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ANNOTATED SUPPLEMENT TO

THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS

NWP 9 (REV. A)/FMFM 1-10

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INTRODUCTORY NOTE

The Commander's Handbook on the Law of Naval Operations (Naval Warfare Publication 9, 1987) replaced Law of Naval Warfare (Naval Warfare Information Publication 10-2, 1955). With Revision A (1989), NWP 9 has also been adopted by the U.S. Marine Corps as Fleet Marine Force Manual (FMFM) 1-10. Unlike its predecessor, NWP 9 contains no reference to sources of authority for statements of relevant law. This approach was deliberately taken for ease of reading by its intended audience -- the operational commander and his staff. The Annotated Supplement has been prepared to support the more in-depth requirements of Navy and Marine Corps judge advocates.

Although prepared under the direction of the Judge Advocate General, in conjunction with the Naval War College, the Annotated Supplement is not an official publication of the Department of the Navy or the U.S. Government.

The text of The Commander's Handbook is set forth verbatim in plain type face. Annotations appear as footnotes numbered consecutively within each chapter and are presented in bold face type for ease of recognition as new material. Insofar as they remain valid, the notes to Law of Naval Warfare, NWIP 10-2, have been incorporated into these annotations. Supplementary text is identified by a prefatory note; each numbered paragraph begins with the letter "S". Supplemental illustrations are identified as Supplement Figures (SF), Supplement Tables (ST), and Supplement Annexes (SA). A table comparing provisions of NWIP 10-2 and NWP 9 has been inserted before the Index.

E. D. STUMBAUGH
Rear Admiral, JAGC, U.S. Navy
Judge Advocate General

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

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ABBREVIATIONS

ACDA	U.S. Arms Control and Disarmament Agency
AFP 110-20	U.S. Air Force Pamphlet 110-20, Selected International Agreements, 1981
AFP 110-31	U.S. Air Force Pamphlet 110-31, International Law--The Conduct of Armed Conflict and Air Operations, 1976
AFP 110-34	U.S. Air Force Pamphlet 110-34, Commander's Handbook on the Law of Armed Conflict, 1980
Alexander	Offshore Consultants, Inc., Navigational Restrictions Within the New LOS Context: Geographical Implications for the United States 8 (L.M. Alexander, ed. Final Report under Defense Supply Service Contract 903-84-C-0276, Dec. 1986) [cited as Alexander, Navigational Restrictions]
AR	Army Regulation
ATP	Allied Tactical Publication
Bevans	Treaties and Other International Agreements of the United States of America, 1776-1949, C.I. Bevans ed., 13 vols., 1968-76
Bothe, Partsch & Solf	New Rules for Victims of Armed Conflicts, 1982
CDDH	Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 1974-1977
C.F.R.	Code of Federal Regulations
Chicago Convention	Convention on International Civil Aviation, Chicago, 7 December 1944
Common article	Article common to all four Geneva Conventions of 12 August 1949 for the Protection of War Victims
Continental Shelf Convention	Convention on the Continental Shelf, Geneva, 29 April 1958
DA Pam 27-1	U.S. Department of the Army Pamphlet 27-1, Treaties Governing Land Warfare, 1956

DA Pam 27-1-1	U.S. Department of the Army Pamphlet 27-1-1, Protocols to the Geneva Conventions of 12 August 1949, 1979
DA Pam 27-161-2	U.S. Department of the Army Pamphlet 27-161-2, International Law Volume II, 1962
Declaration of Brussels	Project of an International Declaration Concerning the Laws and Customs of War, Brussels, 27 August 1874
Declaration of London	Declaration Concerning the Laws of Naval War, London, 26 February 1909
Declaration of Paris	Declaration Respecting Maritime Law, Paris, 16 April 1856
FM 27-10	U.S. Army Field Manual 27-10, The Law of Land Warfare, 1956
Fed. Reg.	Federal Register
GAOR	UN General Assembly, Official Records
GC	Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (Fourth Convention)
GP I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I)
GP II	Protocol Additional to Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II)
GPW	Geneva Convention (III) relative to the Treatment of Prisoners of War of August 12, 1949 (Third Convention)
Greenspan	The Modern Law of Land Warfare, 1959
GWS 1929	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, 27 July 1929
GWS	Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949 (First Convention)

GWS-Sea	Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949 (Second Convention)
Hackworth	Digest of International Law, 8 vols., 1940-44
Hague III	Hague Convention No. III relative to the Opening of Hostilities, 18 October 1907
Hague IV	Hague Convention No. IV respecting the Laws and Customs of War on Land, 18 October 1907
HR	Regulations respecting the Laws and Customs of War on Land, annexed to Hague IV
Hague V	Hague Convention No. V respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 18 October 1907
Hague VII	Hague Convention No. VII relating to the Conversion of Merchant Ships into Warships, 18 October 1907
Hague VIII	Hague Convention No. VIII relative to the Laying of Automatic Submarine Contact Mines, 18 October 1907
Hague IX	Hague Convention No. IX concerning Bombardment by Naval Forces in Time of War, 18 October 1907
Hague X	Hague Convention No. X for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, 18 October 1907
Hague XI	Hague Convention No. XI relative to Certain Restrictions with regard to the Exercise of the Right of Capture in Naval War, 18 October 1907
Hague XIII	Hague Convention No. XIII concerning the Rights and Duties of Neutral Powers in Naval War, 18 October 1907
High Seas Convention	Convention on the High Seas, Geneva, 29 April 1958
Hudson	International Legislation 1919-1945, M. Hudson ed., 9 vols., 1931-49

Hyde	International Law Chiefly as Interpreted and Applied by the United States, C. Hyde ed., 2d & rev. ed., 3 vols., 1945-47
ICAO	International Civil Aviation Organization
I.C.J.	International Court of Justice. Reports of Judgments, Advisory Opinions and Orders
ICRC	International Committee of the Red Cross
ICRC, Commentary	Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, 1987
IMO	International Maritime Organization (formerly International Maritime Consultative Organization (IMCO))
IMT	International Military Tribunal, Nuremberg
IMTFE	International Military Tribunal for the Far East
INCSEA	U.S./U.S.S.R. Incidents at Sea Agreement
Int'l Leg. Mat'ls	International Legal Materials
JAG Manual	Manual of the Judge Advocate General, JAG Instruction 5800.7B
JCS	U.S. Joint Chiefs of Staff
JCS Pub 1	Department of Defense Dictionary of Military and Associated Terms, 1986
JSCP	JCS, Joint Strategic Capabilities Plan
Kelsen	Collective Security under International Law (U.S. Naval War College, International Law Studies 1954) v.39, 1956
LOS Bulletin	UN Office for Ocean Affairs and the Law of the Sea, Law of the Sea Bulletin
Lieber Code	U.S. Department of War, Instructions for the Government of the Armies of the United States in the Field, General Orders No. 100, 24 April 1863
L.N.T.S.	League of Nations Treaty Series
LOAC	Law of Armed Conflict

London Protocol	Proces-Verbal relating to the Rules of Submarine Warfare set forth in Part IV of the Treaty of London of 22 April 1930, London, 6 November 1936
LOS	Law of the Sea
LOS Convention	United Nations Convention on the Law of the Sea, 1982
LOS Glossary	Consolidated Glossary of Technical Terms used in the United Nations Convention on the Law of the Sea, International Hydrographic Bureau Special Pub. No. 51, A Manual on Technical Aspects of the United Nations Convention on the Law of the Sea, 1982, Part I, and UN Office for Ocean Affairs and the Law of the Sea, Baselines, 46-62, 1989
LOS Official Records	Official Records of the Third United Nations Conference on the Law of the Sea, 17 vols. 1975-1984
LRTWC	UN War Crimes Commission, Law Reports of Trials of War Criminals, 15 vols., 1948-49
MacChesney	Situation, Documents and Commentary on Recent Developments in the International Law of the Sea (U.S. Naval War College, International Law Situation and Documents 1956) vol. 51, 1957
Malloy	Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers 1776-1909, W. Malloy comp., 4 vols., 1910-38
Mallison	Studies in the Law of Naval Warfare: Submarines in General and Limited War (U.S. Naval War College, International Law Studies 1966) v.58, 1968
McDougal & Burke	The Public Order of the Oceans, 1962
McDougal & Feliciano	Law and Minimum World Public Order, 1961
MCM, 1984	Manual for Courts-Martial, United States 1984
MCRM	Maritime Claims Reference Manual, DoD 2005.1-M, 1987
MJCS	Memorandum from the Joint Chiefs of Staff
Moore	A Digest of International Law, 8 vols., 1906

NCA	National Command Authorities
Nuremberg Principles	Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal
NWIP 10-2	U.S. Navy, Law of Naval Warfare, 1955
NWP 9	U.S. Navy, The Commander's Handbook on the Law of Naval Operations, 1987
O'Connell	The International Law of the Sea, Shearer ed., 2 vols., 1982
Official Records	Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Geneva, 1974-1977, 16 vols, 1978
1 Oppenheim-Lauterpacht	International Law, Volume I--Peace, H. Lauterpacht ed., 8th ed., 1955
2 Oppenheim-Lauterpacht	International Law, Volume II--Disputes, War and Neutrality, H. Lauterpacht ed., 7th ed., 1952
Oxford Manual	Institute of International Law, The Laws of War on Land, 9 September 1880
Pictet	ICRC, Commentary on the Geneva Conventions of 12 August 1949, J. Pictet ed., 4 vols., 1952-60
PW	Prisoner of War
R.C.M.	Rules for Courts-Martial
Restatement (Third)	American Law Institute, Restatement of the Law Third: The Foreign Relations Law of the United States, 2 vols., 1987
ROE	Rules of engagement
Roerich Pact	Treaty on the Protection of Artistic and Scientific Pact Institutions and Historic Monuments, 15 April 1935
Schindler & Toman	The Laws of Armed Conflicts, 3rd rev. ed., 1988

Scott, Reports	The Reports to the Hague Conferences of 1899 and 1907, 1917
Sohn & Gustafson	The Law of the Sea, 1984
Spaight	Air Power and War Rights, 3d ed., 1947
Stone	Legal Controls of International Conflict, 1954
Stat.	U.S. Statutes at Large
Swarztrauber	The Three-Mile Limit of Territorial Seas, 1972
Territorial Sea Convention	Convention on the Territorial Sea and Contiguous Zone, Geneva, 29 April 1958
T.I.A.S.	U.S. Treaties and Other International Agreements Series
T.S.	Treaty Series
Tucker	The Law of War and Neutrality at Sea (U.S. Naval War College, International Law Studies 1955) v.40, 1957
TWC	Trials of War Criminals before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1946-1949), 15 vols., 1949-53
UCMJ	Uniform Code of Military Justice
UNCLOS III	Third United Nations Conference on the Law of the Sea, 1974-1982
UNGA	United National General Assembly
U.N.T.S.	United Nations Treaty Series
U.S.C.	United States Code
U.S.T.	United States Treaties and Other International Agreements
Whiteman	Digest of International Law, M. Whiteman ed., 15 vols., 1963-1973
Wiktor	Unperfected Treaties of the United States of America 1776-1976, C. Wiktor ed., _ vols., 1976-

PREFACE

SCOPE

This publication sets out those fundamental principles of international and domestic law that govern U.S. naval operations at sea. Part I, Law of Peacetime Naval Operations, provides an overview and general discussion of the law of the sea, including definitions and descriptions of the jurisdiction and sovereignty exercised by nations over various parts of the world's oceans; the international legal status and navigational rights of warships and military aircraft; protection of persons and property at sea; and the safeguarding of national interests in the maritime environment. Part II, Law of Naval Warfare, sets out those principles of law of special concern to the naval commander during any period in which U.S. naval forces are engaged in armed conflict. Although the primary emphasis of part II is upon the rules of international law concerned with the conduct of naval warfare, attention is also directed to relevant principles and concepts common to the whole of the law of armed conflict.

PURPOSE

This publication supersedes NWIP 10-2, Law of Naval Warfare.[1] It is intended for the use of operational commanders and supporting staff elements at all levels of command. It is designed to provide officers in command and their staffs with an overview of the rules of law governing naval operations in peacetime and during armed conflict. The explanations and descriptions in this publication are intended to enable the naval commander and his staff to comprehend more fully the legal foundations upon which the orders issued to them by higher authority are premised and to understand better the commander's responsibilities under international and domestic law to execute his mission within that law. This publication sets forth general guidance. It is not a comprehensive treatment of the law nor is it a substitute for the definitive legal guidance provided by judge advocates and others responsible for advising commanders on the law.[2]

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[1] **A table of comparable provisions in NWIP 10-2 and NWP 9 may be found preceding the Index.**

[2] **Although *The Commander's Handbook on the Law of Naval Operations* is a publication of the Department of the Navy, neither *The Handbook* nor its annotated supplement can be considered as a legislative enactment binding upon courts and tribunals applying the rules of war. However, their contents may possess evidentiary value in matters relating to U.S. custom and practice. See *The Hostages Trial (Wilhelm List et al)*, 11 TWC 1237-38, 8 LRTWC 51-52 (U.S. Military Tribunal, Nuremberg, 8 July 1947-19 Feb. 1948); *The Peleus Trial*, 1 LRTWC 19 (British Military Ct., Hamburg, 1945); *The Belsen Trial*, 2 LRTWC 148-49 (British Military Ct., Luneburg, 1945); *The Abbage Ardenne Case (Trial of Brigadefurher Kurt Meyer)*, 4 LRTWC 110 (Canadian Military Ct., Aurich, Germany, 1945).**

(continued...)

Officers in command of operational units are encouraged to utilize this publication as a training aid for assigned personnel.

APPLICABILITY

Part I of this publication is applicable to U.S. naval operations during time of peace. Part II applies to the conduct of U.S. naval forces during armed conflict. It is the policy of the United States to apply the law of armed conflict to all circumstances in which the armed forces of the United States are engaged in combat operations, regardless of whether such hostilities are declared or otherwise designated as "war."[3] Relevant portions of Part II are, therefore, applicable to all hostilities involving U.S. naval forces irrespective of the character, intensity, or duration of the conflict. Part II may also be used for information and guidance in situations in which the U.S. is a nonparticipant in hostilities involving other nations.

RULES OF ENGAGEMENT (ROE)

The Joint Chiefs of Staff and the commanders of the unified and specified commands, within their areas of responsibility, have the authority to exercise the right of national self-defense and declare forces hostile. Incident to this authority, the commanders of the unified and specified commands may issue directives, e.g., rules of engagement, that delineate the circumstances and limitations under which the forces under their command will initiate and/or continue engagement with other forces encountered. These directives are definitive within the commander's area of responsibility. *This publication provides general information, is not directive, and does not supersede guidance issued by such commanders or higher authority.*

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

[3] **DOD Directive 5100.77, implemented for the Department of the Navy by SECNAVINST 3300.1A, para. 4a. Similar directions have been promulgated by the operational chain of command, e.g., MJCS 59-83, 1 June 1983; USCINCLANTINST 3300.3A; CINCPACFLTINST 3300.9.**

INTERNATIONAL LAW

For purposes of this publication, international law is defined as that body of rules that nations consider binding in their relations with one another. International law derives from the practice of nations in the international arena and from international agreements.[4] International law provides stability in international relations and an expectation that certain acts or omissions will effect predictable consequences. If one nation violates the law, it may expect that others will reciprocate. Consequently, failure to comply with international law ordinarily involves greater political and economic costs than does observance. In short, nations comply with international law because it is in their interest to do so. Like most rules of conduct, international law is in a continual state of development and change.[5]

Practice of Nations. The general and consistent practice among nations with respect to a particular subject, which over time is accepted by them generally as a legal obligation, is known as customary international law. Customary international law is the principal source of international law and is binding upon all nations. (See also paragraph 5.4.1.)

International Agreements. An international agreement is a commitment entered into by two or more nations which reflects their intention to be bound by its terms in their relations with one another. International agreements, whether bilateral treaties, executive agreements, or multilateral conventions, bind only those nations that are party to them or that may otherwise consent to be bound by them.[6] To the extent that multilateral

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

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

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

[6] The particular name assigned to the arrangement, e.g., treaty, executive agreement, memorandum of understanding, exchange of notes or letters, technical arrangement or plan, does not alter the fact that it is an international agreement if the arrangement falls within this definition of international agreement. Procedures within the U.S. Government

(continued...)

conventions of broad application codify existing rules of customary law, they may be regarded as evidence of international law binding upon parties and non-parties alike.[7]

U.S. Navy Regulations. U.S. Navy Regulations, 1973, require U.S. naval commanders to observe international law. Article 0605, Observance of International Law, states:

> *At all times a commander shall observe, and require his command to observe, the principles of international law. Where necessary to fulfillment of this responsibility, a departure from other provisions of Navy Regulations is authorized.*[8]

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[6](...continued)
for negotiating international agreements may be found in State Department, DOD and Navy regulations which impose stringent controls on the negotiation, conclusion and forwarding of international agreements by organizational elements of the Department of the Navy. Those requirements are set forth in 22 C.F.R. part 181; DOD Directive 5530.3, Subj: International Agreements, 11 June 1987. Implementing Navy instructions include SECNAV Instruction 5710.25 (series), Subj: International Agreements; OPNAV Instruction 5710.24, Subj: International Agreements Navy Procedures; and OPNAV Instruction 5710.25, Subj: International Agreements OPNAV Procedures. Questions regarding the definition and processing of international agreements should be referred to the Office of the Chief of Naval Operations (OP-616) or the Office of the Judge Advocate General (Code 10).

[7] Vienna Convention on the Law of Treaties, arts. 1, 26 & 38, AFP 110-20, chap. 7.

[8] UCMJ, article 92, provides that a violation of a lawful general regulation, such as article 0605, Navy Regulations, 1973, is punishable by court-martial.

PART I

Law of Peacetime Naval Operations

Chapter 1 -- Legal Divisions of the Oceans and Airspace

Chapter 2 -- International Status and Navigation of Warships and Military Aircraft

Chapter 3 -- Protection of Persons and Property at Sea

Chapter 4 -- Safeguarding of U.S. National Interests in the Maritime Environment

CHAPTER 1

Legal Divisions of the Oceans and Airspace

1.1 INTRODUCTION

The oceans of the world traditionally have been classified under the broad headings of internal waters, territorial seas, and high seas. Airspace has been divided into national and international airspace.[1] In recent years, new concepts have evolved, such as the exclusive economic zone and archipelagic waters, which have dramatically expanded the jurisdictional claims of coastal and island nations over wide expanses of the oceans previously regarded as high seas. The phenomenon of expanding maritime jurisdiction and the rush to extend the territorial sea to 12 nautical miles and beyond were the subject of international negotiation from 1973 through 1982 in the course of the Third United Nations Conference on the Law of the Sea. That Conference produced the 1982 United Nations Convention on the Law of the Sea (1982 LOS Convention).[2] Although not signed by the

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

[2] The 1982 United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, U.N. Doc. A/CONF. 62/122 (1982), is reprinted in chapter 36 of AFP 110-20 (Navy supplement), and 21 Int'l Leg. Mat'ls 1261 (1982).

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

An understanding of the historical development of the law of the sea is necessary to appreciate the evolutionary nature of international law generally and the importance the

(continued...)

United States and not yet in formal effect,[3] the provisions of the 1982 LOS Convention relating to navigation and overflight codified existing law and practice[4] and are considered

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[2](...continued)
actions and inactions of governments, including their navies, have in establishing and losing rights. That development is summarized in Annex AS1-1.

[3] At mid-1989 there are about 170 nations, including 30 that are land-locked. Over half of the 170 nations achieved independence within the past 45 years. Many of them have struggling economies, some have problems of internal or external stability, and only a few have histories of strong maritime development. 159 nations signed the 1982 LOS Convention; at 27 March 1989 only 40 nations (including 3 land-locked countries, but no major maritime power) have agreed to be bound by its provisions once it enters into force. A list of those nations may be found in Table ST1-1. Sixty ratifications are necessary to bring the Convention into force. Future actions of coastal and island nations will, of course, affect the content of the international law of the sea. See paragraph 2.6 below.

The United States' view of the rights and duties of non-parties to the LOS Convention is set forth in its 8 March 1983 statement in right of reply, 17 LOS Official Records 243, Annex AS1-2.

[4] Reference is made in succeeding notes both to the 1982 LOS Convention and its antecedent provisions in the 1958 Geneva Conventions. Convention on the Territorial Sea and Contiguous Zone, done 29 April 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 (entered into force 10 September 1964); the Convention on the High Seas, done 29 April 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (entered into force 30 September 1962); and Convention on the Continental Shelf, done 29 April 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 (entered into force 10 June 1964). While only the 1958 High Seas Convention purported to have codified the law of the high seas as it existed in 1958, many provisions of the Territorial Sea and Continental Shelf Conventions have generally come to be considered to reflect the customary law of the sea. The Convention on Fisheries and Conservation of the Living Resources of the High Seas, done 29 April 1958, 17 U.S.T. 138, T.I.A.S 5969, 559 U.N.T.S. 285 (entered into force 20 March 1966) has not had similar acceptance. Copies of these conventions are contained in chapter 36, AFP 110-20. The nations party to these conventions are listed in Table ST1-2.

TABLE ST1-1

RATIFICATIONS OF THE 1982 UN CONVENTION ON THE LAW OF THE SEA

As of 27 March 1989, the following nations had deposited their instruments of ratification or accession:

Coastal or Island Nations	*Dates of Ratification*
Antigua and Barbuda	2 February 1989
Bahamas	29 July 1983
Bahrain	30 May 1985
Belize	13 August 1983
Brazil	22 December 1988
Cameroon	19 November 1985
Cape Verde	10 August 1987
Cuba	15 August 1984
Cyprus	12 December 1988
Egypt	26 August 1983
Fiji	10 December 1982
Gambia	22 May 1984
Ghana	7 June 1983
Guinea	6 September 1985
Guinea-Bissau	25 August 1986
Iceland	21 June 1985
Indonesia	3 February 1986
Iraq	30 July 1985
Ivory Coast	26 March 1984
Jamaica	21 March 1983
Kenya	2 March 1989
Kuwait	2 May 1986
Mexico	18 March 1983
Namibia (UN Council for)	18 April 1983
Nigeria	14 August 1986
Philippines	8 May 1984
Saint Lucia	27 March 1985
Sao Tome and Principe	3 November 1987
Senegal	25 October 1984
Sudan	23 January 1985
Tanzania, United Republic of	30 September 1985
Togo	16 April 1985
Trinidad and Tobago	25 April 1986
Tunisia	24 April 1985
Yemen, South (PDRY)	21 July 1987
Yugoslavia	5 May 1986
Zaire	17 February 1989

Land-Locked Nations	*Dates of Ratification*
Mali	16 July 1985
Paraguay	26 September 1986
Zambia	7 March 1983

Sources: 12 UN Law of the Sea Bulletin (Dec. 1988); UN LOS Office.

TABLE ST1-2

RATIFICATIONS OF 1958 LOS CONVENTIONS

Convention on the territorial sea and contiguous zone. Done at Geneva April 29, 1958; entered into force September 10, 1964.
15 UST 1606; TIAS 5639; 516 UNTS 205.
States which are parties:
Australia[1]
Belgium
Bulgaria[2]
Byelorussian Soviet Socialist Rep.[2]
Cambodia
Czechoslovakia[2]
Denmark[1]
Dominican Rep.
Fiji[1]
Finland
German Dem. Rep.[2]
Haiti
Hungary[2]
Israel[1]
Italy[2]
Jamaica
Japan[1]
Kenya
Lesotho
Madagascar[1]
Malawi
Malaysia
Malta
Mauritius
Mexico[2]
Netherlands[1]
Nigeria
Portugal[1]
Romania[2]
Sierra Leone[3]
Solomon Is.
South Africa
Spain[3]
Swaziland
Switzerland
Thailand[1]
Tonga[1]
Trinidad & Tobago
Uganda
Ukrainian Soviet Socialist Rep.[2]
Union of Soviet Socialist Reps.[2]
United Kingdom[1]
United States[1]
Venezuela[2]
Yugoslavia

NOTES:
[1] With a statement.
[2] With reservation.
[3] With a declaration.

Convention on the high seas. Done at Geneva April 29, 1958; entered into force September 30, 1962.
13 UST 2312; TIAS 5200; 450 UNTS 82.
States which are parties:
Afghanistan
Albania[1 2]
Australia[3]
Austria
Belgium
Bulgaria[1 2]
Burkina Faso
Byelorussian Soviet Socialist Rep.[1 2]
Cambodia
Central African Rep.
Costa Rica
Cyprus
Czechoslovakia[1 2]
Denmark[3]
Dominican Rep.
Fiji[3]
Finland
German Dem. Rep.[1 2]
Germany, Fed. Rep.[3 4]
Guatemala
Haiti
Hungary[1 2]
Indonesia[1]
Israel[3]
Italy
Jamaica
Japan[3]
Kenya
Lesotho
Madagascar[3]
Malawi
Malaysia
Mauritius
Mexico[1]
Mongolia[1 2]
Nepal
Netherlands[3]
Nigeria
Poland[1 2]
Portugal[3]
Romania[1 2]
Senegal
Sierra Leone
Solomon Is.
South Africa
Spain[2]
Swaziland
Switzerland
Thailand[3]
Tonga[3]
Trinidad & Tobago
Uganda
Ukrainian Soviet Socialist Rep.[1 2]
Union of Soviet Socialist Reps.[1 2]
United Kingdom[2]
United States[3]
Venezuela
Yugoslavia

NOTES:
[1] With reservation.
[2] With declaration.
[3] With a statement.
[4] Applicable to Berlin (West).

Source: U.S. Dep't of State, Treaties in Force, 1 Jan. 1989.

TABLE ST1-2 (cont'd)

Convention on the continental shelf. Done at Geneva April 29, 1958; entered into force June 10, 1964.
15 UST 471; TIAS 5578; 499 UNTS 311.
States which are parties:
Albania
Australia
Bulgaria
Byelorussian Soviet Socialist Rep.
Cambodia
Canada[1 4]
China (Taiwan)[2 3]
Colombia
Costa Rica
Cyprus
Czechoslovakia
Denmark
Dominican Rep.
Fiji[4]
Finland
France[1 2]
German Dem. Rep.
Greece[2]
Guatemala
Haiti
Israel
Jamaica
Kenya
Lesotho
Madagascar
Malawi
Malaysia
Malta
Mauritius
Mexico
Netherlands[4]
New Zealand
Nigeria
Norway[4]
Poland
Portugal
Romania
Sierra Leone
Solomon Is.
South Africa
Spain[1 4]
Swaziland
Sweden
Switzerland
Thailand[4]
Tonga[4]
Trinidad & Tobago
Uganda
Ukrainian Soviet Socialist Rep.
Union of Soviet Socialist Reps.
United Kingdom[4]
United States[4]
Venezuela[2]
Yugoslavia[2 4]

NOTES:
[1] With declaration.
[2] With reservation.
[3] See note under CHINA (Taiwan) in bilateral section.
[4] With a statement.

Convention on fishing and conservation of living resources of the high seas. Done at Geneva April 29, 1958; entered into force March 20, 1966.
17 UST 138; TIAS 5969; 559 UNTS 285.
States which are parties:
Australia
Belgium
Burkina Faso
Cambodia
Colombia
Denmark[1]
Dominican Rep.
Fiji
Finland
France
Haiti
Jamaica
Kenya
Lesotho
Madagascar
Malawi
Malaysia
Mauritius
Mexico
Netherlands
Nigeria
Portugal
Sierra Leone
Solomon Is.
South Africa
Spain[2]
Switzerland
Thailand
Tonga
Trinidad & Tobago
Uganda
United Kingdom[2]
United States[3]
Venezuela
Yugoslavia

NOTES:
[1] With reservation.
[2] With a statement.
[3] With an understanding.

by the United States to reflect customary international law.[5]

1.2 RECOGNITION OF COASTAL NATION CLAIMS

In a statement on U.S. oceans policy issued 10 March 1983, the President stated:

> First, the United States is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans -- such as navigation and overflight. In this respect, the United States will recognize the rights of other States in the waters off their coasts, as reflected in the [1982 LOS] Convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal States.
>
> Second, the United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the Convention. The United States will not, however, acquiesce in unilateral acts of other States designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses.[6]

The legal classifications ("regimes") of ocean and airspace areas directly affect naval operations by determining the degree of control that a coastal or island nation may exercise over the conduct of foreign merchant ships, warships, and aircraft operating within these areas. The methods for measuring maritime jurisdictional claims, and the extent of coastal or island nation control exercised in those areas, are set forth in the succeeding paragraphs

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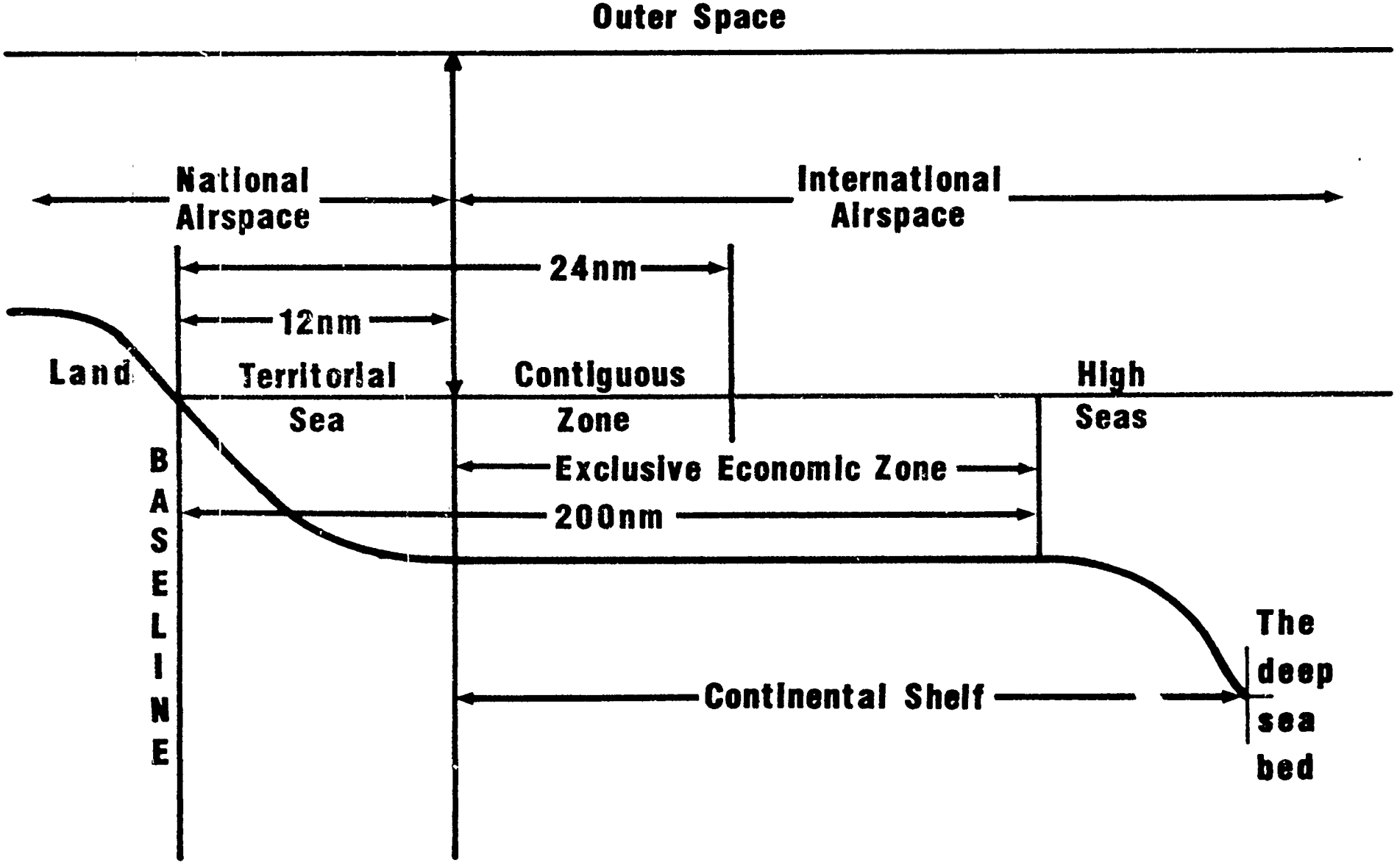
[5] Malone, Freedom and Opportunity: Foundation for a Dynamic National Oceans Policy, Dep't St. Bull., Dec. 1984, at 77. Compare the President's Ocean Policy Statement of 10 March 1983, paragraph 1.2 below, Annex AS1-3 and 2 Restatement (Third), Part V Introductory Note, at 5-6 ("many of the provisions of the [1982 LOS] Convention follow closely provisions in the 1958 conventions to which the United States is a party and which largely restated customary law as of that time. Other provisions in the LOS Convention set forth rules that, if not law in 1958, became customary law since that time, as they were accepted at the Conference by consensus and have influenced, and came to reflect, the practice of states. . . . Thus, by express or tacit agreement accompanied by consistent practice, the United States, and states generally, have accepted the substantive provisions of the Convention, other than those addressing deep sea-bed mining, as statements of customary law binding upon them apart from the Convention. . . . In a few instances, however, there is disagreement whether a provision of the Convention reflects customary law. . . . Some provisions of the Convention, notably those accepting particular arrangements for settling disputes, clearly are not customary law and have not been accepted by express or tacit agreement.")

[6] See Annex AS1-3 for the full text of this statement.

FIGURE SF1-1

LEGAL REGIMES OF OCEANS AND AIRSPACE AREAS



of this chapter.[7] The DOD Maritime Claims Reference Manual (DoD 2005.1-M) contains a listing of the ocean claims of coastal and island nations.[8]

1.3 MARITIME BASELINES

The territorial sea and all other maritime zones are measured from baselines. In order to calculate the seaward reach of claimed maritime zones, it is first necessary to comprehend how baselines are drawn.[9]

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[7] Figure SF1-1 illustrates the several regimes. International navigation and overflight and the conduct by coastal and island nations in those areas are discussed in chapter 2 below.

[8] The MCRM provides a description of the nature of the various claims and includes a system of charts depicting the baselines and seaward reach of the claimed areas of national jurisdiction. These claims also appear in certain issues of Notice to Mariners (e.g., 39/86) and U.S. Dep't State, Limits in the Seas No. 36, National Claims to Maritime Jurisdictions (6th rev. in preparation). Publication of these lists does not constitute U.S. recognition or acceptance of the validity of any claim. The list of United States claims is reproduced in Annex AS1-7. For an analysis of excessive maritime claims, see Smith, Global Maritime Claims, 20 Ocean Dev. & Int'l L. 83 (1989).

[9] The current rules for delimiting baselines are contained in articles 5 through 14 of the 1982 LOS Convention. They distinguish between "normal" baselines (following the sinuosities of the coast) and "straight" baselines (which can be employed along certain irregular coasts). The baseline rules take into account most of the wide variety of physical conditions existing along the coastlines of the world. Alexander, Navigational Restrictions 13-14. The MCRM details the baseline claims of the coastal and island nations. The baseline provisions of the 1982 LOS Convention are examined in UN Office for Oceans Affairs and the Law of the Sea, The Law of the Sea: Baselines, UN Sales No. E.88.V.5* (1989).

The discussion of maritime zones in the text of this chapter assumes that the adjacent land area is within the undisputed sovereignty of the claimant nation. However, the legal title to some mainland and island territories is in dispute, thus affecting the offshore zones; for example: Essequibo region of western Guyana claimed by Venezuela; Western Sahara presently occupied by Morocco, but claimed by the Polisario supported by Algeria and Mauritania; the southern Kuriles, claimed by Japan and occupied by the U.S.S.R. since the end of World War II; the Spratly Islands claimed by China, Vietnam, Malayasia, the Philippines, and Taiwan; the Senkakus Islands disputed among China, Japan, and Taiwan; Liancourt Rock (or Takeshima) disputed between Japan and the Republic of Korea; Mayotte Island in the Indian Ocean disputed between France and Comoros; British Indian Ocean Territory (including Diego Garcia) where the United Kingdom's ownership is disputed by Mauritius; some small islands in the Mozambique Channel between Mozambique and Madagascar disputed between Madagascar and France; Persian Gulf islands of

(continued...)

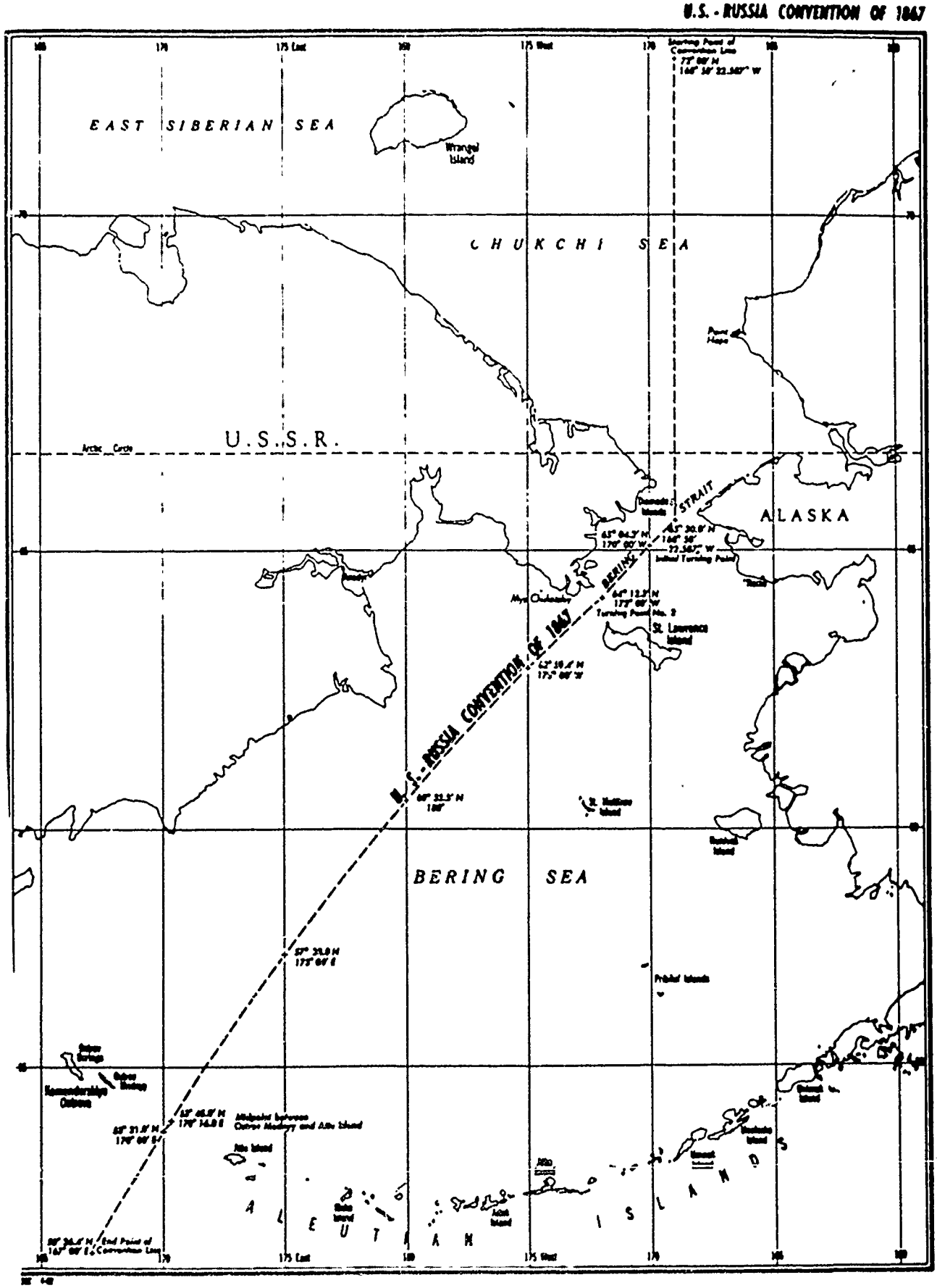
[9](...continued)
Abu Musa, Tung As Sughra, and Tunb Al Kabra disputed between Iran and the United Arab Emirates; Kubbar, Qaruh, and Umm Al Maraden Islands disputed between Kuwait and Saudi Arabia; Falklands/Malvinas dispute between the United Kingdom and Argentina; and the two uninhabited islands of Hunter and Matthew, to the east of New Caledonia, disputed between France and Vanuatu.

Further, although there are close to 400 maritime boundaries, less than a quarter of them have been definitely resolved by agreement between the adjacent or opposing neighbors. Alexander, Navigational Restrictions 41-44. Most of these agreements are collected in UN Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: Maritime Boundary Agreements (1970-1984), UN Sales No. E.87.V.12 (1987); maritime boundary agreements concluded prior to 1970 are listed in an annex to this collection. The Antarctic is discussed in paragraph 2.4.5.2 below.

While the U.S. regards the 1867 U.S.-Russia Convention line as the maritime boundary in the Bering and Chukchi Seas (see Figure SF1-2 and U.S. Dep't of State, International Boundary Study No. 14 (revised) 1 October 1965), discussions have been held with the Soviet Union on interpretation and application of the 1867 boundary line. The United States has sought to begin talks with Canada on outstanding maritime boundary issues, including areas in the Beaufort Sea, Dixon Entrance, Strait of Juan de Fuca, and extension of the Gulf of Maine boundary. Negotiations continue to resolve the U.S.-Dominican Republic maritime boundary. Negroponte, Current Developments in U.S. Oceans Policy, Dep't St. Bull., Sep. 1986, at 86. U.S. maritime boundaries have been established with Canada in the Gulf of Maine (see Figure SF1-3), Mexico (see Figure SF1-4), Cuba (see Figure SF1-5), the Bahamas (see Figure SF1-6), Venezuela (see Figure SF1-7), and the Cook Islands and Tokelau (see Figure SF1-8). Boundaries with Cuba and the Bahamas are established by executive agreement, pending advice and consent of the Senate to the treaties establishing these boundaries. T.I.A.S. No. 9732, 32 U.S.T. 840; T.I.A.S. No. 10,327; T.I.A.S. No. 10,913 (Cuba). See also Feldman & Colson, The Maritime Boundaries of The United States, 75 Am. J. Int'l L. 729 (1981), and Smith, The Maritime Boundaries of The United States, 71 Geographical Rev., Oct. 1981, at 395.

There has been considerable litigation between the United States and several States of the United States concerning the application of these rules. *United States v. California*, 332 U.S. 19, 67 S.Ct. 1658, 91 L.Ed. 1889 (1947); *United States v. California*, 381 U.S. 139, 85 S.Ct. 1401, 14 L.Ed.2d 296 (1965); *United States v. Louisiana*, 394 U.S. 11, 89 S.Ct. 773, 22 L.Ed.2d 44 (1969); *United States v. Alaska*, 422 U.S. 184, 95 S.Ct. 2240, 45 L.Ed.2d 109 (1975), on remand 519 F.3d 1376 (9th Cir. 1975); *United States v. California*, 432 U.S. 40, 97 S.Ct. 2915, 53 L.Ed.2d 94 (1977, modified, 449 U.S. 408, 101 S.Ct. 912, 66 L.Ed.2d 619 (1981).

FIGURE SF1-2

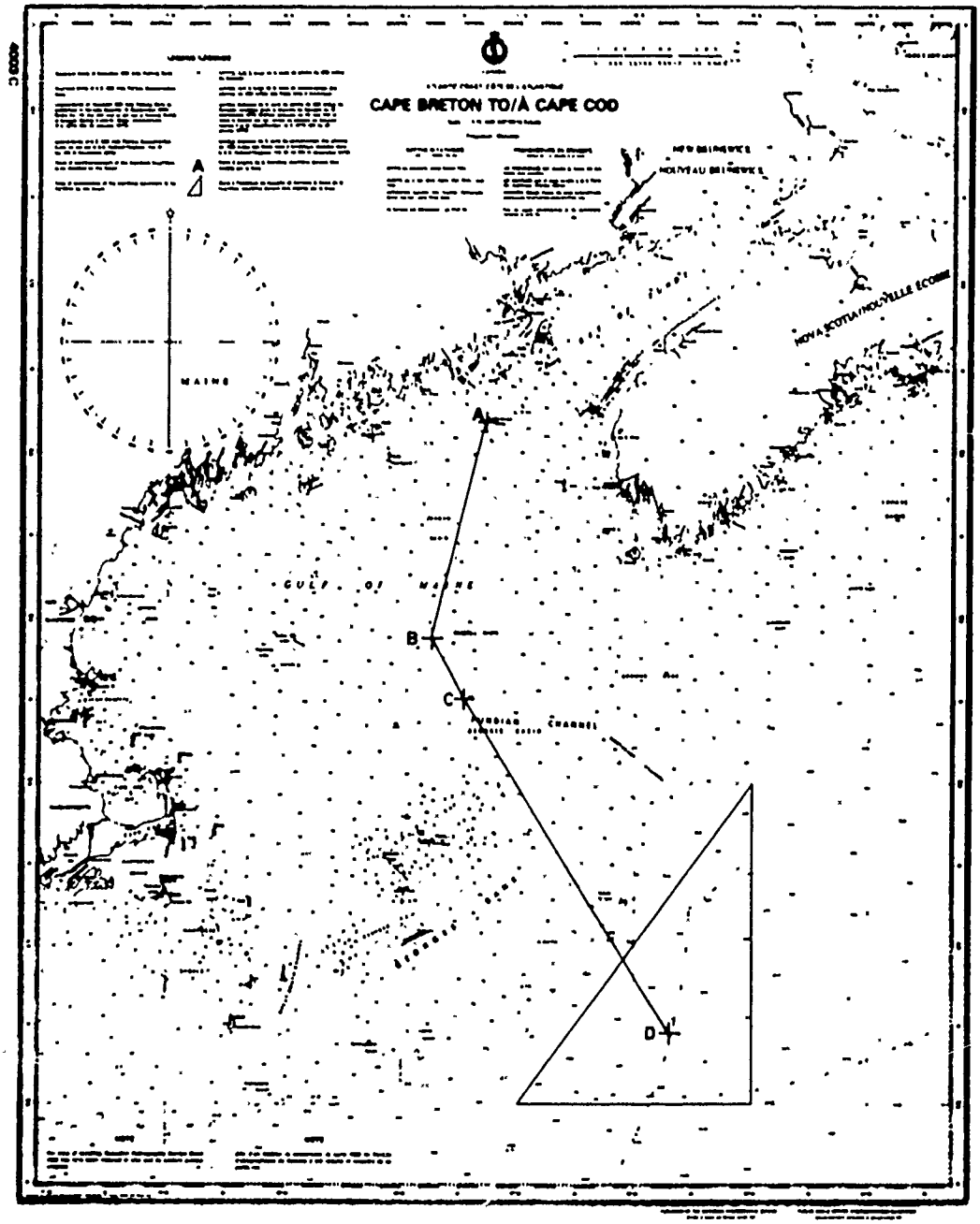


Source: 15 Stat. 539; T.S. 301, 11 Bevans 1216, 20 June 1867

Note: This boundary line is under discussion between the governments. See paragraph 1.3 n.8.

FIGURE SF1-3

GULF OF MAINE (JUDGMENT) 346

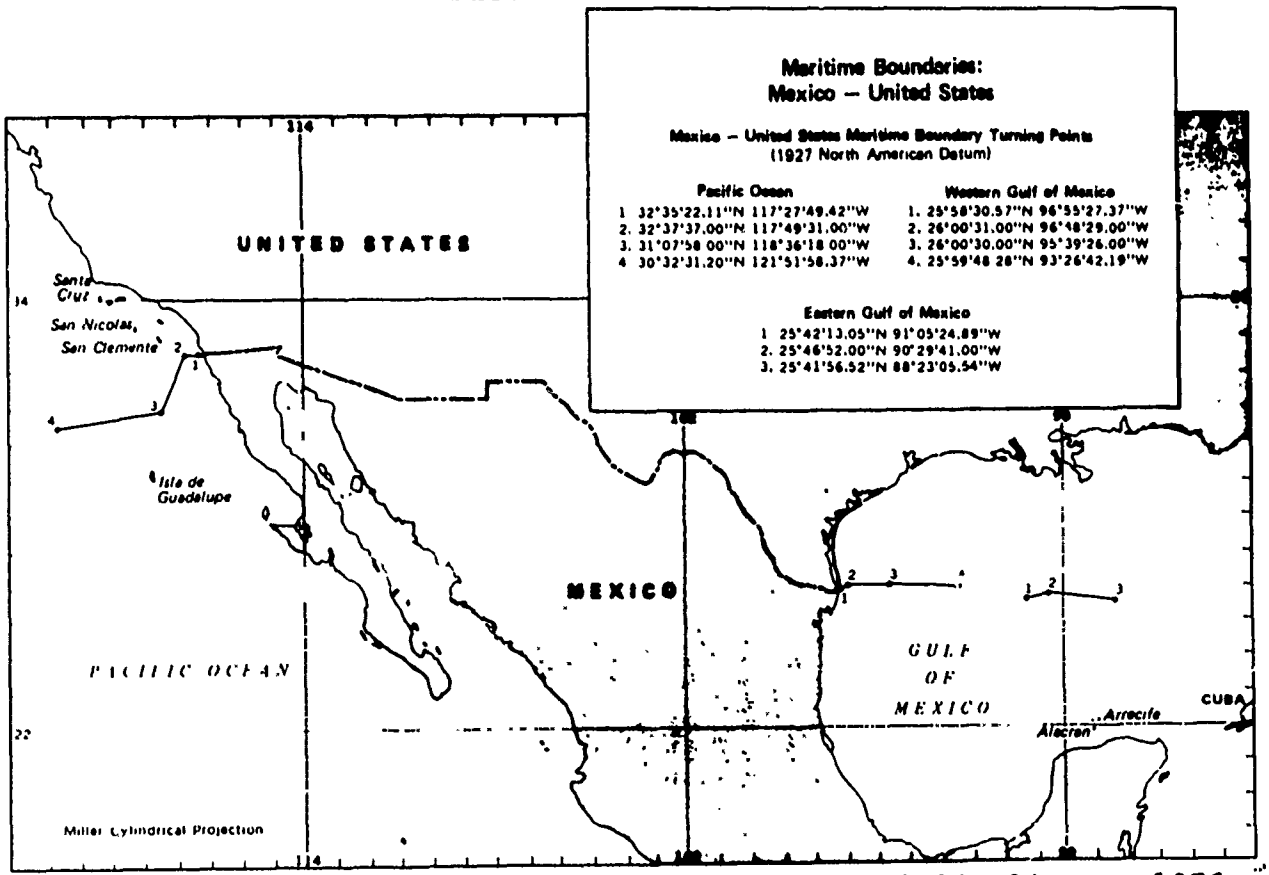


The course of the single maritime boundary that divides the continental shelf and the exclusive fisheries zones of Canada and the United States of America in the area referred to in the Special Agreement concluded by those two States on 29 March 1979 shall be defined by geodetic lines connecting the points with the following co-ordinates :

	Latitude North	*Longitude West*
A	44° 11′ 12″	67° 16′ 46″
B	42° 53′ 14″	67° 44′ 35″
C	42° 31′ 08″	67° 28′ 05″
D	40° 27′ 05″	65° 41′ 59″

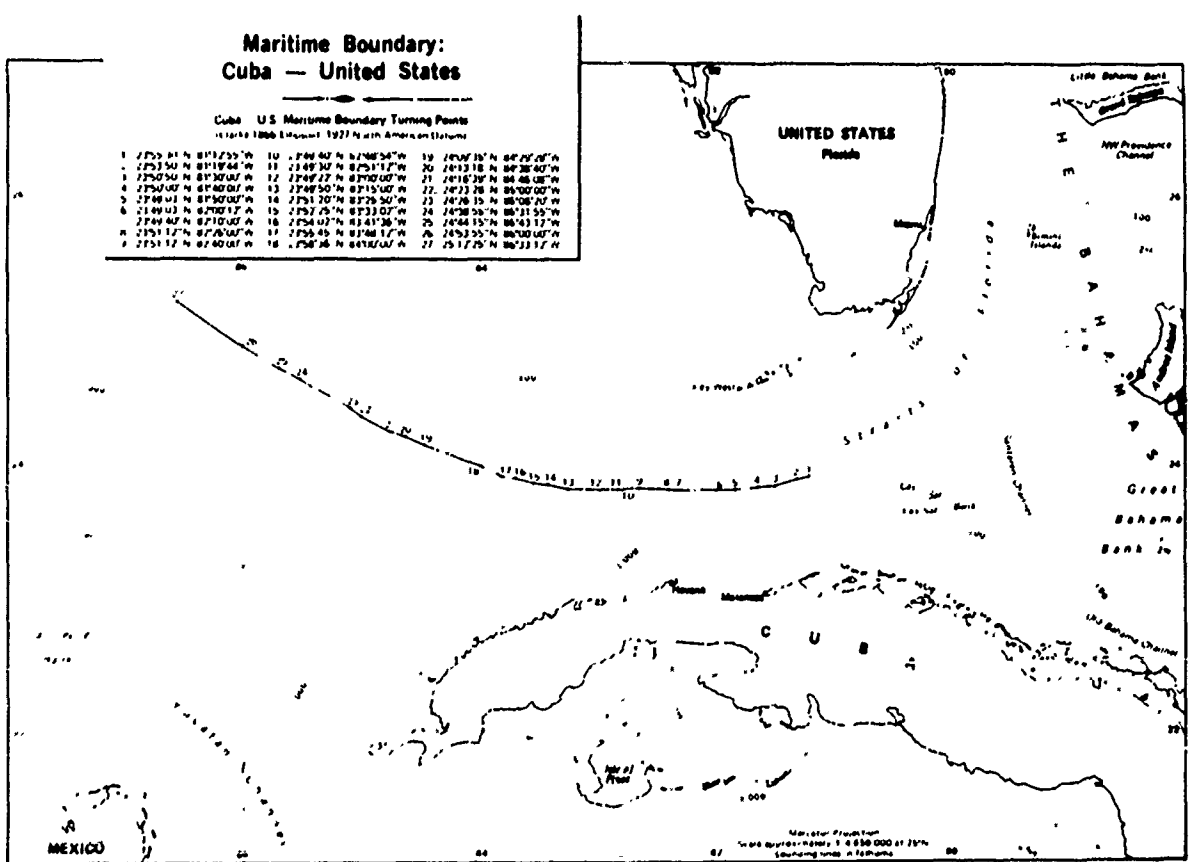
Sources: 1984 I.C.J. Rep. 345-46, 23 Int'l Leg. Mats. 1247

FIGURE SF1-4



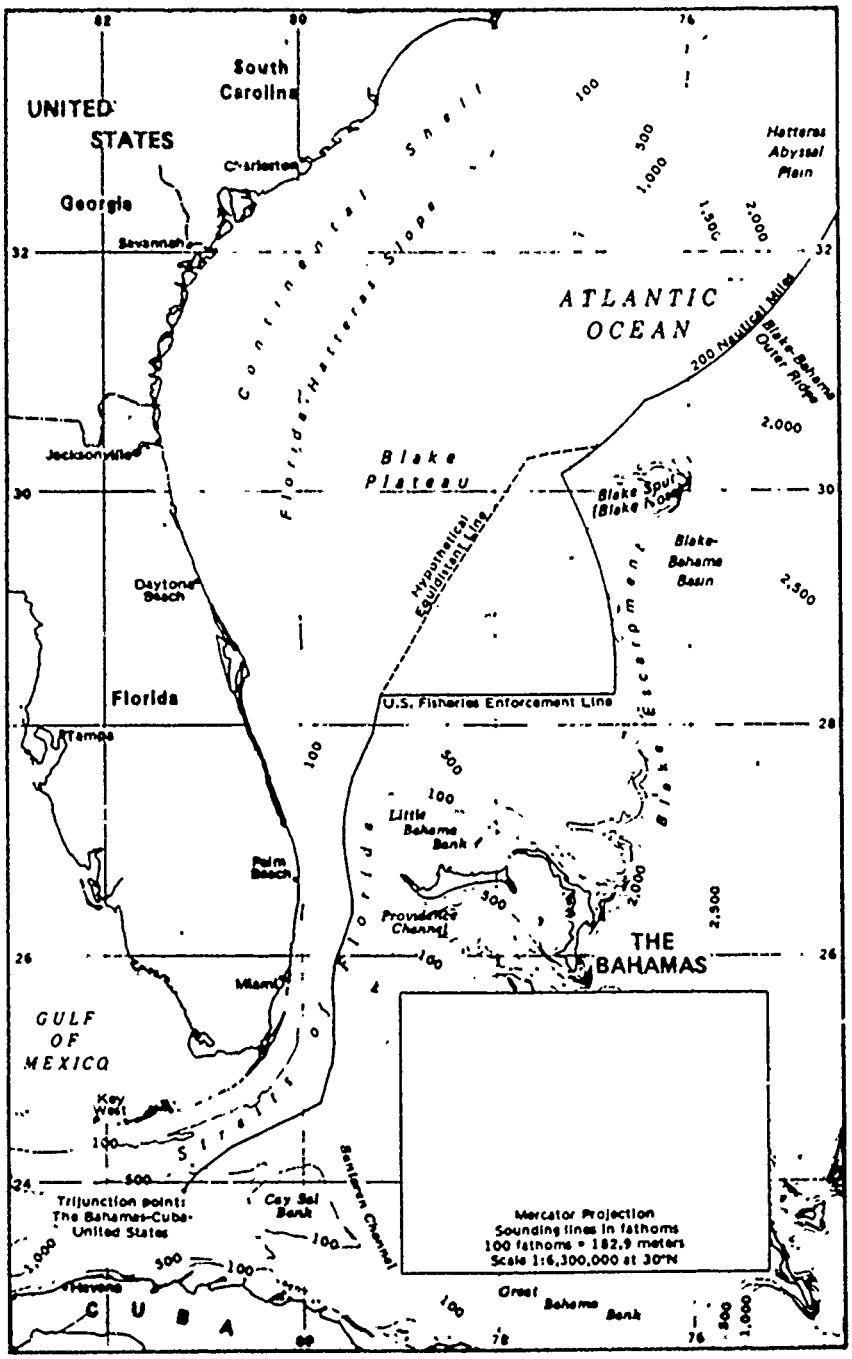
Source: U.S. Department of State 29 UST 196, TIAS 8805, 24 Nov. 1976
1980 Digest of U.S. Practice in International Law 592

FIGURE SF1-5



Source: U.S. Department of State 1980 Digest of U.S. Practice in International Law 593, Sen. Ex. H, 96th Cong. 1st Sess.
17 International Legal Materials 1110 (1978)

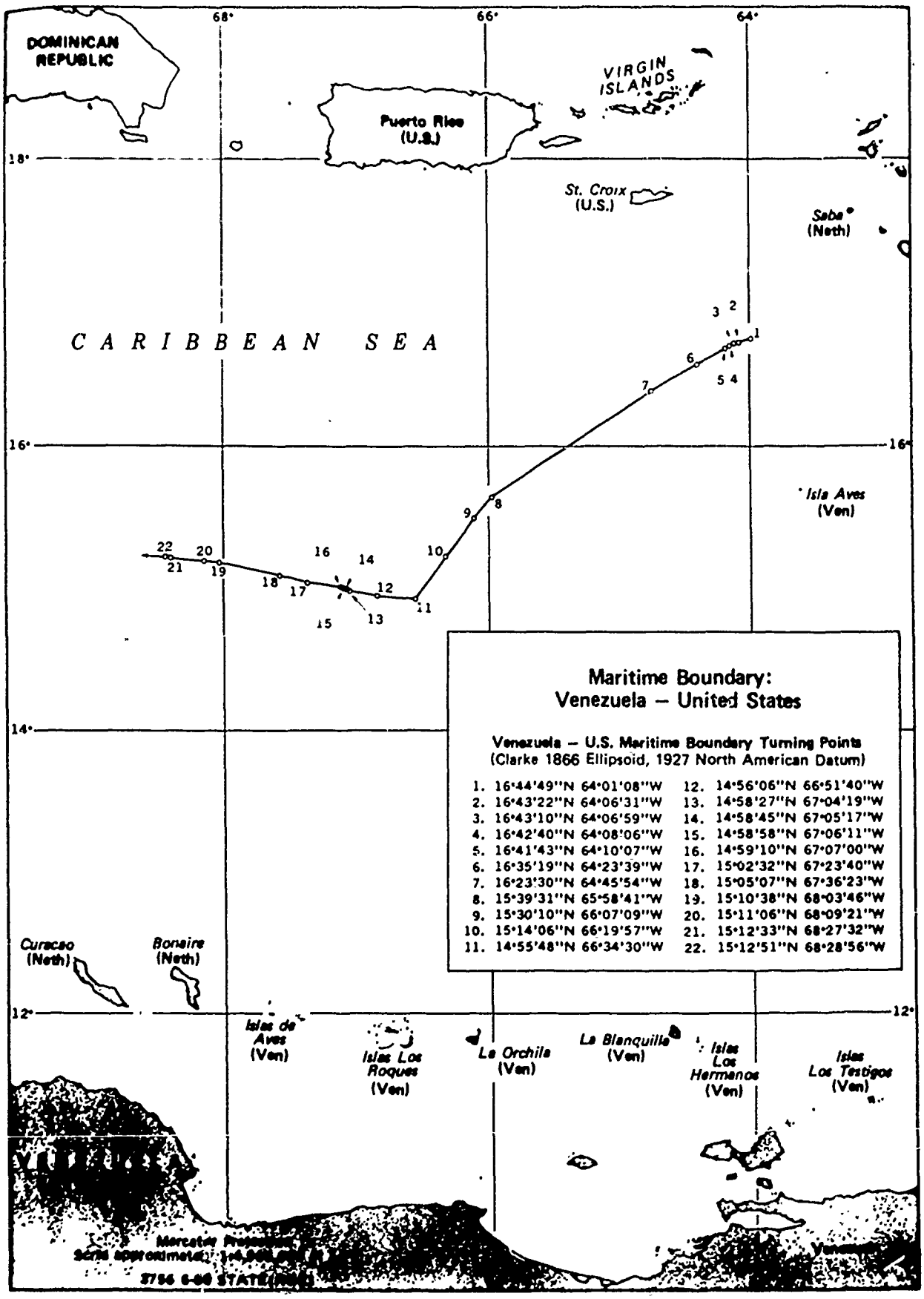
FIGURE SF1-6



Provisional Enforcement Boundary between the United States and the Bahamas.

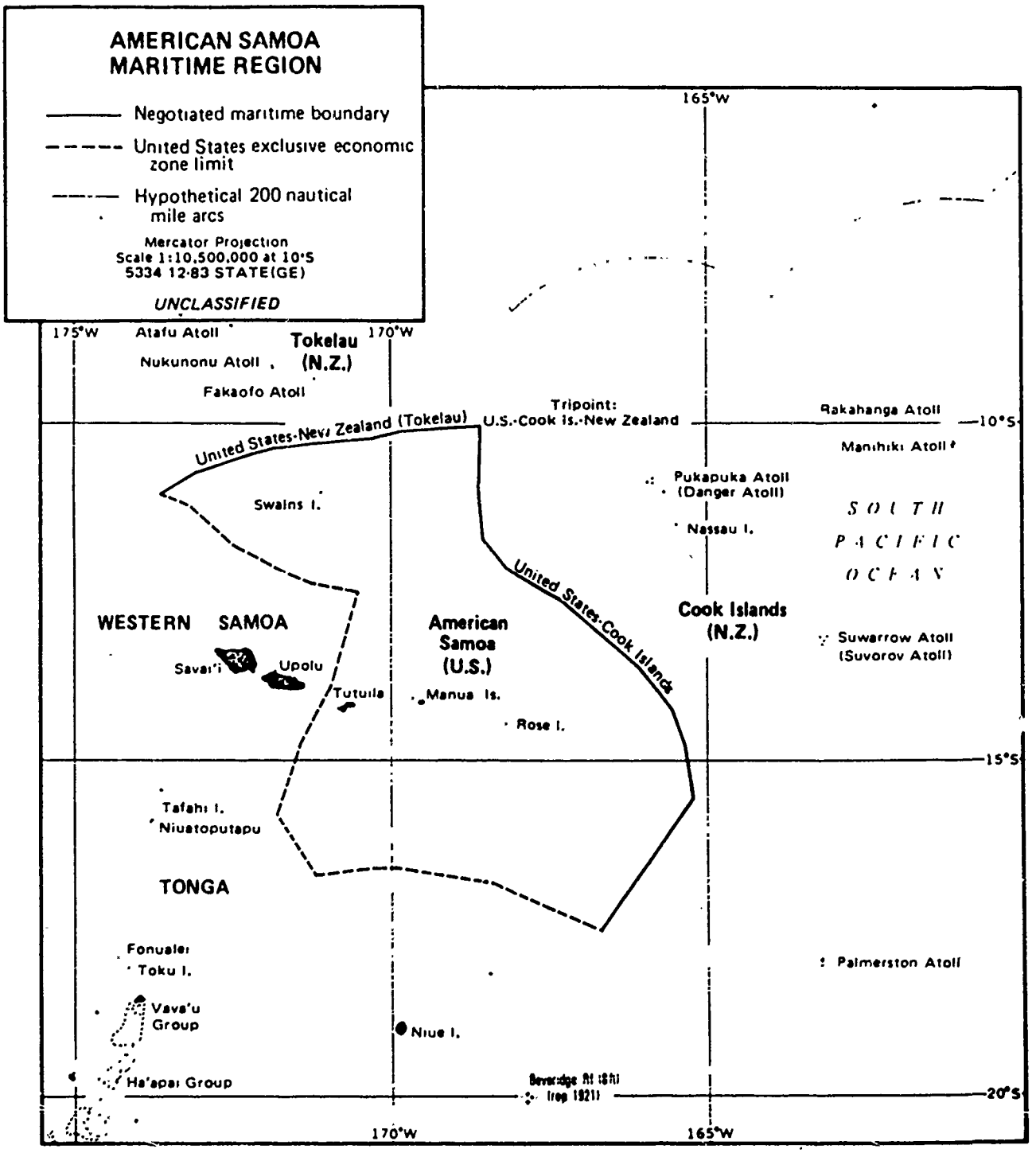
Source: U.S. Department of State

FIGURE SF1-7



Source: 32 UST 3110a, TIAS 9890, 28 March 1978, 1980 Digest of U.S. Practice in International Law 594

FIGURE SF1-8



Source: TIAS 10775, 2 December 1980

1.3.1 Low-Water Line

Unless other special rules apply, the baseline from which maritime claims of a nation are measured is the low-water line along the coast as marked on the nation's official large-scale charts.[10]

1.3.2 Straight Baselines. Where it would be impracticable to use the low-water line, as where the coastline is deeply indented or where there is a fringe of islands along the coast in its immediate vicinity, the coastal or island nation may instead employ straight baselines. The general rule is that straight baselines must not depart from the general direction of the coast, and the sea areas they enclose must be closely linked to the land domain.[11] A

---

[10] Territorial Sea Convention, art. 3; 1982 LOS Convention, art. 5. "Low-water line" has been defined as "the intersection of the plane of low water with the shore. The line along a coast, or beach, to which the sea recedes at low-water." The actual water level taken as low-water for charting purposes is known as the level of Chart Datum. LOS Glossary, definition 50, Annex AS1-8.

Most "normal" baselines claims are consistent with the rule set forth in the text. Excessive "normal" baseline claims include a claim that low-tide elevations wherever situated generate a territorial sea (by Egypt, Oman and Saudi Arabia), and that artificial islands generate a territorial sea (by Egypt and Saudi Arabia). Churchill & Low, The Law of the Sea 41 (1983).

[11] Territorial Sea Convention, art. 4; 1982 LOS Convention, art. 7. Forty-nine nations have delimited straight baselines along all or a part of their coasts. See Table ST1-3. No maximum length of straight baselines is set forth in the 1982 LOS Convention. The longest line used by the Norwegians in 1935 was the 44-mile line across Lopphavet. Much longer lines have since been drawn, not in conformity with the law, such as Ecuador (136 nautical miles), Madagascar (123 nautical miles), Iceland (92 nautical miles), and Haiti (89 nautical miles). Alexander, Baseline Delimitations and Maritime Boundaries, 23 Va. J. Int'l L. 503, 518 (1983). Vietnam's baseline system departs to a considerable extent from the general direction of its coast. Alexander, id., at 520. Other straight baselines that do not conform to the 1982 LOS Convention's provisions include Albania, Canada, Columbia, Cuba, Italy, Senegal, Spain, and the U.S.S.R. Alexander, Navigational Restrictions 37; U.S. Dep't of State, Limits in the Seas No. 103 (1985). Among the straight baselines that depart most radically from the criteria of the 1982 LOS Convention are the Arctic straight baselines drawn by Canada and the U.S.S.R. See Figure SF1-9.

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

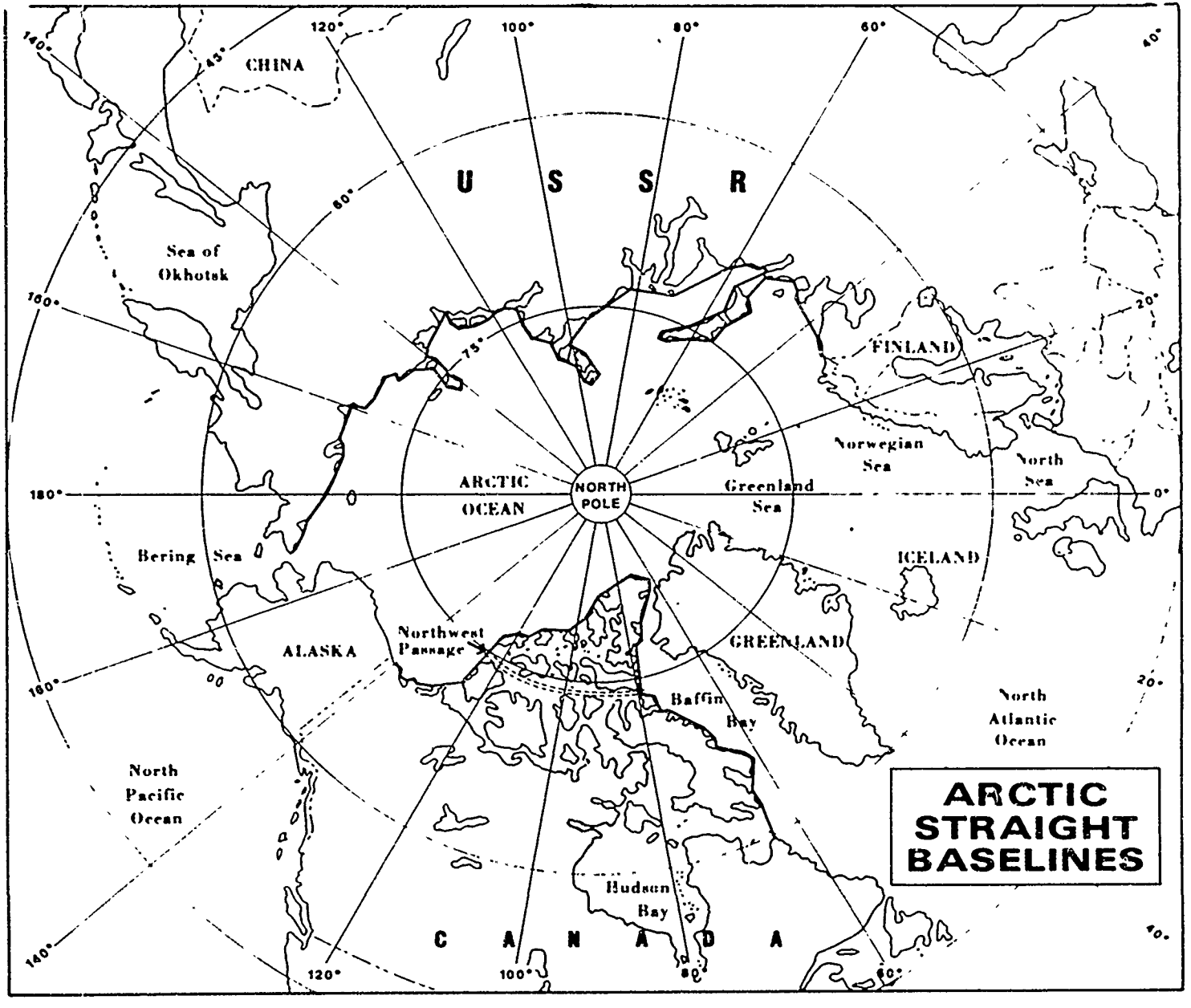
TABLE ST1-3

States Delimiting Straight Baselines Along All Or a Part of Their Coasts

Albania
Australia
Bangladesh
Burma
Cambodia
Cameroon
Canada
Chile
China
Colombia
Cuba
Denmark (also for Greenland)
Dominican Republic
Ecuador
Egypt
Finland
France (also for French Guiana
Mayotte St Pierre & Miquelon
Kerguelen Islands)
German Democratic Republic
Germany, Federal Republic of
Haiti
Iceland
Indonesia
Iran
Ireland
Italy
Kenya
Korea, South
Madagascar
Mauritania
Mauritius
Mexico
Morocco
Mozambique
Norway
Philippines
Portugal
Saudi Arabia
Senegal
Soviet Union
Spain
Sweden
Syria
Tanzania
Thailand
Tunisia
Turkey
Venezuela
Vietnam
Yugoslavia

Source: Alexander, Navigational Restrictions 88.

FIGURE SF1-9


CHINA
U S S R
Sea of Okhotsk
FINLAND
Norwegian Sea
North Sea
ARCTIC OCEAN
NORTH POLE
Greenland Sea
Bering Sea
ICELAND
ALASKA
Northwest Passage
GREENLAND
Baffin Bay
North Atlantic Ocean
North Pacific Ocean
Hudson Bay
C A N A D A
ARCTIC STRAIGHT BASELINES

coastal or island nation which uses straight baselines must either clearly indicate them on its charts or publish a list of geographical coordinates of the points joining them together.[12] See Figure 1-1. The United States, with few exceptions, does not employ this practice and interprets restrictively its use by others.[13]

1.3.2.1 Unstable Coastlines. Where the coastline is highly unstable due to natural conditions, e.g., deltas, straight baselines may be established connecting appropriate points on the low-water line. These straight baselines remain effective, despite subsequent regression or accretion of the coastline, until changed by the coastal or island nation.[14]

1.3.2.2 Low-Tide Elevations. A low-tide elevation is a naturally formed land area surrounded by water and which remains above water at low tide but is submerged at high tide. Straight baselines may generally not be drawn to or from a low-tide elevation unless a lighthouse or similar installation, which is permanently above sea level, has been erected thereon.[15]

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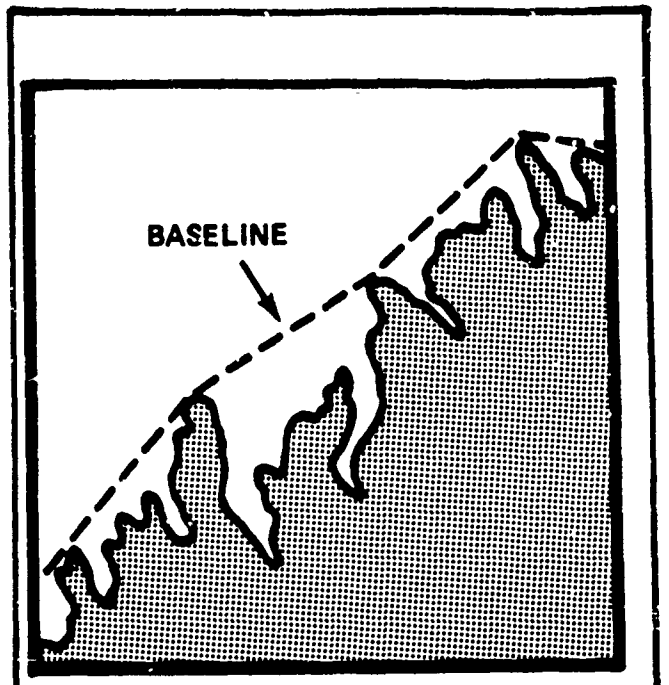
[12] Territorial Sea Convention, art. 4(6); 1982 LOS Convention, art. 16.

[13] Letters from Sec'y State to Dep't Justice, 13 Nov. 1951 and 12 Feb. 1952, quoted in 1 Shalowitz, Shore and Sea Boundaries 354-57 (1962) and 4 Whiteman 174-79. Several parts of the U.S. coast (e.g., Maine and southeast Alaska) have the physical characteristics that would qualify for the use of straight baselines. Alexander, Navigational Restrictions 19.

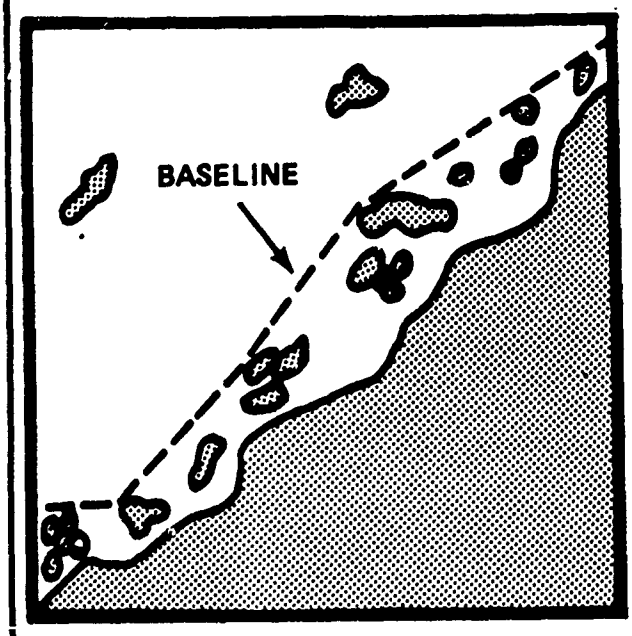
Norway is an example of a country whose coastline is deeply indented and fringed with islands; in 1935 it was the first country to establish a baseline consisting of a series of straight lines between extended land points. In a 1951 decision, the International Court of Justice approved the system. The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

[14] 1982 LOS Convention, art. 7(2). Applicable deltas include those of the Mississippi and Nile Rivers, and the Ganges-Brahmaputra River in Bangladesh. Alexander, Navigational Restrictions 81 n.10.

[15] Territorial Sea Convention, arts. 11 & 4(3); 1982 LOS Convention, arts. 13 & 7(4). Low-tide elevations can be rocks, mud flats, or sandy islands. Alexander, Navigational Restrictions 14. 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.



a. DEEPLY INDENTED COASTLINE



b. FRINGING ISLANDS

Figure I-1. Straight Baselines

1.3.3 Bays and Gulfs. There is a complex formula for determining the baseline closing the mouth of a legal bay or gulf.[16] For baseline purposes, a "bay" is a well-marked indentation in the coastline of such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. The water area of a "bay" must be greater than that of a semicircle whose diameter is the length of the line drawn across the mouth.[17] See Figure 1-2. Where the indentation has more than one mouth due to the presence of islands, the diameter of the test semicircle is the sum of the lines across the various mouths.[18] See Figure 1-3.

The baseline across the mouth of a bay may not exceed 24 nautical miles in length. Where the mouth is wider than 24 nautical miles, a baseline of 24 nautical miles may be drawn within the bay so as to enclose the maximum water area. See Figure 1-4. Where the semicircle test has been met, and a closure line of 24 nautical miles or less may be drawn, the body of water is a "bay" in the legal sense.[19]

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

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

[18] Territorial Sea Convention, art. 7(3); 1982 LOS Convention, art. 10(3).

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

Closure lines for bays meeting the semicircle test must be given due publicity, either by chart indications or by listed geographic coordinates. Where the semicircle test is not met in the first instance, the coastal water area is not a "bay" in the legal sense, but a mere curvature of the coast. In this case, the territorial sea baseline must follow the low water line of the coastline, unless the coastal configuration justifies use of straight baselines (see paragraph 1.3.2) or the waters meet the criteria for an "historic bay" (see paragraph 1.3.3.1). Territorial Sea Convention, arts. 3 & 7(6); 1982 LOS Convention, arts. 16 & 10(6). The 1984 Soviet straight baseline decree along the Arctic coast specifically closed off at their mouths 8 bays wider than 24 nautical miles. Alexander, Navigational Restrictions 36. The unique Soviet claims of *closed seas* are discussed in paragraph 2.4.4 note 58 below and Alexander, Navigational Restrictions 67-69.

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

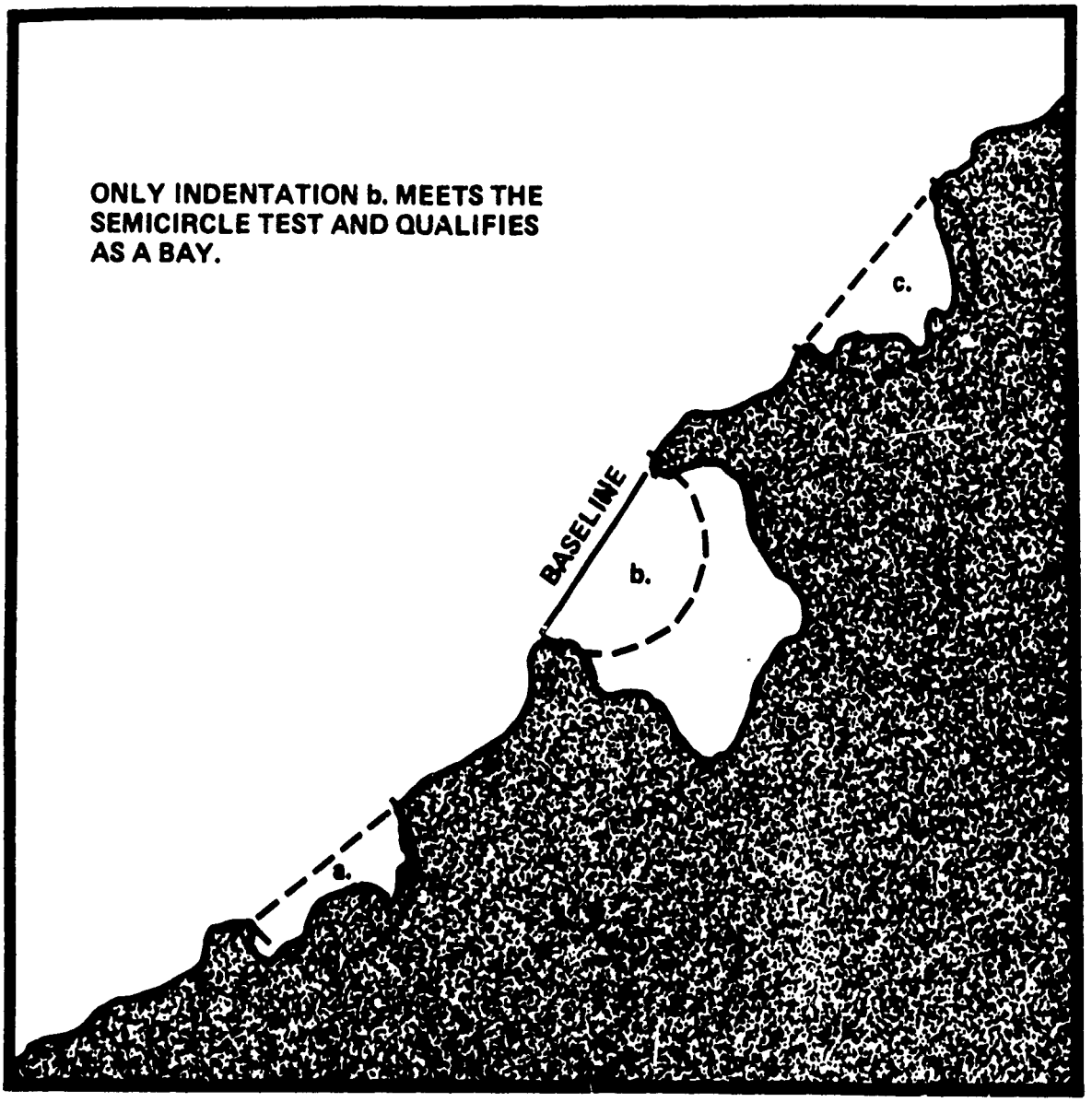

Figure 1-2. The Semicircle Test

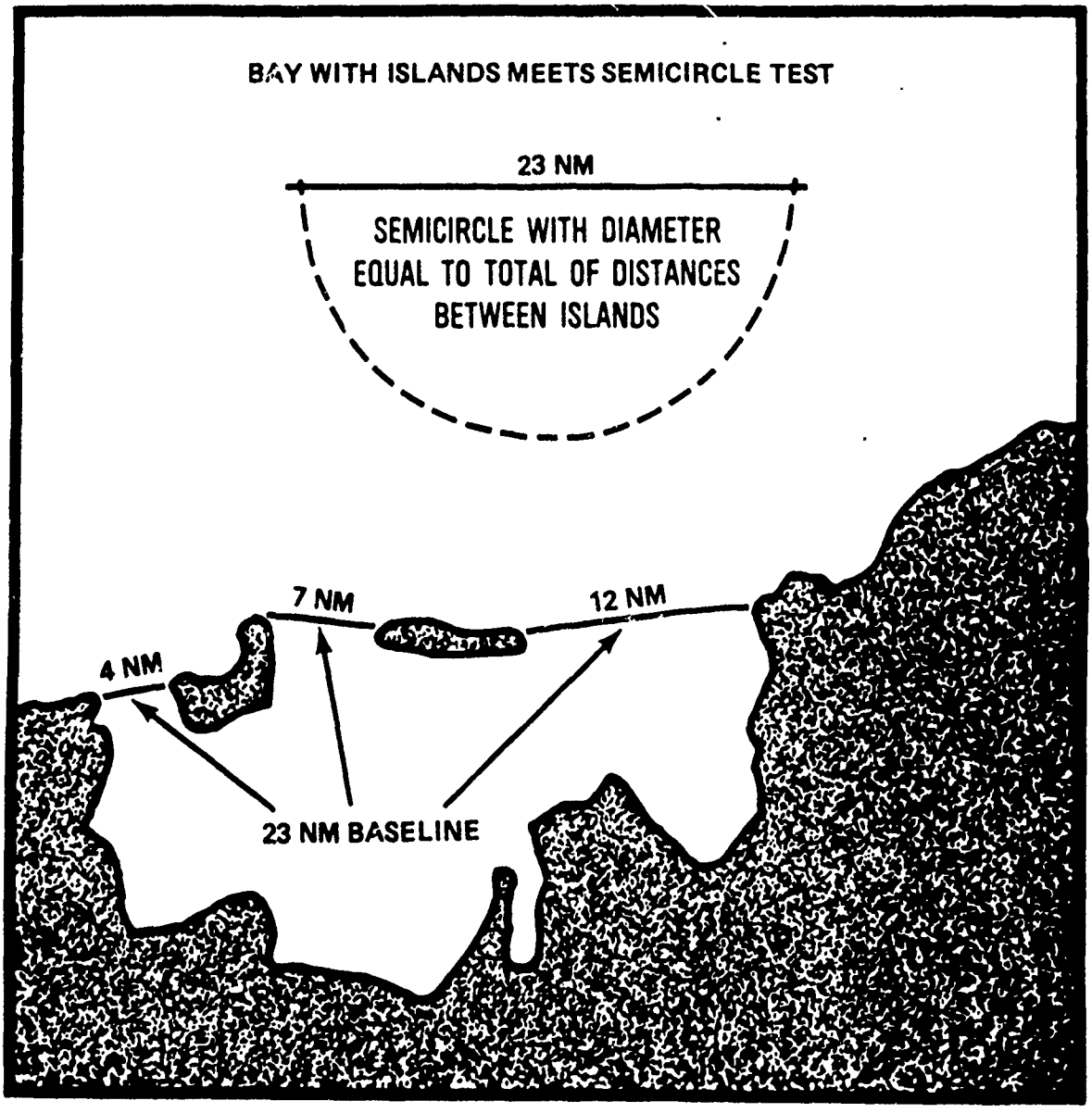

Figure 1-3. Bay With Islands

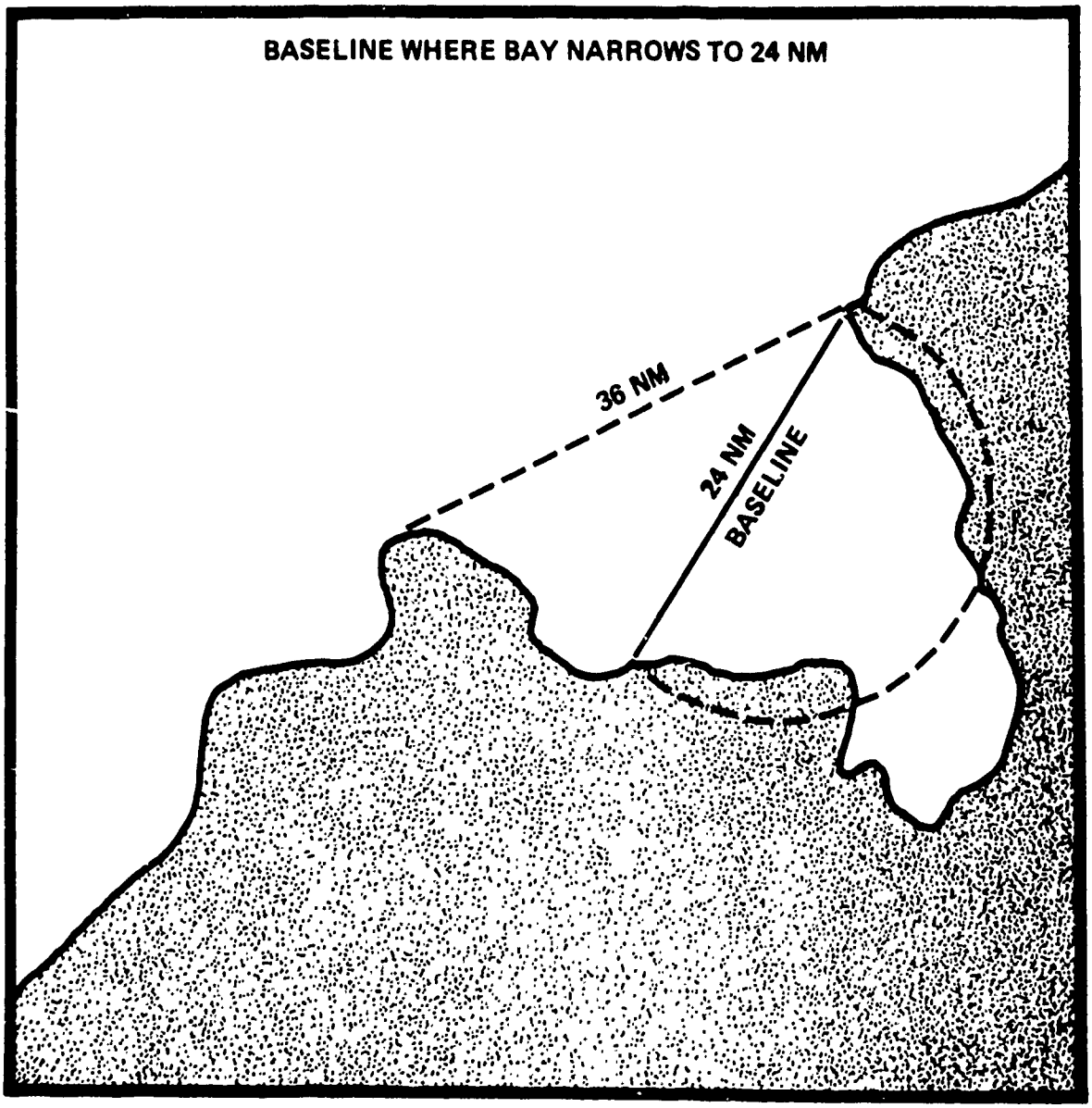

Figure 1-4. Bay With Mouth Exceeding 24 Nautical Miles

1.3.3.1 **Historic Bays.** So-called historic bays are not determined by the semicircle and 24-nautical mile closure line rules described above.[20] To meet the international standard for establishing a claim to a historic bay, a nation must demonstrate its open, effective, long term, and continuous exercise of authority over the bay, coupled with acquiescence by foreign nations in the exercise of that authority. The United States has taken the position that an actual showing of acquiescence by foreign nations in such a claim is required, as opposed to a mere absence of opposition.[21]

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[20] Territorial Sea Convention, art. 7(6); 1982 LOS Convention, art. 10(6).

[21] 1973 Digest of U.S. Practice in International Law 244-45 (1974); Goldie, Historic Bays in International Law--An Impressionistic Overview, 11 Syracuse J. Int'l L. & Comm. 205, 221-23, 248 & 259 (1984). Cf. *United States v. Alaska*, 422 U.S. 184, 200 (1975) (absence of foreign protest does not constitute acquiesence absent showing foreign nations knew or reasonably should have known that territorial sovereignty was being asserted); *Fisheries Case (U.K. v. Norway)*, 1951 I.C.J. Rep. 116, 138 & 139 (mere toleration is sufficient). See also Juridical Regime of Historic Waters, Including Historic Bays, UN Doc. A/CN.4/143, 9 March 1962, in 2 Y.B. Int'l L. Comm. 1 (1964).

The United States "has only very few small spots of historic waters, which are of no consequence to the international community and which could have been incorporated in a straight baseline system had it chosen to do so." Negroponte, Who Will Protect Freedom of the Seas?, Dep't St. Bull., Oct. 1986, at 42-43. Mississippi Sound, a shallow body of water immediately south of the mainland of Alabama and Mississippi, has been held by the U.S. Supreme Court to be an historic bay. *United States v. Louisiana et al. (Alabama and Mississippi Boundary Case)*, 470 U.S. 93 (1985). Cook Inlet, Alaska, has been held by the U.S. Supreme Court to be high seas and not an historic bay. *United States v. Alaska*, 422 U.S. 184. On the other hand, the Chesapeake and Delaware Bays meet the criteria for historic bays, and have been so recognized by other nations. 2 Restatement (Third), sec. 511 Reporters' Note 5, at 32.

Table ST1-4 lists claimed and potential historic bays, none of which are recognized by the United States. The status of some of these bays, and others, are discussed in 4 Whiteman 233-57.

Hudson Bay, with a 50-mile closing line, is not conceded by the United States to be an historic bay, despite Canada's claim since 1926. Colombos, International Law of the Sea 186 (6th ed. 1967); Bishop, International Law 605 (3d ed. 1971); 1 Hackworth 700-01; 4 Whiteman 236-37.

The claim of Libya to historic status for the Gulf of Sidra (Sirte), with a closure line of about 300 miles, first advanced in 1973, has not been accepted by the international community and has been the subject of frequent challenges (see paragraph 2.6 note 30 below). 1974 Digest of U.S. Practice in International Law 293. Only Syria, Sudan, Burkina Faso (formerly Upper Volta), and Romania have publicly recognized the claim. UN Doc.

(continued...)

TABLE ST1-4

CLAIMED HISTORIC BAYS

A. Bays directly claimed as historic

Hudson Bay (Canada)
Gulf of Fonseca (El Salvador, Honduras, Nicaragua)
Rio de la Plata (Argentina, Uruguay)
Gulf of Taranto (Italy)
Sea of Azov (Soviet Union)
Gulf of Riga (Soviet Union)
White Sea (Soviet Union)
Cheshskaya Gulf (Soviet Union)
Peter the Great Bay (Soviet Union)
Gulf of Manaar (India, Sri Lanka)
Gulf of Tonkin — western portion (Vietnam)
Palk Bay (India, Sri Lanka)
Shark Bay (Australia)
Spencer Gulf (Australia)
St. Vincent Gulf (Australia)

B. Bays possibly claimed as historic

Gulf of Panama (Panama)
Bay d'Amatique (Guatemala)
Gulf of San Jorge (Argentina)
Sado Estuary (Portugal)
Tagus Estuary (Portugal)
Gulf of Sidra (Libya)
Gulf of Gabes (Tunisia)
Gulf of Martaban (Burma)
Bight of Bangkok (Thailand)
Gulf of Pohai (China)
Bay of el Arab (Egypt)
Ungwana Bay (Kenya)

C. Bays sometimes mentioned as historic

Gulf of California (Mexico)
Gulf of St. Lawrence (Canada)
Shelikov Gulf (Soviet Union)
Gulf of Carpentaria (Australia)
Gulf of Guayaquil (Ecuador)
Gulf of San Matias (Argentina)
Gulf of Paria (Venezuela, Trinidad & Tobago)
Gulf of Tadjora (Djibouti)
Gulf of Iskenderun (Turkey)
Gulf of Cambay (India)
Gulf of Tonkin, eastern part (China)
Gulf of Anadyr (Soviet Union)

Note: None of these bays have been officially recognized by the United States as historic. Some of the claimed historic bays, e.g., Sea of Azov (Soviet Union), would qualify as juridical bays.

Source: adapted from Alexander, Navigational Restraints 89.

1.3.4 **River Mouths.** If a river flows directly into the sea, the baseline is a straight line across the mouth of the river between points on the low-water line of its banks.[22]

1.3.5 **Reefs.** The low-water line of a reef may be used as the baseline for islands situated on atolls or having fringing reefs.[23]

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

The U.S., Japan, Great Britain, France, Canada, and Sweden have protested the Soviet Union's 1957 claim that Peter the Great Bay (102 nautical miles) is an historic bay. 4 Whiteman 250-57; Darby, The Soviet Doctrine of the Closed Sea, 23 San Diego L. Rev. 685, 696 (1986). The operations of USS LOCKWOOD (FF-1064) on 3 May 1982 and USS OLENDORF (DD-972) on 4 September 1987 challenged the Soviet historic bay and straight baseline claims in Peter the Great Bay.

[22] Territorial Sea Convention, art. 13; 1982 LOS Convention, art. 9. This rule applies only to estuaries. The Conventions place no limit on the length of this line. The tendency has been to close off large estuaries at their seaward extent. For example, Venezuela has closed off the mouth of the Orinoco with a 39-mile closing line, although the principal mouth of the river is 30 miles upstream from that baseline. Alexander, Navigational Restrictions 37. Further, the Conventions do not state exactly where, along the banks of estuaries, the closing points should be placed.

No special baseline rules have been established for rivers entering the sea through deltas, such as the Mississippi, (although the straight baseline principles in paragraph 1.3.2.1 may apply) or for river entrances dotted with islands.

The baseline adopted for a river mouth must be given due publicity either by chart indication or by listed geographical coordinates. Territorial Sea Convention, art. 3; 1982 LOS Convention, art. 16.

[23] 1982 LOS Convention, art. 6. Accordingly, waters inside the lagoon of an atoll are internal waters. See paragraph 1.5 below. In warm water areas, where atolls and reefs are prevalent, navigators may have difficulty in precisely determining the outer limits of a nation's territorial sea. Alexander, Navigational Restrictions 14.

1.3.6 Harbor Works. The outermost permanent harbor works which form an integral part of the harbor system are regarded as forming part of the coast for baseline purposes. Harbor works are structures, such as jetties, breakwaters and groins, erected along the coast at inlets or rivers for protective purposes or for enclosing sea areas adjacent to the coast to provide anchorage and shelter.[24]

1.4 NATIONAL WATERS[25]

For operational purposes, the world's oceans are divided into two parts. The first includes internal waters, territorial seas, and archipelagic waters. These *national waters* are subject to the territorial sovereignty of coastal and island nations, with certain navigational rights reserved to the international community. The second part includes contiguous zones, waters of the exclusive economic zone,[26] and the high seas. These are *international waters* in which all nations enjoy the high seas freedoms of navigation and overflight. International waters are discussed further in paragraph 1.5.

1.4.1 Internal Waters. Internal waters are *landward* of the baseline from which the territorial sea is measured.[27] Lakes, rivers,[28] some bays, harbors, some canals, and lagoons

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[24] Territorial Sea Convention, art. 8; 1982 LOS Convention, art. 11. Offshore installations and artificial islands are not considered permanent harbor works for baseline purposes. Notwithstanding suggestions that there are uncertainties relating to monobuoys, which may be located some distance offshore, Alexander, Navigational Restrictions 17, the U.S. Government rejects the use of monobuoys as a valid baseline point. The U.S. Supreme Court has held that "dredged channels leading to ports and harbors" are not "harbor works." *United States v. Louisiana*, 394 U.S. 11, 36-38, 89 S.Ct. 773, 787-89, 22 L.Ed.2d 44 (1969).

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

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

[26] The high seas rights of navigation in and over the waters of the exclusive economic zone is examined in note 47 below.

[27] Territorial Sea Convention, art. 5(1); 1982 LOS Convention, arts. 2(1) & 8(1).

[28] It should be noted that rivers which flow between or traverse two or more nations are generally regarded as international rivers. 3 Whiteman 872-1075; Berber, Rivers in

(continued...)

are examples of internal waters. From the standpoint of international law, internal waters have the same legal character as the land itself. There is no right of innocent passage in internal waters, and, unless in distress (see paragraph 2.3.2.5), ships and aircraft may not enter or overfly internal waters without the permission of the coastal or island nation.

1.4.2 Territorial Seas. The territorial sea is a belt of ocean which is measured seaward from the baseline of the coastal or island nation and subject to its sovereignty.[29] The U.S. claims a 12-nautical mile territorial sea[30] and recognizes territorial sea claims of other nations up to a maximum breadth of 12 nautical miles.[31]

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[28](...continued)
International Law (1959); Vitanyi, The International Regime of River Navigation (1979).

[29] Territorial Sea Convention, arts. 1-2; 1982 LOS Convention, art. 2.

[30] By Presidential Proclamation 5928, 27 December 1988, the United States extended its territorial sea, for international purposes, from 3 to 12 nautical miles. 54 Fed. Reg. 777, 9 Jan. 1989; 24 Weekly Comp. Pres. Doc. 1661, 2 Jan. 1989; 83 Am. J. Int'l L. 349; Annex AS1-4. The 3-nautical mile territorial sea had been established by Secretary of State Jefferson in his letters of 8 Nov. 1793 to the French and British Ministers, 6 The Writings of Thomas Jefferson 440-42 (Ford ed. 1895) ("reserving . . . the ultimate extent of this for future deliberation the President gives instructions to the officers acting under his authority to . . . [be] restrained for the present to the distance of one sea-league, or three geographical miles from the sea-shore"); Act of 5 June 1794, for the punishment of certain crimes against the United States, sec. 6, 1 Stat. 384 (1850) (granting jurisdiction to the Federal District Courts in cases of captures "within a marine league of the coasts or shores" of the United States); Dep't of State Public Notice 358, 37 Fed. Reg. 11,906, 15 June 1972. See Swarztrauber *passim*.

By its terms, Proclamation 5928 does not alter existing State or Federal law. As a result, the 9 nautical mile natural resources boundary off Texas, the Gulf coast of Florida, and Puerto Rico, and the 3 nautical mile line elsewhere, remain the inner boundary of Federal fisheries jurisdiction and the limit of the states' jurisdiction under the Submerged Lands Act, 43 U.S.C. sec. 1301 et seq. The Puerto Rico natural resources boundary is the limit of that commonwealth's jurisdiction under 48 U.S.C. sec. 749.

[31] See paragraph 2.6 below regarding the U.S. Freedom of Navigation and Overflight Program.

The history of claims concerning the breadth of the territorial sea reflects the lack of any international agreement prior to the 1982 LOS Convention, either at the Hague Codification Conference of 1930 or UNCLOS I and II, on the width of that maritime zone. Today, most nations claim no more than a 12 nautical mile territorial sea. This practice is recognized in the 1982 LOS Convention, article 3, that "every [nation] has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles,
(continued...)

1.4.2.1 Islands, Rocks, and Low-Tide Elevations. Each island has its own territorial sea and, like the mainland, has a baseline from which it is calculated. An island is defined as a naturally formed area of land, surrounded by water, which is above water at high tide.[32] Rocks are islands which cannot sustain human habitation or economic life of their own. Provided they remain above water at high tide, they too possess a territorial sea determined in accordance with the principles discussed in the paragraphs on baselines.[33] A low-tide elevation (above water at low tide but submerged at high tide[34]) situated wholly or partly *within* the territorial sea may be used for territorial sea purposes as though it were an island. Where a low-tide elevation is located entirely *beyond* the territorial sea, it has no territorial sea of its own.[35] See Figure 1-5.

1.4.2.2 Artificial Islands and Off-Shore Installations. Artificial islands and off-shore installations have no territorial sea of their own.[36]

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[31](...continued)
measured from the baseline." Table ST1-5 lists the national maritime claims including those few coastal nations that presently claim territorial sea breadths greater than 12 nautical miles in violation of article 3 of the 1982 LOS Convention. Table ST1-6 shows the expansion of territorial sea claims since 1945.

[32] Territorial Sea Convention, art. 10; 1982 LOS Convention, art. 121(1). The *travaux preparatoires* of article 121 may be found in UN Office for Oceans Affairs and the Law of the Sea, The Law of the Sea: Regime of Islands (1988).

[33] Rocks, however, have no exclusive economic zone or continental shelf. Territorial Sea Convention, art. 10; 1982 LOS Convention, art. 121(3); see also paragraph 1.3 above.

[34] See paragraph 1.3.2.2 above.

[35] Territorial Sea Convention, art. 11; 1982 LOS Convention, art. 13. "Low-tide" is not defined in the Conventions. Various measures of low tide exist, including mean low water and mean lower low water. The average elevations of all daily low tides, calculated for the complete tidal cycle of 18.6 years, should be used. Alexander, Navigational Restrictions 29. See also note 10 above regarding low-water line.

[36] 1982 LOS Convention, arts. 11 & 60(8). See the definitions of these terms in the LOS Glossary, Annex AS1-8. "Offshore terminals" and "deepwater ports" are defined in U.S. law as "any fixed or floating man-made structures other than a vessel, or any group of such structures, located beyond the territorial sea . . . and which are used or intended for use as a port or terminal for the loading or unloading and further handling of oil for transportation to any State." Deepwater Port Act of 1974, as amended, 33 U.S.C. sec. 1501 & 1502(10).

TABLE ST1-5

NATIONAL MARITIME CLAIMS

Territorial Sea

Three nautical miles (10)

Australia
Bahamas, The
Bahrain
Belize
Denmark [1]
Germany, Fed. Rep. [2]
Jordan
Qatar
Singapore
United Arab Emirates [3]

Four nautical miles (2)

Finland
Norway

Six nautical miles (4)

Dominican Republic
Greece
Israel
Turkey (12 in Black and Mediterranean Seas)

Twelve nautical miles (108)

Algeria
Antigua and Barbuda
Bangladesh
Barbados
Belgium
Brunei
Bulgaria
Burma
Cambodia
Canada
Cape Verde [4]
Chile
China
Colombia
Comoros [4]
Cook Islands
Costa Rica
Cote d'Ivoire
Cuba
Cyprus
Djibouti
Dominica
Egypt
Equatorial Guinea
Ethiopia
Fed. States of Micronesia
Fiji [4]
France [5]
Gabon
Gambia, The
German Dem. Rep.
Ghana
Grenada
Guatemala
Guinea
Guinea-Bissau
Guyana
Haiti
Honduras
Iceland
India
Indonesia [4]
Iran
Iraq
Ireland
Italy
Jamaica
Japan [6]
Kenya
Kiribati
Korea, North
Korea, South [7]
Kuwait
Lebanon
Libya
Madagascar
Malaysia
Maldives
Marshall Is.
Malta
Mauritania
Mauritius
Mexico
Monaco
Morocco
Mozambique
Nauru
Netherlands
New Zealand [8]
Niue
Oman
Pakistan
Papua New Guinea [4]
Poland
Portugal
Romania
Saint Kitts and Nevis
Saint Lucia
Saint Vincent and the Grenadines
Sao Tome & Principe [4]
Saudi Arabia
Senegal

Source: Department of State (OES/OLP), 17 May 1989.

Twelve nautical miles (continued)

Seychelles	Tanzania	Vanuatu [4]
Solomon Islands [4]	Thailand	Venezuela
South Africa	Tonga	Vietnam
Soviet Union	Trinidad & Tobago [4]	Western Samoa
Spain	Tunisia	Yemen (Aden)
Sri Lanka	(Ukrainian SSR)	Yemen (Sanaa)
Sudan	Tuvalu	Yugoslavia
Suriname	United Kingdom [11]	Zaire
Sweden	United States	

Fifteen nautical miles (1)

Albania

Twenty nautical miles (1)

Angola

Thirty nautical miles (2)

Nigeria Togo

Thirty-five nautical miles (1)

Syria

Fifty nautical miles (1)

Cameroon

Two hundred nautical miles (13)

Argentina [9]	Ecuador	Panama
Benin	El Salvador [9]	Peru
Brazil	Liberia	Sierra Leone
Congo	Nicaragua	Somalia
		Uruguay [9]

Rectangular claim (1)

Philippines [4]

TABLE ST1-5

Fishery Claims

Twelve nautical miles (2)

Finland
Singapore

Twenty five nautical miles (1)

Malta

Fifty nautical miles (1)

Iran [10]

Two hundred nautical miles (21)

Angola
Australia
Bahamas, The
Belgium
Brunei
Canada
Denmark
German Dem. Rep.
Germany, Fed. Rep.
Guyana
Ireland
Japan
Malaysia
Nauru
Netherlands
Poland
Qatar
South Africa
Sweden
United Kingdom [11]
Zaire

Exclusive Economic Zones (80)

Antigua and Barbuda
Bangladesh
Barbados
Bulgaria
Burma
Cambodia
Cape Verde
Chile
Colombia
Comoros
Cook Islands
Costa Rica
Cote d'Ivoire
Cuba
Djibouti
Dominica
Dominican Republic
Equatorial Guinea
Egypt
Federated States of Micronesia
Fiji
France [5]
Gabon
Ghana
Grenada
Guatemala
Guinea
Guinea-Bissau
Haiti
Honduras
Iceland
India
Indonesia
Kenya
Kiribati
Korea, North [12]
Madagascar
Maldives [13]
Marshall Islands
Mauritania
Mauritius
Mexico
Morocco
Mozambique
New Zealand [8]
Nigeria
Niue
Norway
Oman
Pakistan
Papua New Guinea
Philippines
Portugal
Romania
Saint Kitts and Nevis
Saint Lucia
Saint Vincent and the Grenadines
Sao Tome & Principe
Senegal
Seychelles
Solomon Islands
Soviet Union
Spain
Sri Lanka
Suriname
Tanzania
Thailand
Togo
Tonga
Trinidad & Tobago
Turkey (Black Sea)
Tuvalu
(Ukrainian SSR)
United Arab Emirates
United States [14]
Vanuatu
Venezuela
Vietnam
Western Samoa
Yemen (Aden)

Notes

1. Includes Greenland and the Faroe Islands.

2. The Federal Republic of Germany's territorial sea in the Helgolander Bucht extends, at one point, to 16 nautical miles.

3. Sharjah claims a 12-nautical-mile territorial sea.

4. Maritime limits are measured from claimed "archipelagic baselines" which generally connect the outermost points of outer islands or drying reefs.

5. Includes all French overseas departments and territories.

6. Japan's territorial sea remains 3 nautical miles in five "international straits".

7. South Korea's territorial sea remains 3 nautical miles in the Korea Strait.

8. Includes Tokelau.

9. Overflight and navigation permitted beyond 12 nautical miles.

10. Fifty nautical miles in the Sea of Oman; median line boundaries in the Persian Gulf.

11. Includes Bermuda.

12. North Korea also claims a 50-nautical-mile "military boundary line" within which all foreign vessels and aircraft are banned without permission.

13. The Maldives' economic zone is defined by geographical coordinates. The zone is, in part, a rectangle and, in part, a boundary with India. The breadth of the zone varies from approximately 35 nautical miles to more than 300 nautical miles.

14. Includes Puerto Rico, U.S. Virgin Islands, American Samoa, Guam, Johnston Atoll, Palmyra Atoll, Midway Island, Wake Island, Jarvis Island, Kingman Reef, Howland Island, Baker Island, Northern Marianas. Palau, which is still part of the Trust Territory of the Pacific Islands, claims a 3-nautical-mile territorial sea and a 200-nautical-mile fishery zone.

TABLE ST1-6

THE EXPANSION OF TERRITORIAL SEA CLAIMS

National Claims	1945	1958	1965	1974	1979	1983	1989
3 NM	46	45	32	28	23	25	10
4-11 NM	12	19	24	14	7	5	6
12 NM	2	9	26	54	76	79	108
Over 12 NM	0	2	3	20	25	30	20
Number of Coastal or Island Nations	60	75	85	116	131	139	144

Sources: Office of Ocean Law and Policy, U.S. Department of State; DOD Maritime Claims Reference Manual.

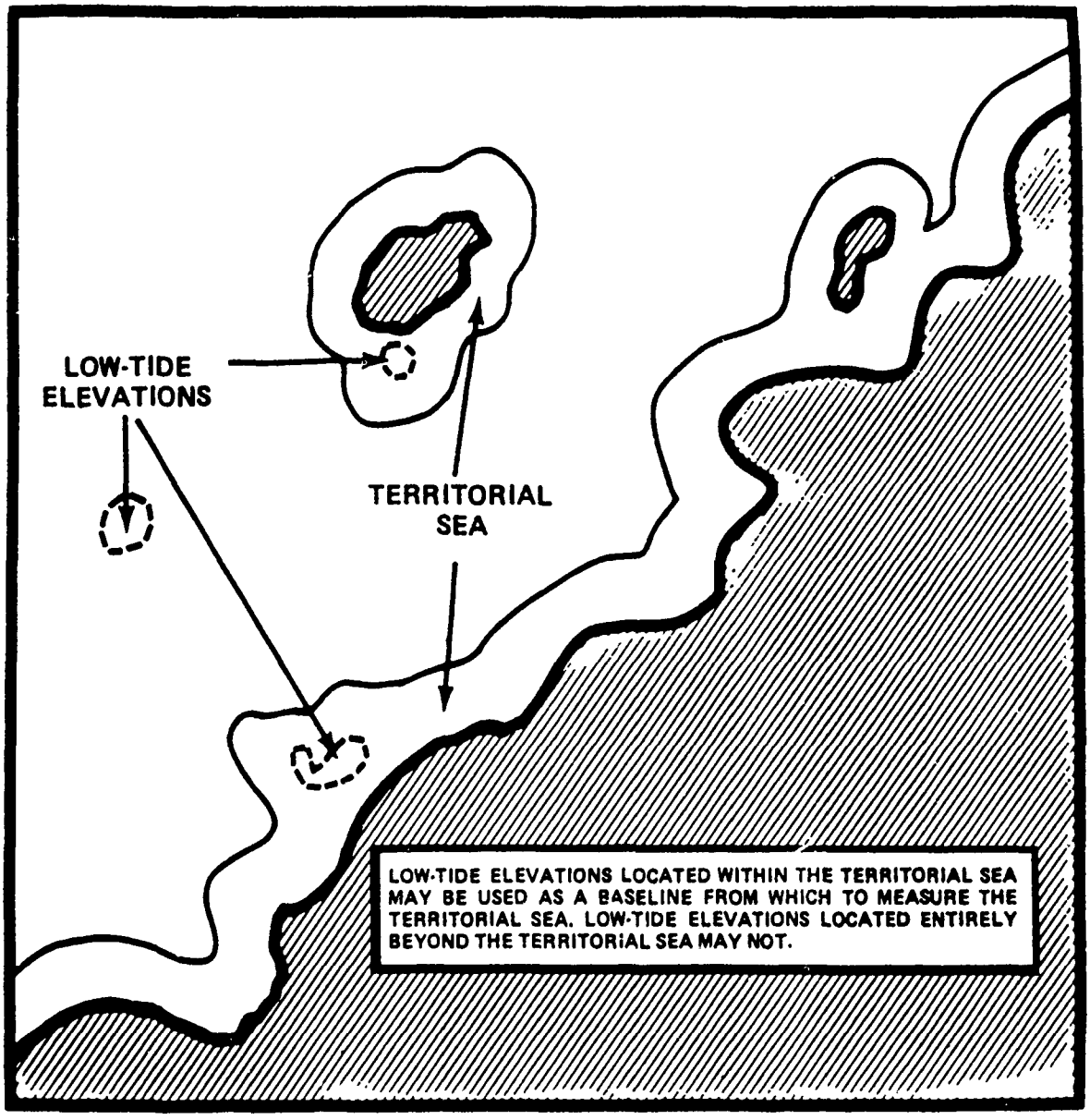

Figure 1-5. Territorial Sea of Islands and Low-Tide Elevations

1.4.2.3 Roadsteads. Roadsteads normally used for the loading, unloading, and anchoring of ships, and which would otherwise be situated wholly or partly beyond the outer limits of the territorial sea, are included within the territorial sea. Roadsteads included within the territorial sea must be clearly marked on charts by the coastal or island nation.[37]

1.4.3 Archipelagic Waters. An archipelagic nation is a nation that is constituted wholly of one or more groups of islands.[38] Such nations may draw straight archipelagic baselines joining the outer-most points of their outermost islands, provided that the ratio of water to land within the baselines is between 1 to 1 and 9 to 1.[39] The waters enclosed within the

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

[38] 1982 LOS Convention, art. 46. Article 46 defines an archipelagic nation as being constituted wholly by one or more archipelagos, and provides that it may include other islands. The article also defines "archipelago" as "a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that [they] form an intrinsic geographical, economic, and political entity, or which historically have been regarded as such." A number of nations appear to fall within the scope of this definition, including Antigua and Barbuda, The Bahamas, Cape Verde, Comoros, Fiji, Indonesia, Papua New Guinea, Philippines, Sao Tome and Principe, the Solomon Islands, Trinadad and Tobago, and Vanuatu. See Table ST1-7. Table ST1-9 lists others, some of which have claimed archipelagic status.

Other nations fall outside the Convention's definition. Continental countries possessing island archipelagos which are not entitled to archipelagic status under the Convention include the United States (Hawaiian Islands and Aleutians), Canada (Canadian Arctic Islands), Greece (the Aegean archipelago), Ethiopia (Dahlak) and Ecuador (the Galapagos Islands). These islands, although archipelagos in a geographical sense, are not archipelagos in the political-legal sense under the Convention. See Table ST1-8 for a complete list.

The concept of archipelagos is examined in detail in Herman, The Modern Concept of the Off-Lying Archipelago in International Law, Can. Y.B. Int'l L. 1985 at 172; 1 O'Connell 236-258; Rodgers, Midocean Archipelagos and International Law (1981); Symmons, The Maritime Zones of Islands in International Law 68-81 (1979); and Dubner, The Law of Territorial Waters of Mid-Ocean Archipelagos and Archipelagic States (1976).

[39] 1982 LOS Convention, art. 47. The ratio is that of the area of the water to the area of the land, including atolls, within the baselines. Article 47 also requires that the length of such baselines not exceed 100 nautical miles (with limited exceptions up to 125 nautical miles); that the baselines do not depart to any appreciable extent from the general

(continued...)

archipelagic baselines are called *archipelagic waters*. (The archipelagic baselines are also the baselines from which the archipelagic nation measures seaward its territorial sea, contiguous zone, and exclusive economic zone.)[40] The U.S. recognizes the right of an archipelagic nation to establish archipelagic baselines enclosing archipelagic waters provided the baselines are drawn in conformity with the 1982 LOS Convention and that the U.S. is accorded navigation and overflight rights and freedoms under international law in the enclosed archipelagic and adjacent waters.[41]

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

The 1:1 - 9:1 water-land area ratio serves to exclude large land area island nations such as Great Britain and New Zealand where the ratio is less than 1:1, and scattered island nations such as Kiribati and Tuvalu where the ratio is greater than 9:1. See Table ST1-8A. Table ST1-9 lists those nations with an acceptable water:land ratio.

Several nations have drawn straight baselines around non-independent archipelagos, in violation of article 7 of the 1982 LOS Convention: Canada (Canadian Arctic Islands), Denmark (Faeroe Islands), Ecuador (Galapagos Islands), Ethiopia (Dahlac Archipelago), Norway (Svalbard) and Portugal (Azores and Madeira Islands). See Table ST1-8B.

[40] 1982 LOS Convention, art. 49. Archipelagic waters are subject, along with the airspace over such waters and the subjacent seabed and subsoil, to archipelagic national sovereignty, excepting, *inter alia*, certain historical rights preserved for existing fisheries agreements and submarine cables. Id. at art. 51. See paragraph 2.3.4 below regarding navigation in and overflight of archipelagic waters.

[41] White House Fact Sheet, Annex AS1-5. Fiji's claim is generally accepted by the United States. U.S. Dep't of State, Limits in the Seas No. 101 (1984). United States' recognition of the archipelagic States principles as applied by Indonesia is expressly conditioned on their application by Indonesia in accordance with the provisions of Part IV of the 1982 LOS Convention and that "Indonesia respects international rights and obligations pertaining to the transit of the Indonesian archipelgic waters in accordance with international law as reflected in that Part." Exchange of letters, initialed 2 May 1986 and signed 11 July 1988, attached to the Indonesian-U.S. Income Tax Treaty, Sen. Treaty Doc. 100-22, at v & 22, 83 Am. J. Int'l L. 559 (1989).

TABLE ST1-7

ARCHIPELAGOS

Nation	Status of Claim to be an Archipelago	Reference
ANTIGUA AND BARBUDA	Claimed archipelagic status. Not ratified LOS Convention.	
BAHAMAS	Legislation pending. Ratified 1982 LOS Convention.	MCRM p.2-41 CH-1
CAPE VERDE	Not claimed status. Archipelagic baselines drawn. Ratified 1982 LOS Convention.	MCRM p.2-91 Contra: Table ST1-9
COMOROS	Claimed archipelagic status. Not drawn baselines. Not ratified 1982 LOS Convention.	MCRM p.2-104
FIJI	Claimed archipelagic status. Drawn archipelagic baselines. Ratified 1982 LOS Convention.	Limits in the Seas No. 101 (1984) MCRM p.2-155
INDONESIA	Claimed archipelagic status. Drawn archipelagic baselines. Ratified 1982 LOS Convention.	Limits in the Seas No. 35 (1971) MCRM p.2-219
PAPUA NEW GUINEA	Delimited interim archipelagic waters. Not ratified 1982 LOS Convention.	MCRM p.2-332
PHILIPPINES	Claimed archipelagic status. Drawn archipelagic baselines. Ratified 1982 LOS Convention.	MCRM p.2-337
SAO TOME AND PRINCIPE	Claimed archipelagic status. Drawn archipelagic baselines. Ratified 1982 LOS Convention.	Table ST1-9 Limits in the Seas No. 98 (1983)
SOLOMON ISLANDS	Claimed archipelagic status. Established archipelagic baselines. Not ratified 1982 LOS Convention.	MCRM p.2-375
TRINIDAD AND TOBAGO	Claimed archipelagic status. Not drawn archipelagic baselines. Ratified 1982 LOS Convention.	LOS Bulletin No. 9
VANUATU	Claimed archipelagic status. Established archipelagic baselines. Not ratified 1982 LOS Convention.	MCRM p.2-506

TABLE ST1-8

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

Mauritius
Western Samoa
Singapore
St Lucia
Japan
New Zealand
United Kingdom

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

American Samoa (US)
Anguilla (UK)
*Azores (Port)
*Dahlac Archipelago (Ethiopia)
Canary Islands (Spain)
*Faroe Islands (Den)
Falkland Islands (UK)
*Galapagos Islands (Ecua)
Guadeloupe (Fr)
Jan Mayen Island (Nor)
*Madeiras Islands (Port)
New Caledonia (Fr)
*Svalbard (Nor)
Turks and Caicos Islands (UK)

*Straight baseline system proclaimed about island group

TABLE ST1-9

States with Acceptable Water/Land Ratios for Claiming Archipelagic Status

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

*Archipelagic status has been declared
#Baseline system does not conform to LOS Convention provisions

Source: Alexander, Navigational Restrictions 87 & 91.

1.4.3.1 Archipelagic Sea Lanes. Archipelagic nations may designate archipelagic sea lanes through their archipelagic waters suitable for continuous and expeditious passage of ships and aircraft. All normal routes used for international navigation and overflight are to be included. If the archipelagic nation does not designate such sea lanes, the right of archipelagic sea lanes passage may nonetheless be exercised by all nations through routes normally used for international navigation and overflight.[42]

1.5 INTERNATIONAL WATERS

International waters include all ocean areas *not* subject to the territorial sovereignty of any nation. All waters seaward of the territorial sea are international waters in which the high seas freedoms of navigation and overflight are preserved to the international community. International waters include contiguous zones, exclusive economic zones, and high seas.

1.5.1 Contiguous Zones. A contiguous zone is an area extending seaward from the territorial sea in which the coastal or island nation may exercise the control necessary to prevent or punish infringement of its customs, fiscal, immigration, and sanitary laws and regulations that occur within its territory or territorial sea (but not for so-called security purposes - see 1.5.4).[43] The U.S. claims a contiguous zone extending 12 nautical miles from the base-lines used to measure the territorial sea.[44] The U.S. will respect, however, contiguous zones extending up to 24 nautical miles in breadth provided the coastal or island

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[42] **1982 LOS Convention, art. 53. Air routes may be designated for the passage of aircraft. The axis of the sea lanes (and traffic separation schemes) are to be clearly indicated on charts to which due publicity shall be given.**

[43] **Territorial Sea Convention, art. 24; 1982 LOS Convention, art. 33. The term "sanitary," a literal translation from the French "*sanitaire*," refers to "health and quarantine" matters. See Lowe, The Development of the Concept of the Contiguous Zone, 1981 Br. Y.B. Int'l L. 109 (1982) and Oda, The Concept of the Contiguous Zone, 11 Int'l & Comp. L.Q. 31 (1962).**

[44] **Dep't of State Public Notice 358, 37 Fed. Reg. 11,906, 15 June 1972. This is now also the outer limit of the U.S. territorial sea for international purposes; for U.S. domestic law purposes the U.S. territorial sea remains at 3 nautical miles. See note 30 above.**

TABLE ST1-10

NATIONS CLAIMING A CONTIGUOUS ZONE BEYOND THE TERRITORIAL SEA

	CZ nm	TS nm
Antigua and Barbuda	24	12
Bangladesh	18	12
Bulgaria	24	12
Burma	24	12
Cambodia	24	12
Chile	24	12
Denmark	4	3
Djibouti	24	12
Dominica	24	12
Dominican Republic	24	6
Egypt	24	12
Fiji	24	12
Finland	6	4
France	24	12
Gabon	24	12
Gambia	18	12
Ghana	24	12
Haiti	24	12
Honduras	24	12
India	24	12
Madagascar	24	12
Malta	24	12
Mauritania	24	12
Mexico	24	12
Morocco	24	12
Namibia	200	12
Norway	10	4
Pakistan	24	12
St. Kitts and Nevis	24	12
Saint Lucia	24	12
St. Vincent & The Grenadines	24	12
Saudi Arabia	18	12
Senegal	24	12
Sri Lanka	24	12
Sudan	18	12
Syria	41	35
Trinadad and Tobago	24	12
Vanuatu	24	12
Venezuela	15	12
Vietnam	24	12
Yemen (YAR)	18	12
Yemen (PDRY)	24	12
Total of Nations:	40	

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

nation recognizes U.S. rights in the zone consistent with the provisions of the 1982 LOS Convention.[45]

1.5.2 **Exclusive Economic Zones.** Exclusive economic zones (EEZs) are resource-related zones adjacent to the coast and extending beyond the territorial sea.[46] As the name suggests, its central purpose is economic. The U.S. recognizes the sovereign rights of a coastal or island nation to prescribe and enforce its laws in the exclusive economic zone, extending up to 200 nautical miles from the baselines used to measure the territorial sea, for the purposes of exploration, exploitation, management, and conservation of the natural resources of the waters, seabed, and subsoil of the zone, as well as for the production of energy from the water, currents, and winds.[47] The coastal or island nation may exercise jurisdiction in the zone over the establishment and use of artificial islands, installations, and structures having economic purposes; over marine scientific research (with reasonable

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[45] White House Fact Sheet, Annex AS1-5. A list of those nations claiming contiguous zones beyond their territorial sea appears as Table ST1-10.

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

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

[46] 1982 LOS Convention, arts. 55 & 86; Sohn & Gustafson 122-23 (pointing out that some nations insist that the exclusive economic zone is a special zone of the coastal nation subject to the freedoms of navigation and overflight). Japan is of the view that "the rights and jurisdiction of the coastal states over the 200 nautical mile exclusive economic zone are yet to be established as principles of general international law." Japanese Embassy ltr to U.S. Dep't of State (OES/OLP), 15 June 1987.

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

[47] 1982 LOS Convention, arts. 56(1)(a) & 157; White House Fact Sheet, Annex AS1-5. These "sovereign rights" are functional in character and are limited to the specified activities; they do not amount to "sovereignty" which a nation exercises over its land territory, internal waters, archipelagic waters, and territorial sea (subject to the right of innocent passage for foreign vessels). International law also grants to coastal states limited "jurisdiction" in the exclusive economic zone for the other purposes mentioned in the text at note 48. 2 Restatement (Third), sec. 511 Comment b at 26-27.

limitations); and over some aspects of marine environmental protection (primarily implementation of international vessel-source pollution control standards).[48] However, in the EEZ all nations enjoy the right to exercise the traditional high seas freedoms of navigation and overflight, of the laying of submarine cables and pipelines, and of all other traditional high seas uses by ships and aircraft which are not resource related.[49] The

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[48] 1982 LOS Convention, art. 56(1)(b). The United States rejects Brazil's assertion that no nation has the right to place or to operate any type of installation or structure in the exclusive economic zone or on the continental shelf without the consent of the coastal nation. 17 LOS Official Records, para. 28, at 40 and U.S. statement in right of reply, 17 LOS Official Records 244, Annex AS1-2.

Marine scientific research (MSR). In Part XII of the Convention regarding protection and preservation of the marine environment, article 236 provides that the environmental provisions of the Convention do not apply to warships, naval auxiliaries, and other vessels and aircraft owned or operated by a nation and used, for the time being, only on government non-commercial service. The provisions of Part XIII regarding marine scientific research, a term not defined in the Convention, similarly do not apply to military activities. Oxman, The Regime of Warships Under the United Nations Convention on the Law of the Sea, 24 Va. J. Int'l L. 809, 844-47 (1984). See also Negroponte, Current Developments in U.S. Oceans Policy, Dep't St. Bull., Sep. 1986, at 86. U.S. policy is to encourage freedom of MSR. The United States does not claim jurisdiction over MSR in its EEZ. See the President's Ocean Policy Statement, 10 March 1983, and accompanying Fact Sheet, Annexes AS1-3 & AS1-5. The United States accepts that MSR is the general term most often used to describe those activities undertaken in the ocean and coastal waters to expand scientific knowledge of the marine environment. MSR includes oceanography, marine biology, fisheries research, scientific ocean drilling, geological/geophysical scientific surveying, as well as other activities with a scientific purpose. When activities similar to those mentioned above are conducted for commercial resource purposes, most governments, including the United States, do not treat them as MSR. Additionally, activities such as hydrographic surveys, the purpose of which is to obtain information for the making of navigational charts, and the collection of information that, whether or not classified, is to be used for military purposes, are not considered by the United States to be MSR and, therefore, are subject to coastal state jurisdiction. 1989 State telegram 063112.

[49] 1982 LOS Convention, art. 58. The United States rejects Brazil's assertion that other nations "may not carry out military exercises or manoeuvres within the exclusive economic zone, particularly when these activities involve the use of weapons or explosives, without the prior knowledge and consent" of the coastal nation. 17 LOS Official Records, para. 28, at 40, and U.S. statement in right of reply, 17 LOS Official Records 244, Annex AS1-2.

United States established a 200-nautical miles exclusive economic zone by Presidential Proclamation on 10 March 1983.[50]

1.5.3 High Seas. The high seas include all parts of the ocean seaward of the exclusive economic zone. When a coastal or island nation has not proclaimed an exclusive economic zone, the high seas begin at the seaward edge of the territorial sea.[51]

1.5.4 Security Zones. Some coastal nations have claimed the right to establish military security zones, beyond the territorial sea, of varying breadth in which they purport to regulate the activities of warships and military aircraft of other nations by such restrictions as prior notification or authorization for entry, limits on the number of foreign ships or aircraft present at any given time, prohibitions on various operational activities, or complete exclusion.[52] International law does not recognize the right of coastal nations to establish

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[50] Presidential Proclamation No. 5030, 48 Fed. Reg. 10,601, 16 U.S.C.A. sec. 1453n, 10 March 1983, Annex AS1-6. See Figure SF1-10. The U.S. thereby acquired the world's largest EEZ (2,831,400 square nautical miles). Alexander, Navigational Restrictions 88 (Table 5). Although the nations with the next 9 largest actual or potential EEZs are all developed nations, the EEZ was proposed by the developing nations. As of 17 May 1989, 79 coastal or island nations have claimed an EEZ. See Table ST1-5. A useful compilation of national legislation on the EEZ appears in UN Office of the Special Representative of the Secretary-General for the Law of the Sea, The Law of the Sea: National Legislation on the Exclusive Economic Zone, the Economic Zone and the Exclusive Fishery Zone (UN Sales No. E.85.V.10, 1986). Other national EEZ legislation appears in later editions of the LOS Bulletin.

Fishery and other resource-related zones adjacent to the coast and extending to a distance of 200 nautical miles from the baseline from which the territorial sea is measured are accepted in customary international law. The U.S. claims and recognizes broad and exclusive fisheries jurisdiction to a limit of 200 nautical miles (with the exception of "highly migratory species" such as tuna). 16 U.S.C. sec. 1811-6l.

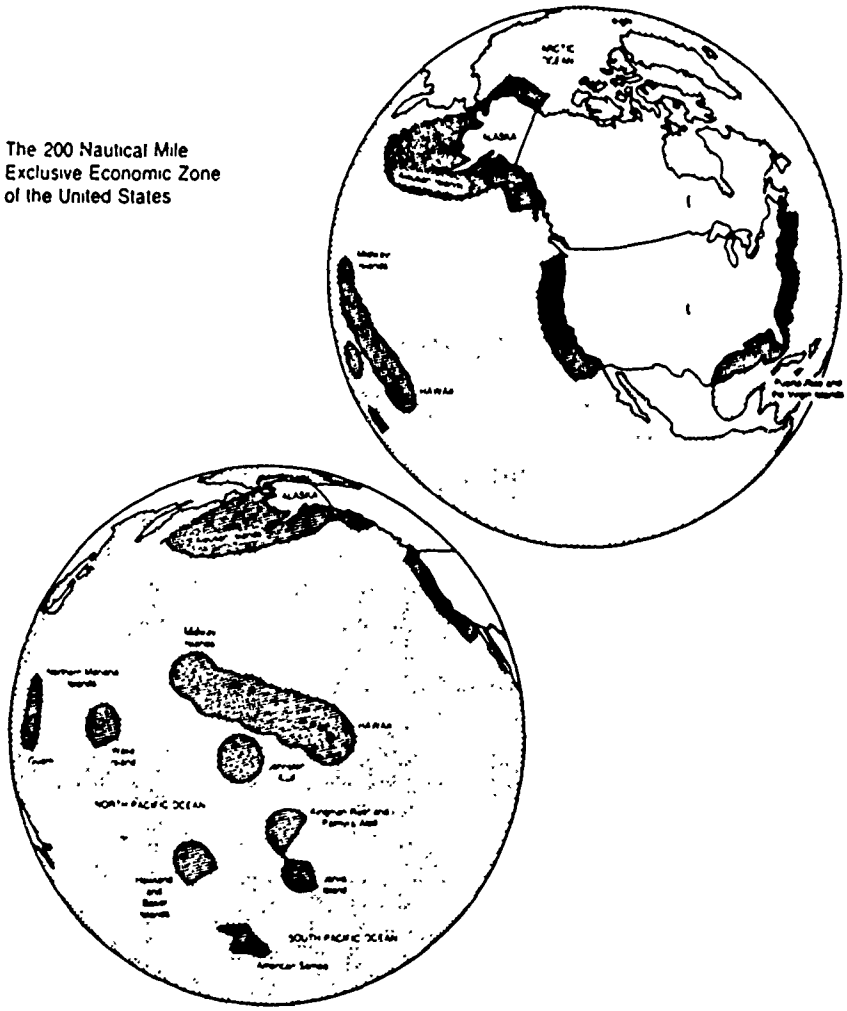
Islands capable of supporting human habitation or economic life may have an exclusive economic zone. 1982 LOS Convention, art. 121. Such an island located more than 400 nautical miles from the nearest land can generate an EEZ of about 125,000 square nautical miles. Rocks, low-tide elevations and man-made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

[51] 1982 LOS Convention, art. 86. Navigation in the high seas is discussed in paragraph 2.4.3 below.

[52] Eighteen nations claim security zones seaward of their territorial seas. Most such claims are designed to control matters of security within a contiguous zone geographically no broader than that permitted under the 1982 LOS Convention. However, security has

(continued...)

FIGURE SF1-10



The U.S. Exclusive Economic Zone as Specified by Presidential Proclamation, March 10, 1983.

Source: U.S. Department of State

zones in peacetime that would restrict the exercise of non-resource-related high seas freedoms beyond the territorial sea. Accordingly, the U.S. does not recognize the peacetime validity of any claimed security or military zone seaward of the territorial sea which purports to restrict or regulate the high seas freedoms of navigation and overflight.[53] (See paragraph 2.3.2.3 for a discussion of temporary suspension of innocent passage in territorial seas.)

1.6 CONTINENTAL SHELVES

The juridical continental shelf of a coastal or island nation consists of the seabed and subsoil of the submarine areas that extend beyond its territorial sea to the outer edge of the continental margin, *or* to a distance of 200 nautical miles from the baseline used to measure the territorial sea where the continental margin does not extend to that distance. The continental shelf may not extend beyond 350 nautical miles from the baseline of the territorial sea *or* 100 nautical miles from the 2,500 meter isobath, whichever is greater.[54]

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[52](...continued)
never been an interest recognized in the Conventions as subject to enforcement in the contiguous zone. Nations claiming a security zone and the seaward extent of their claims are: Bangladesh (18 nautical miles), Burma (24 nautical miles), Cambodia (24 nautical miles), Egypt (18 nautical miles), Haiti (24 nautical miles), India (24 nautical miles), Pakistan (24 nautical miles), Saudi Arabia (18 nautical miles), Sri Lanka (24 nautical miles), Sudan (18 nautical miles), Venezuela (15 nautical miles), Vietnam (24 nautical miles), and both Yemens (PDRY (24 nautical miles)) and YAR (18 nautical miles)).

