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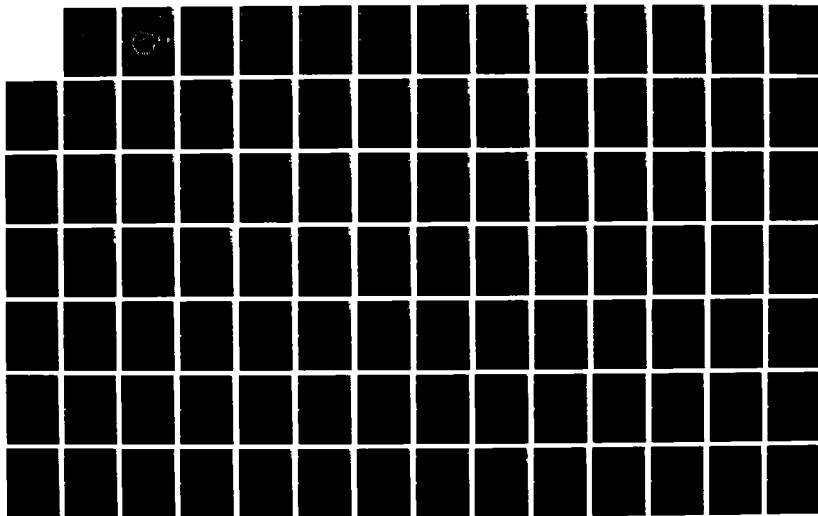
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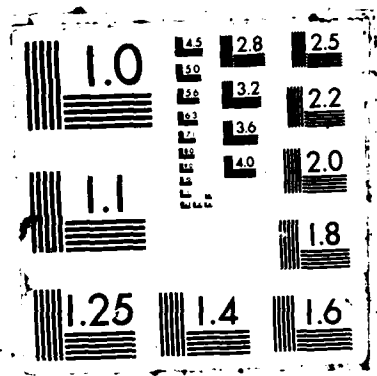
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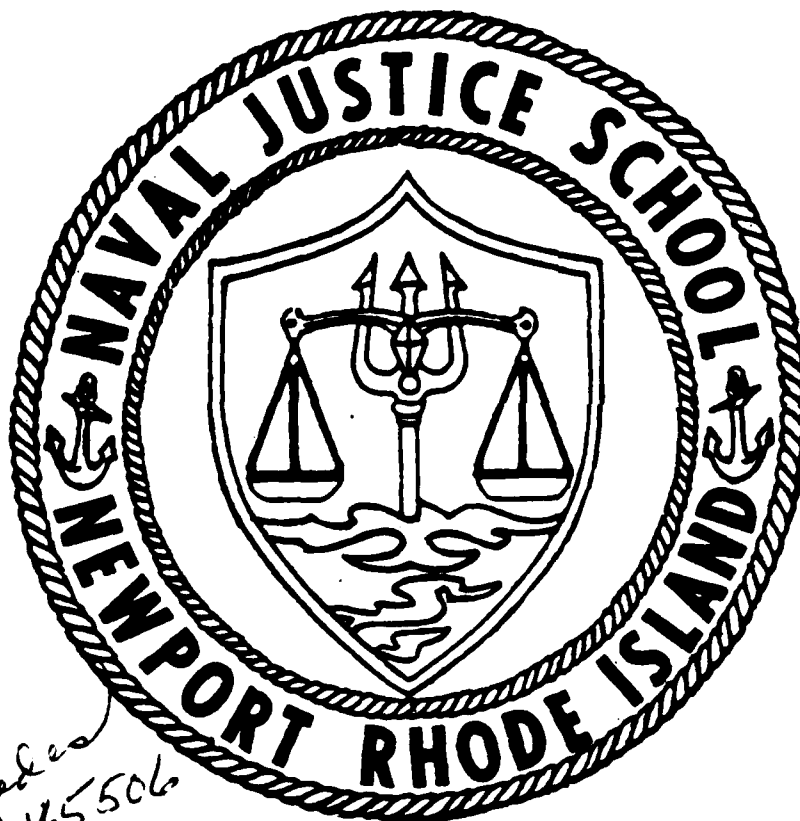
LAW OF THE SEA

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NAVAL JUSTICE SCHOOL

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PREFACE

This publication has been prepared for academic purposes to provide a basic introduction to the legal norms governing the law of the sea/law of armed conflict for lawyer students at the Naval Justice School. It does not purport to promulgate or voice the views of the Judge Advocate General of the Navy, the Department of the Navy, or any other Agency or Department of the United States. Moreover, in some instances, the explanations of law have been oversimplified for the purpose of brevity or clarity. Accordingly, this publication should not be utilized without supplementary research.

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LAW OF THE SEA/
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TABLE OF CONTENTS

	<u>PAGE</u>
LAW OF THE SEA	
Notetaking Guide	1
Reading	5
Presidential Proclamation and attachments	25
 LAW OF NAVAL WARFARE	
Notetaking Guide	31
Reading	41
 PEACETIME AND WARTIME MARITIME PROBLEMS	74

LAW OF THE SEA

- Objectives:
- a. Brief discussion of U.S. naval missions
 - b. Overview of peacetime law of the sea governing ocean space, the subjacent seabed and the superjacent airspace
 - c. Brief introduction to U.S. Peacetime Maritime Rules of Engagement

I. U.S. naval missions

A. Strategic

- 1. Peacetime - SSBNs patrolling in Mediterranean and Indian Ocean
- 2. Wartime - Launch

B. Sea control (or denial)

- 1. Peacetime - Quarantine of Cuba, peacetime embargoes
- 2. Wartime - blockade, sub warfare

C. Naval presence - Naval maneuvers or show of force off Central America

- 1. Preventive
- 2. Reactive

D. Projection of power ashore

- 1. Peacetime - Intervention in Dominican Republic
- 2. Wartime - Amphibious assault, bombardment

E. Note: American and allied dependence on sea transport for oil and critical minerals

II. Law of the sea

A. Historical development

- 1. Romans, Greeks, Italian city-states, Spain and Portugal - the sea as territory
- 2. Ascendancy of the doctrine of freedom of the seas and the three-mile limit of the territorial sea
- 3. 20th Century attempts at codification of the law of the sea
 - a. UNCLOS I & II Conventions on the territorial sea and contiguous zones, the high seas, the continental shelf, and fisheries

- b. UNCLOS III - Law of the Sea Convention
- 4. American policy on current Law of the Sea Convention - Presidential Proclamation of March 1983
- B. Zones of ocean space - The water column, seabed and subsoil, and superjacent airspace
 - 1. Baselines
 - a. Low-water line of mainland and islands
 - b. Straight baselines
 - c. Bays
 - 2. Internal waters - Coastal State sovereignty
 - 3. Territorial seas
 - a. Breadth measured from baseline
 - 3 vs. 12 nautical miles
 - b. Coastal State sovereignty except for right of innocent passage
 - (1) 1958 Territorial Seas Convention - prejudicial to peace, good order or security of the State
 - (2) Law of the Sea Convention
 - (a) Twelve enumerated criteria on innocent passage
 - (b) Claims to prior notice for passage of nuclear powered/ armed warships
 - (3) No submerged passage or overflight
 - c. International straits
 - (1) 3 vs. 12 n.m. - Over 100 critical straits affected worldwide
 - (2) 1958 Territorial Seas Convention - Nonsuspendable innocent passage for international straits

- (3) Law of the Sea Convention
 - (a) Transit passage regime - nonsuspendable navigation and overflight in normal mode
 - (b) High Seas Corridor
 - (c) Island - Mainland
 - (d) Montreux
 - (e) Deadend
- 4. Archipelagos
 - a. Recent development - Philippines, Indonesia
 - b. Law of the Sea Convention
 - (1) Baselines around outside island perimeter
 - (2) Island states only
 - (3) Archipelagic-sealane-passage rights
- 5. Contiguous zone
 - a. Breadth: 24 n.m. from baseline
 - b. Enforce customs, fiscal, immigration and sanitary regulations of coastal state - not security zone
 - c. Hot pursuit
- 6. Resource zones
 - a. Continental shelf
 - (1) Truman Proclamation
 - (2) Breadth formulas: UNCLOS I & II (200 meters or limits of exploitability) vs. UNCLOS III (200 n.m. or more)
 - b. Exclusive economic zone (EEZ)
 - (1) 200 n.m. breadth - 40% of world's ocean space
 - (2) Coastal State sovereign rights over natural resources in water column, seabed and subsoil
 - (3) Recognized in Law of the Sea Convention, U.S. Presidential Proclamation and ICJ's Libyan-Tunisian Continental Shelf Case

- (4) Freedom of navigation and overflight of EEZ and other internationally lawful, nonresource-related uses related to those freedoms

— But Brazilian claims on prior coastal State consent for foreign military exercises in its EEZ

7. High seas

- a. Unimpeded navigation and overflight rights
- b. Reasonable-regard test
 - (1) Warning/danger zones - weapons test or military exercise
 - (2) Air Defense Identification Zones and FIRS
- c. Closed seas concept - deny nonlittoral power access
- d. Deep seabed
 - (1) Res nullius vs. res communis
 - (2) UNCLOS III - Common heritage of mankind
 - (3) Prospects for ocean mining

- C. Status of vessels

1. Warships and other government ships - sovereign immunity doctrine
2. Merchant ships - flag State vs. coastal State criminal jurisdiction
3. Outlawry of pirates and slave traders

III. Peacetime maritime rules of engagement

- A. Interaction of law, policy, military doctrine, and diplomacy
- B. Self-defense
 1. Hostile acts
 2. Hostile intent
 3. National and unit self-defense
 4. Necessity and proportionality in response

LAW OF THE SEA :

TABLE OF CONTENTS

		<u>PAGE</u>
0101	INTRODUCTION	5
	PART A - HISTORICAL DEVELOPMENT OF THE LAW OF THE SEA -	
0102	DEVELOPMENTS THROUGH 1945	5
	A. Ascendancy of the doctrine of mare liberum	5
	B. International straits	6
	C. Hague Codification Conference of 1930	6
0103	POST - WW II DEVELOPMENTS	6
	A. Truman Proclamations of 1945	6
	B. Corfu Channel Case	7
	C. UNCLOS I and II	7
	D. The 1960's ocean policy interregnum	8
	E. UNCLOS III	8
	F. U.S. Presidential Proclamation	9
	PART B - LEGAL DIVISIONS OF OCEAN SPACE AND AIRSPACE	
0104	INTRODUCTION	9
	A. General	9
	B. References	10
0105	BASELINE	10
	A. Normal baseline	10
	B. Straight baseline	10
	C. Bays	11
	D. Special rules	11
0106	INTERNAL WATERS	12

		<u>PAGE</u>
0107	TERRITORIAL SEA	12
	A. Breadth	12
	B. Innocent passage	13
	C. International straits	15
0108	CONTIGUOUS ZONE	17
	A. General	17
	B. Breadth	18
0109	ARCHIPELAGOES	18
	A. Definition	18
	B. Archipelagic baselines	18
	C. Archipelagic waters and airspace	18
	D. Passage rights	19
0110	RESOURCE ZONES	19
	A. Fisheries zones	19
	B. Exclusive economic zones	19
	C. Continental shelf	20
0111	HIGH SEAS	20
	A. "High seas" defined	20
	B. Enumerated freedoms	20
	C. Military exercises	21
	D. Closed sea/zones of peace	21
	E. Airspace	21
	F. Deep seabed	21

PART C - VESSELS AND AIRCRAFT AND CONDUCT
ON THE OCEANS

0112	STATUS OF VESSELS	22
A.	Government vessels	22
B.	Merchant ships	23
0113	STATUS OF AIRCRAFT	24
0114	PEACETIME RULES OF ENGAGEMENT	24
A.	Definition	24
B.	Peacetime ROE	24

LAW OF THE SEA

The seas are ancient, yet they are new
Their regimes are immutable, yet they are fragile.
They are catalysts for progress, yet platforms for discord.

Burdick H. Brittin, International Law for Seagoing Officers 165 (4th ed. 1981)

0101 INTRODUCTION. "Two great winds have never ceased to blow over the seas: the wind from the open sea, that of freedom and the wind from the land, that of sovereignty." R. Dupuy, The Law of the Sea 14 (1974). Those winds continue to clash today affecting the interests of the United States, both as a coastal State seeking to exploit its fisheries resources and offshore oil deposits and as a maritime power dependent on unencumbered navigation and overflight rights throughout the world. This three-part chapter introduces the Navy and Marine Corps judge advocate to the law of the sea: in the first part, by providing an overview of the historical development of the law of the sea; in the second part, by examining the legal divisions of ocean space; and, in the third part, by studying the legal regime governing vessels and aircraft and the peacetime rules of engagement.

PART A - HISTORICAL
DEVELOPMENT OF THE
LAW OF THE SEA

0102 DEVELOPMENTS THROUGH 1945

A. Ascendancy of the doctrine of mare liberum. The maritime powers of ancient Greece, the Roman Empire, and the Italian city States during the Middle Ages, each endeavored with a view towards suppressing piracy and promoting their maritime commerce, to claim sovereignty over vast expanses of ocean space. This historical trend culminated in 1494 in the Treaty of Tordesillas, later approved by Papal Bull, in which Spain and Portugal agreed to a division of the world's oceans between themselves with the former claiming exclusive navigation rights in the western part of the Mediterranean, the Gulf of Mexico and the Pacific, and the latter claiming such rights in the Atlantic south of Morocco and the Indian Ocean. The Portuguese, though, had to compete with the Dutch interests in the East Indies and in 1604, the Dutch scholar, Hugo Grotius, in an effort to defend Dutch navigation rights on the oceans against Portuguese claims, authored the dissertation, Mare Liberum, which is the genesis for the modern concept of freedom of the seas. In the ensuing centuries, exclusive coastal State claims began to recede in the face of emerging Dutch, English, French and other colonial power interests in free and unencumbered trade and commerce the world over. Eventually, only a relatively narrow band of waters nominally within cannon shot of a coast, i.e., 3 nautical miles, the so-called territorial sea, was recognized as subject to coastal State sovereignty.

B. International straits. Events in the late 1800's and early 1900's demonstrated the emerging criticality of man-made and natural ocean choke points or straits used for international navigation. Accordingly, in 1888, the Constantinople Convention was signed by nine major powers guaranteeing free and open passage through the Suez Canal in time of peace and of war to every ship without distinction of flag. At the western end of the Mediterranean, freedom of navigation in the Strait of Gibraltar was acknowledged in the Anglo-French Declaration of 1904, which Spain later adhered to in the Franco-Spanish Treaty of 1912. A decade later, in 1923, the Treaty of Lausanne, later the Montreux Convention of 1936, established a navigation regime for the Turkish Straits of the Dardenelles.

C. Hague Codification Conference of 1930. While the transit regime for many critical straits and canals was codified in international conventions and declarations by the 1920's, the League of Nations was endeavoring to codify general principles of peacetime maritime law. The League's efforts culminated in the first Conference on "the Progressive Codification of International Law," as it was styled, which met at The Hague from March 13 to April 12, 1930. The Conference was unable to agree on a treaty as it encountered difficulties in reaching a consensus related to two areas: (1) The breadth of the territorial seas, with twenty States supporting three miles, four Scandinavian States backing four miles, and twelve nations advocating six miles; and (2) the right of a State in a contiguous zone extending up to twelve miles from its coast to take measures to prevent infringement of its customs and sanitary regulations, a right which was opposed by the maritime powers of Great Britain, Japan and the United States. The Conference was successful, meanwhile, in preparing a Draft on "The Legal Status of the Territorial Sea," which even though only a Draft constituted an important document in the history of codification of the law of the sea, which heavily influenced the subsequent work of the First United Nations Conference on the Law of the Sea (UNCLOS I) in 1958. The Draft recognized in article 5 the right of innocent passage of foreign merchant vessels through a coastal State's territorial sea, provided that: "[N]o acts must be done prejudicial to the security, the public policy, or fiscal interests of the State." For warships in the territorial sea, article 12 of the Draft provided: "As a general rule, a coastal State will not forbid the passage of foreign warships in its territorial sea, and will not require a previous authorization or notification. The coastal State has the right to regulate the conditions of such passage. Submarines shall navigate on the surface."

0103

POST - WW II DEVELOPMENTS

A. Truman Proclamations of 1945. With the end of World War II, the United States flexed its new-found maritime power in 1945, when President Truman signed two Proclamations claiming unilaterally for the United States the continental shelf and fisheries resources contiguous to the American coast. Proclamation No. 2667, 10 Fed. Reg. 12, 303 (1945); Proclamation No. 2668, 10 Fed. Reg. 12,304 (1945). The American precedent, together with technological innovations such as the purse seine, sonar, radar, and offshore drilling, which permitted increased exploitation of the living resources of the sea and the petroleum resources of the continental shelf, presaged a prospective wave of unilateral, exclusive, coastal State claims to large expanses of adjacent seas that continues largely unabated to this day.

