25 August 1966:

> The United Nations has not been able to deal effectively with all threats to the peace, nor will it be able to do so as long as certain of its members believe they must continue to compromise between their professed desire for peace and their short range interest in achieving greater power or place in the world. . . . It was recognized from the outset, however, that the United Nations might not prove able by itself to carry the full burden of collective security. The Charter explicitly provides for the existence of regional organizations, such as the Organization of American States, which would deal with problems of international peace and security in their respective areas. It also explicitly recognizes the inherent right of both individual and collective self-defense.
>
> Consistently with the United Nations Charter, we [the United States] have entered into multilateral and bilateral treaty arrangements with more than 40 countries on 5 continents.

(continued...)

interests. Diplomatic measures include all those political 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).[10] The behavior of an offending nation may be curbed by appeals to world public opinion as in the General Assembly, or, if their misconduct endangers the maintenance of international peace and security, 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 are normally addressed and resolved through diplomatic channels and do not involve resort to the threat or use of force.[11]

9.(...continued)
Quoted in U.S. Cong. House Foreign Affairs Comm., Collective Defense Treaties, with maps, Text of Treaties, A Chronology, Status of Forces Agreements, and Comparative Charts, 91st Cong., 1st Sess., 15-17 (Comm. Print 1969).

The United States has entered into several mutual defense treaties that are currently in force. The NATO and Rio Treaties provide that an attack on one member nation is an attack on all and each will assist in meeting the attack. The ANZUS, Philippine, Japanese, Korean, and SEATO Treaties provide that an armed attack on any party would endanger its own peace and safety and that each party will act to meet the common danger "in accordance with its constitutional processes."

10. 2 Restatement (Third), sec. 905, Comments & Reporters' Notes.

11. Under the U.S. Constitution, the President is responsible for the conduct of U.S. foreign policy. In overseas areas, the President principally exercises that responsibility through the chief U.S. diplomatic and consular representative to the country concerned, also known as the chief of mission. The chief of mission is required, under the direction of the president, to exercise "full responsibility for the direction, coordination, and supervision of all Government employees in that country (except for employees under the command of a United States area military commander)," to keep fully and currently informed with respect to "all activities and operations of the Government within that country," and to ensure that all government employees in that country (except for employees under the command of a U.S. area military commander) "comply fully with all applicable directives of the chief of mission." Further, any U.S. government agency having employees in a foreign country is required to "keep the chief of mission to that country fully and currently informed with respect to all activities and operations of its employees in that country," and to "insure that all of its employees (except for employees under the command of a United States area military commander) comply fully with all applicable directives of the chief of mission." 22 U.S.C. sec. 3927 (1994). This requirement is included in each presidential letter of instruction to chiefs of mission. That letter currently (1994) includes the following:

> As Commander in Chief, I retain authority over United States Armed Forces. On my behalf you have responsiblity for the direction, coordination, supervision, and safety, including secruity from terrorism, of all Defense Department personnel on official duty [in (country)/at (international organization)], except those personnel under the command of a U.S. area military commander. You and such commanders must keep each other currently informed and cooperate on all matters of mutual interest. Any differences that cannot be resolved in the field should be reported by

(continued...)

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.[12] 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,[13] boycott of oil and other export products from the offending nation,[14] suspension of "most favored nation" status, and the assertion of other economic sanctions.[15]

11.(...continued)

to the Secretary of State; area military commanders should report to the Secretary of Defense.

An extended version of President Clinton's letter of instruction to chiefs of mission is at Annex A4-2 (p. 256). Under 10 U.S.C. sec. 162(a)(4) (1994) "[e]xcept as otherwise directed by the Secretary of Defense, all forces operating within the geographic area assigned to a unified combatant command shall be assigned to, and under the command of, the commander of that command."

These requirements are implemented for deployed naval forces in U.S. Navy Regulations, 1990. Art. 0911 provides that the senior officer present in a deployed naval force, insofar as possible, shall preserve close relations with the diplomatic and consular representatives of the United States. Art. 0912 also provides that in the absence of a diplomatic or consular representatives of the United States, the senior officer present in a foreign country has authority, among other things, to communicate or remonstrate with foreign civil authorities as may be necessary. Further, art. 0914 provides that "[O]n occasions when injury to the United States or to citizens thereof is committed or threatened in violation of the principles of international law or in violation of rights existing under a treaty or other international agreement, the senior officer present shall consult with the diplomatic or consular representatives of the United States, if possible, and shall take such action as is demanded by the gravity of the situation." *See* paragraph 4.3.2.2 and accompany notes (p. 263) for a discussion of actions to be taken by U.S. military commanders in such circumstances.

On the matter of requests for asylum, see paragraph 3.3 (p. 216).

12. *See* 12 Whiteman 311-21, 2 Restatement (Third), sec. 905 Comment f at 382, and Reporters' Note 8, at 300-01 for discussions of retorsion (unfriendly but lawful acts not involving the use of force in response to objectionable acts of another nation), retaliation and reprisal.

13. The United States took these actions, among others, in its initial response to the December 25, 1979, invasion of Afghanistan by the Soviet Union. Presidential Address to the Nation, 4 January 1980, Dep't St. Bull., Jan. 1980, at B. This embargo was lifted in April 1981. Dep't St. Bull., Oct. 1982, at 42. Similar actions were taken by the United States in December 1981, in response to Soviet-inspired repression in Poland. Dep't St. Bull., Feb. 1982, at 8.

14. The United States took these actions against Libya in response to the continuing pattern of Libyan activity to promote instability and terrorism which violates accepted international norms of behavior. Exec. Order No. 12,538, 3 C.F.R. 395-96 (1986); Proclamation No. 5141, 3 C.F.R. 143-44 (1984); Proclamation No. 4907, 3 C.F.R. 21-22 (1983) (these presidential documents are *reprinted in* 19 U.S.C. sec. 1862 note (Supp. III 1985).

15. The United States took such actions against Nicaragua on 1 May 1985, Dep't St. Bull., July 1985, at 74-75, under the International Emergency Economic Powers Act of 1977, 50 U.S.C. sec.

(continued...)

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.[16]

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. Nations also have the option of submitting their disputes to ad hoc or other established tribunals.[17]

4.3 MILITARY MEASURES

The mission of U.S. military forces is to deter armed attack against the United States across the range of military operations, defeat an armed attack should deterrence fail, and prevent or neutralize hostile efforts to intimidate or coerce the United States by the threat or use of armed force or terrorist actions.[18] In

15.(...continued)
1701 *et seq.* (1982) and other statutory authority. *See also* Terry, The Iranian Hostages Crisis: International Law and United States Policy, 32 JAG J. 31, 53-56 (1982). The United States' unilateral economic reaction to Iraq's invasion of Kuwait on 2 August 1990 involved the freezing of Iraqi and Kuwaiti assets by Executive Orders 12722-23, 3 C.F.R. 294-96 (1991). More recently, sanctions have been imposed on Cuba (*see. e.g.* 22 U.S.C. sec. 6005 (1996)) and Bosnia (*see* U.N.S.C. Res. 757 (30 May 1992)).

16. On sovereign immunity *see* DA Pam 27-161-1, at chap. 5; Franck & Glennon, Foreign Relations and National Security Law: Cases, Materials and Simulations 214-26 (1987); Brownlie, Principles of Public International Law 322-45 (4th ed. 1990). The United States has waived its sovereign immunity in certain types of cases. *See, e.g.*, the Public Vessels Act, 46 U.S.C. sec. 781 *et seq.*, the Suits in Admiralty Act, 46 U.S.C. sec. 741 *et seq.*, and the Federal Tort Claims Act, 28 U.S.C. sec. 2671 *et seq.* The United States respects assertions of sovereign immunity by foreign sovereigns. Foreign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified as amended at 28 U.S.C. secs. 1330, 1332, 1391, 1441, 1602 *et seq.* (1994)).

17. For a comprehensive analysis of the International Court of Justice and a discussion of major cases brought before it, *see* Rosenne, The World Court: What it is and how it works (5th ed. 1995). *See also* paragraph 10.2.1, note 1 (p. 10-1) for a discussion of the I.C.J. 8 July 1996 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons.*

18. *See* National Security Strategy of the United States, "A National Security of Engagement and Enlargement" The White House, Feburary 1995, at 1-12.

order to deter armed attack, 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.[19]

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[20] 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 tailored 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, 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[21] 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.[22]

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19. *See* National Military Strategy, "A Strategy of Flexible and Selective Engagement," the Pentagon, 1995 at 8-16.

20. The term "National Command Authorities" is defined as "The President and the Secretary of Defense or their duly deputized alternates or successors. Commonly referred to as NCA." Joint Pub. 1-02.

21. The term "National Command Authorities" is defined as "The President and the Secretary of Defense or their duly deputized alternates or successors. Commonly referred to as NCA." Joint Pub. 1-02.

22. U.S. Navy, Naval Doctrine Publication 1, "Naval Warfare" (1994) at 20-1; Watkins, The Maritime Strategy, U.S. Naval Inst. Proc. Supp., Jan. 1986, at 7-8; Neutze, Bluejacket Diplomacy: A Juridical Examination of Naval Forces in Support of United States Foreign Policy, 32 JAG J. 81, 83 (1982).

4.3.2 The Right of Self-Defense. The Charter of the United Nations recognizes that all nations enjoy the inherent[23] right of individual and collective self-defense[24] against armed attack.[25] U.S. doctrine on self-defense, set forth in the JCS Standing 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 demonstration of hostile intent.[26]

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.[27]

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

23. The "inherent" right of self-defense refers to the right of self-defense as it existed in customary international law when the UN Charter was written. *See* Brierly, The Law of Nations 416-21 (6th ed. 1963); Stone, at 244; von Glahn, Law Among Nations 129-33 (6th ed. 1992); Harlow, The Legal Use of Force ... Short of War, U.S. Naval Inst. Proc., Nov. 1966, at 89; Fairley, State Actors, Humanitarian Intervention and International Law: Reopening Pandora's Box, 10 Ga. J. Int'l & Comp. L. 29 (1980); Bowett, Self-Defense in International Law (1958). *Compare* Randelzhofer, Article 51, in The Charter of the United Nations, A Commentary 661-78 (Simma ed. 1994).

24. *See* 2 Restatement (Third), sec. 905. Collective self-defense is considered in paragraph 7.2.2 (p. 370).

25. While the literal English language of art. 51 limits self-defense to cases where "armed attack occurs," State practice such as in the case of the 1962 Cuban Quarantine (*see* paragraph 4.3.2, note 31 (p. 262)) has generally recognized that "armed aggression" rather than "armed attack" justifies the resort to self-defense; this position is supported by the equally authentic French text of art. 51: "agression armee." *See* Brierly and Randelzhofer, both at note 23. Anticipatory self-defense is discussed in paragraph 4.3.2.1 (p. 263). *See also* Dinstein, War, Aggression and Self-Defense 187-91 (2d ed. 1994).

26. *See* SROE, para. 5d at Annex A4-3 (p. 277). 2 Restatement (Third), sec. 905(1)(a) & Comment 3, at 387.

27. *See* SROE, para. 5d at Annex A4-3 (p. 277). 2 Restatement (Third), sec. 905(1)(b) & Reporters' Note 3, at 388-89. *See also* Randelzhofer at 667 for a discussion of the principle of proportionality (note 23). U.S. Navy Regulations, 1990, art. 0915, addressing the legality of resort to the use of force against a foreign nation, reflects these principles:

1. The use of force in time of peace by United States naval personnel against another nation or against anyone within the territories thereof is illegal except as an act of self-defense. Naval personnel have a right of self-defense against hostile acts and hostile intent (imminent threat to use force). This right includes defending themselves, their subunits and, when appropriate, defending U.S. citizens, their property and U.S. commercial assets in the vicinity.

(continued...)

other nations.[28] A number of legal concepts have evolved over the years to sanction the limited use of armed forces in such circumstances (e.g., intervention,[29] embargo,[30] maritime quarantine). To the extent that such

27.(...continued)

2. The conditions calling for the application of the right of self-defense cannot be precisely defined beforehand, but must be left to the sound judgment of responsible naval personnel who are to perform their duties in this respect with all possible care and forbearance. The use of force must be exercised only as a last resort, and then only to the extent which is absolutely necessary to accomplish the end required.

3. Force must never be used with a view to inflicting unlawful punishment for acts already committed.

28. *See* Schachter, Self-Defense and the Rule of Law, 83 Am. J. Int'l L. 259 (1989); Ronzitti, Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity (1985).

29. While difficult to define precisely, intervention is generally recognized in international law as at least including the use of force which results in the interference by one nation in matters under the exclusive jurisdiction of another nation, for instance, interference in its domestic or foreign affairs. It is also sometimes referred to as interference with the sovereignty of another nation. Intervention frequently involves the nonpermissive entry into the territory of another nation. Any action constituting substantial interference with or harassment of a foreign private or public vessel on the high seas may be considered as an impairment of the foreign nation's sovereignty.

Every nation has the obligation under international law to respect the sovereignty of every other nation. A violation of that sovereignty by intervention is therefore a violation of international law unless justified by a specific rule to the contrary, such as the rights of self-defense and of humanitarian intervention to prevent a nation from committing atrocities against its own subjects which is itself a violation of international law. There has been, however, considerable disagreement over this latter rationale.

Intervention may be accomplished either with or without the use of force. Self-defense against armed attack or the threat of imminent attack is generally a necessary prerequisite for armed intervention. Intervention is justified under the following circumstances, which are not all inclusive:

1. To protect nations that request intervention in the face of an external threat and in certain other special cases. The intervention by the UnitedStates in the Dominican Republic in 1965 is illustrative of this circumstance.

2. In response to a request from the government of one nation for assistance in repelling threatened or attempted subversion directed by another nation. Examples of this circumstance include the U.S. and British actions in Lebanon (1958) and Jordan (1957-58), and the U.S. actions in Vietnam (1963-75) and El Slavador (1981-86).

3. A serious danger to the territory of a nation may arise either as a result of a natural catastrophe in another nation or as a result of the other nation deliberately or negligently employing its natural resources to the detriment of the first nation. For example, the reservoirs of Nation A on the upper reaches of a river might be damaged by natural forces, posing a threat to Nation B on the lower reaches. Intervention by the threatened nation (Nation B) is justified if the other nation (Nation A) is unwilling or unable to provide a timely and effective remedy. The U.N. Security Council should be immediately advised of the intervention (art. 51).

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29.(...continued)

4. To protect the lives and property of a nation's citizens abroad, particularly its diplomatic personnel. State practice has tolerated the use of force to protect a nation's citizens outside its borders if the individuals were in imminent danger of irreparable harm and the nation in whose territory the individuals were located could not or would not protect them. The 1976 Israeli raid at Entebbe Airport, the 1977 West German raid at Mogadishu, Somalia, the 1980 U.S. Iranian hostage rescue attempt, the 1983 U.S. intervention in Grenada and the 1988 U.S. intervention in Panama are examples of self-defense being asserted on behalf of one nation's citizens in the territory of another.

5. In response to genocide or other compelling humanitarian circumstance. This evolving concept of humanitarian intervention has not yet attained general acceptance.

See 1976 Digest of U.S. Practice in International Law 3-11; 2 Restatement (Third), sec. 905 Comment g, at 383; Ronzitti, Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity (1985); Dean, Self-Determination and U.S. Support of Insurgents, A Policy-Analysis Model, 122 Mil. L. Rev. 149 (1988); Akehurst, Humanitarian Intervention, in Intervention in World Politics 95 (Bull ed. 1984); and Teson, Humanitarian Intervention (1995).

The Entebbe raid is discussed in Contemporary Practice of the U.S., 73 Am. J. Int'l L 122 (1979); Salter, Commando Coup at Entebbe: Humanitarian Intervention or Barbaric Aggression?, 11 Int'l Lawyer 331 (1977); Boyle, International Law in Time of Crisis: From the Entebbe Raid to the Hostages Convention, 75 Nw. U.L. Rev. 769 (1980); Boyle, The Entebbe Hostages Crisis, 29 Neth. Int'l L. Rev. 32 (1982). *See also* Green, Rescue at Entebbe—Legal Aspects, 6 Isr. Y.B. Human Rights 312 (1976) and Ben-Porat, Haber & Schiff, Entebbe Rescue (1977).

The Iranian hostage rescue attempt is described *in* 78 Am. J. Int'l L. 200 (1984); U.N. Doc. S/13908, 25 April 1980; JCS Special Operations Review Group, Rescue Mission Report, August 1990, *reprinted in* Aviation Week & Space Technology, 15 Sep. 1980, at 61-71, 22 Sep. 1980, at 140-44, 29 Sep. 1980, at 84-91; Carter, Keeping Faith 506-22 (1982); Brzezinski, Power and Principle 487-500 (1985); Beckwith & Know, Delta Force (1983); Ryan, The Iranian Rescue Mission: Why It Failed (1985); Kyle, The Guts to Try (1990); Terry, The Iranian Hostages: International Law and United States Policy, 32 JAG J. 31 (1982); and Green, The Tehran Embassy Incident—Legal Aspects, 19 Archiv des Völkerrechts 1 (1980).

On United States intervention in El Salvador/Nicaragua in the 1980s, *see* Joyner & Grimaldi, The United States and Nicaragua: Reflections on the Lawfulness of Contemporary Intervention, 25 Va. J. Int'l L. 621 (1985); and Moore, The Secret War in Central America and the Future of World Order, 80 Am. J. Int'l L. 43-127 (1986).

The October 1983 Grenada operation is described in O'Shaughnessy, Grenada: Revolution, Invasion and Aftermath (1984); The Grenada Papers (Seabury & McDougall, eds. 1984); American Intervention in Grenada: The Implication of Operation Urgent Fury (Dunn & Watson eds. 1985); Spector, U.S. Marines in Grenada (1987); Lehman, Command of the Seas 291-305 (1988); Adkin, Urgent Fury: The Battle for Grenada (1989); Weinberger, Fighting for Peace 101-33 (1990); Musicant, The Banana Wars 370-89 (1990); Leich, Current Practice of the United States Relating to International Law: Rescue Operation by Armed Forces—Grenada, 78 Am. J. Int'l L. 200-04 (1984); U.N. Doc. S/16076, 25 October 1983; The United States Action in Grenada, 78 Am. J. Int'l L. 131-75 (1984); Moore, Law and the Grenada Mission (1984); Maizel, Intervention in Grenada, 35 JAG J. 47 (1986); and Beck, The "McNeil Mission" and the Decision to Invade Grenada, Nav. War Coll. Rev., Spring 1991, at 93.

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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 UN Charter.[31]

29.(...continued)
The December 1989 U.S. intervention in Panama is described in Musicant, The Banana Wars 390-417 (1990); Briggs, Operation Just Cause: Panama December 1989: A Soldier's Eyewitness Account (1990); Woodward, The Commanders 83-195 (1991); Donnelly, Roth & Baker, Operation Just Cause: The Storming of Panama (1991); McConnell, Just Cause: The Real Story of America's High-Tech Invasion of Panama (1991); Buckley, Panama: The Whole Story (1992). Operation Just Cause is analyzed in Parkerson, United States Compliance with Humanitarian Law Respecting Civilians During Operation Just Cause, 133 Mil. L. Rev. 31 (1991); and Terry, The Panamanian Intervention: Law in Support of Policy, 39 Nav. L. Rev. 5 (1990).

On Operation Provide Comfort, relief to Iraqi Kurds in March 1991, *see* U.N. Security Council Resolution 688 (1991).

30. In practice, the concepts of embargo and boycott have become blurred and have taken on a broader meaning. The terms now include preventing the import, export, movement or other dealing in goods, services or financial transactions to exert pressure on an offending nation. An embargo or boycott may be used, for example, to preclude an alleged aggressor nation from increasing its war-making potential, or to prevent the aggravation of civil strife in a nation in which it may be occurring. *See* 12 Whiteman 344-49. The maritime interception operations and air embargo enforced against Iraq as a consequence of its invasion of Kuwait, on 2 August 1990, are summarized *in* Walker, The Crisis over Kuwait, August 1990-February 1991, 1991 Duke J. Comp. & Int'l L. 25, 34-36. *See also* Joyner, Sanctions, Compliance and International Law: Reflections on the United Nations' Experience Against Iraq, 32 Va. J. Int'l L. 1 (1991); and Almond, An Assessment of Economic Warfare: Developments from the Persian Gulf, 31 Va. J. Int'l L. 645 (1991).

31. At the time, the U.S. Government characterized the quarantine as a sanction imposed by collective agreement pursuant to art. 52 of the U.N. Charter, and did not rely on self-defense to justify its actions. Chayes, The Cuban Missile Crisis: International Crises and the Role of Law (1974); Robertson, Blockade to Quarantine, JAG J., June 1963, at 87; McDevitt, The UN Charter and the Cuban Quarantine, JAG J., April-May 1963, at 71; McDougal, The Soviet-Cuban Quarantine and Self-Defense, 57 Am. J. Int'l L. 597 (1963); Christol & Davis, Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Material to Cuba, 1962, 57 Am. J. Int'l L. 525; Mallison, Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defense Claims Valid Under International Law, 31 Geo. Wash. L. Rev. 335 (1962).

The 1990-91 maritime interception operations in the Persian Gulf and Red Sea by Coalition Forces to prevent Iraqi imports and exports were conducted pursuant to U.N. Security Council Resolutions 661 and 665 and art. 51 of the U.N. Charter. They are described in Carter, Blockade, U.S. Naval Inst. Proc., Nov. 1990, at 42; and Delery, Away, the Boarding Party!, U.S. Nav. Inst. Proc./Naval Review, May 1991, at 65.

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 attack is imminent and no reasonable choice of peaceful means is available.[32]

4.3.2.2 JCS Standing Rules of Engagement (SROE). The JCS Standing Rules of Engagement establish fundamental policies and procedures governing the actions to be taken by U.S. commanders during military operations, contingencies, or prolonged conflicts. (See also the discussion of SROE in the Preface.) At the national level, rules of engagement are promulgated by the NCA, through the Chairman of the Joint Chiefs of Staff, to the combatant commanders to guide them in the employment of their forces toward the achievement of broad national objectives.[33] At the tactical level, rules of

32. This is a departure from the treatment of this issue in NWP-9 (Rev. A) which stated:

> 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. [Emphasis added.]

That statement derives from U.S. Secretary of State Daniel Webster's 1841 articulation of the right to resort to self-defense as emanating from circumstances when the necessity for action is "instant, overwhelming, and leaving no choice of means, and no moment for deliberation." *See The Caroline Case*, 2 Moore 409-14, *discussed in* Bunn, International Law and the Use of Force in Peacetime: Do U.S. Ships Have to Take the First Hit?, Nav. War Coll. Rev., May-June 1986, at 70; and Jennings, *The Caroline* and *McLeod* Cases, 32 Am. J. Int'l L. 82 (1938). The Webster formulation is clearly too restrictive today, particularly given the nature and lethality of modern weapons systems which may be employed with little, if any, warning. Ascertaining when a modern weapons system's employment may be "instant" or "overwhelming" is at best problematical. Moreover, as noted by the Mallisons, "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." *See* Mallison & Mallison, Naval Targeting: Lawful Objects of Attack, *in* Robertson at 263. McDougal and Feliciano, in commenting on this issue, stated "the standard of required necessity has been habitually cast in language so abstractly restrictive as almost, if read literally, to impose paralysis. Such is the clear import of the classical peroration of Secretary of State Webster in *The Caroline* case . . . . [T]he requirements of necessity and proportionality . . . can ultimately be subjected only to that most comprehensive and fundamental test of all law, reasonableness in particular context." McDougal & Feliciano 217-18. *See also*, Jessup, A Modern Law of Nations 163-64 (1948); Sofaer, Terrorism, The Law, and the National Defense, 126 Mil. L. Rev. 89 (1989); Joyner, The Rabta Chemical Factory Fire: Rethinking the Lawfulness of Anticipatory Self-Defense, 13 Terrorism 79 (1990); Dinstein, paragraph 4.3.2, note 25 (p. 259); and Lowe, The Commander's Handbook on the Law of Naval Operations and the Contemporary Law of the Sea, *in* Robertson at 127-30.

33. Self-defense, in relation to the United States as a nation, is the act of defending the United States and U.S. forces from attack or threat of imminent attack. *See* Annex A4-3, para. 5b (p. 281).

(continued...)

engagement are task and mission-oriented. At all levels, U.S. rules of engagement are consistent with the law of armed conflict.[34] Because rules of engagement also reflect operational and national policy factors, they often restrict combat operations far more than do the requirements of international law. A full range of options is reserved to the National Command Authorities to determine the response that will be made to hostile acts and demonstrations of

33.(...continued)
This concept relates to regional or global situations possibly preceding prolonged engagements and related to unstable international relations. The concept of self-defense is also invoked in confrontations between U.S. forces and foreign forces who are involved in an international armed conflict both where the United States remains neutral or is otherwise not a party to the conflict and where the United States is a party to the conflict. For a more detailed discussion of neutrality and its impact on naval operations, *see* Chapter 7. U.S. forces exercised national self-defense in response to Libya's attacks on U.S. forces in the Gulf of Sidra on 24-25 March 1986, and to Libya's support for international terrorism in the attacks on Tripoli and Benghazi on 14 April 1986. U.S. Letter to U.N. Security Council, 25 March 1986, U.N. Doc. S/17938, *reprinted in* Dep't St. Bull., May 1986, at 80; Presidential Letters to Congress, 26 March 1986, 22 Weekly Comp. Pres. Doc. 423; Presidential Letters to Congress, 16 April 1986, *reprinted in* Dep't St. Bull., June 1986, at 8; U.S. Letter to U.N. Security Council, 14 April 1986, U.N. Doc. S/17990. *See also* 80 Am. J. Int'l L. 632 (1986); Lehman, Command of the Seas 357-76 (1988); Weinberger, Fighting for Peace 175-201 (1990); Warriner, The Unilateral Use of Coercion Under International Law: A Legal Analysis of the United States Raid on Libya on April 14, 1986, 37 Nav. L. Rev. 49 (1988).

Documentation regarding the shooting down of Iran Air Flight 655 on 4 July 1988 is *reproduced in* 28 Int'l Leg. Mat'ls 896 (1989); 83 Am. J. Int'l 332 (1989), and *discussed in* Friedman, The *Vincennes* Incident, U.S. Nav. Inst. Proc./Naval Review, May 1989, at 72, and Hearings before the Defense Policy Panel of the House Armed Service Committee, 9 Sep. 1988. *See also* Linman, Iran Air 655 and Beyond: Free Passage, Mistaken Self-Defense, and State Responsibility, 16 Yale J. Int'l L. 245 (1991).

34. Self-defense, in relation to a unit of U.S. naval forces, is the act of defending from attack or threat of imminent attack that unit (including elements thereof) and other U.S. forces in the vicinity, or U.S. citizens or U.S. flag vessels or other U.S. commercial assets in the vicinity of that unit. *See* Annex A4-3, para. 5c (p. 281). Generally, this concept relates to localized, low-level situations that are not preliminary to prolonged engagements. The response of two U.S. Navy F-14 aircraft to the attack by two Libyan Su-22 aircraft over the Gulf of Sidra on 14 August 1981 was an exercise of unit self-defense against a hostile force that had committed a hostile act and posed a continuing threat of immediate attack. U.N. Doc. S/17938, 25 March 1986; Neutze, The Gulf of Sidra Incident: A Legal Prespective, U.S. Nav. Inst. Proc., Jan 1982, at 26; Parks, Crossing the Line, U.S. Nav. Inst. Proc., Nov. 1986, at 40 & 43; Rather, The Gulf of Sidra Incident of 1981: A Study of the Lawfulness of Peacetime Aerial Engagements, 7 Yale J. Int'l L. 59 (1984). Similarly, the shootdown of two Libyan MiG-23s on 4 January 1989 by two F-14s over international waters of the Mediteranean Sea more than 40 miles off the eastern coast of Libya, after the MiGs repeatedly turned toward them and did not break off the intercept, was an act of unit self-defense against units demonstrating hostile intent. U.N. Doc. S/20366, 4 January 1989.

35. Grunawalt, The JCS Standing Rules of Engagement: A Judge Advocate's Primer, 42 Air Force L. Rev. 245 (1997); Roach, Rules of Engagement, Nav. War Coll. Rev., Jan.-Feb. 1983, at 46-53, *reprinted in* 14 Syr. J. Int'l L. & Com. 865 (1988); and Hayes, Naval Rules of Engagement:
(continued...)

hostile intent. The SROE provide implementation guidance on the inherent right and obligation of self-defense and the application of force for mission accomplishment.[35] A principal tenet of these ROE is the commander's inherent authority and obligation to use all necessary means available and to take all appropriate action in self-defense of the commander's unit and other U.S. forces in the vicinity.[36]

4.4 INTERCEPTION OF INTRUDING AIRCRAFT

All nations have complete and exclusive sovereignty over their national airspace (see paragraphs 1.8 and 2.5.1). With the exception of overflight in transit passage of international straits and in archipelagic sea lanes passage (see paragraphs 2.3.3 and 2.3.4.1), distress (see paragraph 3.2.2.1), 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 Chicago Convention.

Customary international law provides that a foreign aircraft entering national airspace without permission due to distress 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, in effect:

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

35.(...continued)
Management Tools for Crisis, Rand Note N-2963-CC (July 1989). *See also* Fleck, Rules of Engagement for Maritime Forces and the Limitations of the Use of Force under the UN Charter, 31 Ger. Y.B. Int'l L. 165 (1988).

36. Contact with a foreign force committing a hostile act or armed attack or displaying hostile intent or threat of armed attack against the United States, its forces, a U.S. flag vessel, U.S. citizens or their property must be reported immediately by the fastest possible means to JCS, CNO/CMC, and the appropriate unified and component commanders (OPREP-1). Where circumstances permit, guidance as to the use of armed force in defense should be sought. However, where the circumstances are such that it is impractical to await such guidance, it is the responsibility of the on-scene commander to take such measures of self-defense to protect his force as are necessary and proportional, consistent with applicable rules of engagement (*see* paragraph 4.3.2 (p. 259) and Annex A 4-3 (p. 277)).

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.[37]

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.[38] 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 a nation's response to military aircraft that stray into national airspace through navigational error or that are in distress[39]

37. Protocol relating to an amendment to the Convention on International Civil Aviation [Art. 3 *bis*], Montreal, 10 May 1984, *reprinted in* 23 Int'l Legal Mat'ls 705 (1984).

Para. 8.1 of Attachment A - Interception of Civil Aircraft - to Annex 2 - Rules of the Air - to the Chicago Convention provides: "The use of tracer bullets to attract attention is hazardous, and it is expected that measures will be taken to avoid their use so that the lives of persons on board and the safety of aircraft will not be endangered."

Documentation regarding the shooting down of KAL 007 is reproduced in 22 Int'l Leg. Mat'ls FitzGerald, The Use of Force against Civil Aircraft: The Aftermath of the KAL Flight 007 Incident, 22 Can. Y.B. Int'l L. 1984, at 291, 309.

38. As of 4 November 1997, 90 nations have ratified the Protocol, including the United Kingdom and the Russian Federation. *See* Table A4-1 (p. 4-33). The Protocol has not been submitted to the Senate for advice and consent because of concerns about I.C.J. compulsory jurisdiction.

39. AFP 110-31, para. 2-5d, at 2-6; 9 Whiteman 328. On aerial intrusions, *see* Hughes, Aerial Intrusions by Civil Airliners and the Use of Force, 45 J. Air L. & Com. 595 (1980); Hassan, A Legal Analysis of the Shooting of Korean Airlines Flight 007 by the Soviet Union, 49 J. Air L. & Com. 553 (1984); Laveson, Korean Airline Flight 007: Stalemate in International Aviation Law—A Proposal for Enforcement, 22 San Diego L. Rev. 859 (1985); Phelps, Aerial Intrusions by Civil and Military Aircraft in Time of Peace, 107 Mil. L. Rev. 255 (1985) and Schmitt, Aerial Blockades in Historical, Legal and Practical Perspective, 2 U.S.A.F.A. J. Leg. Studies 21 (1991). *See also* the Agreement Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on the Prevention of Dangerous Military Activities, Moscow, 12 June 1989, *reprinted in* 28 Int'l Leg. Mat'ls 879 (1989).

ANNEX A4-1

UNITED NATIONS PEACE-KEEPING OPERATIONS

1947

Indonesia - United Nations Consular Commission (CC) 1947-1948.

1948

* Middle East - United Nations Truce Supervision Organization (UNTSO) Jun 1948-date.

Greece - United Nations Special Committee on the Balkans (UNSCOB) 1948.

1949

* India/Pakistan - United Nations Military Observer Group in India & Pakistan (UNMOGIP) Jan 1949-date.

1950

Korea - United Nations Command (UNC) 1950-1953.

1955

Suez - United Nations Emergency Force (UNEF) 1955-1967.

1956

Middle East - First United Nations Emergency Force (UNEFI) Nov 1956-Jun 1967.

1958

Lebanon - United Nations Observation Group in Lebanon (UNOGIL) Jun 1958-Dec 1958.

1960

Congo - United Nations Operations in the Congo (ONUC) Jul 1960-Jun 1964.

1962

West New Guinea - United Nations Security Force in West New Guinea (West Irian) (UNSF) Oct 1962-Apr 1963.

1963

Yemen - United Nations Yemen Observation Mission (UNYOM) Jul 1963-Sep 1964.

1964

* Cyprus - United Nations Peace-keeping Force in Cyprus (UNFICYP) Mar 1964-date.

1965

Dominican Republic - Mission of the Representative of the Secretary-General in the Dominican Republic (DOMREP) May 1965-Oct 1966.

India/Pakistan - United Nations India-Pakistan Observation Mission (UNIPOM) Sep 1965-Mar 1966.

1973

Middle East - Second United Nations Emergency Force (UNEF II) Oct 1973-Jul 1979.

1974

* Golan Heights - United Nations Disengagement Observer Force (UNDOF) Jun 1974-date.

1978

* Lebanon - United Nations Interior Force in Lebanon (UNIFIL) Mar 1978-date.

1988

Afghanistan/Pakistan - United Nations Good Offices Mission in Afghanistan & Pakistan (UNGOMAP) Apr 1988-Mar 1990.

Iran/Iraq - United Nations Iran-Iraq Military Observer Group (UNIIMOG) (Aug 88-Feb 91.

1989

Angola - United Nations Angola Verification Mission I (UNAVEM I) Jan 89-Jun 91.

Namibia - United Nations Transition Assistance Group (UNTAG) Apr 1989-Mar 1990.

Central America - United Nations Observer Group in Central America (ONUCA) Nov 1989-Jan 1992.

1991

* Iraq/Kuwait - United Nations Iraq-Kuwait Observation Mission (UNIKOM) Apr 1991-date.

Angola - United Nations Angola Verification Mission II (UNAVEM II) Jun 1991-Feb 1995.

El Salvador - United Nations Observer Mission in El Salvador (ONUSAL) Jul 1991-Apr 1995.

* Western Sahara - United Nations Mission for the Referendum in Western Sahara (MINURSO) Sep 1991-date.

Cambodia - United Nations Advance Mission in Cambodia (UNAMIC) Oct 1991-Mar 1992.

1992

Cambodia - United Nations Transitional Authority in Cambodia (UNTAC) Mar 1992-Sep 1993.

Former-Yugoslavia - United Nations Protection Force (UNPROFOR) Mar 1992-Dec 1995.

Somalia - United Nations Operation in Somalia I (UNOSOM I) Apr 1972-Mar 1993.

Mozambique - United Nations Operation in Mozambique (ONUMOZ) Dec 1992-Dec 1994.

1993

Somalia - United Nations Operation in Somalia II (UNOSOM II) Mar 1993-Mar 1995.

Rwanda/Uganda - United Nations Observer Mission Uganda-Rwanda (UNOMUR) Jun 1993-Sep 1994.

* Georgia - United Nations Observer Mission in Georgia (UNOMIG) Aug 1993-date.

Haiti - United Nations Mission in Haiti (UNMIH) Sep 1993-Jun 1996.

* Liberia - United Nations Observer Mission in Liberia (UNOMIL) Sep 1993-date.

Rwanda - United Nations Assistance Mission for Rwanda (UNAMIR) Oct 1993-Mar 1996.

1994

Chad/Libya - United Nations Aouzou Strip Observer Group (UNASOG) May-Jun 1994.

* Tajikistan - United Nations Mission of Observers in Tajikistan (UNMOT) Dec 1994-date.

1995

* Angola - United Nations Angola Verification Mission III (UNAVEM III) Feb 1995-date.

Croatia - United Nations Confidence Restoration Organization in Croatia (UNCRO) Mar 1995-Jan 1996.

* Former-Yugoslavia Republic of Macedonia - United Nations Preventive Deployment Force (UNPREDEP) Mar 1995-date.

* Bosnia & Herzegovina - United Nations Mission in Bosnia and Herzegovina (UNMIBH) Dec 1995-date.

1996

* Croatia - United Nations Mission of Observers in Prevlaka (UNMOP) Jan 1996-date.

* Croatia - United Nations Transitional Administration for Eastern Slovenia, Baranja and Western Sirmium (UNTAES) Jan 1996-date.

* Haiti - United Nations Support Mission in Haiti (UNSMIH) Jul 1996-date.

NOTE: * Indicates an on-going operation as of 1 January 1997.

Source: U.N. Dep't of Public Information.

ANNEX A4-2

PRESIDENT'S LETTER OF INSTRUCTION

R 300238Z SEP 94
FM SECSTATE WASHDC
TO ALL DIPLOMATIC AND CONSULAR POSTS
SPECIAL EMBASSY PROGRAM
BT
UNCLAS STATE 265203

SUBJECT: PRESIDENT CLINTON'S LETTER OF INSTRUCTION TO UNITED STATES CHIEFS OF MISSION

1. THIS MESSAGE TRANSMITS THE TEXT OF PRESIDENT CLINTON'S LETTER OF INSTRUCTION TO UNITED STATES CHIEFS OF MISSION (COMS), WHICH HE SIGNED ON SEPTEMBER 16. PLEASE SHARE IT WITH ALL MEMBERS OF YOUR MISSION. YOU MAY EXPECT TO RECEIVE YOUR INDIVIDUAL, SIGNED LETTER BY POUCH IN THE NEXT MONTH OR SO. QUESTIONS OR COMMENTS ON THE LETTER MAY BE ADDRESSED TO THE OFFICE OF MANAGEMENT POLICY (FMP/ MP), ROOM 7427NS, 202-647-7789.

2. BEGIN TEXT.

DEAR MR./MADAM AMBASSADOR:

A) PLEASE ACCEPT MY BEST WISHES AND APPRECIATION FOR YOUR EFFORTS AS MY PERSONAL REPRESENTATIVE TO (COUNTRY/INTERNATIONAL ORGANIZATION).

B) WE ARE AT A MOMENT OF UNIQUE HISTORIC OPPORTUNITY FOR THE UNITED STATES AND FOR THE WORLD. WITH THE END OF THE COLD WAR, WE ARE ENTERING AN ERA SO NEW THAT IT HAS YET TO ACQUIRE A NAME. OUR TASK AS A NATION, AND YOURS AS CHIEF OF THE UNITED STATES MISSION, IS TO ENSURE THAT THIS NEW ERA IS ONE CONDUCIVE TO AMERICAN PROSPERITY, TO AMERICAN SECURITY, AND TO THE VALUES AMERICA SEEKS TO EXEMPLIFY. TO ACCOMPLISH

THIS TASK I NEED YOUR FULL SUPPORT FOR THE THREE GOALS OF MY FOREIGN POLICY THAT AIM TO KEEP OUR NATION STRONG AT HOME AND ABROAD: RENEWING AND ADAPTING AMERICA'S SECURITY ALLIANCES AND STRUCTURES; REBUILDING AND REVITALIZING THE AMERICAN ECONOMY; AND PROMOTING DEMOCRACY, HUMAN RIGHTS, AND SUSTAINABLE DEVELOPMENT.

C) YOU SHOULD GIVE SPECIAL ATTENTION IN THE SECURITY REALM TO HALTING ARMS PROLIFERATION, PREVENTING, RESOLVING, AND CONTAINING CONFLICT, AND TO COUNTERING TERRORISM AND INTERNATIONAL CRIME; AND IN THE ECONOMIC ARENA, TO OPENING AND EXPANDING MARKETS FOR AMERICA'S EXPORTS. NO COUNTRY CAN BE EXEMPT FROM UPHOLDING THE BASIC PRINCIPLES IN THE UNIVERSAL DECLARATION OF HUMAN RIGHTS; ALL SHOULD UNDERSTAND THAT SHARED DEMOCRATIC VALUES ARE THE MOST RELIABLE FOUNDATION FOR GOOD RELATIONS WITH THE UNITED STATES. FINALLY, I WILL NEED YOUR HELP AS MY ADMINISTRATION SEEKS TO PROMOTE INTERNATIONAL COOPERATION TO ADDRESS GLOBAL PROBLEMS INCLUDING THE ENVIRONMENT AND POPULATION, NARCOTICS PRODUCTION AND TRAFFICKING, REFUGEES, MIGRATION, AND HUMANITARIAN ASSISTANCE.

D) ACHIEVING THESE GOALS WILL DEMAND A DYNAMIC DIPLOMACY THAT HARNESSES CHANGE IN THE SERVICE OF OUR NATIONAL INTERESTS AND VALUES. IT WILL REQUIRE US TO MEET THREATS TO OUR SECURITY AND PRACTICE PREVENTIVE DIPLOMACY, AND TO ANTICIPATE THREATS TO OUR INTERESTS AND TO PEACE IN THE WORLD BEFORE THEY BECOME CRISES AND DRAIN OUR HUMAN AND MATERIAL RESOURCES IN WASTEFUL WAYS. I HAVE ASKED YOU TO REPRESENT THE UNITED STATES IN (COUNTRY)/AT (INTERNATIONAL ORGANIZATION) BECAUSE I AM CONFIDENT THAT YOU POSSESS THE SKILLS, DEDICATION, AND EXPERIENCE NECESSARY TO MEET THE MANY CHALLENGES THAT THIS NEW AND COMPLEX ERA PRESENTS. THIS LETTER OUTLINES YOUR PRINCIPAL AUTHORITIES AND RESPONSIBILITIES. I HAVE INFORMED ALL DEPARTMENT AND AGENCY HEADS OF THESE

INSTRUCTIONS, AND I KNOW YOU WILL RECEIVE THEIR FULL SUPPORT.

E) I CHARGE YOU TO EXERCISE YOUR AUTHORITY WITH WISDOM, JUSTICE, AND IMAGINATION. DRAMATIC CHANGE ABROAD AND AUSTERITY HERE AT HOME HAVE PUT A PREMIUM ON LEADERSHIP AND TEAMWORK. CAREFUL STEWARDSHIP OF YOUR MISSION'S RESOURCES STANDS IN THE FOREFRONT OF YOUR RESPONSIBILITIES. I URGE YOU TO SEE BUDGETARY STRINGENCY NOT AS A HARDSHIP TO BE ENDURED BUT AS AN INCENTIVE TO INNOVATION.

F) AS MY REPRESENTATIVE, YOU, WITH THE SECRETARY OF STATE, ASSIST ME IN THE IMPLEMENTATION OF MY CONSTITUTIONAL RESPONSIBILITIES FOR THE CONDUCT OF OUR RELATIONS WITH (COUNTRY/INTERNATIONAL ORGANIZATION). I CHARGE YOU TO EXERCISE FULL RESPONSIBILITY FOR THE DIRECTION, COORDINATION, AND SUPERVISION OF ALL EXECUTIVE BRANCH OFFICES AND PERSONNEL IN (COUNTRY)/AT (INTERNATIONAL ORGANIZATION), EXCEPT FOR PERSONNEL UNDER THE COMMAND OF A U.S. AREA MILITARY COMMANDER, UNDER ANOTHER CHIEF OF MISSION IN (COUNTRY) OR ON THE STAFF OF AN INTERNATIONAL ORGANIZATION. THIS ENCOMPASSES ALL AMERICAN AND FOREIGN NATIONAL PERSONNEL, IN ALL EMPLOYMENT CATEGORIES, WHETHER DIRECT HIRE OR CONTRACT, FULL- OR PART-TIME, PERMANENT OR TEMPORARY.

G) ALL EXECUTIVE BRANCH PERSONNEL UNDER YOUR AUTHORITY MUST KEEP YOU FULLY INFORMED AT ALL TIMES OF THEIR CURRENT AND PLANNED ACTIVITIES, SO THAT YOU CAN EFFECTIVELY CARRY OUT YOUR RESPONSIBILITY FOR U.S. GOVERNMENT PROGRAMS AND OPERATIONS. YOU HAVE THE RIGHT TO SEE ALL COMMUNICATIONS TO OR FROM MISSION ELEMENTS, HOWEVER TRANSMITTED, EXCEPT THOSE SPECIFICALLY EXEMPTED BY LAW OR EXECUTIVE DECISION.

H) AS COMMANDER IN CHIEF, I RETAIN AUTHORITY OVER U.S. ARMED FORCES. ON MY BEHALF YOU HAVE RESPONSIBILITY FOR THE DIRECTION, COORDINATION, SUPERVISION, AND SAFETY, INCLUDING SECURITY FROM TERRORISM, OF ALL

DEPARTMENT OF DEFENSE PERSONNEL ON OFFICIAL DUTY (IN (COUNTRY)/AT (INTERNATIONAL ORGANIZATION), EXCEPT THOSE PERSONNEL UNDER THE COMMAND OF A U.S. AREA MILITARY COMMANDER. YOU AND SUCH COMMANDERS MUST KEEP EACH OTHER CURRENTLY INFORMED AND COOPERATE ON ALL MATTERS OF MUTUAL INTEREST. ANY DIFFERENCES THAT CANNOT BE RESOLVED IN THE FIELD SHOULD BE REPORTED BY YOU TO THE SECRETARY OF STATE; AREA MILITARY COMMANDERS SHOULD REPORT TO THE SECRETARY OF DEFENSE.

I) EVERY EXECUTIVE BRANCH AGENCY UNDER YOUR AUTHORITY, INCLUDING THE DEPARTMENT OF STATE, MUST OBTAIN YOUR APPROVAL TO CHANGE THE SIZE, COMPOSITION, OR MANDATE OF ITS STAFF. USE THIS AUTHORITY TO RESHAPE YOUR MISSION IN WAYS THAT DIRECTLY SERVE AMERICAN INTERESTS AND VALUES. . . .

J) THE SECRETARY OF STATE IS MY PRINCIPAL FOREIGN POLICY ADVISER. UNDER MY DIRECTION, HE IS, TO THE FULLEST EXTENT PROVIDED BY THE LAW, RESPONSIBLE FOR THE OVERALL COORDINATION AND SUPERVISION OF U.S. GOVERNMENT ACTIVITIES ABROAD. THE ONLY AUTHORIZED CHANNEL FOR INSTRUCTIONS TO YOU IS THROUGH HIM OR FROM ME. . . .

K) THE SECRETARY OF STATE AND, BY EXTENSION, CHIEFS OF MISSION ABROAD MUST PROTECT ALL U.S. GOVERNMENT PERSONNEL ON OFFICIAL DUTY ABROAD (OTHER THAN THOSE PERSONNEL UNDER THE COMMAND OF A U.S. AREA MILITARY COMMANDER) AND THEIR ACCOMPANYING DEPENDENTS. I EXPECT YOU TO TAKE DIRECT RESPONSIBILITY FOR THE SECURITY OF YOUR MISSION. I ALSO EXPECT YOU TO SUPPORT STRONGLY APPROPRIATE COUNTERINTELLIGENCE AND COUNTERTERRORISM ACTIVITIES THAT ENHANCE SECURITY BOTH LOCALLY AND IN THE BROADER INTERNATIONAL CONTEXT.

L) YOU SHOULD COOPERATE FULLY WITH PERSONNEL OF THE U.S. LEGISLATIVE AND JUDICIAL BRANCHES IN (COUNTRY)/AT (INTERNATIONAL ORGANIZATION) SO THAT U.S. FOREIGN

POLICY GOALS ARE ADVANCED, SECURITY IS MAINTAINED AND EXECUTIVE, LEGISLATIVE, AND JUDICIAL RESPONSIBILITIES ARE CARRIED OUT.

M) AS CHIEF OF MISSION YOU ARE NOT ONLY MY REPRESENTATIVE IN (COUNTRY/INTERNATIONAL ORGANIZATION) BUT A SERVANT OF THE PEOPLE OF OUR NATION. THIS IS BOTH A HIGH HONOR AND A GREAT RESPONSIBILITY. I EXPECT YOU TO DISCHARGE THIS TRUST WITH PROFESSIONAL EXCELLENCE, THE HIGHEST STANDARDS OF ETHICAL CONDUCT, AND DIPLOMATIC DISCRETION. . . .

N) ALWAYS KEEP IN MIND THAT, FOR THE GOVERNMENT AND PEOPLE OF (COUNTRY)/THE SECRETARIAT AND OTHER REPRESENTATIVES TO (INTERNATIONAL ORGANIZATION), YOU AND YOUR MISSION SYMBOLIZE THE UNITED STATES OF AMERICA AND ITS VALUES. NEVER FORGET THE SOLEMN DUTY THAT WE, AS PUBLIC SERVANTS, OWE TO THE CITIZENS OF AMERICA—THE ACTIVE PROTECTION AND PROMOTION OF THEIR WELL-BEING, SAFETY, AND IDEALS. THERE IS NO BETTER DEFINITION OF AMERICAN NATIONAL INTEREST AND NO LOFTIER OBJECT FOR OUR EFFORTS.

SINCERELY,
(SIGNED)
BILL CLINTON

END TEXT.
BT

ANNEX A4-3

JOINT CHIEFS OF STAFF STANDING RULES OF ENGAGEMENT (SROE)

[NOTE: This annex is a reprint of Enclosure A, Chairman, JCS Instruction 3121.01 (1 Oct 94), which is the unclassified portion of that instruction. Within Enclosure A, there are references to its Appendix A as well as to Enclosures B and C and the Glossary of the CJSC instruction. However, those referenced documents are classified and are not reproduced here.]

STANDING RULES OF ENGAGEMENT FOR US FORCES

1. *Purpose and Scope.*

a. The purpose of these SROE is to provide implementation guidance on the inherent right and obligation of self-defense and the application of force for mission accomplishment. The SROE establish fundamental policies and procedures governing the actions to be taken by U.S. force commanders during all military operations, contingencies, or prolonged conflicts. In order to provide uniform training and planning capabilities, this document is authorized for distribution to commanders at all levels to be used as fundamental guidance for training and directing their forces.

b. Except as augmented by supplemental rules of engagement for specific operations, missions, or projects, the policies and procedures established herein remain in effect until rescinded.

c. U.S. forces operating with multinational forces:

(1) U.S. forces assigned to the operational control (OPCON) of a multinational force will follow the ROE of the multinational force unless otherwise directed by the National Command Authorities (NCA). U.S. forces will be assigned and remain OPCON to a multinational force only if the combatant commander and higher authority determine that the ROE for that multinational force are consistent with the policy guidance on unit self-defense and with the rules for individual self-defense contained in this document.

(2) When U.S. forces, under U.S. OPCON, operate in conjunction with a multinational force, reasonable efforts will be made to effect common ROE. If such ROE cannot be established, U.S. forces will exercise the right and obligation of self-defense contained in this document while seeking guidance from the appropriate combatant command. To avoid mutual interference, the multinational forces will be informed prior to U.S. participation in the operation of the U.S. forces' intentions to operate under these SROE and to exercise unit self-defense. For additional guidance concerning peace operations, see Appendix A to Enclosure A.

(3) Participation in multinational operations may be complicated by varying national obligations derived from international agreements, i.e., other members in a coalition may not be signatories to treaties that bind the United States, or they may be bound by treaties to which the United States is not a party. U.S. forces still remain bound by U.S. treaty obligations even if the other members in a coalition are not signatories to a treaty and need not adhere to its terms.

d. Commanders of U.S. forces subject to international agreements governing their presence in foreign countries (e.g., Status of Forces Agreements) are not relieved of the inherent authority and obligation to use all necessary means available and to take all appropriate action for unit self-defense.

e. U.S. forces in support of operations not under operational or tactical control of a combatant commander or performing missions under direct control of the NCA, Military Departments, or other U.S. government departments/agencies (i.e., marine security guards, certain special security forces) will operate under use-of-force or ROE promulgated by those departments or agencies.

f. U.S. Coast Guard (USCG) units and units under USCG OPCON conducting law enforcement operations, and USCG personnel using their law enforcement authority, will follow the use-of-force policy issued by the Commandant, USCG. Nothing in the USCG use-of-force policy negates a commander's inherent authority and obligation to use all necessary means available and to take all appropriate action for unit self-defense in accordance with these SROE.

g. The guidance in this document does not cover U.S. forces deployed to assist federal and local authorities during times of civil disturbance within the territorial jurisdiction of any state, the District of Columbia, Commonwealths of

Puerto Rico and the Northern Marianas, U.S. possessions, and U.S. territories. Forces in these situations will follow use-of-force policy found in DOD Civil Disturbance Plan, "Garden Plot" (Appendix 1 to Annex C of Garden Plot).

h. U.S. forces deployed to assist foreign, federal, and local authorities in disaster assistance missions, such as earthquakes and hurricanes, will follow use-of-force guidelines as set forth in the mission's execute order and subsequent orders.

i. U.S. forces will always comply with the Law of Armed Conflict. However, not all situations involving the use of force are armed conflicts under international law. Those approving operational rules of engagement must determine if the internationally recognized Law of Armed Conflict applies. In those circumstances when armed conflict, under international law, does not exist, Law of Armed Conflict principles may, nevertheless, be applied as a matter of national policy. If armed conflict occurs, the actions of U.S. forces will be governed by both the Law of Armed Conflict and rules of engagement.

2. *Policy.*

a. THESE RULES DO NOT LIMIT A COMMANDER'S INHERENT AUTHORITY AND OBLIGATION TO USE ALL NECESSARY MEANS AVAILABLE AND TO TAKE ALL APPROPRIATE ACTION IN SELF-DEFENSE OF THE COMMANDER'S UNIT AND OTHER U.S. FORCES IN THE VICINITY.

b. U.S. national security policy serves to protect the United States, U.S. forces, and, in certain circumstances, U.S. citizens and their property, U.S. commercial assets, and other designated non-U.S. forces, foreign nationals, and their property from hostile attack. U.S. national security policy is guided, in part, by the need to maintain a stable international environment compatible with U.S. national security interests. In addition, U.S. national security interests guide our global objectives of deterring armed attack against the United States across the range of military operations, defeating an attack should deterrence fail, and preventing or neutralizing hostile efforts to intimidate or coerce the United States by the threat or use of armed force or terrorist actions. Deterrence requires clear and evident capability and resolve to fight at any level of conflict and, if necessary, to increase deterrent force capabilities and posture deliberately so that any potential aggressor will assess its own risks as unacceptable. U.S. policy, should deterrence fail, provides flexibility to respond to crises with options that:

(1) Are proportional to the provocation.

(2) Are designed to limit the scope and intensity of the conflict.

(3) Will discourage escalation.

(4) Will achieve political and military objectives.

3. *Intent.* These SROE are intended to:

a. Provide general guidelines on self-defense and are applicable worldwide to all echelons of command.

b. Provide guidance governing the use of force consistent with mission accomplishment.

c. Be used in operations other than war, during transition from peacetime to armed conflict or war, and during armed conflict in the absence of superseding guidance.

4. *Combatant Commanders' SROE.*

a. Combatant commanders may augment these SROE as necessary to reflect changing political and military policies, threats, and missions specific to their AOR. When specific standing rules governing the use of force in a combatant commander's AOR are required that are different from these SROE, they will be submitted to the Chairman of the Joint Chiefs of Staff for NCA approval as necessary and promulgated by the Joint Staff as an Annex to Enclosure C of these SROE.

b. Combatant commanders will distribute these SROE to subordinate commanders and units for compliance. The mechanism for disseminating ROE supplemental measures is set forth in Enclosure B.

5. *Definitions.*

a. *Inherent Right of Self-Defense.* A commander has the authority and obligation to use all necessary means available and to take all appropriate action to defend that commander's unit and other U.S. forces in the vicinity from a hostile act or demonstrated hostile intent. Neither these rules nor the supplemental measures activated to augment these rules limit this inherent right and

obligation. At all times, however, the requirements of necessity and proportionality as amplified in these SROE will be the basis for the judgment of the commander as to what constitutes an appropriate response to a particular hostile act or demonstration of hostile intent.

b. *National Self-Defense.* National self-defense is the act of defending the United States, U.S. forces, and, in certain circumstances, U.S. citizens and their property, U.S. commercial assets, and other designated non-U.S. forces, foreign nationals and their property, from a hostile act or hostile intent. Once a force or terrorist unit is declared hostile by appropriate authority exercising the right and obligation of national self-defense (see paragraph 2 of Appendix A to Enclosure A), individual U.S. units do not need to observe a hostile act or determine hostile intent before engaging that force.

NOTE: *Collective Self-Defense*, as a subset of national self-defense, is the act of defending other designated non-U.S. forces, personnel and their property from a hostile act or demonstration of hostile intent. Only the NCA may authorize U.S. forces to exercise collective self-defense.

c. *Unit Self-Defense.* Unit self-defense is the act of defending a particular unit of U.S. forces, including elements or personnel thereof, and other U.S. forces in the vicinity, against a hostile act or hostile intent. The need to exercise unit self-defense may arise in many situations such as localized low-level conflicts, humanitarian efforts, peace enforcement actions, terrorist response, or prolonged engagements. Individual self-defense is a subset of unit self-defense: see the Glossary for a definition of individual self-defense.

d. *Elements of Self-Defense.* The application of armed force in self-defense requires the following two elements:

(1) *Necessity.* A hostile act occurs or a force or terrorist unit exhibits hostile intent.

(2) *Proportionality.* The force used must be reasonable in intensity, duration, and magnitude, based on all facts known to the commander at the time, to decisively counter the hostile act or hostile intent and to ensure the continued safety of U.S. forces.

e. *Hostile Act.* A hostile act is an attack or other use of force by a foreign force or terrorist unit (organization or individual) against the United States, U.S. forces, and in certain circumstance, U.S. citizens, their property, U.S. commercial assets, and other designated non-U.S. forces, foreign nationals and

their property. It is also force used directly to preclude or impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel and U.S. government property. When a hostile act is in progress, the right exists to use proportional force, including armed force, in self-defense by all necessary means available to deter or neutralize the potential attacker or, if necessary, to destroy the threat. (See definitions in the Glossary for amplification.)

f. *Hostile Intent.* Hostile intent is the threat of imminent use of force by a foreign force or terrorist unit (organization or individual) against the United States, U.S. forces, and in certain circumstances, U.S. citizens, their property, U.S. commercial assets, or other designated non-U.S. forces, foreign nationals and their property. When hostile intent is present, the right exists to use proportional force, including armed force, in self-defense by all necessary means available to deter or neutralize the potential attacker or, if necessary, to destroy the threat. (See definitions in the Glossary for amplification.)

g. *Hostile Force.* Any force or terrorist unit (civilian, paramilitary, or military), with or without national designation, that has committed a hostile act, demonstrated hostile intent, or has been declared hostile.

6. *Declaring Force Hostile.* Once a force is declared hostile by appropriate authority, U.S. units need not observe a hostile act or a demonstration of hostile intent before engaging that force. The responsibility for exercising the right and obligation of national self-defense and declaring a force hostile is a matter of the utmost importance demanding considerable judgement of command. All available intelligence, the status of international relationships, the requirements of international law, the possible need for a political decision, and the potential consequences for the United States must be carefully weighed. Exercising the right and obligation of national self-defense by competent authority is in addition to and does not supplant the right and obligation to exercise unit self-defense. The authority to declare a force hostile is limited as amplified in Appendix A to Enclosure A.

7. *Authority to Exercise Self-Defense.*

a. *National Self-Defense.* The authority to exercise national self-defense is outlined in Appendix A to Enclosure A.

b. *Collective Self-Defense.* Only the NCA may authorize the exercise of collective self-defense.

c. *Unit Self-Defense.* A unit commander has the authority and obligation to use all necessary means available and to take all appropriate action to defend the unit, including elements and personnel thereof, or other U.S. forces in the vicinity, against a hostile act or hostile intent. In defending against a hostile act or hostile intent under these SROE, unit commanders should use only that degree of force necessary to decisively counter the hostile intent and to ensure the continued safety of U.S. forces.

8. *Action in Self-Defense.*

a. *Means of Self-Defense.* All necessary means available and all appropriate actions may be used in self-defense. The following guidelines apply for unit or national self-defense:

(1) *Attempt to Control Without the Use of Force.* The use of force is normally a measure of last resort. When time and circumstances permit, the potentially hostile force should be warned and given the opportunity to withdraw or cease threatening actions. (See Appendix A to Enclosure A for amplification.)

(2) *Use Proportional Force to Control the Situation.* When the use of force in self-defense is necessary, the nature, duration, and scope of the engagement should not exceed that which is required to decisively counter the hostile act or hostile intent and to ensure the continued safety of U.S. forces or other protected personnel or property.

(3) *Attack to Disable or Destroy.* An attack to disable or destroy a hostile force is authorized when such action is the only prudent means which a hostile act or hostile intent can be prevented or terminated. When such conditions exist, engagement is authorized only until the hostile force no longer poses an imminent threat.

b. *Immediate Pursuit of Hostile Foreign Forces.* In self-defense, U.S. forces may pursue and engage a hostile force that has committed a hostile act or demonstrated hostile intent and that remains an imminent threat. (See Appendix A to Enclosure A for amplification.)

c. *Defending U.S. Citizens, Property, and Designated Foreign Nationals.*

(1) *Within a Foreign Nation's U.S. Recognized Territory or Territorial Airspace.* A foreign nation has the principal responsibility for defending U.S.

citizens and property within these areas. (See Appendix A to Enclosure A for amplification.)

(2) *At Sea.* Detailed guidance is contained in Annex A to Appendix B of this enclosure.

(3) *In International Airspace.* Protecting civil aircraft in international airspace is principally the responsibility of the nation of registry. Guidance for certain cases of actual or suspected hijacking of airborne U.S. or foreign civil aircraft is contained in MCM-102-92, 24 July 1992, Hijacking of Civil Aircraft.

(4) *Terrorism.* Terrorist attacks are usually undertaken by civilian or paramilitary organizations, or by individuals under circumstances in which a determination of hostile intent may be difficult. The definitions of hostile act and hostile intent set forth above will be used in situations where terrorist attacks are likely. The term "hostile force" includes terrorist units when used in this document. When circumstances and intelligence dictate, supplemental ROE will be used to meet this special threat.

(5) *Piracy.* Piracy is defined as an illegal act of violence, depredation (i.e., plundering, robbing, or pillaging), or detention in or over international waters committed for private ends by the crew or passengers of a private ship or aircraft against another ship or aircraft or against persons or property on board such ship or aircraft. U.S. warships and aircraft have an obligation to repress piracy on or over international waters directed against any vessel, or aircraft, whether U.S. or foreign flagged. If a pirate vessel or aircraft fleeing from pursuit proceeds into the territorial sea, archipelagic waters, or superjacent airspace of another country every effort should be made to obtain the consent of nation sovereignty to continue pursuit. Where circumstances permit, commanders will seek guidance from higher authority before using armed force to repress an act of piracy.

d. *Operations Within or in the Vicinity of Hostile Fire or Combat Zones Not Involving the United States.*

(1) U.S. forces should not enter, or remain in, a zone in which hostilities (not involving the United States) are imminent or occurring between foreign forces unless directed by proper authority.

(2) If a force commits a hostile act or demonstrates hostile intent against U.S. forces in a hostile fire or combat zone, the commander is obligated to act in unit self-defense in accordance with SROE guidelines.

e. *Right of Assistance Entry.*

(1) Ships, or under certain circumstances aircraft, have the right to enter a foreign territorial sea or archipelagic waters and corresponding airspace without the permission of the coastal or island state to engage in legitimate efforts to render emergency assistance to those in danger or distress from perils of the sea.

(2) Right of assistance extends only to rescues where the location of those in danger is reasonably well known. It does not extend to entering the territorial sea, archipelagic waters, or national airspace to conduct a search.

(3) For ships and aircraft rendering assistance on scene, the right and obligation of self-defense extends to and includes persons, vessels, or aircraft being assisted. The right of self-defense in such circumstances does not include interference with legitimate law enforcement actions of a coastal nation. However, once received on board the assisting ship or aircraft, persons assisted will not be surrendered to foreign authority unless directed by the NCA.

(4) Further guidance for the exercise of the right of assistance entry is contained in CJCS Instruction 2410.01, 20 July 1993, "Guidance for the Exercise of Right of Assistance Entry."

TABLE A4-1

STATES WHICH HAVE RATIFIED
THE PROTOCOL RELATING TO AN AMENDMENT TO THE
CONVENTION ON INTERNATIONAL CIVIL AVIATION

ARTICLE 3 *bis*, SIGNED AT MONTREAL ON 10 MAY 1984
(As of 4 November 1997)

Barbados	23 Nov 1984	Niger	8 Apr 1988
Chile	26 Nov 1984	Ecuador	22 Apr 1988
Austria	11 Jan 1985	Guyana	2 May 1988
Oman	21 Feb 1985	Antigua and Barbuda	17 Oct 1988
Republic of Korea	27 Feb 1985	Gabon	1 Nov 1988
Tunisia	29 Apr 1985	Colombia	10 Mar 1989
Senegal	2 May 1985	Cyprus	5 Jul 1989
Luxembourg	10May1985	Mauritius	7 Nov 1989
Ethiopia	22 May 1985	Bahrain	7 Feb 1990
Pakistan	10 Jun 1985	Hungary	24 May 1990
South Africa	28 Jun 1985	Mexico	20 Jun 1990
Togo	5 Jul 1985	Morocco	19 Jul 1990
Nigeria	8 Jul 1985	Russian Federation	24 Aug 1990
Thailand	12 Jul 1985	Ireland	19 Sep 1990
Egypt	1 Aug 1985	Qatar	23 Oct 1990
Seychelles	8 Aug 1985	Malawi	13 Dec 1990
France	19 Aug 1985	Portugal	17 Jun 1991
Belgium	20 Sep 1985	Burundi	10 Oct 1991
Denmark	16 Oct 1985	Finland	18 Dec 1991
Norway	16 Oct 1985	Estonia	21 Aug 1992
Sweden	16 Oct 1985	Fiji	21 Sep 1992
Spain	24 Oct 1985	Papua New Guinea	5 Oct 1992
Switzerland	24 Feb 1986	Monaco	27 Jan 1993
Bangladesh	3 Jun 1986	Turkmenistan	14 Apr 1993
Italy	12 Jun 1986	Czech Republic	15 Apr 1993
Kuwait	18 Jul 1986	Uzbekistan	24 Feb 1994
Saudi Arabia	21 Jul 1986	Malta	25 Mar 1994
Australia	10 Sep 1986	Croatia	6 May 1994
Madagascar	10 Sep 1986	Eritrea	27 May 1994
Canada	23 Sep 1986	Iran	17 Jun 1994
Jordan	8 Oct 1986	Lebanon	14 Dec 1994
Argentina	1 Dec 1986	San Marino	3 Feb 1995
Netherlands	18 Dec 1986	Slovakia	20 Mar 1995
Brazil	21 Jan 1987	Uganda	7 Jul 1995
United Arab Emirates	18 Feb 1987	Kenya	5 Oct 1995
Mali	4 Mar 1987	Germany	2 Jul 1996
Panama	22 May 1987	Belarus	24 Jul 1996
Côte d'Ivoire	5 Jun 1987	Libya	28 Oct 1996
United Kingdom	21 Aug 1987	Maldives	8 Apr 1997
Uruguay	11 Sep 1987	Bosnia & Herzegovina	9 May 1997
Guatemala	18 Sep 1987	Moldova	20 Jun 1997
Greece	26 Oct 1987	Ghana	15 Jul 1997
Nepal	26 Oct 1987	China	23 Jul 1997
Cameroon	28 Jan 1988	Belize	24 Sep 1997
Lesotho	17 Mar1988	Israel	30 Sep 1997

Source: International Civil Aviation Organization, Legal Bureau, Montreal.

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 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 the use of force by member nations except as an enforcement action taken by or on behalf of the United Nations (as in the Gulf War) or as a measure of individual or collective self-defense.[1] It is important to distinguish between resort to armed conflict, and the law governing the conduct of armed conflict. Regardless of whether the use of armed force in a particular circumstance is prohibited by the United Nations Charter (and therefore unlawful),[2] the manner in which the resulting armed

1. United Nations Charter, arts. 2(3), 2(4), 42 & 51-53. These provisions concerning the use of force form the basis of the modern rules governing the resort to armed conflict, or *jus ad bellum*. *See* paragraph 4.1.1 and notes 7-9 thereunder (pp. 250 - 253). *See also* Kellogg-Briand Pact, or the Treaty for the Renunciation of War as an Instrument of National Policy, Paris, 27 August 1928, 46 Stat. 2343, T.S. No. 796, 2 Bevans 732, 94 L.N.T.S. 57.

The relationship concerning resort to war (*jus ad bellum*), relations between combatant nations during war (*jus in bello*), and the law of neutrality in the late 20th Century, is considered *in* Greenwood, The Concept of War in Modern International Law, 36 Int'l & Comp. L.Q. 283 (1987). *See also* Dinstein, War, Aggression and Self-Defense (2d ed. 1994) at 155-61; Green, The Contemporary Law of Armed Conflict (1993) at 59-60. *Jus in bello* is discussed further in note 4 (p. 290).

2. Wars violating these principles are often called "aggressive" or "illegal" wars. Military personnel may not be lawfully punished simply for fighting in an armed conflict, even if their side is clearly the aggressor and has been condemned as such by the United Nations. This rule finds firm support in the Allied war crimes trials that followed World War II. For the crime of planning and waging aggressive war (defined as a crime against peace, *see* paragraph 6.2.5, note 55 (p. 343)), the two post-World War II International Military Tribunals punished only those high ranking civilian and military officials engaged in the formulation of war-making policy. The twelve subsequent Proceedings at Nuremberg rejected all efforts to punish lesser officials for this crime merely because they participated in World War II. *See* DA Pam 27-161-2, at 221-51.

Because nations have traditionally claimed that their wars are wars of self-defense, the courts of the Western Allies were unwilling to punish officials of the Axis powers for waging aggressive war if the officials were not at the policy-making level of government. One of the American tribunals at

(continued...)

conflict is conducted continues to be regulated by the law of armed conflict.[3] (For purposes of this publication, the term "law of armed conflict" is synonymous with "law of war.")[4]

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

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2.(...continued)
Nuremberg stated, "we cannot say that a private citizen shall be placed in the position of being compelled to determine in the heat of war whether his government is right or wrong, or, if it starts right, when it turns wrong." *The I.G. Farben Case*, 8 TWC 1126, 10 LRTWC 39 (1949).

Since armed force can lawfully be used today only in individual or collective self-defense (or as an enforcement action authorized by the United Nations Security Council in accordance with Chapter VII of the U.N. Charter), the unlawful use of armed force constitutes a crime against peace under international law. Crimes against peace are defined in art. 6 of the Charter of the International Military Tribunal at Nuremberg and are discussed in paragraph 6.2.5, note 55 (p. 343).

The Charter of the International Military Tribunal convened at Nuremberg in 1945 empowered the Tribunal to try individuals for international crimes, including initiation or waging of a war of aggression as a crime against peace. This was confirmed as a principle of international law by the U.N. General Assembly in 1946 (Resolution 95(I)) and by the International Law Commission in 1950. In 1974, the U.N. General Assembly adopted by consensus a definition of aggression for use by the Security Council in determining if an act of aggression had been committed:

> Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.

Resolution 3314 (XXIX), 29 U.N. GAOR, Supp. 31, v.1, U.N. Doc. A/9631, at 142 (1974); Dep't St. Bull., 3 Deb. 1975, at 158-660; AFP 110-20, at 5-78 & 5-79.

This statement is amplified by a sries of examples of uses of armed force which, unless otherwise justified in international law or determined by the Security Council not to be of sufficient gravity, would permit the Security Council reasonably to consider to qualify as potential acts of aggression. Among these examples are invasion, the use of any weapons by a nation against the territory of another nation, the imposition of a blockade, an attack by the armed forces of one nation upon the armed forces of another nation, or the sending of armed bands, irregulars or mercenaries against another State. (*See* paragraph 7.7 (p. 390) regarding blockade.) Although neither the International Military Tribunal judgment nor U.N. General Assembly Resolutions are primary sources of international law (see Preface, note 4 (p. 3)), they are generally consistent with the current U.S. view of aggression. Dep't St. Bull., 3 Feb. 1975, at 155-58.

3. *See* paragraph 6.2.5 (war crimes under international law) (p. 343).

4. Joint Pub. 1-02, at 206. The rules governing the actual conduct of armed conflict are variously known as the *jus in bello*, the law of armed conflict (law of war), or international humanitarian law. *See* paragraph 6.2.2, note 34 (p. 335).

(continued...)

4.(...continued)
As a matter of international law, application of the law of armed conflict between belligerents does not depend on a declaration or other formal recognition of the existence of a state of "war," but on whether an "armed conflict" exists, and if so, whether the armed conflict is of an "international" or a "noninternational" character. As a matter of national policy, the Armed Forces of the United States are required to comply with the law of armed conflict in the conduct of military operations and related activities in armed conflict "however such conflicts are characterized." DOD Directive 5100.77, Subj: DOD Law of War Program (in draft as of 1 November 1997). *See* paragraph 5.4.1, note 15 (p. 298) regarding the Lieber Code and also paragraph 6.1.2 (p. 324).

Although it is frequently difficult to determine when a situation involving violent activity becomes an "armed conflict," there is general agreement that *internal disturbances* and *tensions* are not armed conflicts. Examples of internal disturbances and tensions include:

- riots (i.e., all disturbances which from the start are not directed by a leader and have no concerted intent)

- isolated and sporadic acts of violence (as distinct from military operations carried out by armed forces or organized armed groups)

- other acts of a similar nature (such as mass arrests of persons because of their behavior or political opinion).

GP II, art. 1(2); ICRC, Commentary on the Draft Additional Protocols to the Geneva Conventions of August 12, 1949, at 133 (1973), quoted in Bothe, Partsch & Solf 628 n.9. The ICRC Commentary (GP II) (para. 4477, at 1355) distinguishes internal disturbances from internal tensions. "Internal disturbances" occur when the State uses armed force to maintain order. "Internal tensions" refers to those circumstances when force is used as a preventive measure to maintain respect for law and order.

"International" armed conflicts include cases of declared war or any other armed conflict between two or more nations even if the state of war is not recognized by one of them. Common article 2. All other armed conflicts are "noninternational armed conflicts," governed at least by common article 3 of the 1949 Geneva Conventions, and by GP II for nations bound by it if the situation meets the criteria set forth in art. 1(1) thereof (*i.e.*, there must be an armed conflict occurring in the territory of the nation bound by GP II between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement GP II). The United States interprets GP II as applying to all conflicts covered by common article 3, and encourages all other nations to do likewise. Letter of Transmittal, Jan. 29, 1987, Senate Treaty Doc. 100-2, at 7. *See* Annex A5-1 (p. 306). *See also* International Humanitarian Law and Non-International Armed Conflicts, 1990 Int'l Rev. Red Cross 383-408; Levie, The Law of Non-International Armed Conflict (1987). "Armed forces" are discussed in paragraph 5.3, note 11 (p. 296). *See* paragraph 5.4.2, note 34 (p. 303) regarding the U.S. decision not to seek ratification of GP I.