Nicaragua claims a 25 nautical mile security zone coincident with her claimed 25 nautical mile contiguous zone.

North Korea, on the other hand, has claimed no contiguous zone, but claims a security zone extending 50 nautical miles beyond its claimed territorial sea off its east coast and a security zone to the limits of its EEZ off its west coast. Park, The 50-Mile Military Boundary Zone of North Korea, 72 Am. J. Int'l L. 866 (1978); Park, East Asia and the Law of the Sea 163-76 (1983); N.Y. Times, 2 Aug. 1977, at 2; MCRM 2-249.

Greece purports to restrict the overflight of aircraft out to 10 nautical miles while claiming only a 6 nautical mile territorial sea; it, too, claims no contiguous zone. Brazil claims a security zone out to 200 nautical miles as part of its 200 nautical mile territorial sea claim; Indonesia likewise, but to an area 100 nautical miles seaward of its territorial sea. MCRM passim; Notice to Mariners 39/86, pages III-2.31 to III-2.34.

[53] N.Y. Times, 3 Aug. 1977, at 3 (State Dep't statement regarding the North Korean zone).

[54] See Figure SF1-11. The geologic definition of a continental shelf differs from this juridical definition. Geologically, the continental shelf is the gently-sloping platform
(continued...)

FIGURE SF1-11

CONTINENTAL SHELF DELIMITATION

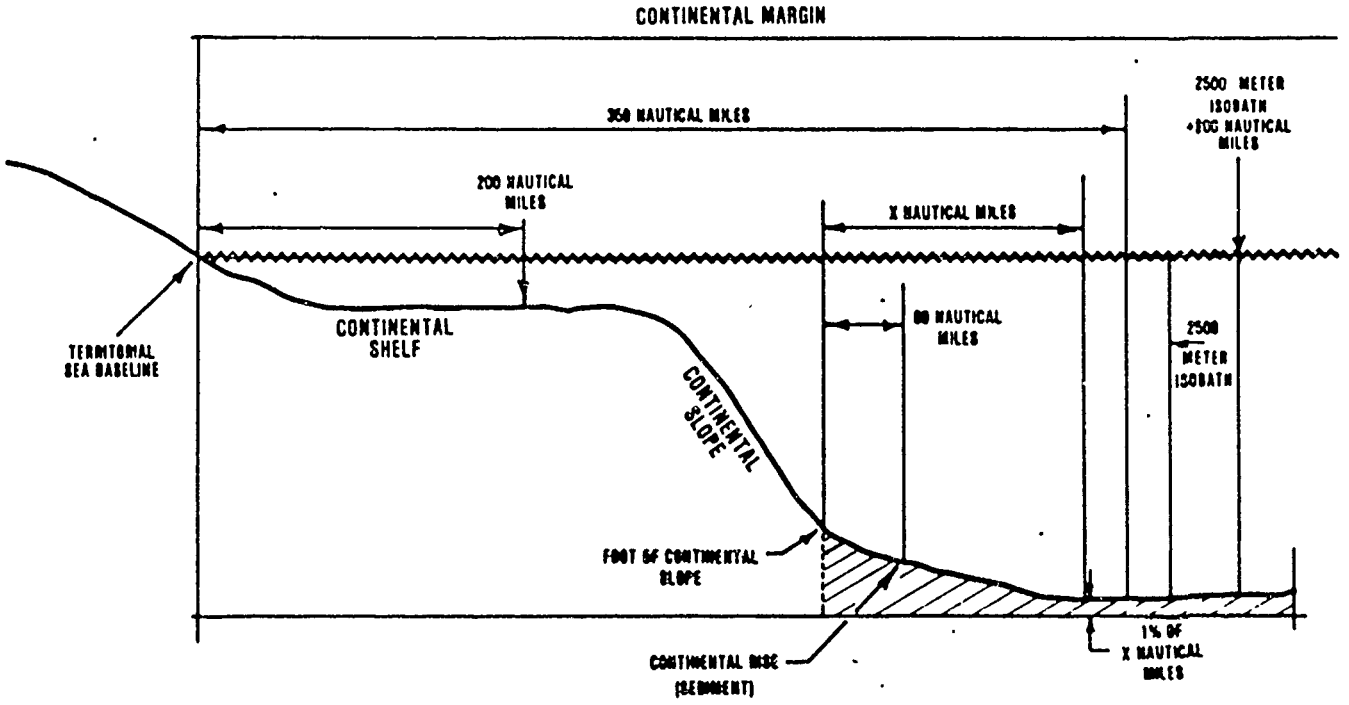
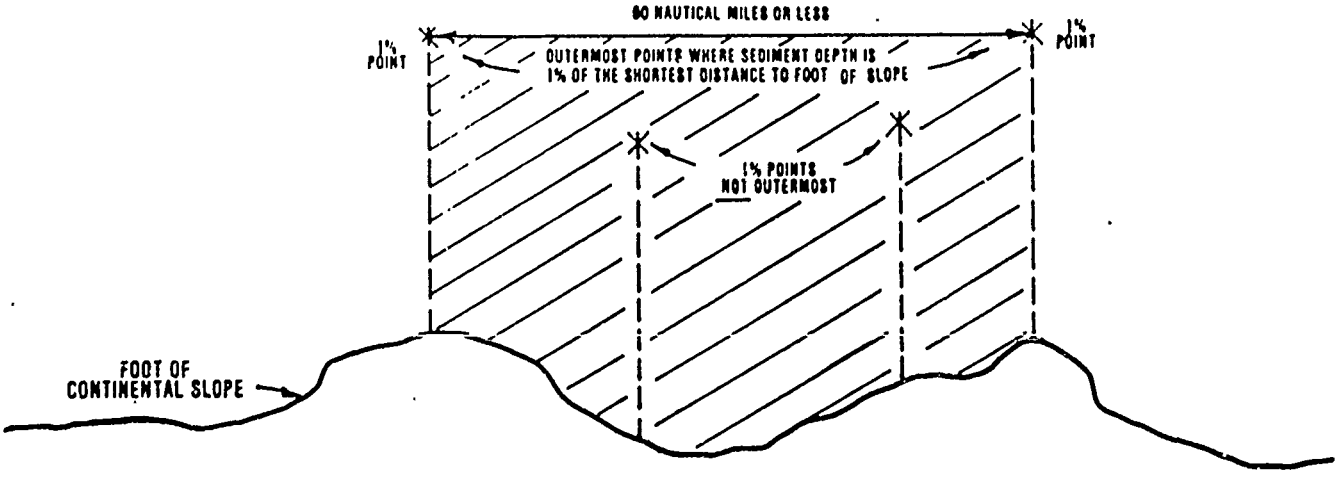


FIGURE SF1-12

DEPTH OF SEDIMENT TEST



Although the coastal or island nation exercises sovereign rights over the continental shelf for purposes of exploring and exploiting its natural resources, the legal status of the superjacent water is *not* affected. Moreover, all nations have the right to lay submarine cables and pipelines on the continental shelf.[55]

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[54](...continued)
extending seaward from the land to a point where the downward inclination increases markedly as one proceeds down the continental slope. The depth at which the break in angle of inclination occurs varies widely from place to place. At the foot of the slope begins the continental rise, a second gently-sloping plain which gradually merges with the floor of the deep seabed. The shelf, slope, and rise, taken together, are geologically known as the continental margin. Alexander, Navigational Restrictions 22-23. The outer edge of any juridical (as opposed to geophysical) continental margin extending beyond 200 nautical miles from the baseline is to be determined in accordance with *either* the depth of sediment test (set forth in article 76(4)(a)(i) of the 1982 LOS Convention and illustrated in Figure SF1-11), *or* along a line connecting points 60 nautical miles from the foot of the continental slope (article 76(4)(a)(ii), illustrated in Figure SF1-12), or the 2500 meter isobath plus 100 nautical miles (article 76(5)). The broad principles of the continental shelf regime reflected in the 1982 LOS Convention, articles 76-81, were established as customary international law by the broad consensus achieved at UNCLOS III and the practices of nations. *Case Concerning Delimitation of the Maritime Boundary of the Gulf of Maine (Canada/United States)*, [1984] I.C.J. Rep. 246, 294; 2 Restatement (Third), sec. 515 Comment a & Reporters' Note 1, at 66-69; Sohn & Gustafson 158.

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

A recent compilation of national legislation on the continental shelf appears in UN Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: National Legislation on the Continental Shelf (UN Sales No. E.89.V.5, 1989).

[55] Continental Shelf Convention, arts. 1-3 & 5; 1982 LOS Convention, arts. 60(7), 76-78 & 80-81. See paragraph 2.4.3 note 54 below for further information regarding cables and pipelines.

It should be noted that the coastal or island nation does not have sovereign rights *per se* to that part of its continental shelf extending beyond the territorial sea, only to the exploration and exploitation of its natural resources. U.S. statement in right of reply, 8 March 1983, 17 LOS Official Records 244, Annex AS1-2. Consequently, SOSUS arrays can be lawfully laid on other nations' continental shelves beyond the territorial sea.

Under the 1982 LOS Convention, the "Area" (i.e., the seabed beyond the juridical continental shelf) and its resources are the "common heritage of mankind." No nation may claim or exercise sovereignty over any part of the deep seabed. 1982 LOS Convention, arts.
(continued...)

1.7 SAFETY ZONES

Coastal and island nations may establish safety zones to protect artificial islands, installations, and structures located in their internal waters, archipelagic waters, territorial seas and exclusive economic zones, and on their continental shelves. In the case of artificial islands, installations, and structures located in the exclusive economic zones or on the continental shelf beyond the territorial sea, safety zones may not extend beyond 500 meters from the outer edges of the facility in question, except as authorized by generally accepted international standards.[56]

1.8 AIRSPACE

Under international law, airspace is classified as either *national* airspace (that over the land, internal waters, archipelagic waters, and territorial seas of a nation) or *international* airspace (that over contiguous zones, exclusive economic zones, the high seas, and territory

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[55](...continued)
136 & 137. The Convention further provides for the sharing with undeveloped nations of financial and other economic benefits derived from deep seabed mining.

The 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, 10 March 1983, Annex AS1-3. See also the United States' 8 March 1983 statement in right of reply, 17 LOS Official Records 243, Annex AS1-2.

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

not subject to the sovereignty of any nation).[57] Subject to a right of overflight of international straits (see paragraph 2.5.1.1) and archipelagic sea lanes (see paragraph 2.5.1.2), each nation has complete and exclusive sovereignty over its national airspace.[58] Except as they may have otherwise consented through treaties or other international agreements, the aircraft of all nations are free to operate in international airspace without interference by other nations.[59]

1.9 OUTER SPACE

The upper limit of airspace subject to national jurisdiction has not been authoritatively defined by international law. International practice has established that airspace terminates at some point below the point at which artificial satellites can be placed in orbit without free-falling to earth. Outer space begins at that undefined point. All nations enjoy a freedom of equal access to outer space and none may appropriate it to its national airspace or exclusive use.[60]

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

[58] **Convention on International Civil Aviation (Chicago Convention), 7 December 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295, 3 Bevans 944, AFP 110-20, chap. 6, arts. 1-2. The U.S. declaration of its sovereignty in national airspace is set forth in 49 U.S.C. sec. 1508(a) (1982).**

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

[60] **AFP 110-31, para. 2-1h, at 2-3.**

CHAPTER 2

International Status and Navigation of Warships and Military Aircraft

2.1 STATUS OF WARSHIPS

2.1.1 Warship Defined. International law defines a warship as a ship belonging to the armed forces of a nation bearing the external markings distinguishing the character and nationality of such ships, under the command of an officer duly commissioned by the government of that nation and whose name appears in the appropriate service list of officers, and manned by a crew which is under regular armed forces discipline.[1] In the U.S. Navy, those ships designated "USS" are "warships" as defined by international law.[2] U.S. Coast Guard vessels designated "USCGC" are also "warships" under international law.[3]

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[1] High Seas Convention, art. 8(2); 1982 LOS Convention, art. 29; Hague VII, arts. 2-5; GP I, art. 43. The service list for U.S. naval officers is the Register of Commissioned and Warrant Officers of the United States Navy and Naval Reserve on the active duty list (NAVPERS 15018); the comparable list for the U.S. Coast Guard is COMDTINST M1427.1 (series), Register of Officers.

[2] U.S. Navy Regulations, 1973, art. 0305; SECNAVINST 5030.1 (series).

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

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

2.1.2 International Status. A warship enjoys sovereign immunity from interference by the authorities of nations other than the flag nation.[4] Police and port authorities may board a warship only with the permission of the commanding officer. A warship cannot be required to consent to an onboard search or inspection,[5] nor may it be required to fly the flag of the host nation.[6] Although warships are required to comply with coastal nation traffic control, sewage, health, and quarantine restrictions instituted in conformance with the 1982 LOS Convention, a failure of compliance is subject only to diplomatic complaint or to coastal nation orders to leave its territorial waters immediately.[7] Moreover, warships are immune from arrest and seizure, whether in national or international waters, are exempt from foreign taxes and regulation, and exercise exclusive control over all passengers and crew with regard to acts performed on board.[8]

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

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[4] High Seas Convention, art. 8; 1982 LOS Convention, arts. 32, 58(2), 95 & 236. The rules applicable in armed conflict are discussed in part II, particularly chapters 7 and 8.

[5] U.S. Navy Regulations, 1973, article 0740. CNO Washington DC message 032330Z MAR 88, NAVOP 024/88, regarding foreign port visits, points out that the United States also will not respond to host nation requests for specific information on individual crew members including crew lists and health records, and will not undertake other requested actions upon which the Commanding Officer's certification is definitive.

[6] The U.S. Navy has provided, as a matter of policy and courtesy, for the display of a foreign flag or ensign during certain ceremonies. See U.S. Navy Regulations, 1973, articles 1076-78.

[7] Territorial Sea Convention, art. 23; 1982 LOS Convention, art. 30; U.S. Navy Regulations, 1973, articles 0763, 0764 & 0765. Quarantine is discussed in paragraph 3.2.3 below. As stated in paragraph 2.3.2.1, force may also be used, where necessary, to prevent passage which is not innocent.

[8] Territorial Sea Convention, art. 22; High Seas Convention, art. 8(1); 1982 LOS Convention, arts. 32, 95 & 236. While on board ship in foreign waters, the crew of a warship are immune from local jurisdiction. Their status ashore is the subject of SECNAVINST 5820.4 (series), Subj: Status of Forces Policies, Procedure, and Information. Under status of forces agreements, obligations exist to assist in the arrest of crew members and the delivery of them to foreign authorities. See AFP 110-20, chap. 2; U.S. Navy Regulations, 1973, article 0729; and JAG Manual, sec. 1307.

[9] Cf. 1982 LOS Convention, arts. 21(1), 22(2) and 23. For further information and guidance see OPNAVINST C3500.5 (series), Subj: Operation of Naval Nuclear Powered Ships (U), and OPNAVINST C3000.8 (series).

(continued...)

[9](...continued)
The Department of State has noted that:

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

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

Although nuclear powered warships frequently pass through the Panama Canal, they have been permitted to transit the Suez Canal only infrequently. The transit by USS ARKANSAS (CGN 41) on 3 November 1984 was the first (U.S. Naval Inst. Proc., May 1985, at 48); the transit by USS ENTERPRISE (CVN 65) from the Indian Ocean to the Mediterranean via the Suez Canal on 28 April 1986 was the second (U.S. Naval Inst. Proc., May 1987, at 38). A request for ENTERPRISE to return to the Pacific via the Suez Canal was denied by Egypt "because it is reviewing its new rules governing passage." Washington Post, 4 July 1986, at A21. The Egyptian President was quoted in a newspaper interview that safety of the waterway and residents on both banks had to be considered, along with a possible surcharge for the passage of nuclear ships, as well as a guarantee for compensation in case of nuclear accidents. See paragraph 2.3.3.1 note 36 below for a discussion of canals.

With regard to nuclear armed warships and aircraft, U.S. policy is to neither confirm nor deny the presence of nuclear weapons on board specific U.S. ships and aircraft. The firmness of the U.S. policy is illustrated by the U.S reaction to the February 1985 decision of the Government of New Zealand to deny permission for USS BUCHANAN (DDG 14) to enter Auckland Harbor since the U.S. would not confirm the absence of nuclear weapons in BUCHANAN. The U.S. suspended all military cooperation with New Zealand, including the ANZUS agreement, training, foreign military sales, and intelligence exchange. Dep't St. Bull., Sep. 1986, at 87; Note, The Incompatibility of ANZUS and a Nuclear-Free New Zealand, 26 Va. J. Int'l L. 455 (1986); Woodliffe, Port Visits by Nuclear Armed Naval Vessels: Recent State Practice, 35 Int'l & Comp. L.Q. 730 (1986); Recent Developments, International Agreements: United States' Suspension of Security Obligations Toward New Zealand, 28 Harv. Int'l L.J. 139 (1987).

2.1.2.2 Sunken Warships and Military Aircraft. Sunken warships and military aircraft remain the property of the flag nation until title is formally relinquished or abandoned, whether the cause of the sinking was through accident or enemy action (unless the warship or aircraft was captured before it sank). As a matter of policy, the U.S. Government does not grant permission to salvage sunken U.S. warships or military aircraft that contain the remains of deceased service personnel or explosive material. Requests from foreign countries to have their sunken warships or military aircraft, located in U.S. waters, similarly respected by salvors, are honored.[10]

2.1.2.3 Auxiliaries. Auxiliaries are vessels, other than warships, that are owned by or under the exclusive control of the armed forces. Because they are state owned or operated and used for the time being only on government noncommercial service, auxiliaries enjoy sovereign immunity. This means that, like warships, they are immune from arrest and search, whether in national or international waters. Like warships, they are exempt from foreign taxes and regulation, and exercise exclusive control over all passengers and crew with respect to acts performed onboard.[11]

U.S. auxiliaries include all vessels which comprise the Military Sealift Command (MSC) Force. The MSC Force includes: (1) United States Naval Ships (USNS) (i.e., U.S.

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[10] **9 Whiteman 221 & 434; Deputy Legal Adviser, U.S. Dep't of State letter to Deputy General Counsel, Maritime Administration, 30 December 1980, reprinted in 1980 Digest of U.S. Practice in International Law 999-1006. Under analogous reasoning, on 12 November 1976 Japan returned a MiG-25 Foxbat flown by LT Victor I. Belenko from Chuguyevka, U.S.S.R., to Hakodate Airport, Hokkaido, Japan on 4 September 1976, albeit the Foxbat was returned disassembled. Barron, MiG Pilot: The Final Escape of LT. Belenko 129, 180 (1980). See paragraph 3.10 below regarding attempts by other nations to recover U.S. government property at sea, and paragraph 4.3.2 below regarding the right of self-defense.**

Government and military vessels are exempt from the International Convention for the Unification of Certain Rules Relating to Salvage of Vessels at Sea, 23 September 1910, 37 Stat. 1658, T.I.A.S No. 576, article 14, and 46 U.S.C. sec. 731 (1982). 46 U.S.C. sec. 1316(d) forbids foreign vessels from engaging in salvaging operations within the territorial or inland waters of the United States. However, the United States is subject to claims for salvage outside U.S. territorial waters. *Vernicos Shipping Co. v. United States*, 223 F. Supp. 116 (S.D.N.Y. 1963), aff'd, 349 F.2d 465 (2d Cir. 1965); *B.V. Bureau Wijsmuller v. United States*, 487 F. Supp. 156 (S.D.N.Y. 1979), aff'd 633 F.2d 202 (2d Cir. 1980); 8 J. Mar. L. & Com. 433 (1977).

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

owned vessels or those under bareboat charter, and assigned to MSC); (2) the National Defense Reserve Fleet and the Ready Reserve Force (RRF) (when activated and assigned to MSC); (3) privately owned vessels under time charter assigned to the Afloat Prepositioned Force (APF); and (4) those vessels chartered by MSC for a period of time or for a specific voyage or voyages.[12] The United States claims full rights of sovereign immunity for all USNS, APF, NRDF and RRF vessels. As a matter of policy, however, the U.S. claims only freedom from arrest and taxation for those MSC Force time and voyage charters not included in the APF.[13]

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

[13] 1985 SECSTATE Washington DC message 317062, subj: status of MSC vessels.

Merchant Ships. In international law, a merchant ship is any vessel, including a fishing vessel, that is not entitled to sovereign immunity, e.g., a vessel, whether privately or publicly owned or controlled, which is not a warship and which is engaged in ordinary commercial activities.

On the High Seas. Merchant ships, save in exceptional cases expressly provided for in international treaties, are subject to the flag nation's exclusive jurisdiction on the high seas. High Seas Convention, art. 6(1); 1982 LOS Convention, art. 92(1). Unless pursuant to hot pursuit (see paragraph 3.9 below), merchant vessels on the high seas may not be boarded by foreign warship personnel without the master's or flag nation consent, unless there is reasonable ground for suspecting that the ship is engaged in piracy, unauthorized broadcasting, or the slave trade, that the ship is without nationality, or that, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship. High Seas Convention, art. 22; 1982 LOS Convention, art. 110. Warship's right of approach and visit is discussed in paragraph 3.8 below. The belligerent right of visit and search is discussed in paragraph 7.6.

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

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

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

(continued...)

2.2 STATUS OF MILITARY AIRCRAFT

2.2.1 Military Aircraft Defined. International law defines military aircraft to include all aircraft operated by commissioned units of the armed forces of a nation bearing the military markings of that nation, commanded by a member of the armed forces, and manned by a crew subject to regular armed forces discipline.[14]

2.2.2 International Status Military aircraft are "state aircraft" within the meaning of the Convention on International Civil Aviation of 1944 (the "Chicago Convention"), and, like warships, enjoy sovereign immunity from foreign search and inspection. Subject to the right of transit passage and archipelagic sea lanes passage, state aircraft may not fly over or land on the territory (including the territorial sea) of another nation without authorization by special agreement or otherwise.[15] Host nation officials may not board the aircraft without the consent of the aircraft commander. Should the aircraft commander fail to certify compliance with host nation customs, immigration or quarantine requirements, the aircraft may be directed to leave the territory and national airspace of that nation immediately.[16]

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[13](...continued)

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

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

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

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

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

[15] Transit passage through international straits and archipelagic sea lanes passage are discussed in paragraphs 2.3.3 and 2.3.4.1 respectively below.

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

2.2.2.1 Military Contract Aircraft. Civilian owned and operated aircraft, the full capacity of which has been contracted by the Military Airlift Command (MAC) and used in the military service of the United States, qualify as "state aircraft" if they are so designated by the United States. In those circumstances they too enjoy sovereign immunity from foreign search and inspection.[17] As a matter of policy, however, the United States normally does not designate MAC-charter as state aircraft.

2.3 NAVIGATION IN AND OVERFLIGHT OF NATIONAL WATERS

2.3.1 Internal Waters. As discussed in the preceding chapter, coastal and island nations exercise the same jurisdiction and control over their internal waters and superjacent airspace as they do over their land territory. Because most ports and harbors are located landward of the baseline of the territorial sea, entering a port ordinarily involves navigation in internal waters. Because entering internal waters is legally equivalent to entering the land territory of another nation, that nation's permission is required. To facilitate international maritime commerce, many nations grant foreign merchant vessels standing permission to enter internal waters, in the absence of notice to the contrary. Warships and auxiliaries, and all aircraft, on the other hand, require specific and advance entry permission, unless other bilateral or multilateral arrangements have been concluded.[18]

Exceptions to the rule of non-entry into *internal* waters without coastal nation permission, whether specific or implied, arise when rendered necessary by *force majeure* or by distress,[19] or when straight baselines are established that have the effect of enclosing as internal waters, areas of the sea previously regarded as territorial waters or high seas.[20] In the latter event, international law provides that the right of innocent passage (see

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

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

[19] ***Force majeure*** **includes a ship forced into internal waters by bad weather. Distress may be caused, *inter alia*, by equipment malfunction or navigational error, as well as by a shortage of food or water, or any other emergency. See paragraph 3.2 at note 1 regarding safe harbor, and paragraph 4.4 regarding interception of intruding aircraft.**

[20] **1982 LOS Convention, art. 8(2).**

paragraph 2.3.2.1)[21] or that of transit passage in an international strait[22] (see paragraph 2.3.3.1) may be exercised by all nations in those waters.

2.3.2 The Territorial Sea [23]

2.3.2.1 Innocent Passage. International law provides that ships (but not aircraft) of all nations enjoy the right of innocent passage for the purpose of continuous and expeditious traversing of the territorial sea or for proceeding to or from internal waters. Innocent passage includes stopping and anchoring, but only insofar as incidental to ordinary navigation, or as rendered necessary by *force majeure* or by distress.[24] Passage is *innocent* so long as it is not prejudicial to the peace, good order, or security of the coastal or island nation.[25] Among the military activities considered to be *prejudicial* to the peace, good order, and security, and therefore inconsistent with innocent passage, are:

1. Any threat or use of force against the sovereignty, territorial integrity, or political independence of the coastal or island nation

2. Any exercise or practice with weapons of any kind

3. The launching, landing, or taking on board of any aircraft or of any military device

4. Intelligence collection activities detrimental to the security of that coastal or island nation

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[21] *Ibid.*

[22] **1982 LOS Convention, art. 35(a).**

[23] **Navigation by foreign vessels in the territorial sea is regulated by the regimes of innocent passage, assistance entry, transit passage and archipelagic sea lanes passage which are discussed in paragraphs 2.3.2.1, 2.3.2.5, 2.3.3.1 and 2.3.4.1 respectively.**

[24] **Territorial Sea Convention, art. 14(2), (3) & (6); 1982 LOS Convention, arts. 18 & 20. Nations with specific domestic legislation recognizing the right of innocent passage are listed in Table ST2-1.**

[25] **What constituted prejudice under article 14(4) of the Territorial Sea Convention was subjective, was left to coastal or island nation interpretation, and failed to limit the prejudicial activities to those engaged in by the foreign vessel while transiting the territorial sea of another nation. The 1982 LOS Convention endeavors to eliminate some of the subjective interpretative difficulties that have arisen concerning the innocent passage regime of the Territorial Sea Convention.**

5. The carrying out of research or survey activities.[26]

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[26] 1982 LOS Convention, art. 19. The other activities set forth in this all-inclusive list are:

- any threat or use of force in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

- any act of propaganda aimed at affecting the defense or security of the coastal or island nation;

- the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal or island nation;

- any act of willful and serious pollution contrary to the 1982 LOS Convention;

- any fishing activities;

- any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal or island nation; and

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

The Territorial Sea Convention contains no comparable listing. See Stevenson & Oxman, The Third United Nations Conference on the Law of the Sea: the 1975 Geneva Session, 69 Am. J. Int'l L. 763, 771-72 (1975); Froman, Uncharted Waters: Non-innocent Passage of Warships in the Territorial Sea, 21 San Diego L. Rev. 625, 659 (1984); Grammig, The Yoron Jima Submarine Incident of August 1980: A Soviet Violation of the Law of the Sea, 22 Harv. Int'l L.J. 331, 340 (1981). See also 1 O'Connell 270, who suggests the list may not be complete since the list does not say "only" the listed actions are prejudicial.

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

The 1983 Soviet "Rules for Navigation and Sojourn of Foreign Warships in the Territorial Waters and Internal Waters and Ports of the USSR," translation in 24 Int'l Leg. Mat'ls 1717 (1985), were not entirely consistent with the relevant provisions of the 1982 LOS

(continued...)

The coastal or island nation may take affirmative actions in its territorial sea to prevent passage that is not innocent, including, where necessary, the use of force.[27] Foreign ships, including warships, exercising the right of innocent passage are required to comply with the laws and regulations enacted by the coastal or island nation in conformity with established principles of international law and, in particular, with such laws and regulations

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[26](...continued)
Convention. Butler, Innocent Passage and the 1982 Convention: The Influence of Soviet Law and Policy, 81 Am. J. Int'l L. 331 (1987). In particular, the Soviet claim to limit the innocent passage of warships to five "routes ordinarily used for international navigation" is inconsistent with the Convention's terms and negotiating history, and prior Soviet support therefor., Neubauer, The Right of Innocent Passage for Warships in the Territorial Sea: A Response to the Soviet Union, Nav. War C. Rev., Spring 1988, at 49. That portion of the 1983 Rules was amended effective 23 September 1989 to conform to the Uniform Interpretation, Annex AS2-0. See paragraph 2.6 note 91 below regarding U.S. challenges to this and other excessive maritime claims.

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

[27] The seizure by Cambodian forces of the SS MAYAGUEZ on 12 May 1975 was justified by Cambodia on the ground that her passage was not innocent. However, the location of the seizure was outside Cambodian territorial seas. Thus, the seizure was unlawful. 1975 Digest of U.S. Practice in International Law 423-26; Note, The *Mayaguez*: The Right of Innocent Passage and the Legality of Reprisal, 13 San Diego L. Rev. 765 (1976). More importantly, even if MAYAGUEZ were in Cambodian territorial waters, the appropriate remedy -- assuming her passage was not innocent -- would have been, consistent with customary international law, first to inform the vessel of the reasons why it questions the innocence of the passage, and to provide the vessel a reasonable opportunity to clarify its intentions or to correct its conduct in a reasonably short period of time. In the case of a warship engaging in conduct which renders its passage non-innocent, and which does not take corrective action upon request, the coastal nation may require the warship to leave the territorial sea, as set forth in article 30 of the 1982 LOS Convention, in which case the warship shall do so immediately. Customary international law requires that the coastal nation normally take steps short of force to prevent non-innocent passage.

relating to the safety of navigation.[28] Innocent passage does *not* include a right of overflight.

[28] Territorial Sea Convention, arts. 16(1) & 17; 1982 LOS Convention, arts. 25(1) & 21(4). For example, a coastal or island nation may prescribe rules as to the showing of flags and salutes to be rendered by vessels traversing its territorial sea. The normal procedure is for a vessel to fly her national flag when in the territorial sea of another nation.

TABLE ST2-1

NATIONS SPECIFICALLY RECOGNIZING THE RIGHT OF INNOCENT PASSAGE

Cape Verde
Columbia
Costa Rica
Dominica (warships)
Equitorial Guinea
Fiji
France (warships)
Federal Republic of Germany (warships)
Guatemala (warships)
Indonesia
Iraq
Ireland
Italy (warships)
Mauritania
Mexico
Nicaragua (merchant ships)
Nigeria (warships)
Oman
Saint Christopher and Nevis
Senegal
Thailand (warships)
United Kingdom (warships)
Uruguay
USA (warships)
USSR (warships)
Vanuatu

Sources: DoD Maritime Claims Reference Manual; UN LOS Bulletin; UN LOS Convention documents.

2.3.2.2 Permitted Restrictions. For purposes such as resource conservation, environmental protection, and navigational safety, a coastal or island nation may establish certain restrictions upon the right of innocent passage of foreign vessels. Such restrictions upon the right of innocent passage through the territorial sea are not prohibited by international law, provided that they are reasonable and necessary; do not have the practical effect of denying or impairing the right of innocent passage; and do not discriminate in form or in fact against the ships of any nation or those carrying cargoes to, from, or on behalf of any nation. The coastal or island nation may, where navigational safety dictates, require foreign ships exercising the right of innocent passage to utilize designated sea lanes and traffic separation schemes.[29]

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[29] **1982 LOS Convention, art. 21. Tankers, nuclear powered vessels, and ships carrying dangerous or noxious substances may be required, for safety reasons, to utilize designated sea lanes. 1982 LOS Convention, art. 22(2). These controls may be exercised at any time.**

Article 21 of the 1982 LOS Convention empowers a coastal or island nation to adopt, with due publicity, laws and regulations relating to innocent passage through the territorial sea in respect of all or any of the following eight subject areas (which do not include security):

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

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

3. The protection of cables and pipelines.

4. The conservation of living resources of the sea.

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

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

7. Marine scientific research and hydrographic surveys.

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

This list is exhaustive and exclusive.

(continued...)

2.3.2.3 Temporary Suspension of Innocent Passage. A coastal or island nation may suspend innocent passage temporarily in specified areas of its territorial sea, when it is essential for the protection of its security. Such a suspension must be preceded by a published notice to the international community and may not discriminate in form or in fact among foreign ships.[30]

2.3.2.4 Warships and Innocent Passage. All warships, including submarines, enjoy the right of innocent passage on an unimpeded and unannounced basis.[31] Submarines, however, are

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

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

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

The Conventions do not define how large an area of territorial sea may be temporarily closed off; nations claiming a territorial sea in excess of 12 NM may purport to close areas beyond 12 NM in such a suspension, in violation of the Conventions' limits on the maximum breadth of the territorial sea. The Conventions also do not explain what is meant by "protection of its security" beyond the example of "weapons exercises" added in the 1982 LOS Convention, an addition not made to the provisions regarding archipelagic waters in article 52(2) of the 1982 LOS Convention. Further, how long "temporarily" may be is not defined, but it clearly may not be factually permanent. Alexander, Navigational Restrictions 39-40; McDougal & Burke 592-93. The prohibition against "discrimination in form or fact among foreign ships" clearly refers to discrimination among flag nations, and, in the view of the United States, to direct and indirect discrimination on the basis of cargo or propulsion. This position is strengthened by the provisions of the LOS Convention explicitly dealing with nuclear-powered and nuclear-capable ships (articles 22(2) & 23).

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

[31] Territorial Sea Convention, art. 14(1); 1982 LOS Convention, art. 17. Some nations view the mere passage of foreign warships through their territorial sea *per se* prejudicial (e.g., because of the military character of the vessel, the flag it is flying, its nuclear propulsion or weapons, or its destination), and insist on prior notice and/or authorization before foreign warships transit their territorial sea. See the list of nations at Table ST2-2.
(continued...)

required to navigate on the surface and to show their flag when passing through foreign territorial seas.[32] If a warship does not comply with coastal or island nation regulations that conform to established principles of international law and disregards a request for compliance which is made to it, the coastal or island nation may require the warship immediately to leave the territorial sea.[33]

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[31](...continued)
The United States' position, consistent with the *travaux preparatoires* of the Territorial Sea Convention and the 1982 LOS Convention, is that warships possess the same right of innocent surface passage as any other vessel in the territorial sea, and that right cannot be conditioned on prior coastal or island nation notice or authorization for passage. Oxman, note 2 above, at 854; Froman, note 26 above, at 625; Harlow, Legal Aspects of Claims to Jurisdiction in Coastal Waters, JAG J., Dec. 1969-Jan. 1970, at 86; Walker, What is Innocent Passage? Nav. War C. Rev., Jan. 1969, at 53 & 63, reprinted in 1 Lillich & Moore, Readings in International Law from the Naval War College Review 1947-1977, at 365 & 375 (U.S. Naval War College, International Law Studies, v.61, 1980). For the ambiguous Soviet views, see Franckx, The U.S.S.R. Position on the Innocent Passage of Warships Through Foreign Territorial Waters, 18 J. Mar. L. & Com. 33 (1987), and Butler, Innocent Passage and the 1982 Convention: The Influence of Soviet Law and Policy, 81 Am. J. Int'l L. 331 (1987). Attempts to require prior authorization or notification of vessels in innocent passage during the Third LOS Conference were focused on warships. All attempts were defeated: 3d session, Geneva 1975; 4th session, New York 1976, 9th session, New York 1980; 10th session 1981; 11th session, New York 1982; and 11th resumed session, Montego Bay 1982. The United States views on innocent passage in the territorial sea were set forth in its 8 March 1983 statement in right of reply, 17 LOS Documents 243-44, Annex AS1-2.

[32] Unless the coastal or island nation has consented to submerged passage, which none have done publicly to date (May 1989). Territorial Sea Convention, art. 14(6); 1982 LOS Convention, art. 20. For discussions of the incident in which the Soviet Whiskey-class submarine U-137 grounded outside the Swedish naval base of Karlskrona, after having entered Swedish internal waters submerged without Swedish permission, see Sweden and the Soviet Submarine--A Diary of Events, 112 Army Q. & Def. J. 6 (1982); Leitenberg, Soviet Submarine Operations in Swedish Waters 1980-1986 (1987); Bildt, Sweden and the Soviet Submarines, Survival, Summer 1983, at 168; Lofgren, Soviet Submarines Against Sweden, Strategic Review, Winter 1984, at 36; Delupis, Foreign Warships and Immunity for Espionage, 78 Am. J. Int'l L. 53 (1984); Amundsen, Soviet Submarines in Scandanavian Waters, The Washington Quarterly, Summer 1985, at 111.

[33] Territorial Sea Convention, art. 23; 1982 LOS Convention, art. 30. A warship required to leave for such conduct shall comply with the request to leave the territorial sea immediately.

Under article 23 of the 1982 LOS Convention, foreign nuclear-powered ships, and ships carrying nuclear or other inherently dangerous or noxious substances, exercising the right of innocent passage must "carry documents and observe special precautionary measures
(continued...)

[33](...continued)
established for such ships by international agreements," such as chapter VIII of the 1974 International Convention for the Safety of Life at Sea, 32 U.S.T. 275-77, 287-91, T.I.A.S. No. 9700 (nuclear passenger ship and nuclear cargo ship safety certificates). These provisions of the 1974 SOLAS are specifically *not* applicable to warships.

TABLE ST2-2

NATIONS CLAIMING A RIGHT TO CONTROL ENTRY OF WARSHIPS INTO OWN TERRITORIAL SEAS

(by prior authorization or permission, prior notice, or limitations on numbers present at any one time)

Albania
Algeria
Antigua and Barbuda
Bangladesh
Barbados
Brazil
Bulgaria
Burma
Cambodia (contiguous zone only)
Cape Verde
China
Denmark
Djibouti (nuclear powered and nuclear weapons)
Egypt
Finland
German Democratic Republic
Grenada
Guyana
India
Iran
North Korea
South Korea
Lebanon
Libya
Maldives
Malta
Mauritius
Netherlands (Western Schelde only)
Nicaragua
Norway
Pakistan
Poland
Romania
Seychelles
Somalia
Sri Lanka
Sudan
Sweden (except in Oresund)
Syria
Vietnam
Yemen (YAR)
Yemen (PDRY)
Yugoslavia

Source: DOD Maritime Claims Reference Manual, June 1987 and September 1988 draft change 1.

2.3.2.5 **Assistance Entry.** All ship and aircraft commanders have an obligation to assist those in danger of being lost at sea. This long recognized duty of mariners permits assistance entry into the territorial sea by ships or under certain circumstances aircraft without permission of the coastal or island nation to engage in *bona fide* efforts to render emergency assistance to those in danger or distress at sea. This right applies only when the location of the danger or distress is reasonably well known. It does not extend to entering the territorial sea or airspace to conduct a search.[34]

2.3.3 **International Straits**

2.3.3.1 **International Straits Overlapped by Territorial Seas.**[35] Straits used for international navigation through the territorial sea between one part of the the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone are subject to the legal regime of *transit passage*.[36]

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[34] COMDTINST 16100.3, Search and Rescue in Foreign Territory and Territorial Seas, 3 December 1987; National Search and Rescue Manual, vol. I: National Search and Rescue System, NWP 19/COMDT M16120.5/FM 20-150/AFM 64-2, para. 1220B (1986). The U.S. Department of State is of the view that the right of assistance entry for aircraft is not as fully developed as that for vessels. The efforts to render emergency assistance must be undertaken in good faith and not as a subterfuge. See Annex AS2-1, and paragraph 3.2.1 (regarding assistance to persons, ships and aircraft in distress at sea).

[35] Under the 1958 Territorial Sea Convention, international straits overlapped by territorial seas were subject to a regime providing only *nonsuspendable* innocent surface passage. Territorial Sea Convention, arts. 14 & 16(4). Transit passage also applies in those straits where the high seas or exclusive economic zone corridor is not suitable for international navigation. See 1982 LOS Convention, art. 36.

[36] 1982 LOS Convention, art. 37. The United States' view regarding the status of the transit passage regime as existing law is reflected in its 3 March 1983 statement in right of reply, 17 LOS Documents 244, Annex AS1-2, and Presidential Proclamation 5928, Annex AS1-4. The right of transit passage was fully recognized in article 4 of the Treaty of Delimitation between Venezuela and the Netherlands, 21 March 1978, an English translation of which is set out in Annex 2 to U.S. Dep't of State, Limit in the Seas No. 105, Maritime Delimitations. Although the term "transit passage" was not used in the statement in connection with extension of Great Britain's territorial sea to 12 NM, apparently to preclude any implication of incorporation by reference of the entire straits regime, 37 Int'l & Comp. L.Q. 415 (1988), the "transit passage" regime was used in a Declaration issued by France and Great Britain setting out the governing regime of navigation in the Dover Straits in conjunction with signature on 2 November 1988 of an Agreement establishing a territorial sea boundary in the Straits of Dover. UK White Paper, France No. 1, Cm. 557 (1989); FCO Press Release No. 100, 2 Nov. 1988.

(continued...)

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

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

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

   For the United Kingdom, these include the Straits of Dover, the North Channel between Scotland and Northern Ireland, and the Fair Isle Gap between the Shetlands and Orkneys, 484 H.L. Hansard, col. 382, 5 Feb. 1987.

2. Straits connecting a part of the high seas/EEZ and the territorial sea of a foreign nation (art. 45.1(a), regulated by nonsuspendable innocent passage, see paragraph 2.3.3.1 last subparagraph).

3. Straits connecting one part of the high seas/EEZ and another part of the high seas/EEZ where the strait is formed by an island of a nation bordering the strait and its mainland, if there exists seaward of the island a route through the high seas/EEZ of similar convenience with regard to navigation and hydrographical characteristics (art. 38(1), regulated by nonsuspendable innocent passage). (Annex AS2-8 lists 22 such straits, including the Strait of Messina. Difficulties in defining "mainland" and alternate routes are discussed in Alexander, Navigational Restrictions 157-61.)

   Other United Kingdom straits used for international navigation, such as the Pentland Firth south of Orkney and the passage between the Scilly Isles and the mainland of Cornwall, are considered subject to the regime of (nonsuspendable) innocent passage. 484 H.L. Hansard, col. 382, 5 Feb. 1987.

(continued...)

[36](...continued)

4. Straits regulated in whole or in part by international conventions (art. 35(c)). The 1982 LOS Convention does not alter the legal regime in straits regulated by long-standing international conventions in force specifically relating to such straits. Such straits include:

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

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

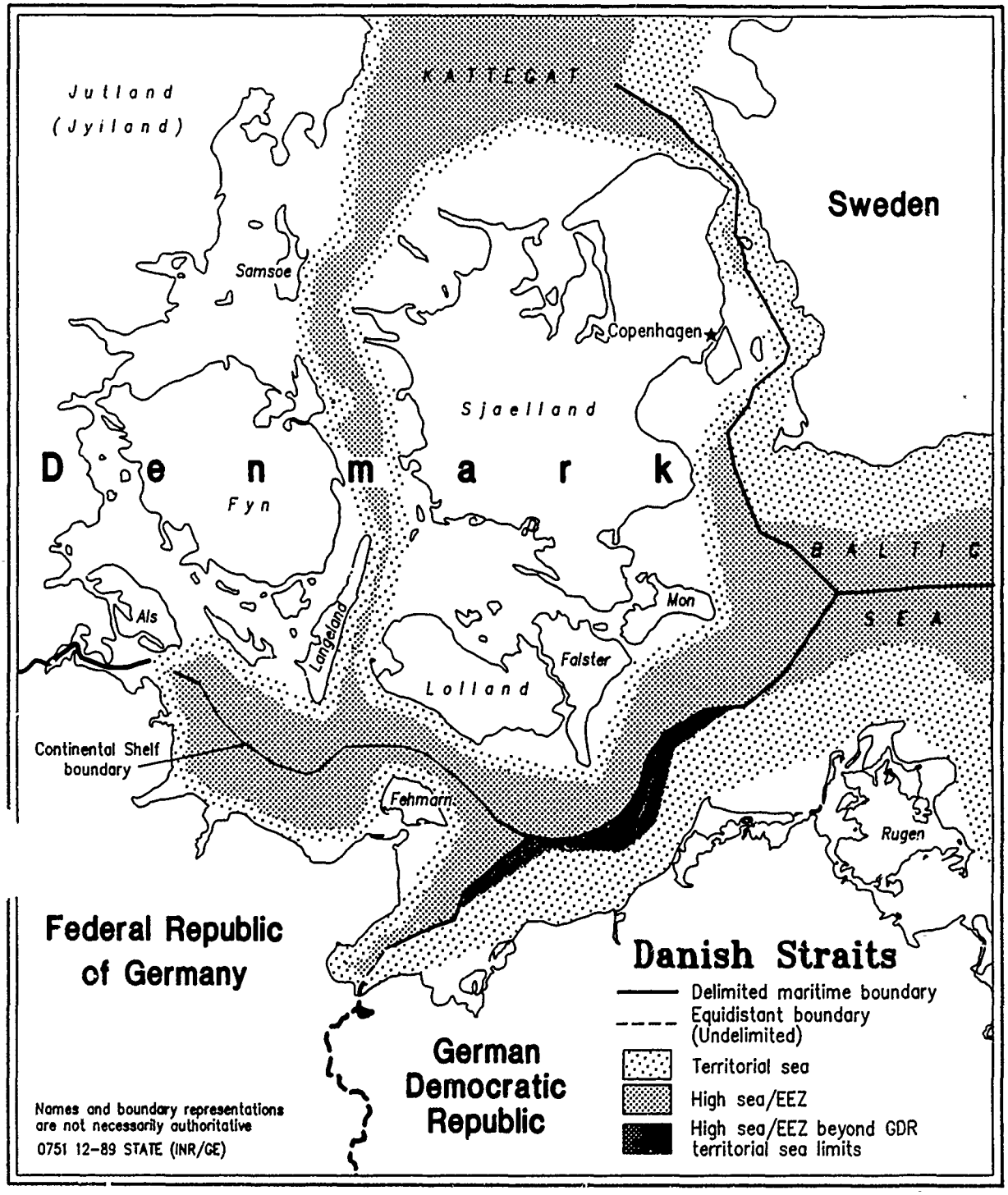
See Annex AS2-5 and Alexander, Navigational Restrictions 140-50. Alexander also lists in this category *The Oresund and Shore Baelt*, governed by the Treaty for the Redemption of the Sound Dues, Copenhagen, 14 March 1857, 116 Perry's T.S. 357, 47 Brit. Foreign & State Papers 24, granting free passage of the Sound and Belts for all flags on 1 April 1857, and the U.S.-Danish Convention on Discontinuance of Sound Dues, 11 April 1857, 11 Stat. 719, T.S. 67, 7 Miller 519, 7 Bevans 11, guaranteeing "the free and unencumbered navigation of American vessels, through the Sound and the Belts forever" (see Figure SF2-2). However, since warships had never been subject to payment of the so-called "Sound Dues," no part of these "long- standing international conventions" which are still in force were or are applicable to them. 7 Miller 524-86. Rather, it is the U.S. view that warships traverse the Oresund and Shore Baelt under rights of customary international law. The Danish view is, however, to the contrary. Alexandersson, The Baltic Straits 82-86 & 89 (1982).

Sweden and Finland claim *Aland's Hav*, the 16 NM wide entrance to the Gulf of Bothnia, as an exception to the transit passage regime, since passage in that strait is regulated in part by the Convention relating to the Non-fortification and Neutralization of the Aaland Island, Geneva, 20 Oct. 1921, 9 L.N.T.S. 211, art. 5 ("The prohibition to send warships into [the waters of the Aaland Islands] or to station them there shall not prejudice the freedom of innocent passage through the territorial waters. Such passage shall continue to be governed by the international rules and useage in force.") Declarations on signature of the 1982 LOS Convention, 10 December 1982.

It may be noted that free passage of the *Strait of Gibralter* was agreed to in a series of agreements between France, Spain and Great Britain in the early 20th Century. Article VII of the Declaration between the United Kingdom and France respecting Egypt and

(continued...)

FIGURE SF2-2


Jutland
(Jyiland)
KATTEGAT
Sweden
Samsoe
Copenhagen
Sjaelland
D e n m a r k
Fyn
BALTIC
SEA
Als
Langeland
Mon
Falster
Lolland
Continental Shelf
boundary
Fehmarn
Rugen
Federal Republic
of Germany
German
Democratic
Republic
Danish Straits
Delimited maritime boundary
Equidistant boundary
(Undelimited)
Territorial sea
High sea/EEZ
High sea/EEZ beyond GDR
territorial sea limits
Names and boundary representations
are not necessarily authoritative
0751 12-89 STATE (INR/GE)

[36](...continued)
Morocco, London, 8 April 1904, 195 Parry's T.S. 198, acceded to by Spain in the Declaration of Paris, 3 Oct. 1904, 196 Parry's T.S. 353; Declarations on Entente on Mediterranean Affairs, Paris, 16 May 1907, 204 Parry's T.S. 176 (France and Spain) and London, 16 May 1907, 204 Parry's T.S. 179 (United Kingdom and Spain); and article 6 of the France-Spain Convention concerning Morocco, Madrid, 27 Nov. 1912, 217 Parry's T.S. 288.

5. Straits through archipelagic waters governed by archipelagic sea lanes passage (art. 53(4), see paragraph 2.3.4.1 below) for nations claiming the status of archipelagic states in accordance with the 1982 LOS Conventions (see Table ST1-7).

There are a number of straits connecting the high seas/EEZ with claimed historic waters (see Annex AS2-10(2)). The validity of those claims is, at best, most uncertain (see paragraph 1.3.3.1 above). The regime of passage through such straits is discussed in Alexander, Navigational Restrictions 155.

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

- the *Panama* Canal, governed by the 1977 Panama Canal Treaty, 33 U.S.T. 1, T.I.A.S. No. 10,029, AFP 110-20 chap. 31 ("in time of peace and in time of war it shall remain secure and open to peaceful transit by the vessels of all nations on terms of entire equality . . . . Vessels of war and auxiliary vessels of all nations shall at all times be entitled to transit the Canal, irrespective of their internal operation, means of propuision, origin, destination or armament");

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

- the *Kiel* Canal, governed by article 380 of the Treaty of Versailles, 28 June 1919, T.S. 4, 13 Am. J. Int'l L. 128, Malloy 3329, 2 Bevans 43, 225 Perry's T.S. 188 ("the Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality"). The Federal Republic of Germany does not consider the Treaty of
(continued...)

Under international law, the ships and aircraft of all nations, including warships and military aircraft, enjoy the right of unimpeded transit passage through such straits.[37] Transit passage is defined as the exercise of the freedoms of navigation and overflight solely for the purpose of continuous and expeditious transit in the normal modes of operation utilized by ships and aircraft for such passage.[38] This means that submarines are free to transit international straits submerged, since that is their normal mode of operation, and that surface warships may transit in a manner consistent with sound navigational practices and the security of the force, including formation steaming and the launching and recovery of aircraft. All transiting ships and aircraft must proceed without delay; must refrain from the threat or the use of force against the sovereignty, territorial integrity, or political independence of nations bordering the strait; and must otherwise refrain from any activities other than those incident to their normal modes of continuous and expeditious transit.[39]

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[36](...continued)
Versailles to apply to the Kiel Canal. Alexander, Navigational Restrictions 181.

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

[37] This regime applies to the entire length and breadth of international straits less than 24 NM in breadth overlapped by territorial sea claims, not governed by a special Montreux-type convention, and not qualifying as an island-mainland or "dead-end" strait. See Alexander, Navigational Restrictions 143-44. The great majority of strategically important straits, i.e., Gibralter, Bab el Mandeb, Hormuz, and Malacca fall into this category. Transit passage regime also applies to those straits less than six miles wide previously subject to the regime of nonsuspendable innocent passage under the Territorial Sea Convention, i.e., Singapore and Sundra. See Annex AS2-4 and Figures SF2-3, SF2-4 and SF2-5. It should be noted that transit passage exists throughout the entire strait and not just the area overlapped by the territorial seas of the littoral nation(s). Navy JAG message 061630Z JUN 88. See, e.g., Figure SF2-4.

[38] 1982 LOS Convention, arts. 38(2) & 39(1)(c); Moore, The Regime of Straits and The Third United Nations Conference on the Law of the Sea, 74 Am. J. Int'l L. 77, 95-102 (1980); 1 O'Connell 331-37. Compare article 53(3) which defines the parallel concept of archipelagic sea lanes passage as "the exercise . . . of the rights of navigation and overflight *in the normal mode* solely for the purpose of continuous, expeditious and unobstructed transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone." The emphasized words do not appear in article 38(2), but rather in the plural in article 39(1)(c); article 39 also applies *mutatis mutandis* to archipelagic sea lanes passage.

[39] 1982 LOS Convention, art. 39(1).

FIGURE SF2-3

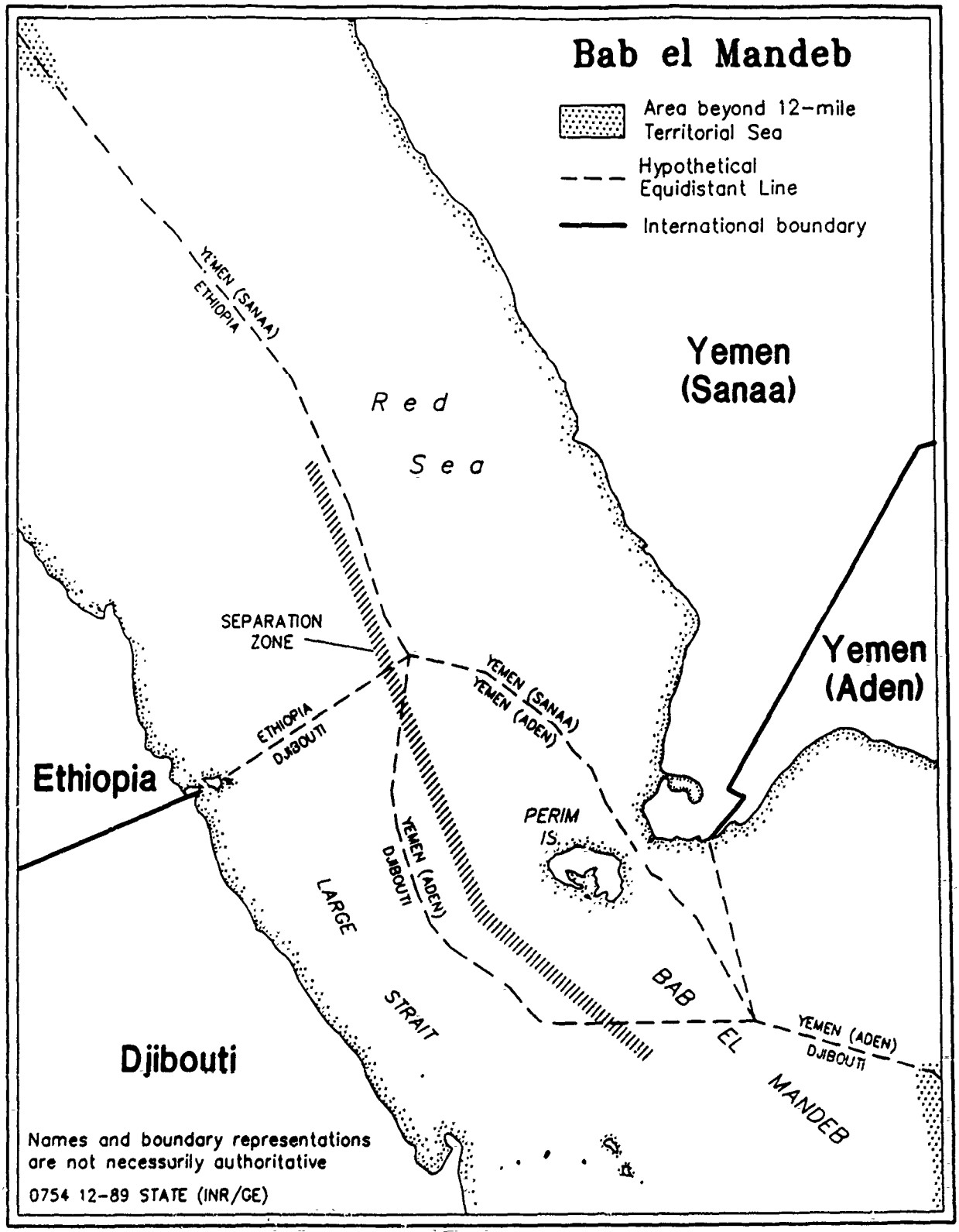

Bab el Mandeb
Area beyond 12-mile Territorial Sea
Hypothetical Equidistant Line
International boundary
YEMEN (SANAA) / ETHIOPIA
Red Sea
Yemen (Sanaa)
SEPARATION ZONE
YEMEN (SANAA) / YEMEN (ADEN)
Yemen (Aden)
ETHIOPIA / DJIBOUTI
Ethiopia
PERIM IS.
YEMEN (ADEN) / DJIBOUTI
LARGE STRAIT
BAB EL MANDEB
YEMEN (ADEN) / DJIBOUTI
Djibouti
Names and boundary representations are not necessarily authoritative
0754 12-89 STATE (INR/GE)

FIGURE SF2-4

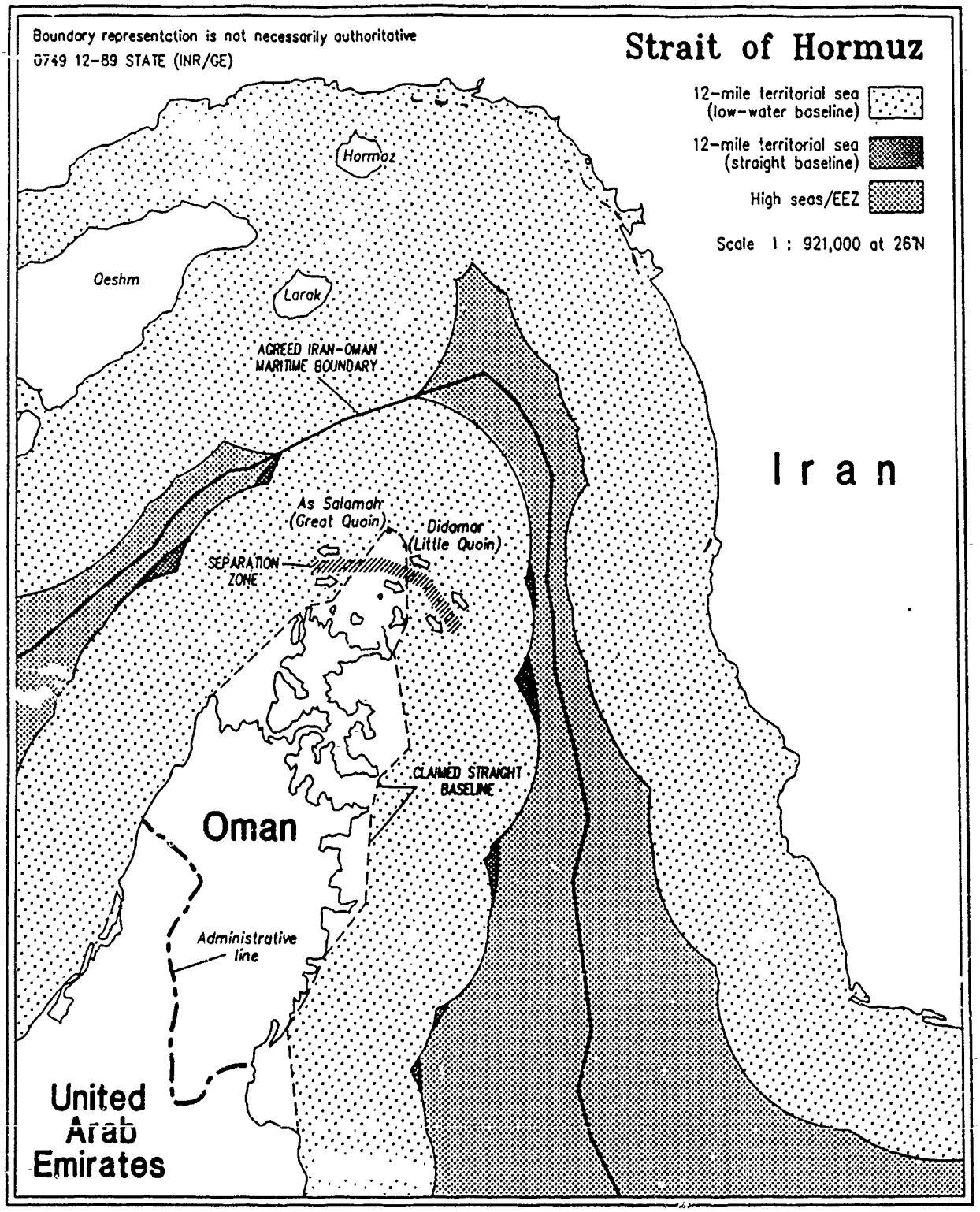
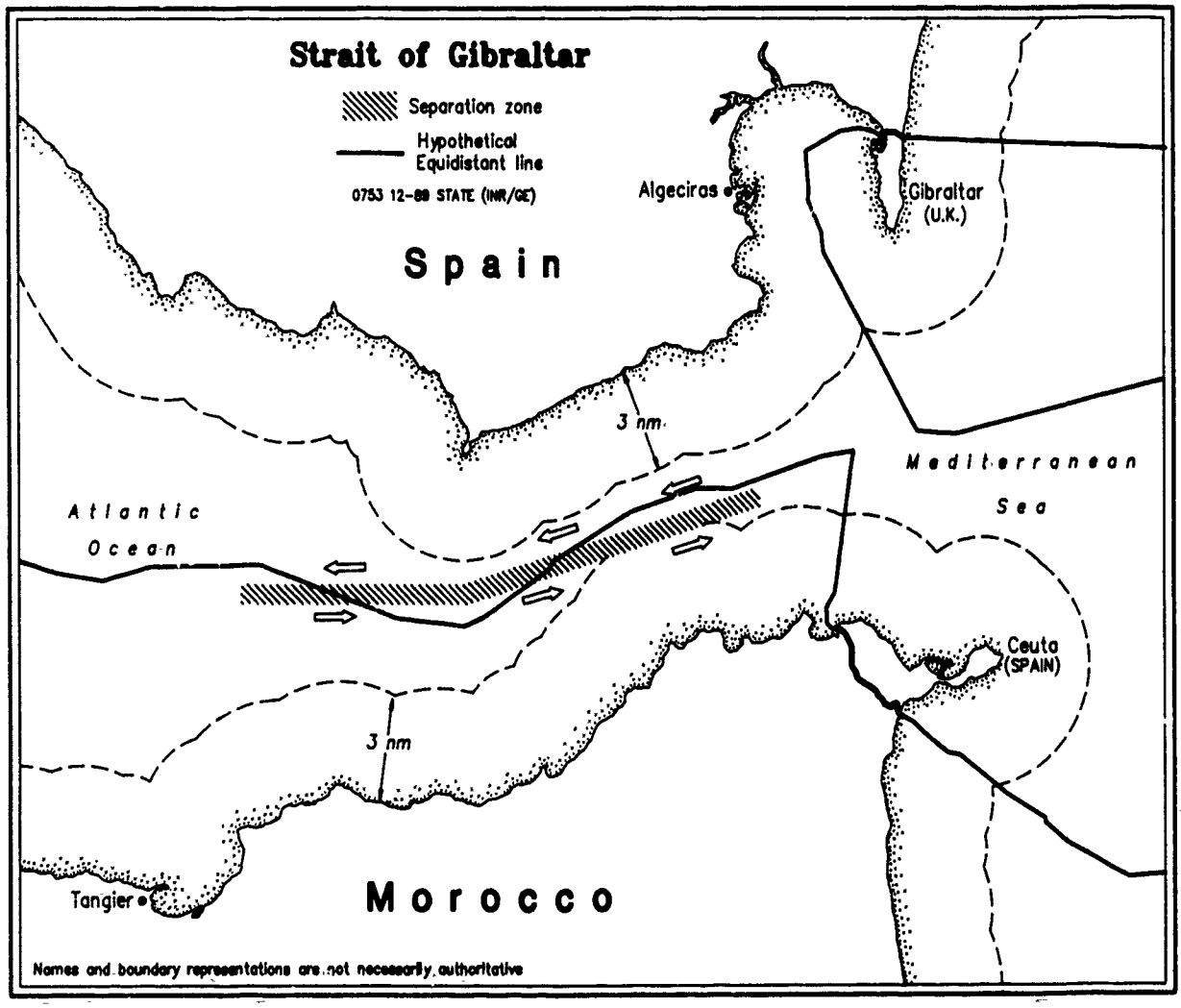

Boundary representation is not necessarily authoritative
0749 12-89 STATE (INR/GE)
Strait of Hormuz
12-mile territorial sea (low-water baseline)
12-mile territorial sea (straight baseline)
High seas/EEZ
Scale 1 : 921,000 at 26°N
Hormoz
Qeshm
Larak
AGREED IRAN-OMAN MARITIME BOUNDARY
Iran
As Salamah (Great Quoin)
Didamar (Little Quoin)
SEPARATION ZONE
CLAIMED STRAIGHT BASELINE
Oman
Administrative line
United Arab Emirates

FIGURE SF2-5


Strait of Gibraltar
Separation zone
Hypothetical Equidistant line
0753 12-88 STATE (INR/GE)
Spain
Algeciras
Gibraltar (U.K.)
3 nm
Mediterranean Sea
Atlantic Ocean
Ceuta (SPAIN)
3 nm
Tangier
Morocco
Names and boundary representations are not necessarily authoritative

Transit passage through international straits cannot be suspended by the coastal or island nation for any purpose during peacetime. This principle of international law also applies to transiting ships (including warships) of nations at peace with the bordering coastal or island nation but involved in armed conflict with another nation.[40]

Coastal or island nations bordering international straits overlapped by territorial seas may designate sea lanes and prescribe traffic separation schemes to promote navigational safety. However, such sea lanes and separation schemes must be approved by the competent international organization in accordance with generally accepted international standards. Ships in transit must respect properly designated sea lanes and traffic separation schemes.[41]

The regime of *innocent passage* (see paragraph 2.3.2.1), rather than transit passage, applies in straits used for international navigation that connect a part of the high seas or an exclusive economic zone with the territorial sea of a coastal or island nation. There may be no suspension of innocent passage through such straits.[42]

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[40] **1982 LOS Convention, art. 44. Warships and other targetable vessels of nations in armed conflict with the bordering coastal or island nation may be attacked within that portion of the international strait overlapped by the territorial sea of the belligerent coastal or island nation, as in all high seas areas of the strait.**

[41] **1982 LOS Convention, arts. 41(1) & 41(3). Traffic separation schemes have been adopted for the Bab el Mandeb (Figure SF2-3), Hormuz (Figure SF2-4), Gibralter (Figure SF2-5), and Malacca-Singapore straits.**

[42] **1982 LOS Convention, art. 45. These so-called "dead-end" straits include the Strait of Tiran, Head Harbour Passage, Bahrain-Saudi Arabia Passage, the Strait of Georgia, and the Gulf of Honduras. Moore, The Regime of Straits and the Third United Nations Conference on the Law of the Sea, 74 Am. J. Int'l L. 112 (1980). Alexander, Navigational Restrictions 154-55 & 186 n.46, asserts the Strait of Juan de Fuca, which is capable of shallow water passage, would belong in this list when the U.S. claims a 12 NM territorial sea.**

The Strait of Tiran is also governed by the Treaty of Peace between Egypt and Israel, 26 March 1979, 18 Int'l Leg. Mat'ls 362, art. V(2) ("the Parties consider the Strait of Tiran and the Gulf of Aqaba to be international waterways open to all nations for unimpeded and non-suspendable freedom of navigation and overflight"). See the list at Annex AS2-10(1). Israel did not object to Part III of the LOS Convention "to the extent that particular stipulations and understandings for a passage regime for specific straits, giving broader rights to their users, are protected, as is the case for some of the straits in my country's region, or of interest to my country." 17 LOS Official Records 84, para. 19. Egypt's declaration accompanying its ratification of the LOS Convention on 26 August 1983 stated "[t]he provisions of the 1979 Peace Treaty Between Egypt and Israel concerning passage though the Strait of Tiran and the Gulf of Aqaba come within the framework of the general

(continued...)

2.3.3.2 International Straits Not Completely Overlapped by Territorial Seas. Ships and aircraft transiting through or above straits used for international navigation which are *not* completely overlapped by territorial seas and through which there is a high seas or exclusive economic zone corridor suitable for such navigation, enjoy the high seas freedoms of navigation and overflight while operating in and over such a corridor. Accordingly, so long as they remain beyond the territorial sea, all ships and aircraft of all nations have the unencumbered right to navigate through and over such waters subject only to due regard for the right of others to do so as well.[43]

2.3.4 Archipelagic Waters

2.3.4.1 Archipelagic Sea Lanes Passage. All ships and aircraft, including warships and military aircraft, enjoy the right of archipelagic sea lane passage while transiting through, under, or over the waters of archipelagos and adjacent territorial seas via designated archipelagic sea lanes.[44] Archipelagic sea lanes include all routes normally used for international navigation and overflight, whether or not designated by the archipelagic nation. Each sea lane is defined by a continuous line from the point of entry into the

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[42](...continued)
regime of waters forming straits referred to in part III of the Convention, wherein it is stipulated that the general regime shall not affect the legal status of waters forming straits and shall include certain obligations with regard to security and the maintenance of order in the State bordering the strait." At a 29 January 1982 press conference, U.S. LOS Ambassador Malone said that "the U.S. fully supports the continuing applicability and force of freedom of navigation and overflight for the Strait of Tiran and the Gulf of Aqaba as set out in the Peace Treaty between Egypt and Israel. In the U.S. view, the Treaty of Peace is fully compatible with the LOS Convention and will continue to prevail. The conclusion of the LOS Convention will not affect these provisions in any way." 128 Cong. Rec. S4089, 27 April 1982. Compare Lapidoth, The Strait of Tiran, the Gulf of Aqaba, and the 1979 Treaty of Peace Between Egypt and Israel, 77 Am. J. Int'l L. 84 (1983) with El Baradei, The Egptian-Israeli Peace Treaty and Access to the Gulf of Aqaba: A New Legal Regime, 76 id. 532 (1982).

[43] **1982 LOS Convention. art. 36. See Annex AS2-4. Annex AS2-6 lists other straits less than 24 NM wide which could have a high seas route if the littoral nations claimed less than a 12 NM territorial sea. While theoretically the regime of transit passage would apply if the corridor is not suitable for passage, Alexander found no such strait. Navigational Restrictions 151-52. Compare, however, the suitability for the passage of deep draft tankers through the waters in the vicinity of Abu Musa Island in the southern Persian Gulf.**

[44] **1982 LOS Convention, art. 53. The United States' views regarding archipelagic sea lanes passage is set forth in its 3 March 1983 statement in right of reply, 17 LOS Documents 244, Annex AS1-2.**

archipelago to the point of exit.[45] Ships and aircraft in archipelagic sea lanes passage are required to remain within 25 nautical miles to either side of the axis line and must approach no closer to the coastline than 10 percent of the distance between the nearest islands. See Figure 2-1. Archipelagic sea lanes passage is defined under international law as the exercise of the freedom of navigation and overflight for the sole purpose of continuous and expeditious transit through archipelagic waters, in the normal modes of operation, by the ships and aircraft involved.[46] This means that submarines may transit while submerged, and that surface warships may carry out those activities normally undertaken during passage through such waters, including activities necessary to their security, such as formation steaming and the launching and recovery of aircraft. The right of archipelagic sea lanes passage cannot be impeded, or suspended by the archipelagic nation for any reason.[47]

2.3.4.2 Innocent Passage. Outside of archipelagic sea lanes, all surface ships, including warships, enjoy the more limited right of innocent passage throughout archipelagic waters just as they do in the territorial sea.[48] Submarines must remain on the surface and fly their national flag. Any threat or use of force directed against the sovereignty, territorial integrity, or political independence of the archipelagic nation is prohibited. Launching and recovery of aircraft are not allowed, nor may weapons exercises be conducted. The archipelagic nation may promulgate and enforce reasonable restrictions on the right of innocent passage through its archipelagic waters for reasons of customs, fiscal, immigration, fishing, pollution, and sanitary purposes.[49] Innocent passage may be suspended temporarily by the archipelagic nation in specified areas of its archipelagic waters when essential for the protection of its security, but it must first promulgate notice of its intentions to do so and must apply the suspension in a nondiscriminating manner.[50] There

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[45] **1982 LOS Convention, arts. 53(4), 53(5) & 53(12). Archipelagic sea lanes must conform to generally accepted international regulations. Id., art. 53(8). None have yet been submitted to IMO, the competent international organization for that purpose. Alexander suggests some sea lanes for Indonesia, Philippines, Fiji, Papua New Guinea, Solomon Islands, Trinidad and Tobago, and Cape Verde Islands. No important navigation routes traverse Sao Tome and Principe. Navigational Restrictions 165-74.**

[46] **1982 LOS Convention, art. 53(3).**

[47] **1982 LOS Convention, arts. 54 & 44.**

[48] **1982 LOS Convention, art. 52(1).**

[49] **1982 LOS Convention, arts. 52(1), 19(2), 20 & 21.**

[50] **1982 LOS Convention, art. 52(2).**

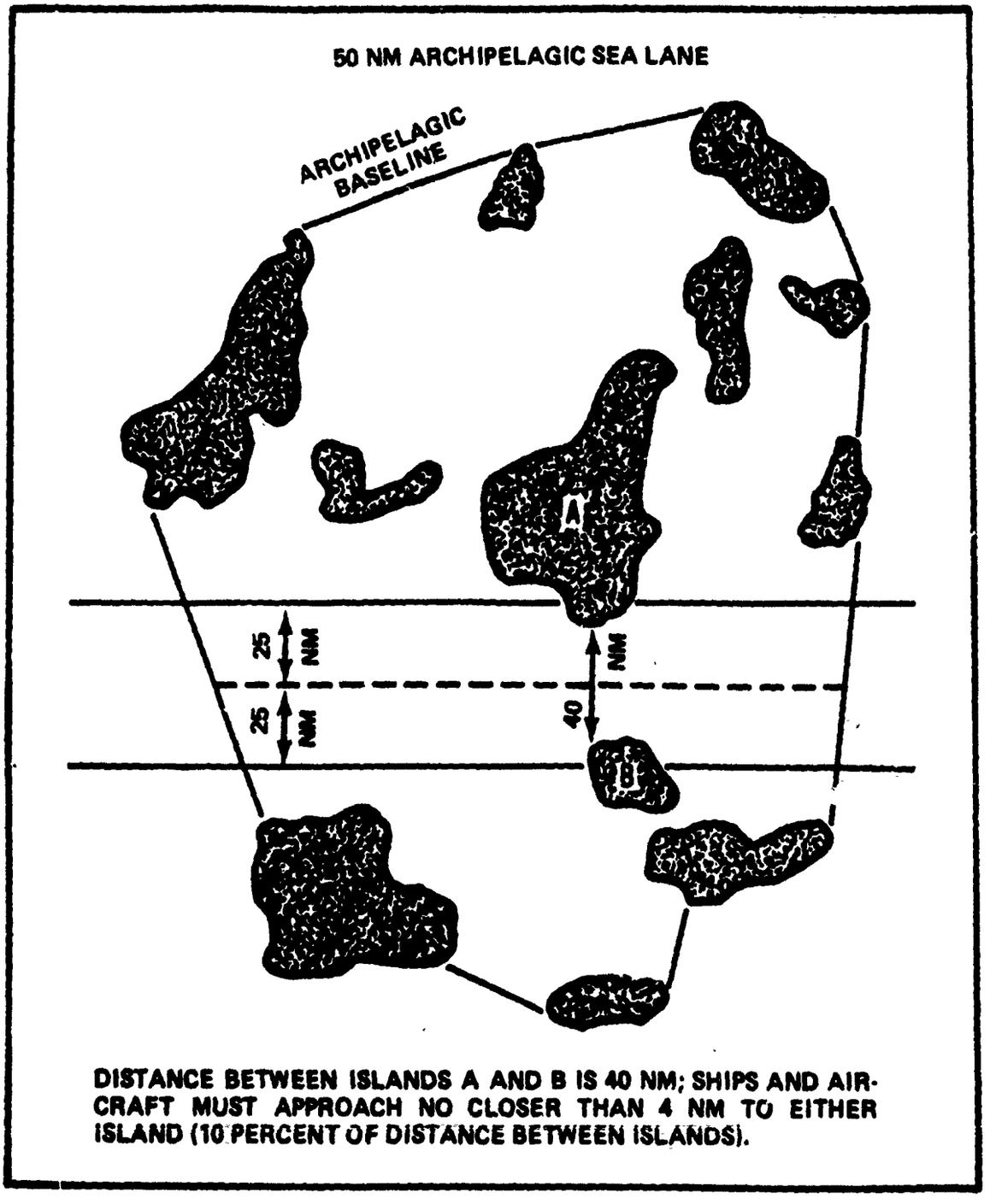

Figure 2-1. Archipelagic Sea Lanes

is no right of overflight through airspace over archipelagic waters outside of archipelagic sea lanes.[51]

2.4 NAVIGATION IN AND OVERFLIGHT OF INTERNATIONAL WATERS

2.4.1 The Contiguous Zone. The contiguous zone is comprised of international waters in and over which the ships and aircraft, including warships and military aircraft, of all nations enjoy the high seas freedoms of navigation and overflight as described in paragraph 2.4.3. Although the coastal or island nation may exercise in those waters the control necessary to prevent and punish infringement of its customs, fiscal, immigration, and sanitary laws that may occur within its territory (including its territorial sea), it cannot otherwise interfere with international navigation and overflight in and above the contiguous zone.[52]

2.4.2 The Exclusive Economic Zone. The coastal or island nation's jurisdiction and control over the exclusive economic zone are limited to matters concerning the exploration, exploitation, management, and conservation of the resources of those international waters. The coastal or island nation may also exercise in the zone jurisdiction over the establishment and use of artificial islands, installations, and structures having economic purposes; over marine scientific research (with reasonable limitations); and over some aspects of marine environmental protection. Accordingly, the coastal or island nation cannot unduly restrict or impede the exercise of the freedoms of navigation in and overflight of the exclusive economic zone. Since all ships and aircraft, including warships and military aircraft, enjoy the high seas freedoms of navigation and overflight and other internationally

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[51] **Straits forming part of an archipelagic sea lane are, *mutatis mutandis*, governed by archipelagic sea lanes passage (paragraph 2.3.4.1), the functional equivalent of transit passage in non-archipelagic international straits. 1982 LOS Convention, art. 54. This right exists regardless of whether the strait connects high seas/EEZ with archipelagic waters (e.g., Lombok Strait) or connects two areas of archipelagic waters with one another (e.g., Wetar Strait). Alexander, Navigational Restrictions 155-56. Although theoretically only the regime of innocent passage exists in straits within archipelagic waters not part of an archipelagic sea lane (paragraph 2.3.4.2; 1982 LOS Convention, art. 52(1); Alexander, Navigational Restrictions 156), since archipelagic sea lanes "shall include all normal passage routes . . . and all normal navigational channels . . ." (article 53(4)), the regime of archipelagic sea lanes passage effectively applies to these straits as well.**

If the archipelagic nation has not claimed archipelagic status, then high seas passage rights exist in straits not overlapped by the territorial seas of the individual islands, transit passage applies in other archipelagic straits overlapped by territorial seas that are susceptible of use for international navigation, and innocent passage applies in straits overlapped by territorial seas that are not susceptible of use for international navigation. Compare U.S. statement in right of reply, 17 LOS Official Records 244, Annex AS1-2.

[52] **Territorial Sea Convention, art. 24; 1982 LOS Convention, art. 33. See paragraph 2.4.4 regarding security zones.**

lawful uses of the sea related to those freedoms, in and over those waters, the existence of an exclusive economic zone in an area of naval operations need not, of itself, be of operational concern to the naval commander.[53]

2.4.3 The High Seas. All ships and aircraft, including warships and military aircraft, enjoy complete freedom of movement and operation on and over the high seas. For warships, this includes task force maneuvering, flight operations, military exercises, surveillance, intelligence gathering activities, and ordnance testing and firing. All nations also enjoy the right to lay submarine cables and pipelines on the bed of the high seas as well as on the continental shelf beyond the territorial sea, with coastal or island nation nation approval for the course of pipelines on the continental shelf.[54] All of these activities must be conducted with due regard for the rights of other nations and the safe conduct and operation of other ships and aircraft.[55]

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[53] 1982 LOS Convention, arts. 56, 58 & 60; see paragraph 1.5.2 note 46 above. A few nations explicitly claim the right to regulate the navigation of foreign vessels in their EEZ beyond that authorized by customary law reflected in the LOS Convention: Brazil, Guyana, India, Maldives, Mauritius, Nigeria, Pakistan and the Seychelles. See Annexes AS2-16 and AS2-17 and Attard, The Exclusive Economic Zone in International Law 51-52, 81 & 85-86 (1987). The United States rejects those claims. U.S. Statement in Right of Reply, 17 LOS Official Records 244, Annex AS1-2, and 1983 Oceans Policy Statement, Annex AS1-3.

[54] Submarine cables include telegraph, telephone and high-voltage power cables. Commentary of the International Law Commission on draft articles 27 and 35 on the law of the sea, UN GAOR Supp. 9, UN Doc. A/3159, II Int'l L. Comm. Y.B. 278 & 281 (1956). All nations enjoy the right to lay submarine cables and pipelines on the bed of the high seas as well as on the continental shelves of their own and other nations. Willful or culpably negligent damage to a submarine cable or pipeline, except in legitimate life-saving or ship-saving situations, is a punishable offense under the laws of most nations. In addition, provisions exist for compensation from a cable owner for an anchor, net or other fishing gear sacrificed in order to avoid injuring the cable. Warships may approach and visit a vessel, other than another warship, suspected of causing damage to submarine cables in investigation of such incidents. Convention on the Protection of Submarine Cables, Paris, 14 March 1884, 24 Stat. 989, T.S. No. 380, as amended 25 Stat. 1414, T.S. Nos. 380-1, 380-2, 380-3, 1 Bevans 89, 112 114, reproduced in AFP 110-20 chap. 36; Franklin, The Law of the Sea: Some Recent Developments 157-178 (U.S. Naval War College, International Law Studies 1959-1960, v.53, 1961) (discussing the boarding of the Soviet trawler NOVOROSSIISK by USS ROY O. HALE on 26 February 1959, 40 Dep't St. Bull. 555-58 (1959)). The 1884 Submarine Cables Convention is implemented in 47 U.S.C. sec. 21 et seq. (1982).

[55] High Seas Convention, art. 2; Continental Shelf Convention, art. 4; 1982 LOS Convention, arts. 79 & 87; Chicago Convention, art. 3(d) (military aircraft). The exercise of any of these freedoms is subject to the conditions that they be taken with "reasonable" regard, according to the High Seas Convention, or "due" regard, according to the 1982 LOS

(continued...)

2.4.3.1 Closure or Warning Areas. Any nation may declare a temporary closure or warning area on the high seas to advise other nations of the conduct of activities that, although lawful, are hazardous to navigation and/or overflight. The U.S. and other nations routinely declare such areas for missile testing, gunnery exercises, space vehicle recovery operations, and other purposes entailing some danger to other lawful uses of the high seas by others. Notice of the establishment of such areas must be promulgated in advance, usually in the form of a Notice to Mariners (NOTMAR) and/or a Notice to Airmen (NOTAM). Ships and aircraft of other nations are *not* required to remain outside a declared closure or warning area, but are obliged to refrain from interfering with activities therein. Consequently, U.S. ships and aircraft may operate in a closure area declared by a foreign nation, collect intelligence and observe the activities involved, subject to the requirement of due regard for the rights of the declaring nation to use the high seas for such lawful purposes, as may the ships and aircraft of other nations in a U.S. declared closure area.[56]

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[55](...continued)
Convention, for the interests of other nations in light of all relevant circumstances. The "reasonable regard" or "due regard" standards require any using nation to be cognizant of the interests of others in using a high seas area, and to abstain from nonessential, exclusive uses which substantially interfere with the exercise of other nations' high seas freedoms. Any attempt by a nation to impose its sovereignty on the high seas is prohibited as that ocean space is designated open to use by all nations. High Seas Convention, art. 2; 1982 LOS Convention, arts. 87 & 89. See MacChesney 610-29.

A legislative history of the articles of the 1982 LOS Convention regarding navigation on the high seas (articles 87, 89-94 and 96-98) may be found in UN Office for Oceans Affairs and the Law of the Sea, The Law of the Sea: Navigation on the High Seas, UN Sales No. E.89.V.2 (1989).

[56] **Franklin, note 54 above, at 178-91; SECNAVINST 2110.3 (series), Subj: Special Warnings to Mariners; OPNAVINST 3721.20, Subj: The U.S. Military Notice to Airmen (NOTAM) System.**

For example, in response to the terrorist attacks on U.S. personnel in Lebanon on 18 April and 23 October 1983, involving the use of extraordinarily powerful gas-enhanced explosive devices light enough to be carried in cars and trucks, single engine private aircraft, or small high speed boats, U.S. forces in the Mediterranean off Lebanon and in the Persian Gulf took a series of defensive measures designed to keep unidentified ships and aircraft whose intentions were unknown from closing within lethal range of suicide attack. The effectiveness of such attacks was firmly established by the 23 October 1983 levelling of the USMC BLT 1/8 Headquarters building at Beirut International Airport by such a truck bomb generating the explosive power of at least 12,000 pounds effective yield equivalent of TNT--the largest conventional blast ever seen by the explosive experts community. Report of the DOD Commission on Beirut International Airport Terrorist Act, October 23, 1983 (Long Commission Report), 20 Dec. 1983, at 86; Frank, U.S. Marines in Lebanon
(continued...)

2.4.4 Declared Security and Defense Zones. International law does not recognize the right of any nation to restrict the navigation and overflight of foreign warships and military aircraft beyond its territorial sea. Although several coastal nations, including North Korea and Vietnam, have asserted claims that purport to prohibit warships and military aircraft from operating in so-called security zones extending beyond the territorial sea, such claims have no basis in international law in time of peace, and are not recognized by the United States.[57]

The Charter of the United Nations and general principles of international law recognize that a nation may exercise measures of individual and collective self-defense against an imminent threat of armed attack or an actual attack directed at that nation or at the regional defense organization of which it is a member. Those measures may include the establishment of "defensive sea areas" or "maritime control areas" in which the threatened nation seeks to enforce some degree of control over foreign entry into its territory. Historically, the establishment of such areas extending beyond the territorial sea has been restricted to periods of war or to declared national emergency involving the outbreak of hostilities. International law does not determine the geographic limits of such areas or the degree of control that a coastal or island nation may lawfully exercise over them, beyond laying down the general requirement of reasonableness in relation to the needs of national security and defense.[58]

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[56](...continued)
1982-1984, at 152 (1987); Navy Times, 15 Dec. 1986, at 11.

These warnings were promulgated through Notices to Mariners and Notices to Airmen. They requested unidentified contacts to communicate on the appropriate international distress frequency and reflected NCA authorization of commanders to take the necessary and reasonable steps to prevent further such terrorist attacks on U.S. forces. See 78 Am. J. Int'l L. 884 (1984).

[57] Leiner, Maritime Security Zones: Prohibited Yet Perpetuated, 24 Va. J. Int'l L. 967, 980 & 984-88 (1984). See paragraph 1.5.4 note 53 above. U.S. protest of the "restricted area" established by Libya within 100 NM radius of Tripoli is recorded in 1973 Digest of U.S. Practice in International Law 302-03. See also 1975 id. 451-52 and 1977 id. 636.

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

(continued...)

2.4.5 Polar Regions

2.4.5.1 Arctic Region. The U.S. considers that the waters, ice pack, and airspace of the Arctic region beyond the lawfully claimed territorial seas of littoral nations have international status and are open to navigation by the ships and aircraft of all nations. Although several nations, including Canada and the U.S.S.R., have, at times, attempted to claim sovereignty over the Arctic on the basis of discovery, historic use, contiguity (proximity), or the so-called "sector" theory, those claims are not recognized in international law. Accordingly, all ships and aircraft enjoy the freedoms of high seas navigation and overflight on, over, and under the waters and ice pack of the Arctic region beyond the lawfully claimed territorial sea.[59]

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

Closed Seas and Zones of Peace. **Proposals have been advanced at various times to exclude non-littoral warships from "closed" seas such as the Black Sea or Baltic Sea, where water access is limited, or from the entire Indian Ocean as a designated "zone of peace". These claims have not gained significant legal or political momentum or support and are not recognized by the United States. Soviet views on closed seas are discussed in Darby, The Soviet Doctrine of the Closed Sea, 23 San Diego L. Rev. 685 (1986). See also paragraph 1.3.3.1 note 21 above. The proposed Indian Ocean Zone of Peace is discussed in Alexander, Navigational Restrictions 339-40.**

Nuclear free zones are discussed in paragraph 2.4.6 below.

[59] Arctic operations are described in Allard, To the North Pole!, U.S. Naval Inst. Proc., Sept. 1987, at 56; LeSchack, ComNavForArctic, U.S. Naval Inst. Proc., Sept. 1987, at 74; Atkeson, Fighting Subs Under the Ice, U.S. Naval Inst. Proc., Sept. 1987, at 81; Le Marchand, Under Ice Operations, Nav. War C. Rev., May-June 1985, at 19; and Caldwell, Arctic Submarine Warfare, The Submarine Rev., July 1983, at 5. Alexander, Navigational Restrictions 311-19 & 358-59, notes the following unilateral claims that adversely impact
(continued...)

FIGURE SF2-6

The United States Government has not recognized the incorporation of Estonia, Latvia and Lithuania into the Soviet Union. Other boundary representation is not necessarily authoritative.

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2.4.5.2 Antarctic Region. A number of nations have asserted conflicting and often overlapping claims to portions of Antarctica. These claims are premised variously on discovery, contiguity, occupation and, in some cases, the "sector" theory. The U.S. does not recognize the validity of the claims of other nations to any portion of the Antarctic area.[60]

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[59] (...continued)
on navigational freedoms through Arctic straits:

- The U.S.S.R. claims the White Sea and Cheshskaya Gulf to the east as historic waters, and has delimited a series of straight baselines along its Arctic coast closing off other coastal indentations, as well as joining the coastal islands and island groups with the mainland, thereby purporting to close off the major straits of the Northeast Passage. See Figures SF1-9 and SF2-6, and Franckx, Non-Soviet Shipping in the Northeast Passage, and the Legal Status of Proliv Vil'kitskogo, 24 Polar Record 269 (1988).

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

- Canada purports to close off its entire Arctic archipelago with straight baselines and declares that the waters within the baselines -- including the Northwest Passage -- are internal waters. 24 Int'l Leg. Mat'ls 1728 (1985). See Figures SF1-9 and SF2-7. The United States has not accepted that claim. See the Agreement between the Government of Canada and the Government of the United States of America on Arctic Cooperation, 11 January 1988, 28 Int'l Leg. Mat'ls 142 (1989). The negotiation of this agreement is discussed in Howson, Breaking the Ice: The Canadian-American Dispute over the Arctic's Northwest Passage, 26 Colum. J. Trans. L. 337 (1988). The October 1988 transit by the icebreaker USCGC POLAR STAR pursuant to this agreement is discussed in 83 Am. J. Int'l L. 63 and 28 Int'l Leg. Mat'ls 144-45 (1989). The Canadian claim is discussed in Pullen, What Price Canadian Sovereignty?, U.S. Naval Inst. Proc., Sept. 1987, at 66 (Captain Pullen, Canadian Navy retired, establishes that the Northwest Passage is the sea route that links the Atlantic and the Pacific oceans north of America, and lists the 36 transits of the Passage from 1906 to 1987). See Figure SF2-7A. See also MacInnis, Braving the Northwest Passage, Nat'l Geog., May 1989, at 584-601.

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

[60] Although the United States would be fully justified in asserting a claim to sovereignty over one or more areas of Antarctica on the basis of its extensive and continuous scientific activities there, it has not done so.

FIGURE SF2-7

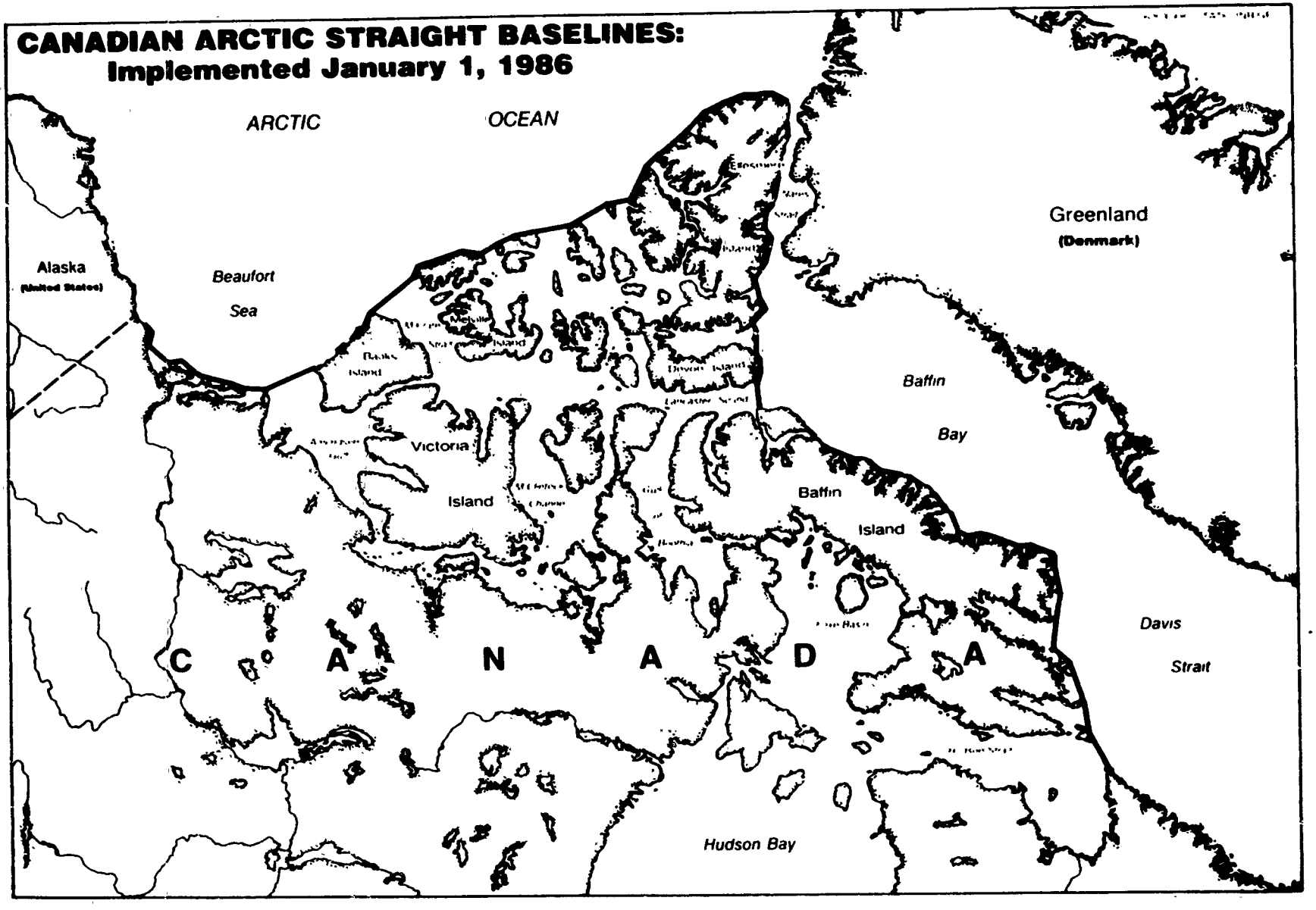
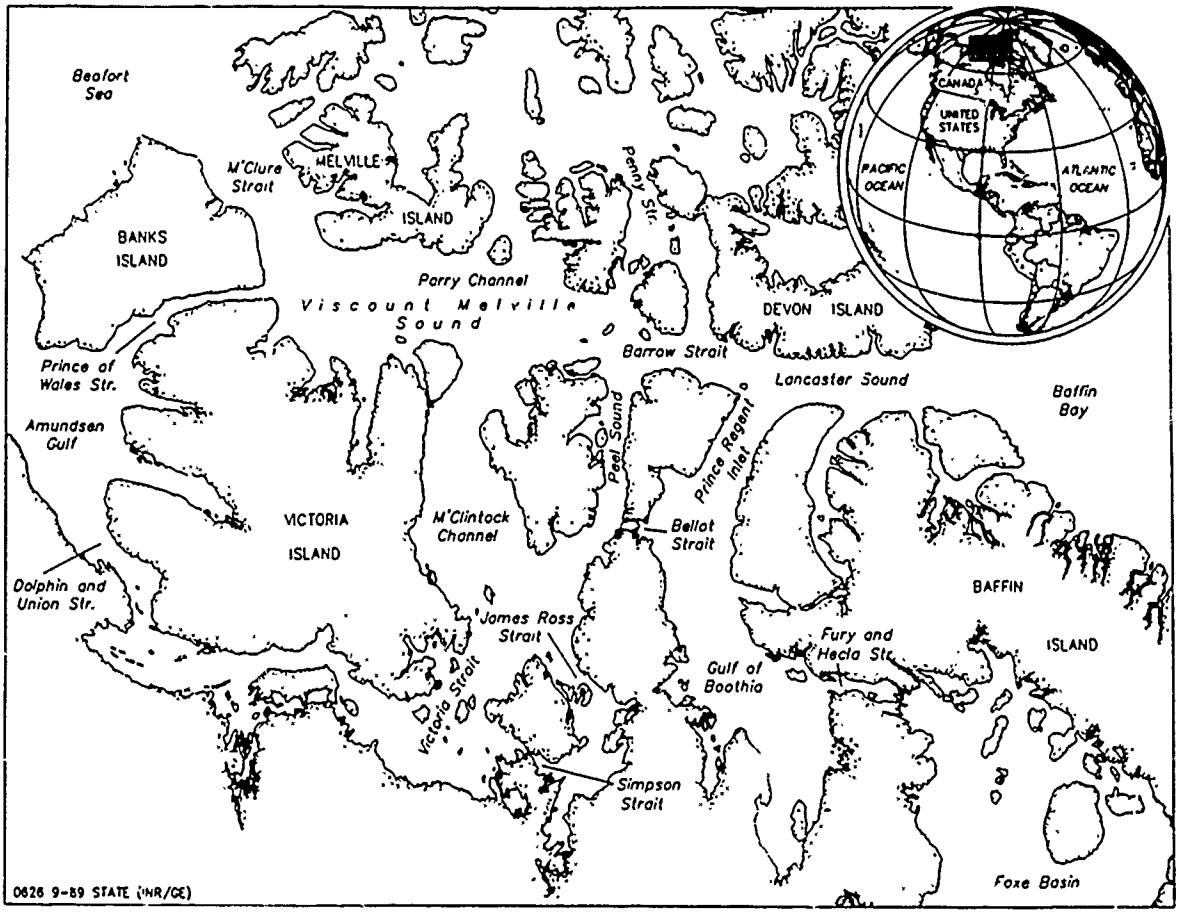

CANADIAN ARCTIC STRAIGHT BASELINES:
Implemented January 1, 1986
ARCTIC
OCEAN
Alaska
(United States)
Beaufort
Sea
Greenland
(Denmark)
Baffin
Bay
Victoria
Island
Baffin
Island
Davis
Strait
C A N A D A
Hudson Bay

FIGURE SF2-7A



Northwest Passage: Alternative Routes Through the Canadian Section (Described from west to east)

Route 1	Parry Channel (Ruling depth 318 feet in Barrow Strait)
Route 2	Parry Channel and Prince of Wales Strait (Ruling depth 105 feet in Prince of Wales)
Route 3	Coastal thence Victoria Strait and Peel Sound (Ruling depth 36 feet in Dolphin and Union Strait)
Route 4	Coastal thence James Ross Strait and Peel Sound (Ruling depth 23 feet in Simpson Strait)
Route 5	Coastal thence Victoria and Bellot Straits and Prince Regent Inlet (Ruling depth 36 feet in Dolphin and Union Strait)
Route 6	Coastal thence James Ross and Bellot Straits and Prince Regent Inlet (Ruling depth 23 feet in Simpson Strait)
Route 7	Coastal thence Victoria, Bellot, Fury, and Hecla straits and Foxe Basin (Ruling depth 36 feet in Dolphin and Union Strait)
Route 8	Coastal thence James Ross, Bellot, Fury and Hecla straits and Foxe Basin (Ruling depth 23 feet in Simpson Strait)

Notes:

Victoria and James Ross straits have yet to be surveyed to modern standards. As of 1984 both are known to have at least 30 feet.

Parry Channel is M'Clure Strait, Viscount Melville Sound, Barrow Strait, and Lancaster Sound.

A surface ship has yet to navigate the Northwest Passage via Route 1.

Source of Table: Pullen, What Price Canadian Sovereignty?, U.S. Naval Institute Proceedings, September 1987, p.68

2.4.5.2.1 The Antarctic Treaty of 1959. The U.S. is a party to the multilateral treaty of 1959 governing Antarctica.[61] Designed to encourage the scientific exploration of the continent and to foster research and experiments in Antarctica without regard to conflicting assertions of territorial sovereignty, the 1959 accord provides that no activity in the area undertaken while the treaty is in force will constitute a basis for asserting, supporting, or denying such claims.[62]

The treaty also provides that Antarctica "shall be used for peaceful purposes only," and that "any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons" shall be prohibited.[63] All stations and installations, and all ships and aircraft at points of discharging or embarking cargo or personnel in Antarctica, are subject to inspection by designated foreign observers.[64] Therefore, classified activities are not conducted by the U.S. in Antarctica, and all classified material is removed from U.S. ships and aircraft prior to visits to the continent.[65] In addition, the treaty prohibits nuclear explosions and disposal of nuclear waste anywhere south of 60° South Latitude.[66] The treaty does not, however, affect in any way the high seas freedoms of navigation and overflight in the Antarctic region. Antarctica has no territorial sea or territorial airspace.

2.4.6 Nuclear Free Zones. The 1968 Nuclear Weapons Non-Proliferation Treaty, to which the United States is a party, acknowledges the right of groups of nations to conclude regional treaties establishing nuclear free zones.[67] Such treaties or their provisions are binding only on parties to them or to protocols incorporating those provisions. To the extent that the rights and freedoms of other nations, including the high seas freedoms of navigation and overflight, are not infringed upon, such treaties are not inconsistent with

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[61] Text in AFP 110-20, chap. 4. Its provisions apply south of 60° South Latitude. See Figure SF2-8.

[62] Article IV.2. See Figure SF2-8.

[63] Article I.1.

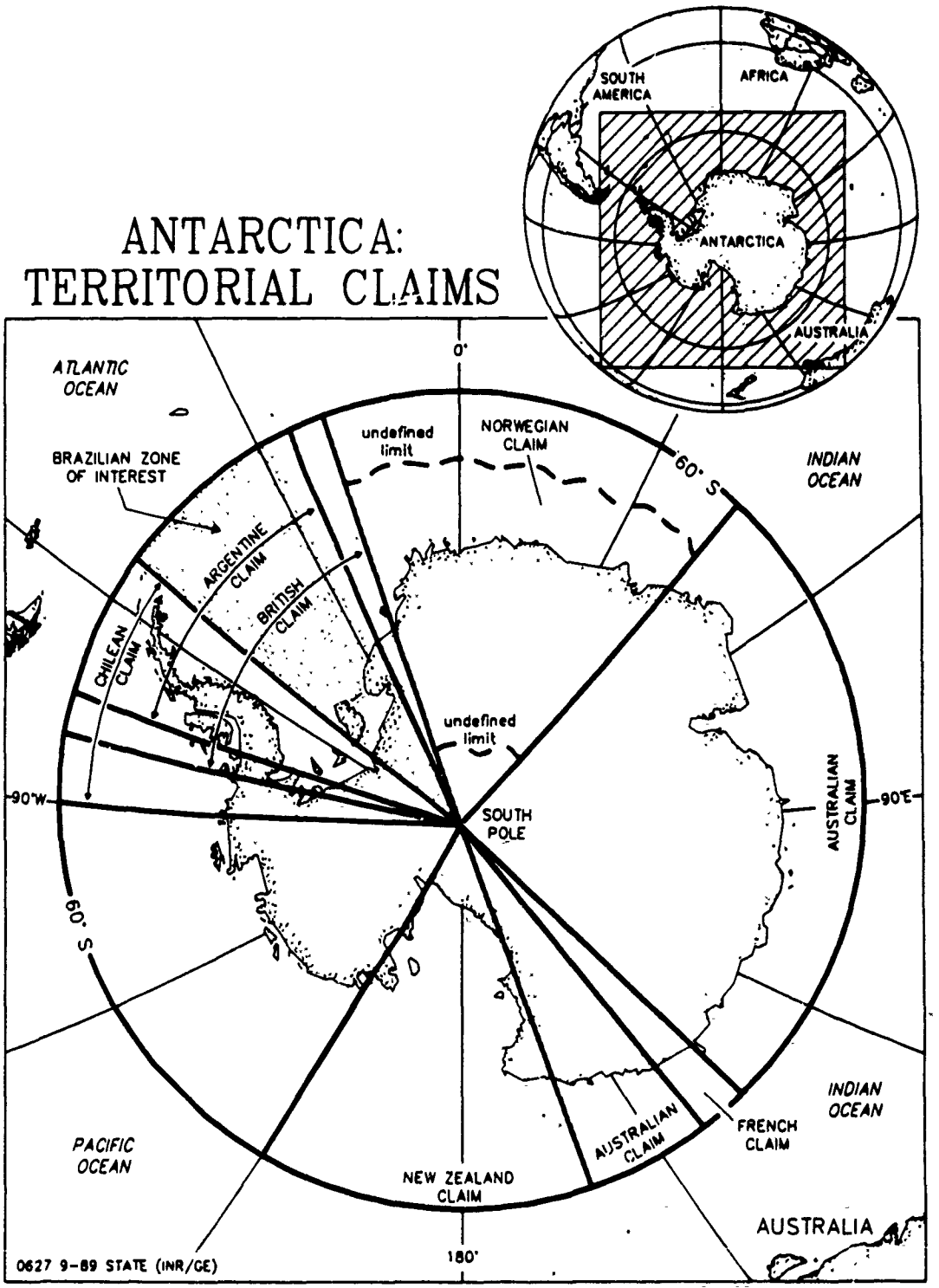
[64] Article VII.3.

[65] For further information and guidance, see DOD Directive 2000.6, Subj: Conduct of Operations in Antarctica, and OPNAVINST 3120.20 (series), Subj: Conduct of Operations in Antarctica.

[66] Article V.

[67] Article VII, text in AFP 110-20, chap. 4.

FIGURE SF2-8


ANTARCTICA:
TERRITORIAL CLAIMS
SOUTH AMERICA
AFRICA
ANTARCTICA
AUSTRALIA
ATLANTIC OCEAN
0°
undefined limit
NORWEGIAN CLAIM
60° S
INDIAN OCEAN
BRAZILIAN ZONE OF INTEREST
ARGENTINE CLAIM
BRITISH CLAIM
CHILEAN CLAIM
undefined limit
90°W
SOUTH POLE
AUSTRALIAN CLAIM
90°E
60° S
INDIAN OCEAN
PACIFIC OCEAN
AUSTRALIAN CLAIM
FRENCH CLAIM
NEW ZEALAND CLAIM
AUSTRALIA
180°
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international law.[68] The 1967 Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco)[69] is an example of a nuclear free zone arrangement that is fully consistent with international law, as evidenced by U.S. ratification of its two

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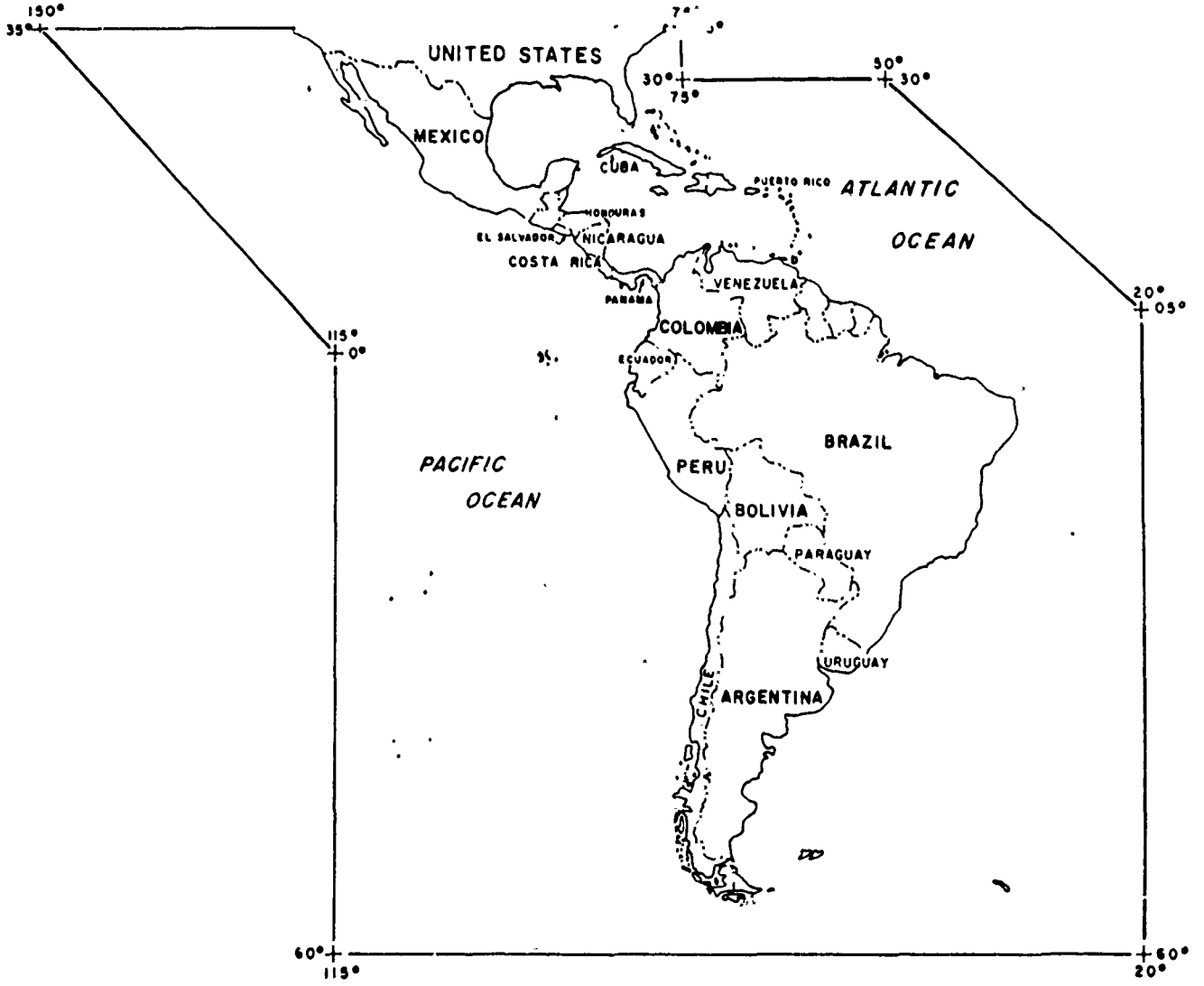
[68] The United States, therefore, does not oppose the establishment of nuclear free zones provided certain fundamental criteria are met, including preservation of the right of parties under international law to grant or deny transit privileges within their respective land territory, and internal waters and airspace, to nuclear powered and nuclear capable ships and aircraft of non-party nations, including port calls and overflight privileges; and non-interference with the high seas freedoms of navigation and overflight, the right of innocent passage of territorial and archipelagic seas, the right of transit passage of international straits, and the right of archipelagic sea lanes passage of archipelagic waters. Dep't St. Bull., Aug. 1978, at 46-47; 1978 Digest of U.S. Practice in International Law 1668; 1979 Digest of U.S. Practice in International Law 1844.

[69] Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco), Mexico City, 14 Feb. 1967, 22 U.S.T. 762, 64 U.N.T.S. 281, entered into force 22 April 1968. By the terms of the treaty, since the United States does not lie within the zone of application of the treaty (see Figure SF2-9), the United States is not, and cannot be, a party to the Treaty of Tlatelolco. The 25 parties as of 23 January 1987 listed at 26 Int'l Leg. Mat'ls 315 (1987) remains current as of mid-1989; Argentina is not a party. A negotiating history of the Treaty of Tlatelolco is given in Robinson, The Treaty of Tlatelolco and the United States: A Latin American Nuclear Free Zone, 64 Am. J. Int'l L. 282 (1970).

FIGURE SF2-9

LATIN AMERICAN NUCLEAR FREE ZONE



Protocols.[70] This in no way affects the exercise by the U.S. of navigational rights and

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[70] *Additional Protocol I.* Additional Protocol I to the Treaty of Tlatelolco, T.I.A.S. No. 10,147, 634 U.N.T.S. 362, AFP 110-20 chap. 4, 11 Dec. 1969, calls on nuclear-weapons nations outside the treaty zone to apply the denuclearization provisions of the treaty to their territories in the zone. As of 1 January 1988, the Netherlands, the United Kingdom and the United States are parties to Additional Protocol I. Treaties in Force on 1 January 1988, at 335. France has signed (on 3 February 1980) but not ratified, Additional Protocol I. Within the Latin American nuclear-weapons free zone lie the Panama Canal, the Guantanamo Naval Base in Cuba, the Virgin Islands, and Puerto Rico.

Since Additional Protocol I entered into force for the United States on 23 November 1981, the U.S. may not store or deploy nuclear weapons in those areas, but its ships and aircraft may still visit these ports and airfields, and overfly them, whether or not these ships and aircraft carry nuclear weapons. In this regard, see also Articles III.1(e) and VI.1 of the 1977 Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, 33 U.S.T. 1, T.I.A.S. No. 10,029, which specifically guarantee the right of U.S. military vessels to transit the Canal regardless of their cargo or armament. This includes submarines as well as surface ships. The United States also has the right to repair and service ships carrying nuclear weapons in ports in the Virgin Islands, Puerto Rico, and Guantanamo when incident to transit through the area. Further, the United States retains the right to off-load nuclear weapons from vessels in these ports in the event of emergency or operational requirements if such off-loading is temporary and is required in the course of a transit through the area.

The U.S. ratification of Additional Protocol I (and of Additional Protocol II discussed below) was subject to understandings and declarations that the Treaty of Tlatelolco does not affect the right of a nation adhering to Protocol I to grant or deny transit and transport privileges to its own or any other vessels or aircraft irrespective of cargo or armaments, and that the treaty does not affect the rights of a nation adhering to Additional Protocol I regarding exercise of the freedoms of the seas, or regarding passage through or over waters subject to the sovereignty of a nation.

The terms "transit and transport" are not defined in the treaty. These terms should be interpreted on a case-by-case basis, bearing in mind the basic idea that the Treaty was not intended to inhibit activities reasonably related to the passage of nuclear weapons through the zone.

The Department of State has summarized the negotiating history relating to transit and transport privileges, as follows:

> The texts of the Treaty and its Protocols were drafted by a Preparatory Commission for the Denuclearization of Latin America, created at a Mexico City conference attended by Latin American nations in November 1965. The drafting was completed and the Treaty was opened for signature in February 1967.

(continued...)

[70](...continued)

Because success in this endeavor required the cooperation, not only of the Latin American States, but also of the nuclear weapon States and the non-Latin States having international responsibility for territories within the Treaty's zone of application, the views of the eligible Protocol States were obviously important to the Preparatory Commission. In particular, the Commission consulted with the United States, which is the only nuclear weapon State in the Hemisphere, and which has international responsibility for several territories within the Treaty zone. These consultations continued throughout the drafting of the Treaty and its Protocols and the United States was represented by an observer at the meetings of the Preparatory Commission. Twenty-one other States, including France, the Netherlands and the United Kingdom, also sent observers to the Commission's meetings. The Soviet Union did not participate in these meetings.

In August 1966, the United States informed the Preparatory Commission of its view that the proposed treaty should impose "no prohibition that would restrict the freedom of transit within the Western Hemisphere." A note to the chairman of the Preparatory Commission stated:

> The United States policy on freedom of transit is based on our national security needs and the vital security interests of the Hemisphere. * * * We therefore assume that the language of Article 1 as finally agreed will not in any way impair the freedom of transit.

Among the alternative drafts of Article 1 of the Treaty considered by the Preparatory Commission was one which would have prohibited the parties from permitting "transport" of nuclear weapons in their respective territories. An express prohibition in the text of the Treaty against transit and transport was urged by at least one member.

However, such a prohibition was rejected by the Commission, and, at the conclusion of its fourth session the Commission included in its Final Act an explanatory paragraph regarding its action on this subject. Specifically, the Commission noted that the Parties to the basic Treaty may not themselves transport nuclear weapons because of Article 1's prohibition against possession. With respect to other States, however, including Parties to Protocol II, the explanatory paragraph states that transit and transport:

> Must be understood to be governed by the principles and rules of international law; according to these principles and rules it is for the territorial State, in the free exercise of its sovereignty, to grant or deny permission for such transit in each individual case, upon application

(continued...)

[70](...continued)

> by the State interested in effecting the transit, unless some other arrangement has been reached in a Treaty between such States.
>
> This statement is fully compatible with the description in the treaty's preamble of the existing situation in Latin America:
>
> > That the privileged situation of the signatory States, whose territories *are* wholly free from nuclear weapons, imposes upon them the inescapable duty of *preserving that situation* both in their own interests and for the goal of mankind. (Emphasis added.)
>
> The statement in the Final Act and the Treaty's preamble, both of which were the product of the Preparatory Commission's work, thus emphasize that the objective of the Treaty regime was continuation of the nuclear-free status of Latin America, as it existed at that time. Together, these statements provide persuasive evidence that the Treaty was not directed at altering existing practice in the region regarding transit and transport, and that these practices were considered to be compatible with the obligations contemplated by the Treaty and its Protocol.

Treaty of Tlatelolco, Hearing before Sen. For. Rel. Comm., 95th Cong., 2d Sess., 15 Aug. 1978, at 47 (footnotes omitted), reprinted in 1978 Digest of U.S. Practice in International Law 1620 & 1622.

In addition, when Nicaragua ratified the Treaty, it formally declared its right to permit "the transit of atomic materials through its territory." Treaty of Tlatelolco at 48; 1978 Digest at 1623. No Latin American party to the Treaty objected when the United States and France made formal statements confirming transit and transport rights when ratifying Additional Protocol II. No Latin American party has denied transit or transport privileges on the basis of the Treaty or its Protocols, notwithstanding the fact that U.S. military vessels and aircraft frequently engage in transit, port calls and overflights in the region, and that it is U.S. policy neither to confirm nor deny the presence of nuclear weapons in such cases. 1978 Digest at 1624; Prohibition of Nuclear Weapons in Latin American, Hearing before Sen. For. Rel. Comm., 97th Cong., 1st Sess., 22 Sept. 1981, at 18-20.

Additional Protocol II. Additional Protocol II to the Treaty of Tlatelolco, 22 U.S.T. 754, T.I.A.S. No. 7137, 634 U.N.T.S. 364, AFP 110-20 chap. 34, entered into force for the United States 12 May 1971 subject to understandings and declarations, obligates nuclear-weapons nations to respect the denuclearized status of the zone, not to contribute to acts involving violation of obligations of the parties, and not to use or threaten to use nuclear weapons against the contracting parties (*i.e.*, the Latin American countries). The United States ratified Additional Protocol II subject to understandings and declarations, 22 U.S.T. 760, (continued...)

freedoms within waters covered by the Treaty of Tlatelolco.[71]

2.5. AIR NAVIGATION

2.5.1 National Airspace.[72] Under international law, every nation has complete and

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[70](...continued)
AFP 110-20 chap. 34, among others, that the treaty and its protocols have no effect upon the international status of territorial claims; the treaty does not affect the right of the Contracting Parties to grant or deny transport and transit privileges to non-Contracting Parties; that the United States would "consider that an armed attack by a Contracting Party, in which it was assisted by a nuclear-weapon state, would be incompatible with the contracting Party's corresponding obligations under Article I of the Treaty;" and, although not required to do so, the United States will act, with respect to the territories of Protocol I adherents that are within the treaty zone, in the same way as Protocol II requires it to act toward the territories of the Latin American treaty parties. As of 1 January 1989, China, France, the Soviet Union, the United Kingdom, and the United States are parties to Additional Protocol II. Treaties in Force on 1 January 1989, at 347.

[71] The South Pacific Nuclear Free Zone Treaty of 1985, text in 24 Int'l Leg. Mat'ls 1442 (1985), is modeled on the Treaty of Tlatelolco, and seeks the same goals through similar legal structures. It is now in force, and although the United States, France, and the United Kingdom have not signed any of its three protocols, China and the Soviet Union have signed both protocols open to them. Its zone of application is shown in Figure SF2-10. The U.S. decision not to sign the protocol reflected the following concerns:

- The growing number of proposals for regional nuclear free zones has the potential to limit the policy of deterrence which has been the cornerstone of Western security since the end of World War II.

- The proliferation of such zones could limit our future ability to meet security commitments worldwide.

- A proliferation of such zones unmatched by disarmament in the Soviet bloc would be clearly detrimental to Western security.

Dep't St. Bull., May 1987, 35-36; id., Sep. 1987, at 52-54.

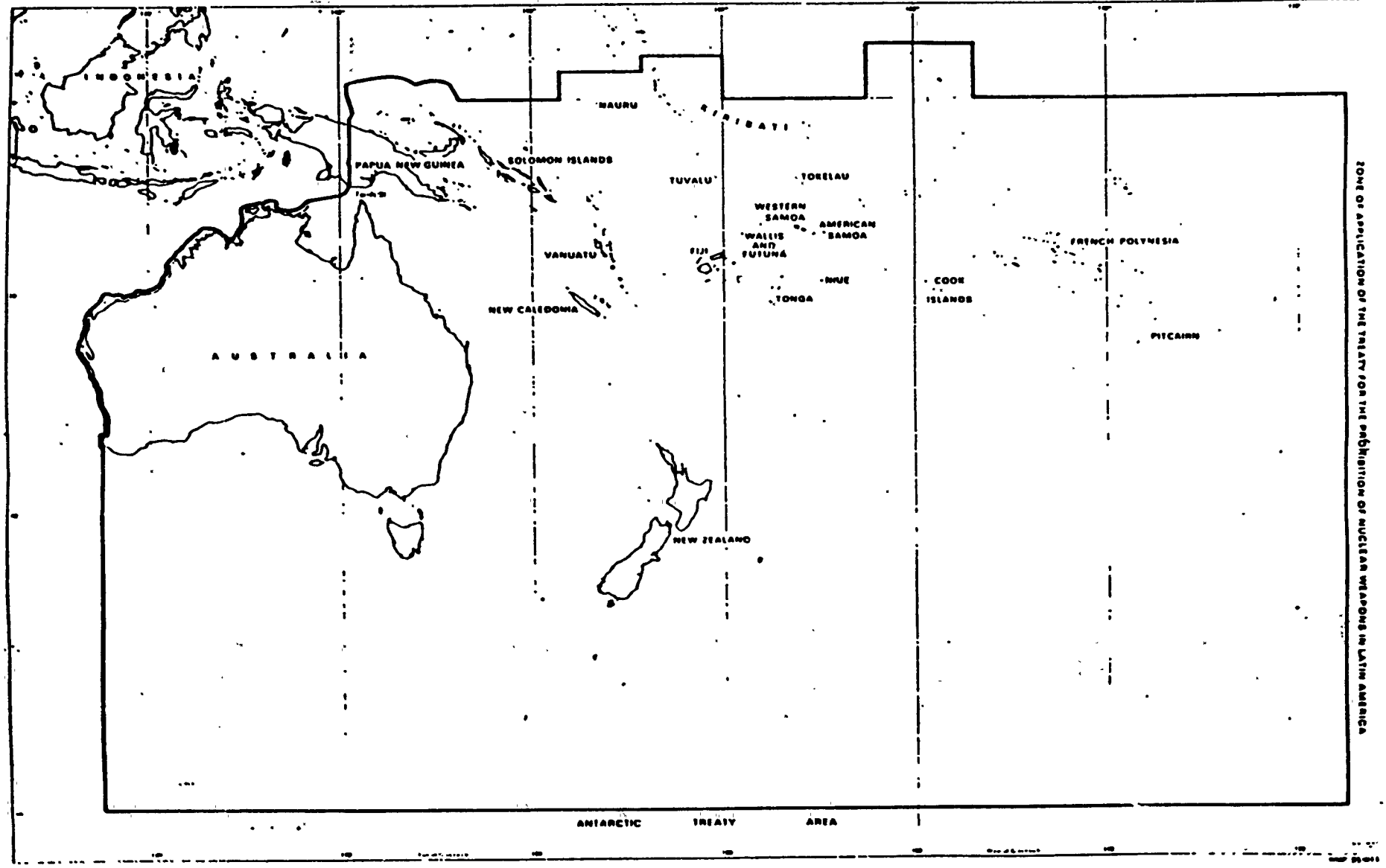
[72] Under international law, airspace is classified under two headings: national airspace (airspace over the land, internal waters, archipelagic waters, and territorial sea of a nation) and international airspace (airspace over a contiguous zone, an exclusive economic zone, and the high seas, and over unoccupied territory (i.e., territory not subject to the sovereignty of any nation such as Antarctica)). Airspace has, in vertical dimension, an upward (but undefined) limit, above which is outer space (see paragraphs 1.1 note 1 (continued...)

FIGURE SF2-10

ATTACHMENT TO ANNEX 1 TO THE SOUTH PACIFIC NUCLEAR-FREE ZONE TREATY.—

ILLUSTRATIVE MAP

(Australian islands in the Indian Ocean, which are also part of the South Pacific Nuclear Free Zone are not shown)



Source: 24 Int'l Legal Mat'ls 1454 (1985)

exclusive sovereignty over its national airspace, that is, the airspace above its territory, its internal waters, its territorial sea, and, in the case of an archipelagic nation, its archipelagic waters.[73] *There is no customary right of innocent passage of aircraft through the airspace over the territorial sea or archipelagic waters analogous to the right of innocent passage enjoyed by surface ships.*[74] Accordingly, unless party to an international agreement to the contrary, all nations have complete discretion in regulating or prohibiting flights within their national airspace (as opposed to a Flight Information Region - see paragraph 2.5.2.2), with the sole exception of overflight of international straits and archipelagic sea lanes. Aircraft wishing to enter national airspace must identify themselves, seek or confirm permission to land or to transit, and must obey all reasonable orders to land, turn back, or fly a prescribed course and/or altitude. Aircraft in distress are entitled to special consideration and should be allowed entry and emergency landing rights.[75] Concerning the right of assistance entry, see paragraph 2.3.2.5.

2.5.1.1 International Straits Which Connect EEZ/High Seas to EEZ/High Seas and are Overlapped by Territorial Seas. All aircraft, including military aircraft, enjoy the right of unimpeded transit passage through the airspace above international straits overlapped by territorial waters. Such transits must be continuous and expeditious, and the aircraft involved must refrain from the threat or the use of force against the sovereignty, territorial integrity, or political independence of the nation or nations bordering the strait.[76] The exercise of the right of overflight by aircraft engaged in the transit passage of international straits cannot be suspended in peacetime for any reason.[77] (See paragraph 2.5.2 for a discussion of permitted activities over international straits *not* completely overlapped by territorial seas.)

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[72](...continued)
and 2.9.2).

[73] **Territorial Sea Convention, art. 2; Chicago Convention, art. 1; 1982 LOS Convention, art. 2. Effective upon the extension of the U.S. territorial sea on 27 December 1988, the Federal Aviation Administration extended seaward the limits of controlled airspace and applicability of certain air traffic rules. 54 Fed. Reg. 264, 4 Jan. 1989, amending 14 CFR Parts 71 and 91.**

[74] **Of course, there is no freedom of flight over internal waters and land territory.**

[75] **Chicago Convention, arts. 5-16. For jurisdiction over aerial intruders, see paragraph 4.4.**

[76] **All aircraft must, however, monitor the internationally designated air-traffic control circuit or distress radio frequency while engaged in transit passage. 1982 LOS Convention, art. 39.**

[77] **1982 LOS Convention, art. 44.**

2.5.1.2 Archipelagic Sea Lanes. All aircraft, including military aircraft, enjoy the right of unimpeded passage through the airspace above archipelagic sea lanes. The right of overflight of such sea lanes is essentially identical to that of transit passage through the airspace above international straits overlapped by territorial seas.[78]

2.5.2 International Airspace. International airspace is the airspace over the contiguous zone, the high seas, the exclusive economic zone, and territories not subject to national sovereignty (e.g., Antarctica). All international airspace is open to the aircraft of all nations.[79] Accordingly, aircraft, including military aircraft, are free to operate in international airspace without interference from coastal or island nation authorities. Military aircraft may engage in flight operations, including ordnance testing and firing, surveillance and intelligence gathering, and support of other naval activities. All such activities must be conducted with due regard for the rights of other nations and the safety of other aircraft and of vessels.[80] (Note, however, that the Antarctic Treaty prohibits military maneuvers and weapons testing in Antarctic airspace.[81]) These same principles apply with respect to the overflight of high seas or EEZ corridors through that part of international straits *not* overlapped by territorial seas.[82]

2.5.2.1 Convention on International Civil Aviation. The United States is a party to the 1944 Convention on International Civil Aviation (as are most all nations). That multilateral treaty, commonly referred to as the "Chicago Convention," applies to civil aircraft.[83] It does *not* apply to military aircraft or MAC-charter aircraft designated as "state aircraft" (see paragraph 2.2.2.1), other than to require that they operate with "due regard for the safety of navigation of civil aircraft."[84] The Chicago Convention established the International Civil Aviation Organization (ICAO) to develop international air navigation principles and techniques and to "promote safety of flight in international air navigation."[85]

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[78] 1982 LOS Convention, art. 53.

[79] High Seas Convention, art. 2; Territorial Sea Convention, art. 24; 1982 LOS Convention, arts. 87, 58 & 33.

[80] Chicago Convention, art. 3(d).

[81] See paragraph 2.4.5.2.1.

[82] 1982 LOS Convention, arts. 35(b), 87 & 58.

[83] Article 3(a); text in AFP 110-20, chap. 36.

[84] Article 3(d).

[85] Article 44(h).

Various operational situations do not lend themselves to ICAO flight procedures. These include military contingencies, classified missions, politically sensitive missions, or routine aircraft carrier operations. Operations not conducted under ICAO flight procedures are conducted under the "due regard" or "operational" prerogative of military aircraft. (For additional information see DOD Dir. 4540.1 and OPNAVINST 3770.4.)

2.5.2.2 Flight Information Regions. A Flight Information Region (FIR) is a defined area of airspace within which flight information and alerting services are provided. FIRs are established by ICAO for the safety of civil aviation and encompass both national and international airspace. Ordinarily, but only as a matter of policy, U.S. military aircraft on routine point-to-point flights through international airspace follow ICAO flight procedures and utilize FIR services. As mentioned above, exceptions to this policy include military contingency operations, classified or politically sensitive missions, and routine aircraft carrier operations or other training activities. When U.S. military aircraft do not follow ICAO flight procedures, they must navigate with "due regard" for civil aviation safety.[86]

2.5.2.3 Air Defense Identification Zones in International Airspace. International law does not prohibit nations from establishing Air Defense Identification Zones (ADIZ) in the international airspace adjacent to their territorial airspace. The legal basis for ADIZ regulations is the right of a nation to establish reasonable conditions of entry into its territory. Accordingly, an aircraft approaching national airspace can be required to identify itself while in international airspace as a condition of entry approval. ADIZ regulations promulgated by the U.S. apply to aircraft bound for U.S. territorial airspace and require the filing of flight plans and periodic position reports.[87] Some nations, however, purport to

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[86] **Chicago Convention, art. 3(d); DOD Directive 4540.1; 9 Whiteman 430-31; AFP 110-31, at 2-9 to 2-10 n.29. Acceptance by a government of responsibility in international airspace for a FIR region does not grant such government sovereign rights in international airspace. Consequently, military and state aircraft are exempt from the payment of en route or overflight fees, including charges for providing FIR services, when merely transiting international airspace located in the FIR. The normal practice of nations is to exempt military aircraft from such charges even when operating in national airspace or landing in national territory. The only fees properly chargeable against state aircraft are those which can be related directly to services provided at the specific request of the aircraft commander or by other appropriate officials of the nation operating the aircraft. 84 State message 205365.**

[87] **United States air defense identification zones have been established by Federal Aviation Administration (FAA) regulations, 14 C.F.R. part 99 (applicable to civil aircraft only). In order that the Administrator may properly carry out his responsibilities, the authority of the Administrator has been extended into the airspace beyond the territory of the United States. U.S. law (49 U.S.C. sec. 1510) grants the President the power to order such extra-territorial extension when requisite authority is found under an international agreement or arrangement; the President invoked this power by Exec. Order 10,854, 27 November 1959, 3C C.F.R. part 389 (1959-1963 Comp.). See also MacChesney 579-600;**

(continued...)

require all aircraft penetrating an ADIZ to comply with ADIZ procedures, whether or not they intend to enter national airspace.[88] The U.S. does not recognize the right of a coastal or island nation to apply its ADIZ procedures to foreign aircraft in such circumstances. Accordingly, U.S. military aircraft not intending to enter national airspace need not identify themselves or otherwise comply with ADIZ procedures established by other nations, unless the U.S. has specifically agreed to do so.[89]

It should be emphasized that the foregoing contemplates a peacetime or nonhostile environment. In the case of imminent or actual hostilities, a nation may find it necessary to take measures in self-defense that will affect overflight in international airspace.[90]

2.6 EXERCISE AND ASSERTION OF NAVIGATION AND OVERFLIGHT RIGHTS AND FREEDOMS

As announced in the President's United States Oceans Policy statement of 10 March 1983,

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

When maritime nations appear to acquiesce in excessive maritime claims and fail to exercise their rights actively in the face of constraints on international navigation and overflight, those claims and constraints may, in time, be considered to have been accepted by the international community as reflecting the practice of nations and as binding upon all users of the seas and superjacent airspace. Consequently, it is incumbent upon maritime nations to protest diplomatically all excessive claims of coastal or island nations and to exercise their navigation and overflight rights in the face of such claims. The President's

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[87](...continued)
NWIP 10-2, art. 422b.

[88] **For example, India, Libya, Greece, Seychelles, and Mauritius. Foreign Clearance Guide.**

[89] **Chicago Convention, art. 11; OPNAVINST 3770.4 (series), promulgating DOD Directive 4540.1, Subj: Use of Airspace by U.S. Military Aircraft and Firings Over the High Seas; OPNAVINST 3772.5 (series), Subj: Identification and Security Control of Military Aircraft; General Planning Section, DoD Flight Information Publications. Appropriate ROE should also be consulted.**

[90] **See also note 56 above.**

Oceans Policy Statement makes clear that the United States has accepted this responsibility as a fundamental element of its national policy.[91]

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[91] Annex AS1-2. See U.S. Dep't State, GIST: US Freedom of Navigation Program, Dec. 1988, Annex AS2-17A and DOD Instruction C2005.1, Subj: U.S. Program for the Exercise of Navigation and Overflight Rights at Sea (U).

The 1982 LOS Convention was designed in part to halt the creeping jurisdictional claims of coastal nations, or ocean enclosure movement. While that effort appears to have met with some success, it is clear that many nations presently purport to restrict navigational freedoms by a wide variety of means that are neither consistent with the 1982 LOS Convention nor with customary international law. See Negroponte, Who Will Protect the Oceans?, Dep't St. Bull., Oct. 1986, at 41-43; Smith, Global Maritime Claims, 20 Ocean Dev. & Int'l L. 83 (1989); and the listing by region at Annex AS2-17B. Alexander warns of a continuation of the ocean enclosure movement. He particularly sees more unauthorized restrictions on the movement of warships, military aircraft and "potentially polluting" vessels in the territorial seas and EEZ, and on transit passage in international straits. Navigational Restrictions 369-70. The United States' view regarding the consistency of certain claims of maritime jurisdiction with the provisions of the LOS Convention is set forth in its 3 March 1983 statement in right of reply, 17 LOS Documents 244, Annex AS1-2.

Between December 1982 and March 1986, the Department of State issued over 40 protest notes (and over 50 since 1975) to other nations concerning their excessive maritime claims, as well as engaging in numerous bilateral discussions with many countries. Negroponte, Current Developments in U.S. Oceans Policy, Dep't St. Bull., Sept. 1986, at 84, 85; Navigation Rights and the Gulf of Sidra, Dep't St. Bull., Feb. 1987, at 70.

See 1 O'Connell 38-44 for a discussion of the significance of protest in the law of the sea. Compare Colson, How Persistent Must the Persistent Objector Be? 61 Wash. L. Rev. 957, at 969 (1986):

> First, States should not regard legal statements of position as provocative political acts. They are a necesary tool of the international lawyer's trade and they have a purpose beyond the political, since, occasionally, States do take their legal disputes to court.
>
> Second, there is no requirement that a statement of position be made in a particular form or tone. A soft tone and moderate words may still effectively make the necessary legal statement.
>
> Third, action by deed probably is not necessary to protect a State's legal position as a persistent objector when that State has otherwise clearly stated its legal position. Action by deed, however, promotes the formation of law consistent with the action and deeds may be necessary in some circumstances to slow erosion in customary legal practice.