B. Corfu Channel Case. One of the most noteworthy unilateral claims advanced in the years immediately following World War II was Albania's attempt in 1946 to close the Corfu Channel, part of which lay within Albanian territorial seas and part of which lay within Greek territorial seas. In May 1946, two British warships were fired upon by Albanian coastal batteries, while the ships were transiting the Albanian part of the strait. Subsequent diplomatic negotiations failed to resolve the matter and the United Kingdom elected to test the Albanian attitude by sending warships through the strait again. During the attempted transit, two British destroyers struck mines with considerable damage and loss of life. The United Kingdom subsequently invoked the compulsory jurisdiction of the International Court of Justice. That Court in 1949 rendered a decision entitled the Corfu Channel Case (U.S. v. Alb.), 1949 I.C.J. 4, 22 (Judgment of Apr. 9, 1949), finding Albania internationally responsible for the death and destruction to the British warships and seamen and bound to pay due compensation to the United Kingdom for having failed to warn the British warships of the existence of the minefield in its waters. Having resolved the British damage claim, the Court then proceeded to address the Albanian claim that the British warships in transiting the Corfu Channel violated Albanian sovereignty for which the United Kingdom was responsible. The Court rejected the Albanian contention finding instead that the strait was an international highway through which States could send their warships in peacetime without the previous authorization of the coastal State, so long as the passage was innocent. The clear import of the Corfu Channel Case was that coastal State authority over passage of warships through contiguous straits was limited to the exclusion of noninnocent passage. An underlying premise to the Court's decision was the implicit assumption that the character of the vessel did not necessarily determine whether passage through straits was innocent. Rather, the Court assimilated warships to merchant vessels with respect to protection of the right to access to international straits.

C. UNCLOS I and II. Contemporaneous with the creeping unilateralism in the first decade following World War II, the United Nations was endeavoring pursuant to article 13 of its Charter, to negotiate a comprehensive, universal, law-of-the-sea treaty. The initial task of drafting was undertaken by the International Law Commission in the early and mid-1950's and culminated in the convening of the First United Nations Conference on the Law of the Sea (UNCLOS I) in Geneva on February 24, 1958, with eighty-six delegates present. That Conference was followed two years later by the Second United Nations Conference on the Law of the Sea (UNCLOS II) which focused unsuccessfully on contentious issues, such as the breadth of the territorial sea, left unresolved at UNCLOS I. The two Conferences concluded with the adoption of four Conventions (legal citations in § 0104B1 below) dealing with: (a) The territorial sea and contiguous zone; (b) the high seas; (c) fisheries and conservation of the living resources of the high seas; and (d) the continental shelf; plus an Optional Protocol on Dispute Settlement. Those Conventions subsequently entered into force in the mid-1960's. The travaux preparatoires of the four 1958 Conventions confirms that: (1) Foreign warship innocent passage through a coastal State's territorial sea may not be subjected to prior notice or authorization requirements by coastal States; (2) military maneuver or training practice areas established by naval powers on the high seas are permissible; (3) nuclear weapons tests on the high seas are not per se

prohibited; and (4) the closure of limited-access seas, such as the Black Sea and Baltic Sea, to nonlittoral naval forces is not recognized by practice or agreement. See generally Zedalis, Military Uses of Ocean Spaces and the Developing International Law of the Sea: An Analysis in the context of ASW, 16 San Diego L. Rev. 575 (1975).

D. The 1960's ocean policy interregnum. The failure at UNCLOS I and II to reach agreement on the breadth of territorial sea contributed to the continued seaward creep during the 1960's of coastal State jurisdiction. As unilateral coastal State claims continued to encroach on navigational uses of the seas in the late sixties, the United States and the Soviet Union, in an attempt to forestall further encroachments, reached a consensus on a twelve-mile-territorial-sea legal regime with freedom of transit guaranteed through and over all international straits overlapped by such territorial seas and then called for the initiation of international negotiations to discuss navigation and fisheries issues. Concurrently, Ambassador Pardo of Malta was proposing the establishment of an international legal regime for the deep seabed. Prompted by these initiatives, the General Assembly of the United Nations voted in December 1970 to convene the Third United Nations Conference on the Law of the Sea (UNCLOS III) in 1973. G.A. Res. 2749, 24 U.N. GAOR Supp. (No. 28) U.N. Doc. A/8028 (1971).

E. UNCLOS III. The third U.N.-sponsored Conference on the Law of the Sea met periodically from 1973 until the Law of the Sea Convention was opened for signature on December 10, 1982. Numerous issues proved highly contentious during the negotiations including the rights of innocent passage and straits passage, and resource exploitation in coastal State economic zones and in the deep seabed. While the LOS Convention is not expected to obtain the requisite ratifications or accessions needed to enter into force as binding conventional international law for many years to come, it nevertheless constitutes a critical source of present-day navigational norms particularly, where its provisions codify existing customary international law. The general proposition that the LOS Convention reflects, with respect to navigation rights, existing customary international law has attracted some support. For example, the introductory note to the American Law Institute's Restatement of the Foreign Relations Law of the United States, tentative draft 3, states: "Except with respect to Part XI of the Draft Convention [relating to deep seabed mining], this Restatement, in general, accepts the Draft Convention as codifying the customary international law of the sea, and as law of the United States." Other experts have gone in the same direction, but not quite as far claiming, for example, that: "The principles worked out by UNCLOS III can constitute, at least potentially, a major factor in the creation of an extremely important new body of [customary international] law. . . ." Address by Thomas A. Clingan, Jr., Professor of Law, Univ. of Miami School of Law, Freedom of Navigation in a Post-UNCLOS III Environment (Oct. 1982), Duke University Law of the Sea Symposium, at 2. This line of thinking certainly indicates an importance for the LOS Convention that transcends the actual treaty itself.

F. U.S. Presidential Proclamation. On March 19, 1983, President Reagan by proclamation claimed for the U.S. sovereign rights to the natural resources of the waters, seabed and subsoil within 200 nautical miles of American shores. Presidential Proclamation No. 5030, 48 Fed. Reg. 10,605 (1983) (at page 25 of this text). At the same time, the President announced that the United States would not sign the U.N. Law of the Sea Convention for reasons primarily related to the regime created therein for deep seabed mining. At the same time, the President stated:

[T]he 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 and freedoms of the international community in navigation and overflight and other related high seas uses.

Statement by the President of Mar. 10, 1983 (at page 27 of this text).

PART B - LEGAL DIVISIONS OF OCEAN SPACE AND AIRSPACE

0104 INTRODUCTION

A. General. This part examines the legal regime of ocean space, the subjacent seabed and subsoil, and the superjacent airspace, according to the following zones of hydrospace recognized by the 1958 and 1982 law of the sea conventions: Internal waters, territorial sea, contiguous zones, resource zones and the high seas. Significantly, the rules regulating the horizontal water zones of ocean space are not always the same as those regulating the subjacent seabed or the superjacent airspace. Moreover, the U.S. decision not to sign the 1982 Law of the Sea Convention means the U.S. is not bound by the prescriptions of that Convention articulated below, except to the extent they reflect existing customary international law.

B. References

1. 1958 law of the sea conventions. Convention on Fisheries and Conservation of the Living Resources of the High Seas, done April 29, 1958, 17 U.S.T. 138, T.I.A.S. 5969, 559 U.N.T.S. 285 (entered into force March 20, 1966) [hereinafter cited as Fisheries Convention]; Convention on the Territorial Sea and Contiguous Zone, done April 29, 1958, 15 U.S.T. 1606, T.I.A.S. 5639, 516 U.N.T.S. 205 (entered into force Sept. 10, 1964) [hereinafter cited as Territorial Sea Convention]; Convention on the Continental Shelf, done April 29, 1958, 15 U.S.T. 471, T.I.A.S. 5578, 499 U.N.T.S. 311 (entered into force June 10, 1964) [hereinafter cited as Continental Shelf Convention]; Convention on the High Seas, done April 29, 1958, 13 U.S.T. 2312, T.I.A.S. 5200, 450 U.N.T.S. 82 (entered into force Sept. 30, 1962) [hereinafter cited as High Seas Convention]. Copies of the conventions are contained in Air Force Pamphlet 110-20, Selected International Agreements (27 Apr 1981).

2. United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, U.N. Doc. A/CONF. 62/122 (1982), reprinted in 21 Int'l Legal Materials 1261 (1982) and JAG memo JAG:103.1:PJC:wav Ser: 10/410 of 8 Sept. 1983 for the Distribution List, Subj: International Agreements Affecting Naval Operations [hereinafter cited as LOS Convention].

0105 BASLINE. The point of departure in any discussion of the legal regime governing ocean space is the delineation of the baseline which separates the internal waters from the territorial sea.

A. Normal baseline. The baseline is normally drawn along the low-water line of the shore (including that of islands, even if small and uninhabitable) of the nation as marked on its official large-scale charts. LOS Convention, art. 5; Territorial Sea Convention, art. 3.

B. Straight baseline. Instead of the low-water line, straight baselines may be employed along a coastline where the coast is deeply indented or there is a fringe of islands along the coast in its immediate vicinity. 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. Norway is an example of a country -- whose coastline is deeply indented and fringed with islands -- that has established a baseline which consists of a series of straight lines between extended land points. Economic interests peculiar to a region may be taken into account in drawing straight baselines, if clearly evidenced by long usage. Straight baselines may not be applied so as to cut off another nation's territorial sea from the high seas or an exclusive economic zone. Where the establishment of straight baselines has the effect of enclosing sea areas not previously considered internal waters, the right of innocent passage through these enclosed areas continues to exist despite their characteristics as internal waters. LOS Convention, arts. 7-8; Territorial Sea Convention, arts. 4-5.

C. Bays

1. Definition. A "bay" is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked 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 which is a semicircle whose diameter is a line drawn across the mouth of that indentation. LOS Convention, art. 10(2); Territorial Sea Convention, art. 7(2). Where the indentation has more than one mouth due to the presence of islands, the diameter of the test semicircle is the sum of the lines across the various mouths. LOS Convention, art. 10(3); Territorial Sea Convention, art. 7(3).

2. Closing line. Where the line across the mouth of the bay does not exceed 24 miles, the baseline for measuring the territorial sea is the line across the mouth of the bay. Where the line across the mouth is greater than 24 nautical miles, a baseline of 24 nautical miles may be drawn within the bay so as to enclose the maximum water area. LOS Convention, art. 10(4)-(5); Territorial Sea Convention, art. 7(4)-(5).

3. Historic bays. Historic bays are not subject to the semicircle or 24-nautical-mile-closing-line rules described above. LOS Convention, art. 10(6); Territorial Sea Convention, art. 7(6). To meet the international standard for establishing a claim to an historic bay, some commentators have suggested that a nation must show: (a) Open, notorious, and effective exercise of authority over the bay by the coastal State; (b) continuous exercise of that authority, which must be commensurate in scope with the nature of the claim; and (c) knowledge and acquiescence by foreign nations in the exercise of that authority. The U.S. 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. Claimed historic bays which the United States have objected to include: Canada's Hudson Bay, Egypt's Gulf of El-Arab, Libya's Gulf of Sidra (Sirte), and the Soviet's Peter the Great Bay.

D. Special rules

1. Unstable coastlines. Where the coastline is highly unstable due to natural conditions, straight baselines under the LOS Convention may be established connecting the furthest seaward extent of the low-water line. These baselines remain effective despite subsequent regression of the coastline, until changed by the coastal State. LOS Convention, art. 7(2).

2. Low-tide elevations. 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. Where a low-tide elevation is situated at a distance not exceeding the breadth of the territorial sea from the mainland or an island, straight baselines may be drawn to, or from, the low-tide elevation. LOS Convention, art. 13; Territorial Sea Convention, art. 11.

3. River mouths. 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. LOS Convention, art. 9; Territorial Sea Convention, art. 13.

4. Reefs. The low-water line of a reef may be used as the baseline for islands situated on atolls, or islands having fringing reefs. LOS Convention, art. 6.

5. Harbor marks, artificial islands and offshore installations. The outermost permanent harbor marks, which form an integral part of the harbor system, such as jetties, breakwaters and groins [but not piers, offshore installations, artificial islands (whether or not connected to the shore by piers), and dredged channels] are regarded as forming part of the coast for baseline purposes. LOS Convention, art. 11; Territorial Sea Convention, art. 8.

6. Roadsteads. Roadsteads which are normally used for the loading, unloading, or 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, but do not affect the baseline from which the territorial sea is drawn. LOS Convention, art 12; Territorial Sea Convention, art. 9.

0106 INTERNAL WATERS. Landward of a coastal State's baseline is its internal waters where the coastal State enjoys virtually absolute sovereignty over the ocean space, seabed, subsoil, and superjacent airspace, including the right to exclude foreign vessels or aircraft from all or certain of her internal waters, or superjacent airspace, to impose whatever conditions it considers necessary upon foreign vessels or aircraft there, or to require such ships or vessels to leave. These rights are limited, however, to the extent that a foreign warship in the internal waters of a coastal State remains under the jurisdiction of her flag State during her stay and no legal proceedings can be taken against her for any cause. LOS Convention, arts. 29-32; Territorial Sea Convention, arts. 22-23.

0107 TERRITORIAL SEA. Seaward of the baseline lies the territorial sea where the coastal State's sovereignty over the ocean space, seabed, subsoil, and superjacent airspace is circumscribed only by the rights of innocent passage and transit passage, discussed in paragraphs B and C below.

A. Breadth. The history of claims concerning the breadth of the territorial sea reflects the lack of any international agreement either at the Hague Codification Conference of 1930 or UNCLOS I and II on the width of that sea zone. From its inception, the United States, however, has claimed and recognized a three n.m. territorial sea. Although the number is declining, 22 other States presently claim a similar territorial sea breadth. The bulk of the countries, 78 to date, though, claim a 12 n.m. territorial sea. This practice is recognized in the LOS Convention which states that: "Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from the baseline" LOS Convention, art. 3. The U.S. while declining to sign the LOS Convention or extend its territorial sea beyond 3 nautical miles has stated it will respect: "[T]hose 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 [e.g., innocent passage and transit passage]." Fact Sheet, United States Ocean Policy (at page 30 of this text).

B. Innocent passage. Navigation in the territorial seas is regulated by the regime of innocent passage.

1. "Passage" defined. Passage means navigation through the territorial seas for the purpose of traversing that sea without entering internal waters or proceeding to, or from, internal waters. Passage must be continuous, expeditious, and on the surface, but may include stopping and anchoring incidental to ordinary navigation or rendered necessary by force majeure or distress. LOS Convention, arts. 18, 20; Territorial Sea Convention, art. 14(2), (3), (6).

2. "Innocent" defined. Passage is innocent so long as it is not prejudicial to peace, good order, or security of the coastal State. The determination of such prejudice, though, under the Territorial Sea Convention was subjective as the Convention left open to coastal State interpretation the question of what activities were innocent and failed to limit the prejudicial activities to those engaged in by the foreign vessel while transiting the territorial sea of another State. The LOS Convention endeavors to eliminate some of the subjective interpretative difficulties that have arisen concerning the innocent passage regime of the Territorial Sea Convention by listing 12 specific activities in article 19 as prejudicial to the peace, good order, or security of the coastal State:

a. Any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

b. any exercise or practice with weapons of any kind;

c. any act aimed at collecting information to the prejudice of the defense or security of the coastal State;

d. any act of propaganda aimed at affecting the defense or security of the coastal State;

e. the launching, landing or taking on board of any aircraft;

f. the launching, landing or taking on board of any military device;

g. the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;

h. any act of willful and serious pollution, contrary to the LOS Convention;

i. any fishing activities;

j. the carrying out of research or survey activities;

k. any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State; and

l. any other activity not having a direct bearing on passage.

Activity appears to be a sine qua non of noninnocence and possession of passive characteristics, such as the innate combat capabilities of a warship, does not appear to constitute "activity" within the meaning of this enumerated list.

3. Warships. The principal emphasis in the above list of 12 specific prejudicial activities is the military security of the coastal State. Some States, in point of fact, view the passage of foreign warships through their territorial sea as per se prejudicial, because of the military character of the vessel, the flag it's flying, its nuclear propulsion or arms, or its destination, and insist on prior notice and/or authorization before foreign warships transit their territorial sea. The U.S. position, consistent with the travaux preparatoires of the Territorial Sea Convention and the 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 State notice or authorization for passage. To safeguard coastal State security concerns, the Territorial Sea and LOS Conventions do authorize the coastal State to require any warship to leave the territorial sea, if it fails to comply with coastal State regulations concerning innocent passage discussed in paragraph B4 below. LOS Convention, art. 30; Territorial Sea Convention, art. 23. Under the regime of innocent passage, submarines are required to navigate on the surface and to show their flag, unless the coastal State has consented to submerged passage. LOS Convention, art. 20; Territorial Sea Convention, art. 14(6). Overflights of the territorial sea are only permissible if coastal State consent is obtained. Under article 23 of the LOS Convention, foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substance -- in essence, all nuclear-powered or nuclear-armed warships and perhaps conventionally-armed warships -- exercising the right of innocent passage must "carry documents and observe special precautionary measures established for such ships by international agreements."

4. Coastal State regulation of innocent passage. The LOS Convention empowers the coastal State 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:

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

b. the protection of navigational aids and facilities and other facilities or installations;

c. the protection of cable and pipeline;

d. the conservation of the marine environment of the sea;

e. the prevention of infringement of the fisheries regulations of the coastal State;

f. the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof;

g. marine scientific research and hydrographic surveys;
and

h. the prevention of infringement of the customs, fiscal, immigration or sanitary regulations of the coastal State.

LOS Convention, art. 21. This list is exhaustive and exclusive.