The spectrum of conflict, reflecting the threshhold criteria, is illustrated in Figure A5-1 (p. 314). Among recent international armed conflicts are the Iran-Iraq War (1980-1988), the Libya-Chad War (1987-1988), the China-Vietnam Conflict (1979), and the Soviet-Afghanistan War (1979-88). Although some have categorized the latter as an internal conflict in which foreign troops participated, others list it as an international conflict. Reisman & Silk, Which Law Applies to the Afghan Conflict?, 82 Am. J. Int'l L. 459, 485-86 (1988) (Soviet invasion resisted by loyal Afghan government troops met the criteria of common article 2(1), and was followed by occupation meeting the criteria of common article 2(2)); Roberts, What is Military Occupation?,
(continued...)

through minimum standards of protection to be accorded to "combatants" and to "noncombatants" and their property.[5] (See paragraphs 5.3 and 11.1.) 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.[6]

4.(...continued)
55 Brit. Y.B. Intl'l L. 249, 278 (1984) (Soviet occupation may well have met the criteria of common article 2(2)). Certainly the Falkland (Malvinas) Islands War between the United Kingdom and Argentina (1982) and the Persian Gulf Conflict of 1990-1991 (Iraqi invasion of Kuwait and the U.N.-authorized coalition response—*e.g.* OPERATION DESERT STORM) constituted international armed conflicts. The U.S. has steadfastly held that the Vietnam War (1961-1975) was an international armed conflict. U.S. Department of State, The Legality of United States Participation in the Defense of Viet-Nam, 54 Dep't. of State Bull. 474 (March 28, 1966). For a wide ranging discussion of this issue as it pertains to Vietnam *see* The Vietnam War and International Law, Am. Soc. Int'l L., 4 vols. (Falk ed. 1968-76). Among recent non-international armed conflicts are the Nicaraguan Civil War (1979-90), the ongoing Sri Lanka Civil War (1983-present), the Chechnya Separatist Conflict (1991-1997), and the Zaire (now Congo) Civil War (1997).

5. As long as war occurs, the law of armed conflict remains an essential body of international law. During such strife, the law of armed conflict provides common ground of rationality between enemies. This body of law corresponds to the mutual interests of belligerents during conflict and constitutes a bridge for a new understanding after the end of the conflict. The law of armed conflict is intended to preclude purposeless, unnecessary destruction of life and property and to ensure that violence is used only to defeat the enemy's military forces. The law of armed conflict inhibits warfare from needlessly affecting persons or things of little military value. By preventing needless cruelty, the bitterness and hatred arising from armed conflict is lessened, and thus it is easier to restore an enduring peace. The legal and military experts who attempted to codify the laws of war more than a hundred years ago reflected this when they declared that the final object of an armed conflict is the "re-establishment of good relations and a more solid and lasting peace between the belligerent States." Final Protocol of the Brussels Conference of 27 August 1874, Schindler & Toman 26. *See also* Green, Why is There—The Law of War?, 5 Finn. Y.B. Int'l L. 1994 at 99-148.

6. This concept, often referred to as the principle of "necessity" or "military necessity," is designed to limit the application of military force in armed conflict to that which is in fact required to carry out a lawful military purpose. *See* Bothe, Partsch & Solf at 194-95. Too often, "military necessity" is misunderstood and misapplied to support an application of military force that is unlawful under the misapprehension that the "military necessity" of mission accomplishment justifies that result. *The Hostages Case (United States v. List et al.)*, 11 TWC 1253-54 (1950); McDougal & Feliciano 523-25; AFP 110-31, at 1-5 & 1-6; FM 27-10, at 3 & 4. *See also* the definition of "military necessity" in de Muliner, Handbook on the Law of War for Armed Forces (1987) at Rule 352. In *The Hostages Case*, the Court explained this principle in the following terms:

> Military necessity has been invoked by the defendants as justifying the killing of innocent members of the population and the destruction of villages and towns in the occupied territory. Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money. In general, it sanctions measures by an occupant necessary to protect the safety of his forces and to facilitate the success of his operations. It permits the destruction of life of armed

(continued...)

6.(...continued)

> enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war; it allows the capturing of armed enemies and others of peculiar danger, but it does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces. It is lawful to destroy railways, lines of communication, or any other property that might be utilized by the enemy. Private homes and churches even may be destroyed if necessary for military operations. It does not admit the wanton devastation of a district or the willful infliction of suffering upon its inhabitants for the sake of suffering alone.

11 TWC 1253-54, *quoted in* 10 Whiteman 386-87. *See also* paragraph 6.2.5.5.2 (military necessity) (p. 356).

General Eisenhower recognized this distinction in a message on 29 December 1943 from him as Allied Commander in the Mediterranean to "all commanders":

> Nothing can stand against the argument of military necessity. That is an accepted principle. But the phrase "military necessity" is sometimes used where it would be more truthful to speak of military convenience or even of personal convenience. I do not want it to cloak slackness or indifference. . . .

Historical Research Center, Maxwell Air Force Base, AL, File 622.610-2, Folder 2, 1944-45, *quoted in* Schaffer, Wings of Judgment: American Bombing in World War II, at 50 (1985) and Hapgood & Richardson, Monte Cassino 158 (1984). *See also* paragraph 8.5.1.6, note 122 (p. 425).

The principle of military necessity may be, and in many instances is, restricted in its application to the conduct of warfare by other customary or conventional rules, *i.e.*, military necessity is not a justification which supersedes all other laws of armed conflict. The minority view that all rules of warfare are subject to, and restricted by, the principle of military necessity has not been accepted by the majority of American and English authorities. Furthermore, this opinion has not been accepted by military tribunals. Indeed, it has been held by military tribunals that the plea of military necessity cannot be considered as a defense for the violation of rules which lay down absolute prohibitions (*e.g.*, the rule prohibiting the killing of prisoners of war) and which provide no exception for those circumstances constituting military necessity. Thus, one United States Military Tribunal, in rejecting the argument that the rules of warfare are always subject to the operation of military necessity, stated:

> It is an essence of war that one or the other side must lose and the experienced generals and statesmen knew this when they drafted the rules and customs of land warfare. In short, these rules and customs of warfare are designed specifically for all phases of war. They comprise the law for such emergency. To claim that they can be wantonly—and at the sole discretion of any one belligerent—disregarded when he considers his own situation to be critical, means nothing more or less than to abrogate the laws and customs of war entirely.

The Krupp Trial (Trial of Alfred Felix Alwyn Krupp von Bohlen und Halbach and Eleven Others), 10 LRTWC 139 (1949).

(continued...)

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.[7]

3. Dishonorable (treacherous) means, dishonorable expedients, and dishonorable conduct during armed conflict are forbidden.[8]

6.(...continued)
However, there are rules of customary and conventional law which normally prohibit certain acts, but which exceptionally allow a belligerent to commit these normally prohibited acts in circumstances of military necessity. In conventional rules, the precise formulation given to this exception varies. Some rules contain the clause that they shall be observed "as far as military necessity (military interests) permits." Examples include GWS, art. 8(3) & GWS-Sea, art. 8(3) (restricting activities of representatives or delegates of Protecting Powers); GWS, art. 33(2), GWS-Sea, art. 28 (use of captured medical supplies); GWS, art. 32(2) (return of neutral persons); GWS, art. 30(1) (return of captured medical and religious personnel); GC, arts. 16(2) (facilitating search for wounded and sick), 55(3) (limiting verification of state of food and medical supplies in occupied territories), 108(2) (limitations on relief shipments); GWS, art. 42(4), GPW, art. 23(4) and GC, art. 18(4) (visibility of distinctive emblems). Other rules permit acts normally forbidden, if "required" or "demanded" by the necessities of war. Examples include HR, art. 23(g), GWS, art. 34(2) & GC, art. 53 (permitting destruction or seizure of property); GPW, art. 126(2) & GC, art. 143(3) (limiting visits of representatives and delegates of Protecting Powers); GC, arts. 49(2) (evacuation of protected persons from occupied territory), 49(5) (detention of protected persons in areas exposed to dangers of war). Rules providing for the exceptional operation of military necessity require a careful consideration of the relevant circumstances to determine whether or not the application of otherwise excessive force is rendered necessary in order to protect the safety of a belligerent's forces or to facilitate the success of its military operations. 10 Whiteman 302 (*citing* NWIP 10-2, sec. 220(b)). *See also* paragraph 6.2.3 (p. 335) regarding reprisals.

7. *See* FM 27-10, at 3; AFP 110-31, at 1-6. This principle, directed against infliction of unnecessary suffering or superflous injury, is referred to as the "principle of proportionality" or the "principle of humanity." The opinion is occasionally expressed that the principles of necessity and proportionality contradict each other in the sense that they serve opposing ends. This is not the case. The principle of necessity allows the use of sufficient force to accomplish a lawful purpose during armed conflict. It complements the principle of proportionality which disallows any kind or degree of force **not** essential for the realization of that lawful purpose. Together, the principles of necessity and proportionality make unlawful any use of force which needlessly or unnecessarily causes or aggravates human suffering or physical destruction. The real difficulty arises not from the actual meaning of the principles, but from their application in practice. 10 Whiteman 302 (*citing* NWIP 10-2, sec. 220 n.9). The rule of proportionality has been articulated in GP I, arts. 51(5)(b) and 57(2)(a)(iii), as prohibiting attacks

> [W]hich 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.

See Fenrick, The Rule of Proportionality and Protocol I in Conventional Warfare, 98 Mil. Law Rev. 1982 at 91. The term "concrete and direct", as used in arts. 51 and 57, refers to "the advantage anticipated from the specific military operation of which the attack is a part taken as a whole and not from isolated or particular parts of the operation." Bothe, Partsch & Solf 311. *See also* Solf, Protection of Civilians 128-35; paragraph 8.1.2.1 and notes 16-20 thereunder (incidental injury and collateral damage) (p. 404).

8. *See* Chapter 12 and Bothe, Partsch & Solf at 201-207 regarding prohibited deceptions or perfidy.

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.[9] However, these principles do not prohibit the

9. Although the U.S. Navy has not adopted as doctrine the Principles of War, useful discussions of their application in naval tactics may be found in Hughes, Fleet Tactics 140-45 & 290-97 (1986); Eccles, Military Concepts and Philosophy 108-13 (1965); and Brown, The Principles of War, U.S. Naval Inst. Proc., June 1949, at 621. The Marine Corps, Army and Air Force have adopted variations of the principles of war as service doctrine: U.S. Marine Corps, Marine Rifle Company/Platoon, FMFM 6-4, para. 1403 (1978); U.S. Air Force, Basic Aerospace Doctrine, AFM 1-1, March 1992, vol. II at 9-15; Department of the Army, Operations, FM 100-5, at 2-4 to 2-5 (1993); Armed Forces Staff College, Joint Staff Officer's Guide, Pub 1, para. 101, at p. 1-3 (1993); Joint Pub 3-0, Doctrine for Joint Operations, 1 February 1995 at II-1. The principles of war in any case are not a set of inflexible rules; rather they are "good tools to sharpen the mind," and are essential elements in successful military operations. Eccles 113.

The principle of *the objective* provides that every military undertaking must have an objective, that is, it must be directed toward a clearly defined goal and all activity must contribute to the attainment of that goal. Military objectives necessarily support national objectives—in peace as well as in war—and, more directly, support the national war aims during conflict. The law of armed conflict supports this principle by assisting in defining what is politically and legally obtainable.

The principle of *concentration* or *mass* states that to achieve success in war it is essential to concentrate superior forces at the decisive place and time in the proper direction, and to sustain this superiority at the point of contact as long as it may be required. With the law of armed conflict, this principle serves, in part, to employ the proper economy of force at or in the decisive points and to enable maximum total effective force to be exerted in achieving the objective.

Economy of force means that no more—or less—effort should be devoted to a task than is necessary to achieve the objective. This implies the correct selection and use of weapons and weapon systems, maximum productivity from available weapons platforms, and careful balance in the allocation of tasks. This principle is consistent with the fundamental legal principle of proportionality.

Surprise results from creating unexpected situations or from taking courses of least probable expectation—both considered from the enemy point of view and both designed to exploit the enemy's consequent lack of preparedness. It permits the attaining of maximum effect from a minimum expenditure of effort. The lawfulness of such techniques as deception supports surprise.

Security embraces all measures which must be taken to guard against any form of counter-stroke which the enemy may employ to prevent the attainment of the objective or to obtain its own objective. Security implies the gaining of enemy intelligence. Surveillance and spying are not prohibited by international law including the law of armed conflict.

(continued...)

application of overwhelming force against enemy combatants, units and material.

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.[10]

The term "combatant" embraces those persons who have the right under international law to participate directly in armed conflict during hostilities. Combatants, therefore, include all members of the regularly organized armed forces of a party to the conflict (except medical personnel, chaplains, civil defense personnel, and members of the armed forces who have acquired civil defense status), as well as irregular forces who are under responsible command and subject to internal military discipline, carry their arms openly, and otherwise distinguish themselves clearly from the civilian population.[11]

9.(...continued)
Other principles of war are: *unity of command* which ensures that all efforts are focused on a common goal or objective; *maneuver* which seeks to place the enemy in a position of disadvantage through the flexible application of combat power; and *offensive* which, contemplates seizing, retaining and exploiting the initiative.

10. 10 Whiteman 135 (*citing* NWIP 10-2, para. 221a). Chapter 11 discusses noncombatants in detail. *See* HR, art. 3(2); GP I, art. 43(2).

11. The "armed forces" of a Party to an armed conflict include 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. GP I, art. 43(1). Other requirements for combatant status are discussed in paragraph 11.7 (p. 489), especially notes 52 & 53 and accompanying text. *See also* de Preux, Synopsis VII: Combatant and prisoner-of-war status, 1989 Int'l Rev. Red Cross 43.

Persons acting on their own in fighting a private war, including gangs of terrorists acting on their own behalf and not linked to an entity subject to international law, are not lawful combatants. *See* paragraph 12.7.1 (p. 515), and Baxter, So-Called Unprivileged Belligerency: Spies, Guerrillas and Saboteurs, 28 Brit. Y.B. Int'l L. 323 (1951), regarding illegal combatants.

On identification of combatants and noncombatants, *see* de Preux, Synopsis IV: Identification—Fundamental Principle, 1985 Int'l Rev. Red Cross 364. For a discussion of the obligation of members of an irregular force to carry their arms openly and otherwise distinguish themselves from the civilian population, *see* paragraph 11.7 and note 53 thereunder (p. 491). On respect for persons protected by the Geneva Conventions, *see* Green, Contemporary Law of Armed Conflict, 1993, chaps. 10 & 11; de Preux, Synopsis IX: Respect for the Human Being in the Geneva Conventions, 1989 Int'l Rev. Red Cross 217.

Conversely, 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 members of or accompanying the armed forces, enjoy special protected status, such as medical officers, corpsmen, chaplains, technical (i.e., contractor) representatives, and civilian war correspondents. (See Chapter 11.) The term is also applied to armed forces personnel who are unable to engage in combat because of wounds, sickness, shipwreck, or capture.[12]

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.[13]

Because only combatants may lawfully participate directly in armed combat, noncombatants that do so are acting unlawfully and are considered illegal combatants. See paragraphs 11.5 (Medical Personnel and Chaplains) and 12.7.1 (Illegal Combatants).

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.[14]

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

12. 10 Whiteman 135, *citing* NWIP 10-2, para. 221a n.12; Kalshoven, Noncombatant Persons, *in* Robertson, at 304-24; Green, note 11, at chap. 12. *See* paragraph 11.1 (p. 481).

13. 10 Whiteman 135, *citing* NWIP 10-2. para. 221b; Kalshoven, Noncombatant Persons, *in* Robertson, at 306-07. *See* paragraph 11.2 (protected status) (p. 481). For a discussion of GP I arts. 48 & 51, *see* Bothe, Partsch & Solf at 280-86 & 296-318.

14. *See* Preface (p. 3). Evidence of the law of armed conflict may also be found in national military manuals, judicial decisions, the writings of publicists, and the work of various international bodies. Documents on the Laws of War 6-9 (Roberts & Guelff eds., 2d ed. 1989). With regard to the importance of national military manuals as evidence of the law of armed conflict, *see* Reisman & Lietzau, Moving International Law from Theory to Practice: the Role of Military Manuals in Effectuating the Law of Armed Conflict, *in* Robertson, at 7-9; Green, paragraph 5.3, note 11 (p. 296), at chap. 2. For a listing of military manuals *see* Fleck at app. 3.

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 conflict 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 armed conflict 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.)[15] However, the inherent flexibility of law built on custom and the

15. The roots of the present law of armed conflict may be traced back to practices of belligerents which arose, and grew gradually, during the latter part of the Middle Ages, primarily as a result of the influences of Christianity and chivalry. *See* Draper, The Interaction of Christianity and Chivalry in the Historical Development of the Law of War, 1965, 5 Int'l Rev. Red Cross 3; Meron, Henry's Wars and Shakespeare's Laws (1993); Meron, Shakespeare's Henry the Fifth and the Law of War, 86 Am. J. Int'l L. 1 (1992); The Laws of War: Constraints on Warfare in the Western World (Howard, Andreopoulus & Shulman eds. 1994) at 27-39. Unlike the savage cruelty of former times, belligerents gradually adopted the view that the realization of the objectives of war was in no way limited by consideration shown to the wounded, to prisoners, and to private individuals who did not take part in the fighting. Progress continued during the seventeenth and eighteenth centuries. Hugo Grotius codified the first rules of warfare in his *De Jure Belli ac Pacis* in 1642. These rules were widely adopted by nations, partly for ethical reasons, and partly because the remnants of chivalry were still influential among aristocratic officers.

The most important developments in the laws of armed conflict took place in the period after 1850. The French Revolution and Napoleonic Wars first introduced the concept of the citizen army. While during the 17th and 18th centuries the means of destruction were limited by the absence of industrial might and combatants were limited to a small group of professional soldiers, the distinction between combatants and noncombatants became blurred as armed forces began to rely upon the direct support of those who remained at home. Limitations on the means of destruction were also in transition, as by the middle of the 19th century the effect of the industrial revolution was beginning to be felt on the battlefield. A combination of the increased killing power of artillery, the inadequacy of field medical treatment and the outmoded infantry tactics resulted in unprecedented battlefield losses. The public reaction to the particularly harsh experiences of the Crimean War (1854-56) and the United States' Civil War, renewed the impetus for the imposition of limits on war and demonstrated the need for mor, precise written rules of the law of armed conflict to replace the vague customary rules. The horrors of the Battle of Solferino in northern Italy in 1859 resulted in the formation of the Red Cross movement in 1863. Dunant, The Battle of Solferino (1861). (*See* paragraph 6.2.2 (p. 334) for a description of the ICRC and its activities.) It was in this light that the first conventions to aid the sick and wounded were concluded at Geneva in 1864. (*See* Pictet, The First Geneva Convention, 1989 Int'l Rev. Red Cross 277.) In the United States, President Lincoln commissioned Dr. Francis Lieber, then a professor at Columbia College, New York City, to draft a code for the use of the Union Army during the Civil War. His code was revised by a board of Army officers, and promulgated by President Lincoln as General Orders No. 100, on 24 April 1863, as the Instructions for the Government of Armies of the United States in the Field. (*See* Baxter, The First Modern Codification of the Law of War, 3 Int'l Rev. Red Cross 1963 at 171; Solf, Protection of Civilians 121; Hoffman, The Customary Law of Non-International Armed Conflict: Evidence from the United States Civil War, 1990 Int'l Rev. Red Cross 322.) The

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fact that it reflects the actual—albeit constantly evolving—practice of nations, underscore the continuing importance of customary international law in the development of the law of armed conflict.[16]

5.4.2 International Agreements. International agreements, whether denominated as treaties, conventions, or protocols, 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

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15.(...continued)
Lieber Code strongly influenced the further codification of the law of armed conflict and the adoption of similar regulations by many nations, including the Oxford Manual of 1880; Declaration of Brussels of 1874; and the United States Naval War Code of 1900, and had a great influence on the drafters of Hague Convention No. II (1899), replaced by Hague Convention IV (1907) regarding the Laws and Customs of War on Land. The 1907 Hague Regulations annexed to Hague IV have been supplemented by the 1949 Geneva Convention Relative to Protection of Civilians in Time of War, the 1949 Convention Relative to the Treatment of Prisoners of War, the 1977 Protocols Additional to the 1949 Geneva Conventions, and the 1980 Conventional Weapons Convention, as amended. The principles of customary international law codified in such treaties are identified in the relevant notes to the text.

In the past half century there has been a marked tendency to include among the sources of the rules of warfare certain principles of law adopted by many nations in their domestic legislation. The Statute of the International Court of Justice includes within the sources of international law which it shall apply, "the general principles of law recognized by civilized nations." Statute of the I.C.J., art. 38, para. 1.c. In the judgment rendered in *The Hostages Case*, the United States Military Tribunal stated:

> The tendency has been to apply the term "customs and practices accepted by civilized nations generally, as it is used in international law, to the laws of war only. But the principle has no such restricted meaning. It applies as well to fundamental principles of justice which have been accepted and adopted by civilized nations generally. In determining whether such a fundamental rule of justice is entitled to be declared a principle of international law, an examination of the municipal laws of states in the family of nations will reveal the answer. If it is found to have been accepted generally as a fundamental rule of justice by most nations in their municipal law, its declaration as a rule of international law would seem to be fully justified.

United States v. List et al., 11 TWC 1235 (1950).

16. The role of customary international law in developing the law of armed conflict is cogently discussed in the introduction to Documents on the Law of War, note 14 (p. 297), at 4-6. *See* Meron, Human Rights and Humanitarian Norms as Customary Law (1989) and Meron, The Geneva Conventions As Customary Law, 81 Am. J. Int'l L. 348 (1987). *See also* Bruderlein, Custom in International Humanitarian Law, 1991 Int'l Rev. Red Cross 579.

or adherence by individual nations.[17] 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 non-party nations alike.[18]

Principal among the international agreements reflecting the development and codification of the law of armed conflict are the Hague Regulations of 1907, the

17. Vienna Convention on the Law of Treaties, art. 21, *reprinted in* 8 Int'l Leg. Mat'ls 679 (1969). Numerous multilateral agreements contain a provision similar to that contained in article 28 of Hague Convention No. XIII (1907) that "The provisions of the present Convention do not apply except between the Contracting Powers, and only if all the belligerents are parties to the Convention." The effects of this so called "general participation" clause have not been as far-reaching as might be supposed. In World Wars I and II and the Korean War, belligerents frequently affirmed their intention to be bound by agreements containing the general participation clause regardless of whether or not the strict requirements of the clause were actually met. In practice, prize courts during and after WW I disregarded the nonparticipation of non-naval belligerents. *The Blood* [1922] 1 A.C. 313.

18. Certain conventions have been generally regarded either as a codification of pre-existing customary law or as having come to represent, through widespread observance, rules of law binding upon all States. Both the International Military Tribunals at Nuremberg and for the Far East treated the general participation clause in Hague Convention No. IV (1907), Respecting the Laws and Customs of War on Land, as irrelevant. They also declared that the general principles laid down in the 1929 Geneva Convention relative to the Treatment of Prisoners of War, which does not contain a general participation clause, were binding on signatories and nonsignatories alike. *Nazi Conspiracy and Aggression*: Opinion and Judgment 83, U.S. Naval War College, International Law Documents 1946-1947, at 281-82 (1948); *IMTFE*, Judgment 28, U.S. Naval War College, International Law Documents 1948-49, at 81 (1950). Art. 2, para. 3, of all four 1949 Geneva Conventions states:

> Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Similar provisions are contained in art. 96 of GP I and art. 7 of the 1980 Conventional Weapons Convention, as amended.

This subject is explored in detail in Meron, The Geneva Conventions as Customary Law, 81 Am. J. Int'l L. 348 (1987); Meron, Human Rights and Humanitarian Norms as Customary Law (1989). *Cf.* Solf, Protection of Civilians 124, text accompanying nn. 39-41.

For efforts to identify those provisions of GP I which codify existing international law, *see* Penna, Customary International Law and Protocol I: An Analysis of Some Provisions, *in* Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet 201 (Swinarski ed. 1984); Cassese, The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law, 3 UCLA Pac. Bas. L.J. 55-118 (1984) (GP I and II); The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 Am. U.J. Int'l L. & Policy 422-28 (1987) (remarks of U.S. Department of State Deputy Legal Adviser Matheson); Hogue, Identifying Customary International Law of War in Protocol I: A Proposed Restatement, 13 Loy. L.A. Int'l & Comp. L.J. 279 (1990).

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, 1993 Chemical Weapons Convention, Hague Cultural Property Convention, Biological Weapons Convention, and the Conventional Weapons Convention are concerned, primarily, with controlling the means and methods of warfare.[19] 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)[20]

2. 1907 Hague Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague V)[21]

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19. The major treaties on naval warfare presently in force date back to 1907, before the large scale use of submarines and aircraft in naval operations. The 1936 London Protocol on submarine warfare resulted from attempts by traditionalists to require submarines, which at that time generally attacked while on the surface, to adhere to rules governing methods of attack applicable to surface combatants. *See* Levie, Submarine Warfare: With Emphasis on the 1936 London Protocol, *in* Grunawalt at 41-48. The GWS-Sea, as supplemented by portions of GP I, develops only the rules on the protection of the wounded, sick and shipwrecked at sea. In large measure, the law of naval warfare continues to develop in its traditional manner through the practice of nations ripening into customary (as opposed to treaty) law. A series of meetings of experts, sponsored by the International Institute of Humanitarian Law, San Remo, Italy commencing in 1987, led to the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, June 1994. The Manual and accompanying explanation of its provisions may be found *in* San Remo Manual on International Law Applicable to Armed Conflicts at Sea, Prepared by International Lawyers and Naval Experts Convened by the International Institute of Humanitarian Law (Doswald-Beck ed. 1995). *See* Robertson, An International Manual for the Law of Armed Conflict at Sea, Duke L. Mag., Winter 1995, at 14-18.

The military manuals on naval warfare were, until recently, antiquated. *See* U.S. Navy, Law of Naval Warfare, NWIP 10-2 (1955) (set out in its entirety in the appendix to Tucker), which was replaced by the Commander's Handbook on the Law of Naval Operations, NWP 9 (1987), NWP 9 Revision A/FMFM 1-10 (1989) (set out in its entirety in the Appendix to Robertson) and this present manual. *See also* chaps. 8-11 of the Royal Australian Navy, Manual of the Law of the Sea, ABR 5179 (1983). New manuals on the law of naval warfare have been recently promulgated or are in preparation by a number of other nations, including the United Kingdom, Canada, Germany, Japan, Italy, and Russia.

20. The general principles of Hague IV reflect customary international law. *See* cases cited in note 18 (p. 300), and Solf, Protection of Civilians 123 text at n.41. Hague IV is discussed in Chapters 8, 9, 11 & 12 *passim*. *But see* Lowe, The Commander's Handbook on the Law of Naval Operations and the Contemporary Law of the Sea, *in* Robertson, at 130.

21. Hague V is discussed in Chapter 7 (The Law of Neutrality).

3. 1907 Hague Convention Relative to the Laying of Automatic Submarine Contact Mines (Hague VIII)[22]

4. 1907 Hague Convention Concerning Bombardment by Naval Forces in Time of War (Hague IX)[23]

5. 1907 Hague Convention Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War (Hague XI)[24]

6. 1907 Hague Convention Concerning the Rights and Duties of Neutral Powers in Naval War (Hague XIII)[25]

7. 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare[26]

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)[27]

9. 1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field[*28]

10. 1949 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea[*29]

11. 1949 Geneva Convention (III) relative to the Treatment of Prisoners of War[*30]

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22. Hague VIII is discussed in paragraphs 9.2 (naval mines) (p. 441) and 9.4 (torpedoes) (p. 9-14).

23. Hague IX is discussed in paragraphs 8.5 (bombardment) (p. 422) and 11.9.3 (Hague symbol) (p. 498).

24. Hague XI is mentioned in paragraph 8.2.3, notes 72, 74, & 78 (pp. 417 and 418).

25. Hague XIII is discussed in Chapter 7.

26. The 1925 Geneva Gas Protocol is discussed in paragraph 10.3 (chemical weapons) (p. 466).

27. The 1936 London Protocol is discussed in paragraphs 8.2.2.2 (destruction of enemy merchant vessels) (p. 410) and 8.3.1 (submarine warfare) (p. 419).

28. The 1949 Geneva Wounded and Sick Convention is discussed in paragraph 11.4 (wounded, sick and shipwrecked) (p. 484). *See* Table A5-1 (p. 315) for a listing of the nations that are party to the 1949 Geneva Conventions, I, II, III and IV.

29. The 1949 Geneva Wounded, Sick and Shipwrecked Convention is discussed in paragraph 11.4 (wounded, sick and shipwrecked) (p. 484).

30. The general principles (but not the details) of the 1929 Geneva Prisoners of War Convention, which are repeated in the 1949 Geneva Prisoners of War Convention, have been held to be declaratory of customary international law. *See* note 18 (p. 300); FM 27-10, para. 6. The 1949 Geneva Prisoners of War Convention is discussed in paragraph 11.7 (prisoners of war) (p. 489).

12. 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War*[31]

13. 1954 Hague Convention for the Protection of Cultural Property in the event of armed conflict[32]

14. 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction[33]

15. 1977 Protocol Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of International Armed Conflict (Additional Protocol I)*[34]

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31. The 1949 Geneva Civilians Convention is discussed in paragraph 11.8 (interned persons) (p. 495).

32. The 1954 Hague Cultural Property Convention and the 1935 Roerich Pact are discussed in paragraph 11.9.2 (other protective symbols) (p. 497).

33. The 1972 Biological Weapons Convention is discussed in paragraph 10.4 (biological weapons) (p. 477).

34. The President decided not to submit GP I to the Senate for its advice and consent to ratification. 23 Weekly Comp. Pres. Doc. 91 (29 Jan. 1987), 81 Am. J. Int'l L. 910. France (Schindler & Toman 709) and Israel have also indicated their intention not to ratify GP I. The U.S. position on GP I is set forth *in* Senate Treaty Doc. No. 100-2, *reprinted in* 26 Int'l Leg. Mat'ls 561 (1987) and Annex A5-1 (p. 306). Other sources opposing U.S. ratification include Roberts, The New Rules for Waging War: The Case Against Ratification of Additional Protocol I, 26 Va. J. Int'l L. 109 (1985); Feith, Law in the Service of Terror—The Strange Case of the Additional Protocol, 1 The National Interest, Fall 1985, at 36; Sofaer, Terrorism and the Law, 64 Foreign Affairs, Summer 1986, at 901; Feith, Moving Humanitarian Law Backwards, 19 Akron L. Rev. 531 (1986); The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 Am. U.J. Int'l L. & Policy 460 (1987) (remarks of U.S. Department of State Legal Adviser Sofaer); Sofaer, The Rationale for the United States Decision, 82 Am. J. Int'l L. 784 (1988); Parks, Air War and the Law of War, 32 A.F.L. Rev. 1, 89-225 (1990). *Contra,* Aldrich, Progressive Development of the Law of War: A Reply to Criticisms of the 1977 Geneva Protocol I, 26 Va. J. Int'l L. 693 (1986); Solf, Protection of Civilians Against the Effects of Hostilities Under Customary International Law and Under Protocol I, 1 Am. Univ. J. Int'l L. & Policy 117 (1986); Solf, A Response to Douglas J. Feith's Law in the Service of Terror—The Strange Case of the Additional Protocol, 20 Akron L. Rev. 261 (1986); Gasser, Prohibition of Terrorist Acts in International Humanitarian Law, 26 Int'l Rev. Red Cross 200, 210-212 (Jul.-Aug. 1986); Gasser, An Appeal for Ratification by the United States, 81 Am. J. Int'l L. 912 (1987); Gasser, Letter to the Editor in Chief, 83 Am. J. Int'l L. 345 (1989); Bagley, 11 Loy. L.A. Int'l & Comp. L.J. 439 (1989); Aldrich, Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions, 85 Am. J. Int'l L. 1 (1991). *See also* Levie, The 1977 Protocol I and the United States, 38 St. Louis U. Law J. 469 (1994), *reprinted in* Schmitt & Green at chap. XVII.

As of 15 October 1997, 147 nations were party to GP I, including NATO members Belgium, Canada, Denmark, Germany, Greece, Iceland, Italy, Luxembourg, Netherlands, Norway and

(continued...)

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)[*35]

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[*36]

34.(...continued)
Spain; the Republic of Korea; Australia; New Zealand; Russia and the former Warsaw Pact nations; Austria, Finland, Sweden and Switzerland (each of which has proclaimed itself as neutral under the doctrine of permanent neutrality); as well as China, Cuba, DPRK and Libya. GP I is in force as between those nations party to it. *See* the complete listing at Table A5-1 (p. 315).

The *travaux préparatoires* of GP I are organized by article and published *in* Levie, Protection of War Victims: Protocol I to the 1949 Geneva Conventions (4 vols. 1979-81 and Supp.). *See also* Bothe, Partsch & Solf at 1-603, and ICRC, Commentary (GP I) 19-1304.

It is important that U.S. military operational lawyers are aware that U.S. coalition partners in a future conflict will likely be party to GP I and bound by its terms. *See also* Matheson, note 18 (p. 300) and Annex A5-1 (final paragraph of p. 308).

35. The President submitted GP II to the Senate for its advice and consent to ratification on 29 January 1987. Sen. Treaty Doc. 100-2, 23 Weekly Comp. Pres. Doc. 91; 26 Int'l Leg. Mat'ls 561 (1987), Annex A5-1 (p. 306). The proposed statements of understanding and reservations to GP II are analyzed *in* Smith, New Protections for Victims of International [*sic*] Armed Conflicts: The Proposed Ratification of Protocol II by the United States, 120 Mil. L. Rev. 59 (1988).

36. The 1980 Conventional Weapons Convention, *reprinted in* 19 Int'l Leg. Mat'ls 1524 (1980); AFP 110-20 at 3-177, is discussed in paragraphs 9.1.1 (undetectable fragments) (p. 438), 9.3 (land mines) (p. 448), 9.6 (booby traps and other delayed action devices) (p. 451), 9.7 (incendiary weapons) (p. 452) and 9.8 (directed energy devices) (p. 452). The Convention originally included three separate protocols, *e.g.*, Protocol on Non-Detectable Fragements (Protocol I); Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II); and Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III). The United States became party to the Convention and Protocols I and II on 24 September 1995, but declined to ratify Protocol III at that time. At the First Review Conference (September 1995-May 1996), Protocol II was substantially amended and a new Protocol on Blinding Laser Weapons (Protocol IV) was adopted. On 5 January 1997, President Clinton submitted the amended Protocol II, the original Protocol III (with a reservation), and new Protocol IV to the Senate for its advice and consent to their ratification. *See* notes 36, 44 & 45 accompanying paragraphs 9.3 (land mines) (p. 448), 9.7 (incendiary weapons) (p. 452) and 9.8 (directed energy devices) (p. 453). *See also* Nash, Contemporary Practice of the United States Relating to International Law, 91 Am. J. Int'l L. 325 (1997). As of 15 October 1997, 71 nations, including the U.S., U.K., Germany, Italy, Denmark, France, Netherlands, Norway, Australia, Japan, China, Russia and other ex-Warsaw Pact nations, and the neutral nations, have ratified the Conventional Weapons Convention (and two or more of its four protocols), and it is in force as between those nations with respect to commonly ratified protocols. (For a current listing of parties to the Convention and its Protocols *see* www.icrc.ch/icrcnews).

The *travaux préparatoires* of the "umbrella" treaty and Protocol I (non-detectable fragments) are set forth *in* Roach, Certain Conventional Weapons Convention: Arms Control or Humanitarian Law?, 105 Mil. L. Rev. 1; of Protocol II (land mines) *in* Carnahan, The Law of Land Mine Warfare: Protocol II to the United Nations Convention on Certain Conventional Weapons, *id.* at
(continued...)

18. 1993 Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction.[37]

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 party to, and bound by, all of the foregoing conventions and protocols, except numbers 13, 15, 16 and 18. The United States has decided not to ratify number 15 (Additional Protocol I).[38] The United States has ratified number 17, Protocols I and II, but has not ratified Protocol III.

5.5 RULES OF ENGAGEMENT[39]

During wartime or other periods of armed conflict, U.S. rules of engagement 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.[40]

36.(...continued)
73; and of Protocol III (incendiary weapons) *in* Parks, The Protocol on Incendiary Weapons, 30 Int'l Rev. Red Cross 535 (Nov.-Dec. 1990). *See also* Fenrick, The Law of Armed Conflict: The CUSHIE Weapons Treaty, 11 Can. Def. Q., Summer 1981, at 25; Fenrick, New Developments in the Law Concerning the Use of Conventional Weapons in Armed Conflict, 19 Can. Y.B. Int'l L. 229 (1981); Schmidt, The Conventional Weapons Convention: Implication for the American Soldier, 24 A.F.L. Rev. 279 (1984); Rogers, A Commentary on the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, 26 Mil. L. & L. of War Rev. 185 (1987); and Symposium, Tenth Anniversary of the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, 30 Int'l Rev. Red Cross 469-577 (Nov.-Dec. 1990).

37. The 1993 Chemical Weapons Convention has since been ratified by the U.S. (24 April 1997). The Convention is discussed in paragraph 10.3.1.2 (p. 10-13).

38. Six of the 1907 Hague Conventions entered into force for the U.S. in 1909, while the four Geneva Conventions of August 12, 1949 entered into force for the United States in 1956. The Administration is reconsidering whether to submit the 1954 Hague Cultural Property Convention to the Senate for its advice and consent to ratification.

39. *See* Preface and paragraph 4.3.2.2 (p. 263).

40. Accordingly, wartime rules of engagement may include restrictions on weapons and targets, and provide guidelines to ensure the greatest possible protection for noncombatants consistent with military necessity. Roach, Rules of Engagement, Nav. War Coll. Rev., Jan.-Feb. 1983, at 49; Phillips, ROE: A Primer, Army Lawyer, July 1993 at 21-23; Grunawalt, The JCS Standing Rules of Engagement: A Judge Advocate's Primer, 42 Air Force Law Rev. 245 (1997).

ANNEX A5-1

LETTER OF TRANSMITTAL AND LETTER OF SUBMITTAL RELATING TO PROTOCOL II ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949.

LETTER OF TRANSMITTAL

The White House, *January 29, 1987.*

To the Senate of the United States

I transmit herewith, for the advice and consent of the Senate to ratification, Protocol II Additional to the Geneva Conventions of 12 August 1949, concluded at Geneva on June 10, 1977. I also enclose for the information of the Senate the report of the Department of State on the Protocol.

The United States has traditionally been in the forefront of efforts to codify and improve the international rules of humanitarian law in armed conflict, with the objective of giving the greatest possible protection to victims of such conflicts, consistent with legitimate military requirements. The agreement that I am transmitting today is, with certain exceptions, a positive step toward this goal. Its ratification by the United States will assist us in continuing to exercise leadership in the international community in these matters.

The Protocol is described in detail in the attached report of the Department of State. Protocol II to the 1949 Geneva Conventions is essentially an expansion of the fundamental humanitarian provisions contained in the 1949 Geneva Conventions with respect to non-international armed conflicts, including humane treatment and basic due process for detained persons, protection of the wounded, sick and medical units, and protection of noncombatants from attack and deliberate starvation. If these fundamental rules were observed, many of the worst human tragedies of current internal armed conflicts could be avoided. In particular, among other things, the mass murder of civilians is made illegal, even if such killings would not amount to genocide because they lacked racial or religious motives. Several Senators asked me to keep this objective in mind when adopting the Genocide Convention. I remember my commitment to them. This Protocol makes clear that any deliberate killing of a noncombatant in the course of a non-international armed conflict is a violation of the laws of war and a crime against humanity, and is therefore also punishable as murder.

While I recommend that the Senate grant advice and consent to this agreement, I have at the same time concluded that the United States cannot ratify a second agreement on the law of armed conflict negotiated during the same

period. I am referring to Protocol I additional to the 1949 Geneva Conventions, which would revise the rules applicable to international armed conflicts. Like all other efforts associated with the International Committee of the Red Cross, this agreement has certain meritorious elements. But Protocol I is fundamentally and irreconcilably flawed. It contains provisions that would undermine humanitarian law and endanger civilians in war. One of its provisions, for example, would automatically treat as an international conflict any so-called "war of national liberation." Whether such wars are international or non-international should turn exclusively on objective reality, not on one's view of the moral qualities of each conflict. To rest on such subjective distinctions based on a war's alleged purposes would politicize humanitarian law and eliminate the distinction between international and non-international conflicts. It would give special status to "wars of national liberation," an ill-defined concept expressed in vague, subjective, politicized terminology. Another provision would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves. These problems are so fundamental in character that they cannot be remedied through reservations, and I therefore have decided not to submit the Protocol to the Senate in any form, and I would invite an expression of the sense of the Senate that it shares this view. Finally, the Joint Chiefs of Staff have also concluded that a number of the provisions of the Protocol are militarily unacceptable.

It is unfortunate that Protocol I must be rejected. We would have preferred to ratify such a convention, which as I said contains certain sound elements. But we cannot allow other nations of the world, however numerous, to impose upon us and our allies and friends an unacceptable and thoroughly distasteful price for joining a convention drawn to advance the laws of war. In fact, we must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law.

The time has come for us to devise a solution for this problem, with which the United States is from time to time confronted. In this case, for example, we can reject Protocol I as a reference for humanitarian law, and at the same time devise an alternative reference for the positive provisions of Protocol I that could be of real humanitarian benefit if generally observed by parties to international armed conflicts. We are therefore in the process of consulting with our allies to develop appropriate methods for incorporating these positive provisions into the rules that govern our military operations, and as customary international law. I will advise the Senate of the results of this initiative as soon as it is possible to do so.

I believe that these actions are a significant step in defense of traditional humanitarian law and in opposition to the intense efforts of terrorist organizations and their supporters to promote the legitimacy of their aims and practices. The repudiation of Protocol I is one additional step, at the ideological level so important to terrorist organizations, to deny these groups legitimacy as international actors.

Therefore, I request that the Senate act promptly to give advice and consent to the ratification of the agreement I am transmitting today, subject to the understandings and reservations that are described more fully in the attached report. I would also invite an expression of the sense of the Senate that it shares the view that the United States should not ratify Protocol I, thereby reaffirming its support for traditional humanitarian law, and its opposition to the politicization of the law by groups that employ terrorist practices.

RONALD REAGAN

LETTER OF SUBMITTAL

DEPARTMENT OF STATE,
Washington, December 13, 1986.

THE PRESIDENT
The White House.

THE PRESIDENT: I have the honor to submit to you, with a view to transmission to the Senate for its advice and consent to ratification, Protocol II Additional to the Geneva Conventions of 12 August 1949, concluded at Geneva on June 10, 1977.

PROTOCOL II

Protocol II to the 1949 Geneva Conventions was negotiated by diplomatic conference convened by the Swiss Government in Geneva, which met in four annual sessions from 1974–77. This Protocol was designed to expand and refine the basic humanitarian provisions contained in Article 3 common to the four 1949 Geneva Conventions with respect to non-international conflicts. While the Protocol does not (and should not) attempt to apply to such conflicts all the protections prescribed by the Conventions for international armed conflicts, such as prisoner-of-war treatment for captured combatants, it does attempt to guarantee that certain fundamental protections be observed, including: (1) humane treatment for detained persons, such as protection from violence, torture, and collective punishment; (2) protection from intentional attack, hostage-taking and acts of terrorism of persons who take no part in hostilities, (3) special protection for children to provide for their safety and education and to preclude their participation in hostilities, (4) fundamental due process for persons against whom sentences are to be passed or penalties executed; (5) protection and appropriate care for the sick and wounded, and medical units which assist them; and (6) protection of the civilian population from military attack, acts of terror, deliberate starvation, and attacks against installations containing dangerous forces. In each case, Protocol II expands and makes more specific the basic guarantees of common Article 3 of the 1949 Conventions. Its specific provisions are described in greater detail in the attached section-by-section analysis.

The final text of Protocol II did not meet all the desires of the United States and other western delegations. In particular, the Protocol only applies to internal conflicts in which dissident armed groups are under responsible command and exercise control over such a part of the national territory as to carry out sustained

and concerted military operations. This is a narrower scope than we would have desired, and has the effect of excluding many internal conflicts in which dissident armed groups occupy no significant territory but conduct sporadic guerrilla operations over a wide area. We are therefore recommending that U.S. ratification be subject to an understanding declaring that the United States will apply the Protocol to all conflicts covered by Article 3 common to the 1949 Conventions (and only such conflicts), which will include all non-international armed conflicts as traditionally defined (but not internal disturbances, riots and sporadic acts of violence). This understanding will also have the effect of treating as non-international these so-called "wars of national liberation" described in Article 1(4) of Protocol I which fail to meet the traditional test of an international conflict.

Certain other reservations or understandings are also necessary to protect U.S. military requirements. Specifically, as described in greater detail in the attached annex, a reservation to Article 10 is required to preclude the possibility that it might affect the administration of discipline of U.S. military personnel under The Uniform Code of Military Justice, under the guise of protecting persons purporting to act in accordance with "medical ethics." However, this is obviously not intended in any way to suggest that the United States would deliberately deny medical treatment to any person in need of it for political reasons or require U.S. medical personnel to perform procedures that are unethical or not medically indicated.

Also, we recommend an understanding with respect to Article 16 to confirm that the special protection granted by that article is required only for a limited class of objects that, because of their recognized importance, constitute a part of the cultural or spiritual heritage of peoples, and that such objects will lose their protection if they are used in support of the military effort. This understanding is generally shared by our allies, and we expect it to appear in the ratification documents of many of them.

Finally, we recommend an understanding to deal with any situation in which the United States may be providing assistance to a country which has not ratified Protocol II and would therefore feel under no obligation to comply with its terms in the conduct of its own operations. Our recommended understanding would make clear that our obligations under the Protocol would not exceed those of the State being assisted. The United States would of course comply with the applicable provisions of the Protocol with respect to all operations conducted by its own armed forces.

With the above caveats, the obligations contained in Protocol II are no more than a restatement of the rules of conduct with which U.S. military forces would almost certainly comply as a matter of national policy, constitutional and legal protections, and common decency. These obligations are not uniformly

observed by other States, however, and their universal observance would mitigate many of the worst human tragedies of the type that have occurred in internal conflicts of the present and recent past. I therefore strongly recommend that the United States ratify Protocol II and urge all other States to do likewise. With our support, I expect that in due course the Protocol will be ratified by the great majority of our friends, as well as a substantial preponderance of other States.

The Departments of State, Defense, and Justice have also conducted a thorough review of a second law-of-war agreement negotiated during the same period—Protocol I Additional to the Geneva Conventions of 12 August 1949. This Protocol was the main object of the work of the 1973-77 Geneva diplomatic conference, and represented an attempt to revise and update in a comprehensive manner the 1949 Geneva Conventions on the protection of war victims, the 1907 Hague Conventions on means and methods of warfare, and customary international law on the same subjects.

Our extensive interagency review of the Protocol has, however, led us to conclude that Protocol I suffers from fundamental shortcomings that cannot be remedied through reservations or understandings. We therefore must recommend that Protocol I not be forwarded to the Senate. The following is a brief summary of the reasons for our conclusion.

In key respects Protocol I would undermine humanitarian law and endanger civilians in war. Certain provisions such as Article 1(4), which gives special status to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination," would inject subjective and politically controversial standards into the issue of the applicability of humanitarian law. Protocol I also elevates the international legal status of self-described "national liberation" groups that make a practice of terrorism. This would undermine the principle that the rights and duties of international law attach principally to entities that have those elements of sovereignty that allow them to be held accountable for their actions, and the resources to fulfill their obligations.

Equally troubling is the easily inferred political and philosophical intent of Protocol I, which aims to encourage and give legal sanction not only to "national liberation" movements in general, but in particular to the inhumane tactics of many of them. Article 44(3), in a single subordinate clause, sweeps away years of law by "recognizing" that an armed irregular "cannot" always distinguish himself from non-combatants; it would grant combatant status to such an irregular anyway. As the essence of terrorist criminality is the obliteration of the distinction between combatants and non-combatants, it would be hard to square ratification of this Protocol with the United States' announced policy of combatting terrorism.

The Joint Chiefs of Staff have conducted a detailed review of the Protocol, and have concluded that it is militarily unacceptable for many reasons. Among these are that the Protocol grants guerrillas a legal status that often is superior to that accorded to regular forces. It also unreasonably restricts attacks against certain objects that traditionally have been considered legitimate military targets. It fails to improve substantially the compliance and verification mechanisms of the 1949 Geneva Conventions and eliminates an important sanction against violations of those Conventions. Weighing all aspects of the Protocol, the Joint Chiefs of Staff found it to be too ambiguous and complicated to use as a practical guide for military operations, and recommended against ratification by the United States.

We recognize that certain provision of Protocol I reflect customary international law, and others appear to be positive new developments. We therefore intend to consult with our allies to develop appropriate methods for incorporating these provisions into rules that govern our military operations, with the intention that they shall in time win recognition as customary international law separate from their presence in Protocol I. This measure would constitute an appropriate remedy for attempts by nations to impose unacceptable conditions on the acceptance of improvements in international humanitarian law. I will report the results of this effort to you as soon as possible, so that the Senate may be advised of our progress in this respect.

CONCLUSION

I believe that U.S. ratification of the agreement which I am submitting to you for transmission to the Senate, Protocol II to the 1949 Geneva Conventions, will advance the development of reasonable standards of international humanitarian law that are consistent with essential military requirements. The same is not true with respect to Protocol I to the 1949 Geneva Conventions, and this agreement should not be transmitted to the Senate for advice and consent to ratification. We will attempt in our consultations with allies and through other means, however, to press forward with the improvement of the rules of international humanitarian law in international armed conflict, without accepting as the price for such improvements a debasement of our values and of humanitarian law itself.

The effort to politicize humanitarian law in support of terrorist organizations have been a sorry development. Our action in rejecting Protocol I should be recognized as a reaffirmation of individual rights in international law and a repudiation of the collectivist apology for attacks on non-combatants.

Taken as a whole, these actions will demonstrate that the United States strongly supports humanitarian principles, is eager to improve on existing international law consistent with those principles, and will reject revisions of

international law that undermine those principles. The Departments of State and Justice support these recommendations.

Respectfully submitted.

GEORGE P. SHULTZ

Attachments:

1—Detailed Analysis of Provisions

2—Recommended Understanding and Reservations

FIGURE A5-1

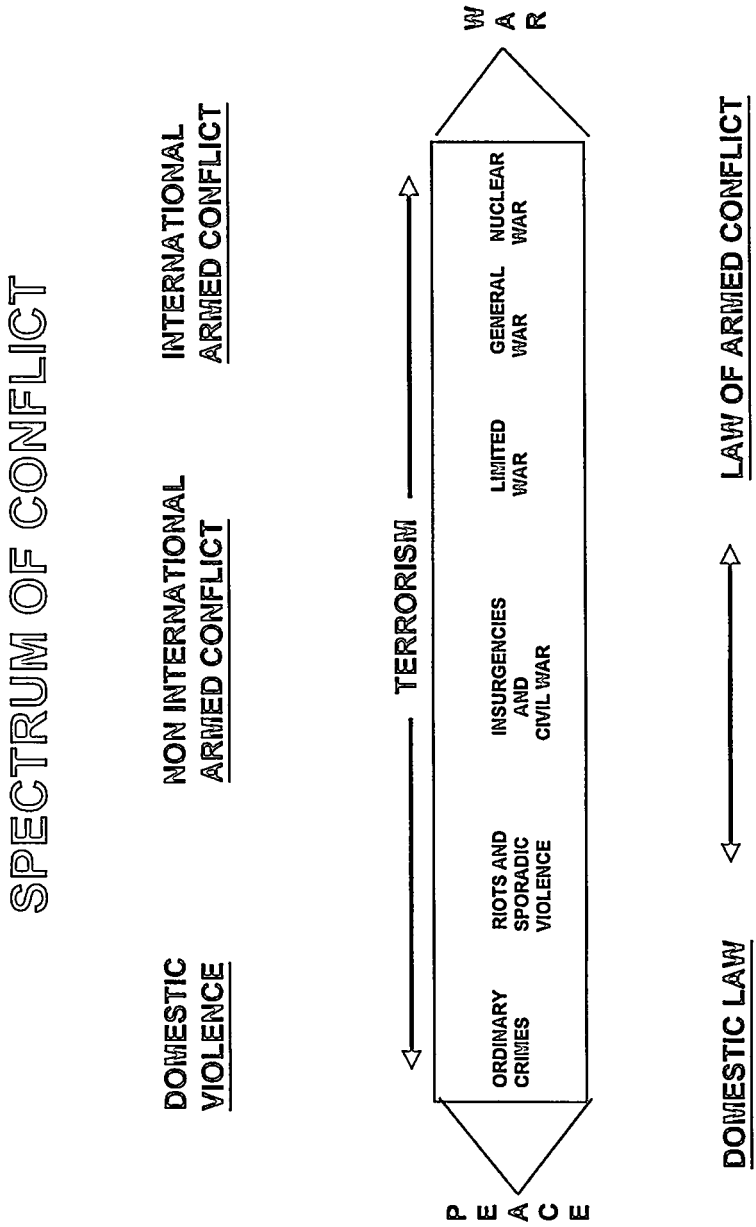
SPECTRUM OF CONFLICT
DOMESTIC VIOLENCE
NON INTERNATIONAL ARMED CONFLICT
INTERNATIONAL ARMED CONFLICT
TERRORISM
ORDINARY CRIMES
RIOTS AND SPORADIC VIOLENCE
INSURGENCIES AND CIVIL WAR
LIMITED WAR
GENERAL WAR
NUCLEAR WAR
PEACE
WAR
DOMESTIC LAW
LAW OF ARMED CONFLICT

TABLE A5-1

STATES PARTY TO THE GENEVA CONVENTIONS AND THEIR ADDITIONAL PROTOCOLS

The following tables show which States were party to the Geneva Conventions of 1949 and to the two Additional Protocols of 1977, as of 15 October 1997. They also indicate which States had made the optional declaration under Article 90 of 1977 Protocol I, recognizing the competence of the International Fact-Finding Commission. The names of the countries given in the tables may differ from their official names.

The dates indicated are those on which the Swiss Federal Department of Foreign Affairs received the official instrument from the State that was ratifying, acceding to or succeeding to the Conventions and Protocols or accepting the competence of the International Fact-Finding Commission. Apart from the exceptions mentioned in the footnotes at the end of the tables, for all States the entry into force of the Conventions and of the Protocols occurs six months after the date given in the present document; for States which have made a declaration of succession, entry into force takes place retroactively, on the day of their accession to independence.

AS OF 15 OCTOBER 1997

- States party to the 1949 Geneva Conventions: 188
- States party to the 1977 Additional Protocol I: 147
- States having made the declaration under Article 90 of Protocol I: 50
- States party to the 1977 Additional Protocol II: 140

Abbreviations

Ratification (R): a treaty is generally open for signature for a certain time following the conference which has adopted it. However, a signature is not binding on a State unless it has been endorsed by ratification. The time limits having elapsed, the Conventions and the Protocols are no longer open for signature. The States which have not signed them may at any time accede or, where appropriate, succeed to them.

Accession (A): instead of signing and then ratifying a treaty, a State may become party to it by the single act called accession.

Declaration of Succession (S): a newly independent State may declare that it will abide by a treaty which was applicable to it prior to its independence. A State may also declare that it will provisionally abide by such treaties during the time it deems necessary to examine their texts carefully and to decide on accession or succession to some or all of them (declaration of provisional application). At present no State is bound by such a declaration.

Reservation/Declaration (R/D): a unilateral statement, however phrased or named, made by a State when ratifying, acceding or succeeding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State (provided that such reservations are not incompatible with the object and purpose of the treaty).

Declaration provided for under Article 90 of Protocol I (D 90): prior acceptance of the competence of the International Fact-Finding Commission.

	GENEVA CONVENTIONS			PROTOCOL I				PROTOCOL II		
COUNTRY	R/A/S		R/D	R/A/S		R/D	D90	R/A/S		R/D
Afghanistan	26.09.1956	R								
Albania	27.05.1957	R		16.07.1993	A			16.07.1993	A	
Algeria	20.06.1960	A		16.08.1989	A	X	16.08.1989	16.08.1989	A	
Andorra	17.09.1993	A								
Angola	20.09.1984	A	X	20.09.1984	A	X				
Antigua and Barbuda	06.10.1986	S		06.10.1986	A			06.10.1986	A	
Argentina	18.09.1956	R		26.11.1986	A	X	11.10.1996	26.11.1986	A	X
Armenia	07.06.1993	A		07.06.1993	A			07.06.1993	A	
Australia	14.10.1958	R	X	21.06.1991	R	X	23.09.1992	21.06.1991	R	
Austria	27.08.1953	R		13.08.1982	R	X	13.08.1982	13.08.1982	R	X
Azerbaijan	01.06.1993	A								
Bahamas	11.07.1975	S		10.04.1980	A			10.04.1980	A	
Bahrain	30.11.1971	A		30.10.1986	A			30.10.1986	A	
Bangladesh	04.04.1972	S		08.09.1980	A			08.09.1980	A	
Barbados	10.09.1968	S	X	19.02.1990	A			19.02.1990	A	
Belarus	03.08.1954	R	X	23.10.1989	R		23.10.1989	23.10.1989	R	
Belgium	03.09.1952	R		20.05.1986	R	X	27.03.1987	20.05.1986	R	
Belize	29.06.1984	A		29.06.1984	A			29.06.1984	A	
Benin	14.12.1961	S		28.05.1986	A			28.05.1986	A	
Bhutan	10.01.1991	A								
Bolivia	10.12.1976	R		08.12.1983	A		10.08.1992	08.12.1983	A	
Bosnia-Herzegovina	31.12.1976	S		31.12.1992	S		31.12.1992	31.12.1992	S	
Botswana	29.03.1968	A		23.05.1979	A			23.05.1979	A	
Brazil	29.06.1957	R		05.05.1992	A		23.11.1993	05.05.1992	A	
Brunei Darussalam	14.10.1991	A		14.10.1991	A			14.10.1991	A	
Bulgaria	22.07.1954	R		26.09.1989	R		09.05.1994	26.09.1989	R	
Burkina Faso	07.11.1961	S		20.10.1987	R			20.10.1987	R	
Burundi	27.12.1971	S		10.06.1993	A			10.06.1993	A	
Cambodia	08.12.1958	A								
Cameroon	16.09.1963	S		16.03.1984	A			16.03.1984	A	
Canada	14.05.1965	R		20.11.1990	R	X	20.11.1990	20.11.1990	R	X
Cape Verde	11.05.1984	A		16.03.1995	A		16.03.1995	16.03.1984	A	
Central African Republic	01.08.1966	S		17.07.1984	A			17.07.1984	A	
Chad	05.08.1970	A		17.01.1997	A			17.01.1997	A	
Chile	12.10.1950	R		24.04.1991	R		24.04.1991	24.04.1991	R	
China	28.12.1956	R	X	14.09.1983	A	X		14.09.1983	A	
Colombia	08.11.1961	R		01.09.1993	A		17.04.1996	14.08.1995	A	
Comoros	21.11.1985	A		21.11.1985	A			21.11.1985	A	
Congo	04.02.1967	S		10.11.1983	A			10.11.1983	A	
Costa Rica	15.10.1969	A		15.12.1983	A			15.12.1983	A	
Côte d'Ivoire	28.12.1961	S		20.09.1989	R			20.09.1989	R	
Croatia	11.05.1992	S		11.05.1992	S		11.05.1992	11.05.1992	S	
Cuba	15.04.1954	R		25.11.1982	A					
Cyprus	23.05.1962	A		01.06.1979	R			18.03.1996	A	
Czech Republic	05.02.1993	S	X	05.02.1993	S		02.05.1995	05.02.1993	S	
Denmark	27.06.1951	R		17.06.1982	R	X	17.06.1982	17.06.1982	R	
Djibouti	06.03.1978[1]	S		08.04.1991	A			08.04.1991	A	
Dominica	28.09.1981	S		25.04.1996	A			25.04.1996	A	
Dominican Republic	22.01.1958	A		26.05.1994	A			26.05.1994	A	
Ecuador	11.08.1954	R		10.04.1979	R			10.04.1979	R	
Egypt	10.11.1952	R		09.10.1992	R	X		09.10.1992	R	X
El Salvador	17.06.1953	R		23.11.1978	R			23.11.1978	R	
Equatorial Guinea	24.07.1986	A		24.07.1986	A			24.07.1986	A	

	GENEVA CONVENTIONS			PROTOCOL I				PROTOCOL II		
COUNTRY	R/A/S		R/D	R/A/S		R/D	D90	R/A/S		R/D
Estonia	18.01.1993	A		18.01.1993	A			18.01.1993	A	
Ethiopia	02.10.1969	R		08.04.1994	A			08.04.1994	A	
Fiji	09.08.1971	S								
Finland	22.02.1955	R		07.08.1980	R	X	07.08.1980	07.08.1980	R	
France	28.06.1951	R						24.02.1984[2]	A	X
Gabon	26.02.1965	S		08.04.1980	A			08.04.1980	A	
Gambia	20.10.1966	S		12.01.1989	A			12.01.1989	A	
Georgia	14.09.1993	A		14.09.1993	A			14.09.1993	A	
Germany	03.09.1954	A	X	14.02.1991	R	X	14.02.1991	14.02.1991	R	X
Ghana	02.08.1958	A		28.02.1978[3]	R			28.02.1978[4]	R	
Greece	05.06.1956	R		31.03.1989	R			15.02.1993	A	
Grenada	13.04.1981	S								
Guatemala	14.05.1952	R		19.10.1987	R			19.10.1987	R	
Guinea	11.07.1984	A		11.07.1984	A		20.12.1993	11.07.1984	A	
Guinea-Bissau	21.02.1974	A	X	21.10.1986	A			21.10.1986	A	
Guyana	22.07.1968	S		18.01.1988	A			18.01.1988	A	
Haiti	11.04.1957	A								
Holy See	22.02.1951	R		21.11.1985	R	X		21.11.1985	R	X
Honduras	31.12.1965	A		16.02.1995	R			16.02.1995	R	
Hungary	03.08.1954	R	X	12.04.1989	R		23.09.1991	12.04.1989	R	
Iceland	10.08.1965	A		10.04.1987	R	X	10.04.1987	10.04.1987	R	
India	09.11.1950	R								
Indonesia	30.09.1958	A								
Iran (Islamic Rep. of)	20.02.1957	R	X							
Iraq	14.02.1956	A								
Ireland	27.09.1962	R								
Israel	06.07.1951	R	X							
Italy	17.12.1951	R		27.02.1986	R	X	27.02.1986	27.02.1986	R	
Jamaica	20.07.1964	S		29.07.1986	A			29.07.1986	A	
Japan	21.04.1953	A								
Jordan	29.05.1951	A		01.05.1979	R			01.05.1979	R	
Kazakhstan	05.05.1992	S		05.05.1992	S			05.05.1992	S	
Kenya	20.09.1996	A								
Kiribati	05.01.1989	S								
Korea (Dem. People's Rep. of)	27.08.1957	A	X	09.03.1988	A					
Korea (Republic of)	16.08.1966[5]	A	X	15.01.1982	R	X		15.01.1982	R	
Kuwait	02.09.1967	A	X	17.01.1985	A			17.01.1985	A	
Kyrgyzstan	18.09.1992	S		18.09.1992	S			18.09.1992	S	
Lao People's Dem. Rep.	29.10.1956	A		18.11.1980	R			18.11.1980	R	
Latvia	24.12.1991	A		24.12.1990	A			24.12.1991	A	
Lebanon	10.04.1951	R		23.07.1997	A			23.07.1997	A	
Lesotho	20.05.1968	S		20.05.1994	A			20.05.1994	A	
Liberia	29.03.1954	A		30.06.1988	A			30.06.1988	A	
Libyan Arab Jamahiriya	22.05.1956	A		07.06.1978	A			07.06.1978	A	
Liechtenstein	21.09.1950	R	X	10.08.1989	R	X	10.08.1989	10.08.1989	R	X
Lithuania	03.10.1996	A								
Luxembourg	01.07.1953	R		29.08.1989	R		12.05.1993	29.08.1989	R	
Macedonia	01.09.1993	S	X	01.09.1993	S	X	01.09.1993	01.09.1993	S	
Madagascar	18.07.1963	S		08.05.1992	R		27.07.1993	08.05.1993	R	
Malawi	05.01.1968	A		07.10.1991	A			07.10.1991	A	
Malaysia	24.08.1962	A								
Maldives	18.06.1991	A		03.09.1991	A			03.09.1991	A	
Mali	24.05.1965	A		08.02.1989	A			08.02.1989	A	
Malta	22.08.1968	S		17.04.1989	A	X	17.04.1989	17.04.1989	A	X

	GENEVA CONVENTIONS			PROTOCOL I				PROTOCOL II		
COUNTRY	R/A/S		R/D	R/A/S		R/D	D90	R/A/S		R/D
Mauritania	30.10.1962	S		14.03.1980	A			14.03.1980	A	
Mauritius	18.08.1970	S		22.03.1982	A			22.03.1982	A	
Mexico	29.10.1952	R		10.03.1983	A					
Micronesia	19.09.1995	A		19.09.1995	A			19.09.1995	A	
Moldova (Republic of)	24.05.1993	A		24.05.1993	A			24.05.1993	A	
Monaco	05.07.1950	R								
Mongolia	20.12.1958	A		06.12.1995	A	X	06.12.1995	06.12.1995	A	
Morocco	26.07.1956	A								
Mozambique	14.03.1983	A		14.03.1983	A					
Myanmar	25.08.1992	A								
Namibia	22.08.1991[6]	S		17.06.1994	A		21.07.1994	17.06.1994	A	
Nepal	07.02.1964	A								
Netherlands	03.08.1954	R		26.06.1987	R	X	26.06.1987	26.06.1987	R	
New Zealand	02.05.1959	R	X	08.02.1988	R	X	08.02.1988	08.02.1988	R	
Nicaragua	17.12.1953	R								
Niger	21.04.1964	S		08.06.1979	R			08.06.1979	R	
Nigeria	20.06.1961	S		10.10.1988	A			10.10.1988	A	
Norway	03.08.1951	R		14.12.1981	R		14.12.1981	14.12.1981	R	
Oman	31.01.1974	A		29.03.1984	A	X		29.03.1984	A	X
Pakistan	12.06.1951	R	X							
Palau	25.06.1996	A		25.06.1996	A			25.06.1996	A	
Panama	10.02.1956	A		18.09.1995	A			18.09.1995	A	
Papua New Guinea	26.05.1976	S								
Paraguay	23.10.1961	R		30.11.1990	A			30.11.1990	A	
Peru	15.02.1956	R		14.07.1989	R			14.07.1989	R	
Philippines	06.10.1952[7]	R						11.12.1986	A	
Poland	26.11.1954	R	X	23.10.1991	R		02.10.1992	23.10.1991	R	
Portugal	14.03.1961	R	X	27.05.1992	R		01.07.1994	27.05.1992	R	
Qatar	15.10.1975	A		05.04.1988	A	X	24.09.1991			
Romania	01.06.1954	R	X	21.06.1990	R		13.05.1995	21.06.1990	R	
Russian Federation	10.05.1954	R	X	29.09.1989	R	X	29.09.1989	29.09.1989	R	X
Rwanda	05.05.1964	S		19.11.1984	A		08.07.1993	19.11.1984	A	
Saint Kitts and Nevis	14.02.1986	S		14.02.1986	A			14.02.1986	A	
Saint Lucia	18.09.1981	S		07.10.1982	A			07.10.1982	A	
Saint Vincent & Grenadines	01.04.1981	A		08.04.1983	A			08.04.1983	A	
Samoa	23.08.1984	S		23.08.1984	A	X		23.08.1984	A	
San Marino	29.08.1953	A		05.04.1994	R			05.04.1994	R	
Sao Tome and Principe	21.05.1976	A		05.07.1996	A			05.07.1996	A	
Saudi Arabia	18.05.1963	A		21.08.1987	A	X				
Senegal	18.05.1963	S		07.05.1985	R			07.05.1985	R	
Seychelles	08.11.1984	A		08.11.1984	A		22.05.1992	08.11.1984	A	
Sierra Leone	10.06.1965	S		21.10.1986	A			21.10.1986	A	
Singapore	27.04.1973	A								
Slovakia	02.04.1993	S	X	02.04.1993	S		13.03.1995	02.04.1993	S	
Slovenia	26.03.1992	S		26.03.1992	S		26.03.1992	26.03.1992	S	
Solomon Islands	06.07.1981	S		19.09.1988	A			19.09.1988	A	
Somalia	12.07.1962	A								
South Africa	31.03.1952	A		21.11.1995	A			21.11.1995	A	
Spain	04.08.1952	R		21.04.1989	R	X	21.04.1989	21.04.1989	R	
Sri Lanka	28.02.1959[8]	R								
Sudan	23.09.1957	A								
Suriname	13.10.1976	S	X	16.12.1985	A			16.12.1985	A	
Swaziland	28.06.1973	A		02.11.1995	A			02.11.1995	A	
Sweden	28.12.1953	R		31.08.1979	R	X	31.08.1979	31.08.1979	R	
Switzerland	31.03.1950[9]	R		17.02.1982	R	X	17.02.1982	17.02.1982	R	

	GENEVA CONVENTIONS			PROTOCOL I				PROTOCOL II		
COUNTRY	R/A/S		R/D	R/A/S		R/D	D90	R/A/S		R/D
Syrian Arab Republic	02.11.1953	R		14.11.1983	A	X				
Tajikistan	13.01.1993	S		13.01.1993	S		10.09.1997	13.01.1993	S	
Tanzania (United Rep. of)	12.12.1962	S		15.02.1983	A			15.02.1983	A	
Thailand	29.12.1954	A								
The Former Y.R. Macedonia	01.09.1993	S		01.09.1993	S		01.09.1993	01.09.1993	S	
Togo	06.01.1962	S		21.06.1984	R		21.11.1991	21.06.1984	R	
Tonga	13.04.1978	S								
Trinidad and Tobago	24.09.1963[10]	A								
Tunisia	04.05.1957	A		09.08.1979	R			09.08.1979	R	
Turkey	10.02.1954	R								
Turkmenistan	10.04.1952	S		10.04.1992	S			10.04.1992	S	
Tuvalu	19.02.1981	S								
Uganda	18.05.1964	A		13.03.1991	A			13.03.1991	A	
Ukraine	03.08.1954	R	X	25.01.1990	R		25.01.1990	25.01.1990	R	
United Arab Emirates	10.05.1972	A		09.03.1983	A	X	06.03.1992	09.03.1983	A	X
United Kingdom	23.09.1957	R	X							
United States of America	02.08.1955	R	X							
Uruguay	05.03.1969	R	X	13.12.1985	A		17.07.1990	13.12.1985	A	
Uzbekistan	08.10.1993	A		08.10.1993	A			08.10.1993	A	
Vanuatu	27.10.1982	A		28.02.1985	A			28.02.1985	A	
Venezuela	13.02.1956	R								
Viet Nam	28.06.1957	A	X	19.10.1981	R					
Yemen	16.07.1970	A	X	17.04.1990	R			17.04.1990	R	
Yugoslavia	21.04.1950	R	X	11.06.1979	R	X		11.06.1979	R	
Zambia	19.10.1966	A		04.05.1995	A			04.05.1995	A	
Zimbabwe	07.03.1983	A		19.10.1992	A			19.10.1992	A	

Palestine

On 21 June 1989, the Swiss Federal Department of Foreign Affairs received a letter from the Permanent Observer of Palestine to the United Nations Office at Geneva informing the Swiss Federal Council "that the Executive Committee of the Palestine Liberation Organization, entrusted with the functions of the Government of the Government of the State of Palestine by decision of the Palestine National Council, decided, on 4 May 1989, to adhere to the Four Geneval Conventions of 12 August 1949 and the two Portocols addiitonal thereto".

On 13 September 1989, the Swiss Federal Council informed the States that it was not in a position to decide whether the letter constituted an instrument of accession, "due to the uncertainty within the international community as to the existnece or non-existence of a State of Palestine".

1 Dijibouti's declaration of succession in respect of the First Convention was dated 26 January 1978.

2 On accession to Protocol II, France made a communication concerning Protocol I.

3 Entry into force on 7 December 1978.

4 Entry into force on 7 December 1978.

5 Entry into force on 23 September 1977, the Republic of Korea having invoked Art. 62/61/141/157 common ot the First, Second, Thrid and Fourth Conventions respecitvely (immediate effect).

6 An instrument of accession to the Geneva Conventions and their additional Protocols was deposited by the United Nations Council for Namibia on 18 October 1983. In an instrument deposited on 22 Augus 1991, Namibia declared its succession to the Geneva Conventions, which were previously applicable pursuant to South Africa's accession on 31 March 1952.

7 The first Geneva Convention was ratified on 17 March 1951.

8 Accession to the Fourth Geneva Convention on 23 February 1959 (Ceylon had signed only the First, Second, and Third Convenitons).

9 Entry into force on 21 October 1950.

10 Accession to the First Geneva Convention on 17 May 1963.

Source: International Committee of the Red Cross, 15 October 1997. (A current listing of parties to the Geneva Conventions and to Additional Protocol I and II may be found at www.icrc.ch/icrcnews).

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[1] but for the very practical reason that it is in their best interest to be governed by consistent and mutually acceptable rules of conduct.[2] The law of armed conflict is effective to the extent that it is obeyed. 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 is no longer regarded as valid.

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1. Under Common article 1, each nation has an affirmative duty at all times not only to respect the requirements of the 1949 Geneva Conventions, but also to ensure respect for them by its armed forces. *Nicaragua Military Activities Case*, 1986 I.C.J. 114; 25 Int'l Leg. Mat'ls 1073 (para. 220) (holding this duty is a general principle of international law). Further, under GWS 1929, arts. 28-30, & 49-54; GWS-Sea, arts. 50-53; GPW, arts. 129-132; GC, arts. 146-149 (and GP I, arts. 85-87, for nations bound thereby—*see* Table A5-1 (p. 315)), every such nation has an obligation to seek out and cause to be prosecuted violators of the Geneva Conventions irrespective of their nationality, and to otherwise encourage compliance of the Conventions by any other country or its armed forces including those of its allies. The United States supports the principle, detailed in GP I, arts. 85-89, that the appropriate authorities take all reasonable measures to prevent acts contrary to the applicable rules of humanitarian law. The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 Am. U.J. Int'l L. & Policy 428 (1987) (remarks of U.S. Department of State Deputy Legal Adviser Matheson). This self-interest is reflected in the following:

> Any government which, while not itself involved in a conflict, is in a position to exert a deterrent influence on a government violating the laws of war, but refrains from doing so, shares the responsibility for the breaches. By failing to react while able to do so, it fosters the process which could lead to its becoming the victim of similar breaches and no longer an accessory by omission.

ICRC Appeal, 1985 Int'l Rev. Red Cross 33 & 289-90.

As of 1 November 1997, only Eritrea, the Marshall Islands and Nauru of the 185 U.N. members were not party to the 1949 Geneva Conventions. *See* Table A5-1 (p. 315).

2. Discipline in combat is essential. Violations of the law of armed conflict detract from the commander's ability to accomplish his mission. Violations of that law also have an adverse impact on national and world public opinion. Violations on occasion have served to prolong a conflict by inciting an opponent to continue resistance.

(continued...)

6.1.1 Adherence by the United States. The Constitution of the United States provides that 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.[3] 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 is a fundamental element of U.S. national law.[4] Since the law of armed conflict is based on international agreements to which the U.S. is a party and customary law, it is binding upon the United States, its citizens, and its armed forces.[5]

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.[6] Article 0705, U.S. Navy Regulations, 1990, provides that:

2.(...continued)
Violations of commitments under the law of armed conflict can seriously hamper the willingness and political ability of allies to support military activities within and outside the alliance. This is particularly true of the United States and other nations with democratic forms of government. In contrast, dictatorships, depending primarily on the deployment of military forces, with total control of internal mass media and allowing no political dissent, may disregard legal commitments without equivalent impact on their overall political and strategic position. Our posture is strengthened by our continued respect for the law of armed conflict, while theirs may be strengthened in some cases by their willingness to disregard those laws for temporary tactical advantage. Therefore, an opponent's disregard of the law is not a sound basis for the United States to take a similar callous attitude. Rather, the sharper the distinction between our respect for the sensitivities and individuality of our allies, supported by our respect for the law, and our opponent's disregard of the interests of their allies and the law, the better for our overall posture. Compliance will also assure the U.S. of the moral high ground, maintain and enhance support from our allies, and foster sympathy for our cause among neutrals. In short, U.S. armed forces are committed to combat to protect fundamental values, not to abandon them.

Accordingly, violations of the law by U.S. armed forces may have greater impact on American and world public opinion than would similar violations by our adversaries. *See* AFP 110-31, para. 1-6; Brittin, International Law for Seagoing Officers 227 (5th ed. 1986).

3. U.S. Const., art. VI, cl. 2.

4. *E.g.*, *The Paquete Habana*, 175 U.S. 677, 20 S.Ct. 290, 299 (1900); *Reid v. Covert*, 354 U.S. 1, 18, 77 S.Ct. 1222, 1231 (1957). *See also* 1 Restatement (Third), sec. 111, Reporters' Notes 2 & 3, and Introductory Note.