(continued...)

[91](...continued)

> Fourth, not every legal action needs an equal and opposite reaction to maintain one's place in the legal cosmos.
>
> Fifth, the more isolated a State becomes in its legal perspective, the more active it must be in restating and making clear its position.

"The exercise of rights--the freedoms to navigate on the world's oceans--is not meant to be a provocative act. Rather, in the framework of customary international law, it is a legitimate, peaceful assertion of a legal position and nothing more." Negroponte, Who Will Protect the Oceans?, Dep't St. Bull., Oct. 1986, at 42. In exercising its navigational rights and freedoms, the United States "will continue to act strictly in conformance with international law and we will expect nothing less from other countries." Schachte, The Black Sea Challenge. U.S. Naval Inst. Proc., June 1988, at 62.

"Passage does not cease to be innocent merely because its purpose is to test or assert a right disputed or wrongfully denied by the coastal State." Fitzmaurice, The Law and Procedure of the International Court of Justice, 27 Br. Y.B. Int'l L. 28 (1950), commenting on the Corfu Channel Case in which the Court held that the United Kingdom was not bound to abstain from exercising its right of innocent passage which Albania had illegally denied. 1949 ICJ Rep. 4, 4 Whiteman 356. The Special Working Committee on Maritime Claims of the American Society of International Law has advised that

> programs for the routine exercise of rights should be just that, "routine" rather than unncessarily provocative. The sudden appearance of a warship for the first time in years in a disputed area at a time of high tension is unlikely to be regarded as a largely inoffensive exercise related solely to the preservation of an underlying legal position. Those responsible for relations with particular coastal states should recognize that, so long as a program of exercise of rights is deemed necessary to protect underlying legal positions, delay for the sake of immediate political concerns may invite a deeper dispute at a latter [sic] time.

Am. Soc. Int'l L. Newsletter, March-May 1988, at 6.

The United States has exercised its rights and freedoms against a variety of objectionable claims, including: unrecognized historic waters claims; improperly drawn baselines for measuring maritime claims; territorial sea claims greater than 12 NM; and territorial sea claims that impose impermissible restrictions on the innocent passage of any type of vessel, such as requiring prior notification or authorization. Since the policy was implemented in 1979, the United States has exercised its rights against objectionable claims of over 35 nations, including the Soviet Union, at the rate of some 30-40 per year. Department of State Statement, 26 March 1986, Dep't St. Bull., May 1986, at 79; Navigation Rights and the Gulf of Sidra, Dep't St. Bull., Feb. 1987, at 70.

(continued...)

[91](...continued)

Perhaps the most widely publicized of these challenges has occurred with regard to the Gulf of Sidra (closing line drawn across the Gulf at 30°30'N). See Figure SF2-11 and Annex AS2-18. The actions of the United States are described in Spinatto, Historic and Vital Bays: An Analysis of Libya's Claim to the Gulf of Sidra, 13 Ocean Dev. & Int'l L.J. 65 (1983); N.Y. Times, 27 July 1984, at 5; and Parks, Crossing the Line, U.S. Naval Inst. Proc., Nov. 1986, at 40.

Other publicized examples include the transits of the Black Sea in November 1984 and March 1986 (Washington Post, 19 March 1986, at 4 & 21; Christian Science Monitor, 20 March 1986, at 1, 40) and in February 1988 (N.Y. Times, 13 Feb. 1988, at 1 & 6) challenging the Soviet limitations on innocent passage, see paragraph 2.3.2.1 note 26, and of Avacha Bay, Petropavlovsk in May 1987 (straight baseline) (Washington Post, 22 May 1987, at A34). Most challenges, however, have occurred without publicity, and have been undertaken without protest or other reaction by the coastal or island nations concerned.

Some public commentary on the Black Sea operations has incorrectly characterized the passage as being not innocent. Rubin, Innocent Passage in the Black Sea? Christian Sci. Mon., 1 Mar. 1988, at 14; Carroll, Murky Mission in the Black Sea, Wash. Post Nat'l Weekly Ed., 14-20 Mar. 1988, at 25; Carroll, Black Day on the Black Sea, Arms Control Today, May 1988, at 14; Arkin, Spying in the Black Sea, Bull. of Atomic Scientists, May 1988, at 5. Authoritative responses include Armitage, Asserting U.S. Rights On the Black Sea, Arms Control Today, June 1988, at 13; Schachte, The Black Sea Challenge, U.S. Naval Inst. Proc., June 1988, at 62; and Grunawalt, Innocent Passage Rights, Christian Sci. Mon., 18 Mar. 1988, at 15. Mere incidental observation of coastal defenses could not suffice to render non-innocent a passage not undertaken for that purpose. Fitzmaurice, above this note, 27 Br. Y.B. Int'l L. 29n.1, quoted in 4 Whiteman 357.

Other claims not consistent with the 1982 LOS Convention that adversely affect freedoms of navigation and overflight and which are included within the U.S. FON program include:

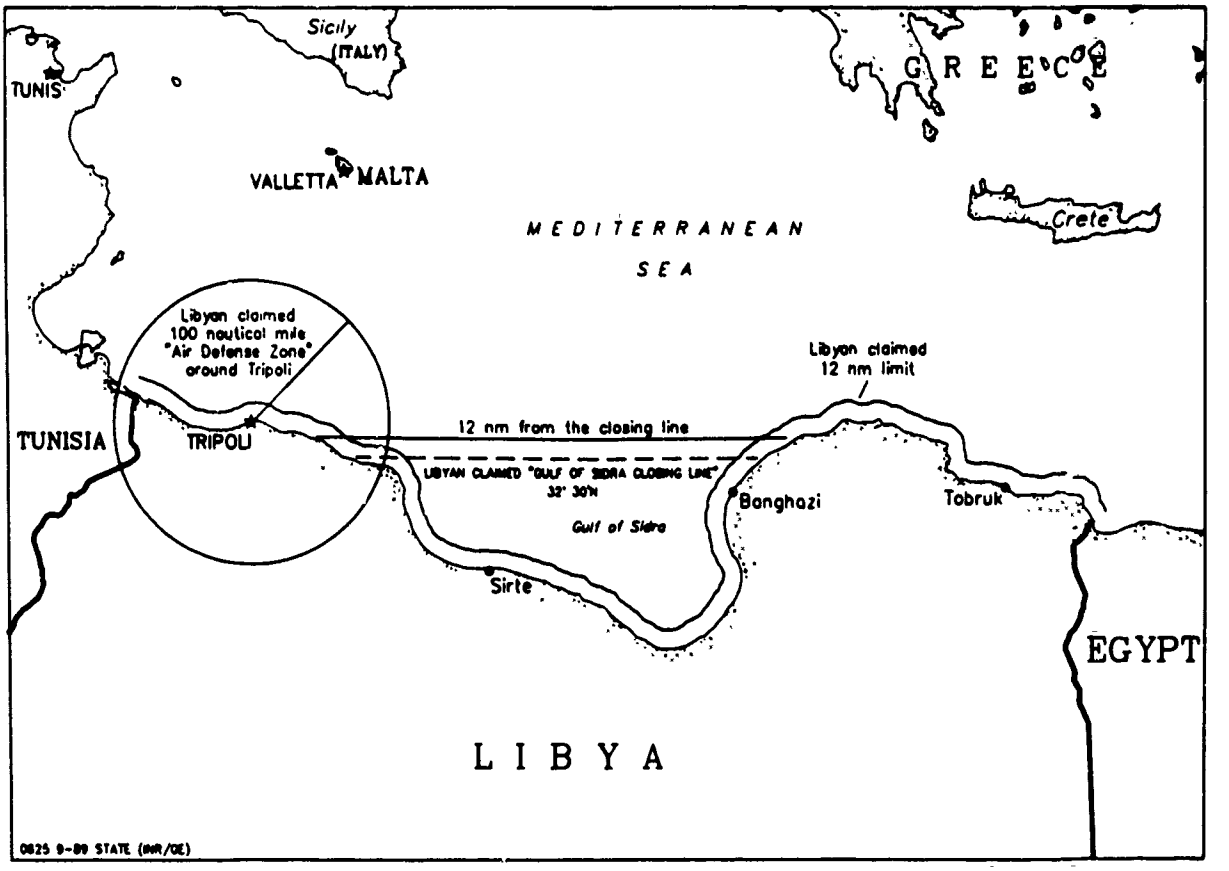
- claims to jurisdiction over maritime areas beyond 12 NM which purport to restrict non-resource related high seas freedoms, such as in the EEZ (paragraph 2.4.2) or security zones (paragraph 2.4.4);

- archipelagic claims that do not conform with the 1982 LOS Convention (paragraph 2.3.4), or do not permit archipelagic sea lanes passage in conformity with the 1982 LOS Convention, including submerged passage of submarines and overflight of military aircraft, and transit in a manner of deployment consistent with the security of the forces involved (paragraph 2.3.4.1); and

- territorial sea claims that overlap international straits, but do not permit transit passage (paragraph 2.3.3.1), or that require advance notification or authori-

(continued...)

FIGURE SF2-11



2.7 RULES FOR NAVIGATIONAL SAFETY FOR VESSELS AND AIRCRAFT

2.7.1 International Rules. Most rules for navigational safety governing surface and subsurface vessels, including warships, are contained in the International Regulations for Preventing Collisions at Sea, 1972, known informally as the "International Rules of the Road" or "72 COLREGS."[92] These rules apply to all international waters (i.e., the high seas, exclusive economic zones, and contiguous zones) and, except where a coastal or island nation has established different rules, in that nation's territorial sea, archipelagic waters, and inland waters as well. Article 1120, U.S. Navy Regulations, 1973, directs that all persons in the naval service responsible for the operation of naval ships and craft "shall diligently observe" the 1972 COLREGS.

2.7.2 National Rules. Many nations have adopted special rules for waters subject to their territorial sovereignty (i.e., internal waters, archipelagic waters, and territorial seas). Violation of these rules by U.S. Navy vessels may subject the U.S. to lawsuit for collision or other damage, provide the basis for diplomatic protest, result in limitation on U.S. access to foreign ports, or provide the basis for other foreign action.[93]

2.7.2.1 U.S. Inland Rules. The U.S. has adopted special Inland Rules[94] applicable to navigation in U.S. waters landward of the demarcation line established by U.S. law for that purpose. (See U.S. Coast Guard publication CG 169, title 33 Code of Federal Regulations part 80, and title 33 U.S.C. sections 2001 to 2073.) The 1972 COLREGS apply seaward of the demarcation line in U.S. national waters, in the U.S. contiguous zone and exclusive economic zone, and on the high seas.

2.7.3 Navigational Rules for Aircraft. Rules for air navigation in international airspace applicable to civil aircraft may be found in Annex 2 (Rules of the Air) to the Chicago Convention, DOD Flight Information Publication (FLIP) General Planning, and OPNAVINST 3710.7 (series) NATOPS Manual. The same standardized technical principles and policies of ICAO that apply in international and most foreign airspace are also in effect in the continental United States. Consequently, U.S. pilots can fly all major international

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[91](...continued)
zation for warships and auxiliaries, or apply discriminatory requirements to such vessels (paragraph 2.3.2.4), or apply requirements not recognized by international law to nuclear powered warships or nuclear capable warships and auxiliaries (paragraph 2.3.2.4 note 31).

[92] **28 U.S.T. 3459, T.I.A.S. No. 8587, 33 U.S.C. sec. 1602 note, 33 C.F.R. part 81, appendix A.**

[93] **See U.S. Navy Regulations, 1973, article 1120.**

[94] **33 U.S.C. sec. 2001 et seq., implemented in 33 C.F.R. parts 84-90.**

routes following the same general rules of the air, using the same navigation equipment and communication practices and procedures, and being governed by the same air traffic control services with which they are familiar in the United States.

2.8 U.S.-U.S.S.R. AGREEMENT ON THE PREVENTION OF INCIDENTS ON AND OVER THE HIGH SEAS

In order better to assure the safety of navigation and flight of their respective warships and military aircraft during encounters at sea, the United States and the Soviet Union in 1972 entered into the U.S.-U.S.S.R. Agreement on the Prevention of Incidents On and Over the High Seas. This Navy-to-Navy agreement, popularly referred to as the "Incidents at Sea" or "INCSEA" agreement, has been highly successful in minimizing the potential for harassing actions and navigational one-upmanship between U.S. and Soviet units operating in close proximity at sea. Although the agreement applies to warships and military aircraft operating on and over the "high seas", it is understood to embrace such units operating in all international waters and international airspace, including that of the exclusive economic zone and the contiguous zone.[95]

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[95] **OPNAVINST C5711.94 (series), Subj: US/USSR Incidents at Sea (INCSEA) Agreement; OPNAVINST 2330.1, Subj: Special Signals for use between United States and Soviet Ships; and U.S. Addendum to volume II of ATP 1. The 1972 INCSEA Agreement, 23 U.S.T. 1168, T.I.A.S. No. 7379, and its 1973 Protocol, 24 U.S.T. 1063, T.I.A.S. No. 7624, are reproduced in AFP 110-20 chap. 36.**

The INCSEA Agreement does not prescribe minimum fixed distances between ships or aircraft; rules of prudent seamanship and airmanship apply.

A similar agreement, incorporating the provisions and special signals from the U.S.-U.S.S.R. INCSEA agreement, entered into force between the United Kingdom and the Soviet Union on 15 July 1986. U.K.T.S. No. 5 (1987); 37 Int'l & Comp. L.Q. 420 (1988); LOS Bulletin, No. 10, Nov. 1987, at 97-102.

An agreement on the prevention of dangerous military activities between the armed forces of the United States and the Soviet Union operating in proximity to each other during peacetime enters into force on 1 January 1990. The agreement provides procedures for resolving incidents involving entry into the national territory, including the territorial sea, of the other nation "owing to circumstances brought about by *force majeure*, or as a result of unintentional actions by such personnel"; using a laser in such a manner that its radiation could cause harm to the other nation's personnel or equipment; hampering the activities of the other nation in Special Caution Areas in a manner which could cause harm to its personnel or damage to its equipment; and interference with the command and control networks of the other party in a manner which could cause harm to its personnel or damage to its equipment. The text of the agreement, which was signed in Moscow, 12 June 1989, appears in 28 Int'l Leg. Mat'ls 877 (1989).

Principal provisions of the INCSEA agreement include:

1. Ships will observe strictly both the letter and the spirit of the International Rules of the Road.

2. Ships will remain well clear of one another to avoid risk of collision and, when engaged in surveillance activities, will exercise good seamanship so as not to embarrass or endanger ships under surveillance.

3. Ships will utilize special signals for signalling their operation and intentions.

4. Ships of one country will not simulate attacks by aiming guns, missile launchers, torpedo tubes, or other weapons at the ships of the other country, and will not launch any object in the direction of passing ships nor illuminate their navigation bridges.[96]

5. Ships conducting exercises with submerged submarines will show the appropriate signals to warn of submarines in the area.

6. Ships, when approaching ships of the other party, particularly those engaged in replenishment or flight operations, will take appropriate measures not to hinder maneuvers of such ships and will remain well clear.

7. Aircraft will use the greatest caution and prudence in approaching aircraft and ships of the other party, in particular ships engaged in launching and landing aircraft, and will not simulate attacks by the simulated use of weapons or perform aerobatics over ships of the other party nor drop objects near them.

The INCSEA agreement was amended in a 1973 protocol to extend certain provisions of the agreement to include nonmilitary ships. Specifically, U.S. and Soviet military ships and aircraft shall not make simulated attacks by aiming guns, missile launchers, torpedo tubes, and other weapons at nonmilitary ships of the other party nor launch or drop any objects near nonmilitary ships of the other party in such a manner as to be hazardous to these ships or to constitute a hazard to navigation.

The agreement also provides for an annual review meeting between Navy representatives of the two parties to review its implementation.[97]

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[96] **Ships are also prohibited from taking such actions against aircraft of the other Party.**

[97] **The results of each annual review meeting are promulgated by CNO (OP-616) to the operational commanders. Consult appropriate Fleet Commander instructions and OPORDS for detailed guidance.**

2.9 MILITARY ACTIVITIES IN OUTER SPACE

2.9.1 Outer Space Defined. As noted in paragraph 2.5.1, each nation has complete and exclusive control over the use of its national airspace. Except when exercising transit passage or archipelagic sea lanes passage, overflight in national airspace by foreign aircraft is not authorized without the consent of the territorial sovereign. However, man-made satellites and other objects in earth orbit may overfly foreign territory freely. Although there is no legally defined boundary between the upper limit of national airspace and the lower limit of outer space, international law recognizes freedom of transit by man-made space objects at earth orbiting altitude and beyond.[98]

2.9.2 The Law of Outer Space. International law, including the United Nations Charter, applies to the outer space activities of nations. Outer space is open to exploration and use by all nations. However, it is not subject to national appropriation, and must be used for peaceful purposes.[99] The term "peaceful purposes" does *not* preclude military activity. While acts of aggression in violation of the United Nations Charter are precluded, space-based systems may lawfully be employed to perform essential command, control, communications, intelligence, navigation, environmental, surveillance and warning functions to assist military activities on land, in the air, and on and under the sea.[100] Users of outer space must have due regard for the rights and interests of other space nations to do so as well.

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[98] **See paragraph 1.1 note 1 and Schwetje, The Development of Space Law and a Federal Space Law Bar, Fed. B. News & J., Sep. 1988, at 316.**

[99] **Although a number of nations maintain that "peaceful purposes" excludes military measures, the United States has consistently interpreted "peaceful purposes" to mean *nonaggressive* purposes. Military activity not constituting the use of armed force against the sovereignty, territorial integrity, or political independence of another nation, and not otherwise inconsistent with the UN Charter, is permissible. The right of self-defense applicable generally in international law also applies in space.**

[100] **Naval operations in support of national security objectives are increasingly dependent upon space systems support services. Today, virtually every fleet unit relies to some extent on space systems for support, and the military applications of space technology are steadily increasing. See Skolnick, The Navy's Final Frontier, U.S. Naval Inst. Proc. Jan. 1989, at 28; Howard, Satellites and Naval Warfare, id. April 1988, at 39; Jones, Photographic Satellite Reconnaissance, id., June 1980, at 41; U.S. Naval Space Command: Suppoting the Fleet, Aviation Week & Space Technology, March 21, 1988, at 38-51; Burrows, Deep-Black: Space Espionage and National Security (1986); Yost, Spy-Tech (1985); Karas, The New High Ground: Strategies and Weapons of Space-Age War (1983); Canan, War in Space (1982); Stine, Confrontation in Space (1981); and Jane's Spaceflight Directory (annual).**

2.9.2.1 General Principles of the Law of Outer Space. International law governing space activities addresses both the nature of the activity and the location in space where the specific rules apply. As set out in paragraph 2.9.1, outer space begins at the undefined upper limit of the earth's airspace and extends to infinity. In general terms, outer space consists of both the earth's moon and other natural celestial bodies, and the expanse between these natural objects.

The rules of international law applicable to outer space include the following:

1. Access to outer space is free and open to all nations.

2. Outer space is free from claims of sovereignty and not otherwise subject to national appropriation.

3. Outer space is to be used for peaceful purposes.

4. Each user of outer space must show due regard for the rights of others.

5. No nuclear or other weapons of mass destruction may be stationed in outer space.

6. Nuclear explosions in outer space are prohibited.

7. Exploration of outer space must avoid contamination of the environment of outer space and of the earth's biosphere.

8. Astronauts must render all possible assistance to other astronauts in distress.

2.9.2.2 Natural Celestial Bodies. Natural celestial bodies include the earth's moon, but not the earth. Under international law, military bases, installations and forts may not be erected nor may weapons tests or maneuvers be undertaken on natural celestial bodies. Moreover, all equipment, stations, and vehicles located there are open to inspection on a reciprocal basis. There is no corresponding right of physical inspection of man-made objects located in the expanse between celestial bodies. Military personnel may be employed on natural celestial bodies for scientific research and for other activities undertaken for peaceful purposes.

2.9.3 International Agreements on Outer Space Activities. The key legal principles governing outer space activities are contained in four widely ratified multilateral treaties: the 1967 Outer Space Treaty;[101] the 1968 Rescue and Return of Astronauts Agreement;[102]

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[101] **Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 27 January 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205, reprinted in AFP 110-20, chap. 6.**

the Liability Treaty of 1972;[103] and the Space Objects Registration Treaty of 1975.[104] A

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[102](...continued)

[102] Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space, 22 April 1968, 19 U.S.T. 7570, T.I.A.S. No. 6599, 672 U.N.T.S. 119, reprinted in AFP 110-20, chap. 6.

[103] Convention on International Liability for Damage Caused by Space Objects, 29 March 1972, 24 U.S.T. 2389, T.I.A.S. No. 7762, reprinted in AFP 110-20, chap. 6. The "launching nation" is responsible for damage. The launching nation is, for purposes of international liability, the nation launching, procuring the launch, or from whose territory the launch is made. Thus, with respect to any particular space object, more than one nation may be liable for the damage it causes. The launching nation is internationally liable for damages even if the launch is conducted entirely by a private, commercial undertaking.

The launching nation is said to be absolutely liable for space- object damage caused on earth or to an aircraft in flight. Liability can be avoided only if it can be shown that the claimant was grossly negligent. The question of liability for space-object damage to another space object, at any location other than the surface of the earth, is determined by the relative negligence or fault of the parties involved. The Liability Convention elaborates the general principle of international liability for damage set forth in Article VII of the Outer Space Treaty in Articles Ic, II, III and VI. Articles IV and V address joint and several liability. The crash of COSMOS 954 in the Canadian Arctic on 24 January 1978 is discussed in Galloway, Nuclear Powered Satellites: The U.S.S.R. Cosmos 954 and the Canadian Claim, 12 Akron L. Rev. 401 (1979), and Christol, International Liability for Damage Caused by Space Objects, 74 Am. J. Int'l L. 346 (1980). The Canadian claim is set forth in 18 Int'l Leg. Mat'ls 899-930 (1979); its resolution at 20 Int'l Leg. Mat'ls 689 (1981) wherein the USSR agreed to pay C$3M in settlement.

There are no "rules of the road" for outer space to determine which spacecraft has the right of way.

The Liability Convention does not distinguish between civil and military space objects. If military weapons are involved, the injured nation may take the view that the principle of self-defense, rather than the Liability Convention, applies.

[104] Convention on Registration of Objects Launched into Outer Space, 14 Jan. 1975, 28 U.S.T. 695, T.I.A.S. No. 8480, 1023 U.N.T.S. 15, reprinted in AFP 110-20, chap. 6. In order to enhance safety of space operations, a dual system for registering space objects launched from earth has been established in the Registration Treaty.

The first obligation is for each launching nation to maintain a registry containing certain information about every space object launched.

(continued...)

fifth, the 1979 Moon Treaty,[105] has not been widely ratified. The United States is a party to all of these agreements except the Moon Treaty.[106]

2.9.3.1 Related International Agreements. Several other international agreements restrict specific types of activity in outer space. The US-USSR Anti-Ballistic Missile (ABM) Treaty of 1972 prohibits the development, testing, and deployment of space-based ABM systems or components. Also prohibited, is any interference with the surveillance satellites both nations use to monitor ABM Treaty compliance.[107]

The 1963 Limited Test Ban Treaty (a multilateral treaty) includes an agreement not to test nuclear weapons or to carry out any other nuclear explosions in outer space.[108]

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[104](...continued)
The second obligation is to pass this basic information to the Secretary-General of the United Nations "as soon as practicable," and to advise the Secretary-General when the object is no longer in earth orbit. A United Nations registry is thereby maintained for all space objects launched from earth. Objects in space remain subject to the jurisdiction and control of the nation of registry. Outer Space Treaty, note 100 above, arts. II(1), II(2), III, IV & VIII. If more than one nation is involved in a launch, one of those nations must agree to act as the nation of registry (article II(2)). The term "as soon as practicable" is not defined in the Registration Treaty. State practice has established that the extent and timeliness of information given concerning space missions may be limited as required by national security.

[105] **Agreement Governing the Activities of States on the Moon and other Celestial Bodies, 5 Dec. 1979, 18 Int'l Leg. Mat'ls 1434 (1979), reprinted in AFP 110-20, chap. 6.**

[106] **The United States' objections to the Moon Treaty include those advanced regarding the deep seabed provisions of the 1982 LOS Convention. See paragraph 1.6 note 55.**

[107] **Treaty Between the United States and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, 26 May 1972, 23 U.S.T. 3435, T.I.A.S. No. 7503, reprinted in AFP 110-20, chap. 4. Sofaer, The ABM Treaty and the Strategic Defense Initiative, 99 Harv. L. Rev. 1972, and Chayes and Chayes, Testing and Development of 'Exotic' Systems Under the ABM Treaty: The Great Reinterpretation Caper, 99 Harv. L. Rev. 1956 (1986), discuss the proper interpretation of the scope of the obligation in article V of the ABM Treaty not to "develop, test or deploy space-based ABM systems or components." See 26 Int'l Leg. Mat'ls 282, id. 1130, and id. 1743 for additional debates on this issue, as well as 133 Cong. Rec. S6623 (19 May 1987), id. S12181 (16 Sep. 1987) (State Department Legal Adviser's report to Congress), and id. S6809 (20 May 1987) (fourth part of Sen. Nunn's restrictive view). See also the series of articles and commentaries in Arms Control Treaty Reinterpretation, 137 U. Pa. L. Rev. 1351-1558 (1989).**

[108] **Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water, 5 Aug. 1963, 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43, reprinted in** (continued...)

The 1977 Environmental Modification Convention (also a multilateral treaty) prohibits military or other hostile use of environmental modification techniques in several environments, including outer space.[109]

The 1982 International Telecommunication Convention[110] and the 1979 Radio Regulations[111] govern the use of the radio frequency spectrum by satellites and the location of satellites in the geostationary-satellite orbit.

2.9.4 Rescue and Return of Astronauts. Both the Outer Space Treaty and the Rescue and Return of Astronauts Agreement establish specific requirements for coming to the aid of astronauts. The treaties do not distinguish between civilian and military astronauts.

Astronauts of one nation engaged in outer space activities are to render all possible assistance to astronauts of other nations in the event of accident or distress. If a nation learns that spacecraft personnel are in distress or have made an emergency or unintended landing in its territory, the high seas, or other international area (e.g., Antarctica), it must notify the launching nation and the Secretary-General of the United Nations, take immediate steps to rescue the personnel if within its territory, and, if in a position to do so, extend search and rescue assistance if a high seas or other international area landing is involved. Rescued personnel are to be safely and promptly returned.[112]

Nations also have an obligation to inform the Secretary-General of the United Nations if they discover outer space phenomena which constitute a danger to astronauts.[113]

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[108](...continued)
AFP 110-20, chap. 4. See paragraph 10.2.2.5 note 7 below.

[109] **Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 18 May 1977, 31 U.S.T. 333, T.I.A.S. No. 9614, reprinted in AFP 110-20, chap. 4.**

[110] **Sen. Ex. Rep. 99-4, T.I.A.S. No. , entered into force for the United States 10 January 1986.**

[111] **T.I.A.S. No. , entered into force for the United States 27 October 1983.**

[112] **Outer Space Treaty, note 100 above, art. V; Rescue and Return Agreement, note 101 above, arts. 1 - 4. If the astronauts land during an armed conflict between the territorial and launching nations, the law of armed conflict would likely apply and permit retention of the astronauts under the 1949 Geneva Conventions. See chapter 11, part II of this publication.**

[113] **Outer Space Treaty, art. V.**

2.9.5 Return of Outer Space Objects. A party to the Rescue and Return of Astronauts Agreement must also notify the Secretary-General of the United Nations if it learns of an outer space object's return to earth in its territory, on the high seas, or in another international area. If the object is located in sovereign territory and the launching authority requests the territorial sovereign's assistance, the latter must take steps to recover and return the object. Similarly, such objects found in international areas shall be held for or returned to the launching authority. Expenses incurred in assisting the launching authority in either case are to be borne by the launching authority. Should a nation discover that such an object is of a "hazardous or deleterious" nature, it is entitled to immediate action by the launching authority to eliminate the danger of harm from its territory.[114]

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[114] **Rescue and Return Agreement, note 101 above, art. 5.**

CHAPTER 3

Protection of Persons and Property at Sea

3.1 INTRODUCTION

The protection of both U.S. and foreign persons and property at sea by U.S. naval forces in peacetime involves international law, domestic U.S. law and policy, and political considerations. Vessels and aircraft on and over the sea, and the persons and cargo embarked in them, are subject to the hazards posed by the ocean itself, by storm, by mechanical failure, and by the actions of others such as pirates, terrorists, and insurgents. In addition, foreign authorities and prevailing political situations may affect a vessel or aircraft and those on board by involving them in refugee rescue efforts, political asylum requests, regulatory enforcement actions, or applications of unjustified use of force against them.

Given the complexity of the legal, political, and diplomatic considerations that may arise in connection with the use of naval forces to protect civilian persons and property at sea, operational plans, operational orders, and, most importantly, the *applicable peacetime rules of engagement* promulgated by the operational chain of command ordinarily require the on-scene commander to report immediately such circumstances to higher authority and, whenever it is practicable under the circumstances to do so, to seek guidance prior to the use of armed force.

3.2 RESCUE, SAFE HARBOR, AND QUARANTINE

Mishap at sea is a common occurrence. The obligation of mariners to provide material aid in cases of distress encountered at sea has long been recognized in custom and tradition. A right to enter and remain in a safe harbor without prejudice, at least in peacetime, when required by the perils of the sea or *force majeure* is universally recognized.[1] At the same time, a coastal nation may lawfully promulgate quarantine regulations and restrictions for the port or area in which a vessel is located.[2]

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[1] **See 2 O'Connell 853-58 and paragraph 3.2.2 below. *Force majeure*, or Act of God, involves distress or stress of weather. Distress may be caused, inter alia, by equipment malfunction or navigational error, as well as by a shortage of food or water, or any other emergency. See paragraph 2.3.1 note 19 above.**

[2] **International Health Regulations, Boston, 1969, 21 U.S.T. 3003, T.I.A.S. No. 7026, 764 U.N.T.S. 3, as amended at Geneva, 1973, 25 U.S.T. 197, T.I.A.S. No. 7786. See paragraph 3.2.3 below regarding the duty of commanders to comply with quarantine regulations.**

3.2.1 Assistance to Persons, Ships, and Aircraft in Distress. Both the 1958 Geneva Convention on the High Seas and the 1982 UN Convention on the Law of the Sea (1982 LOS Convention) provide that every nation shall require the master of a ship flying its flag, insofar as he can do so without serious danger to his ship, crew, or passengers, to render assistance to any person found at sea in danger of being lost and to proceed with all possible speed to the rescue of persons in distress if informed of their need of assistance, insofar as it can reasonably be expected of him. He is also to be required, after a collision, to render assistance to the other ship, its crew, and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry, and the nearest port at which it will call.[3] (See paragraph 2.3.2.5 for a discussion of "Assistance Entry.")

3.2.1.1 Duty of Naval Commanders. Article 0925, U.S. Navy Regulations, 1973, requires that, insofar as he can do so without serious danger to his ship or crew, the commanding officer or senior officer present, as appropriate, shall proceed with all possible speed to the rescue of persons in distress if informed of their need for assistance (insofar as this can reasonably be expected of him); render assistance to any person found at sea in danger of being lost; and, after a collision, render assistance to the other ship, her crew and passengers, and, where possible, inform the other ship of his identity.[4]

3.2.1.2 Duty of Masters. In addition, the U.S. is party to the 1974 London Convention on Safety of Life at Sea, which requires the master of every merchant ship and private vessel not only to speed to the assistance of persons in distress, but to broadcast warning messages with respect to dangerous conditions or hazards encountered at sea.[5]

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[3] **High Seas Convention, art. 12; 1982 LOS Convention, art. 98; International Convention for the Unification of Certain Rules Relating to Salvage of Vessels at Sea, 23 September 1910, 37 Stat. 1658, T.I.A.S. No. 576; 46 U.S.C. sec. 2303 & 2304. Compare article 21 of the Second Geneva Convention of 1949 regarding the right of belligerents to appeal to the "charity of commanders of neutral merchant vessels, yachts or other craft, to take on board and care for the wounded, sick or shipwrecked persons, and to collect the dead" and the special protection accorded those who respond to such appeals. See paragraph 3.2.2.1 below regarding the right of ships transiting territorial seas in innocent passage to render assistance to persons, ships or aircraft in danger or distress.**

[4] **In addition to these obligations explicitly required by the law of the sea conventions, U.S. Navy Regulations, 1973, article 0905, also requires that distressed ships and aircraft be afforded all reasonable assistance. Actions taken pursuant to article 0925 are to be reported promptly to the Chief of Naval Operations and other appropriate superiors.**

[5] **1974 London Convention on Safety of Life at Sea, Regulations 10 and 2, Chapter V, 32 U.S.T. 47, T.I.A.S. No. 9700. The failure of a master or person in charge of a vessel to render assistance so far as he is able (absent serious danger to his own vessel) to every person found at sea in danger of being lost is a crime under U.S. law punishable by a fine not exceeding $1,000 and/or imprisonment for up to two years (46 U.S.C. sec. 2304). This section does not apply to public vessels (see 46 U.S.C. sec. 2109 (Supp. IV, 1986)).**

3.2.2 **Safe Harbor.** Under international law, no port may be closed to a foreign ship seeking shelter from storm or bad weather or otherwise compelled to enter it in distress, unless another equally safe port is open to the distressed vessel to which it may proceed without additional jeopardy or hazard. The only condition is that the distress must be real and not contrived and based on a wellfounded apprehension of loss of the vessel, cargo, or crew. In general, the distressed vessel may enter a port without being subject to local regulations concerning any incapacity, penalty, prohibition, duties, or taxes in force at that port.[6]

3.2.2.1 **Innocent Passage.** Innocent passage through territorial seas and archipelagic waters includes stopping and anchoring when necessitated by *force majeure* or by distress. Stopping and anchoring in such waters for the purpose of rendering assistance to others in similar danger or distress is also permitted by international law.[7]

3.2.3 **Quarantine.** Article 0763, U.S. Navy Regulations, 1973, requires that the commanding officer or aircraft commander of a ship or aircraft comply with quarantine regulations and restrictions. While not required under any circumstances to permit inspection of his vessel or aircraft, commanding officers shall afford every other assistance to health officials, U.S. or foreign, and shall give all information required, insofar as permitted by the requirements of military necessity and security.[8]

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[6] **2 O'Connell 853-58.**

[7] **Territorial Sea Convention, art. 14; 1982 LOS Convention, arts. 18 & 52. Innocent passage is discussed in greater detail in paragraph 2.3.2 above.**

[8] **Additional guidance is provided in ALNAV 051/89:**

> **Ships, aircraft, or other conveyances of the armed forces proceeding to a foreign port will meet the quarantine requirements promulgated by proper authority for such port. The U.S. Government asserts the full panoply of rights of sovereign immunity with respect to U.S. warships and military aircraft, USNS vessels, and Afloat Prepositioning Force ships. They will not be subject to inspections or searches by officials for any purpose. Commanding Officers, Masters, and Aircraft Commanders may certify compliance with quarantine regulations and restrictions to foreign health officials. If requested by host authorities, certification may include a general description of measures taken by U.S. officials in compliance with local requirements. At the discretion of the Commanding Officer, Master, or Aircraft Commander, foreign health officials may be received on board for the purpose of receiving certification of compliance. Such officials may not, however, inspect the ship/aircraft, or act as obeservers while U.S. personnel conduct such inspections. Actions by foreign officials inconsistent with this guidance shall be reported immediately to the chain of command and U.S. embassy.**

(continued...)

3.3 ASYLUM

International law recognizes the right of a nation to grant asylum to foreign nationals already present within or seeking admission to its territory.[9] The U.S. defines "asylum" as:

> *Protection and sanctuary granted by the United States Government within its territorial jurisdiction or in international waters to a foreign national who applies for such protection because of persecution or fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.*[10]

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[8](...continued)

See also SECNAVINST 6210.2 (series), subj: Medical and Agricultural Foreign and Domestic Quarantine Regulations for Vessels, Aircraft, and Other Transports of the Armed Forces, and paragraph 3.2 above. The sovereign immunity of warships and military aircraft is discussed in paragraphs 2.1.2 and 2.2.2 above.

[9] Sometimes referred to as "political asylum", the right of asylum recognized by the U.S. Government is territorial asylum. Christopher, Political Asylum, Dep't St. Bull., Jan. 1980, at 36. The 1948 UN Universal Declaration of Human Rights declares that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution." See Declaration on Territorial Asylum, 22 U.N. GAOR, Supp. 16, U.N. Doc. A/6716, at 81 (1968). The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S. Code), for the first time created substantial protections for aliens fleeing persecution who are physically present in U.S. territory. The Refugee Act of 1980 is carefully examined in Anker, Discretionary Asylum. A Protection Remedy for Refugees Under the Refugee Act of 1980, 28 Va. J. Int'l L. 1 (1987).

[10] This definition is derived from article 1 of the 1951 Convention Relating to the Status of Refugees, 19 U.S.T. 6260, 189 U.N.T.S. 150 (in respect to refugees resulting from pre-1951 events), articles 2 to 34 of which are incorporated in the 1967 Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267, AFP 110-20 chap. 37, which makes its provisions applicable without time reference. The United States is party to the latter instrument. Refugees are defined in 8 U.S.C. sec. 1101(42)(A) (1982) in substantially similar terms.

Asylum responsibility rests with the government of the country in which the seeker of asylum finds himself or herself. The U.S. Government does not recognize the practice of granting "diplomatic asylum" or long-term refuge in diplomatic missions or other government facilities abroad or at sea and considers it contrary to international law (but see paragraph 3.3.2). However, exceptions to this policy have been made. For example, the United States received Cardinal Mindszenty in the U.S. Embassy in Budapest in 1956, and accorded him a protected status for some six years. 6 Whiteman 463-64. Several

(continued...)

3.3.1 Territories Under the Exclusive Jurisdiction of the United States and International Waters. Any person requesting asylum in international waters or in territories under the exclusive jurisdiction of the United States (including the U.S. territorial sea, the Commonwealth of Puerto Rico, territories under U.S. administration, and U.S. possessions), will be received on board any naval aircraft or vessel or any Navy or Marine Corps activity or station. Persons seeking asylum are to be afforded every reasonable care and protection permitted by the circumstances. Under no circumstances will a person seeking asylum in U.S. territory or in international waters be surrendered to foreign jurisdiction or control, unless at the personal direction of the Secretary of the Navy or higher authority. (See Article 0940, U.S. Navy Regulations, 1973, and SECNAVINST 5710.22 for specific guidance.)

3.3.2 Territories Under Foreign Jurisdiction. Commanders of U.S. warships, military aircraft, and military installations in territories under foreign jurisdiction (including foreign territorial seas, archipelagic waters, internal waters, ports, territories, and possessions) are not authorized to receive on board foreign nationals seeking asylum. Such persons should be referred to the American Embassy or nearest U.S. Consulate in the country, foreign

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[10](...continued)
Pentacostals spent five years in the U.S. Embassy in Moscow between 1978 and 1983. 1 Restatement (Third), sec. 466 Reporters' Note 3, at 488-89. Recently two Chinese dissidents were received in the U.S. Embassy in Beijing. Wash. Post, 13 June 1989, at A25; Wall St. J., 13 June 1989, at A20.

Guidance for military personnel in handling requests for political asylum and temporary refuge is found in DOD Directive 2000.11; SECNAVINST 5710.22 (series), Subj: Procedures for Handling Requests for Political Asylum and Temporary Refuge; U.S. Navy Regulations, 1973, article 0940; and applicable OPORDS. These directives were promulgated after the Simas Kurdika incident. See Mann, Asylum Denied: The Vigilant Incident, Nav. War C. Rev., May 1971, at 4, reprinted in 2 Lillich & Moore, Readings in International Law from the Naval War College Review 598 (U.S. Naval War College, International Law Studies, v.60, 1980); Goldie, Legal Aspects of the Refusal of Asylum by U.S. Coast Guard on 23 November 1970, Nav. War C. Rev., May 1971, at 32, reprinted in 2 Lillich & Moore 626; Fruchterman, Asylum: Theory and Practice, 26 JAG J. 169 (1972). Special procedures, held locally, apply to Antarctica and Guantanamo Bay.

On the other hand, some refugees may seek resettlement and not specifically request asylum, such as some of the Indochinese refugees encountered by U.S. naval vessels in the South China Sea since 1975. Guidance for handling refugee resettlement requests may be found in cognizant operations orders, such as CINCPACFLT OPORD 201, Tab G to Appendix 6 to Annex C, para. 3(b).

The legal protections of refugees and displaced persons are discussed in four articles appearing in 1988 Int'l Rev. Red Cross 321-78.

territory, or foreign possession involved, if any, for assistance in coordinating a request for asylum with the host government insofar as practicable. Because warships are extensions of the sovereignty of the flag nation and because of their immunity from the territorial sovereignty of the foreign nation in whose waters they may be located, they have often been looked to as places of asylum. The U.S., however, considers that asylum is generally the prerogative of the government of the territory in which the warship is located.

However, if exceptional circumstances exist involving imminent danger to the life or safety of the person, temporary refuge may be granted. (See paragraph 3.3.4.)

3.3.3 Expulsion or Surrender. Article 33 of the 1951 Convention Relating to the Status of Refugees provides that a refugee may not be expelled or returned in any manner whatsoever to the frontier or territories of a nation where his life or freedom would be threatened on account of his race, religion, nationality, political opinion, or membership in a particular social group, unless he may reasonably be regarded as a danger to the security of the country of asylum or has been convicted of a serious crime and is a danger to the community of that country. This obligation applies only to persons who have entered territories under the exclusive jurisdiction of the United States. It does not apply to temporary refuge granted abroad.[11]

3.3.4 Temporary Refuge. International law and practice have long recognized the humanitarian practice of providing temporary refuge to anyone, regardless of nationality, who may be in imminent physical danger for the duration of that danger. (See Article 0940, U.S. Navy Regulations, 1973, and SECNAVINST 5710.22.)

SECNAVINST 5710.22 defines "temporary refuge" as:

Protection afforded for humanitarian reasons to a foreign national in a Department of Defense shore installation, facility, or military vessel within the

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[11] **This obligation, known as *non-refoulement*, is implemented by 8 U.S.C. sec. 1253(h)(1) (1982). See 2 Restatement (Third), sec. 711 Reporters' Note 7, at 195-96, and 1 id., sec. 433 Reporters' Note 4, at 338-39.**

The United States has granted greater protection to Haitian migrants intercepted at sea under the Haitain Migration Interdiction Program. Under this executive agreement between the United States and Haiti, 23 September 1981, 33 U.S.T. 3559, T.I.A.S. No. 10241, Haiti authorized U.S. Coast Guard personnel to board any Haitain flag vessel on the high seas or in Haitian territorial waters which the Coast Guard has reason to believe may be involved in the irregular carriage of passengers outbound from Haiti, to make inquiries concerning the status of those on board, to detain the vessel if it appears that an offense against U.S. immigration laws or appropriate Haitian laws has been or is being committed, and to return the vessel and the persons on board to Haiti. Under this agreement the United States "does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status."

territorial jurisdiction of a foreign nation[12] *or in international waters, under conditions of urgency in order to secure the life or safety of that person against imminent danger, such as pursuit by a mob.*

It is the policy of the United States to grant temporary refuge in a foreign country to nationals of that country, or nationals of a third nation, solely for humanitarian reasons when extreme or exceptional circumstances put in imminent danger the life or safety of a person, such as pursuit by a mob. The officer in command of the ship, aircraft, station, or activity must decide which measures can prudently be taken to provide temporary refuge. The safety of U.S. personnel and security of the unit must be taken into consideration.[13]

3.3.4.1 Termination or Surrender of Temporary Refuge. Although temporary refuge should be terminated when the period of active danger is ended, the decision to terminate protection will not be made by the commander. Once temporary refuge has been granted, protection may be terminated only when directed by the Secretary of the Navy or higher authority. (See Article 0940, U.S. Navy Regulations, 1973, and SECNAVINST 5710.22.)

A request by foreign authorities for return of custody of a person under the protection of temporary refuge will be reported in accordance with SECNAVINST 5710.22 (series). The requesting foreign authorities will then be advised that the matter has been referred to higher authorities.

3.3.5 Inviting Requests for Asylum or Refuge. Personnel of the Department of the Navy shall neither directly nor indirectly invite persons to seek asylum or temporary refuge.[14]

3.3.6 Protection of U.S. Citizens. The limitations on asylum and temporary refuge are not applicable to U.S. citizens. U.S. citizens are entitled to protection from persecution or danger to life or safety in all circumstances. See the peacetime rules of engagement for applicable guidance.

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[12] **Including foreign territorial seas, archipelagic waters, internal waters, ports, territories and possessions. See paragraph 3.3.1 regarding asylum in international waters.**

[13] **All requests for asylum or temporary refuge will be reported immediately and by the most expeditious means to CNO or CMC in accordance with SECNAVINST 5710.22 (series). No information will be released to the public or the media without the prior approval of the Assistant Secretary of Defense for Public Affairs or higher authority.**

[14] **U.S. Navy Regulations, 1973, article 0940; SECNAVINST 5710.22 (series).**

3.4 REPRESSION OF PIRACY

International law has long recognized a general duty of all nations to cooperate in the repression of piracy. This traditional obligation is included in the 1958 Geneva Convention on the High Seas and the 1982 LOS Convention, both of which provide:

> *[A]ll States shall cooperate to the fullest possible extent in the repression of piracy on the high seas*[15] *or in any other place outside the jurisdiction of any State.*[16]

3.4.1 U.S. Law. The U.S. Constitution (Article I, Section 8) provides that:

> *The Congress shall have Power ... to define and punish piracies and felonies committed on the high seas, and offences against the Law of Nations.*

Congress has exercised this power by enacting title 18 U.S. Code section 1651 which provides that:

> *Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.*[17]

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[15] **The international law of piracy also applies within the exclusive economic zone. 1982 LOS Convention, art. 58(2). Article 19 of the High Seas Convention and article 105 of the 1982 LOS Convention permit any nation to seize a pirate ship or aircraft, or a ship or aircraft taken by and under the control of pirates, and to arrest the persons and seize the property on board. The courts of the seizing nation may also decide upon the penalties to be imposed and the disposition of the ship, aircraft or property, subject to the rights of third parties acting in good faith.**

[16] **High Seas Convention, art. 14; 1982 LOS Convention, art. 100.**

[17] **Congressional exercise of this power is set out in 18 U.S.C. sections 1651-61 (piracy), 49 U.S.C. sections 1472(i)-(n) (aircraft piracy), 33 U.S.C. sections 381-84 (regulations for suppression piracy), and 18 U.S.C. section 1654 (privateering). It should be noted that the municipal law definitions of piracy include acts not considered as piracy in the international law sense of the term. For example, the U.S. law includes in the crime of piracy, arming or serving on privateers (18 U.S.C. sec. 1654), assault by a seaman on a captain so as to prevent him from defending his ship or cargo (18 U.S.C. sec. 1655), running away with a vessel within the admiralty jurisdiction (18 U.S.C. sec. 1656), corruption of seamen to run away with a ship (18 U.S.C. sec. 1657), receipt of pirate property (18 U.S.C. sec. 1660), and robbery ashore in the course of a piratical cruise (18 U.S.C. sec. 1661).**

U.S. law authorizes the President to employ "public armed vessels" in protecting U.S. merchant ships from piracy and to instruct the commanders of such vessels to seize any pirate ship that has attempted or committed an act of piracy against any U.S. or foreign flag vessel in international waters.[18]

3.4.2 Piracy Defined. Piracy is an international crime consisting of illegal acts of violence, detention, or depredation committed for private ends by the crew or passengers of a private ship or aircraft in or over international waters against another ship or aircraft or persons and property on board. (Depredation is the act of plundering, robbing or pillaging.)[19]

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[18] 33 U.S.C. sec. 381 & 382 (1982). These sections also authorize issuance of instructions to naval commanders to send into any U.S. port any vessel which is armed or the crew of which is armed, and which shall have "attempted or committed any piratical aggression, search, restraint, depredation, or seizure, upon any vessel," U.S. or foreign flag, or upon U.S. citizens; and to retake any U.S. flag vessel or U.S. citizens unlawfully captured in international waters.

[19] The 1982 LOS Convention defines piracy as follows:

> Piracy consists of any of the following acts:
>
> (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
>
> (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
>
> (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
>
> (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
>
> (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

1982 LOS Convention, art. 101. The High Seas Convention, art. 15, defines piracy in essentially identical terms. Municipal law definitions, however, vary. Compare note 17 above. The international law of piracy is neither clearly nor completely set forth in the law of the sea conventions. See the discussions in 2 O'Connell 966-83 and Rubin, The Law of Piracy (U.S. Naval War College, International Law Studies, v. 63, 1988).

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing an act of piracy. The same

(continued...)

3.4.2.1 Location. In international law piracy is a crime that can only be committed on or over international waters, including the high seas, exclusive economic zone, the contiguous zone, in international airspace, and in other places at sea beyond the territorial jurisdiction of any nation. The same acts committed in the territorial sea, archipelagic waters, or national airspace of a nation do not constitute piracy in international law but are, instead, crimes within the jurisdiction and sovereignty of the littoral nation.[20]

3.4.2.2 Private Ship or Aircraft. Acts of piracy can only be committed by private ships or private aircraft. A warship or other public vessel or a military or other state aircraft cannot be treated as a pirate unless it is taken over and operated by pirates or unless the crew mutinies and employs it for piratical purposes.[21] By committing an act of piracy, the pirate ship or aircraft, and the pirates themselves, lose the protection of the nation whose flag they are otherwise entitled to fly.[22]

3.4.2.3 Private Purpose. To constitute the crime of piracy, the illegal acts must be committed for private ends. Consequently, an attack upon a merchant ship at sea for the purpose of achieving some criminal end, e.g., robbery, is an act of piracy as that term is currently defined in international law.[23]

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[19](...continued)
applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act. High Seas Convention, art. 17; 1982 LOS Convention, art. 103.

Professor O'Connell correctly notes that "it is the repudiation of all authority that seems to be the essence of piracy." 2 O'Connell 970.

[20] **Piracy is prevalent in the Strait of Malacca, Singapore Strait, Gulf of Thailand, South China Sea, coastal waters off West Africa, and the Caribbean. The impact of modern piracy on the U.S. Navy is described in Petrie, Pirates and Naval Officers, Nav. War C. Rev., May-June 1982, at 15.**

[21] **High Seas Convention, art. 16; 1982 LOS Convention, art. 102.**

[22] **However, the nationality of the vessel is not affected by its piratical use unless such is specifically provided for in the law of the country of the vessel's nationality. High Seas Convention, art. 18; 1982 LOS Convention, art. 104. It should be noted that it is not a precondition for a finding of piracy that the ship in question does not have the right to fly the flag, if any, which it displays. Additionally, the mere fact that a ship sails without a flag is not sufficient to give it the character of a pirate ship, although it could be treated as a ship without nationality. 2 O'Connell 755-57; 9 Whiteman 35-37.**

[23] **Acts otherwise constituting piracy done for purely political motives, as in the case of insurgents not recognized as belligerents, are not piratical. "So long as the acts are**
(continued...)

3.4.2.4 **Mutiny or Passenger Hijacking.** If the crew or passengers of a ship or aircraft, including the crew of a warship or military aircraft, mutiny or revolt and convert the ship, aircraft or cargo to their own use, the act is not piracy.[24] If, however, the ship or aircraft is thereafter used to commit acts of piracy, it becomes a pirate ship or pirate aircraft and those on board voluntarily participating in such acts become pirates.[25]

3.4.3 **Use of Naval Forces to Repress Piracy.** Only warships, military aircraft, or other ships or aircraft clearly marked and identifiable as being on governmental service and authorized to that effect, may seize a pirate ship or aircraft.[26]

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[23](...continued)
those which are normally incidental to belligerent activity they would not be characterized as piracy, even though the actors may have only the most slender claims to international authority. . . . [I]t would be a false characterization of illicit acts to describe them as piracy when the intention of the insurgents is to wage war as distinct from committing random depredation." 2 O'Connell 975 & 976; 2 Restatement (Third), sec. 522 Reporters' Note 2, at 85. So also terrorist attacks on shipping for the sole purpose of achieving some political end are arguably not piracy under current international law. See paragraph 3.11. Terrorist acts on board merchant ships and oil rigs or platforms anchored on the continental shelf are proscribed by the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, and Protocol, Rome, 10 March 1988, Sen. Treaty Doc. 101-1, 27 Int'l Leg. Mat'ls 668 (1988), which the United States and 22 other nations signed on 10 March 1988, Dep't St. Bull., May 1988, at 62.

[24] Although it is a crime under 18 U.S.C. sec. 1656. See also paragraph 3.4.2.3 above.

[25] In international law certain types of acts, perhaps technically falling within the definition of piracy in paragraph 3.4.2, are generally recognized as not being piracy. Their general character is simply not of a nature so offensive and harmful to international maritime commerce and to the community of all nations as to warrant the designation of the perpetrators as enemies of the human race. Here a rule of reason is applied. For example, a mere quarrel followed by acts of violence or depredations occurring between fishermen in international waters ought not to be regarded as an incident of piracy. Likewise, efforts (however unlawful) of conservationists to detain or disrupt whaling vessels on their high seas operations ought not generally to be treated as piracy but may violate U.S. criminal laws. See also Gehring, Defense Against Insurgents on the High Seas: The Lyla Express and Johnny Express, 27 JAG J. 317 (1973).

[26] High Seas Convention, art. 21; 1982 LOS Convention, art. 107. U.S. Coast Guard Cutters are also warships. Paragraph 2.1.1 note 2 above.

In many cases, circumstances may be such as there is no reason to doubt the piratical nature of a ship or aircraft. Where, however, the situation is not so clear, before action may be taken against pirates it must first be ascertained that they are in fact pirates. A
(continued...)

3.4.3.1 Seizure of Pirate Vessels and Aircraft. When a pirate vessel or aircraft is encountered in or over U.S. or international waters it may be seized and detained by any U.S. Navy warship or aircraft. The pirate vessel or aircraft, and all persons on board, should be taken, sent, or directed to the nearest U.S. port or airfield and delivered to U.S. law enforcement authorities for disposition according to U.S. law. Alternatively, higher authority may arrange with another nation to accept and try the pirates and dispose of the pirate vessel or aircraft, since every nation has jurisdiction under international law over any act of piracy.[27]

3.4.3.2 Pursuit into Foreign Territorial Sea, Archipelagic Waters, or Airspace. If a pirate vessel or aircraft fleeing from pursuit by a warship or military aircraft proceeds from international waters or airspace into the territorial sea, archipelagic waters, or superjacent airspace of another country, every effort should be made to obtain the consent of the nation having sovereignty over the territorial sea, archipelagic waters, or superjacent airspace to continue pursuit. The inviolability of the territorial integrity of sovereign nations makes the decision of a warship or military aircraft to continue pursuit into these areas without such consent a serious matter. However, the international nature of the crime of piracy may allow continuation of pursuit, if contact cannot be established in a timely manner with the coastal nation to obtain its consent. In such a case, pursuit must be broken off immediately upon request of the coastal nation, and, in any event, the right to seize the pirate vessel or aircraft and to try the pirates devolves on the nation to which the territorial seas, archipelagic waters, or airspace belong.

Pursuit of a pirate vessel or aircraft through or over international straits overlapped by territorial waters or through archipelagic sea lanes or air routes may proceed with or without the consent of the coastal nation or nations, provided the pursuit is expeditious and

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[26](...continued)
warship may exercise the right of approach and visit (see paragraph 3.8) at any time to verify the nationality of another vessel.

It is within the general authority of the naval commander to protect innocent shipping in international waters from piratical attack. This authority with respect to U.S. citizens and U.S. flag vessels is specified in U.S. Navy Regulations, 1973, articles 0914 and 0920; authority may be derived from an amalgam of customary international law, treaty obligation, statute and Navy Regulations with respect to foreign flag vessels. Guidance for dealing with piracy is contained in the fleet commanders' basic operational orders. The commander's specific authority to use force in such circumstances is derived from rules of engagement promulgated by the operational chain of command. When circumstances permit, higher authority should be consulted.

[27] **High Seas Convention, art. 19; 1982 LOS Convention, art. 105; 1 Restatement (Third), sec. 404 & 423 (an exercise of universal jurisdiction to prescribe and to enforce), and sec. 404 Reporters' Note 1, at 255.**

direct and the transit passage rights of others are not unreasonably constrained in the process.

3.5 PROHIBITION OF THE TRANSPORT OF SLAVES

International law strictly prohibits use of the seas for the purpose of transporting slaves.[28] The 1982 LOS Convention requires every nation to prevent and punish the transport of slaves in ships authorized to fly its flag.[29] Commanders should request guidance from higher authority if confronted with this situation.

3.6 SUPPRESSION OF INTERNATIONAL NARCOTICS TRAFFIC

The 1982 LOS Convention provides that all nations shall cooperate in the suppression of the illicit traffic in narcotic drugs and psychotropic substances by ships in international waters. The 1982 Convention also provides that any nation which has reasonable grounds for believing that a ship flying its flag is engaged in such traffic may request the cooperation of other nations in effecting its seizure. Foreign flag vessels are regularly seized by U.S. Coast Guard ships pursuant to such bilateral arrangements.[30] (See

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[28] **Convention to Suppress the Slave Trade and Slavery, Geneva, 25 September 1926, 46 Stat. 2183, T.S. No. 778, 2 Bevans 607, 60 L.N.T.S. 253; Protocol Amending the Slavery Convention of 25 September 1926, New York, 7 December 1953, 7 U.S.T. 479, T.I.A.S. No. 3532, 182 U.N.T.S. 51; Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, Geneva, 5 September 1956, 18 U.S.T. 3201, T.I.A.S. No. 6418, 266 U.N.T.S. 3. This obligation is implemented in 18 U.S.C. sec. 1581-88 (1982). See 1 Restatement (Third), sec. 404 & 423, and Reporters' Note 1, at 253.**

[29] **1982 LOS Convention, art. 99. The Convention, Amending Protocol, and Supplementary Convention, note 27 above, do not authorize nonconsensual high seas boarding by foreign flag vessels. Nevertheless, such nonconsensual boarding was generally authorized in article 22(1) of the 1958 High Seas Convention and reaffirmed in article 111(1)(b) of the 1982 LOS Convention.**

[30] **1982 LOS Convention, art. 108, implemented by the United States in 49 U.S.C. sec. 781-789 and 14 U.S.C. sec. 89. The Single Convention on Narcotic Drugs, 1961, New York, 30 March 1961, 18 U.S.T. 1407, T.I.A.S. No. 6298, 520 U.N.T.S. 204, is implemented by the United States in 22 U.S.C. sec. 2291 (1982). The 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, December 20, 1988, Sen. Treaty Doc. 101-4, 28 Int'l Leg. Mat'ls 497 (1989), Article 17, also mandates a consensual regime for the boarding of foreign flag vessels suspected of drug trafficking at sea. See also 2 Restatement (Third), sec. 522 comment d & Reporters' Notes 4 & 8; 1 id., sec. 433 Reporters' Note 4, at 337-39; 2 id., sec. 513 Comment f; 1 id., sec. 403 Reporters' Note 9, at 253-54 (special maritime and aircraft jurisdiction of the United States).**

paragraph 3.12.5 regarding utilization of U.S. Navy assets in the support of U.S. drug-interdiction efforts.)

3.7 SUPPRESSION OF UNAUTHORIZED BROADCASTING

The 1982 LOS Convention provides that all nations shall cooperate in the suppression of unauthorized broadcasting from international waters. Unauthorized broadcasting involves the transmission of radio or television signals from a ship or off-shore facility intended for receipt by the general public, contrary to international regulation.[31] Commanders should request guidance from higher authority if confronted with this situation.

3.8 WARSHIP'S RIGHT OF APPROACH AND VISIT

As a general principle, vessels in international waters are immune from the jurisdiction of any nation other than the flag nation. However, under international law, a warship may *approach* any vessel in international waters to verify its nationality.[32] Unless the vessel encountered is itself a warship or government vessel of another nation, it may be stopped, boarded, and the ship's documents examined, *provided* there is reasonable ground for suspecting that it is:

1. Engaged in piracy.[33]

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[31] **1982 LOS Convention, art. 109. This provision supports the Regulations annexed to the International Telecommunications Convention, Malaga-Torremolinos, 25 October 1973, 28 U.S.T. 2495, T.I.A.S. No. 8572, and the Radio Regulations, Geneva, 6 December 1979, U.S.T. , T.I.A.S. No. . Unauthorized broadcasting from international waters is made a crime in the U.S. by 47 U.S.C. sec. 502 (1982). These rules are designed to aid in the suppression of "pirate broadcasting" which had become a problem to European countries within range of international waters in the North Sea in the 1960s, 2 O'Connell 814-19, and thus was not addressed in article 22(1) of the 1958 High Seas Convention. Compare the arrest of Radio New York International personnel operating from the SARAH 4.5 miles off Long Beach, L.I., N.Y. N.Y. Times, 27 July 1987, at A1; id., 29 July 1987, at B1; id., 28 Aug. 1987, at B2 (charges dropped, radio equipment having been destroyed); Wall St. J., 8 Sept. 1987, at 32 (editorial opposing the arrest, without recognizing applicable law); N.Y. Times, 13 Sep. 1988, at B4 (reporting SARAH had been towed from Boston harbor to anchor 4.5 NM south of Long Beach, Long Island, NY, awaiting decision of Boston Federal District Court on Federal Communications Commission request for restraining order).**

[32] ***Mariana Flora*, 24 U.S. (11 Wheaton) 1, 43-44 (1926); 4 Whiteman 515-22; 2 O'Connell 802-03. See also Zwanenberg, Interference with Ships on the High Seas, 10 Int'l & Comp. L.Q. 785 (1961).**

[33] **See paragraph 3.4.**

2. Engaged in the slave trade.[34]

3. Engaged in unauthorized broadcasting.[35]

4. Without nationality.

5. Though flying a foreign flag, or refusing to show its flag, the vessel is, in reality, of the same nationality as the warship.[36]

Vessels without nationality (also referred to as "stateless vessels") are vessels not entitled to fly the flag of any nation and vessels falsely assuming a nationality. Because these vessels are not entitled to the protection of any nation, they are subject to the jurisdiction of all nations.[37] The procedure for ships exercising the right of approach and visit is similar to that used in exercising the belligerent right of visit and search described in paragraph 7.6.1. See Article 630.23 of OPNAVINST 3120.32B for further guidance.

3.9 HOT PURSUIT

The hot pursuit of a foreign ship may be undertaken as a law enforcement action [38] when the coastal or island nation has reason to believe that the ship has violated the laws

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[34] See paragraph 3.5.

[35] See paragraph 3.7.

[36] 1982 LOS Convention, art. 110. The sovereign immunity of warships is discussed in paragraph 2.1.2 above; the belligerent right of visit and search is discussed in paragraph 7.6 below.

[37] Accordingly, a warship of any nation, encountering in international water a stateless vessel (including a vessel assimilated to a stateless vessel), may stop, visit, and search, and in appropriate circumstances, seize such a vessel. 2 Restatement (Third), sec. 522(2)(b) & Reporters' Note 7, at 87-88.

[38] Hot pursuit is extensively discussed in 2 O'Connell 1075-93. Hot pursuit is to be distinguished from the right to take pursuing action, as necessary to ensure the safety of threatened forces or territory, under the fundamental principle of self-defense (see paragraph 4.3.2 below). The latter is a much broader concept, not dependent upon whether the threat occurs within territorial waters or the contiguous zone. This concept is frequently referred to as "immediate pursuit" or "self-defense pursuit." See paragraph 4.3.2.2 note 33.

and regulations of that nation.[39] The pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea, or the contiguous zone of the pursuing nation, and may only be continued outside the territorial sea or contiguous zone if the pursuit has not been interrupted.[40] It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone.[41] If the foreign ship is within a contiguous zone, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.[42] The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own nation or of a third nation.[43] The right of hot pursuit may be exercised only by warships, military aircraft or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.[44] The right of hot pursuit applies also to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations, of the laws

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[39] High Seas Convention, art. 23(1); 1982 LOS Convention, art. 111(1). The 1982 LOS Convention requires that there be "good reason" to believe such a violation has occurred. Regardless of how much this raises the standard, it is clear that mere suspicion does not trigger the right, and actual knowledge of an offense is not required. 2 O'Connell 1088.

[40] High Seas Convention, art. 23(1); 1982 LOS Convention, art. 111(1). The reference to "one of its boats" reflects the doctrine of constructive presence recognized in the High Seas Convention, art. 23(1) & (4), and the 1982 LOS Convention, art. 111(1) & (4). See 2 O'Connell 1092-93.

[41] High Seas Convention, art. 23(4); 1982 LOS Convention, art. 111(5).

[42] High Seas Convention, art. 23(1); 1982 LOS Convention, art. 111(1). The doctrine applies to all violations within the territorial sea and to violations of customs, fiscal, sanitary, and immigration laws and regulations in the contiguous zone. However, some contend hot pursuit commenced in the contiguous zone may be only for offenses committed in the territorial sea, and not for offenses in the contiguous zone. 2 O'Connell 1083-84. The contiguous zone is defined in paragraph 3.9.

[43] High Seas Convention, art. 23(2); 1982 LOS Convention, art. 111(3); 2 Restatement (Third), sec. 513 Comment g, at 49.

[44] High Seas Convention, art. 23(4); 1982 LOS Convention, art. 111(5). Because of *posse comitatus* limitations (see paragraph 3.12 below), the right of hot pursuit is not normally exercised by the U.S. Navy or U.S. Air Force but rather by U.S. Coast Guard forces; however, U.S. Navy or U.S. Air Forces forces may properly exercise the right of hot pursuit if U.S. Coast Guard forces are not in a position to initiate or continue such pursuit.

and regulations of the coastal or island nation applicable to the exclusive economic zone or the continental shelf, including such safety zones.[45]

3.9.1 Commencement of Hot Pursuit. Hot pursuit is not deemed to have begun unless the pursuing ship is satisfied by such practicable means as are available that the ship pursued, or one of its boats or other craft working as a team and using the ship pursued as a mother ship, is within the limits of the territorial sea, within the contiguous zone or the exclusive economic zone, or above the continental shelf. Pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.[46]

3.9.2 Hot Pursuit by Aircraft. Where hot pursuit is effected by aircraft:

1. The provisions of paragraphs 3.9 and 3.9.1 apply.

2. The aircraft giving the order to stop must itself actively pursue the ship until a ship or another aircraft of the coastal or island nation, summoned by the aircraft, arrives to take over the pursuit, unless the aircraft is itself able to arrest the ship. The aircraft must do more than merely sight the offender or suspected offender to justify an arrest outside the territorial sea. It must first order the suspected offender to stop. Should the suspected offender fail to comply, pursuit may be commenced alone or in conjunction with other aircraft or ships. Pursuit must continue without interruption.[47]

3.10 RECOVERY OF GOVERNMENT PROPERTY LOST AT SEA

The property of a sovereign nation lost at sea remains vested in that sovereign until title is formally relinquished or abandoned. Aircraft wreckage, sunken vessels, practice

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[45] **1982 LOS Convention, art. 111(2).**

[46] **High Seas Convention, art. 23(3); 1982 LOS Convention, art. 111(4).**

The release of a ship arrested within the jurisdiction of a nation and escorted to a port of that nation for the purposes of an inquiry before the competent authorities may not be claimed solely on the ground that the ship, in the course of its voyage, was escorted across a portion of the exclusive economic zone or high seas, if the circumstances rendered this necessary. High Seas Convention, art. 23(6); 1982 LOS Convention, art. 111(7).

Where a ship has been stopped or arrested beyond the territorial seas in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained. High Seas Convention, art. 23(7); 1982 LOS Convention, art. 111(8).

[47] **High Seas Convention, art. 23(5); 1982 LOS Convention, art. 111(6).**

torpedoes, test missiles, and target drones are among the types of U.S. Navy property which may be the subject of recovery operations. Should such U.S. property be recovered at sea by foreign entities, it is U.S. policy to demand its immediate return. Specific guidance for the on-scene commander in such circumstances is contained in the applicable operation order (e.g., CINCPACFLT OPORD 201, CINCLANTFLT OPORD 2000).[48]

3.11 PROTECTION OF PRIVATE AND MERCHANT VESSELS AND AIRCRAFT, PRIVATE PROPERTY, AND PERSONS

In addition to the obligation and authority of warships to repress international crimes such as piracy, international law also contemplates the use of force in peacetime in certain circumstances to protect private and merchant vessels, private property, and persons at sea from acts of unlawful violence. The legal doctrines of self-defense and protection of nationals provide the authority for U.S. naval forces to protect both U.S. and foreign flag vessels, aircraft, property and persons from violent and unlawful acts of others. Consult the JCS Peacetime Rules of Engagement for U.S. Forces or applicable theater CINC ROE for detailed guidance.[49]

3.11.1 Protection of U.S. Flag Vessels and Aircraft, U.S. Citizens and Property. International law, embodied in the doctrines of self-defense and protection of nationals, provides authority for the use of proportionate force by U.S. warships and military aircraft when necessary for the protection of U.S. flag vessels and aircraft, U.S. citizens (whether embarked in U.S. or foreign flag vessels), and their property against *unlawful* violence in and over international waters. Peacetime rules of engagement promulgated by the Joint Chiefs of Staff (JCS) to the operational chain of command and incorporated into applicable operational orders, operational plans, and contingency plans, provide guidance to the naval commander for the exercise of this inherent authority. Those rules of engagement are carefully constructed to ensure that the protection of U.S. flag vessels and U.S. citizens and their property at sea conforms with U.S. and international law and reflects national policy.[50]

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[48] **See also paragraphs 2.1.2.2 and 4.3.2 regarding self-defense.**

[49] **International law regards these doctrines as exceptional relief measures that are permitted, only under certain pressing circumstances, to override interests protected by the countervailing principles of non-interference with foreign flag ships and aircraft and inviolability of foreign territory (including territorial seas). These exceptional measures may also be employed to protect U.S. and foreign aircraft under such circumstances.**

[50] **High Seas Convention, arts. 4-5, and the 1982 LOS Convention, arts. 91-92, vest nationality of ships in the nation whose flag they fly, and reserve to that flag nation the exclusive right, in peacetime, to exercise jurisdiction over that ship on the high seas. U.S. Navy Regulations, 1973, articles 0914, 0915 and 0920, also reflect this authority. It must be recognized that, for policy reasons, the U.S. Government may choose to protect only those vessels flying the U.S. flag notwithstanding the existence of other vessels flying foreign flags of convenience which are beneficially owned by U.S. persons or corporations.**

3.11.1.1 Foreign Internal Waters, Archipelagic Waters, and Territorial Seas. Unlawful acts of violence directed against U.S. flag vessels and aircraft and U.S. citizens within and over the internal waters, archipelagic waters, or territorial seas of a foreign nation present special considerations. The coastal or island nation is primarily responsible for the protection of all vessels, aircraft and persons lawfully within its sovereign territory. However, when that nation is unable or unwilling to do so effectively or when the circumstances are such that immediate action is required to protect human life, international law recognizes the right of another nation to direct its warships and military aircraft to use proportionate force in or over those waters to protect its flag vessels and its citizens.[51] Because the coastal or island nation may lawfully exercise jurisdiction and control over foreign flag vessels, aircraft and citizens within its internal waters, archipelagic waters, territorial seas and national airspace, special care must be taken by the warships and military aircraft of other nations not to interfere with the lawful exercise of jurisdiction by that nation in those waters.[52]

3.11.1.2 Foreign Contiguous Zones and Exclusive Economic Zones. The primary responsibility of coastal or island nations for the protection of foreign shipping and aircraft off their shores ends at the seaward edge of the territorial sea. Beyond that point, each nation bears the primary responsibility for the protection of its own flag vessels and aircraft and its own citizens and their property. On the other hand, the coastal or island nation may properly exercise jurisdiction over foreign vessels, aircraft and persons in and over its contiguous zone to enforce its customs, fiscal, immigration, and sanitary laws, and in its exclusive economic zone to enforce its resource-related rules and regulations. When the coastal or island nation is acting lawfully in the valid exercise of such jurisdiction, or is in hot pursuit (see discussion in paragraph 3.9) of a foreign vessel or aircraft for violations that have occurred in or over those waters or in its sovereign territory, the flag nation should not interfere. U.S. naval commanders should consult applicable peacetime rules of engagement for specific guidance.

3.11.2 Protection of Foreign Flag Vessels, Aircraft and Persons. International law, embodied in the concept of collective self-defense, provides authority for the use of proportionate force necessary for the protection of foreign flag vessels and aircraft and foreign persons from *unlawful* violence, including terrorist or piratical attacks, at sea. In such instances, consent of the flag nation should first be obtained unless prior arrangements

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[51] **22 U.S.C. sec. 1732 (1982) requires the President to seek the release of U.S. citizens unjustly deprived of liberty by or under the authority of any foreign government by such means, not amounting to acts of war, as are necessary and proper to obtain or effectuate their release.**

[52] **If a prior arrangement has been made with a coastal or island nation for U.S. forces to protect shipping in the waters of that nation, protective measures may be taken by U.S. warships and military aircraft for these purposes and subject to the limitations of that agreement.**

are already in place or the necessity to act immediately to save human life does not permit obtaining such consent.[53] Should the attack or other unlawful violence occur within or over the internal waters, archipelagic waters, or territorial sea of a third nation, or within or over its contiguous zone or exclusive economic zone, the considerations of paragraphs 3.11.1.1 and 3.11.1.2 would also apply.

3.12 AID TO DOMESTIC CIVIL LAW ENFORCEMENT OFFICIALS

Except when expressly authorized by the Constitution or act of Congress, the use of U.S. Army or U.S. Air Force personnel or resources as a *posse comitatus* -- a force to aid civilian law enforcement authorities in keeping the peace and arresting felons -- or otherwise to execute domestic law, is prohibited by the Posse Comitatus Act, title 18 U.S. Code section 1385.[54] As a matter of policy, the Posse Comitatus Act is made equally applicable to the U.S. Navy and U.S. Marine Corps. The prohibitions of the Act are not applicable to the U.S. Coast Guard, even when operating as a part of the Department of the Navy.[55] (See SECNAVINST 5820.7 (series).)

Although the *posse comitatus* concept forbids military authorities from enforcing, or being directly involved with the enforcement of civil law, some military activities in aid of civil law enforcement may be authorized under the military purpose doctrine. For example, indirect involvement or assistance to civil law enforcement authorities which is incidental to normal military training or operations is not a violation of the Posse Comitatus Act.[56]

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[53] **Such consent could be embodied in an agreement with the flag nation made in advance or may be considered inherent in a request from the vessel's master for assistance. If a prior arrangement has been made, protective measures may be taken for the purposes and subject to the limitations of that agreement. The U.S. offer of distress assistance to friendly innocent neutral vessels in the Persian Gulf and Strait of Hormuz flying a nonbelligerent flag, outside declared war/exclusion zones, that are not carrying contraband or resisting legitimate visit and search by a Persian Gulf belligerent, is a recent example. Dep't St. Bull., July 1988, at 61.**

[54] **The Posse Comitatus Act was originally enacted by the Act of June 18, 1878, sec. 15, 20 Stat. 152 (codified in 18 U.S.C. sec. 1385) in reaction to the excessive use of and resulting abuses by the U.S. Army in the southern states while enforcing the reconstruction laws. See Furman, Restrictions Upon Use of the Army Imposed by the Posse Comitatus Act, 7 Mil. L. Rev. 85, 92-96 (1960).**

[55] **14 U.S.C. sec. 89 (1982).**

[56] **Rice, New Laws and Insights Encircle the Posse Comitatus Act, 104 Mil. L. Rev. 109 (1984); Meeks, Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act, 70 Mil. L. Rev. 83 (1975). See also DOD Directive 5525.5 (series), Subj: DoD Cooperation with Civilian Law Enforcement Officials; Posse Comitatus Act, and relevant OPORDERS/OPLANS for current policy and procedures. Policy waivers may be**

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Additionally, Congress has specifically authorized the limited use of military facilities, platforms, and equipment to assist Federal authorities in the interdiction at sea of narcotics and other controlled substances.[57]

3.12.1 Providing Information to Law Enforcement Agencies. It is ordinarily permissible to provide Federal, State or local law enforcement officials with information acquired during the course of military operations that may be relevant to a violation of any law within the jurisdiction of those officials. However, such operations may not be undertaken with the purpose of acquiring such information for law enforcement officials unless specifically authorized by applicable law or regulation.[58]

3.12.2 Use of Military Equipment and Facilities. Consistent with mission requirements, available equipment (including shipboard or aircraft systems), base facilities, and research facilities may be made available upon request to Federal, State, or local law enforcement authorities subject to approval of higher authority.[59]

3.12.3 Use of DOD Personnel. The use of U.S. Army or U.S. Air Force personnel for purposes of providing direct assistance to law enforcement authorities is generally prohibited. Absent a waiver from the Secretary of the Navy or other approval authority, that prohibition is applicable to the U.S. Navy and U.S. Marine Corps personnel as well.[60]

3.12.4 DOD Mission in Drug Interdiction. The National Defense Authorization Act of 1989 assigned DOD as single lead agency responsible for coordinating all detection and monitoring of aerial and maritime transit of illegal drugs into the United States.[61] It also directed DOD to integrate U.S. command, control, communications and intelligence (C3I) assets dedicated to drug interdiction into an effective communications network.[62]

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[56](...continued)
granted on a case by case basis by the Secretary of the Navy.

[57] 10 U.S.C. secs. 371-378 (1982).

[58] See SECNAVINST 5820.7 (series) and enclosure 2 to DOD Directive 5525.5.

[59] See SECNAVINST 5820.7 (series) and paragraph A of enclosure 3 to DOD Directive 5525.5. The cognizant OPLAN/OPORDER may provide additional guidance.

[60] See SECNAVINST 5820.7 (series) and enclosures 3 and 4 to DOD Directive 5525.5. The cognizant OPLAN/OPORDER may provide additional guidance.

[61] Pub. L. 100-456, sec. 1102(a), 10 U.S.C. sec. 113 note.

[62] Pub. L. 100-456, sec. 1103, 10 U.S.C. sec. 374 note.

3.12.5 Use of U.S. Navy Ships in Support of Drug-Interdiction Operations. Consistent with Congressional direction, U.S. Navy ships operating in waters designated by the Secretary of Defense (in consultation with the Attorney General) as a drug-interdiction area are required to have embarked a Coast Guard officer who is trained in law enforcement and who has power to arrest, search, and seize property or persons suspected of violations of U.S. law. In consonance with the right of the flag state under international law to exercise jurisdiction over vessels flying its flag, a U.S. Navy ship with an appropriately authorized Coast Guard officer on board may approach and stop, anywhere in international waters or in U.S. national waters, any *U.S.* flag vessel which, on reasonable grounds, is believed to be engaged in the illicit traffic of narcotics or psychotropic substances. In such circumstances, any resultant search, seizure or arrest will be accomplished by the embarked Coast Guard officer.

Foreign flag vessels encountered by U.S. Navy ships in the U.S. territorial sea or contiguous zone (see paragraph 1.5.1) under circumstances indicating that the vessel may be engaged in the illicit traffic of narcotics or psychotropic substances may be similarly approached and stopped, and boarded by the embarked Coast Guard officer. In international waters, foreign flag vessels may be boarded and, if warranted, seized for drug-interdiction purposes only under one or more of the following circumstances: with flag state consent; in hot pursuit originating in the U.S. territorial sea or contiguous zone; or if the vessel is the mother ship of one or more craft operating in the U.S. territorial sea or contiguous zone. In addition, a vessel in international waters may be boarded with the consent of the master, but seizure may only occur under one of the foregoing circumstances. Foreign flag nation consent may consist of a bilateral agreement covering all such encounters or may be granted by that nation for the particular occasion. In all drug interdiction cases involving seizure of a foreign flag vessel beyond 12 nautical miles from the U.S. coast, concurrence must be obtained through the Department of State.[63]

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[63] **Trainor, Coping with the Drug Runners at Sea, Nav. War C. Rev., Summer 1987, at 77; Young, Griffes & Tomaselli, Customs or Coast Guard?, U.S. Naval Inst. Proc., Aug. 1987, at 67. SECDEF has approved rendering of U.S. Navy assistance to the U.S. Coast Guard in support of drug interdiction activities. See Annex AS3-1. Applicable guidance may be found in CINCLANTFLT OPORD 2120 and COMTHIRDFLT OPORD 230.**

CHAPTER 4

Safeguarding of U.S. National Interests in the Maritime Environment

4.1 INTRODUCTION

This final chapter of Part I -- Law of Peacetime Naval Operations examines the broad principles of international law that govern the conduct of nations in protecting their interests at sea during time of peace. *As noted in the preface, this publication provides general information, is not directive, and does not supersede guidance issued by the commanders of the unified and specified commands, within the scope of their authority, and in particular any guidance they may issue that delineate the circumstances and limitations under which the forces under their command will initiate and/or continue engagement with other forces encountered.*

Historically, international law governing the use of force between nations has been divided into rules applicable in peacetime and rules applicable in time of war.[1] In recent years, however, the concepts of both "war" and "peace" have become blurred and no longer lend themselves to clear definition.[2] Consequently, it is not always possible, or even useful, to try to draw neat distinctions between the two. Full scale hostilities continue to break out around the world, but few are accompanied by a formal declaration of war.[3] At the same time, the spectrum of armed conflict has widened and become increasingly complex.[4] At one end of that spectrum is total nuclear war; at the other, insurgencies and state-spon-

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[1] 2 Grotius, De Jure Belli Ac Pacis 832 (Kelsey, transl. 1925).

[2] McDougal & Feliciano 7-9.

[3] A number of reasons have been advanced as to why nations conduct hostilities without a formal declaration of war: (1) a desire to avoid being branded as aggressors and of later being compelled to pay reparations; (2) a desire to avoid triggering the sanctions and peace enforcement provisions of Chapters VI and VII of the UN Charter; (3) the "outlawry" of war by article 2 of both the Kellogg-Briand Pact of 1928 and the UN Charter of 1945; (4) the post-World War II war crimes trials in Nuremberg and Tokyo; (5) the fear of embargo on war supplies under national legislation of neutral countries; and (6) the fear held by an attacked weaker nation of widening localized hostilities. Stone 311. See also paragraph 7.1 and note 6 thereto below.

[4] Kidron & Smith, The War Atlas: Armed Conflict--Armed Peace (1983); McDougal & Feliciano 97-120.

sored terrorism.[5] For the purposes of this publication, however, the conduct of armed hostilities involving U.S. forces, irrespective of character, intensity or duration, is addressed in Part II -- Law of Naval Warfare.

4.1.1 Charter of the United Nations. Article 2, paragraph 3 of the Charter of the United Nations[6] provides that:

> *All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.*

Article 2, paragraph 4 provides that:

> *All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.*[7]

In combination, these two provisions establish the fundamental principle of modern international law that nations will *not* use force or the threat of force to impose their will on other nations or to otherwise resolve their international differences.

Article 39 of the Charter looks to the Security Council to enforce this prohibition by providing:

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[5] Terry, Countering State-Sponsored Terrorism: A Law-Policy Analysis, 36 Nav. L. Rev. 159 (1986); Terry, An Appraisal of Lawful Military Response to State-Sponsored Terrorism, Nav. War C. Rev., May-June 1986, at 59.

[6] Charter of the United Nations, 26 June 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153, as amended in 1963, 1965 and 1971, reprinted in AFP 110-20, chap. 5. As of August 1989, there were 159 nations members of the United Nations. The few nations not members of the United Nations include Kiribati, the two Koreas, Liechtenstein, Monaco, Nauru, Samoa, San Marino, Switzerland, Tonga, and Tuvalu.

[7] The Purposes of the UN Charter are set forth in Article 1 of the Charter. They include:

> **To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.**

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of transgression and shall . . . decide what measures shall be taken . . . to maintain or restore international peace and security.

Article 51 of the Charter provides, however, that:

Nothing in the . . . Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member . . . until the Security Council has taken measures necessary to maintain international peace and security. . . .[8]

The following paragraphs discuss some of the measures that nations, acting in conformity with the Charter of the United Nations, may take in pursuing and protecting their national interests at sea during peacetime.

4.2 NONMILITARY MEASURES

4.2.1 Diplomatic. As contemplated by the United Nations Charter, nations generally rely on peaceful means to resolve their differences and to protect their interests. Diplomatic measures include all those political policy actions taken by one nation to influence the behavior of other nations within the framework of international law. They may involve negotiation, conciliation or mediation, and may be cooperative or coercive (e.g., severing of diplomatic relations).[9] The behavior of an offending nation may be curbed by appeals to world public opinion as in the General Assembly, or, if their misconduct involves a threat to or breach of the peace, by bringing the issue before the Security Council. Ordinarily, however, differences that arise between nations are resolved or accommodated through the normal day-to-day, give-and-take of international diplomacy. The key point is that disputes between the U.S. and other nations arising out of conflicting interests in the maritime environment, or having their origin elsewhere but impacting on U.S. uses of the

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[8] The Charter also contemplates the Security Council enforcing its decisions through both peaceful and forceful measures. However, armed forces have never been assigned to UN Command (except in the case of the Korean War). The veto power exercised by the permanent members of the Security Council has prevented the Council from being able to carry out effectively, or in the manner contemplated by the framers of the Charter, its role in the maintenance of international peace and security. As a result, member nations must rely upon their inherent right of individual and collective self-defense to deter aggression and maintain international peace and security. Self-defense is discussed in paragraph 4.3.2. Nations thus continue to act in their own self-interest in a horizontally structured world in which sovereignty continues to play an extremely important role.

[9] 2 Restatement (Third), sec. 905, Comments & Reporters' Notes.

seas, are normally addressed and resolved through diplomatic channels and do not involve resort to the threat or use of force.[10]

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[10] Under the U.S. Constitution, the President is responsible for the conduct of U.S. foreign policy. In overseas areas, the President principally exercises that responsibility through the chief U.S. diplomatic and consular representative to the country concerned, also known as the Chief of Mission. The Chief of Mission is required, under the direction of the President, to exercise "full responsibility for the direction, coordination, and supervision of all Government employees in that country (except for employees under the command of a United States area military commander)," to keep fully and currently informed with respect to "all activities and operations of the Government within that country," and to insure that all government employees in that country (except for employees under the command of a U.S. area military commander) "comply fully with all applicable directives of the chief of mission." Further any U.S. government agency having employees in a foreign country is required to "keep the chief of mission to that country fully and currently informed with respect to all activities and operations of its employees in that country," and to "insure that all of its employees (except for employees under the command of a United States area military commander) comply fully with all applicable directives of the chief of mission." 22 U.S.C. sec. 3927. This requirement is included in each Presidential letter to chiefs of mission. That letter currently includes the following:

> As Commander-in-Chief, I have authority over United States military forces. On my behalf you have responsibility for the direction, coordination, supervision, and safety, including security from terrorism, of all Defense Department personnel in [country] except those forces under the operational command and control of a United States area military commander and personnel detailed to international organizations. Defense Attache offices, units engaged in security assistance, and other DOD components attached to your Mission, as well as other Defense Department activities which may have an impact upon the conduct of our diplomatic relations with [country] fall within your responsibility.

Dep't St. Bull., March 1987, at 40.

These requirements are implemented for deployed naval forces in U.S. Navy Regulations, 1973. Article 0911 provides that the senior officer present in a deployed naval force, insofar as possible, shall preserve close relations with the diplomatic and consular representatives of the United States. Article 0912 also provides that in the absence of a diplomatic or consular representative of the United States, the senior officer present in a foreign country has authority, among other things, to communicate or remonstrate with foreign civil authorities as may be necessary. Further, article 0914 provides that on occasions when injury to the United States or to citizens thereof is committed or threatened in violation of the principles of international law or in violation of rights existing under a treaty or other international agreement, the senior officer present shall consult with the diplomatic or consular representatives of the United States, if possible, and shall take such

(continued...)

4.2.2 Economic. Nations often utilize economic measures to influence the actions of others. The granting or withholding of "most favored nation" status to another country is an often used measure of economic policy. Similarly, trade agreements, loans, concessionary credit arrangements and other aid, and investment opportunity are among the many economic measures that nations extend, or may withhold, as their national interests dictate.[11] Examples of the coercive use of economic measures to curb or otherwise seek to influence the conduct of other nations include the suspension of U.S. grain sales and the embargo on the transfer of U.S. technology to the offending nation,[12] boycott of oil and other export products from the offending nation,[13] and suspension of "most favored nation" status and the assertion of other economic sanctions.[14]

4.2.3 Judicial. Nations may also seek judicial resolution of their peacetime disputes, both in national courts and before international tribunals. A nation or its citizens may bring a

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[10](...continued)
action as is demanded by the gravity of the situation, within the confines dictated by U.S. policies or strategies.

On the matter of requests for asylum, see paragraph 3.3 above.

[11] **See 12 Whiteman 311-21 and 2 Restatement (Third), sec. 905 Comment f at 382, and Reporters' Note 8, at 300-0' discussions of retorsion, or unfriendly but lawful acts not involving the use of for. in response to objectionable acts of another nation, retaliation and reprisal.**

[12] **The United States took these actions, among others, in its initial response to the Christmas 1979 invasion of Afghanistan by the Soviet Union. Presidential Address to the Nation, 4 January 1980, Dep't St. Bull., Jan. 1980, at B. This embargo was lifted in April 1981. Dep't St. Bull., Oct. 1982, at 42. Similar actions were taken by the United States in December 1981 in response to Soviet-inspired repression in Poland. Dep't St. Bull., Feb. 1982, at 8.**

[13] **The United States took these actions against Libya in response to the continuing pattern of Libyan activity to promote instability and terrorism which violates accepted international norms of behavior. Pres. Proclamation No. 4907, 10 March 1982, 49 Fed. Reg. 10,507, repealed and replaced by Proclamation No. 5141, 23 Dec. 1983, 48 Fed. Reg. 56,929, and Exec. Order No. 12,538, 15 Nov. 1985, 50 Fed. Reg. 47,527, 19 U.S.C. sec. 1862 note (Supp. III, 1985).**

[14] **The United States took such actions against Nicaragua on 1 May 1985, Dep't St. Bull., July 1985, at 74-75, under the International Emergency Economic Powers Act of 1977, 50 U.S.C. sec. 1702 et seq. (1982) and other statutory authority. See also Terry, The Iranian Hostages Crisis: International Law and United States Policy, 32 JAG J. 31, at 53-56 (1982).**

legal action against another nation in its own national courts, provided the court has jurisdiction over the matter in controversy (such as where the action is directed against property of the foreign nation located within the territorial jurisdiction of the court) *and* provided the foreign nation does not interpose a valid claim of sovereign immunity. Similarly, a nation or its citizens may bring a legal action against another nation in the latter's courts, or in the courts of a third nation, provided jurisdiction can be found and sovereign immunity is not interposed.[15]

Nations may also submit their disputes to the International Court of Justice for resolution. Article 92 of the United Nations Charter establishes the International Court of Justice as the principal judicial organ of the United Nations. No nation may bring another before the Court unless the latter nation first consents. That consent can be general and given beforehand or can be given in regard to a specific controversy.

In 1946, the U.S. formally accepted compulsory jurisdiction of the Court, in relation to any other nation that had accepted the same obligation, for all disputes involving interpretation of a treaty, a question of international law, or the breach of an international obligation. In doing so, however, the U.S. reserved the right to refuse to accept the jurisdiction of the International Court in any matter that is "essentially within the domestic jurisdiction of the United States as determined by the United States."[16] On 7 October 1985, the United States announced the termination of its acceptance of compulsory jurisdiction effective 7 April 1986. Of the 157 nations that are parties to the International Court of Justice by virtue of their membership in the United Nations, only 45 accept compulsory jurisdiction of the Court. All but six of those 45 nations have reservations similar to that which had been asserted by the U.S.[17]

4.3 MILITARY MEASURES

The mission of all U.S. military forces is to deter aggression and, should deterrence fail, to engage and defeat the aggressor in armed conflict so as to restore international

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[15] On sovereign immunity see DA Pam 27-161-1, at ch. 5; Franck & Glennon, Foreign Relations and National Security Law: Cases, Materials and Simulations 214-26 (1987); Brownlie, Principles of Public International Law 321-344 (3d ed. 1979). The United States has waived its sovereign immunity in certain types of cases. See, e.g., the Public Vessels Act, 46 U.S.C. sec. 781 et seq., the Suits in Admiralty Act, 46 U.S.C. sec. 741 et seq., and the Federal Tort Claims Act, 28 U.S.C. sec. 2671 et seq.

[16] U.S. Declaration of 14 August 1946, 61 Stat. 1218 (1947). See 2 Restatement (Third), sec. 903 Reporters' Note 3, at 362-70.

[17] Dep't St. Bull., Jan. 1986, at 67; 24 Int'l Leg. Mat'ls 1742 (1985).

peace and security.[18] In order to deter aggression, U.S. military forces must be both capable and ready, and must be perceived to be so by potential aggressors. Equally important is the perception of other nations that, should the need arise, the U.S. has the will to use its forces in individual or collective self-defense.[19]

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[18] National Security Strategy of the United States, The White House, January 1988, at 3-4 & 13-14.

[19] The conditions necessary to obtain and maintain that political will have been described in several useful ways. A former Secretary of Defense has identified the following six tests:

> o The United States should not commit forces to combat unless our vital interests are at stake. Our interests, of course, include interests of our allies.
>
> o If the United States decides it is necessary to commit its troops to combat in a specific situation, we must commit them in sufficient numbers and with sufficient support to win.
>
> o If we do decide to commit forces to combat, we must have clearly defined political and military objectives.
>
> o The relationship between our objectives and the forces we have committed -- their size, composition, and disposition -- must be continually reassessed and adjusted as necessary.
>
> o Before the United States commits combat forces abroad, the U.S. government should have some reasonable assurance of the support of the American people and their elected representatives in Congress.
>
> o The commitment of U.S forces to combat should be a last resort -- only after diplomatic, political, economic, and other efforts have been made to protect our vital interests.

SECDEF Weinberger, Annual Report to the Congress FY 1987, at 78-79 (1986). See also New York Times, 29 Nov. 1984, at A-5. A Secretary of State has described when the use of power is legitimate, and thus supported by the American people:

> o *Not* when it crushes the human spirit and tramples human freedom, but when it can help liberate a people or support the yearning for freedom;
>
> o *Not* when it imposes an alien will on an unwilling people, but when its aim is to bring peace or to support peaceful processes; when it prevents others from abusing *their* power through aggression or oppression; and

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4.3.1 Naval Presence. U.S. naval forces constitute a key and unique element of our national military capability. The mobility of forces operating at sea combined with the versatility of naval force composition -- from units operating individually to multi-battle-group formations -- provide the National Command Authorities with the flexibility to tailor U.S. military presence as circumstances may require.

Naval presence, whether as a showing of the flag during port visits or as forces deployed in response to contingencies or crises, can be modulated to exert the precise influence best suited to U.S. interests. Depending upon the magnitude and immediacy of the problem, naval forces may be positioned near areas of potential discord as a show of force or as a symbolic expression of support and concern. Unlike land-based forces, naval forces may be so employed without political entanglement and without the necessity of seeking littoral nation consent. So long as they remain in international waters and international airspace (i.e., beyond the territorial sea or archipelagic waters), U.S. warships and military aircraft enjoy the full spectrum of the high seas freedoms of navigation and overflight, including the right to conduct naval maneuvers, subject only to the requirement to observe international standards of safety, to recognize the rights of other ships and aircraft that may be encountered, and to issue NOTAMs and NOTMARs as the circumstances may require. Deployment of a carrier battle group into the vicinity of areas of tension and augmentation of U.S. naval forces to deter interference with U.S. commercial shipping in an area of armed conflict provide graphic illustrations of the use of U.S. naval forces in peacetime to deter violations of international law and to protect U.S. flag shipping.[20]

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[19](...continued)

> o ***Not*** **when it is applied unsparingly, without care or concern for innocent life, but when it is applied with the greatest efforts to avoid unnecessary casualties and with a conscience troubled by the pain unavoidably inflicted.**
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> . . .
>
> **When we act in accordance with our principles and within the realistic limits of our power, we can succeed. And on such occasions we will be able to count on the full support of the American people. . . .**

Secretary of State Shultz, Address at Yeshiva University, 9 Dec. 1984, Dep't St. Bull., Feb. 1985, at 3.

[20] U.S. Navy, Strategic Concepts of the U.S. Navy, NWP 1 (Rev. A), para. 3.4.3; Watkins, The Maritime Strategy, U.S. Naval Inst. Proc. Supp., Jan. 1986, at 7-8; Neutze, Bluejacket Diplomacy: A Juridical Examination of Naval Forces in Support of United States Foreign Policy, 32 JAG J. 81, at 83 (1982). See also paragraph 2.4.3.1 above regarding NOTAMs and NOTMARs.

4.3.2 The Right of Self-Defense. The Charter of the United Nations recognizes that all nations enjoy the inherent[21] right of individual and collective self-defense[22] against armed attack.[23] U.S. doctrine on self-defense, set forth in the JCS Peacetime Rules of Engagement for U.S. Forces, provides that the use of force in self-defense against armed attack, or the threat of imminent armed attack, rests upon two elements:

1. Necessity -- The requirement that a use of force be in response to a hostile act or hostile intent.[24]

2. Proportionality -- The requirement that the use of force be in all circumstances limited in intensity, duration, and scope to that which is reasonably required to counter the attack or threat of attack and to ensure the continued safety of U.S. forces.[25]

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[21] The "inherent" right of self-defense refers to the right of self-defense as it existed in customary international law when the UN Charter was written. See Lillich, Forcible Self-Help to Protect Nationals Abroad (U.S. Naval War College, International Law Studies 1969-1970, forthcoming); Harlow, The Legal Use of Force ... Short of War, U.S. Naval Inst. Proc., Nov. 1966, at 89; Fairley, State Actors, Humanitarian Intervention and International Law: Reopening Pandora's Box, 10 Ga. J. Int'l & Comp. L. 29 (1980).

[22] See 2 Restatement (Third), sec. 905. Collective self-defense is considered in paragraph 7.2.2 below.

[23] While the literal English language of Article 51 limits self-defense to cases where "armed attack occurs," state practice such as in the case of the 1962 Cuban Quarantine (see note 26 below) has generally recognized that "armed aggression" rather than "armed attack" justifies the resort to self-defense; this position is supported by the equally authentic French text of Article 51: "agression armee." Anticipatory self-defense is discussed in paragraph 4.3.2.1.

[24] See 2 Restatement (Third), sec. 905(1)(a) & Comment 3, at 387.

[25] See 2 Restatement (Third), sec. 905(1)(b) & Reporters' Note 3, at 388-89. U.S. Navy Regulations, 1973, article 0915, addressing the legality of resort to the use of force against a foreign nation, reflects these principles:

> **1. The use of force in time of peace by United States naval personnel against another nation, or against anyone within the territories thereof, is illegal except as an act of self-defense. The right of self-defense may arise in order to counter either the use of force, or an immediate threat of the use of force.**
>
> **2. The conditions calling for the application of the right of self-defense cannot be precisely defined beforehand, but must be left to the sound judgment of responsible naval personnel who are to perform their duties in**

(continued...)

Customary international law has long recognized that there are circumstances during time of peace when nations must resort to the use of armed force to protect their national interests against unlawful or otherwise hostile actions by other nations. A number of legal concepts have evolved over the years to sanction the limited use of armed forces in such circumstances (e.g., intervention,[26] embargo,[27] maritime quarantine). To the extent that

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[25](...continued)

this respect with all possible care and forbearance. The right of self-defense must be exercised only as a last resort, and then only to the extent absolutely necessary to accomplish the end required.

3. Force must never be used with a view to inflicting punishment for acts already committed.

[26] While difficult of precise definition, intervention is generally recognized in international law as at least including the use of force which results in the interference by one nation in matters under the exclusive jurisdiction of another nation, for instance interference in its domestic or foreign affairs. It is also sometimes referred to as interference with the sovereignty of another nation. Intervention frequently involves the non-permissive entry into the territory of another nation. Any action constituting substantial interference with or harassment of a foreign private or public vessel on the high seas may be considered as an impairment of the foreign nation's sovereignty.

Every nation has the obligation under international law to respect the sovereignty of every other nation. A violation of that sovereignty by intervention is therefore a violation of international law unless justified by a specific rule to the contrary, such as the rights of self-defense and of humanitarian intervention to prevent a nation from committing atrocities against its own subjects which is itself a violation of international law. There has been, however, considerable disagreement over this latter rationale.

Intervention may be accomplished either with or without the use of force. Self-defense against armed attack or the threat of imminent attack is clearly a necessary prerequisite for armed intervention. Intervention is justified under the following circumstances, which are not all inclusive:

1. To protect nations which request intervention in the face of an external threat and in certain other special cases. The intervention by the United States in the Dominican Republic in 1965 is illustrative of this circumstance.

2. In response to a request of the government of a nation for assistance in repelling threatened or attempted subversion directed from another country. Examples of this circumstance include the U.S. and British actions in Lebanon (1958) and Jordan (1957-58), and the U.S. action in Vietnam (1963-75). However, if the threatened or attempted subversion is principally

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from internal sources not externally directed, intervention may be improper.

3. A serious danger to the territory of a nation may arise either as a result of a natural catastrophe in another nation or as a result of the other nation deliberately or negligently employing its natural resources to the detriment of the first nation. For example, the reservoirs of Nation A on the upper reaches of a river might be damaged by natural forces, posing a threat to Nation B on the lower reaches. Intervention by the threatened nation (Nation B) is justified if the other nation (Nation A) is not able and prepared to provide a timely and effective remedy and provided that the UN Security Council is immediately advised of the intervention.

4. To protect the lives and property of a nation's citizens abroad, particularly its diplomatic personnel. State practice has tolerated the use of force to protect a nation's citizens outside its borders where the individuals were in imminent danger of irreparable harm and the nation in whose territory the individuals were located could not or would not protect them. The 1976 Israeli raid at Entebbe Airport, the 1977 West German raid at Mogadishu, Somalia, the 1980 U.S. Iranian hostage rescue attempt, and the 1983 U.S. intervention in Grenada are examples of self-defense being asserted on behalf of one nation's citizens in the territory of another.

See 1976 Digest of U.S. Practice in International Law 3-11; 2 Restatement (Third), sec. 905 Comment g, at 383; Ronzitti, Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity (1985); and Dean, Self-Determination and U.S. Support of Insurgents, A Policy-Analysis Model, 122 Mil. L. Rev. 149 (1988).

The Entebbe raid is discussed in Contemporary Practice of the U.S., 73 Am. J. Int'l L 122 (1979); Salter, Commando Coup at Entebbe: Humanitarian Intervention or Barbaric Aggression? 11 Int'l Lawyer 331 (1977); Boyle, International Law in Time of Crisis: From the Entebbe Raid to the Hostages Convention, 75 Nw. U.L. Rev. 769 (1980); Boyle, The Entebbe Hostages Crisis, 29 Neth. Int'l L. Rev. 32 (1982). See Stevenson, 90 Minutes at Entebbe (1976) and Ben-Porat, Haber & Schiff, Entebbe Rescue (1977).

The Iranian hostage rescue attempt is described in 78 Am. J. Int'l L. 200 (1984), UN Doc. S/13908, 25 April 1980, Beckwith & Know, Delta Force (1983) and Ryan, The Iranian Rescue Mission: Why It Failed (1985), and discussed in Terry, The Iranian Hostages: International Law and United States Policy, 32 JAG J. 31 (1982).

The Grenada operation is described in O'Shaughnessy, Grenada: Revolution, Invasion and Aftermath (1984) and The Grenada Papers (Seabury & McDougall, eds. 1984), and discussed in 78 Am. J. Int'l L. 200-04 (1984), UN Doc. S/16076, 25 October 1983, The United States Action in Grenada, 78 Am. J. Int'l L. 131-75 (1984) and Maizel, Intervention
(continued...)

such concepts have continuing validity under the Charter of the United Nations, they are premised on the broader principle of self-defense.

The concept of maritime quarantine provides a case in point. Maritime quarantine was first invoked by the United States as a means of interdicting the flow of Soviet strategic missiles into Cuba in 1962. That action involved a limited coercive measure on the high seas applicable only to ships carrying offensive weaponry to Cuba and utilized the least possible military force to achieve that purpose. That action, formally ratified by the Organization of American States (OAS), has been widely approved as a legitimate exercise of the inherent right of individual and collective self-defense recognized in Article 51 of the UN Charter.[28]

4.3.2.1 Anticipatory Self-Defense. Included within the inherent right of self-defense is the right of a nation (and its armed forces) to protect itself from imminent attack. International law recognizes that it would be contrary to the purposes of the United Nations Charter if a threatened nation were required to absorb an aggressor's initial and potentially crippling first strike before taking those military measures necessary to thwart an imminent attack. Anticipatory self-defense involves the use of armed force where there is a clear

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[26](...continued)
in Grenada, 35 JAG J. 47 (1986).

[27] **An embargo is a form of peacetime coercion technically consisting of the detention of vessels of a nation alleged to have committed a breach of international law. A boycott, on the other hand, is the suspension of trade with an offending nation. In practice, the concepts of embargo and boycott have become blurred into a broader means of preventing the import, export, movement or other dealing in goods, services or financial transactions to exert pressure on an offending nation. An embargo or boycott may be used, for example, to preclude an alleged aggressor nation from increasing its war-making potential, or to prevent the aggravation of civil strife in a nation in which it may be occurring. See 12 Whiteman 344-49.**

[28] **At the time, the U.S. Government characterized the quarantine as a sanction imposed by collective agreement pursuant to article 52 of the UN Charter, and did not rely on self-defense to justify its actions. Chayes, The Cuban Missile Crisis: International Crises and the Role of Law (1974); Robertson, Blockade to Quarantine, JAG J., June 1963, at 87; McDevitt, The UN Charter and the Cuban Quarantine, JAG J., April-May 1963, at 71; McDougal, The Soviet-Cuban Quarantine and Self-Defense, 57 Am. J. Int'l L. 597 (1963); Christol & Davis, Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Material to Cuba, 1962, 57 Am. J. Int'l L. 525; Mallison, Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defense Claims Valid Under International Law, 31 Geo. Wash. L. Rev. 335 (1962).**

necessity that is instant, overwhelming, and leaving no reasonable choice of peaceful means.[29]

4.3.2.2 JCS Peacetime Rules of Engagement (ROE). The JCS Peacetime Rules of Engagement for U.S. Forces are the primary means by which competent military authority in peacetime authorizes commanders to take those actions necessary for the self-defense of the forces they command,[30] the self-defense of the nation and its citizens, and the protection of national assets worldwide.[31] Although they do not, and cannot cover all possible situations that may be encountered by the naval commander at sea, the JCS

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[29] **The *Caroline* Case, 2 Moore 409-14, discussed in Bunn, International Law and the Use of Force in Peacetime: Do U.S. Ships Have to Take the First Hit?, Nav. War C. Rev., May-June 1986, at 70; and Jennings, The Caroline and McLeod Cases, 32 Am. J. Int'l L. 82 (1938).**

[30] **Self-defense, in relation to a unit of U.S. naval forces, is the act of defending from attack or threat of imminent attack that unit (or element thereof), or U.S. citizens or U.S. flag vessels or other U.S. commercial assets in the vicinity of that unit. Generally, this concept relates to localized, low-level situations that are not preliminary to prolonged engagements. The response of two U.S. Navy F-14 aircraft to the attack by two Libyan Su-22 aircraft over the Gulf of Sidra on 14 August 1981 was an exercise of unit self-defense against a hostile force that had committed a hostile act and posed a continuing threat of immediate attack. UN Doc. S/17938, 25 March 1986; Neutze, The Gulf of Sidra Incident: A Legal Perspective, U.S. Naval Inst. Proc., Jan. 1982, at 26; Parks, Crossing the Line, U.S. Naval Inst. Proc., Nov. 1986, at 40 & 43. On the other hand, the shootdown of two Libyan MiG-23s on 4 January 1989 by two F-14s over international waters of the Mediterranean Sea more than 40 nm off the eastern coast of Libya, after repeatedly turning on them and not breaking off the intercept, was an act of unit self-defense against units demonstrating hostile intent. UN Doc. S/20366, 4 January 1989. See Figure SF2-11.**

[31] **Self-defense, in relation to the United States as a nation, is the act of defending the United States and U.S. forces from attack or threat of imminent attack. This concept relates to regional or global situations possibly preceding prolonged engagements and related to unstable international relations. The concept of self-defense is also invoked in confrontations between U.S. forces and foreign forces who are involved in an international armed conflict both where the United States remains neutral or is otherwise not a party to the conflict and where the United States is a party to the conflict. For a more detailed discussion of neutrality and its impact on naval operations, see chapter 7. U.S. forces exercised national self-defense in response to Libya's attacks on U.S. forces in the Gulf of Sidra on 24-25 March 1986, and to Libya's support for international terrorism in the attacks on Tripoli and Benghazi on 14 April 1986. U.S. Letter to UN Security Council, 25 March 1986, UN Doc. S/17938, reprinted in Dep't St. Bull., May 1986, at 80; Presidential Letters to Congress, 26 March 1986, 22 Weekly Comp. Pres. Doc. 423; Presidential Letters to Congress, 16 April 1986, reprinted in Dep't St. Bull., June 1986, at 8; U.S. Letter to UN Security Council, 14 April 1986, UN Doc. S/17990. See also 80 Am. J. Int'l L. 632 (1886).**

Peacetime ROE provide definitive guidance for U.S. military commanders for the use of armed force in self-defense commensurate with international law and U.S. national security objectives.[32] A principal tenet of those ROE is the responsibility of the commander to take all necessary and appropriate action for his unit's self-defense.[33] Subject to that overriding responsibility,[34] the full range of options are reserved to the National Command Authorities to determine the response that will be made to hostile acts and demonstrations of hostile intent. As noted in the preceding paragraphs of this chapter, those options may involve nonmilitary as well as military measures.

4.4 INTERCEPTION OF INTRUDING AIRCRAFT

All nations have complete and exclusive sovereignty over their national airspace, i.e., the airspace above their land territory, internal waters, archipelagic waters (if any), and territorial seas (see paragraph 1.8). With the exception of transit overflight of international straits and archipelagic sea lanes (see paragraph 2.3.3 and 2.3.4.1), and assistance entry to assist those in danger of being lost at sea (see paragraph 2.3.2.5), authorization must be obtained for any intrusion by a foreign aircraft (military or civil) into national airspace (see paragraph 2.5). That authorization may be flight specific, as in the case of diplomatic clearance for the visit of a military aircraft, or general, as in the case of commercial air navigation pursuant to the 1944 Convention on International Civil Aviation (the "Chicago Convention").

Customary international law provides that a foreign aircraft entering national airspace without permission due to distress (e.g., air hijacking) or navigational error may

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[32] Roach, Rules of Engagement, Nav. War C. Rev., Jan.-Feb. 1983, at 46-53.

[33] Self-defense pursuit, sometimes termed immediate pursuit, must be distinguished from the concept of "hot pursuit" discussed in paragraph 3.9 above.

Contact with a foreign force committing a hostile act or armed attack or displaying hostile intent or threat of armed attack against the United States, its forces, a U.S. flag vessel, U.S. citizens or their property must be reported immediately by the fastest possible means to JCS, CNO/CMC, and the appropriate unified and component commanders (OPREP-1). Where circumstances permit, guidance as to the use of armed force in defense should be sought. However, where the circumstances are such that it is impractical to await such guidance, it is the responsibility of the on-scene commander to take such measures of self-defense to protect his force as are necessary and proportionate, consistent with applicable rules of engagement (see paragraph 4.3.2).

[34] It should be noted that higher authority can modify this requirement to order him not to use armed force except in response to an actual attack (i.e., not authorize a unit commander to respond to hostile intent). Higher authority can also define those types of activity which are indicative of hostile intent. Indeed, the NCA may order that the unit commander will not respond even if attacked.

be required to comply with orders to turn back or to land. In this connection the Chicago Convention has been amended to provide:

> 1. That all nations must refrain from the use of weapons against civil aircraft, and, in the case of the interception of intruding civil aircraft, that the lives of persons on board and the safety of the aircraft must not be endangered. (This provision does not, however, detract from the right of self-defense recognized under Article 51 of the United Nations Charter.)
>
> 2. That all nations have the right to require intruding aircraft to land at some designated airfield and to resort to appropriate means consistent with international law to require intruding aircraft to desist from activities in violation of the Convention.
>
> 3. That all intruding civil aircraft must comply with the orders given to them and that all nations must enact national laws making such compliance by their civil aircraft mandatory.
>
> 4. That all nations shall prohibit the deliberate use of their civil aircraft for purposes (such as intelligence collection) inconsistent with the Convention.[35]

The amendment was approved unanimously on 10 May 1984 and will come into force upon ratification by 102 of ICAO's members in respect of those nations which have ratified it.[36] The Convention, by its terms, does not apply to intruding military aircraft. The U.S. takes the position that customary international law establishes similar standards

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[35] Protocol relating to an amendment to the Convention on International Civil Aviation [Article 3 *bis*], Montreal, 10 May 1984, 23 Int'l Legal Mat'ls 705 (1984). That Protocol has not been submitted to the Senate for advice and consent because of concerns about ICJ compulsory jurisdiction.

Documentation regarding the shooting down of KAL 007 is reproduced in 22 Int'l Leg. Mat'ls 1149 (1983); 23 Int'l Leg. Mat'ls 864, 924 & 937; and 78 Am. J. Int'l L. 213 (1984). See FitzGerald, The Use of Force against Civil Aircraft: The Aftermath of the KAL Flight 007 Incident, 22 Can. Y.B. Int'l L. 1984, at 291, 309. The KAL 007 incident is also described in Hersch, "The Target Is Destroyed": What Really Happened to Flight 007 and What America Knew About It (1986), and Johnson, Shootdown: Flight 007 and the American Connection (1986).

[36] As of 27 July 1989, 52 nations had ratified the Protocol. 28 Int'l Leg. Mat'ls 1060 (1989).

of reasonableness and proportionality with respect to military aircraft that stray into national airspace through navigational error or that are in distress.[37]

[37] AFP 110-31, para. 2-5d, at 2-6; 9 Whiteman 328. On aerial intrusions, see Hughes, Aerial Intrusions by Civil Airliners and the Use of Force, 45 J. Air L. & Comm. 595 (1980); Hassan, A Legal Analysis of the Shooting of Korean Airlines Flight 007 by the Soviet Union, 49 J. Air L. & Comm. 553 (1984); Laveson, Korean Airline Flight 007: Stalemate in International Aviation Law--A Proposal for Enforcement, 22 San Diego L. Rev. 859 (1985); Phelps, Aerial Intrusions by Civil and Military Aircraft in Time of Peace, 107 Mil. L. Rev. 255 (1985).

PART II

Law of Naval Warfare

Chapter 5 -- Principles and Sources of the Law of Armed Conflict

Chapter 6 -- Adherence and Enforcement

Chapter 7 -- The Law of Neutrality

Chapter 8 -- The Law of Naval Targeting

Chapter 9 -- Conventional Weapons and Weapons Systems

Chapter 10 - Nuclear, Chemical, and Biological Weapons

Chapter 11 - Noncombatant Persons

Chapter 12 - Deception During Armed Conflict

CHAPTER 5

Principles and Sources of the Law of Armed Conflict

5.1 WAR AND THE LAW

Article 2 of the United Nations Charter requires all nations to settle their international disputes by peaceful means and to refrain from the threat or use of force against the territorial integrity or political independence of other nations. The United Nations Charter prohibits resort to war except as an enforcement action taken by or on behalf of the United Nations (as in the Korean conflict) or as a measure of individual or collective self-defense.[1] It is important to distinguish between resort to war, or armed conflict, and the conduct of armed conflict. Whether or not resort to armed conflict in a particular circumstance is prohibited by the United Nations Charter (and therefore unlawful[2]), the manner in which that armed conflict is conducted continues to be regulated

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[1] United Nations Charter, arts. 2(3), 2(4), 42 & 51-53. These provisions form the basis of the modern rules governing the resort to armed conflict, or *jus ad bellum*. See also Kellogg-Briand Pact, or the Treaty for the Renunciation of War as an Instrument of National Policy, Paris, 27 August 1928, 46 Stat. 2343, T.S. No. 796, 2 Bevans 732, 94 L.N.T.S. 57.

The relationship between war and *jus ad bellum*, hostile and nonhostile relations between combatant nations, *jus in bello*, and the law of neutrality in the late 20th Century is considered in Greenwood, The Concept of War in Modern International Law, 36 Int'l & Comp. L.Q. 283 (1987). *Jus in bello* is discussed further in note 3 below.

[2] Wars violating these principles are often called "aggressive" or "illegal" wars. Military personnel may not be lawfully punished simply for fighting in an armed conflict, even if their side is clearly the aggressor and has been condemned as such by the United Nations. This rule finds firm support in the Allied war crimes trials that followed World War II. For the crime of planning and waging aggressive war (defined as a crime against peace, see paragraph 6.2.5 note 49 below), the two post-World War II International Military Tribunals punished only those high ranking civilian and military officials engaged in the formulation of war-making policy. Later tribunals rejected all efforts to punish lesser officials for this crime merely because they participated in World War II. See DA Pam 27-161-2, at 221-51.

Because nations have traditionally claimed that their wars are wars of self-defense, the courts of the Western Allies were unwilling to punish officials for waging aggressive war if they were not at the policy-making level of government. In the words of one of the American tribunals at Nuremberg, "we cannot say that a private citizen shall be placed in the position of being compelled to determine in the heat of war whether his government is

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by the law of armed conflict. (For purposes of this publication, the term "law of armed

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[2](...continued)
right or wrong, or, if it starts right, when it turns wrong." *The I.G. Farben Case*, 8 TWC 1126, 10 LRTWC 39 (1949).

Since armed force can be used today lawfully only in self-defense (or as an enforcement action by the United Nations in accordance with articles 52 and 53 of the UN Charter), unlawful use of armed force may constitute a crime against peace under international law, a violation of U.S. Navy Regulations, or a violation of the UCMJ. Crimes against peace are defined in article 6 of the Charter of the International Military Tribunal at Nuremberg and are discussed in paragraph 6.2.5 note 49 below.

The Charter of the International Military Tribunal convened at Nuremberg in 1945 empowered the Tribunal to try individuals for international crimes, including initiation or waging of a war of aggression as a crime against peace. This was confirmed as a principle of international law by the UN General Assembly in 1946 (Resolution 95(I)) and by the International Law Commission in 1950. In 1974, the UN General Assembly adopted by consensus a definition of aggression for use by the Security Council in determining if an act of aggression had been committed:

> Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition.

Resolution 3314 (XXIX), 29 U.N. GAOR, Supp. 31, v.1, U.N. Doc. A/9631, at 142 (1974); Dep't St. Bull., 3 Feb. 1975, at 158-60; AFP 110-20, at 5-78 & 5-79.

This statement is amplified by a series of nonexhaustive examples of uses of armed force which, unless otherwise justified in international law or determined by the Security Council not to be of sufficient gravity, would permit the Security Council reasonably to consider to qualify as potential acts of aggression. Among these examples are invasion, the use of any weapon, the imposition of a blockade, or an attack by the armed forces of one nation, against the territory of another nation, or an attack upon the armed forces of another nation. (See paragraph 7.7 below regarding blockade.) Although neither the IMT judgment nor UN General Assembly Resolutions are primary sources of international law (see preface), they do accord with the current U.S. view of aggression. Dep't St. Bull., 3 Feb. 1978, at 155-58.

Improper action by naval personnel in using armed force may result in a number of UCMJ violations, e.g.: disobedience of orders or regulations such as U.S. Navy Regulations, 1973 (see article 1201 thereof) and dereliction of duty (article 92), loss of or damage to government property (articles 108 and 109), hazarding a vessel (article 110), murder and assault (articles 118 and 128), the general articles (133 and 134).

conflict" is synonymous with "law of war."[3])

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[3] JCS Pub. 1, at 204. The rules governing the actual conduct of armed conflict are variously known as the *jus in bello*, the law of armed conflict, or international humanitarian law. See paragraph 6.2.2 note 31 below.

As a matter of international law, application of the law of armed conflict between belligerents does not depend on the recognition of the existence of a formal state of "war," but on whether an "armed conflict" exists, and if so, whether the armed conflict is of an "international" or a "noninternational" character. As a matter of national policy, the Armed Forces of the United States are required to comply with the law of armed conflict in the conduct of military operations and related activities in armed conflict "however such conflicts are characterized." DoD Directive 5100.77, DoD Law of War Program, 10 July 1979. See paragraph 5.4.1 note 13 regarding the Lieber Code and also paragraph 6.1.2.

Although it is frequently difficult to determine when a situation becomes an "armed conflict," there is general agreement that *internal disturbances* and *tensions* are not armed conflicts. Examples of internal disturbances and tensions include:

- riots (i.e., all disturbances which from the start are not directed by a leader and have no concerted intent)

- isolated and sporadic acts of violence (as distinct from military operations carried out by armed forces or organized armed groups)

- other acts of a similar nature (such as mass arrests of persons because of their behavior or political opinion).

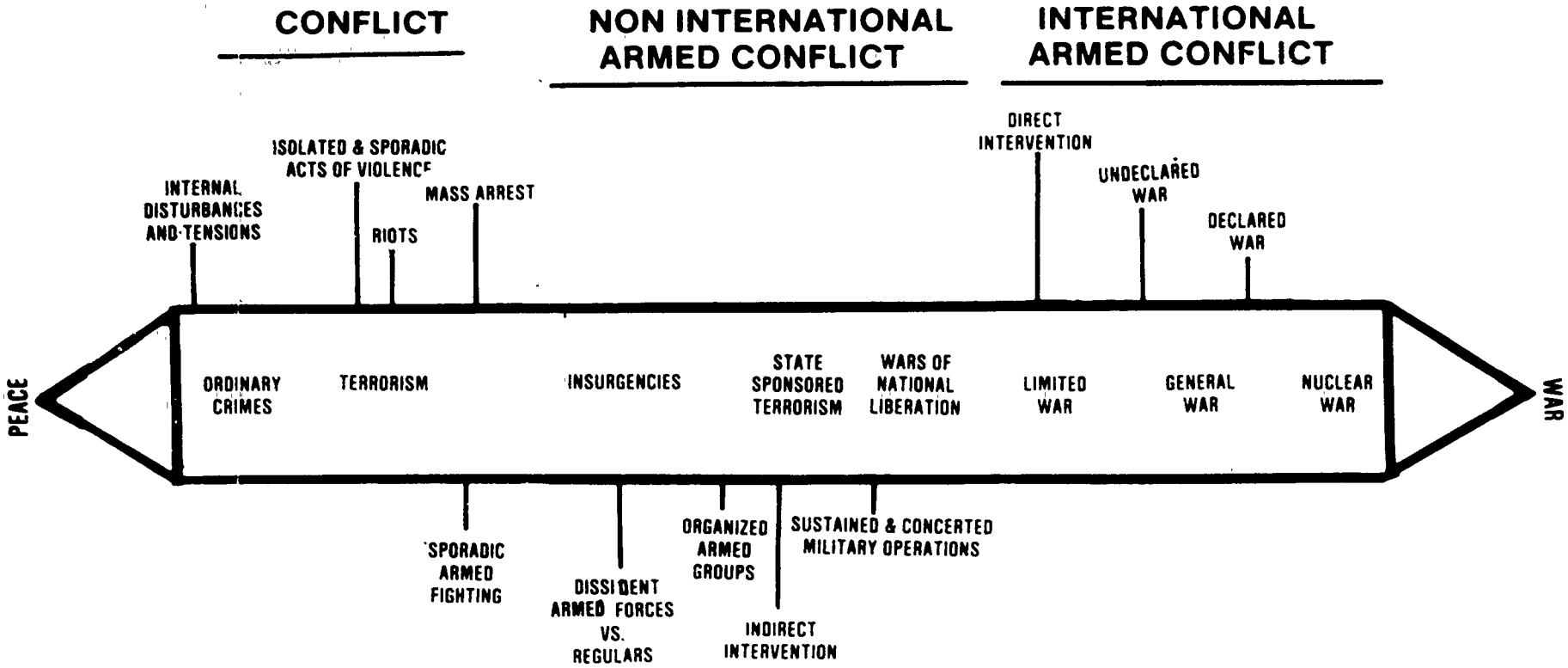
GP II, art. 1(2); ICRC, Commentary on the Draft Additional Protocols to the Geneva Conventions of August 12, 1949, at 133 (1973), quoted in Bothe, Partsch & Solf 628 n.9. The ICRC Commentary on the Additional Protocols (para. 4477, at 1355) distinguishes internal disturbances and internal tensions: "internal disturbances, without being an armed conflict, when the State uses armed force to maintain order" and "internal tensions, without being internal disturbances, when force is used as a preventive measure to maintain respect for law and order."

"International" armed conflicts include cases of declared war or any other armed conflict between two or more nations even if the state of war is not recognized by one of them. Common article 2. All other armed conflicts are "noninternational armed conflicts," governed at least by common article 3 of the 1949 Geneva Conventions, and by Additional Protocol II thereto for nations bound by it if the situation meets the criteria set forth in article 1(1) thereof: there must be an armed conflict occurring in the territory of the nation bound by Additional Protocol II between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military

(continued...)

FIGURE SF5-1

SPECTRUM OF CONFLICT



5.2 GENERAL PRINCIPLES OF THE LAW OF ARMED CONFLICT

The law of armed conflict seeks to prevent unnecessary suffering and destruction by controlling and mitigating the harmful effects of hostilities through minimum standards of protection to be accorded to "combatants" and to "noncombatants."[4] To that end, the law of armed conflict provides that:

> 1. Only that degree and kind of force, not otherwise prohibited by the law of armed conflict, required for the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources may be applied.[5]

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[3](...continued)
operations and to implement Additional Protocol II. Upon ratification of Additional Protocol II by the United States, the United States intends to apply Protocol II to all conflicts covered by common article 3, and to encourage all other nations to do likewise. Sen. Treaty Doc. 100-2, at 7, Annex AS5-1. "Armed forces" are discussed in paragraph 5.3 note 9 below. See paragraph 5.4.2 note 30 below regarding the U.S. decision not to seek ratification of Additional Protocol I.

The spectrum of conflict, reflecting the threshhold criteria, is illustrated in Figure SF5-1. Most modern armed conflicts are not wars between nations but wars "started by rebels who want to change their country's constitution, alter the balance of power between races, or secede." The Economist (London), 12 March 1988, at 19 (describing the 25 major wars underway at the time, only three of which were traditional international armed conflicts: Iran-Iraq, Libya-Chad and Laos-Vietnam). On the other hand, while the Economist categorized the Afghanistan war (1979-1988) as a civil war in which foreign troops were involved, respected jurists have concluded that war was an international armed conflict. Reisman and Silk, Which Law Applies to the Afghan Conflict?, 82 Am. J. Int'l L. 459, 485-86 (1988) (Soviet invasion resisted by loyal Afghan government troops met the criteria of common article 2(1), and was followed by occupation meeting the criteria of common article 2(2)); and Roberts, What Is a Military Occupation?, 55 Brit. Y.B. Int'l L. 249, 278 (1984) (Soviet occupation may well have met the criteria of common article 2(2)).

[4] These terms are defined in paragraph 5.3.

[5] *The Hostage Case (United States v. List et al.)*, 11 TWC 1253-54 (1950); McDougal & Feliciano 525. In the Hostage Case, the Court explained this principle, often misleadingly termed "military necessity":

> Military necessity has been invoked by the defendants as justifying the killing of innocent members of the population and the destruction of villages and towns in the occupied territory. Military necessity permits a belli-gerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of

(continued...)

[5](...continued)

> time, life and money. In general, it sanctions measures by an occupant necessary to protect the safety of his forces and to facilitate the success of his operation. It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war; it allows the capturing of armed enemies and others of peculiar danger, but it does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces. It is lawful to destroy railways, lines of communication, or any other property that might be utilized by the enemy. Private homes and churches even may be destroyed if necessary for military operations. It does not admit the wanton devastation of a district or the willful infliction of suffering upon its inhabitants for the sake of suffering alone.

Id. See also paragraph S6.2.5.6.2 below.

General Eisenhower recognized this distinction in a message on 29 December 1943 from him as Allied Commander in the Mediterranean to "all commanders":

> Nothing can stand against the argument of military necessity. This is an accepted principle. But the phrase "military necessity" is sometimes used where it would be more truthful to speak of military convenience or even of personal convenience. I do not want it to cloak slackness or indifference.
> . . .

Historical Research Center, Maxwell Air Force Base, AL, File 622.610-2, Folder 2, 1944-45, as quoted in Schaffer, Wings of Judgment: American Bombing in World War II, at 50 (1985) and Richardson, Monte Cassino 158 (1984). See also paragraph 8.5.1.6 note 102 below.

The customary rule of military necessity may be, and in many instances is, restricted in its application to the conduct of warfare by other customary or conventional rules. The opinion that all rules of warfare are subject to, and restricted by, the operation of the principle of military necessity has never been accepted by the majority of American and English authorities. Furthermore, this opinion has not been accepted by military tribunals. It has been held by military tribunals that the plea of military necessity cannot be considered as a defense for the violation of rules which lay down absolute prohibitions (e.g., the rule prohibiting the killing of prisoners of war) and which provide no exception for those circumstances constituting military necessity. Thus, one United States Military Tribunal, in rejecting the argument that the rules of warfare are always subject to the

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2. The employment of any kind or degree of force *not* required for the purpose of the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources, is prohibited.[6]

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[5](...continued)
operation of military necessity, stated:

> It is an essence of war that one or the other side must lose and the experienced generals and statesmen knew this when they drafted the rules and customs of land warfare. In short, these rules and customs of warfare are designed specifically for all phases of war. They comprise the law for such emergency. To claim that they can be wantonly -- and at the sole discretion of any one belligerent -- disregarded when he considers his own situation to be critical, means nothing more or less than to abrogate the laws and customs of war entirely.

The Krupp Trial (Trial of Alfred Felix Alwyn Krupp Von Bohlen und Halbach and Eleven Others), 10 LRTWC 139 (1949).

However, there are rules of customary and conventional law which normally prohibit certain acts, but which exceptionally allow a belligerent to commit these normally prohibited acts in circumstances of military necessity. In conventional rules, the precise formulation given to this exception varies. Some rules contain the clause that they shall be observed "as far as military necessity (military interests) permits." Examples include common article 8(3) (restricting activities of representatives or delegates of Protecting Powers); GWS, art. 33(2), GWS-Sea, art. 28 (use of captured medical supplies); GWS, art. 32(2) (return of neutral persons); GPW, art. 30(1) (return of captured medical and religious personnel); GC, arts. 16(2) (facilitating search for wounded and sick), 55(3) (limiting verification of state of food and medical supplies in occupied territories), 108(2) (limitations on relief shipments); common article 42(4)/-/23(4)/18(4) (visibility of distinctive emblem). Other rules permit acts normally forbidden, if "required" or "demanded" by the necessities of war. Examples include HR, art. 23(g), GWS, art 34(2) & GC, art. 53 (permitting destruction or seizure of property); common article 50/51/130/147 (grave breaches if not justified); GPW, art. 126(2) & GC, art. 143(3) (limiting visits of representatives and delegates of Protecting Powers); GC, arts. 49(2) (evacuation of protected persons from occupied territory), 49(5) (detention of protected persons in area exposed to dangers of war). Rules providing for the exceptional operation of military necessity require a careful consideration of the relevant circumstances to determine whether or not the performance of normally prohibited acts is rendered necessary in order to protect the safety of a belligerent's forces or to facilitate the success of its military operations. See also paragraph 6.2.3 regarding reprisals.

[6] NWIP 10-2, sec. 220(b). The opinion is occasionally expressed that these two principles, necessity and proportionality, contradict each other in the sense that they serve
(continued...)

3. Dishonorable (treacherous) means, dishonorable expedients, and dishonorable conduct during armed conflict are forbidden.[7]

The law of armed conflict is not intended to impede the waging of hostilities. Its purpose is to ensure that the violence of hostilities is directed toward the enemy's forces and is not used to cause purposeless, unnecessary human misery and physical destruction. In that sense, the law of armed conflict complements and supports the principles of warfare embodied in the military concepts of objective, mass, economy of force, surprise, and

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[6](...continued)
opposing ends. This is not the case. In allowing only that use of force necessary for the purpose of armed conflict, the principle of necessity implies the principle of proportionality which disallows any kind or degree of force not essential for the realization of this purpose; that is, force which needlessly or unnecessarily causes or aggravates both human suffering and physical destruction. Thus, the two principles may properly be described, not as opposing, but as complementing each other. The real difficulty arises, not from the actual meaning of the principles, but from their application in practice. This customary rule of proportionality has been codified for the first time in Additional Protocol I, articles 51(5)(b) and 57(2)(a)(iii), as prohibiting attacks

> **which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.**

See also paragraph 8.1.2.1 and notes 17-20 (incidental injury and collateral damage) below.

[7] **This is also known as the principle of chivalry. NWIP 10-2, sec. 220c. See chapter 12 regarding prohibited deceptions or perfidy.**

As long as war is not abolished, the law of armed conflict remains essential. During such conflicts the law of armed conflict provides common ground of rationality between enemies. This body of law corresponds to their mutual interests during conflict and constitutes a bridge for a new understanding after the end of the conflict. The law of armed conflict is intended to preclude purposeless, unnecessary destruction of life and property and to ensure that violence is used only to defeat the enemy's military forces. If followed by all participants, the law of armed conflict will inhibit warfare from needlessly affecting persons or things of little military value. By preventing needless cruelty, the bitterness and hatred arising from armed conflict is lessened, and thus it is easier to restore an enduring peace. The legal and military experts who attempted to codify the laws of war more than a hundred years ago reflected this reality when they declared that the final object of an armed conflict is the "re-establishment of good relations and a more solid and lasting peace between the belligerent States." Final Protocol of the Brussels Conference of 27 August 1874, Schindler & Toman 26.

security. Together, the law of armed conflict and the principles of warfare underscore the importance of concentrating forces against critical military targets while avoiding the expenditure of personnel and resources against persons, places, and things that are militarily unimportant.[8]

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[8] Although the U.S. Navy has not adopted as doctrine the Principles of War, useful discussions of their application in naval tactics may be found in Hughes, Fleet Tactics 140-45 & 290-97 (1986); Eccles, Military Concepts and Philosophy 108-13 (1965); and Brown, The Principles of War, U.S. Naval Inst. Proc., June 1949, at 621. The other services have adopted variations of the Principles of War as service doctrine: U.S. Marine Corps, Marine Rifle Company/Platoon, FMFM 6-4, para. 1403 (1978); U.S. Air Force, Basic Aerospace Doctrine, AFM 1-1, 16 March 1984, para. 2-6, at 2-4 to 2-10; Department of the Army, Operations, FM 100-5, at 173-177 (1986); Armed Forces Staff College, Joint Staff Officer's Guide, Pub 1, para. 102, at p. 1-4 (1986). See Table ST5-1. (The 1988 edition of AFSC Pub 1 has noticeably different listings.) The Principles of War in any case are not a set of inflexible rules; rather they are "good tools to sharpen the mind," and are essential elements in successful military operations. Eccles 113.

The principle of *the objective* provides that every military undertaking must have an objective, that is, it must be directed toward a clearly defined goal and all activity must contribute to the attainment of that goal. Military objectives necessarily support national objectives--in peace as well as in war--and, more directly, support the national war aims during conflict. The law of armed conflict supports this principle by assisting in defining what is politically and legally obtainable.

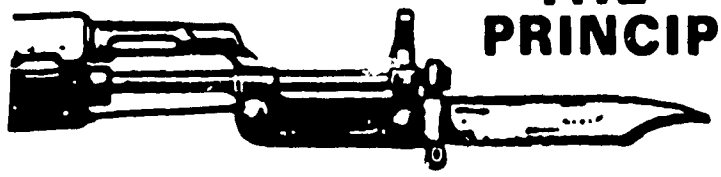
The principle of *concentration* or *mass* states that to achieve success in war it is essential to concentrate superior forces at the decisive place and time in the proper direction, and to sustain this superiority at the point of contact as long as it may be required. With the law of armed conflict this principle serves, in part, to employ the proper economy of force at or in the less decisive points and to enable maximum total effective force to be exerted in achieving the objective.

Economy of force means that no more--or less--effort should be devoted to a task than is necessary to achieve the objective. This implies the correct selection and use of weapons and weapon systems, maximum productivity from available weapons platforms, and careful balance in the allocation of tasks. This principle is embodied in the fundamental legal principle of proportionality.

Surprise results from creating unexpected situations or from taking courses of least probable expectation--both considered from the enemy point of view and both designed to exploit the enemy's consequent lack of preparedness. It permits the attaining of maximum effect from a minimum expenditure of effort. The lawfulness of such techniques as deception supports surprise.

(continued...)