5. Duties of the coastal State. The coastal State may not hamper innocent passage through the territorial sea by imposing requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage or by discriminating in form or in fact against the ships of any State or against ships carrying cargoes to, from, or on behalf of any State. The coastal State is required to give appropriate publicity to any dangers to navigation, of which it has knowledge, within its territorial sea. LOS Convention, art. 24; Territorial Sea Convention, art. 15.

6. Rights of protection of the coastal State. The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent. Moreover, the coastal State may without discrimination amongst foreign ships suspend temporarily in specified areas in its territorial sea the innocent passage of foreign ships, if such suspension is essential for the protection of its security, including weapons exercises. Such suspension shall take effect only having been duly published. LOS Convention, art. 25; Territorial Sea Convention, art. 16(1)-(3).

C. International straits. A unique problem is posed where the territorial seas of coastal State(s) overlap an international strait.

1. "International strait" defined. In the opinion of the International Court of Justice in the Corfu Channel Case, as incorporated in the Territorial Sea and LOS Conventions, the decisive criteria in identifying international straits is not the volume of traffic flowing through the strait or its relative importance to international navigation, but rather its geographical situation connecting, for example, the parts of the high seas and the fact of its being used for international navigation. LOS Convention, arts. 34(1), 36, 45; Territorial Sea Convention, art. 16(4). The geographical definition contemplates a natural and not an artificially constructed canal, such as the Suez Canal.

2. Territorial Sea Convention. Under the 1958 Territorial Sea Convention, international straits overlapped by territorial seas were subject to a regime of nonsuspendable innocent surface passage. Territorial Sea Convention, arts. 14, 16(4).

3. LOS Convention. The legal regime governing navigation, particularly for warships, through international straits has been the subject of considerable dispute in recent years, particularly as the breadth of the territorial sea of many States has expanded from three miles to 12 miles threatening to close off over 100 straits worldwide between 6 and 24 miles in breadth, including the Strait of Gibraltar, that previously possessed a high seas corridor under the 3 n.m. territorial-sea regime. Under the LOS Convention, there are four distinct legal regimes recognized (and discussed below) for various types of international straits which are overlapped by strait State territorial seas.

a. Separate international convention. The LOS Convention does not alter the legal regime in straits regulated by long-standing international conventions in force specifically relating to such straits, i.e., the Montreux Convention for the Turkish Bosphorus and Dardenelles. LOS Convention, art. 35(c).

b. Island-mainland straits. The regime of nonsuspendable innocent surface passage applies in straits used for international navigation, if the strait is formed by an island of a State bordering the strait and its mainland and a high seas route or a route in an exclusive economic zone of similar convenience with respect to navigation and hydrographical characteristics exists seaward of the island. LOS Convention, arts. 38(1), 45.

c. "Dead-end" straits. The regime of nonsuspendable innocent surface passage applies in straits used for international navigation between an area of the high seas or an exclusive economic zone and the territorial sea of a foreign State, such as the Strait of Tiran and the Gulf of Aquaba. LOS Convention, art. 45.

d. Transit passage. For international straits less than 24 n.m. in breadth overlapped by territorial sea claims, such as the Strait of Gibraltar, not governed by a special Montreux-type Convention and not qualifying as an island-mainland or "dead-end" strait, as discussed above, the regime of "transit passage" is prescribed in the LOS Convention, including those straits less than six-miles wide previously subject to the regime of nonsuspendable innocent surface passage under the Territorial Sea Convention.

(1) Definition. Transit passage means the exercise in accordance with the LOS Convention of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit, including overflight by aircraft and submerged passage by submarines, of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or exclusive economic zone. This requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the condition of entry to that State. LOS Convention, art. 38(2).

(2) Duties of ships and aircraft during their passage. Article 39(1) of the LOS Convention requires that transiting ships and aircraft: (1) Proceed without delay; (2) refrain from "any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait . . .;" and (c) refrain from any activities "other than those incident to their normal mode of continuous and expeditious transit." Additionally, under articles 39 and 40 of the LOS Convention, the transiting ship has a duty both to conform to generally accepted international regulations on safety at sea and vessel-source pollution and to refrain from survey and research activities. Under those same articles, transiting aircraft must observe the rules of the air regarding safety, such as those established by the International Civil Aviation Organization for civil aircraft.

(3) Coastal State regulation of transit passage. Articles 41 and 42 of the LOS Convention limit strait State regulatory authority over transit passage to the following four areas:

(a) Designation with due publicity and in conformance with generally accepted international regulations of sealanes and traffic separation schemes where necessary to promote the safe passage of ships;

(b) pollution prevention and control giving effect to applicable international regulations;

(c) prevention of fishing by foreign vessels; and

(d) taking on board or putting aboard of any commodity, currency, or person in contravention of the customs, fiscal, immigration or sanitary regulations of States bordering straits.

Such laws and regulations may not discriminate in form or in fact amongst foreign ships or in their application have the practical effect of changing, hampering or impairing the right of transit passage. Warships and other government-owned vessels or aircraft, which act in a manner contrary to strait State laws and regulations, bear international responsibility for any loss or damage to strait States.

(4) Duties of States bordering straits. Strait States may not hamper transit passage and shall give due publicity to any danger to navigation or overflight within or over the strait of which they have knowledge. There shall be no suspension of transit passage. LOS Convention, art. 44.

0108 CONTIGUOUS ZONE

A. General. A contiguous zone is an area adjacent to the territorial sea in which the coastal State may exercise controls necessary to prevent infringement of its customs, fiscal, immigration, or sanitary regulations within its territory, internal waters, or territorial sea. The travaux preparatoires of both the Territorial Sea and LOS Conventions clearly demonstrate the rejection of security as an area of concern subject to coastal State regulation in the contiguous zone, although nations, such

as Egypt, Syria and North Korea, have made such claims. The status of the waters of the contiguous zone is high seas except to the extent that the contiguous zone is situated on top of a fishery zone or exclusive economic zone. LOS Convention, art. 33; Territorial Sea Convention, art. 24.

B. Breadth. The 12-nautical-mile contiguous zone permitted under the Territorial Sea Convention has been extended to 24 nautical miles under the LOS Convention. The U.S. claims and recognizes contiguous zones extending no further than 12 n.m. from the baseline, but will respect such zones up to 24 n.m. in breadth, where they are otherwise consistent with the regime of the contiguous zone.

0109 ARCHIPELAGOES. The Philippines and Indonesia, starting in the 1950's, pressed for acceptance of a special regime for archipelagic States. The concept was rejected at UNCLOS I and II, but later adopted at UNCLOS III and incorporated in the LOS Convention, which the U.S. has declined to sign.

A. Definition. An archipelagic State is defined in article 46 of the LOS Convention as an island State which includes one or more archipelagoes (i.e., a group of islands, interconnecting waters, and other natural features so closely interrelated that they form an intrinsic geographical, economic, and political entity, or which historically have been regarded as such).

B. Archipelagic baselines. Under article 47 of the LOS Convention, an archipelagic State may draw straight baselines (from which its territorial sea, contiguous zone, exclusive economic zone, and continental shelf is measured), which join the outermost islands of the archipelago, provided that:

1. The ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1;
2. the length of such baselines does not exceed 100 miles (limited exceptions up to 125 miles);
3. the baselines do not depart to any appreciable extent from the general configuration of the archipelago; and
4. the system of baselines does not cut off from the high seas or exclusive economic zone the territorial sea of another State.

If part of the archipelagic water lies between two parts of an immediately adjacent neighboring State, the existing rights and all other legitimate interests which the latter State has traditionally exercised in such waters will survive and must be respected.

C. Archipelagic waters and airspace. The waters landward of the archipelagic baseline are archipelagic waters which are subject, along with the airspace over such waters and the subjacent seabed and subsoil, to archipelagic State sovereignty, excepting certain historic rights preserved for existing fisheries agreements and submarine cables. LOS Convention, arts. 49, 51.

D. Passage rights. Article 53 of the LOS Convention preserves the right of all ships and aircraft of foreign States to enjoy continuous, expeditious, and unobstructed transit in the normal mode in, over, and under sealanes and air routes which traverse the archipelagic waters and innocent passage in the adjacent territorial sea. These sealanes, which are defined by course and distance from a point of entry into and a point of exit from the archipelagic waters and which extend 25 miles on either side of the axis, must be approved by the competent international organization before they are applied by the archipelagic State. The right of passage through archipelagic sealanes is at least as broad with respect to navigation and overflight as is transit passage through international straits, discussed in section 0107C3d above.

0110 RESOURCE ZONES. The post-WWII era has seen a proliferation of coastal State claims to resources in the waters, seabed, and subsoil, seaward of the territorial sea.

A. Fisheries zones. The U.S. claims and recognizes broad and exclusive fisheries jurisdiction to a limit of 200 n.m.

B. Exclusive economic zones. While a fisheries zone involves only coastal State rights in that zone's living resources, the exclusive economic zone (EEZ), which is a fairly recent concept in origin, permits the coastal State to claim sovereign rights to the natural resources of the waters, seabed and subsoil of the EEZ. The breadth of the EEZ is fixed at 200 n.m. measured from the same baseline from which the territorial sea is measured (except rocks, low-tide elevations, and man-made objects such as artificial islands, are not independently entitled to their own EEZ). The legitimacy of such EEZ's has in the last few years been recognized by the U.S., the International Court of Justice, and UNCLOS III. See Case Concerning the Continental Shelf (Tun. v. Lib.), 1982 I.C.J. 101, 208, 234-35, 271, 273 (Judgment of Feb. 24, 1982); LOS Convention, arts. 55-63; Presidential Proclamation No. 5030, 48 Fed. Reg. 10,605 (1983).

1. Legal status. The juridical status of the EEZ as part of the high seas or as subject to coastal State sovereignty was hotly disputed at UNCLOS III until a compromise solution resolved that the EEZ should be a separate juridical zone located between the territorial sea and the high seas. LOS Convention, arts. 55, 86. Article 56(1)(a) of the LOS Convention grants the coastal State sovereign rights for the purpose of exploring and exploiting, conserving and managing all the natural resources of the EEZ. In addition, the coastal State may exercise in the EEZ 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 environmental protection (generally limited to implementation of international standards).

2. Passage rights. Article 58(1) of the LOS Convention preserves the right of all nations to exercise in the EEZ the high-seas freedoms of navigation and overflight and the laying of submarine cables and pipelines and all "other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines...." The U.S. does not recognize coastal State claims that purport to restrict non-resource related high-seas freedoms (including military exercises, operations, and activities) in the EEZ.

3. Safety zones. In the case of facilities located in the EEZ or on the continental shelf, safety zones may be established by the coastal State around these installations to ensure the safety of both navigation and of the artificial islands, installations and structures. The zone may extend only to a distance of 500 meters around the installation, except as authorized by generally accepted international standards or as recommended by the competent international organization, and may not cause any interference with the use of recognized sealanes essential to international navigation. LOS Convention, art. 60.

C. Continental shelf. Seaward of the territorial sea, the coastal State possesses under the LOS Convention inchoate sovereign rights to the resources of the seabed and subsoil of the continental shelf to a distance of 200 n.m. or the edge of the continental margin, whichever is greater (but generally not to exceed 350 n.m. from the baseline). The coastal State's exercise of its rights to the continental shelf must not infringe on, or result in any unjustifiable interference with, navigation. Thus, oil drilling platforms may not be erected so that they interfere with recognized sealanes essential to international navigation. LOS Convention, arts. 60(7), 76-78, 80-81; Continental Shelf Convention, arts. 1-3, 5.

0111 HIGH SEAS

A. "High seas" defined. The high seas is that body of water beyond those waters subject to coastal State sovereignty, i.e., beyond the territorial sea under the High Seas Convention and beyond the territorial sea, EEZ and archipelagic waters under the LOS Convention.

B. Enumerated freedoms. Every State is entitled to exercise on the high seas, inter alia, freedom of navigation and overflight and freedom to lay submarine cables and pipelines. The exercise of any of these freedoms is subject to the conditions that they be undertaken with reasonable regard, according to the High Seas Convention, or due regard, according to the LOS Convention, for the interests of other States in light of all relevant circumstances. LOS Convention, art. 87; High Seas Convention, art. 2. The "due regard" or "reasonable regard" standards require any using State 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 State's high seas freedoms. Any attempt by a State to impose its sovereignty on the high seas is prohibited as that ocean space is designated open to use by all States. LOS Convention, art. 89; High Seas Convention, art. 2.

C. Military exercises. Military exercises and training activities are permissible use of the high seas so long as: (1) They are properly publicized beforehand through, for example, a notice to mariners; and (2) no attempt was made to subject a portion of the high seas to flag State sovereignty by preventing foreign nationals from entering it or by asserting jurisdiction over foreign nationals within it.

D. Closed sea/zones of peace. Proposals have been advanced at various times to exclude warships of the major maritime powers 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 legal concepts have not gained significant legal or political momentum and are not recognized by the U.S.

E. Airspace

1. General. The rule that has evolved for airspace above the high seas is similar to that for the high seas itself. Just as a sovereign State may not exercise jurisdiction over the high seas, so assertions of sovereignty in the form of controlling or denying access, exit or transit are improper in the airspace above the high seas. There are, however, flight information regions established in international airspace to provide flight information service and alerting services for the safety of civil aviation under the authority of the International Civil Aviation Organization.

2. Air defense identification zones. These are zones established by the coastal State in the airspace over the high seas adjacent to their coasts. Civil aircraft entering the zone are required to identify themselves. The validity of these zones is based upon the right of every State to establish reasonable conditions for entry into its airspace, conditions which are based not only on the requirements of national defense but also on the need to promote aviation safety. These zones do not constitute claims of sovereignty, but rather are reference points for the initiation of appropriate clearance.

F. Deep seabed. Under the LOS Convention, the deep seabed and its resources are the "common heritage of mankind" and no State may claim or exercise sovereignty over any part of the deep seabed. LOS Convention, arts. 136, 137. The Convention further provides for the equitable sharing of financial and other economic benefits derived from deep seabed mining. The stated U.S. position is 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, Mar. 10, 1983 (at pages 27-28 of this text).

PART C - VESSELS AND AIRCRAFT
AND CONDUCT ON THE OCEANS

0112 STATUS OF VESSELS

A. Government vessels

1. "Warship" defined. A "warship" means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the Government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline. LOS Convention, art. 29; High Seas Convention, art. 8(2).

2. Immunity. Except incident to armed conflict, a warship is immune from interference by the authorities of nations other than the flag State. Police and port authorities may come aboard a warship only with the permission of the commanding officer. Moreover, a commanding officer need not consent to a search of the ship (Navy Regs. (1973), art. 0470) nor may the ship be required to fly the flag of the host country. Although warships voluntarily comply with traffic control, sewage, health, and quarantine restrictions, a failure of compliance could be met only by diplomatic complaint or requiring the warship to leave. LOS Convention, art. 30; Territorial Sea Convention, art. 23; Navy. Regs. (1973), arts. 0763-0765.

3. Nuclear-powered warships and nuclear arms. The U.S. views nuclear-powered warships and conventionally powered warships in the identical light concerning port visits. With respect to nuclear weapons on board specific U.S. ships and aircraft, the U.S. policy is to neither confirm or deny the presence of such weapons.

4. Crew. While on board ship, the crew of a warship is immune from local jurisdiction. Their status ashore involves foreign criminal jurisdiction issues which are normally dealt with under the applicable status of forces agreement.

5. Other government vessels. Ships owned or operated by a State and used only on government non-commercial service have complete immunity from the jurisdiction of any State other than the flag State on the high seas. LOS Convention, art. 96; High Seas Convention, art. 9.

B. Merchant ships

1. On high seas. Merchant ships sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties, are subject to the flag State's exclusive jurisdiction on the high seas. LOS Convention, art. 92(1); High Seas Convention, art. 6(1). Merchant vessels on the high seas may not be boarded by foreign warship personnel, 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. LOS Convention, art 110; High Seas Convention, art. 22.

2. In the exclusive economic zone. The coastal State may, in the exercise of its economic resource rights to its EEZ, take such measures, including boarding, inspection, arrest and judicial proceedings, against foreign flag vessels as are necessary to ensure compliance with the coastal State EEZ rules and regulations. LOS Convention, art. 73.

3. In the territorial sea. Foreign merchant vessels exercising the right of innocent passage through the territorial sea have the duty to comply with coastal State rules and regulations, as discussed in section 0107B4 above. On board the transiting vessel, the coastal State 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 State;

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

c. assistance of local authorities has been requested by the flag State or captain of the ship transiting the territorial waters; or

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

The above rules do not affect the right of the coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters. LOS Convention, art. 27; Territorial Sea Convention, art. 19.

0113 STATUS OF AIRCRAFT. Aircraft, like ships, assume the nationality of the country in which they are registered and are marked with symbols or designations of their nationality. All aircraft, upon entering the airspace above the territorial sea, internal waters, or over land, are subject to the control and jurisdiction of the national State and may enter only with that State's permission. Military aircraft in a foreign country enjoy considerable immunity since they are the property of a sovereign nation, but they may be subject to more controls than warships by foreign authorities.

0114 PEACETIME RULES OF ENGAGEMENT

A. Definition. Rules of engagement (ROE) are directives issued by competent military authority which delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered.