5. The law of armed conflict is part of U.S. law which every servicemember has taken an oath to obey. This obligation is implemented for the armed forces in DOD Directive 5100.77, Subj: DOD Law of War Program, and the Uniform Code of Military Justice.

6. SECNAVINST 3300.1 (series), Subj: Law of Armed Conflict (Law of War) Program to Insure Compliance by the Naval Establishment, para. 4a. Similar directions have been promulgated by the operational chain of command, *e.g.*, MJCS 0124-88, 4 August 1988, Subj: Implementation of the DOD Law of War Program; USCINCLANTINST 3300.3 (series), Subj: DOD Law of War Instruction; CINCPACFLTINST 3300.9 (series), Subj: Implementation of the DOD Law of War Program.

At all times, commanders shall observe, and require their commands to observe, the principles of international law. Where necessary to fulfill this responsibility, a departure from other provisions of Navy Regulations is authorized.[7]

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 U.S. Navy and Marine Corps observe and enforce the law of armed conflict at all times. International armed conflicts are governed by the law of armed conflict as a matter of law. However, not all situations are "international" armed conflicts. In those circumstances when international armed conflict does not exist (e.g. internal armed conflicts), law of armed conflict principles may nevertheless be applied as a matter of policy.[8]

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.[9]

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7. Other arts. of U.S. Navy Regulations, 1990, concerned with international law and with international relations in armed conflict, include:

Article	*Title*
0406(5)	Designation of Hospital Ships and Medical Aircraft
0829	Prisoners of War
0854	Hospital Ship or Medical Aircraft
0912	Communication with Foreign Officials
0914	Violations of International Law and Treaties
0920	Protection of Commerce of the United States
0924	Medical or Dental Aid to Persons Not in the Naval Service
0925	Assistance to Persons, Ships and Aircraft in Distress
0939	Granting of Asylum and Temporary Refuge
1063	Detail of Persons Performing Medical or Religious Services
1135	Relations with Foreign Nations

8. Para. 3a of the draft revision of DOD Directive 5100.77 (paragraph 6.1.1, note 5 (p. 324)) provides:

> 3. The Heads of the DOD Components shall:
>
> a. Ensure that the armed forces of the United States will comply with the law of war during armed conflict however such conflicts are characterized and with the principles and spirit of the law of war during all other operations.

9. Essential, therefore, is reporting of the facts by all persons with knowledge of suspected violations up the chain of command to the NCA. In the Department of the Navy, SECNAVINST 3300.1 (series) requires the reporting of all suspected violations of the law of armed conflict. *See* Annex A6-1 (p. 359), replicating enclosure (2) to SECNAVINST 3300.1 (series), for an illustrative list of reportable violations. Arts. 87(1) and (3) of GP I require State parties to require military commanders at all levels to report to competent authorities breaches of the 1949 Geneva Conventions and GP I by or against members of the armed forces under their command and other

(continued...)

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.[10]

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

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9.(...continued)
persons under their control, to take the necessary steps to prevent violations, and where appropriate, to initiate disciplinary "or penal" action against the violators. The United States supports this principle as one that should be observed and in due course recognized as customary law. Matheson, Remarks, paragraph 6.1, note 1 (p. 323), at 422 & 428.

10. SECNAVINST 3300.1 (series), para. 4b. OPNAVINST 3300.52, Subj: Law of Armed Conflict (Law of War) Program to Ensure Compliance by the U.S. Navy and Naval Reserve; and MCO 3300.3, Subj: Marine Corps Law of War Program, define, respectively, the U.S. Navy and U.S. Marine Corps law of armed conflict training programs. Annex A6-2 (p. 362) provides the fundamental rules for combatants, suitable for a basic training program.

The law of armed conflict has long recognized that knowledge of the requirements of the law is a prerequisite to compliance with the law and to prevention of violations of its rules, and has therefore required training of the armed forces in this body of law. On dissemination, *see* Hague IV, art. 1; Hague X, art. 20; GWS 1929, art. 29; GWS, art 47; GWS-Sea, art. 48; GPW, art. 127; GC, art. 144; and for States party thereto, the 1954 Hague Convention on Cultural Property, arts. 7 & 25; GP I, arts. 83 & 87(2); GP II, art. 19; and the 1980 Conventional Weapons Convention, art. 6. The United States supports the principle in GP I, art. 83, that study of the principles of the law of armed conflict be included in programs of military instruction. Matheson, Remarks, paragraph 6.1, note 1 (p. 323), at 428. *See also* Meyrowitz, The Function of the Laws of War in Peacetime, 1986 Int'l Rev. Red Cross 77; Hampson, Fighting by the Rules: Instructing the Armed Forces in Humanitarian Law, 1989 *id.* 111; Green, The Man in the Field and the Maxim *Ignorantia Juris Non Excusat, in* Essays on the Modern Law of War 27 (1985). On legal advisers in armed forces, *see* GP I, art. 82; Parks, The Law of War Adviser, 31 JAG J. 1 (1980); Green, The Role of Legal Advisers in the Armed Forces, *in* Essays on the Modern Law of War 73 (1985). The United States supports the principle of art. 82, that legal advisers be made available, when necessary, to advise military commanders at the appropriate level on the application of these principles. Matheson, *id.*, at 428. JAGINST 3300.1 (series), note 11 (p. 327), details the operational law billets identified for U.S. Navy judge advocates. On the duty of commanders, *see* GP I, art. 87.

The manner of achieving these results is left to nations to implement. Various international bodies exist to assist, *e.g.*, the ICRC, Henry Dunant Institute in Geneva Switzerland, International Institute of Humanitarian Law at San Remo Italy, the International Society of Military Law and the Law of War, and the International Committee of Military Medicine and Pharmacy. *See* de Mullinen, Law of War Training Within Armed Forces: Twenty Years Experience, 1987 Int'l Rev. Red Cross 168. On the role of military manuals (such as this publication) in the dissemination of the law of armed conflict to military forces, *see* Reisman & Lietzau, Moving International Law from Theory to Practice: The Role of Military Manuals in Effectuating the Law of Armed Conflict, *in* Robertson at 1-7.

judge advocates have appropriate clearances and access to information to enable them to carry out that responsibility.[11]

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.[12] 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 occur.[13]

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11. OPNAVINST 3300.52, para. 4.k.2. *See* JAGINST 3300.1 (series), Subj: JAG Billets Requiring Special or Detailed Knowledge of the Law of Armed Conflict and Training Objectives for Navy Judge Advocates in Such Billets; and JAGINST 3300.2 (series), Subj: Law of Armed Conflict Resource Materials. The Army Judge Advocate General's School has developed a checklist for the review of operational plans to ensure compliance with the law of armed conflict, which is set forth in chap. 6 of the School's Operational Law Handbook.

12. U.S. Navy Regulations, 1990, art. 0802.1.

13. A commander at any level is personally responsible for the criminal acts of warfare committed by a subordinate if the commander knew in advance of the breach about to be committed and had the ability to prevent it, but failed to take the appropriate action to do so. In determining the personal responsibility of the commander, the element of knowledge may be presumed if the commander had information which should have enabled him or her to conclude under the circumstances that such breach was to be expected. Officers in command are also personally responsible for unlawful acts of warfare performed by subordinates when such acts are committed by order, authorization, or acquiescence of a superior. Those facts will each be determined objectively. *See* Green, War Crimes, Crimes Against Humanity and Command Responsibility, Nav. War Coll. Rev., Spring 1997, 26-68; Levie, Command Responsibility, 8 USAFA J. Leg. Stu. __ (1998) (forthcoming).

Some military tribunals have held that, in suitable circumstances, the responsibility of commanding officers may be based upon the failure to acquire knowledge of the unlawful conduct of subordinates. In *The Hostages Case*, the United States Military Tribunal stated:

> Want of knowledge of the contents of reports made to him [*i.e.*, to the commanding general] is not a defense. Reports to commanding generals are made for their special benefit. Any failure to acquaint themselves with the contents of such reports, or a failure to require additional reports where inadequacy appears on their face, constitutes a dereliction of duty which he cannot use in his own behalf.

United States v. Wilhelm List et al., 9 TWC 127 (1950).

The responsibility of commanding officers for unlawful conduct of subordinates has not been applied to isolated offenses against the laws of armed conflict, but only to offenses of considerable magnitude and duration. Even in the latter instances, the circumstances surrounding the commission of the unlawful acts have been given careful consideration:

(continued...)

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.[14] They also have an affirmative

13.(...continued)

> It is absurd . . . to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nevertheless, where murder and rape and vicious, revengeful actions are wide-spread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawlessness of his troops, depending upon their nature and the circumstances surrounding them.

Trial of General Tomoyuki Yamashita, 4 LRTWC 35 (1948).

The responsibility of a commanding officer may be based solely upon inaction. Depending upon the circumstances of the case, it is not always necessary to prove that a superior actually knew of the offense committed by his subordinates if it can be established that available information was such that he or she *should* have known. (GP I, art. 86, Failure to Act, confirms this rule.) *See* Parks, Command Responsibility for War Crimes, 62 Mil. L. Rev. 1 (1973); Green, Essays on the Modern Law of War 225-37 (1985). *See also* Levie, at 421-9 for a general discussion of command responsibility, and at 156-63 for an analysis of the Yamashita trial. The Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed on the Territory of the Former Yugoslavia Since 1991, *reprinted in* 32 Int'l Leg. Mat'ls 1192 (1993) [hereinafter "Statute of the International Tribunal for Yugoslavia"], art. 7, establishes individual criminal responsibility for "a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution" of grave breaches of the 1949 Geneva Conventions, the laws or customs of war, genocide or crimes against humanity. Art. 7(3) specifically provides:

> 3. The fact that any of the acts ..... was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

The Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Violations Committed in the Territory of Neighboring States Between 1 January 1994 and 31 December 1994, *reprinted in* 33 Int'l Leg. Mat'ls 1598 (1994) [hereinafter "Statute of the International Criminal Tribunal for Rwanda"] contains essentially identical language at art. 6(3).

The Statute of the International Tribunal for Yugoslavia and the Statute of the International Criminal Tribunal for Rwanda were adopted by the U.N. Security Council in U.N.S.C. Resolutions 827 (1993) (*reprinted in* 32 Int'l Leg. Mat'ls 1203 (1993)) and 955 (1994) (*reprinted in* 33 Int'l Leg. Mat'ls 1598 (1994)), respectively.

14. Where U.S. personnel are involved, military personnel with supervisory authority have a duty to prevent criminal acts. Any person in the naval service who sees a criminal act about to be committed must act to prevent it to the utmost of his or her ability and to the extent of his or her authority. 10 U.S. Code sec. 5947; U.S. Navy Regulations, 1990, arts. 1131 & 1137. Possible actions include moral arguments to dissuade, threatening to report the criminal act, repeating orders of superiors, stating personal disagreement, and asking the senior individual on scene to intervene as a means of preventing the criminal act. In the event the criminal act directly and imminently endangers a person's life (including the life of another person lawfully under his or her

(continued...)

obligation to report promptly violations of which they become aware. Members of the naval service, like military members of all nations, must obey readily and strictly all *lawful* orders issued by a superior.[15] Under both international law and U.S. law, an order[16] 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 to an order protect a subordinate from the consequences of violation of the law of armed conflict.[17]

6.2 ENFORCEMENT OF THE LAW OF ARMED CONFLICT

Various means are available to belligerents under international law for inducing compliance with the law of armed conflict. To establish the facts, the belligerents may agree to an *ad hoc* inquiry.[18] In the event *of a clearly established violation* of the law of armed conflict, the aggrieved nation may:[19]

14.(...continued)
custody), force may be used to the extent necessary to prevent the crime. However, the use of deadly force is rarely justified; it may be used only to protect life and only under conditions of extreme necessity as a last resort when lesser means are clearly inadequate to protect life. *Compare* SECNAVINST 5500.29 (series), Subj: Use of Deadly Force and the Carrying of Firearms by Personnel of the Department of the Navy in Conjunction with Law Enforcement, Security Duties, and Personal Protection; OPNAVINST 3120.32 (series), Subj: Standard Organization and Regulations of the U.S. Navy, art. 412b, circumstances under which a weapon may be fired; and OPNAVINST C5510.83 (series), Subj: Navy Nuclear Weapons Security Manual.

15. U. S. Navy Regulations, 1990, art. 1132 and UCMJ, arts. 90-92, delineate offenses involving disobedience of lawful orders. Both SECNAVINST 3300.1 (series) and OPNAVINST 3300.52 (*see* paragraph 6.1.2, note 11 (p. 327)) are drafted as lawful general orders. *See* paragraph 6.2.5.5.1 (p. 355).

16. The order may be direct or indirect, explicit or implied.

17. *See* paragraph 6.2.5.5.1 (p. 355) for a further discussion of the defense of superior orders. War crimes trials are discussed in paragraphs 6.2.5.1 (p. 350) and 6.2.5.2 (p. 351).

18. The Geneva Conventions have long authorized and encouraged belligerents to agree to objective enquiries into alleged violations of those Conventions. GWS 1929, art. 30; GWS, art. 52; GWS-Sea, art. 53; GPW, art. 132; GC, art. 149. (*See* paragraph 6.1.2 (p. 324) regarding national requirements to investigate alleged violations of the law of armed conflict.) No such *ad hoc* agreement has ever been concluded, in large measure because of mutual suspicions and hostilities.

The United Nations has established a team of experts to investigate allegations of such violations. *See, e.g.,* Prisoners of War in Iran and Iraq: The Report of a Mission Dispatched by the Secretary-General, January 1985, U.N. Doc. S/16962, 22 Feb. 1985; and Report of Group of Experts to Investigate Reports of the Alleged Use of Chemical Weapons, U.N. Doc. S/19823, 25 Apr. 1988, which led to vigorous condemnation of their use, albeit without assigning responsibility to one side, in Security Council Resolution 612, 9 May 1988, Dep't St. Bull., July 1988, at 69. *See also* U.N. General Assembly Resolution 46/59 (1991), Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security, 31 Int'l Leg. Mat'ls 235 (1992).

(continued...)

1. Publicize the facts with a view toward influencing world public opinion against the offending nation[20]

18.(...continued)
An International Fact-Finding Commission has been established under GP I, article 90. *See* 1991 Int'l Rev. Red Cross 208-09, 411-12. By 15 October 1997, 50 nations had accepted the competence of the Commission, including the European neutrals (Austria, Finland, Sweden and Switzerland), and ten NATO countries (Belgium, Canada, Denmark, Germany, Iceland, Italy, Luxemburg, the Netherlands, Norway and Spain), Russia, Belarus, Ukraine, Australia and New Zealand. The Commission cannot act without the consent of the parties to the dispute, which can be given either on a permanent one-time basis or an *ad hoc* basis for a particular dispute. The members of the Commission, elected in mid-March 1992, may be found *in* ICRC Bulletin, April 1992, at 4. The fact that the former-Soviet Union (prior to its acceptance of the Commission's competence on 29 September 1989), and its allies and clients, were most reluctant to permit third-party supervision of the Geneva Conventions was another factor in the United States' refusal to seek ratification of GP I. Sofaer, Remarks, 2 Am. U.J. Int'l L. & Policy 470.

Belligerents not party to GP I, or States party to GP I which have not accepted the competence of the Fact Finding Commission, may request the Commission to investigate allegations of grave breaches or serious violations of the Convention. Bothe, Partsch & Solf at 543-44; Krill, The International Fact-Finding Commission—The Role of the ICRC, 1991 Int'l Rev. Red Cross 190, at 197; Roach, The International Fact-Finding Commission, *id.* at 176. *See also* Kalshoven, Noncombatant Persons, *in* Robertson at 306-07.

19. *See* Sachariew, States' Entitlement to Take Action to Enforce International Humanitarian Law, 1989 Int'l Rev. Red Cross 177.

Commanders are not usually required to make the policy decision as to the appropriate use of one or more of the remedial actions set forth in the text, although there are exceptional situations in which even junior commanders may be required to make protests and demands addressed directly to the commander of offending forces. It is also apparent that a government decision cannot be made intelligently unless all officers upon whom the responsibility for decision rests understand the available remedial actions and report promptly to higher authority those circumstances which may justify their use.

20. Experience in the Southeast Asia conflict amply demonstrates the particular effectiveness of television in affecting knowledge of and popular (home) support for U.S. forces. Summers, Western Media and Recent Wars, Mil. Rev., May 1986, at 4; Mitchell, Television and the Vietnam War, Nav. War Coll. Rev., May-June 1984, at 42; Rinaldo, The Tenth Principle of War: Information, Mil. Rev., Oct. 1987, at 55; Walker, Truth is the Best Propaganda: A Study in Military Psychological Operations, National Guard Mag., Oct. 1987, at 26; Paddock, Psychological Operations, Special Operations, and US Strategy, in Special Operations in US Strategy 229 (Barnett, Tovar & Shultz eds. 1984). For the role of the media during Operations Desert Shield and Desert Storm, *see* Shell, A Portrait of Pentagon's Media Strategy, Public Relations J., June 1991, at 9-11; Zoglin, It Was a Public Relations Rout, Too, Time, March 11, 1991, at 56-57; Holland, Put the Brass on the Tube, U.S. Naval Inst. Proc., April 1991, at 48; Watson, The Issue of Media Access to Information, in Military Lessons of the Gulf War 202-11 (1991); Smith, How CNN Fought the War (1991); Arnett, Live From Baghdad (1992).

During Iraq's unlawful occupation of Kuwait, the Security Council invited all States to "collate substantiated information in their possession or submitted to them on the grave breaches by Iraq . . . and to make this information available to the Council." U.N.S.C. Res. 674, 29 Oct. 1990, *reprinted in* U.S. Dep't of State, Dispatch, 5 Nov. 1990, at 239-40. For a report submitted by the U.S. pursuant to Resolution 674, *see* U.N. Doc. S/21987, 7 Dec. 1990 (USA). *See also* U.N. Docs. S/22535 and S/22536, 29 April 1991 (reports of the Secretary-General).

(continued...)

2. Protest to the offending nation and demand that those responsible be punished and/or that compensation be paid[21]

20.(...continued)
Additionally, private individuals and nongovernmental organizations can be expected to attempt to ascertain and publicize the facts pertaining to alleged violations of the Conventions. Other organizations that have provided supervision of the application of the law of armed conflict include, among others, Amnesty International, Commission Medico-Juridique de Monaco, Human Rights Watch, ICRC, International Commission of Jurists, International Committee of Military Medicine and Pharmacy, International Law Association and the World Veterans Federation. All of these organizations have been effective in bringing private and public pressure to bear on governments regarding the conduct of their armed forces in armed conflicts.

21. Such protest and demand for punishment may be communicated directly to an offending belligerent or to the commander of the offending forces. On the other hand, an offended belligerent may choose to forward its complaints through a Protecting Power, a humanitarian organization acting in the capacity of a Protecting Power, or any nation not participating in the armed conflict.

Hague IV, art. 3, states:

> A belligerent party which violates the provisions of the said [Hague] Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

See Affaire des Biens Britannique au Maroc Espagnol (Spain v. U.S.), Report III (Oct. 23, 1924), at 2 UNRIAA 645 (1949) and Kalshoven, State Responsibility for Warlike Acts of the Armed Forces, 40 I.C.L.Q. 827 (1991). It is now generally established that the principle laid down in art. 3 is applicable to the violation of any rule regulating the conduct of hostilities and not merely to violations of the Hague Regulations. *See* Sandoz, Unlawful Damage in Armed Conflicts and Redress Under International Humanitarian Law, 1982 Int'l Rev. Red Cross 131, 136-137. This customary rule is repeated in GP I, art. 91, and is discussed in useful detail in ICRC, Commentary 1053-58. For an excellent discussion of State responsibility and reparations for violations of the law of armed conflict pertaining to environmental damage, *see* Greenwood, State Responsibility and Civil Liability for Environmental Damage Caused by Military Operations, *in* Grunawalt, King & McClain at 397-415; and Green, State Responsibility and Civil Reparation for Environmental Damage, *in id.* at 416-39.

Recent demands for compensation involving U.S. forces include the following:

Iraq agreed to give compensation for "the loss of life, personal injuries and material damages" resulting from the attack on USS STARK on 17 May 1987. Exchange of Notes, 20 & 21 May 1987, 26 Int'l Leg. Mat'ls 1427-28 (1987). Detailed claims for the wrongful deaths were submitted to Iraq in April 1988, Dep't St. Bull., Oct. 1988, at 59; Iraq paid $27.3 million, Dep't St. Bull., May 1989, at 67; 28 Int'l Leg. Mat'ls 644, 83 Am. J. Int'l L. 561 (1989).

For almost two hours on 8 June 1967, Israeli aircraft and torpedo boats attacked USS LIBERTY (AGTR-5) on the high seas of the Mediterranean about 15 NM west of the Gaza strip, just as Israel was concluding the Six-Day War. On 27 May 1968, Israel paid the United States $3,323,500, the full amount of compensation claimed on behalf of the 34 U.S. Navy men killed in the attack. Dep't St. Bull., 17 June 1968, at 799. On 28 April 1969, Israel paid $3,566,457 in settlement of the United States' claims on behalf of the additional 171 U.S. Navy members wounded in the attack. Dep't St. Bull., 2 June 1969, at 473. On 17 December 1980, Israel agreed to pay $6 million, in three installments, for its damages to LIBERTY (albeit without conceding liability). 32 U.S.T. 4434, T.I.A.S. 9957; 1980 Digest of U.S. Practice in International Law 747-48. The factual and legal issues of the attack are carefully examined *in* Jacobsen, A Juridical Examination of the Israeli Attack on the *USS Liberty*, 36 Nav. L. Rev. 1 (1986).

(continued...)

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[22]

21.(...continued)

On 11 July 1988, the United States offered to compensate *ex gratia* the families of those lost in the downing of Iranian Airbus flight 655 on 3 July 1988. 24 Weekly Comp. Pres. Docs. 912 (18 July 1988). *See* Friedman, The *Vincennes* Incident, U.S. Naval Inst. Proc., May 1989, at 72-79, and Agora: The Downing of Iran Air Flight 655, 83 Am. J. Int'l L. 318-41 (1989). The ICAO report of investigation and ICAO Council actions are *reproduced in* 28 Int'l Leg. Mat'ls 896 (1989). Iran's application against the United States before the I.C.J. appears at 28 *id.* 842. *See also* 83 Am. J. Int'l L. 912-13 (1989).

On 25 October 1983, at a time when the People's Revolutionary Army of Grenada was using a group of buildings inside Fort Matthew, St. George's, Grenada, as a military command post 143 feet away from the Richmond Hill Insane Asylum, a bomb from a Navy A-7 aircraft accidentally struck the Asylum, killing sixteen patients and injuring six. A complaint against the United States was deemed admissible by the Inter-American Commission on Human Rights. *See* Weissbrodt & Andrus, The Right to Life During Armed Conflict: Disabled Peoples' International v. United States, 29 Harv. Int'l L.J. 59 (1988). The claim was subsequently withdrawn. While the U.S. Agency for International Development provided *ex gratia* compensation to individual victims and to rebuild the hospital, the U.S. maintained that it had no legal obligation to do so since its actions were in compliance with the law of armed conflict. *Richmond HIll v. United States*, Case 9213, Report No. 3/96, Inter-Am. C.H.R., OEA/Ser. L/V/II.91 Doc. 7 at 201 (1996). *See also* paragraph 8.1.2.1 (p. 404) regarding incidental injury and collateral damage.

See also the Japanese acceptance of responsibility for the 12 December 1937 sinking in the Yangtze River of the U.S. gunboat USS PANAY by Japanese aircraft (38 U.S. Naval War College, International Law Situations, with Situations and Notes, 1938, at 129-50 (1940); Swanson, The *Panay* Incident: Prelude to Pearl Harbor, U.S. Naval Inst. Proc., Dec. 1967, at 26, and the United States acceptance of responsibility for the sinking on 1 April 1945 of the Japanese passenger-cargo vessel AWA MARU on a voyage in which she had been given assurances of safe passage, Agreement and Agreed Terms of Understanding on the Settlement of *Awa Maru* Claim, Tokyo, 14 April 1949, 9 Bevans 467.

During the course of the afternoon of 8 June 1982, near the end of the Falklands/Malvinas war, the Liberian flag tanker HERCULES, in ballast, was attacked three times by Argentinian military aircraft about 600 miles east of Argentina and nearly 500 miles from the Falklands in the South Atlantic. The bombing and rocket attacks damaged her decks and hull and left one undetonated bomb lodged in her starboard side. The owners decided it was too dangerous to attempt to remove this bomb and had her scuttled 250 NM off the Brazilian coast. The vessel owner and time charter sued Argentina in U.S. Federal District Court which held that under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. sec. 1330, 1602-1611, the District Court did not have subject-matter jurisdiction over the claim. *Amerada Hess Shipping Corp. v. Argentine Republic*, 638 F. Supp. 73 (S.D.N.Y. 1986). The Court of Appeals reversed, holding that the facts alleged, if proven, would constitute clear violations of international law (*e.g.*, 1958 High Seas Convention, Hague XIII) cognizable under the Alien Tort Statute, 28 U.S.C. sec. 1350, which the Foreign Sovereign Immunities Act did not change. 830 F.2d 421, 26 Int'l Leg. Mat'ls 1375 (2d Cir. 1987), discussed *in* Recent Developments, 28 Va. J. Int'l L. 221 (1988) and Morris, Sovereign Immunity for Military Activities on the High Seas: Amerada Hess v. Argentine Republic, 23 Int'l Lawyer 213 (1989). The U.S. Supreme Court reversed, holding the FSIA provides the sole basis for obtaining jurisdiction over a foreign nation in U.S. courts, and the District Court correctly dismissed the action, 109 S.C. 683, 57 U.S.L.W. 4121, 28 Int'l Leg. Mat'ls 382 (1989), 83 Am. J. Int'l L. 565 (1989).

(continued...)

4. Execute a belligerent reprisal action (see paragraph 6.2.3)[23]

5. Punish individual offenders either during the conflict or upon cessation of hostilities.[24]

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.[25] Due to the difficulty of finding a nation which the opposing

21.(...continued)

In para. 13 of Resolution 669 (1990), the U.N. Security Council reaffirmed that Iraq is "liable under the [Fourth Geneva] Convention in respect of the grave breaches committed by it, as are individuals who commit or order the commission of grave breaches." U.S. Dep't of State Dispatch, 1 Oct. 1990, at 129. By para. 8 of Resolution 674 (1990), the U.N. Security Council reminded Iraq of its liability under international law for "any loss, damage or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq." *Id.*, 5 Nov. 1990, at 240. *See also* U.N.S.C. Resolution 687 (1991) *reprinted in* 30 Int'l Leg. Mat'ls 846 (1991), which established a compensation commission to administer a fund from which claims against Iraq would be paid.

22. *See, e.g.*, Report of the Mission Dispatched by the Secretary-General on the Situation of Prisoners of War in the Islamic Republic of Iran and Iraq, U.N. Doc. S/20147, 24 Aug. 1988. Diplomatic pressure applied through neutral States or through international organizations has become a major factor in enforcing the law of armed conflict. During the Southeast Asia conflict, for example, the United States conducted a successful diplomatic effort through neutral States to prevent political "show trials" of our prisoners of war. Levie, Maltreatment of Prisoners of War in Vietnam, 48 Boston U.L. Rev. 323, 344-45 (1968), *reprinted in* 2 The Vietnam War and International Law 361, 382-83 (Falk ed. 1969). Accurate, thorough investigation of enemy violations greatly help in pursuing such diplomatic activity. *See* paragraph 6.2, note 18 (p. 329).

23. *See* paragraph 6.2.3 (p. 335).

24. *See* paragraph 6.2.5 (p. 343).

25. GWS, art. 8; GWS-Sea, art. 8; GPW, art. 8, GC, art. 9; GP I, arts. 2(c) & 5; de Preux, Synopsis I: Protecting Power, 1985 Int'l Rev. Red Cross 86. The United States strongly supports the principle that Protecting Powers be designated and accepted without delay from the beginning of any conflict. Matheson, Remarks, paragraph 6.1, note 1 (p. 323), at 428-29. That principle is contained in GP I, art. 5, but not unequivocally, and is still subject, in the last instance, to refusal by the nation in question. *Id.* The United States thus failed to obtain one of its "basic objectives" in the negotiations that produced art. 5. Sofaer, Remarks, paragraph 6.2, note 18 (p. 330), at 469-70.

Prior to its entry into World War II, the United States acted as protecting power for British prisoners of war in Europe. Subsequently, the Swiss assumed this duty for both the United States and Great Britain. Since World War II, the protecting power system has not worked well because some countries refuse to permit on-site inspection. There was no protecting power for U.S. prisoners of war during the conflicts in Korea, Southeast Asia, or Kuwait/Iraq. In fact, since 1949, a Protecting Power (Switzerland) was appointed only in the following cases: the Suez conflict in 1956, the Goa conflict in 1961 and the war between India and Pakistan in 1971-1972 (although in the latter case the mandate of Switzerland was not understood in the same way by both parties). Hay, The ICRC and International Humanitarian Issues, 1984 Int'l Rev. Red Cross 3, 5. During the Falklands/Malvinas conflict, Switzerland and Brazil, although not formally appointed as Protecting Powers for the United Kingdom and Argentina respectively, exercised functions of an intermediary and communicated information. Junod, Protection of the Victims of Armed Conflict, Falkland-Malvinas Islands (1982), at 20 (1984); ICRC, Commentary 77 n.2.

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.[26]

6.2.2 The International Committee of the Red Cross (ICRC). The ICRC is a private, 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.[27] (The ICRC is distinct from and should not be confused with the various national Red Cross societies such as the American National Red Cross.)[28] Its principal purpose is to provide protection and assistance to the victims of armed conflict.[29] 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,[30] providing relief to the civilian population of occupied

26. The Conventions allow the ICRC to perform some duties of the Protecting Power if such a power cannot be found and if the detaining power allows it to so act. GWS, art. 10; GWS-Sea, art. 10; GPW, art. 10; GC, art. 11; GP I, art. 5; *see* Peirce, Humanitarian Protection for the Victims of War: The System of Protecting Powers and the Role of the ICRC, 90 Mil. L. Rev. 89 (1980).

In Korea and in Southeast Asia, for example, the ICRC acted in its traditional humanitarian role for North Korean, Chinese, Viet Cong and North Vietnamese prisoners in the hands of the United States and its allies notwithstanding refusal by North Korea and North Vietnam to provide ICRC access to prisoners in their hands. Levie, Maltreatment of Prisoners of War in Vietnam, 48 Boston U. L. Rev. 323 (1968), *reprinted in* Schmitt & Green at chap. V; Levie, 2 Code of International Armed Conflict 312; The International Committee and the Vietnam Conflict, 1966 Int'l Rev. Red Cross 399; Activities of the ICRC in Indochina from 1965 to 1972, 1973 Int'l Rev. Red Cross 27.

The ICRC also visited Iraqi POWs held by Coalition Forces in Saudi Arabia during the Gulf War. Iraq, however, refused ICRC access to Coalition POWs held in Iraq. ICRC Bulletin, March 1991, at 2.

27. Given the increase in the number of situations in which the ICRC is being called upon to act, it is becoming common for the ICRC to appoint non-Swiss nationals as post and field officers.

28. Statutes of the International Red Cross and Red Crescent Movement, arts. 1 & 5 (1986), *reprinted in* 1987 Int'l Rev. Red Cross 29, 32. The ICRC bases its activities on the principles of neutrality and humanity, and is part of the International Red Cross and Red Crescent Movement. Some national Red Cross societies are under government control.

29. Statutes of the International Red Cross and Red Crescent Movement, art. 5(2)(d) (1986), 1987 Int'l Rev. Red Cross 33. *See* While & Raymer, A Little Humanity: the International Committee of the Red Cross, 170 National Geographic, November 1986, at 647-79.

The ICRC's responsibility to endeavor to ensure the protection of victims extends not only to international and non-international armed conflicts and their direct results, but also to internal strife. Red Cross Movement Statute, art. 5(2)(d). Art. 5 also tasks the ICRC with a number of other functions.

30. The ICRC is also authorized to visit and interview detained or interned civilians in international armed conflicts. All such interviews must be without witnesses present. GPW, art. 126; GC, arts. 30(3), 76(6), 126 & 143(2).

territories,[31] searching for information concerning missing persons,[32] and offering its "good offices" to facilitate the establishment of hospital and safety zones.[33] 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.[34]

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

31. GC, arts. 59, 61 & 142.

32. GPW, art. 123, and GC, art. 140; GP I, art. 33, for State parties thereto. The ICRC is also responsible under these articles for transmitting family messages to PWs and interned civilians.

33. GWS, art. 23(3); GC, art. 14(3). The ICRC is also entitled to receive requests for aid from protected persons (GC art. 30) and to exercise its right of initiative (Red Cross Movement Statute, art. 5(3)). The ICRC may ask the parties to a conflict to agree to its discharging other humanitarian functions in the event of non-international armed conflicts (common article 3) and international armed conflicts (GWS, art. 9; GWS-Sea, art. 9; GPW, art. 9; GC, art. 10). Hay, paragraph 6.2.1, note 25 (p. 333) at 6. The ICRC is now also authorized to act in cases of internal strife. Red Cross Movement Statute, art. 5(2)(d).

34. The 1986 Red Cross Movement Statute (art. 5(2)(c)) expanded the ICRC's mandate to include working for the "faithful application of international humanitarian law applicable in armed conflicts." *See* Forsythe, Human Rights and the International Committee of the Red Cross, 12 Human Rights Q. 265 (1990).

The ICRC has defined "international humanitarian law applicable in armed conflicts" as:

> [I]nternational rules, established by treaties or custom, which are specifically intended to solve humanitarian problems directly arising from international or noninternational armed conflicts and which, for humanitarian reasons, limit the right of parties to a conflict to use the methods and means of warfare of their choice or protect persons and property that are, or may be, affected by conflict. The expression "international humanitarian law applicable in armed conflicts" is often abbreviated to "international humanitarian law" or "humanitarian law."

1981 Int'l Rev. Red Cross 76.

These rules are derived from the Law of the Hague and the Law of Geneva. The Law of the Hague deals principally with weapons and methods of warfare and was codified by the 1899 and 1907 Hague Peace Conferences. The law relating to the protection of war victims has been contained in the various Geneva Conventions (of 1864, 1906, 1929, and 1949). The two traditions (Hague and Geneva) have been somewhat merged in GP I, since Part III of GP I deals with methods and means of warfare. As a result, a new term, "rules of international law applicable in armed conflict," was introduced by GP I to encompass "the rules applicable in armed conflict set forth in international agreements to which the Parties to the conflict are Parties and the generally recognized principles and rules of international law applicable in armed conflict" (GP I, art. 2(b)). Although this term has substantially the same meaning as the ICRC's terms, the ICRC's role does not extend to supervision of the conduct of hostilities.

The ICRC has issued the following internal guidelines to govern its activities in the event of breaches of the law:

(continued...)

34.(...continued)

1. *Steps taken by the ICRC on its own initiative*

General rule: The ICRC shall take all appropriate steps to put an end to violations of international humanitarian law or to prevent the occurrence of such violations. These steps may be taken at various levels according to the gravity of the breaches involved.

However, they are subject to the following conditions:

Confidential character of steps taken: In principle these steps will remain confidential.

Public statements: The ICRC reserves the right to make public statements concerning violations of international humanitarian law if the following conditions are fulfilled:

- the violations are major and repeated;

- the steps taken confidentially have not succeeded in putting an end to the violations;

- such publicity is in the interest of the persons or populations affected or threatened;

- the ICRC delegates have witnessed the violations with their own eyes, or the existence and extent of those breaches were established by reliable and verifiable sources. . . .

1981 Int'l Rev. Red Cross 81-83.

The ICRC made overt representations regarding the Iran-Iraq War. *See* 1983 Int'l Rev. Red Cross 220-22 (press release of 11 May 1983 describing appeal of 7 May 1983 to the nations party to the Geneva Conventions); 1984 *id.* 113-15 (press release of 15 Feb. 1984 regarding appeal to governments of 10 Feb. 1984); 1984 *id.* 357-58 (press release describing appeal to governments of 24 Nov. 1984). The ICRC issued a press release regarding misuse of the Red Cross emblem in Lebanon, 1985 Int'l Rev. Red Cross 316-17; a press release regarding the Afghan Conflict on 20 May 1984, 1985 *id.* 239-40; and a press release (no. 1705) regarding the escalation of fighting in Bosnia-Herzegovina on 10 April 1992.

The ICRC Guidelines provide:

> *Special rule*: The ICRC does not as a rule express any views on the use of arms or methods of warfare. It may, however, take steps and, if need be, make a public statement if it considers that the use or the threat to make use of a weapon or method of warfare gives rise to an exceptionally grave situation.

Such situations arose during the course of the Iran-Iraq War. ICRC, Annual Report 1984, at 60-61 (7 March 1984 report on the use of prohibited weapons, and 7 June 1984 press release on the bombing of Iraqi and Iranian cities); 1987 Int'l Rev. Red Cross 217 (appeal of 11 Feb. 1987 regarding bombing of cities); ICRC Bull., April 1988, at 4 (10 March 1988 press release protesting against bombing of cities, and 23 March 1988 press release condemning use of chemical weapons in the province of Sulaymaniyah).

For the appeals and notes verbale issued by the ICRC to the parties to the Persian Gulf Conflict, *see* 1990 Int'l Rev. Red Cross 444, 1991 *id.* 22-30 and 211-14.

The ICRC Guidelines continue:

2. *Reception and transmission of complaints*

Legal basis: In conformity with article 6(4) of the Statutes of the International Red Cross, the ICRC is entitled to take cognizance of "complaints regarding alleged breaches of the humanitarian Conventions".

(continued...)

34.(...continued)

Complaints from a party to a conflict or from the National Society of a party to a conflict: The ICRC shall not transmit to a party to a conflict (or to its National Red Cross or Red Crescent Society) the complaints raised by another party to that conflict (or by its National Society) unless there is no other means of communication and, consequently, a neutral intermediary is required between them.

Complaints from third parties: Complaints from third parties (governments, National Societies, governmental or nongovernmental organizations, individual persons) shall not be transmitted.

If the ICRC has already taken action concerning a complaint it shall inform the complainant inasmuch as it is possible to do so. If no action has been taken, the ICRC may take the complaint into consideration in its subsequent steps, provided that the violation has been recorded by its delegates or is common knowledge, and insofar as it is advisable in the interest of the victims.

The authors of such complaints may be invited to submit them directly to the parties in conflict.

Publicity given to complaints received: As a general rule the ICRC does not make public the complaints it receives. It may publicly confirm the receipt of a complaint if it concerns events of common knowledge and, if it deems it useful, it may restate its policy on the subject.

3. *Requests for inquiries*

The ICRC can only take part in an inquiry procedure if so required under the terms of a treaty or of an *ad hoc* agreement by all the parties concerned. It never sets itself up, however, as a commission of inquiry and limits itself to selecting, from outside the institution, persons qualified to take part in such a commission.

The ICRC shall moreover not take part in an inquiry procedure if the procedure does not offer a full guarantee of impartiality and does not provide the parties with means to defend their case. The ICRC must also receive an assurance that no public communications on an inquiry request or on the inquiry itself shall be made without its consent.

As a rule, the ICRC shall only take part in the setting up of a commission of inquiry, under the above-stated conditions, if the inquiry is concerned with infringements of the Geneva Conventions or of their 1977 Protocols. It shall on no account participate in the organization of a commission if to do so would hinder or prevent it from carrying out its traditional activities for the victims of armed conflicts, or if there is a risk of jeopardizing its reputation of impartiality and neutrality. . . .

4. *Requests to record violations*

If the ICRC is asked to record the result of a violation of international humanitarian law, it shall only do so if it considers that the presence of its delegates will facilitate the discharge of its humanitarian tasks, especially if it is necessary to assess victims' requirements in order to be able to help them. Moreover, the ICRC shall only send a delegation to the scene of the violation if it has received an assurance that its presence will not be used to political ends.

These guidelines do not deal with violations of international law or humanitarian principles to the detriment of detainees whom they have to visit as part of the activities which the ICRC's mandate requires it to carry out in the event of internal disturbances or tensions within a given State. Since this type of activity is based on *ad hoc* agreements with governments, the ICRC follows specific guidelines in such situations.

(continued...)

justified as a response to the unlawful acts of an enemy.[35] 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.[36]

6.2.3.1 Requirements for Reprisal. To be valid, a reprisal action must conform to the following criteria:

34.(...continued)
1981 Int'l Rev. Red Cross 81-83. See also ICRC Protection and Assistance Activities in Situations Not Covered by International Humanitarian Law, 1988 id. 9-37.

35. Kalshoven, Belligerent Reprisals 33 (1971). McDougal and Feliciano have defined reprisal during armed conflict as follows:

> Legitimate war reprisals refer to acts directed against the enemy which are conceded to be generally unlawful, but which constitute an authorized reaction to prior unlawful acts of the enemy for the purpose of deterring repetition of such antecedent acts. The doctrine of reprisal thus permits the use of otherwise lawless violence as a response to the lawless violence.

McDougal & Feliciano 679-80.

36. Reprisals may lawfully be taken against enemy individuals who have not yet fallen into the hands of the forces making the reprisals. Under customary international law, members of the enemy civilian population are legitimate objects of reprisals. The United States nonetheless considers reprisal actions against civilians not otherwise legitimate objects of attack to be inappropriate in most circumstances. For nations party to GP I, enemy civilians and the enemy civilian population are prohibited objects of reprisal. The United States has found this new prohibition to be militarily unacceptable because renunciation of the option of such attacks "removes a significant deterrent that presently protects civilians and other war victims on all sides of a conflict." Sofaer, Remarks, paragraph 6.2, note 18 (p. 329) at 469. For a contrary view, *see* Kalshoven, Noncombatant Persons, *in* Robertson at 306. *See* paragraph 6.2.3.2 (p. 340) for a further discussion of immunity from reprisals.

Collective loss of rights for residents of occupied territory is clearly prohibited by art. 33 of GC. Internment and assigned residence, whether in the occupying power's natural territory or in occupied territory, are "exceptional" measures to be taken only after careful consideration of each individual case. These strict limitations are a direct reaction to the abuses which occurred during World Wars I and II. *See* 4 Pictet 256-58. *See also* Terry, State Terrorism: A Juridical Examination in Terms of Existing International Law, 10 J. Pal. Studies 94 (1980) for a thorough discussion of illegal collective measures in occupied territory.

Paragraph 6.2.3 deals only with reprisals taken by one belligerent in response to illegal acts of warfare performed by the armed forces of an enemy. Paragraph 6.2.3 does not deal with the collective measures an occupying power may take against the population of an occupied territory in response to illegitimate acts of hostility committed by the civilian population. Art. 50 of HR provided that no general penalty, pecuniary or otherwise, may be inflicted upon the population of occupied territory on account of acts of individuals "for which they cannot be regarded as jointly and severally responsible," and contemplated that *bona fide* fines, in a reasonable amount, intended to insure respect for the rules and decrees in force, were lawful (Levie, 2 The Code of International Armed Conflict 743). GC, art. 33(1) provides that penal liability is personal:

> No protected person may be punished for an offense he or she has not personally committed. Collective penalties . . . are prohibited.

(continued...)

1. Reprisal must be ordered by an authorized representative of the belligerent government.[37] (For the rule applicable to the United States, see paragraph 6.2.3.3).

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.[38]

3. When circumstances permit, reprisal must be preceded by a demand for redress by the enemy of its unlawful acts.[39]

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.[40] Reprisal must never be taken for revenge.[41]

5. Reprisal must only be used as a last resort when other enforcement measures have failed or would be of no avail.[42]

6. Each reprisal must be proportional to the original violation.[43]

36.(...continued)
Although the collective measures taken by an occupying power against the population of an occupied territory are frequently referred to as "reprisals," they should be clearly distinguished from reprisals between belligerents dealt with here. Nevertheless, it should be remembered that GC arts. 4 & 33(3) prohibit reprisals against civilians in occupied territory. Thus, those acts permitted cannot amount to penal punishments or reprisals. *See also* Lowe, The Commander's Handbook on the Law of Naval Operations and the Contemporary Law of the Sea, *in* Robertson at 133-34.

37. *See* AFP 110-31, para. 10-7c(8). *See also* paragraph 6.2.3.3 (p. 341).

38. A careful inquiry by the injured belligerent into the alleged violating conduct should precede the authorization of any reprisal measure. This is subject to the important qualification that, in certain circumstances, an offended belligerent is justified in taking immediate reprisals against illegal acts of warfare, particularly in those situations where the safety of his armed forces would clearly be endangered by a continuance of the enemy's illegal acts. *See* paragraph 6.2.3.3 (p. 341) regarding authority to order reprisals.

39. There must be reasonable notice that reprisals will be taken. Green, The Contemporary Law of Armed Conflict (1993) at 119. The degree of notice required will depend upon the particular circumstances of each case. Notice is normally given after the enemy's violation but may, in appropriate circumstances, predate an imminent violation. An example of notice is an appeal to the transgressor to cease its offending conduct and punish those responsible. Such an appeal may serve both as a plea for compliance and a notice to the adversary that reprisals will be taken otherwise. *See also* FM 27-10, para. 497b.

40. Acts taken in reprisal may also be brought to the attention of neutrals if necessary to achieve maximum effectiveness. Since reprisals are undertaken to induce an adversary's compliance with the recognized rules of armed conflict, any action taken as a reprisal must be announced as a reprisal and publicized so that the adversary is aware of its obligation to abide by the law and to ensure that the reprisal action is not, itself, viewed as an unlawful act. *See* McDougal & Feliciano 689 and AFP 110-31, para. 10-7c.

41. FM 27-10, para. 497d.

42. *Id.*, para. 497b.

43. This rule is not one of strict equivalence because the reprisal will usually be somewhat

(continued...)

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.[44]

6.2.3.2 Immunity From Reprisal. Reprisals are forbidden to be taken against:

1. Prisoners of war[45] and interned civilians[46]

2. Wounded, sick, and shipwrecked persons[47]

3. Civilians in occupied territory[48]

4. Hospitals and medical facilities, personnel,[49] and equipment, including hospital ships, medical aircraft, and medical vehicles.[50]

43.(...continued)
greater than the initial violation that gave rise to it. However, care must be taken that the extent of the reprisal is measured by some degree of proportionality and not solely by effectiveness. Effective but disproportionate reprisals cannot be justified by the argument that only an excessive response will forestall a further transgression. *Compare* McDougal & Feliciano 682-83.

The acts resorted to by way of reprisal need not conform in kind to those complained of by the injured belligerent. The reprisal action taken may be quite different from the original act which justified it, but should not be excessive or exceed the degree of harm required to deter the enemy from continuance of his initial unlawful conduct. McDougal & Feliciano 682.

If an act is a lawful reprisal, it cannot lawfully be a basis for a counter-reprisal. Under international law, there can be no reprisal against a lawful reprisal.

44. When, for example, one party to an armed conflict commits a breach of law but follows that violation with an expression of regret and promise that it will not be repeated, then any action taken by another party to "right" the situation cannot be justified as a lawful reprisal.

45. GPW, art. 13(3); GPW 1929, art. 2(3). Prisoners of war are defined in GPW, art. 4A; *see* paragraph 11.7 (p. 489). In light of the wide acceptance of the 1949 Geneva Conventions by the nations of the world today, this prohibition is part of customary law. Meron, The Geneva Conventions as Customary Law, 81 Am. J. Int'l L. 348 (1987); Meron, Human Rights and Humanitarian Norms as Customary Law (1989). *Compare* NWIP 10-2, para. 310e(1) n.8 ("War crimes tribunals have considered the rule forbidding reprisals against prisoners of war as a codification of existing customary law. Hence, this prohibition may be regarded as binding upon all States regardless of whether or not they are parties to the 1949 Convention.") with Levie, Prisoners of War 366-69 (describing contrary State practice during both World Wars and the Korean and Vietnam conflicts). The taking of prisoners by way of reprisal for acts previously committed (so-called "reprisal prisoners") is likewise forbidden.

46. GC, art. 33(3); *see also* paragraph 11.8 (p. 495).

47. GWS, art. 46, GWS-Sea, art. 47, as defined in GPW, art. 4A.

48. GC, art. 33, as defined in GC, art. 4. Also immune from reprisals under the Geneva Conventions are the property of such inhabitants, enemy civilians in a belligerent's own territory, and the property of such civilians. GC, art. 33, as defined in GC, art. 4.

Civilians not protected from reprisal under these provisions are nationals of a nation not bound by the GC, nationals of a neutral nation in the territory of a belligerent, and nationals of a cobelligerent so long as their nation has normal diplomatic relations with the nation in whose territory they are. These exceptions are eliminated under GP I for nations bound thereby.

49. GWS, art. 46, GWS Sea, art. 47. Medical personnel are defined in GWS, arts. 24-26 and GWS-Sea, art. 36. *See* paragraph 11.5 (p. 486). Chaplains attached to the armed forces (GWS, art.
(continued...)

6.2.3.3 Authority to Order Reprisals. The President alone may authorize the taking of a reprisal action by U.S. forces.[51] 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.[52] The United States has historically been reluctant to resort to reprisal for just this reason.

49.(...continued)
46, GWS-Sea, art. 47) as set forth in GWS, art. 24 and GWS-Sea, art. 36, are also immune from reprisal. *See also* Green, Essays on the Modern Law of War (1985) at chap VI.

50. Fixed establishments and mobile medical units of the medical service, hospital ships, coastal rescue craft and their installations, medical transports, and medical aircraft are immune from reprisal under GWS, art. 46, GWS-Sea, art. 47, as set forth in GWS, arts. 19, 20, 35 & 36; GWS-Sea, arts. 22, 24, 25, 27 & 39.

McDougal and Feliciano, in commenting on the question of immunity from reprisal, argue that:

> The cumulative effect of the Geneva Conventions of 1949 is that all enemy persons who find themselves within a belligerent's effective control are immunized as targets of reprisal. Practically the only enemy persons who may be lawfully subjected to reprisals are those on the high seas and in the enemy's own teritory.

McDougal & Feliciano 684.

51. *See also* paragraph 6.2.3.1 (p. 338).

52. McDougal & Feliciano 689. Other factors which governments will usually consider before taking reprisals include the following:

> 1. Reprisals may have an adverse influence on the attitudes of governments not participating in an armed conflict.
>
> 2. Reprisals may only strengthen enemy morale and underground resistance.
>
> 3. Reprisals may only lead to counter-reprisals by an enemy, in which case the enemy's ability to retaliate effectively is an important factor.
>
> 4. Reprisals may render enemy resources less able to contribute to the rehabilitation of an area after the cessation of hostilities.
>
> 5. The threat of reprisals may be more effective than their actual use.
>
> 6. Reprisals, to be effective, should be carried out speedily and should be kept under control. They may be ineffective if random, excessive, or prolonged.
>
> 7. In any event, the decision to employ reprisals will generally be reached as a matter of strategic policy. The immediate advantage sought must be weighed against the possible long-range military and political consequences.

AFP 110-31, para. 10-7d, citing NWIP 10-2, ch. 3, n. 6.

Many attempted uses of reprisals in past conflicts have been unjustified either because the reprisals were not undertaken to deter violations by an adversary or were disproportionate to the preceding unlawful conduct. In addition to the legal requirements which regulate resort to reprisals, there are various practical factors which governments will consider before taking reprisals. For example, when appeal to the enemy for redress has failed, it may be a matter of policy to consider before resorting to reprisals, whether the opposing forces are not more likely to be influenced by a steady adherence to the law of armed conflict. The relative importance of these political and practical factors depends upon the degree and kind of armed conflict, the character of the adversary and its resources, and the importance of nations not participating in hostilities. *See* Colbert, Retaliation in

(continued...)

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.[53] A major violation by one side will release the other side from all further duty to abide by that obligation. The concept of

52.(...continued)
International Law (1948); 10 Whiteman 317-39; Kalshoven, Belligerent Reprisals (1971); and Greenwood, Reprisals and Reciprocity in the New Law of Armed Conflict, *in* Armed Conflict and the New Law (Meyer ed. 1989) at 227 for thorough discussions of reprisals.

The following activities, otherwise prohibited under the law of armed conflict, are among those which may lawfully be taken in reprisal:

1. Restricted means and methods of warfare set forth in the Hague Conventions of 1907 and, for parties thereto, in GP I, unless specifically prohibited as a means of reprisal. Among the otherwise unlawful means and methods of warfare that may be employed as reprisal are:

a. employing poison or poisoned weapons;

b. killing, wounding or capturing treacherously or perfidiously individuals belonging to the hostile nation or army, such as by feigning incapacitation by wounds or sickness or of civilian noncombatant status;

c. killing or wounding an enemy who, having laid down his arms, or having no longer a means of defense, has surrendered at discretion;

d. declaring that no quarter will be given;

e. employing weapons, projectiles, or material or methods of warfare of a nature to cause superfluous injury or unnecessary suffering;

f. making improper use of a flag of truce, of the national, or neutral flag or of the military insignia and uniform of the enemy as well as the distinctive badges of the Geneva Conventions;

g. use of unanchored submarine contact mines or mines and torpedoes which do not render themselves harmless within one hour after they have broken loose from their moorings or have been fired.

2. Military or other hostile use of environmental modification techniques prohibited by the 1977 Environmental Modification Convention.

3. For nations party thereto, the use of weapons the primary effect of which is to injure by fragments which in the human body escape detection by X-rays, in violation of Protocol I to the 1980 Conventional Weapons Convention.

4. For nations party thereto, the use of mines, booby traps and other devices, in violation of Protocol II to the Conventional Weapons Convention.

5. For nations party thereto (not including the United States), the use of incendiary weapons in a manner which violates Protocol III to the Conventional Weapons Convention.

For a discussion of U.S. objections to new restrictions on reprisal set forth in GP I, *see* paragraph 6.2.3, note 36 (p. 338). *Compare* Hampson, Belligerent Reprisals and the 1977 Protocols to the Geneva Conventions of 1949, 37 Int'l & Comp. L.Q. 818 (1988). *See also* Aldrich, Compliance with International Huamnitarian Law, 1991 Int'l Rev. Red Cross 294, 301-03, who examines the need for States contemplating ratification of GP I, with and without accepting the competence of the Fact Finding Commission, to reserve one or more of the provisions on reprisals.

53. Most truces and armistices are of this nature.

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.[54] The decision to consider the United States released from a particular obligation following a major violation by the enemy will 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 generally recognized 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.[55] Belligerents have the obligation under international law to

54. Vienna Convention on the Law of Treaties, art. 60(5) *reprinted in* 8 Int'l Leg. Mat'ls 679 (1969); de Preux, The Geneva Conventions and Reciprocity, 1985 Int'l Rev. Red Cross 25 (those portions of GP I & II supplementing the 1949 Geneva Conventions are also not subject to the principle of reciprocity).

55. War crimes, as defined in paragraph 6.2.5, are distinguished from "crimes against peace" and "crimes against humanity." This distinction may be seen from art. 6 of the Charter of the International Military Tribunal at Nuremburg, which defined the Tribunal's jurisdiction as follows:

> The following acts, or any one of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility [*see* paragraph 6.1.4 (p. 328)]:
>
> (a) *Crimes against peace*: namely, planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
>
> (b) *War crimes*: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill treatment, or deportation to slave labor or for any other purpose, of civilian population of or in occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
>
> (c) *Crimes against humanity*: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetuated.

U.S. Naval War College, International Law Documents 1944-45, at 254 (1946); AFP 110-20, at 3-183.

Although the distinction between crimes against peace and war crimes is readily apparent, there is a certain difficulty in distinguishing war crimes from crimes against humanity. The precise scope of those acts included within the category of crimes against humanity is not entirely clear from the

(continued...)

55.(...continued)
definition given in art. 6 of the Charter of The International Military Tribunal at Nuremberg. A survey of the judgments of the various tribunals which tried individuals for crimes against humanity committed during World War II may be summarized in the following manner:

> 1. Certain acts constitute both war crimes and crimes against humanity and may be tried under either charge.
>
> 2. Generally, crimes against humanity are offenses against the human rights of individuals, carried on in a widespread and systematic manner. Thus, isolated offenses have not been considered as crimes against humanity, and courts have usually insisted upon proof that the acts alleged to be crimes against humanity resulted from systematic governmental action.
>
> 3. The possible victims of crimes against humanity constitute a wider class than those who are capable of being made the objects of war crimes and may include the nationals of the State committing the offense as well as stateless persons.
>
> 4. Acts constituting crimes against humanity must be committed in execution of, or in connection with, crimes against peace, or war crimes.

See Schwelb, Crimes Against Humanity, 23 Brit. Y.B. Int'l L (1946) 178; Dinstein, Crimes Against Humanity, *in* Theory of International Law at the Threshold of the 21st Century (Makarczyk ed. 1996); Levie, Violation of Human Rights as War Crimes, 1995 Isr. Y.B. Human Rights 119.

On 21 November 1947, the United Nations General Assembly adopted Resolution 177(II) affirming "the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal" and directing the International Law Commission of the United Nations to:

> (a) Formulate the principles of international law recognized in the Charter of the Nuremburg Tribunal and in the judgment of the Tribunal, and
>
> (b) Prepare a draft code of offenses against the peace and security of mankind....

The text of the principles formulated by the United Nations International Law Commission, with a commentary, is *reprinted in* Report of the International Law Commission Covering its Second Session, General Assembly Official Records: Fifth Session, Supp. No. 12 (A/1316), Pt. III, pp. 11-14 (1950); Yearbook of the International Law Commission 1950, at 374-80; and Schindler & Toman 923-24. That text reads as follows:

> Principle I. Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.
>
> Principle II. The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.
>
> Principle III. The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.
>
> Principle IV. The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.
>
> Principle V. Any person charged with a crime under international law has the right to a fair trial on the facts and law.

(continued...)

55.(...continued)

Principle VI. The crimes hereinafter set out are punishable as crimes under international law: [Here follow substantially similar definitions of crimes against peace, war crimes and crimes against humanity, as are given in art. 6 of the Charter of the International Military Tribunal at Nuremberg, quoted at the beginning of this note.]

Principle VII. Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.

For a discussion of difficulties in punishing war crimes committed in non-international armed conflicts, *see* Plattner, The Penal Repression of Violations of International Humanitarian Law Applicable in Non-International Armed Conflicts, 1990 Int'l Rev. Red Cross 409. *See also* Meron, International Criminalization of Internal Atrocities, 89 Am. J. Int'l L. 554 (1995); Bothe, War Crimes in Non-International Conflicts *in* War Crimes in International Law (Dinstein & Tabory eds. 1996) at 293-306. For a comprehensive and chilling analysis of crimes against humanity committed by governments against their own populations, *see* Rummel, Death by Government (1994).

The International Tribunal for Yugoslavia, established in 1993 pursuant to U.N.S.C. Resolution 829 (*see* paragraph 6.1.3, note 13 (p. 327)), was empowered to prosecute persons for:

a. Grave breaches of the Geneva Conventions of 1949;
b. Violations of the laws or customs of war;
c. Genocide; and
d. Crimes against humanity.

In contrast, and reflecting the differing factual and legal setting between the conflict in the former Yugoslavia and that in Rwanda, the International Criminal Tribunal for Rwanda, established in 1994 pursuant to U.N.S.C. Resolution 955 (*see* paragraph 6.1.3, note 13 (p. 327)), was empowered to prosecute persons for:

a. Genocide
b. Crimes against humanity
c. Violations of common article 3 and of GP II

Crimes against humanity are identically defined in art. 5 of the Statute for the International Tribunal for Yugoslavia and in art. 3 of the Statute for the International Criminal Tribunal for Rwanda as:

> . . . the following crimes committed in armed conflict, whether international or internal in character, and directed against any civilian population:
>
> (a) murder;
> (b) extermination;
> (c) enslavement;
> (d) deportation;
> (e) imprisonment;
> (f) torture;
> (g) rape;
> (h) persecutions on political, racial and religious grounds;
> (i) other inhumane acts.

The inclusion of rape on this listing of crimes against humanity represents a departure from Nuremberg where rape was neither mentioned in the Nuremberg Charter nor prosecuted as a war crime. However, GC, art. 27, provides that:

Women shall be especially protected against any attack on their honor, in particular against rape. . . .

(continued...)

punish their own nationals, whether members of the armed forces or civilians, who commit war crimes.[56] 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.[57]

55.(...continued)
The United States considers that GC, art. 27, and comparable provisions of GPW (arts. 13 & 14), establish rape as a war crime. *See* Meron, Comment: Rape as a Crime Under International Humanitarian Law, 87 Am. J. Int'l L. 425 (1993).

Genocide is defined in both Statutes (Yugoslavia, art. 4; Rwanda, art. 2) as:

> . . . any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group;

This definition is identical to that set forth in art. II of the U.N. Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 12 January 1951, 78 U.N.T.S. 277, *reprinted in* 11 Whiteman 849 [hereinafter Genocide Convention]. The Genocide Convention entered into force for the U.S. on 23 February 1989. The Genocide Convention Implementation Act of 1987, Pub. L. 100-606 of Nov. 4 1988, with commentary, is *reprinted in* 28 Int'l Leg. Mat'ls 754 (1989). It is important to note that genocide "whether committed in time of peace or in time of war is a crime under international law." (Genocide Convention, art. I).

56. The most recent action of the United States with respect to this obligation occurred on 21 August 1996 when President Clinton signed into law the War Crimes Act of 1996. Pub. L. 104-192, 110 Stat. 2184, 18 U.S.C. 2401 *reprinted in* 35 Int'l Leg. Mat'ls 1539 (1996). The Act provides:

2401. War Crimes

(a) OFFENSE.-Whoever, whether inside or outside the United States, commits a grave breach of the Geneva Conventions, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

(b) CIRCUMSTANCES.-The circumstances referred to in subsection (a) are that the person committing such breach or the victim of such breach is a member of the Armed Forces of the United States or a national of the United States (as deined in section 101 of the Immigration and Nationality Act).

(c) DEFINITIONS.-As used in this section, the term 'grave breach of the Geneva Conventions' means conduct defined as a grave breach in any of the international conventions relating to the laws of warfare signed at Geneva 12 August 1949 or any protocol to any such convention, to which the United States is a party.

For a comprehensive discussion of military jurisdiction over war crimes committed by foreign nations *see* Newton, Continuum Crimes: Military Jurisdiction Over Foreign Nationals Who Commit International Crimes, 153 Mil. L. Rev. 1 (Summer 1996).

57. With respect to "grave breaches" (*see* following note), parties to the Geneva Conventions of 1949 are obliged to search out, bring to trial and to punish all persons, regardless of nationality, who have committed or ordered to be committed, a grave breach of the Conventions. GWS, art. 49(2); GWS-Sea, art. 50(2); GPW, art. 129(2); GC, art. 146(2). *See* Flores, Repression of Breaches of the Law of War Committed by Individuals, 1991 Int'l Rev. Red Cross 247.

(continued...)

The following acts are representative war crimes:[58]

1. Offenses against prisoners of war, including killing without just cause; torture or inhumane treatment; subjection to public insult or curiosity; unhealthy,

57.(...continued)
The cases of misconduct by U.S. combatants in Vietnam are analyzed through examination of court-martial convictions in Parks, Crimes in Hostilities, Marine Corps Gazette, Aug. 1976, at 16-22 & Sep. 1976, at 33-39.

58. While any violation of the law of armed conflict is a war crime, certain crimes are defined as "grave breaches" by GWS, art. 50; GWS-Sea, art. 51; GPW, art. 130; GC, art. 147 if committed against persons or property protected by the Conventions. They include:

1. Willful killing, torture or inhuman treatment of protected persons;

2. Willfully causing great suffering or serious injury to body or health of protected persons;

3. Taking of hostages and extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly;

4. Unlawful deportation or transfer or unlawful confinement of a protected person;

5. Compelling a prisoner of war or other protected person to serve in the forces of a hostile power; and,

6. Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial prescribed in the Geneva Conventions.

GP I, arts. 11(4) & 85(2-4), codify in greater detail the two separate categories of grave breaches. The first category relates to combat activities and medical experimentation and provides for the first time a meaningful standard by which such acts can be judged. A breach within this category requires (1) *willfulness* and (2) that death or serious injury to body or health be caused (art. 85(3)).

GP I provides that the following acts constitute grave breaches:

1. Making the civilivan population or individual civilians the object of attack;

2. Launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause extensive loss of life, injury to civilians and damage to civilian objects, as defined in article 57, paragraph 2(a)(iii);

3. Launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in article 57, paragraph 2(a)(iii);

4. Making non-defended localities and demilitarized zones the object of attack;

5. Making a person the object of attack in the knowledge that he is *hors de combat*;

6. The perfidious use, in violation of article 37, of the distinctive emblem of the red cross, red crescent, or other protective sign recognized by the Conventions or this Protocol;

7. Physical multilations;

8. Medical or scientific experiments; and,

(continued...)

dangerous, or otherwise prohibited labor; infringement of religious rights; and denial of fair trial for offenses[59]

58.(...continued)

9. Removal of tissue or organs for transplantation, except where these acts are justified in conformity with the state of health of the person or consistent with medical practice or conditions provided for in the Conventions.

(a) Exceptions may be made only in the case of donations of blood for transfusion or of skin for grafting, provided that they are given voluntarily and without any coercion or inducement, and then only for therapeutic purposes, under conditions consistent with generally accepted medical standards and controls designed for the benefit of both the donor and the recipient.

(b) Any willful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends and which either violates any of the prohibitions above or fails to comply with these requirements is a grave breach of Protocol I.

The second category of grave breaches defined by GP I is in art. 85(4). The only requirement to be satisfied with respect to these offenses is *willfulness.*

1. The transfer by the occupying power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of article 49 of the [GC];

2. Unjustified delay in the repatriation of prisoners of war or civilians;

3. Practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;

4. Making the clearly recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of article 53, subparagraph (b), and when such historic monuments, works of art and places or worship are not located in the immediate proximity of military objectives, and,

5. Depriving a person protected by the Conventions or referred to in paragraph 2 of Article 85 of fair and regular trial.

See also Levie, 2 The Code of International Armed Conflict 857-71; Burgos, The Taking of Hostages and International Humanitarian Law, 1989 Int'l Rev. Red Cross 196; and International Convention Against the Taking of Hostages, New York, December 17, 1979, 1316 U.N.T.S. 205, T.I.A.S. 11081.

59. Principle VI(b), 1950 Nuremberg Principles (*see* note 55 (p. 343)); GPW, arts. 13, 17(4), 34-37, 52, 84, 87(3), 105 & 130; GP I, art. 75(2)(a).

2. Offenses against civilian inhabitants of occupied territory, including killing without just cause, torture or inhumane treatment, forced labor, deportation, infringement of religious rights, and denial of fair trial for offenses[60]

3. Offenses against the sick and wounded, including killing, wounding, or mistreating enemy forces disabled by sickness or wounds[61]

4. Denial of quarter (i.e., killing or wounding an enemy *hors de combat* or making a genuine offer of surrender) and offenses against combatants who have laid down their arms and surrendered[62]

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[63]

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60. Principle VI(b), 1950 Nuremberg Principles; GC, arts. 27(1), 31-32, 49(6), 95(3), 100, 118(1) & 147; GP I, art. 75(2)(a); GP II, art. 4(2)(a).

61. Lieber Code, art. 71; HR, art. 23(c); GWS, arts. 12(2) & 50; GP I, arts. 10, 41 & 85(3); GP II, arts. 4(1) & 7(1).

62. HR, arts. 23(c) & 23(d); GP I, art. 40; GP II, art. 4(1); *Trial of Von Ruchteschell*, 9 LRTWC 82 (British military court, Hamburg, 1947) (denial of quarter at sea). *See* paragraph 11.9.5 (p. 499) regarding use of the white flag.

63. Principle VI(b), 1950 Nuremberg Principles; GWS-Sea, arts. 12(2) & 51. This rule was applied in the 1921 case of the *Llandovery Castle*, 16 Am. J. Int'l L. 708 (1922); and in a number of World War II cases, including *The PELEUS Trial*, 1 LRTWC 1 (British Military Court, Hamburg, 1945), *The Trial of Moehle*, 9 LRTWC 75 (British Military Court, Hamburg, 1946) and in the *Trial of Helmuth Von Ruchteschell*, 9 LRTWC 92 (1949). The PELEUS and Von Ruchteschell cases are *summarized in* Mallison 133-43 and *in* Jacobsen, A Juridical Examination of the Israeli Attack on the *U.S.S. Liberty*, 36 Nav. L. Rev. 48 & 50 (1986). Jacobsen 45-51 argues the Israeli machinegunning of liferafts on board and thrown from USS LIBERTY, after the attack on the LIBERTY was completed, falls within this prohibition. *See* paragraph 11.4 (p. 484). There was no prosecution of U.S. and Australian forces for the systematic killing of the Japanese survivors of the March 1943, Battle of the Bismark Sea, who were in lifeboats or clinging to wreckage. *See* 6 Morison, History of the United States Naval Operations in World War II, 62 *et seq.* (1950); Spector, Eagle Against the Sun 227-28 (1985); Dower, War Without Mercy: Race & Power in the Pacific War 67 (1986). Indeed the Commanding Officer of USS WAHOO was awarded the Navy Cross and an Army Distinguished Service Cross following his January 1943 patrol notwithstanding his slaughter of the survivors of WAHOO's torpedoing of a convoy of two freighters and a large transport. 2 Blair, Silent Victory 357-60 (1975); Dower 66-67 & n.94. Blair notes that, although the Commanding Officer

> [D]escribed the killing of the hundreds (or thousands) of survivors of the transport... no queston was raised about it in the glowing patrol report endorsements, where policy was usually set forth. Many submariners interpreted this—and the honors and publicity showered on [Captain] Morton and *Wahoo*—as tacit approval from the submarine high command. In fact, neither Lockwood [Commander Submarine Force Pacific] nor Christie [Commander Task Force 51] nor Fife [Commander Task Force 42] ever issued a policy statement on the subject. Whether other skippers should follow Morton's example was left up to the individual. Few did.

Blair 359-60. The following language of GWS-Sea, art. 12, makes clear that since the coming into force of the 1949 Geneva Conventions, such acts are unlawful:

(continued...)

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[64]

7. Deliberate attack upon medical facilities, hospital ships, medical aircraft, medical vehicles, or medical personnel[65]

8. Plunder and pillage of public or private property[66]

9. Mutilation or other mistreatment of the dead[67]

10. Employing forbidden arms or ammunition[68]

11. Misuse, abuse, or firing on flags of truce or on the Red Cross device, and similar protective emblems, signs, and signals[69]

12. Treacherous request for quarter (i.e., feigning surrender in order to gain a military advantage).[70]

6.2.5.1 Trials During Hostilities. Although permitted under international law, nations rarely try enemy combatants while hostilities are in progress.[71] Such

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63.(...continued)
Article 12

> Members of the armed forces . . . who are at sea and who are . . . . shipwrecked, shall be respected and protected in all circumstances, it being understood that the term "shipwreck" means shipwreck from any cause . . . .

See Doswald-Beck at 136.

64. HR, arts. 23(g) & 25; Hague IX, art. 1(1); Principle VI(b), 1950 Nuremberg Principles; GP I, art. 51(2); GP II, art. 13(2).

65. GWS, arts. 19(1), 20 & 36(1); GWS-Sea, arts. 22-27 & 39(1); GC, arts. 18(1), 21, 22(1); GP I, arts. 12 & 22; GP II, art. 11; *Llandovery Castle Case of Dithmar and Boldt*, German Reichgericht, 16 July 1921, 16 Am. J. Int'l L. 708 (1922).

66. HR, arts. 28, 47 & 56; Hague IX, art. 7; Principle VI(b), 1950 Nuremberg Principles; GWS, art. 15(1); GWS-Sea, art. 18(1); GC, arts. 16(2) & 33(2); GP II, arts. 4(2)(g) & 8.

67. GWS, art. 15(1); GWS-SEA, art. 18(1); GC, art. 16(2); GP I, art. 34(1); GP II, art. 8.

68. HR, arts. 23(a) & 23(e); GP I, art. 35(2).

69. HR, arts. 23(f) & 32-34; 1923 Radio Rules, art. 10 (*reprinted in* 32 Am. J. Int'l L. Suppl. 10, (1938)); Levie, 2 The Code of International Armed Conflict 871 (distress signals); GP I, arts. 37(1), 38(1) & 85(3)(f); GWS, arts. 53 & 54; GWS-Sea, arts. 43 & 45; GP I, arts. 18(8), 38 & 85(3)(f); *Trial of Heinz Hagendorf*, 11 LRTWC 146 (U.S. military court at Dachau, 1946). *See* 10 Whiteman 398 (white flag lawfully fired on during Korean War); Higginbotham, Case Studies in the Law of Land Warfare II: The Campaign in the Falklands, Military Rev., Oct. 1984, at 53.

70. HR, art. 23(b); GP I, art. 40.

71. Exceptions include limited Russian trials in 1943 (McDougal & Feliciano 704) and the trial of Doolittle's raiders in Japan (Glines, Doolittle's Raiders (1964); Schultz, The Doolittle Raid 305-17, 347-48 (1988); and Spaight 58). This is not to deny that atrocities were committed against prisoners of war, but only to suggest that this method of adjudication is not routinely employed against lawful combatants.

trials might provoke undesirable actions from an enemy and complicate humanitarian protections applicable to one's own nationals.[72] Trials of unlawful combatants have been held.[73] Yet, for similar reasons, such trials may be less than rigorously pursued during the course of hostilities. (Regarding trials of a nation's own forces, see paragraph 6.2.5.3.)

6.2.5.2 Trials After Hostilities. Even after the close of hostilities, criminal trials against lawful enemy combatants have been the exception, not the rule.[74]

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72. GPW art. 85 does not prohibit such trials, but does require that prisoners of war retain, even if convicted, the benefits of that Convention. Many former Communist nations reserved art. 85, in various forms, *e.g.*:

> The Union of Soviet Socialist Republics does not consider itself bound by the obligation, which follows from Article 85, to extend the application of the Convention to prisoners of war who have been convicted under the law of the Detaining Power, in accordance with the principles of the Nuremberg trial, for war crimes and crimes against humanity, it being understood that persons convicted of such crimes must be subject to the conditions obtaining in the country in question for those who undergo their punishment.

The United States explicitly rejected these reservations while accepting treaty relations with the reserving countries as to the remaining unreserved provisions. The reservations are *quoted in* Schindler & Toman 563-94. The reservations to art. 85 are *analyzed in* Pilloud, Reservations to the Geneva Conventions of 1949, 1976 Int'l Rev. Red Cross 170-80.

For the United States reaction to the threat by the North Vietnamese Government to try U.S. prisoners of war, *see* the 13 July 1966 memorandum of the Assistant Legal Adviser, Department of State, *reprinted in* 10 Whiteman 231 and Moore, Law and The Indo-China War 635 (1972).

73. *See* paragraphs 6.2.5.3 (p. 353) and 12.7.1 (p. 515) and 10 Whiteman 150-95.

Historically, unlawful combatants were often not afforded the benefit of trials although this is now required by GWS, art. 49; GWS-Sea, art. 50; GPW, art. 129; GC, art. 146; and, for nations party thereto, GP I, art. 75. *Ex Parte Quirin*, 317 U.S. 1 (1942), involved the trial of unlawful combatants who were German soldiers smuggled into the United States via submarine who discarded their uniforms upon entry, but were captured prior to committing acts of sabotage (*see* paragraph 12.5.3 (p. 513)).

On historical precedents for war crime trials of adversary personnel, particularly unlawful combatants, *see* Cowles, Universality of Jurisdiction over War Crimes, 33 Cal. L. Rev. 177, 203 (1945). He notes:

> War criminals . . . are especially found among irregular combatants and former soldiers who have quit their posts to plunder and pillage . . . such as bandits, brigands, buccaneers, bushwackers, filibusters, franctireurs, free-booters, guerrillas, ladrones, marauders, partisans, pirates and robbers . . . Historically, brigandage has been to a large extent international in character . . . Brigandage is a thriving byproduct of war. The object . . . is to bring out the connection between the past and the present . . . It is not meant to be suggested that war crimes committed by members of regularly constituted units are any less amenable to such jurisdiction.

74. As to unlawful combatants, this was frequently done by summary punishment without benefit of trial. *See* Cowles, Universality of Jurisdiction over War Crimes, 33 Cal. L. Rev. 177 (1945).