TABLE ST5-1



THE PRINCIPLES OF WAR

United States Army	U.S. Air Force	Great Britain and Australia	Soviet Union	France	People's Republic of China
					Political mobilization
OBJECTIVE Every military operation should be directed toward a clearly defined, decisive, and attainable objective.	Objective	Selection and maintenance of the aim	Advance and concentration		Selection and maintenance of the aim
OFFENSIVE Seize, retain, and exploit the initiative.	Offensive	Offensive action	Offensive		Offensive action
MASS. Concentrate combat power at decisive place and time.	Mass	Concentration of force	Concentration	Concentration of effort	Concentration of force
ECONOMY OF FORCE. Allocate minimum essential combat power to secondary efforts. (1)	Economy of force	Economy of force	Economy of force		
MANEUVER. Place the enemy in a position of disadvantage through the flexible application of combat power.(2)	Maneuver	Flexibility	Manouver and initiative		Initiative or flexibility
UNITY OF COMMAND. For every objective, there should be unity of effort under one responsible commander.	Unity of command	Cooperation	Combined arms		Coordination
SECURITY. Never permit the enemy to acquire an unexpected advantage. (3)	Security	Security	Adequate reserves		Security
SURPRISE. Strike the enemy at a time or place and in a manner for which they are unprepared.	Surprise	Surprise	Surprise and deception	Surprise	Surprise
SIMPLICITY. Prepare clear, uncomplicated plans and clear, concise orders to ensure thorough understanding.	Simplicity				
	Timing and tempo	Maintenance of morale	Morale	Liberty of action	Morale
	Logistics	Administration	Annihilation		Freedom of action
	Cohesion				Mobility

NOTES: (1) This is a corollary to the principle of mass, for it is a method of achieving mass.
(2) This relates to rapid deployment of forces by both sea and air, as well as rapid movement of forces within the theater of operation in order to focus maximum power against the enemy's weakest link.
(3) Security is achieved by establishing protective measures to counter surprise, observation, detection, interference, espionage or sabotage.

Figure 1-1

5.3 COMBATANTS AND NONCOMBATANTS

The law of armed conflict is based largely on the distinction to be made between combatants and noncombatants. In accordance with this distinction, the population of a nation engaged in armed conflict is divided into two general classes: armed forces (combatants) and the civilian populace (noncombatants). Each class has specific rights and obligations in time of armed conflict, and no single individual can be simultaneously a combatant and a noncombatant.[9]

The term "noncombatant" is primarily applied to those individuals who do not form a part of the armed forces and who otherwise refrain from the commission or direct support of hostile acts. In this context, noncombatants and generally, the civilian population, are

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[8](...continued)
Security embraces all measures which must be taken to guard against any form of counter-stroke which the enemy may employ to prevent the attainment of the objective or to obtain its own objective. Security implies the gaining of enemy intelligence. Surveillance and spying are not prohibited by international law including the law of armed conflict.

Unity of effort ensures that all efforts are focused on a common goal or objective. The law of armed conflict supports the discipline necessary to achieve and maintain unity of efforts.

[9] NWIP 10-2, para. 221a. Chapter 11 discusses noncombatants in detail. "Combatants" are those persons who have the right to participate directly in hostilities. Combatants include all members of the armed forces of a Party to the conflict except medical personnel and chaplains, and members of the armed forces who have acquired civil defense status. HR, art. 3(2); GP I, arts. 43(2) & 67. The "armed forces" of a Party to an armed conflict include all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict. GP I, art. 43(1). The other requirements for combatant status are discussed in paragraph 11.8 below, especially notes 48-49 and accompanying text. See also de Preux, Synopsis VII: Combatant and prisoner-of-war status, 1989 Int'l Rev. Red Cross 43.

Persons acting on their own in fighting a private war, including gangs of terrorists acting on their own behalf and not linked to an entity subject to international law, are not combatants. See paragraph 12.7.1 below, and Baxter, So-Called Unprivileged Belligerency: Spies, Guerrillas and Saboteurs, 28 Brit. Y.B. Int'l L. 323 (1951), regarding illegal combatants.

On identification of combatants and noncombatants, see de Preux, Synopsis IV: Identification--Fundamental Principle, 1985 Int'l Rev. Red Cross 364.

synonymous. The term noncombatants may, however, also embrace certain categories of persons who, although attached to or accompanying the armed forces, enjoy special protected status, such as medical officers, corpsmen, chaplains, and civilian war correspondents. The term is also applied to armed forces personnel who are unable to engage in combat because of wound, sickness, shipwreck, or capture.[10]

Under the law of armed conflict, noncombatants must be safeguarded against injury not incidental to military operations directed against combatant forces and other military objectives. In particular, it is forbidden to make noncombatants the object of attack.[11]

5.4 SOURCES OF THE LAW OF ARMED CONFLICT

As is the case with international law generally, the principal sources of the law of armed conflict are custom, as reflected in the practice of nations, and international agreements.[12]

5.4.1 Customary Law. The customary international law of armed conflict derives from the practice of military and naval forces in the field, at sea, and in the air during hostilities. When such a practice attains a degree of regularity and is accompanied by the general conviction among nations that behavior in conformity with that practice is obligatory, it can be said to have become a rule of customary law binding upon all nations. It is frequently difficult to determine the precise point in time at which a usage or practice of warfare evolves into a customary rule of law. In a period marked by rapid developments in technology, coupled with the broadening of the spectrum of warfare to encompass insurgencies and state-sponsored terrorism, it is not surprising that nations often disagree as to the precise content of an accepted practice of warfare and to its status as a rule of law. This lack of precision in the definition and interpretation of rules of customary law has been a principal motivation behind efforts to codify the law of armed conflict through written agreements (treaties and conventions.)[13]

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[10] NWIP 10-2, para. 221a n.12. See paragraph 11.1.

[11] NWIP 10-2. para. 221b. See paragraph 11.2.

[12] See Preface. Evidence of the law of armed conflict may also be found in national military manuals, judicial decisions, the writings of publicists, and the work of various international bodies. Documents on the Laws of War 6-9 (Roberts & Guelff eds., 2d ed. 1989).

[13] The roots of the present law of armed conflict may be traced back to practices of belligerents which arose, and grew gradually, during the latter part of the Middle Ages, primarily as a result of the influences of Christianity and chivalry. Unlike the savage cruelty of former times, belligerents gradually adopted the view that the realization of the objectives of war was in no way limited by consideration shown to the wounded, to prisoners, and to private individuals who did not take part in the fighting. Progress (continued...)

[13](...continued)
continued during the seventeenth and eighteenth centuries. Hugo Grotius codified the first rules of warfare in his *De Jure Belli ac Pacis* in 1642. These rules were widely adopted by nations, partly for ethical reasons, and partly because the remnants of chivalry were still influential among aristocratic officers.

The most important developments in the laws of armed conflict took place in the period after 1850. The French Revolution and Napoleonic Wars first introduced the concept of the citizen army. While during the seventeenth and eighteenth centuries the means of destruction were limited by the absence of industrial might and combatants were limited to a small group of citizen soldiers, the distinction between combatants and noncombatants was no longer clear cut as armed forces began to rely upon the direct support of those who remained at home. Limitations on the means of destruction were also in transition, as by the middle of the 19th century the effect of the industrial revolution was beginning to be felt in the battlefield. A combination of the increased killing power of artillery, the inadequacy of field medical treatment and the outmoded infantry tactics resulted in unprecedented battlefield losses. The public reaction to the particularly harsh experiences of the Crimean War (1854-56) and the United States' Civil War, renewed the impetus for the imposition of limits on war and demonstrated the need for more precise written rules of the law of armed conflict to replace the vague customary rules. The horrors of the Crimean War also resulted in the formation of the Red Cross movement in 1863. (See paragraph 6.2.2 for a description of the ICRC and its activities.) It was in this light that the first conventions to aid the sick and wounded were concluded at Geneva in 1864. In the United States, President Lincoln commissioned Dr. Francis Lieber, then a professor at Columbia College, New York City, to draft a code for the use of the Union Army during the Civil War. His code was revised by a board of Army officers, and promulgated by President Lincoln as General Orders No. 100, on 24 April 1863, as the Instructions for the Government of Armies of the United States in the Field. The Lieber Code strongly influenced the further codification of the law of armed conflict and the adoption of similar regulations by other nations, including The United States Naval War Code of 1900, and had a great influence on the drafters of Hague Convention No. IV regarding the Laws and Customs of War on Land. The 1907 Hague rules have been supplemented by the 1949 Geneva Convention Relative to Protection of Civilians in Time of War, the 1949 Convention Relative to the Treatment of Prisoners of War, the 1977 Protocols Additional to the 1949 Geneva Conventions, and the 1980 Conventional Weapons Convention. The principles of customary international law codified in such treaties are identified in the relevant notes to the text. The role of customary law in developing the law of war is cogently discussed in the introduction to Documents on the Laws of War, note 12 above, at 4-6.

In recent years there has been a marked tendency to include among the sources of the rules of warfare certain principles of law adopted by many nations in their domestic legislation. In the judgment rendered in The Hostage Case, the United States Military Tribunal stated:

(continued...)

5.4.2 International Agreements. International agreements, whether denominated as treaties or conventions, have played a major role in the development of the law of armed conflict. Whether codifying existing rules of customary law or creating new rules to govern future practice, international agreements are a source of the law of armed conflict. Rules of law established through international agreements are ordinarily binding only upon those nations that have ratified or adhered to them. Moreover, rules established through the treaty process are binding only to the extent required by the terms of the treaty itself as limited by the reservations, if any, that have accompanied its ratification or adherence by individual nations.[14] Conversely, to the extent that such rules codify *existing* customary law or

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[13](...continued)

> **The tendency has been to apply the term "customs and practices accepted by civilized nations generally," as it is used in international law, to the laws of war only. But the principle has no such restricted meaning. It applies as well to fundamental principles of justice which have been accepted and adopted by civilized nations generally. In determining whether such a fundamental rule of justice is entitled to be declared a principle of international law, an examination of the municipal laws of states in the family of nations will reveal the answer. If it is found to have been accepted generally as a fundamental rule of justice by most nations in their municipal law, its declaration as a rule of international law would seem to be fully justified.**

United States v. List et al., 11 TWC 1235 (1950).

[14] Vienna Convention on the Law of Treaties, article 21. Numerous multilateral agreements contain a provision similar to that contained in article 28 of Hague Convention No. XIII (1907) that "The provisions of the present Convention do not apply except between the Contracting Powers, and only if all the belligerents are parties to the Convention." The effects of this so called "general participation" clause have not been as far-reaching as might be supposed. In World Wars I and II and the Korean War, belligerents frequently affirmed their intention to be bound by agreements containing the general participation clause regardless of whether or not the strict requirements of the clause were actually met. Unfortunately, during the Viet Nam conflict North Viet Nam never admitted its belligerency status and the Viet Cong had no recognized leadership structure which spoke for their organization.

Certain conventions have been generally regarded either as a codification of pre-existing customary law or as having come to represent, through widespread observance, rules of law binding upon all States. Both the International Military Tribunals at Nuremberg and For the Far East treated the general participation clause in Hague Convention No. IV (1907), Respecting the Laws and Customs of War on Land, as irrelevant. They also declared that the general principles laid down in the 1929 Geneva Convention relative to the Treatment of Prisoners of War, which does not contain a general participation clause, were binding on signatories and nonsignatories alike. *Nazi Conspiracy and Aggression*: Opinion and (continued...)

otherwise come, over time, to represent a general consensus among nations of their obligatory nature, they are binding upon party and non-party nations alike.

Principal among the international agreements reflecting the development and codification of the law of armed conflict are the Hague Regulations of 1907, the Gas Protocol of 1925, the Geneva Conventions of 1949 for the Protection of War Victims, the 1954 Hague Cultural Property Convention, the Biological Weapons Convention of 1972, and the Conventional Weapons Convention of 1980. Whereas the 1949 Geneva Conventions and the 1977 Protocols Additional thereto address, for the most part, the protection of victims of war, the Hague Regulations, the Geneva Gas Protocol, Hague Cultural Property Convention, Biological Weapons Convention and the Conventional Weapons Convention are concerned, primarily, with controlling the means and methods of warfare.[15] The most

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[14](...continued)
Judgment 83, U.S. Naval War College, International Law Documents 1946-1947, at 281-82 (1948); *IMTFE*, Judgment 28, U.S. Naval War College, International Law Documents 1948-49, at 81 (1950). Article 2, paragraph 3, of all four 1949 Geneva Conventions states:

> Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

(Similar provisions are contained in article 96 of Additional Protocol I and article 7 of the 1980 Conventional Weapons Convention, to each of which the United States is not a party.)

This subject is explored in detail in Meron, The Geneva Conventions as Customary Law, 81 Am. J. Int'l L. 348 (1987); Meron, Human Rights and Humanitarian Norms as Customary Law (forthcoming, 1989).

[15] The major treaties on naval warfare presently in force date back to 1907, before the appearance of the submarine and before the large scale use of aircraft in naval operations. The 1936 London Protocol on submarine warfare set out rules prepared before development of the modern submersible. The Second Geneva Convention of 1949, as supplemented by portions of the 1977 Additional Protocol I, develops only the rules on the protection of the wounded, sick and shipwrecked at sea. In large measure, the law of naval warfare continues to develop in its traditional manner: through the practice of nations ripening into customary (as opposed to treaty) law. Some private and nongovernmental circles favor a treaty codification, and they have begun efforts to draft and develop in treaty form their view of the modern law of naval warfare. Gasser, "Some Reflections on the Future of International Humanitarian Law," remarks at the IXth Round Table on Current Problems of International Humanitarian Law, San Remo, Italy, 7-10 September 1983 ("possible areas for further development: law on armed conflict at sea"); Study on the Naval Arms Race: Report of the Secretary General, UN Doc. A/40/535, 17 September 1985, (continued...)

significant of these agreements (for purposes of this publication) are listed chronologically as follows:

1. 1907 Hague Convention Respecting the Laws and Customs of War on Land (Hague IV)[16]

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[15](...continued)
paras. 302-07, at 85-86 ("need for modernization [by] the conclusion and adoption of . . . protocols" regarding zonal restrictions, long-range weapons, sea mines, and protection of the marine environment); Committee for the Protection of Human Life in Armed Conflicts: Law of Naval Warfare, 10th International Conference of the International Society for Military Law and Law of War, Garmisch-Partenkirchen, West Germany, 2-7 October 1985, 26 Mil. L. & L. of War Rev. 9-181 (1987); Loree, "Maritime Law and the Gulf War," J. Commerce, 12 Nov. 1986 (calling for a limited international conference to draft rules relating to war zones and protection of neutral shipping); Doswald-Beck, The International Law of Naval Armed Conflicts: The Need for Reform, 7 Ital. Y.B. Int'l L. 251 (1986) ("The present state of the law of naval warfare is one of uncertainty, confusion and unnecessary confidentiality . . . . every effort should now be made to draft a code freshly tailored for today's world"); Resolution VIIA, XXVth International Red Cross Conference, 26 Int'l Rev. Red Cross, Nov.-Dec. 1986, at 349 ("some areas of international humanitarian law relating to sea warfare are in need of reaffirmation and clarification . . . and appeals . . . to governments to co-ordinate their efforts in appropriate fora in order to review the necessity and the possibility of updating the relevant texts of international humanitarian law relating to sea warfare"); Round Table meeting of experts on the international humanitarian law governing armed conflicts at sea, International Institute of Humanitarian Law, San Remo, Italy, 15-17 June 1987 (sponsored by the International Law Institute of the University of Pisa, Italy, and the Syracuse, NY, University School of Law), 1987 Int'l Rev. Red Cross 422-23; Round Table of Experts on International Humanitarian Law Applicable to Armed Conflicts at Sea, Madrid, 26-29 September 1988 (sponsored by the International Institute of Humanitarian Law and the Center of Studies on Humanitarian Law of the Spanish Red Cross). The preparatory papers for the 1987 meeting in San Remo, which examined the relevant conventions pertaining to the law of naval warfare, are published as The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries (Ronzitti ed. 1988).

The military manuals on naval warfare were, until recently, antiquated. See U.S. Navy, Law of Naval Warfare, NWIP 10-2 (1955), replaced by the Commander's Handbook on the Law of Naval Operations, NWP 9 (1987) and NWP 9 Revision A/FMFM 1-10 (1989), and chapters 8-11 of the Royal Australian Navy, Manual of the Law of the Sea, ABR 5179 (1983). New manuals on the law of naval warfare are in preparation by a number of nations, including the United Kingdom, Canada, and Italy.

[16] The general principles of Hague IV have been deemed to have passed into general international law. See cases cited in note 14 above. Hague IV is discussed in chapters 8, 9, 11 & 12 *passim*.

2. 1907 Hague Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague V)[17]

3. 1907 Hague Convention Relative to the Laying of Automatic Submarine Contact Mines (Hague VIII)[18]

4. 1907 Hague Convention Concerning Bombardment by Naval Forces in Time of War (Hague IX)[19]

5. 1907 Hague Convention Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War (Hague XI)[20]

6. 1907 Hague Convention Concerning the Rights and Duties of Neutral Powers in Naval War (Hague XIII)[21]

7. 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare[22]

8. 1936 London Protocol in Regard to the Operations of Submarines or Other War Vessels with Respect to Merchant Vessels (Part IV of the 1930 London Naval Treaty)[23]

9. 1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*[24]

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[17] Hague V is discussed in chapter 7 passim (The Law of Neutrality).

[18] Hague VIII is discussed in paragraphs 9.2 (naval mines) and 9.3 (torpedoes).

[19] Hague IX is discussed in paragraphs 8.5 (bombardment) and 11.10.3 (Hague symbol).

[20] Hague XI is mentioned in paragraph 8.2.3 notes 58, 60, & 64.

[21] Hague XIII is discussed in chapter 7 passim (The Law of Neutrality).

[22] The 1925 Geneva Gas Protocol is discussed in paragraph 10.3 (chemical weapons).

[23] The 1936 London Protocol is discussed in paragraphs 8.2.2.2 (destruction of enemy merchant vessels) and 8.3.1 (submarine warfare).

[24] The 1949 Geneva Wounded and Sick Convention is discussed in paragraph 11.4 (wounded and sick).

10. 1949 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea*[25]

11. 1949 Geneva Convention (III) relative to the Treatment of Prisoners of War*[26]

12. 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War*[27]

13. 1954 Hague Convention for the Protection of Cultural Property in the event of armed conflict[28]

14. 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction[29]

15. 1977 Protocol Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of International Armed Conflict (Additional Protocol I)*[30]

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[25] **The 1949 Geneva Wounded, Sick and Shipwrecked Convention is discussed in paragraph 11.6 (the shipwrecked).**

[26] **The general principles (but not the details) of the 1929 Geneva Prisoners of War Convention, which are repeated in the 1949 Geneva Prisoners of War Convention, have been held to be declaratory of customary international law. See note 14 above; FM 27-10, para. 6, at 6. The 1949 Geneva Prisoners of War Convention is discussed in paragraph 11.8 (prisoners of war).**

[27] **The 1949 Geneva Civilians Convention is discussed in paragraph 11.9 (interned persons).**

[28] **The 1954 Hague Cultural Property Convention (and the 1935 Roerich Pact) are discussed in paragraph 11.10.2 (protective symbols).**

[29] **The 1972 Biological Weapons Convention is discussed in paragraph 10.4 (biological weapons).**

[30] **The President has decided not to submit the 1977 Additional Protocol I to the Senate for its advice and consent to ratification. 23 Weekly Comp. Pres. Doc. 91 (29 Jan. 1987), 81 Am. J. Int'l L. 910. France, Israel and South Africa have also indicated their intention not to ratify Additional Protocol I. The Administration's public rationale is set forth in Senate Treaty Doc. No. 100-2, reprinted in 26 Int'l Leg. Mat'ls 561 (1987) and Annex AS5-1. Publications reflecting these views in greater detail include Roberts, The New Rules for Waging War: The Case Against Ratification of Additional Protocol I, 26 Va. J. Int'l L. 109 (1985); Feith, Law in the Service of Terror--The Strange Case of the Additional Protocol, 1 The National Interest, Fall 1985, at 36; Sofaer, Terrorism and the**

(continued...)

16. 1977 Protocol Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II)*[31]

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[30](...continued)
Law, 64 Foreign Affairs, Summer 1986, at 901; The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 Am. U.J. Int'l L. & Policy 460 (1987) (remarks of U.S. Department of State Legal Adviser Sofaer); Sofaer, The Rationale for the United States Decision, 82 Am. J. Int'l L. 784 (1988). *Contra,* Aldrich, Progressive Development of the Law of War: A Reply to Criticisms of the 1977 Geneva Protocol I, 26 Va. J. Int'l L. 693 (1986); Solf, Protection of Civilians Against the Effects of Hostilities Under Customary International Law and Under Protocol I, 1 Am. Univ. J. Int'l L. & Policy 117 (1986); Solf, A Response to Douglas J. Feith's Law in the Service of Terror--The Strange Case of the Additional Protocol, 20 Akron L. Rev. 261 (1986); Gasser, Prohibition of Terrorist Acts in International Humanitarian Law, 26 Int'l Rev. Red Cross 200, 210-212 (Jul.-Aug. 1986); Gasser, An Appeal for Ratification by the United States, 81 Am. J. Int'l L. 912 (1987); and Gasser, Letter to the Editor in Chief, 83 Am. J. Int'l L. 345 (1989).

As of mid-September 1989, 88 nations were party to Additional Protocol I, including NATO members Belgium, Denmark, Greece, Iceland, Italy, Netherlands, Norway and Spain; the Republic of Korea; New Zealand; the Soviet Union and Hungary among the Warsaw Pact nations; the neutral countries of Austria, Finland, Sweden and Switzerland; as well as China, Yugoslavia, Cuba, DPRK and Libya. Additional Protocol I is in force as between those nations party to it. See the complete listing at Annex AS5-2. In addition, Canada, Spain and Haiti have announced intention to ratify Additional Protocol I upon passage of implementing legislation.

The *travaux preparatoires* of Protocol I are set forth in an article-by-article basis in Levie, Protection of War Victims: Protocol I to the 1949 Geneva Conventions (4 v. 1979-81). See also Bothe, Partsch & Solf 1-603, and ICRC, Commentary 19-1304.

[31] The President submitted 1977 Additional Protocol II to the Senate for its advice and consent to ratification on 29 January 1987. Sen. Treaty Doc. 100-2, 23 Weekly Comp. Pres. Doc. 91; 26 Int'l Leg. Mat'ls 561 (1987), Annex AS5-1. The proposed statements of understanding and reservations to Additional Protocol II are analyzed in Smith, New Protections for Victims of International [sic] Armed Conflicts: The Proposed Ratification of Protocol II by the United States, 120 Mil. L. Rev. 59 (1988).

As of mid-September 1989, the 78 parties to Additional Protocol II included NATO allies Belgium, Denmark, France, Iceland, Italy, Netherlands, Norway and Spain; El Salvador, the Philippines and New Zealand; the neutral countries (Austria, Finland, Sweden and Switzerland); and the Soviet Union and Hungary among the Warsaw Pact nations.
(continued...)

17. 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects.[32]

An asterisk (*) indicates that signature or ratification of the United States was subject to one or more reservations or understandings. The United States is a signatory and party to all of the foregoing conventions and protocols, except it has not ratified and, therefore, is not a state party to, numbers 13 and 15-17. The United States has decided not to ratify Additional Protocol I.[33]

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[31](...continued)
Protocol II is in force as between those nations party to it. See the complete listing in Annex AS5-2. In addition, Canada, Spain and Haiti have announced intention to ratify Additional Protocol II upon passage of implementing legislation. Israel and South Africa have indicated they do not intend to ratify Additional Protocol II.

The *travaux preparatoires* of Protocol II are set forth in an article-by-article basis in The Law of Non-International Armed Conflict: Protocol II to the 1949 Geneva Conventions (Levie ed. 1987). See also Bothe, Partsch & Solf 604-705, and ICRC, Commentary 1305-1509.

[32] The 1980 Conventional Weapons Convention is discussed in paragraphs 9.5 (delayed action devices) and 9.6 (incendiary devices). As of December 1988, 26 nations, including Denmark, France, Netherlands, Norway, Australia, Japan, China, the Soviet Union and other Warsaw Pact nations, and the neutral nations, have ratified the Conventional Weapons Convention, and it is in force as between those nations. The President has not yet decided whether to submit the 1980 Conventional Weapons Convention and its three Protocols to the Senate for its advice and consent to ratification.

The *travaux preparatoires* of the "umbrella" treaty and Protocol I are set forth in Roach, Certain Conventional Weapons Convention: Arms Control or Humanitarian Law?, 105 Mil. L. Rev. 1, and of Protocol II (land mines) in Carnahan, The Law of Land Mine Warfare: Protocol II to the United Nations Convention on Certain Conventional Weapons, id. at 73. See also Fenrick, The Law of Armed Conflict: The CUSHIE Weapons Treaty, 11 Can. Def. Q., Summer 1981, at 25; Fenrick, New Developments in the Law Concerning the Use of Conventional Weapons in Armed Conflict, 19 Can. Y.B. Int'l L. 229 (1981); Schmidt, The Conventional Weapons Convention: Implication for the American Soldier, 24 A.F.L. Rev. 279 (1984); and Rogers, A Commentary on the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, 26 Mil. L. & L. of War Rev. 185 (1987). See also paragraph 9.6 below.

[33] Six of the 1907 Hague Conventions entered into force for the U.S. in 1909, while the four Geneva Conventions of August 12, 1949 entered into force for the United States in 1956. The Administration is reconsidering whether to submit the 1954 Hague Cultural (continued...)

5.5 RULES OF ENGAGEMENT

U.S. rules of engagement are the means by which the National Command Authorities (NCA)[34] and the U.S. military chain of command authorize subordinate commanders to employ military force. Rules of engagement delineate the circumstances and limitations under which U.S. naval, ground, and air forces will initiate and/or continue combat engagement with enemy forces.[35] At the national level, wartime rules of engagement are promulgated by the NCA, through the Joint Chiefs of Staff, to unified and specified commanders to guide them in the employment of their forces toward the achievement of broad national objectives. At the tactical level, wartime rules of engagement are task-oriented and frequently mission-oriented. At all levels, U.S. wartime rules of engagement are influenced by, and are consistent with, the law of armed conflict. The law of armed conflict provides the general framework within which U.S. rules of engagement during hostilities are formulated. Because rules of engagement also reflect operational, political, and diplomatic factors, they often restrict combat operations far more than do the requirements of international law.[36]

5.5.1 Peacetime and Wartime Rules of Engagement Distinguished. Chapter 4 addresses the JCS Peacetime Rules of Engagement for U.S. Forces and notes that they provide the authority for and limitations on actions taken in self-defense during peacetime and periods short of prolonged armed conflict, for the defense of U.S forces, the self-defense of the nation and its citizens, and the protection of U.S. national assets worldwide. Wartime rules of engagement, on the other hand, reaffirm the right and responsibility of the operational commander generally to seek out, engage, and destroy enemy forces consistent with national objectives, strategy, and the law of armed conflict.[37]

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[33](...continued)
Property Convention to the Senate for its advice and consent to ratification.

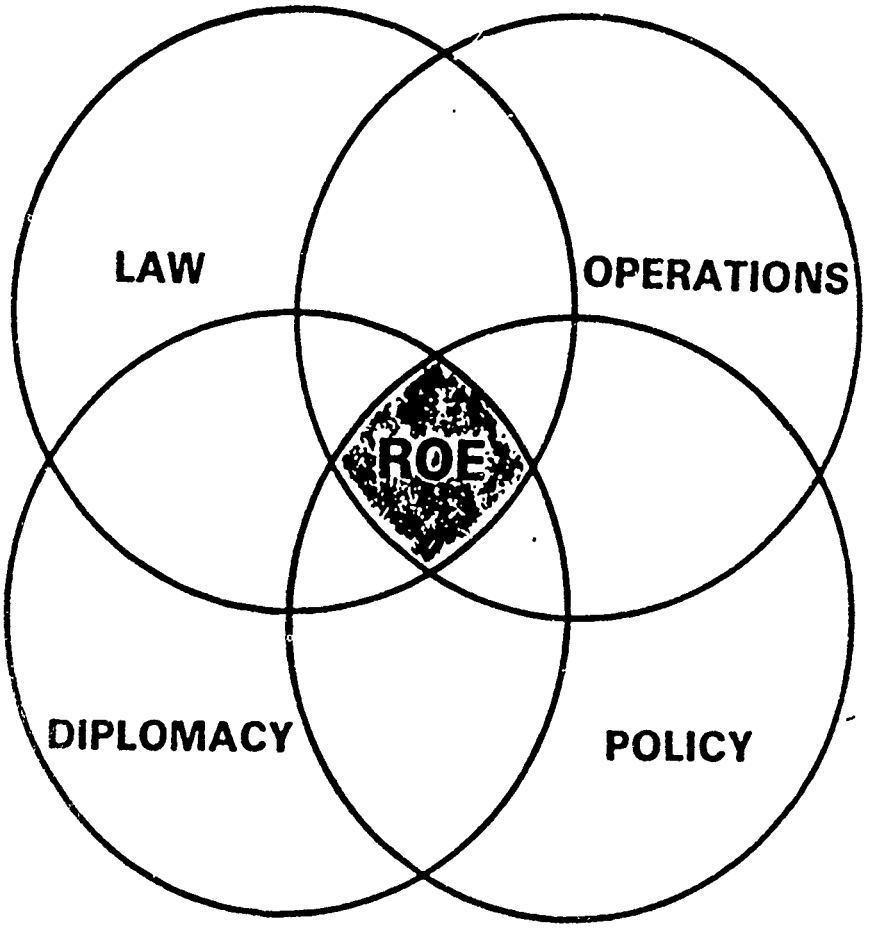
[34] The NCA consist of the President and the Secretary of Defense, or their duly deputized alternates or successors. JCS Pub 1, at 239.

[35] Id. at 313.

[36] Roach, Rules of Engagement, Nav. War C. Rev., Jan.-Feb. 1983, at 46. See Figure SF5-2.

[37] Accordingly, wartime rules of engagement frequently include restrictions on weapons and targets, and provide guidelines to ensure the greatest possible protection for noncombatants consistent with military necessity. Roach, Rules of Engagement, Nav. War C. Rev., Jan.-Feb. 1983, at 49.

FIGURE SF5-2



CHAPTER 6

Adherence and Enforcement

6.1 ADHERENCE TO THE LAW OF ARMED CONFLICT

Nations adhere to the law of armed conflict not only because they are legally obliged to do so[1] but for the very practical reason that it is in the best interest of belligerents to be governed by consistent and mutually acceptable rules of conduct.[2] The law of armed

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[1] Under common article 1, each nation has an affirmative duty at all times not only to respect the requirements of the 1949 Geneva Conventions, but also to ensure respect for them by its armed forces. Nicaragua Military Activities Case, 1986 I.C.J. 114; 25 Int'l Leg. Mat'ls 1073 (para. 220) (holding this duty is a general principle of international law). Further, under GWS 1929, arts. 28-30, and common articles 49-54/50-53/132/149 (and GP I, arts. 85-87, for nations bound thereby -- see Annex AS5-2), every such nation must act to prevent violations of the Geneva Conventions by any other country or its armed forces including those of its allies. The United States supports the principle, detailed in GP I, art. 85-89, that the appropriate authorities take all reasonable measures to prevent acts contrary to the applicable rules of humanitarian law. The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 Am. U.J. Int'l L. & Policy 428 (1987) (remarks of U.S. Department of State Deputy Legal Adviser Matheson). This self-interest is reflected in the following:

> Any government which, while not itself involved in a conflict, is in a position to exert a deterrent influence on a government violating the laws of war, but refrains from doing so, shares the responsibility for the breaches. By failing to react while able to do so, it fosters the process which could lead to its becoming the victim of similar breaches and no longer an accessory by omission.

ICRC Appeal, 1985 Int'l Rev. Red Cross 33 & 289-90.

As of 5 January 1989, only five of the world's 171 nations were not party to the 1949 Geneva Conventions: Bhutan, Brunei, Burma, Maldives and Nauru. However, Burma (now known as Myanmar) is a party to the two 1929 Geneva Conventions, while Brunei has made provisional declaration of application of the 1949 Geneva Conventions. ICRC document Annex AS5-2.

[2] Discipline in combat is essential. Violations of the law of armed conflict detract from the commander's ability to accomplish his mission. Violations of that law also have an adverse impact on national and world public opinion. Violations on occasion have served to prolong a conflict by inciting an opponent to continue resistance.

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conflict is effective to the extent that it is obeyed by the belligerents. Occasional violations do not substantially affect the validity of a rule of law, provided routine compliance, observance, and enforcement continue to be the norm. However, repeated violations not responded to by protests, reprisals, or other enforcement actions may, over time, indicate that a particular rule of warfare is no longer regarded by belligerents as valid.

6.1.1 Adherence by the United States. Pursuant to the Constitution of the United States, treaties to which the U.S is a party constitute a part of the "supreme law of the land" with a force equal to that of law enacted by the Congress.[3] Moreover, the Supreme Court of the United States has consistently ruled that where there is no treaty and no controlling executive, legislative, or judicial precedent to the contrary, customary international law and the common law are fundamental elements of U.S. national law.[4] The law of armed conflict is, therefore, binding upon the United States, its citizens, and its armed forces.[5]

6.1.2 Department of the Navy Policy. SECNAVINST 3300.1A states that the Department of the Navy will comply with the law of armed conflict in the conduct of military operations

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[2](...continued)

Violations of commitments under the law of armed conflict can seriously hamper allies' willingness and political ability to support military activities within and outside the alliance. In contrast, dictatorships, depending primarily on the deployment of military forces, with total control of internal mass media and allowing no political dissent, may disregard legal commitments without equivalent impact on their overall political and strategic position. Our posture is strengthened by our continued respect for the law of armed conflict, while theirs may be strengthened in some cases by their willingness to disregard those laws for temporary tactical advantage. Therefore, an opponent's disregard of the law is not a sound basis for the United States to take a similar callous attitude. Rather, the sharper the distinction between our respect for the sensitivities and individuality of our allies, supported by our respect for the law, and our opponent's disregard of the interests of their allies and the law, the better for our overall posture.

Accordingly, violations of the law by U.S. armed forces may have greater impact on American and world public opinion than would similar violations by our adversaries.

[3] U.S. Const., art. VI, sec. 2.

[4] *E.g.*, *The Paquete Habana*, 175 U.S. 677, 20 S.Ct. 290, 299 (1900); *Reid v. Covert*, 354 U.S. 1, 18, 77 S.Ct. 1222, 1231 (1957). See also 1 Restatement (Third), sec. 111, Reporters' Notes 2 & 3, and Introductory Note.

[5] The law of armed conflict is thus part of U.S. law which every servicemember has taken an oath to obey. This obligation is implemented for the armed forces in DOD Directive 5100.77.

and related activities in armed conflicts.[6] Article 0605, U.S. Navy Regulations, 1973, provides that:

> *At all times a commander shall observe, and require his command to observe, the principles of international law. Where necessary to fulfillment of this responsibility, a departure from other provisions of Navy Regulations is authorized.*[7]

It is the responsibility of the Chief of Naval Operations and the Commandant of the Marine Corps (see OPNAVINST 3300.52 and MCO 3300.3) to ensure that:

1. The obligations of the United States under the law of armed conflict are observed and enforced by the U.S. Navy and Marine Corps in the conduct of military operations and related activities in armed conflict, regardless of how such conflicts are characterized.

2. Alleged violations of the law of armed conflict, whether committed by or against United States or enemy personnel, are promptly reported, thoroughly investigated, and where appropriate, remedied by corrective action.[8]

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[6] **SECNAVINST 3300.1A, para. 4a. Similar directions have been promulgated by the operational chain of command, e.g., MJCS 59-83, 1 June 1983; USCINCLANTINST 3300.3A; CINCPACFLTINST 3300.9.**

[7] **Other articles of U.S. Navy Regulations, 1973, concerned with international law and with international relations in armed conflict, include:**

Article	*Title*
0305(5)	Designation of Hospital Ships and Medical Aircraft
0741	Prisoners of War
0746	Hospital Ship or Medical Aircraft
0845	Detail of Persons Performing Medical or Religious Service
0912	Communications with Foreign Officials
0914	Violations of International Law and Treaties
0920	Protection of Commerce of the United States
0924	Medical or Dental Aid to Persons Not in the Naval Service
0925	Assistance to Persons, Ships and Aircraft in Distress
0940	Granting of Asylum and Temporary Refuge

[8] **Essential, therefore, is reporting of the facts by all persons with knowledge of suspected violations up the chain of command to the NCA. In the Navy, SECNAVINST 3300.1A requires the reporting of all suspected violations of the law of armed conflict. See Annex AS6-1, replicating enclosure (2) to SECNAVINST 3300.1A, for a comprehensive list of reportable violations. Article 87(1) and (3) of Additional Protocol I to the 1949 Geneva Conventions requires state parties to require military commanders at all levels to report**

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3. All service members of the Department of the Navy, commensurate with their duties and responsibilities, receive, through publications, instructions, training programs and exercises, training and education in the law of armed conflict.[9]

Navy and Marine Corps judge advocates responsible for advising operational commanders are specially trained to provide officers in command with advice and assistance in the law of armed conflict on an independent and expeditious basis. The Chief of Naval

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[8](...continued)
to competent authorities breaches of the 1949 Geneva Conventions and Protocol I by or against members of the armed forces under their command and other persons under their control, to take the necessary steps to prevent violations, and where appropriate, to initiate disciplinary action against the violators. The United States supports this principle as one that should be observed and in due course recognized as customary law. Matheson, Remarks, note 1 above, at 428.

[9] OPNAVINST 3300.52, para. 2. That instruction also defines the U.S. Navy's law of armed conflict training program. Annex AS6-2 provides the basic rules for combatants, with explanations, suitable for a basic training program.

The law of armed conflict has long recognized that knowledge of the requirements of the law is a prerequisite to compliance with the law and to prevention of violations of its rules, and has therefore required training of the armed forces in this body of law. On *dissemination*, see Hague IV, art. 1; Hague X, art. 20; common article 47/48/127/144; GWS 1929, art. 29; and for state parties thereto, the 1954 Hague Convention on Cultural Property, arts. 7 & 25; GP I, arts. 83 & 87(2); GP II, art. 19; and the 1980 Conventional Weapons Convention, art. 6. The United States supports the principle in GP I, art. 83, that study of the principles of the law of armed conflict be included in programs of military instruction. Matheson, Remarks, note 1 above, at 428. See also Meyrowitz, The Function of the Laws of War in Peacetime, 1986 Int'l Rev. Red Cross 77 and Hampson, Fighting by the Rules: Instructing the Armed Forces in Humanitarian Law, 1989 id. 111. On *legal advisers in armed forces*, see GP I, art. 82, and Parks, The Law of War Adviser, 31 JAG J. 1 (1980). The United States supports the principle of article 82 that legal advisers be made available, when necessary, to advise military commanders at the appropriate level on the application of these principles. Matheson, Remarks, note 1 above, at 428. JAGINST 3300.1 (series), note 10 below, details the operational law billets identified for U.S. Navy judge advocates. On the *duty of commanders*, see GP I, art. 87, and paragraph 6.1.2 below.

The manner of achieving these results is left to nations to implement. Various international bodies exist to assist, e.g., the ICRC, Henry Dunant Institute in Geneva Switzerland, International Institute of Humanitarian Law at San Remo Italy, the International Society of Military Law and the Law of War, and the International Committee of Military Medicine and Pharmacy. See de Mullinen, Law of War Training Within Armed Forces: Twenty Years Experience, 1987 Int'l Rev. Red Cross 168.

Operations and the Commandant of the Marine Corps have directed officers in command of the operating forces to ensure that their judge advocates have appropriate clearances and access to information to enable them to carry out that responsibility (see CNO Washington DC message 111021Z Oct 85 and MCO 3300.3).[10]

6.1.3 **Command Responsibility.** Officers in command are not only responsible for ensuring that they conduct all combat operations in accordance with the law of armed conflict; they are also responsible for the proper performance of their subordinates. While a commander may delegate some or all of his authority, he cannot delegate responsibility for the conduct of the forces he commands.[11] The fact that a commander did not order, authorize, or knowingly acquiesce in a violation of the law of armed conflict by a subordinate will not relieve him of responsibility for its occurrence, if it is established that he failed to exercise properly his command authority or failed otherwise to take reasonable measures to discover and correct violations that may already have occurred.[12]

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[10] **OPNAVINST 3300.52, para. 4.k.2. See JAGINST 3300.1 (series), subj: JAG Billets Requiring Special or Detailed Knowledge of the Law of Armed Conflict and Training Objectives for Navy Judge Advocates in Such Billets; JAGINST 3300.2 (series), subj: Law of Armed Conflict Resource Materials; and CNO message 111021Z Oct 85. A checklist for the review of operational plans to ensure compliance with the law of armed conflict appears at Annex AS6-3.**

[11] **U.S. Navy Regulations, 1973, article 0702.1.**

[12] **A commander at any level is personally responsible for the criminal acts of warfare committed by a subordinate if the commander knew in advance of the breach about to be committed and had the ability to prevent it, but failed to take the appropriate action to do so. In determining the personal responsibility of the commander, the element of knowledge may be presumed if the commander had information which should have enabled him or her to conclude under the circumstances that such breach was to be expected. Officers in command are also personally responsible for illegitimate acts of warfare performed by subordinates when such acts are committed by order, authorization, or acquiescence of a superior. Those facts will each be determined objectively.**

Some military tribunals have held that, in suitable circumstances, the responsibility of commanding officers may be based upon the failure to acquire knowledge of the unlawful conduct of subordinates. In the Hostages Case, the United States Military Tribunal stated:

> **Want of knowledge of the contents of reports made to him [*i.e.*, to the commanding general] is not a defense. Reports to commanding generals are made for their special benefit. Any failure to acquaint themselves with the contents of such reports, or a failure to require additional reports where inadequacy appears on their face, constitutes a dereliction of duty which he cannot use in his own behalf.**

(continued...)

6.1.4 Individual Responsibility. All members of the naval service have a duty to comply with the law of armed conflict and, to the utmost of their ability and authority, to prevent violations by others.[13] Members of the naval service, like military members of all nations,

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[12](...continued)
United States v. Wilhelm List et al., 9 TWC 127 (1950).

The responsibility of commanding officers for unlawful conduct of subordinates has not been applied to isolated offenses against the laws of armed conflict, but only to offenses of considerable magnitude and duration. Even in the latter instances, the circumstances surrounding the commission of the unlawful acts have been given careful consideration:

> It is absurd . . . to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nevertheless, where murder and rape and vicious, revengeful actions are wide-spread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawlessness of his troops, depending upon their nature and the circumstances surrounding them.

Trial of General Tomoyuki Yamashita, 4 LRTWC 35 (1948).

Thus, the responsibility of a commanding officer may be based solely upon inaction. Depending upon the circumstances of the case, it is not always necessary to establish that a superior knew, or must be presumed to have known of the offense committed by his subordinates. (GP I, art. 86, Failure to Act, confirms this rule.) See Parks, Command Responsibility for War Crimes, 62 Mil. L. Rev. 1 (1973).

[13] Where U.S. personnel are involved, military personnel with supervisory authority have a duty to prevent criminal acts. Any person in the naval service who sees a criminal act about to be committed must act to prevent it to the utmost of his or her ability and to the extent of his or her authority. 10 U.S. Code sec. 5947; U.S. Navy Regulations, 1973, articles 1102 & 1103. Possible steps to be taken include moral arguments, threatening to report the criminal act, repeating orders of superiors, stating personal disagreement, and asking the senior individual on scene to intervene as a means of preventing the criminal act. In the event the criminal act directly and imminently endangers a person's life (including the life of another person lawfully under his or her custody), force may be used to the extent necessary to prevent the crime. However, the use of deadly force is rarely justified; it may be used only to protect life and only under conditions of extreme necessity as a last resort when lesser means have failed. Compare SECNAVINST 5500.29 (series), Subj: Use of force by personnel engaged in law enforcement and security duties; OPNAVINST 3120.32B, article 412b, circumstances under which a weapon may be fired; and OPNAVINST C5510.83 (series), Subj: Navy nuclear weapons security manual.

must obey readily and strictly all *lawful* orders issued by a superior.[14] Under both international law and U.S. law, an order[15] to commit an obviously criminal act, such as the wanton killing of a noncombatant or the torture of a prisoner, is an *unlawful* order and will not relieve a subordinate of his responsibility to comply with the law of armed conflict. Only if the unlawfulness of an order is not known by the individual, and he could not reasonably be expected under the circumstances to recognize the order as unlawful, will the defense of obedience of an order protect a subordinate from the consequences of violation of the law of armed conflict.[16]

6.2 ENFORCEMENT OF THE LAW OF ARMED CONFLICT

Various means are available to belligerents under international law for inducing the observance of legitimate warfare. In the event *of a clearly established violation* of the law of armed conflict, the aggrieved nation may:[17]

1. Publicize the facts with a view toward influencing world public opinion against the offending nation[18]

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[14] U. S. Navy Regulations, 1973, article 1104. UCMJ, articles 90-92, delineate offenses involving disobedience of lawful orders. Both SECNAVINST 3300.1A and OPNAVINST 3300.52 are drafted as lawful general orders.

[15] The order may be direct or indirect.

[16] See paragraph S6.2.5.6.1 below for a further discussion of the defense of superior orders. War crimes trials are discussed in paragraphs S6.2.5.1 and S6.2.5.2.

[17] Commanders are not usually required to make the policy decision as to the appropriate use of one or more of the remedial actions set forth in the text, although there are exceptional situations in which even junior commanders may be required to make protests and demands addressed directly to the commander of offending forces. It is also apparent that a government decision cannot be made intelligently unless all officers upon whom the responsibility for decision rests understand the available remedial actions and report promptly to higher authority those circumstances which may justify their use.

[18] Experience in the Southeast Asia conflict amply demonstrates the particular effectiveness of television in affecting knowledge of and popular (home) support for U.S. forces. Summers, Western Media and Recent Wars, Mil. Rev., May 1986, at 4; Mitchell, Television and the Vietnam War, Nav. War C. Rev., May-June 1984, at 42; Rinaldo, The Tenth Principle of War: Information, Mil. Rev., Oct. 1987, at 55; Walker, Truth is the Best Propaganda: A Study in Military Psychological Operations, National Guard Mag., Oct. 1987, at 26; Paddock, Psychological Operations, Special Operations, and US Strategy, in Special Operations in US Strategy 229 (Barnett, Tovar & Shultz eds. 1984).

(continued...)

2. Protest to the offending nation and demand that those responsible be punished and/or that compensation be paid[19]

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[18](...continued)
The Geneva Conventions have long authorized and encouraged belligerents to agree to objective enquiries into alleged violations of those Conventions. Common article 52/53/132/149 and GWS 1929, art. 30. (See paragraph 6.1.2 regarding national requirements to investigate alleged violations of the law of armed conflict.) At least because of mutual suspicions and hostilities, no such *ad hoc* agreement has ever been concluded. The United Nations has established a team of experts to investigate allegations of such violations. See, e.g., Prisoners of War in Iran and Iraq: The Report of a Mission Dispatched by the Secretary-General, January 1985, UN Doc. S/16962*, 22 Feb. 1985; and Report of Group of Experts to Investigate Reports of the Alleged Use of Chemical Weapons, UN Doc. S/19823, 25 Apr. 1988, which led to vigorous condemnation of their use, albeit without assigning responsibility to one side, in Security Council Resolution 612, 9 May 1988, Dep't St. Bull., July 1988, at 69.

In addition, private individuals and nongovernmental organizations can be expected to attempt to ascertain and publicize the facts pertaining to alleged violations of the Conventions. Other organizations that have provided supervision of the application of the law of armed conflict include, among others, Amnesty International, Commission Medico-Juridique de Monaco, ICRC, International Commission of Jurists, International Committee of Military Medicine and Pharmacy, International Law Association and the World Veterans Federation. All of these organizations have been effective in bringing private and public pressure to bear on governments regarding the conduct of their armed forces in armed conflicts.

In the future, a fact-finding commission may be established under the 1977 Additional Protocol I to the Geneva Conventions. Under Additional Protocol I, article 90, an International Fact-Finding Commission will be established once 20 states parties have accepted its competence. By mid-August 1989, only twelve nations had done so, including the European neutrals and six NATO countries: Austria, Finland, Sweden, Switzerland, Belgium, Denmark, Iceland, Italy, the Netherlands, New Zealand and Norway. None of them are likely to be at war with any of the others. The Commission cannot act without the consent of the parties to the dispute, which can be given either on a permanent one-time basis or an *ad hoc* basis for a particular dispute. The fact that the Soviet Union, and its allies and clients, have been most reluctant to permit third-party supervision of the Geneva Conventions is another factor in the United States' refusal to seek ratification of Additional Protocol I. Sofaer, Remarks, note 1 above, at 470.

[19] Such protest and demand for punishment may be communicated directly to an offending belligerent or to the commander of the offending forces. On the other hand, an offended belligerent may choose to forward its complaints through a Protecting Power, a humanitarian organization acting in the capacity of a Protecting Power, or any nation not
(continued...)

[19](...continued)
participating in the armed conflict.

Hague IV, art. 3, states:

> A belligerent party which violates the provisions of the said [Hague] Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

It is now generally established that the principle laid down in article 3 is applicable to the violation of any rule regulating the conduct of hostilities and not merely to violations of the Hague Regulations. See Sandoz, Unlawful Damages in Armed Conflict and Redress Under International Humanitarian Law, 1982 Int'l Rev. Red Cross 131, 136-137. This customary rule is repeated in GP I, art. 91, and is discussed in useful detail in ICRC, Commentary 1053-58.

Recent demands for compensation involving U.S. forces include the following:

Iraq agreed to give compensation for "the loss of life, personal injuries and material damages" resulting from the attack on USS STARK on 17 May 1987. Exchange of Notes, 20 & 21 May 1987, 26 Int'l Leg. Mat'ls 1427-28 (1987). Claims are expected to exceed $75 million. N.Y. Times, 31 Jan. 1988, sec. 1, at 9. Detailed claims for the wrongful deaths were submitted to Iraq in April 1988, Dep't St. Bull., Oct. 1988, at 59; Iraq paid $27.3 million, Dep't St. Bull., May 1989, at 67; 28 Int'l Leg. Mat'ls 644, 83 Am. J. Int'l L. 561 (1989).

For almost two hours on 8 June 1967, Israeli aircraft and torpedo boats attacked USS LIBERTY (AGTR-5) on the high seas of the Mediterranean about 15 NM west of the Gaza strip, just as Israel was concluding the Six-Day War. On 27 May 1968, Israel paid the United States $3,323,500, the full amount of compensation claimed on behalf of the 34 men killed in the attack. Dep't St. Bull., 17 June 1968, at 799. On 28 April 1969, Israel paid $3,566,457 in settlement of the United States' claims on behalf of those men injured in the attack. Dep't St. Bull., 2 June 1969, at 473. On 17 December 1980, Israel agreed to pay $6 million, in three installments, for its damages to the LIBERTY (albeit without conceding liability). 32 U.S.T. 4434, T.I.A.S. No. 9957; 1980 Digest of U.S. Practice in International Law 747-48. The factual and legal issues of the attack are carefully examined in Jacobsen, A Juridical Examination of the Israeli Attack on the *USS Liberty*, 36 Nav. L. Rev. 1 (1986).

On 11 July 1988, the United States offered to compensate *ex gratia* the families of those lost in the accidental downing of Iranian Airbus flight 655 on 3 July 1988. 24 Weekly Comp. Pres. Docs. 912 (18 July 1988). Congress will have to appropriate the funds. See Friedman, The *Vincennes* Incident, U.S. Naval Inst. Proc., May 1989, at 72-79, and (continued...)

[19](...continued)
Agora: The Downing of Iran Air Flight 655, 83 Am. J. Int'l L. 318-41 (1989). The ICAO report of investigation and ICAO Council actions are reproduced in 28 Int'l Leg. Mat'ls 896 (1989). Iran's application against the United States in the ICJ appears at 28 id. 842.

On 25 October 1983, at a time when the People's Revolutionary Army of Grenada was using as a military command post a group of buildings inside Fort Matthew, St. George's, Grenada, 143 feet away from the Richmond Hill Insane Asylum, a bomb from a Navy A-7 aircraft accidentally struck the Asylum, killing sixteen patients and injuring six. A complaint against the United States has been deemed admissible by the Inter-American Commission on Human Rights. This case is considered in Weissbrodt and Andrus, The Right to Life During Armed Conflict: Disabled Peoples' International v. United States, 29 Harv. Int'l L.J. 59 (1988). See also paragraph 8.1.2.1 below regarding incidental injury and collateral damage.

See also the Japanese acceptance of responsibility for the 12 December 1937 sinking in the Yangtze River of the U.S. gunboat USS PANAY by Japanese aircraft. 38 U.S. Naval War College, International Law Situations, with Situations and Notes, 1938, at 129-50 (1940).

During the course of the afternoon of 8 June 1982, near the end of the Falklands/Malvinas war, the Liberian flag tanker HERCULES, in ballast, was attacked three times by Argentinian military aircraft about 600 miles east of Argentina and nearly 500 miles from the Falklands in the South Atlantic. The bombing and rocket attacks damaged her decks and hull and left one undetonated bomb lodged in her starboard side. The owners decided it was too dangerous to attempt to remove this bomb and had her scuttled 250 NM off the Brazilian coast. The vessel owner and time charter sued Argentina in U.S. Federal District Court which held that under the Foreign Sovereign Immunities Act, 28 U.S.C. sec. 1330, 1602-1611, the District Court did not have subject-matter jurisdiction over the claim. *Amerada Hess Shipping Corp. v. Argentine Republic*, 638 F. Supp. 73 (S.D.N.Y. 1986). The Court of Appeals reversed, holding that the facts alleged, if proven, would constitute clear violations of international law (e.g., 1958 High Seas Convention, Hague XIII) cognizable under the Alien Tort Statute, 28 U.S.C. sec. 1350, which the Foreign Sovereign Immunities Act did not change. 830 F.2d 421, 26 Int'l Leg. Mat'ls 1375 (2d Cir. 1987), discussed in Recent Developments, 28 Va. J. Int'l L. 221 (1988) and Morris, Sovereign Immunity for Military Activities on the High Seas: Amerada Hess v. Argentine Republic, 23 Int'l Lawyer 213 (1989). The U.S. Supreme Court reversed, holding the FSIA provides the sole basis for obtaining jurisdiction over a foreign nation in U.S. courts, and the District Court correctly dismissed the action, 109 S.C. 683, 57 U.S.L.W. 4121, 28 Int'l Leg. Mat'ls 382, 83 Am. J. Int'l L. 565 (1989).

3. Seek the intervention of a neutral party, particularly with respect to the protection of prisoners of war and other of its nationals that have fallen under the control of the offending nation[20]

4. Execute a reprisal action[21]

5. Punish individual offenders either during the conflict or upon cessation of hostilities.[22]

6.2.1 The Protecting Power. Under the Geneva Conventions of 1949, the treatment of prisoners of war, interned civilians, and the inhabitants of occupied territory is to be monitored by a neutral nation known as the Protecting Power.[23] Due to the difficulty of

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[20] See, *e.g.*, Report of the Mission Dispatched by the Secretary-General on the Situation of Prisoners of War in the Islamic Republic of Iran and Iraq, U.N. Doc. S/20147, 24 Aug. 1988. Diplomatic pressure applied through neutral states or through international organizations has become a major factor in enforcing the law of armed conflict. During the Southeast Asia conflict, for example, the United States conducted a successful diplomatic effort through neutral states to prevent political "show trials" of our prisoners of war. Levie, Maltreatment of Prisoners of War in Vietnam, 48 Boston U.L. Rev. 323, 344-45 (1968), reprinted in 1 The Vietnam War and International Law 361, 382-83 (Falk ed. 1969). Accurate, thorough investigation of enemy violations greatly help in pursuing such diplomatic activity. See note 18 above.

[21] See paragraph 6.2.3.

[22] See paragraph 6.2.5.

[23] Common article 8/8/8/9; GP I, arts. 2(c) & 5; de Preux, Synopsis I: Protecting Power, 1985 Int'l Rev. Red Cross 86. The United States strongly supports the principle that Protecting Powers be designated and accepted without delay from the beginning of any conflict. Matheson, Remarks, note 1 above, at 428-29. That principle is contained in GP I, art. 5, but not unequivocally, and is still subject, in the last instance, to refusal by the nation in question. Ibid. The United States thus failed to obtain one of its "basic objectives" in the negotiations that produced article 5. Sofaer, Remarks, note 1 above, at 469-70.

Prior to its entry into World War II, the United States acted as protecting power for British prisoners of war in Europe. Subsequently, the Swiss assumed this duty for both the United States and Great Britain. Since World War II, the protecting power system has not worked well because some countries refuse to permit on-site inspection. There was thus no protecting power for U.S. prisoners of war during the conflicts in Korea and Southeast Asia.

(continued...)

finding a nation which the opposing belligerents will regard as truly neutral, international humanitarian organizations, such as the International Committee of the Red Cross, have been authorized by the parties to the conflict to perform at least some of the functions of a Protecting Power.[24]

6.2.2 The International Committee of the Red Cross (ICRC). The ICRC is a nongovernmental, humanitarian organization based in Geneva, Switzerland. The ruling body of the ICRC is composed entirely of Swiss citizens and is staffed mainly by Swiss nationals. (The ICRC is distinct from and should not be confused with the various national Red Cross societies such as the American National Red Cross.)[25] Its principal purpose is to provide protection and assistance to the victims of armed conflict.[26] The Geneva Conventions

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[23](...continued)

> Since 1949, a Protecting Power (Switzerland) was appointed in the following cases only: in the Suez conflict in 1956, the Goa conflict in 1961 and the war between India and Pakistan in 1971-1972, although in the latter case the mandat[illegible] of Switzerland was not understood in the same way by both parties.

Hay, The ICRC and International Humanitarian Issues, 1984 Int'l Rev. Red Cross 3, 5. During the Falklands/Malvinas conflict, Switzerland and Brazil, although not formally appointed as Protecting Powers for the United Kingdom and Argentina respectively, exercised functions of an intermediary and communicated information. Junod, Protection of the Victims of Armed Conflict Falkland-Malvinas Islands (1982), at 20 (1984); ICRC, Commentary 77n.2.

[24] The Conventions allow the ICRC to perform some duties of the Protecting Power if such a power cannot be found and if the detaining power allows it to so act. Common article 10/10/10/11; see Peirce, Humanitarian Protection for the Victims of War: The System of Protecting Powers and the Role of the ICRC, 90 Mil. L. Rev. 89 (1980).

In Southeast Asia, for example, the ICRC acted in its traditional humanitarian role for Viet Cong and North Vietnamese prisoners in the hands of the United States and its allies. The International Committee and the Vietnam Conflict, 1966 Int'l Rev. Red Cross 399; Activities of the ICRC in Indochina from 1965 to 1972, 1973 Int'l Rev. Red Cross 27.

[25] Statutes of the International Red Cross and Red Crescent Movement, arts. 1 & 5 (1986), in 1987 Int'l Rev. Red Cross 29, 32. The ICRC bases its activities on the principles of neutrality and humanity, and is part of the International Red Cross and Red Crescent Movement. Some national Red Cross societies are under government control.

[26] Statutes of the International Red Cross and Red Crescent Movement, art. 5.2d (1986), 1987 Int'l Rev. Red Cross 33. See While & Raymer, A Little Humanity: the International Committee of the Red Cross, 170 National Geographic, November 1986, at 647-79.

(continued...)

recognize the special status of the ICRC and have assigned specific tasks for it to perform, including visiting and interviewing prisoners of war,[27] providing relief to the civilian population of occupied territories,[28] searching for information concerning missing persons,[29] and offering its "good offices" to facilitate the establishment of hospital and safety zones.[30] Under its governing statute, the ICRC is dedicated to work for the faithful application of the Geneva Conventions, to endeavor to ensure the protection of military and civilian victims of armed conflict, and to serve as a neutral intermediary between belligerents.[31]

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[26](...continued)

The ICRC's responsibility to endeavor to ensure the protection of victims extends not only to international and non-international armed conflicts and their direct results, but also to internal strife.

Article 5 of the Red Cross Movement's Statutes tasks the ICRC with a number of other functions.

[27] **The ICRC is also authorized to visit and interview detained or interned civilians in international armed conflicts. All such interviews must be without witnesses present. GPW, art. 126; GC, arts. 30(3), 76(6), 126 & 143(5).**

[28] **GC, arts. 59, 61 & 142.**

[29] **GPW, art. 123, and GC, art. 140; GP I, art. 33, for state parties thereto. The ICRC is also responsible under these articles for transmitting family messages to PWs and civilians.**

[30] **GWS, art. 23(3); GC, art. 14(3). The ICRC is also entitled to receive requests for aid from protected persons, Fourth Convention, article 30, and to exercise its right of initiative (Red Cross Movement Statute, art. 5(3)):**

> **this means that it [the ICRC] may ask the parties to a conflict to agree to its discharging other humanitarian functions in the event of non-international armed conflicts (Article 3 common to the four Geneva Conventions of 1949) and international armed conflicts (Article 9 of the First, Second and Third Conventions, and Article 10 of the Fourth Convention).**

Hay, note 22 above, at 6. The ICRC is now also authorized to act in cases of internal strife. Red Cross Movement Statute, art. 5(2)(d).

[31] **The 1986 Red Cross Movement Statute expanded the ICRC's mandate to include working for the "faithful application of international humanitarian law applicable in armed conflicts" (art. 5(2)(c)).**

The ICRC has defined "international humanitarian law applicable in armed conflicts" as:
(continued...)

[31](...continued)

> international rules, established by treaties or custom, which are specifically intended to solve humanitarian problems directly arising from international or noninternational armed conflicts and which, for humanitarian reasons, limit the right of parties to a conflict to use the methods and means of warfare of their choice or protect persons and property that are, or may be, affected by conflict. The expression "international humanitarian law applicable in armed conflicts" is often abbreviated to "international humanitarian law" or "humanitarian law".

1981 Int'l Rev. Red Cross 76.

These rules are derived from the Law of the Hague and the Law of Geneva. The Law of the Hague deals principally with weapons and methods of warfare and was codified by the 1899 and 1907 Hague Peace Conferences. The law relating to the protection of war victims has been contained in the various Geneva Conventions (of 1863, 1906, 1929, and 1949). Recently, this law has been somewhat merged in the 1977 Protocols Additional to the 1949 Geneva Conventions, since Part III of Protocol I deals with methods and means of warfare. As a result, a new term, "rules of international law applicable in armed conflict," was introduced by these Protocols to encompass "the rules applicable in armed conflict set forth in international agreements to which the Parties to the conflict are Parties and the generally recognized principles and rules of international law applicable in armed conflict" (GP I, art. 2(b)). Although this term has substantially the same meaning as the ICRC's terms, it does not appear that the ICRC's role has extended to supervision of the conduct of hostilities.

The ICRC has issued the following guidelines to govern its activities in the event of breaches of the law:

> 1. *Steps taken by the ICRC on its own initiative*
>
> *General rule:* The ICRC shall take all appropriate steps to put an end to violations of international humanitarian law or to prevent the occurrence of such violations. These steps may be taken at various levels according to the gravity of the breaches involved.
>
> However, they are subject to the following conditions:
>
> *Confidential character of steps taken:* In principle these steps will remain confidential.
>
> *Public statements:* The ICRC reserves the right to make public statements concerning violations of international humanitarian law if the

(continued...)

[31](...continued)
following conditions are fulfilled:

- the violations are major and repeated;

- the steps taken confidentially have not succeeded in putting an end to the violations;

- such publicity is in the interest of the persons or populations affected or threatened;

- the ICRC delegates have witnessed the violations with their own eyes, or the existence and extent of those breaches were established by reliable and verifiable sources. . . .

1981 Int'l Rev. Red Cross 81-83.

The ICRC made overt representations regarding the Iran-Iraq war. See 1983 Int'l Rev. Red Cross 220-22 (press release of 11 May 1983 describing appeal of 7 May 1983 to the nations party to the Geneva Conventions); 1984 id. 113-15 (press release of 15 Feb. 1984 regarding appeal to governments of 10 Feb. 1984); 1984 id. 357-58 (press release describing appeal to governments of 24 Nov. 1984). The ICRC issued a press release regarding misuse of the Red Cross emblem in Lebanon, 1985 Int'l Rev. Red Cross 316-17; and a press release regarding the Afghan conflict on 20 May 1984, 1985 id. 239-40.

The ICRC Guidelines provide:

> *Special rule*: The ICRC does not as a rule express any views on the use of arms or methods of warfare. It may, however, take steps and, if need be, make a public statement if it considers that the use or the threat to make use of a weapon or method of warfare gives rise to an exceptionally grave situation.

Such situations arose during the course of the Iran-Iraq war. ICRC, Annual Report 1984, at 60-61 (7 March 1984 report on the use of prohibited weapons, and 7 June 1984 press release on the bombing of Iraqi and Iranian cities); 1987 Int'l Rev. Red Cross 217 (appeal of 11 Feb. 1987 regarding bombing of cities); ICRC Bull., April 1988, at 4 (10 March 1988 press release protesting against bombing of cities, and 23 March 1988 press release condemning use of chemical weapons in the province of Sulaymaniyah).

The ICRC Guidelines continue:

> 2. *Reception and transmission of complaints*

(continued...)

[31](...continued)

Legal basis: In conformity with article 6(4) of the Statutes of the International Red Cross, the ICRC is entitled to take cognizance of "complaints regarding alleged breaches of the humanitarian Conventions".

Complaints from a party to a conflict or from the National Society of a party to a conflict: The ICRC shall not transmit to a party to a conflict (or to its National Red Cross or Red Crescent Society) the complaints raised by another party to that conflict (or by its National Society) unless there is no other means of communication and, consequently, a neutral intermediary is required between them.

Complaints from third parties: Complaints from third parties (governments, National Societies, governmental or nongovernmental organizations, individual persons) shall not be transmitted.

If the ICRC has already taken action concerning a complaint it shall inform the complainant inasmuch as it is possible to do so. If no action has been taken, the ICRC may take the complaint into consideration in its subsequent steps, provided that the violation has been recorded by its delegates or is common knowledge, and insofar as it is advisable in the interest of the victims.

The authors of such complaints may be invited to submit them directly to the parties in conflict.

Publicity given to complaints received: As a general rule the ICRC does not make public the complaints it receives. It may publicly confirm the receipt of a complaint if it concerns events of common knowledge and, if it deems it useful, it may restate its policy on the subject.

3. *Requests for inquiries*

The ICRC can only take part in an inquiry procedure if so required under the terms of a treaty or of an *ad hoc* agreement by all the parties concerned. It never sets itself up, however, as a commission of inquiry and limits itself to selecting, from outside the institution, persons qualified to take part in such a commission.

The ICRC shall moreover not take part in an inquiry procedure if the procedure does not offer a full guarantee of impartiality and does not provide the parties with means to defend their case. The ICRC must also receive an assurance that no public communications on an inquiry request or on the inquiry itself shall be made without its consent.

(continued...)

6.2.3 Reprisal. A reprisal is an enforcement measure under the law of armed conflict consisting of an act which would otherwise be unlawful but which is justified as a response to the unlawful acts of an enemy.[32] The sole purpose of a reprisal is to induce the enemy

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[31](...continued)

As a rule, the ICRC shall only take part in the setting up of a commission of inquiry, under the above-stated conditions, if the inquiry is concerned with infringements of the Geneva Conventions or of their 1977 Protocols. It shall on no account participate in the organization of a commission if to do so would hinder or prevent it from carrying out its traditional activities for the victims of armed conflicts, or if there is a risk of jeopardizing its reputation of impartiality and neutrality. . . .

4. *Requests to record violations*

If the ICRC is asked to record the result of a violation of international humanitarian law, it shall only do so if it considers that the presence of its delegates will facilitate the discharge of its humanitarian tasks, especially if it is necessary to assess victims' requirements in order to be able to help them. Moreover, the ICRC shall only send a delegation to the scene of the violation if it has received an assurance that its presence will not be used to political ends.

These guidelines do not deal with violations of international law or humanitarian principles to the detriment of detainees whom they have to visit as part of the activities which the ICRC's mandate requires it to carry out in the event of internal disturbances or tensions within a given State. Since this type of activity is based on *ad hoc* agreements with governments, the ICRC follows specific guidelines in such situations.

1981 Int'l Rev. Red Cross 81-83. See also ICRC Protection and Assistance Activities in Situations not Covered by International Humanitarian Law, 1988 id. 9-37.

[32] Kalshoven, Belligerent Reprisals 33 (1971). Paragraph 6.2.3 deals only with reprisals taken by one belligerent in retaliation for illegal acts of warfare performed by the armed forces of an enemy. Paragraph 6.2.3 does not deal with the collective measures an occupying power may take against the population of an occupied territory in retaliation for illegitimate acts of hostility committed by the civilian population. Although article 50 of the Hague Regulations provided that no general penalty, pecuniary or otherwise, may be inflicted upon the population of occupied territory on account of acts of individuals "for which they cannot be regarded as jointly and severally responsible," and contemplated that bona fide fines, in a reasonable amount, intended to insure respect for the rules and decrees in force, were lawful (2 Levie, The Code of International Armed Conflict 743), article 33(1) of the Fourth Geneva Convention provides that penal liability is personal:

(continued...)

to cease its illegal activity and to comply with the law of armed conflict. Reprisals may be taken against enemy armed forces; enemy civilians, other than those in occupied territory; and enemy property.[33]

6.2.3.1 Requirements for Reprisal. To be valid, a reprisal action must conform to the following criteria:

1. Reprisal must be ordered by the highest authority of the belligerent's government.[34]

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[32](...continued)

> **No protected person may be punished for an offense he or she has not personally committed. Collective penalties . . . are prohibited.**

Although the collective measures taken by an occupying power against the population of an occupied territory are frequently referred to as "reprisals," they should be clearly distinguished from reprisals between belligerents dealt with here. Nevertheless, it should be remembered that the Fourth Geneva Convention prohibits reprisals against civilians in occupied territory. GC, arts. 4 & 33(3). Thus, those acts permitted cannot amount to penal punishments or reprisals.

[33] **Reprisals may lawfully be taken against enemy individuals who have not yet fallen into the hands of the forces making the reprisals. While the United States has always considered that civilian persons are not appropriate objects of attack in reprisal, members of the enemy civilian population are still legitimate objects of reprisals. However, since they are excluded from this category by the 1977 Protocol I Additional to the 1949 Geneva Conventions, for nations party thereto, enemy civilians and the enemy civilian population are prohibited objects of reprisal by their armed forces. The United States has found this new prohibition to be militarily unacceptable. Sofaer, Remarks, note 1 above, at 469. See paragraph 6.2.3.2 for a further discussion of immunity from reprisals.**

Collective loss of rights for residents of occupied territory is clearly prohibited by Article 33 of the Fourth Geneva Convention. Internment and assigned residence, whether in the occupying power's natural territory or in occupied territory, are "exceptional" measures to be taken only after careful consideration of each individual case. These strict limitations are a direct reaction to the abuses which occurred during World Wars I and II. See 4 Pictet 300. See also Terry, State Terrorism: A Juridical Analysis under Existing Law, 10 J. Pal. Studies 94 (1980) for a thorough discussion of illegal collective measures in occupied territory.

[34] **See paragraph 6.2.3.3 below.**

2. It must respond to illegal acts of warfare committed by an adversary government, its military commanders, or combatants for which the adversary is responsible. Anticipatory reprisal is not authorized.[35]

3. When circumstances permit, reprisal must be preceded by a demand for redress by the enemy of his unlawful acts.[36]

4. Its purpose must be to cause the enemy to cease its unlawful activity. Therefore, acts taken in reprisal should be brought to the attention of the enemy in order to achieve maximum effectiveness. Reprisal must never be taken for revenge.[37]

5. Reprisal must only be used as a last resort when other enforcement measures have failed or would be of no avail.

6. Each reprisal must be proportional to the original violation.[38]

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[35] **A careful inquiry by the injured belligerent into the alleged violating conduct should precede the authorization of any reprisal measure. This is subject to the important qualification that, in certain circumstances, an offended belligerent is justified in taking immediate reprisals against illegal acts of warfare, particularly in those situations where the safety of his armed forces would clearly be endangered by a continuance of the illegal acts. See paragraph 6.2.3.3 regarding authority to order reprisals.**

[36] **There must be reasonable notice that reprisals will be taken. The degree of notice required will depend upon the particular circumstances of each case. Notice is normally given after the violation but may, in appropriate circumstances, predate an imminent violation. An example of notice is an appeal to the transgressor to cease its offending conduct and punish those responsible. Thus, such an appeal may serve both as a plea for compliance and a notice to the adversary that reprisals will be taken otherwise.**

[37] **Acts taken in reprisal may also be brought to the attention of neutrals if necessary to achieve maximum effectiveness. Since reprisals are undertaken to induce an adversary's compliance with the recognized rules of armed conflict, any action taken as a reprisal must be announced as a reprisal and publicized so that the adversary is aware of its obligation to abide by the law.**

[38] **This rule is not one of strict proportionality because the reprisal will usually be somewhat greater than the initial violation that gave rise to it. However, care must be taken that the extent of the reprisal is measured by some degree of proportionality and not solely by effectiveness. Effective but disproportionate reprisals cannot be justified by the argument that only an excessive response will forestall a further transgression.**

The acts resorted to by way of reprisal need not conform in kind to those complained of by the injured belligerent. The reprisal action taken may be quite different from the original act which justified it, but should not be excessive or exceed the degree of harm

(continued...)

7. A reprisal action must cease as soon as the enemy is induced to desist from its unlawful activities and to comply with the law of armed conflict.[39]

6.2.3.2 Immunity From Reprisal. Reprisals are forbidden to be taken against:

1. Prisoners of war[40] and interned civilians[41]

2. Wounded, sick, and shipwrecked persons[42]

3. Civilians in occupied territory[43]

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[38](...continued)
committed by the enemy.

If an act is a lawful reprisal, then as a legal measure it cannot lawfully be an excuse for a counter-reprisal. Under international law, as under domestic law, there can be no reprisal against a lawful reprisal.

[39] When, for example, one party to an armed conflict commits a breach of law but follows that violation with an expression of regret and promise that it will not be repeated, and even takes steps to punish those immediately responsible, then any action taken by another party to "right" the situation cannot be justified as a lawful reprisal.

[40] See Table ST6-1. GPW, art. 13(3); GPW 1929, art. 2(3). Prisoners of war are defined in GPW, art. 4A; see paragraph 11.8. In light of the wide acceptance of the 1949 Geneva Conventions by the nations of the world today, this prohibition is part of customary law. Meron, The Geneva Conventions as Customary Law, 81 Am. J. Int'l L. 348 (1987); Meron, Human Rights and Humanitarian Norms as Customary Law (forthcoming, 1989). Compare NWIP 10-2, para. 310e(1) n.8 ("War crimes tribunals have considered the rule forbidding reprisals against prisoners of war as a codification of existing customary law. Hence, this prohibition may be regarded as binding upon all States regardless of whether or not they are parties to the 1949 Convention.") with Levie, Prisoners of War in International Armed Conflict 366-69 (U.S. Naval War College, International Law Studies, vol. 59, 1978) (describing contrary state practice during both World Wars and the Korean and Vietnam conflicts). The taking of prisoners by way of reprisal for acts previously committed (so-called "reprisal prisoners") is likewise forbidden.

[41] GC, art. 33(3).

[42] GWS, art. 46, GWS-Sea, art. 47, as defined in GPW, art. 4A.

[43] GC, art. 33, as defined in GC, art. 4. Also immune from reprisals under the Geneva Conventions are the *property* of such inhabitants, *enemy civilians in a belligerent's own territory*, GC, art. 33, as defined in GC, art. 4, and the *property* of such civilians.
(continued...)

4. Hospitals and medical facilities, personnel,[44] and equipment, including hospital ships, medical aircraft, and medical vehicles.[45]

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[43](...continued)

Civilians *not* protected from reprisal under these provisions are nationals of a nation not bound by the Fourth Convention, nationals of a neutral nation in the territory of a belligerent, and nationals of a cobelligerent so long as their nation has normal diplomatic relations with the nation in whose territory they are. These exceptions are eliminated under Additional Protocol I for nations bound thereby.

[44] GWS, art. 46, GWS Sea, art. 47. Medical personnel are defined in GWS, arts. 24-26 and GWS Sea, art. 36. See paragraph 11.5. *Chaplains* attached to the armed forces (GWS, art. 46, GWS Sea, art. 47) as set forth in GWS, art. 24 and GWS Sea, art. 36, are also immune from reprisal.

[45] Fixed establishments and mobile medical units of the medical service, hospital ships, coastal rescue craft and their installations, medical transports, and medical aircraft are immune from reprisal under GWS, art. 46, GWS Sea, art. 47, as set forth in GWS, arts. 19, 20, 35 & 36; GWS Sea, arts. 22, 24, 25, 27 & 39.

Table ST6-1

CURRENT LIMITATIONS ON REPRISAL

Object Targeted	*Restricted by*
	COMBATANTS
Enemy combatant personnel,* except:	No restrictions, except:
a. Combatant personnel who are wounded, sick, or shipwrecked (WSS)	a. First Geneva Convention of 1949 (GWS), article 46; Second Convention (GWS-Sea), article 47
b. Medical personnel and chaplains ("exclusively engaged")	b. GWS, articles 24 & 46; GWS-Sea, articles 36 & 47
	NONCOMBATANTS
Prisoners of war	Third Geneva Convention of 1949 (GPW), article 13
Enemy civilian nationals in their own occupied territory	No restrictions
Civilian nationals detained in their own territory by a foreign power during its occupation	Fourth Geneva Convention of 1949 (GC), articles 4 & 33
Enemy aliens in the territory, or occupied area, of opposing party	GC, articles 4 & 33
"Neutral parties'" citizens in enemy or occupied territory	Customary international law

* To effect a reprisal, an attack would have to employ an illegal weapon or method of combat.

Table ST6-1 (cont'd)

CURRENT LIMITATIONS ON REPRISAL

Object Targeted	*Restricted by*
	OBJECTS
Protected (medical) equipment, buildings and vessels	GWS, article 46; GWS-Sea, article 47
Property of enemy aliens in the territory of the opposing party	GC, articles 4 & 33
Property of inhabitants of occupied areas	GC, article 33
Property of all enemy combatant personnel, including PWs	No restrictions
Property of "neutral parties'" citizens in enemy or occupied territory	Customary international law
Cultural property	May be restricted by customary international law (see 1954 Hague Convention, article 4(4), which the US has signed but not ratified)

Table ST6-2

NEW PROTOCOL I RESTRICTIONS ON REPRISAL
(*Note:* The United States is not a party to Protocol I and is not bound by these restrictions)

Object Targeted	*Restricted by*
Enemy civilian wounded, sick and shipwrecked; medical and religious personnel	Additional Protocol I (GP I), articles 8 & 20
Enemy civilians in their own territory or the civilian population	GP I, article 51(6)
Civilian objects* on and over land**	GP I, article 52(1)
Cultural objects and places of worship	GP I, article 53(c)
Objects required for survival of civilian population	GP I, article 54(4)
Natural environment	GP I, article 55(2)
Works and installations containing dangerous forces, namely dams, dikes and nuclear electrical generating stations	GP I, article 56(4)

* Defined as "all objects which are not military objectives" in GP I, art. 52(1).

** The provisions of GP I, arts. 48 through 58, do not affect the rules of international law applicable in armed conflict at sea or in the air (see GP I, arts. 49(3) & (4)).

6.2.3.3 **Authority to Order Reprisals.** The National Command Authorities (NCA) alone may authorize the taking of a reprisal action by U.S. forces. Although reprisal is lawful when the foregoing requirements are met, there is always the risk that it will trigger retaliatory escalation (counter-reprisals) by the enemy. The United States has historically been reluctant to resort to reprisal for just this reason.[46]

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[46] **It is impermissible for armed forces of a belligerent to act in reprisal without higher authorization.**

Other factors which governments will usually consider before taking reprisals include the following:

1. Reprisals may have an adverse influence on the attitudes of governments not participating in an armed conflict.

2. Reprisals may only strengthen enemy morale and underground resistance.

3. Reprisals may only lead to counter-reprisals by an enemy, in which case the enemy's ability to retaliate effectively is an important factor.

4. Reprisals may render enemy resources less able to contribute to the rehabilitation of an area after the cessation of hostilities.

5. The threat of reprisals may be more effective than their actual use.

6. Reprisals, to be effective, should be carried out speedily and should be kept under control. They may be ineffective if random, excessive, or prolonged.

7. In any event, the decision to employ reprisals will generally be reached as a matter of strategic policy. The immediate advantage sought must be weighed against the possible long-range military and political consequences.

Many attempted uses of reprisals in past conflicts have been unjustified either because the reprisals were not undertaken to deter violations by an adversary or were disproportionate to the preceding unlawful conduct. In addition to the legal requirements which regulate resort to reprisals, there are various practical factors which governments will consider before taking reprisals. For example, when appeal to the enemy for redress has failed, it may be a matter of policy to consider before resorting to reprisals, whether the opposing forces are not more likely to be influenced by a steady adherence to the law of armed conflict. The relative importance of these political and practical factors depends upon the degree and kind of armed conflict, the character of the adversary and its resources, and the importance of nations not participating in hostilities. See Kalshoven, Belligerent Reprisals (1971) for a thorough discussion of reprisals.

(continued...)

[46](...continued)
The following activities, prohibited under the law of armed conflict, are among those which may lawfully be taken in reprisal:

1. Restricted means and methods of warfare set forth in Hague Conventions (1907) (and Additional Protocol I for parties thereto, not including the United States--see Table ST6-2) not specifically prohibited as a means of reprisal, such as:

a. employing poison or poisoned weapons;

b. killing, wounding or capturing treacherously or perfidiously individuals belonging to the hostile nation or army, such as by feigning incapacitation by wounds or sickness or of civilian noncombatant status;

c. killing or wounding an enemy who, having laid down his arms, or having no longer a means of defense, has surrendered at discretion;

d. declaring that no quarter will be given;

e. employing weapons, projectiles, or material or methods of warfare of a nature to cause superfluous injury or unnecessary suffering;

f. making improper use of a flag of truce, of the national, UN or neutral flag or of the military insignia and uniform of the enemy as well as the distinctive badges of the Geneva Conventions;

use of unanchored submarine contact mines or mines and torpedoes which do not render themselves harmless within one hour after they have broken loose from their moorings or have been fired.

2. Use of gas or biological warfare prohibited by the 1925 Gas Protocol.

3. Military or other hostile use of environmental modification techniques prohibited by the 1977 Environmental Modification Convention.

4. For nations party thereto (not including the United States), the use of weapons the primary effect of which is to injure by fragments which in the human body escape detection by X-rays, in violation of Protocol I to the 1980 Conventional Weapons Convention.

5. For nations party thereto (not including the United States), the use of mines, booby traps and other devices, except against the civilian population or against individual civilians, in violation of Protocol II to the Conventional Weapons Convention.

(continued...)

6.2.4 **Reciprocity.** Some obligations under the law of armed conflict are reciprocal in that they are binding on the parties only so long as both sides continue to comply with them.[47] A major violation by one side will release the other side from all further duty to abide by that obligation. The concept of reciprocity is not applicable to humanitarian rules of law that protect the victims of armed conflict, that is, those persons protected by the 1949 Geneva Conventions.[48] The decision to consider the United States released from a particular obligation following a major violation by the enemy will ordinarily be made by the NCA.

6.2.5 **War Crimes Under International Law.** For the purposes of this publication, war crimes are defined as those acts which violate the law of armed conflict, that is, the rules established by customary and conventional international law regulating the conduct of warfare and which have been designated as war crimes. Acts constituting war crimes may be committed by the armed forces of a belligerent or by individuals belonging to the civilian population.[49] Belligerents have the obligation under international law to punish

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[46](...continued)

6. For nations party thereto (not including the United States), the use of incendiary weapons in violation of Protocol III to the Conventional Weapons Convention.

Table ST6-2 lists the new restrictions on reprisal introduced in Additional Protocol I (which are not binding on the United States but are on nations party thereto). The United States has found to be militarily objectionable the prohibition in Additional Protocol I, art. 51, of reprisal attacks against the civilian population, because renunciation of the option of such attacks "removes a significant deterrent that presently protects civilians and other war victims on all sides of a conflict." Sofaer, Remarks, note 1 above, at 469. Compare Hampson, Belligerent Reprisals and the 1977 Protocols to the Geneva Conventions of 1949, 37 Int'l & Comp. L.Q. 818 (1988).

[47] **Most truces and armistices are of this nature. The 1925 Geneva Gas Protocol is discussed in paragraph 10.3.1.**

[48] **Vienna Convention on the Law of Treaties, art. 60(5); de Preux, The Geneva Conventions and Reciprocity, 1985 Int'l Rev. Red Cross 25. (Those portions of the 1977 Protocols supplementing the 1949 Geneva Conventions are also not subject to the principle of reciprocity.)**

[49] **War crimes, as defined in paragraph 6.2.5, must be distinguished from so-called "crimes against peace" and "crimes against humanity." This distinction may be seen from article 6 of the Charter of the International Military Tribunal at Nuremburg, which defined the Tribunal's jurisdiction as follows:**

> **The following acts, or any one of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility [see paragraph**

(continued...)

[49](...continued)
6.1.4]:

(a) *Crimes against peace*: namely, planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) *War crimes*: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill treatment, or deportation to slave labor or for any other purpose, of civilian population of or in occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) *Crimes against humanity*: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetuated.

U.S. Naval War College, International Law Documents 1944-45, at 254 (1946); AFP 110-20, at 3-183.

Although the distinction between crimes against peace and war crimes is readily apparent, there is a certain difficulty in distinguishing war crimes from crimes against humanity. The precise scope of those acts included within the category of crimes against humanity is not entirely clear from the definition given in article 6 of the Charter of The International Military Tribunal at Nuremberg. A survey of the judgments of the various tribunals which tried individuals for crimes against humanity may be summarized in the following manner:

1. Certain acts constitute both war crimes and crimes against humanity and may be tried under either charge.

2. Generally, crimes against humanity are offenses against the human rights of individuals, carried on in a widespread and systematic manner. Thus, isolated offenses have not been considered as crimes against humanity, and courts have usually insisted upon proof that the acts alleged to be crimes against humanity resulted from systematic governmental action.

3. The possible victims of crimes against humanity constitute a wider class than those who are capable of being made the objects of war crimes and may include the nationals of the enemy state committing the offense as well as stateless persons.

(continued...)

[49](...continued)

4. Acts constituting crimes against humanity must be committed in execution of, or in connection with, crimes against peace, or war crimes.

On 21 November 1947, the United National General Assembly adopted Resolution 177(II) affirming "the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal" and directing the International Law Commission of the United Nations to:

(a) Formulate the principles of international law recognized in the Charter of the Nuremburg Tribunal and in the judgment of the Tribunal, and

(b) Prepare a draft code of offenses against the peace and security of mankind . . . .

The text of the principles formulated by the United Nations International Law Commission, with a commentary, is to be found in the Report of the International Law Commission covering its Second Session, General Assembly Official Records: Fifth Session, Supp. No. 12 (A/1316), Pt. III, pp. 11-14 (1950); Yearbook of the International Law Commission 1950, at 374-80; and Schindler & Toman 923-24. The text of the principles as formulated by the International Law Commission reads as follows:

Principle I. Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

Principle II. The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

Principle III. The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

Principle IV. The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

Principle V. Any person charged with a crime under international law has the right to a fair trial on the facts and law.

Principle VI. The crimes hereinafter set out are punishable as crimes under international law: [Here follow substantially similar definitions of crimes against peace, war crimes and crimes against humanity, as are given in article

(continued...)

their own nationals, whether members of the armed forces or civilians, who commit war crimes. International law also provides that belligerents have the right to punish enemy armed forces personnel and enemy civilians, who fall under their control, for such offenses.[50]

The following acts are representative war crimes:[51]

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[49](...continued)
6 of the Charter of the International Military Tribunal at Nuremberg, quoted at the beginning of this Note.]

Principle VII. Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.

[50] With respect to "grave breaches" (see paragraph 6.2.5 note 51), parties to the Geneva Conventions of 1949 are obliged 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. Common article 49(2)/50(2)/129(2)/146(2).

The causes of misconduct by U.S. combatants in Vietnam are analyzed through examination of court-martial convictions in Parks, Crimes in Hostilities, Marine Corps Gazette, Aug. 1976, at 16-22 & Sep. 1976, at 33-39.

[51] While any violation of the law of armed conflict is a war crime, certain crimes are defined as "grave breaches" by common article 50/51/130/147 if committed against persons or property protected by the Conventions. They include:

(i) Willful killing, torture or inhuman treatment of protected persons;

(ii) Willfully causing great suffering or serious injury to body or health of protected persons;

(iii) Taking of hostages and extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly;

(iv) Unlawful deportation or transfer or unlawful confinement of a protected person;

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile power; and,

(vi) Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial prescribed in the Geneva Conventions.

(continued...)

[51](...continued)
GP I, arts. 11(4) & 85(2-4), codify in greater detail the two separate categories of grave breaches. The first category relates to combat activities and medical experimentation and provides for the first time a meaningful standard by which such acts can be judged. A breach within this category requires (1) *willfulness* and (2) that *death or serious injury to body or health be caused* (article 85(3)).

The Protocol provides that the following acts constitute grave breaches:

(i) Making the civilian population or individual civilians the object of attack;

(ii) Launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause extensive loss of life, injury to civilians and damage to civilian objects, as defined in article 57, paragraph 2(a)(iii);

(iii) Launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in article 57, paragraph 2(a)(iii);

(iv) Making non-defended localities and demilitarized zones the object of attack;

(v) Making a person the object of attack in the knowledge that he is *hors de combat*;

(vi) The perfidious use, in violation of article 37, of the distinctive emblem of the red cross, red crescent, or other protective sign recognized by the Conventions or this Protocol;

(vii) Physical mutilations;

(viii) Medical or scientific experiments; and,

(ix) Removal of tissue or organs for transplantation, except where these acts are justified in conformity with the state of health of the person or consistent with medical practice or conditions provided for in the Conventions.

(1) Exceptions to the prohibition in subparagraph (ix) may be made only in the case of donations of blood for transfusion or of skin for grafting, provided that they are given voluntarily and without any coercion or inducement, and then only for therapeutic purposes, under conditions consistent with generally accepted medical standards and controls designed for the benefit of both the donor and the recipient.

(continued...)

1. Offenses against prisoners of war, including killing without just cause; torture or inhuman treatment; unhealthy, dangerous, or otherwise prohibited labor; infringement of religious rights; and denial of fair trial for offenses[52]

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[51](...continued)

(2) Any willful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends and which either violates any of the prohibitions above or fails to comply with these requirements shall be a grave breach of this Protocol.

The second category of grave breaches defined by Protocol I is in article 85(4). The only requirement to be satisfied with respect to these offenses is *willfulness.*

(i) The transfer by the occupying power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of article 49 of the Fourth Convention;

(ii) Unjustified delay in the repatriation of prisoners of war or civilians;

(iii) Practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;

(iv) Making the clearly recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of article 53, subparagraph (b), and when such historic monuments, works of art and places or worship are not located in the immediate proximity of military objectives, and,

(v) Depriving a person protected by the Conventions or referred to in paragraph 2 of this article of fair and regular trial.

See also 2 Levie, The Code of International Armed Conflict 857-71.

[52] Principle VI(b), 1950 Nuremberg Principles (see note 47 above); GPW, arts. 13, 17(4), 34-37, 52, 84, 87(3), 105 & 130; GP I, art. 75(2)(a).

2. Offenses against civilian inhabitants of occupied territory, including killing without just cause, torture or inhuman treatment, forced labor, deportation, infringement of religious rights, and denial of fair trial for offenses[53]

3. Offenses against the sick and wounded, including killing, wounding, or mistreating enemy forces disabled by sickness or wounds[54]

4. Denial of quarter (i.e., denial of the clemency of not killing a defeated enemy) and offenses against combatants who have laid down their arms and surrendered[55]

5. Offenses against the survivors of ships and aircraft lost at sea, including killing, wounding, or mistreating the shipwrecked; and failing to provide for the safety of survivors as military circumstances permit[56]

6. Wanton destruction of cities, towns, and villages or devastation not justified by the requirements of military operations; and bombardment, the sole purpose of which is to attack and terrorize the civilian population[57]

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[53] Principle VI(b), 1950 Nuremberg Principles; GC, arts. 27(1), 31-32, 49(6), 95(3), 100, 118(1) & 147; GP I, art. 75(2)(a); GP II, art. 4(2)(a).

[54] Lieber Code, art. 71; HR, art. 23(c); GWS, arts. 12(2) & 50; GP I, arts. 10, 41 & 85(3); GP II, arts. 4(1) & 7(1).

[55] HR, arts. 23(c) & 23(d); GP I, art. 40; GP II, art. 4(1); *Trial of Von Ruchteschell*, 9 LRTWC 82 (British military court, Hamburg, 1947) (denial of quarter at sea).

[56] Principle VI(b), 1950 Nuremberg Principles; GWS Sea, arts. 12(2) & 51. This rule was applied in the 1920 case of the LLANDOVERY CASTLE, 16 Am. J. Int'l L. 708 (1922); and in a number of World War II cases, including *The PELEUS Trial*, 1 LRTWC 1 (British military court, Hamburg, 1945), *The Trial of Moehle*, 9 LRTWC 75 (British military court, Hamburg, 1946) and in the *Trial of Helmuth Von Ruchteschell*, 9 LRTWC 92 (1949). The PELEUS and Von Ruchteschell cases are summarized in Mallison 133-43 and in Jacobsen, A Juridical Examination of the Israeli Attack on the U.S.S. Liberty, 36 Nav. L. Rev. 48 & 50 (1986). Jacobsen 45-51 argues the Israeli machinegunning of liferafts on board and thrown from USS LIBERTY, after the attack on the LIBERTY was completed, falls within this prohibition. See paragraph 11.6 and note 35 thereto below. There was no prosecution of Allied forces for the shooting of the Japanese survivors of the March 1943, Battle of the Bismark Sea. See 6 Morrison, History of the United States Naval Operations in World War II, 62 et seq. (1950); Spector, Eagle Against the Sun 226-28 (1985); Dower, War Without Mercy: Race & Power in the Pacific War 67 (1986).

[57] HR, arts. 23(g) & 25; Hague IX, art. 1(1); Principle VI(b), 1950 Nuremberg Principles; GP I, art. 51(2); GP II, art. 13(2).

7. Deliberate attack upon medical facilities, hospital ships, medical aircraft, medical vehicles, or medical personnel[58]

8. Plunder and pillage of public or private property[59]

9. Mutilation or other mistreatment of the dead[60]

10. Employing forbidden arms or ammunition[61]

11. Misuse, abuse, or firing on flags of truce or on the Red Cross device, and similar protective emblems, signs, and signals[62]

12. Treacherous request for quarter (i.e., feigning surrender in order to gain a military advantage).[63]

[*The following material is not in NWP 9 but is considered appropriate for judge advocates. It derives in large part from NWIP 10-2.*]

S6.2.5.1 Trials During Hostilities. Although permitted under international law, nations rarely try enemy combatants while hostilities are in progress.[64] Such trials might provoke undesirable actions from an enemy and complicate humanitarian protections applicable to

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[58] GWS, arts. 19(1), 20 & 36(1); GWS Sea, arts. 22-27 & 39(1); GC, arts. 18(1), 21, 22(1); GP I, arts. 12 & 22; GP II, art. 11; LLANDOVERY CASTLE *Case of Dümar and Boldt*, German Reichgericht, 16 July 1921, 16 Am. J. Int'l L. 708 (1922).

[59] HR, arts. 28, 47 & 56; Hague IX, art. 7; Principle VI(b), 1950 Nuremberg Principles; GWS, art. 15(1); GWS Sea, art. 18(1); GC, arts. 16(2) & 33(2); GP II, arts. 4(2)(g) & 8.

[60] Common article 15(1)/18(1)/-/16(2); GP I, art. 34(1); GP II, art. 8.

[61] HR, arts. 23(a) & 23(e); GP I, art. 35(2).

[62] HR, arts. 23(f) & 32-34; 1923 Radio Rules, art. 10 (32 Am. J. Int'l L. Suppl. 10, 2 Levie, The Code of International Armed Conflict 871 (distress signals)); GP I, arts. 37(1), 38(1) & 85(3)(f); GWS, arts. 53 & 54; GWS Sea, art. 45; GP I, arts. 18(8), 38 & 85(3)(f); *Trial of Heinz Hagendorf*, 11 LRTWC 146 (U.S. military court at Dachau, 1946).

[63] HR, art. 23(b); GP I, art. 40; GP II, art. 4(1).

[64] Exceptions include limited Russian trials in 1943 (McDougal & Feliciano 704) and the trial of Doolittle's raiders in Japan (Glines, Doolittle's Raiders (1964) and Spaight 58). This is not to deny atrocities against prisoners of war, but only to suggest that this method of adjudication is not routinely employed against lawful combatants. See note 20 above accompanying paragraph 6.2.

one's own nationals.[65] Trials of *unlawful* combatants have been held.[66] Yet, for similar

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[65] The 1949 Prisoner of War Convention, article 85, does not prohibit such trials, but does require that prisoners of war retain, even if convicted, the benefits of the Geneva Prisoners of War Convention. Fourteen Communist nations have reserved article 85, in various forms, e.g.:

> The Union of Soviet Socialist Republics does not consider itself bound by the obligation, which follows from Article 85, to extend the application of the Convention to prisoners of war who have been convicted under the law of the Detaining Power, in accordance with the principles of the Nuremberg trial, for war crimes and crimes against humanity, it being understood that persons convicted of such crimes must be subject to the conditions obtaining in the country in question for those who undergo their punishment.

The United States has explicitly rejected these reservations while accepting treaty relations with the reserving countries as to the remaining unreserved provisions. The reservations are quoted in Schindler & Toman 563-94. The reservations to article 85 are analyzed in Pilloud, Reservations to the Geneva Conventions of 1949, 1976 Int'l Rev. Red Cross 170-80.

For the United States reaction to the threat by the North Vietnamese Government to try U.S. prisoners of war, see the 13 July 1966 memorandum of the Assistant Legal Adviser, Department of State, reprinted in 10 Whiteman 231 and Moore, Law and The Indo-China War 635 (1972).

[66] See paragraphs S6.2.5.3 and 12.7.1 below and 10 Whiteman 150-95.

Historically, unlawful combatants were often not afforded the benefit of trials although this is now required by the 1949 Geneva Conventions (and article 75 of Additional Protocol I for nations party thereto). *Ex Parte Quirin*, 317 U.S. 1 (1942), involved the trial of unlawful combatants who were German soldiers smuggled into the United States via submarine who *discarded uniforms* upon entry, but were captured prior to committing acts of sabotage (see paragraph 12.5.3).

On *historical precedents* for war crime trials of adversary personnel, particularly unlawful combatants, see Cowles, Universality of Jurisdiction over War Crimes, 33 Cal. L. Rev. 177, 203 (1954). He notes:

> War criminals . . . are especially found among irregular combatants and former soldiers who have quit their posts to plunder and pillage . . . such as bandits, brigands, buccaneers, bushwackers, filibusters, franctireurs, free-booters, guerrillas, ladrones, marauders, partisans, pirates and robbers . . . Historically, brigandage has been to a large extent international in character . . . Brigandage is a thriving byproduct of war. The object . . . is to bring out the connection between the past and the present . . . It is not meant to be suggested that war

(continued...)

reasons, such trials may be less than rigorously pursued during the course of hostilities.

S6.2.5.2 Trials After Hostilities. Even after the close of hostilities, criminal trials against lawful enemy combatants have been the exception, not the rule.[67] After World War I, responsibility for initiating that conflict was formally assigned to Kaiser Wilhelm, and an extensive report of the atrocities committed was prepared. No international trials were held against World Wat I combatants. Some trials were held by German authorities of German personnel as required by the Allies.[68] Due to the gross excesses of the Axis Powers during World War II, involving not only initiation of aggressive war, but also wholesale execution of ethnic groups and enslavement of occupied territories, the United Nations determined that large scale assignment of individual criminal responsibility was necessary. Crimes against peace and crimes against humanity were charges against the principal political, military and industrial leaders responsible for the initiation of the war and various inhumane policies. The principal offenses against combatants directly related to combat activities were the willful killing of prisoners and others in temporary custody.[69]

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[66](...continued)
crimes committed by members of regularly constituted units are any less amenable to such jurisdiction.

[67] As to unlawful combatants, this was frequently done by punishment without trial. See Cowles, Universality of Jurisdiction over War Crimes, 33 Cal. L. Rev. 177 (1945).

[68] Treaty of Peace Between the Allied and Associated Powers and Germany, Versailles, June 28, 1919, in 1 The Law of War 417 (Friedman ed. 1972); Commission on the Responsibility of the Authors of the War and On Enforcement of Penalties, 14 Am. J. Int'l. L. 95 (1920); Judgments of the Supreme Court at Leipzig of the [World War I] German War Trials, 16 Am. J. Int'l L. 674-724 (1922); Mullins, The Leipzig Trials (1921); Woetzel, The Nuremberg Trials in International Law 27 (1962); Glueck, War Criminals, Their Prosecution and Punishment 19 (1944); UN Sec'y Gen. Memorandum, Historical Survey of the Questions of International Criminal Jurisdiction, A/CN4/7/Rev.1 (1949). Lauterpacht, The Law of Nations and the Punishment of War Crimes, 21 Br. Y.B. Int'l L. 58, at 84 (1944) notes that of the 901 cases heard before the Leipzig Supreme Court in 1923-24, only 13 ended in convictions.

[69] A representative sample of the literature is given:

Views on the Trials: Bosch, Judgment on Nuremberg (1970) (survey of views of others); Nuremberg, German Views of the War Trials (Benton and Grimm ed. 1955); Knieriem, The Nuremberg Trials (1959) (German); Vogt, The Burden of Guilt (1964) (German); Maugham, UNO and War Crimes (1951) (English); Morgan, The Great Assize (1948) (English); Klafkowski, The Nuremberg Principles and the Development of International Law (1966) (Polish); Ginsberg, Laws of War and War Crimes on the Russian Front: The Soviet View, 11 Soviet Studies 253 (1960); Green, Superior Orders in National and International Law (1976); Taylor, Nuremburg and Vietnam: An American Tragedy (1970);
(continued...)

Since World War II, state practice has generally avoided such prosecutions after conflicts have terminated.[70]

S6.2.5.3 **Jurisdiction over Offenses.**[71] Except for war crimes trials conducted by the Allies after World War II, the majority of prosecutions for violations of the law of armed conflict

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[69](...continued)
Hersh, My Lai 4 (1970); Hammer, One Morning in the War (1970).

Bibliographies: Garsse, Genocide, Crimes Against Humanity, War Crimes Trials: A Bibliography (1951); U.S. Library of Congress, The Nazi State, War Crimes and War Criminals (1954).

Summaries of cases are found in UN War Crimes Commission, Law Reports of Trials of War Criminals, 15 volumes (1949); Appleman, Military Tribunals and International Crimes (1954); U.S. Gov't, Trials of War Criminals Before The Nuremberg Military Tribunals Under Control Council Law No. 10 (1946-1949) (princ. U.S. trials subsequent to International Military Tribunal); 11 Whiteman, Digest of International Law 884 (1968).

Judgments: International Military Tribunal (Nuremberg), Judgment and Sentence, 41 Am. J. Int'l L. 172 (1947), International Military Tribunal, Nazi Conspiracy and Aggression, Opinion and Judgment (1947), excerpted in U.S. Naval War College, International Law Documents 1946-1947, at 241-307 (1948); International Military Tribunal for the Far East, Judgment, 3 parts (1948), excerpted in U.S. Naval War College, International Law Documents 1948-1949, at 76-106 (1950).

General Literature: Taylor, Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council Law No. 10 (1949); Appleman, Military Tribunals and International Crimes (1954); Davidson, The Trial of the Germans: An Account of the Twenty-two Defendants Before the International Military Tribunal at Nuremberg (1966); Jackson, The Case Against the Nazi War Criminals (1946); Jackson, The Nuremberg Case (1947); Keeshan, Justice at Nuremberg (1946); Woetzel, The Nuremberg Trials and International Law (1962).

[70] As an example, see Agreement on the Repatriation of Prisoners of War and Civilian Internees, para. 15, signed by Bangladesh, India and Pakistan 9 April 1974, in 13 Int'l Leg. Mat'ls 505 (1974).

[71] On U.S. jurisdiction over enemy nationals, see UCMJ, article 18, which creates jurisdiction in general courts-martial to try "any person" who by the law of armed conflict is subject to trial by a military tribunal; R.C.M. 201(f)(1)(B), MCM, 1984; FM 27-10, at 180; and AFP 110-31, at 3-5.

have been trials of one's own forces for breaches of military discipline.[72] Although jurisdiction extends to enemy personnel, trials have almost exclusively been against *unlawful* combatants, such as persons who take part in combat operations without distinguishing themselves clearly from the civilian population during battle or those acting without state sanction for private ends.[73]

In the United States, jurisdiction is not limited to offenses against U.S. nationals, but extends to offenses against persons of other nationalities. Violations by enemy personnel may be tried as offenses against international law, which forms part of the law of the United States. In occupied territories, trials are usually held under occupation law. Trials of such personnel have been held in military courts, military commissions, provost courts, military government courts, and other military tribunals.[74] There is no statute of limitations on the prosecution of a war crime.[75]

S6.2.5.4 Fair Trial Standards. International law standards for the trial of war crimes are found in the 1949 Geneva Convention for the Protection of Prisoners of War (articles 82-108), in the 1949 Geneva Convention Relative to the Protection of Civilian Persons in

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[72] **Violations of the law of armed conflict committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice and, if so, will be prosecuted under that Code.**

[73] **See Castren, The Present Law of War and Neutrality 87 (1954); Greenspan 502-511; and McDougal & Feliciano 704. The United States normally punishes war crimes, including "grave breaches", as such only if they are committed by enemy nationals or by persons serving the interests of the enemy nations. Violations of the law of armed conflict committed within the United States by other persons will usually constitute violations of federal or state criminal law and preferably will be prosecuted under such law.**

[74] **UCMJ, article 21, establishes concurrent jurisdiction with general courts-martial in military commissions, provost courts or other military tribunals for offenses that by the law of armed conflict may be tried by such commissions or tribunals.**

[75] **1977 Digest of United States Practice in International Law 927; UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 26 Nov. 1968, entered into force 11 Nov. 1970, not in force for the United States, 8 Int'l Leg. Mat'ls 68 (1969). While not opposed to the basic purposes of this convention, the United States voted against its adoption because it redefined crimes against humanity in a legally unsatisfactory way and had retroactive application in nations in which existing limits had expired. Dep't St. Bull., 17 Feb. 1969, at 153. Miller, The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 65 Am. J. Int'l L. 476 (1971) examines the *travaux preparatoires* of this convention.**

Time of War (articles 64-75 and 117-26), and in article 6 of the 1977 Additional Protocol II (and for nations party thereto in article 75 of the 1977 Additional Protocol I).[76]

S6.2.5.5 Failure to Pro· ide a Fair Trial. Failure to provide a fair trial for the alleged commission of war crimes is itself a war crime, a grave breach under common article 50/51/130/147 of the 1949 Geneva Conventions (and under article 85(4)(e) of the 1977 Additional Protocol I for nations party thereto).

S6.2.5.6 Defenses

S6.2.5.6.1 Superior Orders. The fact that a person committed a war crime under orders of his military or civilian superior does not relieve him from responsibility under international law. It may be considered in mitigation of punishment.[77] To establish responsibility, the person must know (or have reason to know) that an act he is ordered to perform is unlawful under international law.[78] Such an order must be manifestly illegal on its face.[79]

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[76] The United States supports "in particular" the fundamental guarantees contained in GP I, article 75, as ones that should be observed and in due course recognized as customary law even if they have not already achieved that status. Matheson, Remarks, note 1 above, at 422 & 427.

[77] See paragraph 6.1.4. The Charter of the International Military Tribunal at Nuremberg, article 8, stated:

> The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

U.S. Naval War College, International Law Documents, 1944-45, 255 (1946).

Despite efforts to include a provision on the defense of superior orders in the 1949 Geneva Conventions, and in the the 1977 Additional Protocol I thereto, nations could not agree on the balance between military discipline and the requirements of humanitarian law, and thus left unchanged the international law on the defense of superior orders. Levie, Protection of War Victims: Protocol I to the 1949 Geneva Conventions: Supplement (1985), provides the negotiating history of the effort to include a provision on the defense of superior orders in Additional Protocol I.

[78] The following statement indicates those circumstances in which the plea of superior orders may serve as a defense:

> Undoubtedly, a Court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience to military orders, not obviously unlawful, is the duty of every member of the armed forces and that the latter cannot, in conditions of war discipline,

(continued...)

The standard is whether under the same or similar circumstances a person of ordinary sense and understanding would know the order to be unlawful.[80] If the person knows the

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[78](...continued)
be expected to weigh scrupulously the legal merits of the order received; that rules of warfare are often controversial; and that an act otherwise amounting to a war crime may have been executed in obedience to orders conceived as a measure of reprisals. Such circumstances are probably in themselves sufficient to divest the act of the stigma of a war crime.

2 Oppenheim-Lauterpacht 568-69.

As to the general attitude taken by military tribunals toward the plea of superior orders, the following statement is representative:

> It cannot be questioned that acts done in time of war under the military authority of an enemy cannot involve any criminal liability on the part of officers or soldiers if the acts are not prohibited by the conventional or customary rules of war. Implicit obedience to orders of superior officers is almost indispensable to every military system. But this implies obedience to lawful orders only. If the act done pursuant to a superior's orders be murder, the production of the order will not make it any less so. It may mitigate but it cannot justify the crime. We are of the view, however, that if the illegality of the order was not known to the inferior, and he could not reasonably have been expected to know of its illegality, no wrongful intent necessary to the commission of a crime exists and the interior [*sic*] will be protected. But the general rule is that members of the armed forces are bound to obey only the lawful orders of their commanding officers and they cannot escape criminal liability by obeying a command which violates international law and outrages fundamental concepts of justice.

The Hostage Case (United States v. Wilhelm List et al.), 11 TWC 1236.

[79] See *U.S. v. Calley*, 46 CMR 1131, 48 CMR 19 (1969, 1971). UCMJ, article 92, requires members of the armed forces to obey only lawful orders. An order that directs the commission of a crime is a patently illegal order. Paragraph 14c(2)(a)(i), Part IV, MCM, 1984.

[80] R.C.M. 916(d); *U.S. v. Calley*, 48 CMR 29 (opinion of J. Quinn), 30 (concurring opinion of J. Duncan); L.C. Green, Superior Orders in National and International Law 142 (1976). R.C.M. 916(d) provides:

> *Obedience to orders.* It is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful.

act is unlawful and only does it *under duress*, this circumstance may be taken into consideration either by way of defense or in mitigation of punishment.[81]

S6.2.5.6.2 **Military Necessity.** When discussing military necessity as a defense to alleged war crimes, U.S. military tribunals have applied the same rule to both individuals and nations. While sanctioning measures necessary to compel the submission of the enemy or to protect the safety of forces in occupied territory, international law does not allow the

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[81] An individual may plead duress if he can establish that he acted only under pain of an immediate threat, e.g., the immediate threat of physical coercion, in the event of noncompliance with the order of a superior. In the judgment of one tribunal, it was declared that:

> . . . there must be a showing of circumstances such that a reasonable man would apprehend that he was in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong.

The High Command Case (United States v. Wilhelm von Leeb et al.), 11 TWC 509.

The International Military Tribunal at Nuremberg declared in its judgment that the test of responsibility for superior orders "is not the existence of the order, but whether moral choice was in fact possible." 1 Trial of Major War Criminals before the International Military Tribunal, Nuremberg 14 November 1945- 1 October 1946, at 224 (1947), excerpted in U.S. Naval War College, International Law Documents, 1946-1947, at 260 (1948).

The following examples illustrate these principles:

> *Case 1*: The deliberate target selection of a hospital protected under the Geneva Conventions for aerial bombardment would be a violation of law. Although the person making the selection would be criminally responsible, a pilot given such coordinates would not be criminally responsible unless he knew the nature of the protected target attacked and that circumstances (e.g., see paragraph 8.5.1.4 at note 98 below) did not otherwise justify the attack.
>
> *Case 2*: Faulty intelligence may cause targets to be attacked which are not in fact military objectives. No criminal responsibility would result in this event unless the attack was pursued after the correct intelligence was received and communicated to the attacking force.
>
> *Case 3.* A naval pilot attacks, admittedly in a negligent manner, and consequently misses his target, a military objective, by several miles. The bombs fall on civilian objects unknown to the pilot. No deliberate violation of international law occurred. However, he might be subject to possible criminal punishment under his own nation's criminal code for dereliction of duty. He could not be charged with a violation of the law of armed conflict.

individual combatant or his superiors to destroy life and property not required by the necessities of war. This law recognizes that a certain number of noncombatants may become inadvertent victims of armed conflict and provides that this unavoidable destruction is permissible when not disproportionate to the military advantage to be gained.[82]

S6.2.5.6.3 Acts Legal or Obligatory Under National Law. The fact that national law does not prohibit an act which constitutes a war crime under international law does not relieve the person who committed the act from responsibility under international law.[83] However, the fact that a war crime under international law is made legal and even obligatory under national law may be considered in mitigation of punishment.[84]

S6.2.5.7 Sanctions. Under international law, any punishment, including the death penalty, may be imposed on any person found guilty of a war crime.[85] United States policy requires that the punishment be deterrent in nature and proportionate to the gravity of the offense.[86]

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[82] See Stone 352; McDougal & Feliciano 72 & 528; FM 27-10, at 3; Note, Military Necessity in War Crimes Trials, 29 Brit. Y.B. Int'l L. 442 (1953); Greenspan 279; and 3 Hyde 1801. Compare paragraph 5.2 note 5 above.

[83] Principle II, note 47 above; FM 27-10, para. 511, at 183.

[84] DA Pam 27-161-2, at 249, and sources cited therein.

[85] 2 Levie, The Code of International Armed Conflict 907.

[86] FM 27-10, para. 508, at 182.

CHAPTER 7

The Law of Neutrality

7.1 INTRODUCTION

The law of neutrality defines the legal relationship between nations engaged in an armed conflict (belligerents) and nations seeking to avoid direct involvement in such hostilities (neutrals). The law of neutrality serves to localize war, to limit the conduct of war on both land and sea, and to lessen the impact of war on international commerce.[1]

Developed at a time when nations customarily issued declarations of war before engaging in hostilities,[2] the law of neutrality contemplated that the transition between war and peace would be clear and unambiguous. With the advent of international efforts to abolish "war,"[3] coupled with the proliferation of collective security arrangements[4] and the extension of the spectrum of warfare to include insurgencies and counterinsurgencies,[5]

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[1] See McDougal & Feliciano 402; Williams, Neutrality in Modern Armed Conflicts: A Survey of the Developing Law, 90 Mil. L. Rev. 9 (1980); Norton, Between the Ideology and the Reality: The Shadow of the Law of Neutrality, 17 Harv. Int'l L.J. 249 (1976).

[2] See Hague III.

[3] The Treaty for the Renunciation of War (Kellogg-Briand Pact), 27 August 1928, 46 Stat. 2343, T.S. No. 796, 2 Bevans 732, 94 L.N.T.S. 57 (No. 2137)), and the UN Charter, were designed to end the use of force to settle disputes between nations and eliminate war. On this basis the International Law Commission refused, at the beginning of its activities, to deal with the law of armed conflict:

> War having been outlawed, the regulation of its conduct has ceased to be relevant. . . . If the Commission, at the very beginning of its task, were to undertake this study, public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace.

Y.B. Int'l L. Comm., 1949, at 281. Wars having continued to occur, nations and the International Committee of the Red Cross (ICRC) have continued to develop the law of armed conflict.

[4] See Annexes AS7-1 and AS7-2.

[5] See Sarkesian, The New Battlefield: The United States and Unconventional Conflicts (1986); Special Operations in U.S. Strategy (Barnett, Tovar & Shultz eds. 1984); Asprey, War in the Shadows: The Guerrilla in History (1975); Thompson, Defeating Communist

(continued...)

armed conflict is now seldom accompanied by formal declarations of war.[6] Consequently, it has become increasingly difficult to determine with precision the point in time when hostilities have become a "war"[7] and to distinguish belligerent nations from those not participating in the conflict.[8] Notwithstanding these uncertainties, the law of neutrality continues to serve an important role in containing the spread of hostilities, in regulating the conduct of belligerents with respect to nations not participating in the conflict, and in reducing the harmful effects of such hostilities on international commerce.

For purposes of this publication, a belligerent nation is defined as a nation engaged in an international armed conflict, whether or not a formal declaration of war has been issued.[9] Conversely, a neutral nation is defined as a nation that has proclaimed its neutrality or has otherwise assumed neutral status with respect to an ongoing conflict.[10]

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[5](...continued)
Insurgency: Experiences from Malaya and Vietnam (1966).

[6] **Paragraph 4.1 & n.3 above; Greenwood, The Concept of War in Modern International Law, 36 Int'l & Comp. L.Q. 283 (1987).**

[7] **See Greenwood *passim*. The traditional rule is that the law of neutrality regulating the behavior of neutrals and belligerents depends on the existence of a state of war, and not merely an outbreak of armed conflict. Tucker 199-202; Greenwood 297-301.**

[8] **See note 12 below, Tucker 196-99 and Greenwood 298-99.**

[9] **See Greenwood 295-96. Compare common article 2: the Geneva Conventions "apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."**

[10] **NWIP 10-2, para. 230a; Kelsen 141-44; Tucker 196-197. Professor Greenwood correctly states that "the law of neutrality is brought into operation by the acts of the neutral States, not the belligerents." Greenwood 301. For example, the United States consistently proclaimed its neutrality in the Iran-Iraq War of 1980-1988. President Carter, Remarks, 24 Sep. 1980, 16 Weekly Comp. Pres. Docs. 1922 (1980); President Reagan, Written Responses to Questions, 23 Weekly Comp. Pres. Docs. 556 (19 May 1987); U.S. Dep't of State, U.S. Policy in the Persian Gulf, Special Report No. 166, July 1987, at 8-11. The duties imposed, and the rights conferred, by international law upon nonparticipants are discussed below in this chapter.**

7.2 NEUTRAL STATUS

Customary international law contemplates that in the absence of an international commitment to the contrary,[11] all nations have the option to refrain from participation in an armed conflict by declaring or otherwise assuming neutral status.[12] The law of armed conflict reciprocally imposes duties and confers rights upon neutral nations and upon belligerents. The principal right of the neutral nation is that of *inviolability*; its principal duties are those of *abstention* and *impartiality*. Conversely, it is the duty of a belligerent to respect the former and its right to insist upon the latter.[13]

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[11] See paragraph 7.2.1 below.

[12] The choice is a political decision. Similarly, recognition of such nonparticipation is also a political decision. NWIP 10-2, para. 230a. Although it is usual, on the outbreak of armed conflict, for nonparticipating nations to issue proclamations of neutrality, a special declaration by nonparticipating nations of their intention to adopt a neutral status is not required. NWIP 10-2, para. 231. Hague III, article 2, obligates belligerents to inform neutrals of the existence of a state of war:

> The existence of a state of war must be notified to the neutral Powers without delay, and shall not take effect in regard to them until after the receipt of a notification, which may, however, be given by telegraph. Neutral Powers, nevertheless, cannot rely on the absence of notification if it is clearly established that they were in fact aware of the existence of a state of war.

The above article is binding between a belligerent nation which is a party to Hague III and neutral nations which also are parties to the Convention. Parties include the United States and many of its allies, the Soviet Union, and most of the permanent neutral nations.

[13] Tucker 202-18, esp. n.14. *Impartiality* obligates neutral nations to fulfill their duties and to exercise their rights in an equal (i.e., impartial or non-discriminatory) manner toward all belligerents, without regard to its differing effect on bellligerents. Tucker 203-05; Hague XIII, Preamble and art. 9. *Abstention* is the neutral's duty to abstain from furnishing belligerents with certain goods or services. Tucker 206-17; Hague XIII, art. 6. Neutral duties also include *prevention* and *acquiescence*. The neutral has a duty to prevent the commission of certain acts by anyone within its jurisdiction, e.g., to prevent belligerent acts of hostility in neutral waters, or the use of neutral ports and waters as a base of operations. Tucker 218-52; Hague XIII. The neutral also has a duty to acquiesce in the exercise by belligerents of those repressive measures international law permits the latter to take against neutral merchantmen engaged in the carriage of contraband, breach or attempted breach of blockade, or in the performance of unneutral service. Tucker 252-58. The application of these concepts in discussed in the balance of this chapter. See Figure SF7-1.

(continued...)

Neutral status, once established, remains in effect unless and until the neutral nation abandons its neutral stance and enters into the conflict or is itself the subject of attack by a belligerent.[14]

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[13](...continued)
A nation may be neutral, insofar as it does not participate in hostilities, even though it may not be impartial in its attitude toward the belligerents. Whether or not a position of nonparticipation can be maintained, in the absence of complete impartiality, depends upon the reaction of the aggrieved belligerent. NWIP 10-2, para. 230b n.16; Tucker 197 ("the only essential condition for neutral status is that of non-participation in hostilities").

On the other hand, the fact that a neutral uses force to resist attempts to violate its neutrality does not constitute participation in the hostilities. Hague XIII, art. 26; 2 Levie, The Code of International Armed Conflict 788. That nations retain their right of self-defense to enforce maintenance of their neutrality is illustrated by actions of neutral nations in escorting neutral ships in the Persian Gulf during the Iran-Iraq tanker war (1984-88), including the United States policy of distress assistance. Dep't St. Bull., July 1988, at 61. Distress assistance is discussed in paragraph 3.11.2 note 53 above.

[14] Tucker 202; NWIP 10-2, para. 231. When the United States is a belligerent, designation of the neutral status of third nations will ordinarily be promulgated by appropriate directives.

To be distinguished from self-proclaimed neutrals -- either "permanent" or temporarily during an armed conflict -- are the two nations currently enjoying internationally recognized permanent neutrality: Switzerland and Austria. 1 Whiteman 342-64. The self-proclaimed (alliance-free) neutrals include Finland, Ireland, Sweden, and the Vatican. On 15 September 1983, Costa Rica proclaimed a policy of "permanent, active and unarmed neutrality" while maintaining its status as a party to the OAS and the 1947 Rio Treaty. N.Y. Times, 18 Nov. 1983, at 6.

RECIPROCAL RIGHTS AND RESPONSIBILITIES

	NEUTRALS	BELLIGERENTS
RIGHTS	o INVIOLABILITY o COMMERCE	o INSIST ON IMPARTIALITY, ABSTENTION AND PREVENTION o ENFORCE ITS RIGHTS
DUTIES	o IMPARTIALITY o ABSTENTION o PREVENTION o ACQUIESCENCE	o RESPECT INVIOLABILITY AND COMMERCE

Figure SF7-1

7.2.1 Neutrality Under the Charter of the United Nations. The Charter of the United Nations imposes upon its members the obligation to settle international disputes by peaceful means and to refrain from the threat or use of force in their international relations.[15] In the event of a threat to or breach of the peace, the Security Council is empowered to take enforcement action on behalf of all member nations, involving or not involving the use of force, in order to maintain or restore international peace.[16] When called upon by the Security Council to do so, the member nations are obligated to provide assistance to the United Nations in any action it takes and to refrain from aiding any nation against whom such action is directed.[17] Consequently, member nations may be obliged to support a United Nations action with elements of their armed forces, a result incompatible with the abstention requirement of neutral status.[18] Similarly, a member nation may be called upon to provide assistance to the United Nations in an enforcement action not involving its armed forces and thereby assume a partisan posture inconsistent with the impartiality necessary to a valid assertion of neutrality.[19] Should the Security Council determine not to institute an enforcement action, or is unable to do so due to the imposition of a veto by one or more of its permanent members, each United Nations member remains free to assert neutral status.[20]

7.2.2 Neutrality Under Regional and Collective Self-Defense Arrangements. The obligation in the United Nations Charter for member nations to refrain from the threat or use of force is qualified by the right of individual and collective self-defense, which member nations may

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[15] UN Charter, arts. 2(3) & 2(4). See also paragraph 7.2.2.

[16] Id., arts. 41-42.

[17] Id., art. 43.

[18] Id., art. 45.

[19] Id., art. 41.

[20] In the absence of a Security Council decision, nations may discriminate, and even resort to armed conflict, against a nation that is guilty of an illegal armed attack. This follows from article 51 of the Charter which stipulates the "right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations . . ." Under the "Uniting For Peace" Resolution, U.N.G.A. Res. 377(V), U.N. G.A.O.R., 5th Sess. 302 (1950), the General Assembly of the United Nations may, in the event of a breach of the peace, make "appropriate recommendations to members for collective measures, including . . . the use of armed force when necessary . . ." However, these recommendations of the General Assembly do not constitute legal obligations for the member nations. In sum, then, although members may discriminate against an aggressor, even in the absence of any action on the part of the Security Council, they do not have the duty to do so. In these circumstances, neutrality remains a distinct possibility. NWIP 10-2, para. 232 n.19; Tucker 13-20, 171-80.

exercise until such time as the Security Council has taken measures necessary to restore international peace. This inherent right of self-defense may be implemented individually or through regional and collective security arrangements.[21] The possibility of asserting and

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[21] See Kelsen *passim*. The collective security agreements described in Annexes AS7-1 and AS7-2 are regional in scope. The Charter recognizes such arrangements in Chapter VIII, entitled "Regional Arrangements", which includes the following paragraph:

> Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations. (Para. 1, article 52.)

Secretary of State John Foster Dulles, in testifying before the Senate Committee on Foreign Relations on the Mutual Defense Treaty with Korea (Hearings, 83d Cong. 2d sess., 13 January 1954, at 21), explained: "all of the security treaties which we have made have been conceived of as falling under Article 51" which says:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Secretary Dulles said further that although there were two relevant articles (51 and 53) in the Charter--

> in the main, the arrangement that we have made has been under article 51, which is one of broad and not necessarily regional scope, because the article which deals with regional associations, as such, has a provision that no forcible action shall be taken under those regional agreements except with the consent of the Security Council, and in view of the Soviet veto power in the Security Council, it would result, if you operated directly under that regional-pact clause, you would not have the right to resort to force or use force except with the consent of the Soviet Union.

Each of the treaties quoted in Annexes AS7-1 and AS7-2 refers to and expresses recognition of the principles, purposes and/or jurisdiction of the United Nations. Article 103 of the Charter states:

(continued...)

[21](...continued)

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Action by the United Nations with respect to threats to the peace, breaches of the peace, and acts of aggression is provided for in chapter VII of the Charter and includes the following:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with articles 41 and 42, to maintain or restore international peace and security. (Article 39.)
>
> Should the Security Council consider that measures provided for in article 41 [measures not involving the use of armed force] would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations. (Article 42.)
>
> 1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purposes of maintaining international peace and security.
>
> 2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided. (Article 43.)
>
> In order to enable the United Nations to take urgent military measures, Members shall hold immediately available national air force contingents for combined international enforcement action. The strength and degree of readiness of these contingents and plans for their combined action shall be determined, within the limits laid down in the special agreement or agreements referred to in article 43, by the Security Council with the assistance of the Military Staff Committee. (Article 45.)

(continued...)

[21](...continued)

> Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee. (Article 46.)
>
> 1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.
>
> 2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members. (Article 48.)
>
> The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council. (Article 49.)

The members of the United Nations have not yet been able to conclude agreements in accordance with Article 43 and related Charter provisions. Instead, by means of resolutions adopted by the General Assembly, the United Nations, acting through the Secretary General, has from time to time requested members to voluntarily constitute emergency international U.N. peacekeeping forces as the need arose. In this way, the United Nations has sent peacekeeping forces to: Indonesia (1947-48), Greece (1947-51), Palestine (1948-date), Kashmir (1948-date), Korea (1950-53), Suez (1955-67), Lebanon (1958, 1978-date), the Congo (1960-64), West Irian (1962-63), Yemen (1962-64), Syria (1974-date), Cyprus (1964-date), Iran-Iraq (1988-date) and Namibia (1989-date). See Bowett, United Nations Forces (1964); Boyd, United Nations Peace-Keeping Operations: A Military and Political Appraisal (1971); and Siekmann, Basic Documents on United Nations and Related Peace-Keeping Forces (1985).

In one situation where the members of the United Nations were unable to agree on a peacekeeping force, a ten-nation Multinational Force and Observers (MFO) was established in 1982 in the Sinai to "supervise the implementation" of the 1979 Israeli-Egyptian peace treaty and to "employ their best efforts to prevent any violation of its terms." The 2600 members of the MFO came from the United States, Colombia, Fiji, Australia, New Zealand, the Netherlands, Italy, Uruguay, France and the United Kingdom.

Secretary of State Rusk stated before the Senate Preparedness Subcommittee on 25 August 1966:

> The United Nations has not been able to deal effectively with all threats to the peace, nor will it be able to do so as long as certain of its members believe they must continue to compromise between their professed desire for peace and their short range interest in achieving greater power or

(continued...)

maintaining neutral status under such arrangements depends upon the extent to which the parties are obligated to provide assistance in a regional action, or in the case of collective self-defense, to come to the aid of a victim of an armed attack. The practical effect of such treaties is to transform the right of the parties to assist one of their number under attack into a duty to do so. This duty may assume a variety of forms ranging from economic assistance to the commitment of armed forces.[22]

7.3 NEUTRAL TERRITORY

As a general rule of international law, all acts of hostility in neutral territory, including neutral lands, neutral waters, and neutral airspace, are prohibited.[23] A neutral nation has the duty to prevent the use of its territory as a place of sanctuary or a base of

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[21](...continued)

> **place in the world. * * * It was recognized from the outset, however, that the United Nations might not prove able by itself to carry the full burden of collective security. The Charter explicitly provides for the existence of regional organizations, such as the Organization of American States, which would deal with problems of international peace and security in their respective areas. It also explicitly recognizes the inherent right of both individual and collective self-defense.**
>
> **Consistently with the United Nations Charter, we [the United States] have entered into multilateral and bilateral treaty arrangements with more than 40 countries on 5 continents.**

Quoted in U.S. Cong. House Foreign Affairs Comm., Collective Defense Treaties, with maps, Text of Treaties, A Chronology, Status of Forces Agreements, and Comparative Charts, 91st Cong. 1st Sess., at 15-17 (Comm. Print, 1969).

The United States has entered into seven mutual defense treaties that are currently in force. The NATO and RIO Treaties provide that an attack on one member nation is an attack on all and each will assist in meeting the attack. The ANZUS, SEATO, Philippine, Japanese, and Korean Treaties provide that an armed attack on any party would endanger its own peace and safety and that each Party will act to meet the common danger "in accordance with its constitutional processes." See Annex AS7-1 for details. Annex AS7-2 provides details of collective security arrangements entered into by some of the allies of the United States.

[22] **NWIP 10-2, para. 233 n.20.**

[23] **Hague V, art. 1; Hague XIII, art. 2. The rules stated in paragraph 7.3 are customary in nature, codified in Hague XIII. NWIP 10-2, para. 441 & n.26.**

operations by belligerent forces of any side.[24] If the neutral nation is unable or unwilling to enforce effectively its right of inviolability, an aggrieved belligerent may resort to acts of hostility in neutral territory against enemy forces, including warships and military aircraft, making unlawful use of that territory.[25] Belligerents are also authorized to act in self-defense when attacked or threatened with attack while in neutral territory or when attacked or threatened from neutral territory.[26]

7.3.1 Neutral Lands. Belligerents are forbidden to move troops or war materials and supplies across neutral land territory.[27] Neutral nations may be required to mobilize sufficient armed forces to ensure fulfillment of their responsibility to prevent belligerent forces from crossing neutral borders.[28] Belligerent troops that enter neutral territory must be disarmed and interned until the end of the armed conflict.[29]

A neutral may authorize passage through its territory of wounded and sick belonging to the armed forces of either side on condition that the vehicles transporting them carry neither combatants nor materials of war. If passage of sick and wounded is permitted, the neutral nation assumes responsibility for providing for their safety and control. Prisoners of war that have escaped their captors and made their way to neutral territory may be either repatriated or left at liberty in the neutral nation, but must not be allowed to take part in belligerent activities while there.[30]

7.3.2 Neutral Ports and Roadsteads. Although neutral nations may, on a nondiscriminatory basis, close their ports and roadsteads to belligerents, they are not obliged to do so.[31] In any event, Hague Convention XIII requires that a 24-hour grace period in which to depart must be provided to belligerent vessels located in neutral ports or roadsteads at the

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[24] Tucker 260-61. Cf. Hague XIII, art. 25.

[25] NWIP 10-2, para. 441 & n.27; Tucker 220-26, 256, 261-62; Harlow, UNCLOS III and Conflict Management in Straits, 15 Ocean Dev. & Int'l L. 197, 204 (1985).

[26] Ibid.

[27] Hague V, art. 2; FM 27-10, paras. 516-17. The various ways in which Sweden responded to demands by Germany in 1941 to transport troops and supplies to and from Norway via Swedish territory is summarized in 1 Levie, The Code of International Armed Conflict 156.

[28] FM 27-10, para. 519b.

[29] Hague V, art. 11; FM 27-10, paras. 532-36.

[30] Hague V, arts. 13-14; FM 27-10, paras. 538-39, 541-43.

[31] NWIP 10-2, para. 443b(1) note 29; Tucker 240. Cf. Hague XIII, art. 9.

outbreak of armed conflict.[32] Thereafter, belligerent vessels may visit only those neutral ports and roadsteads that the neutral nation may choose to open to them for that purpose.[33] Belligerent vessels, including warships, retain a right of entry in distress whether caused by *force majeure* or damage resulting from enemy action.[34]

7.3.2.1 Limitations on Stay and Departure. In the absence of special provisions to the contrary in the laws or regulations of the neutral nation,[35] belligerent warships are forbidden to remain in a neutral port or roadstead in excess of 24 hours.[36] This restriction does not apply to belligerent vessels devoted exclusively to humanitarian, religious, or nonmilitary scientific purposes.[37] (Vessels engaged in the collection of scientific data of potential military application are not exempt.[38]) Belligerent warships may be permitted by a neutral nation to extend their stay in neutral ports and roadsteads on account of stress of weather or damage involving seaworthiness.[39] It is the duty of the neutral nation to

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[32] Hague XIII, art. 13. For the most part, Hague XIII is considered as declaratory of the customary rules restricting belligerent use of neutral ports and waters. Tucker 219. Those of its provisions which are not so accepted are noted in the notes which follow. Even in relation to neutral waters and ports, Hague XIII is not considered as being exhaustive. See Hague XIII, art. 1 and Tucker 219 n.52.

[33] 11 Whiteman 265-69.

[34] NWIP 10-2, para. 443b(1) n.29, quoting Naval War College, International Law Situations 1939, at 43-44 (1940); Tucker 240 & 252. The right of entry in distress does not prejudice the measures a neutral may take after entry has been granted. Under Hague XIII, art. 24(1), the neutral is entitled to take such measures as it considers necessary to render the ship incapable of taking to sea during the war, i.e., to disarm it. 2 Levie, The Code of International Armed Conflict 816-17.

[35] The practice of most neutral nations has been to adopt the 24 hour limit as the normal period of stay granted to belligerent warships. NWIP 10-2, para. 443b(1) n.29; Tucker 241 & n.93.

[36] Hague XIII, arts. 12-13; Tucker 241. Paragraph 7.3.2.1 has reference only to the *stay* of belligerent warships in neutral ports, roadsteads, or territorial sea--not to *passage* through neutral territorial seas. Passage is discussed in paragraph 7.3.4.1.

[37] See Hague XIII, art. 14(2), which refers to warships.

[38] This exception to the exemption from the limitations on stay and departure recognizes the distinction between marine scientific research and military activities. Compare note 49 to paragraph 1.5.2 above.

[39] Hague XIII, art. 14(1).

intern a belligerent warship, together with its officers and crew, that will not or cannot depart a neutral port or roadstead where it is not entitled to remain.[40]

Unless the neutral nation has adopted laws or regulations to the contrary,[41] no more than three warships of any one belligerent nation may be present in the same neutral port or roadstead at any one time.[42] When warships of opposing belligerent nations are present in a neutral port or roadstead at the same time, not less than 24 hours must elapse between the departure of the respective enemy vessels.[43] The order of departure is determined by the order of arrival unless an extension of stay has been granted.[44]

7.3.2.2 War Materials, Supplies, Communications, and Repairs. Belligerent warships may not make use of neutral ports or roadsteads to replenish or increase their supplies of war materials or their armaments, or to erect any apparatus for communicating with belligerent forces.[45] Although they may take on food and fuel, the law is unsettled as to the quantities that may be allowed. In practice, it has been left to the neutral nation to determine the conditions for the replenishment and refueling of belligerent warships, subject to the principle of nondiscrimination among belligerents and to the prohibition against the use of neutral territory as a base of operations.[46]

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[40] Hague XIII, art. 24; Tucker 242.

[41] NWIP 10-2. art. 443b(2).

[42] Hague XIII, art. 15.

[43] Hague XIII, art. 16(1). Similarly, a belligerent warship may not leave a neutral port or roadstead less than 24 hours after the departure of an enemy merchant ship. Hague XIII, art. 16(3).

[44] Hague XIII, art. 16(2).

[45] Hague XIII, arts. 5 & 18. During World War II, practically all neutral nations prohibited the employment by belligerents of radiotelegraph and radiotelephone apparatus within their territorial sea. NWIP 10-2, para. 443c n.31.

[46] Hague XIII, art. 19; NWIP 10-2, para. 443d; Tucker 243. Article 19 limits warships to "the peace standard" of food, and, in practice, this standard has been adhered to generally by neutral nations. However, the same article 19 also establishes two quite different standards for refueling. Vessels may take on sufficient fuel "to enable them to reach the nearest port in their own country," or they may take on the fuel "to fill up their bunkers built to carry fuel, when in neutral countries which have adopted this method of determining the amount of fuel to be supplied." The majority of neutral nations appear to have used the former standard, although it is evident that, given the appropriate circumstances, either standard may easily permit warships to continue their operations against an enemy. Hague XIII, article 20, forbids warships to renew their supply of fuel

(continued...)