B. Peacetime ROE. Since armed force in situations short of declared war may lawfully be used only in self-defense, peacetime ROE limit military actions, including the use of force, to defensive responses to hostile acts or demonstrations of hostile intent in situations short of armed conflict. Peacetime ROE address both unit and national self-defense. Naval personnel with appropriate duty assignments should familiarize themselves with "Peacetime Rules of Engagement for U.S. Forces," "Peacetime ROE for U.S. Seaborne Forces," and applicable unified command and component command ROE. It is a common misconception that under peacetime ROE a commander must "take the first hit" and cannot act in self-defense until the opposing force has committed a hostile act (e.g., opened fire). That is not the law and is not required by U.S. peacetime ROE or the international law of anticipatory self-defense.

THE WHITE HOUSE
Office of the Press Secretary

EMBARGOED FOR RELEASE AT 4:00 PM EST

March 10, 1983

EXCLUSIVE ECONOMIC ZONE OF
THE UNITED STATES OF AMERICA

- - - - -

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 described 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, all 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.

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OVER

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

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THE WHITE HOUSE
Office of the Press Secretary

EMBARGOED FOR RELEASE AT 4:00 PM EST

March 10, 1983

STATEMENT BY THE PRESIDENT

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 interests 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 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 non-living 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.

more

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.

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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 1972 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 of U.S. scientists to foreign EEZ's under reciprocal arrangements.

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

LAW OF NAVAL WARFARE

Objectives: Introduction to law of naval warfare:

- a. Historical development
- b. Basic principles
- c. U.S. and individual responsibilities
- d. Areas, targets and methods of naval operations
- e. Enforcement mechanisms

I. Introduction

A. War/armed conflict

- 1. Political instrument - violent means
- 2. Historic developments since Napoleonic Wars
 - a. Citizen's army
 - b. Industrial revolution and total war
 - c. Weapons of increasing technology and destruction

B. Law of naval warfare

- 1. International law regulating the conduct of naval armed hostilities. Areas of coverage:
 - a. Conventional and unconventional (guerrilla) warfare
 - b. International and noninternational (civil war) armed conflicts
 - c. Not nuclear warfare
- 2. Army/Marine Corps use traditional term "law of war."
Navy/Air Force use term "law of armed conflict" (LOAC)
because it reflects:
 - a. Disappearance of declarations of war
 - b. Outlawry of wars of aggression by U.N. Charter
 - c. Individual or collective self-defense permissible

4. Historical-legal development of naval warfare

a. Declaration of Paris, 1856

b. Hague Conventions of 1907 (* U.S. still a party)

- (i) No. III - Opening of hostilities
- (ii) No. VI - Status of enemy merchant ships at outbreak of hostilities
- (iii) No. VII - Conversion of merchant ships into warships
- (iv) * No. VIII - Laying of automatic submarine contact mines
- (v) * No. IX - Bombardment by naval forces in time of war
- (vi) * No. XI - Certain restrictions with regard to the exercise of the right of capture in naval war
- (vii) * No. XIII - Rights and duties of neutral powers in naval war

c. London Naval Protocol of 1936

d. Geneva Conventions (GC) of 1949 (* U.S. still a party)

- (i) * GC I - Wounded and sick on land
- (ii) * GC II - Wounded, sick and shipwrecked at sea
- (iii) * GC III - Treatment of prisoners of war
- (iv) * GC IV - Protection of civilians
- (v) Broad applicability - common articles
 - (a) Respect and ensure respect in all circumstances regardless of justness of cause
 - (b) International armed conflicts - declared or undeclared
 - (c) Noninternational armed conflict - Basic humanitarian safeguards against violence to life and person, taking of hostages, etc.
 - (d) Duration - until repatriation

- e. Geneva Protocols I & II of 1977
- f. Conventional Weapons Convention, 1980

C. Basic principles

- 1. Military necessity
- 2. Humanity (unnecessary suffering)
- 3. Proportionality
- e. Chivalry

II. U.S. armed forces - obligations and responsibilities

- A. Policy and law of U.S. to adhere to LOAC - Party to Geneva Conventions of 1949 and Hague Conventions III, VIII, IX, XI and XIII of 1907
- B. Law of war violations counterproductive
 - 1. Detract from mission
 - 2. Generate adverse publicity
 - 3. Strengthen enemy resolve and prolong the war
- C. War Powers Resolution
 - 1. Presidential reports submitted to Congress in 3 cases (absent declaration of war) which involve introduction of U.S. armed forces into (a) hostilities or imminent hostilities, (b) foreign nation equipped for combat, or (c) foreign nation substantially enlarging numbers of troops equipped for combat
 - 2. 60-day grace period for President in case #a - 30-day extension possible
 - 3. Presidential responsibility to consult
- D. Dissemination requirements - Instruction commensurate with duties and responsibilities (Tri-level training)

E. Command/individual responsibilities

1. Observe LOAC
2. Prevent/report violations of LOAC to appropriate authorities promptly - OPREP 3 to National Military Command Center
3. Cannot be ordered to violate LOAC
4. UCMJ applies to war crimes
 - But jurisdictional issue for discharged servicemembers

F. Judge advocate's role

1. Legal advisor to military commanders
2. Review operational plans
3. Training
4. Combatant

III. Areas of naval operations

A. High seas - war zones

1. Exclusion zones
2. Task force bubble - cordon sanitaire

B. Belligerent's territorial sea, internal waters, superjacent airspace and accessible land area

C. Restrictions upon belligerents in neutral jurisdiction

1. Neutral States
 - a. Inviolability - Belligerents must abstain from acts of hostility in neutral's jurisdiction, such as using neutral's jurisdiction as a base of operations
 - b. Impartiality observed towards belligerents
2. Neutral territorial seas and ports
 - a. Belligerent passage and self-defense rights
 - b. Belligerent warship port visits - 24-hour rules
3. Neutral air spaces - Belligerent aircraft access forbidden unless medical or unarmed belligerent aircraft

D. Problem areas

1. International straits and airspace
2. Archipelagic waters and airspace
3. Exclusive economic zones and airspace

IV. Targets

A. Attack only legitimate military objectives - destroy no more than your mission requires

1. Enemy combatants, military aircraft and warships
 - a. Also neutral vessels or aircraft with enemy combatant character
 - b. Capture and destruction
2. Enemy merchant vessels and aircraft
 - a. Visit and search - OPNAVINST 3120.32 procedures
 - b. Capture and prize court
 - c. Attack and destroy if:
 - (i) Resist or refuse visit and search or capture
 - (ii) Enemy convoy
 - (iii) Offensively armed
 - (iv) Intelligence gathering
 - (v) Naval auxiliary
 - d. Same treatment for neutral merchant vessels or aircraft acquiring enemy character
3. Enemy bases and support facilities

B. Protected persons, vessels, aircraft and places

1. Persons

a. Wounded, sick and shipwrecked

- (i) Collect and care for after engagement on land or at sea
- (ii) Take all possible humane measures, subject to practical imperatives, security

b. Retained personnel

- (i) Medical personnel, chaplains and staff
- (ii) Identification - Red Cross, Red Crescent, and Red Lion and Sun. Red Star of David (?)
- (iii) Perform their religious or medical duties only
- (iv) Self-defense rights

c. Prisoners of war

- (i) Status entitlement - status determinations
 - (a) Armed forces and accompanying civilians, militia, volunteer corps
 - (b) Guerrillas if (1) military commander responsible for subordinates, (2) fixed distinctive sign, (3) carry arms openly, and (4) conduct operations IAW LOAC
 - (c) Crew of captured enemy merchant vessels and aircraft

(ii) Protections

- (a) Humane treatment
- (b) On land in POW camps so marked
- (c) Restrictions on POW labor - no dangerous work
- (d) Minimum due-process guarantees on POW discipline and punishment
- (e) Protecting powers or agencies, e.g., ICRC

(iv) Repatriation after hostilities

d. Civilians in territory of parties or partially or totally occupied territories

- (i) Respect in all circumstances for person, honor, family rights, religious convictions and practices and manners and customs
- (ii) Cannot use presence of protected persons to render area immune from naval operations
- (iii) Civilian internees - POW-like safeguards

e. Neutrals - not POWs

2. Vessels and aircraft

- a. Enemy vessel or aircraft surrendering
- b. Enemy hospital ship or medical aircraft
 - (1) Markings
 - (2) Exclusively medical usage
 - (3) Notice to belligerents
- c. Enemy vessels with religious, scientific or philanthropic missions

- d. Neutral merchant vessels and aircraft - visit and search by belligerent warships

3. Places:

- a. Undefended enemy places
- b. Cultural, educational, religious and historical places
 - (i) Blue and white symbol
 - (ii) Black and white symbol
 - (iii) Orange symbol
- c. Medical facilities - warning requirements

V. Methods of naval operations

A. Operations against trade

- 1. Contraband - absolute and conditional contraband, free goods
- 2. Blockade
 - a. Declaration by belligerent government
 - b. Timely notice to all states
 - c. Must be effective to be binding
 - d. Application:
 - (i) Not neutral ports or coasts
 - (ii) Equally to ships of all nations (exception for neutral vessels and aircraft)
 - (iii) Breach (real or intended) of blockade - visit and search, capture
- 3. Distinguish wartime blockade from quarantine

B. Weapons employed in naval warfare

- 1. Basic principles
 - a. Avoid superfluous injury
 - b. Indiscriminate weapons forbidden - Few weapons illegal (or indiscriminate) per se

2. Mine warfare

- a. Forbidden to use free-floating mines
- b. Forbidden to lay contact mines off enemy coast with sole object of intercepting commercial shipping
- c. Safeguard peaceful shipping from anchored automatic contact mines
- d. Limited duty to warn

3. Chemical/bacteriological weapons

- a. Poisons prohibited
- b. Poison gas - U.S. reservation provides for no-first use
- c. Anti-plant herbicides and riot control agents - permissible but release authority reserved to President in time of war
- d. Biological weapons - U.S. unilaterally renounced

4. Nuclear weapons

- a. Not illegal per se
- b. Arms control and disarmament treaties
- c. U.S. has not renounced first use, but does not target civilian population as such
- d. Presidential release authority

5. Naval and aerial bombardment

- a. Limited prior warning requirements
- b. Terrorization and wanton destruction prohibited

6. Guided weapons

- a. Not illegal per se
- b. Dangers in over-the-horizon targeting

7. New weapons - JAG review prior to major acquisition decisions

C. Perfidy and ruses

- 1. Lawful ruses, e.g., use of national flags, feints, decoys, camouflage
- 2. Unlawful perfidy, e.g., improper use of Red Cross emblem or flag of truce

VI. Enforcement mechanisms

A. Public opinion and propaganda

B. Protest

C. Reparations - individual suit or State pays

D. Retortion - deliberately unfriendly, but legal, acts against belligerent

E. Reprisals - act, otherwise illegal, exceptionally permitted to belligerent as a reaction against illegal acts of warfare committed by enemy

- 1. National Command Authority authorizes
- 2. Last resort
- 3. Against enemy personnel and property, but not protected persons or property

F. War crimes trials

- 1. UCMJ
- 2. Nuremberg
- 3. Grave breaches
- 4. Command responsibilities
- 5. Defense of superior orders

LAW OF NAVAL WARFARE

TABLE OF CONTENTS

	<u>PAGE</u>
0201 INTRODUCTION	41
A. Naval warfare defined	41
B. Law of naval warfare defined	41
C. Chapter content	41
0202 HISTORICAL DEVELOPMENT	42
A. Origins	42
B. Nineteenth century	42
C. The law of The Hague	42
D. Inter-war period	43
E. The law of Geneva	43
0203 PURPOSES AND PRINCIPLES	44
A. Purposes	44
B. Principles	44
0204 U.S. ARMED FORCES: OBLIGATIONS AND RESPONSIBILITIES	46
A. General	46
B. Training	48
C. Individual responsibilities	48
D. War Powers Resolution	49
0205 AREAS OF NAVAL OPERATIONS	49
A. General	49
B. Neutrality	50
C. Neutral jurisdiction	51
D. New developments	52

		<u>PAGE</u>
0206	TARGETS: VESSELS, AIRCRAFT AND PERSONNEL AT SEA	54
	A. Legitimate military targets	54
	B. Protected persons, vessels and aircraft	57
0207	METHODS OF NAVAL OPERATIONS	60
	A. Operations against trade	60
	B. Weapons employed in naval warfare	64
	C. Perfidy and ruses	67
0208	ENFORCEMENT MECHANISMS	67
	A. Public opinion and propaganda	67
	B. Protest and demand	68
	C. Reparation	69
	D. Retortion	69
	E. Reprisal	69
	F. Reciprocity	70
	G. War crimes trials	70

LAW OF NAVAL WARFARE

The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason for his being. When he violates this sacred trust, he not only profanes his entire cult but threatens the very fabric of international society. The traditions of fighting men are long and honorable. They are based upon the noblest of human traits - sacrifice.

- From the order of General of the Army Douglas MacArthur, Jr. confirming the death sentence of General Yamashita

0201 INTRODUCTION

A. Naval warfare defined. Naval armed conflict involves hostilities between States in which at least one party has resorted to the use of armed conflict at sea, or projected from the sea, to achieve its political aims. Since 1945 there have been over 100 situations in which naval power has been exerted in coercive roles of varying intensity and levels of violence involving over 50 different navies.

B. Law of naval warfare defined. The law of naval warfare is that part of international law that regulates the conduct of armed hostilities by naval and marine forces. It encompasses both international armed conflicts and noninternational armed conflicts(e.g., civil wars).

C. Chapter content. This chapter focuses initially on the historical development and basic principles of the law of naval warfare. Subsequent sections discuss obligations and responsibilities for the U.S. armed forces, areas of naval operations, targets, methods of naval operations, and enforcement of the law of armed conflict.

A. Origins. The roots of the present law of armed conflict can be traced to the Middle Ages and were first codified by Hugo Grotius in his De Jure Belli Ac Pacis (The Law of War and Peace) in 1625. The sources of this law have been, principally, the custom and practices of States and international agreements and, secondarily, general principles of law recognized by nations, judicial decisions, and the writings of highly qualified jurists. Except as otherwise noted, the source documents on the historical development of the law of armed conflict discussed below are contained in volume I of L. Friedman's The Law of War: A Documentary History (1972) and in select cases AFP 110-20, Selected International Agreements (27 Apr 1981).

B. Nineteenth century. The first attempts to establish rules of war as binding enactments of international law began seriously in the nineteenth century. Until then, individual States had negotiated treaties focusing on specific problems that arise in war, especially those relating to the maritime rules on contraband and prize. Significantly, the first binding agreement between States on how to wage naval warfare, the Declaration of Paris of 1856, abolished privateering, recognized the protections of the neutral flag at sea, and required that a blockade be effective to be binding. A few years later, a series of bloody battles in the Franco-Austrian War of 1859 produced a great surge of humanitarian concern for the sick and wounded culminating in the formation of the Red Cross movement and the signing of the Geneva Convention of August 22, 1864, dealing with the treatment of sick and wounded combatants. Contemporaneously, President Lincoln on 24 April 1863 promulgated General Orders No. 100, the so-called Lieber Code, named after its drafter Francis Lieber of Columbia College in New York City, setting forth comprehensive and practical rules of warfare for the U.S. Army. That was followed in 1868 by the Declaration of St. Petersburg proscribing the use of explosive bullets in war and in 1874 by the Declaration of Brussels on land warfare rules, which was never ratified.

C. The law of The Hague. In the summer of 1899, representatives from 26 States met at The Hague and agreed quickly on a plan for arbitration of international disputes and codified, as additional articles to the 1864 Geneva Convention, existing practices on hospital ships and treatment of shipwrecked, wounded and sick at sea. Failing ratification, however, the additional articles never entered into force. In 1904, a separate Convention, to which the United States is still a party, was signed exempting hospital ships from taxation. That was followed in 1907 by the convocation of a Second Conference at The Hague, which resulted in the following numbered, maritime-related Conventions:

1. No. III Relative to the Opening of Hostilities;
2. No. VI Relative to the Status of Enemy Merchant Ships at the Outbreak of Hostilities;
3. No. VII Relative to the Conversion of Merchant Ships into Warships;
4. No. VIII Relative to the Laying of Automatic Submarine Contact Mines;

5. No. IX Concerning Bombardment by Naval Forces in Time of War;

6. No. X For the Adaptation to Maritime Warfare of the Principles of the Geneva Convention;

7. No. XI Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War;

8. No. XII Relative to the Establishment of an International Prize Court; and

9. No. XIII Concerning the Rights and Duties of Neutral Powers in Naval War.

The United States is a party to The Hague Convention Nos. III, VIII, IX, XI, and XIII, which are reprinted in Air Force Pamphlet 110-20, Selected International Agreements at 3-3, 3-15 (1981) or JAG memo JAG:103.1:PJC:wav Ser: 10/410 of 8 Sep. 1983 for the Distribution List, Subj: International Agreements Affecting Naval Operations. The other Hague Conventions listed above have become obsolete or have been superseded by later Conventions. Despite the substantial time devoted to maritime problems at the 1907 Hague meeting, another Naval Conference was called at London in 1908 to resolve some of the thornier problems that had not been settled earlier. The London Declaration of 1909 dealt with blockades, contraband, neutral ships, prize courts and armed merchant vessels; however, it was not ratified. The First World War then interceded precluding the convening of a Third Hague Conference scheduled for 1915.