After World War I, responsibility for initiating that conflict was formally assigned to Kaiser Wilhelm, and an extensive report of alleged atrocities committed by German troops was prepared by the Allies. No international trials were held against World War I combatants. Some trials were held by German authorities of German personnel as required by the Allies.[75] Due to the gross excesses of the Axis Powers during World War II, involving not only initiation of aggressive war but also wholesale execution of ethnic groups and enslavement of occupied territories, the Allied Powers determined that large scale assignment of individual criminal responsibility was necessary. Crimes against peace and crimes against humanity were charges against the principal political, military and industrial leaders responsible for the initiation of the war and various inhumane policies. The principal offenses against combatants directly related to combat activities were the willful killing of prisoners and others in temporary custody.[76] Since World War II, such prosecutions after conflicts have not occurred.[77]

75. Treaty of Peace Between the Allied and Associated Powers and Germany, Versailles, June 28, 1919, *in* 1 The Law of War 417 (Friedman ed. 1972); Commission on the Responsibility of the Authors of the War and On Enforcement of Penalties, 14 Am. J. Int'l. L. 95 (1920); Judgments of the Supreme Court at Leipzig of the [World War I] German War Trials, 16 Am. J. Int'l L. 674-724 (1922); Mullins, The Leipzig Trials (1921); Woetzel, The Nuremberg Trials in International Law 27 (1962); Glueck, War Criminals, Their Prosecution and Punishment 19 (1944); U.N. Sec'y Gen. Memorandum, Historical Survey of the Questions of International Criminal Jurisdiction, A/CN4/7/Rev.1 (1949). Lauterpacht, The Law of Nations and the Punishment of War Crimes, 21 Br. Y.B. Int'l L. 58, at 84 (1944) notes that of the 901 cases heard before the Leipzig Supreme Court in 1923-24, only 13 ended in convictions.

76. A representative sample of the literature is given:

Views on the World War II Trials: Bosch, Judgment on Nuremberg (1970) (survey of views of others); Nuremberg, German Views of the War Trials (Benton and Grimm ed. 1955); Knieriem, The Nuremberg Trials (1959) (German); Vogt, The Burden of Guilt (1964) (German); Maugham, UNO and War Crimes (1951) (English); Morgan, The Great Assize (1948) (English); Klafkowski, The Nuremberg Principles and the Development of International Law (1966) (Polish); Ginsberg, Laws of War and War Crimes on the Russian Front: The Soviet View, 11 Soviet Studies 253 (1960); Green, Superior Orders in National and International Law (1976); Taylor, Nuremburg and Vietnam: An American Tragedy (1970); Doenitz at Nuremberg: A Reappraisal (Thompson & Strutz eds. 1976); Conot, Justice at Nuremberg (1983); Tusa & Tusa, The Nuremberg Trial (1984).

On the Tokyo war crimes trials, *see* Minear, Victors' Justice: The Tokyo War Crimes Trial (1971); Shiroyama, War Criminal: The Life and Death of Hirota Koki (1974, Bester transl. 1977); and Brackman, The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials (1987). As to Japanese atrocities during WWII generally, *see* Tanaka, Hidden Horrors: Japanese War Crimes in World War II (1996).

Bibliographies: Garsse, Genocide, Crimes Against Humanity, War Crimes Trials: A Bibliography (1951); U.S. Library of Congress, The Nazi State, War Crimes and War Criminals (1954).

Summaries of cases are found *in* U.N. War Crimes Commission, Law Reports of Trials of War Criminals, 15 volumes (1949); Appleman, Military Tribunals and International Crimes (1954); U.S. Gov't, Trials of War Criminals Before The Nuremberg Military Tribunals Under Control

(continued...)

6.2.5.3 Jurisdiction over Offenses.[78] Except for war crimes trials conducted by the Allies after World War II, the majority of prosecutions for violations of the law of armed conflict have been trials of one's own forces for breaches of military discipline. Violations of the law of armed conflict committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice and, if so, will be prosecuted under that Code.[79]

76.(...continued)
Council Law No. 10 (1946-1949) (principal U.S. trials subsequent to International Military Tribunal); 11 Whiteman, Digest of International Law 884 (1968).

Judgments: International Military Tribunal (Nuremberg), Judgment and Sentence, 41 Am. J. Int'l L. 172 (1947); International Military Tribunal, Nazi Conspiracy and Aggression, Opinion and Judgment (1947), *excerpted in* U.S. Naval War College, International Law Documents 1946-1947, at 241-307 (1948); International Military Tribunal for the Far East, Judgment, 3 parts (1948), *excerpted in* U.S. Naval War College, International Law Documents 1948-1949, at 76-106 (1950).

General Literature: Taylor, Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council Law No. 10 (1949); Appleman, Military Tribunals and International Crimes (1954); Davidson, The Trial of the Germans: An Account of the Twenty-two Defendants Before the International Military Tribunal at Nuremberg (1966); Jackson, The Case Against the Nazi War Criminals (1946); Jackson, The Nuremberg Case (1947); Keeshan, Justice at Nuremberg (1946); Woetzel, The Nuremberg Trials and International Law (1962); Weingartner, Crossroads of Death: The Story of the Malmedy Massacre and Trial (1979); de Zayas, The Wehrmacht War Crimes Bureau, 1939-1945 (1989); Levie, Terrorism in War—The Law of War Crimes (1992); War Crimes in International Law (Dinstein & Tabory eds. 1996).

Vietnam: Bilton & Sim, Four Hours in My Lai (1992); Peers, The My Lai Inquiry (1979); The My Lai Massacre and its Cover-up (Goldstein, Marshall & Schwartz, eds. 1976) (the 1970 Peers Report); Hersh, Cover-Up (1972); McCarthy, Medina (1972); Everett, Johnson & Rosenthal, Calley (1971).

77. As an example, *see* Agreement on the Repatriation of Prisoners of War and Civilian Internees, para. 15, signed by Bangladesh, India and Pakistan 9 April 1974, *in* 13 Int'l Leg. Mat'ls 505 (1974). Despite the collection by the U.S. and other nations pursuant to U.N.S.C. Resolution 674 (1990) (*see* paragraph 6.2, note 20 (p. 330)) of extensive evidence of Iraqi war crimes committed during the 1990-91 Gulf War, no prosecutions ensued from that effort. *See* McNeill, Panel Discussion, *in* Grunawalt, King & McClain at 619-20 for a brief account of political difficulties that apparently sidetracked that effort. However, internaitonal support of the concept of post-conflict trials is again apparent, as evidenced by the recently established International Tribunal for Yugoslavia (1993) and the International Criminal Tribunal for Rwanda (1994). *See* paragraph 6.2.5, note 55 (p. 343).

78. *See* GWS, art. 49; GWS-Sea, art. 50; GPW, art. 129; GC, art. 146. On U.S. jurisdiction over enemy nationals, *see* UCMJ, art. 18, which creates jurisdiction in general courts-martial to try "any person" who by the law of armed conflict is subject to trial by a military tribunal; R.C.M. 201 (f)(1)(B), MCM, 1984; FM 27-10, para. 505d; and AFP 110-31, para 15-4a. *See also* Newton, paragraph 6.2.5, note 56 (p. 346).

79. U.S. military personnel tried by court-martial for offenses that constitute war crimes are either charged with the U.S. domestic equivalent of such offenses, *e.g.*, murder (art. 118), rape (art. 120), assault (art. 128), cruelty and maltreatment (art. 93); with law-of-war specific offenses, *e.g.*, looting and pillaging (art. 103); with conduct prejudicial to good order and discipline (art. 134); or with violation of a lawful general order (art. 92), such as art. 0705, U.S. Navy Regulations, 1990 (see paragraph 6.1.2 (p. 324)). *See also* Solis, Marines and Military Law in Vietnam: Trial by Fire 32-33 (1989).

Although jurisdiction extends to enemy personnel, trials have almost exclusively been against unlawful combatants, such as persons who take part in combat operations without distinguishing themselves clearly from the civilian population during battle or those acting without state sanction for private ends.[80]

In the United States, its territories and possessions, jurisdiction is not limited to offenses against U.S. nationals, but extends to offenses against persons of other nationalities. Violations by enemy nationals may be tried as offenses against international law, which forms part of the law of the United States. In occupied territories, trials are usually held under occupation law. Trials of such personnel have been held in military courts, military commissions, provost courts, military government courts, and other military tribunals.[81] There is no statute of limitations on the prosecution of a war crime.[82] (On jurisdiction generally, see paragraph 3.11.1.)

6.2.5.4 Fair Trial Standards. The law of armed conflict establishes minimum standards for the trial of foreign nationals charged with war crimes.[83] Failure to

80. *See* Castren, The Present Law of War and Neutrality 87 (1954) and Greenspan 502-511. The United States normally punishes war crimes, including "grave breaches," as such only if they are committed by enemy nationals or by persons serving the interests of enemy nations. Violations of the law of armed conflict committed within the United States by other persons will usually constitute violations of federal or state criminal law and preferably will be prosecuted under such law.

81. Although UCMJ, art. 21, establishes concurrent jurisdiction with general courts-martial in military commissions, provost courts or other military tribunals for offenses that by the law of armed conflict may be tried by such commissions or tribunals, GPW, art. 85 provides that POWs who are prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of that Convention. One benefit of GPW appears in art. 102 that POWs can be validly sentenced only if such sentences have been pronounced by the same courts according to the same procedures as in the case of members of the armed forces of the Detaining Power. A POW in United States custody would enjoy the same procedural safeguards afforded to U.S. armed forces personnel under the UCMJ for offenses committed whether before or after capture. These provisions seem to preclude future use of the type of military commission that tried General Yamashita. *See* McDougal & Feliciano 730-31.

82. 1977 Digest of United States Practice in International Law 927; UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 26 Nov. 1968, entered into force 11 Nov. 1970, not in force for the United States, 8 Int'l Leg. Mat'ls 68 (1969). While not opposed to the basic purposes of this convention, the United States voted against its adoption because it redefined crimes against humanity in a legally unsatisfactory way and had retroactive application in nations in which existing limits had expired. Dep't St. Bull., 17 Feb. 1969, at 153. Miller, The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 65 Am. J. Int'l L. 476 (1971) examines the *travaux préparatoires* of this convention.

83. GPW arts. 82-108, GC, arts. 64-75 & 117-26, GP II, art. 6, and for nations party thereto GP I, art. 75. The United States supports "in particular" the fundamental guarantees contained in GP I, art. 75, as ones that should be observed and in due course recognized as customary law even if they have not already achieved that status. Matheson, Remarks, paragraph 6.1, note 1 (p. 323) at 422 & 427.

provide a fair trial for the alleged commission of a war crime is itself a war crime.[84]

6.2.5.5 Defenses

6.2.5.5.1 Superior Orders. The fact that a person committed a war crime under orders of his military or civilian superior does not relieve him from responsibility under international law. It may be considered in mitigation of punishment.[85] To establish responsibility, the person must know (or have reason to know) that an act he is ordered to perform is unlawful under international law.[86] Such an order must be manifestly illegal.[87] The standard is whether under

84. GWS, art. 50; GWS-Sea, art. 51; GPW, art. 130; GC, art. 147; GP I, art. 85(4)(e) (for States party thereto).

85. *See* paragraph 6.1.4 (p. 328). The Charter of the International Military Tribunal at Nuremberg, art. 8, stated:

> The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

U.S. Naval War College, International Law Documents, 1944-45, 255 (1946).

Despite efforts to include a provision on the defense of superior orders in the 1949 Geneva Conventions, and in GP I, nations could not agree on the balance between military discipline and the requirements of humanitarian law, and thus left unchanged the international law on the defense of superior orders. Levie, Protection of War Victims: Protocol I to the 1949 Geneva Conventions: Supplement (1985), provides the negotiating history of the effort to include a provision on the defense of superior orders in GP I. *See also* Levie, The Rise and Fall of an Internationally Codified Denial of the Defense of Superior Orders, 30 Revue De Droit Militaire Et De Droit De La Guerre 183 (1991), *reprinted in* Schmitt & Green at chap. XV. Note that the Statute for the International Tribunal for Yugoslavia and the Statute for the International Criminal Tribunal for Rwanda (*see* paragraph 6.2.5, note 55 (p. 343)) provide (in arts. 7(4) & 6(4) respectively) the following:

> The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in anticipation of punishment if the Tribunal determines that justice so requires.

86. The following statement indicates those circumstances in which the plea of superior orders may serve as a defense:

> Undoubtedly, a Court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience to military orders, not obviously unlawful, is the duty of every member of the armed forces and that the latter cannot, in conditions of war discipline, be expected to weigh scrupulously the legal merits of the order received; that rules of warfare are often controversial; and that an act otherwise amounting to a war crime may have been executed in obedience to orders conceived as a measure of reprisals. Such circumstances are probably in themselves sufficient to divest the act of the stigma of a war crime.

2 Oppenheim-Lauterpact 568-69.

(continued...)

the same or similar circumstances a person of ordinary sense and understanding would know the order to be unlawful.[88] If the person knows the act is unlawful and only does it under duress, this circumstance may be taken into consideration either by way of defense or in mitigation of punishment.[89]

6.2.5.5.2 Military Necessity. The law of armed conflict provides that 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. This principle, often referred to as "military necessity," is a fundamental concept of

86.(...continued)
As to the general attitude taken by military tribunals toward the plea of superior orders, the following statement is representative:

> It cannot be questioned that acts done in time of war under the military authority of an enemy cannot involve any criminal liability on the part of officers or soldiers if the acts are not prohibited by the conventional or customary rules of war. Implicit obedience to orders of superior officers is almost indispensable to every military system. But this implies obedience to lawful orders only. If the act done pursuant to a superior's orders be murder, the production of the order will not make it any less so. It may mitigate but it cannot justify the crime. We are of the view, however, that if the illegality of the order was not known to the inferior, and he could not reasonably have been expected to know of its illegality, no wrongful intent necessary to the commission of a crime exists and the interior [*sic*] will be protected. But the general rule is that members of the armed forces are bound to obey only the lawful orders of their commanding officers and they cannot escape criminal liability by obeying a command which violates international law and outrages fundamental concepts of justice.

The Hostage Case (United States v. Wilhelm List et al.), 11 TWC 1236.

87. *See U.S. v. Calley*, 46 CMR 1131, 48 CMR 19 (1969, 1971). UCMJ, art. 92, requires members of the armed forces to obey only lawful orders. An order that directs the commission of a crime is a patently illegal order. Para. 14c(2)(a)(i), Part IV, MCM, 1984.

88. R.C.M. 916(d); *U.S. v. Calley*, 48 CMR 29 (opinion of J. Quinn), 30 (concurring opinion of J. Duncan); Green, Superior Orders in National and International Law 142 (1976). R.C.M. 916(d) provides:

> *Obedience to orders.* It is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful.

See Green, Superior Orders and the Reasonable Man, *in* Essays on the Modern Law of War (1985) at chap. III.

89. An individual may plead duress if he can establish that he acted only under pain of an immediate threat, *e.g.*, the immediate threat of physical coercion, in the event of noncompliance with the order of a superior. In the judgment of one tribunal, it was declared that:

> [T]here must be a showing of circumstances such that a reasonable man would apprehend that he was in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong.

The High Command Case (United States v. Wilhelm von Leeb et al.), 11 TWC 509.

(continued...)

restraint designed to limit the application of force in armed conflict to that which is in fact required to carry out a lawful military purpose. Too often it is misunderstood and misapplied to support the application of military force that is excessive and unlawful under the misapprehension that the "military necessity" of mission accomplishment justifies the result. While the principle does recognize that some amount of collateral damage and incidental injury to civilians and civilian objects may occur in an attack upon a legitimate military objective, it does *not* excuse the wanton destruction of life and property disproportionate to the military advantage to be gained from the attack.[90]

6.2.5.5.3 Acts Legal or Obligatory Under National Law. The fact that national law does not prohibit an act which constitutes a war crime under international law does not relieve the person who committed the act from responsibility under international law.[91] However, the fact that a war crime under international law is made legal and even obligatory under national law may be considered in mitigation of punishment.[92]

89.(...continued)
The International Military Tribunal at Nuremberg declared in its judgment that the test of responsibility for superior orders "is not the existence of the order, but whether moral choice was in fact possible." 1 Trial of Major War Criminals before the International Military Tribunal, Nuremberg 14 November 1945- 1 October 1946, at 224 (1947), *excerpted in* U.S. Naval War College, International Law Documents, 1946-1947, at 260 (1948).

The following examples illustrate these principles:

> *Case 1*: The deliberate target selection of a hospital protected under the Geneva Conventions for aerial bombardment would be a violation of law. Although the person making the selection would be criminally responsible, a pilot given such coordinates would not be criminally responsible unless he knew the nature of the protected target attacked and that circumstances (e.g., see paragraph 8.5.1.4 (p. 424)) did not otherwise justify the attack.
>
> Case 2: Faulty intelligence may cause attacks on targets which are not in fact military objectives. No criminal responsibility would result in this event unless the attack was pursued after the correct intelligence was received and communicated to the attacking force.
>
> *Case 3*. A naval pilot attacks, admittedly in a negligent manner, and consequently misses his target, a military objective, by several miles. The bombs fall on civilian objects unknown to the pilot. No deliberate violation of international law occurred. However, he might be subject to possible criminal punishment under his own nation's criminal code for dereliction of duty. He could not properly be charged with a violation of the law of armed conflict.

90. *See* Stone 352; McDougal & Feliciano 72 & 528; FM 27-10, para. 3; Note, Military Necessity in War Crimes Trials, 29 Brit. Y.B. Int'l L. 442 (1953); Greenspan 279; and 3 Hyde 1801. *Compare* paragraph 5.2, note 6 (p. 292). *See also* De Mulinen, Handbook on the Law War For Armed Forces (1987) at 352-55.

91. Principle II, paragraph 6.2.5, note 55 (p. 343); FM 27-10, para. 511.

92. DA Pam 27-161-2, at 249, and sources cited therein.

6.2.5.6 Sanctions. Under international law, any punishment, including the death penalty, may be imposed on any person found guilty of a war crime.[93] United States policy requires that the punishment be deterrent in nature and proportionate to the gravity of the offense.[94]

93. Levie, 2 The Code of International Armed Conflict 907.

94. FM 27-10, para. 508. For a recent general discussion of issues relating to war crimes trials, defenses, and other developments regarding international tribunals, *see* Albany Law Review Annual Symposium: Conceptualizing Violence: Present and Future Developments in International Law, *in* 60 Albany L. Rev. 565-1079 (1997).

ANNEX A6-1

REPORTABLE VIOLATIONS

SECNAVIST 3300.1 (series), OPNAVINST 3300.52 (Navy) and MCO 3300.3 (Marine Corps), require each person in the Department of the Navy who has knowledge of or receives a report of an apparent violation of the law of armed conflict to make that incident known to his immediate commander, commanding officer, or to a superior officer as soon as is practicable, and requires commanders and commanding officers receiving reports of noncompliance with or breaches of the law of armed conflict to report the facts promptly to the National Military Command Center. The 1949 Geneva Conventions for the Protection of War Victims (and the 1977 Protocol I Additional to those Conventions for nations bound thereby) proscribe certain acts which are commonly accepted as violations of the law of armed conflict. *See* paragraph 6.1.2, note 9 (p. 325) and accompanying text.

The following are examples of those incidents which must be reported:

1. Offenses against the wounded, sick, survivors of sunken ships, prisoners of war, and civilian inhabitants of occupied or allied territories including interned and detained civilians: attacking without due cause; willful killing; torture or inhuman treatment, including biological, medical or scientific experiments; physical mutilation; removal of tissue or organs for transplantation; any medical procedure not indicated by the health of the person and which is not consistent with generally accepted medical standards; willfully causing great suffering or serious injury to body or health or seriously endangering the physical or mental health; and taking as hostages.

2. Other offenses against prisoners of war (POW): compelling a POW to serve in the armed forces of the enemy; causing the performance of unhealthy, dangerous, or otherwise prohibited labor; infringement of religious rights; and deprivation of the right to a fair and regular trial.

3. Other offenses against survivors of sunken ships, the wounded or sick: when military interests do permit, failure to search out, collect, make provision for the safety of, or to care for survivors of sunken ships, or to care for members of armed forces in the field who are disabled by sickness or wounds or who have laid down their arms and surrendered.

4. Other offenses against civilian inhabitants, including interned and detained civilians of, and refugees and stateless persons within, occupied or allied territories: unlawful deportation or transfer, unlawful confinement, compelling forced labor, compelling the civilian inhabitants to serve in the armed forces of the enemy or to participate in military operations, denial of religious rights,

denaturalization, infringement of property rights, and denial of a fair and regular trial.

5. Attacks on individual civilians or the civilian population, or indiscriminate attacks affecting the civilian population or civilian property, knowing that the attacks will cause loss of life, injury to civilians or damage to civilian property that would be excessive or disproportionate in relation to the concrete and direct military advantage anticipated, and which cause death or serious injury to body or health.

6. Deliberate attacks upon medical transports including hospital ships, coastal rescue craft, and their lifeboats or small craft; medical vehicles; medical aircraft; medical establishments including hospitals; medical units; medical personnel or crews (including shipwrecked survivors); and persons parachuting from aircraft in distress during their descent.

7. Killing or otherwise imposing punishment, without a fair trial, upon spies and other persons suspected of hostile acts while such persons are in custody.

8. Maltreatment or mutilation of dead bodies.

9. Willful or wanton destruction of cities, towns, or villages, or devastation not justified by military necessity; aerial or naval bombardment whose sole purpose is to attack and terrorize the civilian population, or to destroy protected areas, buildings or objects (such as buildings used for religious, charitable or medical purposes, historic monuments or works of art); attacking localities which are undefended, open to occupation, and without military significance; attacking demilitarized zones contrary to the terms establishing such zones.

10. Improper use of privileged buildings or localities for military purposes.

11. Attacks on facilities—such as dams and dikes, which, if destroyed, would release forces dangerous to the civilian population—when not justified by military necessity.

12. Pillage or plunder of public or private property.

13. Willful misuse of the distinctive emblem (red on a white background) of the red cross, red crescent or other protective emblems, signs or signals recognized under international law.

14. Feigning an intent to negotiate under a flag of truce or surrender; feigning incapacitation by wounds or sickness; feigning civilian non-combatant status; feigning protected status by use of signs, emblems or uniforms of the United Nations or a neutral or other nation not a party to the conflict or by wearing civilian clothing to conceal military identity during battle.

15. Firing upon a flag of truce.

16. Denial of quarter, unless bad faith is reasonably suspected.

17. Violations of surrender or armistice terms.

18. Using poisoned or otherwise forbidden arms or ammunition.

19. Poisoning wells, streams or other water sources.

20. Other analogous acts violating the accepted rules regulating the conduct of warfare.

Source: SECNAVINST 3300.1A (series)

ANNEX A6-2

RULES FOR COMBATANTS

U.S. NAVY
FUNDAMENTAL RULES OF HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS

1. Fight only enemy combatants.

2. Destroy no more than your mission requires.

3. Do not attack enemy soldiers, sailors, airmen or marines who surrender. Disarm them and turn them over to your superior.

4. Prisoners of war and other detainees shall never be tortured or killed.

5. Collect and care for the wounded, sick and shipwrecked survivors, whether friend or enemy, on land or at sea.

6. Medical personnel and chaplains, medical and religious facilities and medical transportation are protected. Respect them and do not attack them.

7. Treat all civilians humanely and respect their property. Do not attack them.

8. Do your best to prevent any violation of the above rules. Report any violations to the appropriate authority promptly.

9. You cannot be ordered to violate these rules.

10. Discipline in combat is essential. Disobedience of the law of armed conflict dishonors your nation, the Navy, and you. Far from weakening the enemy's will to fight, such disobedience strengthens it. Disobedience of the law of armed conflict is also a crime punishable under the Uniform Code of Military Justice (UCMJ).

Source: OPNAVINST 3300.52

U.S. MARINE CORPS LAW OF WAR PRINCIPLES

Discipline in combat is essential. Disobedience to the law of war dishonors the Nation, the Marine Corps, and the individual Marine; and far from weakening the enemy's will to fight, it strengthens it. The following principles require the Marine's adherence in the accomplishment of any mission. Violations have an adverse impact on public opinion both national and international and have on occasion served to prolong conflict by inciting an opponent to continue resistance and in most cases constitute violations of the UCMJ. Violations of these principles prejudice the good order and discipline essential to success in combat.

1. Marines fight only enemy combatants.

2. Marines do not harm enemies who surrender. They must disarm them and turn them over to their superior.

3. Marines do not kill or torture prisoners.

4. Marines collect and care for the wounded, whether friend or foe.

5. Marines do not attack medical personnel, facilities, or equipment.

6. Marines destroy no more than the mission requires.

7. Marines treat all civilians humanely.

8. Marines do not steal. Marines respect private property and possessions.

9. Marines should do their best to prevent violations of the law of war. They must report all violations of the law of war to their superior.

Source: Marine Corps Institue Order P1500.44C

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 not taking part 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.[1]

Developed at a time when nations customarily issued declarations of war before engaging in hostilities,[2] 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,"[3] coupled with the proliferation of collective security arrangements and the extension of the spectrum of warfare to include insurgencies and counterinsurgencies,[4] armed conflict is now seldom accompanied by formal declarations of war.[5] Consequently, it has become

1. *See* McDougal & Feliciano 402; Williams, Neutrality in Modern Armed Conflicts: A Survey of the Developing Law, 90 Mil. L. Rev. 9 (1980); Norton, Between the Ideology and the Reality: The Shadow of the Law of Neutrality, 17 Harv. Int'l L.J. 249 (1976); Dinstein, War, Aggression and Self-defense (2nd ed. 1994) at 25-30; Schindler, Commentary: Neutral Powers in Naval War, *in* Ronzitti at 211-22; Green 264-67.

2. *See* Hague III, art. 1.

3. The Treaty for the Renunciation of War (Kellogg-Briand Pact), 27 August 1928, 46 Stat. 2343, T.S. No. 796, 2 Bevans 732, 94 L.N.T.S. 57 (No. 2137)), and the U.N. Charter, were designed to end the use of force to settle disputes between nations and eliminate war. On this basis, the International Law Commission refused, at the beginning of its activities, to deal with the law of armed conflict:

> War having been outlawed, the regulation of its conduct has ceased to be relevant.... If the Commission, at the very beginning of its task, were to undertake this study, public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace.

Y.B. Int'l L. Comm., 1949, at 281. Wars having continued to occur, nations and various non-governmental entities (*i.e.*, International Committee of the Red Cross (ICRC)) have continued to develop the law of armed conflict.

4. *See* Sarkesian, The New Battlefield: The United States and Unconventional Conflicts (1986); Special Operations in U.S. Strategy (Barnett, Tovar & Shultz eds. 1984); Asprey, War in the Shadows: The Guerrilla in History (1975); Thompson, Defeating Communist Insurgency: The Lessons of Malaya and Vietnam (1966); Coll, Ord & Rose.

5. Paragraph 4.1 & note 3 thereunder (p. 249); paragraph 5-1, note 4 (p. 290); Greenwood, The Concept of War in Modern International Law, 36 Int'l & Comp. L.Q. 283 (1987); Green 69-72.

increasingly difficult to determine with precision the point in time when hostilities have become a "war"[6] and to distinguish belligerent nations from neutrals.[7] 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, in regulating the conduct of neutrals with respect to belligerents, and in reducing the harmful effects of such hostilities on international commerce.[8]

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.[9] 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.[10]

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6. *See* Greenwood *id.*, generally. The traditional rule is that the law of neutrality regulating the behavior of neutrals and belligerents depends on the existence of a state of war, and not merely an outbreak of armed conflict. Tucker 199-202; Greenwood *id.* 297-301.

7. *See* papagraph 7.2, note 13 (p. 368), Tucker 196-99 and Greenwood, note 5 (p. 365) at 298-99.

8. *See* McNeill, Neutral Rights and Maritime Sanctions: the Effects of Two Gulf Wars, 31 Va. J. Intl L. 631 (1991); and Robertson, Interdiction of Iraqi Maritime Commmerce in the 1990-1991 Persian Gulf Conflict, 22 Ocean Dev. & Int'l L. 289 (1991). On 8 July 1996, the I.C.J. stated that:

> The Court finds that as in the case of the principles of humanitarian law applicable in armed conflict, international law leaves no doubt that the principle of neutrality, whatever its content, which is of a fundamental character similar to that of the humanitarian principles and rules, is applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflict, whatever type of weapons might be used.

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. 8 Jul 1996, *reprinted in* 35 Int'l Leg. Mat'ls 809 (1996) at para. 89. *Compare* Janis, Neutrality, *in* Robertson at 148-55. *Compare also* Wright, 1968 Proc. Am. Soc. Int'l L. 79, who argues that "neutrality in principle cannot exist" within the context of the United Nations Charter.

9. *See* Greenwood, note 5 (p. 365) at 295-96. *Compare* Common article 2 of the Geneva Conventions which "apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."

10. NWIP 10-2, para. 230a; Kelsen 141-44; Tucker 196-197. Greenwood correctly states that "the law of neutrality is brought into operation by the acts of the neutral States, not the belligerents." Greenwood note 5 (p. 365) at 301. For example, the United States consistently proclaimed its neutrality in the Iran-Iraq War of 1980-1988. President Carter, Remarks, 24 Sep. 1980, 16 Weekly Comp. Pres. Docs. 1922 (1980); President Reagan, Written Responses to Questions, 23 Weekly Comp. Pres. Docs. 556 (19 May 1987); U.S. Dep't of State, U.S. Policy in the Persian Gulf, Special Report No. 166, July 1987, at 8-11. The San Remo Manual (para. 13(d)) provides simply that "'neutral' means any State not party to the conflict." *See also* Doswald-Beck at 87-88 for commentary on this definition.

7.2 NEUTRAL STATUS

Customary international law contemplates that all nations have the option to refrain from participation in an armed conflict by declaring or otherwise assuming neutral status.[11] 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.[12] This customary law has, to

11. The choice is a political decision. Similarly, recognition of such nonparticipation is also a political decision. NWIP 10-2, para. 230a. Although it is usual, on the outbreak of armed conflict, for nonparticipating nations to issue proclamations of neutrality, a special declaration by nonparticipating nations of their intention to adopt a neutral status is not required. NWIP 10-2, para. 231. Hague III, article 2, obligates belligerents to inform neutrals of the existence of a state of war:

> The existence of a state of war must be notified to the neutral Powers without delay, and shall not take effect in regard to them until after the receipt of a notification, which may, however, be given by telegraph. Neutral Powers, nevertheless, cannot rely on the absence of notification if it is clearly established that they were in fact aware of the existence of a state of war.

Art. 2 is binding between a belligerent nation which is a party to Hague III and neutral nations which also are parties to the Convention. Parties include the United States and many of its allies, the former-Soviet Union, and five of the internationally recognized or self-proclaimed permanent neutral nations *e.g.*, Austria, Finland, Ireland, Sweden and Switzerland.

12. Tucker 202-18, esp. n.14. *Impartiality* obligates neutral nations to fulfill their duties and to exercise their rights in an equal (*i.e.*, impartial or non-discriminatory) manner toward all belligerents, without regard to its differing effect on individual belligerents. Tucker 203-05; Hague XIII, Preamble and art. 9. *Abstention* is the neutral's duty to abstain from furnishing belligerents with certain goods or services. Tucker 206-18; Hague XIII, art. 6. Neutral duties also include *prevention* and *acquiescence*. The neutral has a duty to prevent the commission of certain acts by anyone within its jurisdiction, *e.g.*, to prevent belligerent acts of hostility in neutral waters, or the use of neutral ports and waters as a base of operations. Tucker 218-53; Hague XIII, art. 8. The neutral also has a duty to acquiesce in the exercise by belligerents of those repressive measures international law permits the latter to take against neutral merchantmen engaged in the carriage of contraband, breach or attempted breach of blockade, or in the performance of unneutral service. Tucker 252-58; Green 260-62. The application of these concepts in discussed in the balance of this Chapter. *See* Figure A7-1 (p. 400) for a representation of the reciprocal rights and duties of neutrals and belligerents.

A nation may be neutral, insofar as it does not participate in hostilities, even though it may not be impartial in its attitude toward the belligerents. Whether or not a position of nonparticipation can be maintained, in the absence of complete impartiality, depends upon the reaction of the aggrieved belligerent. NWIP 10-2, para. 230b n.14; Tucker 197 ("the only essential condition for neutral status is that of non-participation in hostilities"). However the Kellogg-Briand Pact (paragraph 7.1, note 3 (p. 365)) has been interpreted to permit benevolent neutrality on behalf of victims of aggression.

(continued...)

some extent, been modified by the United Nations Charter (see paragraph 7.2.1).

Neutral status, once established, remains in effect unless and until the neutral nation abandons its neutral stance and enters into the conflict.[13]

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.[14] In the event of a threat to or breach of the peace or act of aggression, the Security Council is empowered to take enforcement action on behalf of all member nations, including the use of force, in order to maintain or restore international peace and security.[15] When called

12.(...continued)
On the other hand, the fact that a neutral uses force to resist attempts to violate its neutrality does not constitute participation in the hostilities. Hague XIII, art. 26; Levie, 2 The Code of International Armed Conflict 788; 11 Whiteman 185-90. That nations retain their right of self-defense to enforce maintenance of their neutrality is illustrated by actions of neutral nations in escorting neutral ships in the Persian Gulf during the Iran-Iraq tanker war (1984-88), including the United States policy of providing assistance upon request of other neutral flag vessels coming under unlawful attack by belligerent ships or aircraft. *See* Dep't St. Bull., July 1988, at 61; McNeill, paragraph 7.1, note 8 (p. 366), at 638; and De Guttry & Ronzitti, The Iran-Iraq War (1980-1988) and the Law of Naval Warfare (1993) at 173-209. *See also* the discussion of distress assistance in paragraph 3.10.2, note 45 (p. 230).

13. Tucker 202; NWIP 10-2, para. 231, n.16. When the United States is a belligerent, designation of the neutral status of third nations will ordinarily be promulgated by appropriate directives.

To be distinguished from self-proclaimed neutrals — either "permanent" or temporarily during an armed conflict — are the two nations currently enjoying internationally recognized permanent neutrality: Switzerland and Austria. 1 Whiteman 342-64. The self-proclaimed (alliance-free) neutrals include Finland, Ireland, Sweden, and the Vatican (Holy See). *See* Wachtmeister, Neutrality and International Order, Nav. War C. Rev., Spring 1990, at 105. On 15 September 1983, Costa Rica proclaimed a policy of "permanent, active and unarmed neutrality" while maintaining its status as a party to the OAS and the 1947 Rio Treaty. N.Y. Times, 18 Nov. 1983, at A12.

14. U.N. Charter, arts. 2(3) & 2(4). *See also* paragraphs 4.1.1 (p. 250) and 7.2.2 (p. 370).

15. U.N. Charter, arts. 39, 41-42; paragraph 4.1.1, note 8 (p. 251). U.N.S.C. Resolutions S/1501 (1950), S/1511 (1950), and S/1588 (1950), adopted by the Security Council upon the occasion of North Korea's invasion of South Korea on 24 June 1950, determined that North Korea's aggression constituted a "breach of peace," recommended that member nations "furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack," recommended that such forces and assistance be made available to a "unified commander under the United States," and authorized that unified command to use the U.N. Flag "in the course of operations against North Korean forces." These Resolutions were adopted during the Soviet Union's self-imposed absence from Security Council proceedings. Upon the Soviet Union's return, its veto prevented the Council from taking further action. Thereafter, the General Assembly, having determined that the Security Council was unable (due to the threat of a Soviet veto) to "discharge its responsibilities on behalf of all the Member States," adopted the "Uniting for Peace Resolution" of 3 November 1950 which:

(continued...)

upon by the Security Council to do so, member nations are obligated to provide assistance to the United Nations, or a nation or coalition of nations implementing a Security Council enforcement action, in any action it takes and to refrain from aiding any nation against whom such action is directed.[16] 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.[17] 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 required by the traditional law of neutrality.[18] Should the Security Council determine not to institute an enforcement action, each United Nations member remains free to assert neutral status.[19]

15.(...continued)

> *Resolves* that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace . . . , the General Assembly shall consider the matter immediately with a view to making appropriate recommendations . . . . for collective action . . . .

U.N.G.A. Res. 377 (V) (1950) (*reprinted in* 13 Whiteman at 564-68, and *in* Stone at 282-84). Thereafter, and as of July 1997, the Security Council has adopted mandatory sanctions only five times: against Southern Rhodesia (U.N.S.C. Res. S/232 (1966) (trade embargo under article 41), 12 Whiteman 394-95 and U.N.S.C. Res. S/253 (1968) (trade embargo expanded under Chapter VII), 12 Whiteman 403-07)); against South Africa (U.N.S.C. Res. S/418 (1977) (arms embargo under Chapter VII), 1977 Digest 934-36)); against Iraq (U.N.S.C. Res. S/661 (1990) (total embargo under Chapter VII) (*reprinted in* 29 Int'l Leg. Mat'ls 1325 (1990)); against Yugoslavia (U.N.S.C. Res. S/713 (1991) (weapons and military equipment embargo under Chapter VII) (*reprinted in* 31 Int'l Leg. Mat'ls 1433 (1992)); and against Haiti (U.N.S.C. Res. S/841 (1993) (trade embargo) (*reprinted in* 32 Int'l Leg. Mat'ls 1206 (1993)). The Iraqi sanctions are still in force.

16. U.N. Charter arts. 2(5), 25, 43 & 49; paragraph 4.1.1, note 8 (p. 251). For an excellent discussion of this concept *see* Title V Report, App. O, pp. 626-29.

17. U.N. Charter arts. 43 & 45; paragraph 4.1.1, note 8 (p. 251). *See also* Doswald-Beck at 155-56. Some States (*e.g.*, Jordan) continued to assert their neutrality and even to trade with Iraq.

18. U.N. Charter arts. 41 & 49; paragraph 4.1.1, note 8 (p. 251).

19. Traditional concepts of neutral rights and duties are substantially modified when the United Nations authorizes collective action against an aggressor. Absent a Security Council resolution to the contrary, nations may discriminate, and even resort to armed conflict in self-defense, against a nation that is guilty of an illegal armed attack. This follows from art. 51 of the Charter which recognizes the "inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations . . . ." *See* paragraph 4.1.1, note 9 (p. 253). Under the "Uniting For Peace" Resolution, U.N.G.A. Res. 377(V) (1950) (*see* note 15 (p. 256)), the General Assembly of the United Nations may, in the event of a breach of the peace and the inability of the Security Council to act due to a veto, make "appropriate recommendations to members for collective measures, including . . . the use of armed force when necessary . . . ." In contrast to a binding Security Council decision, recommendations of the General Assembly do not constitute legal obligations for the member nations. In sum, then, although members may discriminate against an aggressor, even in the absence of any action on the part of the Security Council, they do not have the duty to do so. In these circumstances, neutrality remains a distinct possibility. NWIP 10-2, para. 232 n.17; Tucker 13-20, 171-80; Schindler, Neutral Powers in Naval War, Commentary, *in* Ronzitti at 211.

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 against the territorial integrity or political independence of any state 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 and security. This inherent right of self-defense may be implemented individually, collectively or on an *ad hoc* basis, or through formalized regional and collective security arrangements.[20] 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 may be 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.[21]

7.3 NEUTRAL TERRITORY[22]

As a general rule of international law, all acts of hostility in neutral territory, including neutral lands, neutral waters, and neutral airspace, are prohibited.[23] 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.[24] If the neutral nation is unable or unwilling to enforce effectively its right of inviolability, an aggrieved belligerent may take such acts as are necessary in neutral territory to counter the activities of enemy forces, including warships and military aircraft, making unlawful use of that territory.[25] Belligerents are also authorized to act in

20. *See* Kelsen, generally. The Charter recognizes regional collective security arrangements in Chapter VIII, entitled "Regional Arrangements". *See* paragraph 4.1.1, note 9 (p. 253).

Each of the collective security treaties to which the United States is party refers to and expresses recognition of the principles, purposes and/or jurisdiction of the United Nations. Art. 103 of the U.N. Charter states:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

21. *See* NWIP 10-2, para. 233 n. 20.

22. The rules of neutral territory stated in paragraph 7.3 are customary in nature and were codified in Hague XIII. NWIP 10-2, para. 441 & no. 26.

23. Hague V, art. 1; Hague XIII, art. 2. *See* Green 265-66.

24. Tucker 260-61; Hague V, art. 5. *Cf.* Hague XIII, art. 25. Resort to force by a neutral nation to prevent violation of its territory by a belligerent does not constitute an act of hostility. Hague V, art. 10.

25. McDougal & Feliciano 406-07; NWIP 10-2, para. 441 & n. 27; Tucker 220-26, 256, 261-62; Harlow, UNCLOS III and Conflict Management in Straits, 15 Ocean Dev. & Int'l L. 197,

(continued...)

self-defense when attacked or threatened with attack while in neutral territory or when attacked or threatened from neutral territory.[26]

7.3.1 Neutral Lands. Belligerents are forbidden to move troops or war materials and supplies across neutral land territory.[27] Neutral nations may be required to mobilize sufficient armed forces to ensure fulfillment of their responsibility to prevent belligerent forces from crossing neutral borders.[28] Belligerent troops that enter neutral territory must be disarmed and interned until the end of the armed conflict.[29]

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.[30]

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.[31] In any event, Hague Convention XIII requires that a 24-hour grace period in which to depart must be provided to belligerent warships located in neutral ports or roadsteads at the outbreak of armed conflict.[32] Thereafter, belligerent warships may visit only those neutral ports and roadsteads that the neutral nation may choose to open to them for that

25.(...continued)
204 (1985); Robertson, The "New" Law of the Sea and the Law of Armed Conflict at Sea, *in* Moore & Turner at 304.

26. *Ibid. Compare* San Remo Manual paras. 22 & 30, and commentary *in* Doswald-Beck at 101-02 & 106-07.

27. Hague V, art. 2; FM 27-10, paras. 516-17. The various ways in which Sweden responded to demands by Germany in 1941 to transport troops and supplies to and from Norway via Swedish territory is summarized *in* Levie, 1 The Code of International Armed Conflict 156.

28. Hague V, art. 5; FM 27-10, para. 519b.

29. Hague V, art. 11; FM 27-10, paras. 532-36.

30. Hague V, arts. 13-14; FM 27-10, paras. 538-39, 541-43; Green 261-62.

31. NWIP 10-2, para. 443b(1) n. 29; Tucker 240. *Cf.* Hague XIII, art. 9.

32. Hague XIII, art. 13. For the most part, Hague XIII is considered as declaratory of the customary rules restricting belligerent use of neutral ports and waters. Tucker 219. Those of its provisions which are not so accepted are identified in the notes which follow. Even in relation to neutral waters and ports, Hague XIII is not considered as being exhaustive. *See* Hague XIII, art. 1 and Tucker 219 n. 52.

purpose.[33] Belligerent vessels, including warships, retain a right of entry in distress whether caused by *force majeure* or damage resulting from enemy action.[34]

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,[35] belligerent warships are forbidden to remain in a neutral port or roadstead in excess of 24 hours.[36] This restriction does not apply to belligerent warships devoted exclusively to humanitarian, religious, or nonmilitary scientific purposes.[37] (Warships engaged in the collection of scientific data of potential military application are not exempt.[38]) 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.[39] 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.[40]

Unless the neutral nation has adopted laws or regulations to the contrary,[41] no more than three warships of any one belligerent nation may be present in the same neutral port or roadstead at any one time.[42] 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.[43] The order of departure is determined by the order of arrival unless an extension of stay has been granted.[44] A belligerent warship may not leave a

33. 11 Whiteman 265-69; *Compare* Hague XIII, art. 9.

34. NWIP 10-2, para. 443b(1) n. 29, *quoting* Naval War College, International Law Situations 1939, No. 39, at 43-44 (1940); Tucker 240 & 252. The right of entry in distress does not prejudice the measures a neutral may take after entry has been granted. Under Hague XIII, art. 24(1), should the belligerent vessel fail to leave port as soon as the cause of entry is abated, the neutral is entitled to take such measures as it considers necessary to render the ship incapable of taking to sea during the war, *i.e.*, to intern it. Levie, 2 The Code of International Armed Conflict 816-17.

35. The practice of most neutral nations has been to adopt the 24 hour limit as the normal period of stay granted to belligerent warships. NWIP 10-2, para. 443b(1) n. 29; Tucker 241 & n. 93.

36. Hague XIII, arts. 12-13; Tucker 241; San Remo Manual, para. 21. Paragraph 7.3.2.1 has reference only to the *stay* of belligerent warships in neutral ports, roadsteads, or territorial sea—not to *passage* through neutral territorial seas. Passage is discussed in paragraph 7.3.4 (p. 375).

37. *See* Hague XIII, art. 14(2).

38. This exception to the exemption from the limitations on stay and departure recognizes the distinction between marine scientific research and military activities. *Compare* paragraph 1.5.2, note 50 (p. 21).

39. Hague XIII, art. 14(1).

40. Hague XIII, art. 24; Tucker 242.

41. Hague XIII, art. 15; NWIP 10-2. art. 443b(2).

42. Hague XIII, art. 15.

43. Hague XIII, art. 16(1).

44. Hague XIII, art. 16(2).

neutral port or roadstead less than 24 hours after the departure of a merchant ship of its adversary (Hague XIII, art. 16(3)).

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 or employ any apparatus for communicating with belligerent forces.[45] 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 the prohibition against the use of neutral territory as a base of operations.[46]

Belligerent warships may carry out such repairs in neutral ports and roadsteads as are absolutely necessary to render them seaworthy. The law is unsettled as to whether repair of battle damage, even for seaworthiness purposes, is permitted under this doctrine. In any event, belligerent warships 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 restore seaworthiness and to insist that they be accomplished with the least possible delay.[47]

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45. Hague XIII, arts. 5 & 18. Although Hague XIII, art. 5, addresses the erection of communication apparatus, during World War II, practically all neutral nations prohibited the employment by belligerents of radiotelegraph and radiotelephone apparatus within their territorial sea. NWIP 10-2, para. 443c n. 31.

46. Hague XIII, art. 19; NWIP 10-2, para. 443d; Tucker 243. Art. 19 limits warships to "the peace standard" of food, and, in practice, this standard has been adhered to generally by neutral nations. However, the same art. 19 also establishes two quite different standards for refueling. Warships may take on sufficient fuel "to enable them to reach the nearest port in their own country," or they may take on the fuel "to fill up their bunkers built to carry fuel, when in neutral countries which have adopted this method of determining the amount of fuel to be supplied." The majority of neutral nations appear to have used the former standard, although it is evident that, given the appropriate circumstances, either standard may easily permit warships to continue their operations against an enemy. Para. 20(b) of the San Remo Manual would permit "replenishment by a belligerent warship or auxiliary vessel of its food, water and fuel sufficient to reach a port in its own territory . . . ." Hague XIII, art. 20, forbids warships to renew their supply of fuel in the ports of the same neutral nation until a minimum period of three months has elapsed. NWIP 10-2, para. 443d n. 32; Tucker 243 n. 99.

47. Hague XIII, art. 17; NWIP 10-2, para. 443e. *See also*, San Remo Manual, para. 20(c). Some nations have interpreted a neutral's duty to include forbidding, under any circumstances, the repair of damage incurred in battle. Hence, a belligerent warship damaged by enemy fire that will not or cannot put to sea once her lawful period of stay has expired, must be interned. However, other nations have not interpreted a neutral's duty to include forbidding the repair of damage produced by enemy fire provided the repairs are limited to rendering the ship sufficiently seaworthy to safely continue her voyage. Art. 17 would appear to allow either interpretation. NWIP 10-2, para. 443e n. 33; Tucker 244-45. These views are illustrated in the case of the German pocket battleship ADMIRAL GRAF SPEE:

(continued...)

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.[48] 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.[49]

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, or, in the case of archipelagic states, within the closing

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47.(...continued)

On December 13, 1939, the *Graf Spee* entered the Uruguayan port of Montevideo, following an engagement with British naval forces. A request was made to the Uruguayan authorities to permit the *Graf Spee* to remain fifteen days in port in order to repair damages suffered in battle and to restore the vessel's navigability. The Uruguayan authorities granted a seventy-two hour period of stay. Shortly before the expiration of this period the *Graf Spee* left Montevideo and was destroyed by its own crew in the Rio de la Plata. The British Government, while not insisting that Article 17 of Hague XIII clearly prohibited the repair of battle damage, did point to the widespread practice of States when neutral in forbidding the repair of battle damage in their ports. In accordance with this practice it was suggested that the *Graf Spee*'s period of stay be limited to twenty-four hours. Uruguay maintained, however, that the scope of the neutral's duty required it only to prevent those repairs that would serve to augment the fighting force of a vessel but not repairs necessary for safety of navigation.

Tucker 245 n. 2. Tucker comments that this incident is "noteworthy as an example of the extent to which belligerents seemingly can make use of neutral ports without violating the prohibition against using neutral territory as a base of naval operations." *Ibid. See* O'Connell, The Influence of Law on Sea Power (1975) at 27-30; Pope, The Battle of the River Plate (1956); and Bennett, Battle of the River Plate (1972) for more detailed discussions of this and other aspects of the Battle of the River Plate. *See also* Churchill, The Second World War (1948) at 7-5.

48. Hague XIII, arts. 21-22. There is a difference of opinion as to whether prizes may be kept in neutral ports pending the decision of a prize court. Hague XIII, art. 23, permits neutrals to allow prizes into their ports "when they are brought there to be sequestrated pending the decision of a Prize Court." The United States (as well as the United Kingdom and Japan) did not adhere to article 23 and has maintained the contrary position. In 1916, the British steamship APPAM, seized by a German raider, was taken into Hampton Roads under a prize crew. The U.S. Supreme Court restored the vessel to her owners and released the crew on the basis that the United States would not permit its ports to be used as harbors of safety in which prizes could be kept. *The Steamship Appam*, 243 U.S. 124 (1917). NWIP 10-2, para. 443f n. 34; Tucker 246-47.

49. Hague XIII, arts. 21-22; NWIP 10-2, para. 443f. Illustrative of these rules is the World War II incident involving the CITY OF FLINT:

(continued...)

lines drawn for the delimitation of such waters.[50] The rules governing neutral ports and roadsteads apply as well to neutral internal waters.[51]

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.[52] Belligerents are obliged to refrain from all

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49.(...continued)

On October 9th, 1939, the American merchant steamer *City of Flint* was visited and searched by a German cruiser at an estimated distance of 1,250 miles from New York. The *Flint*, carrying a mixed cargo destined for British ports, was seized by the German cruiser on grounds of contraband, and a German prize crew was placed on board. Between the 9th of October and the 4th of November the American ship was first taken to the Norwegian port of Tromsoe, then to the Russian city of Murmansk, and then after two days in the last-named port, back along the Norwegian coast as far as Haugesund where the Norwegian authorities on November 4th released the *Flint* on the grounds of the international law rules contained in articles XXI and XXII of Hague Convention XIII of 1907. Prizes may be taken to a neutral harbor only because of an "inability to navigate, bad conditions at sea, or lack of anchors or supplies." The entry of the *Flint* into Haugesund on November 3 was not justified by the existence of any one of these conditions. The original visit and search and seizure of the *Flint* by the German warship, the placing of the prize crew on board, and the conduct of that crew were apparently all in accord with law. The stay in the harbor of Murmansk, however, was of doubtful legality. No genuine distress or valid reason for refuge in a so-called neutral harbor is evident from the examination of the facts. Perhaps the Germans and the Russians hoped to invoke the provisions of Article XXIII of Hague Convention XIII which authorizes a neutral power to permit "prizes to enter its ports and roadsteads . . . when they are brought there to be sequestrated pending the decision of a prize court." This article has never been accepted generally as a part of international law and was specifically rejected by the United States in ratifying the convention. The situation was complicated by the equivocal position of Soviet Russia which was not a neutral in the traditional sense, in the European war. Under strict rules of international law the U.S.S.R. was derelict in regard to its neutral duties and should not have permitted the *Flint* either to enter Murmansk or to find any sort of a haven there.

U.S. Naval War College, International Law Situations 1939, No. 39 at 24-25 (1940), *quoted in* NWIP 10-2, para. 443f n. 35. *See also* Tucker 246 n. 5; Hyde 2277-82.

50. *See* paragraph 1.4.1 (p. 15).

51. *See* paragraph 7.3.2 (p. 371).

52. Hague XIII, art. 5; NWIP 10-2, para. 442; Tucker 226-31. The prohibition against the use of neutral territorial waters as a sanctuary was at issue in the ALTMARK incident of February 1940 in which the German ship transporting British prisoners of war to Germany attempted to escape capture by British warships by transiting south through the western Norwegian territorial sea and ultimately being driven into Norwegian internal waters, the Jossingfjord, by a British naval squadron. Over Norwegian objections, HMS COSSACK entered the fjord, boarded ALTMARK and released the prisoners of war. O'Connell, The Influence of Law on Sea Power 40-44 and sources listed at 195; Tucker 234-39; 7 Hackworth 568-75; 3 Hyde 2339-40; MacChesney 6-48. *See also* note 55 (p. 376) and His Majesty's Stationery Office (H.M.S.O.) Cmd. 8012 (1950).

acts of hostility in neutral territorial seas 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.[53]

A neutral nation may, on a nondiscriminatory basis, suspend passage of belligerent warships and prizes through its territorial seas, except in international straits. 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.[54] A neutral nation may, however, allow the "mere passage" of belligerent warships and prizes through its territorial seas.[55] While in neutral territorial seas, a belligerent warship must also refrain from adding to or repairing its armaments or replenishing its war materials.[56] Although the general practice has been to close neutral territorial seas to belligerent submarines, a neutral nation may elect to allow passage of submarines.[57] Neutral nations customarily authorize passage through their

53. Hague XIII, art. 1; NWIP 10-2, para. 441 & n. 27; Tucker 219-20. The stated exception reflects the reality that some neutrals either cannot or will not enforce the inviolability of their territory. *See also* paragraph 7.3 and notes 25 & 26 thereunder (pp. 370-371).

54. Territorial Sea Convention, art. 16(3); 1982 LOS Convention, arts. 25(3) & 45(2); Scott, Reports 847-48 (while leaving resolution of the question to the law of nations, "it seems that a neutral State may forbid even innocent passage through limited parts of its territorial waters so far as that seems to it necessary to maintain its neutrality, but that this prohibition cannot extend to straits uniting two open seas"); NWIP 10-2, para. 443a n. 28. *See* paragraphs 2.3.2.3 and 2.3.3.1 and accompanying notes (pp. 119 & 121). *See also* paragraphs 7.3.5 and 7.3.6 (pp. 377 & 378) regarding transit passage in neutral straits and archipelagic sea lanes passage through neutral archipelagic waters, respectively.

55. Hague XIII, art. 10; NWIP 10-2, para. 443a. Tucker suggests that the phrase "mere passage," appearing in Hague XIII, art. 10, should be interpreted by reference to Hague XIII, art. 5, which prohibits belligerents from using neutral waters as a base of operations. Tucker 232-39. However, that interpretation is not universally held; Tucker 235 n. 84. MacChesney's examination of the meaning of "mere passage" provides the following insights:

> The legislative history provides no conclusive interpretation. The British who introduced the phrase into their draft of [Article 10] indicated that innocent passage in the peacetime sense was what they had in mind. . . . [T]he peacetime analogy serves to indicate the type of passage that belligerents were willing to allow neutrals to grant. The type of passage contemplated is limited by two basic criteria. It must be an innocent passage for bona fide purposes of navigation rather than for escape or asylum. The passage must also be innocent in the sense that it does not prejudice either the security interests of the coastal State, or the interests of the opposing belligerent in preventing passage beyond the type agreed to in Article X.

MacChesney 18-19. Para. 19 of the San Remo Manual eschews both "innocent" and "mere" in describing transit of belligerent warships through neutral territorial waters using simply the term "passage." *See also* the amplifying discussion *in* Doswald-Beck at 98 & 99.

56. Hague XIII, art. 18; Tucker 234 n. 81. *See also* paragraph 7.3.2.2 and notes 46 & 47 thereunder (p. 373).

57. Tucker 240 n. 89.

territorial sea of ships carrying the wounded, sick, and shipwrecked, whether or not those waters are otherwise closed to belligerent vessels.[58]

7.3.4.1 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 the territorial sea were designed primarily to regulate the conduct of surface warships in a narrow band of water off neutral coasts.[59] The 1982 Law of the Sea Convention provides that coastal nations may lawfully extend the breadth of claimed territorial seas to 12 nautical miles.[60] The U.S. claims a 12-nautical mile territorial sea and recognizes the right of all coastal nations to do likewise.[61]

In the context of a universally recognized 3-nautical mile territorial sea, the rights and duties of neutrals and belligerents in neutral territorial seas were balanced and equitable.[62] 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,[63] 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.[64] 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 and the neutral nation with the law of neutrality.[65]

7.3.5 Neutral International 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,

58. Hague XIII, art. 14(2); Tucker 242.
59. Swarztrauber 32 & 116.
60. 1982 LOS Convention, art. 3.
61. *See* paragraph 1.2 (p. 2) and accompanying notes.
62. Harlow, The Law of Neutrality at Sea for the 80's and Beyond, 3 Pacific Basin L.J. 51 (1984).
63. Swarztrauber 240.
64. *See* Robertson, paragraph 7.3, note 25 (p. 370) at 278-80.
65. 2 O'Connell 1156; NWIP 10-2, para. 441 & n. 27; Waldock, The Release of the *Altmark*'s Prisoners, 24 Brit. Y.B. Int'l L. 216, 235-36 (1947) (self-preservation). Tucker 262 n. 40 justifies the British actions in the ALTMARK incident (paragraph 7.3.4, note 52 (p. 375)) as a "reprisal measure directed against Norway for the latter's refusal to carry out neutral obligations."

over, and under all straits used for international navigation.[66] Neutral nations cannot suspend, hamper, or otherwise impede this right of transit passage through international straits.[67] 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.[68] 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.[69] Belligerent forces may not use neutral straits as a place of sanctuary nor as a base of operations, and belligerent warships may not exercise the belligerent right of visit and search in those waters.[70] (Note: The Turkish Straits are governed by special rules articulated in the Montreux Convention of 1936, which limit the number and types of warships which may use the Straits, both in times of peace and during armed conflict.)[71]

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.[72] The balance of neutral and belligerent rights and duties with respect to neutral waters, is, however, at its most difficult in the context of archipelagic waters.[73]

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66. *See* paragraph 2.3.3.1 and accompanying notes (pp. 121 to 126).

67. 1982 LOS Convention, art. 44; paragraph 2.3.3.1 and note 42 thereto (p. 125); Tucker 232 & n. 80; San Remo Manual, para. 29.

68. 1982 LOS Convention, art. 39(1); paragraph 2.3.3.1 (p. 121). Neutral forces must similarly conform to these requirements in the exercise of transit passage through straits.

69. For a discussion of the exercise of self-defense in neutral straits *see* Harlow, paragraph 7.3, note 25 (p. 370), at 206. *See also* paragraph 7.3.7 (p. 379); and San Remo Manual, para. 30. Neutral forces similarly are entitled to take such defensive measures in neutral straits.

70. *See* NWIP 10-2, para. 441; *cf.* Hague XIII, art. 5; paragraph 7.3.4 (p. 375), and paragraph 7.6 & note 116 thereto (pp. 387-388). The belligerent right of visit and search is, of course, to be distinguished from the warship's peacetime right of approach and visit (discussed in paragraph 3.4 (p. 221)) and to board in connection with drug-interdiction efforts (discussed in paragraph 3.11.2.2 (p. 235)).

71. Convention Regarding the Regime of Straits (Montreux Convention) of 20 July 1936, 173 L.N.T.S. 213, 31 Am. J. Int'l L. Supp. 4; paragraph 2.3.3.1 note 36 (p. 121). Special regimes also apply to the Suez Canal, the Panama Canal and the Kiel Canal, all of which remain open to neutral transit during armed conflict. *See* paragraph 2.3.3.1, note 36 (p. 121).

72. White House Fact Sheet, Annex A1-8 (p. 83); paragraph 1.4.3 and note 41 thereto (p. 18).

73. The application of the customary rules of neutrality to the newly recognized concept of the archipelagic nation remains largely unsettled as a doctrine of international law. *See* Harlow, paragraph 7.3, note 25 (p. 370) at 24-29; Robertson *id.* at 292-94.

Belligerent forces must refrain from acts of hostility in neutral archipelagic waters and from using them as a sanctuary or a base of operations.[74] 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.[75] 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, including formation steaming and the launching and recovery of aircraft.[76] Visit and search is not authorized in neutral archipelagic waters.[77]

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 passage of belligerent ships but it is not obliged to do so.[78] The neutral archipelagic nation has an affirmative duty to police its archipelagic waters to ensure that the inviolability of its neutral waters is respected.[79] 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.[80]

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.[81] Belligerent military aircraft are forbidden to enter neutral airspace[82] with the following exceptions:

74. *See* NWIP 10-2, para. 441; San Remo Manual, paras. 16 & 17; *compare* Hague XIII, arts. 1, 2 & 5.

75. 1982 LOS Convention, arts. 53, 54 & 44; paragraph 2.3.4.1 and notes 47 & 48 (p. 127).

76. 1982 LOS Convention, art. 53(3); paragraph 2.3.4.1 (p. 127); San Remo Manual, para. 30.

77. Since visit and search is a belligerent activity unrelated to navigational passage, it cannot lawfully be exercised in neutral territory; San Remo Manual, para. 16(d). *Compare* Hague XIII, arts. 1 & 2. *See* NWIP 10-2, para. 441. The belligerent right of visit and search is, of course, to be distinguished from the warship's peacetime right of approach and visit (discussed in paragraph 3.4 (p. 221)) and to board in connection with drug-interdiction efforts (discussed in paragraph 3.11.2.2 (p. 235)).

78. San Remo Manual, para. 19. *Compare* 1982 LOS Convention, arts. 52(2) & 54; Hague XIII, art. 9; paragraph 2.3.4.1 (p. 127); *compare* paragraph 7.3.5 (p. 377).

79. San Remo Manual, para. 22. *Compare* Hague XIII, art. 25.

80. *See* NWIP 10-2, para. 441 n. 27; paragraph 7.3, note 25 (p. 370).

81. *See* paragraph 1.8 (p. 25); San Remo Manual, para. 14.

82. Art. 40, Draft 1923 Hague Rules of Aerial Warfare, The Hague, 19 February 1923, *reprinted in* Am. J. Int'l L., vol. 17 (1923), Supp., pp. 245-60 (although never having entered into

(continued...)

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.[83]

2. Medical aircraft may, with prior notice, 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.[84]

3. Belligerent aircraft in evident distress may be 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 must require such aircraft to land and must intern both aircraft and crew.[85]

7.3.7.1 Neutral Duties In Neutral Airspace. Neutral nations have an affirmative duty to prevent violation of neutral airspace by belligerent military aircraft, to compel offending aircraft to land, and to intern both aircraft and crew.[86] Should a neutral nation be unable or unwilling to prevent the unlawful entry or use of its airspace by belligerent military aircraft, belligerent forces of the other side may undertake such self-help enforcement measures as the circumstances may require.[87]

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,

82.(...continued)
force, the draft rules are generally regarded as declaratory of customary law); NWIP 10-2, para. 444a; Tucker 251; Spaight 420-460. The practice in World Wars I and II was in general conformity with the rules stated in paragraph 7.3.7. Spaight 424. *See also* San Remo Manual, para. 181.

83. *See* paragraphs 7.3.5 & 7.3.6 (pp. 377 & 378).

84. GWS-Sea, art. 40; GP I, art. 31; NWIP 10-2, para. 444a(1); Tucker 130-31; Spaight 443-44. *See also* San Remo Manual, paras. 182 & 183.

85. Hague V, art. 11; GP I, art. 31(4); Spaight 436-37; Tucker 252; AFP 110-31, para. 2-6c; and San Remo Manual para. 18. *See* paragraph 7.11 and accompanying notes 168 & 169 (p. 399). NWP 9, para. 7.3.74); NWP 9 (Rev. A), para. 7.3.7(4) and NWIP 10-2, para. 444b, provided that while the neutral nation could intern belligerent aircraft and crews in such circumstances, they were not obliged to do so, given the varied practice in WW II. Paragraph 7.3.7(3) has been revised to reflect the prevailing view. *See also* paragraph 7.11 (p. 399).

86. NWIP 10-2, para. 444b; Tucker 251; San Remo Manual, para. 18.

87. AFP 110-31, para. 2-6c. *See also* paragraph 7.3 (p. 370).

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 contribute to the belligerent's war-fighting/war-sustaining capability.[88] 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.[89]

The law of neutrality does not prohibit neutral nations from engaging in commerce with belligerent nations;[90] however, a neutral government cannot itself 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.[91] Although a neutral may forbid its citizens from carrying on non-neutral commerce with belligerent nations, it is not obliged to do so.[92] In effect, the law establishes a balance-of-interests test to protect 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.[93]

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 had 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 is goods equally susceptible to either peaceful or warlike purposes, such as foodstuffs, construction materials, and fuel.[94] Belligerents often declare contraband lists at

88. Although war-sustaining commerce is not subject to precise definition, commerce that indirectly but effectively supports and sustains the belligerent's war-fighting capability properly falls within the scope of the term. *See* paragraph 8.1.1 & note 11 thereto (pp. 402 & 403). Examples of war-sustaining commerce include *imports* of raw materials used for the production of armaments and *exports* of products the proceeds of which are used by the belligerent to purchase arms and armaments.

89. Visit and search is discussed in paragraph 7.6 (p. 387). The limited circumstances under which capture and destruction of neutral merchant vessels and civil aircraft is permitted are discussed in paragraph 7.10 (p. 396).

90. Hague XIII, art. 7.

91. *See* paragraphs 7.2 (p. 367) and 7.4.1 (p. 381); Hague XIII, art. 6; and Tucker 206-18.

92. Hague V, art. 7. For example, *see* the U.S. Neutrality Act, 18 U.S. Code 963 *et seq.*, and the Arms Export Control Act, 22 U.S.C. 2271 *et seq. See also* Green 262-63.

93. 10 Whiteman 792, *quoting* an unofficial translation of Rousseau, Droit International Public 700-01 (1953). Iran's attacks on neutral ships carrying neutral commerce during the 1984-88 Tanker War as herein defined upset that balance and were unlawful. Roach, Missiles on Target: The Law of Targeting and The Tanker War, 82 Proc. Am. Soc. Int'l L. 154 (1988). *See also* De Guttry & Ronzitti, note 12 (p. 367) at 128-29.

94. NWIP 10-2, art. 631a; Tucker 263. This distinction is expanded on in the following:

(continued...)

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 may vary according to the circumstances of the conflict.[95]

The practice of belligerents since 1939 has collapsed the traditional distinction between absolute and conditional contraband.[96] Because of the involvement of

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94.(...continued)

> There are, in the first place, articles which by their very character are destined to be used in war. In this class are to be reckoned, not only arms and ammunition, but also such articles of ambiguous use as military stores, naval stores, and the like. These are termed *absolute contraband.* There are, secondly, articles which, by their very character, are not necessarily destined to be used in war, but which, under certain circumstances and conditions, can be of the greatest use to a belligerent for the continuance of the war. To this class belong, for instance, provisions, coal, gold, and silver. These articles are termed *conditional* or *relative contraband.* . . . [A]lthough belligerents must be free to take into consideration the circumstances of the particular war, as long as the distinction between absolute and conditional contraband is upheld it ought not to be left altogether to their discretion to declare any articles they like to be absolute contraband. The test to be applied is whether, in the special circumstances of a particular war, the article concerned is by its character destined to be made use of for military, naval, or air-fleet purposes because it is essential to those purposes. If not, it ought not to be declared absolute contraband. However, it may well happen that an article which is not by its very nature destined to be made use of in war, acquires this character in a particular war and under particular circumstances; and in such case it may be declared absolute contraband. Thus, for instance, foodstuffs cannot, as a rule, be declared absolute contraband; but if the enemy, for the purpose of securing sufficient [foodstuffs] for his military forces, takes possession of all the foodstuffs in the country, and puts the whole population on rations, foodstuffs acquire the character essential to articles of absolute contraband, and can therefore be declared to be such.

2 Oppenheim-Lauterpacht 801 & 803. *See also* Green 158. On starvation as an impermissible method of warfare, *see* paragraph 8.1.2, note 15 (p. 404).

95. NWIP 10-2, art. 631b, *quoted with approval in* McDougal & Feliciano 482-83; Green 158.

96. NWIP 10-2, art. 631b n.18; Tucker 266-67. O'Connell has correctly noted that "the central principle is the actual commitment of goods to the prosecution of war, and it is obvious that the principle is differentially applicable in different circumstances. . . . What is likely to occur in the event of resuscitation of the law of contraband in future limited wars is a readjustment of the items on the various lists." 2 O'Connell 1144. In December 1971, Pakistan and India each declared contraband lists containing items traditionally considered to be absolute contraband. The lists are *reprinted in* 66 Am. J. Int'l L. 386-87 (1972). Although neither Iran nor Iraq declared contraband lists in their 1980-88 war, the fact that both nations attacked neutral crude oil carriers, loaded and in ballast, indicated both Iran and Iraq regarded oil (as an export commodity) to be contraband since oil and the armaments which its sale or barter on international markets brought were absolutely indispensable to the war efforts of the Persian Gulf belligerents. *See* Viorst, Iraq at War, 65 Foreign Affairs 349, 350 (Winter 1986/87); Bruce, U.S. Request Stretches Iraq's Patience, 8 Jane's Defence Weekly 363 (29 Aug. 1987); N.Y. Times, 4 Sep. 1986, at A1 & A11.

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 treated all imports directly or indirectly sustaining the war effort as contraband without making a distinction between absolute and conditional contraband.[97] To the extent that international law may continue to require publication of contraband lists, recent practice indicates that the requirement may be satisfied by a listing of exempt goods.[98]

7.4.1.1 Enemy Destination. Contraband goods 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 contraband is direct, involves transshipment, or requires overland transport.[99] When 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

97. The San Remo Manual does not define contraband in terms of it being absolute or conditional. San Remo Manual, para. 148. *See also* the commentary on that paragraph *in* Doswald-Beck at 215-16.

98. *But see* San Remo Manual, paras. 149 & 150 which would require publication of lists of goods considered to be contraband; all else being "free goods" not subject to capture.

99. Tucker 267-68. Stone explains this rule as follows:

> "Continuous voyage" is where, in order to obtain immunity during a part of its voyage to the enemy port, the vessel breaks its journey at a neutral intermediate port, the contraband being ostensibly destined there. At the neutral port, for appearance's sake it may unload and reload the same contraband cargo, but in any case it then proceeds with the cargo on the shortened span of its journey to the enemy port. The *doctrine* of continuous voyage prescribes that such a vessel and its cargo are to be deemed to have an enemy destination (and, therefore, to be liable to seizure) from the time she leaves her home port. Similarly, "continuous transports" is where the guilty cargo is unloaded at the neutral port, and is then carried further to the enemy port or destination by another vessel or vehicle. The corresponding *doctrine* of continuous transports applies with similar effect, rendering the cargo liable to seizure from the time it leaves its home port.

Stone 486. The principles underlying the so-called doctrines of "continuous voyage" and "continuous transports" or "ultimate destination" were applied by prize courts in both World Wars I and II. NWIP 10-2, para. 631c(1) n. 19. Development of the doctrine of continuous voyage is succinctly discussed *in* 2 O'Connell 1146-47.

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.[100]

These presumptions of enemy destination of 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.[101]

7.4.1.2 Exemptions to Contraband. Certain goods are exempt from capture as contraband even though destined for enemy territory.[102] Among them are:

1. Exempt or "free goods"[103]

2. Articles intended exclusively for the treatment of wounded and sick members of the armed forces and for prevention of disease[104]

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[105]

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100. NWIP 10-2, art. 631c(1). The circumstances creating a presumption of ultimate destination of absolute contraband here enumerated are of concern to the operating commander for the reason that circumstances held to create a presumption of enemy destination constitute sufficient cause for capture. Before a prize court, each of these presumptions is rebuttable and whether or not a prize court will, in fact, condemn the captured cargo and vessel (or aircraft) will depend upon a number of complex considerations with which the commander need not be concerned. NWIP 10-2, para. 631c(1) n. 20. *See also* Green 158.

101. NWIP 10-2, art. 631c(2); Tucker 270-75. *See* paragraph 7.4.1.1, note 100 (p. 384). Regarding capture of a vessel carrying contraband, *see* paragraph 7.10, note 153 (p. 396).

102. *See* Tucker 263.

103. NWIP 10-2, para. 631e(1) & n. 17.

104. GWS-Sea, art. 38; NWIP 10-2, para. 631e(2). The particulars concerning the carriage of such articles must be transmitted to the belligerent nation and approved by it.

105. GC, arts. 23 & 59; Tucker 265 n. 4. For nations bound thereby, GP I, art. 70, modifies the conditions of GC, art. 23, that a nation may impose before permitting free passage of these relief supplies. The United States supports the principle contained in GP I, art. 70. The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 Am. U.J. Int'l L. & Policy 426 (1987) (remarks of U.S. Department of State Deputy Legal Adviser Matheson: the United States supports the principle reflected in GP I, arts. 54 & 70, "subject to the requirements of imperative military necessity, that impartial relief actions necessary for the survival of the civilian population be permitted and encouraged").

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[106]

5. Goods otherwise specifically exempted from capture by international convention or by special arrangement between belligerents.[107]

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.[108]

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.[109] The acceptance of a navicert or aircert by a neutral ship or aircraft does not constitute "unneutral service".[110]

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

106. The conditions that may be set on these shipments are set forth in arts. 72-75 and Annex III of GPW.

107. NWIP 10-2, para. 631e(3). *See* GC, arts. 23 & 59.

108. Compare GC, art. 23(4) and 4 Pictet 184.

109. *See* NWIP 10-2, para. 631d n. 22 and sources cited therein; 1 Medlicott, The Economic Blockade (United Kingdom Official History of the Second World War, Civil Series) 94 & 95 (1952); Tucker 280-82, 312-15 & 322-23; McDougal & Feliciano 509-13; 2 O'Connell 1147-48; Green 164. A similar procedure was used during the Cuban Missile Crisis, when the United States issued "clearcerts." Dep't St. Bull., 12 Nov. 1962, at 747; and Mallison, Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defense Claims Valid Under International Law, 31 Geo. Wash. L. Rev. 389-90 (1962). *See also* San Remo Manual, paras. 122-124.

110. "Unneutral service" is discussed in paragraph 7.5.1, note 112 (p. 386).

neutral flag, or that an aircraft bears neutral markings, does not necessarily establish neutral character. Any merchant vessel or civilian aircraft owned or controlled by a belligerent possesses enemy character, regardless of whether it is operating under a neutral flag or bears neutral markings.[111] Vessels and aircraft acquiring enemy character may be treated by an opposing belligerent as if they are in fact 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 merchant vessels and civil aircraft acquire enemy character[112] and may be treated by a belligerent as enemy warships and military aircraft when engaged in either of the following acts:

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111. *See* NWIP 10-2, para. 501; Tucker 76-86; Green 162-63.

A neutral nation may grant a merchant vessel or aircraft the right to operate under its flag, even though the vessel or aircraft remains substantially owned or controlled by enemy interests. According to the international law of prize, such a vessel or aircraft nevertheless possesses enemy character and may be treated as enemy by the concerned belligerent. In view of current commercial practices, determination of true ownership or control may be difficult.

There is no settled practice among nations regarding the conditions under which the transfer of enemy merchant vessels (and, presumably, aircraft) to a neutral flag legitimately may be made. Despite agreement that such transfers will not be recognized when fraudulently made for the purpose of evading belligerent capture or destruction, nations differ in the specific conditions that they require to be met before such transfers can be considered as *bona fide*. However, it is generally recognized that, at the very least, all such transfers must result in the complete divestiture of enemy ownership and control. The problem of transfer is mainly the proper concern of prize courts rather than of an operating naval commander, and the latter is entitled to seize any vessel transferred from an enemy to a neutral flag when such transfer has been made either immediately prior to, or during, hostilities. NWIP 10-2, para. 501 n. 5. *Compare* San Remo Manual, paras. 112-117. *See also* Doswald-Beck at 187-95.