Belligerent warships may carry out such repairs in neutral ports and roadsteads as are absolutely necessary to render them seaworthy. They may not add to or repair weapons systems or enhance any other aspect of their war fighting capability. It is the duty of the neutral nation to decide what repairs are necessary to seaworthiness and to insist that they be accomplished with the least possible delay.[47]

7.3.2.3 Prizes. A prize (i.e., a captured neutral or enemy merchant ship) may only be brought into a neutral port or roadstead because of unseaworthiness, stress of weather, or

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[46](...continued)
in the ports of the same neutral nation until a minimum period of three months has elapsed. NWIP 10-2, para. 443d n.32; Tucker 243 n.99.

[47] Hague XIII, art. 17; NWIP 10-2, para. 443e. Some nations have interpreted a neutral's duty to include forbidding, under any circumstances, the repair of damage incurred in battle. Hence, a belligerent warship damaged by enemy fire that will not or cannot put to sea once her lawful period of stay has expired, must be interned. However, other nations have not interpreted a neutral's duty to include forbidding the repair of damage produced by enemy fire provided the repairs are limited to rendering the ship sufficiently seaworthy to safely continue her voyage. Article 17 would appear to allow either interpretation. NWIP 10-2, para. 443e n.33; Tucker 244-45. These views are illustrated in the case of the German battleship ADMIRAL GRAF SPEE:

> On December 13, 1939, the GRAF SPEE entered the Uruguayan port of Montevideo, following an engagement with British naval forces. A request was made to the Uruguayan authorities to permit the Graf Spee to remain fifteen days in port in order to repair damages suffered in battle and to restore the vessel's navigability. The Uruguayan authorities granted a seventytwo hour period of stay. Shortly before the expiration of this period the Graf Spee left Montevideo and was destroyed by its own crew in the Rio de la Plata. The British Government, while not insisting that Article 17 of Hague XIII clearly prohibited the repair of battle damage, did point to the widespread practice of states when neutral in forbidding the repair of battle damage in their ports. In accordance with this practice it was suggested that the Graf Spee's period of stay be limited to twenty-four hours. Uruguay maintained, however, that the scope of the neutral's duty required it only to prevent those repairs that would serve to augment the fighting force of a vessel but not repairs necessary for safety of navigation.

Tucker 245 n.2. Tucker comments that this incident is "noteworthy as a example of the extent to which belligerents seemingly can make use of neutral ports without violating the prohibition against using neutral territory as a base of naval operations." Ibid. See O'Connell, The Influence of Law on Sea Power 27-39 for a more detailed discussion of this and other aspects of the Battle of the River Plata.

want of fuel or provisions, and must leave as soon as such circumstances are overcome or cease to prevail.[48] It is the duty of the neutral nation to release a prize, together with its officers and crew, and to intern the offending belligerent's prize master and prize crew, whenever a prize is unlawfully brought into a neutral port or roadstead or, having entered lawfully, fails to depart as soon as the circumstances which justified its entry no longer pertain.[49]

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[48] Hague XIII, arts. 21-22. There is a difference of opinion as to whether or not prizes may be kept in neutral ports pending the decision of a prize court. Hague XIII, art. 23, permits neutrals to allow prizes into their ports "when they are brought there to be sequestrated pending the decision of a Prize Court." The United States (as well as the United Kingdom and Japan) did not adhere to article 23 and has maintained the contrary position. In 1916, the British steamship APPAM, seized by a German raider, was taken into Hampton Roads under a prize crew. The U.S. Supreme Court restored the vessel to her owners and released the crew on the basis that the United States would not permit its ports to be used as harbors of safety in which prizes could be kept. The Steamship Appam, 243 U.S. 124 (1917). NWIP 10-2, para. 443f n.34; Tucker 246-47.

[49] NWIP 10-2, para. 443f. Illustrative of these rules is the World War II incident involving the CITY OF FLINT:

> On October 9th, 1939, the American merchant steamer *City of Flint* was visited and searched by a German cruiser at an estimated distance of 1,250 miles from New York. The *Flint*, carrying a mixed cargo destined for British ports, was seized by the German cruiser on grounds of contraband, and a German prize crew was placed on board. Between the 9th of October and the 4th of November the American ship was first taken to the Norwegian port of Tromsoe, then to the Russian city of Murmansk, and then after two days in the last-named port, back along the Norwegian coast as far as Haugesund where the Norwegian authorities on November 4th released the *Flint* on the grounds of the international law rules contained in articles XXI and XXII of Hague Convention XIII of 1907. Prizes may be taken to a neutral harbor only because of an "inability to navigate, bad conditions at sea, or lack of anchors or supplies." The entry of the *Flint* into Haugesund on November 3 was not justified by the existence of any one of these conditions. The original visit and search and seizure of the *Flint* by the German warship, the placing of the prize crew on board, and the conduct of that crew were apparently all in accord with law. The stay in the harbor of Murmansk, however, was of doubtful legality. No genuine distress or valid reason for refuge in a so-called neutral harbor is evident from the examination of the facts. Perhaps the Germans and the Russians hoped to invoke the provisions of Article XXIII of Hague Convention XIII which authorizes a neutral power to permit "prizes to enter its ports and roadsteads * * * when they are brought there to be sequestrated pending the decision of a prize court." This article has never been accepted

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7.3.3 Neutral Internal Waters. Neutral internal waters encompass those waters of a neutral nation that are landward of the baseline from which the territorial sea is measured.[50] The rules governing neutral ports and roadsteads apply as well to neutral internal waters.[51]

7.3.4 Neutral Territorial Seas. Neutral territorial seas, like neutral territory generally, must not be used by belligerent forces either as a sanctuary from their enemies or as a base of operations.[52] Belligerents are obliged to refrain from all acts of hostility in neutral territorial waters except those necessitated by self-defense or undertaken as self-help enforcement actions against enemy forces that are in violation of the neutral status of those waters when the neutral nation cannot or will not enforce their inviolability.[53]

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[49](...continued)

> generally as a part of international law and was specifically rejected by the United States in ratifying the convention. The situation was complicated by the equivocal position of Soviet Russia which was not a neutral in the traditional sense, in the European war. Under strict rules of international law the U.S.S.R. was derelict in regard to its neutral duties and should not have permitted the *Flint* either to enter Murmansk or to find any sort of a haven there.

U.S. Naval War College, International Law Situations 1939, at 24-25 (1940), quoted in NWIP 10-2, para. 443f n.35. See also Tucker 246 n.5.

[50] See paragraph 1.4.1.

[51] See paragraph 7.3.2.

[52] Hague XIII, art. 5; NWIP 10-2, para. 442; Tucker 226-31. The prohibition against the use of neutral territorial waters as a sanctuary was at issue in the ALTMARK case of February 1940 in which the German ship transporting British prisoners of war to Germany attempted to escape capture by British warships by transiting south through the western Norwegian territorial sea and ultimately being driven into Norwegian internal waters, the Jossingfjord, by a British naval squadron. Over Norwegian objections, HMS COSSACK entered the fjord, boarded ALTMARK and released the prisoners of war. O'Connell, The Influence of Law on Sea Power 40-44 and sources listed at 195; Tucker 234-39; 7 Hackworth 568-75; 3 Hyde 2339-40; MacChesney, Situation, Documents and Commentary on Recent Developments in the International Law of the Sea 6-48 (U.S. Naval War College International Law Situation and Documents 1956, vol. 51, 1957). See also note 56 below.

[53] Hague XIII, art. 1; NWIP 10-2, para. 441 & n.27; Tucker 259. The stated exception reflects the reality that some neutrals either cannot or will not enforce the inviolability of their territory.

7.3.4.1 **Mere Passage.** A neutral nation may, on a nondiscriminatory basis, close its territorial waters, except in international straits, to belligerent vessels. When properly notified of its closure, belligerents are obliged to refrain from entering a neutral territorial sea except to transit through international straits or as necessitated by distress.[54] A neutral nation may, however, allow the "mere passage" of belligerent vessels, including warships and prizes, through its territorial waters.[55] To qualify, such passage must be innocent in nature[56] and, in the absence of special laws or regulations of the neutral nation to the

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[54] Territorial Sea Convention, art. 16(3); 1982 LOS Convention, arts. 25(3) & 45(2); Scott, Reports 847-48 (while leaving resolution of the question to the law of nations, "it seems that a neutral State may forbid even innocent passage through limited parts of its territorial waters so far as that seems to it necessary to maintain its neutrality, but that this prohibition cannot extend to straits uniting two open seas"); NWIP 10-2, para. 443a n.28. See paragraphs 2.3.2.3 and 2.3.3.1 above and accompanying notes.

[55] Hague XIII, art. 10; NWIP 10-2, para. 443a. Tucker suggests that the phrase "mere passage," appearing in Hague XIII, art. 10, should be interpreted by reference to Hague XIII, art. 5, which prohibits belligerents from using neutral waters as a base of operations. Tucker 232-39. However, that interpretation is not universally held; Tucker 235n.84.

[56] The "innocent nature" of "mere passage" must be incidental to the normal requirements of navigation and not intended in any way to turn neutral waters into a base of operations. In particular, the prolonged use of neutral waters by a belligerent warship either for the purpose of avoiding combat with the enemy or for the purpose of evading capture, may fall within the prohibition against using neutral waters as a base of operations. NWIP 10-2, para. 443a n.10; Tucker 234-39 (discussing the ALTMARK case). This aspect of the ALTMARK case has been summarized as follows:

> On February 14, 1940, the German naval auxiliary vessel *Altmark* entered Norwegian territorial waters on a return trip from the South Atlantic to Germany. The vessel carried almost three hundred captured British seamen on board, a fact which, in itself, had only a limited relevance to the principle legal issues involved. The German auxiliary was granted permission by the Norwegian authorities to navigate through the latter's territorial waters. At the same time the Norwegian authorities refused the request made by the commander of British naval forces in the area that the *Altmark* be searched in order to determine whether she carried British prisoners. On February 16, 1940, after the *Altmark* had passed through approximately four hundred miles of Norwegian waters, a British destroyer entered these waters and forcibly released the prisoners held on board the German vessel. No attempt was made by the British destroyer carrying out the action either to capture or to sink the *Altmark*.

Tucker 236-37. See also O'Connell, The Influence of Law on Seapower 40-44, who correctly points out that the release of the British prisoners occurred while both ships were in

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contrary, must not exceed 24 hours in duration.[57] While in neutral territorial waters, a belligerent warship must also refrain from adding to or repairing its armaments or replenishing its war materials.[58] Although the general practice has been to close neutral territorial waters to belligerent submarines, a neutral nation may elect to allow mere passage of submarines, either surfaced or submerged.[59] Neutral nations customarily authorize passage through their territorial sea of ships carrying the wounded, sick, and shipwrecked, whether or not those waters are otherwise closed to belligerent vessels.[60]

7.3.4.2 The 12-Nautical Mile Territorial Sea. When the law of neutrality was codified in the Hague Conventions of 1907, the 3-nautical mile territorial sea was the accepted norm, aviation was in its infancy, and the submarine had not yet proven itself as a significant weapons platform. The rules of neutrality applicable to territorial waters were designed primarily to regulate the conduct of surface warships in a narrow band of water off neutral coasts.[61] The 1982 Law of the Sea Convention provides that coastal nations may lawfully

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[56](...continued)
Norwegian internal waters; McDougal & Feliciano 450-57; and note 52 above.

[57] Hague XIII, art. 12; Tucker 235-39. NWIP 10-2, para. 443b(1) note 29 considered this rule as unsettled in 1955, while noting that if Hague XIII is interpreted as permitting passage through neutral waters in *excess* of 24 hours, "such passage should not be used for purposes other than those necessitated by the normal requirements of navigation." As Tucker concludes (at 239):

> a belligerent will not readily accede to his enemy's use of neutral waters for purposes other than those strictly incidental to the normal requirements of navigation. And although the matter cannot be regarded as conclusively settled it is probable that the present scope of the neutral's duty is such that it must prevent passage through its waters by belligerent warships when such passage has for its purpose the use of these waters as a refuge from enemy forces.

Although application of the 24-hour rule to mere passage of a belligerent warship remains somewhat clouded, the position expressed in the text accompanying this note (that it does apply) is regarded as correct.

[58] Hague XIII, art. 18; Tucker 234 n.81.

[59] Tucker 240 n.89.

[60] Hague XIII, art. 14(2); Tucker 242.

[61] Swarztrauber 32 & 116.

extend the breadth of claimed territorial waters to 12 nautical miles.[62] Because of provisions concerning seabed mining (Part XI) the U.S. has not signed the Convention; nonetheless the U.S. is committed to recognizing the rights of nations in the waters off their coasts, as reflected in the Convention.[63] The U.S. claims a 12-nautical mile territorial sea and recognizes the right of all coastal and island nations to do likewise.[64]

In the context of a universally recognized 3-nautical mile territorial sea, the rights and duties of neutrals and belligerents in neutral territorial waters were balanced and equitable.[65] Although extension of the breadth of the territorial sea from 3 to 12 nautical miles removes over 3,000,000 square miles of ocean from the arena in which belligerent forces may conduct offensive combat operations and significantly complicates neutral nation enforcement of the inviolability of its neutral waters,[66] the 12-nautical mile territorial sea is not, in and of itself, incompatible with the law of neutrality. Belligerents continue to be obliged to refrain from acts of hostility in neutral waters and remain forbidden to use the territorial sea of a neutral nation as a place of sanctuary from their enemies or as a base of operations. Should belligerent forces violate the neutrality of those waters and the neutral nation demonstrate an inability or unwillingness to detect and expel the offender, the other belligerent retains the right to undertake such self-help enforcement actions as are necessary to assure compliance by his adversary with the law of neutrality.[67]

7.3.5 Neutral Straits. Customary international law as reflected in the 1982 Law of the Sea Convention provides that belligerent and neutral surface ships, submarines, and aircraft have a right of transit passage through, over, and under all straits used for international

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[62] 1982 LOS Convention, art. 3.

[63] Paragraph 1.4.2 above and accompanying notes. The 1982 LOS Convention was not negotiated to change the law of naval warfare. Oxman, The Regime of Warships Under the United Nations Convention on the Law of the Sea, 24 Va. J. Int'l L. 809, 812, 831-32 (1984). The provision of article 88, LOS Convention, reserving the high seas for "peaceful purposes" means for "nonaggressive" purposes; use of the high seas for aggressive purposes violates the UN Charter, art. 2(4). Sohn & Gustafson 229-30. See paragraph 5.1 note 2 above.

[64] Paragraph 1.2 above and accompanying notes.

[65] Harlow, The Law of Neutrality at Sea for the 80's and Beyond, 3 Pacific Basin L.J. 51 (1984).

[66] Swarztrauber 240.

[67] 2 O'Connell 1156; NWIP 10-2, para. 441 & n.27; Wadlock, The Release of the *Altmark*'s Prisoners, 24 Brit. Y.B. Int'l L. 216, 235-36 (1947) (self-preservation). On the other hand, Tucker 262 n.40 justifies the British actions in the ALTMARK case (notes 52 and 56 above) as a "reprisal measure directed against Norway for the latter's refusal to carry out neutral obligations."

navigation.[68] Neutral nations cannot suspend, hamper, or otherwise impede this right of transit passage through international straits.[69] Belligerent forces transiting through international straits overlapped by neutral waters must proceed without delay, must refrain from the threat or use of force against the neutral nation, and must otherwise refrain from acts of hostility and other activities not incident to their transit.[70] Belligerent forces in transit may, however, take defensive measures consistent with their security, including the launching and recovery of aircraft, screen formation steaming, and acoustic and electronic surveillance.[71] Belligerent forces may not use neutral straits as a place of sanctuary nor a base of operations, and belligerent warships may not exercise the belligerent right of visit and search in those waters.[72] (Note: The Turkish Straits are governed by special rules articulated in the Montreux Convention of 1936, which limit the number and type of warships which may use the Straits, both in times of peace and during armed conflict.[73])

7.3.6 Neutral Archipelagic Waters. The United States recognizes the right of qualifying island nations to establish archipelagic baselines enclosing archipelagic waters, provided the baselines are drawn in conformity with the 1982 LOS Convention and the U.S. and other nations are accorded their full rights under international law, including the law of armed conflict, in those waters.[74] The balance of neutral and belligerent rights and duties with respect to neutral waters, is, however, at its most unsettled in the context of archipelagic waters.

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[68] See paragraph 2.3.3 above and accompanying notes.

[69] 1982 LOS Convention, art. 44; paragraph 2.3.3.1 above and note 40; Tucker 232 & n.80.

[70] 1982 LOS Convention, art. 39(1); paragraph 2.3.3.1 above and note 39. Neutral forces must similarly conform to these requirements in the exercise of transit passage through neutral straits.

[71] Harlow, note 25 above, at 206. See also note 83 below. Neutral forces similarly are entitled to take such defensive measures in neutral straits.

[72] See NWIP 10-2, para. 441; cf. Hague XIII, art. 5; paragraphs 7.3.4, 7.6 & 7.6 note 116. The belligerent right of visit and search is, of course, to be distinguished from the warship's peacetime right of approach and visit (discussed in paragraph 3.8 above) and to board in connection with drug-interdiction efforts (discussed in paragraph 3.12.5 above).

[73] Montreux Convention of 20 July 1936, 173 L.N.T.S. 213, 31 Am. J. Int'l L. Supp. 4; paragraph 2.3.3.1 note 36 above.

[74] White House Fact Sheet, Annotated Supplement Annex AS1-3; paragraph 1.4.3 above and note 41.

Belligerent forces must refrain from acts of hostility in neutral archipelagic waters and from using them as a sanctuary or a base of operations.[75] Belligerent ships or aircraft, including submarines, surface warships, and military aircraft, retain the right of unimpeded archipelagic sea lanes passage through, over, and under neutral archipelagic sea lanes.[76] Belligerent forces exercising the right of archipelagic sea lanes passage may engage in those activities that are incident to their normal mode of continuous and expeditious passage and are consistent with their security.[77] Visit and search is not authorized in neutral archipelagic waters.[78]

A neutral nation may close its archipelagic waters (other than archipelagic sea lanes whether designated or those routes normally used for international navigation or overflight) to the mere passage of belligerent ships but it is not obliged to do so.[79] The neutral archipelagic nation has an affirmative duty to police its archipelagic waters to ensure that the inviolability of its neutral waters is respected.[80] If a neutral nation is unable or unwilling effectively to detect and expel belligerent forces unlawfully present in its archipelagic waters, the opposing belligerent may undertake such self-help enforcement actions as may be necessary to terminate the violation of neutrality. Such self-help enforcement may include surface, subsurface, and air penetration of archipelagic waters and airspace and the use of proportional force as necessary.[81]

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[75] See NWIP 10-2, para. 441; cf. Hague XIII, arts. 1, 2 & 5.

[76] 1982 LOS Convention, arts. 53, 54 & 44; paragraph 2.3.4.1 and notes 44 & 47 thereto above.

[77] 1982 LOS Convention, art. 53(3); paragraph 2.3.4.1 and note 47 thereto above.

[78] Since visit and search is a belligerent activity unrelated to navigational passage, it cannot lawfully be exercised in neutral territory. Cf. Hague XIII, arts. 1 & 2. See NWIP 10-2, art. 441. The belligerent right of visit and search is, of course, to be distinguished from the warship's peacetime right of approach and visit (discussed in paragraph 3.8 above) and to board in connection with drug-interdiction efforts (discussed in paragraph 3.12.5 above).

[79] Cf. 1982 LOS Convention, art. 52(2); Hague XIII, art. 9; paragraph 2.3.4.2 text at note 50 above; compare paragraph 7.3.5 text at note 69 above.

[80] Cf. Hague XIII, art. 25.

[81] See NWIP 10-2, para. 441 n.27 and note 13 above.

7.3.7 Neutral Airspace. Neutral territory extends to the airspace over a neutral nation's lands, internal waters, archipelagic waters (if any), and territorial sea.[82] Belligerent military aircraft are forbidden to enter neutral airspace[83] with the following exceptions:

1. The airspace above neutral international straits and archipelagic sea lanes remains open at all times to belligerent aircraft, including armed military aircraft, engaged in transit or archipelagic sea lanes passage. Such passage must be continuous and expeditious and must be undertaken in the normal mode of flight of the aircraft involved. Belligerent aircraft must refrain from acts of hostility while in transit but may engage in activities that are consistent with their security and the security of accompanying surface and subsurface forces.[84]

2. Unarmed military aircraft may enter neutral airspace under such conditions and circumstances as the neutral nation may wish to impose impartially on the belligerents. Should such unarmed aircraft penetrate neutral airspace without permission, or otherwise fail to abide by the entry conditions imposed upon them by the neutral nations, they may be interned together with their crews.[85]

3. Medical aircraft may overfly neutral territory, may land therein in case of necessity, and may use neutral airfield facilities as ports of call, subject to such restrictions and regulations as the neutral nation may see fit to apply equally to all belligerents.[86]

4. Belligerent aircraft in evident distress are permitted to enter neutral airspace and to land in neutral territory under such safeguards as the neutral nation may wish to impose. The neutral nation may require such aircraft to land, may intern

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[82] See paragraph 1.4 above.

[83] 1923 Hague Rules of Air Warfare, art. 40; NWIP 10-2, para. 444a; Tucker 251; Spaight 420-460. The practice in World Wars I and II was in general conformity with the rules stated in paragraph 7.3.7. Spaight 424.

[84] See note 71 above.

[85] NWIP 10-2, para. 444a(2); paragraph 7.10 and note 164. Unarmed military transport planes were permitted to fly over, land in, and depart from neutral nations in World War II. During the Korean war (1950-53), China (theoretically neutral) permitted North Korean planes to use its territory as sanctuary from United Nations Command aircraft. 2 Levie, The Code of International Armed Conflict 825. Other sources would require internment by a neutral nation of crews of belligerent aircraft landing in neutral territory. 1923 Hague Rules of Air Warfare, art. 42, and sources cited in note 164. A permissive rule seems more appropriate.

[86] GWS-Sea, art. 40; NWIP 10-2, para. 444a(1); Tucker 130-31; Spaight 443-44.

both aircraft and crew, or may impose nondiscriminatory conditions upon their stay or release.[87]

7.3.7.1 Neutral Duties In Neutral Airspace. Neutral nations have an affirmative duty to prevent violation of neutral airspace by belligerent aircraft, to compel offending aircraft to land, and to intern both aircraft and crew.[88] Should a neutral nation be unable or unwilling to prevent the unlawful entry or use of its airspace by belligerent aircraft, belligerent forces of the other side may undertake such self-help enforcement measures as the circumstances may require.[89]

7.4 NEUTRAL COMMERCE

A principal purpose of the law of neutrality is the regulation of belligerent activities with respect to neutral commerce. For purposes of this publication, neutral commerce comprises all commerce between one neutral nation and another not involving materials of war or armaments destined for a belligerent nation, and all commerce between a neutral nation and a belligerent that does not involve the carriage of contraband or otherwise sustain the belligerent's war-fighting capability.[90] Neutral merchant vessels and nonpublic civil aircraft engaged in legitimate neutral commerce are subject to visit and search, but may not be captured or destroyed by belligerent forces.[91]

The law of neutrality does not prohibit neutral nations from engaging in commerce with belligerent nations;[92] however, a neutral government cannot supply materials of war

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[87] **NWIP 10-2, para. 444b & n.40. The view expressed in Spaight 436-37, Tucker 252 and AFP 110-31, para. 2-6c, that there is a duty to intern aircraft and crew entering in distress, is not followed in this text because neutral practice in this regard has varied, notwithstanding Hague V, art. 11. See paragraph 7.10 and accompanying notes 163-64 below.**

[88] **NWIP 10-2, para. 444b; Tucker 251.**

[89] **AFP 110-31, para. 2-6c. See also paragraph 7.3 above.**

[90] **Although the term "war-sustaining commerce" is not subject to precise definition, commerce that indirectly but effectively supports and sustains the belligerent's war-fighting capability properly falls within the scope of the term. See paragraph 8.1.1 & note 11 below. Examples include *imports* of raw materials used for the production of armaments and *exports* of products the proceeds of which are used by the belligerent to purchase arms and armaments.**

[91] **Visit and search is discussed in paragraph 7.6 below. Capture and destruction of neutral merchant vessels and civil aircraft are discussed in paragraph 7.9 below.**

[92] **Hague XIII, art. 7.**

or armaments to a belligerent without violating its neutral duties of abstention and impartiality and risking loss of its neutral status.[93] Although a neutral may forbid its citizens from carrying on non-neutral commerce with belligerent nations, it is not obliged to do so.[94] In effect, the law establishes a balance of interests that protects neutral commerce from unreasonable interference on the one hand and the right of belligerents to interdict the flow of war materials to the enemy on the other.[95]

7.4.1 **Contraband.** Contraband consists of goods which are destined for the enemy of a belligerent and which may be susceptible to use in armed conflict. Traditionally, contraband has been divided into two categories: absolute and conditional. Absolute contraband consisted of goods whose character made it obvious that they were destined for use in armed conflict, such as munitions, weapons, uniforms, and the like. Conditional contraband were goods equally susceptible to either peaceful or warlike purposes, such as foodstuffs, construction materials, and fuel.[96] Belligerents often declared contraband lists

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[93] See paragraphs 7.2 above and 7.4.1 below; Hague XIII, art. 6; and Tucker 206-18.

[94] Hague V, art. 7.

[95] 10 Whiteman 792, quoting an unofficial translation of Rosseau, Droit International Public 700-01 (1953). Iran's attacks on neutral ships carrying neutral commerce as herein defined upset that balance and are unlawful. Roach, Missiles on Target: The Law of Targeting and The Tanker War, 82 Proc. Am. Soc. Int'l L. (1988).

[96] NWIP 10-2, art. 631a; Tucker 263. This distinction is expanded on in the following:

> There are, in the first place, articles which by their very character are destined to be used in war. In this class are to be reckoned, not only arms and ammunition, but also such articles of ambiguous use as military stores, naval stores, and the like. These are termed *absolute contraband.* There are, secondly, articles which, by their very character, are not necessarily destined to be used in war, but which, under certain circumstances and conditions, can be of the greatest use to a belligerent for the continuance of the war. To this class belong, for instance, provisions, coal, gold, and silver. These articles are termed *conditional* or *relative contraband.* . . . [A]lthough belligerents must be free to take into consideration the circumstances of the particular war, as long as the distinction between absolute and conditional contraband is upheld it ought not to be left altogether to their discretion to declare any articles they like to be absolute contraband. The test to be applied is whether, in the special circumstances of a particular war, the article concerned is by its character destined to be made use of for military, naval, or air-fleet purposes because it is essential to those purposes. If not, it ought not to be declared absolute contraband. However, it may well happen that an article which is not by its very nature destined to be made use of in war,

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at the initiation of hostilities to notify neutral nations of the type of goods considered to be absolute or conditional contraband as well as those not considered to be contraband at all, i.e., exempt or "free goods." The precise nature of a belligerent's contraband list varied according to the circumstances of the conflict.[97]

The practice of belligerents in World War II has cast doubt on the relevance, if not the validity, of the traditional distinction between absolute and conditional contraband. Because of the involvement of virtually the entire population in support of the war effort, the belligerents of both sides during the Second World War tended to exercise governmental control over all imports. Consequently, it became increasingly difficult to draw a meaningful distinction between goods destined for an enemy government and its armed forces and goods destined for consumption by the civilian populace. As a result, belligerents considered goods as absolute contraband which in earlier conflicts were considered to be conditional contraband.[98]

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[96](...continued)

> **acquires this character in a particular war and under particular circumstances; and in such case it may be declared absolute contraband. Thus, for instance, foodstuffs cannot, as a rule, be declared absolute contraband; but if the enemy, for the purpose of securing sufficient [foodstuffs] for his military forces, takes possession of all the foodstuffs in the country, and puts the whole population on rations, foodstuffs acquire the character essential to articles of absolute contraband, and can therefore be declared to be such.**

2 Oppenheim-Lauterpacht 801 & 803. On starvation as a permissible method of warfare, see paragraph 8.1.2 note 15 below.

[97] NWIP 10-2, art. 631b, quoted with approval in McDougal & Feliciano 482-83.

[98] NWIP 10-2, art. 631b n.18; Tucker 266-67. O'Connell has correctly noted that "the central principle is the actual commitment of goods to the prosecution of war, and it is obvious that the principle is differentially applicable in different circumstances. . . . What is likely to occur in the event of resuscitation of the law of contraband in future limited wars is a readjustment of the items on the various lists." 2 O'Connell 1144. Thus, in December 1971 Pakistan and India each declared contraband lists containing items traditionally considered to be absolute contraband. The lists are reprinted in 66 Am. J. Int'l L. 386-87 (1972). Although neither Iran nor Iraq declared contraband lists, the fact that both nations attacked neutral crude oil carriers, loaded and in ballast, indicated both Iran and Iraq regarded oil as contraband. Whether classified as absolute or conditional contraband, oil and the armaments which its sale or barter on international markets bring, were absolutely indispensable to the war efforts of the Persian Gulf belligerents. See Viorst, Iraq at War, 65 Foreign Affairs 349, 350 (Winter 1986/87); Bruce, U.S. Request Stretches Iraq's Patience, 8 Jane's Defence Weekly 363 (29 Aug. 1987); N.Y. Times, 4 Sep. 1986, at A1 & A11; and Baltimore Sun, 13 July 1987, at .

7.4.1.1 Enemy Destination. To the extent that the distinction between absolute and conditional contraband has continuing relevance, it is with respect to the rules pertaining to the presumption of ultimate enemy destination. Goods consisting of absolute contraband are liable to capture at any place beyond neutral territory, if their destination is the territory belonging to or occupied by the enemy. It is immaterial whether the carriage of absolute contraband is direct, involves transshipment, or requires overland transport.[99] When absolute contraband is involved, a destination of enemy owned or occupied territory may be presumed when:

1. The neutral vessel is to call at an enemy port before arriving at a neutral port for which the goods are documented.

2. The goods are documented to a neutral port serving as a port of transit to an enemy, even though they are consigned to a neutral.

3. The goods are consigned "to order" or to an unnamed consignee, but are destined for a neutral nation in the vicinity of enemy territory.[100]

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[99] **Tucker 267-68. This rule is explained as follows:**

> **"Continuous voyage" is where, in order to obtain immunity during a part of its voyage to the enemy port, the vessel breaks its journey at a neutral intermediate port, the contraband being ostensibly destined there. At the neutral port, for appearance's sake it may unload and reload the same contraband cargo, but in any case it then proceeds with the cargo on the shortened span of its journey to the enemy port. The *doctrine* of continuous voyage prescribes that such a vessel and its cargo are to be deemed to have an enemy destination (and, therefore, to be liable to seizure) from the time she leaves her home port. Similarly, "continuous transports" is where the guilty cargo is unloaded at the neutral port, and is then carried further to the enemy port or destination by another vessel or vehicle. The corresponding *doctrine* of continuous transports applies with similar effect, rendering the cargo liable to seizure from the time it leaves its home port.**

Stone 486. The principles underlying the so-called doctrines of "continuous voyage" and "continuous transport" were applied by prize courts in both World Wars I and II. NWIP 10-2, para. 631c(1) n.19. Development of the doctrine of continuous voyage is succinctly discussed in 2 O'Connell 1146-47.

[100] **NWIP 10-2, art. 631c(1). The circumstances creating a presumption of ultimate destination of absolute contraband here enumerated are of concern to the operating commander for the reason that circumstances held to create a presumption of enemy destination constitute sufficient cause for capture. Before a prize court, each of these**

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These presumptions of enemy destination of absolute contraband render the offending cargo liable to seizure by a belligerent from the time the neutral merchant vessel leaves its home or other neutral territory until it arrives again in neutral territory. Although conditional contraband is also liable to capture if ultimately destined for the use of an enemy government or its armed forces, enemy destination of conditional contraband must be factually established and cannot be presumed.[101]

7.4.1.2 Exemptions to Contraband. Certain goods are exempt from capture as contraband even though destined for enemy territory.[102] Among them are:

1. Exempt or "free goods," i.e., goods not susceptible for use in armed conflict[103]

2. Articles intended exclusively for the treatment of wounded and sick members of the armed forces and for prevention of disease[104]

3. Medical and hospital stores, religious objects, clothing, bedding, essential foodstuffs, and means of shelter for the civilian population in general, and women and children in particular, provided there is not serious reason to believe that such goods will be diverted to other purpose, or that a definite military advantage would accrue to the enemy by their substitution for enemy goods that would thereby become available for military purposes[105]

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[100](...continued)
presumptions is rebuttable and whether or not a prize court will, in fact, condemn the captured cargo and vessel (or aircraft) will depend upon a number of complex considerations with which the commander need not be concerned. NWIP 10-2, para. 631c(1) n.20.

[101] **NWIP 10-2, art. 631c(2); Tucker 270-75. See note 99 above. Regarding the circumstances in which a vessel carrying contraband may be captured, see note 148 accompanying paragraph 7.9 below.**

[102] **See Tucker 263.**

[103] **NWIP 10-2, para. 631e(1) & n.17.**

[104] **GWS-Sea, art. 38; NWIP 10-2, para. 631e(2); Tucker 265 n.4. The particulars concerning the carriage of such article must be transmitted to the belligerent nation and approved by it.**

[105] **GC, arts. 23 & 59. For nations bound thereby, Additional Protocol I, art. 70, modifies the conditions of GC, art. 23, that a nation may impose before permitting free passage of these relief supplies. The United States supports the principle contained in GP I, art. 70. The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the**
(continued...)

4. Items destined for prisoners of war, including individual parcels and collective relief shipments containing food, clothing, medical supplies, religious objects, and educational, cultural, and athletic articles[106]

5. Goods otherwise specifically exempted from capture by international convention or by special arrangement between belligerents.[107]

It is customary for neutral nations to provide belligerents of both sides with information regarding the nature, timing, and route of shipments of goods constituting exceptions to contraband and to obtain approval for their safe conduct and entry into belligerent owned or occupied territory.[108]

7.4.2 Certificate of Noncontraband Carriage. A certificate of noncontraband carriage is a document issued by a belligerent consular or other designated official to a neutral vessel (navicert) or neutral aircraft (aircert) certifying that the cargo being carried has been examined, usually at the initial place of departure, and has been found to be free of contraband. The purpose of such a navicert or aircert is to facilitate belligerent control of contraband goods with minimal interference and delay of neutral commerce. The certificate is not a guarantee that the vessel or aircraft will not be subject to visit and search or that cargo will not be seized. (Changed circumstances, such as a change in status of the neutral vessel, between the time of issuance of the certificate and the time of interception at sea may cause it to be invalidated.) Conversely, absence of a navicert or aircert is not, in itself, a valid ground for seizure of cargo. Navicerts and aircerts issued by one belligerent have no effect on the visit and search rights of a belligerent of the opposing side.[109]

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[105](...continued)

1977 Protocols Additional to the 1949 Geneva Conventions, 2 Am. U.J. Int'l L. & Policy 426 (1987) (remarks of U.S. Department of State Deputy Legal Adviser Matheson: the United States supports the principle reflected in GP I, arts. 54 & 70, "subject to the requirements of imperative military necessity, that impartial relief actions necessary for the survival of the civilian population be permitted and encouraged").

[106] The conditions that may be set on these shipments are set forth in articles 72-75 and Annex III of GPW.

[107] NWIP 10-2, para. 631e(3). See GC, arts. 23 & 59.

[108] Compare GC, art. 23(4) and 4 Pictet 184.

[109] See NWIP 10-2, para. 631d n.22 and sources cited therein; 1 Medlicott, The Economic Blockade (United Kingdom Official History of the Second World War, Civil Series) 94 & 95 (1952); Tucker 280-82, 312-15 & 322-23; McDougal & Feliciano 509-13; and 2 O'Connell 1147-48. A similar procedure was used during the Cuban Missile Crisis, when

(continued...)

7.5 ACQUIRING ENEMY CHARACTER

All vessels operating under an enemy flag, and all aircraft bearing enemy markings, possess enemy character. However, the fact that a merchant ship flies a neutral flag, or that an aircraft bears neutral markings, does not necessarily establish neutral character. Any vessel or aircraft, other than a warship or military aircraft, owned or controlled by a belligerent possesses enemy character, regardless of whether it is operating under a neutral flag or bears neutral markings.[110] Vessels and aircraft acquiring enemy character may be treated by an opposing belligerent as if they are enemy vessels and aircraft. (Paragraphs 8.2.1 and 8.2.2 set forth the actions that may be taken against enemy vessels and aircraft.)

7.5.1 Acquiring the Character of an Enemy Warship or Military Aircraft. Neutral vessels and aircraft, other than warships and military aircraft, acquire enemy character[111] and may

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[109](...continued)
the United States issued "clearcerts." Dep't St. Bull., 12 Nov. 1962, at 747; and Mallison, Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defense Claims Valid Under International Law, 31 Geo. Wash. L. Rev. 389-90 (1962).

[110] NWIP 10-2, para. 501; Tucker 76-86.

A neutral nation may grant a merchant vessel or aircraft the right to operate under its flag, even though the vessel or aircraft remains substantially owned or controlled by enemy interests. According to the international law of prize, such a vessel or aircraft nevertheless possesses enemy character and may be treated as enemy by the concerned belligerent.

There is no settled practice among nations regarding the conditions under which the transfer of enemy merchant vessels (and, presumably, aircraft) to a neutral flag legitimately may be made. Despite agreement that such transfers will not be recognized when fraudulently made for the purpose of evading belligerent capture, nations differ in the specific conditions that they require to be met before such transfers can be considered as *bona fide*. However, it is generally recognized that, at the very least, all such transfers must result in the complete divestiture of enemy ownership and control. The problem of transfer is mainly the proper concern of prize courts rather than of an operating naval commander, and the latter is entitled to seize any vessel transferred from an enemy to a neutral flag when such transfer has been made either immediately prior to, or during, hostilities. NWIP 10-2, para. 501 n.5.

On the mid-1987 reflagging of eleven Kuwaiti tankers to U.S. registration, see Weinberger, A Report to the Congress on Security Arrangements in the Persian Gulf, 26 Int'l Leg. Mat'ls 1450-51 (1987).

[111] NWIP 10-2, para. 501a; Tucker 319-21. With the exception of resistance to visit and search, the acts defined here (and in examples 7 and 8 of paragraph 7.9) have been (continued...)

be treated by a belligerent as enemy warships and military aircraft when engaged in the following acts:

1. Taking a direct part in the hostilities on the side of the enemy

2. Acting in any capacity as a naval or military auxiliary to the enemy's armed forces.

(Paragraph 8.2.1 describes the actions that may be taken against enemy warships and military aircraft.)

7.5.2 Acquiring the Character of an Enemy Merchant Vessel or Aircraft. Neutral vessels and aircraft, other than warships and military aircraft, acquire enemy character and may be treated by a belligerent as enemy merchant vessels or aircraft when engaged in the following acts:

1. Operating directly under enemy control, orders, charter, employment, or direction

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[111](...continued)
traditionally considered under the heading of "unneutral service." Although originally established for and applied to the conduct of neutral vessels, the rules regarding unneutral service have been considered generally applicable to neutral aircraft as well.

The term "unneutral service" does not refer to acts performed by, and attributable to, a neutral nation; that is to say, acts the performance of which would, if performed by a neutral nation, constitute a violation of the neutral nation's obligations. It does refer to certain acts which are forbidden to neutral vessels and aircraft (other than neutral warships and neutral military aircraft). Attempts to define the essential characteristics common to acts constituting unneutral service have not been very satisfactory. However, it is clear that the types of unneutral service which a neutral merchant vessel or aircraft may perform are varied; hence, the specific penalties applicable for acts of unneutral service may vary. The services enumerated in paragraph 7.5.1 are of such a nature as to identify a neutral vessel or aircraft with the armed forces of the belligerent for whom these acts are performed, and, for this reason, such vessels or aircraft may be treated in the same manner as enemy warships or military aircraft. The services defined in paragraph 7.5.2 below also define neutral merchant vessels and aircraft performing them with the belligerent, but not with the belligerent's armed forces. Such vessels and aircraft are assimilated to the position of, and may be treated in the same manner as, enemy merchant vessels and aircraft. The acts of unneutral service cited in paragraph 7.9 (examples 7 and 8) imply neither a direct belligerent control over, nor a close belligerent relation with, neutral merchant vessels and aircraft. By custom, vessels performing these acts, though not acquiring enemy character, are liable to capture. NWIP 10-2, para. 501a n.6; Tucker 318-21 & 355-56.

2. Resisting an attempt to establish identity, including visit and search.[112]

(Paragraph 8.2.2 describes the actions that may be taken against enemy merchant ships and civilian aircraft.)

7.6 VISIT AND SEARCH

Visit and search is the means by which a belligerent warship or belligerent military aircraft may determine the true character (enemy or neutral) of merchant ships encountered outside neutral territory, the nature (contraband or exempt "free goods") of their cargo, the manner (innocent or hostile) of their employment, and other facts bearing on their relation to the armed conflict.[113] Warships are not subject to visit and search.[114] The prohibition

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[112] NWIP 10-2, para. 501a; Tucker 319-21. With the exception of resistance to visit and search, the acts defined here (and in examples 7 and 8 of paragraph 7.9) have been traditionally considered under the heading of "unneutral service." Although originally established for and applied to the conduct of neutral vessels, the rules regarding unneutral service have been considered generally applicable to neutral aircraft as well.

The term "unneutral service" does not refer to acts performed by, and attributable to, a neutral nation; that is to say, acts the performance of which would, if performed by a neutral nation, constitute a violation of the neutral nation's obligations. It does refer to certain acts which are forbidden to neutral vessels and aircraft (other than neutral warships and neutral military aircraft). Attempts to define the essential characteristics common to acts constituting unneutral service have not been very satisfactory. However, it is clear that the types of unneutral service which a neutral merchant vessel or aircraft may perform are varied; hence, the specific penalties applicable for acts of unneutral service may vary. The services enumerated in paragraph 7.5.1 are of such a nature as to identify a neutral vessel or aircraft with the armed forces of the belligerent for whom these acts are performed, and, for this reason, such vessels or aircraft may be treated in the same manner as enemy warships or military aircraft. The services defined in paragraph 7.5.2 below also define neutral merchant vessels and aircraft performing them with the belligerent, but not with the belligerent's armed forces. Such vessels and aircraft are assimilated to the position of, and may be treated in the same manner as, enemy merchant vessels and aircraft. The acts of unneutral service cited in paragraph 7.9 (examples 7 and 8) imply neither a direct belligerent control over, nor a close belligerent relation with, neutral merchant vessels and aircraft. By custom, vessels performing these acts, though not acquiring enemy character, are liable to capture. NWIP 10-2, para. 501a n.6; Tucker 318-21 & 355-56.

[113] Hague XIII, art. 2; Tucker 332-33. The peacetime right of approach is discussed in paragraph 3.8.

[114] Stone 591-92; 11 Whiteman 3. See also paragraph 2.1.2 above.

against visit and search in neutral territory[115] extends to international straits overlapped by neutral territorial seas and archipelagic sea lanes.[116] Neutral vessels engaged in government noncommercial service may not be subjected to visit and search.[117] Neutral merchant vessels under convoy of neutral warships of the same nationality are also exempt from visit and search, although the convoy commander may be required to provide in writing to the commanding officer of an intercepting belligerent warship information as to the character of the vessels and of their cargoes which could otherwise be obtained by visit and search.[118] Should it be determined by the convoy commander that a vessel under his charge possesses enemy character or carries contraband cargo, he is obliged to withdraw his protection of the offending vessel, making it liable to visit and search, and possible capture, by the belligerent warship.[119]

7.6.1 Procedure for Visit and Search. *In the absence of specific rules of engagement or other special instructions*[120] issued by the operational chain of command during a period of armed conflict, the following procedure should be carried out by U.S. Navy warships exercising the belligerent right of visit and search:

1. Visit and search should be exercised with all possible tact and consideration.

2. Before summoning a vessel to lie to, the warship should hoist its national flag. The summons is made by firing a blank charge, by international flag signal (SN or SQ), or by other recognized means. The summoned vessel, if a neutral merchant

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[115] NWIP 10-2, para. 441.

[116] Harlow, note 25 above, at 205-06. See paragraphs 7.3.5 and 7.3.6 above.

[117] Oxford Manual, art. 32, Schindler & Toman 862; paragraph 2.1.2.3 above; but see Tucker 335-36 & n.10.

[118] This has been the consistent position of the United States which, while previously not commonly accepted, NWIP 10-2, para. 502a & n.10, Tucker 334-35, appears to have recently achieved such acceptance. Certainly, the experience of the convoying by several nations in the Persian Gulf during the tanker war between Iran and Iraq (1984-1988) supports the U.S. position.

[119] NWIP 10-2, para. 502a n.10, quoting paragraphs 58-59 of the 1941 Tentative Instructions for the Navy of the United States Governing Maritime and Aerial Warfare.

[120] The issuance of certificates of noncontraband carriage are one example of special instructions. See paragraph 7.4.2 above. The Visit and Search Bill, contained in paragraph 630.23.5 of OPNAVINST 3120.32B, Standard Organization and Regulations of the U.S. Navy, reproduced as Annex AS7-3, contains instructions which are to be implemented in conjunction with the guidance set forth in this publication, including paragraph 7.6.1. See also Tucker 336-38.

ship, is bound to stop, lie to, display her colors, and not resist. (If the summoned vessel is an enemy ship, it is not so bound and may legally resist, even by force, but thereby assumes all risk of resulting damage or destruction.)

3. If the summoned vessel takes flight, she may be pursued and brought to by forcible measures if necessary.

4. When a summoned vessel has been brought to, the warship should send a boat with an officer to conduct the visit and search. If practicable, a second officer should accompany the officer charged with the examination. The officer(s) and boat crew may be armed at the discretion of the commanding officer.

5. If visit and search at sea is deemed hazardous or impracticable, the neutral vessel may be escorted by the summoning of another U.S. Navy warship or by a U.S. military aircraft to the nearest place (outside neutral territory) where the visit and search may be conveniently and safely conducted. The neutral vessel is not obliged to lower her flag (she has not been captured) but must proceed according to the orders of the escorting warship or aircraft.[121]

6. The boarding officer should first examine the ship's papers to ascertain her character, ports of departure and destination, nature of cargo, manner of employment, and other facts deemed pertinent. Papers to be examined will ordinarily include a certificate of national registry, crew list, passenger list, logbook, bill of health clearances, charter party (if chartered), invoices or manifests of cargo, bills of lading, and on occasion, a consular declaration or other certificate of noncontraband carriage certifying the innocence of the cargo.

7. Regularity of papers and evidence of innocence of cargo, employment, or destination furnished by them are not necessarily conclusive, and, should doubt exist, the ship's company may be questioned and the ship and cargo searched.

8. Unless military security prohibits, the boarding officer will record the facts concerning the visit and search in the logbook of the visited ship, including the date and position of the interception. The entry should be authenticated by the signature and rank of the boarding officer, but neither the name of the visiting warship nor the identity of her commanding officer should be disclosed.[122]

7.6.2 Visit and Search by Military Aircraft. Although there is a right of visit and search by military aircraft, there is no established international practice as to how that right is to

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[121] **On diversion, see Tucker 338-44.**

[122] **See Annex AS7-3, at para. 630.23.5d, and Annex AS7-6, Forms 4-5, for sample log entries.**

be exercised.[123] Ordinarily, visit and search of a vessel by an aircraft is accomplished by directing and escorting the vessel to the vicinity of a belligerent warship, which will carry out the visit and search, or to a belligerent port.[124] Visit and search of an aircraft by an aircraft may be accomplished by directing the aircraft to proceed under escort to the nearest convenient belligerent landing area.[125]

7.7 BLOCKADE

7.7.1 General. Blockade is a belligerent operation to prevent vessels and/or aircraft of all nations, enemy as well as neutral, from entering or exiting specified ports, airfields, or coastal areas belonging to, occupied by, or under the control of an enemy nation.[126] A belligerent's purpose in establishing a blockade is to deny the enemy the use of enemy and neutral vessels or aircraft to transport personnel and goods to or from enemy territory. Unlike the belligerent right of visit and search, which is designed to interdict the flow of contraband goods into enemy territory and which may be exercised anywhere outside of neutral territory, the belligerent right of blockade is intended to prevent vessels and aircraft from crossing an established and publicized cordon separating the enemy from international waters and/or airspace.[127]

7.7.2 Traditional Rules. In order to be valid under the traditional rules of international law, a blockade must conform to the following criteria.[128]

7.7.2.1 Establishment. A blockade must be established by the government of the belligerent nation. This is usually accomplished by a declaration of the belligerent government or by the commander of the blockading force acting on behalf of his

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[123] NWIP 10-2, para. 502 n.8, 502b(5) & nn.13-14; Tucker 333, 355 & n.62; 11 Whiteman 3-5.

[124] NWIP 10-2, para. 502b(5) & nn.13-14; Tucker 333 & 342. Spaight 484 points out how this practice, if carried to excess, would "authorise a grave interference with the freedom of maritime commerce," as well as the danger of attack if aircraft were required to land on the water and conduct the visit and search on the spot.

[125] NWIP 10-2, para. 502 n.8; Tucker 354-55.

[126] NWIP 10-2, para. 632a; Tucker 283.

[127] 10 Whiteman 861-64.

[128] Concise statements of these criteria and the rationale for their development appear in ICRC, Commentary 654, para. 2094, and 2 O'Connell 1150-51. See also Mallison & Mallison, A Survey of the International Law of Naval Blockade, U.S. Naval Inst. Proc., Feb. 1976, at 44-53.

government.[129] The declaration should include, as a minimum, the date the blockade is to begin, its geographic limits, and the grace period granted neutral vessels and aircraft to leave the area to be blockaded.[130]

7.7.2.2 Notification. It is customary for the belligerent nation establishing the blockade to notify all affected nations of its imposition. Because knowledge of the existence of a blockade is an essential element of the offenses of breach and attempted breach of blockade (see 7.7.4), neutral vessels and aircraft are always entitled to notification. The commander of the blockading forces will usually also notify local authorities in the blockaded area. The form of the notification is not material so long as it is effective.[131]

7.7.2.3 Effectiveness. In order to be valid, a blockade must be effective. To be effective, it must be maintained by a surface, air, or subsurface force or other mechanism that is sufficient to render ingress or egress of the blockaded area dangerous. The requirement of effectiveness does not preclude temporary absence of the blockading force, if such absence is due to stress of weather or to some other reason connected with the blockade (e.g., pursuit of a blockade runner). Nor does effectiveness require that every possible avenue of approach to the blockaded area be covered.[132]

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[129] Declaration of London, art. 9, Schindler & Toman 846; NWIP 10-2, para. 632b; Tucker 287. A blockade may also be ordered by the UN Security Council pursuant to the specific language of article 42. It is not possible to say whether, or to what extent, a UN blockade would be governed by the traditional rules. NWIP 10-2, para. 632b, at n.29. Article 42 has never been applied by the Security Council. Goodrich & Hambro, Charter of the United Nations 315 (3d ed. 1969).

[130] Declaration of London, art. 9. A form for declaration of blockade is set forth at Annex AS7-7. Only the NCA can direct establishment of a blockade by U.S. forces. Although it is the customary practice of nations when declaring a blockade to specify a period during which neutral vessels and aircraft may leave the blockaded area, there is no uniformity with respect to the length of the period of grace. A belligerent declaring a blockade is free to fix such a period of grace as it may consider to be reasonable under the circumstances. NWIP 10-2, para. 632b n.30; Tucker 287; Alford, Modern Economic Warfare (Law and the Naval Participant) 345-51 (U.S. Naval War College, International Law Studies 1963, vol. 61, 1967).

[131] Declaration of London, arts. 11 & 16; NWIP 10-2, para. 632c & n.31; Tucker 288. See Annexes AS7-8 and AS7-9 for model forms of local notification.

[132] Declaration of London, arts. 2 & 3; NWIP 10-2, para. 632d & n.32; Tucker 288-89. One commentator has noted that:

> "Effective," in short, comes to mean sufficient to render capture probable under ordinary weather or other similar conditions. But even on this view, due no doubt to the fact that the lines of controversy were set before the

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7.7.2.4 Impartiality. A blockade must be applied impartially to the vessels and aircraft of all nations. Discrimination by the blockading belligerent in favor of or against the vessels and aircraft of particular nations, including those of its own or those of an Allied nation, renders the blockade legally invalid.[133]

7.7.2.5 Limitations. A blockade must not bar access to or departure from neutral ports and coasts.[134] Neutral nations retain the right to engage in neutral commerce that does not involve trade or communications originating in or destined for the blockaded area.

7.7.3 Special Entry and Exit Authorization. Although neutral warships and military aircraft enjoy no positive right of access to blockaded areas, the belligerent imposing the blockade may authorize their entry and exit. Such special authorization may be made subject to such conditions as the blockading force considers to be necessary and expedient. Neutral vessels and aircraft in evident distress should be authorized entry into a blockaded area, and subsequently authorized to depart, under conditions prescribed by the commander of the blockading force. Similarly, neutral vessels and aircraft engaged in the carriage of

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[132](...continued)

> **rise of steampower, mines, or submarines, aircraft and wireless communication, at least one man-o'-war must be present. Aircraft and submarines, however, as well as mines, concrete blocks, or other sunken obstacles, may be used as auxiliary to blockading surface vessel or vessels. How many surface vessels, with what speed and armament, are necessary, along with auxiliary means, and how close they must operate for effectiveness in view of the nature of the approaches to the blockaded port, are questions of nautical expertise in each case.**

Stone 496 (footnotes omitted), quoted in NWIP 10-2, para. 632d n.32. The presence of at least one surface warship is no longer an absolute requirement to make a blockade legally effective, as long as other sufficient means are employed. See paragraph 7.7.5 below.

[133] **Declaration of London, art. 5; NWIP 10-2, para. 632f & n.34; Tucker 288 & 291.**

[134] **Declaration of London, art. 18; NWIP 10-2, para. 632e; Tucker 289-90. This rule means that the blockade must not prevent trade and communication to or from neutral ports or coasts, provided that such trade and communication is neither destined to nor originates from the blockaded area (see paragraph 7.7.4 below). It is a moot point to what extent conventions providing for free navigation on international rivers or through international canals (see paragraph 2.3.3.1 note 36 above and 2 Oppenheim-Lauterpacht 771-75) have been respected by blockading nations. The practice of nations in this matter is far from clear. NWIP 10-2, para. 632e, at n.33.**

qualifying relief supplies for the civilian population and the sick and wounded should be authorized to pass through the blockade cordon.[135]

7.7.4 Breach and Attempted Breach of Blockade. Breach of blockade is the passage of a vessel or aircraft through a blockade without special entry or exit authorization from the blockading belligerent. Knowledge of the existence of the blockade is essential to the offenses of breach of blockade and attempted breach of blockade. Knowledge may be presumed once a blockade has been declared and appropriate notification provided to affected governments.[136] Attempted breach of blockade occurs from the time a vessel or aircraft leaves a port or airfield with the intention of evading the blockade. It is immaterial that the vessel or aircraft is at the time of interception bound for neutral territory, if its ultimate destination is the blockaded area. There is a presumption of attempted breach of blockade where vessels or aircraft are bound for a neutral port or airfield serving as a point of transit to the blockaded area.[137] Capture of such vessels is discussed in paragraph 7.9.

7.7.5 Contemporary Practice. The traditional rules of blockade, as set out above, are for the most part customary in nature, having derived their definitive form through the practice of maritime powers during the nineteenth century. The rules reflect a balance between the right of a belligerent possessing effective command of the sea to close enemy ports and coastlines to international commerce, and the right of neutral nations to carry out neutral commerce with the least possible interference from belligerent forces. The law of blockade is, therefore, premised on a system of controls designed to effect only a limited interference with neutral trade. This was traditionally accomplished by a relatively "close-in" cordon of surface warships stationed in the immediate vicinity of the blockaded area.

The increasing emphasis in modern warfare on seeking to isolate completely the enemy from outside assistance and resources by targeting enemy merchant vessels as well as warships, and on interdicting all neutral commerce with the enemy, is not furthered substantially by blockades established in strict conformity with the traditional rules. In World Wars I and II, belligerents of both sides resorted to methods which, although frequently referred to as measures of blockade, cannot be reconciled with the traditional concept of the close-in blockade. The so-called long-distance blockade of both World Wars departed materially from those traditional rules and were justified instead upon the belligerent right of reprisal against illegal acts of warfare on the part of the enemy. Moreover, recent developments in weapons systems and platforms, particularly nuclear-pow-

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[135] Declaration of London, art. 6; NWIP 10-2, para. 632h; Tucker 291-92; ICRC, Commentary 654, paras. 2095-96; Matheson, Remarks, note 105 above.

[136] Declaration of London, arts. 14 & 15; NWIP 10-2, para. 632g & n.35; Tucker 292-93.

[137] NWIP 10-2, para. 632g(1); 2 O'Connell 1157. The practice of nations has rendered obsolete the contrary provisions of the Declaration of London, arts. 17 & 19. See paragraph 7.4.1.1 above regarding presumption of ultimate enemy destination.

ered submarines, supersonic aircraft, and cruise missiles, have rendered the in-shore blockade exceedingly difficult, if not impossible, to maintain during anything other than a local or limited armed conflict.[138]

Notwithstanding this trend in belligerent practices (during general war) away from the establishment of blockades that conform to the traditional rules, blockade continues to be a useful means to regulate the competing interests of belligerents and neutrals in more limited armed conflict. The experience of the United States during the Vietnam Conflict provides a case in point. The blockade of Haiphong and other North Vietnamese ports, accomplished by the emplacement of mines, was undertaken in conformity with traditional criteria of establishment, notification, effectiveness, limitation, and impartiality.[139]

7.8 BELLIGERENT CONTROL OF THE IMMEDIATE AREA OF NAVAL OPERATIONS

Within the immediate area or vicinity of naval operations, a belligerent may establish special restrictions[140] upon the activities of neutral vessels and aircraft and may prohibit altogether such vessels and aircraft from entering the area. The immediate area or vicinity of naval operations is that area within which hostilities are taking place or belligerent forces are actually operating.[141] A belligerent may not, however, purport to

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[138] 2 O'Connell 1151-56; NWIP 10-2, para. 632a n.27; Tucker 305-15.

[139] McDougal & Feliciano 493-95; Swayze, Traditional Principles of Blockade in Modern Practice: United States Mining of Internal and Territorial Waters of North Vietnam, 29 JAG J. 143 (1977); Clark, Recent Evolutionary Trends Concerning Naval Interdiction of Seaborne Commerce as a Viable Sanctioning Device, 27 JAG J. 160 (1973). Compare Tucker 316-17. See 2 O'Connell 1156 (who erroneously states only three hours were allowed between notification and activation of the minefield; actually three daylight periods were allowed). O'Connell (at 1156) suggests that since in conditions of general war "close blockade is likely in the missile age to be a tactically unavailable option, and long-distance blockade to be a politically unavailable one," the twelve-mile territorial sea "may have facilitated naval operations in finding a compromise between close and long-distance blockade." See also paragraph 9.2.3 below.

[140] See, for example, paragraph 7.8.1 next below.

[141] NWIP 10-2, para. 430b & n.23; Tucker 300-01. Belligerent control over neutral vessels and aircraft within an immediate area of naval operations, a limited and transient claim, is based on a belligerent's right to attack and destroy his enemy, his right to defend himself without suffering from neutral interference, and his right to ensure the security of his forces.

The belligerent establishment of an immediate area of naval operations should be clearly distinguished from the belligerent practice during World Wars I and II of establishing

(continued...)

deny access to neutral nations, or to close an international strait to neutral shipping, pursuant to this authority unless another route of similar convenience remains open to neutral traffic.[142]

7.8.1 **Belligerent Control of Neutral Communications at Sea.** The commanding officer of a belligerent warship may exercise control over the communication of any neutral merchant vessel or civil aircraft whose presence in the immediate area of naval operations might otherwise endanger or jeopardize those operations.[143] A neutral merchant ship or civil aircraft within that area that fails to conform to a belligerent's directions concerning communications may thereby assume enemy character and risk being fired upon or captured. Legitimate distress communications should be permitted to the extent that the success of the operation is not prejudiced thereby. Any transmission to an opposing belligerent of information concerning military operations or military forces is inconsistent with the neutral duties of abstention and impartiality and renders the neutral vessel or aircraft liable to capture or destruction.[144]

7.9 CAPTURE OF NEUTRAL VESSELS AND AIRCRAFT

Neutral merchant vessels and civil aircraft[145] are liable to capture by belligerent warships and military aircraft if engaged in any of the following activities:

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[141](...continued)
"operational (or war) zones." Operational or war zones refer to areas of the high seas, of widely varying extent which, for substantial periods of time, are barred altogether to neutral shipping or within which belligerents claim the right to exercise a degree of control over neutral vessels not otherwise permitted by the rules of naval warfare. In practice, belligerents have based the establishment of operational or war zones on the right of reprisal against alleged illegal behavior of an enemy. See Tucker 301-17 and Fenrick, The Exclusion Zone Device in the Law of Naval Warfare, 24 Can. Y.B. Int'l L. 91 (1986) for detailed examinations of this subject. See also Russo, Neutrality at Sea in Transition: State Practice in the Gulf War as Emerging International Law, 19 Ocean Dev. & Int'l L. 381, 389-92, 396 (1988) and Leckow, The Iran-Iraq Conflict in the Gulf: The Law of War Zones, 37 Int'l & Comp. L.Q. 629 (1988).

[142] See Declaration of Paris, para. 4, Schindler & Toman 788; Declaration of London, art. 1; Oxford Manual, art. 30; NWIP 10-2, para. 632a.

[143] See Annex AS7-10 for a model form of such a declaration.

[144] NWIP 10-2, para. 520a; Tucker 300; 1923 Hague Radio Rules, art. 6, 17 Am. J. Int'l L. Supp. 242-45 (1923) (text), 32 id. 2-11 (1938) (text and commentary), Schindler & Toman 208 (text).

[145] See note 111 above for a discussion of how the rules may be applied to neutral civil aircraft engaging in unneutral service.

1. Avoiding an attempt to establish identity[146]

2. Resisting visit and search[147]

3. Carrying contraband[148]

4. Breaking or attempting to break blockade[149]

5. Presenting irregular or fraudulent papers; lacking necessary papers; or destroying, defacing, or concealing papers[150]

6. Violating regulations established by a belligerent within the immediate area of naval operations[151]

7. Carrying personnel in the military or public service of the enemy[152]

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[146] NWIP 10-2, para. 503d(5); Tucker 336. See also 11 Whiteman 30-38 for a discussion of resistance and evasion.

[147] NWIP 10-2, para. 503d(5). See paragraph 7.6 above.

[148] NWIP 10-2, para. 503d(1). Exceptions may exist when the owner of the vessel is unaware that some or all of the cargo being carried on his vessel was contraband. Tucker 295; 2 O'Connell 1148-49. See paragraph 7.4.1 above for a discussion of what constitutes contraband.

[149] NWIP 10-2, para. 503d(2). See paragraph 7.7.4 above.

[150] NWIP 10-2, para. 503d(6); Tucker 338 n.14.

[151] NWIP 10-2, para. 503d(7). See paragraph 7.8 above.

[152] NWIP 10-2, para. 503d(3); Tucker 325-30.

Normally, a neutral merchant vessel is not considered liable to capture for the acts enumerated in examples 7 and 8 of paragraph 7.9 if, when encountered at sea, she is unaware of the opening of hostilities, or if the master, after becoming aware of the opening of hostilities, has not been able to disembark those passengers who are in the military or public service of a belligerent. A vessel is deemed to know of the state of armed conflict if she left an enemy port after the opening of hostilities, or if she left a neutral port after a notification of the opening of hostilities had been made in sufficient time to the nation to which the port belonged. However, actual knowledge is often difficult or impossible to establish. Because of the existence of modern means of communication, a presumption of knowledge may be applied in all doubtful cases. The final determination of this question

(continued...)

8. Communicating information in the interest of the enemy.[153]

Captured vessels and aircraft are sent to a port or airfield under belligerent jurisdiction as prize for adjudication by a prize court. Ordinarily, a belligerent warship will place a prize master and prize crew on board a captured vessel for this purpose. Should that be impracticable, the prize may be escorted into port by a belligerent warship or military aircraft. In the latter circumstances, the prize must obey the instructions of its escort or risk forcible measures.[154] (Article 630.23 of OPNAVINST 3120.32B, Standard Organization and Regulations of the U.S. Navy, sets forth the duties and responsibilities of commanding officers and prize masters concerning captured vessels.[155])

Neutral vessels or aircraft attempting to resist proper capture lay themselves open to forcible measures by belligerent warships and military aircraft and assume all risk of resulting damage.[156]

7.9.1 Destruction of Neutral Prizes. Every reasonable effort should be made to avoid destruction of captured neutral vessels and aircraft. A capturing officer, therefore, should not order such destruction without being entirely satisfied that the prize can neither be sent into a belligerent port or airfield nor, in his opinion, properly be released.[157] Should it become necessary that the prize be destroyed, the capturing officer must provide for the safety of the passengers and crew.[158] In that event, all documents and papers relating to

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[152](...continued)
properly can be left to the prize court. NWIP 10-2, para. 503d n.25; Tucker 13, 263 & 325.

[153] **NWIP 10-2, para. 503d(4); Tucker 321 n.5 & 330-31; 1923 Hague Rules for Control of Radio in Time of War, art. 6. See paragraph 7.8.1 above.**

[154] **Tucker 345 n.36 and accompanying text.**

[155] **Article 630.23 is reproduced as Annex AS7-3. See also Annex AS7-4 which provides detailed instructions for prize masters, naval prize commissioners and special naval prize commissioners; Annex AS7-5, United States Prize Statutes; and Annex AS7-6, Forms for Use by Prize Masters and Commissioners.**

[156] **Tucker 336-37 & n.11.**

[157] **It should be noted that paragraph 7.9.1 refers to destruction of neutral merchant vessels whose capture for any of the acts mentioned in paragraph 7.9 has already been effected. Paragraph 7.9.1 does not refer to neutral merchant vessels merely under detention and directed into port for visit and search; such vessels are not prizes.**

[158] **See paragraph 8.2.2.2 and accompanying notes. The obligations laid down in the London Protocol of 1936, insofar as they apply to neutral merchant vessels and aircraft,**
(continued...)

the prize should be saved.[159] If practicable the personal effects of passengers should also be safeguarded.[160]

7.9.2 Personnel of Captured Neutral Vessels and Aircraft. The officers and crews of captured neutral merchant vessels and civil aircraft who are nationals of a neutral nation do not become prisoners of war and must be repatriated as soon as circumstances reasonably permit. This rule applies equally to the officers and crews of neutral vessels and aircraft which have assumed the character of enemy merchant vessels or aircraft by operating under enemy control or resisting visit and search. If, however, the neutral vessels or aircraft had taken a direct part in the hostilities on the side of the enemy or had served in any way as a naval or military auxiliary for the enemy, it thereby assumed the character of an enemy warship or military aircraft and, upon capture, its officers and crew may be interned as prisoners of war.[161]

Enemy nationals found on board neutral merchant vessels and civil aircraft as passengers who are actually embodied in the military forces of the enemy, who are en route to serve in the enemy's armed forces, who are employed in the public service of the enemy, or who may be engaged in or suspected of service in the interests of the enemy may be made prisoners of war. All such enemy nationals may be removed from the neutral vessel or aircraft whether or not there is reason for its capture as a neutral prize. Enemy nationals not falling within any of these categories are not subject to capture or detention.[162]

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[158](...continued)
remain valid, exception being made only for those neutral merchant vessels and aircraft performing any of the acts enumerated in paragraphs 7.5.1, 7.5.2 and 7.8. In its judgment on Admiral Doenitz, the International Military Tribunal at Nuremberg found the accused guilty of violating the London Protocol by proclaiming "operational zones" and sinking neutral merchant vessels entering those zones:

> **. . . the protocol made no exception for operational zones. The order of Doenitz to sink neutral ships without warning when found within these zones was, therefore, in the opinion of the Tribunal, a violation of the protocol.**

U.S. Naval War College, International Law Documents 1946-1947, at 300 (1948).

[159] **London Protocol, art. 22; Tucker 325.**

[160] **NWIP 10-2, para. 503e.**

[161] **Hague XI, arts. 5 & 8; NWIP 10-2, art. 513a & n.40. Auxiliaries are defined in paragraph 2.1.2.3 above.**

[162] **GPW, art. 4A; Hague XI, art. 6; NWIP 10-2, art. 513b & n.41.**

7.10 BELLIGERENT PERSONNEL INTERNED BY A NEUTRAL GOVERNMENT

International law recognizes that neutral territory, being outside the region of war, offers a place of asylum to members of belligerent forces and as a general rule requires the neutral government concerned to prevent the return of such persons to their own forces. The neutral nation must accord equal treatment to the personnel of all the belligerent forces.[163]

With respect to aircrews of belligerent aircraft that land in neutral territory, whether intentionally or inadvertently, the neutral nation should usually intern them.[164]

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[163] Hague V, art. 11; Hague XIII, arts. 9 & 24; Tucker 242 & n.97. See paragraph 7.3 above. U.S. forces rescued 26 crewmembers who abandoned the IRAN AJR following the TF 160 MH-6A helicopter attacks of 21 September 1987 while the AJR was laying mines in international waters off Bahrain. Five days later they were handed over to Omani Red Crescent officials and shortly thereafter were turned over to Iranian officials, along with the remains of three others killed in the attack on the IRAN AJR. On 8 October 1987, U.S. Navy SEALs rescued six Iranian revolutionary guardsmen overboard from IRGC small craft that had been attacked following their firing at three trailing Army helicopters (one OH-6 and two AH-6s) about 15 NM southwest of Farsi Island, two of whom subsequently died on board USS RALEIGH. They, and the bodies of the dead, were similarly returned to Iran. 1987 Int'l Rev. Red Cross 650. It is unknown whether Iraq consented to these arrangements, as contemplated by GWS-Sea, art. 17(1); in any event it does not appear that Iraq objected to these actions which seem to be inconsistent with GWS-Sea, art. 15; Hague XIII, art. 24; and Hague V, art. 11.

[164] The text was changed in Revision A to be consistent with paragraph 7.3.7(2) above and to reflect NWIP 10-2, para. 444b & n.40 which treated this duty as discretionary ("should usually intern"). See notes 85 & 87 above. Other sources would *require* internment: Hague V, art. 11; 1923 Hague Rules of Air Warfare, art. 43; AFP 110-31, para. 2-6c; Tucker 251-52; 2 Levie, The Code of International Armed Conflict 807 ("there does not appear to be any reason for not accepting the present article as a current rule of the law of war").

Neutrals have no duty to intern belligerent aircrews rescued in international waters. On 31 August 1987, while escorting U.S. flag tankers, USS GUADALCANAL rescued an Iraqi fighter pilot downed by an Iranian air-to-air missile in international waters of the Persian Gulf. He was turned over to officials of the Saudi Arabian Red Crescent. N.Y. Times, 2 Sep. 1987, at A6; Washington Post, 2 Sep. 1987, at A18.

CHAPTER 8

The Law of Naval Targeting

8.1 PRINCIPLES OF LAWFUL TARGETING

The law of naval targeting is premised upon the three fundamental principles of the law of armed conflict:[1]

1. The right of belligerents to adopt means of injuring the enemy is not unlimited.[2]

2. It is prohibited to launch attacks against the civilian population as such.[3]

3. Distinctions must be made between combatants and noncombatants, to the effect that noncombatants be spared as much as possible.[4]

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[1] The United States considers these three fundamental principles as customary international law. General Counsel, Department of Defense letter of 22 Sept. 1972, reprinted in 67 Am. J. Int'l L. 122 (1973). See also Res. XXVIII of the XXth International Conference of the Red Cross, Vienna, 1965 (Schindler & Toman 259-69), UNGA Res. 2444(XXIII), 19 Dec. 1968 (Schindler & Toman 261-62), and UNGA Res. 2675(XXV), 9 Dec. 1970 (Schindler & Toman 267-68).

[2] HR, art. 22; cf. Lieber Code, art. 30. Article 22 of the Hague Regulations, which refers to weapons and methods of warfare, is merely an affirmation that the means of warfare are restricted by rules of conventional (i.e., treaty) and customary international law. This principle is applicable to the conduct of naval warfare and is viewed by the United States as customary international law. See also Additional Protocol I, article 35(1), which is viewed by the United States as declarative of customary international law. The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 Am. U.J. Int'l L. & Policy 424 (1987) (remarks of U.S. Department of State Deputy Legal Adviser Matheson). Cf. CDDH/SR.39, annex (FRG) and Bothe, Partsch & Solf 194. See paragraph 5.4.2 note 30 above regarding the U.S. decision not to seek ratification of Additional Protocol I.

[3] This customary rule of international law is codified for the first time in Additional Protocol I, article 51(2). Bothe, Partsch & Solf 299 & n.3; FM 27-10, para. 25; AFP 110-31, para. 5-3. See paragraphs 5.3 above and 11.2 below.

[4] This customary rule of international law is codified for the first time in Additional Protocol I, article 57(1). Bothe, Partsch & Solf 359. See paragraphs 5.3 above and 11.2 below.

These legal principles governing targeting generally parallel the military principles of *the objective*, *mass* and *economy of force*.[5] The law requires that only objectives of military importance be attacked but permits the use of sufficient mass to destroy those objectives. At the same time, unnecessary (and wasteful) collateral destruction must be avoided to the extent possible and, consistent with mission accomplishment and the security of the force, unnecessary human suffering prevented.[6] The law of naval targeting, therefore, requires that all reasonable precautions must be taken to ensure that only military objectives are targeted so that civilians and civilian objects are spared as much as possible from the ravages of war.[7]

8.1.1 Military Objective. Only combatants and other military objectives may be attacked.[8] Military objectives are those objects which, by their nature, location, purpose, or use, effectively contribute to the enemy's war-fighting or war-sustaining capability *and* whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack.[9] Military advantage may involve a variety of considerations including the security of the attacking force.

Proper targets for naval attack include such military objectives as enemy warships and military aircraft, naval and military auxiliaries, naval and military bases ashore, warship construction and repair facilities, military depots and warehouses, POL storage areas, docks, port facilities, harbors, bridges, airfields, military vehicles, armor, artillery, ammunition stores, troop concentrations and embarkation points, lines of communication and other objects used to conduct or support military operations. Proper naval targets also include geographic targets, such as a mountain pass,[10] and buildings and facilities that provide

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[5] See paragraph 5.2, note 8 thereto, and Figure SF5-1.

Bothe, Partsch & Solf 299, 309 & 359-61. See paragraph 8.1.2.1 below.

[7] This customary rule of international law is codified for the first time in Additional Protocol I, article 57(4). Bothe, Partsch & Solf 369.

[8] This customary rule is codified in Additional Protocol I, article 52(2). Military personnel that may not be attacked are discussed in chapter 11 below. Other military objectives that may not be attacked are discussed in the succeeding paragraphs of this chapter.

[9] This variation of the definition contained in Additional Protocol I, article 52(2), is not intended to alter its meaning, and is accepted by the United States as declarative of the customary rule. See Bothe, Partsch & Solf 323-26. Cf. FM 27-10, para. 40c (ch. 1, 15 July 1976).

[10] Bothe, Partsch & Solf 325. Some nations have noted that a specific area of land may also be a military objective. Statements of Italy (1986 Int'l Rev. Red Cross 113), the

(continued...)

administrative and personnel support for military and naval operations such as barracks, communications and command and control facilities, headquarters buildings, mess halls, and training areas.

Proper economic targets for naval attack include enemy lines of communication used for military purposes, rail yards, bridges, rolling stock, barges, lighters, industrial installations producing war-fighting products, and power generation plants. Economic targets of the enemy that indirectly but effectively support and sustain the enemy's war-fighting capability may also be attacked.[11]

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[10](...continued)
Netherlands (1987 id. 426) and New Zealand (1988 id. 186) on ratification of, and the United Kingdom (Schindler & Toman 717) on signature to, Additional Protocol I. See also ICRC, Commentary 621-22.

[11] The United States considers this a statement of customary law. General Counsel, Department of Defense, letter of 22 Sept. 1972, reprinted in 67 Am. J. Int'l L. 123-24 (1973). An 1870 international arbitral tribunal recognized that the destruction of raw cotton within Confederate territory by the Union was justified during the American Civil War since the sale of cotton provided funds for almost all Confederate arms and ammunition. 6 Papers Relating to the Treaty of Washington 52-57 (1874) (Report of U.S. Agent); 7 Moore 693-94; Carnahan, Protecting Civilians under the Draft Geneva Protocol: A Preliminary Inquiry, 18 A.F.L. Rev. 47-48 (1976); Bothe, Partsch & Solf 324 n.15; Hague Cultural Property Convention, art. 8(3). Whether this rule permits attacks on war-sustaining cargo carried in neutral bottoms at sea, such as by Iraq on the tankers carrying oil exported by Iran during the Iran-Irag war, is not firmly settled. Authorization to attack such targets is likely to be reserved to higher authority. See paragraph 7.4 & note 90 above, and note 52 below this chapter.

When civil aircraft form part of enemy lines of communication, they are legitimate military objectives. Before targeting or attacking any civil aircraft, particular care should be taken to ensure they are legitimate military objectives. See paragraph 8.2.3.6 for the special rules regarding destruction of civil airliners in flight.

Civilian vessels, aircraft, vehicles, and buildings may be lawfully attacked if they contain combatant personnel or military equipment or supplies or are otherwise associated with combat activity inconsistent with their civilian status and if collateral damage would not be excessive under the circumstances (see paragraphs 8.1.2.1 and 8.2.2.2 below). (For other circumstances when civilian objects may be attacked, see paragraphs 8.3 through 8.5.1.7.) See also paragraph 11.3 below.

Hospital ships, noninterfering neutral vessels, medical units, medical vehicles and aircraft, civilian and military churches and chapels, and cultural objects (among others) may not, of course, be attacked unless they are being used by the enemy for military or other prohibited purposes. For details, see paragraphs 8.2.3, 8.3.2, 8.4.1 and 8.5.1.4 to 8.5.1.6
(continued...)

8.1.2 Civilian Objects. Civilian objects may not be made the object of attack.[12] Civilian objects consist of all civilian property and activities other than those used to support or sustain the enemy's war-fighting capability.[13] Attacks on installations such as dikes and dams are prohibited if their breach or destruction would result in the loss of civilian lives disproportionate to the military advantage to be gained.[14] (See also paragraph 8.5.1.7.) Similarly, the intentional destruction of food, crops, livestock, drinking water, and other objects indispensable to the survival of the civilian population, for the specific purpose of denying the civilian population of their use, is prohibited.[15]

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[11](...continued)
below.

[12] Additional Protocol I, article 52(1), codifying customary international law. That portion of article 52(1) stating that civilian objects shall not be the object of reprisals creates new law for nations party to Additional Protocol I. See Table ST6-2 above, New Protocol I Restrictions on Reprisals.

[13] Additional Protocol I, article 52(1), defines civilian objects as "all objects which are not military objectives as defined in paragraph 2." The definition of military objectives in paragraph 8.1.1, although not identical to that in Additional Protocol I, article 52(2), is quite similar.

[14] Additional Protocol I, article 56, would create new law to prohibit, except in very limited circumstances, attacks on this limited class of objects even if the attack was proportional. Such a restriction is militarily unacceptable, particularly since the class of objects may be heavily defended. For historic development, see Human Rights and Armed Conflict: Conflicting Views, 1973 Proc. Am. Soc. Int'l L. 141, President Nixon's News Conference of 27 July 1972, 62 Dep't St. Bull. 173, 201, 203 (1972); for a detailed analysis of article 56, see Bothe, Partsc & Solf 350-57 and ICRC, Commentary 666-75.

[15] This customary rule is accepted by the United States, Letter from DoD General Counsel to Chairman, Sen. Comm. on For. Rel., 5 April 1971, reprinted in 10 Int'l Leg. Mat'ls 1301 (1971), and is codified in Additional Protocol I, article 54(2).

Article 54(1) of Additional Protocol I would create a new prohibition on the starvation of civilians as a method of warfare (Bothe, Partsch & Solf 336-38; Solf, Protection of Civilians Against the Effects of Hostilities Under Customary International Law and Under Protocol I, 1 A.U.J. Int'l L. & Pol'y 117, 133 (1986)) which the United States believes should be observed and in due course recognized as customary law (Matheson, Remarks, note 2 above, at 426). Starvation of civilians as a method of warfare has potential implications on the law of blockade and categories of contraband which are discussed in id. at 338-39 & 433-35, and ICRC, Commentary 653-54. Blockade is discussed in detail in paragraph 7.7 above.

8.1.2.1 **Incidental Injury and Collateral Damage.** It is not unlawful to cause incidental injury or death to civilians, or collateral damage to civilian objects, during an attack upon a legitimate military objective.[16] Incidental injury or collateral damage should not, however, be excessive in light of the military advantage anticipated by the attack.[17] Naval commanders must take all practicable precautions, taking into account military and humanitarian considerations, to keep civilian casualties and damage to the absolute minimum consistent with mission accomplishment and the security of the force.[18] In each instance, the commander must determine whether incidental injuries and collateral damage would be excessive, on the basis of an honest and reasonable estimate of the facts available to him.[19] Similarly, the commander must decide, in light of all the facts known or reasonably available to him, including the need to conserve resources and complete the

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[16] Lieber Code, art. 15; AFP 110-31, para. 5-3c(2)(b), at 5-10. Accord, An Introduction to Air Force Targeting, AFP 200-17, para. 8-3 (1978); AFP 110-34, para. 3-8.

[17] This rule of proportionality, which is inherent in both the principles of humanity and necessity upon which the law of armed conflict is based (see paragraph 5.2 above), is codified in Additional Protocol I, articles 51(5)(b) and 57(2)(a)(ii) & (iii). Bothe, Partsch and Solf 309-11 & 359-67; Matheson, Remarks, note 2 above, at 426. Fenrick, The Rule of Proportionality and Protocol I in Conventional Warfare, 98 Mil. L. Rev. 91, 125 (1982), while viewing as unsettled the principle of proportionality as customary law, views the requirement to reconcile humanitarian imperatives and military requirements during armed conflict as widely recognized. Cf. FM 27-10, para. 41 (ch. 1). Some nations have asserted that the advantage anticipated must consider the attack as a whole and not only from isolated or particular parts of the attack: on ratification of Additional Protocol I, Belgium (1986 Int'l Rev. Red Cross 174), the Netherlands (1987 id. 426), Italy (1986 id. 113); and the United Kingdom on signature (Schindler & Toman 717). These and other nuances are examined in ICRC, Commentary 683-85, and Kalshoven, Constraints on the Waging of War 99-100 (1987). See also paragraph 5.2 note 6 above.

[18] This principle, reflected in GP I, art. 57(2), is supported by the United States as customary law. Matheson, Remarks, note 2 above, at 426, and Bothe, Partsch & Solf 359. Compare the requirement of Additional Protocol I, articles 51-58, to take "feasible" precautions which NATO and other nations understood to mean "that which is practicable or practically possible, taking into account all circumstances at the time, including those relevant to the success of military operations." Bothe, Partsch & Solf 373; declarations on ratification of Additional Protocol I by Belgium, the Netherlands, and Italy, and the United Kingdom on signature, note 17 above.

[19] GP I, art. 57(2)(a)(iii), as interpreted on ratification of Additional Protocol I by Belgium, the Netherlands, and Italy; by the United Kingdom on signature, note 17 above; and Bothe, Partsch and Solf 279-80, 310 & 363. Cf. FM 27-10, para. 41 (ch. 1).

mission successfully, whether to adopt an alternative method of attack, if .easonably available, to reduce civilian casualties and damage.[20]

8.2 SURFACE WARFARE

As a general rule, surface warships may employ their conventional weapons systems to attack, capture, or destroy enemy surface, subsurface, and air targets at sea wherever located beyond neutral territory. (Special circumstances in which enemy warships and military aircraft may be attacked in neutral territory are discussed in Chapter 7 The Law of Neutrality.)[21] The law of armed conflict pertaining to surface warfare is concerned primarily with the protection of noncombatants[22] through rules establishing lawful targets of attack. For that purpose, all enemy vessels and aircraft fall into one of three general classes, i.e., warships and military aircraft,[23] merchant vessels and civilian aircraft,[24] and exempt vessels and aircraft.[25]

8.2.1 Enemy Warships and Military Aircraft. Enemy warships and military aircraft. including naval and military auxiliaries, are subject to attack, destruction, or capture anywhere beyond neutral territory.[26] It is forbidden, however, to refuse quarter to any enemy who has surrendered in good faith.[27] Once an enemy warship has clearly indicated a readiness to surrender by hauling down her flag, by hoisting a white flag, by surfacing (in

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[20] GP I, art. 57(3), as interpreted by governments and commentators cited in note 19 above.

[21] Conventional weapons are discussed in Chapter 9 Conventional Weapons and Weapons Systems. Special weapons are discussed in Chapter 10 Nuclear, Chemical, and Biological Weapons.

[22] Noncombatants are discussed in Chapter 11 Noncombatant Persons.

[23] Discussed in paragraph 8.2.1.

[24] Discussed in paragraph 8.2.2.

[25] Discussed in paragraph 8.2.3.

[26] Although this customary rule is not codified in any treaty on the law of naval warfare, it appears in the 1913 Oxford Manual of Naval War, articles 1 & 31, reprinted in Schindler & Toman 858 & 860 and NWIP 10-2, articles 430a, 441 & 503a.

[27] HR, art. 23(c), reaffirmed in more modern language in GP I, art. 41. Article 40 and Additional Protocol II, article 4(1), reaffirm the prohibition of Hague Regulations, article 23(d), against ordering that there shall be no survivors. Matheson, Remarks, note 2 above, at 425. However, quarter can be refused when those who ask for it subsequently attempt to destroy those who have granted it. NWIP 10-2, art. 511c n.34.

the case of submarines), by stopping engines and responding to the attacker's signals, or by taking to lifeboats, the attack must be discontinued.[28] Disabled enemy aircraft in air combat are frequently pursued to destruction because of the impossibility of verifying their true status and inability to enforce surrender.[29] Although disabled, the aircraft may or may not have lost its means of combat. Moreover, it still may represent a valuable military asset. Accordingly, surrender in air combat is not generally offered.[30] However, if surrender is offered in good faith so that circumstances do not preclude enforcement, it must be respected.[31] Officers and crews of captured or destroyed enemy warships and military aircraft should be made prisoners of war.[32] (See Chapter 11, Noncombatant Persons.) As far as military exigencies permit, after each engagement all possible measures should be taken without delay to search for and collect the shipwrecked, wounded, and sick and to recover the dead.[33]

Prize procedure is not used for captured enemy warships and naval auxiliaries because their ownership vests immediately in the captor's government by the fact of capture.[34]

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[28] NWIP 10-2, para. 511c n.35, and Mallison 134 (summarizing customary practice described in the *Trial of Von Ruchteschell*, 1 Reps. U.N. Comm. 89 (1947), 9 LRTWC 89 (1949)).

[29] AFP 110-31, para. 4-2d, at 4-1; Spaight 125-27. Spaight, at 128-30, describes a few cases of surrender in the air during World War I.

[30] AFP 110-31, para. 4-2d.

[31] Ibid; AFP 110-34, para. 3-3b, at 3-2.

[32] GWS-Sea, art. 16.

[33] Hague X, art. 16; GWS-Sea, art. 18; the corresponding provision in land warfare is set forth in GWS, art. 15; there is no corresponding requirement in the Fourth Geneva Convention. A new duty to search for the missing is imposed by Additional Protocol I, article 33, which the United States supports. Matheson, Remarks, note 2 above, at 424. See also paragraph 11.4 note 19 below.

The procedures for search and rescue set forth in the National Search and Rescue Manual (NWP 19/COMDTINST M16120.5/FM 20-150/AFM 64-2), Combat Search and Rescue Procedures (NWP 19-2/AFR 64-3/AR 525-90), and Search and Rescue (ATP 10), are designed for recovery of own and allied forces. Nevertheless, those procedures should be followed, to the extent they are applicable, in complying with the requirement set forth in the text.

[34] NWIP 10-2, art. 503a(2). See paragraphs 2.1.2.2 and 2.1.2.3 above.

8.2.2 Enemy Merchant Vessels and Civilian Aircraft

8.2.2.1 Capture. Enemy merchant vessels and civil aircraft may be captured at sea wherever located beyond neutral territory.[35] Prior exercise of visit and search is not required, provided positive determination of enemy status can be made by other means.[36] When military circumstances preclude sending or taking in such vessel or aircraft for adjudication as an enemy prize, it may be destroyed after all possible measures are taken to provide for the safety of passengers and crew.[37] Documents and papers relating to the prize should be safeguarded and, if practicable, the personal effects of passengers should

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[35] This rule, previously set forth in NWIP 10-2, para. 503b(1) (1956), Tentative Instructions for the Navy of the United States Governing Maritime and Aerial Warfare, May 1941, para. 67, and Instructions for the Navy of the United States Governing Maritime Warfare, June 1917, para. 62, reflects the rejection by the United States of Hague Convention No. VI relating to the status of enemy merchant vessels at the outbreak of hostilities. The United States Naval War Code of 1900, article 14, had a similar rule. See Tucker 74-75, 102-03 & 108-09, and U.S. Naval War College, International Law Topics and Discussions 1905, at 9-20 (1906), for discussions of this rule which is opposite to that applicable in land warfare, where the private property of the enemy population may not, as a general rule, be seized and confiscated. See also Mallison 101.

[36] NWIP 10-2, para. 502a & n.9; Tucker 103-04 & n.31; Mallison 101 & n.19.

[37] NWIP 10-2, para. 502b(2) & nn.18, 19 & 21; Tucker 106-08 & n.40. As against an enemy, title to captured enemy merchant vessels or aircraft vests in the captor's government by virtue of the fact of capture. However, claims may be made by neutrals, either with respect to the captured vessel or aircraft, or with respect to the cargo (normally, noncontraband neutral cargo on board a captured enemy vessel is not liable to confiscation). For these reasons, it is always preferable that captured enemy prizes be sent in for adjudication, whenever possible.

It remains unclear whether the law of naval warfare now permits destruction if the "all possible measures" taken do not in fact provide for the safety of passengers and crew.

be saved.[38] Every case of destruction of a captured enemy prize should be reported promptly to higher command.[39]

Officers and crews of captured enemy merchant ships and civilian aircraft may be made prisoners of war.[40] Other enemy nationals on board such captured ships and aircraft as private passengers are subject to the discipline of the captor.[41] Nationals of a neutral nation on board captured enemy merchant vessels and civilian aircraft are not made prisoners of war unless they have participated in acts of hostility or resistance against the captor.[42]

8.2.2.2 Destruction. Prior to World War II, both customary and conventional international law prohibited the destruction of enemy merchant vessels by surface warships unless the safety of passengers and crew was first assured. This requirement did not apply, however, if the merchant vessel engaged in active resistance to capture or refused to stop when

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[38] NWIP 10-2, para. 502b(2) & n.20. All the documents and papers of a prize, as required by 10 U.S.C. sec. 7657, should be taken on board the capturing vessel of war and should be inventoried and sealed, in accordance with the procedure set forth in that section, for delivery to the prize court, with particular attention being paid to the protection of the interests of the owners of innocent neutral cargo on board, if such exists. OPNAVINST 3120.32B, para. 630.23.5f, Annex AS7-3. A list of such documents and papers is furnished in paragraph 2.4 of Annex AS7-4, Instructions for Prize Masters, Naval Prize Commissioners, and Special Naval Prize Commissioners. The U.S. prize statutes, 10 U.S.C. secs. 7651-7681, appear as Annex AS7-5.

[39] NWIP 10-2, para. 502b(2).

[40] GPW, art. 4A(5); NWIP 10-2, para. 512. The evolution of the law regarding the treatment of persons found on captured enemy merchant ships and aircraft is described in Tucker 112-15.

[41] NWIP 10-2, para. 512 & n.38. If necessary, enemy nationals found on board captured enemy merchant vessels may be treated as prisoners of war. GPW, art. 5. Normally, however, enemy nationals who are merely private individuals are placed under detention and subjected to the discipline of the captor. GC, art. 4 & 41. Enemy nationals in the public service of an enemy nation may be made prisoners of war. Tucker 114-15 & nn.61-62.

[42] Hague XI, arts. 5 & 8; GPW, art. 5; NWIP 10-2, para. 512 & n.39; Tucker 113-14 & n.60.

ordered to do so.[43] Specifically, the London Protocol of 1936, to which almost all of the belligerents of World War II expressly acceded,[44] provides in part that:

> *In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to taken them on board.*

During World War II, the practice of attacking and sinking enemy merchant vessels by surface warships, submarines, and military aircraft without prior warning and without first providing for the safety of passengers and crew was widespread on both sides. Rationale for these apparent departures from the agreed rules of the 1936 London Protocol varied. Initially, such acts were justified as reprisals against illegal acts of the enemy. As the war progressed, however, merchant vessels were regularly armed and convoyed, participated in intelligence collection, and were otherwise incorporated directly or indirectly into the enemy's war-fighting/war-sustaining effort. Consequently, enemy merchant vessels were widely regarded as legitimate military targets subject to destruction on sight.

Although the rules of the 1936 London Protocol continue to apply to surface warships, they must be interpreted in light of current technology, including satellite communications, over-the-horizon weapons, and antiship missile systems, as well as the customary practice of belligerents that evolved during and following World War II. Accordingly, enemy merchant vessels may be attacked and destroyed by surface warships, either with or without prior warning, in any of the following circumstances:[45]

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[43] **NWIP 10-2, para. 503b(3) n.21; Treaty relating to the Use of Submarines and Noxious Gases in Warfare, Washington, 6 February 1922, never came into force, 3 Malloy 3118, 6 Wiktor 398-99, preamble & art. I; Treaty for the Limitation and Reduction of Naval Armaments, London, 22 April 1930, entered into force for the United States 31 December 1930, 46 Stat. 2881-82, T.S. 380, 112 L.N.T.S. 88, 4 Malloy 5281, 2 Bevans 1070, 2 Hackworth 691, art. 22; Proces-Verbal relating to the Rules of Submarine Warfare set forth in Part IV of the Treaty of London of 22 April 1930, London, 6 November 1936 (London Protocol), 3 Bevans 298-99, 173 L.N.T.S. 357, 7 Hudson 492. The developments are considered in detail in Tucker 55-70 and Mallison 106-23.**

[44] **China and Romania were the World War II belligerents who did not accede to the London Protocol of 1936.**

[45] **The London Protocol was designed to protect only those merchant ships which "at the moment" were not "participating in hostilities in such a manner as to cause [them] to lose [their] right to the immunities of a merchant vessel." Report of the Committee of Jurists, 3 April 1930, who drafted article 22, reprinted in Dep't of State, Proceedings of the**

(continued...)

1. Actively resisting visit and search or capture[46]

2. Refusing to stop upon being duly summoned to do so[47]

3. Sailing under convoy of enemy warships or enemy military aircraft[48]

4. If armed[49]

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[45](...continued)
London Naval Conference of 1930 and Supplementary Documents 189 (Dep't of State Conf. Ser. No. 6, 1931), and quoted in U.S. Naval War College, International Law Situations 1930, at 5 (1931), Mallison 120, and Tucker 63. Unfortunately the Conference delegates were unable to agree on the circumstances that would cause the loss of the immunities of a merchant vessel. The list of circumstances set out in the text of paragraph 8.2.2.2 reflects the practice of nations and the judgment of the International Military Tribunal on Admiral Doenitz. 1 TMWC 313, 40 U.S. Naval War College, International Law Documents 1946-47, at 300-301 (1948); 1 Levie, The Code of International Armed Conflict 162-63. Contra, Parks, Conventional Aerial Bombing and the Law of War, U.S. Naval Inst. Proc., May 1982, at 106 (the London Protocol is "of historical interest only"), and O'Connell, International Law and Contemporary Naval Operations, 44 Br. Y.B. Int'l L. 52 (1970) ("submarines operating in times of war are today governed by no legal text").

[46] Second exception to the general rule of the London Protocol quoted in the text of paragraph 8.2.2.2.

[47] The refusal must be *persistent* to meet the standard of the first exception to the general rule of the London Protocol quoted in the text of paragraph 8.2.2.2. See note 63 and accompanying text below.

[48] This "accurately reflects the traditional law as well as the uniform practice of the two World Wars." Mallison 122.

[49] In light of modern weapons, it is impossible to determine, if it ever was possible, whether the armament on merchant ships is to be used offensively against an enemy or merely defensively. It is unrealistic to expect enemy forces to be able to make that determination. Accordingly, this rule has been modified in this text from that previously appearing in NWIP 10-2, para. 503b(3)(4). See U.S. Naval War College, International Law Situations 1930, at 9-19 & 21-25 for a discussion of earlier conflicting views of nations on armed merchant vessels.

5. If incorporated into, or assisting in any way, the intelligence system of the enemy's armed forces[50]

6. If acting in any capacity as a naval or military auxiliary to an enemy's armed forces[51]

7. If integrated into the enemy's war-fighting/war-sustaining effort and compliance with the rules of the 1936 London Protocol would, under the circumstances of the specific encounter, subject the surface warship to imminent danger or would otherwise preclude mission accomplishment.[52]

Rules relating to surrendering and to the search for and collection of the shipwrecked, wounded, and sick and the recovery of the dead, set forth in paragraph 8.2.1, apply also to enemy merchant vessels and civilian aircraft that may become subject to attack and destruction.[53]

8.2.3 Enemy Vessels and Aircraft Exempt from Destruction or Capture. Certain classes of enemy vessels and aircraft are exempt under the law of naval warfare from capture or destruction provided they are innocently employed in their exempt category.[54] These specially protected vessels and aircraft must not take part in the hostilities, must not hamper

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[50] This reflects the traditional law as it developed during the two World Wars. Mallison 122-23.

[51] Mallison (at 123) correctly points out that a traditional interpretation of this paragraph would not permit destruction of an enemy merchant ship designed for carrying cargo and actually carrying cargo of substantial military importance, but that is not a "military or naval auxiliary" because it is not owned by or under the exclusive control of the armed forces (see paragraph 2.1.2.3 above for a discussion of auxiliaries), and does not fall under the other numbered subparagraphs of 8.2.2.2.

[52] This new paragraph is added to cope with the circumstance described in note 51 and to reflect the actual practice of nations, at least in general wars. See Mallison 120-21 & 123. Although the term "war-sustaining" is not subject to precise definition, "effort" that indirectly but effectively supports and sustains the belligerent's war-fighting capability properly falls within the scope of the term. See paragraphs 7.4 note 90 and 8.1.1 & note 11 above.

[53] See note 33 and accompanying text above.

[54] The granting of this protection is consistent with the "maintenance of military efficiency." Mallison 16. These classes of exempt vessels are discussed in Tucker 86-98 and Mallison 123-29.

the movement of combatants, must submit to identification and inspection procedures, and may be ordered out of harm's way.[55] These specifically exempt vessels and aircraft include:

1. Vessels and aircraft designated for and engaged in the exchange of prisoners (cartel vessels).[56]

2. Properly designated and marked hospital ships, medical transports, and known medical aircraft.[57]

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[55] In such a way, the law fairly balances the rights of opposing belligerents. As reflected in the succeeding notes to this paragraph, the practice of nations is generally consistent with this balance.

[56] Tucker 97-98; Mallison 126; NWIP 10-2, para. 503c(1). Cartel ships were used *at the conclusion* of the Falklands/Malvinas conflict to repatriate about 10,000 Argentine PWs. The British used three requisitioned merchant ships, Argentina two of its hospital ships. Each ship was identified by flying the flag of truce and the colors of the two nations. Junod, Protection of the Victims of Armed Conflict Falkland-Malvinas Islands (1982), at 31. However, during World War II at least 15,000 PWs and civilian internees disappeared at sea as a result of attacks against the ships that were carrying them. Report of the ICRC on its Activities During the Second World War 319. Temporary detention of PWs and others aboard naval vessels is discussed in paragraph 11.8.4 below.

[57] GWS-Sea, arts. 22 & 29 (hospital ships) and 39 (medical aircraft); Tucker 97 & 123-34; Mallison 124-25; NWIP 10-2, para. 503c(2). Coastal rescue craft are also exempt from capture and destruction. GWS-Sea, art. 27; Eberlin, The Protection of Rescue Craft in Periods of Armed Conflict, 1985 Int'l Rev. Red Cross 140. Temporary medical ships would be granted a lesser degree of protection by Additional Protocol I, article 23.

GWS-Sea, article 36, provides the hospital ship's medical personnel and crew may not be attacked or captured, even if there are no sick and wounded on board. This extensive protection reflects the facts that hospital ships without crew cannot function, and that the protection and care of the sick and wounded would be impossible without a medical staff. They must, however, not be used for any other purpose during the conflict, particularly in an attempt to shield military objectives from attack. To ensure this, an opposing force may visit and search hospital ships, put on board a commissioner temporarily or put on neutral observers (as was done in the 1982 Falklands war), detain the ship for no more than seven days (if required by the gravity of the circumstances), and control the ship's means of communications. The opposing force may also order hospital ships to depart, make them take a certain course, or refuse assistance to them. GWS-Sea, arts. 30-31.

Hospital ships can leave port even if the port falls into enemy hands. Hospital ships are not classified as warships with regard to the length of their stay in neutral ports. GWS-Sea, arts. 29 & 32. See paragraph 7.3.2.1 above.

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Marking. To ensure protection for its hospital ships, U.S. practice has been to mark and illuminate them as follows:

1. Exterior surfaces shall be white except those areas designated for identifying insignia.

2. Weather decks covered with wood shall be unpainted except for a square white area to be painted around the distinctive emblem, i.e., red crosses.

3. Steel weather decks outside of walking areas shall be painted white and walking areas thereon shall be gray.

4. Outer smoke pipe casing, booms, masts, and boats shall be white except that a black band shall be painted around the top of smoke stacks.

5. Three red crosses, as large as possible, shall be painted on each side of the hull (forward, center and aft).

6. Two red crosses, as large as possible, shall be painted on top of the superstructure (forward and aft) with an additional red cross as large as possible on the forward vertical face of the forward superstructure.

7. One red cross, as large as possible, shall be painted on each side of the stern of boats and on each side of life rafts. Each boat may also be equipped with a mast on which a red cross flag measuring at least 6 by 6 feet can be hoisted.

8. To provide the desired contrast where infra-red instruments and infra-red film are used, the red cross may be painted over a black cross.

9. Optional flashing blue lights may be installed in accordance with Annex AS11-5, Visual Signal for Medical Transports. See also paragraph S11.11.2.

10. The whole ship, particularly the red crosses, should be fully illuminated at night.

GWS-Sea, art. 43; International Code of Signals, Pub. No. 102, at 136 (Notice to Mariners 52/85, at II-2.4); and Figure 11-1a. See Eberlin, Identification of Hospital Ships and Ships Protected by the Geneva Conventions of 12 August 1949, 1982 Int'l Rev. Red Cross 315; and Eberlin, Underwater acoustic identification of hospital ships, 1988 id. 505. GWS-Sea, art. 27, extends these rules to rescue craft "so far as operational requirements permit."

Communications. Hospital ships are authorized to carry equipment to be used solely for those transmissions necessary to movement or navigation. GWS-Sea, art. 35(2). See

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paragraph S11.11 and Annexes AS11-4 and AS11-5 below for a description of, and discussion of the legal effect of, the optional signals now available to identify medical transports and hospital ships.

Hospital ships may not use or possess cryptographic means of communication. GWS-Sea, art. 34(2). Constant care must therefore be given to ensure transmissions in the clear do not compromise operational integrity. It should be noted that the equally authentic French text, as well as the official Spanish translation, of article 34 prohibit only the sending ("pour leurs emissions"), but not the receiving as seems to be implied in the English text, of secret codes. See Revision of Annex I to Protocol I, 1983 Int'l Rev. Red Cross 26.

Notification. Ten days prior to placing a hospital ship into service, notification must be effected to the parties to the conflict of the vessel's characteristics and name. The characteristics include at least the gross registered tonnage, length and the number of masts and funnels and may also include, for example, the vessel's silhouette. GWS-Sea, art. 22. The notification can be made in peacetime (to other nations party to the 1949 Geneva Conventions), when the ship is nearing completion, or even after the outbreak of hostilities. As a precaution, it is advisable to confirm earlier notification at the opening of hostilities. 2 Pictet, Commentary 161. See also the useful summary provided in Smith, Safeguarding the Hospital Ships, U.S. Naval Inst. Proc., Nov. 1988, at 56.

Sick Bays. Sick bays and their personnel aboard naval vessels must be respected by boarding parties and spared as much as possible. They remain subject to the laws of warfare, but cannot be diverted from their medical purposes if required for the care of the wounded or sick. If a naval commander can ensure the proper care of the sick and wounded, and if there is urgent military necessity, the sick bays may be used for other purposes. GWS-Sea, art. 28.

Conditions which do not Violate Protected Status

Hospital Ships. The following non-exclusive list of factors (from GWS-Sea, art. 35) do *not* deprive a hospital ship of its guaranteed protection and do *not* permit attacks upon it:

1. The crews of hospital ships are armed with light individual weapons for the maintenance of order, for their own defense or that of the sick and wounded. See 2 Pictet 194. (It is probable that the taking of other limited self-defense measures against antiship missile attack, such as equipping hospital ships with chaff, ECM and infra red decoy dispensers, as suggested in Oreck, Hospital Ships: The Right of Limited Self Defense, U.S. Naval Inst. Proc., Nov. 1988, at 65, would not violate their protected status. However, equipping of such ships with the Phalanx close-in weapon system (CIWS) is much more problematical.)

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2. Apparatus intended exclusively to facilitate navigation or communication is on board these vessels. (But see above this note regarding cryptographical communications.)

3. Portable arms and ammunition, taken from the wounded, sick and shipwrecked and not yet handed over to the proper authorities, are found on board hospital ships.

4. The humanitarian activities of hospital ships or of the crews extend to the care of the wounded, sick or shipwrecked civilians.

5. These vessels transport equipment and personnel, intended exclusively for medical duties, over and above the normal requirements. See also GWS-Sea, art. 38.

Sick Bays. The following factors (from GWS-Sea, art. 35) do *not* deprive a sick bay on a warship of its guaranteed protection and do *not* permit attacks on it:

1. The crews of sick bays are armed with light individual weapons for the maintenance of order, for their own defense or that of the sick and wounded.

2. Portable arms and ammunition, taken from the wounded, sick and shipwrecked and not yet handed over to the proper authorities, are found in sick bays.

3. The humanitarian activities of sick bays of vessels extend to the care of the wounded, sick or shipwrecked civilians.

Medical Aircraft. Medical aircraft are those planes and helicopters, military or civilian, permanent or temporary, *exclusively* employed for the removal of wounded, sick and shipwrecked, and for the transport of medical personnel and equipment, and which are under the control of a competent authority of the Party to the conflict. Common article 36/39/-/22; GP I, art. 8.

Medical aircraft, recognized as such, should not be deliberately attacked. AFP 110-34, para. 3-2c. However, there is no specific treaty to which the United States is a party providing this protection. (An earlier Air Force manual would permit attack if "under the circumstances at the time it represents an immediate military threat and other methods of control are not available." AFP 110-31, para. 4-2f.) Medical aircraft, wherever flying, are protected from attack to the extent they are flying at altitudes, times, and on routes specifically agreed upon between the belligerents. Common article 36/39/-/22. Thus, U.S. medical aircraft may not over fly enemy-controlled territory and expect to be immune from attack without prior enemy agreement.

Medical aircraft shall be neither armed nor reconnaissance-configured and shall contain no armament other than small arms and ammunition belonging to the wounded and sick or necessary for the defense of the wounded and sick and the medical personnel. As far

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as practicable under the circumstances, the medical mission shall be performed in such places and in such a manner as to minimize the risk that the conduct of hostilities by combatants may imperil the safety of medical aircraft. See generally, AFR 160-4, Medical Service under the 1949 Geneva Convention [sic] on Protection of War Victims.

Aeromedical evacuation also may, of course, be conducted by combat-equipped helicopters and airplanes. They are not, however, exempt from attack, and fly at their own risk of being attacked.

Additional Protections. Even if the belligerents are not party to Additional Protocol I to the 1949 Geneva Conventions, the belligerents may mutually agree to abide by the following procedures (established in Additional Protocol I, articles 25-30) to obtain these supplemental protections for medical aircraft:

In and over land areas physically controlled by friendly forces, and in and over sea areas not physically controlled by the enemy, medical aircraft will be immune from attack. Before making flights bringing them within range of the enemy's surface-to-air weapons systems, however, the enemy should be notified with a view to ensuring such aircraft will not be attacked. (GP I, art. 25.) Whether or not the parties to the conflict are bound by Additional Protocol I, prior agreement between them is necessary in order to afford protection from attack to medical aircraft that are flying in and over those parts of the contact zone which are physically controlled by friendly forces, and in and over those areas the physical control of which is not fully established. In the absence of such an agreement, medical aircraft operate at their own risk. Nevertheless, they shall be respected after they have been recognized as medical aircraft. (GP I, art. 26(1).) These procedures were followed in the 1982 Falklands war where neither belligerent was a party to Additional Protocol I.

"Contact zone" here means any land area where the forward elements of opposing forces are in contact with each other, especially when they are exposed to direct fire from the ground. The breadth of the contact zone will vary according to the tactical situation. (GP I, art. 26(2).)

"Friendly forces" are the forces of the nation operating the aircraft, or its allies or co-belligerents.

Requests to Land. Medical aircraft must comply with a request to land for inspection. (Common article 36/39/-/22.) Under Additional Protocol I, article 30, these requests are to be given in accordance with the International Civil Aviation Organization (ICAO) standard procedures for interception of civil aircraft. They are found in Section D of the DOD Flight Information Publication (FLIP) (Enroute) IFR Supplement.

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Continuance of Flight. Medical aircraft complying with such a request to land must be allowed to continue their flight, with all personnel on board belonging to their forces, to neutral countries, or to countries not a party to the conflict, so long as inspection does not reveal that the aircraft was engaging in acts harmful to the inspecting force or otherwise violating the Geneva Conventions of 1949. (Common article 36/39/-/22.) Persons of the nationality of the inspecting force found on board may be taken off and retained. Bothe, Partsch & Solf 163.

Agreements. It is very difficult to ensure the safety of medical aircraft in armed conflict no matter how clear their markings. If possible, therefore, the parties should reach an agreement to facilitate their protection. Although rarely reached in the past, a proposal for such an agreement should state the proposed number of medical aircraft, their flight plans and their means of identification. Receipt of the proposal should be acknowledged and then answered definitively, as rapidly as possible. The substance of any proposal, reply and agreement (including the means of identification to be used) should be rapidly disseminated to the military units concerned. (The desirability of similar agreements was highlighted by the accidental downing of Iran Airbus Flight 655 on 3 July 1988. See note 61 below.)

Distinctive Signals. See paragraph S11.11 and Annex AS11-4 for a description of, and a discussion of the legal effect of, the optional distinctive signals now available for medical aircraft.

Distinctive Markings. Medical aircraft shall be clearly marked with the red cross/red crescent, as large as possible, on a white background, together with their national colors, on their upper, lateral and lower surfaces. They may be painted white all over. See International Code of Signals, Pub. No. 102, at 136 (Notice to Mariners 52/85, at II-2.2) and Figure 11-1a.

Communications. Medical aircraft may not be used to collect or transmit intelligence data since they may not be used to commit, outside their humanitarian duties, acts harmful to the enemy. This prohibition does not preclude the presence or use on board medical aircraft of communications equipment and encryption materials solely to facilitate navigation, identification or communication in support of medical operations.

Flights over Neutral Territory. Guidance regarding flight of medical aircraft over, or landing on, neutral territory is found in paragraph 7.3.7 paragraph 3.

3. Vessels charged with religious, non-military scientific, or philanthropic missions. (Vessels engaged in the collection of scientific data of potential military application are not exempt.)[58]

4. Vessels and aircraft guaranteed safe conduct by prior arrangement between the belligerents.[59]

5. Small coastal (not deep-sea) fishing vessels and small boats engaged in local coastal trade. Such vessels and boats are subject to the regulations of a belligerent naval commander operating in the area.[60]

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[58] Hague XI, art. 4; NWIP 10-2, para. 503c(3). As noted in Tucker 96-97 and Mallison 128, the practice has been to construe this exemption quite narrowly and to grant this exemption by express agreement between the belligerents. The parenthetical exception to the exemption has been added to reflect modern practices in the exploration of the sea and seabed; see Mallison 128 and 1 Levie, The Code of International Armed Conflict 186.

[59] NWIP 10-2, para. 503c(4). One such vessel, the Japanese merchant ship AWA MARU, sailing alone in a fog bank, was torpedoed and sunk by USS QUEENFISH on 1 April 1945 thinking she was a Japanese destroyer. Although QUEENFISH had received notice of the guarantee of safe conduct in a plain language COMSUBPAC message three week before, it had not been read by the ship's officers. For details see Dep't St. Bull., 3 June, 15 July & 12 August 1945, reprinted in U.S. Naval War College, International Law Documents 1944-45, at 125-38 (1946); Voge, Too Much Accuracy, Naval Inst. Proc., March 1950, at 256; Speer, Let Pass Safely the *Awa Maru*, id., April 1964, at 69; Lowman, Treasure of the Awa Maru, id., Aug. 1982, 45; Loughlin, As I Recall "Damned if I Did; Damned if I Didn't," id. Aug. 1982, at 49; and Innis, In Pursuit of the Awa Maru (1980) (describing the events and subsequent general court-martial of QUEENFISH's commanding officer).

Ships chartered to convey medical equipment and pharmaceuticals for the wounded and sick only, so long as the particulars of the voyage have been agreed to beforehand between the belligerents, are exempt from capture and destruction. GWS-Sea, art. 38.

[60] The Paquete Habana, 175 U.S. 677 (1900); Hague XI, art. 3; Tucker 95-96; Mallison 15-16 & 126-28; NWIP 10-2, para. 503c(6). See Cagle and Manson, The Sea War in Korea 296-97 (1957) and the text accompanying note 65 below. It is necessary to emphasize that the immunity of small coastal fishing vessels and small boats depends entirely upon their "innocent employment." If found to be assisting a belligerent in any manner whatever (e.g., if incorporated within a belligerent's naval intelligence network), they may be captured or destroyed. Thus, the British were entirely justified in attacking, on 9 May 1982, the Argentine fishing vessel NARWAL which was used to shadow the British fleet and report its location. Before NARWAL sank, a British boarding party found an Argentine naval officer on board with orders directing him to conduct reconnaissance and to detect and report the position of British units. London Times, 11 May 1982, at 1 & 6; Hastings & (continued...)

6. Civilian passenger vessels at sea and civil airliners in flight are subject to capture but are exempt from destruction. Although enemy lines of communication are generally legitimate military targets in modern warfare, civilian passenger vessels at sea, and civil airliners in flight, are exempt from destruction, unless at the time of the encounter they are being utilized by the enemy for a military purpose (e.g., transporting troops or military cargo) or refuse to respond to the directions of the intercepting warship or military aircraft. Such passenger vessels in port and airliners on the ground are not protected from destruction.[61]

If an enemy vessel or aircraft assists the enemy's military effort in any manner, it may be captured or destroyed.[62] Refusal to provide immediate identification upon demand is

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Jenkins, The Battle for the Falklands 159 (1983); Middleton, Operation Corporate 186-87 (1985); 1 Levie, The Code of International Armed Conflict 186. Refusal to provide immediate identification upon demand is sufficient basis for capture or destruction of such vessels and boats. See also note 33 and accompanying text (regarding duty to search for the shipwrecked) and paragraphs 7.7.4 (regarding breach and attempted breach of blockade).

[61] AFP 110-31, para. 4-3, at 4-2 to 4-4; AFP 110-34, para. 2-3b. Civilian passenger vessels and civil aircraft were not addressed in NWIP 10-2, para. 503c. The rule prohibiting destruction of civilian passenger vessels at sea and civil airliners in flight which have become military objectives by virtue of being part of enemy lines of communication (see paragraph 8.1.1 and note 11 above), is premised upon the assessment that the inevitable death of the large number of innocent civilians normally carried in them would, in the circumstances described in the text of paragraph 6, be clearly disproportionate to whatever military advantage that might be expected from attacking such vessels or aircraft. The rule denying protection from destruction of passenger vessels in port and airliners on the ground assumes they are not carrying passengers at the time of attack.

The accidental downing of Iran Airbus Flight 655 on 3 July 1988 by USS VINCENNES (CG 49) while defending herself from Iranian gunboat attacks near the Strait of Hormuz illustrates the danger to civil aircraft flying over the combat zone in apparent ignorance of the battle occuring below it.

The list of exempt vessels in paragraph 8.2.3 omits "vessels and aircraft exempt by U.S. or allied proclamation, operation plan, order or other directive" which were included in NWIP 10-2, para. 503c(5), because of the unilateral basis of the exemption. See Tucker 98 n.14.

[62] See paragraph 8.2.2 above.

ordinarily sufficient legal justification for capture or destruction.[63] All nations have a legal obligation not to take advantage of the harmless character of exempt vessels and aircraft in order to use them for military purposes while preserving their innocent appearance.[64] For example, the utilization by North Vietnam of innocent appearing small coastal fishing boats as logistic craft in support of military operations during the Vietnam Conflict was in violation of this obligation.[65]

8.3 SUBMARINE WARFARE

The law of armed conflict imposes essentially the same rules on submarines as apply to surface warships.[66] Submarines may employ their conventional weapons systems to attack, capture, or destroy enemy surface or subsurface targets wherever located beyond neutral territory.[67] Enemy warships and naval auxiliaries may be attacked and destroyed without warning.[68] Rules applicable to surface warships regarding enemy ships that have surrendered in good faith, or that have indicated clearly their intention to do so, apply as well to submarines.[69] To the extent that military exigencies permit, submarines are also required to search for and collect the shipwrecked, wounded, and sick, following an engagement.[70] If such humanitarian efforts would subject the submarine to undue additional hazard or prevent it from accomplishing its military mission, the location of possible

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[63] **Refusal by an exempt vessel or aircraft to provide immediate identification is considered to be an act of refusing to stop upon being summoned, particularly in light of the abilities of modern communications. Compare note 47 and accompanying text above.**

[64] **Hague XI, art. 3.**

[65] **O'Connell, The Influence of Law on Seapower 177 (1975). See generally Hodgman, Market Time in the Gulf of Thailand, in Uhlig, Vietnam: The Naval Story 308 (1986).**

[66] **The legal principles governing modern submarine warfare are discussed in Gilliland, Submarines and Targets: Suggestions for New Codified Rules of Submarine Warfare, 73 Geo. L.J. 975 (1985).**

[67] **Enemy air targets may similarly be attacked, captured, or destroyed.**

[68] **Mallison 105-06.**

[69] **See paragraph 8.2.1 text at notes 29-31.**

[70] **Paragraph 8.2.1 text at note 33 and Mallison 134-39.**

survivors should be passed at the first opportunity to a surface ship, aircraft, or shore facility capable of rendering assistance.[71]

8.3.1 Interdiction of Enemy Merchant Shipping by Submarines. The conventional rules of naval warfare pertaining to submarine operations against enemy merchant shipping constitute one of the least developed areas of the law of armed conflict. Although the submarine's effectiveness as a weapons system is dependent upon its capability to remain submerged (and thereby undetected) and despite its vulnerability when surfaced, the London Protocol of 1936 (paragraph 8.2.2.2) makes no distinction between submarines and surface warships with respect to the interdiction of enemy merchant shipping. The London Protocol specifies that except in case of persistent refusal to stop when ordered to do so, or in the event of active resistance to capture, a warship "whether surface vessel or submarine" may not destroy an enemy merchant vessel "without having first placed passengers, crew and ship's papers in a place of safety." The impracticality of imposing upon submarines the same targeting constraints as burden surface warships is reflected in the practice of belligerents of both sides during World War II when submarines regularly attacked and destroyed without warning enemy merchant shipping.[72] As in the case of such attacks by surface warships, this practice was justified either as reprisal in response to unlawful acts of the enemy or as a necessary consequence of the arming of merchant vessels, of convoying, and of the general integration of merchant shipping into the enemy's war-fighting/war-sustaining effort.[73]

The United States considers that the London Protocol of 1936, coupled with the customary practice of belligerents during and following World War II,[74] imposes upon submarines the responsibility to provide for the safety of passengers, crew, and ship's papers before destruction of an enemy merchant vessel unless:[75]

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[71] **All ships, including submarines must "take all possible measures" to search for and collect survivors after each engagement. GWS-Sea, art. 18(1). Fleet Admiral Nimitz indicated during the Nuremberg war crimes trial of the German submarine Admiral Donitz that the U.S. policy in the Pacific during World War II was not to search for survivors if such action would cause undue additional hazard to the submarine, or prevent the submarine from accomplishing its military mission. The behavior of the other parties to World War II was similar. Mallison 134-39.**

[72] **Mallison 106-22.**

[73] **Compare Tucker 63-70 with Mallison 119-20.**

[74] **See Mallison 113-122.**

[75] **These exceptions are identical to those applicable to surface warfare.**

1. The enemy merchant vessel refuses to stop when summoned to do so or otherwise resists capture.[76]

2. The enemy merchant vessel is sailing under armed convoy or is itself armed.[77]

3. The enemy merchant vessel is assisting in any way the enemy's military intelligence system or is acting in any capacity as a naval auxiliary to the enemy's armed forces.[78]

4. The enemy has integrated its merchant shipping into its war-fighting/war-sustaining effort and compliance with this rule would, under the circumstances of the specific encounter, subject the submarine to imminent danger or would otherwise preclude mission accomplishment.[79]

8.3.2 Enemy Vessels Exempt From Submarine Interdiction. Rules of naval warfare regarding enemy vessels that are exempt from capture and/or destruction by surface warships apply as well to submarines. (See paragraph 8.2.3.)

8.4 AIR WARFARE AT SEA

Military aircraft may employ conventional weapons to attack and destroy warships and military aircraft, including naval and military auxiliaries, anywhere at sea beyond neutral territory.[80] Enemy merchant vessels and civil aircraft may be attacked and destroyed by military aircraft only under the following circumstances:

1. When refusing to comply with directions from the intercepting aircraft

2. When assisting in any way the enemy's military intelligence system or acting in any capacity as auxiliaries to the enemy's armed forces

3. When sailing under convoy of enemy warships, escorted by enemy military aircraft, or armed

4. When otherwise integrated into the enemy's war-fighting or war-sustaining effort.

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[76] **Paragraph 8.2.2.2 paras. 1-2 & notes 46-47 above.**

[77] **Paragraph 8.2.2.2 paras. 3-4 & notes 48-49 above.**

[78] **Paragraph 8.2.2.2 paras. 5-6 & notes 50-51 above.**

[79] **Paragraph 8.2.2.2 para. 7 & note 52 above.**

[80] **AFP 110-31, paras. 4-2a, 4-2c & 4-4a, at 4-1 & 4-4.**

To the extent that military exigencies permit, military aircraft are required to search for the shipwrecked, wounded, and sick following an engagement at sea.[81] The location of possible survivors should be passed at the first opportunity to a surface vessel, aircraft, or shore facility capable of rendering assistance.[82]

Historically, instances of surrender of enemy vessels to aircraft are rare.[83] If, however, an enemy has surrendered in good faith, under circumstances that do not preclude enforcement of the surrender, or has clearly indicated an intention to do so, the enemy must not be attacked.[84]

8.4.1 Enemy Vessels and Aircraft Exempt From Aircraft Interdiction. Rules of naval warfare regarding enemy vessels and aircraft that are exempt from capture and/or destruction by surface warships apply as well to military aircraft. (See paragraph 8.2.3.)

8.5 BOMBARDMENT

For purposes of this publication, the term "bombardment" refers to naval and air bombardment of enemy targets on land with conventional weapons, including naval guns,

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[81] **Common article 15/18/-/16; AFP 110-31, para. 4-2d n.11, at 4-7 ("in the case of aircraft, unfortunately, departure from the scene is usually required"). Under Additional Protocol I, medical aircraft flying pursuant to agreement between the parties in the contact zone or over areas controlled by the enemy may not search for the wounded, sick and shipwrecked except by prior agreement with the enemy. GP I, art. 28(4).**

[82] **The procedures for search and rescue set forth in the National Search and Rescue Manual (NWP 19/COMDTINST M16120.5/FM 20-150/AFM 64-2), Combat Search and Rescue Procedures (NWP 19-2/AFR 64-3/AR 525-90), and Search and Rescue (ATP 10), are designed for recovery of own and allied forces. Nevertheless, those procedures should be followed, to the extent they are applicable, in complying with the requirement set forth in the text.**

[83] **Spaight 132-134 describes the surrender of U570 in August 1941, of the British submarine SEAL in May 1940, and of a German convoy on 1 May 1945.**

[84] **AFP 110-31, para. 4-2d, at 4-1.**

rockets and missiles, and air-delivered ordnance.[85] Bombardment by land forces is not included in this text.[86] Engagement of targets at sea is discussed in paragraphs 8.2 to 8.4.

8.5.1 General Rules. The United States ia a party to Hague Convention No. IX (1907) Respecting Bombardment by Naval Forces in Time of War. That convention establishes the general rules of naval bombardment of land targets. These rules have been further developed by customary practice in World Wars I and II, Vietnam, and the Falklands. Underlying these rules are the broad principles of the law of armed conflict that belligerents are forbidden to make noncombatants the target of direct attack,[87] that superfluous injury and unnecessary suffering are to be avoided,[88] and that wanton destruction of property is prohibited.[89] To give effect to these humanitarian concepts, the following general rules governing bombardment must be observed.

8.5.1.1 Destruction of Civilian Habitation. The wanton or deliberate destruction of areas of concentrated civilian habitation, including cities, towns, and villages, is prohibited.[90] A military objective within a city, town, or village may, however, be bombarded if required for the submission of the enemy with the minimum expenditure of time, life, and physical resources.[91]

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[85] With regard to aerial bombardment, see also AFP 110-31, ch. 5 and para. 6-6a; Parks, Crossing the Line, U.S. Naval Inst. Proc., Nov. 1986, at 40-52; Parks, Linebacker and the Law of War, Air U. Rev., Jan.-Feb. 1983, at 2-30; Parks, Rolling Thunder and the Law of War, Air U. Rev., Jan.-Feb. 1982, at 2-23; Carnahan, "Linebacker II" and Protocol I, The Convergence of Law and Professionalism, 31 Am. U.L. Rev. 861 (1982); and Greenwood, International Law and the United States' Air Operations Against Libya, 89 W. Va. L. Rev. 933 (1987).

[86] For which, see FM 27-10, paras. 39-46.

[87] Paragraph 8.1 note 3 above and accompanying text.

[88] Paragraph 9.1.1 below.

[89] Common article 50/51/-/147; GP I, art. 85(2); Principle VI(b) of the Nuremberg Tribunal, paragraph 6.2.5 note 49 above.

[90] Common article 50/51/-/147.

[91] Cf. HR, art. 23(g); Draft Hague Rules of Air Warfare, art. 24(4); GP I, art. 51(5)(b); Conventional Weapons Convention, Protocol III, art. 3.

8.5.1.2 Terrorization. Bombardment for the sole purpose of terrorizing the civilian population is prohibited.[92]

8.5.1.3 Undefended Cities or Agreed Demilitarized Zones. Belligerents are forbidden to bombard a city or town that is undefended and that is open to immediate entry by their own or allied forces.[93] A city or town behind enemy lines is, by definition, neither undefended nor open and military targets therein may be destroyed by bombardment.[94] An agreed demilitarized zone is also exempt from bombardment.[95]

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[92] 1923 Hague Rules of Air Warfare, art. 22; NWIP 10-2, para. 221b at n.15; codified in GP I, art. 51(2), and GP II, art. 13(2); Matheson, Remarks, note 2 above, at 426. Otherwise legal acts which cause *incidental* terror to civilians, for example in the bombing of a munitions factory the work force of which is civilian, is not prohibited. As a practical matter, some fear and terror will be experienced by civilians whenever military objectives in their vicinity are attacked. 1 Levie, The Code of International Armed Conflict 217-218; Bothe, Partsch & Solf 300-301.

[93] HR, art. 25; Hague IX, art. 1; clarified in GP I, art. 59. Solf views article 59 as a "clear declaration of well-established customary international law." Solf, Protection of Civilians, note 15 above, at 135. FM 27-10 gives the following conditions that should be fulfilled for a place to be considered undefended:

> (1) Armed forces and all other combatants, as well as mobile weapons and mobile military equipment, must have been evacuated, or otherwise neutralized;
> (2) no hostile use shall be made of fixed military installations or establishments;
> (3) no acts of warfare shall be committed by the authorities or by the population; and
> (4) no activities in support of military operations shall be undertaken.
>
> The presence, in the place, of medical units, wounded and sick, and police forces retained for the sole purpose of maintaining law and order does not change the character of such an undefended place.

FM 27-10, para. 39b (ch. 1, 15 July 1976).

[94] Bothe, Partsch & Solf 382.

[95] The United States considers this to be customary law. Matheson, Remarks, note 2 above, at 427. Standards for the creation of demilitarized zones may be found in Additional Protocol I, article 60.

8.5.1.4 Medical Facilities. Medical establishments and units (both mobile and fixed), medical vehicles, and medical equipment and stores may not be deliberately bombarded.[96] Belligerents are required to ensure that such medical facilities are, as far as possible, situated in such a manner that attacks against military targets in the vicinity do not imperil their safety.[97] If medical facilities are used for military purposes inconsistent with their humanitarian mission, and if appropriate warnings that continuation of such use will result in loss of protected status are unheeded, the facilities become subject to attack.[98] The distinctive medical emblem, a red cross or red crescent, should be clearly displayed on medical establishments and units in order to identify them as entitled to protected status.[99] Any object recognized as being a medical facility may not be attacked whether or not marked with a protective symbol.[100]

8.5.1.5 Special Hospital Zones and Neutralized Zones. When established by agreement between the belligerents, hospital zones and neutralized zones are immune from bombardment in accordance with the terms of the agreement concerned.[101]

8.5.1.6 Religious, Cultural, and Charitable Buildings and Monuments. Buildings devoted to religion, the arts, or charitable purposes; historic monuments; and other religious, cultural, or charitable facilities should not be bombarded, provided they are not used for

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[96] HR, art. 27; Hague IX, art. 5; common articles 19, 35/23/-/18 & 21; GP I, art. 12; GP II, art. 11.

[97] Common article 19/-/-/18; GP I, art. 12(4).

[98] HR, art. 27; Hague IX, art. 5; common article 21/34/-/19; GP I, art. 13; GP II, art. 11.

[99] See paragraph 11.10.1 below.

[100] Paragraph 11.10.6 below.

[101] GWS, art. 23; GC, arts. 14-15. Annexes to each of these conventions provide sample ("draft") agreements relating to the establishment of these zones. See paragraph 11.10.2 and accompanying note 78 below regarding marking of these zones. On 13 June 1982, the British and Argentine authorities, at the suggestion of the ICRC representative on scene in the Falklands, agreed to the establishment of a neutralized zone in the center of Stanley, comprising the Anglican Cathedral and a clearly defined 5 acre area around it. This zone was, however, not used as the surrender was accepted at 2100 (local) 14 June 1982. UN Doc. S/15215, 14 June 1982; HMSO, The Falklands Campaign: A Digest of Debates in the House of Commons 2 April to 15 June 1982, at 340-47 (1982); London Times, 14 June 1982, at 1; London Times, 15 June 1982, at 1 & 8; Junod, Protection of the Victims of Armed Conflict Falkland-Malvinas Islands 1982, at 33-34.

military purposes.[102] It is the responsibility of the local inhabitants to ensure that such

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[102] HR, art. 27; Hague IX, art. 5. General Eisenhower, as Supreme Allied Commander in Europe preparing to invade Europe, reminded his forces to comply with this rule in the following memorandum:

> To Bernard Law Montgomery, May 26, 1944
> Omar Nelson Bradley
> Bertram Home Ramsey, and
> Trafford Leigh-Mallory
>
> *Secret*
>
> Subject: Preservation of Historical Monuments
>
> 1. Shortly we will be fighting our way across the Continent of Europe in battles designed to preserve our civilization. Inevitably, in the path of our advance will be found historical monuments and cultural centers which symbolize to the world all that we are fighting to preserve.
>
> 2. It is the responsibility of every commander to protect and respect these symbols whenever possible.
>
> 3. In some circumstances the success of the military operation may be prejudiced in our reluctance to destroy these revered objects. Then, as at Cassino, where the enemy relied on our emotional attachments to shield his defense, the lives of our men are paramount. So, where military necessity dictates, commanders may order the required action even though it involves destruction of some honored site.
>
> 4. But there are many circumstances in which damage and destruction are not necessary and cannot be justified. In such cases, through the exercise of restraint and discipline, commanders will preserve centers and objects of historical and cultural significance. Civil Affairs Staffs at higher echelons will advise commanders of the locations of historical monuments of this type, both in advance of the front lines and in occupied areas. This information, together with the necessary instructions, will be passed down through command channels to all echelons.

The Papers of Dwight David Eisenhower: The War Years: II, at 1890-91 (Chandler & Ambrose, eds. 1970). See also Schaffer, Wings of Judgment: American Bombing in World War II, at 50 (1985) and Hapgood, Monte Cassino 158-59 (1984) (quoting a 29 December 1943 message from General Eisenhower to "all commanders" to the same effect, Historical Research Center, Maxwell Air Force Base, AL, File 622.610-2, Folder 2, 1944-45) and Blumenson, United States Army in World War II: The Mediterranean Theater of

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buildings and monuments are clearly marked with the distinctive emblem of such sites -- a rectangle divided diagonally into two triangular halves, the upper portion black and the lower white.[103] (See paragraph 11.10.)

8.5.1.7 Dams and Dikes. Dams, dikes, levees, and other installations, which if breached or destroyed would release flood waters or other forces dangerous to the civilian population, should not be bombarded if the potential for harm to noncombatants would be excessive in relation to the military advantage to be gained by bombardment.[104] Conversely, installations containing such dangerous forces that are used by belligerents to shield or support military activities are not so protected.[105]

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[102](...continued)
Operations: Salerno to Cassino 397-399 (1969) (quoting Combined Chiefs of Staff messages of 10 and 19 June 1943 to Eisenhower on this effect and some of the actions taken thereon).

Development of rules for the protection of cultural property is described in Verri, The Condition of Cultural Property in Armed Conflicts, 1985 Int'l Rev. Red Cross 67 (antiquity to the Napoleonic Wars) and id. 127 (1850s to World War II).

[103] Hague IX, art. 5. There is, however, no requirement to observe these signs or any others indicating inviolability of buildings that are known to be used for military purposes.

[104] Compare Additional Protocol I, article 56, which, for nations bound thereby, provides a much higher standard of protection for this limited class of objects, as well as nuclear electrical generating stations. For example, even if a dam or dike is a military objective, article 56 prohibits attacking it if the attack may cause flooding and consequent severe losses among the civilian population. Article 56 subjects attacks on military objectives in the vicinity of dams and dikes to the same high standard. (The special protection can be lost under the limited circumstances described in article 56(2).) Reasons why article 56 is militarily unacceptable to the United States appear in Sofaer, Remarks, note 2 above, at 468-69. They include the protection given under article 56 to "modern integrated power grids, where it is impossible to say that electricity from a particular plant goes to a particular customer" and to nuclear power plants "used to produce plutonium for nuclear weapons purposes." See paragraph 11.10.2 and Figure 11.1i below for the protective signs associated with these objects. The United States does not, of course, consider the provisions of article 56 to be customary law. Matheson, Remarks, note 2 above, at 427.

[105] Attacks on such installations are, of course, subject to the rule of proportionality described in paragraph 8.1.2.1 above. GC, art. 28; GP I, art. 51(7); Solf, Protection of Civilians, note 15 above, at 134. The practice of nations has previously indicated great restraint in the attacks of dams and dikes, the breach of which would cause such severe civilian losses. Thus, Solf is of the view that article 56 "differs little from customary international law." Ibid.

8.5.2 Warning Before Bombardment. Where the military situation permits, commanders should make every reasonable effort to warn the civilian population located in close proximity to a military objective targeted for bombardment. Warnings may be general rather than specific warnings lest the bombarding force or the success of its mission be placed in jeopardy.[106]

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[106] Warnings are relevant to the protection of the civilian population (so the civilians will have an opportunity to seek safety) and need not be given when they are unlikely to be affected by the attack.

The requirement of warning is longstanding and derives from both Hague Regulations (article 26) and Hague Convention IX (article 6). During World War II, practice was lax on warnings because of the heavily defended nature of the targets attacked as well as attempts to conceal targets. More recently, increased emphasis has been placed on the desirability and necessity of prior warnings even to military personnel. For example, on 19 October 1987 Iranian naval personnel were warned of the impending attack by U.S. naval forces on the Rashadat Platform in the Persian Gulf (in response to the attack on the U.S.-flag tanker SS SEA ISLE CITY four days earlierin Kuwaiti territorial waters) and allowed to depart before commencing the attack. Presidential Letter to Congress, 20 Oct. 1987, 23 Weekly Comp. Pres. Docs., 26 Oct. 1987, at 1206. Similar advance warning was given in the 18 April 1988 attacks on Sassan and Sirri oil/gas separation platforms and the Iranian frigate JOSHAN (in response to the mining of USS SAMUEL B. ROBERTS (FFG-58) on 14 April 1988). Presidential Letter to Congress, 19 Apr. 1988, 24 Weekly Comp. Pres. Docs., 25 Apr. 1988, at 493; Perkins, The Surface View: Operation Praying Mantis, U.S. Naval Inst. Proc., May 1989, at 68 & 69. Nevertheless, the practice of nations recognizes that warnings need not always be given.

This same requirement is included as a "precaution in attack" in Additional Protocol I, article 57(2)(c), which the United States supports as customary law. Matheson, Remarks, note 2 above, at 427.