D. Inter-war period. The conclusion of World War I with the signing of the Treaty of Versailles led to further codification of the rules of war. A five-power Conference in 1922 produced an unratified treaty on submarine attacks on merchant vessels. At the end of the decade, another Conference at Geneva produced the Red Cross Convention on treatment of prisoners of war and the sick and wounded that was to be in force during World War II. That was followed in 1936 by the Protocol to the Treaty of London which provided that: "In their action with regard to merchant ships, submarines must conform to the rules of International Law to which surface vessels are subject." See Proces - Verbal Relating to the Rules of Submarine Warfare of 1936, reprinted in 1 L. Friedman, The Law of War: A Documentary History 523-24 (1972). At the outbreak of World War II, there were 36 parties bound by the London rules; however, the treaty structure crumbled with the outbreak of war, when it was recognized that the conditions imposed all but prohibited the military, operational use of the submarine.

E. The law of Geneva. World War II disclosed numerous shortcomings in the Geneva Red Cross Convention of 1929 on civilian populations and prisoners of war requiring new, more comprehensive rules on the subject. Geneva was chosen as the site for a Conference in 1949 culminating in the adoption and subsequent entry into force of four Conventions:

1. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949;

2. Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea of August 12, 1949;

3. Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949; and

4. Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949.

Those Conventions are reprinted in NWIP 10-2, Law of Naval Warfare apps. C-F (1955), AFP 110-20, Selected International Agreements 3-30 to 3-126 (1981), and Army Pamphlet 27-1, Treaties Governing Land Warfare 24-194 (1956). At present, over 160 nations of the world have accepted the rules as binding upon themselves. Since 1949 there have been several attempts to reaffirm and develop the law of armed conflict in the 1977 Protocols I and II Additional to the Geneva Conventions of August 1949 and 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, none of which are in force for, or have been ratified by, the United States, although they are reprinted in AFP 110-20, Selected International Agreements 3-127 to 3-182 (1981). More recently, proposals to convene a conference to modernize the law of naval warfare have surfaced, but the proposals have yet to attract significant support.

0203 PURPOSES AND PRINCIPLES

A. Purposes. The law of naval warfare is inspired by the desire to diminish the evils of war by:

1. Protecting both combatants and noncombatants from unnecessary suffering;

2. safeguarding certain fundamental human rights of persons who fall into the hands of the enemy, particularly prisoners of war, the wounded and sick, and civilians; and

3. facilitating the restoration of peace.

Army FM 27-10, The Law of Land Warfare par. 2 (1956).

3. Principles. The law of naval warfare is based on the overriding principles of the law of armed conflict -- military necessity, unnecessary suffering (humanity), and chivalry, plus the principle of proportionality which establishes the link between the concepts of military necessity and humanity. While the rules of naval warfare have been extensively codified, these overriding principles are still relevant for two reasons. First, there are situations in which no "black letter" codified rule applies; the general principles must then be relied on to determine the legality of a specific action. Second, situations may arise in which the "black letter" rule is dated and no longer fits the particular circumstances presented. In such cases the general principles may be used to interpret the codification or to develop analogies from them.

Another useful way to think of the law of armed conflict is to consider it as an expression, in legal terms, of principles of war such as objective, mass, economy of force, surprise, and security. Both the law and the principles of war stress the importance of concentrating forces against critical targets, while avoiding the waste of resources against militarily unimportant objectives.

AFP 110-34, Commander's Handbook on the Law of Armed Conflict par. 1-1b (1980). The basic principles of the law of armed conflict are defined as follows:

1. Military necessity. Military necessity is that principle that justifies measures of regulated force not forbidden by international law which are indispensable for securing the prompt submission of the enemy with the least possible expenditures of time, life and physical resources.

2. Humanity. Complementing the principle of necessity is the principle of humanity which forbids the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes.

3. Proportionality. The principle of proportionality means that the commander is not allowed to cause damage to non-combatants which is disproportionate to military need. In deciding whether the principle of proportionality is being respected, during an attack or operation the standard of measurement is the contribution to the military purpose of an attack or operation considered as a whole, as compared with other consequences of the action, such as the effect upon civilians or civilian objects. It involves weighing the interests arising from the success of the operation on the one hand, against the possible harmful effects upon protected persons and objects on the other. That is, there must be an acceptable relation between the legitimate destructive effect and undesirable collateral effects. As an example, you are not allowed to bomb a refugee camp if its only military significance is that women in the camp are knitting socks for soldiers. As a converse example, you are not obliged to hold back an air strike on an ammunition dump because a farmer is plowing a field beside it. Unfortunately, most applications of the principle of proportionality are not quite so clear cut. It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances, largely because the comparison is often between unlike quantities and values. How do you assess the relative values of dead civilians and your own dead soldiers? In many cases, commanders will assign a very generous plus factor to the lives of their own soldiers. It is even more difficult to assess the relative values of innocent human lives as opposed to capturing a particular military object such as a hill.

4. Chivalry. During the Middle Ages, chivalry embraced the notion that combatants belonged to a caste, that their combat in arms was ceremonial, and that the opponent was entitled to respect and honor.

Citizen armies, as well as modern technological and industrialized armed conflict, have made war less a gentlemanly contest; nevertheless, the principle of chivalry remains in specific prohibitions, such as those against poison, dishonorable or treacherous conduct, and misuse of enemy flags, uniforms, and flags of truce.

0204 U.S. ARMED FORCES: OBLIGATIONS AND RESPONSIBILITIES

A. General. DoD policy recognizes that it is in the national interest of the United States to comply with the law of armed conflict, even if the enemy does not. Respect for law is deeply ingrained in American culture and the American people have always insisted that their own Government follow the law. For this reason, violation of the law by U.S. armed forces may have a greater impact on our own peoples, and on world public opinion, than similar violations by our adversaries. If the enemy does violate the law of armed conflict, there are many diplomatic and military actions, as discussed in section 0208 below, that the United States can take in reply. As a foundation for these actions, however, the United States must be prepared to verify, through evidence that would be convincing to other nations and to the public, that the enemy did in fact violate the law. Military personnel on the scene must, therefore, be prepared to recognize and report accurately that a particular enemy act is in violation of international law.

1. Doctrine. In addition to the Hague and Geneva Conventions to which the United States is a party as discussed in section 0202 above, law-of-armed-conflict doctrine for the U.S. armed forces is laid out in the following references:

a. Naval Warfare Information Publication 10-2, Law of Naval Warfare (1955);

b. Department of the Army Field Manual 27-10, The Law of Land Warfare (1956);

c. Air Force Pamphlet 110-34, Commander's Handbook on the Law of Armed Conflict (1980) (To the extent this Pamphlet relies on the Geneva Protocols of 1977, it may not reflect Navy policy.); and

d. Air Force Pamphlet 110-31, International Law - The Conduct of Armed Conflict and Air Operations (1976) (To the extent this Pamphlet relies on the Geneva Protocols of 1977, it may not reflect Navy policy.).

2. Rules of engagement. Rules of engagement are directives delineating the circumstances and limitations under which a State's armed forces will initiate and/or continue combat engagement with enemy forces, including terrorists. Peacetime and wartime rules of engagement are distinct and separate, although both must conform to international law, including the law of armed conflict. Peacetime rules of engagement, as discussed in section 0114 above, support national sovereignty and generally limit military actions, including the use of force, to defensive responses to hostile acts or demonstrations of hostile intent in situations short of

armed conflict. Rules of engagement during armed conflict, although predicated on the law of self-defense, do not limit military responses to defensive actions alone and thus permit a wider range of uses of military force. Wartime rules of engagement place limits, consistent with national objectives, strategy, and the law of armed conflict, on the methods and means of warfare. These limits include restrictions on certain weapons and targets and ensure the greatest possible protection for noncombatants consistent with military necessity.

3. Applicability of the law of armed conflict

a. International armed conflict. Traditionally most of the law of armed conflict applies only to conflicts between nations. It thus does not apply to suppression of riots or civil disturbances, since these do not involve international violence. Until recently, hostilities with terrorist groups were treated in the United States as law enforcement matters and not governed by the law of armed conflict. The advent of paramilitary and military terrorist groups sponsored or supported by sovereign states may result in the application of the law of armed conflict, where the level of violence generates the need to respond with armed force in the exercise of unit or even national self-defense. As a general rule, however, terrorist groups are not entitled to the status of belligerents unless the conflict as a whole has been determined by political authorities to be governed by the law of armed conflict.

The law of armed conflict applies equally to all sides in international armed conflicts, even if one side wages an illegal or aggressive war. (Since the end of World War I, many nations have entered into treaties limiting the right to use armed force. In the post-WW II period, the most important of these treaties is the Charter of the United Nations, which requires member nations to "refrain . . . from the threat or use of force against the territorial integrity or political independence of any" nation, but preserves "the inherent right of individual or collective self-defense." U.N. Charter, art. 2, par. 4; art. 51. Wars violating these principles are often called "aggressive" or "illegal" wars.) The United Nations Charter has dramatically changed the justification for the use of armed force in the Twentieth Century because most of the nations of the world are parties to it, and the international community has made serious attempts to limit the scope of armed conflicts which occur. Nevertheless, the side defending against illegal aggression does not, because of that fact, gain any right to violate the law of armed conflict. Even forces acting under the authority of the United Nations, as were U.S. forces in the Korean Conflict (1950-1953), are required to follow the law of armed conflict in dealing with the enemy. AFP 110-34, Commander's Handbook on the Law of Armed Conflict par. 1-4 (1980).

b. Noninternational armed conflict. An armed conflict occurring solely within the borders of a sovereign nation between the armed forces of that nation and dissident forces is subject to different rules of law than international conflicts. Article 3, common to the four Geneva Conventions of 1949, provides basic safeguards in noninternational armed conflicts against, inter alia, violence to life and person, hostage taking and denial of judicial due process.

B. Training. Under the Geneva Conventions of 1949 and Hague Convention No. IV of 1907 and implementing directives within the Department of Defense, all members of the naval service must receive training and education in the law of armed conflict commensurate with their duties and responsibilities. See DoD Dir. 5100.77 of 10 Jul. 1979, DoD Law of War Program; SECNAVINST 3300.1A of 2 May 1980, Subj: Law of Armed Conflict (Law of War) Program to insure compliance by the naval establishment. Three levels of training are provided for:

1. Accession training for all servicemembers;
2. special knowledge training for members whose military specialty or assignment involves participation in combat operations (naval aviators, special warfare personnel, targeting personnel, and other combat personnel) or whose military specialty or level of rank requires additional training (chaplains, medical personnel and officers and senior petty officers in formal professional military education programs); and
3. detailed knowledge training for members whose military job, specialty or assignment involves participation in the direction of combat operations (commanding and executive officers of combatant ships and aircraft squadrons, groups and wings, designated officers on fleet staffs, and target intelligence selection officers).

OPNAVINST 3300.52 of 18 Mar 1983, Subj: Law of Armed Conflict (Law of War) Program to ensure compliance by the U.S. Navy and Naval Reserve. See also JAGINST 3300.1A of 22 Aug 1983, Subj: JAG Billets Requiring Special or Detailed Knowledge of the Law of Armed Conflict and Training Objectives for Navy Judge Advocates in such Billets; CINCPACFLTINST 3300.9 of 20 Dec. 1984, Subj: IMPLEMENTATION OF DOD LAW OF WAR PROGRAM; CINCLANTINST 3300.3A of 9 Jun 1981, Subj: DoD Law of War Instruction.

C. Individual responsibilities. Servicemembers are required to adhere to the law of armed conflict and an order of a superior to violate the law of armed conflict is unlawful. Moreover, violations of the law of armed conflict by servicemembers are punishable under the Uniform Code of Military Justice. Under paragraph 8 of SECNAVINST 3300.1A and paragraph 6 of OPNAVINST 3300.52, both punitive general orders:

1. Each person in the naval service who knows, or who has information that should enable him to conclude in the circumstances at the time, that a subordinate is committing, or about to commit, a violation of the law of armed conflict, shall take all feasible measures within his power to prevent it; and
2. each person in the naval service who has knowledge of, or receives a report of, an apparent violation of the law of armed conflict, shall as soon thereafter as practicable:
 - a. Make the incident known to his immediate officer in command; or

b. if such person has an honest and reasonable belief that the immediate officer in command is or may be involved in the violation, make the incident known to an officer, normally in the chain of command, senior to the immediate officer in command, or to any judge advocate or chaplain.

D. War Powers Resolution. Under the War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973), codified at 50 U.S.C. §§ 1541-48 (1982), the President in every possible instance must consult with Congress before introducing U.S. armed forces into hostilities or situations where imminent involvement in hostilities is clearly indicated. Absent a declaration of war, the President is required to submit reports to Congress in those situations which involve the introduction of U.S. armed forces:

1. In numbers which substantially enlarge U.S. armed forces equipped for combat already located in a foreign nation;
2. into a foreign country equipped for combat (not routine deployments); and
3. into hostilities or situations in which imminent involvement in hostilities is clearly indicated by the circumstances.

Within 60 days after a report is submitted under paragraph 3 above, the President must terminate any use of U.S. armed forces with respect to which the report was submitted, absent favorable Congressional action, although the President may extend the 60-day period by an additional 30 days in accordance with the statutory criteria. See U.S.C. § 1544(b) (1982). Action under this resolution is the responsibility of the President and his specific designees, including the Legal Advisor to the Chairman, Joint Chiefs of Staff, who reviews all force deployment actions routed through the Chairman's Office that may raise questions under the War Powers Resolution and consults with the DoD General Counsel as required. Although the military forces have no responsibilities under the War Powers Resolution, it is an important part of decisionmaking within the highest levels of the United States military establishment.

0205 AREAS OF NAVAL OPERATIONS

A. General. The general area within which the naval forces of belligerents are permitted to conduct operations includes, under the law of The Hague, the high seas, the territorial seas and internal waters of belligerents, the territory of belligerents accessible to naval forces, and the air space over such waters and territory. Recent years, however, have seen substantial shifts in the law of the sea with the general expansion of territorial seas to 12 miles, overlapping over 100 critical international straits worldwide, and the creation of new maritime zones including exclusive economic zones and archipelagic waters. These latter developments are separately discussed in paragraph D below. Within the immediate area or vicinity of naval operations, a belligerent may establish special restrictions upon the activities of neutral vessels and aircraft (including control over the communications of any neutral merchant vessel or aircraft whose presence might otherwise endanger the success of his operations), and may prohibit altogether such vessels and aircraft from

entering the area. Neutral vessels and aircraft which fail to comply with a belligerent's orders expose themselves to the risk of being fired upon. Such vessels and aircraft are also liable to capture. NWIP 10-2, Law of Naval Warfare §§ 430, 520a (1955).

B. Neutrality

1. Definition. Neutral States include all States not taking part in an armed conflict. It includes not only those States who consider themselves to be permanently neutral (Switzerland, Finland, Sweden, and Austria), but also those who declare or otherwise establish themselves as neutrals in a particular armed conflict. In the absence of a treaty limiting the available scope of neutrality, whether or not a State chooses to refrain from participating in an armed conflict is a policy decision. Similarly, recognition of such nonparticipation is also a policy decision. NWIP 10-2, Law of Naval Warfare § 230a (1955). Although it is possible at the outbreak of an armed conflict for nonparticipating States to issue proclamations of neutrality, a special declaration by nonparticipating States of their intention to adopt a neutral status is not required. The status of neutrality is terminated only when a neutral State resorts to war against a belligerent or when a belligerent resorts to war against a neutral State. NWIP 10-2, Law of Naval Warfare § 231 (1955). As a consequence of their nonparticipation in an armed conflict, a neutral State has certain obligations (impartiality) and rights (inviolability) toward belligerents and belligerents have corresponding rights and obligations toward a neutral State.

2. Impartiality. The principle of impartiality holds that a neutral State is required to fulfill its obligations and enforce its rights equally toward all belligerents. If a neutral State does not observe the principle of impartiality, the belligerent injured by such nonobservance may consider itself no longer bound by its obligations toward the neutral. NWIP 10-2, Law of Naval Warfare § 230b (1955).

3. Inviolability. As a general rule, all acts of hostility in neutral jurisdiction are forbidden. Belligerents, then, may not use neutral territory, territorial sea, or air space as a base for hostile operations. A belligerent is not forbidden, however, to resort to acts of hostility in neutral jurisdiction against enemy troops, vessels or aircraft making illegal use of neutral territory, waters or air space, if a neutral State will not or cannot effectively enforce its rights against such offending forces. At the same time, neutrals have a right to defend their territory, sea and air space with armed force. During World War II, Switzerland fired on U.S. bombers that had strayed over the Swiss border during bombing raids on Germany. After the war the United States compensated the Swiss Government for inadvertent bomb damage to several Swiss cities. AFP 110-34, Commander's Handbook on the Law of Armed Conflict par. 7-1 (1980); NWIP 10-2, Law of Naval Warfare § 441 (1955).

4. U.N. Charter. Neutrality is a concept that has been altered by the Charter of the United Nations, which obligates States to settle their international disputes by peaceful means without the threat or use of force. In case of a threat or breach of the peace, the Security Council is authorized to take enforcement action, including the use of force, in order to maintain or restore peace.

Nations that take part in military action pursuant to a resolution of the United Nations are not "belligerents" in the strict sense of International Law. Since they cannot be said to be neutral, the question arises as to what their status actually is. It is now generally recognized that countries engaged in military action pursuant to a call of the United Nations and its organs, are "unneutral" only insofar as they comply with the request of the United Nations. A state that refrains from taking part in hostilities between other nations but renders assistance to one side has been called a qualified neutral.