On the mid-1987 reflagging of eleven Kuwaiti tankers to U.S. registration, *see* Weinberger, A Report to the Congress on Security Arrangements in the Persian Gulf, 26 Int'l Leg. Mat'ls 1450-51 (1987); De Guttry & Ronzitti, paragraph 7.2, note 12 (p. 367), at 121-23.

112. NWIP 10-2, para. 501a; Tucker 319-21. *Compare* San Remo Manual, paras. 67 (neutral merchant vessels) & 68 (neutral civil aircraft). With the exception of resistance to visit and search, the acts defined here (and in examples 7 and 8 of paragraph 7.10 (p. 397)) have been traditionally considered under the heading of "unneutral service." Although originally established for and applied to the conduct of neutral vessels, the rules regarding unneutral service have been considered generally applicable to neutral aircraft as well.

The term "unneutral service" does not refer to acts performed by, and attributable to, a neutral nation itself. Rather, it refers to certain acts which are forbidden to neutral merchant vessels and civilian aircraft. Attempts to define the essential characteristics common to acts constituting unneutral service have not been very satisfactory. However, it is clear that the types of unneutral service which a neutral merchant vessel or civilian aircraft may perform are varied; hence, the specific sanctions applicable for acts of unneutral service may vary. The services enumerated in paragraph 7.5.1 are of such a nature as to identify a neutral merchant vessel or civilian aircraft with

(continued...)

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 Civil Aircraft. Neutral merchant vessels and civil aircraft acquire enemy character and may be treated by a belligerent as enemy merchant vessels or civil aircraft when engaged in either of the following acts:

1. Operating directly under enemy control, orders, charter, employment, or direction[113]

2. Resisting an attempt to establish identity, including visit and search.[114]

(Paragraph 8.2.2 describes the actions that may be taken against enemy merchant ships and civil 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.[115]

112.(...continued)
the armed forces of the opposing belligerent for whom these acts are performed, and, for this reason, such vessels or aircraft may be treated in the same manner as enemy warships or military aircraft. The acts identified in paragraph 7.5.2 (p. 387) involve neutral merchant vessels and aircraft operating at the direction or under the control of the belligerent, but not in direct support of the belligerent's armed forces. Such vessels and aircraft are assimilated to the position of, and may be treated in the same manner as, enemy merchant vessels and aircraft. The acts of unneutral service cited in paragraph 7.10 (examples 7 and 8) (p. 397) imply neither a direct belligerent control over, nor a close belligerent relation with, neutral merchant vessels and aircraft. By custom, vessels performing these acts, though not acquiring enemy character, are liable to capture. NWIP 10-2, para. 501a n. 6; Tucker 318-21 & 355-56.

113. This would include neutral merchant vessels in belligerent convoy. *See* San Remo Manual, para. 67(e).

114. NWIP 10-2, para. 501b; Tucker 322-23. *See* paragraph 7.5.1, note 112 (p. 386).

115. Hague XIII, art. 2; Tucker 332-33; Green 163; San Remo Manual, para. 118. The peacetime right of approach and visit is discussed in paragraph 3.4 (p. 221).

Warships are not subject to visit and search.[116] The prohibition against visit and search in neutral territory[117] extends to international straits overlapped by neutral territorial seas and archipelagic sea lanes.[118] Neutral vessels engaged in government noncommercial service may not be subjected to visit and search.[119] 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.[120] 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.[121]

7.6.1 Procedure for Visit and Search. In the absence of specific rules of engagement or other special instructions[122] issued by the operational chain of command during a period of armed conflict, the following procedure should be carried out by U.S. 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

116. Stone 591-92; 11 Whiteman 3. *See also* paragraph 2.1.2 (p. 110).

117. Hague XIII, art. 2; NWIP 10-2, para. 441.

118. Harlow, paragraph 7.3, note 25 (p. 370), at 205-06, and 1982 LOS Convention, arts. 39 & 54. *See* paragraphs 7.3.5 (p. 377) and 7.3.6 (p. 378).

119. Oxford Manual, art. 32, Schindler & Toman 862; paragraph 2.1.3 (p. 112); *but see* Tucker 335-36 & n. 10.

120. This has been the consistent position of the United States which, while previously not commonly accepted (NWIP 10-2, para. 502a & n. 10, Tucker 334-35) appears to have recently achieved such acceptance. *See* San Remo Manual, para. 120(b). Certainly, the experience of the convoying by several nations in the Persian Gulf during the tanker war between Iran and Iraq (1984-1988) supports the U.S. position. *See* De Guttry & Ronzitti, paragraph 7.2, note 12 (p. 367) at 105, 188-89 & 197. It is unsettled as to whether this rule would also apply to a neutral nerchant vessel under convoy of a neutral warship of another flag. The San Remo Manual would apply it if there exists an agreement to that effect between the flag State of the merchant vessel and the flag State of the convoying warship. San Remo Manual, para. 120(b).

121. NWIP 10-2, para. 502a n. 10, *quoting* paras. 58-59 of the 1941 Tentative Instructions for the Navy of the United States Governing Maritime and Aerial Warfare.

122. The issuance of certificates of noncontraband carriage are one example of special instructions. *See* paragraph 7.4.2 (p. 385). The Visit and Search Bill, contained in paragraph 630.23.5 of OPNAVINST 3120.32 (series), Standard Organization and Regulations of the U.S. Navy, provides instructions which are to be implemented in conjunction with the guidance set forth in this publication, including paragraph 7.6.1. *See also* Tucker 336-38.

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, or another, U.S. 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.[123]

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.[124]

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.[125] Ordinarily, visit and search of a vessel by an

123. *See* Tucker 338-44.
124. *See* OPNAVINST 3120.32 (series), note 122 (p. 388).
125. NWIP 10-2, para. 502 n. 8, 502b(5) & nn. 14-15; Tucker 333, 355 & n. 62; 11 Whiteman 3-5.

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.[126] 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.[127]

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.[128] 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. While the belligerent right of visit and search is designed to interdict the flow of contraband goods, the belligerent right of blockade is intended to prevent vessels and aircraft, regardless of their cargo, from crossing an established and publicized cordon separating the enemy from international waters and/or airspace.[129]

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.[130]

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.[131] The declaration should include, as a minimum, the

126. NWIP 10-2, para. 502 n. 8, 502b(5) & nn. 14-15; Tucker 333, 355 & n. 62; 11 Whiteman 3-5.

127. NWIP 10-2, para. 502b(5) & nn. 14-15; Tucker 333 & 342.

128. NWIP 10-2, para. 502 n. 8; Tucker 354-55; Green 170-72.

129. 10 Whiteman 861-64.

130. Concise statements of these criteria and the rationale for their development appear in ICRC, Commentary (GP I) 654, para. 2094, and 2 O'Connell 1150-51. *See also* Mallison & Mallison, A Survey of the International Law of Naval Blockade, U.S. Naval Inst. Proc., Feb. 1976, at 44-53.

131. Declaration of London, Concerning the Laws of Naval Warfare, London, 26 February 1909 [hereinafter Declaration of London], art. 9, *reprinted in* Schindler & Toman at 846; NWIP 10-2, para. 632b; Tucker 287. A blockade may also be ordered by the U.N. Security Council pursuant to the specific language of art. 42. It is not possible to say whether, or to what extent, a U.N. blockade would be governed by the traditional rules. NWIP 10-2, para. 632b, at n. 30. Art. 42 has never been applied by the Security Council. For a discussion of the continuing significance of the Declaration of London *see* Kalshoven, Commentary on the Declaration of London, *in* Ronzitti at 257, 259-62, 274.

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.[132]

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 paragraph 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.[133]

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.[134]

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132. Declaration of London, art. 9. Only the NCA can direct establishment of a blockade by U.S. forces. Although it is the customary practice of nations when declaring a blockade to specify a period during which neutral vessels and aircraft may leave the blockaded area, there is no uniformity with respect to the length of the period of grace. A belligerent declaring a blockade is free to fix such a period of grace as it may consider to be reasonable under the circumstances. NWIP 10-2, para. 632b n. 31; Tucker 287; Alford, Modern Economic Warfare (Law and the Naval Participant) 345-51 (U.S. Naval War College, International Law Studies 1963, No. 61, 1967).

133. Declaration of London, arts. 11 & 16; NWIP 10-2, para. 632c & n. 32; Tucker 288. *See also* San Remo Manual, para. 93.

134. Declaration of London, arts. 2 & 3; NWIP 10-2, para. 632d & n. 33; Tucker 288-89. One commentator has noted that:

> "Effective," in short, comes to mean sufficient to render capture probable under ordinary weather or other similar conditions. But even on this view, due no doubt to the fact that the lines of controversy were set before the rise of steampower, mines, or submarines, aircraft and wireless communication, at least one man-o'-war must be present. Aircraft and submarines, however, as well as mines, concrete blocks, or other sunken obstacles, may be used as auxiliary to blockading surface vessel or vessels. How many surface vessels, with what speed and armament, are necessary, along with auxiliary means, and how close they must operate for effectiveness in view of the nature of the approaches to the blockaded port, are questions of nautical expertise in each case.

Stone 496 (footnotes omitted), *quoted in* NWIP 10-2, para. 632d n. 33. The presence of at least one surface warship is no longer an absolute requirement to make a blockade legally effective, as long as other sufficient means are employed. *See* paragraph 7.7.5 (p. 393); San Remo Manual, paras. 95-97; Doswald-Beck, at 177-78.

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.[135]

7.7.2.5 Limitations. A blockade must not bar access to or departure from neutral ports and coasts.[136] 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 officer in command of the blockading force or responsible for maintenance of the blockading instrumentality (e.g., mines). 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.[137]

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. Attempted breach of blockade occurs from the time a vessel or aircraft leaves a port or airfield with the intention of evading the blockade, and for vessels exiting the blockaded area, continues until the voyage is completed.[138] Knowledge of the existence of the blockade is essential to the offenses of breach of blockade and attempted breach of blockade.

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135. Declaration of London, art. 5; NWIP 10-2, para. 632f & n. 35; Tucker 288 & 291; San Remo Manual, para. 100.

136. Declaration of London, art. 18; NWIP 10-2, para. 632e; Tucker 289-90. This rule means that the blockade must not prevent trade and communication to or from neutral ports or coasts, provided that such trade and communication is neither destined to nor originates from the blockaded area. It is a moot point to what extent conventions providing for free navigation on international rivers or through international canals (*see* paragraph 2.3.3.1, note 36 (p. 121) and 2 Oppenheim- Lauterpacht 771-75) have been respected by blockading nations. The practice of nations in this matter is far from clear. NWIP 10-2, para. 632e, at n. 34.

137. Declaration of London, art. 6; NWIP 10-2, para. 632h; Tucker 291-92; ICRC, Commentary (GP I) 654, paras. 2095-96; Matheson, Remarks, paragraph 7.4.1.2, note 105 (p. 384). *Compare* San Remo Manual, para. 103.

138. Hall, Law of Naval Warfare 205-06 (1921).

Knowledge may be presumed once a blockade has been declared and appropriate notification provided to affected governments.[139] 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.[140] 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 7.10.

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 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.[141]

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

139. Declaration of London, arts. 14 & 15; NWIP 10-2, para. 632g & n. 36; Tucker 292-93.

140. NWIP 10-2, para. 632g(3); 2 O'Connell 1157. The practice of nations has rendered obsolete the contrary provisions of the Declaration of London, arts. 17 & 19. *See* paragraph 7.4.1.1 (p. 383) regarding presumption of ultimate enemy destination.

141. 2 O'Connell 1151-56; NWIP 10-2, para. 632a n. 28; Tucker 305-15. *See also* Goldie, Maritime War Zones & Exclusion Zones, *in* Robertson at 168-71.

belligerents and neutrals in more limited armed conflict. The experience of the United States during the Vietnam Conflict provides a case in point. The mining 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, although at the time the mining took place the term "blockade" was not used.[142]

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[143] 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.[144] 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.[145]

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

142. McDougal & Feliciano 493-95; Swayze, Traditional Principles of Blockade in Modern Practice: United States Mining of Internal and Territorial Waters of North Vietnam, 29 JAG J. 143 (1977); Clark, Recent Evolutionary Trends Concerning Naval Interdiction of Seaborne Commerce as a Viable Sanctioning Device, 27 JAG J. 160 (1973). *Compare* Tucker 316-17. *See* 2 O'Connell 1156 (who erroneously states only three hours were allowed between notification and activation of the minefield; actually three daylight periods were allowed). *But see* Levie, Mine Warfare at Sea 151-57 (1992) who correctly argues that the mining of North Vietnamese ports did not constitute a blockade in the traditional sense and that it was not claimed to be a blockade by U.S. spokesmen at the time. O'Connell (at 1156) suggests that since in conditions of general war "close blockade is likely in the missile age to be a tactically unavailable option, and long-distance blockade to be a politically unavailable one," the twelve-mile territorial sea "may have facilitated naval operations in finding a compromise between close and long-distance blockade." *See also* paragraph 9.2.3 (p. 443).

143. *See*, for example, paragraph 7.8.1 (p. 394) and note 146 (p. 395). *See also* San Remo Manual, para. 146; Doswald-Beck, at 214.

144. NWIP 10-2, para. 430b & n. 17; Tucker 300-01. Belligerent control over neutral vessels and aircraft within an immediate area of naval operations, a limited and transient claim, is based on a belligerent's right to attack and destroy its enemy, its right to defend itself without suffering from neutral interference, and its right to ensure the security of its forces.

145. *See* Declaration of Paris, para. 4, *reprinted in* Schindler & Toman at 788; Declaration of London, art. 1; Oxford Manual, art. 30; NWIP 10-2, para. 632a.

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.[146]

7.9 EXCLUSION ZONES AND WAR ZONES

Belligerent control of an immediate area of naval operations is to be clearly distinguished from the belligerent practice during World Wars I and II of establishing broad ocean areas as "exclusion zones" or "war zones" in which neutral shipping was either barred or put at special risk. Operational war/exclusion zones established by the belligerents of both sides were based on the right of reprisal against alleged illegal behavior of the enemy and were used to justify the exercise of control over, or capture and destruction of, neutral vessels not otherwise permitted by the rules of naval warfare.[147] Exclusion or war zones established by belligerents in the context of limited warfare that has characterized post-World War II belligerency at sea, have been justified, at least in part, as reasonable, albeit coercive, measures to contain the geographic area of the conflict or to keep neutral shipping at a safe distance from areas of actual or potential hostilities. To the extent that such zones serve to warn neutral vessels and aircraft away from belligerent activities and thereby reduce their exposure to collateral damage and incidental injury (see paragraph 8.1.2.1), and to the extent that they do not unreasonably interfere with legitimate neutral commerce, they are undoubtedly lawful. However, the establishment of such a zone does not relieve the proclaiming belligerent of the obligation under the law of armed conflict to refrain from attacking vessels and aircraft which do not constitute lawful targets.[148] In short, an otherwise

146. NWIP 10-2, para. 520a; Tucker 300; 1923 Hague Radio Rules, art. 6, 17 Am. J. Int'l L. Supp. 242-45 (1923) (text), 32 *id.* 2-11 (1938) (text and commentary), Schindler & Toman 208 (text).

147. *See* Tucker 301-17.

148. *See* San Remo Manual, paras. 105-108. As to when enemy merchant vessels and civil aircraft constitute lawful targets, *see* paragraph 8.2.2 (p. 408). Rules pertaining to the permissible targeting of neutral merchant vessels and civil aircraft that have acquired enemy character, have resisted visit and search, or have attempted to breach blockade, are addressed in paragraphs 7.5 (p. 385), 7.6 (p. 387) and 7.7.4 (p. 392), respectively. *See also* discussion of the Iran-Iraq War and the war zones proclaimed by the two belligerents *in* De Guttry & Ronzitti, paragraph 7.2, note 12 (p. 367) at 133-38.

protected platform does not lose that protection by crossing an imaginary line drawn in the ocean by a belligerent.[149]

7.10 CAPTURE OF NEUTRAL VESSELS AND AIRCRAFT

Neutral merchant vessels and civil aircraft[150] 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[151]

2. Resisting visit and search[152]

3. Carrying contraband[153]

4. Breaking or attempting to break blockade[154]

5. Presenting irregular or fraudulent papers; lacking necessary papers; or destroying, defacing, or concealing papers[155]

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149. In assessing Iran's proclaimed "exclusion zone" during the Iran/Iraq Tanker War (1980-88), McNeill stated that:

> [I]nternational law has never legitimized attacks upon neutral merchant vessels simply because they ventured into a specified area of the high seas. . . . Iran's attempts to deny "responsibility for merchant ships failing to comply" with [the Iranian proclaimed exclusion zone] could not operate to excuse Iran from its legal obligations to avoid attacks on protected vessels wherever located . . . .

McNeill, Neutral Rights and Maritime Sanctions: The Effect of Two Gulf Wars, 31 Va. J. Int'l L. 631, 636 (1991).

For a detailed examination of this subject *see* Fenrick, The Exclusion Zone Device in the Law of Naval Warfare, 24 Can. Y.B. Int'l L. 91 (1986) and Goldie, Maritime War Zones & Exclusion Zones, *in* Robertson at 156-204. *See also* Russo, Neutrality at Sea in Transition: State Practice in the Gulf War as Emerging International Law, 19 Ocean Dev. & Int'l L. 381, 389-92, 396 (1988) and Leckow, The Iran-Iraq Conflict in the Gulf: The Law of War Zones, 37 Int'l & Comp. L.Q. 629 (1988). *Compare* San Remo Manual, paras. 105 & 106; Doswald-Beck, at 181-83.

150. *See* paragraph 7.5.1, note 112 (p. 386) for a discussion of how the rules may be applied to neutral civil aircraft engaging in unneutral service.

151. NWIP 10-2, para. 503d(5); Tucker 336. *See also* 11 Whiteman 30-38 for a discussion of resistance and evasion.

152. NWIP 10-2, para. 503d(5). *See* paragraph 7.6 (p. 387).

153. NWIP 10-2, para. 503d(1). Exceptions may exist when the owner of the vessel is unaware that some or all of the cargo being carried on his vessel was contraband. Tucker 295; 2 O'Connell 1148-49. *See* paragraph 7.4.1 (p. 381) for a discussion of what constitutes contraband.

154. NWIP 10-2, para. 503d(2). *See* paragraph 7.7.4 (p. 392).

155. NWIP 10-2, para. 503d(6); Tucker 338 n. 14.

6. Violating regulations established by a belligerent within the immediate area of naval operations[156]

7. Carrying personnel in the military or public service of the enemy[157]

8. Communicating information in the interest of the enemy.[158]

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.[159] (Article 630.23 of OPNAVINST 3120.32 (series), 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.[160]

7.10.1 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.[161] Should it become necessary that the prize

156. NWIP 10-2, para. 503d(7). *See* paragraph 7.8 (p. 394).

157. NWIP 10-2, para. 503d(3); Tucker 325-30.

Normally, a neutral merchant vessel is not considered liable to capture for the acts enumerated in examples 7 and 8 of paragraph 7.10 if, when encountered at sea, it is unaware of the opening of hostilities, or if the master, after becoming aware of the opening of hostilities, has not been able to disembark those passengers who are in the military or public service of a belligerent. A vessel is deemed to know of the state of armed conflict if it left an enemy port after the opening of hostilities, or if it left a neutral port after a notification of the opening of hostilities had been made in sufficient time to the nation to which the port belonged. However, actual knowledge is often difficult or impossible to establish. Because of the existence of modern means of communication, a presumption of knowledge may be applied in all doubtful cases. The final determination of this question properly can be left to the prize court. NWIP 10-2, para. 503d n. 25; Tucker 13, 263 & 325.

158. Tucker 336-37 & n. 11.

159. Tucker 345 n. 36 and accompanying text.

160. Tucker 336-37 & n. 11.

161. *Compare* San Remo Manual, para. 151. It should be noted that paragraph 7.10.1 refers to destruction of neutral merchant vessels whose capture for any of the acts mentioned in paragraph 7.10 has already been effected. Paragraph 7.10.1 does not refer to neutral merchant vessels merely under detention and directed into port for visit and search; such vessels are not prizes.

be destroyed, the capturing officer must provide for the safety of the passengers and crew.[162] In that event, all documents and papers relating to the prize should be saved.[163] If practicable, the personal effects of passengers should also be safeguarded.[164]

7.10.2 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.[165]

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.[166]

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162. *See* paragraph 8.2.2.2 (p. 410) and accompanying notes. The obligations laid down in the London Protocol of 1936, insofar as they apply to neutral merchant vessels and aircraft, remain valid, exception being made only for those neutral merchant vessels and aircraft performing any of the acts enumerated in paragraphs 7.5.1 (p. 386), 7.5.2 (p. 387) and 7.8 (p. 394). In its judgment on Admiral Doenitz, the International Military Tribunal at Nuremberg found the accused guilty of violating the London Protocol by proclaiming "operational zones" and sinking neutral merchant vessels entering those zones. The Tribunal noted that:

> [T]he 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.

U.S. Naval War College, International Law Documents 1946-1947, No. 45, at 300 (1948). *See also* paragraph 7.9 (p. 395). The San Remo Manual, para. 140, would prohibit the sinking of a passenger vessel, carrying only passengers, in such circumstances.

163. London Protocol, art. 22; Tucker 325; San Remo Manual, para. 151(b).

164. NWIP 10-2, para. 503e; San Remo Manual, para. 151(c).

165. Hague XI, arts. 5 & 8; NWIP 10-2, art. 513a & n. 40. *See also* San Remo Manual, para. 166. Auxiliaries are defined in paragraph 2.1.3 (p. 112).

166. GPW, art. 4A; Hague XI, art. 6; NWIP 10-2, art. 513b & n. 41.

7.11 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 individual 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.[167]

Belligerent combatants taken on board a neutral warship or military aircraft beyond neutral waters must be interned.[168] Belligerent civilians taken on board a neutral warship or military aircraft in such circumstances are to be repatriated.

With respect to aircrews of non-medical belligerent aircraft that land in neutral territory, whether intentionally or inadvertently, the neutral nation must intern them.[169]

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167. Hague V, art. 11; Hague XIII, arts. 9 & 24; Tucker 242 & n. 97. *See* paragraph 7.3 (p. 370).

168. During the Iran-Iraq Tanker War, U.S. forces rescued 26 crewmembers who abandoned the Iranian minelayer IRAN AJR following the TF 160 MH-60A helicopter attacks of 21 September 1987 while the IRAN AJR was laying mines in international waters off Bahrain. Five days later they were handed over to Omani Red Crescent officials and shortly thereafter were turned over to Iranian officials, along with the remains of three others killed in the attack on the IRAN AJR. *See* De Guttry & Ronzitte, paragraph 7.2 note 12 (p. 367). On 8 October 1987, U.S. Navy SEALs rescued six Iranian Revolutionary Guardsmen overboard from Iranian small craft that had been attacked following their firing at three trailing Army helicopters about 15 NM southwest of Farsi Island, two of whom subsequently died on board USS RALEIGH. They, and the bodies of the dead, were similarly returned to Iran. 1987 Int'l Rev. Red Cross 650. It is unknown whether Iraq consented to these arrangements, as contemplated by GWS-Sea, art. 17(1); in any event it does not appear that Iraq objected to these actions which seem to be inconsistent with the requirements of GWS-Sea, art. 15; Hague XIII, art. 24; and Hague V, art. 11, to intern them for the duration of the conflict.

169. Hague V, art. 11; Draft 1923 Hague Rules of Aerial Warfare, art. 42; AFP 110-31, para. 2-6c; Tucker 251-52; 2 Levie, The Code of International Armed Conflict 807.

On 31 August 1987, in the course of escorting U.S. flag tankers, USS GUADALCANAL rescued an Iraqi fighter pilot downed by an Iranian air-to-air missile in international waters of the Persian Gulf. While apparently inconsistent with GWS-Sea, art. 15, he was repatriated through officials of the Saudi Arabian Red Crescent Society. N.Y. Times, 2 Sep. 1987, at A6; Washington Post, 2 Sep. 1987, at A18. Although the situation never arose, the United States advised Iran during the 1991 Gulf War that in light of U.N.S.C. Resolution 678 which called upon all U.N. member nations to "provide appropriate support" for coalition actions, and despite Iran's declaration of "neutrality" in that conflict, Iran would be obligated to return coalition aircraft and aircrew (rather than intern them) that might be downed in Iranian territory. Title V Report, App. O, p. 628. This again illustrates the modified nature of neutrality in circumstances where the Security Counsel has issued binding resolutions. *See* paragraph 7.2.1 (p. 368).

FIGURE A7-1

RECIPROCAL RIGHTS AND DUTIES

	NEUTRALS	BELLIGERENTS
RIGHTS	° INVIOLABILITY ° NEUTRAL COMMERCE	° INSIST ON NEUTRAL IMPARTIALITY, ABSTENTION AND PREVENTION ° ENFORCE ITS RIGHTS
DUTIES	° IMPARTIALITY ° ABSTENTION ° PREVENTION ° ACQUIESCENCE	° RESPECT NEUTRAL INVIOLABILITY AND COMMERCE

CHAPTER 8

The Law of Targeting

8.1 PRINCIPLES OF LAWFUL TARGETING

The law of targeting is premised upon the three fundamental principles of the law of armed conflict:[1]

1. The right of belligerents to adopt means of injuring the enemy is not unlimited.[2]

2. It is prohibited to launch attacks against the civilian population as such.[3]

3. Distinctions must be made between combatants and noncombatants, to the effect that noncombatants be spared as much as possible.[4]

These legal principles governing targeting generally parallel the military principles of the objective, mass, and economy of force.[5] 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 collateral destruction must be avoided to the extent possible and, consistent with

1. The United States considers these three fundamental principles as customary international law. General Counsel, Department of Defense letter of 22 Sept. 1972, *reprinted in* 67 Am. J. Int'l L. 122 (1973). *See also* Res. XXVIII of the XXth International Conference of the Red Cross, Vienna, 1965 (Schindler & Toman 259-60), U.N.G.A. Res. 2444(XXIII), 19 Dec. 1968 (Schindler & Toman 261-62), and U.N.G.A. Res. 2675(XXV), 9 Dec. 1970 (Schindler & Toman 267-68).

2. HR, art. 22; *cf.* Lieber Code, art. 30. Art. 22 of the Hague Regulations, which refers to weapons and methods of warfare, is merely an affirmation that the means of warfare are restricted by rules of conventional (*i.e.*, treaty) and customary international law. This principle is applicable to the conduct of naval warfare and is viewed by the United States as customary international law. *See also* GP I, art. 35(1), which is viewed by the United States as declarative of customary international law. The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 Am. U.J. Int'l L. & Policy 424 (1987) (remarks of U.S. Department of State Deputy Legal Adviser Matheson). *Cf.* CDDH/SR.39, annex (FRG) and Bothe, Partsch & Solf 194. *See* paragraph 5.4.2, note 34 (p. 303) regarding the 1987 U.S. decision not to seek ratification of GP I.

3. This customary rule of international law is codified for the first time in GP I, art. 51(2). Bothe, Partsch & Solf 299 & n.3; Green 220-33; FM 27-10, para 25; AFP 110-31, para. 5-3. *See* paragraphs 5.3 (p. 296) and 11.2 (p. 481).

4. This customary rule of international law is codified for the first time in GP I, arts. 57(1) and 57(4). Bothe, Partsch & Solf 359. *See* paragraphs 5.3 (p. 296) and 11.2 (p. 481).

5. *See* paragraph 5.2, note 9 (p. 295).

mission accomplishment and the security of the force, unnecessary human suffering prevented.[6] The law of 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.[7]

8.1.1 Military Objectives. Only military objectives may be attacked.[8] Military objectives are combatants and 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.[9] 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, petroleums/oils/lubricants (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,[10] 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, rail yards, bridges, rolling stock, barges, lighters, industrial installations producing war-fighting products, and power generation plants.

6. Bothe, Partsch & Solf 299, 309 & 359-61. *See* paragraph 8.1.2.1 (p. 404).

7. This customary rule of international law is also codified for the first time in GP I, art. 57(4). Bothe, Partsch & Solf 369; Green, 168. *Compare* San Remo Manual, para. 46, which employs the word "feasible" rather than "reasonable."

8. This customary rule is codified in GP I, art. 52(2). Military personnel that may not be attacked are discussed in Chapter 11. Military platforms and facilities that enjoy protected status and may not be attacked are discussed in the succeeding paragraphs of this Chapter.

9. This definition is accepted by the United States as declarative of the customary rule. *See* note 11 (p. 403). *Compare* GP I, art. 52(2) and San Remo Manual, para. 40, which utilize the term "make an effective contribution to enemy action." *See also* Doswald-Beck at 117.

10. Bothe, Partsch & Solf 325. Some nations have noted that a specific area of land may also be a military objective. Statements of Italy (1986 Int'l Rev. Red Cross 113), the Netherlands (1987 *id.* 426) and New Zealand (1988 *id.* 186) on ratification of, and the United Kingdom (Schindler & Toman 717) on signature to, GP I. *See also* ICRC, Commentary (GP I) at 621-22.

Economic targets of the enemy that indirectly but effectively support and sustain the enemy's war-fighting capability may also be attacked.[11]

8.1.2 Civilians and Civilian Objects. Civilians and civilian objects may not be made the object of attack.[12] Civilian objects consist of all civilian property and activities other than those used to support or sustain the enemy's war-fighting

11. The United States considers this a statement of customary law. General Counsel, Department of Defense, letter of 22 Sept. 1972, *reprinted in* 67 Am. J. Int'l L. 123-24 (1973). The American-British Claims Commission of 1871 recognized that the destruction of raw cotton within Confederate territory by the Union was justified during the American Civil War since the sale of cotton provided funds for almost all Confederate arms and ammunition. 6 Papers Relating to the Treaty of Washington 52-57 (1874) (Report of U.S. Agent); 7 Moore 693-94; Carnahan, Protecting Civilians Under the Draft Geneva Protocol: A Preliminary Inquiry, 18 A.F.L. Rev. 47-48 (1976); Hague Cultural Property Convention, art. 8(3). Whether this rule permits attacks on war-sustaining cargo carried in neutral bottoms at sea, such as by Iraq on the tankers carrying oil exported by Iran during the Iran-Iraq war, is not firmly settled. Authorization to attack such targets is likely to be reserved to higher authority. *See* paragraph 7.4 and note 93 thereunder (pp. 380 & 381) and paragraph 8.2.3 (p. 412).

The target sets for the offensive air campaign of OPERATION DESERT STORM illustrate the range of objectives, both military and economic, which may be attacked. The 12 target sets were: Leadership Command Facilities; Electricity Production Facilities; Telecommunications and Command, Control and Communication Nodes (to include microwave relay towers, telephone exchanges, switching rooms, fiber optic nodes, bridges that carried coaxial communications cables, and civil television and radio installations since they could easily be used for C-3 backup for military purposes and were used as the principal media for Iraqi propaganda); Strategic Integrated Air-Defense System; Air Forces and Air Fields; Nuclear, Biological, and Chemical Weapons Research, Production, and Storage Facilities; Scud Missile Launchers and Production and Storage Facilities; Naval Forces and Port Facilities; Oil Refining and Distribution Facilities; Railroads and Bridges; Iraqi Army Units; and Military Storage and Production Sites. Title V Report, 125-130.

When civil aircraft form part of enemy lines of communication, they are legitimate military objectives. *But see* paragraph 8.2.3, subparagraph 6 (p. 418) for the special rules regarding destruction of civil airliners in flight.

Civilian vessels, aircraft, vehicles, and buildings may be lawfully attacked if they are used for military purposes, including the housing of military personnel, equipment or supplies, or are otherwise associated with combat activity inconsistent with their civilian status and if collateral damage and incidental injury would not be excessive under the circumstances (*see* paragraphs 8.1.2.1 (p. 404) and 8.2.2.2 (p. 410)). (For other circumstances when civilian objects may be attacked, *see* paragraphs 8.3 through 8.5.1.7 (pp. 419 through 426).) *See also* paragraph 11.3 (p. 482).

Hospital ships, medical units, medical vehicles and aircraft, noninterfering neutral vessels, civilian and military churches and chapels, civilian educational institutions, and cultural objects (among others) may not, of course, be attacked unless they are being used by the enemy for prohibited purposes. For details, *see* paragraphs 8.2.3 (p. 412), 8.3.2 (p. 421), 8.4.1 (p. 422), and 8.5.1.4 to 8.5.1.6 (pp. 424 & 425).

12. GP I, art. 51(1), codifying customary international law. *See* Bothe, Partsch & Solf 299; Green 151. However, that portion of art. 52(1) stating that civilian objects shall not be the object of reprisals creates new law for nations party to GP I. *See* paragraph 6.2.3, note 36 (p. 338).

capability.[13] 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.[14] (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.[15]

8.1.2.1 Incidental Injury and Collateral Damage. It is not unlawful to cause incidental injury to civilians, or collateral damage to civilian objects, during an attack upon a legitimate military objective.[16] Incidental injury or collateral damage must not, however, be excessive in light of the military advantage anticipated by the attack.[17] Naval commanders must take all reasonable

13. GP I, art. 52(1), defines civilian objects as "all objects which are not military objectives as defined in paragraph 2." The definition of military objectives in paragraph 8.1.1 (p. 402), although not identical to that in GP I, art. 52(2), is similar. *See* note 11 (p. 403).

14. GP I, art. 56, would create new law to prohibit, except in very limited circumstances, attacks on this limited class of objects even if the attack was proportional. Such a restriction does not reflect customary international law and is militarily unacceptable to the U.S. Matheson Remarks, paragraph 8.1, note 2 (p. 401) at 427. *See also* Green 149-50. For historic development, *see* Human Rights and Armed Conflict: Conflicting Views, 1973 Proc. Am. Soc. Int'l L. 141; President Nixon's News Conference of 27 July 1972, 67 Dep't St. Bull. 173, 201, 203 (1972). For a detailed analysis of art. 56, *see* Bothe, Partsch & Solf 350-57 and ICRC, Commentary (GP I) 666-75.

15. This customary rule is accepted by the United States, Letter from DoD General Counsel to Chairman, Sen. Comm. on For. Rel., 5 April 1971, *reprinted in* 10 Int'l Leg. Mat'ls 1301 (1971), and is codified in GP I, art. 54(2).

Art. 54(1) of GP I would create a new prohibition on the starvation of civilians as a method of warfare (Bothe, Partsch & Solf 336-38; Solf, Protection of Civilians Against the Effects of Hostilities Under Customary International Law and Under Protocol I, 1 A.U.J. Int'l L. & Pol'y 117, 133 (1986)) which the United States believes should be observed and in due course recognized as customary law (Matheson, Remarks, paragraph 8.1, note 2 (p. 401), at 426). *See also*, Allen, Civilian Starvation and Relief During Armed Conflict: the Modern Humanitarian Law, 19 Ga. J. Int'l & Comp. L. 1 (1989); Green 135-36. Starvation of civilians as a method of warfare has potential implications on the law of blockade and categories of contraband which are discussed in Bothe, Partsch & Solf at 338-39 & 433-35, and ICRC, Commentary (GP I) 653-54. Blockade is discussed in detail in paragraph 7.7 (p. 390).

16. Lieber Code, art. 15; AFP 110-31, para. 5-3c.(2)(b), at 5-10. *Accord*, An Introduction to Air Force Targeting, AFP 200-17, attach. 2, para. A2-3a,(2) (1989); AFP 110-34, para. 3-8.

17. This rule of proportionality, which is inherent in both the principles of humanity and necessity upon which the law of armed conflict is based (*see* paragraph 5.2 (p. 290)), is codified in GP I, arts. 51(5)(b) and 57(2)(ii) & (iii). Bothe, Partsch and Solf 309-11 & 359-67; Matheson, Remarks, paragraph 8.1, note 2 (p. 401) at 426. Fenrick, while viewing as unsettled the principle of proportionality as customary law, views the requirement to reconcile humanitarian imperatives and military requirements during armed conflict as widely recognized. Fenrick, The Rule of Proportionality and Protocol I in Conventional Warfare, 98 Mil. L. Rev. 91, 125 (1982). *Cf.* FM 27-10, para. 41 (ch. 1, 15 July 1976); Green 120-21, 330-32. Some nations have asserted that the advantage anticipated must consider the attack as a whole and not only isolated or particular parts of the attack: on ratification of GP I, Belgium (1986 Int'l Rev. Red Cross 174), the Netherlands (1987 *id.* 426), Italy (1986 *id.* 113); and the United Kingdom on signature (Schindler & Toman 717). These and other nuances are examined in ICRC, Commentary (GP I) 683-85, and Kalshoven, Constraints on the Waging of War 99-100 (1987). *See also* paragraph 5.2, note 7 (p. 294).

precautions, taking into account military and humanitarian considerations, to keep civilian casualties and damage to the minimum consistent with mission accomplishment and the security of the force.[18] 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,[19] 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.[20]

8.1.3 Environmental Considerations. It is not unlawful to cause collateral damage to the natural environment during an attack upon a legitimate military objective. However, the commander has an affirmative obligation to avoid unnecessary damage to the environment to the extent that it is practicable to do so consistent with mission accomplishment. To that end, and as far as military requirements permit, methods or means of warfare should be employed with due regard to the protection and preservation of the natural environment. Destruction of the natural environment not necessitated by mission accomplishment and carried out wantonly is prohibited.[21] Therefore, a commander should consider the environmental damage which will result from

18. This principle, reflected in GP I, art. 57(4), is supported by the United States as customary law. Bothe, Partsch & Solf 359. *See also* Title V Report, App. O, at 0-13. *Compare* the requirement of GP I, arts. 56-58, to take "feasible" precautions which NATO and other nations understood to mean "that which is practicable or practically possible, taking into account all circumstances at the time, including those relevant to the success of military operations." Bothe, Partsch & Solf 373; declarations on ratification of GP I by Belgium, the Netherlands, and Italy, and by the United Kingdom on signature, note 17 (p. 404). *See also* paragraph 8.1, note 7 (p. 402).

19. GP I, art. 57(2)(iii), as interpreted on ratification by Belgium, the Netherlands, and Italy; by the United Kingdom on signature, note 17 above; and Bothe, Partsch and Solf 279-80, 310 & 363. Cf. FM 27-10, para. 41 (ch. 1, 15 July 1976).

20. GP I, art. 57(3), as interpreted by governments and commentators *cited in* note 19 (p. 405). *See* Green 147-48. Altering a method of attack may involve such factors as choice of attack platforms, weaponeering, fusing of ordnance, time of attack, and angle of approach to the target.

21. This provision is responsive to U.N.G.A. Resolutions A/47/37 and A/49/50, adopted by consensus on 25 November 1992 and 9 December 1994, respectively, which call upon States to incorporate into their military manuals guidance on the international law applicable to protection of the environment in time of armed conflict. I.C.R.C. compiled "Guidance for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict," which were annexed to U.N. Doc. A/49/323 (1994), are set out in Annex A8-1 (p. 430). *See* Gasser, The Debate to Assess the Need for New International Accords, *in* Grunawalt, King & McClain at 521.

Para. 44 of the San Remo Manual states that:

(continued...)

an attack on a legitimate military objective as one of the factors during targeting analysis.

21.(...continued)

> Methods and means of warfare should be employed with due regard for the natural environment taking into account the relevant rules of international law. Damage to or destruction of the natural environment not justified by military necessity and carried out wantonly is prohibited.

For a commentary on this provision of the San Remo Manual *see* Doswald-Beck at 119-21.

During the Persian Gulf War (1991), between seven and nine million barrels of oil were intentionally released into the Gulf by Iraqi action. Five hundred and ninety oil well heads in Kuwait were deliberately damaged or destroyed. Five hundred and eight were set on fire, and eighty-two were damaged so that oil was flowing freely from them. In July 1991, a conference of international experts convened in Ottawa, Canada to examine the law of war implications of these actions. The conference concluded they constituted violations of the law of war, namely:

> - Art. 23g of the Annex to Hague IV, which forbids the destruction of "enemy property, unless . . . imperatively demanded by the necessities of war;" and
>
> - Art. 147 of the GC, which makes a Grave Breach the "extensive destruction . . . of property, not justified by military necessity and carried out unlawfully and wantonly."

See Title V Report, App. O at 0-26.

In September 1995, the Naval War College hosted a Law of Naval Warfare Symposium on the Protection of the Environment During Armed Conflict and Other Military Operations. The papers and proceedings of that conference of forty eminent government officials, legal scholars, scientists, environmentalists and military commanders from the U.S., the U.K., Australia, Argentina, Canada, Germany, the Netherlands and Switzerland that participated in the Symposium are set out *in* Grunawalt, King & McClain. It was the general consensus of the participants in the Symposium that it is the failure of enforcement actions for violation of existing norms rather than the lack of standards for protection of the environment that is the principal deficiency of this area of international law generally, and of the law of armed conflict in particular. *See* Grunawalt, King & McClain at XIX. *See also* Green, The Environment and the Law of Conventional Warfare, 29 Can. Y.B. Int'l L. 222-37 (1991); and Baker, Legal Protections for the Environment in Times of Armed Conflict, 33 Va. J. Int'l L. 351 (1993).

The United States is a party to the 1977 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD), 31 UST 233, T.I.A.S. 9614, *reprinted in* 16 Int'l Leg. Mat'ls 90 (1977). That Convention provides that it is prohibited to engage in military or any other hostile use of environmental modification techniques having widespread, long lasting, or severe effects as a means of destruction, damage, or injury to any other State Party. The Convention defines "environmental modification techniques" to include any technique for changing - through the deliberate manipulation of natural processes - the dynamics, composition, or structure of the Earth, including its biota, lithosphere, hydrosphere, and atmosphere, or of outer space. Contemporaneous "Understandings" defined "widespread" as encompassing an area on the scale of several hundred square kilometers; "long-lasting" as lasting for a period of months, or approximately a season; and "severe" as involving serious or significant disruption or harm to human life, natural and economic resources, or other assets. *See* Bothe, Partsch & Solf at 347.

(continued...)

8.2 SURFACE WARFARE

As a general rule, surface warships may employ their conventional weapons systems[22] to attack enemy surface, subsurface, and air targets wherever located beyond neutral territory.[23] (Special circumstances in which enemy warships and military aircraft may be attacked in neutral territory are discussed in Chapter 7.) The law of armed conflict pertaining to surface warfare is concerned primarily with the protection of noncombatants[24] 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,[25] merchant vessels and civilian aircraft,[26] and exempt vessels and aircraft.[27]

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.[28] It is forbidden, however, to target an enemy warship or military aircraft that in good faith clearly conveys a timely offer of surrender.[29] Once an enemy warship has clearly

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21.(...continued)
The ENMOD Convention is an arms control measure meant to prevent the use of the environment as an instrument of war. The Convention does not, nor was it ever intended to, constrain peaceful activities or hostile activities other than those involving environmental modification techniques as defined in the preceding paragraph. Accordingly, the ENMOD Convention was not applicable to Iraqi actions since they were undertaken, not as techniques to modify the environment, but simply as wanton acts of destruction. *See* McNeill, Protection of the Environment in Time of Armed Conflict: Environmental Protection in Military Practice, *in* Grunawalt, King & McClain at 538; Green 131-32.

22. Conventional weapons are discussed in Chapter 9, Conventional Weapons and Weapons Systems. Nuclear weapons are discussed in Chapter 10, Nuclear, Chemical, and Biological Weapons.

23. Neutral territory consists of the lands, internal waters, archipelagic waters, territorial seas and national airspace of neutral nations. *See* paragraph 7.3 (p. 370). "Beyond neutral territory" therefore refers to all waters, airspace and seabed beyond the outer edge of the 12 NM territorial sea.

24. Noncombatants are discussed in Chapter 11, Noncombatant Persons.

25. Discussed in paragraph 8.2.1.

26. Discussed in paragraph 8.2.2 (p. 408).

27. Discussed in paragraph 8.2.3 (p. 412).

28. Although this customary rule is not codified in any treaty on the law of naval warfare, it appears in the 1913 Oxford Manual of Naval War, arts. 1 & 31, (*reprinted in* Schindler & Toman 858 & 860); in the San Remo Manual, para. 10; and in NWIP 10-2, arts. 430a, 441 & 503a. The sinking of the Argentine cruiser GENERAL BELGRANO during the Falklands (Malvinas) Conflict by the U.K. submarine HMS CONQUEROR beyond the U.K.-declared 200 NM "Total Exclusion Zone" around the Falkland (Malvina) Islands was a legitimate act of war. For a discussion of this incident *see* Woodward, One Hundred Days 149-63 (1992).

29. HR, art. 23(c), reaffirmed in more modern language in GP I, art. 41. *See also* San Remo Manual para. 46(i). Art. 40 of GP I and art. 4(1) of GP II reaffirm the prohibition of Hague Regulations, art. 23(d), against ordering that there shall be no survivors. Matheson, Remarks, paragraph 8.1, note 2 (p. 401), at 425; Green 166-67.

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.[30] 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.[31] 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.[32] However, if surrender is offered in good faith so that circumstances do not preclude enforcement, it must be respected.[33] Officers and crews of captured or destroyed enemy warships, military aircraft, and naval and military auxiliaries should be made prisoners of war.[34] (See Chapter 11 for further discussion of surrender and prisoners of war.) 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.[35]

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.[36]

8.2.2 Enemy Merchant Vessels and Civil Aircraft

8.2.2.1 Capture. Enemy merchant vessels and civil aircraft may be captured wherever located beyond neutral territory.[37] Prior exercise of visit and search is

30. NWIP 10-2, para. 511c and nn. 35-37, and Mallison 134 (summarizing customary practice described in the *Trial of Von Ruchteschell*, 1 Reps. U.N. Comm. 89 (1947), 9 LRTWC 89 (1949)). *See also* Robertson, The Obligation to Accept Surrender, Nav. War Coll. Rev., Spring 1993, 102.

31. AFP 110-31, para. 4-2d, at 4-1; Spaight 125-27. Spaight, at 128-30, describes a few cases of surrender in the air during World War I.

32. AFP 110-31, para. 4-2d.

33. *Ibid*; AFP 110-34, para. 3-3b, at 3-2.

34. GWS-Sea, art. 16.

35. NWIP 10-2, para. 511b; Hague X, art. 16; GWS-Sea, art. 18. The corresponding provision in land warfare is set forth in GWS, art. 15; there is no corresponding requirement in the GC. A new duty to search for the missing is imposed by GP I, art. 33, which the United States supports. Matheson, Remarks, paragraph 8.1, note 2 (p. 401), at 424. *See also* paragraph 11.4, note 19 (p. 485).

Procedures set forth in Combat Search and Rescue Procedures (NWP 19-2/AFDD-34/AR 525-90), Doctrine for Joint Combat Search and Rescue (Joint Pub 3-50.2) and Search and Rescue (ATP 10), are designed for recovery of own and allied forces. Nevertheless, those procedures should be followed, to the extent they are applicable, in complying with the requirement set forth in the text.

36. NWIP 10-2, art. 503a(2). *See* paragraphs 2.1.2.2 (p. 111) and 2.1.3 (p. 112).

37. This rule, previously set forth in NWIP 10-2, para. 503b(1) (1956), Tentative Instructions for the Navy of the United States Governing Maritime and Aerial Warfare, May 1941, para. 67, and Instructions for the Navy of the United States Governing Maritime Warfare, June 1917, para. 62,

(continued...)

not required, provided positive determination of enemy status can be made by other means.[38] 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.[39] Documents and papers relating to the prize should be safeguarded and, if practicable, the personal effects of passengers should be saved.[40] Every case of destruction of a captured enemy prize should be reported promptly to higher command.[41]

Officers and crews of captured enemy merchant ships and civilian aircraft may be made prisoners of war.[42] Other enemy nationals on board such captured ships and aircraft as private passengers are subject to the discipline of the captor.[43] 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 or are otherwise in the service of the enemy.[44]

37.(...continued)
reflects the rejection by the United States of Hague VI relating, *inter alia*, to the exemption from capture of enemy merchant vessels located in ports of their adversary at the outbreak of hostilities. Although originally parties to Hague VI, Japan, France, the UK and the former USSR subsequently denounced it, and it does not articulate customary international norms. Green 76-7; Ronzitti, 102 & 108. *See also* Tucker 74-75, 102-03 & 108-09, and U.S. Naval War College, International Law Topics and Discussions 1905, at 9-20 (1906), for discussions of this rule which is opposite to that applicable in land warfare, where the private property of the enemy population may not, as a general rule, be seized and confiscated. *See also* Mallison 101.

38. NWIP 10-2, para. 502a & n. 9; Tucker 103-04 & n. 31; Mallison 101 & n. 19; San Remo Manual, para. 135.

39. NWIP 10-2, para. 502b(2) & nn. 18, 19 & 21; Tucker 106-08 & n. 40; San Remo Manual, para. 139. As against an enemy, title to captured enemy merchant vessels or aircraft vests in the captor's government by virtue of the fact of capture. However, claims may be made by neutrals, either with respect to the captured vessel or aircraft, or with respect to the cargo (normally, noncontraband neutral cargo on board a captured enemy vessel is not liable to confiscation). For these reasons, it is always preferable that captured enemy prizes be sent in for adjudication, whenever possible.

40. NWIP 10-2, para. 503b(2) & n. 20; San Remo Manual, para. 139. All the documents and papers of a prize, as required by 10 U.S.C. sec. 7657, should be taken on board the capturing vessel of war and should be inventoried and sealed, in accordance with the procedure set forth in that section, for delivery to the prize court, with particular attention being paid to the protection of the interests of the owners of innocent neutral cargo on board, if such exists.

41. NWIP 10-2, para. 503b(2).

42. GPW, art. 4A(5); NWIP 10-2, para. 512 and n. 38. The evolution of the law regarding the treatment of persons found on captured enemy merchant ships and aircraft is described *in* Tucker 112-15. *See also* San Remo Manual, para. 165.

43. NWIP 10-2, para. 512. *See also* GC, arts. 4 & 41. If necessary, enemy nationals, particularly those in the public service of the enemy, found on board captured enemy merchant vessels may be treated as prisoners of war. NWIP 10-2, para. 512, and n. 39.

44. Hague XI, arts. 5 & 8; GPW, art. 5; NWIP 10-2, para. 512; Tucker 113-14 & n. 60 & n. 62. If there is doubt as to entitlement of such detained neutral nationals to treatment as prisoners of war, they are to be given the benefit of that doubt until the contrary is determined by a "competent tribunal." GPW, art. 5(2); GP I, art. 45(1). Nationals of a neutral nation who have not so participated in acts of hostility or resistance are to be released. *See* San Remo Manual, para. 166.

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.[45] Specifically, the London Protocol of 1936, to which almost all of the belligerents of World War II expressly acceded,[46] 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 take them on board.*

During World War II, the practice of attacking and sinking enemy merchant vessels by surface warships and submarines without prior warning and without first providing for the safety of passengers and crew was widespread on both sides.[47] 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.[48]

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45. NWIP 10-2, para. (503b(3) and n. 22; Treaty Relating to the Use of Submarines and Noxious Gases in Warfare, Washington, 6 February 1922, never came into force, 3 Malloy 3118, 6 Wiktor 398-99, preamble & art. I; Treaty for the Limitation and Reduction of Naval Armaments, London, 22 April 1930 [hereinafter Treaty of London], entered into force for the United States 31 December 1930, 46 Stat. 2881-82, T.S. 380, 112 L.N.T.S. 88, 4 Malloy 5281, 2 Bevans 1070, 2 Hackworth 691, art. 22; Proces-Verbal Relating to the Rules of Submarine Warfare set forth in Part IV of the Treaty of London, 6 November 1936 [hereinafter 1936 London Protocol], 3 Bevans 298-99, 173 L.N.T.S. 357, 7 Hudson 492. The developments are considered in detail in Tucker 55-70 and Mallison 106-23. *See also* Levie, Submarine Warfare: With Emphasis on the 1936 London Protocol, *in* Grunawalt at 28-71.

46. China and Romania were the World War II belligerents who had not acceded to the London Protocol of 1936.

47. *See* Mallison & Mallison, The Naval Practices of Belligerents in World War II: Legal Criteria and Development, *in* Grunawalt at 87-103. Enemy merchant vessels were also destroyed by military aircraft without warning and without first providing for the safety of passengers and crew. However, this practice did not constitute a departure from the 1936 London Protocol which does not address the destruction of merchant shipping by aircraft.

48. Mallison & Mallison, *id.* at 90-91.

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.[49] Accordingly, enemy merchant vessels may be attacked and destroyed by surface warships, either with or without prior warning, in any of the following circumstances:[50]

1. Persistently refusing to stop upon being duly summoned to do so[51]

2. Actively resisting visit and search or capture[52]

3. Sailing under convoy of enemy warships or enemy military aircraft[53]

4. If armed[54]

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49. Nwogugu, Commentary on the 1936 London Proces-Verbal, *in* Ronzitti at 353.

50. The 1936 London Protocol was designed to protect only those merchant ships which "at the moment" were not "participating in hostilities in such a manner as to cause [them] to lose [their] right to the immunities of a merchant vessel." Report of the Committee of Jurists, 3 April 1930, which drafted article 22, *reprinted in* Dep't of State, Proceedings of the London Naval Conference of 1930 and Supplementary Documents 189 (Dep't of State Conf. Ser. No. 6, 1931), and *quoted in* U.S. Naval War College, International Law Situations 1930, at 5 (1931), Mallison 120, and Tucker 63. Unfortunately the Conference delegates were unable to agree on the circumstances that would cause the loss of the immunities of a merchant vessel. The list of circumstances set out in the text of paragraph 8.2.2.2 reflects the practice of nations and the judgment of the International Military Tribunal on Admiral Doenitz. 1 TWC 313, 40 U.S. Naval War College, International Law Documents 1946-47, at 300-301 (1948); Levie, 1 The Code of International Armed Conflict 162-63; and Jacobson, The Law of Submarine Warfare Today, *in* Robertson at 205. *Contra,* Parks, Conventional Aerial Bombing and the Law of War, U.S. Naval Inst. Proc., May 1982, at 106 (the London Protocol is "of historical interest only"), and O'Connell, International Law and Contemporary Naval Operations, 44 Br. Y.B. Int'l L. 52 (1970) ("submarines operating in times of war are today governed by no legal text"). *See also* Green 163.

51. The refusal must be *persistent* to meet the standard of the first exception to the general rule of the London Protocol quoted in the text of paragraph 8.2.2.2. *See* paragraph 8.2.3, note 77 and accompanying text (p. 418).

52. Second exception to the general rule of the 1936 London Protocol *quoted in* the text of paragraph 8.2.2.2 (p. 410). *See* paragraph 7.6 (p. 387) for a general discussion of visit and search.

53. This "accurately reflects the traditional law as well as the uniform practice of the two World Wars." Mallison 122; Jacobson, note 50 (p. 411) at 231.

54. In light of modern weapons, it is impossible to determine, if it ever was possible, whether the armament on merchant ships is to be used offensively against an enemy or merely defensively. It is unrealistic to expect enemy forces to be able to make that determination. Accordingly, this rule has been modified in this text from that previously appearing *in* NWIP 10-2, para. 503b(3)(4). *See* U.S. Naval War College, International Law Situations 1930, at 9-19 & 21-25 for a discussion of earlier conflicting views of nations on armed merchant vessels. *See also* Levie, paragraph 8.2.2.2, note 45 (p. 410), at 36-41; Fenrick, Comments, *in* Grunawalt at 113-18. Crew members bearing side arms for personal protection against pirates and other marauders do not render a merchant vessel "armed" for purposes of this listing. While the presence on board of shoulder-fired missiles

(continued...)

5. If incorporated into, or assisting in any way, the intelligence system of the enemy's armed forces[55]

6. If acting in any capacity as a naval or military auxiliary to an enemy's armed forces[56]

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.[57]

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.[58]

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.[59] 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.[60] These specifically exempt vessels and aircraft include:

54.(...continued)
and rockets would likely constitute arming of a merchant vessel, the equipping of the vessel with chaff launchers would not. *See* San Remo Manual, para. 60(f) and Doswald-Beck at 151. *See also* paragraph 8.2.3, note 66 (p. 414).

55. This reflects the traditional law as it developed during the two World Wars. Mallison 122-23.

56. An enemy merchant ship designed for carrying cargo and actually carrying cargo of substantial military importance is not a "military or naval auxiliary" unless it is owned by or under the exclusive control of the armed forces. Mallison 123. (*See* paragraph 2.1.3 (p. 112) for a discussion of auxiliaries). Such a vessel would not be subject to destruction unless it otherwise falls under one of the other numbered headings of paragraph 8.2.2.2.

57. This paragraph addresses the circumstance described in the preceding note and reflects the actual practice of nations, at least in general wars. *See* Mallison 120-21 & 123. Although the term "war-sustaining" is not subject to precise definition, "effort" that indirectly but effectively supports and sustains the belligerent's war-fighting capability properly falls within the scope of the term. *See also* paragraph 7.4, note 88 (p. 381) and paragraph 8.1.1, note 11 (p. 403). *Compare* San Remo Manual, para. 60(g) and *see* Doswald-Beck at 150.

58. *See* note 35 and accompanying text (p. 408).

59. The granting of this protection is consistent with the "maintenance of military efficiency." Mallison 16. These classes of exempt vessels are discussed *in* Tucker 86-98 and Mallison 123-29.

60. In such a way, the law fairly balances the rights of opposing belligerents. As reflected in the succeeding notes to this paragraph, the practice of nations is generally consistent with this balance. *See also* San Remo Manual, paras. 48 & 137.

1. Vessels and aircraft designated for and engaged in the exchange of prisoners of war (cartel vessels).[61]

2. Properly designated and marked hospital ships, medical transports, and medical aircraft.[62] Names and descriptions of hospital ships must be provided to the parties to the conflict not later than ten days before they are first employed.[63] Thereafter,

61. Tucker 97-98; Mallison 126; NWIP 10-2, para. 503c(1); San Remo Manual, paras. 47(c) & 136(c). Cartel ships were used at the conclusion of the Falklands/Malvinas conflict to repatriate about 10,000 Argentine PWs. The British used three requisitioned merchant ships, Argentina two of its hospital ships. Each ship was identified by flying the flag of truce and the colors of the two nations. Junod, Protection of the Victims of Armed Conflict Falkland-Malvinas Islands (1982), at 31. During World War II at least 15,000 PWs and civilian internees disappeared at sea as a result of attacks against non-cartel ships that were carrying them. Report of the ICRC on its Activities During the Second World War 319. Temporary detention of PWs and others aboard naval vessels is discussed in paragraph 11.7.4 (p. 494).

62. GWS-Sea, arts. 22 & 29 (hospital ships) and 39 (medical aircraft); Tucker 97 & 123-34; Mallison 124-25; NWIP 10-2, para 503c(2); San Remo Manual, para. 47(a). Coastal rescue craft are also exempt from capture and destruction. GWS-Sea, art. 27; Eberlin, The Protection of Rescue Craft in Periods of Armed Conflict, 1985 Int'l Rev. Red Cross 140; San Remo Manual, para. 47(b). Temporary medical ships would be granted a lesser degree of protection by GP I, art. 23.

GWS-Sea, art. 14 permits warships to demand the surrender to them of enemy military wounded, sick and shipwrecked personnel found in hospital ships and other craft "provided they are in a fit state to be moved and that the warship can provide adequate facilities for necessary medical treatment." GWS-Sea, art. 36, provides the hospital ship's medical personnel and crew may not be attacked or captured, even if there are no sick and wounded on board. This extensive protection reflects the facts that hospital ships without crew cannot function, and that the protection and care of the sick and wounded would be impossible without a medical staff. They must, however, not be used for any other purpose during the conflict, particularly in an attempt to shield military objectives from attack. To ensure this, an opposing force may visit and search hospital ships, put on board a commissioner temporarily or put on neutral observers (as was done in the 1982 Falklands war), detain the ship for no more than seven days (if required by the gravity of the circumstances), and control the ship's means of communications. The opposing force may also order hospital ships to depart, make them take a certain course, or refuse assistance to them. GWS-Sea, arts. 30-31.

Sick bays and their medical personnel aboard other naval vessels must also be respected by boarding parties and spared as much as possible. They remain subject to the laws of warfare, but cannot be diverted from their medical purposes if required for the care of the wounded or sick. If a naval commander can ensure the proper care of the sick and wounded, and if there is urgent military necessity, the sick bays may be used for other purposes. GWS-Sea, art. 28.

Hospital ships can leave port even if the port falls into enemy hands. Hospital ships are not classified as warships with regard to the length of their stay in neutral ports. GWS-Sea, art. 29 & 32. *See* paragraph 7.3.2.1 (p. 372). *See generally*, Green 215-18.

63. GWS-Sea, art. 22, provides that at least ten days prior to placing a hospital ship into service, notification must be effected to the parties to the conflict of the vessel's characteristics and name. The characteristics include at least the gross registered tonnage, length and the number of masts and funnels and may also include, for example, the vessel's silhouette. (*See also* San Remo Manual, para. 169.) The notification can be made in peacetime (to other nations party to the 1949 Geneva Conventions), when the ship is nearing completion, or even after the outbreak of hostilities. As a precaution, it is advisable to confirm earlier notification at the opening of hostilities. 2 Pictet, Commentary 161. *See also* the useful summary provided *in* Smith, Safeguarding the Hospital Ships, U.S. Naval Inst. Proc., Nov. 1988, at 56.

hospital ships must be used exclusively to assist, treat and transport the wounded, sick and shipwrecked.[64] All exterior surfaces of hospital ships are painted white and the distinctive emblem of the Red Cross or Red Crescent is displayed on the hull and on horizontal surfaces.[65] Hospital ships may not be armed although crew members may carry light individual weapons for the maintenance of order, for their own defense and that of the wounded, sick and shipwrecked.[66] Use or

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64. GWS-Sea, art. 22.

65. GWS-Sea, art. 43. To ensure maximum protection for its hospital ships, U.S. practice has been to mark and illuminate them as follows:

1. Exterior surfaces shall be white except those areas designated for identifying insignia.

2. Weather decks covered with wood shall be unpainted except for a square white area to be painted around the distinctive emblem, *i.e.*, red crosses.

3. Steel weather decks outside of walking areas shall be painted white and walking areas thereon shall be gray.

4. Outer smoke pipe casing, booms, masts, and boats shall be white except that a black band shall be painted around the top of smoke stacks.

5. Three red crosses, as large as possible, shall be painted on each side of the hull (forward, center and aft).

6. Two red crosses, as large as possible, shall be painted on top of the superstructure (forward and aft) with an additional red cross as large as possible on the forward superstructure.

7. One red cross, as large as possible, shall be painted on each side of the stern of boats and on each side of life rafts. Each boat may also be equipped with a mast on which a red cross flag measuring at least 6 by 6 feet can be hoisted.

8. To provide the desired contrast where infra-red instruments and infra-red film are used, the red cross may be painted over a black cross.

9. Optional flashing blue lights may be installed. *See also* paragraph 11.10.2 (p. 500)).

10. The whole ship, particularly the red crosses, should be fully illuminated at night.

See International Code of Signals, Pub. No. 102, at 136 (Notice to Mariners 52/85, at II-2.4); and Figures 11-1a and 11-1b (p. 503). *See also* Eberlin, Identification of Hospital ships and Ships Protected by the Geneva Conventions of 12 August 1949, 1982 Int'l Rev. Red Cross 315; and Eberlin, Underwater acoustic identification of hospital ships, 1988 *id.* 505. GWS-Sea, art. 27, extends these rules to rescue craft "so far as operational requirements permit." *See also* paragraph 11.10 (p. 500).

66. GWS-Sea, art. 35. See 2 Pictet 194. The taking of other limited self-defense measures against antiship missile attack, such as equipping hospital ships with chaff, ECM and infra red decoy dispensers, as *suggested in* Oreck, Hospital Ships: The Right of Limited Self Defense, U.S. Naval Inst. Proc., Nov. 1988, at 65, and as *provided in* San Remo Manual, para. 170, would not violate their protected status. However, equipping of such ships with the Phalanx close-in weapon system (CIWS) would, under the San Remo Manual rule, be inconsistent with their protected status. *See* Doswald-Beck at 235 and paragraph 8.2.2.2, note 54 (p. 411).

(continued...)

possession of cryptographic means of transmitting message traffic by hospital ships is prohibited under current law.[67] Medical aircraft, whether civilian or military, and whether permanently or temporarily so employed, must be used exclusively for the removal and transportation of the wounded, sick and shipwrecked, or for the transportation of medical personnel or medical equipment.[68] They may not be armed nor may they be reconnaissance configured.[69] Medical aircraft must be clearly marked with the emblem of the red cross or red crescent.[70] Hospital ships,

66.(...continued)
Portable arms and ammunition, taken from the wounded, sick and shipwrecked, may be retained on board for eventual turn-over to proper authority; similarly, arming crews of sick bays with light individual weapons for the maintenance of order, for their own defense or that of the sick and wounded, does not deprive a sick bay on a warship of its guaranteed protection and does not permit attacks on it (GWS-Sea, art. 36).

67. GWS-Sea, art. 35(2), authorizes hospital ships to carry and employ communications equipment necessary for their movement and navigation. GWS-Sea, art. 34, however, restricts the use of cryptographic means of communication. The English language version of art. 34 implies that the possession or use of such means for both *sending* and *receiving* encrypted communications are prohibited. The equally authentic Spanish and French texts of art. 34(2), however, prohibit only the *sending* ("pour leurs emissions") of encrypted traffic. *See* Revision of Annex I to Protocol I, 1983 Int'l Rev. Red Cross, 22 at 26. The requirement that hospital ships must transmit in the clear is undergoing critical review in various international fora and it is anticipated that this prescription will eventually be either relaxed or abandoned. Indeed, the San Remo Manual, para. 171, would permit the use of cryptographic equipment in hospital ships to "fulfill most effectively their humanitarian mission."

68. GWS, art. 36; GWS-Sea, art. 39; GC, art. 22; and GP I, art. 8. Medical aircraft may not be used to collect or transmit intelligence data since they may not be used to commit, outside their humanitarian duties, acts harmful to the enemy. This prohibition does not preclude the presence or use on board medical aircraft of communications equipment and encryption materials solely to facilitate navigation, identification or communication in support of medical operations.

See paragraph 7.3.7 (p. 379) for guidance regarding flight of medical aircraft over, or landing on, neutral territory.

69. *See* Pictet, Vol. I, 289. Medical aircraft shall contain no armament other than small arms and ammunition belonging to the wounded and sick or necessary for the defense of the wounded and sick and the medical personnel. *See* San Remo Manual, para. 178. As far as practicable under the circumstances, the medical mission shall be performed in such places and in such a manner as to minimize the risk that the conduct of hostilities by combatants may imperil the safety of medical aircraft. *See generally*, AFR 160-4, Medical Service under the 1949 Geneva Convention [sic] on Protection of War Victims. *See also* GP I art. 28.

Aeromedical evacuation also may, of course, be conducted by combat-equipped helicopters and airplanes. They are not, however, exempt from attack, and fly at their own risk of being attacked.

70. AFP 110-31. Medical aircraft shall be clearly marked with the red cross/red crescent, as large as possible, on a white background, together with their national colors, on their upper, lateral and lower surfaces. They may be painted white all over. *See* International Code of Signals, Pub. No. 102, at 136 (Notice to Mariners 52/85, at II-2.2) and Figure 11-1a (p. 503). *See also* San Remo Manual, para. 175.

medical transports and medical aircraft utilized solely for medical purposes and recognized as such are not to be deliberately attacked.[71]

71. As a general rule, medical aircraft, recognized as such, should not be deliberately attacked. AFP 110-34, para. 3-2c. However, there is no specific treaty to which the United States is a party providing this protection. (An earlier Air Force manual would permit attack if "under the circumstances at the time it represents an immediate military threat and other methods of control are not available." AFP 110-31, para. 4-2f.) Medical aircraft, wherever flying, are protected from attack to the extent they are flying at altitudes, times, and on routes specifically agreed upon between the belligerents. GWS, art. 36; GWS-Sea, art. 39; GC, art. 22. Thus, U.S. medical aircraft may not over fly enemy-controlled territory and expect to be immune from attack without prior enemy agreement.

In and over land areas physically controlled by friendly forces, and in and over sea areas not physically controlled by the enemy, medical aircraft will be immune from attack. Before making flights bringing them within range of the enemy's surface-to-air weapons systems, however, the enemy should be notified with a view to ensuring such aircraft will not be attacked. (GP I, art. 25.) Whether or not the parties to the conflict are bound by GP I, prior agreement between them is necessary in order to afford protection from attack to medical aircraft that are flying in and over those parts of the contact zone which are physically controlled by friendly forces, and in and over those areas the physical control of which is not fully established. In the absence of such an agreement, medical aircraft operate at their own risk. Nevertheless, they shall be respected after they have been recognized as medical aircraft. (GP I, art. 26(1); Green 216-18.) These procedures were followed in the 1982 Falklands war where neither belligerent was a party to GP I. *See also* San Remo Manual, para. 180.

"Contact zone"here means any land area where the forward elements of opposing forces are in contact with each other, especially when they are exposed to direct fire from the ground. The breadth of the contact zone will vary according to the tactical situation. (GP I, art. 26(2).)

"Friendly forces" are the forces of the nation operating the aircraft, or its allies or co-belligerents.

Medical aircraft must comply with a request to land for inspection. (GWS, art. 36; GWS-Sea, art. 39; GC, art. 22.) Under GP I, art. 30, these requests are to be given in accordance with the International Civil Aviation Organization (ICAO) standard procedures for interception of civil aircraft. They are found in Section D of the DOD Flight Information Publication (FLIP) (Enroute) IFR Supplement.

Medical aircraft complying with such a request to land must be allowed to continue their flight, with all personnel on board belonging to their forces, to neutral countries, or to countries not a party to the conflict, so long as inspection does not reveal that the aircraft was engaging in acts harmful to the inspecting force or otherwise violating the Geneva Conventions of 1949. Persons of the nationality of the inspecting force found on board may be taken off and retained. Bothe, Partsch & Solf 163. *See also* GP I, art. 30.

It is very difficult to ensure the safety of medical aircraft in armed conflict no matter how clear their markings. If possible, therefore, the parties should reach an agreement to facilitate their protection. Although rarely reached in the past, a proposal for such an agreement should state the proposed number of medical aircraft, their flight plans and their means of identification. Receipt of the proposal should be acknowledged and then answered definitively, as rapidly as possible. The substance of any proposal, reply and agreement (including the means of identification to be used) should be rapidly disseminated to the military units concerned. *See* AFP 110-31, para. 2-6e.

See paragraph 11.10 (p. 500) for the optional distinctive signals now available for 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.)[72]

4. Vessels and aircraft guaranteed safe conduct by prior arrangement between the belligerents.[73]

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.[74]

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72. Hague XI, art. 4; NWIP 10-2, para. 503c(3). As noted *in* Tucker 96-97 and Mallison 128, the practice has been to construe this exemption quite narrowly and to grant this exemption by express agreement between the belligerents. The parenthetical exception to the exemption has been added to reflect modern practices in the exploration of the sea and seabed; *see* Mallison 128 and Levie, 1 The Code of International Armed Conflict 186. The San Remo Manual, paras. 47(f) and 136(e), reflects this exception as well.

73. NWIP 10-2, para. 503c(4); San Remo Manual, paras. 47(c) and 136(c). One such vessel, the Japanese merchant ship AWA MARU, sailing alone in a fog bank, was torpedoed and sunk by USS QUEENFISH on 1 April 1945 thinking she was a Japanese destroyer. Although QUEENFISH had received notice of the guarantee of safe conduct in a plain language COMSUBPAC message three weeks before, it had not been read by the ship's officers. For details *see* Dep't St. Bull., 3 June, 15 July & 12 August 1945, *reprinted in* U.S. Naval War College, International Law Documents 1944-45, at 125-38 (1946); Voge, Too much Accuracy, Naval Inst. Proc., March 1950, at 256; Speer, Let Pass Safely the *Awa Maru, id.*, April 1964, at 69; Lowman, Treasure of the Awa Maru, *id.*, Aug. 1982, 45; Loughlin, As I Recall "Damned if I Did; Damned if I Didn't," *id.* Aug. 1982, at 49; and Innis, In Pursuit of the Awa Maru (1980) (describing the events and subsequent general court-martial conviction of QUEENFISH's commanding officer). *See also* Green 166.

In October 1943, the properly marked Japanese hospital ship TACHIBANA MARU was stopped at sea by two U.S. Navy destroyers and was found to be carrying 700 drums of oil, 1500 able-bodied combat troops (dressed in white hospital gowns), and 1500 boxes of ammunition marked with the Red Cross Symbol, all in clear violation of Hague X, art. 4(2). *See* The trial of Takaji Wachi, *recounted in* Levie, Terrorism in War: the Law of War Crimes, at 374 (1993).

Ships chartered to convey medical equipment and pharmaceuticals for the wounded and sick only, so long as the particulars of the voyage have been agreed to beforehand between the belligerents, are exempt from capture and destruction. GWS-Sea, art. 38.

74. *The Paquete Habana*, 175 U.S. 677 (1900); Hague XI, art. 3; Tuckert 95-96; Mallison 15-16 & 126-28; NWIP 10-2, para. 503c(6); San Remo Manual, paras. 47(g) & 136(f). *See* Cagle & Manson, The Sea War in Korea 296-97 (1957). It is necessary to emphasize that the immunity of small coastal fishing vessels and small boats depends entirely upon their "innocent employment." If found to be assisting a belligerent in any manner whatever (*e.g.*, if incorporated into a belligerent's naval intelligence network), they may be captured or destroyed. The British were entirely justified in attacking, on 9 May 1982, the Argentine fishing vessel NARWAL which was used to shadow the British fleet and report its location. Before NARWAL sank, a British boarding party found an Argentine naval officer on board with orders directing him to conduct reconnaissance and to detect and report the position of British units. London Times, 11 May 1982, at 1 & 6; Hastings & Jenkins, The Battle of the Falklands 158 (1983); Middleton, Operation Corporate 186-87 (1985); Woodward, One Hundred Days 191-5, 197-8 (1992). *See also* Levie, 1 The Code of International

(continued...)

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.[75]

If an enemy vessel or aircraft assists the enemy's military effort in any manner, it may be captured or destroyed.[76] Refusal to provide immediate identification upon demand is ordinarily sufficient legal justification for capture or destruction.[77] 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.[78] 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.[79]

74.(...continued)
Armed Conflict at 186. Refusal to provide immediate identification upon demand is sufficient basis for capture or destruction of such vessels and boats. *See* paragraph 8.2.1, note 35 (p. 408) and accompanying text (regarding duty to search for the shipwrecked) and paragraph 7.7.4 (p. 392) (regarding breach and attempted breach of blockade).

75. AFP 110-31, para. 4-3, AFP 110-34, para. 2.3b. Civilian passenger vessels and civil aircraft were not addressed in NWIP 10-2, para. 503c. The rule prohibiting destruction of civilian passenger vessels at sea and civil airliners in flight which have become military objectives by virtue of being part of enemy lines of communication (*see* paragraph 8.1.1 and note 11 (pp. 402 & 403)), is premised upon the assessment that the inevitable death of the large number of innocent civilians normally carried in them would in the circumstances described in the text of paragraph 6, be clearly disproportionate to whatever military advantage that might be expected from attacking such vessels or aircraft. The rule denying protection from destruction of passenger vessels in port and airliners on the ground assumes they are not carrying passengers at the time of attack. Green 180-81. *Compare* the more restrictive approach of San Remo Manual, paras. 47(e), 53(c) and 56.

The list of exempt vessels in paragraph 8.2.3 omits "vessels and aircraft exempt by U.S. or allied proclamation, operation plan, order or other directive" which were included in NWIP 10-2, para. 503c(5), because of the unilateral basis of the exemption. *See* Tucker 98 n. 14.

76. *See* paragraph 8.2.2.2 (p. 410). *But also see* preceding note.

77. Refusal by an exempt vessel or aircraft to provide immediate identification is considered to be an act of refusing to stop upon being summoned, particularly in light of the abilities of modern communications. *Compare* note 50 and accompanying text (p. 411).

78. Hague XI, art. 3. *See also* San Remo Manual, paras. 49-51 (loss of exemption of hospital ships), para. 52 (loss of exemption of other protected vessels), and para. 57 (loss of exemption of protected aircraft).

79. O'Connell, The Influence of Law on Seapower 177 (1975). *See generally* Hodgman, Market Time in the Gulf of Thailand, *in* Uhlig, Vietnam: The Naval Story 308 (1986).