CHAPTER 9

Conventional Weapons and Weapons Systems

9.1 INTRODUCTION

This chapter addresses the legal considerations pertaining to the use of conventional weapons and weapons systems.[1] It is a fundamental tenet of the law of armed conflict that the right of nations engaged in armed conflict to choose methods or means of warfare is not unlimited.[2] This rule of law is expressed in the concept that the employment of weapons, material, and methods of warfare that are designed to cause superfluous injury or unnecessary suffering is prohibited.[3] A corollary concept is that weapons which by their

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[1] 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 by the Judge Advocate General of the Service concerned before the engineering development stage of the acquisition process, and before the initial contract for production is let. A similar rule of international law is imposed, for the first time, on the nations party to Additional Protocol I by article 36. For further information see SECNAVINST 5711.8 (series) and Meyrowitz, The Function of the Laws of War in Peacetime, 1986 Int'l Rev. Red Cross 71, 78-81. See paragraph 5.4.2 note 30 above regarding the U.S. decision not to seek ratification of Additional Protocol I.

[2] HR, art. 22; cf. Lieber Code, art. 30. Hague Regulations, article 22, which refers to weapons and methods of warfare, is merely an affirmation that the means of warfare are restricted by rules of conventional (treaty) and customary international law. Although immediately directed to the conduct of land warfare, the principle embodied in article 22 of the Hague Regulations is applicable equally to the conduct of naval warfare. Article 22 is viewed by the United States as declarative of customary international law, General Counsel, Department of Defense letter of 22 Sept. 1972, reprinted in 67 Am. J. Int'l L. 122 (1973), and is confirmed in Additional Protocol I, article 35(1). The United States supports article 35(1) of Additional Protocol I as a statement of customary law. The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 Am. U.J. Int'l L. & Policy 424 (1987) (remarks of U.S. Department of State Deputy Legal Adviser Matheson). See also paragraph 8.1 notes 1 and 2 above.

[3] Hague Regulations, article 23(c), forbids belligerents "to employ arms, projectiles, or material calculated to cause unnecessary suffering." While the official French texts are identical, the 1899 unofficial English text of this article forbids belligerents "to employ arms, projectiles or material of a nature to cause superfluous injury." These rules are confirmed in Additional Protocol I, article 35(2), and are viewed by the United States as declaratory of customary international law. General Counsel letter and Matheson remarks,

(continued...)

nature are incapable of being directed specifically against military objects, and therefore that put noncombatants at equivalent risk, are forbidden due to their indiscriminate effect.[4] A few weapons, such as poisoned projectiles, are unlawful, no matter how employed.[5] Others may be rendered unlawful by alteration, such as by coating ammunition with a poison. Still others may be unlawfully employed, such as setting armed contact naval mines adrift so as to endanger innocent as well as enemy shipping. And finally, any weapon may be set to an unlawful purpose when it is directed against noncombatants and other protected persons and property.

Of particular interest to naval officers are law of armed conflict rules pertaining to naval mines, torpedoes, cluster and fragmentation weapons, delayed action devices, incendiary weapons, and beyond-visual-range weapons systems. Each of these weapons or systems will be assessed in terms of their potential for causing unnecessary suffering and superfluous injury or indiscriminate effect.

9.1.1 Unnecessary Suffering. Antipersonnel weapons are designed to kill or disable enemy combatants and are lawful notwithstanding the death, pain, and suffering they inflict. Weapons that are *designed* to cause *unnecessary* suffering or *superfluous* injury are, however, prohibited because the degree of pain or injury, or the certainty of death, they produce is needlessly or clearly disproportionate to the military advantage to be gained by their use. Poisoned projectiles and dum-dum bullets fall into this category, because there is little military advantage to be gained by ensuring the death of wounded personnel through poisoning or the expanding effect of soft-nosed or unjacketed lead ammunition. Similarly, using materials that are difficult to detect or undetectable by field x-ray equipment, such as glass or clear plastic, as the injuring mechanism in military ammunition is prohibited, since they unnecessarily inhibit the treatment of wounds. Use of such materials as incidental components in ammunition, e.g., as wadding or packing, is not prohibited.[6]

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[3](...continued)
note 2 above.

[4] This customary rule is codified in Additional Protocol I, article 51(4)(b).

[5] Lieber Code, arts. 16 & 70; Declaration of Brussels, art. 13(a); 1880 Oxford Manual, art. 8(a); 1913 Oxford Manual of Naval War, art. 16(1). This customary rule was codified in article 23(a) of the 1899 and 1907 Hague Regulations, to which the United States is a party. With regard to their use in reprisal, see note 46 to paragraph 6.2.3.3 above.

[6] Lieber Code, art. 16; Fenrick, New Developments in the Law Concerning the Use of Conventional Weapons in Armed Conflict, 19 Can. Y.B. Int'l L. 229, 242 (1981); Roach, Certain Conventional Weapons Convention: Arms Control or Humanitarian Law? 105 Mil. L. Rev. 1, 69-72 (1984); and Schmidt, The Conventional Weapons Convention: Implication for the American Soldier, 24 A.F.L. Rev. 279, 308-12 (1984).

9.1.2 Indiscriminate Effect. Weapons that are incapable of being controlled so as to be directed against a military target are forbidden as being indiscriminate in their effect.[7] Drifting armed contact mines and long-range unguided missiles (such as the German V-1 and V-2 rockets of World War II) fall into this category. A weapon is not indiscriminate simply because it may cause incidental or collateral civilian casualties, provided such casualties are not foreseeably excessive in light of the expected military advantage to be gained.[8] An artillery round that is capable of being directed with a reasonable degree of accuracy at a military target is not an indiscriminate weapon simply because it may miss its mark or inflict collateral damage. Conversely, uncontrolled balloonborne bombs, such as those released by the Japanese against the west coast of the United States and Canada in World War II lack that capability of direction and are, therefore, unlawful.[9]

9.2 NAVAL MINES

Naval mines have been effectively employed for area denial, coastal and harbor defense, antisurface and antisubmarine warfare, and blockade. Naval mines are lawful weapons, but their potential for indiscriminate effects has led to specific regulation of their deployment and employment by the law of armed conflict. The extensive and uncontrolled use of naval mines by both sides in the Russo-Japanese War of 1904-5 inflicted great damage on innocent shipping both during and long after that conflict, and led to Hague

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[7] GP I, art. 51(4)(b). Military targets are defined in paragraph 8.1.1. The rule stated in this sentence does not prohibit naval or land mines *per se*. Naval mines are discussed in paragraph 9.2 below. Developments in the law of land mine warfare are considered in Fenrick, note 6 above, at 242-45; Carnahan, The Law of Land Mine Warfare: Protocol II to the United Nations Convention on Certain Conventional Weapons, 105 Mil. L. Rev. 73 (1984); Schmidt, note 6 above, at 312-22 & 329-38; and Rogers, A Commentary on the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, 26 Mil. L. & L. of War Rev. 185 (1987).

[8] See paragraph 8.1.2.1 for a discussion of this aspect of collateral damage. Compare Lieber Code, art. 15.

[9] Bothe, Partsch & Solf 305; ICRC, Commentary 621; DoD General Counsel letter, note 2 above, 67 Am. J. Int'l L. 124, rejecting as inaccurate paragraphs 7 and 8 of the Resolution of the Institute of International Law, Edinburgh, 9 Sep. 1969, 66 Am. J. Int'l L. 470 (1972), Schindler & Toman 265-66. The balloon-borne bombs are described in Mikesh, Japan's World War II Balloon Bomb Attacks on North America, Smithsonian Annals of Flight No. 9 (1973); Webber, The Silent Siege: Japanese Attacks Against North America in World War II (1984); Prioli, The Fu-Go Project, American Heritage, April-May 1982, at 89-92. The same assertion of illegality might also be said of an aborted American plan to drop on Japan bats armed with tiny incendiary bombs. Feist, Bats Away, American Heritage, April-May 1982, at 93-94; Lewis, Bats Out of Hell, Soldier of Fortune, Nov. 1987, at 80-81, 112. The legality of these weapons does not appear to have been previously addressed. See note 1 above.

Convention No. VIII of 1907 Relative to the Laying of Automatic Submarine Contact Mines.[10] The purpose of the Hague rules was to ensure to the extent practicable the safety of peaceful shipping by requiring that naval mines be so constructed as to become harmless should they break loose from their moorings or otherwise cease to be under the affirmative control of the belligerents that laid them. The Hague rules also require that shipowners be warned of the presence of mines as soon as military exigencies permit.

Although the Hague provisions date from 1907, they remain the only codified rules specifically addressing the emplacement of conventional naval mines. Technological developments have created weapons systems obviously not contemplated by the drafters of these rules. Nonetheless, the general principles of law embodied in the 1907 Convention continue to serve as a guide to lawful employment of naval mines.[11]

9.2.1 Current Technology. Modern naval mines are versatile and variable weapons. They range from relatively unsophisticated and indiscriminate contact mines to highly technical, target-selective devices with state-of-the-art homing guidance capability. Today's mines may be armed and/or detonated by physical contact, acoustic or magnetic signature, or sensitivity to changes in water pressure generated by passing vessels and may be emplaced by air, surface, or subsurface platforms.[12] For purposes of this publication, naval mines are classified as armed or controlled mines. *Armed mines* are either emplaced with all safety devices withdrawn, or are armed following emplacement, so as to detonate when preset parameters (if any) are satisfied. *Controlled mines* have no destructive capability until affirmatively activated by some form of controlled arming order (whereupon they become armed mines).[13]

9.2.2 Peacetime Mining. Consistent with the safety of its own citizenry, a nation may emplace both armed and controlled mines in its own internal waters at any time with or without notification. A nation may also mine its own archipelagic waters and territorial sea during peacetime when deemed necessary for national security purposes. If armed mines are emplaced in archipelagic waters or the territorial sea, appropriate international

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[10] **36 Stat. 2332; T.S. No. 541; 1 Bevans 669; DA Pam 27-161-2; Navy Supplement to Selected International Agreements, AFP 110-20, ch. 37.**

[11] ***Nicaragua Military Activities Case*, 1986 I.C.J. 14, 111-12, 128-29, 147-48; 25 Int'l Leg. Mat'ls 1023, 1072, 1080-81, 1090 (paras 213-15, 253-54, 292(7) (14-1)). See also dissenting opinion of Judge Schwebel, paras. 234-40, 25 Int'l Leg. Mat'ls 1205-07, and NWP 27-4, at 1-3 to 1-6 (ch. 1).**

[12] **Hartman, Weapons That Wait 103 (1979).**

[13] **JCS Pub 1, at 35 & 89; Hartman 8-9.**

notification of the existence and location of such mines is required.[14] Because the right of innocent passage can be suspended only temporarily,[15] armed mines must be removed or rendered harmless as soon as the security threat that prompted their emplacement has terminated. Emplacement of controlled mines in a nation's own archipelagic waters or territorial sea is not subject to such notification or removal requirements.[16]

Naval mines may not be emplaced in the internal, territorial, or archipelagic waters of another nation in peacetime without that nation's consent.[17] Controlled mines, however, may be emplaced in international waters beyond the territorial sea subject only to the requirement that they do not unreasonably interfere with other lawful uses of the oceans. The determination of what constitutes an "unreasonable interference" involves a balancing of a number of factors including the rationale for their emplacement (i.e., the self-defense requirements of the emplacing nation), the extent of the area to be mined, the hazard (if any) to other lawful ocean uses, and the duration of their emplacement. Because controlled mines do not constitute a hazard to navigation, international notice of their emplacement is not required.

Armed mines may not be emplaced in international waters prior to the outbreak of armed conflict, except under the most demanding requirements of individual or collective self-defense.[18] Should armed mines be emplaced in international waters under such circumstances, prior notification of their location must be provided and the anticipated date of their complete removal must be clearly stated. The nation emplacing armed mines in international waters during peacetime also assumes responsibility to maintain on-scene presence in the area sufficient to ensure that appropriate warning is provided to ships

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[14] *Corfu Channel Case (merits)*, 1949 I.C.J. 22, U.S. Naval War College, International Law Documents 1948-49, at 133 (based on "general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States").

[15] Suspension of innocent passage is discussed in paragraph 2.3.2.3.

[16] Controlled mines pose no hazard to navigation until they are armed. Neutral territorial seas are discussed in paragraph 7.3.4.

[17] To do so would be a major violation of that nation's territorial integrity. The national and international reactions to the covert mining of the Gulf of Suez and the Red Sea in mid-1984 is examined in Truver, Mines of August: An International Whodunit, U.S. Naval Inst. Proc., May 1985, at 94, and The Gulf of Suez Mining Crisis: Terrorism at Sea, id., Aug. 1985, at 10-11.

[18] Thorpe, Mine Warfare at Sea--Some Legal Aspects of the Future, 18 Ocean Dev. & Int'l L. 255, 267 (1987). Self-defense is discussed in paragraph 4.3.2.

approaching the danger area. All armed mines must be expeditiously removed or rendered harmless when the imminent danger that prompted their emplacement has passed.

9.2.3 Mining During Armed Conflict. Naval mines may be lawfully employed by parties to an armed conflict subject to the following restrictions:

1. International notification of the location of emplaced armed mines must be made as soon as military exigencies permit.[19]

2. Mines may not be emplaced by belligerents in neutral waters.[20]

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[19] Hague VIII, art. 3; *Corfu Channel case*, 1949 I.C.J. 22. Such notice was not given in the covert minings of the Red Sea in 1984, or in the Persian Gulf and the Gulf of Oman in 1987. In the *Nicaragua Military Activities Case*, 1986 I.C.J. 46-48, 112, 147-48; 25 Int'l Leg. Mat'ls 1039-40, 1072, 1090 (paras. 76-80, 215, 292(8), the ICJ decided (14-1) that the United States, "by failing to make known the existence and location of the mines laid by it [in 1984] ... has acted in breach of its obligation [to Nicaragua] under cust mary international law." Judge Schwebel dissented with the view that the mining of Nicaraguan ports was lawful in respect to Nicaragua, but unlawful in regard to third nations because of the failure to give official public notice "about the fact that mines would be or had been laid in specified waters." 1986 I.C.J. 378-80, 25 Int'l Leg. Mat'ls 1205-06 (paras. 234-240). Judge Jennings, while dissenting on other grounds, joined in subparagraph 292(8) of the Court's opinion by applying the logic of the Corfu Channel judgment, in which two British destroyers hit moored contact mines laid in Albanian waters, that the obligation to notify the existence of mines "for the benefit of shipping in general" is an obligation

> based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States" (1949 I.C.J. 22).

Judge Jennings applied this law *a fortiori* to the situation where a nation lays mines in another nation's ports or port approaches and fails to notify shipping. Judge Jennings noted that "even supposing the United States were acting in legitimate self-defence, failure to notify shipping would still make the mine-laying unlawful." 1986 I.C.J. 536, 25 Int'l Leg. Mat'ls 1284.

[20] Hague XIII, arts. 1-2. This rule was not carefully followed in the Iran-Iraq war. Ships have hit mines in the national waters of Kuwait and Oman. N.Y. Times, 20 July 1987, at A6, & 14 Aug. 1987, at A9.

3. Anchored mines must become harmless as soon as they have broken their moorings.[21]

4. Unanchored mines not otherwise affixed or imbedded in the bottom must become harmless within an hour after loss of control over them.[22]

5. The location of minefields must be carefully recorded to ensure accurate notification and to facilitate subsequent removal and/or deactivation.[23]

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[21] Hague VIII, art. 1(2); Hartman, note 12 above, at 8 & 84. U.S. mines either detonate or go safe. In Haiphong Harbor they exploded, thereby giving visible reminders of the existence of the minefield and the need for reseeding of the minefield. On the other hand, the anchored contact mines laid by Iran in the Persian Gulf war frequently broke loose but had no built-in mechanism to render them harmless.

[22] Hague VIII, art. 1(1). The mines laid by Iran during the Tanker War (1984-88) had their safing device omitted at the time of manufacture. U.S. naval mines all are constructed with self-neutralizing devices. For example, the mines laid in Haiphong Harbor in 1972 were set to neutralize within six months. Hartman 8 & 84.

[23] Hague VIII, art. 5. At the close of hostilities, each nation should remove the mines it has laid. However, each nation must remove the mines in its own waters, irrespective of the entity which laid them. The nations party to the conflict may also make other arrangements for mine clearance.

Th[illegible]stice of 1918 imposed a duty of disclosure upon Germany and her Allies. Art. X. [illegible] German Armistice of 11 Nov. 1918, U.S. Naval War College, International Law Documents, 1918, at 65 ("the Allies and the United States of America shall have the right to sweep up all minefields and to destroy obstructions laid by Germany outside German territorial waters, the positions of which are to be indicated"); art. IV of naval conditions of Austro-Hungarian Armistice of 3 Nov. 1918, id., at 19; art. IV of naval clauses of appendix to the Armistice, id., at 27-28. Art. XIII of the Hungarian Armistice of 13 Nov. 1918, id., at 33 (mines in the Danube); arts. II and III of Turkish Armistice of 30 Oct. 1918, id., at 160. The burden of removal was, however, only pressed upon those nations according to the geographical relationship or proximity of their respective territories to mines or fields of mines which they had sown. Thus, Turkey was to assist in sweeping or to remove, as might be required, all mines and other obstructions in Turkish waters. Id. 160. Hungary undertook to stop the passage of floating mines sown in the Danube upstream from the Hungarian and Austrian frontier and to remove all those actually in Hungarian waters. Id., at 33. According to article 193 of the German peace treaty of Versailles of 28 June 1919, Germany undertook to sweep up the mines in specified areas in the easterly portion of the North Sea, to keep those areas free from mines, and to sweep and keep free from mines such areas in the Baltic as might ultimately be notified by the Principal Allied and Associated Powers. 3 U.S.T. 3410. The Principal Allied and Associated Powers assumed by the terms of the Armistice no specific contractual burdens

(continued...)

[23](...continued)
of removal or disclosure. They acquired a right rather than assumed a burden. U.S. naval forces undertook successfully the removal of mines which they had laid in the North Sea. For an illuminating account of the accomplishment of this task, see Davis, The Removal of the North Sea Mine Barrage, 38 National Geographic, Feb. 1920, at 103.

According to the armistice treaties between France and Germany, of 22 June 1940, (art. IX, 34 Am. J. Int'l L., Official Documents 173, 175) and France and Italy, of 24 June 1940, (arts. XII and XIII, id., at 178, 181) the French Government undertook not only to report to the enemy the location of mines which it had set out, but also, if so required by the enemy, to clear away such mines. 3 Hyde 1946-47.

After World War II, some of the Allies (United States, France, United Kingdom and U.S.S.R.) agreed on an International Organization for the Clearance of Mines in European Waters. Agreement on Mine Clearance in European Waters, London, 22 Nov. 1945, 3 Bevans 1322. Other stipulations regarding assistance in mine clearance at the close of World War II may be found in the Instrument of Surrender of Italy, 29 Sep. 1943, 61 Stat. 2742, 2743-44, T.I.A.S. No. 1604; the Treaty of Peace with Italy, Paris, 10 Feb. 1947, 61 Stat. 1245, 1396, T.I.A.S. No. 1648, 49 U.N.T.S. 3, 153, and the Declaration regarding the Defeat of Germany and the Assumption of Supreme Authority by the Allied Powers of 5 June 1945, 60 Stat. 1648, 1654, T.I.A.S. No. 1520, 68 U.N.T.S. 189, 198. On mine clearance in German waters and the North Sea, see 3 Roskill, The War at Sea, pt. II, at 307 & 308 (1961). On mine clearance in the Pacific, see Morison, Supplement and General Index, 15 History of United States Naval Operations In World War II, at 13-14 (1962).

The Protocol to the Agreement on Ending the War and Restoring Peace in Viet Nam Concerning the Removal, Permanent Deactivation, or Destruction of Mines in the Territorial Waters, Ports, Harbors, and Waterways of the Democratic Republic of Viet Nam, 27 Jan. 1973, 24 U.S.T. 133, T.I.A.S. No. 7542, required the United States to clear all mines it had so placed by rendering them harmless through removal, permanent deactivation, or destruction. This mine clearance operation is described in McCauley, Operation End Sweep, U.S. Naval Inst. Proc., March 1974, at 18.

The United States and Egypt, through an exchange of notes dated 13 and 25 April 1974, agreed on an arrangement for U.S. assistance in clearing mines and unexploded ordnance from the Suez Canal, 25 U.S.T. 1474, T.I.A.S. No. 7882. This agreement was amended by an exchange of notes dated 8 July, 20 and 21 Sept., and 25 Sept. 1975, 26 U.S.T. 2517, T.I.A.S. No. 8169. The Suez Canal clearance operation is described in Boyd, Nimrod Spar: Clearing the Suez Canal, U.S. Naval Inst. Proc., Feb. 1976, at 18.

On the other hand, as a matter of self-defense the United States, United Kingdom, Belgium, France, Italy and the Netherlands conducted extended mine countermeasures in international and neutral waters of the Persian Gulf (the latter with the neutral nations' consent) from July 1987 in order to remove the interference with freedom of navigation (continued...)

6. Naval mines may be employed to channelize neutral shipping, but not in a manner to impede the transit passage of international straits[24] or archipelagic sea lanes passage of archipelagic waters by such shipping.[25]

7. Naval mines may not be emplaced off the coasts and ports of the enemy with the *sole* objective of intercepting commercial shipping,[26] but may otherwise be employed in the strategic blockade of enemy ports, coasts, and waterways.[27]

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[23](...continued)
caused by the contact mines unlawfully laid by Iran. See notes 20-22 above; Friedman, World Naval Developments 1987, U.S. Naval Inst. Proc., May 1988, at 219-20; and Friedman, Western European and NATO Navies, U.S. Naval Inst. Proc., March 1988, at 34 & 39.

[24] Transit passage is discussed in paragraph 2.3.3.

[25] Archipelagic sea lane passage is discussed in paragraph 2.3.4.1.

[26] Hague VIII, art. 2. France and Germany reserved this article on ratification.

[27] 1909 London Declaration Concerning the Laws of Naval War, arts. 1, 4 & 5. See paragraph 7.7 for a detailed discussion of blockade.

At one time, a blockade established exclusively by minefields was considered illegal because international law required that naval forces be present for the maintenance of an effective blockade. It has also been claimed that a blockade established by mines alone violates article 2 of Hague VIII which prohibits the use of mines with the sole object of intercepting commercial shipping, because historically the primary purpose of a blockade has been just that.

The international acceptance of the U.S. mine blockade of Haiphong Harbor during the Vietnam conflict has established a legal precedent for blockades established by mines alone. In that instance, it was argued effectively that all *significant* requirements of blockade were established:

- First, by virtue of its status as a belligerent in the Vietnam conflict, the United States was empowered to employ blockade as a mode of coercion.

The blockade was established pursuant to the authorization of the President of the United States, an appropriate authority from the perspective of customary international law and the only legal authority in terms of U.S. practice.

- Notice to all governments and shipping interests was assured by the President's public announcement via a letter from the U.S. representative to the President of the UN

(continued...)

8. Mining of areas of indefinite extent in international waters is prohibited. Reasonably limited barred areas may be established by naval mines, provided neutral shipping retains an alternate route around or through such an area with reasonable assurance of safety.[28]

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[27](...continued)
Security Council, notices to mariners, and by the U.S.-South Vietnamese undertaking to warn all vessels approaching the mined areas.

An interval of three days was allowed as a grace period during which all vessels in North Vietnamese waters might exit without danger.

The blockade was strictly limited to Vietnamese-claimed territorial seas, did not extend to preclude access to neutral ports or coasts, and did not interfere in any way with neutral shipping on the high seas.

- Impartial application of that blockade to all states was inherent in the very nature of the operation, because mines are passive instrumentalities generally incapable of discerning the nationality of the targeted platform.

- The blockade did not result in starvation of the civilian population or denial of essential foodstuffs, clothing and tonics (intended for children under 15, expectant mothers and maternity cases) or medical and hospital stores since there were overland, air and domestic sources of supply.

- And, finally, the blockade was effective, operating to close the ports of North Vietnam and contributing to a reduction in the flow of war materials from North Vietnam to South Vietnam to approximately 10 percent of its prior level.

The operation was therefore conducted in a manner compatible with traditional requirements of blockade and was permissible when judged by those criteria. Swayze, Traditional Principles of Blockade in Recent Practice: United States Mining of Internal and Territorial Waters of North Vietnam, 29 JAG J. 163 (1977). The 1986 ICJ opinion on the merits of the Nicaragua Military Activities Case did not decide this question.

It appears that classic arguments to the effect that only naval forces can satisfy the legal requirements of blockade can be successfully refuted by recitation of the myriad resources now available to the modern naval commander. Current warfare techniques which involve the use of radar, sonar, aircraft, and satellite information gathering appear clearly to provide for an effective blockade capability without the need to keep naval forces in the vicinity for the purpose of intercepting would-be blockade runners. Moreover, modern weapons systems now generally available to blockaded nations, including high performance aircraft, over-the-horizon missiles, and long-range artillery, may render on-scene surface enforcement difficult, if not impossible, to maintain.

[28] Thorpe, note 18 above, at 265. In the Persian Gulf war on 21 September 1987, the IRAN AJR was captured by U.S. forces in the act of laying mines in the international (continued...)

9.3 TORPEDOES

Torpedoes which do not become harmless when they have missed their mark constitute a danger to innocent shipping and are therefore unlawful.[29] All U.S. Navy torpedoes are designed to sink to the bottom and become harmless upon completion of their propulsion run.[30]

9.4 CLUSTER AND FRAGMENTATION WEAPONS

Cluster and fragmentation weapons are projectiles, bombs, missiles, and grenades that are designed to fragment prior to or upon detonation, thereby expanding the radius of their lethality and destructiveness. These weapons are lawful when used against combatants. When used in proximity to noncombatants or civilian objects, their employment should be carefully monitored to ensure that collateral civilian casualties or damage are not excessive in relation to the legitimate military advantage sought.[31]

9.5 DELAYED ACTION DEVICES

Booby traps and other delayed action devices are not unlawful, provided they are not designed or employed to cause unnecessary suffering. Devices that are designed to simulate items likely to attract and injure noncombatants (e.g., toys and trinkets) are prohibited. Attaching booby traps to protected persons or objects, such as the wounded and sick, dead bodies, or medical facilities and supplies, is similarly prohibited.[32]

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[28](...continued)
shipping lanes without notice. Presidential letter of 24 Sep. 1987, 23 Weekly Comp. Pres. Docs. 1066 (1987); Elliott, The Navy in 1987, U.S. Naval Inst. Proc., May 1988, at 146-47.

[29] Hague VIII, art. 1(3).

[30] E.g., Submarine Torpedo Defense Manual (U), NWP 72-1 (Rev. A), vol. I, Mark 48 Torpedo, at 2-9 (1987).

[31] Compare paragraph 8.1.2.1 above. Attempts to restrict further their use have failed. See Schmidt, note 6 above, at 294 & n.96.

Concerning legal restrictions on the use of small-calibre weapons and ammunition, see Parks, Killing a Myth, Marine Corps Gazette, Jan. 1988, at 25-26; Fenrick, note 6 above, at 250-52.

[32] Fenrick, note 6 above, at 245; Carnahan, note 7 above, at 89-93; Schmidt, note 6 above, at 323-29; and Rogers, note 7 above, at 198-200.

9.6 INCENDIARY WEAPONS

Incendiary devices, such as tracer ammunition, thermite bombs, flame throwers, napalm, and other incendiary weapons and agents, are lawful weapons. Where incendiary devices are the weapons of choice, they should be employed in a manner that minimizes uncontrolled or indiscriminate effects on the civilian population consistent with mission accomplishment and force security.[33]

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[33] White phosphorous may also be considered an incendiary weapon.

On 10 October 1980, the United Nations Conference on Prohibitions or Restrictions on Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects ended with the adoption by consensus of, among others, a Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), 19 Int'l Leg. Mat'ls 1534 (1980), AFP 110-20, ch. 3.

Protocol III applies to incendiary weapons the general principle, reaffirmed in the 1977 Additional Protocol I, that civilians should not be subject to attack. It places severe restrictions on attacks on military objectives located within a concentration of civilians and particularly by prohibiting completely any attacks by aerially delivered "fire bombs," such as those thermite bombs used in World War II, and napalm on such objectives.

It will be noted that Protocol III contains no new provision to protect combatants against incendiary weapons.

The third Protocol would, for nations accepting the restriction, extend the traditional rule of proportionality to prohibit the use of ground-to-ground incendiaries against any military objective unless it is clearly separated from a concentration of civilians and all feasible precautions are taken to limit the incendiary effects to the military objective and to minimize collateral damage.

This Protocol would also prohibit nations bound thereby from conducting incendiary attacks on forests or other plant cover except when those conceal, cover or camouflage combatants or other military objectives, or are themselves military objectives.

Although the United States has signed the Convention, it has not ratified the convention or any of its protocols, and is not bound by any of their provisions which create new law. The Warsaw Pact nations and a number of the United States' allies (including Denmark, Netherlands, Norway, Australia and Japan) have ratified the convention and accepted all three protocols. The Convention entered into force on 2 December 1983 for the nations bound by it. See paragraph 5.4.2 note 32 above. This Protocol is analyzed in Fenrick, note 6 above, at 247-50 and Schmidt, note 6 above, at 338-46.

9.7 OVER-THE-HORIZON WEAPONS SYSTEMS

Missiles and projectiles dependent upon over-the-horizon or beyond-visual-range guidance systems are lawful, provided they are equipped with sensors, or are employed in conjunction with external sources of targeting data, that are sufficient to ensure effective target discrimination.[34]

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[34] The legal standards for "effective target discrimination" are set forth in paragraph 9.1.2 (indiscriminate effect) above. Nations possessing OTH/BVR weapons are not required to use them in lieu of unguided weapons. Parks, Submarine-Launched Cruise Missiles and International Law: A Response, U.S. Naval Inst. Proc., Sept. 1977, at 122-23; O'Connell, The Legality of Naval Cruise Missiles, 66 Am. J. Int'l L. 785, 793 (1972). Cf. Digby, Precision-Guided Weapons, Adelphi Paper No. 118 (International Institute for Strategic Studies 1975); Walker, Precision-Guided Weapons, 245 Scientific American, Aug. 1981, at 37-45; 2 O'Connell 1131.

On 17 May 1987, an Iraqi Mirage F-1 attacked USS STARK (FFG-31) in the Persian Gulf northeast of Bahrain with two Exocet missiles without first identifying the ship as a legitimate target. Apparently through navigational error, the Iraqi pilot thought USS STARK was located within the Iranian-declared war zone of the Persian Gulf, a zone avoided by neutral and other protected shipping. The Iraqi pilot followed standard Iraqi policy and fired at that target believed to be within the Iranian war zone providing the largest radar return. House Armed Services Comm. Report on the Staff Investigation into the Iraqi Attack on the USS *Stark*, 14 June 1907, at 8; Vlahos, The *Stark* Report, U.S. Naval Inst. Proc., May 1988, at 64-67. Iraq has accepted responsibility for the erroneous attack. 26 Int'l Leg. Mat'ls 1427-1428 (1987). See also paragraph 6.2 note 18 above.

CHAPTER 10

Nuclear, Chemical, and Biological Weapons

10.1 INTRODUCTION

Nuclear, chemical, and biological weapons present special law-of-armed-conflict problems due to their potential for indiscriminate effects and unnecessary suffering. This chapter addresses legal considerations pertaining to the development, possession, deployment and employment of these weapons.

10.2 NUCLEAR WEAPONS

10.2.1 General. There are no rules of customary or conventional international law prohibiting nations from employing nuclear weapons in armed conflict. In the absence of such an express prohibition, the use of nuclear weapons against enemy combatants and other military objectives is not unlawful. Employment of nuclear weapons is, however, subject to the following principles: the right of the parties to the conflict to adopt means of injuring the enemy is not unlimited; it is prohibited to launch attacks against the civilian population as such; and the distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible. The decision to authorize employment of nuclear weapons must emanate from the highest level of government. For the United States, that authority resides solely in the President.[1]

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[1] NWIP 10-2, para. 613 & n.8; FM 27-10, para. 35; AFP 110-31, para. 6-5; AFP 110-34, para. 6-4; ICRC, Commentary 593-96. Cf. Reisman, Nuclear Weapons in International Law, 4 N.Y.L. Sch. J. Int'l & Comp. L. 339, 340 (1983) (pointing out the significant difference between what the law now is and what one believes the law should be, and recognizing that the effective decisionmakers in the international environment, the United States and the U.S.S.R., have not acted as if they believed the use of nuclear weapons is *per se* illegal). Constraints on nuclear weapons are cogently described in Bunn, U.S. Law of Nuclear Weapons, Nav. War C. Rev., July-Aug. 1984, at 46-62.

The rules relevant to the use of weapons established by the 1977 Additional Protocol I to the 1949 Geneva Conventions apply to conventional weapons only and are not intended to have any effect on and do not regulate or prohibit the use of nuclear or other weapons of mass destruction, including chemical and biological weapons. Those questions are the subject of arms control and disarmament negotiations and agreement. Statements on ratification by Belgium, Italy, the Netherlands, and by the United Kingdom and the United States on signature to Additional Protocol I; Roach, Certain Conventional Weapons Convention: Arms Control or Humanitarian Law? 105 Mil. L. Rev. 1, 31-34 n.83 (1984); ICRC, Commentary 593-94. See paragraph 5.4.2 note 30 above regarding the U.S. decision not to seek ratification of Additional Protocol I.

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The following assertions have been made contending that nuclear weapons are illegal:

Poison Gas Analogy. It has been contended that nuclear radiation is sufficiently comparable to a poison gas to justify extending the 1925 Gas Protocol's prohibition to include the use of nuclear weapons. However, this ignores the explosive, heat and blast effects of a nuclear burst, and disregards the fact that fall-out is a by-product which is not the main or most characteristic feature of the weapon. The same riposte is available to meet an argument that the use of nuclear weapons would violate the prohibition on the use of poisoned weapons, set out in article 23(a) of the Hague Regulations. Accord, ICRC, Commentary 594.

The Unnecessary Suffering Argument. Customary international law prohibits the use of weapons calculated to cause unnecessary suffering; the rule is declared in the Hague Regulations, article 23(e), and now confirmed in Additional Protocol I, article 35(2), which prohibits the employment of weapons, projectiles and materials and methods of warfare of a nature such as would cause superfluous injury or unnecessary suffering. However, these humanitarian considerations are offset by a due regard for the military interests at stake. The Declaration of St. Petersburg 1868, Schindler & Toman 102, contrasts the two: on the one hand, the only legitimate object during a war is to weaken the military forces of the enemy. On the other, this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable. Nuclear weapons can be selectively directed against military targets. In the context of this balance, it is not clear that the use of nuclear weapons necessarily violates international law.

The Crime Argument. It has been argued that using nuclear weapons would constitute a crime against humanity, this being a violation of international law under the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, paragraph 6.2.5 note 47 above, signed in 1945 by the United States, the U.S.S.R., the United Kingdom and France, and later adhered to by 19 other nations. The definition of crimes against humanity in the Charter of the Nuremberg International Military Tribunal included murder committed against any civil population, the object being to encompass acts of extermination of whole groups of civilians. The principles of international law recognized by the Charter of the Nuremberg Tribunal and by its Judgment were affirmed in Resolution 95(I) adopted unanimously by the UN General Assembly on 11 December 1946. Schindler & Toman 833. This Resolution associated the General Assembly with the Nuremberg Judgment, and also implied that that judgment was consistent with international law. Similarly, the killing of people with intent to destroy, in whole or in part, a national or other group, is among conduct which the Genocide Convention of 1948, 78 U.N.T.S. 277, T.I.A.S. No. , AFP 110-20, at 5-56, makes a crime in international law. (Pursuant to Sen. Ex. Rep. 99-5, 18 July 1985, the Senate gave advice and consent to ratification of the Genocide Convention on 19 February 1986, subject

(continued...)

10.2.2 **Treaty Obligations.** Nuclear weapons are regulated by a number of arms control agreements restricting their development, deployment, and use. Some of these agreements (e.g., the 1963 Nuclear Test Ban Treaty) may not apply during time of war.[2]

10.2.2.1 **Seabed Arms Control Treaty.** This multilateral convention prohibits emplacement of nuclear weapons on the seabed and the ocean floor beyond a 12-nautical mile coastal zone measured from the baseline of the territorial sea.[3] The prohibition extends to

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[1](...continued)
to two reservations, five understandings, and one declaration that the President will not deposit the instrument of ratification until after implementing legislation has been enacted. Klitzman, Baab and Murphy, Ratification of the Genocide Convention: From the Ashes of "Shoah" Past the Shoals of the Senate, Fed. Bar News, July-Aug. 1986, at 255; Cong. Q. 909 & 1045 (1988). That legislation was enacted as the Genocide Convention Implementation Act of 1987 (the Proxmire Act), Pub. L. 100-606, 102 Stat. 3045, 18 U.S.C. 1091-93. The Genocide Convention entered into force for the United States on 23 February 1989. See 28 Int'l Leg. Mat'ls 754-85 (1989) for full text of the pertinent legislative actions. In neither case was nuclear warfare envisaged. The argument that would describe nuclear warfare as a crime against humanity or as genocide lacks legal and historical foundation.

The Resolutions Argument. In Resolution 1653(XVI) adopted on 24 November 1961, the UN General Assembly declared the use of nuclear weapons to be illegal, as being contrary to the UN Charter, the law of nations, and laws of humanity. However, an assumption that this resolution is legally binding may be countered first by the fact that the UN Charter confers no legislative power on the General Assembly, and second by examining the voting which took place in 1961. That resolution had a majority of only 35, 55 nations having voted for it and 20 against it (including the United States, the United Kingdom, and France), with 26 nations abstaining. Schindler & Toman 129-30. The wording of the resolution is more appropriate to a condemnation in moral rather than in legal terms.

[2] Such treaties permit withdrawal if the supreme interests of a nation are at stake; these treaties include the Seabed Arms Control Treaty (art. VIII), Outer Space Treaty (art. IV), Treaty of Tlatelolco (art. 30.1) and its two Protocols, Nuclear Test Ban Treaty (art. IV), Non-Proliferation Treaty (art. X.1) (see paragraph 10.2.2.6), and, of the bilateral nuclear arms control agreements, the ABM Treaty (art. XV.2), the Threshold Test Ban Treaty (art. V.2), and SALT I (art. VIII.3).

[3] Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, 11 February 1971, entered into force 18 May 1972, 23 U.S.T. 701, T.I.A.S. No. 7337, AFP 110-20. Weapons of mass destruction, other than nuclear weapons, are not defined in this or any other arms control treaty. Baselines are described in paragraph 1.3.

(continued...)

structures, launching installations, and other facilities specifically designed for storing, testing, or using nuclear weapons. This treaty prohibits emplacement of nuclear mines on the seabed and ocean floor or in the subsoil thereof. It does not, however, prohibit the use of nuclear weapons in the water column that are not so affixed to the seabed (e.g., nuclear armed depth charges and torpedoes).

10.2.2.2 Outer Space Treaty. This multilateral convention prohibits the placement, installation, or stationing of nuclear weapons or other weapons of mass destruction in earth orbit, on the moon or other celestial bodies, or in outer space. Suborbital missile systems are not included in this prohibition.[4]

10.2.2.3 Antarctic Treaty. The Antarctic Treaty is a multilateral convention designed to ensure that Antarctica, defined to include the area south of 60° South Latitude, is used for peaceful purposes only. The treaty prohibits in Antarctica "any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons." Nuclear explosions are specifically prohibited. Ships and aircraft at points of discharging personnel or cargoes in Antarctica are subject to international inspection. Ships and aircraft operating on and over the high seas within the treaty area are not subject to these prohibitions.[5]

10.2.2.4 Treaty of Tlatelolco. This treaty is an agreement among the Latin American countries not to introduce nuclear weapons into Latin America. The treaty does not, however, prohibit Latin American nations from authorizing nuclear armed ships and aircraft

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[3](...continued)
Two conferences have been held to review the implementation of the terms of this treaty: 20 June-1 July 1977 and 12-23 September 1983. The Final Declaration of the first review conference is reprinted in ACDA, Documents on Disarmament 1977, at 398-401 (1979); the Final Declaration of the second review conference is reprinted in 8 United Nations Disarmament Yearbook 1983, at 400-403 (1984).

[4] **Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 27 January 1967, entered into force 10 October 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, AFP 110-20. It also limits the use of the moon and other celestial bodies exclusively to peaceful purposes and expressly prohibits their use for establishing military bases, installations, or fortifications, testing weapons of any kind, or conducting military maneuvers. See paragraph S2.9.4.**

[5] **12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71, AFP 110-20, entered into force 23 June 1961. There were 37 parties to the Antarctic Treaty on 1 January 1989, of which 20 are consultative members under article IX of the treaty. A review conference may be called in 1991. See paragraph 2.4.5.2 for information on peacetime operations in the Antarctic region.**

of nonmember nations to visit their ports and airfields or to transit through their territorial seas or airspace.[6] The treaty is not applicable to the power system of any vessel.

Protocol I to the treaty is an agreement among non-Latin American nations that exercise international responsibility over territory within the treaty area to abide by the denuclearization provisions of the treaty. The Netherlands, the U.K., and the U.S. are parties to Protocol I. U.S. territory within the Latin America treaty area includes Guantanamo Bay in Cuba, the Virgin Islands, and Puerto Rico. Consequently the U.S. cannot maintain nuclear weapons in those areas. Protocol I nations retain, however, competence to authorize transits and port visits by ships and aircraft of their own or other armed forces in their Protocol I territories, irrespective of armament or cargo.

Protocol II is an agreement among nuclear-armed nations (China, France, the U.S.S.R., the U.K., and the U.S.) to respect the denuclearization aims of the treaty, to not use nuclear weapons against Latin American nations party to the treaty, and to refrain from contributing to a violation of the treaty by the Latin American nations.

10.2.2.5 Nuclear Test Ban Treaty. This multilateral treaty prohibits the testing of nuclear weapons in the atmosphere, in outer space, and underwater. Over 100 nations are party to the treaty, including the U.S.S.R., the U.K., and th U.S. (France and China are not parties.) Underground testing of nuclear weapons is . ncluded within the ban.[7]

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[6] **Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco), Mexico City, 14 February 1967, entered into force 22 April 1968, AFP 110-20. The *travaux preparatoires* and navigational implications of this treaty and its two protocols are fully discussed in the note to paragraph 2.4.6 above. The United States is not party to any other nuclear free zone treaty.**

[7] **Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space, and Under Water, 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43, AFP 110-20. There were 117 parties on 1 January 1989.**

The treaty also prohibits "any other nuclear explosi-" in the specified areas:

> **The phrase "any other nuclear explosion" includes explosions for peaceful purposes. Such explosions are prohibited by the treaty because of the difficulty of differentiating between weapon test explosions and peaceful explosions without additional controls.**

Statement of State Department Legal Adviser to Senate Foreign Relations Comm., reprinted in 11 Whiteman 793-96.

All bodies of water, including inland waters, are included within the term "under water" (id. at 790).

(continued...)

10.2.2.6 **Non-Proliferation Treaty.** This multilateral treaty obligates nuclear-weapons-nations to refrain from transferring nuclear weapons or nuclear weapons technology to non-nuclear-weapons nations, and obligates non-nuclear-weapons nations to refrain from accepting such weapons from nuclear-weapons-nations or from manufacturing nuclear weapons themselves. The treaty does not apply in time of war.[8]

10.2.2.7 **Bilateral Nuclear Arms Control Agreements.** The United States and the U.S.S.R. have concluded a number of bilateral agreements designed to restrain the growth of nuclear

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[7](...continued)
The treaty also prohibits nuclear explosions in any other environment if the explosion would cause radioactive debris to be present outside the borders of the nation conducting the explosion. Underground tests which do not cause radioactive debris to be present outside the territorial limits of the nation in which the test is conducted are not prohibited (id. at 791).

The treaty does not impose any limitation on the use of nuclear weapons by the parties in war (id. at 793-98).

[8] Treaty on the Nonproliferation of Nuclear Weapons, signed 1 July 1968, 21 U.S.T. 483, T.I.A.S. No. 6839, AFP 110-20. This treaty is designed to prevent the spread of nuclear weapons; to provide assurances, through international safeguards, that the peaceful nuclear activities of nations which have not already developed nuclear weapons will not be diverted to making such weapons; to promote, to the maximum extent consistent with the other purposes of the treaty, the peaceful uses of nuclear energy through the full cooperation, with the potential benefits of any peaceful application of nuclear explosive technology being made available to non-nuclear parties under appropriate international observation; and to express the determination of the parties that the treaty should lead to further progress in comprehensive arms control and nuclear disarmament measures.

Over 137 nations are party to this treaty, including the nuclear-weapons-nations of the United States, the United Kingdom, and the U.S.S.R. However, Argentina, China, France, Israel, India, Pakistan, and South Africa, all of whom either have nuclear weapons or the technology to manufacture them, are not parties. N.Y. Times, 4 May 1987, at A24.

Three conferences have been held to review the implementation of the terms of the NPT treaty: 5-30 May 1975; 11 August-7 September 1980; and 27 August-21 September 1985. The Final Declaration of the first review conference is reprinted in ACDA, Documents on Disarmament 1975, at 146-156 (1977) and Dep't St. Bull., 30 June 1975, at 924-929. The proceedings of the second review conference are summarized in 5 United Nations Disarmament Yearbook 1980, at 126-147 (1981); no consensus was reached on a final declaration at this review conference. The Final Declaration of the third review conference is reprinted in Dep't St. Bull., Nov. 1985, at 38-44, and 10 United Nations Disarmament Yearbook 1985, at 169-190 (1986).

warheads and launchers and to reduce the risk of miscalculation that could trigger a nuclear exchange. Among these agreements are the Hotline Agreements of 1963 and 1971,[9] the Accidents Measures Agreement of 1971,[10] the 1973 Agreement on Prevention of Nuclear War,[11] the Anti-Ballistic Missile Treaty of 1972 and its Protocol of 1974,[12] the Threshold Test Ban Treaty of 1974,[13] the 1976 Treaty on Peaceful Nuclear Explosions,[14] the SALT

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[9] Memorandum of Understanding between the United States of America and the Union of Soviet Socialist Republics Regarding the Establishment of a Direct Communications Link, with Annex, 20 June 1963, 14 U.S.T. 825, T.I.A.S. No. 5362, 472 U.N.T.S. 163; Agreement Between the United States of America and the Union of Soviet Socialist Republics on Measures to Improve the USA-USSR Direct Communications Link, with Annex, 30 September 1971, 22 U.S.T. 1598, T.I.A.S. No. 7187, 806 U.N.T.S. 402, as amended March 20 and April 29, 1975, 26 U.S.T. 564, T.I.A.S. No. 8059.

[10] Agreement on Measures to Reduce the Risk of Outbreak of Nuclear War Between the United States of America and the Union of Soviet Socialist Republics, 30 September 1971, 22 U.S.T. 1590, T.I.A.S. No. 7186, 807 U.N.T.S. 57. On 15 September 1987, the Agreement Between the United States of America and the Union of Soviet Socialist Republics on the Establishment of Nuclear Risk Reduction Centers, and its two Protocols, was signed and entered into force. Dep't St. Bull., Nov. 1987, at 34, 27 Int'l Leg. Mat'ls 76 (1988).

[11] Agreement Between the United States of America and the Union of Soviet Socialist Republics on the Prevention of Nuclear War, 22 June 1973, 24 U.S.T. 1478, T.I.A.S. No. 7654.

[12] Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, entered into force 3 October 1972, 23 U.S.T. 2435, T.I.A.S. No. 7503 (ABM Treaty); Protocol to the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, Moscow, 3 July 1974, entered into force 24 May 1976, 27 U.S.T. 1645, T.I.A.S. No. 8276. See paragraph 2.9.3.1 note 107. The results of the third review conference of the ABM Treaty are summarized in Dep't St. Bull., Nov. 1988, at 19-20.

[13] Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Underground Nuclear Weapon Tests and Protocol thereto, Moscow, 3 July 1974. This treaty was submitted to the Senate for its advice and consent in July 1976, along with the companion treaty on underground nuclear explosions for peaceful purposes which was signed on 28 May 1976 having been negotiated in accordance with Article III of the Threshold Test Ban Treaty. Sen. Ex. N, 94th Cong., 2d Sess. Hearings were held in 1977 and 1987; effective verification and nuclear testing treaty safeguards are the principle difficulties in achieving ratification. Dep't St. Bull., June 1987, at 48-52. On 27 February 1987 the Senate Foreign Relations Committee reported these treaties favorably with reservations and declarations (as quoted in note 14 below) and

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Agreements of 1972 and 1977 (SALT I--Interim Agreement has expired; SALT II was never ratified),[15] and the INF Treaty of 1988.[16]

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[13](...continued)
recommended the Senate give its advice and consent to ratification. Sen. Ex. Rep. 100-1. To date the Senate has not acted on these treaties.

[14] Treaty Between the United States of America and the Union of Soviet Socialist Republics on Underground Nuclear Explosions for Peaceful Purposes and Protocol thereto, 28 May 1976, Sen. Ex. N, 94th Cong., 2d Sess.; Sen. Ex. Rep. 100-1. The proposed reservation and declaration state:

> The advice and consent of the Senate to the ratification of the Treaty on Underground Nuclear Explosions for Peaceful Purposes is subject to the condition that the President shall not proceed with ratification of this treaty until he has certified to the Senate that the Union of Soviet Socialist Republics has concluded with the United States additional agreements expanding upon the obligations stated in Article II of the Treaty on Limitation of Underground Weapon Tests . . . , including provisions for direct, accurate yield measurements taken at the site of all appropriate nuclear detonations, so that the limitations and obligations of these treaties, inter alia the 150-kiloton limit, are effectively verifiable.
>
> The Senate declares its support for the President's commitment of October 10, 1986, to propose, upon ratification of the Treaty on the Limitation of Underground Nuclear Weapon Tests . . . and the Treaty on Underground Nuclear Explosions for Peaceful Purposes . . . , immediate negotiations with the Soviet Union on further testing constraints, consistent with the commitment made by each party in Paragraph 2 of Article I of the Treaty on the Limitation of Underground Nuclear Weapons Tests to "limit its underground nuclear weapons tests to a minimum" and the obligation of the two parties in Paragraph 3 of Article I to "continue their negotiations with a view toward achieving a solution to the problem of the cessation of all underground nuclear weapons tests."

The President's 10 October 1986 letter to Congress appears in Dep't St. Bull., June 1987, at 49-50.

[15] SALT I includes the ABM Treaty (see note 12 above) and the Interim Agreement Between the United States of America and the Union of Soviet Socialist Republics on Certain Measures with respect to the Limitation of Strategic Offensive Arms with associated Protocol, entered into force 3 October 1972, 23 U.S.T. 3462, T.I.A.S. No. 7504, AFP 110-20. The Interim Agreement expired on 3 October 1977. However, both the United States and the Soviet Union issued parallel statements announcing that they would continue to observe the limitations on strategic buildups which were contained in the
(continued...)

[15](...continued)
agreement. 77 Dep't St. Bull. 642 (1977).

SALT II is formally known as the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Strategic Offensive ' ms, signed 18 June 1979, submitted to the Senate for its advice and consent 22 Ju .e 1979, and withdrawn from the Senate's calendar in January 1980. In 1977 the Presidents of both countries stated they would do nothing to jeopardize the treaty so long as each abided by it. 77 Dep't St. Bull. 642 (1977).

In 1982 the United States announced that it would not undercut the expired SALT I Interim Agreement and the unratified SALT II Agreement as long as the Soviet Union exercised equal restraint. 1 Public Papers of President Reagan 709 (31 May 1982); ACDA, Documents on Disarmament, 1982, at 332. Taken to foster an atmosphere of mutual restraint, the policy was founded on the assumption of Soviet reciprocity, and it was also contingent on the United States being able to uphold U.S. national security interests.

Following a 1985 review of the continuing pattern of Soviet noncompliance and its adverse implications for the security and arms control process (see Dep't St. Bull., Aug. 1985, at 33-37), the United States announced in May 1986 that it would henceforth base decisions regarding its strategic force structure on the nature and magnitude of the threat posed by Soviet strategic forces, and not on the standards contained in the expired SALT I Interim Agreement and the unratified SALT II Treaty. Dep't St. Bull., Aug. 1986, at 36-43. Consistent with this policy, the United States ceased technical observance of the SALT II Treaty on November 28, 1986. At the same time, the United States indicated it will continue to exercise the utmost restraint. In particular, during strategic modernization essential to U.S. security and that of its allies, it will continue to retire older forces as national security requirements permit. Further, no appreciable growth in the size of U.S. strategic forces is anticipated, and the United States does not intend to increase the size of deployed strategic nuclear delivery vehicles or strategic ballistic missile warheads above the number for the Soviet Union. Dep't St. Bull., Oct. 1986, at 10-13.

[16] The Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles (INF Treaty), and associated documents, signed 8 December 1987, Dep't St. Bull., Feb. 1988, at 24, 27 Int'l Leg. Mat'ls 84 (1988), and submitted to the Senate for its advice and consent on 25 January 1988, Sen. Treaty Doc. 100-11. The Letters of Transmittal and Submittal appear in 27 Int'l Leg. Mat'ls 262; the Article-by-Article Analysis appears in 27 Int'l Leg. Mat'ls 199. Hearings commenced on 25 January 1988. Advice and consent, subject to three conditions, four declarations, and three declarations and understandings, was given on 27 May 1988; instruments of ratification were exchanged on 1 June 1988. (The President has rejected the condition relating to Treaty Clauses of the Constitution. Presidential letter of 10 June 1988, 24 Weekly Comp. Pres. Docs. 842, 134 Cong. Rec. S7825-26 (daily ed. 15 June 1988).) The treaty is also subject to certain agreed notes and
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10.3 CHEMICAL WEAPONS

Both customary and conventional international law prohibit the "first use" of lethal chemical weapons in armed conflict.

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[16](...continued)
minutes dated 12 May 1988, Cong. Rec., 26 May 1988, at S6705-06, and corrections dated 21 & 22 May 1988, id. at S6717-18. The associated documents include a Memorandum of Understanding Regarding the Establishment of the Data Base for the Treaty Between the U.S.S.R. and the U.S.A. on the Elimination of Their Intermediate-Range and Shorter-Range Missiles, a Protocol on Procedures Governing the Elimination of the Missile Systems Subject to the Treaty Between the U.S.A. and the U.S.S.R. on the Elimination of Their Intermediate-Range and Shorter-Range Missiles, and a Protocol Regarding Inspections Relating to the Treaty Between the U.S.A. and the U.S.S.R. on the Elimination of Their Intermediate-Range and Shorter-Range Missiles. Related treaties are the Agreement Among the United States of America and the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Italy, the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland Regarding Inspections Relating to the Treaty Between the U.S.A. and the U.S.S.R. on the Elimination of Their Intermediate-Range and Shorter-Range Missiles, Brussels, 11 December 1987, Dep't St. Bull., Feb. 1988, at 78, 27 Int'l Leg. Mat'ls 60; and separate exchanges of notes between the U.S.A. and the German Democratic Republic and Czechoslovakia, and between the U.S.S.R. and the five U.S. allied basing countries, acknowledging agreement to inspections on their territory by the U.S.A. and U.S.S.R. respectively. The U.S.A.-G.D.R. exchange of notes is set out in 27 Int'l Leg. Mat'ls 73.

Some military bases agreements with the United States restrict the storage or installation of nuclear weapons in the host country. For example, the U.S.-Philippines Military Bases Agreement, 17 October 1988, provides:

> VI. Nuclear Weapons
>
> 1. Notwithstanding the provisions of Article III of the 1947 Military Bases Agreement, as amended, the storage or installation of nuclear or non-conventional weapons or their components in Philippine territory shall be subject to the agreement of the Government of the Philippines.
>
> 2. For purposes of paragraph 1, transits, overflights or visits by U.S. aircraft or ships in Philippine territory shall not be considered storage or installation. These transits, overflights or visits will be conducted in accordance with existing procedures, which may be changed or modified, as necessary, by mutual agreement between both parties.

Dep't St. Bull., Dec. 1988, at 25. Similar terms exist in the 1988 U.S.-Spain military bases agreement.

10.3.1 Treaty Obligations. The United States is a party to the 1925 Geneva Gas Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare ("the 1925 Gas Protocol"). All other NATO nations and all Warsaw Pact nations are also parties.[17] The United States, the U.S.S.R., and most other NATO and Warsaw Pact nations conditioned their adherence to the 1925 Gas Protocol on the understanding that the prohibition against use of chemical weapons ceases to be binding with respect to nations whose armed forces, or the armed forces of their allies, fail to respect that prohibition. This, in effect, restricts the prohibition to the "first use" of such munitions, with parties to the Protocol reserving the right to employ chemical weapons for retaliatory purposes.[18]

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[17] 26 U.S.T. 571, T.I.A.S. No. 8061, AFP 110-20, entered into force for the United States on 10 April 1975. There are at least 135 parties to this treaty. The operative provisions of the Protocol obligate the contracting nations not to use in war "asphyxiating, poisonous or other gases, and . . . all analogous liquids, materials or devices." See the Final Declaration of the Paris Conference on the Prohibition of Chemical Weapons, 11 January 1989, UN Doc. A/44/88, 20 Jan. 1989, Annex, reprinted in 28 Int'l Leg. Mat'ls 1020 and Arms Control Rep. 704.B.338.2 (1989) and discussed in 30 Harv. Int'l L.J. 495 (1989).

[18] Forty nine nations adhering to the Protocol have done so subject to reservations. For all practical purposes the reservations, although sometimes differently worded, may all be assimilated to the following:

> (1) The Protocol is binding only as regards nations which are parties to the protocol itself (this reservation is somewhat superfluous, as it reiterates something which is already stated in the Protocol's text).
>
> (2) The Protocol ceases to be binding as regards nations whose armed forces or the armed forces of whose allies fail to respect the prohibition laid down in the Protocol. This reservation, which in fact restricts the prohibition to first use of chemical weapons, was entered by the following NATO/Warsaw Pact nations: Belgium, Canada, France, the Netherlands, Portugal, Spain, United Kingdom, United States, Bulgaria, Czechoslovakia, Romania and U.S.S.R., and was not objected to by any nation.

The United States ratified the agreement subject to the reservation that the Protocol would cease to be binding with respect to the use in war of asphyxiating, poisonous or other gases, and of all analagous liquids, materials, or devices, in regard to an enemy nation if such nation or any of its allies fails to respect the prohibitions laid down in the Protocol. See paragraph 10.3.2.1 below regarding U.S. policy on the retaliatory use of lethal and incapacitating agents.

The 1925 Gas Protocol does not prohibit the development, production, testing, or stockpiling of chemical weapons, nor does it prevent equipping and training military forces for chemical warfare.[19]

10.3.2 United States Policy Regarding Chemical Weapons. The United States categorizes chemical weapons under three headings of lethal and incapacitating agents, riot control

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[19] The Federal Republic of Germany is the only nation which has unilaterally obligated itself not to *produce* chemical weapons on its territory.

The United States is committed (e.g., by Article IX of the 1972 Biological Weapons Convention) to the objective of the complete, effective and verifiable prohibition of all chemical weapons. The United States continues to support the essential objective of concluding a complete and verifiable prohibition on the production, development, acquisition and stockpiling of CW agents and munitions, recognizing that for the foreseeable future such a prohibition would be unverifiable by national technical means alone.

Bilateral U.S.-U.S.S.R. negotiations on a comprehensive chemical weapons prohibition began in 1977 and stalled in 1979, due principally to fundamental disagreement on the issue of the need for effective verification of a chemical weapons ban and particularly Soviet intransigence relating to on-site inspections. Bilateral negotiations resumed in 1986.

In multilateral fora, discussions on a chemical weapons agreement have been underway since the late 1960s. During the U.S.-U.S.S.R. negotiations, multilateral activity waned to some extent, although interest in a chemical weapons prohibition continued. Since 1980, discussions on the multilateral elaboration of a chemical weapons convention have occurred in the 40-nation Committee on Disarmament (CD) in Geneva, Switzerland. In 1982, the CD began to elaborate a chemical weapons convention. On 18 April 1984, the United States tabled a comprehensive draft treaty banning entirely the possession, production, acquisition, retention or transfer of chemical weapons. Dep't St. Bull., June 1984, 40-43. The CD Draft Convention text of 27 April 1987 may be found in The Arms Control Reporter 1987, at 704.D.105-.118.

agents, and herbicidal agents.[20] United States policy with respect to these three categories

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[20] *Chemical operations* is the employment of chemical agents to kill, injure, or incapacitate for a significant period of time, man or animals, and deny or hinder the use of areas, facilities, or material; as well as the defense against their employment. On the other hand, *chemical warfare* involves all aspects of military operations involving the employment of lethal and incapacitating munitions/agents and the warning and protective measures associated with such offensive operations.

Chemical agents are substances which, through their chemical properties, are intended for use in military operations to kill, seriously injure, or incapacitate man through their physiological effects. This definition excludes riot control agents (RCAs), chemical herbicides, and smoke and flame materials. (RCAs and herbicides are either referred to separately or under the broader term *chemicals*.) Chemical agents are classified according to physical state, use, and physiological effects, with the latter two being the most common in military usage. The two classifications used are *toxic* agents and *incapacitating* agents.

Toxic agents are capable of producing incapacitation, serious injury, or death when used in field concentrations. *Incapacitating agents*, on the other hand, produce temporary physiological or mental effects, or both, rendering individuals incapable of concerted efforts in the performance of their assigned duties while normally allowing complete recovery without medical treatment. Although there could be numerous military advantages to incapacitants, past efforts to develop an agent with predictable results were unsuccessful, and the U.S. does not have such an agent available for military use. However, a variety of toxic agents are known and are further classified by physiological effect.

Nerve agents are lethal agents which cause paralysis by interfering with the transmission of nerve impulses. They are organophosphorous compounds similar to many commonly used insecticides. However, they are several orders of magnitude more toxic and minute quantities can kill. Basically, the nerve agents work at the nerve/muscle interface by blocking the enzyme which allows the muscles to relax. Consequently, the victim loses muscular control and dies of suffocation due to inability to breathe. Death can occur within a few minutes if the dose is large enough. Nerve agents are liquids which vaporize into the air or can be disseminated in the form of an aerosol. In addition to working through inhalation or ingestion, the liquid and (to a minor extent) the vapors can be absorbed through the skin. The eyes are particularly sensitive to nerve agents and very small liquid or vapor exposures can cause pinpointing of the pupils (miosis) making it impossible to perform tasks requiring good visual acuity. A mask, protective garment, and gloves are required for protection, but the garment may be removed as the possibility of liquid contamination declines, permitting greater operational efficiency.

Blood agents are chemical compounds, including the cyanide group, that affect bodily functions by preventing the transfer of oxygen from the blood to the body cells causing rapid death. All the blood agents are highly volatile which enhances their ability to spread rapidly over a target, but requires large concentrations of agent and greatly limits their

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[20](...continued)
duration of effectiveness. Some of the compounds deteriorate rapidly in storage. They are also called *cyanogen agents.*

Choking agents work by breaking down the interior surface of the lungs causing them to fill up with fluids. Death can result from what has been called "dry land drowning." The most commonly known choking agent is phosgene, which was used in World War I. Under its chemical name (carbonyl chloride) phosgene is an industrial chemical used in the manufacture of plastics, some drug products, and urethane foam. This class of agents, effective in trench warfare, would be of only very limited utility in modern military operations and is generally considered to be obsolete.

Blister agents or *vessicants* are chemical agents which injure the eyes and lungs, and burn or blister the skin. Both the liquid and the vapors can have this effect, making whole body protection mandatory in a blister agent environment. The most commonly known blister agent is mustard, which was widely used in World War I. Blister agents can be lethal if inhaled; however, the more common result is incapacitation due to blistering of the skin. Mustard has a delayed effect; it does not cause immediate pain, the first symptoms appear in 4-6 hours. Also, it freezes at approximately 58°F. However, mixing mustard with lewisite results in an agent with a lower freezing point which produces immediate stinging of the skin. The U.S. has some mustard stockpiles.

JCS Pub 1 passim; 50 U.S.C. sec. 1521(j).

Chemical munitions may be classified as unitary or binary. *Unitary* munitions are filled with the premixed complete agent. These can be very simple in design and all consist of a container which opens or bursts on or over the target releasing the agent. Another type of munition contains separate non-lethal chemical compounds which must mix in route to the target to produce a lethal chemical agent. Because contemplated designs contain two substances, these are called *binary munitions.* Binary munitions, as being developed by the U.S., contain two non-lethal substances which mix to form the standard nerve agents. Binaries of this type offer safety, surety, and logistical advantages over unitary munitions. However, binaries are more complex. Binary technology could also be used to weaponize agents with desirable military characteristics, but which are unstable in storage, by separating two or more stable precursor compounds in the weapon and mixing only when used. Production of binary agents is subject to the provisions of 50 U.S.C. sec. 1516, 1519 and 1519a requiring various Presidential certification to Congress that production of new chemical agents or munitions is essential to the national interest, and regarding destruction of serviceable unitary artillery shells. Production started in December 1987; destruction of the U.S. unitary CW stockpile, including both munitions and chemical agents in bulk storage, is required to be completed by April 1997, provided an adequate quantity of binary munitions is produced by that date. Fiscal Year 1990 Arms Control Impact Statements, Jt. Comm. Print, 101st Cong., 1st Sess., at 89 (1989). For additional background on chemical warfare see St. Aubin & Williams, Soviet Chemical
(continued...)

is summarized in the following paragraphs.

10.3.2.1 Lethal and Incapacitating Agents. The United States considers the prohibition against first use of lethal and incapacitating chemical weapons to be part of customary international law and, therefore, binding on all nations whether or not they are parties to the 1925 Gas Protocol.[21] Lethal chemical agents are those asphyxiating, poisonous, or other

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[20](...continued)
Warfare Agents: Another Type of Threat, All Hands, April 1982, at 38-43; Moore, Ratification of the Geneva Protocol on Gas and Bacteriological Warfare: A Legal and Political Analysis, 58 Va. L. Rev. 419 (1972); CBW, Chemical and Biological Warfare (Rose ed. 1968); Thomas & Thomas, Legal Limits on the Use of Chemical and Biological Weapons (1970); Carnegie Endowment for International Peace, The Control of Chemical and Biological Weapons (1971); Geneva Gas Protocol of 1925, Hearings Before Sen. Comm. on Foreign Relations on Sen. Ex. J, 92d Cong., 1st Sess. (1972); 10 Whiteman 454-79; 6 Hackworth 269-71. More recent developments on the use of chemical weapons are described in Report of Group of Experts on the Alleged Use of Chemical Weapons, UN Doc. A/37/259, 1 Dec. 1982 (Iran-Iraq war); Chemical Warfare in Southeast Asia and Afghanistan, Report to the Congress by Secretary of State Haig, March 22, 1982, Dep't of State Special Report No. 98; Chemical Warfare in Southeast Asia and Afghanistan: An Update, Report from Secretary of State Shultz, November 1982, Dep't of State Special Report No. 104, reprinted in Dep't St. Bull., Dec. 1982, at 44-53; Reports of the Missions Dispatched by the Secretary General to Investigate Allegations of the Use of Chemical Weapons in the Conflict between the Islamic Republic of Iran and Iraq, UN Docs. S/16433, 26 Mar. 1984; S/17911, 12 Mar. 1986; S/18852, 13 May 1987; S/19823, 25 Apr. 1988; S/20060, 20 July 1988; S/20063, 25 July 1988 (generally confirming the use by Iraq of mustard gas in the Iran-Iraq war); Cordesman, Creating Weapons of Mass Destruction, Armed Forces J. Int'l, Feb. 1989, at 54 (recounting development and use of chemical weapons by Iran and Iraq).

Although some have claimed the reports of "yellow rain" in Southeast Asia were actually "bee dung," e.g., Robinson, Guillemin & Meselson, Yellow Rain: The Story Collapses, Foreign Policy, Fall 1987, at 100, no further reports of debilitating injuries from "yellow rain" or "bee dung" were reported in the open press after the extensive publicity attendant to these apparent violations of the rules against chemical and biological warfare. Perhaps coincidentally, both man ceased dropping "yellow rain" and the bees stopped their "collective cleansing."

[21] Statement by the President, Use of Poison Gas, 8 June 1943, 8 Dep't St. Bull. 507 (1943) (use of chemical weapons has been "outlawed by the general opinion of civilized mankind"); Letter from Ass't Sec'y State Macomber to Cong. Rosenthal, 22 Dec. 1967, quoted in Bunn, Banning Poison Gas and Germ Warfare: Should the United States Agree? 1969 Wis. L. Rev. 375, 384-85 (the rule set forth in the 1925 Gas Protocol "is now considered to form a part of customary international law"); DA Pam. 27-161-2, at 44 (1962). Accord McDougal & Feliciano 634 and sources cited therein at n.360; Parks, Classification
(continued...)

[21](...continued)
of Chemical-Biological Warfare, 13 U. Toledo L. Rev. 1165, 1167 (1982); and Smith, International Regulation of Chemical and Biological Weapons: "Yellow Rain" and Arms Control, 1984 U. Ill. L. Rev. 1011, 1048-56.

There are different views as to the extent to which the prohibition of use of chemical weapons has become part of customary international law. At least three positions may be taken by nations on this question:

(1) The 1925 Gas Protocol is *not* customary international law, and use of chemical weapons is not contrary, *per se*, to internationally accepted customary rules. The Protocol is a no-first-use agreement *between the contracting parties.*

(2) The prohibition of *first-use* of chemical weapons as embodied in the 1925 Gas Protocol and relevant reservations thereto has become part of the customary international law and is, therefore, binding on *all* nations towards *all the others*, whether parties to it or not. This is the position of the United States.

(3) Use of chemical weapons is contrary to customary international law. It is permitted only as a belligerent reprisal in response to a chemical attack.

Whichever position is adopted, since all NATO and Warsaw Pact nations are parties to the 1925 Gas Protocol, there may be no legitimate first-use of chemical weapons in a NATO-Warsaw Pact confrontation.

The doctrine of *reciprocity* provides a basis for the *legitimate* use of chemical Weapons. Under article 60 of the Vienna Convention on the Law of Treaties, 8 Int'l Leg. Mat'ls 679 (1969), AFP 110-20, and the customary international law of reciprocity, a breach of a multilateral treaty, that is a violation of a provision essential to the accomplishment of the object of the treaty, can be invoked by the affected parties as a ground for suspending the operation of the treaty in their relations with the violating nation or nations. Therefore, all NATO nations, whether they ratified the Geneva Protocol with reservations or not, may invoke the customary rule stated in the Vienna Convention, as well as the application of the general principle of reciprocity, to justify a response with chemical weapons if attacked with such weapons by a Warsaw Pact country. Some nations, however, hold the view that article 60 of the Vienna Convention does not apply to the 1925 Gas Protocol, since this protocol may be considered as a treaty of humanitarian character (see article 60, paragraph 5).

As for the limits to this chemical response, a nation which ratified the 1925 Gas Protocol with retaliatory use reservation could take the position that, in case of violation of the treaty, it will feel free from any obligation under the terms of the Protocol. It is

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gases; analogous liquids; or materials that cause immediate death. Incapacitating agents are those producing symptoms that persist for appreciable periods of time after exposure to the agent has terminated. Because the 1925 Gas Protocol effectively prohibits only first use of such weapons, the United States maintains a lethal and incapacitating chemical weapons capability for deterrence and possible retaliatory purposes only. National

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[21](...continued)
important to note that, according to the letter of this clause:

> **- The violation may be committed either against the reserving nation or against one of its allies. The clause affirms the right of the reserving nation to retaliate on behalf of its allies.**
>
> **- All members of the enemy alliance are equally legitimate objects of retaliation whichever the violating nation.**
>
> **- Since the violation of the treaty causes, for the reserving nation, the "suspension" of the prohibition altogether, the retaliatory use of chemical weapons does not need to be proportionate or comparable to the violation to which it replies.**

The same position could be taken also by a nation which ratified the 1925 Gas Protocol without reservations. In fact, if the violation is committed by a nation which has, or whose allies have, a retaliatory-use reservation, the nation attacked could invoke the principle of reciprocity. Under the principle of reciprocity, a reservation entered by a nation which modifies the provisions of a treaty in its relations with other parties, modifies those provisions to the same extent for the other parties in their relations with the reserving nation (see Vienna Convention on the Law of Treaties, art. 21).

On the other hand, if the view on the consolidation of the prohibition of chemical weapons into a rule of customary international law is accepted, then this right of retaliation is no longer applicable without limitations. According to this interpretation, since the prohibition of chemical weapons no longer stems from a multilateral treaty, but has become a rule of customary international law, the use of such weapons by an enemy does not confer on a nation the right to "suspend" the prohibition altogether, but only gives the nation the right to act in reprisal (including in-kind reprisal) against the violating nation, in accordance with international law.

As a consequence, and regardless of whether they ratified the 1925 Gas Protocol with reservations or not, nations which consider the general prohibition of chemical weapons as being part of the customary international law, may take the position that they are only allowed to act in reprisal, including in-kind reprisal where necessary, if attacked with chemical weapons. It is to be noted that the right to use chemical weapons in reprisal does not stem from reservations to the 1925 Gas Protocol, but from the law of reprisal. For a discussion of reprisal see paragraph 6.2.3.

Command Authorities (NCA) approval is required for retaliatory use of lethal or incapacitating chemical weapons by U.S. Forces. Retaliatory use of lethal or incapacitating chemical agents must be terminated as soon as the enemy use of such agents that prompted the retaliation has ceased *and* any tactical advantage gained by the enemy through unlawful first use has been redressed.[22]

10.3.2.2 Riot Control Agents. Riot control agents are those gases, liquids, and analogous substances that are widely used by governments for civil law enforcement purposes. Riot

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[22] **Other U.S. military activities associated with chemical weapons are governed by Federal statutes. Section 1512 of 50 U.S. Code provides that the Secretary of Defense may authorize, after complying with 50 U.S. Code, chapter 32:**

(a) the testing, development, transportation, deployment, storage, and disposal* of chemical weapons;

(b) the transportation, open-air testing, or disposal* of lethal chemical warfare agents within the United States;**

(c) the deployment, storage or disposal outside the United States* of lethal chemical warfare agents or any delivery system specifically designed to disseminate any such agent;**

(d) the disposal* of any chemical munition in international waters; and

(e) the testing, development, transportation, storage or disposal* of lethal chemical warfare agents outside the United States*.**

***Except for dumping from a vessel in an emergency to safeguard life at sea (33 U.S.C. sec. 1415(h)), chemical warfare agents may not be disposed of in U.S. navigable waters (33 U.S.C. sec. 1311(f)), in ocean waters (33 U.S.C. sec. 1412(a) and 50 U.S.C. sec. 1513(1) and (2)), or on land within the United States if the manner of disposition and the disposal site will result in the contamination of public drinking water supplies, aquifiers, or the leaching of such chemical agents into the navigable waters of the United States or state waters. Otherwise onland disposal of chemical agents may be permitted if there is compliance with the National Environmental Policy Act (42 U.S.C. sec. 4321-61), Rivers and Harbors Act of 1899 (33 U.S.C. sec. 401-466n), the Federal Water Pollution Control Act as amended (33 U.S.C. sec. 1251-1376), the Safe Water Drinking Act (42 U.S.C. sec. 7401-7642), and the Resource Conservation and Recovery Act (42 U.S.C. sec. 6901-6987).**

****The term "United States" as used here includes the States, the District of Columbia, and the territories and possessions of the United States (50 U.S.C. sec. 1514).**

*****The term "United States" as used here means the States and the District of Columbia (50 U.S.C. sec. 1513(1)).**

50 U.S.C. sec. 1521, effective 1 October 1985, directs the steps to be taken to carry out the destruction of the existing U.S. stockpile of lethal chemical agents and munitions in conjunction with the acquisition of binary chemical weapons for use by the U.S. armed forces. No lethal chemical agents or munitions other than binary chemical weapons may be developed or acquired by the U.S. government (except for intelligence analysis and RDT&E purposes). 50 U.S.C. sec. 1521(h). See Rouse, The Disposition of the Current Stockpile of Chemical Munitions and Agents, 121 Mil. L. Rev. 17 (1988).

control agents, in all but the most unusual circumstances, cause merely transient effects that disappear within minutes after exposure to the agent has terminated. Tear gas and Mace are examples of riot control agents in widespread use by law enforcement officials. The United States considers that use of riot control agents in wartime is not prohibited by the 1925 Gas Protocol. However, the United States has formally renounced first use of riot control agents in armed conflict except in defensive military modes to save lives. Examples of authorized use of riot control agents in time of armed conflict include:

1. Riot control situations in areas under effective U.S. military control, to include control of rioting prisoners of war

2. Rescue missions involving downed aircrews or escaping prisoners of war

3. Protection of military supply depots, military convoys, and other military activities in rear echelon areas from civil disturbances, terrorist activities, or paramilitary operations.

Use of riot control agents by U.S. forces in armed conflict requires NCA approval.[23]

Employment of riot control agents in *peacetime* may be authorized by the Secretary of Defense, or in limited circumstances, by the commanders of the unified and specified commands. Examples of authorized use of riot control agents in peacetime include:

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[23] **Exec. Order No. 11,850, 40 Fed. Reg. 16187, 3A C.F.R. 149-50 (1975); AFP 110-20; FM 27-10 ch. 1. Exec. Order No. 11,850 expressly permits:**

> **the first use of riot control agents in war . . . in defensive military modes to save lives *such as*:**
>
> **(1) Use of riot control agents in riot control situations in areas under direct and distinct U.S. military control, to include controlling rioting prisoners of war.**
>
> **(2) Use of riot control agents in situations in which civilians are used to mask or screen attacks and civilian casualties can be reduced or avoided.**
>
> **(3) Use of riot control agents in rescue missions in remotely isolated areas, of downed air crews and passengers, and escaping prisoners.**
>
> **(4) Use of riot control agents in rear echelon areas outside the zone of immediate combat to protect convoys from civil disturbances, terrorist and paramilitary organizations.**

Presidential memorandum to the Secretary of Defense, 10 January 1976, Subj: Use of Riot Control Agents to Protect or Recover Nuclear Weapons, adds to this list security operations regarding the protection or recovery of nuclear weapons. See Table ST10-1.

1. Civil disturbances and other law enforcement activities in the United States, its territories and possessions[24]

2. On U.S. bases, posts, embassy grounds, and installations overseas for protection and security purposes, including riot control[25]

3. Offbase overseas for law enforcement purposes specifically authorized by the host government[26]

4. Humanitarian evacuation operations involving U.S. or foreign nationals.[27]

10.3.2.3 Herbicidal Agents. Herbicidal agents are gases, liquids, and analogous substances that are designed to defoliate trees, bushes, or shrubs, or to kill long grasses and other vegetation that could shield the movement of enemy forces. The United States considers that use of herbicidal agents in wartime is not prohibited by the 1925 Gas Protocol, but has formally renounced the first use of herbicides in time of armed conflict except for control of vegetation within U.S. bases and installations or around their immediate defensive perimeters. Use of herbicidal agents during armed conflict requires NCA approval.[28] Use of herbicidal agents in peacetime may be authorized by the Secretary of Defense or, in limited circumstances, by the commanders of the unified and specified commands.[29]

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[24] **Department of the Army Civil Disturbance Plan, GARDEN PLOT, 3 August 1978; SECNAVINST 5400.12 (series), Subj: Civil disturbances.**

[25] **The U.S.-controlled portions of foreign installations are considered U.S. installations. JSCP Annex F.**

[26] **DEPSECDEF memo for Service Secretaries and Chairman, Joint Chiefs of Staff, Subj: Use of Chemical Irritants in Military Law Enforcement, 19 June 1978. Chemical aerosol-irritant projectors may also be used by military law enforcement personnel for the performance of law enforcement activities (1) on-base and offbase in the United States and in its territories and possessions, and (2) on-base overseas.**

[27] **Authority for use of RCAs in peacetime situations not covered by the above (e.g., to save lives in counterterrorist operations) should be submitted through the chain of command to SECDEF for approval. JSCP Annex F.**

[28] **Exec. Order No. 11,850 permits such use under regulations applicable to their domestic use.**

[29] **JSCP Annex F.**

TABLE ST10-1

EMPLOYMENT POLICY FOR RIOT CONTROL AGENTS

RELEASE AUTHORITY

REASONS FOR EMPLOYMENT PEACETIME	President	Sec of Defense	Sec of Mil Dept	U&S Cmds	US1/ On Base	US1/ Off Base	OVERSEAS2/ On Base	OVERSEAS2/ Off Base
1. Civil disturbance operations in CONUS.			X3/					
2. On US bases, posts, and installations for:								
a. Protection and security purposes.		X4/		X	X		X	
b. Riot control.		X4/		X	X		X	
c. Installation security.		X4/		X	X		X	
d. Evacuation of US noncombatant and foreign nationals.		X4/		X	N/A		X	
3. Chemical aerosol-irritant projectors for the performance of law enforcement activities by military law enforcement personnel.		X5/	X		X	X	X	X6/
4. For the protection or recovery of nuclear weapons under the same conditions as authorized for the use of lethal force.		X4/		X7/		X		X
5. For movement and storage to support peacetime and wartime contingency planning requirements.		X4/		X	X	X	X	X
6. For training.		X4/		X	X	X	X	

Source: USMC Law of War Course

TABLE ST10-1 (cont'd)

RELEASE AUTHORITY

REASONS FOR EMPLOYMENT WARTIME	President	Sec of Defense	Sec of Mil Dept	U&S Cmds	US1/ On Base	US1/ Off Base	OVERSEAS2/ On Base	OVERSEAS2/ Off Base
7. Riot control situations in areas under direct and distinct US military control; includes control of prisoners of war.	X							
8. Situation in which civilians are used to mask or screen attacks and civilian casualties can be reduced or avoided.	X							
9. Rescue missions in remotely isolated areas, such as recovering downed aircrews and passengers and recapturing escaping prisoners.	X							
10. In rear-echelon areas outside the zone of immediate combat to protect convoys from civil disturbances, terrorists, and paramilitary operations.	X							
11. Security operations regarding the protection or recovery of nuclear weapons.	X9/	X						

1/ As used here, "US" includes all 50 States, the District of Columbia, and the territories and possessions of the United States.
2/ US-controlled portions of foreign installations are considered US installations.
3/ The Secretary of the Army, as DOD Executive Agent for civil disturbance operations, has promulgated instructions (Department of the Army Civil Disturbance Plan, GARDEN PLOT) governing the employment of RCAs in civil disturbances in CONUS, Alaska, Hawaii, the Commonwealth of Puerto Rico, and US possessions and territories.
4/ Release authority delegated to US commanders. In special cases (counterterrorist) not covered by 1-4 (Peacetime), the Secretary of Defense retains the authority.
5/ Authority delegated to the Secretaries of the Military Departments.
6/ In those countries where such use is specifically authorized by the host-country government.
7/ As authorized by the Secretary of Defense.
8/ US policy is no first-use of RCAs in war except as in Reasons for Employment 7-10 as stated in Executive Order 11850. Declaration of war does not alter release authority prescribed in 1-6 (Peacetime) when such conflict is an overseas area.
9/ Authority delegated to Secretary of Defense.

10.4 BIOLOGICAL WEAPONS

International law prohibits all biological weapons or methods of warfare whether directed against persons, animals, or plant life. Biological weapons include microbial or other biological agents or toxins whatever their origin (i.e., natural or artificial) or methods of production.[30]

10.4.1 Treaty Obligations. The 1925 Gas Protocol prohibits the use in armed conflict of biological weapons.[31] The 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (the "1972 Biological Weapons Convention") prohibits the production, testing, and stockpiling of biological weapons.[32] Weapons Convention obligates nations that are a party thereto not to develop, produce, stockpile, or acquire biological agents or toxins "of types and in quantities that have no justification for prophylactic, protective, or other peaceful purposes," as well as "weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict." All such material were to

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[30] *Biological weapons* are items of materiel which project, disperse, or disseminate biological agents, including arthopod vectors. They are inherently indiscriminate and uncontrollable and are universally condemned. *Biological warfare* is the employment of biological agents to produce casualties in man or animals and to damage plants or materiel. Biological operations also include defense against such employment.

Any microorganism able to cause disease in man, animals, or plants, or cause the deterioration of materiel, is capable of being used as a *biological agent*. However due to difficulty in production, storage and dissemination, and to limited effectiveness, a large number of diseases would have little or no military utility. Even those capable of producing significant results would have a delayed effect due to the incubation period, and the results would be dependent on a variety of factors including weather, target characteristics, and countermeasures. Due to the delayed effectiveness, biological agents do not lend themselves to tactical, but rather to strategic employment to achieve a long-term decrease in an enemy's warmaking capability. Biological agents also lend themselves to clandestine delivery.

Biological toxins are the toxic chemical by-products of biological organisms. They can be synthesized chemically and share many of the characteristics of chemical agents; however, they are considered to be biologicals under the 1972 Biological Weapons Convention. Toxins have advantages over organisms in storage, delivery, and onset of effects. Some toxins are much more toxic than the most powerful nerve agents.

JCS Pub 1 passim. See also Rose, The Coming Explosion of Silent Weapons, Nav. War C. Rev., Summer 1989, at 6-29.

[31] The United States has accepted this obligation without reservation. Compare note 21 above.

be destroyed by 26 December 1975. The United States, the U.S.S.R., and most other NATO and Warsaw Pact nations are parties to both the 1925 Gas Protocol and the 1972 Biological Weapons Convention.

10.4.2 United States Policy Regarding Biological Weapons. The United States considers the prohibition against the use of biological weapons during armed conflict to be part of customary international law and thereby binding on all nations whether or not they are parties to the 1925 Gas Protocol or the 1972 Biological Weapons Convention.[33] The United States has, therefore, formally renounced the use of biological weapons under any circumstances.[34] Pursuant to its treaty obligations, the United States has destroyed all its biological and toxin weapons and restricts its research activities to development of defensive capabilities.[35]

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[33] AFP 110-31, para. 6-4b, at 6-4 and sources cited at note 21 above.

[34] 5 Weekly Comp. Pres. Doc. 1659-61 (25 Nov. 1969); 62 Dep't St. Bull. 226-27 (1970).

[35] 11 Weekly Comp. Pres. Doc. 73-74 (White House Statement 22 Jan. 1975); 1976 Digest of U.S. Practice in International Law 732-36. U.S. research activities are devoted primarily to the development of vaccines.

CHAPTER 11

Noncombatant Persons

11.1 INTRODUCTION

As discussed in Chapter 5, the law of armed conflict is premised largely on the distinction to be made between combatants and noncombatants. Noncombatants are those individuals who do not form a part of the armed forces and who otherwise refrain from the commission of hostile acts.[1] Noncombatants also include those members of the armed forces who enjoy special protected status, such as medical personnel and chaplains, or who have been rendered incapable of combat by wounds, sickness, shipwreck, or capture. This chapter reviews the categories of noncombatants and outlines the general rules of the law of armed conflict designed to protect them from direct attack.[2]

11.2 PROTECTED STATUS

The law of armed conflict prohibits making noncombatant persons the object of intentional attack[3] and requires that they be safeguarded against injury not incidental to

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[1] These civilians are known as "protected persons" in the law of armed conflict. In this context, "hostile acts" include those actions described in the second paragraph of paragraph 11.3 below. (For nations bound thereby, Additional Protocol I, article 51(3), addresses this rule by granting protection to civilians "unless and for such time as they take a direct part in hostilities" without further definition. The United States supports this principle. The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 Am. U.J. Int'l L. & Policy 426 (1987) (remarks of U.S. Department of State Deputy Legal Adviser Matheson). See paragraph 5.4.2 note 30 above regarding the U.S. decision not to seek ratification of Additional Protocol I.)

[2] Incidental injury to or death of civilians is discussed in paragraph 8.1.2.1 above. A useful summary of the rules governing capture of noncombatants (as that term is used in this chapter) may be found in de Preux, Synopsis V: Capture, 1986 Int'l Rev. Red Cross 89 and of the obligations of neutrals regarding noncombatants in de Preux, Synopsis VIII: Conventions and Neutral Powers, 1989 id. 125.

[3] Medical personnel: GWS, art. 24; GWS-Sea, art. 36; wounded and sick: GWS, art. 12(1); shipwrecked: GWS-Sea, art. 12(1) ("shall be respected and protected in all circumstances"); prisoners of war: GPW, art. 13 (humanely treated; protected); civilians: GP I, arts. 51(2) & 57(5) ("shall not be the object of attack"); Matheson remarks, note 1 above, at 423; Solf, Protection of Civilians Against the Effects of Hostilities Under Customary International Law and Under Protocol I, 1 Am. U.J. Int'l L. & Policy 117, at

(continued...)

military operations directed against combatant forces and other military objectives.[4] When circumstances permit, advance warning should be given of attacks that might endanger noncombatants in the vicinity.[5] Such warnings are not required, however, if mission accomplishment, including the security of attacking forces, is premised on the element of surprise.[6] On the other hand, a party to an armed conflict that has control over civilians and other noncombatants has an affirmative duty to remove them from the vicinity of targets of likely enemy attack and to otherwise separate military activities and facilities from areas of noncombatant concentration.[7] Deliberate use of noncombatants to shield military objectives from enemy attack is prohibited.[8] The presence of noncombatants within or adjacent to a legitimate target does not, however, preclude its attack.[9]

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[3](...continued)
130 (1986).

[4] GPW, arts. 19(3) & 23; GP I, arts. 48 & 57(2)(a).

[5] HR, art. 26; Hague IX, art. 6; GP I, art. 57(2)(c); Matheson remarks, note 1 above, at 427. See also paragraph 8.5.2 above.

[6] See paragraph 8.5.2.

[7] GWS, art. 19 and GC, art. 18 (locate hospitals away from military objectives); GC, art. 28; GP I, arts. 58(a) & (b).

[8] GC, art. 28 (enemy aliens in national territory of a belligerent and civilians in occupied territory); GP I, art. 51(7) (own civilians); GPW, art. 23(1); GP I, art. 12(4) (medical units); Matheson remarks, note 1 above, at 426.

This duty requires only actions that are feasible under the circumstances. For example, civilians accompanying an armed force, such as journalists and media representatives, civilian governmental employees and contractor employees, obviously cannot be separated from all military targets. Similarly, civilian crewmembers on merchant vessels, trains and civil aircraft cannot be separated from such objects which are often legitimate military objectives. Cities often surround transportation centers. The urban population cannot be separated from docks, warehouses, runways and similar military objectives within these cities.

An occupying power may evacuate an area if civilian protection or military reasons demand. Transfer outside of occupied territory must be avoided if possible. The Fourth Geneva Convention and Additional Protocol I contain special restrictions on evacuation of children, especially from occupied territory.

[9] Solf, Protection of Civilians, note 3 above, at 131, who correctly notes:

(continued...)

11.3 THE CIVILIAN POPULATION

The civilian population as such, as well as individual civilians, may not be the object of attack or of threats or acts of intentional terrorization.[10] The civilian population consists of all persons not serving in the armed forces, militia, or paramilitary forces and not otherwise taking a direct part in the hostilities.[11] Women and children are entitled to

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[9](...continued)

> while a civilian may not lose his protection against individualized attack while working in a munitions plant, he assumes the risk of collateral injury when he is in the vicinity of the munitions plant, although he continues to retain full protection while at home.

Cf. GPW, art. 23(1); GC, art. 28; GP I, arts. 51(7) & 12(4); and notes 14 & 15 and accompanying text below. Precautions to be taken in attack are discussed in chapter 8 above.

[10] Hague Rules of Air Warfare of 1923, art. 22; GC, art. 33; common article 3; GP I, art. 51(2); GP II, arts. 4(2)(d) & 13(2); Matheson remarks, note 1 above, at 426. The concept of terror has been explained as follows:

> Any action which carries warfare to civilians is bound to create terror in some and perhaps all. However, what the present article prohibits is only conduct which is intended to terrorize civilians. Otherwise legal acts which cause incidental terror to civilians (for example, the bombing of a munitions factory the work force of which is civilian) are not within the prohibitions of the present article.

1 Levie, The Code of International Armed Conflict 217-18; CDDH/215/ Rev. 1; XV Official Records 261, at para. 51; 3 Levie, Protection of Victims of War 158 (1980). See Gasser, Prohibition of Terrorist Acts in International Humanitarian Law, 1986 Int'l Rev. Red Cross 200.

Starvation as a method of warfare is discussed in paragraph 8.1.2 at note 15 above.

[11] GP I, art. 50. Cf. GPW, arts. 4A(4)-(5); GC, arts. 4 & 13. Under GP I, article 51(3), civilians taking a direct part in hostilities lose their protection against dangers arising from military operations, but not their status as civilians.

War correspondents accredited by the armed forces which they accompany, although civilians, are entitled to prisoner of war status on capture. GPW, art. 4A(4). Other journalists do not have this protected status, although nations must treat them (and accredited war correspondents) prior to capture as civilians provided the unaccredited journalists take no action adversely affecting their status as civilians. The United States

(continued...)

special respect and protection.[12] Unlike military personnel (other than those in a specially protected status such as medical personnel and the sick and wounded) who are always subject to attack whether on duty or in a leave capacity, civilians are immune from attack unless they are acting in direct support of the enemy's war-fighting or war-sustaining effort.[13] Civilians providing command, administrative, or logistic support to military operations are subject to attack while so engaged.[14] Similarly, civilian employees of naval shipyards, merchant seamen in ships carrying military cargoes, and laborers engaged in the construction of military fortifications, may be attacked while so employed.[15]

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[11](...continued)
supports the principle in GP I, art. 79, that journalists must be protected as civilians under the same conditions. Matheson remarks, note 1 above, at 428. (Nations bound by Additional Protocol I may issue identity cards to journalists on dangerous professional missions in areas of armed conflict, art. 79 & Annex II.) Both accredited war correspondents and other journalists act at their own risk if they operate too close to military units engaged in or subject to attack. Gasser, The Protection of Journalists Engaged in Dangerous Professional Missions: Law Applicable in Periods of Armed Conflict, 1983 Int'l Rev. Red Cross 3.

[12] The special respect and protection to which women and children in the power of a party to the conflict (friend or foe) are entitled is detailed in GWS, art. 12(4); GWS-Sea, art. 12(4); GPW, arts. 14(2), 25(4), 29(2), 88(2-3), 97(4) & 108(2); GC, art. 27(2), 85(4), 124(3) & 97(4) (women); and GC, arts. 14(1-2), 17, 23, 24, 38(5), 50(1-5), 51(2), 68(4), 76(5), 89(5) & 132 (children); and for parties thereto amplified in GP I, arts. 76 to 78, and GP II, arts. 4-6. The United States supports the principles in GP I, arts. 76-77, that women and children be the object of special respect and protection, that women be protected against rape and indecent assault, and that all feasible measures be taken in order that children under the age of fifteen do not take direct part in hostilities. Matheson remarks, note 1 above, at 428. See also de Preux, Synopsis III: Special Protection of Women and Children, 1985 Int'l Rev. Red Cross 292; Krill, The Protection of Women in International Humanitarian Law, 1985 id. 337; Singer, The Protection of Children During Armed Conflict Situations, 1986 id. 133; Plattner, Protection of Children in International Humanitarian Law, 1984 id. 140.

[13] The "direct support" envisaged includes direct support by civilians to those actually participating in battle or directly supporting battle action, and military work done by civilians in the midst of an ongoing engagement. Bothe, Partsch & Solf 302-304.

[14] The military operations must be posing an immediate threat to the enemy to justify deliberate individual attack on these civilians. In any event, they assume the risk of incidental injury as a result of attacks against their places of work or transport. Bothe, Partsch & Solf 303. See notes 9 above and 15 next below.

[15] Even if such civilians do not pose an immediate threat to the enemy, they assume the risk of incidental injury (collateral damage) as a result of attacks against their places
(continued...)

Civilians who take a direct part in hostilities by taking up arms or otherwise trying to kill, injure, or capture enemy persons or destroy enemy property lose their immunity and may be attacked.[16] Similarly, civilians serving as lookouts, guards, or intelligence agents for military forces may be attacked.[17]

11.4 THE WOUNDED AND SICK

Members of the armed forces incapable of participating in combat due to injury or illness may not be the subject of attack.[18] Moreover, parties to any armed engagement must, without delay, take all possible measures to search for and collect the wounded and sick on the field of battle, protect them from harm, and ensure their care.[19] When

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[15](...continued)
of work or transport. Bothe, Partsch & Solf 303, citing 1973 ICRC Commentary on Draft Article 46 that "civilians who are within or in the immediate vicinity of military objectives run the risk of unintended effects". See also note 9 above.

[16] GC, art. 5; GP I, arts. 45 & 51(3); FM 27-10, para. 81; Matheson remarks, note 1 above, at 426.

[17] GC, art. 5. Civil defense personnel have limited protection under GC, article 63(2); for nations party thereto, civil defense personnel are given more detailed protection by GP I, articles 61-67. When performing purely humanitarian duties related to protection and rescue of endangered civilians, civil defense personnel, recognized as such, should not be attacked, and should be permitted to perform their civil defense tasks except in cases of imperative military necessity. Matheson remarks, note 1 above, at 427. Examples of such humanitarian duties include warning, evacuation, management of shelters, management of blackout measures, rescue, medical and religious services, fire-fighting, detection and marking of danger areas, providing emergency accomodations and supplies, providing emergency assistance in the restoration and maintenance of order, emergency repair of utilities, decontamination, emergency disposal of the dead and assistance in the preservation of objects essential for survival. These activities do not amount to acts harmful to the opposing force. However, these personnel are legitimate targets if they directly engage in hostile acts. Jakovljevic, New International Status of Civil Defence (1982). They also asume the risk of incidental injury in the circumstances described in note 15 above.

[18] GWS, art. 12(1); GP I, art. 41(1). See generally, Bothe & Janssen, Issues in the Protection of the Wounded and Sick: The Implementation of International Humanitarian Law at the National Level, 1986 Int'l Rev. Red Cross 189.

[19] GWS, art. 15(1); GC, art. 16; GP I, art. 33(1) (the missing); Matheson remarks, note 1 above, at 424. This requirement also extends to the dead, and includes a requirement to prevent despoiling of the dead. GWS, art. 15(1); GC, art. 16(2); GP I, art.
(continued...)

circumstances permit, an armistice or cease-fire should be arranged to enable the wounded and sick to be located and removed to safety and medical care.[20] Wounded and sick personnel falling into enemy hands must be treated humanely and cared for without adverse distinction along with the enemy's own casualties.[21] Priority in order of treatment may only be justified by urgent medical considerations.[22] The physical or mental well-being of enemy wounded and sick personnel may not be unjustifiably endangered, nor may they be subjected to any medical procedure not called for by their condition or inconsistent with accepted medical standards.[23]

11.5 MEDICAL PERSONNEL AND CHAPLAINS

Medical personnel, including medical and dental officers, technicians and corpsmen, nurses, and medical service personnel, have special protected status when engaged exclusively in medical duties and may not be attacked.[24] Possession of small arms for

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[19](...continued)
34(1). The United States also supports the new principles in GP I, arts. 32 & 34, that families have a right to know the fate of their relatives, and that as soon as circumstances permit, arrangement be made to facilitate access to grave sites by relatives, to protect and maintain such sites permanently, and to facilitate the return of the remains when requested. Matheson remarks, note 1 above, at 424. Further, the United States supports the principles in GP I, art. 74, that nations facilitate in every possible way the reunion of families dispersed as a result of armed conflicts and encourage the work of humanitarian organizations engaged in this task, and the principle in article 73 that persons who were considered as refugees or stateless persons before the beginning of hostilities nonetheless be protected persons under the GC. Matheson remarks, note 1 above, at 427. See Vecsey, Co-operation between the Central Tracing Agency of the International Committee of the Red Cross and National Red Cross and Red Crescent Society Tracing Services, 1988 Int'l Rev. Red Cross 257.

[20] GWS, art. 15(2); GWS-Sea, art. 18(2); GC, art. 17; GP I, art. 33(4).

[21] GWS, art. 12(1-2); GP I, art. 10(2). This protection also extends to the shipwrecked. GWS-Sea, art. 12(2).

[22] GWS, art. 12(3); GP I, arts. 10(2), 15(3); Matheson remarks, note 1 above, at 423. This protection applies to the shipwrecked. GWS-Sea, art. 12(3).

[23] GWS, art. 12, as amplified by GP I, art. 11(1); Matheson remarks, note 1 above, at 423. This protection also applies to the shipwrecked. GWS-Sea, art. 12.

[24] GWS, art. 24; GWS-Sea, art. 36. Medical personnel are therein defined as:

> 1. Medical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of

(continued...)

self-protection, for the protection of the wounded and sick, and for protection from marauders and others violating the law of armed conflict does not disqualify medical personnel from protected status.[25] Medical personnel may not use such arms against enemy forces acting in conformity with the law of armed conflict.[26] Chaplains engaged in ministering to the armed forces enjoy protected status equivalent to that of medical

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[24](...continued)
disease, and staff exclusively engaged in the administration of medical units and establishments.

2. Members of the armed forces specially trained for employment, should the need arise, as hospital orderlies, nurses or auxiliary stretcher-bearers, in the search for or the collection, transport or treatment of the wounded and sick, if they are carrying out these duties at the time when they come into contact with the enemy or fall into his hands;

3. Staff of National Red Cross Societies and of other Voluntary Aid Societies, duly recognized and authorized by their Governments, employed as in subparagraph 1 above, provided the staff of such societies are subject to military laws and regulations;

4. Medical and hospital personnel of hospital ships and their crews.

The United States supports the principle in GP I, art. 15, that civilian medical and religious personnel be respected and protected and not be made the object of attacks. Matheson remarks, note 1 above, at 423.

See generally, Pictet, The Medical Profession and International Humanitarian Law, 1985 Int'l Rev. Red Cross 191; Bothe & Janssen, Issues in the Protection of the Wounded and Sick, 1986 id. 191-99; and Mine, The Geneva Conventions and Medical Personnel in the Field, 1987 id. 180. The protections afforded hospitals and hospital ships are discussed in paragraphs 8.5.1.4 and 8.2.3 note 57 respectively above.

[25] **GWS, art. 22(1); GP I, arts. 13(2)(a) & 65(3). Cf. GP I, article 65(3), defining the arms civil defense personnel may use as "light individual weapons." There was no agreement at the Diplomatic Conference which negotiated Additional Protocol I as to what that term meant, although a number of military experts agreed with this British proposal: "The term 'light individual weapons' excludes fragmentation grenades and similar devices, as well as weapons which cannot fully be handled or fired by a single individual and those basically intended for non-human targets." CDDH/406/Rev. 1, paras. 56 & 58; 13 Official Records 372; Bothe, Partsch & Solf 414-15; ICRC, Commentaries, para. 2626, at 776 ("a valuable contribution to the definition").**

[26] **1 Pictet 203.**

personnel.[27] Medical personnel and chaplains should display the distinctive emblem of the Red Cross or Red Crescent when engaged in their respective medical and religious activities.[28] Failure to wear the distinctive emblem does not, by itself, justify attacking a

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[27] GWS, art. 24; GWS-Sea, art. 36. To be entitled to protection, chaplains, unlike medical personnel, need not be exclusively or even partially assigned to the wounded and sick. However, U.S. Navy Regulations, 1973, article 0845, requires that they be engaged exclusively in *religious* duties. Chaplains must abstain from all hostile acts. Further, to be accorded immunity they must be attached to the armed forces and not be mere volunteers. The government thus decides who is a chaplain for this purpose. The Geneva Conventions do not otherwise attempt to define who is a chaplain; article 36 of the Second Convention uses the term "religious personnel" in lieu of "chaplains". Additional Protocol I, article 8(d), speaks of chaplains by way of example only, in expanding the units to which "religious personnel" may be attached. Chaplains lose their special status if they commit acts harmful to the enemy outside their humanitarian functions. Although not forbidden by international law, U.S. Navy chaplains are forbidden to carry arms by article 1204.1 of the Chaplains Manual. Enlisted religious program specialists have no such special status since they are not chaplains and the protected "staff" are limited to those administering *medical* units and establishments.

[28] GWS, arts. 39 & 40; GWS-Sea, arts. 41 & 42. Personnel exclusively engaged in medical duties, along with personnel temporarily assigned to medical duties, may wear an arm band on the left arm bearing a red cross or red crescent. The arm band in actual practice has not been worn with any regularity, and the Bureau of Medicine and Surgery has no regulation regarding its wearing. Experience has shown that the "regular" arm band is not recognizable beyond 60 meters. de Mulinen, Signalling and Identification of Medical Personnel and Material, 1972 Int'l Rev. Red Cross 479, 483. Accordingly, the 1977 Additional Protocol I, Annex I, articles 3-4, provides that the distinctive emblem shall be as large as appropriate under the circumstances, and worn so as to be visible from as many directions and from as far away as possible, such as large emblems worn on the chest and back. For nations bound by Additional Protocol I, this new rule will effectively supersede the narrow requirements set forth above. The new rule should be followed whenever tactically appropriate.

Personnel exclusively engaged in medical duties should, in time of armed conflict, carry a special identity card (such as the Geneva Conventions Identity Card DD Form 1934) bearing the distinctive emblem (red cross or red crescent) to establish their status in the event of capture. GWS, art. 40 & Annex II; GWS-Sea, art. 42 & Annex. For additional guidance regarding the identity card, see U.S. Navy Regulations 1973, article 0845, and MILPERSMAN 4620100.

Chaplains are entitled to wear the arm band. Chaplains in time of armed conflict should carry a special identity card bearing the red cross (such as DD Form 1834) or equivalent emblem. This identification card is identical to that carried by medical personnel. For additional guidance see U.S. Navy Regulations, 1973, article 0845; MILPERSMAN 4620100;

(continued...)

medical person or chaplain, recognized as such.[29] Medical personnel and chaplains falling into enemy hands do not become prisoners of war.[30] Unless their retention by the enemy is required to provide for the medical or religious needs of prisoners of war, medical personnel and chaplains must be repatriated at the earliest opportunity.[31]

11.6 THE SHIPWRECKED

Shipwrecked persons, whether military or civilian, may not be attacked.[32] Shipwrecked persons include those in peril at sea or in other waters as a result of either the sinking, grounding, or other damage to a vessel in which they are embarked, or of the downing or distress of an aircraft.[33] It is immaterial whether the peril was the result of enemy action or nonmilitary causes.[34] Following each naval engagement at sea, the belligerents are obligated to take all possible measures, consistent with the security of their forces, to search for and rescue the shipwrecked.[35]

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[28](...continued)
and OPNAVINST 1730.1, The Chaplains Manual, sections 1204 and 1200.

[29] 1 Pictet 307. See paragraph 11.10.6 below.

[30] GPW, art. 33(1); GWS, art. 28(2); GWS-Sea, art. 37. See DoD Directive 1300.7, Annex AS11-2, for a good discussion of U.S. Code of Conduct implications for medical personnel who fall into enemy hands.

[31] GWS, art. 28(1); GWS-Sea, art. 37; GPW, arts. 4C & 33. See ICRC Model Agreement relating to the Retention of Medical Personnel and Chaplains, September 1955, reprinted in Levie, Documents on Prisoners of War 668 (U.S. Naval War College, International Law Studies 1978, vol. 60, 1979). Based upon past experience, in future conflicts retention will be the rule.

[32] HR, art. 23(c); GWS-Sea, art. 12(1); GP I, art. 41(1); Trial of Eck, 1 War Crimes Trials 1, 1 Reps. U.N. Comm. 1 (1945) (The *Peleus* Trial); The *Llandovery Castle* Case, 16 Am. J. Int'l L. 708 (1922); The *Jean Nicolet*, F.E.I.M.T. Proc. 15,095-148, Judgment 1072, Mallison 139-43.

[33] GWS-Sea, art. 12(1); GP I, art. 8(b). The shipwrecked may display the international code signal of distress indicated by "NC" on their liferaft. This signal means "I am in distress and require immediate assistance." International Convention for the Safety of Life at Sea, Annex B, Regulation 31 (N over C); Eberlin, Protective Signs 60 (1983).

[34] GWS-Sea, art. 12(1).

[35] Hague X, art. 16; GWS-Sea, art. 18(1); GP I, art. 33(1). An engagement is not finished until the warships involved are safe from attack. Frequently, it is operationally hazardous or infeasible for a submarine to comply with this requirement. 2 Pictet 131, (continued...)

Shipwrecked persons do not include combatant personnel engaged in amphibious, underwater, or airborne attacks who are proceeding ashore, unless they are clearly in distress and require assistance.[36] In the latter case they may qualify as shipwrecked persons only if they cease all active combat activity and the enemy has an opportunity to recognize their condition of distress.[37] Shipwrecked combatants falling into enemy hands become prisoners of war.[38]

11.7 PARACHUTISTS

Parachutists descending from disabled aircraft may not be attacked while in the air and, unless they land in territory controlled by their own forces or engage in combatant acts while descending, must be provided an opportunity to surrender upon reaching the ground.[39] Airborne troops, special warfare infiltrators, and intelligence agents parachuting into combat areas or behind enemy lines are not so protected and may be attacked in the air as well as on the ground.[40] Such personnel may not be attacked, however, if they clearly indicate their intention to surrender.[41]

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[35](...continued)
citing with approval Tucker 71-73. But if military circumstances permit, it is a war crime to fail to provide for the safety of survivors, or to take affirmative actions to prevent survival, such as shooting at life rafts. See paragraph 6.2.5 paragraph 5 and note 56 thereto above.

[36] GP I, art. 42(3).

[37] GP I, art. 42(2).

[38] GWS-Sea, art. 16.

[39] GP I, arts. 42(1) & 42(2), codifying the customary rule set out in Hague Rules of Air Warfare, 1923, art. 20; Spaight 152, 155-64; AFP 110-31, para. 4-2e; Bothe, Partsch & Solf 226; Matheson remarks, note 1 above, at 425. Firing his weapon is clearly a combatant act. If a downed airman, aware of the presence of enemy armed forces, tries to escape, he probably will be considered as engaging in a hostile act and, therefore, subject to attack from the ground or from the air. However, mere movement in the direction of his own lines does not, by itself, mean that he should not be given an opportunity to surrender; he may not know in which direction he was going or that he was visible to enemy armed forces. Persons who remain within the disabled aircraft for a forced landing are not within the purview of paragraph 11.7.

[40] GP I, art. 42(3). These persons may be attacked whether or not the airplane from which they are descending is in distress.

[41] HR, art. 23(c); GP I, arts. 41(1) & 41(2)(b).

11.8 PRISONERS OF WAR

Combatants cease to be subject to attack when they have individually laid down their arms to surrender, when they are no longer capable of resistance, or when the unit in which they are serving or embarked has surrendered or been captured.[42] Combatants that have surrendered or otherwise fallen into enem hands are entitled to prisoner-of-war status and, as such, must be treated humanely and d against violence, intimidation, insult, and public curiosity.[43] When prisoners e given medical treatment, no distinction

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[42] HR, art. 23(c); GP I, art. 41. Such persons are *hors de combat* and must be permitted to surrender (that is, quarter must be granted). The walking wounded leaving the battlefield also may not be attacked. It is forbidden to declare that no quarter will be given or that no prisoners will be taken. HR, art. 23(d); GP I, art. 40. Such an order

> tends to stiffen the adversary's will to resist and is therefore counterproductive to the achievement of the legitimate objectives of a military operation. Moreover, it incites the adversary to adopt a similar policy thus causing the conflict to degenerate into unrestrained savagery.

Bothe, Partsch & Solf 217. Although it is not prohibited to issue such an order as a reprisal, this form of reprisal offers little military advantage. Bothe, Partsch & Solf 218, 221-22. Reprisals are discussed in greater detail in paragraphs 6.2.3 - 6.2.3.3 and accompanying notes above.

[43] GPW, art. 13. In the U.S. armed forces, the control and care of PWs, inhabitants of occupied territory and civilian internees is a primary function of the U.S. Army which has issued detailed regulations on the matter. However, this paragraph provides general guidance for naval personnel who may take custody of or control enemy personnel in the absence of, or before turning them over to, army personnel. For further guidance, see SECNAVINST 3461.3; Standard Organization and Regulations of the U.S. Navy, OPNAVINST 3120.32 (series), paragraph 650.3, POW Bill (reproduced as Annex AS11-1); Prisoners of War: Rights and Obligations Under the Geneva Conventions, DOD GEN-35A, NAVEDTRA 46903; and Army Regulation 190-8, Enemy Prisoners of War: Administration, Employment, and Compensation.

The rights and obligations of PWs are detailed in the 1949 Geneva Convention Relative to the Treatment of Prisoners of War. The Convention's underlying philosophy is that PWs should not be punished merely for having engaged in armed conflict, and that their captivity should be as humane as possible. Although difficulties have been encountered in practice, the Convention is the universally accepted standard for treatment of PWs; almost every nation is a party to it. See also de Preux, Synopsis VII: Combatants and prisoner-of-war status, 1989 Int'l Rev. Red Cross 47-50.

For guidance on the Code of Conduct, see OPNAVINST 1000.24 (series) and its enclosure DoD Directive 1300.7 (set out in Annex AS11-2); Code of the US Fighting Force, DOD

(continued...)

among them will be based on any grounds other than medical ones.[44] (See paragraph 11.4 for further discussion of the medical treatment to be accorded captured enemy wounded and sick personnel.) Prisoners of war may be interrogated upon capture but are only required to disclose their name, rank, date of birth, and military serial number.[45] Torture, threats, or other coercive acts are prohibited.[46]

Persons entitled to prisoner-of-war status upon capture include members of the regular armed forces, the militia and volunteer units fighting with the regular armed forces, and civilians accompanying the armed forces.[47] Militia, volunteers, guerrillas, and other

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[43](...continued)
GEN-11A, NAVEDTRA 46907; and OPNAVINST C3305.1 (series), subj: Survival, Evasion, Resistance and Escape (SERE) Program, doctrine and policy concerning.

[44] GPW, art. 16.

[45] GPW, art. 17(1). These items are contained on each U.S. armed forces identification card, DD Form 2, which also serves as the Geneva Conventions Identification Card. The permissible sanction for a PW failing to furnish basic required information is to treat that PW as the equivalent of an E-1 and not afford the PW any privileges that might be due because of military rank or status. GPW, art. 17(2).

This rule does not prohibit a Detaining Power from interrogating a PW on subjects going far beyond name, rank and service number. While the range of questioning is completely unlimited, the means of questioning are limited. 1 Levie, The Code of International Armed Conflict 310.

[46] GPW, art. 17(4). There are a variety of practical as well as humane reasons to support this prohibition. The truth and accuracy of information obtained through coercion, torture or threats is always suspect. Humane treatment of PWs encourages other enemy personnel to surrender or defect, and permits the use of fewer resources to detain PWs and obtain reliable information. Disclosure that PWs have been tortured will almost always produce adverse public opinion. See, for example, Stockdale & Stockdale, In Love and War 295-325, 361-71 (1984). Moreover, maltreatment of PWs by one side may be reciprocated by the other.

[47] HR, art. 3; GPW, arts. 4A(1) & 4A(4). The United States supports the principle that persons entitled to combatant status be treated as prisoners of war in accordance with GPW. Matheson remarks, note 1 above, at 425.

Persons who accompany the armed forces without actually being members thereof include "civilian members of military aircraft crews, war correspondents, supply contractors, members of labor units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card." GPW, art.
(continued...)

partisans not fighting in association with the regular armed forces qualify for prisoner-of-war status upon capture,[48] provided they are commanded by a person responsible for their conduct, are uniformed or bear a fixed distinctive sign recognizable at a distance, carry their arms openly, and conduct their operations in accordance with the law of armed conflict.[49]

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[47](...continued)
4A(4). SECNAVINST 5512.9 governs issuance of identity cards for civilians accompanying the armed forces.

Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the parties to the conflict, who do not benefit by more favorable treatment under any other provisions of international law, and members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power, are also entitled to PW status upon capture. GPW, arts. 4A(5) & 4A(3).

The officers and crews of captured or destroyed enemy warships and military aircraft (including naval auxiliaries) should be made PWs. See paragraph 8.2.2.1 regarding the treatment of officers, crew and passengers of captured enemy merchant vessels and civil aircraft. See paragraph 7.9.2 regarding treatment of officers, crew and passengers of captured neutral merchant vessels and civil aircraft.

Any wounded, sick or shipwrecked found on board a hospital ship or neutral merchant vessel may be taken on board the searching warship providing they are in a fit state to be moved and the warship can provide adequate medical facilities. If they are of enemy nationality, they become PWs. This situation may arise when a warship exercises its right to search any hospital ship or neutral merchant vessel it meets on the high seas. (See paragraph 7.6 regarding visit and search generally.)

[48] Members of a *levee en masse, i.e,* inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, are also entitled to PW status upon capture, provided they carry arms openly and respect the laws and customs of war. GPW, art. 4A(6).

[49] Declaration of Brussels, 1874, art. 9; HR, art. 1; GPW 1929, art. 1; GPW, art. 4A(2). GP I, article 44(3), would effectively remove all these requirements for irregulars except that of carrying their arms openly only "during each military engagement and during such time as he is visible to the enemy while engaged in a military deployment preceding the launching of an attack." Perhaps more than any other provision, this proposed change is the most militarily objectionable to the United States because of the increased risk to the civilian population within which such irregulars often attempt to hide. U.S. Secretary of State Letter of Submittal, 13 December 1986, 26 I.L.M. 564; Feith, The National Interest, Fall 1985, 43-47; Sofaer, Foreign Affairs, Summer 1986, at 914-15; Roberts, 26 Va. J. Int'l L. 128-34; 1 Levie, The Code of International Armed Conflict 300-01; Sofaer remarks, (continued...)

Should a question arise regarding a captive's entitlement to prisoner-of-war status, that individual should be accorded prisoner-of-war treatment until a competent tribunal convened by the captor determines the status to which that individual is properly entitled.[50] Individuals captured as spies or as illegal combatants have the right to assert their entitlement to prisoner-of-war status before a judicial tribunal and to have the question adjudicated.[51] Such persons have a right to be fairly tried for violations of the law of armed conflict and may not be summarily executed.[52]

11.8.1 Trial and Punishment. Prisoners of war may not be punished for hostile acts directed against opposing forces prior to capture, unless those acts constituted violations of the law of armed conflict.[53] Prisoners of war prosecuted for war crimes committed prior to or after capture are entitled to be tried by the same courts as try the captor's own forces and are to be accorded the same procedural rights.[54] At a minimum, these rights must include the assistance of lawyer counsel, an interpreter, and a fellow prisoner.[55]

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[49](...continued)
note 1 above, at 463 & 466-67. Some nations have ratified Additional Protocol I on the understanding that this exception would apply only in occupied territory (Belgium, Italy, New Zealand, South Korea, United Kingdom on signature) or in wars of national liberation covered by GP I, art. 1(4) (Belgium, New Zealand, South Korea, United Kingdom on signature), and that "deployment" means any individual or collective movement towards a position from which an attack is to be launched (Belgium, Italy, Netherlands, New Zealand, South Korea, United Kingdom on signature). Some of these nations have also declared that "visible to the adversary" includes visible with the aid of any form of surveillance, electronic or otherwise, available to keep a member of the armed forces of the adversary under observation (New Zealand). The negotiating history on these points is analyzed in Bothe, Partsch & Solf 251-55 and ICRC, Commentary 529-36.

[50] GPW, art. 5(2); GP I, art. 45(1); Matheson remarks, note 1 above, at 425. For instances of its application, see Levie, Prisoners of War in International Armed Conflict 55-57 (U.S. Naval War College, International Law Studies, vol. 59, 1978), and Levie, Documents on Prisoners of War 694, 722, 732, 737, 757, 771 (U.S. Naval War College, International Law Studies, vol. 60, 1979).

[51] GP I, arts. 45(3), 75(3) & 75(7); Matheson remarks, note 1 above, at 425-26.

[52] GP I, art. 75(4).

[53] See paragraph S6.2.5.1 regarding trials for war crimes.

[54] GPW, art. 84. Such trials may be in military or civilian courts. 3 Pictet 412; Levie, Documents on Prisoners of War 372.

[55] GPW, art. 105, which details these and other rights.

Although prisoners of war may be subjected to disciplinary action for minor offenses committed during captivity, punishment may not exceed 30 days confinement.[56] Prisoners of war may not be subjected to collective punishment nor may reprisal action be taken against them.[57]

11.8.2 Labor. Enlisted prisoners of war may be required to engage in labor having no military character or purpose.[58] Noncommissioned officers may only be required to perform supervisory work.[59] Officers may not be required to work.[60]

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[56] GPW, arts. 89 & 90.

[57] GPW, art. 26(6), 87(3) & 13(3).

[58] GPW, art. 50; Levie, Prisoners of War in International Armed Conflict 225-37. Prisoners of war may not be compelled to remove mines or similar devices. GPW, art. 52(3); Levie, Prisoners of War 238-40; 1 Levie, The Code of International Armed Conflict 356-57.

> In the Falklands/Malvinas conflict, Argentine PWs, specialized in engineering, voluntarily took part in operations under the responsibility of British officers to mark the outer limit of minefields. . . . On visiting these prisoners, the ICRC made sure that they were doing this marking work without compulsion. However, and although there was no compulsion, one incident associated with the dangerous nature of these operations did occur after which the British no longer requested the voluntary assistance of the Argentine prisoners of war.

Junod, Protection of the Victims of Armed Conflict: Falklands-Malvinas Islands (1982): International Humanitarian Law and Humanitarian Action 30 (1984). See also London Times, 2 June 1982, at 1; id., 3 June 1982, at 1; UN Docs. S/15176, 7 June 1982, and S/15182, 8 June 1982 (Argentine letters of complaint); UN Doc. S/15198, 11 June 1982 (British response).

[59] GPW, art. 49(2).

[60] GPW, art. 49(3). "It has been found that the physical and mental health, and morale, of prisoners of war who are not given work to occupy their time (which in any event passes all too slowly) steadily deteriorate. In addition they are much more susceptible to being led into disruptive actions, such as mutinies, when their time is not fully occupied." 1 Levie, The Code of International Armed Conflict 351.

11.8.3 Escape. Prisoners of war may not be punished for attempting to escape, unless they cause death or injury to someone in the process.[61] Prisoners of war who make good their escape by rejoining friendly forces or leaving enemy controlled territory, may not be punished if recaptured for offenses committed during their previous escape.[62]

11.8.4 Temporary Detention of Prisoners of War, Civilian Internees, and Other Detained Persons Aboard Naval Vessels. International treaty law expressly prohibits "internment" of prisoners of war other than in premises on land,[63] but does not address temporary stay on board vessels.[64] U.S. policy, however, permits detention of prisoners of war, civilian internees, and detained persons (PW/CI/DET) on naval vessels as follows:[65]

1. PW/CI/DET picked up at sea may be temporarily held on board as operational needs dictate, pending a reasonable opportunity to transfer them to a shore facility or to another vessel for evacuation to a shore facility.

2. PW/CI/DET may be temporarily held on board naval vessels while being transported between land facilities.

3. PW/CI/DET may be temporarily held on board naval vessels if such detention would appreciably improve their safety or health prospects.

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[61] GPW, arts. 92 & 93; however, disciplinary punishment is authorized. Article III of the Code of Conduct (Annex AS11-2) imposes a duty on all U.S. PWs to escape and to aid others to escape. Persons guarding PWs may use weapons against PWs escaping or attempting to escape only as an extreme measure and must always precede their use by giving warning appropriate to the circumstances. GPW, art. 42. Unless he or she injures someone in the process, a PW cannot be awarded more than the punishments noted in paragraph 11.8.1 for trying to escape or helping others to escape.

[62] Brussels Declaration, 1874, art. 28; GPW, art. 91.

[63] GPW, art. 22(1). This provision was made explicit in the 1949 Prisoners of War Convention, probably in response to the use of ships to intern prisoners of war during World War II. The practice had previously been prevalent especially during the Napoleonic Wars. 1 ICRC, Report on its Activities During the Second World War 248 (1948); Levie, Prisoners of War in International Armed Conflict 121 & n.84; 1 Levie, The Code of International Armed Conflict 318. Cartel vessels are discussed in paragraph 8.2.3 and accompanying note 56 above.

[64] This need was acutely present at the end of the 1982 Falklands/Malvinas Conflict when 13,000 Argentine soldiers surrendered, winter was fast approaching, and the tent shelters Britain had sent were lost in the sinking of the ATLANTIC CONVEYOR. Middlebrook, Task Force: The Falklands War, 1982, at 247, 381, 385 (rev. ed. 1987).

[65] JCS SM-550-84, 24 August 1984.

Detention on board vessels must be truly temporary, limited to the minimum period necessary to evacuate such persons from the combat zone or to avoid significant harm such persons would face if detained on land.[66] Use of immobilized vessels for temporary detention of prisoners of war, civilian internees, or detained persons is not authorized without NCA approval.[67]

11.9 INTERNED PERSONS

Enemy civilians falling under the control of a belligerent may be interned if security considerations make it absolutely necessary to do so.[68] Civilians sentenced for offenses committed in occupied territory may also be ordered into internment in lieu of punishment.[69] Enemy civilians may not be interned as hostages.[70] Interned persons may not be

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[66] PWs must be evacuated, as soon as possible after capture, away from the combat zone to safe camps. While awaiting evacuation from a fighting zone, PWs must not be unnecessarily exposed to danger. Evacuation must be effected humanely and under conditions similar to those used to evacuate the capturing force. GPW, arts. 19-20. In small unit operations such as commando raids, long range reconnaissance patrols and airborne operations, it is frequently impracticable to evacuate PWs promptly from the combat zone. Bothe, Partsch & Solf 224. PWs may not be put to death even if their presence retards movement or diminishes operational effectiveness. FM 27-10, para. 85, at 35. Rather, such PWs may be disarmed and released at some appropriate time taking all feasible precautions for their safety. GP I, art. 41(3). Those precautions are only those practicable in light of the combat situation and all other circumstances prevailing at the time. There is, of course, no requirement for the captors to render themselves ineffective in providing for the PWs' safety after their release.

Within the limits imposed by available resources and without endangering its own forces, the detaining power must provide sufficient free food, clothing, shelter and medical care for PWs to maintain good health. GPW, arts. 15 & 25-28.

Arms, military documents and military property may be confiscated. PWs must be allowed to keep all personal property, identification and military articles issued for personal protection from the elements. For security reasons the detaining power may limit the amount of currency and other articles of value in each PW's possession. GPW, art. 18.

[67] JCS SM-550-84, note 65 above.

[68] They may also be assigned residence. GC, arts. 42(1) & 78. In the U.S. armed forces, responsibility for handling internees is generally a function of the Army. See U.S. Army Field Manual 19-40, Enemy Prisoners of War and Civilian Internees.

[69] GC, art. 68(1). The general penal laws and regulations of the occupying power applicable to all citizens of the occupied territory or to all citizens of the territory of a

(continued...)

removed from the occupied territory in which they reside unless their own security or

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[69](...continued)
party to the conflict apply to individuals after their internment. An internee may be subjected to judicial punishment only for a violation of these substantive laws. Internees may receive only disciplinary punishments for acts which are punishable when committed solely by them, but which are not punishable when committed by persons who are not internees. The punishments for such acts are severely curtailed. No internee can be fined more than 50% of his pay for one month, given fatigue duties exceeding two hours daily for one month, or imprisoned for more than one month. Such disciplinary punishment may only be ordered by the commander of the place of internment, or by one to whom the commander has delegated his disciplinary powers. The disciplinary sanctions allowed against internees are the same as those against PWs. GC, arts. 117-26.

[70] GC, art. 34; 4 Pictet 229-31. Cf. *The Hostages Case, U.S. v. Wilhelm List et al.*, 11 TWC 1230 (1948).

imperative military reason demands.[71] All interned persons must be treated humanely and may not be subjected to collective punishment nor reprisal action.[72]

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[71] GC, art. 49(2); 4 Pictet 278-83. This prohibition results from the experiences of World War II when:

> there were many instances of individual and mass forcible transfers or deportations of the inhabitants of occupied territories by the Occupying Power, frequently under horrendous conditions and usually accomplished solely because the Occupying Power wanted additional manpower for labor in other areas (perhaps in armament factories in its home territories or, just as important, as agricultural workers), or because it desired to make room for the movement of its own nationals into the occupied territory.

2 Levie, The Code of International Armed Conflict 720. GP I, article 78, details restrictions on the evacuation of children applicable to parties to Additional Protocol I. The United States supports the principle in article 78 that no nation arrange the evacuation of children except for temporary evacuation where compelling reasons of the health or medical treatment of the children or their safety, except in occupied territory, so require. Matheson remarks, note 1 above, at 428. The complex body of law that may be applicable in the variety of situations involving the evacuation of children is carefully explained in ICRC, Commentary 908-15.

Whether interned in occupied territory or in territory of a party to the conflict, an individual's status as an internee during hostilities is subject to periodic review at least every six months in domestic territory, and if possible, every six months in occupied territory. GC, arts. 43 & 72(2). If occupation is terminated by the withdrawal of the occupying power before the close of hostilities, such power may not forcibly transfer internees out of the former occupied territory. GC, art. 49(1). Since the existence of hostilities is the main cause for internment, internment should cease when hostilities cease. GC, art. 133(1).

[72] GC, arts. 32 & 33. Professor Levie cites this extreme example of illegal imposition of collective punishment:

> The execution of 190 male residents, the deportation of the women, the dispersion of the children, and the razing of the town of Lidice, in Czechoslovakia, on 10 June 1942, because of the assassination of the Nazi gauleiter Reinhard Heydrich . . . by Czech resistance fighters parachuted in from Great Britain.

1 Levie, The Code of International Armed Conflict 444. See Calvocoressi & Wint, Total War 267 (1972); Asprey, War in the Shadows: The Guerrilla in History 421 (1975); and sources cited therein.

11.10 PROTECTIVE SIGNS AND SYMBOLS

11.10.1 The Red Cross and Red Crescent. A red cross on a white field (Figure 11-1a) is the internationally accepted symbol of protected medical and religious persons and activities. Moslem countries utilize a red crescent on a white field for the same purpose (Figure 11-1b).[73] A red lion and sun on a white field, once employed by Iran, is no longer used.[74] Israel employs the Red Star of David, which it reserved the right to use when it ratified the 1949 Geneva Conventions (Figure 11-1c).[75] The United States has not agreed

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[73] HR, art. 23(f); Geneva Conventions common article 38/41/-/18. The red cross on a white ground was first adopted in the 1864 Geneva Convention, art. 7, reversing the Swiss Federal colors as a compliment to Switzerland.

[74] As from 4 July 1980. 1980 Int'l Rev. Red Cross 316-17.

[75] The Israeli reservations to First, Second and Fourth Geneva Conventions are quite similar. The reservation to the First Convention reads:

> Subject to the reservation that, while respecting the inviolability of the distinctive signs and emblems of the Convention, Israel will use the Red Shield of David as the emblem and distinctive sign of the medical services of her armed forces.

To the Second Convention, Israel's reservation states:

> . . . Israel will use the Red Shield of David on the flags, armlets and on all equipment (including hospital ships), employed in the medical service.

Schindler & Toman 576. The Director of the ICRC has argued that the Israeli statement constitutes merely a unilateral declaration. Pilloud, Reservations to the Geneva Conventions of 1949, 1976 Int'l Rev. Red Cross 121-22. Israel continues to use the Red Star of David as its protective emblem. CDDH/SR.37 Annex, 6 Official Records 78-79, 1 Levie, Protection of War Victims 309, 4 id. 161.

that it is a protected symbol.[76] Nevertheless, all medical and religious persons or objects recognized as being so marked are to be treated with care and protection.[77]

11.10.2 Other Protective Symbols. Other protective symbols specially recognized by international law include an oblique red band on a white background to designate hospital zones and safe havens for noncombatants (Figure 11-1d).[78] Prisoner-of-war camps are marked by the letters "PW" or "PG" (Figure 11-1e);[79] civilian internment camps with the letters "IC" (Figure 11-1f).[80] A royal-blue diamond and royal-blue triangle on a white shield is used to designate cultural buildings, museums, historic monuments, and other cultural

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[76] Only the United States has rejected the Israeli reservations, as part of its rejection of all reservations to the 1949 Geneva Conventions while accepting treaty relations with all parties "except as to the changes proposed by such reservations." Schindler & Toman 590. As a result, the use by Israel of the Red Shield of David (Magen David Adom) has to be, and has been in the Arab-Israeli conflicts, recognized as a protective emblem by any other party to an armed conflict with Israel. Bothe, Partsch & Solf 103; Vienna Convention on the Law of Treaties, art. 20.5. Nevertheless, despite strenuous efforts, the Red Shield of David has not been formally recognized as a protective symbol in the relevant treaties. Rosenne, The Red Cross, Red Crescent, Red Lion and Sun and the Red Shield of David, 5 Israel Y.B. Human Rights 1 (1975). Multiplicity of protective symbols does not facilitate their recognition in the heat of battle. Gasser, The Protection of Journalists Engaged in Dangerous Professional Missions, 1983 Int'l Rev. Red Cross 10.

[77] Pilloud, note 75 above, at 122; 2 Levie, The Code of International Armed Conflict, art. 1011.1.2, at 651.

[78] GC, art. 14 & Annex I, art. 6. A history of hospital and safety zones may be found in 4 Pictet 121-24. Hospital zones for the wounded and sick combatants are to be marked with red crosses. GWS, art. 23 & Annex I, art. 6; 1 Pictet 422; 4 Pictet 634.

[79] GPW, art. 23(4); 3 Pictet 190. PW camps are to be marked with the letters PW or PG (prisonniers de guerre) placed so as to be clearly visible from the air in daytime. If the exact locations of PW camps are provided as required by GPW, art. 23(3), the need for this marking may be reduced. Levie, Prisoners of War in International Armed Conflict 123-24; 2 Levie, The Code of International Armed Conflict 689. The parties may agree on some other marking scheme. Areas other than PW camps must not bear the markings. GPW, art. 23(4).

[80] GC, art. 83(3); 4 Pictet 383-84. The letters IC are used only if military considerations permit and are to be placed so as to be clearly visible from the air in daytime. If the exact locations of internment camps are provided as required by GC, art. 83(2), the need for this marking may be reduced. The parties may agree on some other marking scheme. Areas other than internment camps must not bear these markings. GC, art. 83(3).

objects that are exempt from attack (Figure 11-1g).[81] In the Western Hemisphere, a red circle with triple red spheres in the circle, on a white background (the "Roerich Pact" symbol) is used for that purpose (Figure 11-1h).[82]

Two protective symbols established by the 1977 Protocols Additional to the Geneva Conventions of 1949, to which the United States is not a party, are described as follows for informational purposes only. Works and installations containing forces potentially dangerous to the civilian population, such as dams, dikes, and nuclear power plants, may be marked by three bright orange circles of equal size on the same axis (Figure 11-1i).[83] Civil defense facilities and personnel may be identified by an equilateral blue triangle on an orange background (Figure 11-1j).[84]

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[81] Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954, 249 U.N.T.S. 240, art. 16, ICRC Handbook 340 (12th ed. 1983), Schindler & Toman 749. The parties to the Hague Convention are shown in Table ST11-1.

[82] Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, Washington, 15 April 1935, 49 Stat. 3267, T.S. No. 899, 3 Bevans 254, 167 L.N.T.S. 279, entered into force 26 August 1935, art. 3. The parties to the Roerich Pact are also shown in Table ST11-1.

[83] GP I, art. 56(7).

[84] GP I, art. 66(4). Civil defense personnel are discussed in paragraph 11.3 note 17 above.

TABLE ST11-1

PARTIES TO CONVENTIONS FOR PROTECTION OF CULTURAL PROPERTY

Hague 1954	*Roerich Pact 1935*
Albania	
Austria	
Belgium	
Brazil	Brazil
Bulgaria	
Burma (Myanaman)	
Byelorussian SSR	
Cambodia (Kampuchea)	
Cameroon	
	Chile
	Columbia
Cuba	Cuba
Cyprus	
Czechoslovakia	
Dominican Republic	Dominican Republic
Ecuador	
Egypt	
	El Salvador
France	
Gabon	
Germany, Dem. Rep.	
Germany, Fed. Rep.	
Ghana	
Greece	
Guatemala	Guatemala
Guinea	
Holy See	
Hungary	
India	
Indonesia	
Iran	
Iraq	
Israel	
Italy	
Ivory Coast	
Jordan	
Kuwait	
Lebanon	
Libya	
Liechtenstein	
Luxembourg	
Madagascar	
Malaysia	
Mali	
Mexico	Mexico
Monaco	
Mongolia	
Morocco	
Netherlands	
Nicaragua	

TABLE ST11-1 (cont'd)

PARTIES TO CONVENTIONS FOR PROTECTION OF CULTURAL PROPERTY

Hague 1954	*Roerich Pact 1935*
Niger	
Nigeria	
Norway	
Oman	
Pakistan	
Panama	
Philippines	
Poland	
Qatar	
Romania	
San Marino	
Saudi Arabia	
Spain	
Sudan	
Sweden	
Switzerland	
Syria	
Tanzania	
Thailand	
Tunisia	
Turkey	
Ukrainian SSR	
USSR	
	United States
Upper Volta (Burkina Faso)	
	Venezuela
Yemen, Southern	
Yugoslavia	
Zaire	

Sources: U.S. State Department, Treaties in Force as of 1 January 1989, at 291.
Schindler & Toman, The Laws of Armed Conflicts 769-73.