B. Brittin, International Law for Seagoing Officers 257 (4th ed. 1981).

C. Neutral jurisdiction

1. Passage through territorial sea. A neutral State, if it desires, may allow the mere passage of warships (including submerged submarines, if the neutral consents on a nondiscriminatory basis) or prizes, of belligerents through its ordinary territorial sea, i.e., up to 12-mile territorial sea excluding those portions which overlap international straits and their approaches. Alternatively, a neutral State may refuse to allow passage of belligerent vessels through its ordinary territorial sea on a nondiscriminatory basis. NWIP 10-2, Law of Naval Warfare § 443a (1955).

2. Belligerents stay in neutral ports and waters. Absent special provisions adopted by the neutral State, belligerent warships may not remain in a neutral's territorial sea, ports or roadsteads for over 24 hours. This restriction does not apply to vessels devoted exclusively to humanitarian, religious, or scientific purposes, e.g., belligerent hospital ships. In addition, belligerent warships may be permitted to extend their stay in neutral ports on account of stress of weather or damage (see paragraph C5 below). It is the duty of a neutral State to intern a belligerent warship, together with officers and crew, that will not or cannot leave a neutral port where she is not entitled to remain. No more than three warships of a belligerent are allowed to be in the same port or roadstead of a neutral at one time. When warships of opposing belligerents are present in a neutral port at the same time, at least 24 hours must elapse between the departure of the respective enemy vessels. The order of departure is determined by the order of arrival, unless the vessel which arrived first is granted an extension of the period of stay. A belligerent warship cannot leave a neutral port or roadstead less than 24 hours after the departure of an enemy merchant ship. NWIP 10-2, Law of Naval Warfare § 443b (1955).

3. War materials, armaments and communications. Belligerent warships may not use neutral ports, roadsteads or territorial seas to take on war materials or armaments or to erect any apparatus for communicating with belligerent forces. NWIP 10-2, Law of Naval Warfare § 443c (1955).

4. Food and fuel. Belligerent warships in neutral ports or roadsteads may supply themselves with food and fuel, although there is disagreement as to the amount that may be taken on. In practice, it has been left to the neutral to determine the conditions for replenishing food and fuel so long as all belligerents are treated equally. A neutral may extend by 24 hours the lawful stay of vessels taking on fuel. NWIP 10-2, Law of Naval Warfare § 443d (1955).

5. Repairs. In neutral ports and roadsteads, belligerent warships may carry out only such repairs as are absolutely necessary to render them seaworthy, and may not add in any manner whatsoever to their fighting force. A neutral State must decide what repairs are necessary and insist that they be made with the least possible delay. NWIP 10-2, Law of Naval Warfare § 443e (1955).

6. Prizes. A prize may be brought into a neutral port only because of unseaworthiness, stress of weather, or want of fuel or provisions. It must leave as soon as the circumstances which justified its entry are at an end. If a prize crew violates these rules, the neutral State must release the prize and its crew and intern the prize crew. NWIP 10-2, Law of Naval Warfare § 443f (1955).

7. Aircraft. Belligerent military aircraft are forbidden to enter neutral airspace. Exceptions to this prohibition are as follows:

a. The medical aircraft of belligerents may fly over neutral territory, land thereon in case of necessity, or use such neutral territory as a port of call, subject to such regulations as the neutral may see fit to apply equally to all belligerents; and

b. a neutral State may permit unarmed belligerent military aircraft to enter its airspace under such conditions as it may wish to impose. In fact, unarmed military transport planes were permitted to fly over, land in, and depart from neutral States in World War II. When such aircraft enter without permission, the neutral State may intern the aircraft together with their crews. NWIP 10-2, Law of Naval Warfare § 444 (1955).

D. New developments. Technological advances in recent decades have wrought fundamental changes not only in the means and methods of warfare at sea, but also in the peacetime exploitation of the sea for resources. The latter development has occasioned a continuous seaward creep of coastal State maritime zones. See § 0110 above. The fact, though, that the law of the sea may grant greater rights to the coastal State than in the past does not mean that the law of naval warfare will automatically alter the maritime balance of interests between neutral coastal States and maritime belligerents in the same manner or in the same degree.

1. Territorial seas and international straits. The expansion of the ordinary territorial seas from 3 to 12 miles removes only a small portion of the world's ocean space from the area available for belligerent operations. Moreover, the area in question outside straits and their approaches is not especially strategic. Accordingly, extension of The

Hague neutrality rules to an expanded ordinary territorial sea of 12 miles is not expected to encounter significant opposition. The same cannot be said for international straits overlapped by neutral State territorial seas, since neutral State prohibitions against belligerent straits transit would severely impede belligerent naval mobility. Although the text of Hague Convention No. XIII does not separately address belligerent and neutral rights and duties in overlapped straits, the travaux preparatoires reveals that the negotiations generally agreed that the rights of neutral States to prohibit mere belligerent passage through its territorial sea did not extend to straits connecting parts of the high seas. Since the formulation addressed this question, the matter was "left under the empire of the general law of nations." Recent commentary and historic practices, both before and after the 1907 Hague Conference, generally support the right of belligerent passage through international straits bordered by neutrals. U.S. interests, as typified by American overflight and probable submerged passages through the Strait of Gibraltar in 1973 in support of Israel during the Arab-Israeli conflict, favor inclusion of nonsuspendable submerged passage and overflight as part of the regime of belligerent straits passage. As regards the activities permitted to belligerent vessels and aircraft passing continuously and expeditiously in a normal mode through neutral straits in wartime, the traditional law of neutrality prohibits acts of hostility but not action in self-defense. Clearly, routine defensive measures necessary for the security of the unit, such as, in the case of surface vessels, operation of air and surface search radar and use of sonar, are permissible during straits passage.

2. Exclusive economic zone (EEZ). The combination of references in articles 3 and 8 of Hague Convention No. XIII to the "jurisdiction of a neutral" and the grant to coastal States of certain jurisdictions in EEZ has prompted suggestions of neutral status for a neutral State's EEZ. The resource-related rights and jurisdiction of a coastal State in its EEZ, though, are a far cry from the type of jurisdiction envisioned by Hague Convention No. XIII in connection with articles III and VIII on prize ships and arming vessels for operations against a belligerent. Those articles use jurisdiction as a rough synonym for "territory, including territorial waters." Functionally, however, the EEZ, unlike the territorial sea, does not form a part of a nation's sovereign territory. Moreover, the regime of the EEZ preserves the high seas freedoms of navigation and overflight and other internationally lawful uses of the seas related to these freedoms. In peacetime, this permits weapons exercises and other peaceful military undertakings. In a conflict, it permits belligerent operations.

3. Archipelagic waters. It is not at all clear what impact the 1982 Law of the Sea Convention will have on the law of armed conflict in archipelagic waters. This issue was not addressed at the Third United Nations Conference on the Law of the Sea, and it may be that the Convention simply does not apply during periods of sustained hostilities. It is probably more accurate, however, to address the 1982 Convention's impact on the law of armed conflict by emphasizing and applying those provisions that articulate generally accepted state practice (custom), particularly those provisions that protect and enhance maritime navigation, overflight, and commerce in favor of the international community. The rights and obligations of belligerents and neutrals in archipelagic waters would

appear, at a minimum, to include the right of archipelagic sealane passage and the right of innocent passage in non-sealane waters. Where a neutral archipelagic State is unable or unwilling to enforce its neutrality in its waters, it would be reasonable for the belligerents to conduct naval operations in those waters to ensure that the enemy is not using them as a base of military operations, safe haven, or otherwise making use of archipelagic waters to the prejudice of the other belligerent. Under such circumstances, it also would appear reasonable for the belligerent who discovers such an activity to conduct offensive naval operations to terminate the use of those waters by the other belligerent. In view of the practice of belligerents during major international conflicts, it might be reasonable to argue that belligerents may conduct operations throughout the archipelagic area except within a twelve-mile belt of waters adjacent to the individual islands of the archipelago. In summary, the legal rights and obligations of belligerents and neutrals in archipelagic waters and sealanes will not be clarified for the foreseeable future, and it would be an error to conclude that all belligerent and neutral rights and obligations that derive from territorial sovereignty have been engrafted onto the vast archipelagic ocean spaces simply by virtue of the 1982 Convention.

0206 TARGETS: VESSELS, AIRCRAFT AND PERSONNEL AT SEA. This section describes the legal status or character of vessels, aircraft and personnel in warfare at sea and the action permitted them under international law.

A. Legitimate military targets

1. Warships and military aircraft. Enemy warships, naval auxiliaries, and military aircraft may be captured, or attacked and destroyed, outside neutral jurisdiction as defined in section 0205C above. Prize procedure is not used for these vessels and aircraft when captured, because their ownership immediately vests in the captor's government by the fact of capture. Neutral merchant vessels and aircraft acquire enemy character and are liable to the same treatment as enemy warships and military aircraft when engaging in the following acts:

 a. Taking a direct part in the hostilities on the side of an enemy; or

 b. acting in any capacity as a naval or military auxiliary to an enemy armed force.

NWIP 10-2, Law of Naval Warfare §§ 501a, 503a(1)(1955).

2. Merchant vessels and aircraft

 a. Definition. "The term 'merchant vessels and aircraft' refers to all vessels and aircraft, whether privately or publicly owned or controlled, which are not in the warship or military aircraft category, and which are solely engaged in ordinary commercial activities." NWIP 10-2, Law of Naval Warfare § 500b (1955) (footnotes omitted).

b. Enemy merchant vessels and aircraft. Enemy merchant vessels and aircraft may be captured outside neutral jurisdiction, as defined in section 0205C above, and, when captured, may, in case of military necessity, be destroyed by the capturing officer when they cannot be sent in, or escorted in, for adjudication. Traditional rules of naval warfare required that destruction could occur only after removal of crew, passengers, and papers to a place of safety. This rule still applies to surface ships, but it was widely violated in the submarine warfare of World War II, and it is doubtful whether submarines can be reasonably expected to comply with it. Enemy merchant vessels in lieu of capture, may be attacked and destroyed, either with or without prior warning when participating in armed conflict, in any of the following circumstances:

- (1) Actively resisting visit and search or capture;
- (2) refusing to stop upon being duly summoned;
- (3) sailing under convoy of enemy warships or enemy military aircraft;
- (4) if armed, and there is reason to believe that such armament has been used, or is intended for use, offensively against an enemy;
- (5) if incorporated into, or assisting in any way, the intelligence system of an enemy's armed forces; or
- (6) if acting in any capacity as a naval or military auxiliary to an enemy's armed forces.

NWIP 10-2, Law of Naval Warfare § 503b(1) (1955). Neutral merchant vessels and aircraft acquire enemy character and are liable to the same treatment as enemy merchant vessels and aircraft when operating directly under enemy control, orders, charter, employment, or direction, or resisting an attempt to establish identity, including visit and search. NWIP 10-2, Law of Naval Warfare § 501b (1955).

c. Neutral merchant vessels and aircraft. Neutral merchant vessels and aircraft are liable to capture for the following:

- (1) Carrying contraband (see § 0207A2 below);
- (2) breaking, or attempting to break, blockade (see 0207A1c below);
- (3) carrying personnel in the military or public service of an enemy;
- (4) communicating information in the interest of the enemy;
- (5) avoiding an attempt to establish identity, including visit and search;

(6) presenting irregular or fraudulent papers or lacking necessary papers or destroying, defacing or concealing papers;

(7) violating regulations established by a belligerent within the immediate area of naval operations (see § 0205A above). When neutral merchant vessels or aircraft are captured as prize by U.S. Navy ships, the detailed prize procedures contained in the Standard Organization and Regulations of the U.S. Navy, OPNAVINST 3120.32 of 30 Jul. 1974, paragraph 630.23.5, must be followed. Although the destruction of a neutral prize is not absolutely forbidden, it involves a much more serious responsibility than the destruction of an enemy prize and should not be undertaken, whenever possible, without guidance from higher authority. NWIP 10-2, Law of Naval Warfare § 503d-e (1955).

d. Visit and search

(1) Occasions for exercise. The belligerent right of visit and search may be exercised anywhere outside of neutral jurisdiction, as defined in section 0205C above, upon all merchant vessels and aircraft in order to determine their character (enemy or neutral), the nature of their cargo, the manner of their employment, or other facts which bear in their relation to war. Changes in warfare have rendered visit and search either hazardous or impracticable in many situations. In such situations, diversion is permitted. In the case of merchant vessels and aircraft of the enemy, or a neutral with enemy character as described in section 0205A above, the belligerent right of capture and, exceptionally, destruction need not be preceded by a visit and search, provided that a positive determination of status can be obtained by other means. NWIP, Law of Naval Warfare § 502a (1955).

(2) Method. In the absence of special instructions, U.S. naval personnel will follow the procedures set forth in the Standard Organization and Regulations of the U.S. Navy, OPNAVINST 3120.32 of 30 Jul. 1974, paragraph 630.23.5, in conducting visit and search of merchant vessels.

3. Other military targets. Naval bases, naval vessels, ships under construction, ship production and repair facilities, military petroleum storage areas, docks, port facilities, harbors, airfields, points of embarkation, tanks, armored vehicles, artillery, weapons, ammunition and other things used in military operations are universally regarded as lawful targets of naval warfare. Similarly, buildings and objects that provide administrative and logistic support for military and naval operations are also proper objects of attack (such as personnel offices, mess halls, barracks, supply depots, barges, staff cars and support aircraft). Under limited circumstances, civilian vehicles, buildings and other objects may become objects of attack if, for example, they have combatant personnel in them and collateral damage would not be excessive under the circumstances. NWIP 10-2, Commander's Handbook on the Law of Armed Conflict par. 2-2 (1964).

4. Persons. Unless specifically protected as discussed in paragraph 5 below, two categories of persons are generally considered to be legitimate and thus subject to attack:

a. Military personnel, including members of the Regular armed forces, as well as Reserves, militia and paramilitary police operations if called to active duty, even if performing noncombatant duties such as logistic, administrative and personnel work (Military chaplains, medical personnel and the sick, wounded, and shipwrecked may not, however, be attacked.); and

b. other persons who take a direct part in the hostilities, such as trying personally to kill, injure, or capture enemy persons or objects or being embarked aboard a vessel or aircraft subject to lawful attack as discussed in paragraphs A1-A2 above. AFP 110-34, Commander's Handbook on the Law of Armed Conflict pars. 2-6, 2-7, 2-8 (1980).

B. Protected persons, vessels and aircraft

1. Enemy vessels and aircraft. The following enemy vessels and aircraft, when innocently employed, are exempt from destruction or capture:

a. Cartel vessels and aircraft, i.e., vessels and aircraft designated for and engaged in the exchange of prisoners;

b. properly designated hospital ships, temporary medical ships, coastal rescue craft, medical transports, and medical aircraft;

c. vessels charged with religious, nonmilitary scientific, or philanthropic missions;

d. vessels and aircraft guaranteed safe conduct by prior agreement between the belligerents;

e. for purposes of U.S. Navy operations, vessels and aircraft exempt by U.S. or allied proclamation, operation plan, order or other directive;

f. small coastal (not deep-sea) fishing vessels and small boats engaged in local coastal trade and not taking part in hostilities (Such vessels and boats are subject to the regulations of a belligerent naval commander operating in the area, as discussed in section 0205A above.); and

g. 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. NWIP 10-2, Law of Naval Warfare § 503c & n. 22 (1955).

(1) Hospital ships. The Second Geneva Convention of 1949 provides that hospital ships and embarked medical personnel, sick and wounded, and the crew, may not be captured or attacked, even if there are no sick and wounded on board. To prevent abuse of this protected status, an opposing force may visit and search hospital ships, post on board a neutral commissioner (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 communication. There are detailed provisions regarding markings for all hospital ships, lifeboats and coastal rescue craft in the Second Geneva Convention and the obligation is imposed upon the parties concerned to make them visible and recognizable at night. See Geneva Convention II, arts. 25-27, 43. In addition, the protection of hospital ships is conditioned upon notification to the belligerents of the names and detailed description of these ships. See Geneva Convention II, art. 22. A hospital ship so declared does not lose its protection if the crew is armed with light individual weapons for the maintenance of order or for their own defense or that of the sick and wounded. Similarly, hospital ships may carry equipment exclusively intended to facilitate navigation or communication but may not use or possess cryptologic means of communication.

(2) Medical aircraft. Clearly marked medical aircraft, recognized as such, are not to be deliberately attacked or fired on. Such aircraft, absent the enemy's prior agreement, may not fly over territory controlled by the enemy and must comply with requests to land for inspection. Medical aircraft complying with such a request must be allowed to continue their flight with all personnel on board, if inspection does not reveal that the aircraft has engaged in acts harmful to the enemy or otherwise violated the Geneva Conventions of 1949, such as by gathering intelligence. In reality, it is very difficult to ensure the safety of medical aircraft in an armed conflict no matter how clear their markings. If possible, therefore, the parties should reach a detailed agreement to facilitate their protection and communicate that agreement to the military units concerned. AFP 110-34, Commander's Handbook on the Law of Armed Conflict par. 3-2c (1980).