8.3 SUBMARINE WARFARE

The law of armed conflict imposes essentially the same rules on submarines as apply to surface warships.[80] Submarines may employ their conventional weapons systems[81] to attack enemy surface, subsurface or airborne targets wherever located beyond neutral territory.[82] Enemy warships and military aircraft, including naval and military auxiliaries, may be attacked and destroyed without warning.[83] 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.[84] To the extent that military exigencies permit, submarines are also required to search for and collect the shipwrecked, wounded, and sick following an engagement.[85] 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.[86]

8.3.1 Interdiction of Enemy Merchant Shipping by Submarines. The 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

80. The legal principles governing modern submarine warfare are discussed *in* Gilliland, Submarines and Targets: Suggestions for New Codified Rules of Submarine Warfare, 73 Geo. L.J. 975 (1985). *See also* Jacobson, paragraph 8.2.2.2, note 50 (p. 411) at 205.

81. Conventional weapons are discussed in Chapter 9, Conventional Weapons and Weapon Systems. Nuclear weapons are discussed in Chapter 10, Nuclear, Chemical and Biological Weapons.

82. *See* paragraph 8.2.1, note 23 (p. 407) and paragraph 7.3 (p. 370) for a discussion of neutral territory.

83. Mallison 105-06.

84. *See* paragraph 8.2.1 (p. 407).

85. Paragraph 8.2.1 and note 35 (pp. 407 & 408); Mallison 134-39.

86. All ships, including submarines, must "take all possible measures" to search for and collect survivors after each engagement. GWS-Sea, art. 18. Fleet Admiral Nimitz indicated before the International Military Tribunal at Nuremberg trying the German submarine commander Admiral Doenitz that the U.S. policy in the Pacific during World War II was not to search for survivors if such action would cause undue additional hazard to the submarine, or prevent the submarine from accomplishing its military mission. The behavior of the other parties to World War II was similar. Mallison 134-39. *See also* Doenitz, Memoirs: Ten Years and Twenty Days, 259 (1958). However, firing upon shipwrecked survivors in the water is clearly a war crime. *See The Llandovery Castle Case* (1921), 2 Ann. Dig. 436, in which a German tribunal tried and convicted the officers of a U-boat for, "contrary to international law," firing upon and killing survivors of an unlawfully torpedoed hospital ship during WW I. Levie, Terrorism in War: The Law of War Crimes, 33 (1993); Green 33, n. 90. *See also The Peleus Case* (1946), 13 Ann. Dig. 248, in which a British tribunal tried and convicted the commanding officer (Heinz Eck) of a German submarine that during WW II had systematically fired upon survivors of a torpedoed merchant vessel as they clung to wreckage and rafts. Levie, *id.* at 105.

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 attacks upon 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.[87] As in the case of such attacks by surface warships, this practice was justified either as a 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.[88]

The United States considers that the London Protocol of 1936, coupled with the customary practice of belligerents during and following World War II,[89] 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:[90]

1. The enemy merchant vessel persistently refuses to stop when duly summoned to do so[91]

2. It actively resists visit and search or capture[92]

3. It is sailing under convoy of enemy warships or enemy military aircraft[93]

4. It is armed[94]

87. Mallison 106-22; Mallison & Mallison, The Naval Practices of Belligerents in World War II: Legal Criteria and Developments, *in* Grunawalt at 89-102. *See also* Levie, Submarine Warfare: With Emphasis on the 1936 London Protocol, *in id.*, at 28.

88. *Compare* Tucker 63-70 *with* Mallison 119-20. For a discussion of reprisal, *see* paragraph 6.2.3 (p. 335).

89. *See* Mallison 113-122; Mallison & Mallison, note 87.

90. These exceptions are identical to those applicable to surface warfare set forth in paragraph 8.2.2.2 (p. 410).

91. *Id.*, paragraph 8.2.2.2, subparagraph 1 and note 51 (p. 411).

92. *Id.*, subparagraph 2 and note 52 (p. 411).

93. *Id.*, subparagraph 3 and note 53 (p. 411).

94. *Id.*, subparagraph 4 and note 54 (p. 411).

5. It is incorporated into, or is assisting in any way the enemy's military intelligence system[95]

6. It is acting in any capacity as a naval or military auxiliary to an enemy's armed forces[96]

7. The enemy has integrated its merchant shipping into its war-fighting/war-sustaining effort and compliance with the London Protocol of 1936 would, under the circumstances of the specific encounter, subject the submarine to imminent danger or would otherwise preclude mission accomplishment.[97]

8.3.2 Enemy Vessels and Aircraft Exempt From Submarine Interdiction. The rules of naval warfare regarding enemy vessels and aircraft that are exempt from capture and/or destruction by surface warships also apply to submarines. (See paragraph 8.2.3.)

8.4 AIR WARFARE AT SEA

Military aircraft may employ conventional weapons systems[98] to attack warships and military aircraft, including naval and military auxiliaries, anywhere beyond neutral territory.[99] Enemy merchant vessels and civil aircraft may be attacked and destroyed by military aircraft only under the following circumstances:[100]

1. When persistently refusing to comply with directions from the intercepting aircraft

2. When sailing under convoy of enemy warships or military aircraft

3. When armed

4. When incorporated into or assisting in any way the enemy's military intelligence system

95. *Id.*, subparagraph 5 and note 55 (p. 412).
96. *Id.*, subparagraph 6 and note 56 (p. 412).
97. *Id.*, subparagraph 7 and note 57 (p. 412).
98. *See* paragraph 8.3, note 81 (p. 419).
99. This listing is identical to that for surface warships and for submarines except for the omission of reference to a merchant vessel resisting visit and search or capture. Should visit and search or capture of a merchant vessel by an aircraft be feasible, as perhaps by a helicopter, that provision would apply as it does for surface warships and submarines.
100. AFP 110-31, paras. 4-2a, 4-2c, & 4-4a, at 4-1 & 4-4. *See* paragraph 8.2, note 23 (p. 407) for a discussion of neutral territory. *See also* Green 182.

5. When acting in any capacity as a naval or military auxiliary to an enemy's armed forces

6. 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.[101] The location of possible survivors should be passed at the first opportunity to a surface vessel, aircraft, or shore facility capable of rendering assistance.[102]

Historically, instances of surrender of enemy vessels to aircraft are rare.[103] 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.[104]

8.4.1 Enemy Vessels and Aircraft Exempt From Aircraft Interdiction. The rules of naval warfare regarding enemy vessels and aircraft that are exempt from capture and/or destruction by surface warships also apply 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.[105] Land warfare is discussed in paragraph 8.6. Engagement of targets at sea is discussed in paragraphs 8.2 to 8.4.

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101. GWS, art. 15; GWS-Sea, art. 18; GC, art. 16; AFP 110-31, para. 4-2d n. 11, at 4-7 ("in the case of aircraft, unfortunately, departure from the scene is usually required"). Under GP I, medical aircraft flying pursuant to agreement between the parties in the contact zone or over areas controlled by the enemy may not search for the wounded, sick and shipwrecked except by prior agreement with the enemy. GP I, art. 28(4).

102. *See* paragraph 8.2.1 note 35 (p. 408).

103. Spaight 132-134 describes the surrender of U570 in August 1941, of the British submarine SEAL in May 1940, and of a German convoy on 1 May 1945.

104. AFP 110-31, para. 4-2d, at 4-1. *See also* paragraph 8.2.1 and notes 29-33 (pp. 407-408).

105. With regard to aerial bombardment, *see also* AFP 110-31, ch. 5 and para. 6-6a; Parks, Crossing the Line, U.S. Naval Inst. Proc., Nov. 1986, at 40-52; Parks, Linebacker and the Law of War, Air U. Rev., Jan.-Feb. 1983, at 2-30; Parks, Rolling Thunder and the Law of War, Air U. Rev., Jan.-Feb. 1982, at 2-23; Carnahan, "Linebacker II" and Protocol I, The Convergence of Law and Professionalism, 31 Am. U.L. Rev. 861 (1982); Greenwood, International Law and the United States' Air Operations Against Libya, 89 W. Va. L. Rev. 933 (1987); and Green, 147-49, 167-68, 183-85.

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, the Falkland/Malvinas Conflict, and the Persian Gulf. 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,[106] that superfluous injury and unnecessary suffering are to be avoided,[107] and that wanton destruction of property is prohibited.[108] To give effect to these concepts of humanitarian law, 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.[109] A military objective[110] 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.[111] Incidental injury to civilians, or collateral damage to civilian objects must not be excessive in light of the military advantage anticipated by the attack. (See Paragraph 8.1.2.1.)

8.5.1.2 Terrorization. Bombardment for the sole purpose of terrorizing the civilian population is prohibited.[112]

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

106. *See* paragraph 8.1 and note 3 (p. 401).

107. *See* paragraph 8.1.2.1, Incidental Injury and Collateral Damage, and notes 16-20 thereunder (pp. 404-405).

108. *Id.*; GWS, art. 50; GWS-Sea, art. 51; GC, art. 147; GP I, art. 85(2); Charter of the International Military Tribunal at Nuremberg, art. 6(b) (paragraph 6.2.5, note 55 (p. 343)). *See also* Principle VI(b), Nuremberg Principles. The Nuremberg Principles may be found *in* DA PAM 27-161-2 at 303.

109. GWS, art. 50; GWS-Sea, art. 51; GC, art. 147; GP I, art. 85(2).

110. Military objective is defined in paragraph 8.1.1 (p. 8-2).

111. *Cf.* HR, art. 23(g); 1923 Draft Hague Rules of Air Warfare, art. 24(4); GP I, art. 51(5)(b); Conventional Weapons Convention, Protocol III, art. 3.

112. 1923 Draft Hague Rules of Air Warfare, art. 22; NWIP 10-2, para. 221b at n. 15; codified *in* GP I, art. 51(2), and GP II, art. 13(2); Matheson, Remarks, paragraph 8.1, note 2 (p. 401), at 426. Otherwise legal acts which cause incidental terror to civilians, for example in the bombing of a munitions factory the work force of which is civilian, are not prohibited. As a practical matter, some fear and terror will be experienced by civilians whenever military objectives in their vicinity are attacked. Levie, 1 The Code of International Armed Conflict 217-218; Bothe, Partsch & Solf 300-301.

immediate entry by their own or allied forces.[113] A city or town behind enemy lines is, by definition, neither undefended nor open, and military targets therein may be destroyed by bombardment.[114] An agreed demilitarized zone is also exempt from bombardment.[115]

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.[116] 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.[117] 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.[118] The distinctive medical emblem, a red cross or red crescent, is to be clearly displayed on medical establishments and units in order to identify them as entitled to protected status.[119] Any object recognized as being a medical facility may not be attacked whether or not marked with a protective symbol.[120]

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113. HR, art. 25; Hague IX, art. 1; clarified in GP I, art. 59. Solf views article 59 as a "clear declaration of well-established customary international law." Solf, Protection of Civilians, paragraph 8.1.2, note 15 (p. 404), at 135. *See also* Green 97-8, 147-49. *But see* Robertson, *in* Ronzitti, at 161-171, who regards this provision of Hague IX as "moribund" and inappropriate for naval forces. He argues that the test should be whether the city or town, or a portion thereof, is a legitimate military objective. FM 27-10 gives the following conditions that should be fulfilled for a place to be considered undefended:

> (1) Armed forces and all other combatants, as well as mobile weapons and mobile military equipment, must have been evacuated, or otherwise neutralized;
>
> (2) no hostile use shall be made of fixed military installations or establishments;
>
> (3) no acts of warfare shall be committed by the authorities or by the population; and
>
> (4) no activities in support of military operations shall be undertaken.
>
> The presence in the place, of medical units, wounded and sick, and police forces retained for the sole purpose of maintaining law and order does not change the character of such an undefended place.

FM 27-10, para. 39b (Ch. 1, 15 July 1976).

114. Bothe, Partsch & Solf 382.

115. The United States considers this to be customary law. Matheson, Remarks, paragraph 8.1, note 2 (p. 401), at 427. Standards for the creation of demilitarized zones may be found *in* GP I, art. 60. *See also* Green 96-7.

116. HR, art. 27; Hague IX, art. 5; GWS, arts. 19 & 35; GWS-Sea, art. 23; GC, arts. 18 & 21; GP I, art. 12; GP II, art. 11.

117. GWS, art. 19; GC, art. 18; GP I, art. 12(4).

118. HR, art. 27; Hague IX, art. 5; GWS, art. 21; GWS-Sea, art. 34; GC, art. 19; GP I, art. 13, GP II, art. 11.

119. *See* paragraph 11.9.1, The Red Cross and Red Crescent (p. 496).

120. *See* paragraph 11.9.7 (p. 499).

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.[121]

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.[122] It is the

121. GWS, art. 23; GC, arts. 14-15. Annexes to each of these conventions provide sample agreements relating to the establishment of these zones. On 13 June 1982, the British and Argentine authorities, at the suggestion of the ICRC representative on scene in the Falklands, agreed to the establishment of a neutralized zone in the center of Stanley, comprising the Anglican Cathedral and a clearly defined 5 acre area around it. This zone was, however, not used as the surrender was accepted at 2100 (local) 14 June 1982. U.N. Doc. S/15215, 14 June 1982; HMSO, The Falklands Campaign: A Digest of Debates in the House of Commons 2 April to 15 June 1982, at 340-47 (1982); London Times, 14 June 1982, at 1; London Times, 15 June 1982, at 1 & 8; Junod, Protection of the Victims of Armed Conflict Falkland-Malvinas Islands 1982, at 33-34. Similarly, a neutralized zone was established at sea in the Falkland (Malvinas) Conflict by the parties to permit hospital ships to hold position to facilitate the exchange of wounded and sick British and Argentine personnel. That zone, referred to as the "Red Cross Box," is discussed *in* Junod, *id.* at 26. For a discussion of the differences among hospital, safety and neutralized zones, *see* Pictet, Vol. 1, at 206.

122. HR, art. 27; Hague IX, art. 5; GP I, art. 53(a); Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954, 249 U.N.T.S. 216, [hereinafter 1954 Hague Convention], art. 4. While the United States is not a Party to the 1954 Hague Convention, it considers it to reflect customary law. U.S. and other Coalition forces followed the Convention throughout the Persian Gulf War. Indeed, Coalition forces continued to accord protection to Iraqi cultural property even when Iraqi forces unlawfully used such property to shield military targets from attack. *See* Title V Report, App. O, at O-2 & O-8. For a comprehensive commentary on the 1954 Hague Convention *see* Toman, The Protection of Cultural Property in the Event of Armed Conflict (1996).

General Eisenhower, as Supreme Allied Commander in Europe preparing to invade Europe, reminded his forces to comply with this customary rule in the following memorandum:

> To Bernard Law Montgomery, May 26, 1944
> Omar Nelson Bradley
> Bertram Home Ramsey, and
> Trafford Leigh-Mallory
>
> *Secret* [Since declassified]
>
> Subject: Preservation of Historical Monuments
>
> 1. Shortly we will be fighting our way across the Continent of Europe in battles designed to preserve our civilization. Inevitably, in the path of our advance will be found historical monuments and cultural centers which symbolize to the world all that we are fighting to preserve.

(continued...)

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.[123] (See paragraph 11.9.)

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.[124] Conversely, installations containing such

122.(...continued)

2. It is the responsibility of every commander to protect and respect these symbols whenever possible.

3. In some circumstances the success of the military operation may be prejudiced in our reluctance to destroy these revered objects. Then, as at Cassino, where the enemy relied on our emotional attachments to shield his defense, the lives of our men are paramount. So, where military necessity dictates, commanders may order the required action even though it involves destruction of some honored site.

4. But there are many circumstances in which damage and destruction are not necessary and cannot be justified. In such cases, through the exercise of restraint and discipline, commanders will preserve centers and objects of historical and cultural significance. Civil Affairs Staffs at higher echelons will advise commanders of the locations of historical monuments of this type, both in advance of the front lines and in occupied areas. This information, together with the necessary instructions, will be passed down through command channels to all echelons.

The Papers of Dwight David Eisenhower: The War Years: II, at 1890-91 (Chandler & Ambrose, eds. 1970). *See also* Schaffer, Wings of Judgment: American Bombing in World War II, at 50 (1985); Hapgood, Monte Cassino 158-59 (1984) (*quoting* a 29 December 1943 message from General Eisenhower to "all commanders" to the same effect, Historical Research Center, Maxwell Air Force Base, AL, File 622.610.2, Folder 2, 1944-45); and Blumenson, United States Army in World War II: The Mediterranean Theater of Operations: Salerno to Cassino 397-399 (1969) (*quoting* Combined Chiefs of Staff messages of 10 and 19 June 1943 to Eisenhower on this effect and some of the actions taken thereon).

Development of rules for the protection of cultural property is described *in* Verri, The Condition of Cultural Property in Armed Conflicts, 1985 Int'l Rev. Red Cross 67 (antiquity to the Napoleonic Wars) and 127 (1850s to World War II). *See also*, Green 44, 145-46.

123. Hague IX, art. 5. There is, however, no requirement to observe these signs or any others indicating inviolability with respect to buildings that are known to be used for military purposes.

124. *Compare* GP I, art. 56, which, for nations bound thereby, provides a much higher standard of protection for this limited class of objects, as well as nuclear electrical generating stations. For example, even if a dam or dike is a military objective, art. 56 prohibits attacking it if the attack may cause flooding and consequent severe losses among the civilian population. Art. 56 subjects attacks on military objectives in the vicinity of dams and dikes to the same high standard. (The special protection can be lost under the limited circumstances described in art. 56(2).) Green 149-50. Reasons why art. 56 is militarily unacceptable to the United States appear in remarks of U.S.

(continued...)

dangerous forces that are used by belligerents to shield or support military activities are not so protected.[125]

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 lest the bombarding force or the success of its mission be placed in jeopardy.[126]

124.(...continued)
Department of State Legal Advisor Sofaer in Sixth Annual American Red Cross—Washington College of Law Conference, paragraph 8.1, note 2 (p. 401), at 468-9. They include the protection given under art. 56 to "modern integrated power grids, where it is impossible to say that electricity from a particular plant goes to a particular customer" and to nuclear power plants "used to produce plutonium for nuclear weapons purposes." *See* paragraph 11.9.2 (p. 497) and Figure 11-1i (p. 505) for the protective signs associated with these objects. The United States does not, of course, consider the provisions of art. 56 to be customary law. Matheson, Remarks, paragraph 8.1, note 2 (p. 401), at 427.

125. Attacks on such installations are, of course, subject to the rule of proportionality described in paragraph 8.1.2.1 (p. 404). GC, art. 28; GP I, art. 51(7); Solf, Protection of Civilians, paragraph 8.1.2, note 15 (p. 404) at 134. The practice of nations has previously indicated great restraint in the attacks of dams and dikes, the breach of which would cause such severe civilian losses. Thus, Solf is of the view that art. 56 "differs little from customary international law." *See*, however, the U.K. destruction of the Ruhr dams during WW II, described *in* V Churchill, Second World War (1954), at 63. For an example of U.S. application of this principle in the Vietnam Conflict *see* President Nixon's news conference of 27 July 1972, paragraph 8.1.2, note 14 (p. 404).

126. *See* paragraph 11.2, Protected Status (p. 481). Warnings are relevant to the protection of the civilian population (so the civilians will have an opportunity to seek safety) and need not be given when they are unlikely to be affected by the attack.

The requirement of warning is longstanding and derives from both Hague Regulations (art. 26) and Hague Convention IX (art. 6). Green 101, 148, 168 & 183. During World War II, practice was lax on warnings because of the heavily defended nature of the targets attacked as well as attempts to conceal targets. More recently, increased emphasis has been placed on the desirability and necessity of prior warnings even to military personnel. For example, on 19 October 1987 Iranian naval personnel were warned of the impending attack by U.S. naval forces on the Rashadat Platform in the Persian Gulf (in response to the attack on the U.S.-flag tanker SS SEA ISLE CITY four days earlier in Kuwaiti territorial waters) and allowed to depart before the attack commenced. Presidential Letter to Congress, 20 Oct. 1987, 23 Weekly Comp. Pres. Docs., 1206 (1987). Similar advance warning was given in the 18 April 1988 attacks on the Sassan and Sirri gas/oil separation platforms (in response to the near-destruction of USS SAMUEL B. ROBERTS (FFG-58) on 14 April 1988 by an Iranian mine in a minefield laid across a neutral shipping channel). Presidential Letter to Congress, 19 Apr. 1988, 24 Weekly Comp. Pres. Docs., 25 Apr. 1988, at 493. *See also* Perkins, The Surface View: Operation Praying Mantis, U.S. Naval Inst. Proc., May 1989, at 68 & 69. Similarly, during the Persian Gulf War Coalition forces frequently dropped leaflets alerting Iraqi ground forces of impending attacks and encouraging them to surrender. Title V Report, at 0-618. Nevertheless, the practice of nations recognizes that warnings need not always be given.

This same requirement is included as a "precaution in attack" in GP I, art. 57(2)(c), which the United States supports as customary law. Matheson, Remarks, paragraph 8.1, note 2 (p. 401) at 427.

8.6 LAND WARFARE.

The guidance in this paragraph provides an overview of the basic principles of law governing conflict on land. For a comprehensive treatment of the law of armed conflict applicable to land warfare see FMFM 0-25 "Department of the Army Field Manual FM 27-10, The Law of Land Warfare."

8.6.1 Targeting in Land Warfare. Only combatants and other military objectives may be attacked (see paragraph 8.1.1). Noncombatants and civilian objects may not be objects of attack. Incidental injury to noncombatants and collateral damage to civilian objects incurred during an attack upon a legitimate military objective must not be excessive in relation to the military advantage to be achieved by the attack (see paragraph 8.1.2.1). When circumstances permit, advance warning should be given of attacks that might endanger noncombatants in the vicinity (see paragraph 11.2).

8.6.2 Special Protection. Under the law of land warfare, certain persons, places and objects enjoy special protection against attack. Protection is, of necessity, dependent upon recognition of protected status and special signs and symbols are employed for that purpose (see paragraph 11.9). Failure to display protective signs and symbols does not render an otherwise protected person, place or object a legitimate target if that status is otherwise apparent (see paragraph 11.9.6).[127] However, protected persons participating directly in hostilities lose their protected status and may be attacked while so employed. Similarly, misuse of protected places and objects for military purposes renders them subject to legitimate attack during the period of misuse.

8.6.2.1 Protected Persons. Protected persons include the wounded, sick, and shipwrecked (see paragraph 11.4), certain parachutists[128] (see paragraph 11.6), and prisoners of war (see paragraph 11.7). Civilians and other noncombatants, such as medical personnel and chaplains (see paragraph 11.5), and interned persons (see paragraph 11.8) also enjoy protected status.

8.6.2.2 Protected Places and Objects. Protected places include undefended cities and towns and agreed demilitarized zones (see paragraph 8.5.1.3), and agreed special hospital zones and neutralized zones (see paragraph 8.5.1.5). Protected objects include historic monuments and structures, works of art, medical facilities and religious, cultural, and charitable buildings and monuments (see paragraph 8.5.1.6).

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127. This cite to paragraph 11.9.6 is in error. Correct cite is paragraph 11.9.7.

128. Parachutists descending from disabled aircraft are protected. Airborne troops, *etc.*, parachuting into combat are not. *See* paragraph 11.6, note 41 (p. 489).

8.6.2.3. The Environment. A discussion of environmental considerations during armed conflict is contained in paragraph 8.1.3.[129] The use of herbicidal agents is addressed in paragraph 10.3.3.

129. *See also* ICRC Compiled Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict, appended hereto as Annex A8-1 (p. 430).

ANNEX 8A-1

INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC) COMPILED

GUIDELINES FOR MILITARY MANUALS AND INSTRUCTIONS ON THE PROTECTION OF THE ENVIRONMENT IN TIMES OF ARMED CONFLICT

I. PRELIMINARY

(1) The present Guidelines are drawn from existing international legal obligations and from State practice concerning the protection of the environment against the effects of armed conflict. They have been compiled to promote an active interest in, and concern for, the protection of the environment within the armed forces of all States.

(2) Domestic legislation and other measures taken at the national level are essential means of ensuring that international law protecting the environment in times of armed conflict is indeed put into practice.

(3) To the extent that the Guidelines are the expression of international customary law or of treaty law binding a particular State, they must be included in military manuals and instructions on the laws of war. Where they reflect national policy, it is suggested that they be included in such documents.

II. GENERAL PRINCIPLES OF INTERNATIONAL LAW

(4) In addition to the specific rules set out below, the general principles of international law applicable in armed conflict—such as the principle of distinction and the principle of proportionality—provide protection to the environment. In particular, only military objectives may be attacked and no methods or means of warfare which cause excessive damage shall be employed. Precautions shall be taken in military operations as required by international law.

G.P.I Arts. 35, 48, 52 and 57

(5) International environmental agreements and relevant rules of customary law may continue to be applicable in times of armed conflict to the extent that they are not inconsistent with the applicable law of armed conflict.

Obligations relating to the protection of the environment towards States not party to an armed conflict (*e.g.*, neighbouring States) and in relation to areas beyond the limits of national jurisdiction (*e.g.*, the High Seas) are not affected by the existence of the armed conflict to the extent that they are not inconsistent with the applicable law of armed conflict.

(6) Parties to a non-international armed conflict are encouraged to apply the same rules that provide protection to the environment as those which prevail in international armed conflict and, accordingly, States are urged to incorporate such rules in their military manuals and instructions on the laws of war in a way that does not discriminate on the basis of how the conflict is characterized.

(7) In cases not covered by rules of international agreements, the environment remains under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

H.IV preamble, G.P.I Art. 1.2, G.P.II preamble

III. SPECIFIC RULES ON THE PROTECTION OF THE ENVIRONMENT

(8) Destruction of the environment not justified by military necessity violates international humanitarian law. Under certain circumstances, such destruction is punishable as a grave breach of international humanitarian law.

H.IV.R Art. 23(g), G.IV Arts. 53 and 147, G.P.I Arts. 35.3 and 55

(9) The general prohibition to destroy civilian objects, unless such destruction is justified by military necessity, also protects the environment.

H. IV. R Art. 23 (g) , G. IV Art. 53, G. P. I Art. 52, G. P. I I Art. 14

In particular, States should take all measures required by international law to avoid:

(a) making forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives;

CW.P.Ili

(b) attacks on objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas or drinking water installations, if carried out for the purpose of denying such objects to the civilian population;

G.P.I Art. 54, G.P.II Art. 14

(c) attacks on works or installations containing dangerous forces, namely dams, dikes and nuclear electrical generating stations, even where they are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population and as long as such works or installations are entitled to special protection under Protocol I additional to the Geneva Conventions;

G.P.I Art. 56, G.P.II Art. 15

(d) attacks on historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples.

H.CP, G.P.I Art. 53, G.P.II Art. 16

(10) The indiscriminate laying of landmines is prohibited. The location of all pre-planned minefields must be recorded. Any unrecorded laying of remotely delivered non-self-neutralizing landmines is prohibited. Special rules limit the emplacement and use of naval mines.

G.P.I Arts. 51.4 and 51.5, CW.P.II Art. 3, H.VIII

(11) Care shall be taken in warfare to protect and preserve the natural environment. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment and thereby prejudice the health or survival of the population.

G.P.I Arts. 35.3 and 55

(12) The military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State party is prohibited. The term "environmental modification techniques" refers to any technique for changing—through the deliberate manipulation of natural processes—the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space.

ENMOD Arts. I and II

(13) Attacks against the natural environment by way of reprisals are prohibited for States party to Protocol I additional to the Geneva Conventions.

G.P.I Art. 55.2

(14) States are urged to enter into further agreements providing additional protection to the natural environment in times of armed conflict.

G.P.1 Art. 56.6

(15) Works or installations containing dangerous forces, and cultural property shall be clearly marked and identified, in accordance with applicable international rules. Parties to an armed conflict are encouraged to mark and identify also works or installations where hazardous activities are being carried out, as well as sites which are essential to human health or the environment.

e.g., G.P.I Art. 56.7, H.CP. Art. 6

IV.IMPLEMENTATION AND DISSEMINATION

(16) States shall respect and ensure respect for the obligations under international law applicable in armed conflict, including the rules providing protection for the environment in times of armed conflict.

G.IV Art. 1, G.P.I Art. 1.1

(17) States shall disseminate these rules and make them known as widely as possible in their respective countries and include them in their programs of military and civil instruction.

H.IV.R Art. 1, G.IV Art. 144, G.P.I Art. 83, G.P.II Art. 19

(18) In the study, development, acquisition or adoption of a new weapon, means or method of warfare, States are under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by applicable rules of international law, including those providing protection to the environment in times of armed conflict.

G.P.I Art. 36

(19) In the event of armed conflict, parties to such a conflict are encouraged to facilitate and protect the work of impartial organizations contributing to prevent or repair damage to the environment, pursuant to special agreements between the parties concerned or, as the case may be, the permission granted by one of them. Such work should be performed with due regard to the security interests of the parties concerned.

e.g., G.IV Art. 63.2, G.P.I Arts. 61-67

(20) In the event of breaches of rules of international humanitarian law protecting the environment, measures shall be taken to stop any such violation and to prevent further breaches. Military commanders are required to prevent and, where necessary, to suppress and to report to competent authorities breaches of these rules. In serious cases, offenders shall be brought to justice.

G.IV Arts. 146 and 147, G.P.I Arts. 86 and 87

SOURCES OF INTERNATIONAL OBLIGATIONS CONCERNING THE PROTECTION OF THE ENVIRONMENT IN TIMES OF ARMED CONFLICT

1. General principles of law and international customary law

2. International conventions

Main international treaties with rules on the protection of the environment in times of armed conflict:

Hague Convention (IV) respecting the Laws and Customs of War on Land, of 1907 (H.IV), and Regulations Respecting the Laws and Customs of War on Land (H.IV.R)

Hague Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines, of 1907 (H. VIII)

Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 1949 (GC.IV)

Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, of 1954 (H.CP)

Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques, of 1976 (ENMOD)

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 1977 (G.P.I)

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 1977 (G.P.II)

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, of 1980 (CW), with:

- Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (CW.P.II)

- Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (CW.P.III)

Source: U.N. Doc. A/49/323, Annex (1994)

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.[1] 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.[2] This rule of law is expressed in the concept that the employment of weapons, material, and

1. DOD Instruction 5500.15, Subj: Review of Legality of Weapons Under International Law, and DOD Directive 5000.1, Subj: Defense Acquisition, mandate that all weapons newly developed or purchased by the U.S. armed forces be reviewed for consistency with international law. These reviews are carried out by the Judge Advocate General of the Service concerned before the engineering development stage of the acquisition process, and before the initial contract for production is let. A similar rule of international law is imposed, for the first time, on the nations party to GP I by art. 36. *See* Robertson, Modern Technology and the Law of Armed Conflict, 362 at 367-68, *in* Robertson. *See also* Green 273-74. For further information *see* DOD Regulation 5000.2-R, Subj: Mandatory Procedures for Major Defense Acquisition Programs and Major Automated Information Systems, and SECNAVINST 5000.2B, Subj: Implementation of Mandatory Procedures for Major and Non-Major Defense Acquisition Programs and Major and Non-Major Information Technology Acquisition Programs. *See also* Meyrowitz, The Function of the Laws of War in Peacetime, 1986 Int'l Rev. Red Cross 71, 78-81; and paragraph 5.4.2, note 34 (p. 303), regarding the U.S. decision not to seek ratification of GP I.

Non-lethal weapon systems also require legal review. DOD Directive 3000.3, Subj: Policy for Non-Lethal Weapons, para. E6b. Non-lethal weapons are defined as "[w]eapons that are explicitly designed and primarily employed so as to incapacitate personnel or material, while minimizing fatalities, permanent injury to personnel, and undesired damage to property and to the environment." *Id.*, para. C. Non-lethal weapons are not intended to take the place of conventional (lethal) weapons and their availability does not limit a commander's inherent authority and obligation to use all necessary means available and take all appropriate action in self-defense. *Id.*, para. D4. *See also* paragraph 4.3.2.2 (p. 263).

2. HR, art. 22; *cf.* Lieber Code, art. 30. HR, art. 22, which refers to weapons and methods of warfare, is merely an affirmation that the means of warfare are restricted by rules of conventional (treaty) and customary international law. Although immediately directed to the conduct of land warfare, the principle embodied in HR, art. 22 is applicable equally to the conduct of naval warfare. Art. 22 is viewed by the United States as declarative of customary international law, (General Counsel, Department of Defense letter of 22 Sept. 1972, *reprinted in* 67 Am. J. Int'l L. 122 (1973)). HR, art. 22 is confirmed in GP I, art. 35(1). The United States supports art. 35(1) of GP I as a statement of customary law. The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 Am. U. J. Int'l L. & Policy 424 (1987) (remarks of U.S. Department of State Deputy Legal Adviser Matheson). *See also* paragraph 8.1, notes 1 & 2 (p. 401).

methods of warfare that are designed to cause superfluous injury or unnecessary suffering is prohibited.[3] A corollary concept is that weapons which by their nature are incapable of being directed specifically against military objectives, and therefore that put noncombatants at equivalent risk, are forbidden due to their indiscriminate effect.[4] A few weapons, such as poisoned projectiles, are unlawful, no matter how employed.[5] Others may be rendered unlawful by alteration, such as by coating ammunition with a poison. Still others may be unlawfully employed, such as by 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. (See Chapter 11—Noncombatant Persons.)

Of particular interest to naval officers are law of armed conflict rules pertaining to naval mines, land mines, torpedoes, cluster and fragmentation weapons, delayed action devices, incendiary weapons, directed energy devices and over-the-horizon weapons systems. Each of these weapons or systems will be assessed in terms of its potential for causing unnecessary suffering and superfluous injury or indiscriminate effect.[6]

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 small arms ammunition intended to cause superfluous injury or unnecessary suffering fall into this category.[7] Similarly, using materials that are

3. HR, art. 23(e), forbids belligerents "to employ arms, projectiles, or material calculated to cause unnecessary suffering." These rules are confirmed in GP I, art. 35(2), and are viewed by the United States as declaratory of customary international law. General Counsel letter and Matheson remarks, preceding note.

4. This customary rule is codified in GP I, arts. 51(4)(b) and 51(5). *See* Green at 151-52; Fleck at 111-14.

5. Lieber Code, arts, 16 & 70; Declaration of Brussels, art. 13(a); 1880 Oxford Manual, art. 8(a); 1913 Oxford Manual of Naval War, art. 16(1). This customary rule was codified *in* HR, art. 23(a), to which the United States is a party. With regard to their use in reprisal, *see* paragraph 6.2.3.3, note 52 (p. 341). *See also* Green, What One Can Do In Conflict - Then and Now, *in* International Humanitarian Law: Challenges for the Next Ten Years 269-95 (Delissens & Tanja eds., 1991).

6. Non-lethal weapons are not addressed in this edition of NWP 1-14M but will be included in follow-on versions. For a discussion of non-lethal weapons *see* Non-Lethal Weapons: Emerging Requirements for Security Strategy, Report Prepared by The Institute for Foreign Policy Analysis (1996). *See also* note 1 (p. 437).

7. The 1899 Hague Declaration IV Respecting the Prohibition of the Use of Bullets which Expand or Flatten Easily in the Human Body, The Hague, 29 July 1899, *reprinted in* Schindler & Toman at 103 [hereinafter 1899 Hague Declaration], prohibits the use in international

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armed conflict of "bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pieced with incisions." The United States is not a party to this treaty, but has taken the position that the United States will adhere to its terms in conventional military operations to the extent that its application is consistent with the object and purpose of HR, art. 23(e) (which prohibits employment of "arms, projectiles, or material calculated to cause unnecessary suffering.") *See*, Army JAG Memo DAJA/IO of 16 Feb 93, Legal Review of USSOCOM Special Operations Offensive Handgun (concluding use of hollow-tip or similar expanding ammunition by special operations force personnel across the spectrum of conflict is lawful); Army JAG Memo DAJA/IA of 12 Oct 90, Sniper Use of Open-Tip Ammunition (concluding 7.62mm "open-tip" MatchKing Ammunition bullet may lawfully be employed in peacetime or wartime missions of the Army), *reprinted in* The Army Lawyer, Feb 91, at 86; Army JAG Memo DAJA-IO (27-1a) of 13 May 1996, Fabrique Nationale 5.7 x 28mm Weapon System (concluding that the JAG Memo DAJA-IO (27-1a) of 13 May 1996, Fabrique Nationale 5.7 x 28mm Weapon System (concluding that the Fabrique Nationale P90 and its 5.7 x 28mm SS190 projectile do not produce wounds that cause superfluous injury). In essense, the foregoing Army JAG opinions express the view that the rule against hollow-point or expanding bullets is not to be applied mechanically; *e.g.*, bullets designed with a hollow point for increased accuracy are not prohibited.

Legal analysis of small arms ammunition has also focused on increased accuracy and reduced probability of over penetration which, aside from having obvious military advantages, also reduce the likelihood of incidental injury to noncombatants. Finally, the Army JAG opinions conclude that the prohibition contained in the 1899 Hague Declaration "is of minimal to no value, inasmuch as virtually all full metal jacketed military rifle bullets employed since 1899 with pointed ogival "spitzer" tip shape have a tendency to fragment on impact . . . leading to wounds not dissimilar to those condemned by the 1899 Hague Declaration. . . . The true test remains whether or not a bullet causes superfluous injury. . ."

Use of expanding ammunition by units involved in full-time operations against terrorists is not constrained by the law of armed conflict. Navy JAG ltr of 22 January 1992, Legal Review of the Use of Expanding Ammunition by Marine Corps Units (concluding use of 9mm hollow-point ammunition in peacetime counterterrorist and special security missions is lawful); Army JAG Memo DAJA-IA 1985/7026 of 23 Sep 85, Use of Expanding Ammunition by U.S. Military Forces in Counterterrorist Incidents (concluding such use is lawful); Air Force JAG Memo HQ USAF/JAI of 22 Aug 1997, Legal Review of Security Police Use of 9mm Expanding, Hollow Point Bullets (PHOENIX RAVEN Program) (concluding that such use constitutes a peacetime law enforcement function and is not unlawful).

There is no rule of conventional or customary international law that would prohibit the use of shotguns in armed conflict. DA Pam 27-161-2 at 45, Cutshaw, Ammunition, *in* 1 International Military and Defense Encyclopedia (Dupuy ed., 1993) at 127 notes that:

> Shotguns are especially useful in jungle warfare, where ranges of engagement seldom exceed 50 meters (165 ft). Indeed, they were widely used by U.S. forces in Vietnam.

Contra see Oeter, Methods and Means of Combat *in* Fleck at 122 who agrues that:

> It is prohibited to use bullets which expand or flatten easily in the human body (*e.g.*, dum-dum bullets) (Declaration Concerning Expanding Bullets of 1899). This applies also to the use of shotguns, since shot causes similar suffering unjustified from the military point of view. . . .

But see Parks, Joint Service Combat Shotgun Program, *in* The Army Lawyer (DA Pam 27-50-299), Oct. 1997, who concludes, *inter alia*, that:

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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.[8] Use of such materials as incidental components in ammunition, e.g., as wadding or packing, is not prohibited. Use of .50 caliber weapons against individual enemy combatants does not constitute a violation of this proscription against unnecessary suffering or superfluous injury.[9]

9.1.2 Indiscriminate Effect. Weapons that are incapable of being controlled (i.e., directed at a military target) are forbidden as being indiscriminate in their effect.[10] 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.[11] 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 balloon-borne bombs, such as those released

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> Lead-and-antimony buckshot does not "expand or flatten easily," and therefore violates neither the 1899 Hague Delcaration nor the criteria for legality previously articulated in opinions of the Judge Advocate General, United States Army.
>
> The combat shotgun and its lead-and-antimony buckshot (or shot) ammunition are consistent with the law of war obligations of the United States.

8. Protocol I (Protocol on Non-Detectable Fragments) of the 1980 Conventional Weapons Convention (*see* paragraph 5.4.2 and note 36 thereto (p. 304)) provides, in its entirety, that:

> It is prohibited to use any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays.

See also Lieber Code, art. 16; Fenrick, New Developments in the Law Concerning the Use of Conventional Weapons in Armed Conflict, 19 Can. Y.B. Int'l L. 229, 242 (1981); Roach, Certain Conventional Weapons Convention: Arms Control or Humanitarian Law? 105 Mil. L. Rev. 3, 69-72 (1984); and Schmidt, The Conventional Weapons Convention: Implications for the American Soldier, 24 A.F.L. Rev. 279, 308-12 (1984).

9. The persistent myth that .50 caliber weapons may not be lawfully employed against enemy personnel is thought to have its origins in a Vietnam War era rule of engagment predicated upon conserving .50 caliber ammunition. *See, e.g.*, Smith, Rifle Expands Shooting Range of Leathernecks, Jacksonville Daily News, Sept. 12, 1993 at p. D1 (perpetuating the erroneous notion that .50 caliber ammuntion may not lawfully be directed against individual enemy soldiers).

10. GP I, art. 51(4)(b). *See also* Fleck at 118-20. Military targets are defined in paragraph 8.1.1 (p. 402). The rule stated in this sentence does not prohibit naval or land mines *per se*. Naval mines and land mines are discussed in paragraphs 9.2 (p. 441) and 9.3 (p. 448), respectively.

11. *See* paragraph 8.1.2.1 (p. 404) for a discussion of this aspect of collateral damage. *Compare* Lieber Code, art. 15.

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.[12]

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.[13] 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.[14] The purpose of the Hague rules is to ensure, to the extent practicable, the safety of innocent shipping. These rules require 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.[15] 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.[16]

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12. Bothe, Partsch & Solf 305; ICRC, Commentary (GP I) 621. The balloon-borne bombs are described *in* Mikesh, Japan's World War II Balloon Bomb Attacks on North America, Smithsonian Annals of Flight No. 9 (1973); Webber, The Silent Siege: Japanese Attacks Against North America in World War II (1984); Prioli, The Fu-Go Project, American Heritage, April-May 1982, at 89-92. The same assertion of illegality might also be said of an aborted American plan to drop bats armed with tiny incendiary bombs on Japan. Feist, Bats Away, American Heritage, April-May 1982, at 93-94; Lewis, Bats Out of Hell, Soldier of Fortune, Nov. 1987, at 80-81, 112. The legality of these weapons does not appear to have been previously addressed. *See* paragraph 9.1, note 1 (p. 437).

13. *See generally*, Fleck 442-58; Green 168-69.

14. For a discussion of the background of Hague VIII *see* Fleck at 442.

15. 36 Stat. 2332; T.S. No. 541; 1 Bevans 669; DA Pam 27-161-2; Navy Supplement to Selected International Agreements, AFP 110-20, p. 3-10. For an excellent analysis of the Hague rules on mine warfare, *see* Levie, Mine Warfare at Sea 23-63 (1992). *See also* Clingan, Submarine Mines in International Law, 351, *in* Robertson.

16. *Nicaragua Military Activities Case*, 1986 I.C.J. 14, 111-12, 128-29, 147-48; 25 Int'l Leg. Mat'ls 1023, 1072, 1080-81, 1090 (paras. 213-15, 253-54, 292(7) (14-1)) (1986). *See also* dissenting opinion of Judge Schwebel, paras. 234-40, 25 Int'l Leg. Mat'ls 1205-07 (1986), and NWP 27-4 (Rev. B), Mining Operations, at 1-3 to 1-6.

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.[17] 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 pre-set parameters (if any) are satisfied. Controlled mines have no destructive capability until affirmatively activated by some form of arming order (whereupon they become armed mines).[18]

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.[19] Because the right of innocent passage can be suspended only temporarily,[20] armed mines must be removed or rendered harmless as soon as the security threat that prompted their emplacement has terminated. Armed mines may not be emplaced in international straits or archipelagic sea lanes during peacetime.[21] Emplacement of controlled mines in a nation's own archipelagic waters or territorial sea is not subject to such notification or removal requirements.[22]

Naval mines may not be emplaced in internal waters, territorial seas, or archipelagic waters of another nation in peacetime without that nation's

17. Hartmann, Weapons That Wait 103-05 (1991); Levie, note 15, at 97-133.

18. Joint Pub. 1-02, at 35 & 89; Hartmann, note 17, at 8 & 9. NWP 27-4 (Rev. B), note 16, at 1-3 to 1-8.

19. *Corfu Channel Case (merits)*, 1949 I.C.J. 22, U.S. Naval War College, International Law Documents 1948-49, at 133 (based on "general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States").

20. Suspension of innocent passage is discussed in paragraph 2.3.2.3 (p. 119).

21. Commenting on the *Corfu Channel Case*, Fitzmaurice states that the I.C.J. decision authorizes the sweeping of mines unlawfully laid in an international strait if it is accomplished as "part of and incidental to the passage." Fitzmaurice, The Law and Procedures on the International Court of Justice: General Principles and Substantive Law, 28 Brit. Y.B. Int'l L. (1950) 1, 30-31.

22. Controlled mines pose no hazard to navigation until they are armed. Neutral territorial seas are discussed in paragraph 7.3.4 (p. 375).

consent.[23] Controlled mines may, however, be emplaced in international waters (i.e., beyond the territorial sea) if 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.[24] Should armed mines be emplaced in international waters under such circumstances, prior notification of their location must be provided. A nation emplacing armed mines in international waters during peacetime must maintain an 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 mines must be made as soon as military exigencies permit.[25]

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23. To do so would likely be regarded as a major violation of that nation's territorial integrity. The national and international reactions to the covert mining of the Gulf of Suez and the Red Sea in mid-1984, allegedly by a Libyan merchant vessel, is examined *in* Truver, Mines of August: An International Whodunit, U.S. Naval Inst. Proc., May 1985, at 94; The Gulf of Suez Mining Crisis: Terrorism at Sea, *id.*, Aug. 1985, at 10-11.

24. Thorpe, Mine Warfare at Sea—Some Legal Aspects of the Future, 18 Ocean Dev. & Int'l L. 255, 267 (1987). *See also* Clingan, paragraph 9.2, note 15 (p. 441). Self-defense is discussed in paragraph 4.3.2 (p. 259).

25. Hague VIII, art. 3; *Corfu Channel Case*, 1949 I.C.J. 22. Such notice was not given in the covert mining of the Red Sea in 1984, or in the Persian Gulf and the Gulf of Oman in 1987. In the *Nicaragua Military Activities Case*, 1986 I.C.J. 46-48, 112, 147-48, 25 Int'l Leg. Mat'ls 1039-40, 1072, 1090 (paras. 76-80, 215, 292(8)) (1986), the Court decided (14-1) that the United States, "by failing to make known the existence and location of the mines laid by it [in 1984] . . . has acted in breach of its obligations under customary international law." Judge Schwebel dissented with the view that the mining of Nicaraguan ports was lawful in respect to Nicaragua, but unlawful in regard to third nations because of the failure to give official public notice "about the fact that mines would be or had been laid in specified waters." 1986 I.C.J. 378-80, 25 Int'l Leg. Mat'ls 1205-06 (paras. 234-240). Judge Jennings, while dissenting on other grounds, joined in subparagraph 292(8) of the Court's opinion by applying the logic of the Corfu Channel judgment, in which two British destroyers hit moored contact mines laid in Albanian waters, that the obligation to notify the existence of mines "for the benefit of shipping in general" is an obligation

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2. Mines may not be emplaced by belligerents in neutral waters.[26]

3. Anchored mines must become harmless as soon as they have broken their moorings.[27]

4. Unanchored mines not otherwise affixed or imbedded in the bottom must become harmless within an hour after loss of control over them.[28]

5. The location of minefields must be carefully recorded to ensure accurate notification and facilitate subsequent removal and/or deactivation.[29]

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> [B]ased, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States (1949 I.C.J. 22).

Judge Jennings applied this law *a fortiori* to the situation where a nation lays mines in another nation's ports or port approaches and fails to notify shipping. Judge Jennings noted that "even supposing the United States were acting in legitimate self-defence, failure to notify shipping would still make the mine-laying unlawful." 1986 I.C.J. 536, 25 Int'l Leg. Mat'ls 1284 (1986).

The San Remo Manual, para. 83, provides that:

> The laying of armed mines or the arming of pre-laid mines must be notified unless the mines can only be detonated against vessels which are military objectives.

The commentary on para. 83 *in* Doswald-Beck, at 172, indicates that the decision to omit the qualifying phrase "as soon as military exigencies permit" of Hague VIII, art. 3, was premised on the notion that it was "not justified in the light of the general requirement imposed upon belligerents to limit as much as possible the effect of hostilities." Notwithstanding the San Remo Manual's modern origins, it is considered that the Hague VIII, art. 3 approach continues to represent the more realistic possibility and probability of compliance. Hence adherence to the term "as soon as military exigencies permit" in paragraph 9.2.3, subparagraph 1.

26. Hague XIII, arts. 1-2. This rule was not always observed by the belligerents in the Iran-Iraq war. Ships hit mines in the national waters of Kuwait and Oman, both of whom claimed neutral status. N.Y. Times, 20 July 1987, at A6, & 14 Aug. 1987, at A9. *See also* San Remo Manual, para. 86.

27. Hague VIII, art. 1(2); Hartmann, paragraph 9.2.1, note 17 (p. 442), at 8 & 84. *Compare* San Remo Manual, para. 81. U.S. naval mines are all constructed with self-neutralizing devices. For example, the mines laid in Haiphong Harbor in 1972 were set to neutralize within six months. They exploded, thereby giving visible reminders of the existence of the minefield and the need for reseeding of the minefield. On the other hand, the anchored contact mines laid by Iran in the Tanker War (1984-88) frequently broke loose but lacking the requisite built-in mechanism to render them harmless, continued to pose a hazard to shipping.

28. *See* Hague VIII, art. 1(1). Hague VIII does not include the phrase "not otherwise affixed or imbedded in the bottom" in its art. 1(1) prescription that "unanchored automatic contact mines" must become harmless within an hour after control over them is lost. However, mines so "affixed or imbedded in the bottom" do not constitute a hazard to general navigation in the sense that free-floating mines do. The San Remo Manual, para. 82, employs the term "free-floating" rather than "unanchored" in this context to the same result. *See* Doswald-Beck, at 171.

29. *See* Hague VIII, art. 5; San Remo Manual, paras. 84 & 90. At the close of hostilities, each nation should remove the mines it has laid. However, each nation must remove the mines in its own waters, irrespective of the entity which laid them. The nations party to the conflict may also make other arrangements for mine clearance.

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The Armistice of 1918 called upon Germany to indicate the location of naval mines. Art. XXIV of the German Armistice of 11 Nov. 1918, U.S. Naval War College, International Law Documents, 1918, at 65 ("the Allies and the United States of America shall have the right to sweep up all minefields and to destroy obstructions laid by Germany outside German territorial waters, the positions of which are to be indicated,"); art. IV, sec. 2, of the Austro-Hungarian Armistice of 3 Nov. 1918, *id.*, at 19; art. IV, sec. 2, of the appendix to the Austro-Hungarian Armistice, *id.*, at 27-28. Art. XIII of the Hungarian Armistice of 13 Nov. 1918, *id.*, at 33 (mines in the Danube); arts. II and III of Turkish Armistice of 30 Oct. 1918, *id.*, at 160. The burden of removal was, however, only pressed upon those nations according to the geographical relationship or proximity of their respective territories to mines or fields of mines which they had sown. Thus, Turkey was to assist in sweeping or to remove, as might be required, all mines and other obstructions in Turkish waters. *Id.* at 160. Hungary undertook to stop the passage of floating mines sown in the Danube upstream from the Hungarian and Austrian frontier and to remove all those actually in Hungarian waters. *Id.*, at 33. According to art. 193 of the German peace treaty of Versailles of 28 June 1919, Germany undertook to sweep the mines in specified areas in the easterly portion of the North Sea, to keep those areas free from mines, and to sweep and keep free from mines such areas in the Baltic as might ultimately be notified by the Principal Allied and Associated Powers. 3 U.S.T. 3410. U.S. naval forces undertook successfully the removal of mines which they had laid in the North Sea. For an illuminating account of the accomplishment of this task, *see* Davis, The Removal of the North Sea Mine Barrage, 38 National Geographic, Feb. 1920, at 103.

According to the armistice treaties between France and Germany, of 22 June 1940, (art. IX, 34 Am. J. Int'l L., Official Documents, at 173, 175) and France and Italy, of 24 June 1940, (arts. XII and XIII, *id.*, at 178, 181) the French Government undertook not only to report to the enemy the location of mines which it had set out, but also, if so required by the enemy, to clear away such mines. 3 Hyde 1946-47.

After World War II, some of the Allies (United States, France, United Kingdom and U.S.S.R.) agreed on an International Organization for the Clearance of Mines in European Waters. Agreement on Mine Clearance in European Waters, London, 22 Nov. 1945, 3 Bevans 1322. Other stipulations regarding assistance in mine clearance at the close of World War II may be found in the Instrument of Surrender of Italy, 29 Sep. 1943, 61 Stat. 2742, 2743-44, T.I.A.S. 1604; the Treaty of Peace with Italy, Paris, 10 Feb. 1947, 61 Stat. 1245, 1396, T.I.A.S. 1648, 49 U.N.T.S. 3, 153, and the Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority by the Allied Powers of 5 June 1945, 60 Stat. 1648, 1654, T.I.A.S. 1520, 68 U.N.T.S. 189, 198. On mine clearance in German waters and the North Sea, *see* 3 Roskill, The War at Sea, pt. II, at 307 & 308 (1961). On mine clearance in the Pacific, *see* Morison, Supplement and General Index, 15 History of United States Naval Operations In World War II, at 13-14 (1962).

The Protocol to the Agreement on Ending the War and Restoring Peace in Viet Nam Concerning the Removal, Permanent Deactivation, or Destruction of Mines in the Territorial Waters, Ports, Harbors, and Waterways of the Democratic Republic of Viet Nam, 27 Jan. 1973, 24 U.S.T. 133, T.I.A.S. 7542, required the United States to clear all mines it had so placed by rendering them harmless through removal, permanent deactivation, or destruction. This mine clearance operation is described *in* McCauley, Operation End Sweep, U.S. Naval Inst. Proc., March 1974, at 18.

The United States and Egypt, through an exchange of notes dated 13 and 25 April 1974, agreed on an arrangement for U.S. assistance in clearing mines and unexploded ordnance from the Suez Canal, 25 U.S.T. 1474, T.I.A.S. 7882. This agreement was amended by an exchange of notes dated 6 July, 20 and 21 August, and 25 September 1975, 26 U.S.T. 2517, T.I.A.S. 8169. The Suez Canal clearance operation is described in Boyd, Nimrod Spar: Clearing the Suez Canal, U.S. Naval Inst. Proc., Feb 1976, at 18.

(continued...)

6. Naval mines may be employed to channelize neutral shipping, but not in a manner to deny transit passage of international straits[30] or archipelagic sea lanes passage of archipelagic waters by such shipping.[31]

7. Naval mines may not be emplaced off the coasts and ports of the enemy with the sole objective of intercepting commercial shipping,[32] but may otherwise be employed in the strategic blockade of enemy ports, coasts, and waterways.[33]

29.(...continued)
On the other hand, as a matter of self-defense, the United States, United Kingdom, Belgium, France, Italy and the Netherlands conducted extended mine countermeasures in international and neutral waters of the Persian Gulf (the latter with the neutral nations' consent) from July 1987 in order to remove the interference with freedom of navigation caused by the contact mines unlawfully laid by Iran. *See* notes 26 and 27 (p. 444); Friedman, World Naval Developments 1987, U.S. Naval Inst. Proc., May 1988, at 219-20; and Friedman, Western European and NATO Navies, U.S. Naval Inst. Proc., March 1988, at 34 & 39. Following the cessation of hostilities in the 1991 Persian Gulf War, the U.N. Security Council demanded that "Iraq provide all information and assistance in identifying Iraqi mines . . . in Kuwait, in areas of Iraq . . . and in the adjacent waters." U.N.S.C.R. 686 (2 March 1991) S/RES/686 (1991) *reported in* 30 Int'l Leg. Mat'ls 568, 569 (1991).

30. *See* note 25 (p. 443). Transit passage is discussed in paragraph 2.3.3 (p. 121).

31. Archipelagic sea lanes passage is discussed in paragraph 2.3.4.1 (p. 127).

32. Hague VIII, art. 2. *See also* Ronzitti, at 143; Levie, paragraph 9.2, note 15 (p. 441), at 32-3. France and Germany filed reservations on this article upon ratification.

33. 1909 Declaration of London Concerning the Laws of Naval Warfare, London, 26 February 1909, *reprinted in* Schindler & Toman at 755 [hereinafter Declaration of London], arts. 1, 4 & 5. *See* paragraph 7.7 (p. 390) for a detailed discussion of blockade.

At one time, a blockade established exclusively by minefields was considered illegal because international law required that naval forces be present for the maintenance of an effective blockade. It has also been claimed that a blockade established by mines alone violates art. 2 of Hague VIII which prohibits the use of mines with the sole object of intercepting commercial shipping, although historically the primary purpose of a blockade has been just that.

The international acceptance of the U.S. mine blockade of Haiphong Harbor during the Vietnam conflict has established a legal precedent for blockades enforced by mines alone. (*But see* Levie, paragraph 9.2, note 15 (p. 441) at 144-47, 156-57.) In that instance, it was argued effectively that all *significant* requirements of blockade were established:

- First, by virtue of its status as a belligerent in the Vietnam conflict, the United States was empowered to employ blockade as a mode of coercion.

- The blockade was established pursuant to the authorization of the President of the United States, an appropriate authority from the perspective of customary international law and the only legal authority in terms of U.S. practice.

- Notice to all governments and shipping interests was assured by the President's public announcement via a letter from the U.S. representative to the President of the U.N. Security Council, notices to mariners, and by the U.S.-South Vietnamese undertaking to warn all vessels approaching the mined areas.

- An interval of three daylight periods was allowed as a grace period during which all vessels in North Vietnamese waters might exit without danger.

(continued...)

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.[34]

33.(...continued)

- The blockade was strictly limited to Vietnamese-claimed territorial seas, did not extend to preclude access to neutral ports or coasts, and did not interfere in any way with neutral shipping on the high seas.

- Impartial application of that blockade to all States was inherent in the very nature of the operation, because mines are passive instrumentalities generally incapable of discerning the nationality of the targeted platform.

- The blockade did not result in starvation of the civilian population or denial of essential foodstuffs, clothing and tonics (intended for children under 15, expectant mothers and maternity cases) or medical and hospital stores since there were overland, air and domestic sources of supply.

- And, finally, the blockade was effective, operating to close the ports of North Vietnam and contributing to a reduction in the flow of war materials from North Vietnam to South Vietnam to approximately 10 percent of its prior level.

The operation was therefore conducted in a manner compatible with traditional requirements of blockade and was permissible when judged by those criteria. Swayze, Traditional Principles of Blockade in Recent Practice: United States Mining of Internal and Territorial Waters of North Vietnam, 29 JAG J. 163 (1977). *Compare* Levie, paragraph 9.2, note 15 (p. 441) at 144-47, 153-55 who correctly notes that at the time of the mining of North Vietnamese ports in 1972, U.S. spokesmen carefully refrained from characterizing that operation as a "blockade." The 1986 I.C.J. opinion on the merits of the Nicaragua Miliary Activities Case did not address the legality of the use of mines as the instrumentality for enforcement of a blockade.

It appears that classic arguments to the effect that only naval forces can satisfy the legal requirements of blockade can be successfully refuted by recitation of the myriad resources now available to the modern naval commander. Current warfare techniques which involve the use of radar, sonar, aircraft, and satellite information gathering appear clearly to provide for an effective blockade capability without the need to keep naval forces in the vicinity for the purpose of intercepting would-be blockade runners. Moreover, modern weapons systems now generally available to blockaded nations, including high performance aircraft, over-the-horizon missiles, and long-range artillery, render on-scene surface enforcement difficult, if not impossible, to maintain. The San Remo Manual does not include a requirement for an on-scene surface warship in a lawful blockade. Para. 97 provides that:

> A blockade may be enforced and maintained by a combination of legitimate methods and means of warfare . . . .

The commentary on this provision *in* Doswald-Beck, at 178, states:

> This paragraph [97] does not require the enforcement of a blockade by surface ships only. It does, however, prohibit the enforcement solely by weapons systems, such as mines, unless they are employed in such a manner as not to endanger legitimate sea-going commerce.

34. The San Remo Manual, para. 80, provides:

(continued...)

9.3 LAND MINES

Land mines are munitions placed on, under, or near the ground or other surface area and designed to be detonated or exploded by the passage of time; the presence, proximity or contact of a person or vehicle; or upon command. As with all weapons, to be lawful, land mines must be directed at military objectives. The controlled nature of command detonated land mines provides effective target discrimination. In the case of non-command detonated land mines, however, there exists potential for indiscriminate injury to noncombatants.[35] Accordingly, special care must be taken when employing land mines to ensure noncombatants are not indiscriminately injured.[36] International law requires

34.(...continued)

> Mines may only be used for legitimate military purposes including the denial of sea areas to the enemy.

The commentary on that para. in Doswald-Beck (at 169) states:

> The obligation to use mines for legitimate military purposes logically flows from rules of international humanitarian law. Participants [in the San Remo Manual drafting process] deemed reaffirmation of the rule in specific relation to naval mining to be useful in order to establish unequivocally that indiscriminate mining practices on the high seas are unlawful.

See also Thorpe, paragraph 9.2.3, note 24 (p. 443), at 265. In the Persian Gulf war on 21 September 1987, the Iranian naval vessel IRAN AJR was captured by U.S. forces in the act of laying mines in the international shipping lanes without notice. Presidential letter of 24 Sep. 1987, 23 Weekly Comp. Pres. Docs. 1066 (1987); Elliott, The Navy in 1987, U.S. Naval Inst. Proc., May 1988, at 146-47. *See also* the U.S. response to Iranian mining that severely damaged USS SAMUEL B. ROBERTS on 14 April 1988 discussed at paragraph 8.5.2, note 126 (p. 427).

35. *See* Arms Project of Human Rights Watch/Physicians for Human Rights, Landmines: A Deadly Legacy (1993).

36. The 1980 Conventional Weapons Convention (*see* paragraph 5.4.2 and note 36 thereto (pp. 299 & 304) is an umbrella treaty which originally had three supporting protocols - nondetectable fragments (Protocol I), mines and booby-traps (Protocol II), and incendiary weapons (Protocol III). The United States became a party to the Convention, and to Protocols I and II, on 24 September 1995. Protocol II, entitled Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, is the first treaty to specifically address the employment of land mines.

The law of land mine warfare and the implications of Protocol II are discussed *in* Fenrick, paragraph 9.1.1, note 8 (p. 440), at 242-45; Schmidt, *id.*, at 312-22, 329-38; Carnahan, The Law of Land Mine Warfare: Protocol II to the United Nations Convention on Certain Conventional Weapons, 105 Mil. L. Rev. 73 (1984); Greenspan, The Modern Law of Land Warfare, 362-63 (1959); Rogers, A Commentary on the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, 26 Mil. L. & L. of War Rev. 185 (1987); Green at 132-34, 186 and 337; and Levie, Prohibitions and Restrictions on the Use of Conventional Weapons, 68 St. Johns L. Rev. 643 (1994), *reprinted in* Schmitt & Green at chap. XVIII.

The Law of land mine warfare is undergoing substantial evolutionary change. At the First Review Conference on the Conventional Weapons Convention (September 1995-May 1996), Protocol II

(continued...)

36.(...continued)
was substantially amended to restrict the use and transfer of mines lacking self-destruction/self-deactivation capability. (Protocol II, as amended, is *reprinted in* 35 Int'l Leg. Mat'ls 1206 (1996)).

On 7 January 1997, President Clinton transmitted Protocol II (as amended) to the Senate for its advice and consent to ratification. Letter of Transmittal, 7 Jan. 1997, *see* Annex A9-1 (p. 455). The amended Protocol accomplishes six principal purposes:

a. It expands the application of Protocol II to internal armed conflicts (art. 1(2));

b. It requires that all remotely delivered anti-personnel land mines be equipped with self-destruction devices and backup self-deactivation devices (art. 6(3));

c. It mandates that all nonremotely delivered anti-personnel land mines not so equipped be used only within controlled and marked perimeters (art. 5(2)(a));

d. It requires all anti-personnel land mines to contain the equivalent of 8 grams of iron to ensure detectability (art. 4; Technical Annex, para. 2);

e. It imposes upon the party laying the mines responsibility to ensure against their irresponsible and indiscriminate use (art. 14) and to clear, remove or destroy them without delay upon the cessation of active hostilities, or to maintain them within a marked and monitored area (art. 10); and

f. It provides means for more effective compliance (art. 14).

See also the article-by-article analysis of Protocol II, as amended, *in* the State Department Letter of Submittal of 7 December 1996 *attached to* Senate Treaty Doc. 105-1; Matheson, Current Developments, The Revision of the Mines Protocol, 91 Am. J. Int'l L. 158 (1997).

Claymore mines employed in a command-detonated mode do not fall within the proscriptions of Protocol II, as amended. Letter of Submittal, *id.*, at 7. Claymore mines may be employed in a trip-wired mode provided they are located in the immediate vicinity of the military unit that emplaced them and that the area of their emplacement is monitored to ensure effective exclusion of civilians. *Id.*, at 23.

The 7 January 1997 Letter of Transmittal also renewed President Clinton's commitment to seek international acceptance of a total prohibition of anti-personnel land mines. President Clinton had first announced his commitment to that end on 16 May 1996. (That announcement also established a unilateral commitment to immediately suspend use of all non-self-destructing anti-personnel land mines and to destroy existing stocks of such weapons by 1 January 2000. Anti-personnel land mines currently in place in Korea were excepted from this policy pronouncement.) White House Press Release, May 16, 1996. This was followed by a resolution in the U.N. General Assembly on 10 December 1996 urging all nations to pursue a total ban on all anti-personnel land mines. U.N.G.A. Res. 51/45S (10 Dec. 1996).

On 17 January 1997, President Clinton announced that the United States had unilaterally established a permanent ban on the "export and transfer of anti-personnel land mines. (White House Press Release, Jan. 17, 1997).

On 20 January 1997, at the opening of the 1997 session of the Conference on Disarmament in Geneva, the United States "began to work with the other [61] member nations to initiate negotiations on a comprehensive, global agreement to ban [anti-personnel land mines]." (White House Press Release, May 16, 1997.) On 18 August 1997, President Clinton announced that the United States would participate in the Canadian-led effort (the so-called "Ottawa process") outside of the Conference on Disarmament process to achieve a total ban on anti-personnel land

(continued...)

that, to the extent possible, belligerents record the location of all minefields in order to facilitate their removal upon the cessation of hostilities.[37] It is the

36.(...continued)
mines, but would propose provisions to preserve the right to continue their use in Korea and in conjunction with the emplacement of anti-tank/anti-vehicle mines. (White House Press Release, Aug. 18, 1997; Graham, U.S. to Join Canadian-Led Talks on Land Mine Ban, With Reservations, Wash. Post, 19 Aug. 1997 at 1/4.) U.S. efforts to amend the draft "Ottawa process" treaty were unsuccessful. Bonner, Land Mine Treaty Takes Final Form Over U.S. Dissent, N.Y. Times, 18 Sep. 1997 at 1. Accordingly, President Clinton announced on 17 September 1997 that the U.S. would not sign the total ban treaty. Wilson, Clinton Declines to Sign Treaty to Ban Anti-Personnel Land Mines, Army Times, 6 Oct. 1997 at 32.

The Senior Military Leadership of the United States has cautioned that unilateral U.S. adherence to a total abolition of all anti-personnel land mines "will unnecessarily endanger U.S. military forces and significantly restrict the ability to conduct combat operations successfully." Letter to the Chairman, Senate Armed Services Committee, from the Joint Chiefs/Unified Combatant Commanders, of 14 July 1997. That letter, written in response to proposed legislation which would permanently restrict the use of funds for new deployment of anti-personnel land mines commencing in the year 2000, included the following observations:

> We share the world's concern about the growing humanitarian problem related to the indiscriminate and irresponsible use of a lawful weapon, non-self-destructing APL [anti-personnel land mines]. In fact, we have banned non self-destructing ("dumb") APL, except for Korea. We support the President's APL policy which has started us on the road to ending our reliance on any anti-personnel land mines. Having taken a great step toward the elimination of APL, we must, at this time, retain the use of self-destructing APL in order to minimize the risk to US soldiers and marines in combat. However, we are ready to ban all APL when the major producers and suppliers ban theirs or when an alternative is available.
>
> Land mines are a "combat multiplier" for US land forces, especially since the dramatic reduction of the force structure. Self-destructing land mines greatly enhance the ability to shape the battlefield, protect unit flanks, and maximize the effects of other weapons systems. Self-destructing land mines are particularly important to the protection of early entry and light forces, which must be prepared to fight outnumbered during the initial stages of a deployment.
>
> . . . .
>
> We request that you critically review the new APL legislation and take appropriate action to ensure maximum protection for our soldiers and marines who carry out national security policy at grave personal risk. Until the United States has a capable replacement for self-destructing APL, maximum flexibility and warfighting capability for American combat commanders must be preserved. The lives of our sons and daughters should be given the highest priority when deciding whether or not to ban unilaterally the use of self-destructing APL.

37. Art. 7 and the Technical Annex of the original text of Protocol II of the Conventional Weapons Convention required nations that are parties thereto to record the location of all pre-planned minefields and to endeavor to ensure the recording of the location of all other minefields. This is the practice of many States; however, it is uncertain whether this burden will prove too onerous to be practicable for some States. *See* Levie, The Code of International Armed Conflict, 146-47 (1986) in which he notes that it remains to be seen whether States will be able to comply with the Convention's detailed recording requirements. Art. 9 and the Technical Annex of Protocol II, as amended, continues this obligation to record the location of emplaced mines.

practice of the United States to record the location of minefields in all circumstances.

9.4 TORPEDOES

Torpedoes which do not become harmless when they have missed their mark constitute a danger to innocent shipping and are therefore unlawful.[38] All U.S. Navy torpedoes are designed to sink to the bottom and become harmless upon completion of their propulsion run.[39]

9.5 CLUSTER AND FRAGMENTATION WEAPONS

Cluster and fragmentation weapons are projectiles, bombs, missiles, submunitions, and grenades that are designed to fragment 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 damage and incidental injury is not excessive in relation to the legitimate military advantage sought.[40]

9.6 BOOBY TRAPS AND OTHER DELAYED ACTION DEVICES

Booby traps and other delayed action devices are not unlawful, provided they are not designed to cause unnecessary suffering or employed in an indiscriminate manner.[41] Devices that are designed to simulate items likely to attract and injure noncombatants (e.g., toys and trinkets) are prohibited.[42] Attaching booby traps to protected persons or objects, such as the wounded and sick, dead bodies, or medical facilities and supplies, is similarly prohibited.[43] Belligerents are required

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38. Hague VIII, art. 1(3). *See also* Fleck, at 458. The San Remo Manual, para. 79, provides:

> It is prohibited to use torpedoes which do not sink or otherwise become harmless when they have completed their run.

39. Submarine Torpedo Defense Manual (U), NWP 72-1 (Rev. A), vol. I, Mark 48 Torpedo, at 2-9 (1987).

40. *Compare* paragraph 8.1.2.1 (p. 404). Attempts to restrict further their use have failed. *See* Schmidt, paragraph 9.1.1, note 8 (p. 440), at 294 & n. 96.

41. Protocol II to the Conventional Weapons Conventions (*see* paragraph 9.3, note 36 (p. 448)), as its title (Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices) states, also regulates booby-traps and other delayed actions devices. However, such devices are not prohibited when directed against enemy military personnel.

42. *Id.* Art. 6 of the original text of Protocol II (art. 7 of the amended text) specifically prohibits the use of such devices.

43. Fenrick, paragraph 9.1.1, note 8 (p. 440), at 245; Carnahan, paragraph 9.3, note 36 (p. 448), at 89-93; Schmidt, paragraph 9.1.1, note 8 (p. 440), at 323-29; Rogers, paragraph 9.3, note 36 (p. 448), at 198-200; and Green 132-33.

to record the location of booby traps and other delayed action devices in the same manner as land mines (see paragraph 9.3).

9.7 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 does not cause incidental injury or collateral damage that is excessive in light of the military advantage anticipated by the attack.[44]

9.8 DIRECTED ENERGY DEVICES

Directed energy devices, which include laser, high-powered microwave, and particle beam devices, are not proscribed by the law of armed conflict. Lasers may

44. The Conventional Weapons Convention Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), *reprinted in* 19 Int'l Leg. Mat'ls 1534 (1980), AFP 110-20, at 3-182 [hereinafter Protocol III] applies to incendiary weapons the general principle, reaffirmed in GP I, that civilians should not be subject to attack. It places severe restrictions on attacks on military objectives located within a concentration of civilians and particularly by prohibiting completely any attacks by aerially delivered "fire bombs," such as the thermite bombs used in World War II, and napalm on such objectives. Green, 133-34; Parks, The Protocol on Incendiary Weapons, 279 Int'l Rev. Red Cross 535 (1990); Levie, paragraph 9.3, note 36 (p. 448).

Protocol III extends the traditional rule of proportionality to prohibit the use of ground-to-ground incendiaries against any military objective unless it is clearly separated from a concentration of civilians and all feasible precautions are taken to limit the incendiary effects to the military objective and to minimize collateral damage. It also specifically prohibits incendiary attacks on forests or other plant cover except when those conceal, cover or camouflage combatants or other military objectives, or are themselves military objectives.

Incendiary weapons, as defined in art. 1 of Protocol III, do not include munitions which have incidental incendiary effects, such as illuminants, tracers, signalling flares, *etc.*, or munitions designed to combine an incendiary effect with penetration, blast or fragmenting effects, such as armor-piercing rounds, *etc.*, which are designed for use against tanks, aircraft, *etc.*, and are not intended to cause burn injuries to personnel.

The United States did not ratify Protocol III in 1995 when it became party to the Conventional Weapons Convention and Protocols I and II. *See* paragraph 5.4.2 and note 36 thereto (pp. 299 & 304)). However, President Clinton included a request for advice and consent of the Senate to ratification of Protocol III (subject to a reservation) in his Transmittal Letter of 7 January 1997. Paragraph 9.3, note 36 (p. 448) and Annex A9-1 (p. 455). The proposed reservation would allow employment of incendiary weapons, whether air-to-ground or ground-to-ground, against military objectives located in concentrations of civilians where it is judged that such use would cause fewer casualties and less collateral damage than alternate weapons. (For example, incendiary weapons are the only means which can effectively destroy "biological weapons facilities which require high heat to eliminate bio-toxins." Resort to high explosive munitions against such targets "would risk widespread release of dangerous contaminants with potentially disasterous consequences for the civilian population." State Department Letter of Submittal (see paragraph 9.3, note 36 (p. 448)) at 39.

be employed as a rangefinder or for target acquisition, with the possibility of ancillary injury to enemy personnel, or directly against combatants as an antipersonnel weapon.[45] Their use does not violate the prohibition against the infliction of unnecessary suffering.[46]

45. This statement is no longer completely accurate with respect to antipersonnel weapons. There have been various efforts over the years to prohibit the use of lasers as antipersonnel weapons, *e.g.*, at the 1974–1977 Diplomatic Conference in Geneva which produced GP I and II, the 1978-1980 United Nations Conference on Certain Conventional Weapons, also in Geneva, and by Sweden and Switzerland at the 1986 International Conference of the Red Cross. *See* Robertson, paragraph 9.1, note 1 (p. 437), at 374–77. These efforts culminated in developments at the First Review Conference on the Conventional Weapons Convention (September 1995-May 1996) which, in addition to adopting substantial changes to Protocol II (Mines, Booby-Traps, *etc.*) (*see* paragraph 9.3, note 36 (p. 448)), also adopted a new protocol on lasers. Entitled Protocol on Blinding Laser Weapons (Protocol IV), *reprinted in* 35 Int'l Leg. Mat'ls 1218 (1996) [hereinafter Protocol IV], Protocol IV prohibits the use or transfer of laser weapons specifically designed to cause blindness to unenhanced vision (*e.g.*, to the naked eye or to the eye with corrective eyesight devices). While blinding as an incidental effect of "legitimate military employment" of range finding or target acquisition lasers is not prohibited by Protocol IV (*see* art. 3), parties thereto are obligated "to take all feasible precautions" to avoid such injuries. *Id.*, art. 2.