11.10.3 The 1907 Hague Symbol. A protective symbol of special interest to naval officers is the sign established by the 1907 Hague Convention Concerning Bombardment by Naval Forces in Time of War (Hague IX). The 1907 Hague symbol is used to mark sacred edifices, hospitals, historic monuments, cultural buildings, and other structures protected from naval bombardment. The symbol consists of a rectangular panel divided diagonally into two triangles, the upper black, the lower white (Figure 11-1k).[85]

11.10.4 The White Flag. Customary international law recognizes the white flag as symbolizing a request to cease fire, negotiate, or surrender. Enemy forces displaying a white flag should be permitted an opportunity to surrender or to communicate a request for cease-fire or negotiation.[86]

11.10.5 Permitted Use. Protective signs and symbols may be used only to identify personnel, objects, and activities entitled to the protected status which they designate.[87] Any other use is forbidden by international law.[88]

11.10.6 Failure to Display. When objects or persons are readily recognizable as being entitled to protected status, the lack of protective signs and symbols does not render an otherwise protected object or person a legitimate target. Failure to utilize internationally

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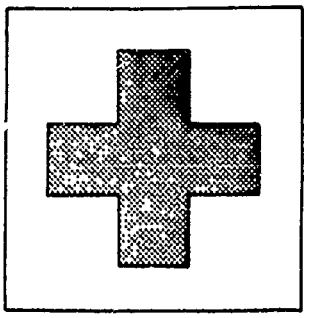
[85] Hague IX, art. 5. Hospitals should be marked with red crosses.

[86] Lieber Code, arts. 111-14; HR, arts. 23(f) & 32; GP I, art. 38(1).

[87] GWS, art. 44(1); GWS-Sea, art. 44; Hague Cultural Property Convention, art. 17; GP I, art. 66(8) (civil defense). The United States has reserved the right of a few of its businesses to continue using the red cross commercially. Schindler & Toman 590; 1 Pictet 387; Pilloud, Reservations to the Geneva Conventions of 1949, 1976 Int'l Rev. Red Cross 123. See Annex AS11-3 for suggestions on the practical use and construction of protective signs.

[88] HR, art. 23(f); GWS, art. 53; GP I, art. 38; implemented in 18 U.S.C. sec. 706 (1982). There are no express limitations on the use of the special sign of the Roerich Pact, the Hague 1907 sign, or for dams, dikes and nuclear power stations established by art. 56(7) of GP I. However, "the supervision and control of the special sign [for dams, dikes, and nuclear generating stations] depends on the more general provisions of Art. 80 and the general prohibitions against improper use of recognized emblems of Art. 38" of Additional Protocol I. Bothe, Partsch & Solf 357. They are of the view that in some (unspecified) circumstances, "the deliberate misuse of the special sign could constitute a grave breach" under article 85(3)(f) of Additional Protocol I. Ibid. The same rationale would apply to misuse of the Roerich Pact and Hague 1907 signs. The protections for dams, dikes and nuclear electrical generating stations are discussed in paragraph 8.5.1.7 and accompanying notes.

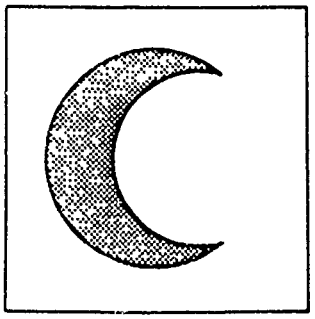
a.



The Red Cross

Symbol of medical and religious activities.

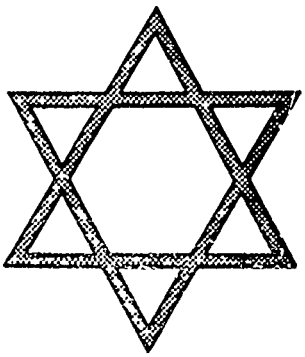
b.



The Red Crescent

Symbol of medical and religious activities.

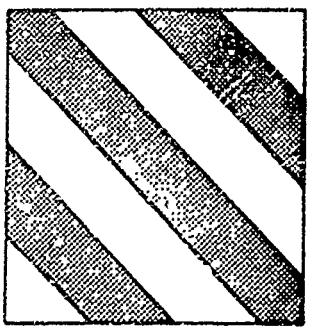
c.



The Red Star of David

Israeli emblem for medical and religious activities. Israel reserved the right to use the Red Star of David when it ratified the 1949 Conventions.

d.



Marking for Hospital and Safety Zones for Civilians and Sick and Wounded (Three Red Stripes)

(Noncombatants)

Figure II-1. Protective Signs and Symbols (Sheet 1 of 3)

e.

PW

PG

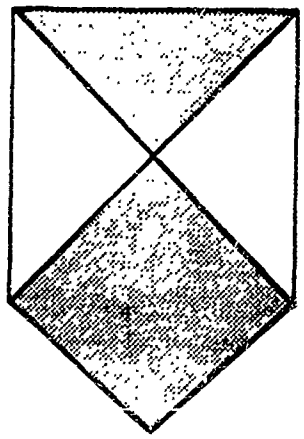
Symbols for Prisoner of War Camps

f.

IC

Civilian Internment Camps

g.

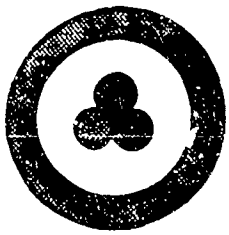


Symbol for Cultural Property Under the 1954 Hague Convention (Blue and White)

(Also used in a group of three to indicate special protection.)

Figure II-1. Protective Signs and Symbols (Sheet 2 of 3)

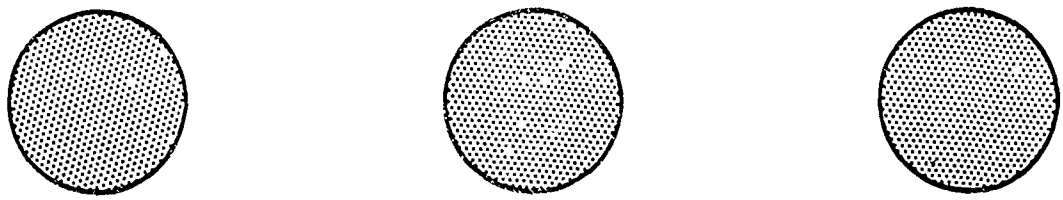
h.



Roerich Pact (Red and White)

Symbol used for historical, artistic, education, and cultural institutions, among Western Hemisphere nations.

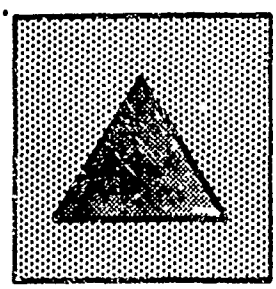
i.



Special Symbol for Works and Installations Containing Dangerous Forces (Three Orange Circles)

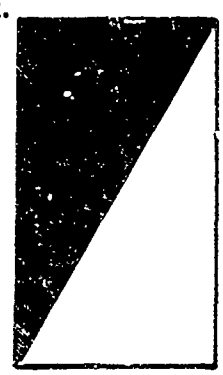
(Dams, dikes, and nuclear power stations)

j.



Symbol designating Civil Defense Activities
(Blue triangle in an orange square)

k.



The 1907 Hague Sign

Naval bombardment symbol designating cultural, medical, and religious facilities.

Figure II-1. Protective Signs and Symbols (Sheet 3 of 3)

agreed protective signs and symbols may, however, subject protected persons and objects to the risk of not being recognized by the enemy as having protected status.[89]

[*The following new material is not in NWP 9 but is considered appropriate for judge advocates.*]

S11.11 PROTECTIVE SIGNALS. Three optional methods of identifying medical units and transports have been created internationally.[90] United States hospital ships and medical aircraft do not use these signals.

S11.11.1 Radio Signals. For the purpose of identifying medical transports by radio telephone, the words PAN PAN are repeated three times followed by the word "medical" pronounced as in the French MAY-DEE-CAL. Medical transports are identified in radio telegraph by three repetitions of the group XXX followed by the single group YYY.[91] See Annex AS11-4 for details of these optional signals.

S11.11.2 Visual Signal. On aircraft, the flashing blue light may be used only on medical aircraft. Hospital ships, coastal rescue craft and medical vehicles may also use the flashing blue light. Only by special agreement between the parties to the conflict may its use be reserved exclusively to those forms of surface medical transport.[92] See Annex AS11-5 for details.

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[89] 1 Pictet 307 recognizes there are circumstances when display of the distinctive emblem unnecessarily exposes noncombatants to risk of attack in violation of their immunity or compromises operational integrity. In the U.S. Army, authority to direct the protective emblem not be used for tactical or operational reasons is held by the "major tactical commander." AR 750-58, para. 5i.

[90] GP I, art. 18(5-6) & Annex I, art. 5.

[91] Radio Regulations (Mob 1983), art. 40, 1984 Int'l Rev. Red Cross 54-56; International Code of Signals, H.O. Pub. 102, at 137 (rev. 1981); GP I, Annex I, art. 7; Bothe, Partsch & Solf 586-88; 2 Levie, The Code of International Armed Conflict 704-06; Eberlin, Protective Signs 12-16; ICRC, Commentary 1216-45.

[92] International Code of Signals, H.O. Pub. 102 (rev. 1981), change 136A, Notice to Mariners 52/85, at II-2.5; GP I, Annex I, art. 6. See Bothe, Partsch & Solf 585; 2 Levie, The Code of International Armed Conflict 703-04; Eberlin, The Identification of Medical Aircraft in Periods of Armed Conflict, 1982 Int'l Rev. Red Cross 207-09; Eberlin, Identification of Hospital Ships and Ships Protected by the Geneva Conventions of 12 August 1949, 1982 id. 315; Eberlin, The Protection of Rescue Craft in Periods of Armed Conflict, 1985 id. 140; ICRC, Commentary 1206-11. Experiments conducted during the Falklands/Malvinas war by the British found the visibility of a flashing blue light as on a police car was seven nautical miles, while normal visibility at sea was one mile. Junod, Protection of the Victims of Armed Conflict Falkland-Malvinas Islands (1982), at 25. Its use ashore poses difficulties caused by the extensive use by many European and Asian police, fire and emergency vehicles of the flashing blue light.

S11.11.3 Electronic Identification. The identification and location of medical ships and craft may be effected by means of appropriate standard maritime radar transponders as established by special agreement to the parties to the conflict. The identification and location of medical aircraft may be effected by use of the secondary surveillance radar (SSR) specified in Annex 10 to the ICAO Convention.[93] The SSR mode and code is to be reserved for the exclusive use of the medical aircraft.

S11.12 IDENTIFICATION OF NEUTRAL PLATFORMS. Ships and aircraft of nations not party to an armed conflict may use certain signals, as detailed in Annex AS11-6, for self-identification, location and establishing communications. Use of these signals does not confer or imply recognition of any special rights or duties of neutrals or belligerents, except as may otherwise be agreed between them.[94]

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[93] Radio Regulations (Mob 1983), arts. 3219A & 3219B; International Code of Signals, H.O. Pub. 102 (rev. 1981), change 136A, Notice to Mariners 52/85, at II-2.5; Eberlin, Amendments to the Radio Regulations concerning Medical Means of Transport and Neutral Means of Transport, 1984 Int'l Rev. Red Cross 51; Eberlin, Protective Signs 15; GP I, Annex I, art. 8; Bothe, Partsch & Solf 589; 2 Levie, The Code of International Armed Conflict 706-07; ICRC, Commentary 1248-55. The SSR is also known as IFF (identification friend or foe).

[94] Resolution No. 18 (Mob-83), World Administrative Radio Conference for Mobile Services, Geneva 1983, reprinted in 1984 Int'l Rev. Red Cross 58-59 and ICRC, Commentaries 1244-45. See Eberlin, Amendments to the Radio Regulations concerning Medical Means of Transport and Neutral Means of Transport, 1984 Int'l Rev. Red Cross 52 and ICRC, Commentaries 1244-45.

CHAPTER 12

Deception During Armed Conflict

12.1 GENERAL

The law of armed conflict permits deceiving the enemy through strategems and ruses of war intended to mislead him, to deter him from taking action, or to induce him to act recklessly, *provided* the ruses do not violate rules of international law applicable to armed conflict.[1]

12.1.1 Permitted Deceptions. Strategems and ruses of war permitted in armed conflict include such deceptions as camouflage, deceptive lighting, dummy ships and other armament, decoys, simulated forces, feigned attacks and withdrawals, ambushes, false intelligence information, electronic deceptions, and utilization of enemy codes, passwords and countersigns.[2]

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[1] Lieber Code, art. 101; HR, art. 24; GP I, art. 37(2). These rules are considered applicable to warfare at sea. Ruses of war were also known as strategems, but that term is no longer used in the law of armed conflict. Hall, False Colors and Dummy Ships: The Use of Ruse in Naval Warfare, Nav. War C. Rev., Summer 1989, at 54-55 sets out a useful flowchart for analysis of proposed deception.

See paragraph 5.4.2 note 30 above regarding the U.S. decision not to seek ratification of Additional Protocol I.

"...les of international law applicable in armed conflict" has been defined as "the rules ...able in armed conflict set forth in international agreements to which the Parties to ...onflict are Parties and the generally recognized principles and rules of international law which are applicable to armed conflict." GP I, art. 2(b). See also paragraph 6.2.2 note 31.

[2] NWIP 10-2, para. 641 n.41; AFP 110-34, para. 5-1; AFP 110-31, paras. 8-3b & 8-4; FM 27-10, para. 51; DA Pam 27-1-1, at 57; British Manual of Military Law, Part III, para. 312 (1958); 2 Oppenheim-Lauterpacht, International Law 340-42 (5th ed. 1935); GP I, art. 37(2). See Hartcup, Camouflage: A History of Concealment and Deception in War (1980). These acts are not perfidious because they do not invite the confidence of the enemy with respect to protection under the law. GP I, Article 37(2).

Other permissible deceptions include traps; mock operations; feigned retreats or flights; surprise attacks; simulation of quiet and inactivity; use of small units to simulate large units; use of dummy aircraft, vehicles, airfields, weapons and mines to create a fictitious force; moving landmarks and route markers; pretending to communicate with forces or reinforcements which do not exist; deceptive supply movements; and allowing false

(continued...)

[2](...continued)
messages to fall into enemy hands. It is permissible to attempt to frustrate target intelligence activity, for example by the employment of ruses to conceal, deceive and confuse reconnaissance means. The prohibition of Additional Protocol I, article 39, against the use of the adversary's "military emblems, insignia or uniforms" refers only to concrete visual objects and not to his signals and codes. Bothe, Partsch & Solf 214.

AFP 110-31, para. 8-4b, provides the following additional examples of lawful ruses:

(1) The use of aircraft decoys. Slower or older aircraft may be used as decoys to lure hostile aircraft into combat with faster and newer aircraft held in reserve. The use of aircraft decoys to attract ground fire in order to identify ground targets for attack by more sophisticated aircraft is also permissible.

(2) Staging air combats. Another lawful ruse is the staging or air combat between two properly marked friendly aircraft with the object of inducing an enemy aircraft into entering the combat in aid of a supposed comrade.

(3) Imitation of enemy signals. No objection can be made to the use by friendly forces of the signals or codes of an adversary. The signals or codes used by enemy aircraft or by enemy ground installations in contact with their aircraft may properly be employed by friendly forces to deceive or mislead an adversary. However, misuse of distress signals or distinctive signals internationally recognized as reserved for the exclusive use of medical aircraft would be perfidious.

(4) Use of flares and fires. The lighting of large fires away from the true target area for the purpose of misleading enemy aircraft into believing that the large fires represent damage from prior attacks and thus leading them to the wrong target is a lawful ruse. The target marking flares of the enemy may also be used to mark false targets. However, it is an unlawful ruse to fire false target flare indicators over residential areas of a city or town which are not otherwise valid military objectives.

(5) Camouflage use. The use of camouflage is a lawful ruse for misleading and deceiving enemy combatants. The camouflage of a flying aircraft must not conceal national markings of the aircraft, and the camouflage must not take the form of the national markings of the enemy or that of objects protected under international law.

(6) Operational ruses. The ruse of the "switched raid" is a proper method of aerial warfare in which aircraft set a course, ostensibly for a particular target, and then, at a given moment, alter course in order to strike another

(continued...)

[2](...continued)
military objective instead. This method was utilized successfully in World War II to deceive enemy fighter interceptor aircraft.

While it is common practice among nations to place national markings on both military aircraft and vessels, it is unclear if international law requires nations to do so. Failure to so mark clearly results in the loss of certain privileges and immunities for such aircraft or vessel, and quite likely for the crew as well. See 1982 LOS Convention, arts. 29 & 107, and Chicago Convention, arts. 20 & 89 (reflecting customary international law on the importance of external markings on aircraft and vessels). While the legality of the use of unmarked military aircraft or vessels in combat is highly problematic, operational requirements occasionally dictate that markings not be used. Compare Jacobsen, A Juridical Examination of the Israeli Attack on the *U.S.S. Liberty*, 36 Nav. L. Rev. 41-44 (1986) (the use of unmarked Israeli aircraft to attack USS LIBERTY on 8 June 1967 violated international law) with AFP 110-31, para. 7-4 (superfluous marking not required, as "when no other aircraft except those belonging to a single state are flown").

There can be no objection to the use of deceptive measures to thwart precision guided weapons. Smoke and aerosol material and dissemination devices can lawfully be used as countermeasures against visually guided, laser-guided, infrared and television-guided missiles. Chaff is a lawful countermeasure against active radar-homing missiles. Infrared-absorbing paint and flare technology are lawful countermeasures against infrared sensors.

> It would be a legitimate ruse to use the electronic transponder aboard a combatant aircraft to respond with the code used for identifying friendly aircraft (IFF), but it would be perfidious to use for this purpose the electronic signal established under annex I, Art. 8, [Additional Protocol I,] for the exclusive use of medical aircraft. Similarly the use of distress signals established under the Radio Regulations of the International Telecommunications Union is prohibited under the second sentence of Art. 38, para. 1 [of Additional Protocol I,] ... might also be violative of Art. 37 [of Additional Protocol I].

Bothe, Partsch & Solf 207, citing 10 Whiteman 399.

Under Additional Protocol I it would be improper to disseminate false intelligence reports intended to induce the enemy to attack civilians and civilian objects in the mistaken belief that they are military objects. This was done by Great Britain in World War II by sending out false intelligence reports that induced the Luftwaffe to bomb civilian areas of English cities in the belief they were actually bombing strategic military objectives. See paragraphs 8.1.2 and 8.5.

It is not, however, perfidious to use spies and secret agents; encourage defection or insurrection among the enemy; or to encourage enemy combatants to desert, surrender or

(continued...)

12.1.2 Prohibited Deceptions. The use of unlawful deceptions is called "perfidy." Acts of perfidy are deceptions designed to invite the confidence of the enemy to lead him to believe that he is entitled to, or is obliged to accord, protected status under the law of armed conflict, with the intent to betray that confidence.[3] Feigning surrender in order to lure the enemy into a trap, is an act of perfidy.[4]

12.2 MISUSE OF PROTECTIVE SIGNS, SIGNALS, AND SYMBOLS

Misuse of protective signs, signals, and symbols in order to injure, kill, or capture the enemy constitutes an act of perfidy. Such acts are prohibited because they undermine the effectiveness of protective signs, signals, and symbols and thereby jeopardize the safety of noncombatants and the immunity of protected structures and activities. For example, using an ambulance or medical aircraft marked with the red cross or red crescent to carry armed combatants, weapons, or ammunition with which to attack or elude enemy forces is

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[2](...continued)
rebel. Bothe, Partsch & Solf 207.

Cover and deception tactics of World War II are described in Fisher, The War Magician (1983); Reit, Masquerade: The Amazing Camouflage Deceptions of World War II (1978); Brown, Bodyguard of Lies (1975) (D-Day, 1944); Holmes, Double-Edged Secrets: U.S. Naval Intelligence Operations in the Pacific During World War II (1979); and sources cited therein and in AFP 110-31, para. 8-4b n.5.

Dewar, The Art of Deception in Warfare (1989) develops a modern theory of deception. Modern deception tactics are, of course, classified. See OPNAVINST 3070.1 (series) and JCS Pub 18, subj: Operations Security, and OPNAVINST S3430.1 (series), subj: Joint Electronics Warfare Policy. See also OPNAVINST S3490.1 (series), subj: Navy Operational Deception Policy.

[3] This definition appears for the first time in Additional Protocol I, article 37(1); perfidy had not been previously defined in treaty law. The United States supports this principle that "individual combatants not kill, injure, or capture enemy personnel by resort to perfidy." The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 Am. U.J. Int'l L. & Policy 425 (1987) (remarks of U.S. Department of State Deputy Legal Adviser Matheson). The rationale of this rule is that if protected status or protective signs, signals, symbols, and emblems are abused they will lose their effectiveness and put protected persons and places at additional risk.

[4] 2 Oppenheim-Lauterpacht 342.

prohibited.[5] Similarly, use of the white flag to gain a military advantage over the enemy is unlawful.[6]

12.3 NEUTRAL FLAGS, INSIGNIA, AND UNIFORMS

12.3.1 At Sea. Under the customary international law of naval warfare, it is permissible for a belligerent warship to fly false colors and disguise its outward appearance in other ways in order to deceive the enemy into believing the vessel is of neutral nationality or is other than a warship. However, it is unlawful for a warship to go into action without first

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[5] This customary rule derives from HR, arts. 23(f) & 27; Hague V, art. 5; GWS-Sea, arts. 30, 34, 35, 41 & 45; GWS, art. 36; 36; GC, arts. 18, 20-22 & Annex I (b); GPW, art. 23; Roerich Pact, arts. 1 & 5. See FM 27-10, para. 55; DA Pam 27-1-1, at 53; AFP 110-31, paras. 8-3c, 8-6a(1) & 8-6b; AFP 110-34, para. 5-1a. See also GP I, arts. 18(6) & 38, and Hague Cultural Property Convention, arts. 17(3) & (4). The protective signs, symbols, and emblems are illustrated in Figure 11-1. Protective signals are discussed in paragraph S11.11 above.

[6] HR, arts. 23(f) & 32; GP I, art. 37(1)(a). See also FM 27-10, paras. 52-53, at 22-23, and paras. 458-61, at 167-68 & 180; 2 Oppenheim-Lauterpacht 541; Greenspan 320-21 & 384-85. The white flag symbolizes a request to cease fire, negotiate or surrender. HR, arts. 23(f) & 32; FM 27-10, paras. 53 & 458; AFP 110-34, para. 5-1b; Greenspan 320-21 & 384-85; 2 Oppenheim-Lauterpacht 541. Displaying a white flag before attack to cause the enemy to cease firing is prohibited. As misuse of the red cross (or red crescent) could result in attacks on the sick and wounded, misuse of the white flag might prevent efforts to negotiate on important matters.

However, the enemy is not required to cease firing when a white flag is raised. To indicate that the hoisting is authorized by its commander, the appearance of the flag should be accompanied or followed promptly by a complete cessation of fire from that side. Further the commander authorizing the hoisting of the flag should also promptly send one or more *parlementaires*. FM 27-10, para. 458, at 167; AFP 110-31, para. 8-6a(2). See DA Pam 27-1-1, at 53. See also paragraph 11.10.4 regarding surrender. Application of these principles was illustrated during the battle for Goose Green in the Falklands/Malvinas conflict when Argentine soldiers raised a white flag then killed three British soldiers advancing to accept what they thought was a surrender. Higgenbotham, Case Studies in the Law of Land Warfare II: The Campaign in the Falklands, 64 Mil. Rev., Oct. 1984, at 53 ("Whatever the case was at Goose Green, there was no requirement for the British to expose themselves. The hoister of the white flag is the one expected to come forward, and that is what should have been required of the Argentine soldiers in this case.").

Similarly international law prohibits pretending to surrender or requesting quarter in order to attack an enemy because of the obligation of combatants to respect opposing combatants who are *hors de combat* or have surrendered. A false broadcast to the enemy that an armistice has been agreed upon has been widely recognized to be treacherous.

showing her true colors.[7] Use of neutral flags, insignia, or uniforms during an actual armed engagement at sea is, therefore, forbidden.[8]

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[7] Hall, note 1 above, at 58-60.

> The ruse which is of most practical importance in naval warfare is the use of the false flag. It now seems to be fairly well established by the custom of the sea that a ship is justified in wearing false colours for the purpose of deceiving the enemy, provided that she goes into action under her true colours. The celebrated German cruiser "Emden" made use of this strategem in 1914 when she entered the harbour of Penang [on 28 October] under [then neutral] Japanese colours, hoisted her proper ensign, and then torpedoed a Russian cruiser lying at anchor. It is equally permissible for a warship to disguise her outward appearance in other ways and even to pose as a merchant ship, provided that she hoists the naval ensign before opening fire. Merchant vessels themselves are also at liberty to deceive enemy cruisers in this way.

Smith, The Law and Custom of the Sea 115-16 (3d ed. 1959), citing 1 Corbett, Naval Operations 350 (1920).

This practice was followed by Iran in the Persian Gulf war. Newport (R.I.) Daily News, 18 February 1988, at A-10, citing a Gulf News (Bahrain) article.

Sources differ as to which flag EMDEN was actually flying on entry into Penang harbor. van der Vat, Gentlemen of War 86-87 (1983) (the British white ensign); Lochner, The Last Gentleman-of-War: The Raider Exploits of the Cruiser *Emden* 151 (1979, Lindauer transl. 1988), which van der Vat claims is exhaustive, states EMDEN flew no flag as she entered Penang harbor. Corbett states that the flag appeared to be the British white ensign. Flying the enemy flag is discussed in paragraph 12.5.1 below.

Additional Protocol I, article 39(3), explicitly states that no changes in the rules set out in the text of paragragh 12.3.1 are made by articles 39 or 37(1)(d) of that Protocol. Nevertheless the use of these ruses by naval forces today may be politically sensitive, since using neutral emblems might lead a party erroneously to conclude that a neutral has given up its neutrality (see chapter 7) and entered the fighting on the other side. This could lead to an attack or declaration of war on the neutral. AFP 110-34, para. 5-1c; Smith 116-18; Tucker 140-41. See paragraph 12.7 below regarding false claims of noncombatant status.

[8] Additional Protocol I, article 39(1), codifies the customary international law rule that prohibits the use of neutral symbols or uniforms in armed conflict, whether in attack or to promote the interest of a party to the conflict in the conduct of that conflict. CDDH/215/Rev.1, para. 38; 15 Official Records 259; Bothe, Partsch & Solf, para. 2.2, at 213.

12.3.2 **In the Air.** Use of false or deceptive markings to disguise belligerent military aircraft as being of neutral nationality is prohibited.[9]

12.3.3 **On Land.** The law of armed conflict applicable to land warfare has no rule of law analogous to that which permits belligerent warships to display neutral colors. Belligerents engaged in armed conflict on land are not permitted to use the flags, insignia, or uniforms of a neutral nation to deceive the enemy.[10]

12.4 THE UNITED NATIONS FLAG AND EMBLEM

The flag of the United Nations and the letters "UN"[11] may not be used in armed conflict for any purpose without the authorization of the United Nations.[12]

12.5 ENEMY FLAGS, INSIGNIA, AND UNIFORMS

12.5.1 **At Sea.** Naval surface and subsurface forces may fly enemy colors and display enemy markings to deceive the enemy. Warships must, however, display their true colors prior to an actual armed engagement.[13]

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[9] **AFP 110-31, para. 7-4 & n.5. This prohibition applies while engaging in combat.**

[10] **This customary rule is codified in Additional Protocol I, article 39(1). "The purpose behind this rule is to avoid escalation of armed conflict to neutral countries in the mistaken belief that the neutral State had abandoned its neutrality." Bothe, Partsch & Solf 213.**

[11] **The United Nations flag is white on light blue; the letters "UN" are its emblem.**

[12] **Additional Protocol I, article 37(1)(d), prohibits on land "the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict." In addition, Additional Protocol I, article 38(2), states that "[i]t is prohibited to make use of the distinctive emblem of the United Nations, except as authorized by that Organization." See AFP 110-34, para. 5-1d. The prohibition is extended to operations at sea as a matter of U.S. policy.**

[13] **This rule with respect to warships has precedent in the skillful disguise of German armed raiders in World Wars I and II. Tucker 140 n.37; Muggenthaler, German Raiders of World War II (1977); Woodward, The Secret Raiders: The Story of the German Armed Merchant Raiders in the Second World War (1955). The EMDEN added a false fourth funnel for her entry into Penang in 1914 to make her resemble a British cruiser of the YARMOUTH class. See sources cited in note 7 above. On 27/28 March 1942, HMS CAMPBELTOWN (ex-USS BUCHANAN) with two stacks removed and her two remaining funnels cut off at an angle to resemble a German torpedo-boat destroyer entered St. Nazaire harbor in German-occupied Brittany and rammed herself hard up on the outer**

(continued...)

12.5.2 In the Air. The use in combat of enemy markings by belligerent military aircraft is forbidden.[14]

12.5.3 On Land. The law of land warfare does not prohibit the use by belligerent land forces of enemy flags, insignia, or uniforms to deceive the enemy either before or following an armed engagement.[15] Combatants risk loss of entitlement to prisoner-of-war status, however, if they are captured while displaying enemy colors or insignia or wearing enemy uniforms in combat.[16]

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[13](...continued)
lock of the the only dry dock large enough to take the German battleship TIRPITZ. Hours later she was blown up with timed charges, putting the dry dock out of the war. (The attack was facilitated by CAMPBELTOWN's responses to German challenges and gun fire with flashing light delaying signal using the call sign of one of the German ships in the local flotilla, and to another with "wait", followed by the emergency signal, "Am being fired upon by friendly forces." See note 2 above.) Haines, Destroyers at War 73-80 (1982); Calvocoressi & Wint, Total War 450 (1972); Piekalkiewick, Sea War 1939-1945, at 206 (1987); 2 Roskill, The War at Sea 1939-1945, at 168-73 (1956).

A belligerent may prosecute as a war crime the use of its naval ensigns, emblems or uniforms by enemy forces *during* actual military operations against it. AFP 110-31, para. 5-1e.

[14] Tucker 142 & n.43; AFP 110-31, paras. 7-4 & 8-4b(5). This rule may be explained by the fact that an aircraft, once airborne, is generally unable to change its markings prior to actual attack as could a warship. Additionally, the speed with which an aircraft can approach a target (in comparison with warships) would render ineffective any attempt to display true markings at the instant of attack.

[15] HR, article 23(f), forbids "improper use . . . of the national flag, or of the military insignia and uniform of the enemy." "Improper use" of an enemy's flags, military insignia, national markings and uniforms involves use in actual attacks. This clarification is necessary because disputes arose concerning the meaning of the term "improper" during World War II. Bothe, Partsch & Solf 212-15. A reciprocal advantage is secured from observing this rule. It is clear, however, that this article does not change or affect the law concerning whether a combatant is entitled to PW status. That question is a separate matter determined by the GPW, as well as other applicable international law. AFP 110-31, para. 8-6c. See also DA Pam 27-161-2, at 53.

[16] This is based on the necessity to maintain security and to prevent surprise by the enemy. AFP 110-31, para. 5-1e(1).

Additional Protocol I, articles 37 & 39(2), prohibit even prior to combat the use of enemy flags, insignia, and uniforms to shield, favor, protect or impede military operations, thereby
(continued...)

Similarly, combatants caught behind enemy lines wearing the uniform of their adversaries are not entitled to prisoner-of-war status or protection and, historically, have been subjected to severe punishment.[17] It is permissible, however, for downed aircrews and escaping prisoners of war to use enemy uniforms to evade capture, so long as they do not attack enemy forces, gather military intelligence, or engage in similar military operations while so attired.[18] As a general rule, enemy markings should be removed from captured enemy equipment before it is used in combat.[19]

12.6 FEIGNING DISTRESS

It is unlawful to feign distress through the false use of internationally recognized distress signals such as SOS and MAYDAY.[20] In air warfare, however, it is permissible to feign disablement or other distress as a means to induce the enemy to break off an attack. Consequently, there is no obligation in air warfare to cease attacking a belligerent military

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[16](...continued)
attempting to reverse the rule of *U.S. v. Skorzeny*, 9 LRTWC 90 (1949), summarized in DA Pam 27-161-2, at 53-56, and reflected in FM 27-10, para. 54. Acceptance of this rule would prevent their use as a disguise during any military operation on or over land preparatory to an attack and appears to be impracticable. Bothe, Partsch & Solf 214. The United States considers this new rule militarily unacceptable since "there are certain adversarial forces that would use enemy uniforms in their operations in any case [and thus] it is important from the beginning to preserve that option for the United States as well." Matheson remarks, note 3 above, at 425 & 435.

[17] FM 27-10, paras. 75-78; DA Pam 27-161-2, at 59; AFP 110-31, para. 9-2b.

[18] GPW, arts. 83, 89 & 93 in particular, recognize that the wearing of civilian clothing by a PW to escape is permissible and not an offense. It may result in disciplinary punishment only under the GPW. Bothe, Partsch & Solf 214-15; AFP 110-34, para. 5-1e.

[19] Unmarked or camouflaged captured material may, however, be used immediately. Using foreign military uniforms or equipment in training to promote realism and recognition is not prohibited by international law. Cf. Bothe, Partsch & Solf 214.

[20] HR, art. 23(f); GP I, art. 37(1); AFP 110-34, para. 5-1a; FM 27-10, para. 55. See paragraph 11.10 above. However, a sick or wounded combatant does not commit perfidy by calling for and receiving medical aid even though he may be intending immediately to resume fighting. Nor do medical personnel commit perfidy by rendering such aid. Additional Protocol I, article 37(1)(b), adds to the list of perfidious acts in ground combat feigning distress or death, wounds or sickness without using such signals in order to resume hostilities.

aircraft that appears to be disabled.[21] However, if one knows the enemy aircraft is disabled such as to permanently remove it from the conflict (e.g., major fire or structural damage) there is an obligation to cease attacking to permit possible evacuation by crew or passengers.[22]

12.7 FALSE CLAIMS OF NONCOMBATANT STATUS

It is a violation of the law of armed conflict to kill, injure, or capture the enemy by false indication of an intent to surrender or by feigning shipwreck, sickness, wounds, or civilian status (but see paragraph 12.3.1).[23] A surprise attack by a person feigning shipwreck, sickness, or wounds undermines the protected status of those rendered incapable of combat. Similarly, attacking enemy forces while posing as a civilian puts all civilians at hazard.[24] Such acts of perfidy are punishable as war crimes.

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[21] **AFP 110-34, para. 5-1g; AFP 110-31, para. 4-2d. Further, the practice of submarines in releasing oil and debris to feign success of a depth charge or torpedo attack has never been considered to be unlawful.**

[22] **AFP 110-31, para. 4-2d.**

[23] **HR, art. 23(b); GP I, art. 37(1). Since civilians are not lawful objects of attack as such in armed conflict, it follows that disguising combatants in civilian clothing in order to commit hostilities constitutes perfidy. This is analogous to other situations where combatants attempt to disguise their intentions behind the protections afforded by the law of armed conflict in order to engage in hostilities. ICRC Report, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva 24 May - 12 June 1971, Rules Relative to Behavior of Combatants (1971); Greenspan 61; Schwartzenberger, International Courts, The Law of Armed Conflict 110 & 114 (1968).**

[24] **These rules have developed in recognition of the reality that the enemy will be tempted to attack civilians and the sick and wounded and refuse offers to surrender or negotiate, if it appears dangerous to respect these persons or offers.**

PWs and downed aircrews may feign civilian status for escape and evasion, and are not lawfully subject to punishment on that account if captured. GPW, art. 93. PWs and downed aircrews should avoid combatant or espionage activities while so dressed to avoid loss of PW status if captured. AFP 110-31 quotes FM 27-10 on the uniform requirements of ground forces in paragraph 7-2; paragraph 7-3 provides a discussion of the policies regarding aircrews.

Of course it may be difficult to establish military identity if apprehended in civilian clothing. See paragraph 12.8 below.

(continued...)

12.7.1 **Illegal Combatants.** Persons who take part in combat operations without distinguishing themselves clearly from the civilian population are illegal combatants and are subject to punishment upon capture.[25] If determined by a competent tribunal of the captor nation to be illegal combatants, such persons may be denied prisoner-of-war status and be tried and punished for falsely claiming noncombatant status during combat.[26] It is the policy of the United States, however, to accord illegal combatants prisoner-of-war status if they were carrying arms openly at the time of capture.[27]

12.8 SPIES

A spy is someone who, while in territory under enemy control, seeks to obtain information while operating under a false claim of noncombatant or friendly forces status with the intention of passing that information to an opposing belligerent.[28] Members of the armed forces who penetrate enemy-held territory in civilian attire or enemy uniform to collect intelligence are spies.[29] Conversely, personnel conducting reconnaissance missions behind enemy lines while properly uniformed are not spies.[30] Crew-members of warships

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[24](...continued)
Gathering information while feigning civilian status is discussed in paragraph 12.8 below.

[25] Baxter, So-Called Unprivileged Belligerency: Spies, Guerrillas and Saboteurs, 28 Brit. Y.B. Int'l L. 323 (1951); GP I, art. 44(3) & (4). See paragraph 11.8 note 49 above for the U.S. objections to these provisions of art. 44(3).

[26] GPW, art. 5. For discussions of such tribunals, see paragraphs S6.2.5.1 note 64 and 11.8 note 50 above, and 10 Whiteman 150-95.

[27] AR 190-8, paras. 1-3 & 1-3f. Cf. NATO STANAG 2044.

[28] Lieber Code, art. 88(1); HR, art. 29.

[29] Ibid.

[30] HR, art. 29; GP I, art. 46(2). Additional Protocol I also extends those protections beyond the zone of operations of hostile forces to any territory controlled by the enemy, and thus negates the possibility that members of the armed forces who openly seek to gather and transmit intelligence information in the enemy's zone of the interior, including crews of reconnaissance aircraft, may be subject to national espionage legislation. Additional Protocol I requires only that members of the armed forces be in any customary uniform of his armed forces that clearly distinguishes the members wearing it from nonmembers, including any distinctive sign which shows that the activity in question had nothing clandestine about it. Bothe, Partsch & Solf 265. The United States has not indicated its acceptance of these new provisions.

and military aircraft engaged in intelligence collection missions in enemy waters or airspace are not spies unless the ship or aircraft displays false civilian, neutral, or enemy marking.[31]

12.8.1 Legal Status. Spying during armed conflict is not a violation of international law. Captured spies are not, however, entitled to prisoner of war status.[32] The captor nation may try and punish spies in accordance with its national law.[33] Should a spy succeed in eluding capture and return to friendly territory, liability to punishment terminates. If subsequently captured during some other military operation, the former spy cannot be tried or punished for the earlier act of espionage.[34]

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[31] AFP 110-31, para. 7-4. See Jacobsen, note 2 above, at 21-32 for a discussion of intelligence gathering on the high seas.

[32] HR, art. 24; GP I, arts. 39(3) & 46(1). This is a statement of the customary law. Bothe, Partsch & Solf 264-65.

[33] HR, art. 30; Baxter, note 25 above, at 325. The United States would grant such persons a trial that meets international standards for fairness. Matheson remarks, note 3 above, at 427-28, that the United States "support[s] in particular the fundamental guarantees contained in" Additional Protocol I, article 75, that entitle such persons to a trial that meets international standards for fairness. See also paragraph 5.3 note 9. See AFP 110-31, para. 9-2b, for discussion of UCMJ and other Federal statutes on espionage such as 18 U.S.C. sec. 792-99.

[34] HR, art. 31; GP I, art. 46(4). These rules apply only to members of the armed forces, including members of those resistance and guerrilla groups who qualify under the applicable international law as members of the armed forces (see paragraph 5.3 and note 9 thereto above) who gather information under false pretenses. Espionage by civilians remains covered by the Hague Regulations, articles 29 and 30, as supplemented by the Fourth Convention and Additional Protocol I, as well as by the national law of espionage. Bothe, Partsch & Solf 267.

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.

Source: U.S. Naval Justice School

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.

UNITED STATES OF AMERICA

[Original English]
[8 March 1983]

Rights and duties of non-parties

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

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

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

Deep sea-bed mining

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

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

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

Innocent passage in the territorial sea

Some speakers spoke to the right of innocent passage in the territorial sea and asserted that a coastal State may require prior notification or authorization before warships or other governmental ships on non-commercial service may enter the territorial sea. Such assertions are contrary to the clear import of the Convention's provisions on innocent passage. Those provisions, which reflect long-standing international law, are clear in denying coastal State competence to impose such restrictions. During the eleventh session of the Conference, formal amendments which would have afforded such competence were withdrawn. The withdrawal was accompanied by a statement read from the Chair, and that statement clearly placed coastal State security interests within the context of

Source: Official Records of the Third UN Conference on the Law of the Sea, v. 17 (1984).

articles 19 and 25. Neither of those articles permits the imposition of notification or authorization requirements on foreign ships exercising the right of innocent passage.

Exclusive economic zone

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

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

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

Continental shelf

Some speakers made observations concerning the continental shelf. The Convention adopted by the Conference recognizes that the legal character of the continental shelf remains the natural prolongation of the land territory of the coastal State wherein the coastal State has sovereign rights for the purpose of exploring and exploiting its natural resources. In describing the outer limits of the continental shelf the Convention applies, in a practical manner, the basic elements of natural prolongation and adjacency fundamental to the doctrine of the continental shelf under international law. This description prejudices neither the existing sovereign rights of all coastal States with respect to the natural prolongation of their land territory into and under the sea, which exists *ipso facto* and *ab initio* by virtue of their sovereignty over the land territory, nor freedom of the high seas, including the freedom to exploit the sea-bed and subsoil beyond the limits of coastal State jurisdiction.

Boundaries of the continental shelf and exclusive economic zone

Some speakers directed statements to the boundary provisions found in articles 74 and 83 of the Convention adopted by the Conference. Those provisions do no more than reflect existing law in that they require boundaries to be established by agreement in accordance with equitable principles and in that they give no precedence to any particular delimitation method.

Archipelagic sea lanes passage and transit passage

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

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

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

Some speakers also called attention to specific claims of maritime jurisdiction and to the application of certain provisions of the Convention adopted by the Conference to specific geographical areas. These statements included assertions that certain claims are in conformity with the Convention, that certain claims are not in conformity with the Convention but are nevertheless consistent with international law, that certain baselines have been drawn in conformity with international law, and that transit passage is not to be enjoyed in particular straits due to the purported applicability of certain provisions of the Convention.

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

United States Oceans Policy [*]

Statement by the President.
March 10, 1983

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

Last July I announced that the United States will not sign the United Nations Law of the Sea Convention that was pened 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 nonliving resources within 200 nautical miles of its coast. This will provide United States jurisdiction for mineral resources out to 200 nautical miles that are not on the continental shelf. Recently discovered deposits there could be an important future source of strategic minerals.

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

While international law provides for a right of jurisdiction over marine scientific research within such a zone, the proclamation does not assert this right. I have elected not to do so because of the United States interest in encouraging marine scientific research and avoiding any unneccessary 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

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* Reproduced from the Weekly Compilation of Presidential Documents, Volume 19, Number 10 (March 14, 1983), pp. 383-85.
Source: 22 International Legal Materials 464 (1983)

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.

Federal Register
Vol. 54, No. 5
Monday, January 9, 1989

Presidential Documents

Title 3—

The President

Proclamation 5928 of December 27, 1988

Territorial Sea of the United States of America

By the President of the United States of America

A Proclamation

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

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

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

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

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

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

Nothing in this Proclamation:

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

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

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

Ronald Reagan

[FR Doc. 89-51[illegible]
Filed 1-6-89; 10:32 am]
Billing code 3195-01-M

ANNEX AS1-5

THE WHITE HOUSE
Office of the Press Secretary

March 10, 1983

EMBARGOED FOR RELEASE AT 4:00 PM EST

FACT SHEET

UNITED STATES OCEANS POLICY

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

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

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

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

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

Since 1976 the United States has exercised management and conservation authority over fisheries resources (with the exception of highly migratory species of tuna) within 200 nautical miles of the coasts, under the Magnuson Fishery Conservation and Management Act. The U.S. neither recognizes nor asserts jurisdiction over highly migratory species of tuna. Such species are best managed by international agreements with concerned countries. In addition to confirming the United States sovereign rights over mineral deposits beyond the continental shelf but within 200 nautical miles, the Proclamation bolsters U.S. authority over the living resources of the zone.

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

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

Source: 22 International Legal Materials 461 (1983)

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

Exclusive Economic Zone of the United States of America

48 F.R. 10605

By the President of the United States of America

A Proclamation

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

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

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

NOW, THEREFORE, I, RONALD REAGAN, by the authority vested in me as President by the Constitution and laws of the United States of America, do hereby proclaim the sovereign rights and jurisdiction of the United States of America and confirm also the rights and freedoms of all States within an Exclusive Economic Zone, as 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, (a) sovereign rights for the purpose of exploring, exploiting, conserving and managing natural resources, both living and non-living, of the seabed and subsoil and the superjacent waters and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; and (b) jurisdiction with regard to the establishment and use of artificial islands, and installations and structures having economic purposes, and the protection and preservation of the marine environment.

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

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

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

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

Ronald Reagan

ANNEX AS1-7

MARITIME CLAIMS OF THE UNITED STATES

a. Summary of Claims

TYPE		DATE	SOURCE	LIMITS	NOTES
I.	TERRITORIAL SEA	1793		3nm	
		Apr 61		3nm	Became party to the 1958 Convention on the Territorial Sea and the Contiguous Zone.
		Jun 72	Public Notice No. 358, Fed. Reg. Vol. 37, No. 116	3nm	Reaffirmed U.S. claim.
				12nm	See Note.
IV.	CONTIGUOUS ZONE	1930	Tariff Act	12nm	Customs regulations.
		Jun 72	Public Notice No. 358, Fed. Reg. Vol. 37, No. 116	12nm	Reaffirmed U.S. claim; for purposes of customs, fiscal, immigration and sanitary controls.
V.	CONTINENTAL SHELF	Sep 45	Proclamation No. 2667	Not Specific	White House press release issued on same date described 100-fathom depth as outer limit.
		Aug 53	Outer Continental Shelf Lands Act, 43 U.S.C. 1331	Seabed and subsoil appertaining	
		Apr 61			Became party to the 1958 Convention on the Continental Shelf.
VI.	FISHING/ ECONOMIC ZONE	Oct 66	Law No. 89-658	12nm	
		Mar 77	P.L. No. 94-265 (Magnuson Fishery Conservation and Management Act of 1976)	200nm	Fishing zone: claimed exclusive management authority; applied to American Samoa, Guam, Puerto Rico, U.S. Virgin Islands, and other possessions and territories.

Source: DoD Maritime Claims Reference Manual, pp 2-501 to 2-503 (1987)

TYPE		DATE	SOURCE	LIMITS	NOTES
'''	FISHING/ ECONOMIC ZONE	Jan 78		200nm	Fishery law applied to Northern Marianas.
	(continued)	Mar 83	Presidential Proclamation No. 5030	200nm	EEZ: applied to Puerto Rico, Northern Marianas and overseas possessions; no claim to jurisdiction over scientific research.
VII.	POLLUTION	Oct 72	Marine Protection, Research and Sanctuaries Act, Title I & II (33 U.S.C. §§1401 et seq., as amended)		Regulated transportation of wastes for ocean dumping in waters adjacent to the U.S.
		Oct 72	Clean Water Act, (33 U.S.C. §§1321 et seq., as amended)		Regulated pollution which may affect resources under the exclusive management authority of the U.S. or which is caused by activities under the Outer Continental Shelf Lands Act.
		Feb 74	Intervention on the High Seas Act P.L. 93-248		
		Jun 78	Intervention on the High Seas Act Amendment		
		Sep 78	Outer Continental Shelf Lands Act		Liability for spills from any facility or vessel operated in conjunction with an OCS lease.
VIII.	MARITIME BOUNDARIES	Apr 72	Agreement		Maritime boundary agreement with Mexico entered into force.
		Dec 77	Agreement		Maritime boundary agreement with Cuba signed.
		May 78	Agreement		Maritime boundary agreement with Mexico (Caribbean Sea and Pacific) signed.

TYPE	DATE	SOURCE	LIMITS	NOTES
VIII. MARITIME BOUNDARIES (continued)	Nov 80	Agreement		Maritime boundary agreement with Venezuela entered into force.
	Sep 83	Agreement		American Samoa: maritime boundary agreement with Cook Islands entered into force.
	Sep 83	Agreement		American Samoa: maritime boundary agreement with New Zealand (Tokelau) entered into force.
	Oct 84	ICJ Judgment		Maritime boundary with Canada (Gulf of Maine and Georges Bank) delimited.
IX. LAW OF THE SEA CONVENTION	Apr 82			Voted against and did not sign.

NOTE: U.S. territorial sea was extended for international purposes to 12 NM by Proclamation 5928, 27 December 1988, without changing domestic Federal or State law or regulation.

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

INTRODUCTION

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

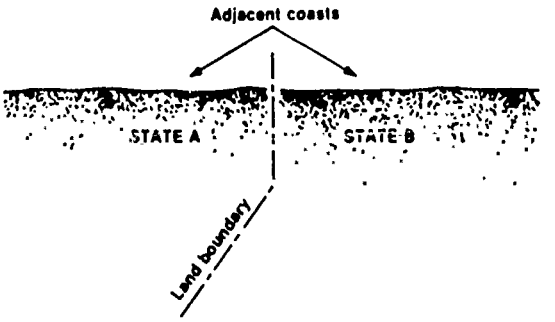
INDEX OF GLOSSARY TERMS

1 Adjacent coasts
2 Aid to navigation
3 Archipelagic baselines
4 Archipelagic sea lane
5 Archipelagic State
6 Archipelagic waters
7 Area
8 Artificial island
9 Atoll
10 Bank
11 Baseline
12 Basepoint
13 Bay
14 Cap
15 Chart
16 Closing line
17 Coast
18 Contiguous zone
19 Continental margin
20 Continental rise
21 Continental shelf
22 Continental slope
23 Danger to navigation
24 Deep ocean floor
25 Delimitation
26 Delta
27 Due publicity
28 Enclosed sea
29 Equidistance line
30 Estuary
31 Exclusive economic zone (EEZ)
32 Facility (navigational)
33 Facility (port)
34 Foot of the continental slope
35 Geodetic data
36 Geodetic datum
37 Geographical co-ordinates
38 Harbour works
39 Historic bay
40 Hydrographic survey
41 Installation (off-shore)
42 Internal waters
43 Islands
44 Isobath
45 Land territory
46 Latitude
47 Line of delimitation
48 Longitude
49 Low-tide elevation
50 Low-water line/Low-water mark
51 Median line / Equidistance line
52 Mile
53 Mouth (bay)
54 Mouth (river)
55 Nautical chart
56 Nautical mile
57 Navigational aid
58 Navigational chart
59 Oceanic plateau
60 Oceanic ridge
61 Opposite coasts
62 Outer limit
63 Parallel of latitude
64 Platform
65 Port
66 Reef
67 Rise
68 River
69 Roadstead
70 Rock
71 Routeing system
72 Safety aids
73 Safety zone
74 Scale
75 Sea-bed
76 Sedimentary rock
77 Semi-enclosed sea
78 Shelf
79 Size of area
80 Slope
81 Spur
82 Straight baseline
83 Straight line
84 Strait
85 Structure
86 Submarine cable
87 Submarine pipelines
88 Submarine ridge
89 Subsoil
90 Superjacent waters
91 Territorial sea
92 Tide
93 Traffic separation scheme
94 Water column

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

1 Adjacent coasts

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



2 Aid to navigation

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

See: Navigational aid

3 Archipelagic baselines

See: Baseline.

4 Archipelagic sea lane

As defined in article 53.

See: Routeing system; traffic separation scheme.

5 Archipelagic State

As defined in article 46.

See: Archipelagic waters; baseline; islands.

6 Archipelagic waters

The waters enclosed by archipelagic baselines

See: Articles 46, 47 and 49.

See: Archipelagic State; baseline; internal waters.

7 Area

As defined in article 1.1.(1).

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

8 Artificial island

See: Installation (off-shore).

9 Atoll

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

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

For the purpose of computing the ratio of water to land when establishing archipelagic waters, atolls and the waters contained within them may be included as part of the land area (article 47 7)

See. Archipelagic waters, baseline, islands, low-water line, reef

10 Bank

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

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

See Continental shelf

11 Baseline

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

The term usually refers to the baseline from which to measure the breadth of the territorial sea; the seaward limits of the contiguous zone (article 33.2), the exclusive economic zone (article 57) and, in some cases, the continental shelf (article 76) are measured from the same baseline.

See: Internal waters.

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

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

See: Low-water line.

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

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

See: Low-tide elevation

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

See: Straight line

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

12 Basepoint

A basepoint is any point on the baseline. In the method of straight baselines, where one straight baseline meets another baseline at a common point, one line may be said to "turn" at that point to form another baseline. Such a point may be termed a "baseline turning point" or simply "basepoint".

13 Bay

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

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

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

See: Historic bays.

14 Cap

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

15 Chart

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

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

16 Closing line

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

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

17 Coast

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

See: Baseline; low-water line.

18 Contiguous zone

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

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

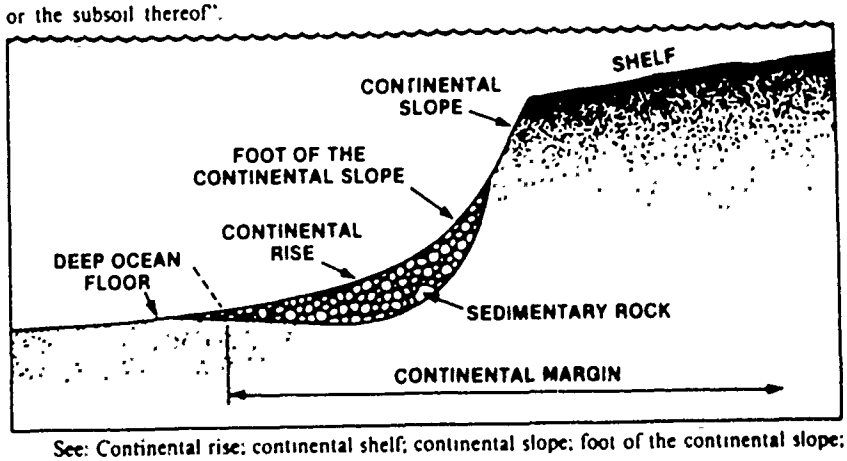
(*b*) Punish infringement of the above laws and regulations committed within its territory or territorial sea.

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

See: Baseline; exclusive economic zone; high seas.

19 Continental margin

As defined in article 76 3, as follows: "The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the sea-bed and subsoil of the shelf, the slope and the rise It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof".



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

20 Continental rise

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

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

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

21 Continental shelf

As defined in article 76.1, as follows

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

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

See: Continental margin, outer limit

22 Continental slope

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

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

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

23 Danger to navigation

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

24 Deep ocean floor

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

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

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

25 Delimitation

See: Line of delimitation.

26 Delta

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

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

See: Baseline; low-water line.

27 Due publicity

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

Under the provisions of the Convention, States shall give due publicity, *inter alia*, to charts or lists of geographical co-ordinates defining the baselines and some limits and boundaries (articles 16.2, 47.9, 75.2 and 84.2), to laws and regulations pertaining to innocent passage (article 21.3), and to sea lanes and traffic separation schemes established in the territorial sea (article 22.4) and archipelagic waters (article 53.10).

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

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

28 Enclosed sea

As defined in article 122, as follows:

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

29 Equidistance line

See: Median line.

30 Estuary

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

See: Bay; river; delta.

31 Exclusive economic zone (EEZ)

As defined in article 55.

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

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

32 Facility (navigational)

See: Aid to navigation.

33 Facility (port)

See: Harbour works.

34 Foot of the continental slope

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

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

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

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

See: Continental rise; continental shelf; continental slope.

35 Geodetic data

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

See: Geodetic datum.

36 Geodetic datum

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

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

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

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

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

37 Geographical co-ordinates

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

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

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

Examples: 47° 20′ 16″ N, 20° 18′ 24″ E, or 47° 20.27′ N, 20° 18.4′ E

See: Geodetic datum.

38 Harbour works

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

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

See: Baseline; port.

39 Historic bay

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

40 Hydrographic survey

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

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

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

See: Baseline; geographical co-ordinates.

41 Installation (off-shore)

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

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

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

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

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

42 Internal waters

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

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

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

43 Islands

As defined in article 121.1.

Maritime zones of islands are referred to in article 121.2.

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

44 Isobath

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

See: article 76.5.

45 Land territory

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

See: Tide.

46 Latitude

See: Geographical co-ordinates.

47 Line of delimitation

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

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

See: Due publicity.

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

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

48 Longitude

See: Geographical co-ordinates

49 Low-tide elevation

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

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

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

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

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

50 Low-water line/low-water mark

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

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

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

See: Baseline; chart; tide.

51 Median line/equidistance line

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

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

52 Mile

See: Nautical mile.

53 Mouth (bay)

Is the entrance to the bay from the ocean.

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

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

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

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

54 Mouth (river)

The place of discharge of a stream into the ocean.

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

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

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

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

55 Nautical chart

See: Chart.

56 Nautical mile

A unit of distance equal to 1,852 metres.

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

See: Geographical co-ordinates.

57 Navigational aid

See: Aid to navigation.

58 Navigational chart

See: Aid to navigation.

59 Oceanic plateau

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

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

See: Archipelagic State; baseline.

60 Oceanic ridge

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

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

See: Deep ocean floor.

61 Opposite coasts

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

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

62 Outer limit

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

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

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

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

63 Parallel of latitude

See: Geographical co-ordinates.

64 Platform

See: Installation (off-shore).

65 Port

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

66 Reef

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

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

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

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

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

67 Rise

See: Continental rise.

68 River

A relatively large natural stream of water.

69 Roadstead

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

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

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

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

70 Rock

A solid mass of limited extent.

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

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

See: Island; low-tide elevation.

71 Routeing system

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

72 Safety aids

See: Aid to navigation.

73 Safety zone

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

See: Installation (off-shore).

74 Scale

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

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

See: Chart.

75 Sea-bed

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

The sea-bed may be that of the territorial sea (article 2.2), archipelagic waters (article 49.2), the exclusive economic zone (article 56), the continental shelf (article 76), the high seas (article 112.1) or the area (articles 1.1 (1) and 133). It may be noted, however, that in reference to the surface layer seaward of the continental rise, article 76 uses the term "deep ocean floor" rather than "sea-bed."

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

76 Sedimentary rock

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

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

77 Semi-enclosed sea

See: Enclosed sea (article 122).

78 Shelf

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

See: Continental shelf.

79 Size of area

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

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

See: Geographical co-ordinates.

80 Slope

See: Continental slope

81 Spur

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

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

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

82 Straight baseline

See: Baseline.

83 Straight line

Mathematically the line of shortest distance between two points.

See: Baseline; continental margin; continental shelf.

84 Strait

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

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

85 Structure

See: Installation (off-shore).

86 Submarine cable

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

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

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

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

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

See: Submarine pipelines.

87 Submarine pipelines

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

They are laid on or trenched into the sea-bed, and they could stand at some height above it. In areas of strong tidal streams and soft sea-bed material the sea-bed may be scoured from beneath sections of the pipe leaving them partially suspended.

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

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

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

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

See: Submarine cables.

88 Submarine ridge

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

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

See: Continental shelf.

89 Subsoil

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

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

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

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

90 Superjacent waters

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

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

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

91 Territorial sea

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

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

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

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

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

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

92 Tide

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

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

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

See: Chart; low-water line.

93 Traffic separation scheme

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

See: Routeing system.

94 Water column

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

See: Sea-bed; superjacent waters.

JOINT STATEMENT BY THE UNITED STATES OF AMERICA AND THE UNION OF SOVIET SOCIALIST REPUBLICS

Since 1986, representatives of the United States of America and the Union of Soviet Socialist Republics have been conducting friendly and constructive discussions of certain international legal aspects of traditional uses of the oceans, in particular, navigation.

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

The Governments consider it useful to issue the attached Uniform Interpretation of the Rules of International Law Governing Innocent Passage. Both Governments have agreed to take the necessary steps to conform their internal laws, regulations and practices with this understanding of the rules.

FOR THE UNITED STATES OF AMERICA:

JAMES A. BAKER, III

FOR THE UNION OF SOVIET SOCIALIST REPUBLICS:

E.A. SHEVARDNADZE

Jackson Hole, Wyoming
September 23, 1989

UNIFORM INTERPRETATION OF RULES OF INTERNATIONAL LAW GOVERNING INNOCENT PASSAGE

1. The relevant rules of international law governing innocent passage of ships in the territorial sea are stated in the 1982 United National Convention on Law of the Sea (Convention of 1982), particularly in Part II, Section 3.

2. All ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance with international law, for which neither prior notification nor authorization is required.

3. Article 19 of the Convention of 1982 sets out in paragraph 2 an exhaustive list of activities that would render passage not innocent. A ship passing through the territorial sea that does not engage in any of those activities is in innocent passage.

4. A coastal State which questions whether the particular passage of a ship through its territorial sea is innocent shall inform the ship of the reason why it questions the innocence of the passage, and provide the ship an opportunity to clarify its intentions or correct its conduct in a reasonably short period of time.

5. Ships exercising the right of innocent passage shall comply with all laws and regulations of the coastal State adopted in conformity with relevant rules of international law as reflected in Articles 21, 22, 23 and 25 of the Convention of 1982. These include the laws and regulations requiring ships exercising the right of innocent passage through its territorial sea to use such sea lanes and traffic separation schemes as it may prescribe where needed to protect safety of navigation. In areas where no such sea lanes or traffic separation schemes have been prescribed, ships nevertheless enjoy the right of innocent passage.

6. Such laws and regulations of the coastal State may not have the practical effect of denying or impairing the exercise of the right of innocent passage as set forth in Article 24 of the Convention of 1982.

7. If a warship engages in conduct which violates such law or regulations or renders its passage not innocent and does not take corrective action upon request, the coastal State may require it to leave the territorial sea, as set forth in Article 30 of the Convention of 1982. In such case the warship shall do so immediately.

8. Without prejudice to the exercise of rights of coastal and flag States, all differences which may arise regarding a particular case of passage of ships through the territorial sea shall be settled through diplomatic channels or other agreed means.

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ANNEX AS2-1

STATEMENT OF POLICY

BY

THE DEPARTMENT OF STATE,

THE DEPARTMENT OF DEFENSE,

AND

THE UNITED STATES COAST GUARD

CONCERNING

EXERCISE OF

THE RIGHT OF ASSISTANCE ENTRY

I. Purpose. To establish a uniform policy for the exercise of the right of assistance entry by United States military ships and aircraft.

II. Background. For centuries, mariners have recognized a humanitarian duty to rescue others, regardless of nationality, in danger or distress from perils of the sea. The right to enter a foreign territorial sea to engage in bona fide efforts to render emergency assistance to those in danger or distress from perils of the sea (hereinafter referred to as the right of assistance entry) has been recognized since the development of the modern territorial sea concept in the eighteenth century. Acknowledgment of the right of assistance entry is evidenced in customary international law. The right of assistance entry is independent of the rights of innocent passage, transit passage, and archipelagic sea lanes passage.

III. Right of Assistance Entry. The right of assistance entry is not dependent upon seeking or receiving the permission of the coastal State. While the permission of the coastal State is not required, notification of the entry should be given to the coastal State both as a matter of comity and for the purpose of alerting the rescue forces of that State. The right of assistance entry extends only to rescues where the location of the danger or distress is reasonably well known. The right does not extend to conducting searches within the foreign territorial sea without the permission of the coastal State. The determination of whether a danger or distress requiring assistance entry exists properly rests with the operational commander on scene.

IV. Policy.

a. Assistance Entry by Military Vessels. When the operational commander of a United States military vessel determines or is informed that a person, ship, or aircraft in a foreign territorial sea (12nm or less) is in danger or distress from perils of the sea, that the location is reasonably well known, and that the United States military vessel is in a position to render assistance, assistance may be rendered. Notification of higher authority and the coastal State will be as specified in applicable implementing directives. Implementing directives will provide for prompt notification of the Department of State.

b. Assistance Entry by Military Aircraft. In accordance with applicable implementing directives, when the appropriate operational commander determines or is informed that a person, ship, or aircraft in a foreign territorial sea is in danger or distress from perils of the sea, that the location is reasonably well known, and that he is in a position to render assistance by deploying or employing military aircraft, he shall request guidance from higher authority by the fastest means available. Implementing directives will provide for consultation with the Department of State prior to responding to such requests. If, in the judgment of the operational commander, however, any delay in rendering assistance could be life-threatening, the operational commander may immediately render the assistance. Notification of higher authority and the coastal State will be as specified in applicable implementing directives. Implementing directives will provide for prompt notification of the Department of State.

V. Application. This statement of policy applies only in cases not covered by prior agreement with the coastal State concerned. Where the rendering of assistance to persons, ships, or aircraft in a foreign territorial sea is specifically addressed by an agreement with that coastal State, the terms of the agreement are controlling.

VI. Implementation. The parties to this statement of policy will implement the policy in directives, instructions, and manuals promulgated by them or by subordinate commands and organizations.

June 27, 1986
Date

for the Department of State
Abraham Sofaer, Legal Adviser

July 20, 1986
Date

for the Department of Defense
Hugh O'Neill, Oceans Policy Adviser

8 Aug 1986
Date

for the U. S. Coast Guard
P. A. YOST
Admiral, U.S. Coast Guard
COMMANDANT

International Straits
Arranged by Region, Counter-Clockwise
North and Central America

1. *Bering Strait, West... 19¹ .. 150' ....25.....USSR
65°50'N, 169°00'W.
between Big Diomede Island and the Siberian mainland
16220—1:315,350

2. **Bering Strait, East.....20².....160'.....11.....US
65°43'N, 168°25'W.
between Little Diomede Island and the Alaskan mainland
16220—1:315,350

3. **Etolin Strait.... 16.....42'.....35.....US
60°20'N, 165°25'W.
between Nunivak Island and the Alaskan mainland [Bering Sea]
16006—1 1,534,076

4 "Agattu Strait 15³ .. 165 + ' 25 US
52°35 N, 173°30 E
between Agattu and Semichi Islands [Aleutians]
15420—1,300,000

5 *Amchitka Pass 52... .1,000 + '. ...40. .. US
51°30'N, 179°45'W.
between Amchitka/Semisopochnoi Islands and Unalga/Gareloi Islands [Aleutians]
16460—1:300,000

6 **Tanaga Pass. 13.. ..165 + ' 25.... US
51°40'N, 178°20'W.
between Tanaga and Ilak, Skagul and the Gareloi Islands [Aleutians]
16460—1,300 000

7. **Adak Strait... 7 . 165 + ' .. .20 .US
51°50 N 177°00 W
between Kanaga and Adak Islands [Aleutians]
16460—1 300,000

8 "Seguam Pass 15 165 + ' 2 US
52°12N, 172°45 W
between Amlia and Seguam Islands [Aleutians]
16480—1:300,000

9. *Amutka Pass... 37.....165 + '.... 4.....US
52°52'N, 171°45'W.
between Seguam and Amutka Islands [Aleutians]
16480—1 300 000

10 "Yunaska Pass 10 1 000 + 6 US
52°30 N 171°00 W
between Amutka and Chagulak Islands and Yunaska Island [Aleutians]
16500—1 300 000

11 "Herbert Pass.....14 . 1,000 + '. 3 .US
52°40'N, 170°20 W
between Yunaska and Herbert Islands [Aleutians]
16501—1 80 000

12 "Samalga Pass 16 165 + 3 US
52°45 N 169°30 W
between Chuginadak and Samalga Islands [Aleutians]
16501—1 80 000

13 "Unimak Pass 13 165 + 8 US
54°18 N 164°45 W
between Ugamak and Unimak Islands [Aleutians]
16531—1 80 000 . 16520—1 300 000

14. **Shelikof Strait.....20.....165 + '.....110.....US
58°00'N, 135°30'W.
between Kodiak Island and the Alaskan Peninsula
16580—1:350,000

15. *Icy Strait.....2.....120'.....29.....US
58°15'N, 135°30W.
between Chichagof Island and the Alaskan mainland
17300—1:209,978

16 *Chatham Strait.....4.....1,000 + '.....118.....US
57°00'N, 134°40'W.
between Chichagof and Admiralty Islands [Alaska]
17300—1,207,978 & 17320—1,217,828

17 *Sumner Strait.. 3.. 165 + ' 53 US
56°00'N, 134°00'W
between Prince of Wales Island and Kuiu and Kupreanof Islands [Alaska]
17360—1,217,828

18 *Clarence Strait.....4. ...1,000 + ' . 84 US
55°25'N, 134°00'W
between Prince of Wales Island and the Alaskan mainland
17420—1:299,376

19 *Dixon Entrance.....27.....1,000 + ' ..95. Canada/US
54°25'N, 132°00'W.
between Alexander Archipelago and the Queen Charlotte Islands
17200—1,229,376 or 17008—1:525,000

20 *Hecate Strait ...23.6⁴ 165 + ' ...135.. ..Canada
54°00'N, 131°20'W
between Queen Charlotte Islands and the Canadian mainland
17460—1 250,000 & 17461—1 146,000 or 17008—1 525,000

21 #*Queen Charlotte Strait . .2. 165 + ' .. 45.. ..Canada
51°00'N, 127°50'W.
between Vancouver Island and the Canadian mainland across Gordon Channel
17504—1 73,000 & 17506—1 148,390

22 #*Johnstone Strait 1⁴ 50 65 Canada
50°30 N, 126°30 W
between Vancouver Island and the Canadian mainland
17005—1 525 000

23 #*Strait of Georgia 5⁶ 165 + 117 Canada
49°45'N, 124°45'W
between Balanas Island off Vancouver Island and San Gaster Island off the Canadian mainland
17513—1 149 705 & 17516—1 153 734 & 18410—1 80 000 17517—1 79 200

24 *Rosario Strait 2 160 15 Canada
48°35'N, 122°45 W
between Orcas/Lopez and Lummi/Cypress Islands east of Vancouver Island
18400—1 200 000

Source: Alexander, Navigational Restrictions 188-212.

25 **Strait of Juan de Fuca 9 165 + 65 Canada /US
48°20'N, 124°00'W
between Vancouver Island and Washington State
18400—1 200,000

26 **Santa Barbara Channel 11.. . 165 + ' 60 .. US
34°10'N, 120°00'W
between Anacapa Island [Santa Barbara Islands] and the US mainland
18720—1.232,188

27 *Entrance to the Gulf of Fonseca.....17⁷.....84' .. 10 .....El Salvador/Nicaragua
13°05'N, 87°50'W.
between Punta Ampala (El Salvador) and the coast of Nicaragua, north of Punta Cosiguina
21521—1 145,280

28. *Serpent's Mouth.. 5⁸.....78'.....18.....Trinidad and Tobago/Venezuela
10°00'N, 62°00'W.
between Trinidad and the Venezuelan coast
24409—1 50,000 or 24404—1.175,000

29 *Dragon's Mouths 5 165 + ' 5 Trinidad and Tobago/Venezuela
10°40'N, 61°48'W
between Chacachacare Island (Trinidad) and Isla Patos, off the Paria Peninsula
24405—1:45,000 or 24404—1:175,000

30. *Aruba-Paraguana Passage. ...15.....150'.....11..... Netherlands/Venezuela
12°20'N, 72°00'W.
between Aruba (Netherlands Antilles) and the Paraguana Peninsula
24460—1:250,000

31 *Galleons Passage 19. 156' . .5.. ..Trinidad and Tobago
11°00'N, 60°50'W
between Trinidad and Tobago
24402—1 75,000 or 24400—1 150,000

32 *Grenada-Tobago Passage .71 . 1.000 + ' .20 Grenada/Trinidad and Tobago
11°30'N, 61°00°W
between Grenada and Tobago
25400—1:250,000

33 *St. Vincent Passage. ...23.5.....1,000 + '.....7.....St. Lucia/St. Vincent
13°30'N, 61°00'W
between St Lucia and St Vincent
24033—1 952 800

34 *St Lucia Channel 17 1 000 + ' .7 France/St Lucia
14°15 N, 61°00 W
between Martinique (France) and St Lucia
24033—1 952,800

35 *Martinique Channel 22 1.000 + ' . 15 . Dominica/France
15°00'N, 61°1 .W
between Dominica and Martinique (France)
25008—1 931 650

36 *Dominica Channel 16 1 000 + ' 8 France/Dominica
15°45 N, 61°30 W
between Marie-Galante Island (Guadeloupe) and Dominica
25008—1 931 650

37 *Guadeloupe Passage 29⁹ 1.000 + ' 32 UK & Antigua and Barbuda/France
16°40'N, 61°45'W
between Montserrat/Antigua and Guadeloupe (France)
25008—1 931.650

38. *Anegada Passage. 43¹⁰ 1,000 + ' 27 UK
18°30'N, 63°40'W.
between Anegada Island (British Virgin Islands) and Sombrero Island
25600—1:250,000

39. **Virgin Passage.....8¹¹.....90'.....6.....US
18°20'N, 65°10'W.
between Culebra Island, off Puerto Rico, and the American Virgin Islands
25650—1:100,000

40 *Vieques Passage.....5.6.... 42'.....7.....US
18°10'N, 65°35'W.
between Vieques Island and Puerto Rico
25664—1:25,000 or 26560—1.1,000,000

41 *Mona Passage .. 31¹² ....1,000 + '.....33. ... Dominican Republic/US
18°25 N 67°45'W
between the Dominican Republic and Puerto Rico
25700—1:175,000

42. *Windward Passage.....46 .. .1,000 + '. 20..... Cuba/Haiti
20°00'N, 74°00'W.
between Cuba and Haiti
26235—1:145,300

43. *Jamaica Passage.....73¹³ .. 1,000 + '. 20..... Jamaica/Haiti
18°00'N, 75°30'W.
between Jamaica and Navassa Island
26010—1:926,560

44. *Yucatan Channel .105. ..1,000 + '... 30..... Mexico/Cuba
25°00'N 86°00'W
between the Yucatan Peninsula and Cuba
28015—1,906,530

45 *Entrance to Bay d'Amatique . .10 48' .2 ... Guatelama
15°52'N, 88°40'W.
between Punta Herreria and Cabo Tres Puntas
28164—1:50,000

46 *Silver Bank Passage 32 1.000 + ' 10 UK
20°40'N 70°25 W
between Mouchoir Bank and Silver Bank [Turks and Caicos Islands]
24720—1 300 000

47 **Mouchoir Passage 23 1 000 + 10 UK
21°10 N 70°55 W
between East Cay and Mouchoir Bank [Turks and Caicos Islands]
24720—1 300,000

48 **Turks Island Passage 18 1 000 + 25 UK
21°30 N, 71°20 W
between South Caicos and Salt Cay [Turks and Caicos Islands]
26261—1 100 000 or 24720—1 300 000

49 *Caicos Passage 30 1,000+' 17 The Bahamas/UK
22°00'N, 72°30'W
between reef at eastern end of Mayaguana Island (The Bahamas) and rock off Providenciales Island (Turks and Caicos Islands)
26260—1:300,000

50. **Mayaguana Passage. 20 1,000+'. 5. The Bahamas
22°30'N, 73°20'W.
between Plana Cays off Acklins Island and Mayaguana Island
26260—1:300,000

51. *Crooked Island Passage.....26. 1,000+'....13.... The Bahamas
23°00'N, 74°40'W
between Long Island and Crooked Island
26240—1:300,000

52. **Old Bahama Channel. 13. ...1,000+'.....95.. The Bahamas/Cuba
22°35'N, 78°00'W
between Cuban offshore cays and Great Bahama Bank
27047—1:144,220 or 27040—1:300,000

53. *Straits of Florida South.. .82 1,000+'..... 133.....U.S./Cuba
24°00'N, 82°00'W.
between Key West and Cuba
11461—1:300,000

54. *Straits of Florida, East.. ..43.....1,000+'.....180 ... .U.S./The Bahamas
25°45'N, 79°30'W
between Florida and Bimini Island
11460—1:466,940

55 *Providence Channel, Northwest ..24 25 . . 1,000+'.....100.. The Bahamas
26°15'N, 78°00'W
south of Great Abaco Island
26320—1:300,000

56 *Providence Channel, Northeast 25.....1,000+ 50 ... The Bahamas
25°45'N, 77°05'W
between Great Abaco Island and Egg Reef off Eleuthera Island
26320—1:300,000

57 #*Head Harbour Passage 1,5[illegible] . .150'.....4. Canada/US
44°57'N, 66°56'W
between Deer and Campobello Islands
13328—1:40,000

58 *Canso Strait [illegible] Canada
44°35'N, 61°23'W
between Cape Breton Is and and Nova Scotia
14111—1:25,000 or 14110—1:75,000

59. #*Northumberland Strait. 7 ...48'. 103.....Canada
46°10'N, 63°40'W
between New Brunswick and Prince Edward Island
14002—1:300,000

60 *Cabot Strait . 42[illegible] 165+ 20. Canada
47°20'N, 59°45'W
between Newfoundland and Nova Scotia
14008—1:350,000

61 *Detroit d Honguedo 38 165+ 50 Canada
49°00 N, 64°00'W
between Anticosti Island and the Gaspe Peninsula
14180—1:350,000 or 14260—1:300,000

62 #*Jacques Cartier Passage 15 165+ 112 Canada
50°00'N, 64°00'W.
between Quebec and Anticosti Island
14260—1:300,000 & 14280—1:300,000

63. *Strait of Belle Isle.. 9.. ..150'.. 138.. Canada
51°24'N, 46°45'W.
between Labrador and Newfoundland
14415—1:150,000

64. #*Hudson Strait.....30[illegible].....165+'...S.415.....Canada
62°30'N, 72°00'W.
between Baffin Island and the Quebec mainland
15017—1:1,000,000

65. *Davis Strait.....172.....1,000+'....300..... Canada/Denmark
66°30'N, 58°00'W.
between Baffin Island and Greenland
38032—1:841,000

66. **Kennedy Channel.....13.....165+' .92..... Canada/Denmark
80°45'N, 67°15'W.
between Ellesmere Island and Franklin Island off Greenland
38280—1:250,000 or 15720—1:500,000

67. **Nares Strait.... 22.....1,000+'....76.. . Canada/Denmark
78°30'N, 74°00'W.
between E[illegible]re Island and Greenland
15720—[illegible],000

68. **Robeson Channel.....12.....1,000+'.....31. ... Canada/Denmark
82°00'N, 61°45'W.
between Ellesmere Island and Greenland
15720-1:500,000

69. #*Lancaster Sound.....38.....1,000+'...164.. ..Canada
74°00'N, 84°00'W
between Somerset and Devon Islands [Northwest Passage]
15630—1:500,000 & 15742—1:500,000

70 #*Barrow Strait 15[illegible]. 165+' .. 127 .. .Canada
74°15'N, 95°00'W.
between Somerset and Cornwallis and Devon Islands [Northwest Passage]
15671—1:200,000 & 15742—1:500,000

71 #*Viscount Melville Sound 78 1,000+' Canada
74°00'N, 112°00'W
between [illegible]ville and Victoria Islands [Northwest Passage]
15810—1:500,000 & 15670—1:500,000

72 #*Prince of Wales Strait [illegible] 165+ 155 Canada
72°45 N, 118°00'W
between Banks and Victoria Islands [Northwest Passage]
15821—1:250,000

73 #*M'Clure Strait 53 1,000+' 170 Canada
75°00'N 121°00'W
between Banks and Melville Islands [Northwest Passage]
15800—1:500,000 & 15810—1:500,000

74 #*Amundsen Gulf 61 1,000+' 218 Canada
70°30'N 123°00'W
between Banks Island and Parry Peninsula [Northwest Passage]
15920—1:500,000

Eurasia

75 Gorlo Strait 25 83' 105 USSR
66°30'N, 42°00'E
between the Kola Peninsula and the Soviet coast, north of Archangel
42560—1:200,000 & 42580—1:200,000

76. Entrance to the Gulf of Finland. 17 165+ . 85 Finland/USSR
59°10'N, 21°45'E.
between Finland and the Estonian SSR
44380—1:200,000

77. Aland's Hav. ...7[19] ....78'.....16.....Finland/Sweden
60°12'N, 19°00'.
between Aland Islands and the Swedish mainland
44320—1:225,000

78. Kalmar Sund.....2.....24'.....74.....Sweden
56°50'N, 16°30'E.
between Oland Island and the Swedish mainland
44120—1:198,600

79. Borholmsgat ..19.. 150',....11....Denmark/Sweden
55°20'N, 14°30'E.
between Bornholm Island and the Swedish mainland
44100—1:203,700

80. Kadet Channel. ...19 ....54'.....13.....
Denmark/German Democratic Republic
54°30'N 12°15'E.
between Falster Island (Denmark) and the German mainland
44068—1:137,000

81 Fehmarn Belt.....10.....90'.....13.....Denmark/Federal Republic of Germany
54°35'N, 11°15'E.
between Fehmarn (FRG) and Lolland Island (Denmark)
44069—1:137,000

82 Oresund 2 23' 38. ...Denmark/Sweden
55°40'N 12°50 E
between Sjaelland Island and the Swedish mainland
44048—1:62,200 & 44049—1:62,900 or 44047—1:136,920

83. Langeland Belt.....5.6.....66'.....12.....Denmark
54°50'N, 10°53'E.
between Langeland and Lolland Islands
44064—1:136,900

84 Store Baelt 4[0] ..72'... .61 . .Denmark
55°20'N ' '30'E
between Fyn and Sjaelland Islands
44064—' '36 900

85 Samsoe Bel: 7 66 15 Denmark
55°45 N '0°45 E
between Samsoe and rock off Sjaelland Islands
44064—1:136,900

86. Little Belt. 0 4.....45'.....72.....Denmark
55°30'N, 9°40'E.
between Fyn Island and the Jutland Peninsula
44061—1:136,900

87 Denmark Strait 182 . 1.000+' 150 Denmark Iceland
66°00 N 2°30 W
between Greenland and Iceland
112—1:3,500,000

88 The Hole 20 165+' 30 UK
59°30'N, 1°40'W
between Fair Island (Orkney Islands) and Horse Islet, west of Sumburgh Head (Shetland Islands)
35010—1:356,785

89 Pentland Firth. .3[21] 165+' 12. .UK
58°43'N, 3°10'W.
between Orkney Islands and the Scottish mainland
35141—1:31,130

90. North Minch.....23.5.....165+'.....21.....UK
58°15'N, 5°45'W.
between the Outer Hebrides and the Scottish mainland
35220—1:153,450

91 Little Minch.....9.....120'.. ..21. .. UK
57°30'N, 6°45'W.
between the Outer Hebrides and Fladda Chuain Island off the Isle of Skye, Scotland
35420—1:272,670

92 North Channel.....11. . .165+' 6 UK
55°20'N, 6°00'W.
between Northern Ireland and Scotland
35302—1:75,000

93 St. George's Channel. . 39. 165+' . 50 Ireland/UK
52°20'N, 5°30'W.
between Ireland and North Bishop Rock off Wales
36040—1:200,000

94. Bristol Channel.....10.....33'.....55.....UK
50°20'N, 3°30'W.
between southern Wales and England
36165—1:75,000

95. Dover Strait.....18.....66'.....20.....UK/France
51°00'N 1°30'E.
between England and France
37121—1:75,000 & 37140—1:150,000

96. The Solent .1. .. 165+' '6 UK
50°43'N, 1°30'W
between the Isle of Wight and the English mainland
37084—1:20,000 & 37085—1:20,000

97. Ile d'Yeu.....9.... 165+'.. ..5. . France
46°45'N, 2°15'W
between Ile d'Yeu and the French mainland [Bay of Biscay]
37360—1:200,000

98 Strait of Gibraltar 8 165+ 33 Spain/Morocco/UK
35°55'N, 5°30'W
between Morocco and Spain and Morocco and Gibraltar
52041—1:100,000

99 Freu de Menorca 20 165+ 12 Spain
39°50'N, 3°30'E.
between Mallorca and Menorca Islands [Balearic Islands]
52141—1:100,000

100 Corsica-Elba Passage 27[2] 1:000+ 30 France/Italy
43°00'N, 10°00'E
between Corsica (France) and Isola Capraia (Italy)
53120—1:214,880

101 Strait of Bonifacio 3[2] 165+ 9 France/Italy
41°17°N 9°16°E
between Corsica (France) and Sardinia (Italy)
53287—1:30,000

102 *Strait of Messina 2 165+' 23 Italy
38°15'N, 15°42'E
between Sicily and the Italian mainland
53183—1:30,000 or 53180—1:228,170

103 *Strait of Sicily 55[24] 165+' 25 Italy/Tunisia
37°10'N, 11°40'E
between Sicily and Tunisia
53021—1:754,300 or 53019—1:798,700

104 *Malta Channel 44 165+' 19 Italy/Malta
36°16'N, 14°45'E.
between Gozo Island (Malta) and Sicily
53220—1:230,540

105 *Strait of Otranto 39 1,000+' 32 Italy/Albania
40°25'N, 19°00'W
between Italy and Albania
54260—1:221,380

106 *Corfu Channel 1[25] 165+' 26 Greece/Albania
39°46'N, 19°58'E.
between Corfu Island (Greece) and the Albanian mainland
54281—1:25,000 or 54280—1:250,000

107 *Elafonisou Strait 5 165+' 12 Greece
36°25'N, 23°00'E
between Nisos Kithira and the Greek mainland
54303—1:73,260 or 54300—1:255,000

108 *Kithira Strait 11[26] 165+' 5 Greece
36°00'N, 23°10'E.
between Nisos Kithira and Nisos Andikithira
54300—1:255,000

109 **Andikithiron Strait 16 165+' 3 Greece
35°45'N, 23°25'E.
between Nisos Andikithira and Nisis Agria Gramvousa, an island off Crete
54300—1:255,000

110 **Karpathos Strait 23 1,000+' 20 Greece
35°50'N, 27°30'E
between Nisos Karpathos and Nisis Karavolas off Nisos Rodhos (Rhodes Island)
54400—1:255,000

111 **Kasos Strait 23 8[27] 1,000+' 6 Greece
35°20'N, 26°30'E
between Nisos Kasos and Crete
54333—1:100,000 or
54400—1:255,000

112 *Keas Strait 8 165+' 8 Greece
37°40'N, 24°15'E
between Nisos Makronisos and Nisos Kea [Aegean Sea]
54334—1:115,210

113 *Kafireas Strait 6 165+ 12 Greece
38°00'N, 24°42'E
between Nisos Evvoia and Nisos Andros [Aegean Sea]
54335—1:104,120

114 *Imroz Strait 9 165+' 4 Turkey
40°09'N, 26°08'E
between Imroz Island and the Gallipoli Peninsula [Aegean Sea]
54360—1:250,000

115 *Dardanelles 0 6 165+' 35 Turkey
40°11'N, 26°25'E
between the Gallipoli Peninsula and Anatolia
55041—1:75,000 or 55040—1:271,690

116 *Bosporus 0 45 108' 17 Turkey
41°02'N, 29°00'E
between Turkey in Europe and Anatolia
55048—1:25,000 or 55040—1:271,690

117 *Kerch Strait 1 50' 21 USSR
45°23'N, 36°43'E
between the Crimea Peninsula and the Soviet mainland
55015—1:750,000

118 *Strait of Jubal 7 100' 28 Egypt
27°45'N, 33°50'E
between the Sinai Peninsula and the Egyptian mainland
62191—1:150,000

119 *Strait of Tiran 3 165+' 3 Egypt/Saudi Arabia
28°00'N, 34°28'E.
between the Sinai Peninsula and Jazirat Tiran (Saudi Arabia)
62222—1:25,000

120 *Massawa Strait 3[28] 132' 44 Ethiopia
16°00'N, 39°22'E.
between Dahlak Kebir (Dahlak Archipelago) and the Ethopian mainland [Red Sea]
62120—1:296,000

121 *Bab el Mandeb 9[29] 150' 42
Djibouti North Yemen/South Yemen
12°40'N, 42°20'E.
between Perim Island (South Yemen) and Ile Grande (Djibouti). The west coast of North Yemen also adjoins the strait.
62100—1:200,000

122 *Bahrain-Saudi Arabia Passage 9 17' 19
Bahrain/Saudi Arabia
26°13'N, 50°15'E.
between Umm Na'San (off the Bahrain coast) and Saudi Arabia
62411—1:150,000 or 62420—1:200,000

123 **Bahrain-Qatar Passage 19 12' 15
Bahrain/Qatar
26°00'N, 50°57'E
between Bahrain and Qatar
62411—1:150,000

124 *Strait of Hormuz 26[30] 165+ 22
Oman/Iran
26°40'N, 56°30'E
between Oman and Iran
62392—1:100,000

125 *Eight Degree Channel 70 1,000+' 12
India/Maldives
7°35'N, 72°50'E
between Minicoy Island (India) and Thavandiffulu Atoll (Maldives)
63010—1:964,000

126 *Palk Strait 3 30 India and Sri Lanka
10°30'N, 79°45'E
between India and Sri Lanka
63250—1:310,350

127 *Preparis North Channel 54[31] 165+' 5
Burma
15°10'N, 93°45'E
between Cow and Calf Islands (Preparis Islands) and the Burmese mainland
63410—1:360,610

128 *Preparis South Channel 36[32] 165+ 5 Burma
14°30'N, 93°30'E
between Preparis and Great Coco Islands
63030—1:538,660

129 *Coco Channel 22 126' 7 Burma/India
13°50'N, 93°10'E
between Little Coco Island and Landfall Island (Andaman Islands)
63371—1 96,290

130 *Ten Degree Channel 77 1,000+' 10 India
10°00'N, 92°30'E
between the Andaman and Nicobar Islands
63035-1,500,000

131 *Great Channel .86. .1,000+' .22 .India/Indonesia
6°20'N, 94°10'E
between Great Nicobar Island (India) and Pulau Rondo, north of Sumatra
63035—1 500,000

132 *Malacca Strait. 8 84' .520 Malaysia/Indonesia
3°00'N, 100°30'E.
between Pulau Iyu-Kecil off Sumatra and Pulau Kukup off Malaysia
71260—1:250,000

133 *Singapore Strait 2 72'.. .43.. Singapore/Indonesia/Malaysia
1°10'N, 103°50 E.
between Singapore and Malaysia and Indonesia
72145—1 50,000 & 72149—1,50,000

134 *Durian Strait 3.....90' 17 ....Indonesia
1°15'S, 103°35'E
between Pelangkat and Perasi Island
71241—1:100,000

135. *Berhala Strait.....10[33].....66'.....7.....Indonesia
0°50,S, 104°20'E.
between Singkep Island and the East Sumatra coast
71230—1:300,000

136 *Bangka Strait.. ..8... .36' ...117.....Indonesia
3°00'S, 106°10'E
between Pulau Pelepasan, off Bangka Island and the east Sumatra coast
71221—1 100,000 & 71222—1,150,000

137 *Gaspar Strait .4[34] 132' .31 ..Indonesia
3°00 S, 107°00'E.
between Bangka and Billiton Islands
71211—1,100,000 & 71210—1:200,000

138. *Karimata Strait.....112[35].....96'.....45.....Indonesia
3°00'S, 109°00'E.
between Billiton Island and Borneo
71033—1 1,613,850

139 *Sunda Strait 4[36] 165+' 38. .Indonesia
6°00 S 105°45 E
between Java and Sumatra
71180—1 290 480

140 *Sapud Strait 7 150 9 Indonesia
7°02 S 114°03 E
between Gili Iyang, off Madura, and Pulau Sapudi
72223—1 200,000

141 *Bali Strait 2 165+' 20. Indonesia .
8°06'S 114°25'E.
between Java and Bali
72223—1 200 000

142 *Lombok Strait 11[37] 1 000+' 25 Indonesia
8°30 S 115°50 E
between Bali and Lombok
72222—1 200 000

143 *Alas Strait 6[38] 165+ 24 Indonesia
8°28 S 116°47 E
between Gili Petagan and Pulau Pandjang
72211—1 201 800

144 *Sape Strait 5 165+ 12 Indonesia
8°40'S, 119°20'E
between Sumbawa and Komodo Islands, many rocks in channel
73041—1 212,660

145. *Sumba Strait 25. .1,000+' .60 Indonesia
8°55'S, 120°00'E.
between Sumba Island and the Sumbawa/Komodo/Flores Islands
73041—1 212,660

146. *Roti Strait.. 5.. ..165+' ..9.. .Indonesia
10°25'S, 123°25'E.
between Timor and Roti Islands
73072—1:203,523

147. *Ombai Strait.. 17 ....1,000+'... 72.....Indonesia
8°30'S, 125°00'E
between Alor and Timor Islands
73191—1:200,000 or 73004—1:500,000

148. *Wetar Strait.. 13[39].....1,000+'.....85.....Indonesia
8°15'S, 126°30'E.
between Wetar and Timor Islands
73004—1 500,000

149 *Boeton Passage 14 1,000+' 17 . Indonesia
5°20'S. 123°20 E
off southwestern Sulawesi (Celebes) between Boeton and Karangi Kapoota Reefs and Wandji Island
73010—1 500,000

150. *Manipa Strait.....13[40].....1,000+'.....17.....Indonesia
3°20'S, 127°20'E.
between Buru and Ceram Islands
73018—1:500,000

151. *Api Passage.....16.....78'.....1 ....Indonesia
2°00'N, 109°10'E.
off the west coast of Borneo, between Pulau Merundung and Borneo
71350—1 300,000

152. *Serasan Passage. .9[41] ..102'.. .8.... Indonesia
2°20'N, 109°00'E
off the west coast of Borneo between Serasan Island and Maloe Reefs
71350—1 300,000

153. *Koti Passage 10 . .102'. ..5 . Indonesia
2°38'N, 108°55'E.
off the west coast of Borneo, between Serasan Island and a reef adjoining Kerdau Island
92360—1 100,000 or 71350—1:300,000

154 *Sibutu Passage 17 165+' 18. Philippines
5°00'N, 119°40 E
between Sibutu and Bongao Island in the Simunul Islands [Sulu Archipelago]
72150—1 196 000 or 92260—1 100 000

155 *Makassar Strait 84 1,000+ 285 Indonesia
2°00'S 118°00 E
between Borneo and Sulawesi
72014—1 750,000 & 72007—1 750,000

156 *Bangka Passage . 18 1 000+' 3 Indonesia
2°00'N, 125°25 E
off northwest Sulawesi between Bangka and Biaro Islands
73341—1 213 860

157 *Greyhound Strait 10 1 000+ 17 Indonesia
1°50 S 123°50 E
off eastern Sulawesi between Bokan and Tampau Islands
73291—1 228 000

158 *Balut Channel 37 1,000 + ' 5
Philippines/ Indonesia
5°00'N, 125°30'E
between Balut Island, off southern Mindanao, and Pulau Marore, an islet to the south
92006—1:1,089,900

159 *Obi Strait. . .21 1,000 + ' 77 . nesia
1°10'S, 128°00'E
off southern Halmahera, betwee. Batan Island and Bisa (Setile) Island, off Obi Major
73016—1:500,000

160. *Jailolo Passage. 19 ...1,000 + ' ..2. . .Indonesia
0°00', 129°00'E.
between Halmahera and Gebe Island, off New Guinea
73016—1:500,000

161. *Balabac Strait 6 5[43] .138' 35. . Malaysia/ Philippines
7°35'N, 117°00'E.
between Balambangan Island, off North Borneo (Malaysia) and Balabac Island
92560—1:200,000

162. *Mindoro Strait. 15[44] 1,000 + ' 67 Philippines
12°30 N, 110°20 E
between the Calamian Islands and Mindoro Island
91321—1,100,000 or 91331—1 200,000

163. *Verde Island Passage. 4[45] 1,000 + ' 14 . .
Philippines
13°35'N, 120°40'E.
between Luzon and Mindoro
91300—1:100,000

164. *Maqueda Channel. 3[46] 165 + '.. 12.....Philippines
13°42'N, 124°02'E.
between eastern Luzon and Catanduun Island
91040—1:100,000

165. *Polillo Strait 10 165 + ' 21 Philippines
14°45 N, 121°45'E.
between eastern Luzon and Polillo Island
91080—1 200,000

166 *San Bernardino Strait 4[47] 165 + ' 20
Philippines
12°35'N, 124°10'E
between southeastern Luzon and Samar Island
91380—1:100,000

167. *Surigao Strait.....8[48].....165 + '.....53.....Philippines
10°10'N, 125°20'E.
between Leyte and Mindanao
92080—1 100,000 or 92310—1 120,000

168 *Basilan Strait 6 4[49] 165 + 21 Philippines
6°48 N, 122°05'E
between Mindanao and Basilan Island [Sulu Archipelago]
92210—1 100 000

169 *' Hainan Strait 10 132 50 China
20°10'N, 110°20'E
between Hainan Island and the Chinese mainland
93661—1 150,000

170 *Lamma Channel [50] 99 12 UK China
22°36 N 114°10 E
between Hong Kong and Lamma Islands
93733—1 75 000

*' *Bat.van Channe. [51] 1 000 + 25
Philippines
18°20 N 121°30 E
between Fuga Island Babuyan Islands) and Luzon [Luzon Strait]
91140—1 200 000

172 *Balintang Channel 23 7[51]. 1,000 + ' . 30 .
Philippines
19°50'N, 122°30'E
between Babuyan and Balintang Islands and Luzon [Luzon Strait]
91160—1:200,000

173. *Bashi Channel.....53[52] ... 1,000 + ' . 15.. Taiwan/ Philippines [Luzon Strait]
21°25'N, 121°30'E.
between the Batan Islands and Taiwan
91170—1:200,000

174. *Formosa Strait.....64[53] ....126'... .135.....China/ Taiwan
25°00'N, 120°00'E.
between mainland China and Taiwan
94004—1:600,000

175. *Pescadores Channel. .17....165 + '.....38....Taiwan
23°30'N, 119°50'E.
between Taiwan and Pa-Chao Tao (Pescadores)
94067—1:150,000

176. *Amami Passage.....31 ...1,000 + ' . .25.. . Japan
28°40'N, 129°10'E.
between Yakoale Shima and Amami-O Shima [Ryukyus]
97440—1 360,230

177 *Suwanose-suido.... 9 1,000 + ' . .2. ...Japan
29°30'N, 119°50'E
between Suwanose Shima and Akuseki Shima [Ryukyus]
97440—1:350,230

178. *Nakanoshima-suido.....11.....1,000 + '.....4.....Japan
29°45'N, 129°48'E.
between Nakano Shima and Suwanose Shima [Ryukyus]
97440—1:360,230

179 *Kuchinoshima-suido 5 1,000 + ' .5. . Japan
29°58'N, 129°55'E.
between Kuchino Shima and Nakano Shima [Ryukyus]
97440—1 360 230

180 *Tokara-kaikyo 22 1,000 + ' 5 Japan
30°10'N, 130°15 E.
between Yaku Shima (Tokara Gunto) and Hira se (Osumi Gunto) [Ryukyus]
97440—1:360,230

181. *Yakushima-kaikyo.....7 ....1,000 + '.. ..4.....Japan
30°23'N, 130°20'E
between Yaku Shima and Kuchineroabu Shima [Ryukyus]
97360—1 200,000 or 97440—1 360,230

182 *Tanegashima-kaikyo 10 165 + ' 6 Japan
30°20'N, 130°45 E
between Tanega Shima and Yaku Shima [Ryukyus]
97340—1 200,000

183. "Osumi-kaikyo.....17,.. 165 + . ..27 .. .Japan
30°50'N, 130°40'E.
between southern Kyushu and Mage Shima, off Tanega Shima
97340—1 200 000 & 97360—1 200,000

184 *Cheju Strait.. 8[54] 165 + 33 South Korea
33°40'N, 126°30'E
between Cheju Island and the Korean mainland
95100—1 250 000

185 *Maemel Sudo 16 165+ 30 South Korea
34°30'N, 125°20'E
between Sojunggan Kundo and rock off the southwest coast of Maenggol Kudo
95100—1 250 000

186 *Huksan Jedo 8 165+' 15. South Korea
34°40'N, 125°20'E
between Hong Do and Taejang Do, off the southwest coast
95110—1:250,000

187 *Pohai Strait.. 23. .120' 71.. .China
38°35'N, 121°00'E.
between Pei-ch'eng-huang Tao, in mid-channel off the Shantung Peninsula and Shantung Province
94341—1 182,498 or 94032—1 864,700

188. "Korea Strait, West... 22[55]... 165+'.... 41.....South Korea/Japan
34°30'N, 128°50'W
between Tsushima Island and the Korean mainland
95140—1 251,500

189 *Korea Strait, East 25 165+' .12.. Japan
34°00'N, 129°30'E
between Iki Shima off the Kyushu coast, and Tsushima Island
95340—1:251,500

190 *Sado-kaikyo. . .17 ..165+' ....27.. Japan
38°00'N, 133°00'E.
between the west coast of Honshu and Sado Island
95274—1:200,000

191. "Tsugaru-kaikyo.....10.. ..165+' ....60.....Japan
41°30'N, 140°40'E.
between Hokkaido and Honshu
96943—1:222,350

192 *Okushiri-kaikyo 10 1,000+' . 11 . ..Japan
42°15'N, 139°40'E
between western Hokkaido and Okushiri Island
96945-1 250 000

193 *Nemuro-kaikyo 13 18' 38 Japan/USSR Administered Territory*
44°00'N, 145°20'E
between Hokkaido and Kunashir Island
96901—1,229,435

194 *Notsuke-suido.....9. .24' .. 4.. ..Japan/USSR Administered Territory*
43°37'N, 145°20'E.
between Hokkaido and Kunashir Island
96904—1 88,350 or 96901—1 229,435

195 *Taraku-suido 6 2' 4 USSR Administered Territory*
43°33'N, 146°15'E
between Taraku Island and Shiaokotu Island [Habomai Islands]
96202—1 88,350 or 96901—1 229,435

196. *Shikotan-suido. .. 12 108'. . 7 USSR Administered Territory*
43°40'N, 146°35'E
between Shikotan and Taraku Islands [Habomai Islands]
96902—1 88,350 or 96901—1 229,435

197 *Kunashir-suido 32 12 165+ USSR Administered Territory
44°25'N, 146°45'E
between Kunashir and Etorofu Islands [Kuriles]
96901—1 229 435 or 96780—1 225 515

198 *Rishiri-suido 10 165+' 10 Japan
45°10'N, 141°30'E
between western Hokkaido and Rishiri Island
96939—1 200,000 or 96938—1 200,000

199 "Soya-kaikyo 21 165+' 6 ..Japan/USSR
45°40'N, 142°00'E
between Hokkaido and Ostrov Kamen Opasnosti, off Sakhalin
96938—1:200,000

200. *Proliv Tatarskiy 58. . 33'... .360.....USSR
50°00'N, 141°30'E
between Sakhalin and the Siberian mainland
96140—1,250,000

201 *Proliv Nevel'skogo .4. 24'.. 30.... USSR
53°20'N, 141°40'E
between Sakhalin and the Siberian mainland
96382—1:100,000 or 96381—1 100,000 or 96400—1:250,000

202. *Etorofu-kaikyo. . 22.. 1,000+' 7 .. USSR Administered Territory*/USSR
45°30'N, 149°10'E
between Etorofu Island and Ostrov Urup [Kuriles]
96780—1 225 515 or 96800—1 242,465

203. *Proliv Urup .. 15 165+ ...4 . USSR
46°20'N, 150°45'E
between Ostrov Urup and Ostrova Chernyye Batva [Kuriles]
96800—1:242,465 or 96820—1:242,990

204. *Proliv Bussol.....37.....1,000+'.....12.....USSR
46°40'N, 151°30'E
between Ostrova Chernyye Bratya and Ostrov Shimushir [Kuriles]
96820—1:242,990

205 *Proliv Diany 11 .1000+' 5 USSR
47°13'N, 152°20'E
between Ostrov Simushir and Ostrov Ketoy [Kuriles]
96820—1 242 990

206 *Proliv Rikorda '4 1,000+' 3 USSR
47°25'N, 152°45'E
between Ostrov Ketoy and Ostrova Ushishir [Kuriles]
96820—1 242,990 or 96840—1,243,990

207. *Proliv Nadezhedy . 16. 1,000+'. ...3.....USSR
47°55'N, 153°10'E
between Ostrov Rasshua and Ostrova Matua [Kuriles]
96840—1 243 900

208 *Proliv Golovnina '0 1 000+ 4 USSR
48°10'N, 153°15'E
between Ostrova Matua and Ostrov Raikoke [Kuriles]
96840—1 243 900

209. *Proliv Kruzenshterna 29 1,000+ 9 USSR
48°25'N, 153°30'E
between Ostrov Raikoke and Ostrov Louvushki, south of Ostrov Shiashkot. . [Kuriles]
96840—1 243 900

210 *Proliv Sevastyana '6 '65+ 3 USSR
49°00'N, 154°20'E
between Ostrov Shiashkotan and Ostrov Kharimkotan [Kuriles]
96860—1 244 242

211 *Proliv Krenitsyna 8 165+ 7 USSR
49°10'N, 154°40'E
between Ostrov Kharimkotan and Ostrov Onekotan [Kuriles]
96860—1 244,242

212 *Proliv Yevreinova 15 165+' 5 USSR
49°40'N, 154°35'E
between Ostrov Onekotan and Ostrov Mankanrusn [Kuriles]
96880—1 242,250 or 96860—1 244,242

213 *Chetvertyy Kuril'sky Proliv .30. 1,000+ ... 21' USSR
49°45'N, 155°00'E
between Ostrov Onekotan and Ostrov Paramushir [Kuriles]
96880—1 242,250

214 *Proliv Luzhinka. 8 1,000+' ..8 . ..USSR
50°10'N, 155°05'E.
between Ostrov Paramushir and Ostrov Shirinki [Kuriles]
96880—1 242,250

215 *Proliv Alaid 12 1,000+' 8 USSR
50°45'N, 155°45'E
between Ostrov Paramushir and Ostrov Atlasova [Kuriles]
96880—1 242,250

216 *Pervyy Kuril sky Proliv 6 .. 93' 4 USSR
50°50'N, 156°35'E
between Ostrov Shumshu and the Kamchatka Peninsula
96880—1 242,250

217 *Kamchatsky Proliv . 104 ..1,000+'. ...45 .. USSR
55°00'N, 164°00'E
between the Komandorskiye Islands and the Kamchatka Peninsula
96028—1 1,329,300

218 *Proliv Litke 15[56] ...120'.. ..60. USSR
59°00'N 163°30'E
between Ostrov Karaginskiy and the Kamchatka Peninsula
96540—1 388,000

219 **Proliv Longa 69 150' 65 USSR
70°00'N, 180°00'E
between the Chuckchi Peninsula and Wrangel Island [Arctic coast]
96700—1 218,550 & 96720—1 500,000

220 **Proliv Dmitriya Lapteva 27 23' 57 USSR
73°00'N 145°00'E
between Ostrov Bol shoy Lakhouskiy and the Soviet mainland [Arctic coast]
41000—1 1 000 000 or 41004—1 1 000 000

221 *Proliv Sannikova 31 165+ 65 USSR
74°30 N 140°00 E
between Ostrov Maly Lyakhovsky and Ostrov Kotel'nyy
41000—1 1,000,000

222 *Proliv Blagoveshchenskiy 23 165+ 35 USSR
75°30 N 146°00 E
between Ostrov Feddeyevskiy and Ostrova Novaya Sibir
41000—1 1 000 000

223 **Proliv V tskogo 30 165+ 90 USSR
78°00 N 102°00'E
between Ostrov Bolshevik of the Severnaya Zemlya Archipelago and the Soviet mainland [Arctic coast]
41008—1 1 000,000

224 **Proliv Shokal'skogo 11 165+ 85 USSR
79°00 N 100°30 E
between Ostrov Oktyabr skoy Revolyutsii and Ostrov Bol'shevik
41008—1 1,000,000

225. **Proliv Karskiye Vorota 26 110' 20 USSR
70°30'N, 58°00 E
between Novaya Zemlya and Vaygach Island off the Soviet mainland [Arctic coast]
42301—1 250,000

Other Areas

Southern South America

226. *Strait of Magellan 2 120' ..310.. Chile/Argentina
54°00'S, 71°00'W.
between Tierra del Fuego and the mainland
22032—1 564,500 & 22036—1 566,820

227 *Estrecho de la Maire . 16. . 165+' 13 Argentina
54°50'S, 65°00 W
between Tierra del Fuego and Isla do los Estados
22036—1 566 820

228 *Beagle Channel 1 '00'... Argentina/Chile
54°53'S, 67°50 W
between Tierra del Fuego (Argentina) and Isla Navarino (Chile)
22433—1:80,000 or 22430—1:200,000

Central and Southern Africa

229 *Cameroon Strait.....19 165+'.....Equatorial Guinea/Cameroon
3°40'N, 9°00'E.
between Bioko Island (Macias Nguema Biyogo) and the Cameroon mainland
57162—1 96,675 or 57160—1 299,500

230 *Mozambique Channel 2275' 1,000+' . Mozambique-Madagascar-France
17°00'S 42°00 E
between Mozambique and Madagascar
61009—1 915,540 & 61024—1 830,980 & 61207—1 852 180

231. *Mafia Strait. 10 ...42' ....Tanzania
7°55'S, 39°30'E.
between Mafia Island and the Tanzanian mainland
61990—1 300 000

232 *Zanzibar Channel [illegible] 102 Tanzania
6°30 S 39°15 E
between Zanzibar and the Tanzanian mainland
61200—1 298 370

233 *Pemba Channel 29 1 000+ Tanzania
5°00 S 39°30 E
between Pemba Island and the Tanzanian mainland
61200—1 298 370

Australia, New Zealand, etc.

234 *Torres Strait 2 [illegible] 50 Australia/Papua New Guinea
10°05'S 143°00 E
between Australia and Papua New Guinea
73550—1 300 000 & 73552—1 150,000 or 74293—1 150 000

235 "Clarence Strait 14[60] 30 20 Australia
12°05'S, 131°00'E
between Melville Island and the north Australian mainland
74392—1:100,000

236 "Dundas Strait 15 132' 21 Australia
11°20'S, 131°38'E
between Melville Island and the Coburg Peninsula on the north Australian mainland
74391—1:150,000

237 *Geographe Channel 21 90' 3 Australia
24°35'S, 113°15'E.
between Bernier Island and the west Australian mainland
74540—1:265,750

238 *Naturaliste Channel. 14. 54'.. 3 Australia
25°25'S, 113°00'E.
between Dirk Hartog Island and Dorre Island off the west Australian mainland
74540—1:255,750

239 *Investigator Strait 18 108' 47 Australia
35°30'S, 137°00'E
between Kangaroo Island and Althorpe Island off the Yorke Peninsula on the south Australian mainland
75130—1:300,000

240. "Bass Strait. 23[61].... 165+'.....165.....Australia
39°15'S, 146°30'E.
between the Australian mainland and Tasmania
75170—1:300,000 or 75220—1:300,000

241 "Banks Strait 9. .. 126' .. .10... .Australia
40°40.S, 148°10'E.
between Clarke Island (Furneaux Group) and Cygnet Island off Swan Island, Tasmania
73571—1:46,250

242 *Isumrud Strait 8. .1,000+'. 10 Papua New Guinea
4°45'S, 145°45'E
between Karkar Island and the mainland of northern New Guinea
82005—1:600,000

243 *Vitiaz Strait 23[62] 1,000+'. 60... Papua New Guinea
5°30'S, 146°45'E
between Long and Umboi Islands and the mainland
73650—1:300,000

244 *Dampier Strait 13 165+' 23. .Papua New Guinea
5°40'S, 148°15'E
between Umboi Island and New Britain
[illegible]

245 *Goschen Strait 45' 165+ 25 Papua New Guinea
10°10'S, 151°00'E
between Normanby Island (D'Estrecausteaux Islands) and the mainlan
73601—1:300,000

246 *St. George's Channel 8 1,000+ 49 Papua New Guinea
4°30'S, 152°[illegible]E
between New Britain and New Ireland
[illegible]

247 *Bougainville Strait 164 90 28 Papua New Guinea-Solomon Islands
7°15'S, 156°21'E
between Bougainville and Choiseul Islands
82010—1:[illegible]

248 *Manning Strait 6 1,000+ 20 Solomon Islands
7°25'S, 157°55'E
between Vaghena Island and the Arnavon Islands
82010—1:1,090,000

249 *Indispensable Strait 19 1,000+' . 33 Solomon Islands
8°20'S, 160°15'E
between Florida Island and Alite Reef off Malaita Island
82367—1:248,894

250. *Cook Strait.....12.2.....165+'. ..11 ....New Zealand
41°10'S, 174°35'E.
between North and South Islands
76070—1:278,000

251. *Foveaux Strait.....12[65]. .60' . ..42 ...New Zealand
46°30'S, 167°45'E.
between Stewart Island and South Island
76120—1:249,530

Central Pacific

252 *Vatu-I-Ra Channel 2 1,000+ 12 Fiji
17°16'S, 178°32'E
between Vatu-I-Ra and Vanua Levu Barrier Reef
83597—1:150,000

253. *Kandavu Passage.....23... 1,000+'. 50 ... Fiji
18°45'S, 178°10'E.
between Mbengga Island and North Astrolabe Reef
83608—1:143,130

254. *Nanuku Passage.....17.. . 1,000+' ...62.....Fiji
16°45'S, 179°20'W.
between Nanuku Reef and Wailangilalai Island
83594—1:351,678

255 *Apolima Strait . .4... 165+' .7 Western Samoa
14°45'S, 172°10'E.
between Savai and Apolima Islands

256 *Saipan Channel .3 165+ 4 U.S.
15°05'N, 145°42'E
between Saipan and Tinian (Northern Marianas)
81067—1:75,000

257 "Kaulakahi Channel ....15 1,000+' ...9. . U.S.
22°00'N, 159°55'W.
between Kauai and Niihau Islands (Hawaii)
19387—1:126,800

258 *Kauai Channel 64 1,000+ 18 U.S.
21°45'N, 159°00'W.
between Kauai and Oahu (Hawaii)
19375—1:250,000 or 19380—1:247,482

259 "Kaiwi Channel 22 *[illegible]+ 5 U.S.
21°15'N, 157°30'W
between Oahu and Molokai (Hawaii)
19351—1:80,000

260 "Auau Channel 8 120' 7 U.S.
20°50'N, 156°45'W
between Lanai and Maui (Hawaii)
19344—1:80,000

261 "Kalohi Channel 8 165+ 17 U.S.
21°00'N, 157°10'W
between Lanai and Molokai (Hawaii)
19351—1:80,000

262 "Kaeaihakiki Channel 15 165+ 9 U.S.
20°40'N, 156°45'W
between Kahoolawe Island (off Maui) and Lanai (Hawaii)
19344—1:80,000

263 *Alalakeiki Channel 5 8 165 + 5 U S
21°25'N, 156°25'W
between Kahoolawe and Maui Islands [Hawaii]
19344—1 80 000

264. "Pailolo Channel 7 5 165 + ' 10 U S
21°05'N, 156°45'W
between Molokai and Maui [Hawaii]
19344—1 80.000

265 *Alenuihaha Channel 25 1,000 + ' 15 U S
20°30'N, 155°50'W
between Maui and Hawaii [Hawaii]
19320—1:250,000

Key:

Strait.....least width .least depth.....approximate length.... bordering State(s)

Latitude and Longitude
Geographical Location
Appropriate Defense Mapping Agency chart and scale

– least widths and lengths shown in nautical miles
-- depths shown in feet

* Legal strait (overlapped by territorial seas or claimed archipelagic waters)

Straits where Transit Passage regime is not applicable:

* Strait more than 24 miles in least width with high seas/EEZ corridor of similar convenience

" Strait less than 24 miles in least width with high seas/EEZ corridor of similar convenience

° Transit passage regime not applicable for other reasons

° In 1945 the Soviets seized the southern Kuriles (Japan's "Northern Territories") and have administered them since then, although the seizure has never been recognized by Japan, the United States, or a number of other countries.

Footnotes

1 Distance between Big Diomede Island (USSR) and Little Diomede Island (US), 2 miles.

2. Total distance across Bering Strait, 45 miles.

3. Joined by Semichi Pass with the Bering Sea

4 Distance between Rose Point on Graham Island and Butterworth Rocks off Tree Nob Group, at the northern entrance to the strait

5 Includes George Passage, connecting the Queen Charlotte Strait, and Discovery Passage, connecting with the Strait of Georgia.

6 Distance between Sangster Island and Ballenas Islands Total distance, Vancouver Island to the mainland, 6 miles.

7 Distance between Punta Ampala (El Salvador) and the coast of Nicaragua, north of Punta Cosiguina In the entrance are the Islas Farallones, located 5 miles off Nicaragua, and 13 miles from Punta Ampala.

8. Distance across the Western Channel from Pelican Rocks to the Venezuelan coast. Total distance, Trinidad to Venezuela, 8 miles.

9 Distance between Montserrat and Ilet a Kahouanne, 0 5 miles off Basse Terre, Guadeloupe

10 Distance between Sombrero Island and Horseshoe Reef a breaking reef running southeast of Anegada and attached thereto Total distance Sombrero to Anegada, 48 miles

11 Distance between Culebrita, an islet west of Culebra, and Savanna Island west of St Thomas Distance between Culebra and Savanna Islands 10 miles

12 Distance between Isla Monito off Mona Island and the coast of the Dominican Republic Distance between Puerto Rico and the Dominican Republic main and 58 miles

13 Distance between Jamaica and Haiti, 103 miles.

14 Distance between Deer Island and Campobello Island Passage narrows to 0 5 miles southeast of Eastport Quoddy Head between Campobello Island and offshore islets

15 Distance between St Paul Island, north of Cape Breton Island and the coast of Newfoundland Distance between Cape Breton Island and Newfoundland 57 miles

16 Distance between Digges Island, off Quebec, and Nottingham Island at the western end of the strait Distance in the central portion between Quebec and Big Island off Baffin Island 55 miles Distance at the eastern end of the strait, between Resolution and Button Islands 37 miles

17 Distance across Kellett Passage at the western end of the strait between Young and Lowther Islands

18 Distance between Prince Royal Island located within the strait and the eastern mainland Total distance across the strait 12 miles

19 Distance across Soderarkarken between Understen Is and off Sweden and Market Island off Aland Island Distance between Gassten Island and the Aland Islands 17 miles

20 Distance between Sprogo Island and Hallskov (Sjaelland) Distance from Fyn to Hallskov, 9 miles

21 Distance between Swonga and Stroma Islands Distance from South Ronaldsay Island to Duncansby Head on Scotland, 5 4 miles

22 Least distance across the waterway, Corsica to Isola Capraia (Italy) is 15 miles

23 Distance between a rock north of, and attached to, Sardinia, and Sco Lavezzi Rocks off Isles Lavezzi, south of Corsica Distance from Sardinia to Corsica, 6 miles.

24 Distance Pantelleria Island to Sicily Pantelleria Island to Tunisia, 38 miles Total distance, Tunisia to Sicily, 78 miles

25. Distance at the northern entrance of the Channel. In the central area of the Channel, the least width is 3.6 miles.

26. Distance across Kithiron Channel between Nisidhes Kofinidhia, a rock south of Nisos Kithera, and Vrakhos Poreti, an islet north of Andikithira Distance from Nisos Kithira to Nisos Andikithira, 17 miles.

27. Distance between Nisis Elasa, an island off Crete, and Nisis Platí, an islet off Nisos Kasos. Distance between Crete and Kasos, 26 miles.

28. Distance between Sciumma Island, off Dahlak Kebir, and Assarca Islet, off Ethiopia. Distance, Dahlak Kebir to the Ethiopian mainland, 9 miles

29. Distance between Perim (Barim) Island (South Yemen) and Ile Grande (part of the Djeziret Seba) off the Djibouti coast. Distance between the mainlands of South Yemen and Djibouti, 14 miles.

30. Distance between Jazireh-Ye-Larak, an island off the coast of Iran, and Ra's Sharitah on the Oman mainland. Distance from Didmar (Little Quoin) and Jazirat Tawakkul, through which a traffic separation scheme passes, 5 miles. Distance between Jazireh-Ye-Larak and As Salamah (Great Quoin), an islet off Oman, 21 miles

31 Distance from Cow and Calf Islands to Alguada Reefs Distance from Preparis Island to the mainland of Burma, 68 miles

32 Distance from an islet south of Preparis Island to Table Island, north of Great Coco Island Distance, Preparis Island to Great Cow Island, 45 miles.

33. Distance between Berhala Island, in the center of the strait, and Sumatra. Distance, Singkep Island to Sumatra, 20 miles.

34. Distance across Macclesfield Channel from Tjelaka, an island off Pulau Liat, and Discovery Rocks off Pulau Lepar. Distance across Macclesfield Channel between Pulau Liat and Pulau Lepar, 8 miles. Total distance, Bangka to Billiton, 45 miles.

35 Many islets and rocks in the strait Least distance between major islands (Pulau Seratu and Pulau Nangka) at the northern entrance to the strait, 46 miles.

36. Distance between Pulau Sangiang and the nearest coastal islet adjacent to Sumatra. Distance, Pulau Sangiang to islet off Java, 4 miles Total distance, Sumatra to Java, 12 miles.

37 Distance between Lombok and Noesa Besar (Panide) Island Distance from Lombok to Bali, 19 miles.

38 Distance at the northern end of the strait between Gili Petagan, off Lombok, and Pulau Pandjang off Sumbawa Distance Lombok to Sumbawa, 8 miles.

39 Distance from Kambing Island (Ngo Tn), southwest of Wetar Island, to Fatoe on the north coast of Timor Total distance, Wetar Island to Timor 27 miles

40. Distance between Buru Island and Soeanggi, an islet off the east coast of Manipa Island Distance, Buru to Manipa, 14 miles.

41 Distance between the islet off Serasan and Maloe Reefs. Distance, Serasan to Maloe Reefs, 10 miles.

42. Distance between Borneo and Pulau Tuguana, an islet off Sulawesi at the northwestern entrance to the strait Distance, Borneo to Sulawesi, 62 miles.

43 Distance between reef south of Lumbucan Island and Simanahan Reef, across Lumbucan Channel, the most frequently used of the strait's five channels Distance between Balabac, largest of the major islands south of Palawan and Barambangan north of Borneo, 27 miles

44 Distance from Mindoro to Apo Reef off Busuanga Island (Calamian Group) Distance Mindoro to Busanga Island, 43 miles

45 Distance across South Pass between Verde Island and Mindoro Distance across North Pass Verde Island to Luzon 3 75 miles Distance Mindoro to Luzon, 7 miles

46. Distance between Palpomon Island, off Luzon, and Catanduanes Island. Distance, Catanduanes Island to Luzon, 4 miles.

47 Distance at the southern end of the strait between Capul and Calintaan Islands Distance across Capul Pass, 3 miles. across Capul Pass 3 miles Distance between Luzon and Samar Island, 8 miles

48 Distance between Leyte and Sumilon Island, off the coast of Mindanao Distance, Leyte to Mindanao, 10 miles

49 Distance between Basilan Island and Great Santa Cruz Island, off Mindanao Distance between Basilan Island and Mindanao 9 miles

50 Statistics refer to East Lamma Channel which is normally used for navigation West Lamma Channel has a least width of 3 miles

51 Distance between Babuyan Island and the Balintang Islands Some charts label Balintang Channel as extending north of the Balintang Islands to Sabtang Island of the Batan Islands Total distance Babuyan Island to Sabtang Island, 43 miles

52 Distance between Hsiao-kab Yu, south of Lan Yu and Amiaman Island of the Batan Islands Distance, Amiaman Island to Taiwan 78 miles

53 Distance between Niu Shan, an islet off the Chinese mainland and Taiwan Distance is 68 miles from Taiwan to the Chinese offshore island fringe (Tung-chai Tao), and 74 miles to the Chinese mainland.

54 Distance between Cholmyong So, an island south of Cheju Gundo, and Hwa Do, an island to the south Distance from Cheju Island to the fringe of coastal islands off the Korean coast, 33 miles

55 Distance between Ko Do, an islet off the coast of Korea, and Tsushima Distance from Tsushima to the Korean mainland, 26 miles

56 Distance in the western part of the strait between Mys Kuzmishcheva, on the mainland, and Mys Semenova on Ostrov Karaginskiy Distance 12 miles at the northern entrance of the strait between Ostrov Verkhoturova, and Somnitelnaya Bank, north of Ostrov Karaginskiy.

57 Distance at the northern entrance between Mozambique and Madagascar. Distance from Ile Juan de Nova (France) within the strait to Mozambique, 151 miles.

58 Distance, Zanzibar to the mainland Least width across the Channel itself, between reefs, 6 miles

59 Approximate width of Prince of Wales Channel, the principal navigation route through the strait Distance from the Australian mainland to Papua New Guinea, 82 miles.

60 Distance between Cape Gambier (Melville Island) and Gunn Point on the Australian mainland One-mile distances exist between islands and reefs in both North Channel and Howard Channel.

61 Distance between Southeast Point on the Australian mainland and Curtis Island. The rocks and islands in the channel reduce water distances to 7 miles or less Distance from the Australian mainland to Tasmania, 80 miles

62 Distance between Papua New Guinea and Malai Island off Umboi Island Distance Papua New Guinea to Umboi Island 27 miles

63 Distance Gallows Reef to Grind Reef, at the southeastern end of the strait Distance, Normanby Island to the mainland, 8 miles

64 Distance between Choiseul Island and rocks off Fauro Island Distance from Choiseul Island to Bougainville Island, 27 miles.

65. Distance between Stewart Island and Escape Reefs off South Island, 18 miles.

ANNEX AS2-3

INTERNATIONAL STRAITS
Number Refers to Listing in Table
Major Straits are in Bold Type

Adak Strait (7)
Agattu Strait (4)
Alalakeiki Channel (263)
ALAND'S HAV (Entrance to the Gulf of Bothnia) (77)
Alas Strait (Selat Alas) (143)
Alenuihaha Channel (265)
Amami Passage (176)
Amchitka Pass (5)
Amundsen Gulf (74)
[illegible]
[illegible]
ANEGADA PASSAGE (38)
Api Passage (151)
Apolima Strait (255)
Aruba-Paraguana Passage (30)
Aslau Channel (260)
BAB EL MANDEB (121)
Bahrain-Qatar Passage (123)
Bahrain-Saudi Arabia Passage (122)
BALABAC STRAIT (167)
Bali Strait (Selat Bali) (141)
BALUT CHANNEL (158)
BANGKA PASSAGE (156)
Bangka Strait (Selat Bangka) (136)
Banks Strait (24)
BARROW STRAIT (70)
BASILAN STRAIT (168)
BASS STRAIT (240)
Beagle Channel (228)
BELLE ISLE, STRAIT OF (63)
Berhala Strait (Selat Berhala) (135)
BERING STRAIT, EAST (2)
BERING STRAIT, WEST (1)
Boeton Passage (Bulung Pulau) (149)
BONIFACIO, STRAIT OF (101)
Bosporus (79)
BOUGAINVILLE STRAIT (247)
Bristol Channel (94)
CABOT STRAIT (60)
Caicos Passage (49)
Cameroon Strait (229)
Canso, Strait of (58)
Chatham Strait (16)
Cheju Strait (Cheju Haehyop) (184)
CHETVERTYY KURIL SKY PROVLIV (Kuril Strait) (213)
Clarence Strait (Australia) (235)
Clarence Strait (U.S.) (18)
Coco Channel (129)
COOK STRAIT (250)
Cortu Channel (106)
Corsica-Elba Passage (Tuscany Channel) (100)
CROOKED ISLAND PASSAGE (51)
Dampier Strait (244)
DARDANELLES (115)
Davis Strait (65)
Denmark Strait (87)
Detroit d'Honguedo (Gaspe Passage) (61)
Dixon Entrance (19)
[illegible] (36)
DOVER STRAIT (95)
Dragon Mouths (29)
Duncas Strait (236)
Durian Strait (134)
Eight Degree Channel (125)
Elafonisou Strait (Stenon Elafonisou) (107)
Entrance to the Bay d'Amatique (45)
ENTRANCE TO THE GULF OF FINLAND (76)
Entrance to the Gulf of Fonseca (27)
Estrecho de la Maire (227)
Etorofu Strait (3)
Etorofu-Kunashiri (Provliv Frisa) (202)
FEHMARN BELT (81)
FLORIDA STRAITS OF, EAST (54)

FLORIDA STRAITS OF SOUTH (53)
FORMOSA STRAIT (Taiwan Haxia) (174)
Foveaux Strait (251)
Freu de Menorca (99)
GALLEONS PASSAGE (31)
GASPAR STRAIT (Selat Gaspar or Selat Kelasa) (137)
Geographe Channel (237)
Georgia, Strait of (23)
GIBRALTAR, STRAIT OF (98)
Gorlo Strait (75)
Goschen Strait (245)
Great Channel (131)
Grenada-Tobago Passage (32)
Greyhound Strait (Selat Greyhound or Selat Timpaus) (157)
GUADELOUPE PASSAGE (37)
Hainan Strait (Ch'iung-chou Hai-hsai) (169)
Head Harbour Passage (57)
Herbert Pass (11)
Hecate Strait (20)
The Ho[illegible] 38)
HORMUZ STRAIT OF (124)
Hudson Strait (64)
Huksan Jedo (186)
Icy Strait (15)
Ile d'Yeu (97)
Imroz Strait (114)
Indispensable Strait (249)
Investigator Strait (239)
Isumrud Strait (242)
Jacques Cartier Passage (62)
Jailolo Passage (Djailolo Passage) (160)
Jamaica Passage (43)
Johnstone Strait (22)
JUAN DE FUCA STRAIT OF (25.
JUBAL, STRAIT OF (Madig[illegible]ubal) (118)
KADET CHANNEL (Kadet Rinne) (80)
Kafireos Strait (Dhiekplous Kafireos) (113)
Kairi Channel (259)
Kalmar Sund (78)
Kalohi Channel (261)
Kamchatsky Proliv (217)
Kandavu Passage (253)
KARIMATA STRAIT (Selat Karimata) (138)
KARPATHOS STRAIT (Dhiavlos Karpathou) (112)
KASOS STRAIT (Dhiavlos Kasoulon) (111)
Kauai Channel (258)
Kaulakahi Channel (257)
Kaelaiha[illegible] Channel (262)
Keas Strait (112)
Kennedy Channel (66)
Kerch Strait (Kerchenskiy Proliv) (171)
KITHIRA STRAIT (Dhiekplous Kithiron) (108)
KOREA STRAIT EAST (Tsushima Strait) (189)
KOREA STRAIT WEST (188)
Koti Passage (153)
Kuchinoshima-suido (179)
Kunashiri-suido (Proliv Yekateriny) (197)
Lamma Channel (Lema Channel) (170)
Lancaster Sound (69)
Langeland Belt (83)
Little Belt (86)
Little Minch (91)
LOMBOK STRAIT (Selat Lombok) (142)
LUZON STRAIT
BABUYAN CHANNEL (171)
BALINTANG CHANNEL (172)
BASHI CHANNEL (173)
Maemel Sudo (185)
Mafia Strait (231)
MAGELLAN, STRAIT OF (Estrecho de Magallanes) (226)
MAKASSAR STRAIT 155)
MALACCA STRAIT (132)
Malta Channel (104)
MANIPA STRAIT (Selat Manipa) (150)
Manning Strait (248)
Maqueda Channel (164)
MARTINIQUE CHANNEL (35)
Massawa Strait (Mits'wa Channel) (120)
Mayaguana Passage (50)
M'Clure Strait (73)
MESSINA, STRAIT OF (Stretto di Messina) (102)
MINDORO STRAIT (162)
MONA PASSAGE (41)
Mouchoir Passage (47)
MOZAMBIQUE CHANNEL (230)
Nakanoshima-suido (178)
Nanuku Passage (254)
Nares Strait (67)
Naturaliste Channel (238)
Nemuro-kaikyo (193)
North Channel (92)
North Minch (90)
Northumberland Strait (59)
Notsuke-suido (194)
Obi Strait (159)
Okushiri-kaikyo (192)
OLD BAHAMA CHANNEL (52)
OMBAI STRAIT (Selat Ombai) (147)
ORESUND (The Sound) (82)
OSUMI-KAIKYO (Van Diemen Strait) (183)
OTRANTO STRAIT OF (105
Pailolo Channel (264)
Palk Strait (126)
Pemba Channel (233)
PENTLAND FIRTH (89)
Pervyy Kuril'sky Proliv (216)
Pescadores Channel (P'eng-hu Shui-tao) (175)
Pohai Strait (Bohai Haixia) (187)
Polillo Strait (165)
Preparis North Channel (127)
Preparis South Channel (128)
Prince of Wales Strait (72)
PROVIDENCE CHANNEL NORTHEAST (56)
PROVIDENCE CHANNEL NORTHWEST (55)
Proliv Alaid (Banjo-kaikyo) (215)
Proliv Blagoveshchenskiy (222)
Proliv Bussol (204)
Proliv Diany (Diane Strait) (205)
PROVLIV DIMITRIYA LAPTEVA (Laptev Strait) (220)
Proliv Golovnina (Kokoni-kaikyo) (208)
PROVLIV KARSKIYE VOROTA (Kara or Kara Gates Strait) (225)
Proliv Krenitsyna (Harumukotan-kaikyo) (211)
Proliv Kruzenshterna (209)
Proliv Litke (218)
PROVLIV LONGA (219)
Proliv Luzhinka (Shiriniki-kaikyo) (214)
Proliv Nadezhedy (Rashowa-kaikyo) (207)
Proliv Nevel'skogo (201)
Proliv Rikorda (Ketoi-kaikyo) (206)
Proliv Sannikova (221)
Proliv Severgina (Shiashkotan-kaikyo) (210)
Proliv Shokal'skogo (224)
Proliv Tatarskiy (Tatar Strait) (200)
Proliv Urup (Mimiamiuruppus-suido) (203)
PROVLIV VIL'KITSKOGO (Vilkitsky Strait) (223)
Proliv Yevreinova (Piah Strait) (212)
Queen Charlotte Strait (21)
Rishiri-suido (198)
Robeson Channel (68)
Rosario Strait (24)
Roti Strait (Selat Roti) (146)
Sado-kaikyo (190)
St George's Channel [Papua New Guinea] (246)
St George's Channel [U.K.-Ireland] (93)
ST LUCIA CHANNEL (34)
ST VINCENT PASSAGE (33)
Saipan Channel (256)
Samalga Pass (12)
Samsoe Belt (85)
SAN BERNARDINO STRAIT (166)
Santa Barbara Channel (26)
Sape Strait (Selat Sape or Sapie) (144)
Sapudi Strait (140)
Sequam Pass (8)
SERASAN PASSAGE (Selat Serasan) (152)
Sergent's Mouth (28)
Shelikof Strait (14)
Shikotan-suido (196)
SIBUTU PASSAGE (154)
Sicily, Strait of (103)
Silver Bank Passage (46)
SINGAPORE STRAIT (133)
The Solent (96)
SOYA-KAIKYO (La Perouse Strait) (199)
STORE BAELT (Great Belt) (84)
Sumba Strait (145)
Sumner Strait (17)
SUNDA STRAIT (Selat Sunda) (139)
SURIGAO STRAIT (167)
Suwanose-suido (177)
Tanaga Pass (6)

Tanegashima-kaikyo (Vincennes Strait) (182)
Taraku-suido (195)
Ten Degree Channel (130)
TIRAN, STRAIT OF (119)
Tokara-kaikyo (Colnett Strait) (180)
TORRES STRAIT (234)
TSUGARU-KAIKYO (191)
Turks Island Passage (48)
UNIMAK PASS (13)
Vatu-I-Ra Channel (252)
VERDE ISLAND PASSAGE (163)
Vieques Passage (40)
Virgin Passage (39)
Viscount Melville Sound (71)
Vitiaz Strait (243)
WETAR STRAIT (148)
WINDWARD PASSAGE (42)
Yakushima-kaikyo (181)
YUCATAN CHANNEL (44)
Yunaska Pass (10)
Zanzibar Channel (232)

International Straits: Least Width

Less than Six Miles in Width (52)

* Alalakeiki Channel
* Apolima Strait
* Bali Channel
* Beagle Channel
* Bonifacio, Strait of
Bosporus
Canso Strait
* Chatham Strait
* Clarence Strait [U.S.]
* Corfu Channel
Dardanelles
* Dragon's Mouths
* Durian Strait
Elafonisou Strait
* Gaspar Strait
Georgia, Strait of
* Goschen Strait
Head Harbour Passage
* Icy Strait
Johnstone Strait
Kalmar Sund
Kerch Strait
* Kuchinoshima-suido
* Lamma Channel
* Langeland Belt
* Little Belt
* Magellan, Strait of
* Maqueda Channel
* Massawa Strait
Messina, Strait of
Oresund
Palk Strait
Pentland Firth
Prince of Wales Strait
*Provliv Nevel'skogo
Queen Charlotte Strait
* Rosario Strait
* Roti Strait
* Saipan Channel
* San Bernardino Strait
* Sape Strait
* Serpent's Mouth
* Singapore Strait
The Solent
Store Baelt
* Sumner Strait
* Sunda Strait
* Tiran, Strait of
* Torres Strait
* Vatu-I-Ra Channel
* Verde Island Passage
* Vieques Passage

* Transit Passage applies.