(3) Surrender. A ship may clearly express its intention to surrender by taking all of the following actions: Stopping her engines, having the crew amidships taking to the lifeboats, hoisting a white flag by day or lighting the ship's exterior lights at night, and putting the ship's weapon systems down. NWIP 10-2, Law of Naval Warfare at 5-13, 5-14, n.35 (1955). Having taken these steps, the ship's offer to surrender must be accepted. An enemy aircraft's offer to surrender, however, need not be accepted, but, if accepted, both sides must abide by the surrender and cease attacks. AFP 110-34, Commander's Handbook on the Law of Armed Conflict par. 3-3b (1980).

2. Neutral vessels and aircraft. Except to the extent that neutral vessels and aircraft are subject to visit and search or capture and destruction as discussed in section 0206A1-2 above, such vessels and aircraft are protected, i.e., not lawful objects of attacks.

3. Other places

a. Hospitals. Fixed military medical establishments, such as hospitals, and mobile medical units, such as ambulances, must be marked with the red cross or red crescent and may not be bombarded or attacked, unless they are used to commit acts harmful to the enemy outside their humanitarian function, such as firing at opposing belligerent forces, storing arms and munitions, or serving as an observation post. In such an event they may be attacked, after a warning setting, in proper cases, a reasonable time limit to correct abuses, has gone unheeded.

b. Cultural objects. The 1907 Hague Convention No. IX on naval bombardment, to which the United States is a party (see § 0202C above), requires at article 5 that all necessary measures be taken by the naval commander to spare as far as possible "sacred edifices, buildings used for artistic, scientific, or charitable purposes, historic monuments, hospitals and places where the sick or wounded are collected, on the understanding that they are not used at the same time for military purposes." The Convention on naval bombardment further requires that the civilian inhabitants indicate such places with visible signs, which should consist of large, stiff rectangular panels divided diagonally into two colored triangular portions, the upper portion black, the lower portion white. For the United States and several other Western Hemisphere nations which are parties to the Roerich Pact of 1935, a red and white flag may also be used to identify historic monuments, museums, and scientific, artistic, educational, and cultural institutions of the parties to that treaty in conflicts between the parties. Finally, many allies and potential adversaries of the United States are parties to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict which establishes a blue and white shield for protected cultural property. The United States, although not a party to this Hague Convention, recognizes the protections of property marked with the blue and white shield. AFP 110-34, Commander's Handbook on the Law of Armed Conflict par. 3-5b (1980).

c. Open towns. See § 0207B6a below.

4. Persons

a. Quarter. "It is forbidden to refuse quarter to any enemy who has surrendered in good faith." NWIP 10-2, Law of Naval Warfare § 511c (1955).

b. Enemy wounded and dead. "As far as military interests permit, after each engagement all possible measures should be taken without delay to search for and collect the shipwrecked, wounded and sick; to protect them against pillage and ill-treatment; to ensure their adequate care; and to search for the dead and prevent their being despoiled." NWIP 10-2, Law of Naval Warfare § 511b (1955).

c. Captured enemy personnel. The officers and crews of captured or destroyed enemy warships and aircraft (including naval and military auxiliaries) and persons authorized to accompany the armed forces should be made prisoners of war. The officers and crew of captured enemy merchant vessels and aircraft should also be made prisoners of war. Enemy nationals found on board neutral merchant vessels and aircraft as passengers who are actually embodied in, or en route to serve in, an enemy's military forces, or who are employed in the public service of an enemy, or who may be engaged in, or suspected of service in, the interests of an enemy, may be made prisoners of war. Religious, medical, and hospital personnel, however, taken from enemy warships and military aircraft are not considered prisoners of war, although they may be retained by the belligerent commander, under whose authority they are, to minister to the needs of prisoners of war. NWIP 10-2, Law of Naval Warfare §§ 511a,

512, 513b (1955). For a discussion of the duties owed prisoners of war and civilians in occupied territories, see FM 27-10, The Law of Land Warfare (1956) and AFP 110-31, International Law - The Conduct of Armed Conflict and Air Operations (1976).

d. Neutral personnel. The officers and crew of captured neutral merchant vessels and aircraft who are nationals of a neutral State should not be made prisoners of war, unless they take a direct part in the hostilities on the side of an enemy or serve in any way as a naval or military auxiliary for an enemy. Similarly, the nationals of a neutral State on board captured enemy merchant vessels and aircraft as officers and crew or as private passengers should not be made prisoners of war, unless they participate in any acts of resistance against a captor.

0207 METHODS OF NAVAL OPERATIONS

A. Operations against trade. One of the accepted means of reducing an enemy to submission in war is to block his trade with other countries so that he cannot receive the arms, munitions, foods and other products needed to carry on. Examples include the Federal blockade of the South in the American Civil War and the vigorous submarine warfare campaign conducted by the United States against the Japanese in World War II which practically isolated the Japanese from their raw materials in Southeast Asia. The principal measures of maritime warfare against trade are the imposition of blockade, the control and capture of contraband, and the capture or destruction of enemy goods found at sea, each of which is discussed below.

1. Blockade

a. Definition. A blockade is a belligerent operation intended to prevent vessels of all States from entering or leaving specified coastal areas which are under the sovereignty, occupation, or control of the enemy. Such areas include ports and harbors, the entire coastline, or parts of it. International law does not prohibit the extension of a blockade to include the air space above those portions of the high seas in which the blockading forces are operating. NWIP 10-2, Law of Naval Warfare § 632(a) (1955).

b. Establishment. To be binding, a blockade must be established by the belligerent State concerned. A blockade may be declared by the blockading State's Government or naval commander acting on behalf of the Government. The blockading nation must make certain that all other nations receive suitable and timely notice of the intention to impose a blockade. Such notice is usually made through diplomatic channels to the nations of the world and by the blockading commander to the locally affected area. After proper notification, a blockade, in order to be binding, must be effective. This means that it must be maintained by a force sufficient to render ingress to, or egress from, the blockaded area dangerous, i.e., such that capture is probable. In addition to being effective, the blockade must be declared so that its imposition does not bar arrival to, or departure from, neutral ports or coasts. NWIP 10-2, Law of Naval Warfare § 632.b-e (1955). Examples include:

The mining of North Vietnamese ports in 1972 is instructive of the modern application of the rules governing the use of mines. The following precautions for the security of peaceful shipping were taken by the United States: in an address on 3 May the [P]resident announced details of the mining; notices were issued to all mariners; a letter was sent to the U.N. Security Council; and bilateral approaches were made through diplomatic channels to countries concerned. Each of these communications detailed the protective measures taken, which included the facts that delayed-activation mines only were to be used so that ships in Vietnamese harbors had three days in which to leave, and U.S. and Republic of Vietnam warships were to notify each ship approaching the internal and claimed territorial waters of North Vietnam. In addition, no mines were laid in international waters and the mining did not bar access to or departure from neutral coasts.

B. Brittin, International Law for Seagoing Officers 248 (4th ed. 1981).

3. Submarine warfare. A belligerent submarine may sink belligerent warships without warning on the high seas, in territorial seas of parties to conflicts or allies, and in territorial seas of neutrals in self-defense or when the neutral is unwilling or unable to preclude belligerent warships from violating its neutrality. In addition, a belligerent submarine may sink enemy merchant vessels that fail to stop when ordered to do so, that resist visit and search, or that are participating in the conflict.

4. Chemical/bacteriological weapons. The use of poison gas in World War I resulted in 1,000,000 casualties, including 100,000 deaths. That shocking example prompted the Geneva Gas Protocol of 1925 prohibiting poison gas. The United States and the other major military powers are parties to that Protocol, but many of those parties, including the United States, have made their adherence subject to a so-called first-use reservation, which means that they will use such weapons only in retaliation against their prior use by other belligerents. In defining poison gas, the United States does not regard the Geneva Gas Protocol as prohibiting riot control agents or herbicides in armed conflict. As a matter of national policy, the U.S. has, however, renounced in war the first use of riot control agents and herbicides with certain limited exceptions. Army FM 27-10, The Law of Land Warfare par. 38c (1956, with ch. 1 of 15 Jul. 1976). In addition, the United States has renounced the use of bacteriological weapons under all circumstances.

5. Nuclear weapons. At present, no rule of international law makes nuclear weapons illegal per se or prohibits nations from using nuclear weapons in warfare, although the employment of nuclear weapons remains subject to the basic principles of military necessity and unnecessary suffering. Their use, moreover, is controlled at the highest

levels of government. Although the possession and use of these weapons generally cannot be regarded as a violation of existing international law, they are the subject of intense international interest, which has, to date, produced conventions prohibiting their emplacement in outer space, Latin America, Antarctica, and on the seabed.

6. Bombardment

a. Bombardment of cities. The indiscriminate bombardment of cities or any bombardment not justified by military necessity, is prohibited. In bombardment, all necessary steps should be taken to spare, as far as possible, all buildings devoted to religion, art, private science, or charitable purposes, historic monuments, and hospitals and other places where the sick and wounded are collected, provided that they are not used at the time of attack for military purposes. A city or town containing neither defenses of its own nor any other military objectives may not be attacked. Moreover, bombardment for the sole purpose of terrorizing the civilian population is prohibited. NWIP 10-2, Law of Naval Warfare §§ 621 a, c, d, 622 (1955).

b. Noncombatants. Belligerents may not make noncombatants the target of direct attack in the form of naval bombardment or air strikes which are unrelated to a military objective. The presence, however, of noncombatants in the vicinity of military objectives does not render such objectives immune from naval bombardment or air strikes, even if such attacks result in indirect injury to noncombatants and their property. In attempting to attack a military objective, naval commanders are not responsible for such incidental damage to objects in the vicinity that are not military objectives. NWIP 10-2, Law of Naval Warfare § 621b (1955).

c. Warnings. If the military situation permits, the commander of the attacking naval force must do his utmost to warn the populace before commencing bombardment. NWIP 10-2, Law of Naval Warfare § 623 (1955). General warnings are more frequently given than specific warnings to prevent the mission from being jeopardized. Such warnings are given for the protection of the civilian population, so they need not be given when the civilians are unlikely to be killed or injured by the attack.

7. Guided weapons. Guided weapons and precision-guided munitions are not prohibited, since they are not inherently indiscriminate. No rule of law, however, requires nations possessing such weapons to use them in place of unguided weapons. Guided weapons are to be used consistent with their characteristics with due regard for the basic principles governing the use of weapons generally, discussed in paragraph B1 above.

8. Weapons review. DoD policy states that all weapons newly developed or purchased by the U.S. armed forces must be reviewed for consistency with international law. These reviews are carried out for the Navy by the Judge Advocate General, before the engineering development stage of the acquisition process, and before the initial contract for production is let. See SECNAVINST 5711.8 of 14 Jan 1976, Subj: Review of Legality of Weapons under International Law.

C. Perfidy and ruses

1. Strategems. Ruses (strategems) of war are designed to misinform, deceive, or mislead under circumstances, where there is no duty to speak the truth and as such are legally permitted. In particular, according to custom, it is permissible for the belligerent warship to use false colors and to disguise her outward appearance in other ways in order to deceive an enemy, provided that prior to going into action such warship shows her true colors. Other legally permissible ruses include, but are not limited to, the following: Surprises; feigned attacks, ambushes; retreats or flights; simulation of quiet or inactivity; use of small units to simulate large units; transmittal of false or misleading messages or deception of the enemy by false instructions; utilization of the enemy's signals; deliberate planting of false information; and use of dummy ships, aircraft, airfields and other installations. NWIP 10-2, Law of Naval Warfare § 640a, at 6-13, 6-14, n.41 (1955).

2. Perfidy. Acts of treachery (perfidy) are designed to invite the confidence of the adversary that he is entitled to protection or is obliged to give protection combined with the intent of betraying that confidence. Such acts are legally forbidden. For example, it is an act of perfidy to make improper use of a flag of truce or the Red Cross emblem or to employ national flags, insignia and uniforms of the enemy or a neutral during combat. NWIP 10-2, Law of Naval Warfare §§ 640b, 641 (1955); Army FM 27-10, The Law of Land Warfare pars. 52-55 (1956).

0208 ENFORCEMENT MECHANISMS. In recent years, a frequent criticism of international law has been that:

[T]he laws of armed conflict are meaningless because there is no way of enforcing them. If this criticism is based on the fact that there is no single, all-powerful tribunal that can impartially try and punish offenders, whether losers or victors, the point is well made. On the other hand, there are other methods of enforcing the law of armed conflict, and in many cases they have been quite effective.

B. Brittin, International Law for Seagoing Officers 259 (4th ed. 1981). Those methods are discussed below.

A. Public opinion and propaganda. Although often scoffed at, the most effective means probably of enforcing the laws of armed conflict at the political level is the injured belligerent nation's publication of the facts with a view to influencing world opinion against the offending belligerent.

Germany's reaction to world opinion after she sank the Lusitania without warning provides a good example. Primarily as a result of the sharp protests of neutrals, who were shocked at her lawless conduct, Germany acknowledged her liability and issued instructions to her submarine commanders not to sink merchant ships without warning and without providing for the safety of crews and passengers.

B. Brittin, International Law for Seagoing Officers 259 (4th ed. 1981). More recently, during the Southeast Asia conflict, the United States mounted a successful diplomatic effort through neutral nations to prevent political "show trials" of our prisoners of war.

B. Protest and demand. Where the laws of armed conflict have been breached, protest and demand by the wronged belligerent for punishment of individual offenders may be communicated directly to an offending belligerent, including a belligerent commander, or indirectly through a protecting power, a humanitarian organization, such as the International Committee of the Red Cross, acting in the capacity of a protecting power, or any State not participating in the armed conflict. NWIP 10-2, Law of Naval Warfare § 300(2) (1955).

1. The protecting power. Under the 1949 Geneva Conventions, the treatment of prisoners of war, interned civilians, and inhabitants of occupied territory is to be monitored by a neutral State known as the protecting power. During the early days of World War II, the United States acted as protecting power for British prisoners of war in Europe. When the United States subsequently entered the war as a British ally, the Swiss assumed this duty for both the U.S. and Great Britain. Since World War II, the protecting power system has not worked well for several reasons, including the difficulty of finding States which the opposing belligerents regard as truly neutral. There was, thus, no protecting power for American prisoners of war during the conflicts in Korea and Southeast Asia. AFP 110-34, Commander's Handbook on the Law of Armed Conflict par. 8-2b (1980).

2. The International Committee of the Red Cross (ICRC). This committee is a humanitarian organization based in Geneva, Switzerland. Under the 1949 Geneva Conventions, the ICRC is allowed to perform some of the duties of the protecting power, if such a power cannot be found and if the detaining power allows it to act. In Southeast Asia, for example, the ICRC tried to act as a protecting power for Viet Cong and North Vietnamese prisoners in the hands of the United States and our allies. The ICRC should not be confused with the various national Red Cross Societies, such as the American National Red Cross. The ICRC is organized separately from the national societies which are, in some countries, under the control of the government or ruling party. AFP 110-34, Commander's Handbook on the Law of Armed Conflict par. 8-2c (1980).

C. Reparation. A wronged belligerent may demand compensation from an offending belligerent, such as Germany was required to do after World War I, for violations of the law of armed conflict. This liability applies, irrespective of individual responsibilities that may exist, with respect to the treatment of prisoners of war and protected civilians. Geneva Convention III, art. 12; Geneva Convention IV, art. 29. As a general rule, however, in the absence of some cause for fault, no obligation for compensation arises on the part of a State for other violations of the law of armed conflict committed by individual members outside of their general area of responsibility. AFP 110-31, International Law - The Conduct of Armed Conflict and Air Operations par. 10-3 (1976).

D. Retortion. Retortion is retaliation for legally permissible acts of a belligerent State which are of a cruel, discourteous, unfair, harrassing or otherwise objectionable nature by acts of a similar kind, i.e., by acts that are legally permissible. NWIP 10-2, Law of Naval Warfare § 310a (1955).

E. Reprisal

1. Definition. "Reprisals between belligerents are acts, otherwise illegal, which are exceptionally permitted to a belligerent as a reaction against illegal acts of warfare committed by an enemy." NWIP 10-2, Law of Naval Warfare § 310a (1955). Reprisal is distinguished from retortion in that a reprisal is a retaliation against an illegal act and has the legal character of an enforcement action which may involve the use of armed force. Reprisals must be preceded by a request for redress of the wrong, may not be taken merely for revenge, and must cease as soon as they have achieved their objective.

2. Authorization. Only the National Command Authority may authorize the execution of reprisals or other reciprocal violations of the law of armed conflict by U.S. armed forces. AFP 110-34, Commander's Handbook on the Law of Armed Conflict par. 8-4b(2) (1980).

3. Risks. As a matter of national policy, the United States has generally refrained from carrying out reprisals against the enemy, both because of the potential for escalation and because it is generally in our national interest to follow the law even if the enemy does not. AFP 110-34, Commander's Handbook on the Law of Armed Conflict par. 8-4b(3) (1980).

4. Persons and things not subject to reprisals. Under the 1949 Geneva Conventions, reprisals are forbidden against hospital ships, coastal rescue crafts, hospitals and other medical units and transports, medical and religious personnel, the sick and wounded, the shipwrecked, interned civilians, inhabitants of occupied territory, and prisoners of war. NWIP 10-2, Law of Naval Warfare § 310e (1955). (Neutrals may not, of course, be made the object of reprisals.) Protocol I Additional to the 1949 Geneva Conventions would expand this list to include all civilians and civilian objects on land, as well as cultural property, dams, dikes, and nuclear electrical generating stations, and the natural environment. The United States is not now bound by these additional restrictions.