President Clinton transmitted Protocol IV to the Senate for its advice and consent to ratification as part of his Transmittal Letter of 7 January 1997. *See* paragraph 9.3, note 36 (p. 448) and Annex A9-1 (p. 455). *See also* the article-by-article analysis of Protocol IV *in* the State Department Letter of Submittal of 7 December 1996 *attached to* Senate Treaty Doc. 105-1. For a comprehensive discussion of Protocol IV *see* Army JAG Memo, DAJA-IO (27-1a) of 20 December 1996, *Travaux Préparatoires* and Legal Analysis of Blinding Laser Weapons Protocol, *reprinted in* The Army Lawyer, Jun 1997, at 33. *See also* Carnahan, Unnecessary Suffering, The Red Cross and Tactical Laser Weapons, 18 Loy. L.A. Int'l & Comp. L.J. 705 (1996); Carnahan & Robertson, Current Development: The Protocol on "Blinding Laser Weapons": A New Direction for International Humanitarian Law, 90 Am. J. Int'l L. 484 (1996).

On 17 January 1997, the Secretary of Defense promulgated the following guidance on blinding lasers:

> The Department of Defense prohibits the use of lasers specifically designed to cause permanent blindness and supports negotiations to prohibit the use of such weapons. However, laser systems are absolutely vital to our modern military. Among other things, they are currently used for detection, targeting, range-finding, communications and target destruction. They provide a critical technological edge to US forces and allow our forces to fight, win and survive on an increasingly lethal battlefield. In addition, lasers provide significant humanitarian benefits. They allow weapon systems to be increasingly discriminate, thereby reducing collateral damage to civilian lives and property. The Department of Defense recognizes that accidental or incidental eye injuries may occur on the battlefield as the result of the use of lasers not specifically designed to cause permanent blindness. Therefore, we continue to strive, through training and doctrine, to minimize these injuries.

SECDEF Memo U00888/97, DOD Policy on Blinding Lasers, 17 Jan 1997.

46. In reviewing the legality of lasers as antipersonnel weapons, the Judge Advocate General of the Army in 1988 noted that the most severe effects on personnel produced by lasers were blindness, temporary and permanent, and severe skin burns. He observed that neither blindness nor permanent disablement on the battlefield are unique to laser weapons and concluded that their use "would not cause unnecessary suffering" when compared to other wounding mechanisms and

(continued...)

9.9 OVER-THE-HORIZON WEAPONS SYSTEMS

Missiles and projectiles with over-the-horizon or beyond-visual-range capabilities 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.[47]

46.(...continued)
therefore "the use of antipersonnel laser weapons is lawful." Army JAG Memo on Use of Lasers as Antipersonnel Weapons, 29 Sept. 1988, *reprinted in* The Army Lawyer, Nov. 1988 (DA PAM 27-50-191), at p. 3.

47. The legal standards for "effective target discrimination" are set forth in paragraph 9.1.2 (indiscriminate effect) (p. 440). Nations possessing OTH/BVR weapons are not required to use them in lieu of unguided weapons. Parks, Submarine-Launched Cruise Missiles and International Law: A Response, U.S. Naval Inst. Proc., Sept. 1977, at 122-23; O'Connell, The Legality of Naval Cruise Missiles, 66 Am. J. Int'l L. 785, 793 (1972). *Cf.* Digby, Precision-Guided Weapons, Adelphi Paper No. 118 (International Institute for Strategic Studies 1975); Walker, Precision-Guided Weapons, 245 Scientific American, Aug. 1981, at 37-45; 2 O'Connell 1131. *See also* Robertson, paragraph 9.1, note 1 (p. 437), at pp. 371-72.

On 17 May 1987, an Iraqi Mirage F-1 attacked USS STARK (FFG-31) in the Persian Gulf northeast of Bahrain with two Exocet missiles without first identifying the ship as a legitimate target. Apparently through navigational error, the Iraqi pilot thought USS STARK was located within the Iranian-declared war zone of the Persian Gulf, a zone avoided by neutral and other protected shipping. The Iraqi pilot followed standard Iraqi policy and fired at that target believed to be within the Iranian war zone providing the largest radar return. House Armed Services Comm. Report on the Staff Investigation into the Iraqi Attack on the USS *Stark*, 14 June 1907, at 8; Vlahos, The *Stark* Report, U.S. Naval Inst. Proc., May 1988, at 64-67. Iraq accepted responsibility for the erroneous attack. 26 Int'l Leg. Mat'ls 1427-1428 (1987). *See also* paragraph 6.2, note 21 (p. 331).

The "Scud" missiles employed by Iraq during the 1991 Persian Gulf War were the Iraqi "Al Hussein" variant of the Soviet SS-1 "Scud-B" SRBM (Short-Range Ballistic Missile). These missiles, with a range of up to 650km and a 500kg warhead, rely on a simple "strapdown" inertial guidance system. Lacking active radar terminal guidance, Scud-B has a CEP (Circular Error Probable) of approximately 500 yds. Jane's Strategic Weapon Systems, "Iraq: Offensive Weapons" & "USSR: Offensive Weapons," (Lennox ed., 1990); The Illustrated Directory of Modern Soviet Weapons, at 89, (Bonds ed., 1986). Unlike the German V-1 and V-2 rockets of World War II, which lacked on-board sensors and were employed without sufficient external sources of targeting information to ensure a reasonable level of targeting discrimination, the Scud-B is fully capable of being employed lawfully. However, Iraq's indiscriminate Scud-B missile attacks during the 1991 Persian Gulf War, which caused unnecessary destruction of Saudi Arabian and Israeli civilian property, were war crimes in violation of HR, art. 23(g). Title V Report, 0-623.

ANNEX A9-1

105TH CONGRESS 1st Session	SENATE	TREATY DOC 105-1

PROTOCOLS TO THE 1980
CONVENTIONAL WEAPONS CONVENTION

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

PROTOCOLS TO THE 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: THE AMENDED PROTOCOL ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF MINES, BOOBY-TRAPS AND OTHER DEVICES (PROTOCOL II OR THE AMENDED MINES PROTOCOL); THE PROTOCOL ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF INCENDIARY WEAONS (PROTOCOL III OR THE INCENDIARY WEAPONS PROTOCOL); AND THE PROTOCOL ON BLINDING LASER WEAPONS (PROTOCOL IV)

JANUARY 7, 1997.—Protocols were read the first time and, together with the accompanying papers, referred to the Committee on Foreign Relations and ordered to be printed for the use of the Senate

LETTER OF TRANSMITTAL

THE WHITE HOUSE, *January 7, 1997.*

To the Senate of the United States:

I transmit herewith, for the advice and consent of the Senate to ratification, the following Protocols to the 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: the amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II or the amended Mines Protocol); the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III or the Incendiary Weapons Protocol); and the Protocol on Blinding Laser Weapons (Protocol IV). Also transmitted for the information of the Senate is the report of the Department of State with respect to these Protocols, together with article-by-article analyses.

The most important of these Protocols is the amended Mines Protocol. It is an essential step forward in dealing with the problem of anti-personnel landmines (APL) and in minimizing the very severe casualties to civilians that have resulted from their use. It is an important precursor to the total prohibition of these weapons that the United States seeks.

Among other things, the amended Mines Protocol will do the following: (1) expand the scope of the original Protocol to include internal armed conflicts, where most civilian mine casualties have occurred; (2) require that all remotely delivered anti-personnel mines be equipped with self-destruct devices and backup self-deactivation features to ensure that they do not pose a long-term threat to civilians; (3) require that all nonremotely delivered anti-personnel mines that are not equipped with such devices be used only within controlled, marked, and monitored minefields to protect the civilian population in the area; (4) require that all anti-personnel mines be detectable using commonly available technology to make the task of mine clearance easier and safer; (5) require that the party laying mines assume responsibility for them to ensure against their irresponsible and indiscriminate use; and (6) provide more effective means for dealing with compliance problems to ensure that these restrictions are actually observed. These objectives were all endorsed by the Senate in its Resolution of Ratification of the Convention in March 1995.

The amended Mines Protocol was not as strong as we would have preferred. In particular, its provisions on verification and compliance are not as rigorous as we had proposed, and the transition periods allowed for the conversion or

elimination of certain noncompliant mines are longer than we thought necessary. We shall pursue these issues in the regular meetings that the amended Protocol provides for review of its operation.

Nonetheless, I am convinced that this amended Protocol will, if generally adhered to, save many lives and prevent many tragic injuries. It will, as well, help to prepare the ground for the total prohibition of anti-personnel landmines to which the United States is committed. In this regard, I cannot overemphasize how seriously the United States takes the goal of eliminating APL entirely. The carnage and devastation caused by anti-personnel landmines—the hidden killers that murder and maim more than 25,000 people every year—must end.

On May 16, 1996, I launched an international effort to this end. This initiative sets out a concrete path to a global ban on anti-personnel landmines and is one of my top arms control priorities. At the same time, the policy recognizes that the United States had international commitments and responsibilities that must be taken into account in any negotiations on a total ban. As our work on this initiative progresses, we will continue to consult with the Congress.

The second of these Protocols—the Protocol on Incendiary Weapons—is a part of the original Convention but was not sent to the Senate for advice and consent with the other 1980 Protocols in 1994 because of concerns about the acceptability of the Protocol from a military point of view. Incendiary weapons have significant potential military value, particularly with respect to flammable military targets that cannot so readily be destroyed with conventional explosives.

At the same time, these weapons can be misused in a manner that could cause heavy civilian casualties. In particular, the Protocol prohibits the use of air-delivered incendiary weapons against targets located in a city, town, village, or other concentration of civilians, a practice that caused very heavy civilian casualties in past conflicts.

The executive branch has given very careful study to the Incendiaries Protocol and has developed a reservation that would, in our view, make it acceptable from a broader national security perspective. This proposed reservation, the text of which appears in the report of the Department of State, would reserve the right to use incendiaries against military objectives located in concentrations of civilians where it is judged that such use would cause fewer casualties and less collateral damage than alternative weapons.

The third of these Protocols—the new Protocol on Blinding Lasers—prohibits the use or transfer of laser weapons specifically designed to cause permanent blindness to unenhanced vision (that is, to the naked eye or to the eye with corrective devices). The Protocol also requires Parties to take all feasible precautions in the employment of other laser systems to avoid the incidence of such blindness.

These blinding lasers are not needed by our military forces. They are potential weapons of the future, and the United States is committed to preventing their emergence and use. The United States supports the adoption of this new Protocol.

I recommend that the Senate give its early and favorable consideration to these Protocols and give its advice and consent to ratification, subject to the conditions described in the accompanying report of the Department of State. The prompt ratification of the amended Mines Protocol is particularly important, so that the United States can continue its position of leadership in the effort to deal with the humanitarian catastrophe of irresponsible landmine use.

WILLIAM J. CLINTON.

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 effect. 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.[1] In

1. Singh & McWhinney, Nuclear Weapons and Contemporary International Law (1988). In 1994, the United Nations General Assembly passed U.N.G.A. Res. 49/75K (15 Dec. 1994) requesting an advisory opinion of the I.C.J. on the question:

> Is the threat or use of nuclear weapons in any circumstance permitted under international law?

Rejecting the argument of some States, including the United States, that the I.C.J. should, in the exercise of its discretion, decline to issue an opinion "on what is in many respects a political matter," the Court responded to the General Assembly request with an advisory opinion stating that:

> A. There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons (unanimous vote);
>
> B. There is in neither customary nor conventional international law any comprehensive and universal prohibition on the threat or use of nuclear weapons as such (11 to 3 vote);
>
> C. A threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4 of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful (unanimous vote);
>
> D. A threat or use of nuclear weapons should also be compatible with requirements of the international law applicable in armed conflicts, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons (unanimous vote);
>
> E. It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;

(continued...)

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 distinction must be made at all times between combatants and noncombatants to the effect that the latter be spared as much as possible.[2] Given their destructive

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1.(...continued)

However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake (7 to 7 vote with the President's vote breaking the tie);

F. There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control (unanimous vote).

I.C.J. *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, July 8, 1996, *reprinted in* 35 Int'l Leg. Mat'ls 809 (1996). For commentary on the Court's non-binding advisory opinion *see* Matheson, The Opinions of the International Court of Justice and the Use of Nuclear Weapons, 91 Am. J. Int'l L. 417 (1997); Schmitt, The International Court of Justice and the Use of Nuclear Weapons, 7 U.S.A.F.A. J. Leg. Studies 57 (1997), revised and scheduled for *reprint in* Nav. War Coll. Rev., Spring 1998 at 91-116; McNeill, The International Court of Justice Advisory Opinion in the *Nuclear Weapons Cases*—a First Appraisal, 316 I.C.R.C. Rev. 103 (1997); Bekker, International Decisions, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 91 Am. J. Int'l L. 126 (1997).

2. In its advisory opinion of the legality of the threat or use of nuclear weapons (*see* note 1), the International Court of Justice held (Finding D) that the law of armed conflict governs use of nuclear weapons. This was a position advocated by, *inter alia*, the United States. *See generally* Written Statement of the Government of the United States of America, June 20, 1995 (Legality of the Threat or Use of Nuclear Weapons). *Accord* Green, Nuclear Weapons and the Law of Armed Conflict, 17 Denver J. Int'l L. & Policy 1 (1988); Oeter, Methods and Means of Warfare, *in* Fleck, at 141-42. For additional background, *see* NWIP 10-2, para. 613 & n.8; FM 27-10, para. 35; AFP 110-31, para. 6-5; AFP 110-34, para. 6-4; ICRC, Commentary (GP I) 593-96. *Cf.* Reisman, Nuclear Weapons in International Law, 4 N.Y.L. Sch. J. Int'l & Comp. L. 339, 340 (1983) (pointing out the significant difference between what the law now is and what one believes the law should be, and recognizing that the effective decisionmakers in the Cold War environment, the United States and the U.S.S.R., did not act as if they believed the use of nuclear weapons was *per se* illegal). Cold War era constraints on nuclear weapons are described *in* Bunn, U.S. Law of Nuclear Weapons, Nav. War Coll. Rev., July-Aug. 1984, at 46-62.

The rules relevant to the use of weapons established by GP I apply to conventional weapons only and were not intended to have any effect on and do not regulate or prohibit the use of nuclear or other weapons of mass destruction, including chemical and biological weapons. Those questions have been the subject of arms control and disarmament negotiations and agreement. Statements on ratification by Belgium, Italy, and the Netherlands, and by the United Kingdom and the United States on signature to GP I; Roach, Certain Conventional Weapons Convention: Arms Control or Humanitarian Law? 105 Mil. L. Rev. 1, 31-34 n.83 (1984); ICRC, Commentary (GP I) 593-94. *See* paragraph 5.4.2, note 34 (p. 303) regarding the U.S. decision not to seek ratification of GP I.

potential, the decision to authorize employment of nuclear weapons should emanate from the highest level of government. For the United States, that authority resides solely in the President.[3]

10.2.2 Treaty Obligations. Nuclear weapons are regulated by a number of arms control agreements restricting their development, possession, deployment, and use. Some of these agreements (e.g., the 1963 Nuclear Test Ban Treaty) may not apply during time of war.[4]

10.2.2.1 Seabed Arms Control Treaty. This multilateral convention prohibits emplacement of nuclear weapons on the seabed and the ocean floor beyond 12 nautical miles from the baseline from which the territorial sea is measured.[5] 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, provided they are not 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 in earth orbit, installation on the moon and other celestial bodies, and stationing in outer space in any other manner, of nuclear and other weapons of mass destruction. Suborbital missile systems are not included in this prohibition.[6]

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3. Joint Pub. 3-12, Subj: Doctrine for Joint Nuclear Operations, at para. 1a. For a discussion of the U.S. view that nuclear weapons remain important for deterrence, *see* Slocombe, Remarks, *in* National Sec. L. Rept., Vol. 19, No. 2, May 1997.

4. Such treaties permit withdrawal if the supreme interests of a nation are at stake; these treaties include the Seabed Arms Control Treaty (art. VIII) (*see* paragraph 10.2.2.1 and note 5), Outer Space Treaty (art. XIV) (*see* paragraph 10.2.2.2 and note 6), Treaty of Tlatelolco (art. 30.1) and its two Protocols (*see* paragraph 10.2.2.4 and note 8 (p. 462)), Nuclear Test Ban Treaty (art. IV) (*see* paragraph 10.2.2.5 and note 9 (p. 463)), Non-Proliferation Treaty (art. X.1) (*see* paragraph 10.2.2.6 and note 10 (p. 464)), and, of the bilateral nuclear arms control agreements, the ABM Treaty (art. XV.2), the Threshold Test Ban Treaty (art. V.2), and SALT I (art. VIII.3) (*see* paragraph 10.2.2.7 and notes 14, 15 and 17, respectively (p. 465)).

5. 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, Washington, London & Moscow, 11 February 1971, 23 U.S.T. 701, T.I.A.S. 7337, *reprinted in* AFP 110-20, at 4-26 [hereinafter Seabed Arms Control Treaty]. There were 93 parties to the Seabed Arms Control Treaty as of 24 June 1997. Weapons of mass destruction, other than nuclear weapons, are not defined in this or any other arms control treaty. Baselines are described in paragraph 1.3 (p. 3).

6. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Washington, London & Moscow, 27 January 1967, 18 U.S.T. 2410, T.I.A.S. 6347, *reprinted in* AFP 110-20, at 6-30 [hereinafter Outer Space Treaty]. There were 98 parties to the Outer Space Treaty as of 24 June 1997. This

(continued...)

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 or embarking personnel or cargoes in Antarctica are subject to international inspection. Ships operating on and under, and aircraft operating over the high seas within the treaty area are not subject to these prohibitions.[7]

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 non-member nations to visit their ports and airfields or to transit through their territorial sea or airspace.[8] The treaty is not applicable to the means of propulsion 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. France, the Netherlands, the U.K., and the U.S. are parties to Protocol I. For purposes of this treaty, U.S. controlled territory in Latin America 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, cargo, or means of propulsion.

6.(...continued)
treaty also limits the use of the moon and other celestial bodies exclusively to peaceful purposes and expressly prohibits their use for establishing military bases, installations, or fortifications, testing weapons of any kind, or conducting military maneuvers. *See also* paragraphs 2.9.1 and 2.9.2 (p. 149).

7. Antarctic Treaty, Washington, 1 December 1959, 12 U.S.T. 794, T.I.A.S. 4780, 402 U.N.T.S. 71, *reprinted in* AFP 110-20, at 4-21. There were 43 parties to the Antarctic Treaty on 16 July 1997 of which 26 are consultative members under article IX of the treaty. *See* paragraph 2.4.5.2 (p. 135) for information on peacetime operations in the Antarctic region.

8. Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco), Mexico City, 14 February 1967, 634 U.N.T.S. 281, 22 U.S.T. 762, T.I.A.S. 7137, *reprinted in* AFP 110-20, at 4-9. The *travaux préparatoires* and navigational implications of this treaty and its two protocols are fully discussed in paragraph 2.4.6, notes 80 and 81 (p. 136). The United States is also a signatory of, but not yet a party to, Protocols I, II and III of the 1985 South Pacific Nuclear Free Zone Treaty, and Protocols I and II of the 1996 African Nuclear-Weapon-Free Zone Treaty. *See* paragraph 2.4.6, note 82 (p. 137).

Protocol II is an agreement among nuclear-armed nations (China, France, Russia, 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 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.[9] Over 100 nations are party to the treaty, including Russia, the

9. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space, and Under Water, Moscow, 5 August 1963, 14 U.S.T. 1313, T.I.A.S. 5433, 480 U.N.T.S. 43, *reprinted in* AFP 110-20, at 4-3 [hereinafter Nuclear Test Ban Treaty]. There were 116 parties as of 24 June 1997.

The treaty also prohibits "any other nuclear explosion" in the specified areas:

> The phrase "any other nuclear explosion" includes explosions for peaceful purposes. Such explosions are prohibited by the treaty because of the difficulty of differentiating between weapon test explosions and peaceful explosions without additional controls.

Statement of State Department Legal Adviser to Senate Foreign Relations Comm., *reprinted in* 11 Whiteman 793-96.

All bodies of water, including inland waters, are included within the term "under water" (*id.* at 790). The treaty also prohibits nuclear explosions in any other environment if the explosion would cause radioactive debris to be present outside the borders of the nation conducting the explosion. Underground tests which do not cause radioactive debris to be present outside the territorial limits of the nation in which the test is conducted are not prohibited (*id.* at 791).

The treaty does not impose any limitation on the use of nuclear weapons by the parties in armed conflict (*id.* at 793-98).

On 12 December 1995, the U.N. General Assembly resumed its call for a comprehensive nuclear test ban treaty that would embrace all nuclear explosive testing, including underground testing. U.N.G.A. Res. 50/65, Dec. 1995. On 17 September 1996, the U.N. General Assembly adopted U.N.G.A. Res. 50/245, Sep. 1997 and the text of the Comprehensive Nuclear Test Ban Treaty. U.N. Doc. M/50/1027, *reprinted in* 35 Int'l Leg. Mat'ls 1439 (1996). The basic obligation of States in the Comprehensive Nuclear Test Ban Treaty is contained in art. I:

> 1. Each State Party undertakes not to carry out any nuclear test explosion or any other nuclear explosion, and to prohibit and prevent any such nuclear explosion at any place under its jurisdiction or control.
>
> 2. Each State Party undertakes, furthermore, to refrain from causing, encouraging, or in any way participating in the carrying out of any nuclear weapon test explosion or any other nuclear explosion.

The Treaty also establishes an international organization to ensure compliance with its terms, particularly the comprehensive verification procedures which it mandates. The United States and 146 other nations are signatories to the Treaty which is not yet in force. Among the nations that are not signatories are India, Iraq, North Korea and Pakistan. On 22 September 1997, President Clinton submitted the Comprehensive Nuclear Test Ban Treaty to the Senate for its advice and consent to ratification.

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]

10.2.2.7 Bilateral Nuclear Arms Control Agreements. The United States and Russia (as the successor state to the U.S.S.R.) are parties to a number of bilateral agreements designed to either restrain the growth or reduce the number of nuclear warheads and launchers and to reduce the risk of miscalculation that could trigger a nuclear exchange. Among these agreements are the Hotline

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10. Treaty on the Nonproliferation of Nuclear Weapons, Washington, London & Moscow 1 July 1968, 21 U.S.T. 483, T.I.A.S. 6839, 729 U.N.T.S. 161, *reprinted in* AFP 110-20, at 4-5. This treaty is designed to prevent the spread of nuclear weapons; to provide assurances, through international safeguards that the peaceful nuclear activities of nations which have not already developed nuclear weapons will not be diverted to making such weapons; to promote, to the maximum extent consistent with the other purposes of the treaty, the peaceful use of nuclear energy through full cooperation, with the potential benefits of any peaceful application of nuclear explosive technology being made available to non-nuclear parties under appropriate international observation; and to express the determination of the parties that the treaty should lead to further progress in comprehensive arms control and nuclear disarmament measures.

There were 187 nations party to this treaty as of 27 June 1997, including the nuclear-weapons-nations of China, France, Russia, the U.K. and the U.S. Only Brazil, Cuba, Israel, India and Pakistan are non-parties; the latter three of whom either have nuclear weapons or the technology to manufacture them. N.Y. Times, 4 May 1987, at A24. On 3 December 1993, North Korea became the first and only nation to withdraw from the Treaty. Arms Control Reporter, June 1997, at 602.A.11.

By its terms, the Nuclear Non-Proliferation Treaty was to remain in force at least until its 25th anniversary, at which time "a conference shall be convened to decide whether the Treaty shall continue in force indefinitely, or shall be extended for an additional fixed period or periods." Art. X2. That conference, entitled the 1995 Nuclear Non-Proliferation Treaty Review and Extension Conference, convened in New York and on 11 May 1995 formally extended the Treaty "indefinitely". The 1995 Conference also agreed to a set of "Principles and Objectives for Nuclear Nonproliferation and Disarmament." Arms Control Reporter, 1996 Annual Report, at chap. VI A. For a discussion of the Treaty and calls for its indefinite extension *see* Epstein & Szasz, Extention of the Nuclear Non-Proliferation Treaty: A Means of Strengthening the Treaty, 33 Va. J. Int'l L. 735 (1993). For a discussion of forceful counter-proliferation should non-proliferation prove ineffective, *see* Gibson, The International Legal Ramifications of United States Counter-Proliferation Strategy: Problems and Prospects, Newport Paper No. 11, U.S. Nav. War Coll. (1997).

Agreements of 1963 and 1971,[11] the Accidents Measures Agreement of 1971,[12] the 1973 Agreement on Prevention of Nuclear War,[13] the Anti-Ballistic Missile Treaty of 1972 and its Protocol of 1974,[14] the Threshold Test Ban Treaty of 1974,[15] the 1976 Treaty on Peaceful Nuclear Explosions,[16] the SALT Agreements of 1972 and 1977 (SALT I—Interim Agreement has expired; SALT II was never ratified),[17] the INF Treaty of 1988,[18] and the START treaties of

11. Memorandum of Understanding between the United States of America and the Union of Soviet Socialist Republics Regarding the Establishment of a Direct Communications Link, with Annex, Geneva, 20 June 1963, 14 U.S.T. 825, T.I.A.S. 5362, 472 U.N.T.S. 163; Agreement Between the United States of America and the Union of Soviet Socialist Republics on Measures to Improve the USA-USSR Direct Communications Link, with Annex, Washington, 30 September 1971, 22 U.S.T. 1598, T.I.A.S. 7187, 806 U.N.T.S. 402; *id.* as amended 20 March and 29 April 1975, 26 U.S.T. 564, T.I.A.S. 8059. (In a note dated 13 January 1992, the Russian Federation informed the United States that it "... continues to perform the rights and fulfill the obligations following from the international agreements signed by the Union of the Soviet Socialist Republics ..." T.I.F., 1 Jan. 1994, at 258.)

12. Agreement on Measures to Reduce the Risk of Outbreak of Nuclear War Between the United States of America and the Union of Soviet Socialist Republics, Washington, 30 September 1971, 22 U.S.T. 1590, T.I.A.S. 7186, 807 U.N.T.S. 57. On 15 September 1987, the Agreement Between the United States of America and the Union of Soviet Socialist Republics on the Establishment of Nuclear Risk Reduction Centers, and its two Protocols, were signed in Washington and entered into force. Dep't St. Bull., Nov. 1987, at 34; *reprinted in* 27 Int'l Leg. Mat'ls 76 (1988).

13. Agreement Between the United States of America and the Union of Soviet Socialist Republics on the Prevention of Nuclear War, Washington, 22 June 1973, 24 U.S.T. 1478, T.I.A.S. 7654.

14. Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, Moscow, 26 May 1972, 12 U.S.T. 2435, T.I.A.S. 7503 [hereinafter ABM Treaty]; Protocol to the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, Moscow, 3 July 1974, entered into force 24 May 1976, 27 U.S.T. 1645, T.I.A.S. 8276. *See also* paragraph 2.9.3.1, note 131 (p. 153).

15. Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Underground Nuclear Weapon Tests, Moscow, 3 July 1974. The Treaty, and the 1990 Protocol thereto, entered into force on 11 December 1990.

16. Treaty Between the United States of America and the Union of Soviet Socialist Republics on Underground Nuclear Explosions for Peaceful Purposes, Washington, 28 May 1976, Sen. Ex. N, 94th Cong., 2d Sess.; Sen. Ex. Rep. 100-1. The Treaty, and the 1990 Protocol thereto, entered into force on 11 December 1990.

17. SALT I includes the ABM Treaty (*see* note 14 (p. 465)) and the Interim Agreement Between the United States of America and the Union of Soviet Socialist Republics on Certain Measures with respect to the Limitation of Strategic Offensive Arms with associated Protocol, entered into force 3 October 1972, 23 U.S.T. 3462, T.I.A.S. 7504, AFP 110-20 at 4-35. The Interim Agreement expired on 3 October 1977. However, both the United States and the Soviet Union issued parallel statements announcing that they would continue to observe the limitations on strategic buildups which were contained in the agreement. 77 Dep't St. Bull. 642 (1977).

SALT II is formally known as the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Strategic Offensive Arms, signed 18 June 1979, submitted to the Senate for its advice and consent 22 June 1979, and withdrawn from the Senate's

(continued...)

1991 (START I) and 1993 (START II). The START treaties have initiated the process of physical destruction of strategic nuclear warheads and launchers by the U.S., Russia, Ukraine, Belarus and Kazakhstan (the latter four being recognized as successor states to the U.S.S.R. for this purpose).[19]

10.3 CHEMICAL WEAPONS

International law prohibits the use of chemical weapons in armed conflict.[20]

10.3.1 Treaty Obligations. The 1925 Geneva Gas Protocol for the Prohibition of the use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological

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17.(...continued)
calendar in January 1980 at the request of President Carter. In 1977, the Presidents of both countries stated they would do nothing to jeopardize the treaty so long as each abided by it. 77 Dep't St. Bull. 642 (1977).

In 1982, the United States announced that it would not undercut the expired SALT I Interim Agreement and the unratified SALT II Agreement as long as the Soviet Union exercised equal restraint. 1 Public Papers of President Reagan 709 (31 May 1982); ACDA, Documents on Disarmament, 1982, at 332. However, the United States announced in May 1986 that it would henceforth base decisions regarding its strategic force structure on the nature and magnitude of the threat posed by Soviet strategic forces, and not on the standards contained in the expired SALT I Interim Agreement and the unratified SALT II Treaty. Dep't St. Bull., Aug. 1986, at 36-43. Consistent with this policy, the United States ceased technical observance of the SALT II Treaty on 28 November 1986.

18. The Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles (INF Treaty), and associated documents, Washington, 8 December 1987, *reprinted in* 27 Int'l Leg. Mat'ls 84 (1988), entered into force 1 June 1988.

19. *See* Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Reduction and Limitation of Strategic Offensive Arms, 31 July 1991 (START I), and accompanying Protocol between the United States and the Republic of Belarus, the Republic of Kazakhstan, the Russian Federation, and Ukraine, 23 May 1992, S. Treaty Doc. 20, 102d Cong., 1st Sess. (1991); *reprinted in* Dept. of State DISPATCH, Oct. 1991, Vol. 2, Supp. No. 5. The Treaty Between the United States of America and the Russian Federation on Further Reduction and Limitation of Strategic Offensive Arms, 3 January 1993 (START II), to which the Senate provided its advice and consent on 26 January 1996. However, the Russian Duma has not. Accordingly, START II is not in force. For a discussion of START I and START II *see* Bunn & Rhinelander, The Arms Control Obligations of the Former Soviet Union, 33 Va. J. Int'l L. 323 (1993).

In November 1991 Congress authorized establishment of the Cooperative Threat Reduction Program, 22 U.S.C. 5952. Sometimes referred to as the Nunn-Lugar Program, this legislation is design to assist the newly independent states of the former Soviet Union in the safety, security and dismantlement of nuclear, chemical and other weapons (to include strategic nuclear delivery vehicles). Through FY 1996, approximately $1.5 billion was authorized by Congress to fund this effort. *See* Arms Control Rept., 1996 Annual Report at chap. 6.

20. Oeter, Methods and Means of Combat, *in* Fleck at 147-50; Levie, Nuclear, Chemical and Biological Weapons, *in* Robertson at 334-41.

Methods of Warfare ("the 1925 Gas Protocol")[21] is the principal international agreement in force relating to the regulation of chemical weapons in armed conflict. The far more comprehensive 1993 Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (the "1993 Chemical Weapons Convention")[22] will enter into force for those nations party to it in the near future.[23]

10.3.1.1 The 1925 Gas Protocol. The United States is a party to the 1925 Gas Protocol, as are all other NATO nations and all former Warsaw Pact nations. 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[24] 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, restricted the prohibition to the "first use" of such munitions, with parties to the Protocol reserving the right to employ chemical weapons for retaliatory purposes.[25]

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21. Geneva, 17 June 1925, 26 U.S.T. 571, T.I.A.S. 8061, L.N.T.S. 65, *reprinted in* AFP 110-20, at 4-68 and *in* 14 Int'l Leg. Mat'ls 49 (1975), entered into force for the United States on 10 April 1975. There were 145 parties to the 1925 Gas Protocol as of 1 September 1997. The Protocol is discussed at paragraph 10.3.1.1 (p. 467).

22. Paris, 13 January 1993, *reproduced in* 32 Int'l Leg. Mat'ls 800 (1993). The 1993 Chemical Weapons Convention is discussed in paragraph 10.3.1.2 (p. 472).

23. The 1993 Chemical Weapons Convention actually came into force on 29 April 1997. As of 29 October 1997,102 nations had ratified or acceded to the Convention.

24. The operative provisions of the Protocol obligate the contracting nations not to use in war "asphyxiating, poisonous or other gases, and . . . all analogous liquids, materials or devices." *See* the Final Declaration of the Paris Conference on the Prohibition of Chemical Weapons, 11 January 1989, U.N. Doc. A/44/88, 20 Jan. 1989, Annex, *reprinted in* 28 Int'l Leg. Mat'ls 1020 and *in* Arms Control Rep. 704.B.338.2 (1989) and discussed *in* Recent Developments: Arms Control; Declaration of the Paris Chemical Weapons Conference, 30 Harv. Int'l L. J. 495 (1989). For a discussion of the 1925 Gas Protocol *see* Levie, paragraph 10.3, note 20 (p. 466); Oeter, *id.* at 147-50.

25. Forty-nine nations adhering to the Protocol have done so subject to reservations. For all practical purposes the reservations, although sometimes differently worded, may all be assimilated to the following:

> (1) The Protocol is binding only as regard nations which are parties to the Protocol itself (this reservation is somewhat superfluous, as it reiterates something which is already stated in the Protocol's text).
>
> (2) The Protocol ceases to be binding as regards nations whose armed forces, or the armed forces of whose allies, fail to respect the prohibition laid down in the Protocol.

This formulation of the reservation, which restricts the prohibition to first use of chemical weapons, was entered by the following NATO/Warsaw Pact nations: Belgium, Canada, France, the Netherlands, Portugal, Spain, United Kingdom, United States, Bulgaria, Czechoslovakia, Romania and U.S.S.R., and was not objected to by any nation.

(continued...)

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.[26] The United States considers the Protocol to be applicable to lethal and incapacitating agents but not to riot control agents (see paragraph 10.3.2) or herbicidal agents (see paragraph 10.3.3).

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.[27] Lethal chemical agents are those asphyxiating, poisonous, or other

25.(...continued)
The United States ratified the 1925 Gas Protocol subject to the reservation that it would cease to be binding with respect to the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials, or devices, in regard to an enemy nation if such nation or any of its allies fails to respect the prohibitions in the agreement.

26. The Federal Republic of Germany was the only nation which, upon ratification of the Protocol, unilaterally obligated itself not to produce chemical weapons on its territory.

The United States has long been committed (*e.g.*, by Art. IX of the 1972 Biological Weapons Convention) to the objective of the complete, effective and verifiable prohibition of all chemical weapons.

In 1980, discussions on the multilateral elaboration of a chemical weapons convention were begun in the 40-nation Committee on Disarmament (CD) in Geneva, Switzerland. On 18 April 1984, the United States tabled a comprehensive draft treaty banning entirely the possession, production, acquisition, retention or transfer of chemical weapons. Dep't St. Bull., June 1984, 40-43. The CD Draft Convention text of 27 April 1987 may be found *in* Arms Control Reporter 1987, at 704.D.105-118. That draft became the basis of negotiations which produced the 1993 Chemical Weapons Convention.

27. Statement by the President, Use of Poison Gas, 8 June 1943, 8 Dep't St. Bull. 507 (1943) (use of chemical weapons has been "outlawed by the general opinion of civilized mankind"); Letter from Ass't Sec'y State Macomber to Cong. Rosenthal, 22 Dec. 1967, *quoted in* Bunn, Banning Poison Gas and Germ Warfare: Should the United States Agree? 1969 Wis. L. Rev. 375, 384-85 (the rule set forth in the 1925 Gas Protocol "is now considered to form a part of customary international law"); DA Pam. 27-161-2, at 44 (1962). *Accord* McDougal & Feliciano 634 and sources cited therein at n.360; Parks, Classification of Chemical-Biological Warfare, 13 U. Toledo L. Rev. 1165, 1167 (1982); Smith, International Regulation of Chemical and Biological Weapons: "Yellow Rain" and Arms Control, 1984 U. Ill. L. Rev. 1011, 1048-56; Green 37-38, 129-31.

There are different views as to the extent to which the prohibition of use of chemical weapons has become part of customary international law. At least four positions may be advanced on this question:

(1) The 1925 Gas Protocol is not customary international law, and use of chemical weapons is not contrary, *per se*, to internationally accepted customary rules. The Protocol is a no-first-use agreement between the contracting parties.

(2) The prohibition of first use of chemical weapons as embodied in the 1925 Gas Protocol and relevant reservations thereto has become part of the customary international law and is, therefore, binding on all nations towards all the others, whether parties to it or not. This is the position of the United States.

(continued...)

27.(...continued)

(3) Use of chemical weapons is contrary to customary international law. It is permitted only as a belligerent reprisal.

(4) Use of chemical weapons is contrary to customary international law in all circumstances.

Since all NATO and Warsaw Pact nations became parties to the 1925 Gas Protocol, there could have been no legitimate first-use of chemical weapons in a NATO-Warsaw Pact confrontation.

The doctrine of reciprocity has also been advanced as a possible basis for the *legitimate* use of chemical weapons. Under art. 60 of the Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, 1155 U.N.T.S. 331, *reprinted in* 8 Int'l Leg. Mat'ls 679 (1969), and *in* AFP 110-20, at 7-2, and the customary international law of reciprocity, a breach of a multilateral treaty, that is a violation of a provision essential to the accomplishment of the object of the treaty, can be invoked by the affected parties as a ground for suspending the operation of the treaty in their relations with the violating nation or nations. Therefore, all NATO nations, whether they ratified the Geneva Protocol with reservations or not, could arguably have invoked the customary rule stated in the Vienna Convention, as well as the application of the general principle of reciprocity, to justify a response with chemical weapons if attacked with such weapons by a Warsaw Pact country. It could be argued, however, that art. 60 of the Vienna Convention does not apply to the 1925 Gas Protocol because, as a treaty of humanitarian character, the Protocol is not amenable to reservation (*see* art. 60, para. 5).

As for the limits to this chemical response, a nation which ratified the 1925 Gas Protocol with retaliatory use reservation could take the position that, in case of violation of the treaty, it would feel free from any obligation under the terms of the Protocol. It is important to note that, according to the letter of the first use reservation:

- The violation may be committed either against the reserving nation or against one of its allies. The reservation affirms the right of the reserving nation to retaliate on behalf of its allies.

- All members of the enemy alliance are equally legitimate objects of retaliation whichever the violating nation.

- Since the violation of the Treaty causes, for the reserving nation, the "suspension" of the prohibition altogether, the retaliatory use of chemical weapons does not need to be proportionate or comparable to the violation to which it replies.

The same position could be taken also by a nation which ratified the 1925 Gas Protocol without reservations. In fact, if the violation is committed by a nation which has, or whose allies have, a retaliatory-use reservation, the nation attacked could invoke the principle of reciprocity. Under the principle of reciprocity, a reservation entered by a nation which modifies the provisions of a treaty in its relations with other parties, modifies those provisions to the same extent for the other parties in their relations with the reserving nation (*see* Vienna Convention on the Law of Treaties, art. 21).

On the other hand, if the view on the consolidation of the prohibition of chemical weapons into a rule of customary international law is accepted, then this right of retaliation is no longer applicable without limitations. According to this interpretation, since the prohibition of chemical weapons no longer stems from the Protocol, but has become a rule of customary international law, the use of such weapons by an enemy does not confer on a nation the right to "suspend" the prohibition altogether, but only gives the nation the right to act in reprisal against the violating nation, in accordance with international law. As a reprisal, such response must be proportionate to the initial violation.

As a consequence, and regardless of whether they ratified the 1925 Gas Protocol with reservations or not, nations which consider the general prohibition of chemical weapons as being part of

(continued...)

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.[28] Consistent with its first-use

27.(...continued)
customary international law, may take the position that they are only allowed to act in reprisal, including in-kind reprisal where necessary, if attacked with chemical weapons. It is to be noted that the right to use chemical weapons in reprisal does not stem from reservations to the 1925 Gas Protocol, but from the law of reprisal itself. For a discussion of reprisal *see* paragraph 6.2.3 (p. 335).

28. Lethal and incapacitating agents are chemical agents intended for use in military operations to kill, seriously injure, or incapacitate personnel through their physiological effects. This definition excludes riot control agents (RCAs), chemical herbicides, and smoke and flame materials. Chemical agents are classified according to physical state, use, persistence and physiological effects, with the latter two being the most common in military usage.

Lethal agents are capable of producing incapacitation, serious injury, or death when used in field concentrations. *Incapacitating agents*, on the other hand, produce non-permanent physiological or mental effects, or both, rendering individuals incapable of concerted efforts in the performance of their assigned duties while normally allowing complete recovery.

Nerve agents are lethal agents which cause paralysis by interfering with the transmission of nerve impulses. They are organophosphorus compounds similar to many commonly used insecticides. However, they are several orders of magnitude more toxic, minute quantities of which can kill. Basically, the nerve agents work at the nerve/muscle interface by blocking the enzyme which allows the muscles to relax. Consequently, the victim loses muscular control and dies of suffocation due to inability to breathe. Death can occur within a few minutes if the dose is large enough. Nerve agents are liquids which vaporize into the air or can be disseminated in the form of an aerosol. In addition to working through inhalation or ingestion, the liquid and (to a minor extent) the vapors can be absorbed through the skin. The eyes are particularly sensitive to nerve agents and very small liquid or vapor exposures can cause pinpointing of the pupils (miosis) making it impossible to perform tasks requiring good visual acuity. A mask, protective garment, and gloves are required for protection, but the garment may be removed as the possibility of liquid contamination declines, permitting greater operational efficiency.

Blood agents are chemical compounds, including the cyanide group, that affect bodily functions by preventing the transfer of oxygen from the blood to the body cells causing rapid death. Blood agents are highly volatile which enhances their ability to spread rapidly over a target, but requires large concentrations of agent and greatly limits their duration of effectiveness. Some of the compounds deteriorate rapidly in storage. They are also called *cyanogen agents*.

Choking agents work by breaking down the interior surface of the lungs causing them to fill up with fluids. Death can result from what has been called "dry land drowning." The most commonly known choking agent is phosgene, which was used in World War I. Under its chemical name (carbonyl chloride) phosgene is an industrial chemical used in the manufacture of plastics, some drug products, and urethane foam. This class of agents, effective in trench warfare, would be of only very limited utility in modern military operations and is generally considered to be obsolete.

Blister agents or *vesicants* are chemical agents which injure the eyes and lungs, and burn or blister the skin. Both the liquid and the vapors can have this effect, making whole body protection mandatory in a blister agent environment. The most commonly known blister agent is mustard, which was widely used in World War I. Blister agents can be lethal if inhaled; however, the more common result is incapacitation due to blistering of the skin. Mustard has a delayed effect; it does not cause immediate pain, the first symptoms appear in 4-6 hours. Also, it freezes at approximately 58°F.

(continued...)

reservation to the 1925 Gas Protocol, the United States maintained a lethal and incapacitating chemical weapons capability for deterrence and possible retaliatory purposes only. National Command Authorities (NCA) approval was required for retaliatory use of lethal or incapacitating chemical weapons by U.S. Forces. Retaliatory use of lethal or incapacitating chemical agents was to be terminated as soon as the enemy use of such agents that prompted the retaliation had ceased and any tactical advantage gained by the enemy through unlawful first use had been redressed. Upon coming into force of the 1993 Chemical Weapons Convention, any use of chemical weapons by a party to that convention, whether or not in retaliation against unlawful first use by another nation, will be prohibited. (See paragraph 10.3.1.2).

28.(...continued)
However, mixing mustard with lewisite results in an agent with a lower freezing point which produces immediate stinging of the skin.

Chemical munitions may be classified as unitary or binary. *Unitary* munitions are filled with the premixed complete agent. These can be very simple in design and all consist of a container which opens or bursts on or over the target releasing the agent. *Binary* munitions contain two non-lethal substances which mix in route to the target to produce a lethal or incapacitating agent. While they offer safety, surety, and logistical advantages over unitary munitions, binary weapons are more complex.

Joint Pub. 1-02 *passim*; 50 U.S.C. sec. 1521(j); Joint Pub. 3-11, Subj: Joint Doctrine for Nuclear, Biological, and Chemical Defense; OPNAVINST P-86-1-95, Subj: Chemical, Biological, and Radiological Defenses Handbook; FM 3-6, Subj: Field Behaviors of Nuclear, Biological, and Chemical Agents.

For additional background on chemical warfare *see* St. Aubin & Williams, Soviet Chemical Warfare Agents: Another Type of Threat, All Hands, April 1982, at 38-43; Moore, Ratification of the Geneva Protocol on Gas and Bacteriological Warfare: A Legal and Political Analysis, 58 Va. L. Rev. 419 (1972); CBW, Chemical and Biological Warfare (Rose ed. 1968); Thomas & Thomas, Legal Limits on the Use of Chemical and Biological Weapons (1970); Carnegie Endowment for International Peace, The Control of Chemical and Biological Weapons (1971); Geneva Gas Protocol of 1925, Hearings Before Sen. Comm. on Foreign Relations on Sen. Ex. J, 92d Cong., 1st Sess. (1972); 10 Whiteman 454-79; 6 Hackworth 269-71. More recent developments on the use of chemical weapons are described in Report of Group of Experts on the Alleged Use of Chemical Weapons, U.N. Doc. A/37/259, 1 Dec. 1982 (Iran-Iraq war); Chemical Warfare in Southeast Asia and Afghanistan, Report to the Congress by Secretary of State Haig, March 22, 1982, Dep't of State Special Report No. 98; Chemical Warfare in Southeast Asia and Afghanistan: An Update, Report from Secretary of State Shultz, November 1982, Dep't of State Special Report No. 104, *reprinted in* Dep't St. Bull., Dec. 1982, at 44-53; Reports of the Missions Dispatched by the Secretary General to Investigate Allegations of the Use of Chemical Weapons in the Conflict between the Islamic Republic of Iran and Iraq, U.N. Docs. S/16433, 26 Mar. 1984; S/17911, 12 Mar. 1986; S/18852, 13 May 1987; S/19823, 25 Apr. 1988; S/20060, 20 July 1988; S/20063, 25 July 1988 (generally confirming the use by Iraq of mustard gas in the Iran-Iraq war); Cordesman, Creating Weapons of Mass Destruction, Armed Forces J. Int'l, Feb. 1989, at 54 (recounting development and use of chemical weapons by Iran and Iraq); Spiers, Chemical and Biological Weapons, A Study of Proliferation (1994).

10.3.1.2 The 1993 Chemical Weapons Convention.[29] This comprehensive Convention will, upon entry into force,[30] prohibit the development, production, stockpiling and use of chemical weapons, and mandate the destruction of chemical weapons and chemical weapons production facilities for all nations that are party to it.[31] The Convention specifically prohibits the use of

29. *See* paragraph 10.3.1, note 22 (p. 467).
30. The 1993 Chemical Weapons Convention came into force on 29 April 1997.
31. Art. I of the Convention, entitled "General Obligations," provides that:

> 1. Each State Party to this Convention undertakes never under any circumstances:
>
> (a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone;
>
> (b) To use chemical weapons;
>
> (c) To engage in any military preparations to use chemical weapons;
>
> (d) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.
>
> 2. Each State Party undertakes to destroy chemical weapons it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with the provisions of this Convention.
>
> 3. Each State Party undertakes to destroy all chemical weapons it abandoned on the territory of another State Party, in accordance with the provisions of this Convention.
>
> 4. Each State Party undertakes to destroy any chemical weapons production facilities it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with the provisions of this Convention.
>
> 5. Each State Party undertakes not to use riot control agents as a method of warfare.

The Convention's Annex on Implementation and Verification (referred to in the Convention as the "Verification Annex") establishes detailed verification procedures providing for on-site inspection and monitoring with on-site instruments of all locations at which chemical weapons are stored or destroyed and of all chemical weapons production facilities.

Destruction of chemical weapons, except for "old chemical weapons" and "abandoned chemical weapons," must begin within two years after the Convention enters into force for the party that possesses them and must be completed not later than ten years after the Convention comes into forces (Art. IV, para. 6). If a party to the Convention is unable to destroy its chemical weapons within that ten year period, the deadline may be extended, but in no circumstances beyond fifteen years after the Convention enters into force (Verification Annex, Part IV (A), para. 26). "Old chemical weapons" are defined as those produced before 1925, or those produced between 1925 and 1946 that have deteriorated to the extent that they can no longer be used as chemical weapons (Art. II, para. 5). "Abandoned chemical weapons" are chemical weapons, including "old chemical weapons," abandoned by one nation after 1924 on the territory of another nation without the consent of the latter (Art. II, para. 5). "Old chemical weapons" are to be disposed of or destroyed as "toxic waste" (Verification Annex, Part IV (B), para. 7). Under the regime for destruction of "abandoned chemical weapons," the abandoning nation, upon conclusion of a mutually agreeable program with the nation in whose territory the weapons are located, is responsible for the destruction (Verification Annex, Part IV (B), paras. 8-18).

(continued...)

riot control agents as a "method of warfare."[32] It does not, however, modify existing international law with respect to herbicidal agents.[33]

The United States signed the 1993 Chemical Weapons Convention on 13 January 1993. The President transmitted the Convention to the Senate on 23 November 1993 for its advice and consent to ratification.[34]

10.3.2 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.

10.3.2.1 Riot Control Agents in Armed Conflict.

10.3.2.1.1 Under the 1925 Gas Protocol. The United States considers that use of riot control agents in armed conflict was not prohibited by the 1925 Gas Protocol. However, the United States formally renounced first use of riot control agents in armed conflict except in defensive military modes to save lives. Uses of riot control agents in time of armed conflict which the United States considers not to be violative of the 1925 Gas Protocol include:

1. Riot control situations in areas under effective U.S. military control, to include control of rioting prisoners of war.

2. Situations in which civilians are used to mask or screen attacks and civilian casualties can be reduced or avoided.

3. Rescue missions involving downed aircrews or escaping prisoners or war.

31.(...continued)
Destruction of a party's chemical weapons production facilities must begin within one year after the Convention enters into force for that nation and must be completed within ten years after the Convention enters into force (Art. V, para. 8), *e.g.*, 29 April 2007.

For a comprehensive commentary on the Convention *see* Krutzsch & Trapp, A Commentary on the Chemical Weapons Convention (1994). *See also* the article-by-article analysis of the Convention *in* the State Department Letter of Submittal attached to the President's Letter of Transmittal to the Senate of 23 November 1993 (*see* note 34 (p. 473)).

32. *See* paragraph 10.3.2 (p. 473).

33. *See* paragraph 10.3.3 (p. 476).

34. Chemical Weapons Convention, Letter of Transmittal, Senate Treaty Doc. 103-21; *reprinted in* Dept. of State DISPATCH, Dec. 1993, Vol. 4, No. 49. On 24 April 1997, the Senate adopted its Resolution of Ratification, subject to 28 "conditions." The complete text of the Senate Resolution is *reprinted in* Nash, Contemporary Practice of the United States Relating to International Law, Chemical Weapons Convention, 91 Am. J. Int'l L. 499 (1997).

4. Protection of military supply depots, military convoys, and other military activities in rear echelon areas from civil disturbances, terrorist activities, or paramilitary operations.

Such employment of riot control agents by U.S. forces in armed conflict requires NCA approval.[35]

10.3.2.1.2 Under the 1993 Chemical Weapons Convention. Use of riot control agents as a "method of warfare" is prohibited by the 1993 Chemical Weapons Convention.[36] However, that term is not defined by the Convention. The United States considers that this prohibition applies in international as well as internal armed conflict[37] but that it does not apply in normal peacekeeping operations, law enforcement operations, humanitarian and disaster relief operations, counter-terrorist and hostage rescue operations, and noncombatant rescue operations conducted outside of such conflicts.[38]

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35. Exec. Order No. 11,850, 40 Fed. Reg. 16187, 3A C.F.R. 149-50 (1975); FM 27-10, para. 38; *reprinted in* AFP 110-20, at 4-69. Presidential memorandum to the Secretary of Defense, 10 January 1976, Subj: Use of Riot Control Agents to Protect or Recover Nuclear Weapons, adds to this list security operations regarding the protection or recovery of nuclear weapons.

36. Art. I, para. 5 of the 1993 Chemical Weapons Convention provides that:

> Each State Party undertakes not to use riot control agents as a method of warfare.

Art. II, para. 7 defines "Riot Control Agents" as:

> Any chemical not listed in a Schedule [of toxic and precursor chemicals] which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure.

Art. II, para. 2 defines "Toxic Chemicals" as:

> Any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals . . . .

37. The meaning of the term "international armed conflict" is well-established in international law. It encompasses armed conflict between sovereign States, including the armed occupation of one State of the territory of another. The scope of "internal armed conflict" is less well-established. Such a conflict generally involves significant fighting between the established government and dissident armed groups. An internal armed conflict is generally not considered to include internal disturbances and tensions that do not involve relatively protracted and sustained hostilities. Riots and isolated and sporadic acts of violence do not constitute internal armed conflict as that term is understood in international law. *See* paragraph 5.1, note 4 (p. 290).

38. President Clinton's message to the Senate of the United States of 23 June 1994. White House Press Release, Jun. 23, 1994. That message also states that "according to the current international understanding" the use of riot control agents against enemy combatants, or mixed groups of enemy combatants and noncombatants, is prohibited even for humanitarian purposes, such as the rescue of downed aircrews or in situations where the enemy utilizes noncombatants to mask or screen attacks. *But see* note 39 which sets forth Condition 26 of the Senate's Resolution of

(continued...)

The United States also considers that it is permissible to use riot control agents against other than combatants in areas under direct U.S. military control, including to control rioting prisoners of war and to protect convoys from civil disturbances, terrorists and paramilitary organizations in rear areas outside the zone of immediate combat.[39]

38.(...continued)
Ratification of the Convention. This Condition requires that the President take no action which would alter or eliminate Executive Order 11,850. *See* note 35 (p. 474). *See also* CJCSI 3100.07A, Subj: Nuclear, Biological, and Chemical Defense; Riot Control Agents [RCAs]; and Herbicides, which provides in Enclosure B, para. 2b that:

> The United States has renounced first use of RCAs in war except in defensive military modes to save lives, such as:
>
> (1) Use of riot control agents in riot control situations in areas under direct and distinct United States military control, to include controlling rioting prisoners of war.
>
> (2) Use of riot control agents in a situation in which civilians are used to mask or screen attacks and civilian casualties can be reduced or avoided.
>
> (3) Use of RCAs in rescue missions in remotely isolated areas, of downed aircrews and passengers, and escaping prisoners.
>
> (4) 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.
>
> (5) Security operations regarding the protection or recovery of nuclear weapons.

Para. 4.a.(1) of Enclosure B provides that only the President may authorize the "Use of RCAs in war, including defensive military modes. However, advance authority to use RCAs in wartime for protection or recovery of nuclear weapons has been delegated to the Secretary of Defense."

39. *See* note 38. *See also* Senate Resolution of Ratification (paragraph 10.3.1.2, note 34 (p. 473)), which provides in Condition 26:

> (26) Riot Control Agents.—
>
> (A) Permitted Uses.—Prior to the deposit of the United States instrument of ratification, the President shall certify to Congress that the United States is not restricted by the Convention in its use of riot control agents, including the use against combatants who are parties to a conflict, in any of the following cases:
>
> (i) United States Not a Party.—The conduct of peacetime military operations within an area of ongoing armed conflict when the United States is not a party to the conflict (such as recent use of the United States Armed Forces in Somalia, Bosnia, and Rwanda).
>
> (ii) Consensual Peacekeeping.—Consensual peacekeeping operations when the use of force is authorized by the receiving State, including operations pursuant to Chapter VII of the United Nations Charter.
>
> (iii) Chapter VII Peacekeeping.—Peacekeeping operations when force is authorized by the Security Council under Chapter VII of the United Nations Charter.

(continued...)

10.3.2.2 Riot Control Agents in Time of Peace. Employment of riot control agents in peacetime is not proscribed by either the 1925 Gas Protocol or the 1993 Chemical Weapons Convention and may be authorized by the Secretary of Defense, or in limited circumstances, by the commanders of the combatant commands. Circumstances in which riot control agents may be authorized for employment in peacetime include:

1. Civil disturbances in the United States, its territories and possessions.[40]

2. Protection and security on U.S. bases, posts, embassy grounds, and installations overseas, including for riot control purposes.[41]

3. Law enforcement

   a. On-base and off-base in the United States, its territories and possessions;

   b. On-base overseas;

   c. Off-base overseas when specifically authorized by the host government.[42]

4. Noncombatant evacuation operations involving U.S. or foreign nationals.[43]

10.3.3 Herbicidal Agents. Herbicidal agents are gases, liquids, and analogous substances that are designed to defoliate trees, bushes, or shrubs, or to kill long

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39.(...continued)

(B) Implementation.—The President shall take no measure, and prescribe no rule or regulation, which would alter or eliminate Executive Order 11,850 of April 8, 1975. [*See* paragraph 10.3.2.1.1, note 35 (p. 473).]

(C) Definition.—In this paragraph, the term "riot control agent" has the meaning given the term in Article II(7) of the Convention. [*See* note 36 (p. 474).]

But see Krutzsch & Trapp, paragraph 10.3.1.2, note 31 (p. 472) at 36 & 42-43. On 25 April 1997, President Clinton certified to the Congress acceptance of the 28 Conditions, including Condition 26 on riot control agents. Cong. Rec. 105th Cong., 1st Sess., 28 Apr 1997, at H 1895.

40. Department of Defense Civil Disturbance Plan, GARDEN PLOT, 15 February 1991; DOD Directive 3025.12, Subj: Military Assistance for Civil Disturbances; DOD Directive 3025.15, Subj: Military Assistance to Civil Authorities; DOD Directive 5525.5, Subj: DOD Cooperation with Civilian Law Enforcement Officials; SECNAVINST 5820.7B, Subj: Cooperation with Civilian Law Enforcement Officials.

41. The U.S.-controlled portions of foreign installations are considered U.S. installations. JSCP Annex F.

42. DEPSECDEF memo for Service Secretaries and Chairman, Joint Chiefs of Staff, Subj: Use of Chemical Irritants in Military Law Enforcement, 19 June 1978.

43. Authority for use of riot control agents in peacetime situations not covered by the above (*e.g.*, to save lives in counterterrorist operations) should be submitted through the chain of command for approval pursuant to CJCSI 3100.07A (paragraph 10.3.2.1.2, note 38 (p. 474)).

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 either the 1925 Gas Protocol[44] or the 1993 Chemical Weapons Convention[45] 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.[46] Use of herbicidal agents in peacetime may be authorized by the Secretary of Defense or, in limited circumstances, by commanders of the combatant commands.[47]

10.4 BIOLOGICAL WEAPONS

International law prohibits all biological weapons or methods of warfare whether directed against persons, animals, or plant life.[48] Biological weapons include microbial or other biological agents or toxins whatever their origin (i.e., natural or artificial) or methods of production.[49]

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44. *See* paragraph 10.3.1.1 (p. 467).

45. *See* paragraph 10.3.1.2 (p. 472). The Preamble to the 1993 Chemical Weapons Convention provides:

> The States Parties to this Convention,
>
> . . . .
>
> 7. Recognizing the prohibition, embodied in the pertinent agreements and relevant principles of international law, of the use of herbicides as a method of warfare.
>
> . . . .
>
> Have agreed as follows:

See also Krutzsch & Trapp, paragraph 10.3.1.2, note 31 (p. 472) at 8-9. However, Art. II, para. 2 defines "Toxic Chemicals" prohibited by the Convention in terms of their adverse impact on "humans or animals" (see note 36 (p. 474)). In their commentary on Art. II, para. 2, Krutzsch & Trapp, *id.*, at 30, observe that:

> The definition excludes, on the other hand, toxicity against plants. Herbicides will not be regarded as chemical weapons if used with an intent to destroy plants. That would even apply if the (secondary) effect of such use were the killing or harming of people, for example by toxic side effects or by denial of food supplies. On the other hand, herbicides would be covered if they were used in order to *directly* kill or harm people through their toxicity.

46. Executive Order No. 11,850 permits such use under regulations applicable to their domestic use. *See* paragraph 10.3.2.1.1, note 35 (p. 474). *See also* CJCSI 3100.07A (note 38 (p. 474)) at Encl. B.

47. JSCP Annex F.

48. Green 47-48; Oeter, Methods and Means of Combat, *in* Fleck, at 151-52. *Compare* Levie, paragraph 10.3, note 20 (p. 466) at 342-45.

49. *Biological weapons* are items or materiel which project, disperse, or disseminate biological agents, including arthropod vectors. They are inherently indiscriminate and uncontrollable and are

(continued...)

10.4.1 Treaty Obligations. The 1925 Gas Protocol prohibits the use in armed conflict of biological weapons.[50] 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.[51] The 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 materials were to be destroyed by 26 December 1975. The United States, Russia, and most other NATO and former 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

49.(...continued)
universally condemned. *Biological warfare/biological operations* is the employment of biological agents to produce casualties in man or animals and to damage plants or materiel. *Biological operations* also include defense against such employment.

Any microorganism able to cause disease in man, animals, or plants, or cause the deterioration of materiel, is capable of being used as a *biological agent*. However, due to difficulty in production, storage and dissemination, and to limited effectiveness, a large number of diseases would have little or no military utility. Even those capable of producing significant results would have a delayed effect due to the incubation period, and the results would be dependent on a variety of factors including weather, target characteristics, and countermeasures. Due to their delayed effectiveness, biological agents do not lend themselves to tactical, but rather to strategic employment to achieve a long-term decrease in an enemy's warmaking capability. Biological agents also lend themselves to clandestine delivery.

Biological toxins are the toxic chemical by-products of biological organisms. They can be synthesized chemically and share many of the characteristics of chemical agents; however, they are considered to be biologicals under the 1972 Biological Weapons Convention. Toxins have advantages over organisms in storage, delivery, and onset of effects. Some toxins are much more toxic than the most powerful nerve agents.

Joint Pub. 1-02 *passim*. *See also* Rose, The Coming Explosion of Silent Weapons, Nav. War Coll. Rev., Summer 1989, at 6-29.

50. The United States has accepted this obligation without reservation. *Compare* the U.S. first use reservation on chemical weapons under the 1925 Gas Protocol, paragraph 10.3.1.1, note 24 (p. 467).

51. Washington, London & Moscow, 10 April 1972, 26 U.S.T. 583; T.I.A.S. 8062; 1015 U.N.T.S. 163; *reprinted in* AFP 110-20, at 4-71. There were 139 parties to the 1972 Biological Weapons Convention as of 1 January 1997. Arms Control Reporter January 1997, at 701.A.4.

Biological Weapons Convention.[52] The United States has, therefore, formally renounced the use of biological weapons under any circumstance.[53] 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.[54]

52. AFP 110-31, para. 6-4b, at 6-4 and sources cited at paragraph 10.3.1.1, note 27 (p. 468).

53. 5 Weekly Comp. Pres. Doc. 1659-61 (25 Nov. 1969); Dep't St. Bull. 226-27 (1970).

54. 11 Weekly Comp. Pres. Doc. 73-74 (White House Press Release, Jan. 22, 1975); 1976 Digest of U.S. Practice in International Law 732-36. U.S. research activities are devoted primarily to the development of vaccines.

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.[1] Noncombatants are those individuals who do not form a part of the armed forces and who otherwise refrain from the commission of hostile acts.[2] 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.[3]

11.2 PROTECTED STATUS

The law of armed conflict prohibits making noncombatant persons the object of intentional attack[4] and requires that they be safeguarded against injury not incidental to military operations directed against military objectives.[5] When

1. *See* paragraph 5.3 and note 11 (p. 296). *See also* Ipsen, Combatants and Non-Combatants, *in* Fleck at 65-104.

2. In this context, "hostile acts" include those actions described in the second subparagraph of paragraph 11.3 (p. 484). (For nations bound thereby, GP I, art. 51(3), addresses this rule by granting protection to civilians "unless and for such time as they take a direct part in hostilities" without further definition. The United States supports this principle. The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 Am. U.J. Int'l L. & Policy 426 (1987) (remarks of U.S. Department of State Deputy Legal Adviser Matheson). (*See* paragraph 5.4.2, note 34 (p. 303) regarding the U.S. decision not to seek ratification of GP I.)

3. Incidental injury to or death of civilians is discussed in paragraph 8.1.2.1 (p. 404). A useful summary of the rules governing capture of noncombatants (as that term is used in this chapter) may be found *in* de Preux, Synopsis V: Capture, 1986 Int'l Rev. Red Cross 89, and of the obligations of neutrals regarding noncombatants *in* de Preux, Synopsis VIII: Conventions and Neutral Powers, 1989 *id.* 125.

4. Medical personnel: GWS, art. 24; GWS-Sea, art. 36; wounded and sick: GWS, art. 12(1); shipwrecked: GWS-Sea, art. 12(1) ("shall be respected and protected in all circumstances"); prisoners of war: GPW, art. 13 (humanely treated; protected); civilians: GP I, arts. 51(2) & 57(5) ("shall not be the object of attack"); Matheson remarks, note 2, at 423; Solf, Protection of Civilians Against the Effects of Hostilities Under Customary International Law and Under Protocol I, 1 Am. U.J. Int'l L. & Policy 117, 130 (1986).

5. GPW, arts. 19(3) & 23; GP I, arts. 48 & 57(2)(a).

circumstances permit, advance warning should be given of attacks that might endanger noncombatants in the vicinity.[6] Such warnings are not required, however, if mission accomplishment requires the element of surprise or the security of the attacking forces would be otherwise compromised.[7] On the other hand, a party to an armed conflict has an affirmative duty to remove civilians under its control as well as the wounded, sick, shipwrecked, and prisoners of war from the vicinity of targets of likely enemy attack.[8] Deliberate use of noncombatants to shield military objectives from enemy attack is prohibited.[9] Although the principle of proportionality underlying the concept of collateral damage and incidental injury continues to apply in such cases, the presence of noncombatants within or adjacent to a legitimate target does not preclude attack of it.[10]

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

6. HR, art. 26; Hague IX, art. 6; GP I, art. 57(2)(c); Matheson remarks, note 2, at 427. *See also* paragraph 8.5.2 (p. 427).

7. *See* paragraph 8.5.2 (p. 427).

8. GWS, art. 19 and GC, art. 18 (locate hospitals away from military objectives); GC, art. 28; GP I, arts. 58(a) & (b).

This duty requires only actions that are feasible under the circumstances. For example, civilians accompanying an armed force, such as journalists and media representatives, civilian governmental employees and contractor employees, obviously cannot be separated from all military targets. Similarly, civilian crewmembers on merchant vessels, trains and civil aircraft cannot be separated from such objects which are often legitimate military objectives. Cities often surround transportation centers. The urban population cannot be separated from docks, warehouses, runways and similar military objectives within these cities.

An occupying power may evacuate an area if civilian protection or military reasons demand. *See* Gasser, Protection of the Civilian Population, *in* Fleck at 544; Green at 255-56. Transfer outside of occupied territory must be avoided if possible. GC, art. 24, and GP I, art. 78, contain special restrictions on evacuation of children, especially from occupied territory.

9. GC, art. 28 (enemy aliens in national territory of a belligerent and civilians in occupied territory); GP I, art. 51(7) (own civilians); GPW, art. 23(1); GP I, art. 12(4) (medical units); Matheson remarks, note 2 (p. 481), at 426. *See also* CG, art. 34, which prohibits the taking of hostages. During the Persian Gulf War, Iraq's taking of U.S. and other hostages, including civilians forcibly deported from Kuwait, and their placement in or around military targets as a "human shield," in violation of GC, arts. 28 & 34, constituted grave breaches under GC, art. 147. Title V Report at 0-607, 08; Moore, Crisis in the Gulf 86, 87 (1992).

10. Solf, Protection of Civilians, note 4 (p. 481) at 131, correctly notes:

> [W]hile a civilian may not lose his protection against individualized attack while working in a munitions plant, he assumes the risk of collateral injury when he is in the vicinity of the munitions plant, although he continues to retain full protection while at home.

Cf. GPW, art. 23(1); GC, art. 28; GP I, arts. 51(7) & 12(4); notes 14 & 15 and accompanying text (p. 484). Precautions to be taken in attack are discussed *in* Chapter 8.

terrorization.[11] 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.[12] Women and children are entitled to special respect and protection.[13] 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, as a class, are not to be the object of attack. However, civilians that are engaged in direct

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11. 1923 Draft Hague Rules of Air Warfare, art. 22; GC, art. 33; common article 3; GP I, art. 51(2); GP II, arts. 4(2)(d) & 13(2); Matheson remarks, paragraph 11.1, note 2 (p. 481), at 426; Green 220-233. The concept of terror has been explained as follows:

> Any action which carries warfare to civilians is bound to create terror in some and perhaps all. However, what the present article prohibits is only conduct which is intended to terrorize civilians. Otherwise legal acts which cause incidental terror to civilians (for example, the bombing of a munitions factory the work force of which is civilian) are not within the prohibitions of the present article.

Levie, 1 The Code of International Armed Conflict 217-18 (1986). *See also* CDDH/215/ Rev.1; XV Official Records 261, at para. 51; Levie, 3 Protection of Victims of War 158 (1980); Gasser, Prohibition of Terrorist Acts in International Humanitarian Law, 1986 Int'l Rev. Red Cross 200.

Starvation as a method of warfare is discussed in paragraph 8.1.2, note 15 (p. 404).

12. GP I, art. 50. *Cf.* GPW, arts. 4A(4)-(5); GC, arts. 4 & 13. Under GP I, art. 51(3), civilians taking a direct part in hostilities lose their protection against dangers arising from military operations, but not their status as civilians. Bothe, Partsch & Solf 301.

War correspondents accredited by the armed forces which they accompany, although civilians, are entitled to prisoner of war status on capture. GPW, art. 4A(4). Other journalists do not have this protected status, although nations must treat them (and accredited war correspondents) prior to capture as civilians provided the unaccredited journalists take no action adversely affecting their status as civilians. The United States supports the principle in GP I, art. 79, that journalists must be protected as civilians under the same conditions. Matheson remarks, paragraph 11.1, note 2 (p. 481), at 428. (Nations bound by GP I may issue identity cards to journalists on dangerous professional missions in areas of armed conflict, art. 79 & Annex II.) *See also*, Green 233. Both accredited war correspondents and other journalists act at their own risk if they operate too close to military units engaged in or subject to attack. Gasser, The Protection of Journalists Engaged in Dangerous Professional Missions: Law Applicable in Periods of Armed Conflict, 1983 Int'l Rev. Red Cross 3.

13. The special respect and protection to which women and children in the power of a party to the conflict (friend or foe) are entitled is detailed in GWS, art. 12(4); GWS-Sea, art. 12(4); GPW, arts. 14(2), 25(4), 29(2), 88(2,3), 97(4) & 108(2); GC, art. 27(2), 85(4), 124(3) & 97(4) (women); and GC, arts. 14(1,2), 17, 23, 24, 38(5), 50(1-5), 51(2), 68(4), 76(5), 89(5) & 132 (children); and for parties thereto amplified in GP I, arts. 76-78, and GP II, arts. 4-6. The United States supports the principles in GP I, arts. 76, 77, that women and children be the object of special respect and protection, that women be protected against rape and indecent assault, and that all feasible measures be taken in order that children under the age of fifteen do not take direct part in hostilities. Matheson remarks, paragraph 11.1, note 2 (p. 481), at 428. *See also* de Preux, Synopsis III: Special Protection of Women and Children, 1985 Int'l Rev. Red Cross 292; Krill, The Protection of Women in International Humanitarian Law, 1985 *id.* 337; Singer, The Protection of Children During Armed Conflict Situations, 1986 *id.* 133; Plattner, Protection of Children in International Humanitarian Law, 1984 *id.* 140.

support of the enemy's war-fighting or war-sustaining effort are at risk of incidental injury from attack on such activities.[14]

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.[15] Similarly, civilians serving as lookouts, guards, or intelligence agents for military forces may be attacked.[16] Direct participation may also include civilians serving as guards, intelligence agents, or lookouts on behalf of millitary forces. Direct participation in hostilities must be judged on a case-by-case basis. Combatants in the field must make an honest determination as to whether a particular civilian is or is not subject to deliberate attack based on the person's behavior, location and attire, and other information available at the time.[17]

11.4 THE WOUNDED, SICK, AND SHIPWRECKED

Members of the armed forces incapable of participating in combat due to injury or illness may not be the object of attack.[18] Moreover, parties to the

14. The "direct support" envisaged includes direct support by civilians to those actually participating in battle or directly supporting battle action, and military work done by civilians in the midst of an ongoing engagement. Bothe, Partsch & Solf 302-304. Civilians not in a "direct support" role also assume the risk of incidental injury as a result of attacks against legitimate military objectives in the immediate vicinity, *e.g.*, "their places of work or transport." *Id.*

15. GC, art. 5; GP I, arts. 45 & 51(3); FM 27-10, para. 81; Matheson remarks, paragraph 11.1, note 2 (p. 481), at 426.

16. GWS, art. 12(1); GP I, art. 41(1). *See generally*, Bothe & Janssen, Issues in the Protection of the Wounded and Sick: The Implementation of International Humanitarian Law at the National Level, 1986 Int'l Rev. Red Cross 189; Green 207-11; Rabus, Protection of the Wounded, Sick and Shipwrecked, *in* Fleck at 293-99.

17. GWS, art. 15(1); GC, art. 16; GP I, art. 33(1); Matheson remarks, paragraph 11.1, note 2 (p. 481), at 424. This requirement also extends to the dead, and includes a requirement to prevent despoiling of the dead. GWS, art. 15(1); GC, art. 16(2); GP I, art. 34(1). The United States also supports the new principles in GP I, arts. 32 & 34, that families have a right to know the fate of their relatives, and that as soon as circumstances permit, arrangement be made to facilitate access to grave sites by relatives, to protect and maintain such sites permanently, and to facilitate the return of the remains when requested. Matheson *id.*, at 424. Further, the United States supports the principles in GP I, art. 74, that nations facilitate in every possible way the reunion of families dispersed as a result of armed conflicts and encourage the work of humanitarian organizations engaged in this task, and the principle in article 73 that persons who were considered as refugees or stateless persons before the beginning of hostilities nonetheless be protected persons under the GC. Matheson *id.*, at 427. *See* Vecsey, Co-operation between the Central Tracing Agency of the International Committee of the Red Cross and National Red Cross and Red Crescent Society Tracing Services, 1988 Int'l Rev. Red Cross 257.

18. GWS, art. 12(1); GP I, art. 41(1). *See generally*, Bothe & Janssen, Issues in the Protection of the Wounded and Sick: The Implementation of International Humanitarian Law at the National Level, 1986 Int'l Rev. Red Cross 189; Green 207-11; Rabus, Protection of the Wounded, Sick and Shipwrecked, *in* Fleck at 293-99.

conflict must, after each engagement and 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.[19] 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.[20] 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.[21] Priority in order of treatment may only be justified by urgent medical considerations.[22] 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.[23]

Similarly, shipwrecked persons, whether military or civilian, may not be the object of attack.[24] 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.[25] It is immaterial whether the peril was the result of enemy action or nonmilitary causes.[26] Following each naval engagement at sea, the belligerents are obligated to take all

19. GWS, art. 15(1); GC, art. 16; GP I, art. 33(1); Matheson remarks, paragraph 11.1, note 2 (p. 481), at 424. This requirement also extends to the dead, and includes a requirement to prevent despoiling of the dead. GWS, art. 15(1); GC, art. 16(2); GP I, art. 34(1). The United States also supports the new principles in GP I, arts. 32 & 34, that families have a right to know the fate of their relatives, and that as soon as circumstances permit, arrangement be made to facilitate access to grave sites by relatives, to protect and maintain such sites permanently, and to facilitate the return of the remains when requested. Matheson *id.*, at 424. Further, the United States supports the principles in GP I, art. 74, that nations facilitate in every possible way the reunion of families dispersed as a result of armed conflicts and encourage the work of humanitarian organizations engaged in this task, and the principle in article 73 that persons who were considered as refugees or stateless persons before the beginning of hostilities nonetheless be protected persons under the GC. Matheson *id.*, at 427. *See* Vecsey, Co-operation between the Central Tracing Agency of the International Committee of the Red Cross and National Red Cross and Red Crescent Society Tracing Services, 1988 Int'l Rev. Red Cross 257.

20. GWS, art. 15(2); GWS-Sea, art. 18(2); GC, art. 17; GP I, art. 33(4).

21. GWS, art. 12(1-2); GP I, art. 10(2). This protection also extends to the shipwrecked. GWS-Sea, art. 12(2).

22. GWS, art. 12(3); GP I, arts. 10(2), 15(3); Matheson remarks, paragraph 11.1, note 2 (p. 481), at 423. This protection applies to the shipwrecked. GWS-Sea, art. 12(3).

23. GWS, art. 12, as amplified by GP I, art. 11(1); Matheson remarks, paragraph 11.1, note 2 (p. 481), at 423. This protection also applies to the shipwrecked. GWS-Sea, art. 12.

24. HR, art. 23(c); GWS-Sea, art. 12(1); GP I, art. 41(1); *Trial of Eck*, 1 War Crimes Trials 1, 1 Reps. U.N. Comm. 1 (1945) (*The Peleus Trial*); The *Llandovery Castle* Case, 16 Am. J. Int'l L. 708 (1922); *The Jean Nicolet*, F.E.I.M.T. Proc. 15,095-148, Judgment 1072; Mallison 139-43. *See also* San Remo Manual, para. 47(j) and paragraph 8.3, note 86 (p. 419).

25. GWS-Sea, art. 12(1); GP I, art. 8(b). The shipwrecked may display the international code signal of distress indicated by "NC" on their liferaft. This signal means "I am in distress and require immediate assistance." International Convention for the Safety of Life at Sea, Annex B, Regulation 31 (N over C); Eberlin, Protective Signs 60 (1983).

26. GWS-Sea, art. 12(1).

possible measures, consistent with the security of their forces, to search for and rescue the shipwrecked.[27]

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.[28] 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.[29] Shipwrecked combatants falling into enemy hands become prisoners of war.[30]

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.[31]

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27. Hague X, art. 16; GWS-Sea, art. 18(1); GP I, art. 33(1). An engagement is not finished until the warships involved are safe from attack. Frequently, it is operationally hazardous or infeasible for a submarine to comply with this requirement. 2 Pictet 131, *citing with approval* Tucker 71-73. But if military circumstances permit, it is a war crime to fail to provide for the safety of survivors, or to take affirmative actions to prevent survival, such as shooting at life rafts. *See* note 24 (p. 485) and paragraph 6.2.5, subparagraph 5 and note 63 (p. 349). *See also* Rabus, paragraph 11.4 note 18 (p. 484) at 297.

28. GP I, art. 42(3).

29. GP I, art. 42(2).

30. GWS-Sea, art. 16.

31. GWS, art. 24; GWS-Sea, art. 36. Medical personnel are therein defined as:

> 1. 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, and staff exclusively engaged in the administration of medical units and establishments;
>
> 2. 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, if they are carrying out these duties at the time when they come into contact with the enemy or fall into his hands;
>
> 3. Staff of National Red Cross Societies and of other Voluntary Aid Societies, duly recognized and authorized by their Governments, employed as in subparagraph 1 above, provided the staff of such societies are subject to military laws and regulations;
>
> 4. Medical and hospital personnel of hospital ships and their crews.

The United States supports the principle in GP I, art. 15, that civilian medical and religious personnel be respected and protected and not be made the objects of attack. Matheson remarks, paragraph 11.1, note 2 (p. 481), at 423. *See also* Rabus, paragraph 11.4, note 18 (p. 484) at 300-19; Green 212-19.

See generally, Pictet, The Medical Profession and International Humanitarian Law, 1985 Int'l Rev. Red Cross 191; Bothe & Janssen, Issues in the Protection of the Wounded and Sick, 1986 *id.* 191-99; and Mine, The Geneva Conventions and Medical Personnel in the Field, 1987 *id.* 180. The protections afforded hospitals and hospital ships are discussed in paragraph 8.5.1.4 (p. 424) and paragraph 8.2.3, note 62 (p. 413), respectively.

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.[32] Medical personnel may not use such arms against enemy forces acting in conformity with the law of armed conflict.[33] Chaplains attached to the armed forces are entitled to respect and protection.[34] 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.[35] Failure to wear the

32. GWS, art. 22(1); GP I, arts. 13(2)(a) & 65(3). *Cf.* GP I, art. 65(3), defining the arms civil defense personnel may use as "light individual weapons." There was no agreement at the Diplomatic Conference which negotiated GP I as to what that term meant, although a number of military experts agreed with this British proposal: "The term 'light individual weapons' excludes fragmentation grenades and similar devices, as well as weapons which cannot fully be handled or fired by a single individual and those basically intended for non-human targets." CDDH/406/Rev. 1, paras. 56 & 58; 13 Official Records 372; Bothe, Partsch & Solf 414-15; ICRC, Commentary (GP I), para. 2626, at 776 ("a valuable contribution to the definition"). Rabus, paragraph 11.4, note 18 (p. 484) at 311, states that:

> Medical personnel may be equipped with small-arms weapons for the protection of the wounded, sick and shipwrecked in their charge and for their own protection.... Small-arms are pistols, sub-machine guns and rifles.

33. 1 Pictet 203.

34. GWS, art. 24; GWS-Sea, art. 36. To be entitled to protection, chaplains, unlike medical personnel, need not be exclusively or even partially assigned to the wounded and sick. However, U.S. Navy Regulations, 1990, art. 1063, requires that "while assigned to a combat area during a period of armed conflict" they be engaged exclusively in religious duties. Chaplains must abstain from all hostile acts. Further, to be accorded immunity they must be attached to the armed forces and not be mere volunteers. The government thus decides who is a chaplain for this purpose. The Geneva Conventions do not otherwise attempt to define who is a chaplain; GWS-Sea, art. 36 uses the term "religious personnel" in lieu of "chaplains". GP I, art. 8(d), speaks of chaplains by way of example only, in expanding the units to which "religious personnel" may be attached. Chaplains lose their special status if they commit acts harmful to the enemy outside their humanitarian functions. Although not forbidden by international law, U.S. Navy chaplains are forbidden to carry arms by SECNAVINST 1730.7A, Subj: Religious Ministries in the Navy, encl. 1, para. 1e. Unlike the protected "staff" of medical units, enlisted religious program specialists have no such special status since they are not chaplains. *See generally*, Rabus, Religious Personnel, *in* Fleck at 369-75.

35. GWS, arts. 39 & 40; GWS-Sea, arts. 41 & 42. Personnel exclusively engaged in medical duties, along with personnel temporarily assigned to medical duties, may wear an arm band on the left arm bearing a red cross or red crescent. The arm band in actual practice has not been worn with any regularity, and the U.S. Navy Bureau of Medicine and Surgery has no regulation regarding its wearing. Experience has shown that the "regular" arm band is not recognizable beyond 60 meters. de Mulinen, Signalling and Identification of Medical Personnel and Material, 1972 Int'l Rev. Red Cross 479, 483. Accordingly, GP I, Annex I, arts. 3, 4, provide that the distinctive emblem shall be as large as appropriate under the circumstances, and worn so as to be visible from as many directions and from as far away as possible, such as large emblems worn on the chest and back. For nations bound by GP I, this rule effectively supersedes the narrow requirements set forth above. That rule should be followed whenever tactically appropriate. *See* Cauderay, Visibility of the Distinctive Emblem on Medical Establishments, Units, and Transports, 1990 Int'l Rev. Red Cross 295.

(continued...)

distinctive emblem does not, by itself, justify attacking a medical person or chaplain, recognized as such.[36] Medical personnel and chaplains falling into enemy hands do not become prisoners of war.[37] 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.[38]

11.6 PARACHUTISTS

Parachutists descending from disabled aircraft may not be attacked while in the air unless they engage in combatant acts while descending.[39] Upon reaching the ground,[40] such parachutists must be provided an opportunity to surrender.

35.(...continued)
Personnel exclusively engaged in medical duties should, in time of armed conflict, carry a special identity card (such as the Geneva Conventions Identity Card DD Form 1934) bearing the distinctive emblem (red cross or red crescent) to establish their status in the event of capture. GWS, art. 40 & Annex II; GWS-Sea, art. 42 & Annex. For additional guidance regarding the identity card, *see* Naval Military Personnel Manual (MILPERSMAN) 4620100.

Chaplains are entitled to wear the arm band. Chaplains in time of armed conflict should carry a special identity card bearing the red cross (such as DD Form 1934) or equivalent emblem. This identification card is identical to that carried by medical personnel. For additional guidance *see* MILPERSMAN 4620100.

36. 1 Pictet 307. *See* paragraph 11.9.6 (p. 499).

37. GPW, art. 33(1); GWS, art. 28(2); GWS-Sea, art. 37. *See* DOD Directive 1300.7, Subj: Training and Education Measures Necessary to Support the Code of Conduct, for a discussion of U.S. Code of Conduct implications for medical personnel and chaplains who fall into enemy hands. This requirement of GPW, GWS and GWS-Sea that medical personnel be repatriated immediately unless their retention is necessary in order to provide for the medical needs of prisoners of war, does not apply to captured personnel who are specially trained for employment, should the need arise, as hospital orderlies, auxiliary stretcher-bearers, *etc.*, but who are not "exclusively" so engaged. This is true even if they were engaged in such duties at the time of capture. They are, of course, to be "respected and protected" while so engaged and are accorded prisoner of war status upon capture. GWS, art. 25. Captured personnel not attached to the medical service of their armed forces but who are physicians, surgeons, nurses or medical orderlies, may be required by the enemy to "exercise their medical functions in the interests of prisoners of war." Such personnel are, however, prisoners of war and need not be repatriated when their medical capabilities are no longer required for the support of other prisoners. GPW, art. 32.

38. GWS, art. 28(1); GWS-Sea, art. 37; GPW, arts. 4C & 33. *See* ICRC Model Agreement relating to the Retention of Medical Personnel and Chaplains, September 1955, *reprinted in* Levie, Documents at 668. Based upon past experience, in future conflicts retention will be the general practice.

39. GP I, arts. 42(1) & 42(2), codifying the customary rule set out in the 1923 Draft Hague Rules of Air Warfare, art. 20; Spaight 152, 155-64; AFP 110-31, para. 4-2e; Bothe, Partsch & Solf 226; Matheson remarks, note 2 (p. 481) at 425. Firing a weapon is clearly a combatant act.

40. A downed airman, who aware of the presence of enemy armed forces, attempts to evade capture, will probably be considered as engaging in a hostile act and, therefore, subject to attack from the ground or from the air. However, mere movement in the direction of one's own lines does not, by itself, constitute an act of hostilities. Airmen remaining within a disabled aircraft for a forced landing are not within the purview of paragraph 11.6. *See* Green 179.

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.[41] Such personnel may not be attacked, however, if they clearly indicate in a timely manner their intention to surrender.[42]

11.7 PRISONERS OF WAR[43]

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.[44] However, the law of armed conflict does not precisely define when surrender takes effect or how it may be accomplished in practical terms. Surrender involves an offer by the surrendering party (a unit or individual combatant) and an ability to accept on the part of the opponent. The latter may not refuse an offer of surrender when communicated,[45] but that communication must be made at a time when it can be received and properly acted upon—an attempt to surrender in the midst of a hard-fought battle is neither easily communicated nor received. The issue is one of reasonableness.[46]

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

41. GP I, art. 42(3). These persons may be attacked whether or not the airplane from which they are descending is in distress. *See also* Bothe, Partsch & Solf 227.

42. HR, art. 23(c); GP I, arts. 41(1) & 41(2)(b).

43. *See generally* Levie, Prisoners of War, and Levie, Documents. *See also* Green 188-206; Fisher, Protection of Prisoners of War, *in* Fleck at 701-33.

44. HR, art. 23(c); GP I, art. 41. Such persons are *hors de combat* and must be permitted to surrender (that is, quarter must be granted). The walking wounded leaving the battlefield also may not be attacked.

45. It is forbidden to declare that no quarter will be given or that no prisoners will be taken. HR, art. 23(d); GP I, art. 40. Such an order:

> tends to stiffen the adversary's will to resist and is therefore counterproductive to the achievement of the legitimate objectives of a military operation. Moreover, it incites the adversary to adopt a similar policy thus causing the conflict to degenerate into unrestrained savagery.

Bothe, Partsch & Solf 217. Although it is not prohibited to issue such an order as a reprisal, this form of reprisal offers little military advantage. Bothe, Partsch & Solf 218, 221-22. Reprisals are discussed in greater detail in paragraphs 6.2.3 to 6.2.3.3 and accompanying notes (pp. 335 to 341). *See also* paragraph 11.7.1, note 58 (p. 492).

46. For an excellent discussion on surrender *see* Robertson, The Obligation to Accept Surrender, Nav. War Coll. Rev., Spring 1993, at 103. *See also* San Remo Manual, para. 43; Title V Report, at 0-629 to 632 (discussing the concept of surrender in the context of the Coalition's breaching of the Iraqi defensive line and the Coalition attack on Iraqi troops retreating from Kuwait City).

protected against violence, intimidation, insult, and public curiosity.[47] When prisoners of war are given medical treatment, no distinction among them will be based on any grounds other than medical ones.[48] (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 required to disclose only their name, rank, date of birth, and military serial number.[49] Torture, threats, or other coercive acts are prohibited.[50]

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47. GPW, art. 13. In the U.S. armed forces, the control and care of PWs, inhabitants of occupied territory and civilian internees is a primary function of the U.S. Army which has issued detailed regulations on the matter. However, this paragraph provides general guidance for Navy, Marine Corps and Coast Guard personnel who may take custody of or control enemy personnel in the absence of, or before turning them over to, Army personnel. For further guidance, *see* SECNAVINST 3461.3, Subj: Program for Prisoners of War and Other Detainees; OPNAVINST 3120.32 (series), Subj: Standard Organization and Regulations of the U.S. Navy, para. 650.3 (POW Bill); FMFRP 4-26, Subj: Enemy Prisoners of War and Civilian Internees; FM 19-4, Subj: Military Police, Battlefield Circulation Control, Area Security, and Prisoners of War; and AR 190-8 (Ch. 1), Enemy Prisoners of War: Administration, Employment, and Compensation.

The rights and obligations of PWs are detailed in GPW. The Convention's underlying philosophy is that PWs should not be punished merely for having engaged in armed conflict, and that their captivity should be as humane as possible. Although difficulties have been encountered in practice, GPW is the universally accepted standard for treatment of PWs; virtually all nations are parties to it and it is now regarded as reflecting customary law. *See also* de Preux, Synopsis VII: Combatants and Prisoner-of-War Status, 1989 Int'l Rev. Red Cross 47-50, and Dutli, Captured Child Combatants, 1990 Int'l Rev. Red Cross 421.

For guidance on the conduct of U.S. military personnel taken prisoner by the enemy, *see* The Code of Conduct at Annex A11-1 (p. 11-25); DOD Directive 1300.7, Subj: Training and Education Measures Necessary to Support the Code of Conduct; OPNAVINST 1000.24 (series), Subj: Code of Conduct Training; and OPNAVINST C3305.1 (series), Subj: Survival, Evasion, Resistance and Escape (SERE) Program, Doctrine and Policy Concerning.

48. GPW, art. 16.

49. GPW, art. 17(1). These items are contained on each U.S. armed forces identification card, DD Form 2, which also serves as the Geneva Conventions Identification Card. The permissible sanction for a PW failing to furnish basic required information is to treat that PW as the equivalent of an E-1 and not afford the PW any privileges that might be due because of military rank or status. GPW, art. 17(2).

This rule does not prohibit a Detaining Power from interrogating a PW on subjects going far beyond name, rank and service number. While the range of questioning is completely unlimited, the means of questioning are limited. Levie, 1 The Code of International Armed Conflict 310. The PW is, of course, not bound to respond beyond name, rank, *etc.* Indeed, the Code of Conduct, art. V, requires that U.S. military personnel taken prisoner by the enemy evade answering further questions to the utmost of their ability. *See* Annex A11-1 (p. 502).

50. GPW, art. 17(4). There are a variety of practical as well as humane reasons to support this prohibition. The truth and accuracy of information obtained through coercion, torture or threats is always suspect. Humane treatment of PWs encourages other enemy personnel to surrender or defect, and permits the use of fewer resources to detain PWs and obtain reliable information. Disclosure that PWs have been tortured will almost always produce adverse public opinion in both belligerent and neutral nations. *See*, Stockdale & Stockdale, In Love and War 295-325, 361-71 (1984). Moreover, maltreatment of PWs by one side may lead the other side to reciprocate.

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,[51] 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,[52] 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.[53]

51. HR, art. 3; GPW, arts. 4A(1) & 4A(4). The United States supports the principle that persons entitled to combatant status be treated as prisoners of war in accordance with GPW. Matheson remarks, paragraph 11.1, note 2 (p. 481), at 425.

Persons who accompany the armed forces without actually being members thereof include "civilian members of miliary aircraft crews, war correspondents, supply contractors, members of labor units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card." GPW, art. 4A(4). BUPERSINST 1750.10, Subj: Identification Cards for Members of the Uniformed Services, Their Family Members and Other Eligible Persons governs the issuance of identity cards for civilians accompanying the armed forces.

Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the parties to the conflict, who do not benefit by more favorable treatment under any other provisions of international law, and members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power, are also entitled to PW status upon capture. GPW, arts. 4A(5) & 4A(3).

The officers and crews of captured or destroyed enemy warships and military aircraft (including naval auxiliaries) should be made PWs. *See* paragraph 8.2.2.1 (p. 408) regarding the treatment of officers, crew and passengers of captured enemy merchant vessels and civil aircraft. *See* paragraph 7.10.2 (p. 398) regarding treatment of officers, crew and passengers of captured neutral merchant vessels and civil aircraft.

Any wounded, sick or shipwrecked found on board a hospital ship or neutral merchant vessel may be taken on board the searching warship providing they are in a fit state to be moved and the warship can provide adequate medical facilities. If they are of enemy nationality, they become PWs. *See also* paragraph 8.2.3, note 62 (p. 413). This situation may arise when a warship exercises its right to search any hospital ship or neutral merchant vessel it meets on the high seas. (*See* paragraph 7.6 (p. 387) regarding visit and search generally.)

52. Members of a *levee en masse, i.e.*, 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 are also entitled to PW status upon capture, provided they carry arms openly and respect the laws and customs of war. GPW, art. 4A(6).

53. Declaration of Brussels art. 9; HR, art. 1; GPW 1929, art. 1; GPW, art. 4A(2). GP I, art. 44(3), would significantly diminish these requirements for irregulars by requiring them to carry their arms openly only "during each military engagement and during such time as they are visible to the enemy while engaged in a military deployment preceding the launching of an attack." Perhaps more than any other provision, this proposed change is the most militarily objectionable to the United States because of the increased risk to the civilian population within which such irregulars often attempt to hide. U.S. Secretary of State Letter of Submittal, 13 December 1986, 26 Int'l Leg. Mat'ls 564; Feith, The National Interest, Fall 1985, at 43-47; Sofaer, Foreign Affairs,

(continued...)

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.[54] Individuals captured as spies or as illegal combatants have the right to assert their claim of entitlement to prisoner-of-war status before a judicial tribunal and to have the question adjudicated.[55] Such persons have a right to be fairly tried for violations of the law of armed conflict and may not be summarily executed.[56]

11.7.1 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.[57] 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.[58] At a minimum, these rights must include the assistance of lawyer counsel, an interpreter, and a fellow prisoner.[59]

53.(...continued)
Summer 1986, at 914-15; Roberts, 26 Va. J. Int'l L. 128-34; Levie, 1 The Code of International Armed Conflict 300-01; The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 Am. U.J. Int'l L. & Policy (1987) (remarks of U.S. Department of State Legal Adviser Sofaer) at 463 & 466-67. Some nations have ratified GP I on the understanding that this exception would apply only in occupied territory (Belgium, Canada, Italy, New Zealand, South Korea, Spain, United Kingdom on signature) or in wars of national liberation covered by GP I, art. 1(4) (Belgium, Canada, New Zealand, South Korea, United Kingdom on signature), and that "deployment" means any individual or collective movement towards a position from which an attack is to be launched (Belgium, Canada, Italy, Netherlands, New Zealand, South Korea, Spain, United Kingdom on signature). Some of these nations have also declared that "visible to the adversary" includes visible with the aid of any form of surveillance, electronic or otherwise, available to keep a member of the armed forces of the adversary under observation (New Zealand). The negotiating history on these points is analyzed *in* Bothe, Partsch & Solf 251-55 and ICRC, Commentary (GP I) 529-36.

54. GPW, art. 5(2); GP I, art. 45(1); Matheson remarks, paragraph 11.1, note 2 (p. 481), at 425. For instances of its application, *see* Levie, Priosners of War 55-57; Levie, Documents 694, 722, 732, 737, 757 & 771; Green 109.

55. GP I, arts. 45(3), 75(3) & 75(7); Matheson remarks, paragrph 11.1, note 2 (p. 481), at 425-26. *See also* the discussion on spies at paragraph 12.8 (p. 515).

56. GP I, art. 75(4). *See also* paragraph 12.7.1 (p. 515) (illegal combatants) and paragraph 12.8.1 (p. 516) (PWs).

57. *See* paragraph 6.2.5.1 (p. 350) regarding war crime trials during hostilities. *See also* Levie, Criminality in the Law of War, *in* 1 International Criminal Law (Bassiouni ed., 1986), *reprinted in* Schmitt & Green at chap. 11.

58. GPW, art. 84. Such trials may be in military or civilian courts. 3 Pictet 412; Levie, Documents 372.

59. GPW, art. 105, which details these and other rights, including the right to call witnesses.

Although prisoners of war may be subjected to disciplinary action for minor offenses committed during captivity, punishment may not exceed 30 days confinement.[60] Prisoners of war may not be subjected to collective punishment nor may reprisal action be taken against them.[61]

11.7.2 Labor. Enlisted prisoners of war may be required to engage in labor having no military character or purpose.[62] Noncommissioned officers may be required to perform only supervisory work.[63] Officers may not be required to work.[64]

11.7.3 Escape. Prisoners of war may not be punished for acts committed in attempting to escape, unless they cause death or injury to someone in the process. Disciplinary punishment may, however, be imposed upon them for the escape attempt.[65] Prisoners of war who make good their escape by rejoining friendly forces or leaving enemy controlled territory, may not be subjected to such

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60. GPW, arts. 89 & 90. This limitation of course applies only to "minor offenses."

61. GPW, arts. 26(6), 87(3) & 13(3).

62. GPW, art. 50; Levie, Prisoners of War 225-37. Prisoners of war may not be compelled to remove mines or similar devices. GPW, art. 52(3); Levie, *id.*, 238-40; Levie, 1 The Code of International Armed Conflict 356-57.

> In the Falklands/Malvinas conflict, Argentine PWs, specialized in engineering, voluntarily took part in operations under the responsibility of British officers to mark the outer limit of minefields. . . . On visiting these prisoners, the ICRC made sure that they were doing this marking work without compulsion. However, and although there was no compulsion, one incident associated with the dangerous nature of these operations did occur after which the British no longer requested the voluntary assistance of the Argentine prisoners of war.

Junod, Protection of the Victims of Armed Conflict: Falklands-Malvinas Islands (1982): International Humanitarian Law and Humanitarian Action 30 (1984). *See also* London Times, 2 June 1982, at 1; *id.*, 3 June 1982, at 1; U.N. Docs. S/15176, 7 June 1982, and S/15182, 8 June 1982 (Argentine letters of complaint); U.N. Doc. S/15198, 11 June 1982 (British response).

63. GPW, art. 49(2).

64. GPW, art. 49(3). Officers may, however, volunteer to do so. "It has been found that the physical and mental health, and morale, of prisoners of war who are not given work to occupy their time (which in any event passes all too slowly) steadily deteriorate. In addition they are much more susceptible to being led into disruptive actions, such as mutinies, when their time is not fully occupied." Levie, 1 The Code of International Armed Conflict 351; Levie, The Employment of Prisoners of War, 57 Am. J. Int'l L. 318 (1963) *reprinted in* Schmitt & Green at chap. 3.

65. GPW, arts. 92 & 93. Art. III of the Code of Conduct (Annex A11-1 (p. 502)) imposes a duty on all U.S. PWs to escape and to aid others to escape. Persons guarding PWs may use weapons against PWs escaping or attempting to escape only as an extreme measure and must always precede their use by giving warning appropriate to the circumstances. GPW, art. 42. Unless he or she injures someone in the process, a PW cannot be awarded more than the disciplinary punishment noted in paragraph 11.7.1 (p. 492) for trying to escape or helping others to escape.

disciplinary punishment if recaptured. However, they remain subject to punishment for causing death or injury in the course of their previous escape.[66]

11.7.4 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,[67] but does not address temporary stay on board vessels.[68] U.S. policy permits detention of prisoners of war, civilian internees, and detained persons on naval vessels as follows:[69]

1. When picked up at sea, they 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. They may be temporarily held on board naval vessels while being transported between land facilities.

3. They 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.[70] Use of

66. Declaration of Brussels, art. 28; GPW, art. 91.

67. GPW, art. 22(1). This provision was made explicit in GPW, probably in response to the use of ships to intern prisoners of war during World War II. The practice had previously been prevalent especially during the Napoleonic Wars. ICRC, 1 Report on its Activities During the Second World War 248 (1948); Levie, Prisoners of War 121 & n.84; Levie, 1 The Code of International Armed Conflict 318. Cartel vessels are discussed in paragraph 8.2.3 and note 61 (pp. 412 & 413).

68. This need was acutely present at the end of the 1982 Falklands/Malvinas Conflict when 13,000 Argentine soldiers surrendered, winter was fast approaching, and the tent shelters Britain had sent were lost in the sinking of the ATLANTIC CONVEYOR. Middlebrook, Task Force: The Falklands War, 1982, at 247, 381, 385 (rev. ed. 1987).

69. AR 190-8, paragraph 11.7, note 47 (p. 490).

70. PWs must be evacuated, as soon as possible after capture, away from the combat zone to safe camps. While awaiting evacuation from a fighting zone, PWs must not be unnecessarily exposed to danger. Evacuation must be effected humanely and under conditions similar to those used to evacuate the capturing force. GPW, arts. 19-20. In small unit operations such as commando raids, long range reconnaissance patrols and airborne operations, it is frequently impracticable to evacuate PWs promptly from the combat zone. Bothe, Partsch & Solf 224. PWs may not be put to death even if their presence retards movement or diminishes operational effectiveness. FM 27-10, para. 85, at 35. Rather, such PWs may be disarmed and released at some appropriate time taking all feasible precautions for their safety. GP I, art. 41(3). Those precautions are only those practicable in light of the combat situation and all other circumstances prevailing at the time. There is, of course, no requirement for the captors to render themselves ineffective in providing for the PWs' safety after their release.

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immobilized vessels for temporary detention of prisoners of war, civilian internees, or detained persons is not authorized without NCA approval.[71]

11.8 INTERNED PERSONS

Enemy civilians falling under the control of a belligerent may be interned if security considerations make it absolutely necessary to do so.[72] Civilians sentenced for offenses committed in occupied territory may also be ordered into internment in lieu of punishment.[73] Enemy civilians may not be interned as hostages.[74] Interned persons may not be removed from the occupied territory in which they reside except as their own security or imperative military considerations may require.[75] All interned persons must be treated

70.(...continued)
Within the limits imposed by available resources and without endangering its own forces, the detaining power must provide sufficient free food, clothing, shelter and medical care for PWs to maintain good health. GPW, arts. 15 & 25-28.

Arms, military documents and military property may be confiscated. PWs must be allowed to keep all personal property, identification, military articles issued for personal protection from the elements, and uniforms, badges of rank and decorations. For security reasons the detaining power may limit the amount of currency and other articles of value in each PW's possession. GPW, art. 18.

71. AR 190-8, paragraph 11.7, note 47 (p. 490).

72. They may also be assigned residence. GC, arts. 42(1) & 78. In the U.S. armed forces, responsibility for handling internees is generally a function of the Army. *See* FM 19-40, Enemy Prisoners of War and Civilian Internees; Gasser, Protection of the Civilian Population, *in* Fleck at 288-96.

73. GC, art. 68(1). The general penal laws and regulations of the occupying power applicable to all citizens of the occupied territory or to all citizens of the territory of a party to the conflict apply to individuals after their internment. An internee may be subjected to judicial punishment only for a violation of these substantive laws. Internees may receive only disciplinary punishments for acts which are punishable when committed solely by them, but which are not punishable when committed by persons who are not internees. The punishments for such acts are severely curtailed; no internee can be fined more than 50% of his pay for one month, given fatigue duties exceeding two hours daily for one month, or imprisoned for more than one month. Such disciplinary punishment may only be ordered by the commander of the place of internment, or by one to whom the commander has delegated his disciplinary powers. The disciplinary sanctions allowed against internees are the same as those against PWs. GC, arts. 117-26. *See also* Green 220-23.

74. GC, art. 34; 4 Pictet 229-31. *Cf. The Hostages Case, U.S. v. Wilhelm List et al.*, 11 TWC 1230 (1948). For a discussion of Iraqi violation of this prohibition during the Persian Gulf War *see* Title V, Report at 0-607; Moore, Crisis in the Gulf 86-88 (1992). *See also* paragraph 11.2 and note 8 (pp. 481 & 482).

75. GC, art. 49(2); 4 Pictet 278-83. This prohibition results from the experiences of World War II when:

> [T]here were many instances of individual and mass forcible transfers or deportations of the inhabitants of occupied territories by the Occupying Power, frequently under

(continued...)

humanely and may not be subjected to reprisal action or collective punishment.[76]

11.9 PROTECTIVE SIGNS AND SYMBOLS

11.9.1 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).[77] A red lion and sun on a white field, once

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75.(...continued)

> horrendous conditions and usually accomplished solely because the Occupying Power wanted additional manpower for labor in other areas (perhaps in armament factories in its home territories or, just as important, as agricultural workers), or because it desired to make room for the movement of its own nationals into the occupied territory.

Levie, 2 The Code of International Armed Conflict 720. GP I, art. 78, details restrictions on the evacuation of children applicable to parties to GP I. The United States supports the principle in article 78 that no nation arrange the evacuation of children except for temporary evacuation where compelling reasons of the health or medical treatment of the children or, except in occupied territory, their safety so require. Matheson remarks, paragraph 11.1, note 2 (p. 481), at 428. The complex body of law that may be applicable in the variety of situations involving the evacuation of children is carefully explained *in* ICRC, Commentary (GP I) 908-15.

Whether interned in occupied territory or in territory of a party to the conflict, an individual's status as an internee during hostilities is subject to periodic review at least every six months in domestic territory, and if possible, every six months in occupied territory. GC, arts. 43 & 72(2). If occupation is terminated by the withdrawal of the occupying power before the close of hostilities, such power may not forcibly transfer internees out of the former occupied territory. GC, art. 49(1). Since the existence of hostilities is the main cause for internment, internment should cease when hostilities cease. GC, art. 133(1).

76. GC, arts. 32 & 33. Professor Levie cites this extreme example of illegal imposition of collective punishment:

> The execution of 190 male residents, the deportation of the women, the dispersion of the children, and the razing of the town of Lidice, in Czechoslovakia, on 10 June 1942, because of the assassination of the Nazi gauleiter Reinhard Heydrich . . . by Czech resistance fighters parachuted in from Great Britain.

Levie, 1 The Code of International Armed Conflict 444. *See* Calvocoressi & Wint, Total War 267 (1972); Asprey, War in the Shadows: The Guerrilla in History 421 (1975); and sources cited therein.

77. HR, art. 23(f); GWS, art. 38; GWS-Sea, art. 41; GC, art. 18. The red cross on a white ground was first adopted in the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva, 22 August 1864, 22 Stat. 940; 55 BFSP 43; *reprinted in* Schindler & Toman 213, at art. 7, reversing the Swiss Federal colors as a compliment to Switzerland. The strengths and weaknesses of the emblems are discussed in a series of articles appearing in 1989 Int'l Rev. Red Cross 405-64, and Cauderay, Visibility of the Distinctive Emblem on Medical Establishments, Units and Transports, 1990 Int'l Rev. Red Cross 295.

employed by Iran, is no longer used.[78] Israel employs a red six-pointed star, 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.[79] Nevertheless, all medical and religious persons or objects recognized as being so marked are to be treated with care and protection.[80]

11.9.2 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).[81] Prisoner-of-war camps are marked by the letters "PW" or "PG" (Figure 11-1e);[82] civilian internment camps with the letters "IC" (Figure

78. As from 4 July 1980. 1980 Int'l Rev. Red Cross 316-17.

79. The Israeli reservations to GWS, GWS-Sea and GC are quite similar. The reservation to the GWS reads:

> Subject to the reservation that, while respecting the inviolability of the distinctive signs and emblems of the Convention, Israel will use the Red Shield of David as the emblem and distinctive sign of the medical services of her armed forces.

To GWS-Sea, Israel's reservation states:

> ... Israel will use the Red Shield of David on the flags, armlets and on all equipment (including hospital ships), employed in the medical service.

Schindler & Toman 576. The Director of the ICRC has argued that the Israeli statement constitutes merely a unilateral declaration. Pilloud, Reservations to the Geneva Conventions of 1949, 1976 Int'l Rev. Red Cross 121-22. Israel continues to use the Red Star of David as its protective emblem. CDDH/SR.37 Annex, 6 Official Records 78-79, Levie, 1 Protection of War Victims 309, 4 *id.* 161.

The United States has rejected the Israeli reservations, as part of its rejection of all reservations to the 1949 Geneva Conventions, while accepting treaty relations with all parties "except as to the changes proposed by such reservations." Schindler & Toman 590. As a result, the use of the Red Shield of David (Magen David Adom) has to be, and has been in the Arab-Israeli conflicts, recognized as a protective emblem by any other party to an armed conflict with Israel. Bothe, Partsch & Solf 103; Vienna Convention on the Law of Treaties, art. 20.5. Nevertheless, despite strenuous efforts, the Red Shield of David has not been formally recognized as a protective symbol in the relevant treaties. Rosenne, The Red Cross, Red Crescent, Red Lion and Sun and the Red Shield of David, 5 Israel Y.B. Human Rights 1 (1975). Multiplicity of protective emblems does not facilitate their recognition in the heat of battle. Gasser, The Protection of Journalists Engaged in Dangerous Professional Missions, 1983 Int'l Rev. Red Cross 10.

80. Pilloud, note 79, at 122; Levie, 2 The Code of International Armed Conflict, art. 1011.1.2, at 651. *See also* paragraph 11.9.7 (p. 499).

81. GC, art. 14 & Annex I, art. 6. A history of hospital and safety zones may be found *in* 4 Pictet 121-24. Hospital zones for the wounded and sick combatants are to be marked with red crosses. GWS, art. 23 & Annex I, art. 6; 1 Pictet 422; 4 Pictet 634.

82. GPW, art. 23(4); 3 Pictet 190. PW camps are to be marked with the letters PW or PG (*prisonniers de guerre*) placed so as to be clearly visible from the air in daytime. If the exact locations of PW camps are provided as required by GPW, art. 23(3), the need for this marking may be reduced. Levie, Prisoners of War 123-24; Levie, 2 The Code of International Armed Conflict 689. The parties may agree on some other marking scheme. Areas other than PW camps must not bear these markings. GPW, art. 23(4).

11-1f).[83] 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).[84] 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).[85]

Two protective symbols established by the 1977 Protocol I 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).[86] Civil defense facilities and personnel may be identified by an equilateral blue triangle on an orange background (Figure 11-1j).[87]

11.9.3 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).[88]

11.9.4 The 1954 Hague Convention Symbol. A more recent protective symbol was established by the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict.[89] Cultural sites that are of artistic, historical, or archaeological interest, whether religious or secular, may be marked with the symbol to facilitate recognition. The symbol may be used alone

83. GC, art. 83(3); 4 Pictet 383-84. The letters IC are used only if military considerations permit and are to be placed so as to be clearly visible from the air in daytime. If the exact locations of internment camps are provided as required by GC, art. 83(2), the need for this marking may be reduced. The parties may agree on some other marking scheme. Areas other than internment camps must not bear these markings. GC, art. 83(3).

84. Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954, 249 U.N.T.S. 240, *reprinted in* Schindler & Toman 749, art. 16.

85. Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, Washington, 15 April 1935, 49 Stat. 3267; T.S. 899; 3 Bevans 254; 167 L.N.T.S. 279, art. 3. Parties to the Roerich Pact include Brazil, Chile, Colombia, Cuba, Dominican Republic, El Salvador, Guatemala, Mexico, the United States, and Venezuela.

86. GP I, art. 56(7). *See* paragraph 8.5.1.7 (p. 426).

87. GP I, art. 66(4). Civil defense personnel are discussed in paragraph 11.3, note 16 (p. 484).

88. Hague IX, art. 5. Hospitals should be marked with red crosses.

89. *See* note 84 (p. 498).

or repeated three times in a triangular formation. It takes the form of a shield, pointed below, consisting of a royal-blue square, one of the angles of which forms the point of the shield, and of a royal-blue triangle above the square, the space on either side being taken up by a white triangle (Figure 11-1g).

11.9.5 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.[90]

11.9.6 Permitted Use. Protective signs and symbols may be used only to identify personnel, objects, and activities entitled to the protected status which they designate.[91] Any other use is forbidden by international law.[92]

11.9.7 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.[93]

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90. Lieber Code, arts. 111-14; HR, arts. 23(f) & 32; GP I, art. 38(1); FM 27-10, paras. 53, 458, 460 & 467. *See* paragraph 11.7 (p. 489) for a discussion of surrender.

91. GWS, art. 44(1); GWS-Sea, art. 44; Hague Cultural Property Convention, art. 17. *See* paragraph 11.9.2, note 84 (p. 498); GP I, art. 66(8) (civil defense). The United States has reserved the right of a few of its businesses to continue using the red cross commercially provided it was so used prior to 1905. Schindler & Toman 590; 1 Pictet 387; Pilloud, paragraph 11.9.1, note 79 (p. 497) at 123.

92. HR, art. 23(f); GWS, art. 53; GP I, art. 38; implemented *in* 18 U.S.C. sec. 706 (1982). There are no express limitations on the use of the special sign of the Roerich Pact, the Hague 1907 sign, or for dams, dikes and nuclear power stations established by art. 56(7) of GP I. However, "the supervision and control of the special sign [for dams, dikes, and nuclear generating stations] depends on the more general provisions of Art. 80 and the general prohibitions against improper use of recognized emblems of Art. 38" of GP I. Bothe, Partsch & Solf 357. They are of the view that in some (unspecified) circumstances, "the deliberate misuse of the special sign could constitute a grave breach" under art. 85(3)(f) of GP I. *Ibid.* The same rationale would apply to misuse of the Roerich Pact and Hague 1907 signs. Improper use of protected signs and symbols constitutes perfidy. *See* paragraph 12.1.2 (p. 509) for a discussion of perfidy. The protections for dams, dikes and nuclear electrical generating stations are discussed in paragraph 8.5.1.7 and accompanying notes (p. 426).

93. 1 Pictet 307 recognizes there are circumstances when display of the distinctive emblem unnecessarily exposes noncombatants to risk of attack in violation of their immunity or compromises operational integrity. In the U.S. Army, authority to direct the protective emblem not be used for tactical or operational reasons is held by the "major tactical commander." AR 750-1, Subj: Maintenance of Supplies and Equipment: Army Materiel Maintenance Policy and Retail Maintenance Operations (ch. 1), paras. 4-41d(6) & (7).

11.10 PROTECTIVE SIGNALS

Three optional methods of identifying medical units and transports have been created internationally.[94] United States hospital ships and medical aircraft do not use these signals.

11.10.1 Radio Signals. For the purpose of identifying medical transports by radio telephone, the words PAN PAN are repeated three times followed by the word "medical" pronounced as in the French MAY-DEE-CAL. Medical transports are identified in radio telegraph by three repetitions of the group XXX followed by the single group YYY.[95]

11.10.2 Visual Signals. On aircraft, the flashing blue light may be used only on medical aircraft. Hospital ships, coastal rescue craft and medical vehicles may also use the flashing blue light. Only by special agreement between the parties to the conflict may its use be reserved exclusively to those forms of surface medical transport.[96]

11.10.3 Electronic Identification. The identification and location of medical ships and craft may be effected by means of appropriate standard maritime radar transponders as established by special agreement to the parties to the conflict. The identification and location of medical aircraft may be effected by use of the secondary surveillance radar (SSR) specified in Annex 10 to the Chicago Convention. The SSR mode and code is to be reserved for the exclusive use of the medical aircraft.[97]

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94. GP I, art. 18(5-6) & Annex I, art. 5.

95. Radio Regulations (Mob 1983), art. 40, 1984 Int'l Rev. Red Cross 54-56; International Code of Signals, H.O. Pub. 102, at 137 (rev. 1981); GP I, Annex I, art. 7; Bothe, Partsch & Solf 586-88; Levie, 2 The Code of International Armed Conflict 704-06; Eberlin, Protective Signs 12-16; ICRC, Commentary (GP I) 1216-45.

96. International Code of Signals, H.O. Pub. 102 (rev. 1981), change 136A, Notice to Mariners 52/85, at II-2.5; GP I, Annex I, art. 6. *See* Bothe, Partsch & Solf 585; Levie, 2 The Code of International Armed Conflict 703-04; Eberlin, The Identification of Medical Aircraft in Periods of Armed Conflict, 1982 Int'l Rev. Red Cross 207-09; Eberlin, Identification of Hospital Ships and Ships Protected by the Geneva Conventions of 12 August 1949, 1982 *id.* 315; Eberlin, The Protection of Rescue Craft in Periods of Armed Conflict, 1985 *id.* 140; ICRC, Commentary (GP I) 1206-11. Experiments conducted during the Falklands/Malvinas war by the British found the visibility of a flashing blue light was seven nautical miles, while normal visibility at sea was one mile. Junod, Protection of the Victims of Armed Conflict Falkland-Malvinas Islands (1982), at 25. Similar results are reported in Cauderay, Visibility of the Distinctive Emblem on Medical Establishments, Units, and Transports, 1990 Int'l Rev. Red Cross 295. Its use ashore poses difficulties caused by the extensive use by many European and Asian police, fire and emergency vehicles of the flashing blue light.

97. Radio Regulations (Mob 1983), arts. 3219A & B; International Code of Signals, H.O. Pub. 102 (rev. 1981), change 136A, Notice to Mariners 52/85, at II-2.5; Eberlin, Amendments to

(continued...)

11.11 IDENTIFICATION OF NEUTRAL PLATFORMS

Ships and aircraft of nations not party to an armed conflict may adopt special signals for self-identification, location and establishing communications. Use of these signals does not confer or imply recognition of any special rights or duties of neutrals or belligerents, except as may otherwise be agreed between them.[98]

97.(...continued)
the Radio Regulations Concerning Medical Means of Transport and Neutral Means of Transport, 1984 Int'l Rev. Red Cross 51; Eberlin, Underwater Acoustic Identification of Hospital Ships, 1988 Int'l Rev. Red Cross 505; GP I, Annex I, art. 8; Bothe, Partsch & Solf 589; Levie, 2 The Code of International Armed Conflict 706-07; ICRC, Commentary (GP I) 1248-55. The SSR is also known as IFF (identification friend or foe).

98. Resolution No. 18 (Mob 1983), World Administrative Radio Conference for Mobile Services, Geneva 1983, *reprinted in* 1984 Int'l Rev. Red Cross 58; ICRC, Commentary (GP I) 1244-45. *See* Eberlin, Amendments to the Radio Regulations Concerning Medical Means of Transport and Neutral Means of Transport, 1984 Int'l Rev. Red Cross 52.

ANNEX A11-1

CODE OF CONDUCT

I

I am an American, fighting in the forces which guard my country and our way of life. I am prepared to give my life in their defense.

II

I will never surrender of my own free will. If in command, I will never surrender the members of my command while they still have the means to resist.

III

If I am captured I will continue to resist by all means available. I will make every effort to escape and aid others to escape. I will accept neither parole nor special favors from the enemy.

IV

If I become a prisoner of war, I will keep faith with my fellow prisoners. I will give no information or take part in any action which might be harmful to my comrades. If I am senior, I will take command. If not, I will obey the lawful orders of those appointed over me and will back them up in every way.

V

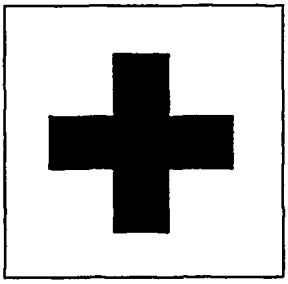
When questioned, should I become a prisoner of war, I am required to give name, rank, service number, and date of birth. I will evade answering further questions to the utmost of my ability. I will make no oral or written statements disloyal to my country and its allies or harmful to their cause.

VI

I will never forget that I am an American, fighting for freedom, responsible for my actions, and dedicated to the principles which made my country free. I will trust in God and in the United States of America.

Sources: Executive Order 12633 (Mar. 1988); Code of the U.S. Fighting Force, American Forces Information Service, DOD (1988).

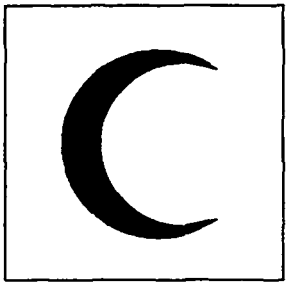
a.



The Red Cross

Symbol of medical and religious activities.

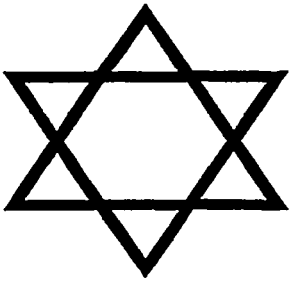
b.



The Red Crescent

Symbol of medical and religious activities.

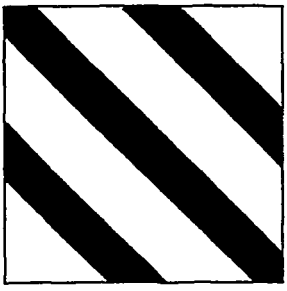
c.



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.

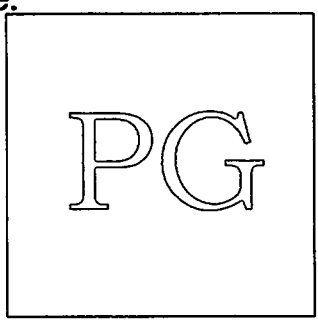


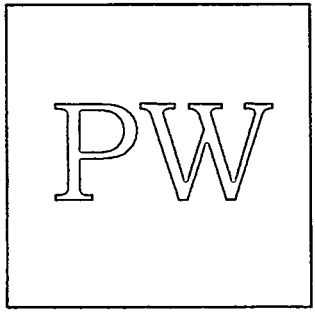
Marking for Hospital and Safety Zones for Civilians and Sick and Wounded (Three Red Stripes)

(Noncombatants)

FIGURE 11-1. Protective Signs and Symbols (Sheet 1 of 3)

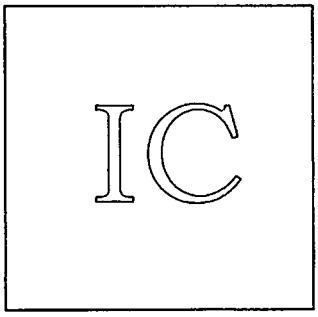
e.





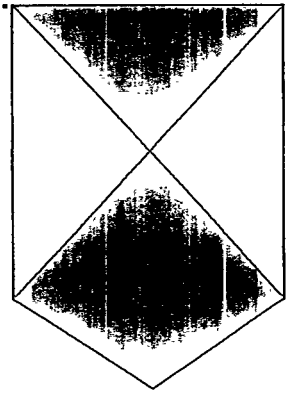
Symbols for Prisoner of War Camps

f.



Civilian Internment Camps

g.

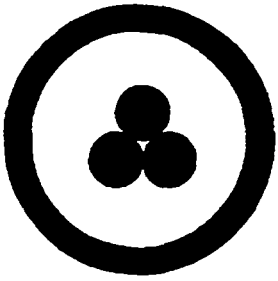


Symbol for Cultural Property Under the 1954 Hague Convention (Blue and White)

(Also used in a group of three to indicate special protection.)

FIGURE 11-1. Protective Signs and Symbols (Sheet 2 of 3)

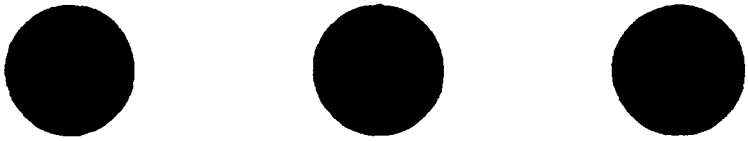
h.



Roerich Pact (Red and White)

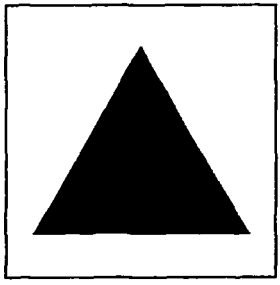
Symbol used for historical, artistic, education, and cultural institutions, among Western Hemisphere nations.

i.



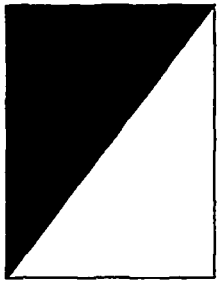
Special Symbol for Works and Installations Containing Dangerous Forces (Three Orange Circles)
(Dams, dikes, and nuclear power stations)

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.[1]

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.[2]

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1. Lieber Code, art. 101; HR, art. 24; GP I, art. 37(2). These rules are considered applicable to warfare at sea. Hall, False Colors and Dummy Ships: The Use of Ruse in Naval Warfare, Nav. War Coll. Rev., Summer 1989, at 54-55, sets out a useful flowchart for analysis of proposed deception. *See also* Green 138, 139, 169 & 170.

See paragraph 5.4.2, note 34 (p. 303) regarding the U.S. decision not to seek ratification of GP I.

"Rules of international law applicable in armed conflict" has been defined as "the rules applicable in armed conflict set forth in international agreements to which the Parties to the conflict are Parties and the generally recognized principles and rules of international law which are applicable to armed conflict." GP I, art. 2(b). *See also* paragraph 6.2.2, note 34 (p. 335), for the ICRC definition of "international humanitarian law applicable in armed conflict."

2. NWIP 10-2, para. 640 n.41; AFP 110-34, para. 5-1; AFP 110-31, paras. 8-3b & 8-4; FM 27-10, para. 51; DA Pam 27-161-2, at 57; British Manual of Military Law, Part III, para. 312 (1958); 2 Oppenheim-Lauterpacht 428-30; GP I, art. 37(2); Green 139. *See* Hartcup, Camouflage: A History of Concealment and Deception in War (1980) and Glantz, Soviet Military Deception in the Second World War (1989). These acts are not perfidious because they do not invite the confidence of the enemy with respect to protection under the law. GP I, art. 37(2).

Other permissible deceptions include traps; mock operations; feigned retreats or flights; surprise attacks; simulation of quiet and inactivity; use of small units to simulate large units; use of dummy aircraft, vehicles, airfields, weapons and mines to create a fictitious force; moving landmarks and route markers; pretending to communicate with forces or reinforcements which do not exist; deceptive supply movements; and allowing false messages to fall into enemy hands. *See* Montagu, The Man Who Never Was (1954), for an account of a British ruse during World War II regarding the invasion of Europe. It is permissible to attempt to frustrate target intelligence activity, for example by the employment of ruses to conceal, deceive and confuse reconnaissance means. The prohibition in GP I, art. 39, against the use of the adversary's "military emblems, insignia or uniforms" refers only to concrete visual objects and not to his signals and codes. Bothe, Partsch &

(continued...)

2.(...continued)
Solf 214. The United States does not support the prohibition in art. 39 on the use of enemy emblems, insignia and uniforms during military operations except in actual armed engagement. *See* paragraph 12.5.3 (p. 513).

AFP 110-31, para. 8-4b, provides the following additional examples of lawful ruses:

(1) The use of aircraft decoys. Slower or older aircraft may be used as decoys to lure hostile aircraft into combat with faster and newer aircraft held in reserve. The use of aircraft decoys to attract ground fire in order to identify ground targets for attack by more sophisticated aircraft is also permissible.

(2) Staging air combats. Another lawful ruse is the staging of air combat between two properly marked friendly aircraft with the object of inducing an enemy aircraft into entering the combat in aid of a supposed comrade.

(3) Imitation of enemy signals. No objection can be made to the use by friendly forces of the signals or codes of an adversary. The signals or codes used by enemy aircraft or by enemy ground installations in contact with their aircraft may properly be employed by friendly forces to deceive or mislead an adversary. However, misuse of distress signals or distinctive signals internationally recognized as reserved for the exclusive use of medical aircraft would be perfidious.

(4) Use of flares and fires. The lighting of large fires away from the true target area for the purpose of misleading enemy aircraft into believing that the large fires represent damage from prior attacks and thus leading them to the wrong target is a lawful ruse. The target marking flares of the enemy may also be used to mark false targets. However, it is an unlawful ruse to fire false target flare indicators over residential areas of a city or town which are not otherwise valid military objectives.

(5) Camouflage use. The use of camouflage is a lawful ruse for misleading and deceiving enemy combatants. The camouflage of a flying aircraft must not conceal national markings of the aircraft, and the camouflage must not take the form of the national markings of the enemy or that of objects protected under international law.

(6) Operational ruses. The ruse of the "switched raid" is a proper method of aerial warfare in which aircraft set a course, ostensibly for a particular target, and then, at a given moment, alter course in order to strike another military objective instead. This method was utilized successfully in World War II to deceive enemy fighter interceptor aircraft.

While it is common practice among nations to place national markings on both military aircraft and vessels, it is unclear if international law requires nations to do so. The legality of the use of unmarked military aircraft or vessels in combat is unsettled as operational requirements occasionally dictate that markings not be used. *Compare* Jacobsen, A Juridical Examination of the Israeli Attack on the *U.S.S. Liberty*, 36 Nav. L. Rev. 41-44 (1986) (the use of unmarked Israeli aircraft to attack USS LIBERTY on 8 June 1967) with AFP 110-31, para. 7-4 (superfluous marking not required, as "when no other aircraft except those belonging to a single state are flown"). Failure to mark vessels and aircraft clearly in peacetime results in the loss of certain privileges and immunities for such aircraft or vessels, and quite likely for the crew as well. *See* 1982 LOS Convention, arts. 29 & 107, and Chicago Convention, arts. 20 & 89 (reflecting customary international law on the importance of external markings on aircraft and vessels). *See also* paragraphs 2.1.1 (p. 109) and 2.2.1 (p. 114) for a discussion, respectively, of warships and military aircraft.

(continued...)

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.[3] Feigning surrender in order to lure the enemy into a trap is an act of perfidy.[4]

2.(...continued)
The use of deceptive measures to thwart precision guided weapons is legally permissible. Flares, smoke and aerosol material and dissemination devices can lawfully be used as countermeasures against visually guided, laser-guided, infrared and television-guided missiles. Chaff is a lawful countermeasure against active radar-homing missiles. Infrared-absorbing paint and flare technology are lawful countermeasures against infrared sensors.

> It would be a legitimate ruse to use the electronic transponder aboard a combatant aircraft to respond with the code used for identifying friendly aircraft (IFF), but it would be perfidious to use for this purpose the electronic signal established under annex I, Art. 8, [GP I] for the exclusive use of medical aircraft. Similarly, the use of distress signals established under the Radio Regulations of the International Telecommunications Union is prohibited under the second sentence of Art. 38, para. 1 [of GP I] and might also be violative of Art. 37 [of GP I].

Bothe, Partsch & Solf 207, *citing* 10 Whiteman 399. The United States considers that GP I, arts. 37 and 38 reflect customary international law. Matheson, remarks, paragraph 11.1, note 2 (p. 481) at 425.

During Operation Desert Storm, Coalition Forces employed psychological operations involving air-dropped leaflets and radio broadcasts to destroy enemy morale and to induce Iraqi troops to surrender. Title V Report, at J-536 to 38.

Under the definition of perfidy in GP I it would be improper to disseminate false intelligence reports intended to induce the enemy to attack civilians and civilian objects in the mistaken belief that they are military objects. *See also* paragraphs 8.1.2 (p. 403) and 8.5.1.1 (p. 423). On the other hand, it is a common practice, not prohibited by GP I, to disguise a military object to appear to be a civilian object. *See*, for example, the cover and deception tactics used in World War II and described *in* Fisher, The War Magician (1983); Reit, Masquerade: The Amazing Camouflage Deceptions of World War II (1978); Brown, Bodyguard of Lies (1975) (D-Day, 1944); Holmes, Double-Edged Secrets: U.S. Naval Intelligence Operations in the Pacific During World War II (1979); and sources cited therein. World War I examples may be found in the sources cited in AFP 110-31, para. 8-4b n.5.

It is not perfidious to use spies and secret agents, encourage defection or insurrection among the enemy, or encourage enemy combatants to desert, surrender or rebel. Bothe, Partsch & Solf. 207. Enemy personnel that do desert and surrender cannot be compelled to take an oath of allegiance to the captor. Green 140-41.

Dewar, The Art of Deception in Warfare (1989) develops a modern theory of deception. Many modern deception tactics are, of course, classified. *See* OPNAVINST 3070.1 (series), Subj: Operations Security; Joint Pub 18, Subj: Operations Security; and OPNAVINST S3430.21 (series), Subj: Electronics Warfare Operations Security. *See also* OPNAVINST S3490.1 (series), Subj: Military Deception.

3. This definition appears for the first time in GP I, art. 37(1); perfidy had not been previously defined in treaty law. The United States supports the principle that "individual combatants not kill, injure, or capture enemy personnel by resort to perfidy." Matheson, remarks, paragraph 11.1, note 2 (p. 481) at 425. The rationale for this rule is that if protected status or protective signs, signals, symbols, and emblems are abused they will lose their effectiveness and put protected persons and places at additional risk.

4. 2 Oppenheim-Lauterpacht 342; San Remo Manual, para. 111.

12.2 MISUSE OF PROTECTIVE SIGNS, SIGNALS, AND SYMBOLS

Misuse of protective signs, signals, and symbols (see paragraphs 11.9 and 11.10) 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.[5] Similarly, use of the white flag to gain a military advantage over the enemy is unlawful.[6]

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5. This customary rule derives from HR, arts. 23(f) & 27; Hague V, art. 5; GWS-Sea, arts. 30, 34, 35, 41 & 45; GWS, arts. 21, 22, 35 & 36; GC, arts. 18, 20-22; GPW, art. 23; Roerich Pact, arts. 1 & 5. *See* FM 27-10, para. 55; DA Pam 27-161-2, at 53; AFP 110-31, paras. 8-3c, 8-6a(1) & 8-6b; AFP 110-34, para. 5-1a; Slim, Protection of the Red Cross and Red Crescent Emblems, 1989 Int'l Rev. Red Cross 420; and Green 290-91. *See also* GP I, arts. 18(6) & 38, and Hague Cultural Property Convention (paragraph 8.5.1.6, note 122 (p. 425)), arts. 17(3) & (4). The protective signs, symbols, and emblems are illustrated in Figure 11-1 (pp. 503-505). Protective signals are discussed in paragraph 11.10 (p. 500).

6. HR, arts. 23(f), 32 & 34; GP I, art. 37(1)(a). *See also* FM 27-10, paras. 52-53, 458-61 & 504; 2 Oppenheim- Lauterpacht 541; Greenspan 320-21 & 384-85. The white flag symbolizes a request to cease fire, negotiate or surrender. HR, arts. 23(f) & 32; FM 27-10, paras. 53 & 458; AFP 110-34, para. 5-1b; Greenspan 320-21 & 384-85; 2 Oppenheim-Lauterpacht 541. Displaying a white flag before attack to cause the enemy to cease firing is prohibited. As misuse of the red cross (or red crescent) could result in attacks on the sick and wounded, misuse of the white flag might prevent efforts to negotiate on important matters.

However, the enemy is not required to cease firing when a white flag is raised. To indicate that the hoisting is authorized by its commander, the appearance of the flag should be accompanied or followed promptly by a complete cessation of fire from that side. Further, the commander authorizing the hoisting of the flag should also promptly send one or more *parlementaires*. FM 27-10, para. 458, at 167; AFP 110-31, para. 8-6a(2). *See* DA Pam 27-161-2, at 53. (*Parlementaires* are designated personnel employed by military commanders of belligerent forces to pass through enemy lines in order to negotiate or communicate openly and directly with enemy commanders. *Cf.* FM 27-10, para. 459, at 167; HR 32; Levie, 1 The Code of International Armed Conflict 154; Green 88-9.) *See also* paragraph 11.7 and note 43 (p. 489) regarding surrender. Application of these principles was illustrated during the battle for Goose Green in the Falklands/Malvinas conflict when some Argentine soldiers may have raised a white flag and others then killed three British soldiers advancing to accept what they thought was a surrender. Higgenbotham, Case Studies in the Law of Land Warfare II: The Campaign in the Falklands, 64 Mil. Rev., Oct. 1984, at 53 ("Whatever the case was at Goose Green, there was no requirement for the British to expose themselves. The hoister of the white flag is the one expected to come forward, and that is what should have been required of the Argentine soldiers in this case."); Middlebrook, Operation Corporate: The Falklands War, 1982, at 269-70. *But see* Middlebrook, The Fight for the 'Malvinas' 189-90 (1989) (British officer killed when returning from an attempt to negotiate a local surrender with Argentine forces).

(continued...)

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.[7] Use of neutral flags, insignia, or uniforms during an actual armed engagement at sea is, therefore, forbidden.[8]

6.(...continued)
Similarly, international law prohibits pretending to surrender or requesting quarter in order to attack an enemy because of the obligation of combatants to respect opposing combatants who are *hors de combat* or have surrendered. For an account of the perfidious use of the white flag by Iraqi forces during the Persian Gulf War *see* Title V Report, at 0-621. A false broadcast to the enemy that an armistice has been agreed upon has been widely recognized to be perfidious.

7. 2 Oppenheim-Lauterpacht 509.

> The ruse which is of most practical importance in naval warfare is the use of the false flag. It now seems to be fairly well established by the custom of the sea that a ship is justified in wearing false colours for the purpose of deceiving the enemy, provided that she goes into action under her true colours. The celebrated German cruiser "Emden" made use of this strategem in 1914 when she entered the harbour of Penang [on 28 October] under [then neutral] Japanese colours, hoisted her proper ensign, and then torpedoed a Russian cruiser lying at anchor. It is equally permissible for a warship to disguise her outward appearance in other ways and even to pose as a merchant ship, provided that she hoists the naval ensign before opening fire. Merchant vessels themselves are also at liberty to deceive enemy cruisers in this way.

Smith, The Law and Custom of the Sea 115-16 (3d ed. 1959), *citing* Corbett, 1 Naval Operations 350 (1920).

Sources differ as to which flag EMDEN was actually flying on entry into Penang harbor. Van der Vat, Gentlemen of War 86-87 (1983) (the British white ensign); Lochner, The Last Gentleman-of-War: The Raider Exploits of the Cruiser *Emden* 151 (1979, Lindauer transl. 1988), which van der Vat claims is exhaustive, states EMDEN flew no flag as she entered Penang harbor. Corbett states that the flag appeared to be the British white ensign. 2 Oppenheim-Lauterpacht 510 states that EMDEN was flying the Japanese flag. Flying the enemy flag at sea is discussed in paragraph 12.5.1 (p. 512).

GP I, art. 39(3), explicitly states that no changes in the rules applicable to the conduct of war at sea (as set out in the text of paragraph 12.3.1) are made by arts. 39 or 37(1)(d) of that Protocol. Nevertheless the use of these ruses by naval forces today may be politically sensitive, since using neutral emblems might lead a party erroneously to conclude that a neutral has given up its neutrality (*see* Chapter 7) and entered the fighting on the other side. This could lead to an attack or declaration of war on the neutral. AFP 110-34, para. 5-1c; Smith 116-18; Tucker 140-41. *See* paragraph 12.7 (p. 514) regarding false claims of noncombatant status.

8. 2 Lauterpacht-Oppenheim 509; San Remo Manual, paras. 110 & 111; Heinegg, The Law of Armed Conflict at Sea, *in* Fleck at 422.

12.3.2 In the Air. Use in combat of false or deceptive markings to disguise belligerent military aircraft as being of neutral nationality is prohibited.[9]

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.[10]

12.4 THE UNITED NATIONS FLAG AND EMBLEM

The flag of the United Nations and the letters "UN"[11] may not be used in armed conflict for any purpose without the authorization of the United Nations.[12]

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.[13]

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9. AFP 110-31, para. 7-4 & n.5; San Remo Manual, para. 109.

10. This customary rule is codified in GP I, art. 39(1), and applies whether in attack or to promote the interest of a party to the conflict in the conduct of that conflict. CDDH/215/Rev.1, para. 38; 15 Official Records 259; Bothe, Partsch & Solf, para. 2.2, at 213. "The purpose behind this rule is to avoid escalation of armed conflict to neutral countries in the mistaken belief that the neutral State had abandoned its neutrality." Bothe, Partsch & Solf 213. *See also* Oeter, Methods and Means of Combat, *in* Fleck at 202; Green 138-39.

11. The United Nations flag is white on light blue; the letters "UN" are its emblem.

12. GP I, art. 37(1)(d), defines as perfidy in land warfare "the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict." In addition, GP I, art. 38(2), states that "[i]t is prohibited to make use of the distinctive emblem of the United Nations, except as authorized by that Organization." *See* AFP 110-34, para. 5-1d. The United States concurs with this statement and has extended its application to operations at sea as a matter of U.S. policy.

13. This rule with respect to warships has precedent in the skillful disguise of German armed raiders in World Wars I and II. Tucker 140 n.37; Muggenthaler, German Raiders of World War II (1977); Woodward, The Secret Raiders: The Story of the German Armed Merchant Raiders in the Second World War (1955). The EMDEN added a false fourth funnel for her entry into Penang in 1914 to make her resemble a British cruiser of the YARMOUTH class. *See* sources cited in paragraph 12.3.1, note 7 (p. 511). On 27/28 March 1942, HMS CAMPBELTOWN (ex-USS BUCHANAN), with two stacks removed and her two remaining funnels cut off at an angle to resemble a German torpedo-boat destroyer entered St. Nazaire harbor in German-occupied Brittany and rammed herself hard up on the outer lock of the the only dry dock large enough to take the German battleship TIRPITZ. Hours later she was blown up with timed charges, putting the dry dock out of the war. (The attack was facilitated by CAMPBELTOWN's responses to German challenges and gun fire with flashing light delaying signal using the call sign of one of the German ships in the local flotilla, and to another with "wait," followed by the emergency signal,

(continued...)

12.5.2 In the Air. The use in combat of enemy markings by belligerent military aircraft is forbidden.[14]

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.[15] Combatants risk severe punishment, however, if they are captured while displaying enemy colors or insignia or wearing enemy uniforms in combat.[16]

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.[17] 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, collect

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13.(...continued)
"Am being fired upon by friendly forces." *See* paragraph 12.1.1, note 2 (p. 507).) Haines, Destroyers at War 73-80 (1982); Calvocoressi & Wint, Total War 450 (1972); Piekalkiewick, Sea War 1939-1945, at 206 (1987); Roskill, 2 The War at Sea 1939-1945, at 168-73 (1956).

A belligerent may prosecute as a war crime the use of its ensigns, emblems or uniforms by enemy forces during actual military operations against it. AFP 110-31, para. 5-1e. *See also* Heinegg, paragraph 12.3.1, note 8 (p. 511) at 422.

14. Tucker 142 & n.43; AFP 110-31, paras. 7-4 & 8-4b(5). This rule may be explained by the fact that an aircraft, once airborne, is generally unable to change its markings prior to actual attack as could a warship. Additionally, the speed with which an aircraft can approach a target (in comparison with warships) would render ineffective any attempt to display true markings at the instant of attack.

15. HR, art. 23(f), forbids "improper use . . . of the national flag, or of the military insignia and uniform of the enemy." "Improper use" of an enemy's flags, military insignia, national markings and uniforms involves use in actual attacks. This clarification is necessary because disputes arose concerning the meaning of the term "improper" during World War II. Bothe, Partsch & Solf 212-15. A reciprocal advantage is secured from observing this rule. It is clear, however, that this article does not change or affect the law concerning whether a combatant is entitled to PW status. That question is a separate matter determined by the GPW, as well as other applicable international law. AFP 110-31, para. 8-6c. *See also* DA Pam 27-161-2, at 53.

16. This is based on the necessity to maintain security and to prevent surprise by the enemy. AFP 110-34, para. 5-1e(1).

GP I, arts. 37 & 39(2), provide that even prior to combat the use of enemy flags, insignia, and uniforms to shield, favor, protect or impede military operations is prohibited, thereby attempting to reverse the rule derived from *U.S. v. Skorzeny*, 9 LRTWC 90 (1949), *summarized in* DA Pam 27-161-2, at 53-56, and reflected *in* FM 27-10, para. 54. *See also* 10 Whiteman 395-98. Acceptance of this rule would prevent their use as a disguise during any military operation on or over land preparatory to an attack and appears to be impracticable. Bothe, Partsch & Solf 214. The United States considers this departure to be militarily unacceptable since "there are certain adversarial forces that would use enemy uniforms in their operations in any case [and thus] it is important from the beginning to preserve that option for the United States as well." Matheson remarks, paragraph 11.1, note 2 (p. 481) at 425 & 435.

17. FM 27-10, paras. 75-78; DA Pam 27-161-2, at 59; AFP 110-31, para. 9-2b.

military intelligence, or engage in similar military operations while so attired.[18] As a general rule, enemy markings should be removed from captured enemy equipment before it is used in combat.[19]

12.6 FEIGNING DISTRESS

It is unlawful to feign distress through the false use of internationally recognized distress signals such as SOS and MAYDAY.[20] 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.[21] However, if one knows the enemy aircraft is disabled so 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.[22]

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).[23] A surprise attack

18. Bothe, Partsch & Solf 214-15; AFP 110-34, para. 5-1e. *See also* paragraph 12.7, note 24 (p. 515).

19. Unmarked or camouflaged captured material may, however, be used immediately. Using foreign military uniforms or equipment in training to promote realism and recognition is not prohibited by international law. *Cf.* Bothe, Partsch & Solf 214.

20. GP I, art. 38(1); AFP 110-34, para. 5-1a; AFP 110-31, para. 8-6a(1); FM 27-10, para. 55; and Bothe, Partsch & Solf 207 n.25; Draft Hague Radio Rules, 1923, art. 10; Greenspan 321; 10 Whiteman 399. *See* paragraph 11.10 (p. 500). However, a sick or wounded combatant does not commit perfidy by calling for and receiving medical aid even though he may be intending immediately to resume fighting.

21. AFP 110-34, para. 5-1g; AFP 110-31, para. 4-2d. Further, the practice of submarines in releasing oil and debris to feign success of a depth charge or torpedo attack has never been considered to be unlawful.

22. AFP 110-31, para. 4-2d. There is no duty to cease attack if the disabled aircraft is nevertheless capable of or intent on causing destruction, as for example were the Kamikaze pilots during the latter stages of World War II.

23. HR, art. 23(b); GP I, art. 37(1). Since civilians are not lawful objects of attack as such in armed conflict, it follows that disguising combatants in civilian clothing in order to commit hostilities constitutes perfidy. This is analogous to other situations where combatants attempt to disguise their intentions behind the protections afforded by the law of armed conflict in order to engage in hostilities. ICRC Report, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva 24 May -12 June 1971, Rules Relative to Behavior of Combatants (1971); Greenspan 61; Schwarzenberger, International Courts, The Law of Armed Conflict 110 & 114 (1968). *See also* paragraph 12.2, note 6 (p. 510).

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.[24] Such acts of perfidy are punishable as war crimes.

12.7.1 Illegal Combatants. It is prohibited to kill, injure or capture an adversary by feigning civilian, non-combatant status.[25] 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.[26] It is the policy of the United States, however, to accord illegal combatants prisoner-of-war protection if they were carrying arms openly at the time of capture.[27]

12.8 SPIES

A spy is someone who, while in territory under enemy control or the zone of operations of a belligerent force, 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.[28] Members of the armed

24. These rules have developed in recognition of the reality that the enemy will be tempted to attack civilians and the sick and wounded and refuse offers to surrender or negotiate, if it appears dangerous to respect these persons or offers.

Feigning death in order to escape capture is not prohibited. PWs and downed aircrews may feign civilian status for escape and evasion, and are not lawfully subject to punishment on that account if captured. GPW, arts. 83, 89 & 93 in particular, recognize that the wearing of civilian clothing by a PW to escape is permissible and not a violation of the law of armed conflict. It may, however, result in disciplinary punishment under the GPW. Bothe, Partsch & Solf 214-15; AFP 110-24, para. 5-1e. PWs and downed aircrews should avoid combatant or espionage activities while so dressed to avoid loss of PW status if captured. AFP 110-31 quotes FM 27-10 on the uniform requirements of ground forces in para. 7-2; para. 7-3 provides a discussion of the policies regarding aircrews.

Of course it may be difficult to establish military identity if apprehended in civilian clothing. Gathering information while feigning civilian status is discussed in paragraph 12.8 (p. 515).

25. Baxter, So-Called Unprivileged Belligerency: Spies, Guerrillas and Saboteurs, 28 Brit. Y.B. Int'l L. 323 (1951); GP I, art. 44(3) & (4). *See* paragraph 11.7 note 53 (p. 491) for U.S. objections to provisions of GP I, art. 44(3) which blur the distinction between combatants and noncombatants by according combatant status to persons not recognizable as such at a distance or who do not carry their arms openly.

26. GPW, art. 5. For discussions of the tribunals, *see* paragraph 6.2.5.1, note 73 (p. 6-30) and paragraph 11.8, note 73 (p. 495), 10 Whiteman 150-95, and Green 109.

27. AR 190-8, paragraph 11.7, note 47 (p. 490) at para. 1-5. *Cf.* NATO STANAG 2044. Prisoner-of-war protection is not synonymous with prisoner of war status. Illegal combatants are not accorded prisoner of war status whether or not they were carrying arms openly at time of capture. *See also* paragraph 11.7, note 53 (p. 491).

28. Lieber Code, art. 88(1); HR, art. 29; 10 U.S.C. sec. 906 (UCMJ, art. 106); 18 U.S.C. sec. 792-99.

forces who penetrate enemy-held territory in civilian attire or enemy uniform to collect intelligence are spies.[29] Conversely, personnel conducting reconnaissance missions behind enemy lines while properly uniformed are not spies.[30]

Crewmembers 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.[31]

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.[32] The captor nation may try and punish spies in accordance with its national law.[33] 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.[34]

29. HR, art. 29. *See also* Green 116-17, 142-43.

30. HR, art. 29; GP I, art. 46(2). GP I purports to extend those protections beyond the zone of operations of hostile forces to any territory controlled by the enemy, and thus negates the possibility that members of the armed forces who openly seek to gather and transmit intelligence information in the enemy's zone of the interior, including crews of reconnaissance aircraft, may be subject to national espionage legislation. GP I would require only that members of the armed forces be in any customary uniform of their armed forces that clearly distinguishes the members wearing it from nonmembers, including any distinctive sign which shows that the activity in question had nothing clandestine about it. Bothe, Partsch & Solf 265. The United States has not indicated its acceptance of these new provisions.

31. AFP 110-31, para. 7-4. *See* Jacobsen, paragraph 12.1.1, note 2 (p. 508), at 21-32 for a discussion of intelligence gathering on the high seas.

32. HR, art. 24; GP I, arts. 39(3) & 46(1). This is a statement of customary law. Bothe, Partsch & Solf 264-65; Green 190-91.

33. HR, art. 30; Baxter, paragraph 12.7.1, note 25 (p. 515), at 325. The United States would grant such persons a trial that meets international standards for fairness. Matheson remarks, paragraph 11.1, note 2 (p. 481), at 427-28, that the United States "support[s] in particular the fundamental guarantees contained in" GP I, art. 75, that entitle such persons to a trial that meets international standards for fairness. *See also* paragraph 6.2.5.4, note 84 (p. 355). *See* AFP 110-31, para. 9-2b, for a discussion of the UCMJ and other Federal statutes on espionage, such as 18 U.S.C. sec. 792-99.

34. HR, art. 31; GP I, art. 46(4). These rules apply only to members of the armed forces, including members of those resistance and guerrilla groups who qualify under the applicable international law as members of the armed forces (*see* paragraph 5.3 and note 11 thereunder (p. 296)) who gather information under false pretenses. Espionage by civilians remains covered by HR, arts. 29 and 30, as supplemented by GC & GP I, as well as by the national law of espionage. Bothe, Partsch & Solf 267.

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