F. Reciprocity. The reciprocal nature of obligations under the law of armed conflict is closely related to the right of effective reprisal. A major violation of the law by one side may release the other side from any further duty to obey the obligation. Most truces and armistices are of this nature, as is the 1925 Geneva Gas Protocol (see § 0207 B4 above). AFP 110-34, Commander's Handbook on the Law of Armed Conflict par. 8-4a(2) (1980). Decisions to consider the United States released from a particular obligation under such circumstances will normally be made by or at the direction of the National Command Authority. It should be noted that the principle of reciprocity is not applicable to humanitarian law such as the 1949 Geneva Conventions.

G. War crimes trials. The final method of enforcement of the laws of war is by the punishment of war crimes.

It is a popular misconception that war crimes trials originated at Nuremberg following World War II. This erroneous belief is probably the result of the large amount of publicity that surrounded them. Some of the defendants were tried for war crimes, such as the violation of the laws of warfare, but the offenses that received the most notoriety and elicited the greatest amount of controversy were the so-called crimes against humanity and crimes against peace.

B. Brittin, International Law for Seagoing Officers 260 (4th ed. 1981). It has long been an obligation -- one that most civilized nations have honored -- for States to punish their own or other nationals who violate the law of armed conflict.

1. War crimes defined

a. General. War crimes are those acts which violate the customary or conventional international-law rules regulating the conduct of war. War crimes may be committed either by members of an armed force or civilians. Examples of violations of the law of armed conflict are, inter alia:

- (1) Deliberate attack upon hospital ships, medical establishments, or medical units;
- (2) misuse of the Red Cross emblem or a similar protective emblem;
- (3) denial of quarter, unless bad faith is reasonably suspected;
- (4) treacherous request for quarters;
- (5) wanton destruction of cities, towns or villages or devastation not justified by military necessity;

(6) aerial bombardment where the sole purpose is to attack and terrorize the civilian population;

(7) plunder and pillage of public or private property;
and

(8) imposing punishment, without a fair trial, upon spies and other persons suspected of hostile acts. NWIP 10-2, Law of Naval Warfare § 320b (1955).

b. Grave breaches. War crimes committed against persons or property specially protected by the Geneva Convention of 1949 include, inter alia:

(1) Willful killing, torture or inhumane treatment (including biological experiments);

(2) willfully causing great suffering or serious injury to health;

(3) extensive destruction of property not justified by military necessity;

(4) compelling a prisoner of war or other protected person to serve in a hostile armed force;

(5) willfully depriving a prisoner of war or other protected person of a fair and regular trial; and

(6) taking of hostages.

Geneva Convention I, art. 50; Geneva Convention II, art. 51; Geneva Convention III, art. 130; Geneva Convention IV, art. 147.

2. Punishment of war crimes

a. General. Belligerent States have the obligation under customary international law to punish their own nationals who violate the law of armed conflict and the right to punish enemy nationals, whether members of the armed forces or civilian persons, who fall under their control. NWIP 10-2, Law of Naval Warfare § 330a (1955). With respect to grave breaches, parties to the Geneva Convention of 1949 are obligated to search out, bring to trial, and to punish all persons who have committed, or ordered to be committed, a grave breach of the Conventions.

b. Jurisdiction. War crimes are within the jurisdiction of general courts-martial under Article 18, UCMJ or military commissions, provost courts, military government courts and other military tribunals under Article 21, UCMJ of the United States, as well as of international tribunals. These war crimes need not be limited to offenses committed against U.S. nationals, but also extend to nationals of allies and of co-belligerents and stateless persons. Army FM 27-10, The Law of Land Warfare par. 507a (1956).

c. Procedures. These trials must meet certain minimum standards of fairness and due process, such as notice of the charges, the assistance of counsel and an interpreter, and the right to call witnesses for the defense, now set out in detail in the 1949 Geneva Conventions.

d. Penal sanctions. "The punishments imposed for a violation of the law of armed conflict must be proportionate to the gravity of the offense. The death penalty may be imposed for grave breaches of the law. Corporal punishment is excluded. Punishments should be deterrent, and . . . a sentence of imprisonment [is permissible]. . . ." Army FM 27-10, The Law of Land Warfare par. 508 (1956).

e. Defenses

(1) Defense of superior orders. The fact that a person acted pursuant to orders of his government or of a superior does not relieve him from responsibility under international law but may be considered in mitigation of punishment.

In the most publicized case of the Vietnam conflict, an army platoon commander, First Lieutenant William L. Calley, Jr., was tried by court-martial and convicted of the premeditated murder of about one hundred Vietnamese civilians. Part of Calley's defense was that he was carrying out the orders of his company commander. This defense was rejected by the appellate courts that considered his conviction on the grounds that the order to "waste" the victims was illegal "upon even cursory evaluation by a man of ordinary sense and understanding." The basic rule is that a superior may not lawfully order one of his subordinates to violate the law of armed conflict. Therefore, when a subordinate obeys an order that is a clear violation of the law of armed conflict, such as killing or torturing a prisoner, the result can be conviction by court-martial of both the subordinate and the superior.

B. Brittin, International Law for Seagoing Officers 260 (4th ed. 1981).

(2) Official capacity. "The fact that a person who committed an act which constitutes a war crime acted as the head of a State or as a responsible government official does not relieve him from responsibility for his act." Army FM 27-10, The Law of Land Warfare par. 510 (1956).

(3) Acts not punishable under domestic law. That domestic law imposes no penalty for a war crime under international law does not relieve the person who committed the act from responsibility under international law. NWIP 10-2, Law of Naval Warfare § 330b(3) (1955).

3. Command responsibility. Commanding officers are responsible for illegitimate acts of warfare performed by subordinates, when such orders are committed by order, authorization or acquiescence of a superior. The fact that a commanding officer did not order, authorize, or acquiesce in illegal acts of warfare committed by subordinates does not relieve him from responsibility, provided it is established that the superior failed to exercise his authority to prevent such acts and, in addition, did not take reasonable measures to discover and stop offenses already perpetrated. NWIP 10-2, Law of Naval Warfare § 330b(2) (1955).

PEACETIME AND WARTIME MARITIME PROBLEMS

These problems are designed to be taught to seminar groups of up to 18 students. Each seminar group will be divided into two teams, one from the country of TIPSYP and the other from the country of KRAKPOT. Each student is assigned a particular job in his naval service and is presented during the seminar with one or more peacetime or wartime maritime problem to answer accurately. The oral answers are scored and a team total is kept. Eventually, a victorious TIPSYP or KRAKPOT team emerges. The game prizes will, of course, be made with due regard for the standards of conduct.

It is assumed, for purposes of these problems, that both TIPSYP and KRAKPOT, descended as they are from American ancestry, are parties to the same international treaties as the United States and follow religiously the customary international law recognized by the United States.

PROBLEM #1:

You are Captain E.E. ZEE, the operations officer for Commander, KRAKPOT Mobile Squadron One (KRAKMORONONE). TIPSY has recently proclaimed, patterned on the U.S. Proclamation, a 200-mile exclusive economic zone in consonance with the U.N. Law of the Sea Convention. KRAKMORONONE wants to conduct naval exercises in that 200-mile zone and asks you for advice since the staff judge advocate is permanently out to lunch.

QUESTION:

What effect, if any, does the exclusive economic zone have on military exercises in that area?

PROBLEM #2:

You are Captain N.O.I. QUE, chief of staff for TIPSYP navel intelligence. KRAKPOT intelligence ships are operating off the shore of the coast of TIPSYP on the high seas monitoring the movement of TIPSYP subs. Those submarines, in moving to the sea, must traverse the territorial sea of a neighboring state, DEEPTHROAT. In your capacity, you seek to avoid detection of TIPSYP submarine transits by KRAKPOT intelligence ships.

QUESTION:

Can TIPSYP subs be sent through the territorial seas of DEEPTHROAT submerged?

PROBLEM #3:

You are Commander N.O. DEFENSE, commanding the KRAKPOT DAUNTED on the high seas, when you receive a distress signal from a merchant ship of Liberian registry on the high seas with a KRAKPOT crew and cargo that is under attack by TIPSY warships.

QUESTION:

Can you defend the merchant ship?

PROBLEM #4:

You are Rear Admiral B. G. FOOTE, Commander, TIPSY First Fleet (TIPSYFEET), embarked on the TIPSY carrier IMPULSE, which is rushing to recover the survivors from the TIPSY CANOE sunk off KRAKPOT shores. No state of war or hostilities exists and KRAKPOT has disclaimed all responsibility. Twenty-four hours after the sinking, a KRAKPOT submarine is detected on the surface returning to homeport. Peacetime maritime rules of engagement are still in effect. TIPSY CANOE's former commanding officer, Captain TYLER II, is aboard the IMPULSE and urges you to sink the submarine as he believes the submarine is the one which attacked his ship.

QUESTION:

Do you attack?

PROBLEM #5:

You are Commander RUN CY LENT, staff judge advocate to Commodore R. DEEP, Commander, KRAKPOT Submarine Squadron One (KRAKSUBONE). TIPSY sits astride the TIPSILY Straits, 20 miles in breadth, which is sandwiched between two continents and is used extensively by international ocean-going vessels including KRAKPOT ships. Two years ago, TIPSY and the strait state on the other side of TIPSILY Straits each proclaimed a 12-mile territorial sea. KRAKPOT, following the example of the U.S. Proclamation, has recognized the 12-mile territorial sea claims of the two strait states.

QUESTION:

What, if any, options does KRAKSUBONE have to minimize the risk of detection for his submarines transiting the straits since they are overlapped by territorial seas?

PROBLEM #6:

You are Commander GULL E. BULL, staff judge advocate to Governor LILL E. PUTT, the military governor of LITTLE TIPSY, the fiftieth state of TIPSY. LITTLE TIPSY consists of an archipelagic grouping of islands off the shores of mainland TIPSY. The Governor has heard rumors of a special legal regime for archipelagos under the U.N. Law of the Sea Convention, a treaty which the TIPSY government is contemplating ratifying. The Governor asks your advice.

QUESTION:

Can LITTLE TIPSY be accorded archipelagic status under the U.N. Law of the Sea Convention?

PROBLEM #7:

You are Rear Admiral CON FUSION, Judge Advocate General of the KRAKPOT Navy (KRAKPOTJAG). The Chief of Naval KRAKPOT Operations has decided to launch a full-scale attack on the TIPSY Navy, but worries that a formal declaration of war may be required to ensure that the Geneva Conventions apply to his sailors and marines that fall into enemy hands. You, of course, want to avoid the fate of other Judge Advocate Generals such as General Lehmann in Nazi Germany.

QUESTION:

Is a declaration of war required for the Geneva Conventions of 1949 to apply?

PROBLEM #8:

You are Captain I.M. QUICK, commanding the TIPSY DRAW, which is ordered into combat after KRAKPOT's initiation of hostilities. Enroute, you are approached by a warship flying the good ole' British Union Jack. At 8000 yards, though, the warship lowers the Union Jack, raises the KRAKPOT ensign, and attacks. Given your family name and fine fighting ship, QUICK's DRAW, you outduel the enemy vessel, sinking it in the process and capturing its commanding officer.

QUESTION:

What, if any, charge of violation of the law of naval warfare can be filed by you against the captured commanding officer?

PROBLEM #9:

The TIPSY - KRAKPOT war is now full-blown. KRAKPOT declares a 200-mile maritime exclusion zone around its coastline saying that it will attack without warning TIPSY warships found in that zone. You are Commander GUN N. RUN, submarine commander of KRAKPOT's finest and you spot the TIPSY aircraft carrier GIPSY on the high seas 214 miles from KRAKPOT headed for its coast.

QUESTION:

Must you wait until the aircraft carrier is inside the 200-mile zone to attack?

PROBLEM #10: While the KRAKPOT's finest and only submarine was occupied chasing the TIPSY aircraft carrier, GIPSY, a TIPSY amphibious assault force slipped in close to KRAKPOT's shore. During the amphibious assault, an assault craft with embarked marines was struck and started to sink 200 yards from shore. These few good men started to swim with their weapons to the TIPSY beachhead. During the swim, the men came under intense fire and most of them were killed. Subsequently, the KRAKPOT coastal artillery battery is overrun and the officer in charge captured. You are Rear Admiral GOFOR, Judge Advocate General of the TIPSY Navy (GOFORJAG) and are consulted as to whether there has been a violation of the law of armed conflict.

QUESTION: Were the Marines in the water protected personnel not subject to attack?

PROBLEM #11:

You are Commander DOGIT, KRAKPOT Captain of the DALMATIAN (FF-1001). During the second month of the war you sight a small armed KAT-class TIPSYP vessel just outside the territorial sea of the neighboring state of DEEPTHROAT, a nation which has carefully observed its rights and duties as a neutral state during the hostilities. Without warning, you open fire on the enemy vessel and doggone it if you don't score several hits. The enemy craft then enters the territorial waters of DEEPTHROAT and continues to transit those waters on the way to its home base in TIPSYP.

QUESTION:

When the enemy vessel enters the territorial sea of DEEPTHROAT to escape you, must you break off the action?

PROBLEM #12: You are First Lieutenant D. I. HARD, commander of a TIPSY Marine platoon ashore in KRAKPOT. You are taking small arms fire from a hospital clearly marked with Red Crosses in a nearby KRAKPOT village, which you have been tasked with securing.

QUESTION: Can you return the fire from the hospital? What precautions, if any, must be observed?

PROBLEM #13: You are Captain JACK T. RIPPER, commanding the KRAKPOT MASH (HO-4077), a hospital ship. The on-scene commander, Rear Admiral Trap E.R. JOHN, a true Krakpotite, expresses the desire to use your ship to gather intelligence through the use of onboard communications equipment while at the same time providing medical care.

QUESTION: What are the legal ramifications of such action?

PROBLEM #14: You are Captain I.D. HO, one of TIPSYS's few good men, who is protecting and escorting a group of vacationing TIPSYS potato farmers through KRAKUF, the populated capital of KRAKPOT, to the TIPSYS secured beachhead for evacuation. In the center part of the populated city, you start receiving isolated sniper fire.

QUESTION: Can you request naval gunfire support to silence the KRAKPOT sniper?

PROBLEM #15: You are Commander NEVERSINK, the skipper of KRAKPOT's DESTROYER (DD-00). In a close naval engagement between your destroyer and two enemy patrol boats, you have sunk one patrol boat and severely damaged the second. The severely damaged boat has ceased firing, lowered its colors, raised a white flag, and broadcast a surrender over VHF circuits thereby surrendering. As you come alongside, the patrol boat suddenly opens fire again, killing ten of your crewmen and severely injuring twenty others. You promptly sink the second patrol boat and discover the captain of the patrol boat among the survivors and capture him.

QUESTION: Did the captain of the second patrol boat violate the law of armed conflict and, if so, did he lose his entitlement to POW status?

PROBLEM #16: You are Commander FIND A. WAY, TIPSy staff judge advocate to Rear Admiral HAWK I. PIERCE, Commander, TIPSy Mobile Squadron One (COMTIPSYMORON), who desires to convert one of his merchant ships, which transported TIPSy troops to the amphibious landing zone on KRAKPOT, to use as a platform for providing medical care.

QUESTION: What must be done to convert a merchant ship to such use and guarantee that it will be afforded protected status?

PROBLEM #17: You are Captain H.I. SEE, the KRAKPOT staff judge advocate for RADM JOHN, who wants to lay a naval minefield which is partly in KRAKPOT's territorial sea and partly in the territorial sea of TIPSYP, but outside any international straits.

QUESTION: Assuming that neutral states ordinarily transit these two areas, what is the legal status of each of these portions of the minefield?

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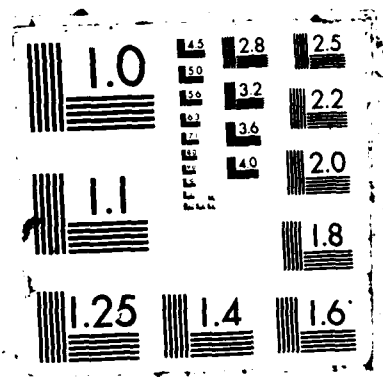
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PROBLEM #18:

You are Captain A. MORALE, commanding the TIPSY ENTERPRISE, which is being used to transport KRAKPOT POWs to POW camps back in TIPSY. You have 400 POWs on board, including two individuals who are identified by their uniforms as enemy chaplains. You have been allowing the POW chaplains to conduct religious services on a routine daily basis. You also happen to have the Chief of TIPSY Chaplains (TIPSYCHAP) aboard who accidentally wound up in the combat area by taking the wrong aircraft enroute TAD to a religious conference at St. Tropez. He embarked on your ship because it was the first available transport out of the combat zone.

Your third day underway, TIPSYCHAP still slightly distraught at missing his conference, comes to you and complains that it is a disgrace to the Navy that you are allowing the POWs to hold their religious services on your ship. He tells you that the POWs profess a state religion KRAKPOTISM, and it is well known that KRAKPOTISM is on about the same moral plane as DRUIDISM. It remains uninfluenced by every important religious development that has occurred during the past six thousand years. The Chaplain states that he is sure that he and all other chaplains and the moral majority would be appalled if they were aware that the Navy was allowing KRAKPOTISM to flourish aboard Navy ships. The Chaplain insists that their services must be stopped at once.

QUESTION:

Can you legally require the POWs to discontinue the KRAKPOT services aboard your ship?

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