Between Six and Twenty-four Miles in Width (153)

Adak Strait
Agattu Strait
Aland's Hav
Alas Strait
Andikithiron Strait
Api Passage
Aruba-Paraguana Passage
Auau Channel
Bab el Mandeb
Babuyan Channel (Luzon Strait)
Bahrain-Qatar Passage
Bahrain-Saudi Arabia Passage
Balabac Strait
Balintang Channel (Luzon Strait)
Bangka Passage
Bangka Strait
Banks Strait
Barca Strait
Basilan Strait
Bass Strait
Belle Isle, Strait of
Berhala Strait
Bering Strait, East
Bering Strait, West
Boeton Passage
Bornholmsgat
Bougainville Strait
Bristol Channel
Cameroon Strait
Cheju Strait
Clarence Strait [Australia]
Coco Channel
Cook Strait
Dampier Strait
Dominica Channel
Dover Strait
Dundas Strait
Entrance to Bay d'Amatique
Entrance to the Gulf of Finland
Entrance to Gulf of Fonseca
Estrecho de la Maire
Etolin Strait
Etorofu-kaikyo
Fehmarn Belt
Foveaux Strait
Freu de Menorca
Galleons Passage
Geographe Channel
Gibraltar, Strait of
Greyhound Strait
Hainan Strait
Herbert Pass
Hecate Strait
The Hoe
Huksan Jedo
Ile d'Yeu
Imroz Strait
Indispensable Strait
Investigator Strait
Isumrud Strait
Jacques Cartier Passage
Jailolo Passage
Juan de Fuca, Strait of
Jubal, Strait of
Kadet Channel
Kafireos Strait
Kaiwi Channel
Kalohi Channel
Kandavu Strait
Karpathos Strait
Kasos Strait
Kaulakahi Channel
Kealaikahiki Channel
Keas Strait
Kennedy Channel
Kithira Strait
Korea Strait, West
Koti Passage
Kunashiri-suido
Little Minch
Lombok Strait
Maemel Sudo
Mafia Strait
Malacca Strait
Mangpa Strait
Manning Strait
Manoque Channel
Maracaibo Passage
Mindoro Strait
Mouchoir Passage
Nakanoshima-suido
Nanuku Passage
Nares Strait
Naturaliste Channel
Neumuro-kaikyo
North Channel
North Minch
Northumberland Strait
Notsuke-suido
Obi Strait
Okushiri-kaikyo
Old Bahama Channel

Ombai Strait
Osumi-kaikyo
Pailolo Channel
Pervyy Kuril'sky Provliv
Pescadores Channel
Pohai Strait
Polillo Strait
Provliv Alaid
Provliv Diany
Provliv Blagoveschenskiy
Provliv Golovnina
Provliv Krenitsyna
Provliv Litke
Provliv Luzhinka
Provliv Nadezhedy
Provliv Rikorda
Provliv Severgina
Provliv Shokal'skogo
Provliv Urup
Provliv Yevreinova
Rishiri-suido
Robeson Channel
Sado-kaikyo
St. George's Channel
St. Lucia Channel
St Vincent Passage
Samalga Pass
Samsoe Belt
Santa Barbara Channel
Sapudi Strait
Seguam Pass
Serasan Passage
Shelikof Strait
Shikotan-suido
Sibutu Passage
Soya-kaikyo
Surigao Strait
Suwanose-suido
Tanaga Pass
Tanegashima-kaikyo
Taraku-suido
Tokara-kaikyo
Tsugaru-kaikyo
Turks Island Passage
Unimak Pass
Virgin Passage
Vitiaz Strait
Wetar Strait
Yakushima-kaikyo
Yunaska Pass
Zanzibar Channel

More than Twenty-four Miles in Width (60)

Alenuihaha Channel
Amami Passage
Amchitka Pass
Amundsen Gulf
Amutka Pass
Anegada Passage
Balut Channel
Bashi Channel (Luzon Strait)
Cabot Strait
Caicos Passage
Chetvertyy Kuril'sky Provliv
Corsica-Elba Passage
Crooked Island Passage
Davis Strait
Denmark Strait
Detroit d'Honguedo
Dixon Entrance
Eight Degree Channel
Florida, Straits of, East
Florida, Straits of, South
Formosa Strait
Gorlo Strait
Great Channel
Grenada-Tobago Passage
Guadeloupe Passage
Hormuz, Strait of
Hudson Strait
Jamaica Passage
Kamchatsky Provliv
Karimata Strait
Kaiwa Channel
Korea Strait, East
Lancaster Sound
Makassar Strait
Malta Channel
M'Clure Strait
Mona Passage
Mozambique Channel
Otranto, Strait of
Pemba Channel
Prepar's North Channel
Prepar's South Channel
Providence Channel Northeast
Providence Channel Northwest
Provliv Bussol
Provliv Dmitrya Lapteva
Provliv Karskiye Vorota
Provliv Kruzenshterna
Provliv Longa
Provliv Sannikova
Provliv Tatarskiy
Provliv Vil'kitskogo
St. George's Channel [U.K.-Ireland]
Sicily, Strait of
Silver Bank Passage
Sumba Strait
Ten Degree Channel
Viscount Melville Sound
Windward Passage
Yucatan Channel

ANNEX AS2-5

Straits in Which Passage is Regulated by Long-Standing Conventions in Force

Bosporus
Dardanelles
Magellan
Oresund
Store Baelt

ANNEX AS2-6

Straits, Less Than 24 Miles in Least Width, in Which There Exists a Route Through the High Seas or an Exclusive Economic Zone of Similar Convenience With Respect to Navigational or Hydrographical Characteristics

Non-U.S. Straits* (27)

Andikithiron Strait—4 (Greece)
Bahrain-Qatar Passage—13 (Bahrain/Qatar)
Banks Strait—3 (Australia)
Bass Strait—17 (Australia)
Bornholmsgat—6.5 (Denmark)
Bristol Channel—4 (U.K.)
Dover Strait—6 (U.K.)
Entrance to Gulf of Finland—4.5 (Finland)
Fehmarn Belt—4 (Denmark/Federal Republic of Germany)
The Hole—14 (U.K.)
Kadet Channel—12 (Denmark/F.R.G.)
Karpathos Strait—11 (Greece)
Kasos Strait—11.8 (Greece)
Kennedy Channel—4.5 (Denmark)
Korea Strait, West—7 (South Korea/Japan)
Little Minch—3 (U.K.)
Mayaguana Passage—14 (The Bahamas)
Mouchoir Passage—17 (U.K.)
Nares Strait—4 (Denmark)
North Channel—5 (U.K.)
Old Bahama Channel—3 (Bahamas)
Osumi-kaikyo—11 (Japan)
Robeson Channel—2 (Denmark)
Samsoe Belt—1 (Denmark)
Soya-kaikyo—7.5 (Japan/USSR)
Tsugaru-kaikyo—4 (Japan)
Turks Island Passage—12 (U.K.)

*Distance given is for east width of the belt of high seas/EEZ, assuming current breadths claimed for territorial seas continue. Countries named are those off whose coasts the belt of high seas/EEZ exists

U.S. Straits (20)

Adak Strait—1
Agattu Strait—9
Auau Channel—2
Bering Strait, East—14
Etolin Strait—10
Herbert Pass—8
Juan de Fuca, Strait of—1.5
Kaiwi Channel—16
Kalohi Channel—2
Kaulakahi Channel—9
Kealaihakiki Channel—9
Pailolo Channel—1
Samalga Pass—10
Santa Barbara Channel—5
Seguam Pass—7
Shelikof Strait—14
Tanaga Pass—7
Unimak Pass—4
Virgin Passage—2
Yunaska Pass—4

ANNEX AS2-7

Straits in which, Given Bordering 12-Mile Territorial Seas, the High Seas/EEZ Corridor is Less Than 3 Miles in Width at the Narrowest Point.

Alenuihaha Channel
Crooked Island Passage
Gorlo Strait
Korea Strait, East
Providence Channel, NE
Providence Channel, NW
Proliv Karskiye Vorota
Sumba Strait

ANNEX AS2-8

Straits Formed by an Island of a State and the Mainland Where There Exists Seaward of the Island a Route Through the High Seas or an Exclusive Economic Zone of Similar Convenience

Strait	Bordering State	Island	Alternative Route
Queen Charlotte	Canada	Vancouver	high seas/eez route west of Vancouver Island
Johnstone	Canada	Vancouver	high seas/eez route west of Vancouver Island
Georgia	Canada	Vancouver	high seas/eez route west of Vancouver Island
Canso	Canada	Cape Breton	Cabot Strait
Northumberland	Canada	Prince Edward	high seas/eez route north of Prince Edward Island
Jacques Cartier Passage	Canada	Anticosti	Cabot Strait

Strait	Bordering State	Island	Alternative Route
Kalmar Sund	Sweden	Oland	high seas/eez route east of Oland Island
Pentland Firth	United Kingdom	Orkney Islands	high seas/eez route north of the Orkneys
The Solent	United Kingdom	Isle of Wight	high seas/eez route south of the Isle of Wight
Ile d'Yeu	France	Ile d'Yeu	high seas/eez route west of Ile d'Yeu
Messina	Italy	Sicily	high seas/eez route south of Sicily
Elafonisou[1]	Greece	Kithira	Kithira or Andikithiron Straits
Imroz	Turkey	Imroz	high seas/eez route west of Imroz Island
Hainan	China	Hainan	high seas/eez route south of Hainan Island
Sado-kaikyo	Japan	Sado	high seas/eez route west of Sado Island
Okushiri-kaikyo	Japan	Okushiri	high seas/eez route west of Okushiri Island
Rishiri-suido	Japan	Rishiri	high seas/eez route west of Rishiri Island
Proliv Litke	USSR	Karaginsky	high seas/eez route east of Ostov Karaginsky
Estrecho de la Maire	Argentina	Isla de los Estados	high seas/eez route east of Isla de los Estados
Mafia	Tanzania	Mafia	high seas/eez route east of Mafia Island
Zanzibar Channel	Tanzania	Zanzibar	high seas/eez route east of Zanzibar Island
Foveaux	New Zealand	Stewart	high seas/eez route south of Stewart Island

[1]Andikithiron Strait has a least width of 16 miles. Given Greece's 6-mile territorial sea claim, this leaves a high seas/eez corridor of 4 miles through the strait.

ANNEX AS2-9

Straits Completely Closed Off Within a Straight Baseline System

Amundsen Gulf
Barrow Strait
Lancaster Sound
Little Minch
Maemel Sudo
M'Clure Strait
North Minch
Prince of Wales Strait
Proliv Blagoveshchenskiy
Proliv Dmitrya Lapteva
Proliv Karskiye Vorota
Proliv Sannikova
Proliv Shokal'skogo
Proliv Vilkitskogo
Viscount Melville Sound

ANNEX AS2-10

Straits Which do not Connect Two Parts of the High Seas or an Exclusive Economic Zone with One Another

(1) Straits Connecting the High Seas or an Exclusive Economic Zone with the Territorial Sea of a Foreign State

Bahrain-Qatar Passage
Bahrain-Saudi Arabia Passage
Head Harbour Passage
Strait of Tiran

(2) Straits Connecting the High Seas or an Exclusive Economic Zone with Claimed Historic Waters

Strait	State	Claimed Historic Waters
Amundsen Gulf	Canada	Arctic Archipelago
Barrow Strait	Canada	Arctic Archipelago
Entrance to the Bay D Amatique	Guatemala	Bay D'Amatique
Geographe Channel	Australia	Shark Bay
Hainan Strait*	China	Gulf of Tonkin
Hudson Strait	Canada	Hudson Bay
Investigator Strait	Australia	Gulf of St. Vincent
Kerch Strait	USSR	Sea of Azov
Lancaster Sound	Canada	Arctic Archipelago
M'Clure Strait	Canada	Arctic Archipelago
Naturaliste Channel	Australia	Shark Bay
Palk Strait	India	Gulf of Manaar
Pohai Strait	China	Gulf of Pohai
Prince of Wales Strait	Canada	Arctic Archipelago
Viscount Melville Sound	Canada	Arctic Archipelago

*China claims the strait itself as historic, rather than the gulf with which it connects.

(3) Straits Connecting with Claimed "Special Status" Waters

Proliv Blagoveshchenskiy	Proliv Longa	Proliv Vilkit'skogo
Proliv Dmitriya Lapteva	Proliv Sannikova	
Proliv Karskiye Vorota	Proliv Shokal'skogo	

ANNEX AS2-11

An International Strait Profile

1 Physical Elements
  a. Location
    (1) latitude and longitude
    (2) bordering basepoints
  b Least width
  c Least depth
  d Length
  e Water bodies connected
  f Land areas separated
  g Regional relationships
    (1) relation to major navigation routes
    (2) alternative waterways available
2 Territorial Elements
  a. Bordering State or States
  b Status of any international boundary passing through the strait
  c Disputes over land territories which might affect conditions of passage
  d Non-littoral State waters affecting approaches to the strait
3 Economic Elements
  a Amount of shipping utilizing the strait
  b Major trade routes served by the strait
  c Principal cargoes in transit through the strait
  d Navigation aids in the strait
  e Costs of utilizing alternative waterways
4 Legal Elements
  a Variations in the transit passage regime of the LOS Convention which might apply to the strait
    (1) Strait affected by a straight baseline regime
    (2) Passage through the strait regulated by a long-standing international convention in force
    (3) Strait through which there exists a high seas/EEZ route of similar convenience
    (4) Strait not connecting two parts of the high seas or EEZ with one another
    (5) Strait formed by an island and the same country's mainland, where a high seas/EEZ route of similar convenience exists seaward of the island

ANNEX AS2-12
Straits States

State	Bordering Strait(s)
USSR[1]	
United States[2]	
Canada[3]	
El Salvador	Entrance to Gulf of Fonseca
Nicaragua	Entrance to Gulf of Fonseca
Trinidad and Tobago	Serpent's Mouth Dragon's Mouths Galleons Passage Grenada-Tobago Passage
Venezuela	Serpents Mouth Dragon's Mouths Aruba-Paraguana Passage
Netherlands	Aruba-Paraguana Passage
Grenada	Grenada-Tobago Passage
St Lucia	St. Vincent Passage St. Lucia Channel
St. Vincent	St. Vincent Passage
France[4]	
Dominica	Martinique Channel Dominica Channel
United Kingdom[5]	
Antigua and Barbuda	Guadeloupe Passage
Dominican Republic	Mona Passage
Cuba[6]	
Haiti	Windward Passage Jamaica Passage
Mexico	Yucatan Channel
Guatemala	Entrance to Bay d'Amatique
The Bahamas[7]	
Denmark[8]	
Finland	Entrance to Gulf of Finland Aland's Hav
Sweden	Aland's Hav Kalmar Sund Bornholmsgat Oresund
German Democratic Republic	Kadet Channel
Germany, Federal Republic of	Kadet Channel Fehmarn Belt
Ireland	St George s Channel
Spain	Strait of Gibraltar Freu de Menorca
Morocco	Strait of Gibraltar
Italy	
Tunisia	Strait of Sicily
Albania	Strait of Otranto Corfu Channel
Greece[10]	
Turkey	Imroz Strait Dardanelles Bosporus
Egypt	Strait of Jubal Strait of Tiran

State	Bordering Strait(s)
Saudi Arabia	Strait of Tiran Bahrain-Saudi Arabia Passage
Ethiopia	Massawa Strait
Djibouti	Bab el Mandeb
Yemen (Sanaa)	Bab el Mandeb
Yemen (Aden)	Bab el Mandeb
Bahrain	Bahrain-Saudi Arabia Passage Bahrain-Qatar Passage
Qatar	Bahrain-Qatar Passage
Oman	Strait of Hormuz
Iran	Strait of Hormuz
India[11]	
Maldives	Eight Degree Channel
Sri Lanka	Palk Strait
Burma	Preparis North Channel Preparis South Channel Coco Channel
Indonesia[12]	
Malaysia	Strait of Malacca Strait of Singapore Balabac Strait
Singapore	Strait of Singapore
Philippines[13]	
China	Hainan Strait Lamma Channel Formosa Strait Pohai Strait
Taiwan	Bashi Channel Formosa Strait Pescadores Channel
Japan[14]	
South Korea[15]	
Chile	Strait of Magellan Beagle Channel
Argentina	Strait of Magellan Estrecho de la Maire Beagle Channel
Equatorial Guinea	Cameroon Strait
Cameroon	Cameroon Strait
Mozambique	Mozambique Channel
Madagascar	Mozambique Channel
Tanzania	Mafia Strait Zanzibar Channel Pemba Channel
Australia[16]	
Papua New Guinea	
Solomon Islands	Bougainville Strait Manning Strait Indispensable Strait
New Zealand	Cook Strait Foveaux Strait
Fiji	Vatu-i-Ra Channel Kandavu Passage Nanuku Passage
Western Samoa	Apolima Strait

[1]U.S.S.R.
Bering Strait, West
Gorlo Strait
Entrance to Gulf of Finland
Kerch Strait
Nemuro-kaikyo
Notsuke-suido
Taraku-suido
Shikotan-suido
Kunashiri-suido
Soya-kaikyo
Provliv Tatarskiy
Provliv Nevel'skogo
Etorofu-kaikyo
Provliv Urup
Provliv Bussol
Provliv Diany
Provliv Rikorda
Provliv Nadezhedy
Provliv Golovnina
Provliv Kruzenshterna
Provliv Severgina
Provliv Krenitsniya
Provliv Yevreinova
Chetvertyy Kuril'sky Provliv
Provliv Luzhinka
Provliv Alaid
Pervyy Kuril'sky Provliv
Kamchatsky Provliv
Provliv Litke
Provliv Longa
Provliv Dmitriya Lapteva
Provliv Vil'kitskogo
Provliv Karskiye Vorota

[2]United States
Bering Strait, East
Etolin Strait
Agattu Strait
Amchitka Pass
Tanaga Pass
Adak Strait
Seguam Pass
Amutka Pass
Yunaska Pass
Herbert Pass
Samalga Pass
Unimak Pass
Shelikof Strait
Icy Strait
Chatham Strait
Sumner Strait
Clarence Strait
Dixon Entrance
Strait of Juan de Fuca
Santa Barbara Channel
Virgin Passage
Vieques Passage
Mona Passage
Straits of Florida, East
Straits of Florida, South
Head Harbour Passage
Saipan Channel
Kaulakahi Channel
Kauai Channel
Kaiwi Channel
Auau Channel
Kalohi Channel
Kealaikahiki Channel
Alalakeiki Channel
Pailolo Channel
Alenuihaha Channel

[3]Canada
Dixon Entrance
Hecate Strait
Queen Charlotte Strait
Strait of Georgia
Rosario Strait
Strait of Juan de Fuca
Head Harbour Passage
Canso Strait
Northumberland Strait
Cabot Strait
Detroit d'Honguedo
Jacques Cartier Passage
Strait of Belle Isle
Hudson Strait
Davis Strait
Kennedy Strait
Nares Strait
Robeson Channel
Lancaster Strait
Barrow Strait
Viscount Melville Sound
Prince of Wales Strait
M'Clure Strait
Amundsen Gulf

[4]France
St. Lucia Channel
Martinique Channel
Dominica Channel
Guadeloupe Passage
Strait of Dover
Ile d'Yeu
Mozambique Channel

[5]United Kingdom
Anegada Passage
Silver Bank Passage
Mouchoir Passage
Turks Island Passage
Caicos Passage
The Hole
Pentland Firth
North Minch
Little Minch
North Channel
St. Georges Channel
Bristol Channel
Strait of Dover
The Solent

[6]Cuba
Windward Passage
Yucatan Channel
Old Bahama Channel
Straits of Florida, South

[7]The Bahamas
Caicos Passage
Mayaguana Passage
Crooked Island Passage
Old Bahama Channel
Straits of Florida, East
Providence Channel, Northwest
Providence Channel, Northwest

[8]Denmark
Davis Strait
Kennedy Channel
Robeson Channel
Bornholmsgat
Kadet Channel
Fehmarn Belt
Oresund
Langeland Belt
Little Belt
Store Baelt
Samsoe Belt
Denmark Strait

[9]Italy
Corsica-Elba Passage
Strait of Bonifacio
Strait of Messina
Strait of Sicily
Malta Channel
Strait of Otranto

[10]Greece
Corfu Channel
Elafonisou Strait
Kithira Strait
Andikithiron Strait
Karpathos Strait
Kasos Strait
Keas Strait
Kafireos Strait

[11]India
Eight Degree Channel
Palk Strait
Coco Channel
Ten Degree Channel
Great Channel

[12]Indonesia
Great Channel
Strait of Malacca
Strait of Singapore
Durian Strait
Berhala Strait
Gaspar Strait
Kanmata Strait
Sunda Strait
Sapudi Strait
Bali Strait
Lombok Strait
Alas Strait
Sape Strait
Sumba Strait
Roti Strait
Ombai Strait
Wetar Strait
Boeton Passage
Manipa Strait
Api Strait
Sorasan Passage
Roti Strait
Makassar Strait
Bangka Passage
Greyhound Strait
Balut Channel
Obi Strait
Jailolo Strait

[13]Philippines
Balut Channel
Balabac Strait

Mindoro Strait
Verde Island Passage
Maqueda Channel
Polillo Strait
San Bernardino Strait
Surigao Strait
Basilan Strait
Babuyan Channel
Balintang Channel
Bashi Channel

[14]Japan
Amami Passage
Suwanose-suido
Nakanoshima-suido
Tokara-kaikyo
Yakushima-kaikyo
Tanegashima-kaikyo
Osumi-kaikyo
Korea Strait, West
Korea Strait, East
Sado-kaikyo
Tsugaru-kaikyo
Okushiri-kaikyo
Nemuro-kaikyo
Notsuke-suido
Rishiri-suido
Soya-kaikyo

[15]South Korea
Cheju Strait
Maemel Sudo
Huksan Jedo
Korea Strait, West

[16]Australia
Torres Strait
Clarence Strait
Dundas Strait
Geographe Channel
Naturaliste Channel
Investigator Strait
Bass Strait
Banks Strait

[17]Papua New Guinea
Isumrud Strait
Vitiaz Strait
Dampier Strait
Goschen Strait
St. George's Channel
Bougainville Strait

Composite List of Strait States

Albania
Antigua & Barbuda
Argentina
Australia
Bahamas, The
Bahrain
Burma
Canada
Chile
China
Comoros
Cuba
Denmark
Dominica
Dominican Republic
Egypt
El Salvador
Equatorial Guinea
Ethiopia
Fiji
Finland
France
German Democratic Republic
Germany, Federal Republic of
Greece
Grenada
Guatemala
Haiti
India
Indonesia
Iran
Ireland
Italy
Japan
Korea, South
Madagascar
Malaysia
Maldives
Mexico
Morocco
Mozambique
Netherlands
New Zealand
Nicaragua
Oman
Qatar
Papua New Guinea
Philippines
St. Lucia
St. Vincent and the Grenadines
Saudi Arabia
Singapore
Solomon Islands
Spain
Sri Lanka
Sweden
Taiwan
Tanzania
Trinidad & Tobago
Tunisia
Turkey
U.S.S.R
United States
Venezuela
Western Samoa
Yemen, North
Yemen, South

ANNEX AS2-13

Straits Associated with Potential Territorial Disputes

Maritime Boundary Disputes

Balabac Strait (Philippines/Malaysia)
Balut Channel (Philippines/Indonesia)
Bashi Channel (Philippines/Taiwan)
Cameroon Strait (Equatorial Guinea/Cameroon)
Dixon Entrance (U.S./Canada)
Soya-kaikyo (Japan/USSR)

Island Sovereignty Disputes

Bahrain-Qatar Passage (Bahrain/Qatar)—Hawar Islands
Formosa Strait (China/Taiwan)—Taiwan and the Pescadores
Jamaica Passage (U.S./Haiti)—Navassa Island
Mozambique Channel (France/Madagascar)—Europa, Bassa da India, Juan de Nova, Glorieuses Islands, Tromelin Island
Nemuro-kaikyo & Notsuke-suido (Japan/USSR)—Etorofu, Kunashiri, Shikotan, and Habomai Islands

ANNEX AS2-14

Straits Approached Only Through "Foreign" Jurisdictional Zones

Strait	Direction of Approach	"Foreign" Jurisdictional Zone
Anegada Passage	southwest	U.S. (Virgin Islands)
Dardanelles	west	Greece
Mozambique Channel	north	Comoro Islands
Oresund/Store Baelt	east	German Democratic Republic
St Lucia Channel	southeast	Barbados
St Vincent Passage	east	Barbados
Windward Passage	north	The Bahamas and/or U.K. (Turks & Caicos Islands)

ANNEX AS2-15

Straits Without Viable Alternative Waterways

Straits for Which There is No Alternative Waterway

Aland's Hav
Entrance to the Gulf of Finland
Gorlo Strait
Strait of Otranto
Pohai Strait
Strait of Tiran
Dardanelles/Bosporus
Entrance to the Gulf of Fonseca
Entrance to Bay d'Amatique
Kerch Strait
Investigator Strait

Straits for Which There is Only a Costly Alternative Waterway

Bab el Mandeb
Barrow Strait
Bering Strait
Strait of Gibralter
Kennedy/Nares/Robeson Channels
Korea Straits
Malacca/Singapore Straits
Strait of Sicily
Torres Strait

ANNEX AS2-16

States Whose EEZ Proclamations and/or National Laws Appear Inconsistent with the Convention Provisions Regarding Freedoms of Navigation and Overflight

Bangladesh—a, c, f
Burma—e
Cape Verde—b, c, f
Colombia—a, c, e
Comoros—a, c
Cook Islands—a, c, f
Costa Rica—a
Cuba—a
Dominican Republic—a
Fiji—a
France—c
Guinea-Bissau—a, c
Guyana—a, d, e
Haiti—b
Iceland—c
India—d, e
Indonesia—c
Ivory Coast—f
Kampuchea—c
Kenya—c
Malaysia—a, c
Maldives—a, d
Mauritania—d
Mauritius—d, e
Mexico—a
Mozambique—a, c
New Zealand—a, c
Nigeria—a, d
Norway—a, f
Oman—a, c
Pakistan—d, e, f
Portugal—f
Samoa—c, f
Sao Tome & Principe—a
Seychelles—d, e, f
Spain—f
Sri Lanka—c
Suriname—a, f
Togo—a, c
Trinidad & Tobago—a
United Arab Emirates—a
Uruguay—b
USSR—d
Vanuatu—c, e
Venezuela—a
Vietnam—c
Yemen (Aden)—e

a States silent on the question of residual rights in their EEZ
b. States claiming possession of residual rights in their EEZ
c States whose EEZ proclamations and/or national laws are silent on foreign rights to navigation and overflight in their EEZ
d States whose EEZ proclamations and/or national laws allow the government to regulate the navigation of foreign vessels in the EEZ or in nationally designated zones of the EEZ (see Annex AS2-17)
e. States claiming "exclusive jurisdiction" over environmental protection in their EEZ
f. States having special formulations with respect to environmental protection in their EEZ

ANNEX AS2-17

State Proclamations Regarding Navigation and Overflight in and over the EEZ

A. States whose EEZ proclamations and/or laws explicitly recognize the right of foreign navigation through and overflight over their national EEZ.

Barbados
Burma
Cuba
Democratic Yemen
Dominica
Dominican Republic
Grenada
Guatemala
Ivory Coast
Mexico
Norway
Philippines
Portugal
Sao Tome and Principe
Spain
Suriname
Thailand
Trinidad and Tobago
United Arab Emirates (1)
United States
Venezuela

(1) The UAE legislation provides that national rights in the EEZ "shall not prejudice international navigation rights exercised by states in accordance with the rules of international law." It is not clear if this provision applies to aircraft.

Source: Alexander, Navigational Restrictions 91-92.

B. States whose EEZ proclamations and/or laws are silent on foreign navigation through and overflight over their national EEZ.

Bangladesh	Iceland	Oman
Cape Verde	Indonesia	Sri Lanka
Colombia	Kampuchea	Togo
Comoros	Kenya	Vanuatu
Cook Islands	Malaysia	Vietnam
France	Mozambique	Western Samoa
Guinea-Bissau	New Zealand	

C. States whose EEZ proclamations and/or laws explicitly allow the government to regulate the navigation of foreign vessels in the EEZ or nationally designated zones of the EEZ (article citations refer to the respective national legislation)

Guyana. The President may declare any area of the EEZ to be a designated area and make provisions he deems necessary with respect to entry into and passage through the designated area of foreign ships by the establishment of fairways sealanes, traffic separation schemes or any other mode of ensuring freedom of navigation which is not prejudicial to the interests of Guyana." [article 18(a) and (b) (vi)]

India. The government may provide for regulation of entry, passage through designated area "by establishment of fairways sealanes, traffic separation schemes or any other mode of ensuring freedom of navigation which is not prejudicial to the interests of India." [article 7(6) (Explanation)]

Maldives. Ships of all States shall enjoy the right of innocent passage through the territorial waters and other exclusive economic zone of the Republic of the Maldives. . [No] foreign fishing vessel shall enter its economic zone without prior consent of the Government of the Maldives." [article 1]

Mauritania In its EEZ the rights and freedoms of States with respect to navigation, overflight, the laying of cables and pipelines, as provided for on the high seas, shall not be amended unless they adversely affect the provisions of Article 185 above [treating Mauritania s sovereign rights and jurisdiction in the EEZ] and the security of the Mauritanian State " [article 186]

Mauritius. The Prime Minister may provide in designated areas of the EEZ or continental shelf necessary provisions with respect to "the regulation of entry into and passage of foreign ships through the designated area" and "the establishment of fairways, sealanes, traffic separation schemes or any other mode of ensuring freedom of navigation which is not prejudicial to the interest of Mauritius." [article 9(a) and (b) (vi) and (vii)]

Nigeria. The government may, for the purpose of protecting any installation in a designated area.. prohibit ships from entering without its consent such part of that area as may be specified." [article 3(2)]

Pakistan. The government may declare any area of the EEZ to be a designated area and make provisions as it deems necessary with respect to the regulation of entry into and passage through the designated area of foreign ships by the establishment of fairways, sealanes, traffic separation schemes or any other mode of ensuring freedom of navigation which is not prejudicial to the interest of Pakistan." [article 6(a) and (b) (vi)]

Seychelles. The President may declare any area of the continental shelf or EEZ to be a designated area and make provisions as he considers necessary with respect to the regulation of entry into and passage of foreign ships through the designated area [and] the establishment of fairways, sealanes, traffic separation schemes or any mode of ensuring freedom of navigation which is not prejudicial to the interest of Seychelles." [article 9(a) and (b) (vi) and (vii)]

USSR In connection with certain specifically bounded regions of the economic zone of the USSR in which, for technical reasons connected with oceanographic and ecological conditions, as well as for the use of these regions or for the protection of their resources, or because of the special requirements for navigation in them, it is necessary that special obligatory measures shall be taken to prevent pollution from vessels, such measures, including those connected with navigation practices, may be established by the Council of Ministers of the USSR in regions determined by it The borders of these special regions should be noted in 'Notification to Mariners' " [article 13]

• gist

A quick reference aid on U S foreign relations
Not a comprehensive policy statement
Bureau of Public Affairs • Department of State

US Freedom of Navigation Program December 1988

Background: US interests span the world's oceans geopolitically and economically. US national security and commerce depend greatly upon the internationally recognized legal rights and freedoms of navigation and overflight of the seas. Since World War II, more than 75 coastal nations have asserted various maritime claims that threaten those rights and freedoms. These "objectionable claims" include unrecognized historic waters claims; improperly drawn baselines for measuring maritime claims; territorial sea claims greater than 12 nautical miles; and territorial sea claims that impose impermissible restrictions on the innocent passage of military and commercial vessels, as well as ships owned or operated by a state and used only on government noncommercial service.

US policy: The US is committed to protecting and promoting rights and freedoms of navigation and overflight guaranteed to all nations under international law. One way in which the US protects these maritime rights is through the US Freedom of Navigation Program. The program combines diplomatic action and operational assertion of our navigation and overflight rights by means of exercises to discourage state claims inconsistent with international law and to demonstrate US resolve to protect navigational freedoms. The Departments of State and Defense are jointly responsible for conducting the program.

The program started in 1979, and President Reagan again outlined our position in an ocean policy statement in March 1983:

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

The US considers that the customary rules of international law affecting maritime navigation and overflight freedoms are reflected and stated in the applicable provisions of the 1982 UN Convention on the Law of the Sea.

Nature of the program: The Freedom of Navigation Program is a peaceful exercise of the rights and freedoms recognized by international law and is not intended to be provocative. The program impartially rejects excessive maritime claims of allied, friendly, neutral, and unfriendly states alike. Its objective is to preserve and enhance navigational freedoms on behalf of all states.

Diplomatic action: Under the program, the US undertakes diplomatic action at several levels to preserve its rights under international law. It conducts bilateral consultations with many coastal states stressing the need for and obligation of all states to adhere to the

international law customary rules and practices reflected in the 1982 convention. When appropriate, the Department of State files formal diplomatic protests addressing specific maritime claims that are inconsistent with international law. Since 1948, the US has filed more than 70 such protests, including more than 50 since the Freedom of Navigation Program began.

Operational assertions: Although diplomatic action provides a channel for presenting and preserving US rights, the operational assertion by US naval and air forces of internationally recognized navigational rights and freedoms complements diplomatic efforts. Operational assertions tangibly manifest the US determination not to acquiesce in excessive claims to maritime jurisdiction by other countries. Planning for these operations includes careful interagency review. Although some operations asserting US navigational rights receive intense public scrutiny (such as those that have occurred in the Black Sea and the Gulf of Sidra), most do not. Since 1979, US military ships and aircraft have exercised their rights and freedoms in all oceans against objectionable claims of more than 35 nations at the rate of some 30-40 per year.

Future intentions: The US is committed to preserve traditional freedoms of navigation and overflight throughout the world, while recognizing the legitimate rights of other states in the waters off their coasts. The preservation of effective navigation and overflight rights is essential to maritime commerce and global naval and air mobility. It is imperative if all nations are to share in the full benefits of the world's oceans.

For further information: See also GISTs, "Law of the Sea," June 1986, and "Navigation Rights and the Gulf of Sidra," December 1986.

Harriet Culley, Editor (202) 647-1208

ANNEX AS2-17 B

COUNTRIES WITH EXCESSIVE MARITIME CLAIMS

The following list summarizes excessive maritime claims alphabetically by country. Omission from this list of any maritime claim of any country should not be construed as acceptance of that claim by the U.S. Government.

COUNTRY	OBJECTIONABLE CLAIM
Albania	15-nm territorial sea.
	Foreign warships and military aircraft may enter into territorial sea and airspace only with special permission.
Algeria	Prior permission for military-related vessels to enter 12-nm territorial sea.
Angola	20-nm territorial sea.
Antigua and Barbuda	Prior permission for warships to enter territorial sea.
Argentina	Excessive straight baselines (Bays of San Jorge, San Matias, and Nuevo).
	Claims Rio de la Plata as historic.
Bangladesh	Prior permission for warships to enter 12-nm territorial sea.
Barbados	Prior permission for warships to enter 12-nm territorial sea.
Benin	200-nm territorial sea.
Brazil	200-nm territorial sea.
	Prior permission for more than three warships to enter territorial waters.
Bulgaria	Prior permission for warships to enter 12-nm territorial sea.
Burma	Prior permission for warships to enter 12-nm territorial sea.
	Excessive straight baselines.
Cambodia	Prior permission for warships to enter 12-nm territorial sea and 12-nm to 24-nm contiguous zone.
	Excessive straight baselines.
Cameroon	50-nm territorial sea
	Excessive straight baselines.
Canada	Excessive straight baselines (Arctic Archipelago).

COUNTRY	OBJECTIONABLE CLAIM
Cape Verde	Prior permission for warships to enter 12-nm territorial sea.
China (PRC)	Prior permission for warships to enter 12-nm territorial sea.
Colombia	Excessive straight baselines.
Congo	200-nm territorial sea.
Cuba	Excessive straight baselines.
Denmark	Excessive straight baselines.
	Straight baselines have the effect of enclosing waters between the Faroe Islands as internal.
	Prior notification for warships to enter 3-nm territorial sea (special treatment in some straits).
	Prior permission for more than three warships to transit territorial sea (prior notice in straits).
Djibouti	NPWs and ships carrying nuclear materials must give prior notification (does not modify "International rules of navigation" in strait of Bab el Mandeb).
Dominican Republic	Excessive straight baselines and historic bay claims: Andres, Aquilas, Ocoa, Escocesa, Santo Domingo, and Yuma Bays.
Ecuador	200 nm territorial sea.
	Excessive straight baselines.
	Straight baselines have the effect of enclosing waters between the Galapagos Islands as internal.
Egypt	Prior permission for NPWs and ships carrying nuclear materials to enter territorial sea.
	Prior notification for warships to enter 12-nm territorial sea.
	Historic claim to Bay of El-Arab.
Ethiopia	Claims area enclosing Dahlak Islands as territorial sea.
Finland	Prior notification for warships to enter 4-nm territorial sea.
Germany, East (GDR)	Requires prior permission for warships to enter 12-nm territorial sea.
Germany, West (FRG)	Extended territorial sea to 16 nm in certain areas of the Helgolander Bucht to regulate shipping.
Greece	Restricts international airspace 4 nm beyond its 6-nm territorial sea.
Grenada	Prior permission for warships to enter 12-nm territorial sea.

COUNTRY	OBJECTIONABLE CLAIM
Guatemala	Historic claim to Gulf of Amatique.
Guinea	Excessive straight baselines.
Guinea-Bissau	Excessive straight baselines.
Guyana	Prior notification for warships to enter 12-nm territorial sea.
Haiti	Excessive straight baselines (e.g., Gulf of Gonave).
India	Prior notification for warships to enter 12-nm territorial sea.
	Historic claims to portions of Palk Strait, Palk Bay, and Gulf of Mannar.
Iran	Prior permission for warships to enter 12-nm territorial sea.
	Restricts right of transit passage through Strait of Hormuz to Law of Sea Convention signatories.
Italy	Excessive straight baselines.
	Claims Gulf of Taranto as historic.
Kenya	Historic claims to Ungwana Bay.
Korea, North (DPRK)	50-nm security zone; prior permission required to enter zone.
	Excessive straight baselines (inferred from limits of security zone).
Korea, South (ROK)	Prior notification for warships to enter 12-nm territorial sea except in international straits.
Liberia	200-nm territorial sea.
Libya	Claims Gulf of Sidra as historic waters.
	Restricted airspace in the vicinity of Banghazi.
	Innocent passage requires prior notice and must occur in daylight.
Maldives	Irregular territorial sea (3 nm to 55 nm).
	Prior permission for warships to enter claimed territorial sea or archipelagic waters.
Mauritania	70-nm territorial sea.
	Excessive straight baselines.
Mauritius	Prior notification for warships to enter 12-nm territorial sea.
Mexico	Excessive straight baselines (Gulf of California).
Mozambique	Excessive straight baselines.
Nicaragua	200-nm territorial sea.
Nigeria	30-nm territorial sea.

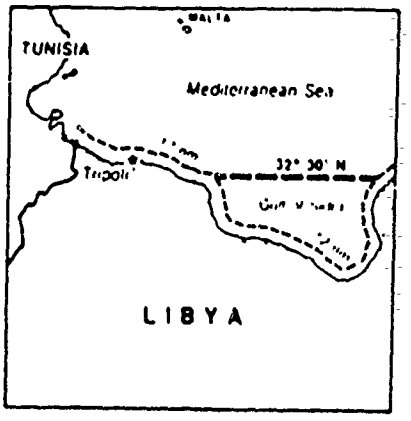
COUNTRY	OBJECTIONABLE CLAIM
Oman	Only recognizes innocent passage through and over international straits.
	Excessive straight baselines.
Pakistan	Prior permission for warships and prior notice for certain ships to enter 12-nm territorial sea.
Panama	200-nm territorial sea.
	Historic claim to Bay of Panama.
Peru	200-nm territorial sea.
Philippines	Excessive archipelagic baselines (territorial sea up to 285 nm).
Poland	Prior permission for warships to enter 12-nm territorial sea.
	Excessive straight baselines (Gulf of Gdansk).
Portugal	Excessive straight baselines (Tagus and Sado estuaries).
	Only overflight and innocent passage allowed within EEZ.
	Straight baselines have the effect of enclosing waters between the Madeiras and Azores Islands as internal.
Romania	Prior permission for warships to enter 12-nm territorial sea.
Sao Tome and Principe	Excessive archipelagic claim (under review).
Seychelles	Prior notification for warships to enter 12-nm territorial sea.
Sierra Leone	200-nm territorial sea.
Somalia	200-nm territorial sea.
	Prior permission for warships to enter 200-nm territorial sea.
Sri Lanka	Prior permission for warships to enter 12-nm territorial sea.
	Historic waters claim to portion of Palk Strait and Bay, Gulf of Mannar.
Sudan	Prior permission for warships to enter 12-nm territorial sea.
Sweden	Prior notification for warships to enter 12-nm territorial sea (except in Oresund).
	Passage of Aland Strait limited to surface transit.
Syria	35-nm territorial sea.
	6-nm security zone beyond territorial sea.
	Prior permission for warships to enter claimed territorial sea.
Taiwan	Possible requirement for prior notification.
Tanzania	50-nm territorial sea.

COUNTRY	OBJECTIONABLE CLAIM
Thailand	Excessive straight baselines.
	Historical claim to Bight of Thailand.
Togo	30-nm territorial sea.
Tunisia	Excessive straight baselines (Gulfs of Tunis and Gabes).
USSR	Historical claims enclose high seas areas.
	Excessive straight baselines.
	Prior permision required for warship passage outside traditional sealanes.
Uruguay	Claims Rio de la Plata as historic waters.
Vietnam	Prior permission for warships to enter its contiguous zone or territorial sea.
	No more than three warships may be present at one time; weapons all in "nonoperative positions."
	Claims portion of Gulf of Tonkin as internal waters.
	Excessive straight baselines.

COUNTRY	OBJECTIONABLE CLAIM
Yemen (Aden) (PDRY)	Prior permission for warships to enter 12-nm territorial sea.
	Prior notification for NPWs and ships carrying nuclear materials.
Yemen (Sanaa) (YAR)	Prior notification for warships to pass through 12-nm territorial sea including Bab El Mandeb.
Yugoslavia	Prior permission for more than three warships to be in 12-nm territorial sea at one time.
	24-hour notification prior to naval vessel entering territorial sea.

ANNEX AS2-18

Navigation Rights and the Gulf of Sidra



Background

In October 1973, Libya announced that it considered all water in the Gulf of Sidra south of a straight baseline drawn at 32° 30' north latitude to be internal Libyan waters because of the gulf's geographic location and Libya's historic control over it. The United States and other countries, including the U.S.S.R., protested Libya's claim as lacking any historic or legal justification and as illegally restricting freedom of navigation on the high seas. Further, the U.S. Navy has conducted many operations within the gulf during the past 12 years to protest the Libyan claim. These exercises have resulted in two shooting incidents between Libyan and U.S. forces. The first was in 1981, when two Libyan aircraft fired on U.S. aircraft and were shot down in air-to-air combat, and the second in March 1986, when the Libyans fired several missiles at U.S. forces and the United States responded by attacking Libyan radar installations and patrol boats.

Barbary Coast History

This is not the first time that the United States has contended with navigational hindrances imposed by North African states. After the American Revolution, the United States adhered to the then common practice of paying tribute to the Barbary Coast states to ensure safe passage of U.S. merchant vessels. In 1796, the United States paid a one-time sum (equal to one-third of its defense budget) to Algiers, with guarantees of further annual payments. In 1801, the United States refused to conclude a similar agreement with Tripoli, and the Pasha of Tripoli declared war on the United States. After negotiations failed, the United States blockaded Tripoli; in the autumn of 1803 Commodore Edward Preble led a squadron, including the U.S.S. *Constitution* ("Old Ironsides"), to the Mediterranean to continue the blockade. Shortly after the squadron arrived off Tripoli, a U.S. frigate, the *Philadelphia*, ran aground and was captured. Lt. Stephen Decatur led a team into Tripoli harbor and successfully burned the *Philadelphia*. In June 1805, the Pasha agreed to terms following a ground assault led by U.S. Marines that captured a port n[illegible]ripoli. In 1810 Algiers and Tripoli [illegible]ewed raids against U.S. shipping, and in 1815, Commodore Decatur's squadron caught the Algerian fleet at sea and forced the Dey of Algiers to agree to terms favorable to the United States. Decatur then proceeded to Tunis and Tripoli and obtained their consent to similar treaties. A U.S. squadron remained in the Mediterranean for several years to ensure compliance with the treaties.

Current Law and Custom

By custom, nations may lay historic claim to those bays and gulfs over which they have exhibited such a degree of open, notorious, continuous, and unchallenged control for an extended period of time as to preclude traditional high seas freedoms within such waters. Those waters (closed off by straight baselines) are treated as if they were part of the nation's land mass, and the navigation of foreign vessels is generally subject to complete control by the nation. Beyond lawfully closed-off bays and other areas along their coasts, nations may claim a "territorial sea" of no more than 12 nautical miles in breadth (measured 12 miles out from the coast's low water line—or legal straight baseline) within which foreign vessels enjoy the limited navigational "right of innocent passage." Beyond the territorial sea, vessels and aircraft of all nations enjoy freedom of navigation and overflight.

Since Libya cannot make a valid historic waters claim and meets no other international law criteria for enclosing the Gulf of Sidra, it may validly claim a 12-nautical-mile territorial sea as measured from the normal low-water line along its coast (see map). Libya also may claim up to a 200-nautical-mile exclusive economic zone in which it may exercise resource jurisdiction, but such a claim would not affect freedom of navigation and overflight. (The United States has confined its exercises to areas beyond 12 miles from Libya's coast.)

U.S. Position

The United States supports and seeks to uphold the customary law outlined above, and it has an ongoing global program of protecting traditional navigation rights and freedoms from encroachment by illegal maritime claims. This program includes diplomatic protests (delivered to more than 50 countries since 1975) and ship and aircraft operations to preserve those navigation rights. Illegal maritime claims to which the United States responds include:

- Excessive territorial sea claims;
- Improperly drawn baselines for measuring maritime claims; and
- Attempts to require notification or permission before foreign vessels can transit a nation's territorial sea under the right of innocent passage.

Thus Libya has not been singled out for special consideration but represents simply one instance in the continuing U.S. effort to preserve worldwide navigational rights and freedoms. The fact that Libya chose to respond militarily to the U.S. exercise of traditional navigation rights was regrettable and without any basis in international law.

U.S. Intentions

The United States will pursue actively its efforts to preserve traditional navigational rights and freedoms that are equally guaranteed to all nations. The preservation of rights is essential to maritime commerce and global naval and air mobility and is imperative if all nations are to share equally in the benefits of the world's oceans. As always, the United States will exercise its rights and freedoms fully in accord with international law and hopes to avoid further military confrontations, but it will not acquiesce in unlawful maritime claims and is prepared to defend itself if circumstances so require

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Department of State Bulletin February 1987, pp. 69, 70

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THE SECRETARY OF DEFENSE

WASHINGTON, THE DISTRICT OF COLUMBIA

9 AUG 1982

MEMORANDUM FOR THE SECRETARY OF THE NAVY

SUBJECT: U.S. Navy Support to the U.S. Coast Guard in Drug Interdiction Activities

Your memorandum of 29 July 1982, requested approval of U.S. Navy support to the U.S. Coast Guard, to include:

(a) Air and surface surveillance operations;

(b) Embarkation of U.S. Coast Guard detachments on U.S. Navy vessels for law enforcement boardings of U.S. flag and stateless vessels;

(c) Towing/escorting of seized vessels and transportation of arrested persons in U.S. Coast Guard custody; and

(d) Logistic support to U.S. Coast Guard forces.

In accordance with the requirements of DoD Directive 5525.5, "DoD Cooperation with Civilian Law Enforcement Officials," I hereby approve the rendering of U.S. Navy assistance to the U.S. Coast Guard in support of drug interdiction activities, as outlined in your memorandum of 29 July 1982, and as specifically delineated in enclosure (1) thereto.

THE SECRETARY OF THE NAVY
WASHINGTON, D. C. 20350

29 July 1982

MEMORANDUM FOR THE SECRETARY OF DEFENSE

Subj: U.S. Navy Support to the U.S. Coast Guard in Drug Interdiction Activities - ACTION MEMORANDUM

Ref: (a) Secretary of Transportation letter of 2 April 1982 to SECDEF
(b) SECNAVINST 5820.7 of 15 May 1982, Subj: "Posse Comitatus Act"
(c) DoD Directive 5525.5 of 22 March 1982, Subj: "DoD Cooperation with Civilian Law Enforcement Officials"

Encl: (1) CINCLANTFLT OPORD 2120
(2) Executive Summary - Proposed OPORD 2120
(3) Proposed Reply

In reference (a) the Secretary of Transportation requested that the U.S. Navy assist the U.S. Coast Guard in drug interdiction operations. He advised that there are inadequate civilian resources to respond to the surge of vessels trafficking in drugs and other contraband en route to the United States from the Caribbean and other regions, and stated that the inability to interdict this massive influx of drugs is detrimental to the national interest of the United States. Enclosure (1) is a proposed plan for extending Navy assistance to the Coast Guard in drug interdiction activities until such time as civilian law enforcement capabilities become adequate to meet the threat posed by drug smugglers.

Enclosure (1) includes provisions for:

a. Air and surface surveillance operations (Annex E).

b. Embarkation of Coast Guard detachments on U.S. Navy vessels for law enforcement boardings of U.S. flag and stateless vessels (Annexes C and E). Tactical control of Navy vessels will shift to the Coast Guard prior to any interdiction. Detailed guidance is provided to govern the use of force, including warning shots, disabling fire, and deadly force, in support of law enforcement operations (Appendix 1 to Annex C).

c. Towing/escorting of seized vessels and transportation of arrested persons in Coast Guard custody (Annexes C, E, and N). Navy personnel are authorized to assist Coast Guard personnel in guarding and controlling arrested persons. Ship's brigs may be used when Navy prisoners are not incarcerated. Temporary custody of seized vessels/prisoners at U.S. Naval Base, Guantanamo Bay, Cuba, while awaiting onward movement to CONUS, is authorized.

d. Logistic support to Coast Guard forces (Annnex D). Logistic support will encompass the following areas: fuel, provisions, repairs, medical, and squadron support. Squadron support entails the dedication of Navy vessels as platforms for command and control support for embarked Coast Guard personnel, communications, relief crew facilities, helicopter operations, and logistic support for 2-4 Coast Guard patrol vessels.

Enclosure (2) is an executive summary of OPORD 2120.

Reference (b) adopts for the Navy, as a matter of policy, the restrictions of the Posse Comitatus Act, 18 U.S.C. 1385 (1976), and authorizes exceptions to this policy when specific approval of the Secretary of the Navy is granted. To the extent that enclosure (1) authorizes activities otherwise prohibited as a matter of policy by reference (b), I specifically approve the rendering of such assistance to the Coast Guard in support of drug interdiction operations. I will review, on an annual basis, the need and advisability of continued Navy assistance in drug interdiction operations.

Reference (c) requires your prior approval before certain aspects of the assistance outlined in enclosure (1) may be provided. I respectfully request that you approve Navy assistance to the Coast Guard in support of drug interdiction activities as set forth in enclosure (1). If you concur, your signature on enclosure (3) will signify your approval.

It is understood that approval of this request will supersede my memorandum of 4 May 1982, Subj: U.S. Navy Support to the U.S. Coast Guard in Drug Interdiction Activities and your memorandum dated 24 May 1982, same subject.

JOHN LEHMAN

THE SECRETARY OF DEFENSE

WASHINGTON, THE DISTRICT OF COLUMBIA

10 NOV 1986

MEMORANDUM FOR SECRETARY OF THE NAVY

SUBJECT: Navy Assistance to Coast Guard Tactical Law Enforcement Teams (TACLETS)

On October 6, 1986, the Deputy Secretary of Defense approved a request from the Secretary of Transportation for expanded Navy assistance to Coast Guard TACLETS through December 31, 1987.

The attached letter to Secretary Dole concurs with her request to eliminate the need for annual correspondence concerning this support.

I appreciate the Navy's continued support to the TACLET concept. This program is an important and highly visible element of the President's anti-drug policy.

Attachment

AS3-1-4

WASHINGTON, THE DISTRICT OF COLUMBIA

6 October 1986

Honorable Elizabeth H. Dole
Secretary of Transportation
Washington, D.C. 20590

Dear Elizabeth:

Thank you for your letter of August 21, regarding expanded U.S. Navy assistance to Coast Guard Tactical Law Enforcement Teams.

I have approved your request and have extended our support through 31 December 1987. This support includes:

- Air and surface surveillance operations;

- Embarkation of U.S. Coast Guard detachments on U.S. Navy vessels for law enforcement boarding of U.S. flag and stateless vessels, and consensual and nonconsensual boarding of foreign flag vessels, in accordance with Presidential Directives and international law.

- Towing/escorting of seized vessels and transportation of arrested persons in U.S. Coast Guard custody.

- Logistic support to U.S. Coast Guard forces.

I agree with your proposal to eliminate the need for annual correspondence concerning this support. Major General Olmstead, USMC (Ret.), Director of the DoD Task Force on Drug Enforcement, is prepared to discuss adjustments to our current agreement with Admiral Yost's staff.

Support of the President's anti-drug policy is in the national interest, and I welcome the opportunity to contribute further to its success.

Sincerely,

William H. Taft, IV
Deputy Secretary of Defense

AS3-1-5

THE SECRETARY OF DEFENSE

WASHINGTON, THE DISTRICT OF COLUMBIA

10 NOV 1986

Honorable Elizabeth H. Dole
Secretary of Transportation
Washington, D.C. 20590

Dear Elizabeth:

The Department of Defense concurs with your August 21, 1986, request to eliminate the need for annual correspondence regarding expanded Navy assistance to Coast Guard Tactical Law Enforcement Teams (TACLETS). Accordingly, the termination date (December 31, 1987) in our October 6, 1986 letter to you is rescinded, and the expanded TACLET authority agreement will continue in effect until further notice.

The Defense Department remains firmly committed to this important and highly effective element of the President's anti-drug program.

Sincerely,

AS3-1-6

ANNEX AS5-1

UNITED STATES: MESSAGE FROM THE PRESIDENT TRANSMITTING PROTOCOL II ADDITIONAL TO THE 1949 GENEVA CONVENTIONS, RELATING TO THE PROTECTION OF VICTIMS OF NONINTERNATIONAL ARMED CONFLICTS*

[January 29, 1987]

+Cite as 26 I.L.M. 561 (1987)+

I.L.M. Background/Content Summary

The four 1949 Geneva Conventions and two 1977 Additional Protocols are major efforts to codify the international rules of humanitarian law in armed conflict. The status of these agreements, indicating which countries have signed and/or ratified them, appears above at I.L.M. page 553.

In this message to the U.S. Senate, Protocol I is rejected. Protocol II is recommended, subject to certain understandings and reservations.

Letter of Submittal from the President - I.L.M. page 562
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100TH CONGRESS 1st Session	SENATE	TREATY DOC 100-2

PROTOCOL II ADDITIONAL TO THE 1949 GENEVA CONVENTIONS, AND RELATING TO THE PROTECTION OF VICTIMS OF NONINTERNATIONAL ARMED CONFLICTS

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

THE PROTOCOL II ADDITIONAL TO THE GENEVA CONVENTIONS OF AUGUST 12, 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF NONINTERNATIONAL ARMED CONFLICTS, CONCLUDED AT GENEVA ON JUNE 10, 1977

*[Reproduced from U.S. Congress, Senate, Message from the President of the United States Transmitting the Protocol II Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Noninternational Armed Conflicts, concluded at Geneva on June 10, 1977, 100th Cong., 1st Sess., Treaty Doc. 100-2 (Washington: GPO, 1987).]

AS5-1-2

LETTER OF TRANSMITTAL

THE WHITE HOUSE, *January 29, 1987*

To the Senate of the United States

I transmit herewith, for the advice and consent of the Senate to ratification, Protocol II Additional to the Geneva Conventions of 12 August 1949, concluded at Geneva on June 10, 1977. I also enclose for the information of the Senate the report of the Department of State on the Protocol.

The United States has traditionally been in the forefront of efforts to codify and improve the international rules of humanitarian law in armed conflict, with the objective of giving the greatest possible protection to victims of such conflicts, consistent with legitimate military requirements. The agreement that I am transmitting today is, with certain exceptions, a positive step toward this goal. Its ratification by the United States will assist us in continuing to exercise leadership in the international community in these matters.

The Protocol is described in detail in the attached report of the Department of State. Protocol II to the 1949 Geneva Conventions is essentially an expansion of the fundamental humanitarian provisions contained in the 1949 Geneva Conventions with respect to non-international armed conflicts, including humane treatment and basic due process for detained persons, protection of the wounded, sick and medical units, and protection of noncombatants from attack and deliberate starvation. If these fundamental rules were observed, many of the worst human tragedies of current internal armed conflicts could be avoided. In particular, among other things, the mass murder of civilians is made illegal, even if such killings would not amount to genocide because they lacked racial or religious motives. Several Senators asked me to keep this objective in mind when adopting the Genocide Convention. I remember my commitment to them. This Protocol makes clear that any deliberate killing of a noncombatant in the course of a non-international armed conflict is a violation of the laws of war and a crime against humanity, and is therefore also punishable as murder.

While I recommend that the Senate grant advice and consent to this agreement, I have at the same time concluded that the United States cannot ratify a second agreement on the law of armed conflict negotiated during the same period. I am referring to Protocol I additional to the 1949 Geneva Conventions, which would revise the rules applicable to international armed conflicts. Like all other efforts associated with the International Committee of the Red Cross, this agreement has certain meritorious elements. But Protocol I is fundamentally and irreconcilably flawed. It contains provisions

that would undermine humanitarian law and endanger civilians in war. One of its provisions, for example, would automatically treat as an international conflict any so-called "war of national liberation." Whether such wars are international or non-international should turn exclusively on objective reality, not on one's view of the moral qualities of each conflict. To rest on such subjective distinctions based on a war's alleged purposes would politicize humanitarian law and eliminate the distinction between international and non-international conflicts. It would give special status to "wars of national liberation," an ill-defined concept expressed in vague, subjective, politicized terminology. Another provision would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves. These problems are so fundamental in character that they cannot be remedied through reservations, and I therefore have decided not to submit the Protocol to the Senate in any form, and I would invite an expression of the sense of the Senate that it shares this view. Finally, the Joint Chiefs of Staff have also concluded that a number of the provisions of the Protocol are militarily unacceptable.

It is unfortunate that Protocol I must be rejected. We would have preferred to ratify such a convention, which as I said contains certain sound elements. But we cannot allow other nations of the world, however numerous, to impose upon us and our allies and friends an unacceptable and thoroughly distasteful price for joining a convention drawn to advance the laws of war. In fact, we must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law.

The time has come for us to devise a solution for this problem, with which the United States is from time to time confronted. In this case, for example, we can reject Protocol I as a reference for humanitarian law, and at the same time devise an alternative reference for the positive provisions of Protocol I that could be of real humanitarian benefit if generally observed by parties to international armed conflicts. We are therefore in the process of consulting with our allies to develop appropriate methods for incorporating these positive provisions into the rules that govern our military operations, and as customary international law. I will advise the Senate of the results of this initiative as soon as it is possible to do so.

I believe that these actions are a significant step in defense of traditional humanitarian law and in opposition to the intense efforts of terrorist organizations and their supporters to promote the legitimacy of their aims and practices. The repudiation of Protocol I is one additional step, at the ideological level so important to terrorist organizations, to deny these groups legitimacy as international actors.

Therefore, I request that the Senate act promptly to give advice and consent to the ratification of the agreement I am transmitting today, subject to the understandings and reservations that are described more fully in the attached report. I would also invite an expression of the sense of the Senate that it shares the view that the United States should not ratify Protocol I, thereby reaffirming its support for traditional humanitarian law, and its opposition to the politicization of that law by groups that employ terrorist practices.

RONALD REAGAN.

AS5-1-3

LETTER OF SUBMITTAL

DEPARTMENT OF STATE,
Washington, December 13, 1986.

The PRESIDENT,
The White House.

THE PRESIDENT: I have the honor to submit to you, with a view to transmission to the Senate for its advice and consent to ratification, Protocol II Additional to the Geneva Conventions of 12 August 1949, concluded at Geneva on June 10, 1977.

PROTOCOL II

Protocol II to the 1949 Geneva Conventions was negotiated by a diplomatic conference convened by the Swiss Government in Geneva, which met in four annual sessions from 1974-77 This Protocol was designed to expand and refine the basic humanitarian provisions contained in Article 3 common to the four 1949 Geneva Conventions with respect to non-international conflicts While the Protocol does not (and should not) attempt to apply to such conflicts all the protections prescribed by the Conventions for international armed conflicts, such as prisoner-of-war treatment for captured combatants, it does attempt to guarantee that certain fundamental protections be observed, including: (1) humane treatment for detained persons, such as protection from violence, torture, and collective punishment; (2) protection from intentional attack, hostage-taking and acts of terrorism of persons who take no part in hostilities, (3) special protection for children to provide for their safety and education and to preclude their participation in hostilities, (4) fundamental due process for persons against whom sentences are to be passed or penalties executed; (5) protection and appropriate care for the sick and wounded, and medical units which assist them, and (6) protection of the civilian population from military attack, acts of terror, deliberate starvation, and attacks against installations containing dangerous forces. In each case, Protocol II expands and makes more specific the basic guarantees of common Article 3 of the 1949 Conventions. Its specific provisions are described in greater detail in the attached section-by-section analysis.

The final text of Protocol II did not meet all the desires of the United States and other western delegations. In particular, the Protocol only applies to internal conflicts in which dissident armed groups are under responsible command and exercise control over such a part of the national territory as to carry out sustained and concerted military operations This is a narrower scope than we would have desired, and has the effect of excluding many internal

conflicts in which dissident armed groups occupy no significant territory but conduct sporadic guerrilla operations over a wide area We are therefore recommending that U.S ratification be subject to an understanding declaring that the United States will apply the Protocol to all conflicts covered by Article 3 common to the 1949 Conventions (and only such conflicts), which will include all non-international armed conflicts as traditionally defined (but not internal disturbances, riots and sporadic acts of violence) This understanding will also have the effect of treating as non-international these so-called "wars of national liberation" described in Article 1(4) of Protocol I which fail to meet the traditional test of an international conflict.

Certain other reservations or understandings are also necessary to protect U.S. military requirements Specifically, as described in greater detail in the attached annex, a reservation to Article 10 is required to preclude the possibility that it might affect the administration of discipline of U.S. military personnel under The Uniform Code of Military Justice, under the guise of protecting persons purporting to act in accordance with "medical ethics" However, this is obviously not intended in any way to suggest that the United States would deliberately deny medical treatment to any person in need of it for political reasons or require U.S medical personnel to perform procedures that are unethical or not medically indicated

Also, we recommend an understanding with respect to Article 16 to confirm that the special protection granted by that article is required only for a limited class of objects that, because of their recognized importance, constitute a part of the cultural or spiritual heritage of peoples, and that such objects will lose their protection if they are used in support of the military effort This understanding is generally shared by our allies, and we expect it to appear in the ratification documents of many of them

Finally, we recommend an understanding to deal with any situation in which the United States may be providing assistance to a country which has not ratified Protocol II and would therefore feel under no obligation to comply with its terms in the conduct of its own operations Our recommended understanding would make clear that our obligations under the Protocol would not exceed those of the State being assisted. The United States would of course comply with the applicable provisions of the Protocol with respect to all operations conducted by its own armed forces

With the above caveats, the obligations contained in Protocol II are no more than a restatement of the rules of conduct with which U.S. military forces would almost certainly comply as a matter of national policy, constitutional and legal protections, and common decency. These obligations are not uniformly observed by other States, however, and their universal observance would mitigate many of the worst human tragedies of the type that have occurred in internal conflicts of the present and recent past I therefore strongly recommend that the United States ratify Protocol II and urge all other States to do likewise With our support, I expect that in due course the Protocol will be ratified by the great majority of our friends, as well as a substantial preponderance of other States

PROTOCOL I

The Departments of State, Defense, and Justice have also conducted a thorough review of a second law-of-war agreement negotiated during the same period—Protocol I Additional to the Geneva Conventions of 12 August 1949 This Protocol was the main object of the work of the 1973-77 Geneva diplomatic conference, and represented an attempt to revise and update in a comprehensive manner the 1949 Geneva Conventions on the protection of war victims, the 1907 Hague Conventions on means and methods of warfare, and customary international law on the same subjects.

Our extensive interagency review of the Protocol has, however, led us to conclude that Protocol I suffers from fundamental shortcomings that cannot be remedied through reservations or understandings. We therefore must recommend that Protocol I not be forwarded to the Senate The following is a brief summary of the reasons for our conclusion

In key respects Protocol I would undermine humanitarian law and endanger civilians in war. Certain provisions such as Article 1(4), which gives special status to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination," would inject subjective and politically controversial standards into the issue of the applicability of humanitarian law Protocol I also elevates the international legal status of self-described "national liberation" groups that make a practice of terrorism. This would undermine the principle that the rights and duties of international law attach principally to entities that have those elements of sovereignty that allow them to be held accountable for their actions, and the resources to fulfill their obligations.

Equally troubling is the easily inferred political and philosophical intent of Protocol I, which aims to encourage and give legal sanction not only to "national liberation" movements in general, but in particular to the inhumane tactics of many of them. Article 44(3), in a single subordinate clause, sweeps away years of law by "recognizing" that an armed irregular "cannot" always distinguish himself from non-combatants; it would grant combatant status to such an irregular anyway As the essence of terrorist criminality is the obliteration of the distinction between combatants and non-combatants, it would be hard to square ratification of this Protocol with the United States' announced policy of combatting terrorism.

The Joint Chiefs of Staff have conducted a detailed review of the Protocol, and have concluded that it is militarily unacceptable for many reasons. Among these are that the Protocol grants guerrillas a legal status that often is superior to that accorded to regular forces. It also unreasonably restricts attacks against certain objects that traditionally have been considered legitimate military targets. It fails to improve substantially the compliance and verification mechanisms of the 1949 Geneva Conventions and eliminates an important sanction against violations of those Conventions Weighing all aspects of the Protocol, the Joint Chiefs of Staff found it to be too ambiguous and complicated to use as a practical guide for military operations, and recommended against ratification by the United States

We recognize that certain provisions of Protocol I reflect customary international law, and other appear to be positive new developments. We therefore intend to consult with our allies to develop appropriate methods for incorporating these provisions into rules that govern our military operations, with the intention that they shall in time win recognition as customary international law separate from their presence in Protocol I This measure would constitute an appropriate remedy for attempts by nations to impose unacceptable conditions on the acceptance of improvements in international humanitarian law I will report the results of this effort to you as soon as possible, so that the Senate may be advised of our progress in this respect.

CONCLUSION

I believe that U.S. ratification of the agreement which I am submitting to you for transmission to the Senate, Protocol II to the 1949 Geneva Conventions, will advance the development of reasonable standards of international humanitarian law that are consistent with essential military requirements. The same is not true with respect to Protocol I to the 1949 Geneva Conventions, and this agreement should not be transmitted to the Senate for advice and consent to ratification. We will attempt in our consultations with allies and through other means, however, to press forward with the improvement of the rules of international humanitarian law in international armed conflict, without accepting as the price for such improvements a debasement of our values and of humanitarian law itself.

The effort to politicize humanitarian law in support of terrorist organizations have been a sorry development Our action in rejecting Protocol I should be recognized as a reaffirmation of individual rights in international law and a repudiation of the collectivist apology for attacks on non-combatants.

Taken as a whole, these actions will demonstrate that the United States strongly supports humanitarian principles, is eager to improve on existing international law consistent with those principles, and will reject revisions of international law that undermine those principles. The Departments of State and Justice support these recommendations.

Respectfully submitted.

GEORGE P. SHULTZ.

Attachments:

1—Detailed Analysis of Provisions

2—Recommended Understandings and Reservations

Detailed Analysis of Provisions

The following is a detailed analysis of the various provisions of Protocol II Additional to the Geneva Conventions of 12 August 1949 (Protocol II).

Protocol II consists of four preambular clauses and twenty-eight operative articles.

The Preamble

The first paragraph of the Preamble states that the humanitarian principles in Article 3 common to the four Geneva Conventions of 1949 constitute the foundation of respect for the human person in cases of armed conflict not of an international character. The fundamental guarantees of common Article 3 continue to apply to all non-international conflicts even in cases where such a conflict is not technically covered by Protocol II. As explained more fully below, we recommend that U S ratification be subject to a declaration that the United States will apply Protocol II to all such conflicts.

The second and third paragraphs recall that existing international instruments relating to human rights offer basic protection to the human person, but emphasize the need to ensure better protection for the victims of non-international armed conflicts.

The fourth paragraph recalls that, in cases not covered by specific legal provisions, the human person remains under the protection of the principles of humanity and the dictates of public conscience.

Article 1

Article 1 defines the scope of application of Protocol II. Paragraph 1 provides that the Protocol applies to all armed conflicts not covered by Article 1 of Protocol I Additional to the 1949 Geneva Conventions, and which take place in the territory of a party to Protocol II between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement the Protocol. Paragraph 2 provides that Protocol II will not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature

This Article technically excludes four types of situations from the scope of the Protocol: (1) international armed conflicts as defined in the traditional sense in Article 2 common to the four 1949 Geneva Conventions, that is, conflicts between two or more states (whether or not a state of war is recognized between them) or cases of occupation by one state of the territory of another state (whether or not the occupation meets with armed resistance); (2) the so-

called wars of "national liberation" defined as international armed conflicts by Article 1(4) of Protocol I Additional to the 1949 Geneva Conventions; (3) non-international conflicts covered by common Article 3 to the 1949 Conventions but falling below the threshold in Article 1 of Protocol II, such as guerrilla conflicts in which insurgent groups do not control substantial territory on a permanent basis or conduct sustained and concerted regular military operations; and (4) situations of internal violence that have not been traditionally considered as armed conflicts and are not covered by the 1949 Conventions, such as riots and sporadic terrorist acts.

The first and fourth types of situations should not be subject to Protocol II and their exclusion presents no problems. However, the exclusion of the second and third categories is inappropriate The second category—so-called "liberation wars" defined in Protocol I—are often in fact non-international conflicts, and are distinguished by Protocol I from other non-international conflicts only on the basis of highly politicized and undesirable criteria which detract from the integrity of international humanitarian law; the United States should therefore reject this distinction The third category—guerrilla wars and other conflicts where insurgents do not occupy territory and conduct sustained military operations on a regular basis—should be subject to the fundamental humanitarian provisions of Protocol II; most western states resisted their exclusion at the diplomatic conference that negotiated the Protocol

Accordingly, while we cannot now, as a legal matter, compel other parties to Protocol II to accept a broader scope of application than is presently defined in Article 1, the United States can and should declare, as part of its ratification, that it will apply the Protocol to all conflicts covered by Article 3 common to the 1949 Conventions and only such conflicts, and encourage other states to do likewise.

Article 2

Article 2 states that Protocol II shall be applied to all persons affected by an armed conflict, as defined in Article 1, without any adverse distinction based on race, sex, religion, national or social origin, or any similar criteria It also provides that, at the end of such an armed conflict, all persons whose liberty has been deprived or restricted shall continue to enjoy the protections of the relevant provisions of the Protocol until their liberty is restored.

Article 3

Article 3 states that nothing in Protocol II affects the sovereignty or national unity of any state or the responsibility of its government to maintain law and order, or justifies intervention by any other state in its internal affairs. The recognition of this point is essential in persuading states to accept Protocol II and apply its provisions to conflicts within their territory.

Article 4

Article 4 states a series of fundamental guarantees that must be provided to all persons not taking part in hostilities.

Paragraph 1 states generally that such persons (whether or not they are in detention or their liberty is otherwise restricted) are entitled to respect for their person, honor, convictions and religious practices, and must be treated humanely, without any adverse distinction, in all circumstances. It is prohibited to order that there shall be no survivors.

Paragraph 2 prohibits a series of specific acts with respect to such persons, including:

(1) violence to life, health, and physical or mental well-being, in particular by murder, torture, mutilation or corporal punishment;

(2) collective punishments, hostage-taking, acts of terrorism, or pillage; and

(3) outrages upon personal dignity, in particular rape, enforced prostitution and indecent assault.

Paragraph 3 requires that children be provided with the care and aid they require, and provides in particular that:

(1) they must receive an education, including religious and moral education, in keeping with the wishes of their parents;

(2) all appropriate steps must be taken to facilitate the reunion of families temporarily separated;

(3) children below the age of fifteen must not be recruited into the armed forces or allowed to take part in hostilities; and

(4) where necessary, measures must be taken to remove children temporarily from any area in which hostilities are taking place, accompanied by persons responsible for their safety and well-being.

ARTICLE 5

Article 5 provides additional protections for persons who are under detention or otherwise deprived of liberty for reasons related to the conflict. In particular, paragraph 1 provides that:

(1) such persons are to be provided, to the same extent as the local civilian population, with food, drinking water, safeguards for health and hygiene, protection from the climate and the dangers of armed conflict, and access to relief;

(2) they are to be allowed to practice their religion and have spiritual assistance; and

(3) they must, if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population.

Paragraph 2 further provides that those responsible for the detention of such persons also take the following actions, within the limits of their capabilities:

(1) place men and women in separate quarters, except for families living together;

(2) permit the sending and receiving of letters;

(3) refrain from locating places of detention close to the combat zone; and

(4) provide medical examinations, and refrain from any unjustified act or omission endangering their physical or mental health and integrity.

Paragraphs 3 and 4 require that all persons detained be treated humanely and that necessary measures be taken to ensure their safety when released.

ARTICLE 6

Article 6 applies to the prosecution and punishment of criminal offenses related to the conflict. It sets forth a series of requirements to guarantee fundamental due process, including:

(1) a requirement that the accused be informed without delay of the particulars of the alleged offense, and upon conviction be informed of his appeal rights;

(2) a prohibition on collective penal responsibility, or conviction for acts that were not an offense when committed, or subjection to heavier penalties than applied at the time of the offense, or the imposition of the death penalty on persons under 18, pregnant women or mothers of small children; and

(3) a requirement for trial in the presence of the accused, a presumption of innocence until guilt is proven, and a prohibition against self-incrimination.

The Article requires that, at the end of hostilities, the authorities endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict and to persons whose liberty has been restricted for reasons related to the armed conflict. Unlike the rules of international armed conflict. Unlike the rules of international armed conflict, however, no immunity as such from the operation of local law is granted by Protocol II to persons who have engaged in hostilities against enemy combatants.

ARTICLE 7

Article 7 requires that all the wounded, sick and shipwrecked be respected and protected, whether or not they have taken part in the conflict. They must be treated humanely in all circumstances and receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition, with no distinction on any grounds other than medical ones.

ARTICLE 8

Article 8 requires, when circumstances permit, that all possible measures be taken without delay to search for and collect the wounded, sick and shipwrecked, to protect them against pillage and ill-treatment, and to search for, protect and decently dispose of the remains of the dead.

ARTICLE 9

Article 9 requires that medical and religious personnel be respected and protected and granted all available help for the performance of their duties. They may not be compelled to carry out tasks incompatible with their humanitarian mission, nor may medical personnel be required to give priority to any person except on medical grounds.

ARTICLE 10

Article 10 provides that under no circumstances shall any person be punished for having carried out medical activities compatible with medical ethics, nor compelled to perform acts inconsistent with medical ethics or other rules designed for the benefit of the wounded and sick. Subject to national law, medical personnel may not be penalized for refusing to give information concerning the wounded and sick under their care

A reservation to this Article is necessary to preserve the ability of the U.S. Armed Forces to control the actions of their medical personnel, who might otherwise feel entitled to invoke these provisions to disregard, under the guise of "medical ethics", the priorities and restrictions established by higher authority. But for a few general principles established in war crime tribunals after World War II, there is no internationally agreed legal definition of the term "medical ethics". Use of the concept in this context therefore invites political manipulation. For example, military personnel might refuse service in certain areas due to their political opposition to United States policy; or such military medical personnel might disregard procedures established by higher levels within the military medical establishment regarding treatment priorities and methods. To ensure discipline and control within the Armed Forces, U.S. ratification should be subject to a reservation to Article 10 to the extent that it would affect the internal administration of U.S. Armed Forces, including the administration of military justice. At the same time, we should make clear that this reservation is not intended in any way to suggest that the United States would deliberately deny medical treatment to any person in need of it for political reasons or require U S medical personnel to perform procedures that are unethical or not medically indicated.

ARTICLE 11

Article 11 provides that medical units and transports shall be respected and protected at all times and not be made the object of attack. This protection ceases only if such units or transports are used to commit hostile acts outside their humanitarian function, and then only after a warning has been given and remains unheeded.

ARTICLE 12

Article 12 requires that the distinctive emblem of the red cross (or red crescent) be displayed by medical and religious personnel, medical units and medical transports, and that this emblem be respected and not be used improperly

ARTICLE 13

Article 13 states the general principles protecting the civilian population. It states that the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations, and shall not be the object of attack or acts or threats of violence designed to spread terror. Civilians only

enjoy these protections for such time as they do not take a direct part in hostilities.

ARTICLE 14

Article 14 prohibits the starvation of civilians as a method of combat. It prohibits attacking, destroying or removing objects indispensable to the survival of the civilian population, such as foodstuffs, crops, livestock, water supplies and irrigation works.

ARTICLE 15

Article 15 prohibits making works or installations containing dangerous forces, namely dams, dikes and nuclear electrical generating stations, the object of attack if that may cause the release of dangerous forces and consequent severe losses among the civilian population.

ARTICLE 16

Article 16 prohibits any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and any use of them in support of the military effort To avoid confusion, U S ratification should be subject to an understanding confirming that the special protection granted by this article is only required for a limited class of objects that, because of their recognized importance, constitute a part of the cultural or spiritual heritage of peoples, and that such objects will lose their protection if they are used in support of the military effort.

ARTICLE 17

Article 17 provides that the displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand, and in any event that all possible measures be taken to provide adequately for their safety and health Civilians may not be compelled to leave their own territory for reasons connected with the conflict.

ARTICLE 18

Article 18 provides that relief societies and the civilian population itself may offer their services for the care of the wounded and sick, and relief of the civilian population It further provides that if the civilian population is suffering undue hardship from a lack of essential supplies, relief actions of an exclusively humanitarian and impartial nature shall be undertaken, subject to the consent of the party concerned. This important provision was the subject of considerable debate, and reflects compromise with those delegations which were unwilling to accept an unconditional obligation to permit and facilitate relief shipments For its part, the United States would expect that the requirement of consent by the party concerned would not be implemented in an arbitrary manner, and that essential relief shipments would only be restricted or denied for the most compelling and legitimate reasons If so implemented, this article, together with Article 14, could help to reduce some of

the more tragic circumstances of internal conflicts of the present and recent past.

ARTICLES 19–28

These articles incorporate the final clauses necessary for such an international convention. They include provisions for ratification, amendments, and possible denunciation on six-months' notice. There are no restrictions on reservations, and no mandatory dispute-settlement procedures.

RECOMMENDED UNDERSTANDINGS AND RESERVATIONS RELATING TO PROTOCOL II TO 1949 GENEVA CONVENTIONS

The ratification of the United States is subject to the following:

1. The United States reserves as to Article 10 to the extent that it would affect the internal administration of the United States Armed Forces, including the administration of military justice.

2. The United States understands that Article 16 establishes a special protection for a limited class of objects that, because of their recognized importance, constitute a part of the cultural or spiritual heritage of peoples, and that such objects will lose their protection if they are used in support of the military effort.

3. The United States understands that when a High Contracting Party provides assistance to a State whose armed forces are engaged in a conflict of the type described in Article 1(1), any obligations which may arise for that High Contracting Party pursuant to this Protocol will not in any event exceed those assumed by the State being assisted. However, such a High Contracting Party must comply with the Protocol with respect to all operations conducted by its armed forces, and the United States will encourage all States to whom it provides assistance to do likewise.

4. The United States declares that it will apply this Protocol only to those conflicts covered by Article 3 common to the Geneva Conventions of 12 August 1949 and to all such conflicts, and encourages all other States to do likewise.

States party to the Additional Protocols *

30.4.1989		Protocol I	Protocol II
Angola	(20 9 1984 - A)	● (46)	
Antigua and Barbuda	(6.10 1986 - A)	● (62)	● (55)
Argentina	(26 11 1986 - A)	● (66)	● (59)
Austria (90)	(13 8.1982 - R)	● (25)	● (22)
Bahamas	(10 4.1980 - A)	● (14)	● (13)
Bahrain	(30.10 1986 - A)	● (65)	● (58)
Bangladesh	(8 9.1980 - A)	● (16)	● (15)
Belgium (90)	(20 5 1986 - R)	● (58)	● (51)
Belize	(29 6.1984 - A)	● (42)	● (36)
Benin	(28 5 1986 - A)	● (59)	● (52)
Bolivia	(8.12 1983 - A)	● (37)	● (30)
Botswana	(23 5.1979 - A)	● (6)	● (6)
Burkina Faso	(20.10 1987 - R)	● (71)	● (64)
Cameroon	(16. 3.1984 - A)	● (39)	● (33)
Central African Republic	(17. 7 1984 - A)	● (44)	● (38)
China	(14 9 1983 - A)	● (33)	● (27)
Comoros	(21 11 1985 - A)	● (52)	● (45)
Congo	(10.11 1983 - A)	● (35)	● (29)
Costa Rica	(15.12 1983 - A)	● (38)	● (31)
Cuba	(25.11 1982 - A)	● (27)	
Cyprus	(1. 6.1979 - R)	● (7)	
Denmark (90)	(17 6.1982 - R)	● (24)	● (21)
Ecuador	(10 4 1979 - R)	● (4)	● (4)
El Salvador	(23.11 1978 - R)	● (3)	● (3)
Equatorial Guinea	(24. 7 1986 - A)	● (60)	● (53)
Finland (90)	(7 8 1980 - R)	● (15)	● (14)
France	(24. 2 1984 - A)		● (32)
Gabon	(8. 4.1980 - A)	● (13)	● (12)
Gambia	(12 1 1989 - A)	● (79)	● (70)
Ghana	(28 2 1978 - R)	● (1)	● (1)
Greece	(31 3.1989 - R)	● (81)	
Guatemala	(19 10 1987 - R)	● (70)	● (63)
Guinea	(11 7 1984 - A)	● (43)	● (37)
Guinea-Bissau	(21 10 1986 - A)	● (64)	● (57)
Guyana	(18 1 1988 - A)	● (72)	● (65)
Holy See	(21 11 1985 - R)	● (53)	● (46)
Hungary	(12 4 1989 - R)	● (82)	● (72)
Iceland (90)	(10 4 1987 - R)	● (67)	● (61)
Italy (90)	(27 2 1986 - R)	● (57)	● (50)
Jamaica	(29 7 1986 - A)	● (61)	● (54)
Jordan	(1 5 1979 - R)	● (5)	● (5)
Korea (Democratic People's Republic)	(9. 3.1988 - A)	● (74)	
Korea (Rep.)	(15. 1 1982 - R)	● (20)	● (18)

30 [illegible]		Protocol I	Protocol II
[illegible]	(17 1 1985 - A)	● (49)	● (42)
Laos	(18 11 1980 - R)	● (17)	● (16)
Liberia	(30 6 1988 - A)	● (76)	● (67)
Libya	(7 6 1978 - A)	● (2)	● (2)
Mali	(8 2 1989 - A)	● (80)	● (71)
Malta (90)	(17 4 1989 - A)	● (83)	● (73)
Mauritania	(14 3 1980 - A)	● (12)	● (11)
Mauritius	(22 3 1982 - A)	● (22)	● (20)
Mexico	(10 3 1983 - A)	● (30)	
Mozambique	(14 3 1983 A)	● (31)	
Namibia	(18 10 1983 - A)	● (34)	● (28)
Netherlands (90)	(26 6 1987 - R)	● (68)	● (62)
New Zealand (90)	(8 2 1988 - R)	● (73)	● (66)
Niger	(8 6 1979 - R)	● (8)	● (7)
Nigeria	(10 10 1988 - A)	● (78)	● (69)
Norway (90)	(14 12 1981 - R)	● (19)	● (17)
Oman	(29 3 1984 - A)	● (40)	● (34)
Philippines	(11 12 1986 - A)		● (60)
Qatar	(5 4 1988 - A)	● (75)	
Rwanda	(19 11 1984 - A)	● (48)	● (41)
Saint Christopher and Nevis	(14 2 1986 - A)	● (56)	● (49)
Saint Lucia	(7 10 1982 - A)	● (26)	● (23)
Saint Vincent and Grenadines	(8 4 1983 - A)	● (32)	● (26)
Saudi Arabia	(21 8 1987 - A)	● (69)	
Senegal	(7 5 1985 - R)	● (51)	● (44)
Seychelles	(8 11 1984 - A)	● (47)	● (40)
Sierra Leone	(21 10 1986 - A)	● (63)	● (56)
Solomon Islands	(19 9 1988 - A)	● (77)	● (68)
Spain (90)	(21 4 1989 - R)	● (84)	● (74)
Suriname	(16 12 1985 - A)	● (55)	● (48)
Sweden (90)	(31 8 1979 - R)	● (11)	● (10)
Switzerland (90)	(17 2 1982 - R)	● (21)	● (19)
Syria	(14 11 1983 - A)	● (36)	
Tanzania	(15 2 1983 - A)	● (28)	● (24)
Togo	(21 6 1984 - R)	● (41)	● (35)
Tunisia	(9 8 1979 - R)	● (10)	● (9)
United Arab Emirates	(9 3 1983 - A)	● (29)	● (25)
Uruguay	(13 12 1985 - A)	● (54)	● (47)
Vanuatu	(28 2 1985 - A)	● (50)	● (43)
Viet Nam	(19.10 1981 - R)	● (18)	
Western Samoa	(23 8 1984 - A)	● (45)	● (39)
Yugoslavia	(11 5 1979 - R)	● (9)	● (8)
Zaire	(3 6 1982 - A)	● (23)	

* *Protocols additional to the Geneva Conventions of 12 August 1949*
(A) *Accession*
(R) *Ratification*
(90) *Deposit of declaration provided for under Article 90*

The numbering indicates the chronological order of accessions and ratifications
The date between brackets indicates when the instrument of ratification or accession was deposited with the Swiss Federal Council the depository of the Conventions and the Protocols

*Ratifications and accessions to the Geneva Conventions and/or the Additional Protocols between 1.1.1989 and 30.4.1988**

Kiribati: Succession to the four Geneva Conventions on 5 January 1989, effective 12 July 1979
Gambia: Accession to the two Additional Protocols on 12 January 1989
Mali: Accession to the two Additional Protocols on 8 February 1989
Greece: Ratification of Protocol I on 31 March 1989
Hungary: Ratification of the two Additional Protocols on 12 April 1989
Malta: Accession to the two Additional Protocols on 17 April 1989
Spain: Ratification of the two Protocols on 21 April 1989

* *A State may become party to the Additional Protocols of 8 June 1977 only if it is, or at the same time becomes, party to the Geneva Conventions of 12 August 1949*

REMARKS

A State may express its consent to be bound by a treaty in one of three ways

— by its signature, followed by ratification,
— by accession,
— by a declaration of succession.

It then becomes a *State party* to the treaty.

Signature and ratification: by its *signature*, a State undertakes to study a treaty. A treaty is usually open to signature for a certain time after its adoption—by a diplomatic conference, for example.

By *ratification*, a State expresses its consent to be bound by a treaty which it has previously signed.

Accession a State which is not signatory to a treaty may accede to it. The legal effect of accession is the same as that of signature followed by ratification.

Declaration of succession: a newly independent State may declare that it will continue to be bound by a treaty which was applicable to it prior to its independence.

Declarations or *reservations*: such indications mean that the official act of ratification or accession is accompanied by declarations or reservations

** *Declaration in accordance with Article 90, Additional Protocol I* By this declaration a State recognizes the competence of the International Fact-Finding Commission provided for in this article. This declaration may be made at the same time as ratification or accession or at a later date Thes declarations are mentioned overleaf. (See Note '90)

TOTALS

STATES

Total number of States	171
Members of the United Nations	159

GENEVA CONVENTIONS OF 12 AUGUST 1949

Signatory States (all of which subsequently ratified the Conventions)	61
States party to the Conventions	166
— Ratifications	61
— Accessions	64
— Declarations of succession	41

ADDITIONAL PROTOCOLS OF 8 JUNE 1977

PROTOCOL I

Signatory States	62
States party to Protocol I	84
— Ratifications	30
— Accessions	54
Declarations pursuant to Article 90	13

PROTOCOL II

Signatory States	58
States party to Protocol II	74
— Ratifications	27
— Accessions	47

States not party to the Geneva Conventions of 1949 on 30.4.1989

Bhutan	(UN)	Maldives	(UN)	Total 5	
Burma**	(UN)	Nauru	—	States	
Brunei*	(UN)			— members of the United Nations (UN)	4
				— non-members	1

* *States in which the 1949 Geneva Conventions are applicable by virtue of a provisional declaration of application of the treaties*
** *Party to the 1929 Geneva Conventions (sick and wounded prisoners of war)*

ANNEX A86-1

REPORTABLE VIOLATIONS

SECNAVINST 3300.1A (CH-1) and OPNAVINST 3300.52 require each person in the Department of the Navy who has knowledge of or receives a report of an apparent violation of the law of armed conflict to make that incident known to his immediate commander, commanding officer, or to a superior officer as soon as is practicable, and requires Commanders and Commanding Officers receiving reports of noncompliance with or breaches of the law of armed conflict to report the facts promptly to the National Military Command Center. The 1949 Geneva Conventions for the Protection of War Victims (and the 1977 Protocol I Additional to those Conventions for nations bound thereby) proscribe certain acts which are commonly accepted as violations of the law of armed conflict. See paragraph 6.1.2 n.8 and accompanying text.

The following are examples of those incidents which must be reported:

1. Offenses against the wounded, sick, survivors of sunken ships, prisoners of war, and civilian inhabitants of occupied or allied territories including interned and detained civilians: attacking without due cause; willful killing; torture or inhuman treatment, including biological, medical or scientific experiments; physical mutilation; removal of tissue or organs for transplantation; any medical procedure not indicated by the health of the person and which is not consistent with generally accepted medical standards; willfully causing great suffering or serious injury to body or health or seriously endangering the physical or mental health; taking as hostages.

2. Other offenses against prisoners of war (POW): compelling a POW to serve in the armed forces of the enemy; causing the performance of unhealthy, dangerous, or otherwise prohibited labor; infringement of religious rights; and deprivation of the right to a fair and regular trial.

3. Other offenses against survivors of sunken ships, the wounded or sick: when military interests do permit failure to search out, collect, make provision for the safety of, or to care for survivors of sunken ships, or to care for members of armed forces in the field who are disabled by sickness or wounds or who have laid down their arms and surrendered.

4. Other offenses against civilian inhabitants of, including interned and detained civilians, refugees and stateless persons within, occupied or allied territories: unlawful deportation or transfer, unlawful confinement, compelling forced labor, compelling the civilian inhabitant to serve in the armed forces of the enemy or to participate in military operations, denial of religious rights, denaturalization, infringement of property rights, and denial of a fair and regular trial.

5. Attacks on individual civilians or the civilian population, or indiscriminate attacks affecting the civilian population or civilian property, knowing that the attacks will cause loss of life, injury to civilians or damage to civilian property that would be excessive or disproportionate in relation to the concrete and direct military advantage anticipated, and which cause death or serious injury to body or health.

6. Deliberate attacks upon medical transports including hospital ships, coastal rescue craft, and their lifeboats or small craft; medical vehicles; medical aircraft; medical establishments including hospitals; medical units; medical personnel or crews (including shipwrecked survivors); and persons parachuting from aircraft in distress during their descent.

7. Killing or otherwise imposing punishment, without a fair trial, upon spies and other persons suspected of hostile acts while such persons are in United States custody.

8. Maltreatment or mutilation of dead bodies.

9. Willful or wanton destruction of cities, towns, or villages, or devastation not justified by military necessity; aerial or naval bombardment whose sole purpose is to attack and terrorize the civilian population, or to destroy protected areas, buildings or objects (such as buildings used for religious, charitable or medical purposes, historic monuments or works of art); attacking localities which are undefended, open to occupation, and without military significance; attacking demilitarized zones contrary to the terms establishing such zones.

10. Improper use of privileged buildings or localities for military purposes.

11. Attacks on facilities--such as dams and dikes, which, if destroyed, would release forces dangerous to the civilian population--when not justified by military necessity.

12. Pillage or plunder of public or private property.

13. Willful misuse of the distinctive emblem (red on a white background) of the red cross, red crescent or other protective emblems, signs or signals recognized under international law.

14. Feigning an intent to negotiate under a flag of truce or of surrender; feigning incapacitation by wounds or sickness; feigning civilian non-combatant status; feigning protected status by use of signs, emblems or uniforms of the United Nations or a neutral or other nation not a party to the conflict or by wearing civilian clothing to conceal military identity during battle.

15. Firing upon a flag of truce.

16. Denial of quarter, unless bad faith is reasonably suspected.

17. Violations of surrender or armistice terms.

18. Using poisoned or otherwise forbidden arms or ammunition.

19. Poisoning wells, streams or other water sources.

20. Other analogous acts violating the accepted rules regulating the conduct of warfare.

ANNEX AS6-2

RULES FOR COMBATANTS

1. Fight only enemy combatants.

2. Attack only military targets. Do not attack, mistreat or harm:

   - wounded or shipwrecked enemy combatants, or
   - enemy combatants who surrender.

3. Do not kill, torture or mistreat prisoners.

   - Wounded and sick prisoners must receive medical treatment.
   - These are your rights if taken prisoner.

4. Collect and care for the wounded, sick and shipwrecked, whether friend or foe, military or civilian, on land or at sea.

5. Do not attack medical personnel, facilities, equipment, vehicles, ships or aircraft protected by the Red Cross or Red Crescent signs. The Red Cross and Red Crescent signs are reserved for use by:

   - the wounded, sick and shipwrecked;
   - hospitals, ambulances, hospital ships and medical aircraft;
   - doctors, nurses, corpsmen and chaplains;
   - relief goods and transports of the Red Cross/Red Crescent;
   - delegates of the Red Cross/Red Crescent.

6. Destroy only what the mission requires.

7. Treat all civilians, particularly women, children and aged persons, humanely and with respect. These are the actions of a disciplined fighting force in battle.

8. You are obligated to prevent violations of the law of armed conflict. Report all violations to your superiors.

9. Neither a commander nor any other any combatant may order or be ordered to violate the law of armed conflict.

Rules for Combatants Explained

1. **Fight only enemy combatants.**

This rule is consistent with the Principles of War of economy of force, the objective and mass. It supports judicious use of limited military assets, and supports discipline in battle.

See paragraph 5.2 and chapters 8 and 11.

2. **Attack only military targets. Do not attack, mistreat or harm:**
   - **wounded or shipwrecked enemy combatants, or**
   - **enemy combatants who have surrendered.**

   Disarm them and turn them over to superiors.

This rule is consistent with the doctrine for dealing with captured prisoners: silence, search, segregate, secure, safeguard and speed to the rear. They may have valuable information. Humane treatment induces others to surrender. Once he surrenders to you, he is under your control, and his safety is your responsibility until you are relieved of this job.

See paragraphs 8.2.1, 11.6 and 11.8.

3. **Do not kill, torture or mistreat prisoners.**
   - **Wounded and sick prisoners must receive medical treatment.**
   - **These are your rights if taken prisoner.**

Torture or mistreatment of the enemy is counterproductive, no matter what information is obtained. Lack of humane treatment induces the enemy to fight to the death rather than surrender, thereby increasing our own casualties and expenditures of munitions. Killing, torturing or mistreating prisoners will usually produce adverse world public opinion. Do not take personal belongings from captives and detainees who come under your control, or from the bodies of the enemy. Only items of military value may be seized.
Although giving humane treatment does not guarantee equal treatment, inhumane treatment generally does guarantee equivalent actions by the enemy. Treat captives as you would like to be treated.

See paragraphs 11.4 and 11.8.

4. **Collect and care for the wounded, sick and shipwrecked, whether friend or foe, military or civilian, on land or at sea.**

They are no longer a threat and may not be attacked. Send them to a superior or to the nearest medical personnel, as appropriate. Humane treatment may produce active support for you, and can deny support for the enemy, particularly where civilians are involved. Take care of those left at the mercy of the sea. Treat all casualties on the basis of medical priority: a seriously wounded prisoner is entitled to medical treatment before our own personnel who are not seriously injured.

See paragraphs 8.2.1 and 11.4.

5. **Do not attack medical personnel, facilities, equipment, vehicles, ships or aircraft protected by the Red Cross or Red Crescent signs. These signs are reserved for use by:**
   - **the wounded, sick and shipwrecked;**
   - **hospitals, ambulances, hospital ships and medical aircraft;**
   - **doctors, nurses, corpsmen and chaplains;**
   - **relief goods and transports of the Red Cross/Red Crescent;**
   - **delegates of the Red Cross/Red Crescent.**

So long as they are not being used at the time by the enemy for military operations or purposes, you must take as much care as possible not to damage or destroy these objects, buildings and persons. They are not being used against you, and may be needed to care for you if captured by the enemy.
Whether or not marked with a protective sign, you must not fire at any person or object which you recognize as being a medical or religious person or facility.

See paragraphs 11.5 and 11.10.1.

6. **Destroy only what the mission requires.**

Judicious use of military assets calls for timely and accurate fire by the most effective means available. This is the basis for fire support control, targeting and weaponeering doctrine. Unnecessary destruction frequently impedes advance of friendly forces and imposes problems on tactical commanders with refugees or shipwrecked persons.

See paragraphs 8.1.1 and 8.1.2.1.

7. **Treat all civilians, particularly women, children and aged persons, humanely and with respect. These are the actions of a disciplined fighting force in battle.**

Experience shows that mistreatment of civilians frequently alienates the civilian population. Vengeance and taking hostages are prohibited. Women, children and aged persons, in particular, should be protected against ill-treatment, threats and insults. Women in war zones must be protected against rape and forced prostitution. Looting is not the action of a disciplined armed force. Mistreatment of civilians will make them more likely to fight you or to support enemy forces.

See paragraph 11.3.

8. **You are obligated to prevent violations of the law of armed conflict. Report all violations to your superiors.**

If you see any criminal act about to be committed, you must act to prevent it. You can use moral arguments, threaten to report the criminal act, repeat the orders of your superiors, state your personal disagreement, or take other acts to prevent it. The use of deadly force is justified only to protect life and only under conditions of extreme necessity as a last resort, when lesser means have failed. Only in the event the criminal act directly and immediately endangers your life or the life of another person in your care or custody, may you use the amount of force necessary to prevent the violation. Violations of the law of armed conflict must be reported to your superiors. Failure to report a violation is itself an offense.

See paragraphs 6.1.2 and 6.1.4.

9. **Neither a commander nor any other combatant may order or be ordered to violate the law of armed conflict.**

Such an order is obviously criminal on its face when it violates the common sense rules of decency, social conduct and morality upon which the law of armed conflict and the military profession is based.

See paragraphs 6.1.3 and 6.1.4.

CHECKLIST FOR COMPLIANCE WITH LAW OF WAR REQUIREMENTS OF OPERATION PLANS AND CONCEPT PLANS USING THE JOINT OPERATION PLANNING SYSTEM (JOPS) FORMAT

PREFACE

This law of war checklist is intended primarily as an instructional device to demonstrate the vast range of law of war and related issues that arise during the operational staff planning process. Some of the issues raised obviously will not concern staff officers at the small unit level, others are of universal import and require close attention at all levels, and some would be considered only by the National Command Authorities. The checklist was prepared by the Headquarters Marine Corps Law of War Reserve Augmentation Unit (TDE). Although the checklist uses the Joint Operation Planning System (JOPS) format approved by the Joint Chiefs of Staff, it is not an officially sanctioned part of JOPS.

The checklist has been prepared to assist staff officers and commanders in the development and review of operation plans (Oplans) and concept plans (Conplans). Since these plans are an essential link between the commander's decision and the initiation of military action, it is important that all plans ensure that U.S. responsibilities under domestic and international law are properly discharged. Periodic review of operation and concept plans to assure consistency with the law of war is required by paragraph 10g of Marine Corps Order 3300.3 (Marine Corps Law of War Program).

The checklist assumes, without further emphasis, that all regular members of the force to be deployed (1) are equipped with the identity tags and cards required by the 1949 Geneva Conventions; and (2) have received the required accession level law of war training and the additional training required for commanders and those filling billets requiring specialized law of war training. It further assumes that all non-nuclear weapons to be employed by the force have been reviewed for compliance with the law of war in accordance with DOD Instruction 5500.15. The checklist does not cover normal military law or UCMJ questions except as they might interact with or be affected by the law of war.

The Appendix is a list of the reference abbreviations used in the checklist with the full titles of the references spelled out. Also included in the Appendix for convenience

are certain treaties and directives which, while not referred to in this checklist, have possible law of war application to the preparation and review of Oplans and Conplans. The latter documents are identified by an asterisk (*).

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CHECKLIST FOR COMPLIANCE WITH LAW OF WAR REQUIREMENTS OF OPERATION PLANS AND CONCEPT PLANS USING THE JOINT OPERATION PLANNING SYSTEM (JOPS) FORMAT

I. BASIC PLAN.

A. [Classification and Heading of Plan]

1. SITUATION

a. General.
b. Enemy Forces.
c. Friendly Forces.
d. Attachments and Detachments.
e. Assumptions.
f. Legal Considerations.

2. MISSION

3. EXECUTION

a. Concept of Operations.
b. Tasks.
c. Reserve.
d. Coordinating Instructions.

4. ADMINISTRATION AND LOGISTICS

a. Concept of Support.
b. Logistics.
c. Personnel.
d. Coordinating Instructions.

5. COMMAND AND SIGNAL

a. Command Relationships.
b. Signal.
c. Command Posts.

II. ANNEXES.

A. Annex A - Task Organization

1. Appendix 1 - Time-phased force and deployment list

> Does the task organization include civilians or other non-military personnel accompanying the force in the field (see articles 3 and 13 of Hague IV, articles 13 of GWS and GWS(Sea), and article 4 of GPW)? If so:

___ Are they equipped with the proper identification provided for such individuals (see, e.g., article 40 of GWS, article 4(A)(4) and Annex IV(A) of GPW, and DOD Instruction 1000.1, "Identity Cards Required by the Geneva Conventions")?

___ Have they been instructed in their rights, duties and obligations under the law of war?

> Does the task organization include personnel of the American Red Cross Society or other U.S. voluntary aid societies assigned exclusively to medical and medical support duties (see articles 24 and 26 of GWS)?:

___ Are they subject to U.S. military laws and regulations?

___ Has their intended assistance been notified to the enemy?

___ Have they been instructed in their rights, duties and obligations under the law of war?

___ Have they been furnished the identity cards required by article 40 of GWS?

> Does the task organization include personnel of a recognized national red cross society or other voluntary aid societies of a neutral country (see article 27 of GWS)? If so:

___ Are they present with U.S. authorization and the previous consent of their own government?

___ Are they under official U.S. control?

___ Has their intended assistance been notified to the enemy?

___ Have they been instructed in their rights, duties and obligations under the law of war?

___ Have they been furnished the identity cards required by article 40 of GWS?

> Are the medical and religious personnel of the force (article 24 of GWS) equipped with the protective identification provided for such individuals (see article 40 and Annex II of GWS and article 42 and the Annex to GWS(Sea))?

___ Are such personnel assigned exclusively to medical or religious duties or to the administration of medical or religious organizations?

___ Have they been trained in the special rights, duties and obligations of such personnel under the law of war?

___ Has a model of the protective identity card for such personnel been communicated to the enemy as required by article 40 of GWS?

> Are auxiliary medical personnel of the force (article 25 of GWS) equipped with the protective emblems provided for by article 41 of GWS and with the military identity documents specified by that article?

> Does the task organization include personnel of the American Red Cross Society whose duties are not exclusively medical or medical support? If so:

___ Are they aware of the restrictions on their use of the red cross emblem contained in article 44 of GWS?

> Are there any theater-specific law of war training requirements or rules of engagement for the area into which the force is to be deployed?

B. Annex B - Intelligence

1. Appendix 1 - Essential Elements of Information

___ Should the plan call for the collection of information about the enemy's policies, attitudes and practices concerning compliance with the law of war?

___ Should the plan call for the collection of information about allied policies, attitudes and practices concerning compliance with the law of war?

___ Should the plan call for the collection of information about enemy and allied protective emblems and insignia?

___ Should the plan call for locating enemy POW camps?

___ Should the plan call for locating civilian and military hospitals or other medical installations?

___ Should the plan call for locating concentrations of the civilian population, including refugee camps?

___ Should the plan call for locating civilian artistic, scientific or cultural institutions within the contemplated area of operations?

2. Appendix 2 - Signals Intelligence

___ Is the plan consistent with the prohibition against the presence or use of cryptographic equipment aboard hospital ships supporting the U.S. forces, as required by article 34 of GWS(Sea)?

___ Are signals intelligence personnel aware of the prohibition on the enemy's use of cryptographic equipment and encrypted communications on hospital ships?

3. Appendix 3 - Counterintelligence

___ Is the plan consistent with the prohibition on assassination contained in article 23(b) of Hague IV and paragraph 2.11 of Executive Order 12333? (NOTE: Lawful targets and combatants may be attacked whenever and wherever found.)

___ Does the plan provide guidance on the processing of captured enemy agents and spies which is consistent with article 29 of Hague IV and paragraphs 75 to 78 of FM 27-10?

___ Does the plan comply with

international law concerning the arrest, detention or expulsion of host country or third country nationals (see GC generally)?

4. Appendix 4 - Target List/Target Intelligence

___ Are any potential targets restricted or prohibited because of an erroneous interpretation of the requirements of the law of war? If so, they should be promptly identified to the issuing authority. (NOTE: Lawful targets and combatants may be attacked whenever and wherever found.)

___ Is the target list consistent with international law governing the attack or bombardment of defended places only (see paragraphs 39 and 40 of, and Change 1 to, FM 27-10 and articles 25 and 26 of Hague IV)?

___ If the plan contemplates the bombardment of a defended place containing a concentration of civilians, does the plan provide for the giving of an appropriate (i.e., either specific or general) warning (see paragraph 43 of FM 27-10 and article 26 of Hague IV)?

___ Is the target list consistent with the restrictions on intentional attack or bombardment of buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, hospital zones, safety zones, and places where the sick and wounded are collected (see paragraphs 45 and 57 of FM 27-10 and relevant provisions of Hague IV, Hague IX, GC, GWS, GWS(Sea), the Roerich Pact and the Hague Cultural Property Convention)?

___ If the plan contemplates the attack or bombardment of any buildings or zones of the type described in the preceding

paragraph on the grounds that the buildings or zones are being used for military purposes, does the plan require the prior authorization of a sufficiently responsible level of command prior to such attack or bombardment?

___ Does the target list reference or identify appropriate protective symbols (see article 27 of Hague IV, article V of Hague IX, articles 23 and 38 and Annex I of GWS, articles 36, 38 and 40-44 of GWS(Sea), article 23 of GPW, articles 14 and 83 and Annex I of GC, articles I and III of the Roerich Pact, and articles 6 and 16-17 of the Hague Cultural Property Convention)?

___ Does the plan identify the requirement for warnings and the appropriate level of authorizing authority where protective emblems and areas are abused by the enemy (see article 26 of Hague IV, article 21 of GWS, article 34 of GWS(Sea), and article 11 of the Hague Cultural Property Convention)?

___ Is the plan consistent with the fundamental right of self-defense in situations where protective emblems and protected areas are misused against our forces?

5. Appendix 5 - Mapping, Charting & Geodesy

> Do maps and overlays of the contemplated area of operations of U.S. forces identify targets which may be entitled to special protection?

___ Are hospital, safety and neutral zones, if any, identified? Are they visibly marked (see article 23 and Annex I of GWS and article 14 and Annex I of GC)?

___ Are any special agreement hospital ship safety zones identified?

___ Are friendly and neutral embassies, consulates and chanceries identified?

___ Are POW and civilian internee and refugee camps identified? Are they visibly marked (see article 23 of GPW and article 83 of GC)?

___ Are hospitals, schools, and other civilian facilities such as orphanages, retirement homes and the like identified to the extent feasible?

___ Are facilities and sites such as nuclear plants, chemical plants and dams, damage to which might be dangerous to the populace, identified?

___ Are important cultural and artistic locations identified? Are they visibly marked in accordance with article 27 of Hague IV, article V of Hague IX, article III of the Roerich Pact, or article 6 of the Hague Cultural Property Convention?

6. Appendix 6 - Human Source Intelligence

___ Has the right of members of the force to POW status if captured been considered in determining whether modifications to or elimination of their uniforms, or other ruses, will be permitted (see articles 23, 24 and 29 of Hague IV and article 4 of GPW)?

___ Does the plan include appropriate instructions to insure proper treatment of prisoners of war during interrogation? In particular:

(i) Is the plan consistent with the

prohibitions against the killing, torture or mistreatment of prisoners of war effective from the time of their surrender (see paragraphs 28, 29, 84 and 85 of FM 27-10 and the provisions of GPW and Hague IV cited therein)?

(ii) Does the plan recognize the limitations on the interrogation of prisoners of war including the requirement that they be interrogated in a language they understand (see article 17 of GPW)?

(iii) Does the plan provide a procedure for inventorying and safeguarding POW personal property?

(iv) Does the plan provide guidance on disposition of captured enemy armaments including limitations on the taking of souvenirs? (See Army Regulation 608-4 of 28 August 1969, "Control and Registration of War Trophies and War Trophy Firearms." (Issued by all services as Chief of Naval Operations Instruction 3460.7A, Air Force Regulation 125-13 and Marine Corps Order 5800.6A).)

7. Appendix 7 - Intelligence Estimate
8. Appendix 8 - Tactical Study of Weather and Terrain
9. Appendix 9 - Beach Study
10. Appendix 10 - Helicopter Landing Zone/Drop Zone Study
11. Appendix 11 - Surveillance and Reconnaissance Plan

___ Has the right of members of the force to POW status if captured been considered in determining whether modifications to or elimination of their uniforms, or other ruses, will be permitted (see articles 23, 24 and 29 of Hague IV and article 4 of GPW)?

C. Annex C - Operations

1. Appendix 1 - Nuclear Operations

a. Tab A - Nuclear Options
b. Tab B - Nuclear Option Analysis
c. Tab C - Reconnaissance Operations to Support Nuclear Options

___ If nuclear weapons are to be deployed with U.S. forces, will any deployment route be over or through foreign countries which prohibit or restrict such weapons?

d. Tab D - Nuclear Fire Support Table/Target List
e. Tab E - Nuclear Target Overlay

2. Appendix 2 - Chemical Warfare and NBC Defense Operations

___ Does the plan contemplate the use of riot control agents, defoliants, chemical agents or gases of any kind? If so, is the intended use consistent with the Geneva Gas Protocol and Executive Order 11850? (See also paragraphs 37 and 38 and Change 1 to FM 27-10 and article 23(a) of Hague IV).

___ If the plan contemplates the use of any of the above, is the prior authorization of a sufficiently responsible level of command required (see Executive Order 11850 and Annex F, Joint Strategic Capabilities Plan)?

___ Is the contemplated use consistent with the provisions of the UN Environmental Modification Convention?

3. Appendix 3 - Electronic Warfare Operations
4. Appendix 4 - Psychological Operations

___ Is the plan consistent with the requirement that psyops efforts supporting U.S. forces comply with international law?

(i) Do such propaganda operations constitute permissible ruses of war as allowed by article 24 of Hague IV?

(ii) Is there sufficient guidance to ensure psyops efforts do not violate the restrictions on coercion, compulsion, and force towards civilians set forth in articles 23(h), 44 and 45 of Hague IV and articles 27, 31 and 51 of GC?

5. Appendix 5 - Unconventional Warfare Operations

___ Does the plan contemplate clandestine operations designed to kill high ranking or key enemy officers or authorities? If so, are such plans compatible with the prohibition against assassination (see paragraph 31 of FM 27-10, article 23(b) of Hague IV and paragraph 2.11 of Executive Order 12333)? (NOTE: Lawful targets and combatants may be attacked whenever and wherever found.)

___ Does the plan require unconventional warfare personnel to conduct operations in uniform to the extent practicable in order to avoid denial of POW status if captured (see article 29 of Hague IV and article 4 of GPW)?

6. Appendix 6 - Search and Rescue Operations

___ Is the plan consistent with the fact that search and rescue personnel and their transport do not enjoy special

protection under the law of war (see, e.g., article 27 of GWS(Sea))?

___ Is the plan consistent with the requirement to take all possible measures to search for and collect shipwrecked, wounded and sick combatants, without delay following an engagement, in accordance with article 15 of GWS and article 18 of GWS(Sea)?

___ Is the plan consistent with common article 12 of GWS and GWS(Sea) requiring U.S. forces to care for shipwrecked, wounded and sick combatants without adverse distinction other than medical priority?

___ Is the plan consistent with the requirement that enemy wounded, sick and shipwrecked combatants who fall into the hands of U.S. forces be accorded prisoner of war status in compliance with article 14 of GWS, articles 14 and 16 of GWS(Sea), and article 4 of GPW?

___ Is the plan consistent with the requirement that enemy wounded, sick and shipwrecked religious and medical personnel who fall into the hands of U.S. forces be accorded retained person status in compliance with articles 24, 26 and 28 of GWS and article 33 of GPW?

7. Appendix 7 - Deception

___ Is the plan consistent with the prohibition against the use of treachery or perfidy to gain an advantage over the enemy (see article 23 of Hague IV)?

___ Is the plan consistent with the prohibition against the improper use of a flag of truce, and misuse of the

protective emblems of the Geneva Conventions (see article 23(f) of Hague IV, article 44 of GWS and article 45 of GWS(Sea))?

___ Is the plan consistent with the prohibition of article 23(f) of Hague IV against the improper use of the enemy's national flag, military insignia and uniform?

___ Are other ruses or deceptions consistent with the law of war (see, e.g., article 24 of Hague IV)?

___ Does the plan designate the appropriate level of command to determine whether medical installations, facilities and personnel will be protected by the protective emblem of the Geneva Conventions or will rely upon camouflage and camouflage discipline (see articles 39 and 42 of GWS and article 41 of GWS(Sea))?

8. Appendix 8 - Rules of Engagement

___ Do any of the rules of engagement restrict the operational freedom of action of the force because of an erroneous interpretation of the requirements of the law of war? If so, they should be promptly identified to the issuing authority.

___ Do any of the rules of engagement erroneously make <u>avoidance</u> of collateral civilian casualties and/or damage to civilian objects a primary concern? Only <u>intentional</u> attack of civilians and employment of weapons and tactics which cause <u>excessive</u> collateral civilian casualties are prohibited. Any actions taken to avoid collateral civilian casualties and damage must be consistent with mission accomplishment and force security.

___ Do the rules of engagement recognize the inherent right of self-defense of all persons?

___ Is the plan consistent with the restrictions on unnecessary killing and the devastation, destruction, or seizure of property (see paragraphs 3, 34, 41, 47, 56, 58, and 59 and Change 1 to FM 27-10; articles 27 and 56 of Hague IV; and article 53 of GC)?

___ If the plan contemplates any military actions which could only be justified as reprisals, is it consistent with the requirement that reprisals may only be conducted with the approval of the National Command Authorities (see paragraph 497 of FM 27-10 and the provisions of the Geneva Conventions cited therein)?

9. Appendix 9 - Reconnaissance

___ Has the right of members of the force to POW status if captured been considered in determining whether modifications to or elimination of their uniforms, or other ruses, will be permitted (see articles 23, 24 and 29 of Hague IV and article 4 of GPW)?

10. Appendix 10 - Operations Overlay
11. Appendix 11 - Concept of Operations

___ Does the concept of operations contain any limitations on the operational freedom of action of the force which are erroneously attributed to law of war requirements? If so, they should be promptly identified to the issuing authority.

___ Is the plan consistent with the restrictions on unnecessary killing and

the devastation, destruction, or seizure of property (see paragraphs 3, 41, 47, 56, 58, and 59 of FM 27-10; articles 27 and 56 of Hague IV; and article 53 of GC)?

___ If the plan contemplates any military actions which could only be justified if done as reprisals, is it consistent with the requirement that reprisals may only be conducted with the approval of the National Command Authorities (see paragraph 497 of FM 27-10 and the provisions of the Geneva Conventions cited therein)?

12. Appendix 12 - Fire Support

___ Are the fire support plans consistent with international law governing the attack or bombardment of defended places only (see paragraphs 39 and 40 of FM 27-10 and articles 25 and 26 of Hague IV)?

___ If a fire support plan contemplates the bombardment of a defended place containing a concentration of civilians, does the plan provide for the giving of an appropriate (i.e., either specific or general) warning (see paragraph 43 of FM 27-10 and article 26 of Hague IV)?

___ Are the fire support plans consistent with the restrictions on intentional attack or bombardment of buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, hospital zones, safety zones, and places where the sick and wounded are collected (see paragraphs 45 and 57 of FM 27-10 and relevant provisions of Hague IV, Hague IX, GC, GWS, GWS(Sea), the Roerich Pact and the Hague Cultural Property Convention)?

___ If the fire support plans contemplate the attack or bombardment of any buildings or zones of the type described in the preceding paragraph on the grounds that the buildings or zones are being used for military purposes, do they require the prior authorization of a sufficiently responsible level of command prior to such attack or bombardment?

___ Do the fire support plans reference or identify appropriate protective symbols (see article 27 of Hague IV, article V of Hague IX, articles 23 and 38 and Annex I of GWS, articles 36, 38 and 40-44 of GWS(Sea), article 23 of GPW, articles 14 and 83 and Annex I of GC, articles I and III of the Roerich Pact, and articles 6 and 16-17 of the Hague Cultural Property Convention)?

___ Do the fire support plans identify the requirement for warnings and the appropriate level of authorizing authority where protective emblems and areas are abused (see article 26 of Hague IV, article 21 of GWS, article 34 of GWS(Sea), and article 11 of the Hague Cultural Property Convention)?

___ Are the fire support plans consistent with the fundamental right of self-defense in situations where protective emblems and protected areas are misused against our forces?

___ Do maps and overlays of the contemplated area of operations of U.S. forces identify targets which may be entitled to special protection?

___ Are hospital, safety and neutral zones, if any, identified? Are they visibly marked (see article 23 and Annex I of GWS and article 14 and Annex I of GC)?

___ Are any special agreement hospital ship safety zones identified?

___ Are friendly and neutral embassies, consulates and chanceries identified?

___ Are POW and civilian internee and refugee camps identified? Are they visibly marked (see article 23 of GPW and article 83 of GC)?

___ Are hospitals, schools, and other civilian facilities such as orphanages, retirement homes and the like identified to the extent feasible?

___ Are facilities and sites such as nuclear plants, chemical plants and dams, damage to which might be dangerous to the populace, identified?

___ Are important cultural and artistic locations identified? Are they visibly marked in accordance with article 27 of Hague IV, article V of Hague IX, article III of the Roerich Pact, or article 6 of the Hague Cultural Property Convention?

a. Tab A - Air Fire Plan

(1) Enclosure 1 - Preplanned Close Air Support
(2) Enclosure 2 - Air Target List
(3) Enclosure 3 - Air Fire Plan Target Overlay

b. Tab B - Artillery Fire Plan

(1) Enclosure 1 - Target Overlay
(2) Enclosure 2 - Fire Support Table (Preparation Fires)
(3) Enclosure 3 - Fire Support Table (Groups of Fires)

c. Tab C - Naval Gunfire Plan

(1) Enclosure 1 - Naval Gunfire Support Operations Overlay
(2) Enclosure 2 - Schedule of Fires
(3) Enclosure 3 - Naval Gunfire Reports
(4) Enclosure 4 - Radar Beacon Plan

d. Tab D - Chemical Fire Plan

___ Does the plan contemplate the use of riot control agents, defoliants, chemical agents or gases of any kind? If so, is the intended use consistent with the Geneva Gas Protocol and Executive Order 11850? (See also paragraphs 37 and 38 of, and Change 1 to, FM 27-10 and article 23(a) of Hague IV).

___ If the plan contemplates the use of any of the above, is the prior authorization of a sufficiently responsible level of command required (see Executive Order 11850 and Annex F, Joint Strategic Capabilities Plan)?

___ Is the contemplated use consistent with the provisions of the UN Environmental Modification Convention?

(1) Enclosure 1 - Chemical Fire Support Table/Target List
(2) Enclosure 2 - Chemical Target Overlay

e. Tab E - Target List
f. Tab F - Fire Support Coordination Plan
g. Tab G - Fire Support Communication Plan
h. Tab H - Countermechanized Fire Plan

13. Appendix 13 - Countermechanized Plan

a. Tab A - Countermechanized Overlay

14. Appendix 14 - Counterattack Plan

a. Tab A - Operation Overlay
b. Tab B - Fire Support

15. Appendix 15 - Breaching Plan

16. Appendix 16 - Obstacle/Barrier Plan

___ Is the barrier plan consistent with the prohibition against indiscriminate and uncharted mining?

D. Annex D - Logistics

___ Will the plan support the logistics requirements for anticipated prisoners of war, refugees and internees?

___ If the plan contemplates an occupation can it be supported logistically with respect to the requirements of the civilian population (see articles 47-78 of GC)?

1. Appendix 1 - Petroleum, Oils, and Lubricants Supply
2. Appendix 2 - Mortuary Services

___ Does the plan provide for the collection, care, and accounting for enemy dead in accordance with articles 16 and 17 of GWS and articles 19 and 20 of GWS(Sea)?

___ Is the plan consistent with the limitations on cremation and the provisions regarding burial at sea of enemy dead (see article 17 of GWS and article 20 of GWS(Sea))?

3. Appendix 3 - Medical Services

___ Is the plan consistent with the limitations on capture or destruction of enemy medical material, stores and equipment imposed by article 33 of GWS and article 38 of GWS(Sea)?

___ Is the plan consistent with the qualified requirement of articles 23

and 56 of GC for the free passage of medical and hospital stores intended only for civilians of the opponent?

___ If the plan contemplates an occupation does it provide for medical supplies for the occupied population to the fullest extent of the means available (as required by article 55 of GC)?

___ Is the plan consistent with the limitations on requisition of medical materials and stores of an occupied population contained in article 57 of GC?

___ Does the plan provide, subject to the commander's discretion, for the marking with the red cross of all U.S. medical vehicles, facilities and stores in accordance with articles 39 and 42 of GWS and article 41 of GWS(Sea), and for their use exclusively for medical purposes if so marked?

4. Appendix 4 - Mobility/Transportation

___ Is medical transport marked, at the discretion of the commander, with the protective emblem provided for by article 39 of GWS and article 41 of GWS(Sea), and is their intended use restricted exclusively to medical purposes if so marked?

___ Will the plan support the possible requirement for evacuation of prisoners of war, civilian internees, refugees, and the sick and wounded?

___ Have the names and descriptions of all hospital ships been notified to the parties to the conflict at least ten days before their employment, as required by articles 22, 24 and 25 of GWS(Sea)?

___ Have all vessels converted to hospital ships been stripped of inappropriate armament and cryptographic equipment?

___ Are all hospital ships, rescue craft and lifeboats marked in accordance with the requirements of article 43 of GWS(Sea)?

___ If hospital ships of the American Red Cross Society, other recognized U.S. relief societies or private U.S. citizens are employed, have they been given an official commission as required by article 24 of GWS(Sea)?

___ If hospital ships of a national red cross society, other officially recognized relief societies, or private citizens of neutral countries are employed, have they placed themselves under the control of one of the parties to the conflict as required by article 25 of GWS(Sea)?

___ Are crews and medical personnel of hospital ships aware of their rights, duties and obligations under articles 29, 32 and 34-37 of GWS(Sea)?

___ If any aircraft are to be exclusively employed for medical and medical support purposes are they marked in accordance with the provisions of article 36 of GWS and article 39 of GWS(Sea)?

5. Appendix 5 - Civil Engineering Support Plan

___ Does the plan provide, as far as possible, for the locating of medical establishments and units in such a manner as not to imperil their safety, in accordance with article 19 of GWS?

___ Does the plan provide for the locating of POW camps in such a manner as not to expose them to the hazards of combat, in accordance with article 23 of GPW?

___ Is the plan consistent with the possible requirement for construction of POW, internee, and civilian refugee camps?

6. Appendix 6 - Nonnuclear Ammunition

___ Does the plan provide guidance on disposition of captured enemy armaments including limitations on the taking of souvenirs? (See Army Regulation 608-4 of 28 August 1969, "Control and Registration of War Trophies and War Trophy Firearms." (Issued by all services as Chief of Naval Operations Instruction 3460.7A, Air Force Regulation 125-13 and Marine Corps Order 5800.6A).)

E. Annex E - Personnel

___ Are all members of the force subject to the UCMJ for law of war purposes?

1. Appendix 1 - Enemy POWs, Civilian Internees, and Other Detained and Retained Persons

___ Is the plan consistent with the provisions of FM 19-40, Enemy Prisoners of War, Civilian Internees and Detained Persons?

___ Does the plan include procedures for ascertaining whether various persons who fall into the hands of U.S. forces are entitled to treatment as prisoners of war or retained personnel, or to be released (see articles 4 and 5 of GPW,

articles 24-32 of GWS, and articles 36-37 of GWS (Sea))?

___ Is the plan consistent with the requirement that where there is any doubt as to the status of a person who has committed a belligerent act and is in the hands of U.S. forces such person shall be treated as a prisoner of war until such time as his status is determined by a competent tribunal (see article 5 of GPW)?

___ Does the plan provide procedures for setting up and operating an article 5 (GPW) tribunal?

___ Does the plan include appropriate instructions to insure proper treatment of prisoners of war at the point of capture and during interrogation? In particular:

(i) Is the plan consistent with the prohibitions against the killing, torture or mistreatment of prisoners of war effective from the time of their surrender (see paragraphs 28, 29, 84 and 85 of FM 27-10 and the provisions of GPW and Hague IV cited therein)?

(ii) Does the plan recognize the limitations on the interrogation of prisoners of war, including the requirement that they be interrogated in a language they understand (see article 17 of GPW)?

(iii) Does the plan provide a procedure for inventorying and safeguarding POW personal property?

(iv) Are procedures for the evacuation of prisoners of war consistent with articles 19 and 20 of GPW?

(v) Does the plan provide for furnishing identity documents to prisoners of war who possess none, consistent with article 18 of GPW?

___ If the plan contemplates transfer of prisoners of war to the custody of allied forces, is it consistent with the requirements of article 12 of GPW and DOD Directive 5100.69, "DOD Program for Prisoners of War and Other Detainees"?

___ Does the plan assign responsibility to an appropriate component command (usually Army) for the care and handling of prisoners of war? In particular:

(i) Internment (see articles 21-24 and 111 of GPW);

(ii) Quarters, food and clothing (see articles 25-28 of GPW);

(iii) Hygiene and medical care (see articles 29-32 and 112-114 of GPW);

(iv) Religious, educational and recreational activities (see articles 34-38 of GPW);

(v) Labor and compensation (see articles 49-57 of GPW);

(vi) Information bureaus, mail service and other communications with the exterior (see articles 69-77 of GPW);

(vii) Prisoner relations (see articles 79-81 of GPW);

(viii) Disciplinary and penal sanctions (see articles 82-108 and 115 of GPW);

(ix) Release and repatriation (see articles 109-110 and 112-119 of GPW);

(x) Care of enemy wounded and sick and graves registration (see articles 109-110, 112-114 and 120-121 of GPW).

___ Is the plan consistent with the requirements of articles 79-135 concerning the treatment of civilian internees?

2. Appendix 2 - Processing of Formerly Captured, Missing or Detained U.S. Personnel

___ Does the plan include appropriate procedures for reporting alleged war crimes and related misconduct committed by the enemy, and alleged misconduct by U.S. and allied POWs, and assign responsibility for the collection and preservation of evidence of all such matters (see, e.g., common article 49/50/129/146 of the Geneva Conventions)?

F. Annex F - Public Affairs

___ Is the plan consistent with the serious incident reporting requirements of higher headquarters as they pertain to alleged war crimes and related misconduct (see the various directives in the Appendix)?

1. Appendix 1 - Personnel Requirements

2. Appendix 2 - Equipment Requirements for Sub-JIB's

G. Annex G - Civil Affairs

___ Is the plan consistent with the guidance contained in FM 41-5 and FM 41-10?

1. Appendix 1 - Public Safety

___ Does the plan provide guidance on requests for asylum and temporary refuge in accordance with DOD Directive 2000.11, "Procedures for Handling Requests for Political Asylum and Temporary Refuge"?

___ If the plan contemplates the internment of civilians, does it provide guidance on the establishment and operation of internee camps in accordance with the requirements of articles 79-135 of GC until such time that the camps can be turned over to other agencies?

___ If the plan contemplates occupation of foreign or enemy territory by U.S. forces, does the plan provide that civil affairs operations conform to international law relating to occupations as set forth in articles 42- 56 of Hague IV and articles 47-78 of GC?

(i) Is the plan consistent with the obligation of an occupier to restore and preserve public order and safety while respecting, in accordance with article 43 of Hague IV, the laws in force in that country?

(ii) If the plan includes draft proclamations, laws, or ordinances

for use in the occupied territory, do those documents conform to the requirements of international law as set forth in articles 42-56 of Hague IV and articles 64-78 of the GC?

(iii) Is the plan consistent with the requirements of international law to avoid the unnecessary destruction of public utilities and safety facilities?

(iv) Does the plan comply with international law regarding methods of property control and does it recognize the limitations on the requisitioning, seizure and use of civilian property (see, e.g., articles 43 and 47-56 of Hague IV and articles 33, 53, 97 and 108 of GC)?

(v) Is the plan consistent with international law in affording maximum protection to shrines, buildings, symbols, etc., associated with the religion and culture of the civilian populace?

(vi) If the plan contemplates the utilization of the services and labor of the civilian population, are the procedures consistent with the requirements of Hague IV and GC in addition to U.S. policy as set forth in DAPam 690-80, Administration of Foreign Labor During Hostilities? Are they consistent with existing alliance agreements and status of forces agreements?

(vii) Does the plan allow procedures for civilians to send and receive news of a strictly personal nature to members of their families in accordance with articles 25 and 26 of GC?

(viii) Is the plan consistent with the prohibition against the improper transfer, deportation or evacuation of civilians in occupied territory contained in article 49 of GC?

2. Appendix 2 - Public Health and Welfare

___ Does the plan ensure that all aspects of the civil affairs program conform to the requirements of international law, and in particular to GC, with a view to giving maximum attention to alleviating the human suffering of the civilian population?

___ Does the plan ensure that refugee collection points and routes of evacuation are consistent with the scheme of maneuver and as remote as practicable from those areas where combat can be expected?

___ Does the plan allow, where tactically appropriate, for the evacuation from besieged areas of wounded, sick, infirm, young and aged civilians as set forth in article 17 of GC?

___ Is the plan consistent with the special obligation imposed by article 16 and other provisions of GC to give particular protection and respect to civilian wounded and sick, aged and infirm, and expectant mothers?

___ Does the plan provide that displaced persons, refugees and evacuees be treated in accordance with the requirements of international law?

___ Does the plan comply with the protection required for civilian

hospitals and staff set forth in articles 18-20 and 57 of GC?

___ Does the plan provide for or reference draft agreements for the establishment of safety or neutral zones for civilians as permitted in article 15 of GC?

3. Appendix 3 - Information and Education

___ If the plan includes draft proclamations, laws, or ordinances for use in the occupied territory, do those documents conform to the requirements of international law as set forth in articles 42-56 of Hague IV and articles 64-78 of the GC?

H. Annex H - Environmental Services

___ Are the provisions of the plan for disposition of enemy dead consistent with both the law of war (article 17 of GWS and article 20 of GWS(Sea)) and environmental restrictions?

___ Are the provisions of the plan for disposition of captured munitions, fuels, and other toxic and dangerous substances consistent with environmental restrictions such as the UN Environmental Modification Convention?

J. Annex J - Command Relationships

___ Are the command relationships consistent with the concept and obligation of command responsibility under the law of war?

1. Appendix 1 - Command Relations Diagram

K. Annex K - Communications and Electronics

1. Appendix 1 - Communications Security

___ Is the plan consistent with the prohibition against cryptographic methods and equipment on hospital ships (article 34 of GWS(Sea))?

___ Does the plan provide for medical aircraft to have the communications capability to respond to "every [enemy] summons to alight" during mutually agreed medevac missions as required by article 36 of GWS and article 39 of GWS(Sea)?

___ Does the plan provide for the communications capability to communicate with the enemy in furtherance of the various notification, truce and local agreement provisions of the Geneva Conventions and Hague IV?

2. Appendix 2 - Radio Circuit Plan
3. Appendix 3 - Call Signs and Routing Indicators
4. Appendix 4 - Wire and Multichannel Radio Plan
5. Appendix 5 - Visual and Sound Communication
6. Appendix 6 - System Management and Control
7. Appendix 7 - Command Post Displacement
8. Appendix 8 - Tactical Satellite Communications
9. Appendix 9 - Contingency Communications

___ Does the plan allow for communications with the enemy for truce and local agreement purposes?

___ If the plan contemplates local agreements with the enemy for medical aircraft operations and overflights, do medical aircraft have the communications capability to respond to "every [enemy] summons to alight" required by article 36 of GWS and article 39 of GWS(Sea)?

10. Appendix 10 - Commercial Telecommunications
11. Appendix 11 - Special Maintenance Procedures
12. Appendix 12 - Messenger Service

L. Annex L - Operations Security

1. Appendix 1 - Essential Elements of Friendly Information

___ Should the plan call for the collection of information about allied policies, attitudes and practices concerning compliance with the law of war?

___ Should the plan call for the collection of information about enemy and allied protective emblems and insignia?

M. Annex M - Air Operations

1. Appendix 1 - Air Defense/Antiair Warfare

___ Is the air defense appendix consistent with the permissible attack of descending enemy paratroopers and the impermissible attack of aircrews abandoning disabled enemy aircraft?

2. Appendix 2 - Air Support
3. Appendix 3 - Assault Support
4. Appendix 4 - Air Control
5. Appendix 5 - Search and Rescue

___ Is the plan consistent with the fact that search and rescue personnel and their transport do not enjoy special protection under the law of war (see, e.g., article 27 of GWS(Sea))?

___ Is the plan consistent with the requirement to take all possible measures to search for and collect shipwrecked, wounded and sick combatants, without delay following an

engagement, in accordance with article 15 of GWS and article 18 of GWS(Sea)?

___ Is the plan consistent with common article 12 of GWS and GWS(Sea) requiring U.S. forces to care for shipwrecked, wounded and sick combatants without adverse distinction other than medical priority?

___ Is the plan consistent with the requirement that enemy wounded, sick and shipwrecked combatants who fall into the hands of U.S. forces be accorded prisoner of war status in compliance with article 14 of GWS, articles 14 and 16 of GWS(Sea), and article 4 of GPW?

___ Is the plan consistent with the requirement that enemy wounded, sick and shipwrecked religious and medical personnel who fall into the hands of U.S. forces be accorded retained person status in compliance with articles 24, 26 and 28 of GWS and article 33 of GPW?

6. Appendix 6 - Armament
7. Appendix 7 - Aircraft Schedules
8. Appendix 8 - Air Communications

___ If the plan contemplates local agreements with the enemy for medical aircraft operations and overflights, do medical aircraft have the communications capability to respond to "every [enemy] summons to alight" required by article 36 of GWS and article 39 of GWS(Sea)?

9. Appendix 9 - Air Operations Overlay

P. Annex P - Combat Service Support

1. Appendix 1 - Concept of Combat Service Support
2. Appendix 2 - CSS Overlay

3. Appendix 3 - CSS Installations Defense
4. Appendix 4 - Reports
5. Appendix 5 - Bulk Fuel
6. Appendix 6 - Medical/Dental

___ Are medical personnel of the force (article 24 of GWS) equipped with the protective emblems provided for by article 38 of GWS and article 41 of GWS(Sea), and with the special identification cards referenced in those conventions?

___ Are such personnel assigned exclusively to medical duties or to the administration of medical organizations (article 24 of GWS)?

___ Have such personnel been trained in their special rights, duties and obligations under the law of war?

___ Are auxiliary medical personnel of the force (article 25 of GWS) equipped with the protective emblems provided for by article 41 of GWS and with the military identity documents specified by that article?

___ Does the plan reference or identify appropriate protective symbols (see article 38 of GWS and article 41 of GWS(Sea)?

___ Does the plan provide for a command determination as to whether medical personnel and facilities will display the protective emblem or will rely upon camouflage and camouflage discipline?

___ Does the plan provide, subject to the commander's discretion, for the marking with the red cross of all U.S. medical vehicles, facilities and stores in accordance with articles 39 and 42 of GWS and article 41 of GWS(Sea), and for

their use exclusively for medical purposes if so marked?

___ Does the plan provide, as far as possible, for the locating of medical establishments and units in such a manner as not to imperil their safety, in accordance with article 19 of GWS?

___ Have the names and descriptions of all hospital ships been notified to the parties to the conflict at least ten days before their employment as required by articles 22, 24 and 25 of GWS(Sea)?

___ Is the plan consistent with the prohibition against cryptographic methods and equipment on hospital ships (article 34 of GWS(Sea))?

___ Have all vessels converted to hospital ships been stripped of inappropriate armament and cryptographic equipment?

___ Are all hospital ships, rescue craft and lifeboats marked in accordance with the requirements of article 43 of GWS(Sea)?

___ If hospital ships of the American Red Cross Society, other recognized U.S. relief societies or private U.S. citizens are employed, have they been given an official commission as required by article 24 of GWS(Sea)?

___ If hospital ships of a national red cross society, other officially recognized relief societies, or private citizens of neutral countries are employed, have they placed themselves under the control of one of the parties to the conflict as required by article 25 of GWS(Sea)?

___ Are crews and medical personnel of hospital ships aware of their rights, duties and obligations under articles 29, 32 and 34-37 of GWS(Sea)?

___ If any aircraft are to be exclusively employed for medical and medical support purposes are they marked in accordance with the provisions of article 36 of GWS and article 39 of GWS(Sea)?

___ Is the plan consistent with the fact that search and rescue personnel and their transport do not enjoy special protection under the law of war (see, e.g., article 27 of GWS(Sea))?

___ Does the plan contemplate local agreements with the enemy for medical aircraft operations and overflights (see article 36 of GWS and article 39 of GWS(Sea)?

(i) If so, do medical aircraft have the communications capability to respond to "every [enemy] summons to alight" required by article 36 of GWS and article 39 of GWS(Sea)?

___ Is the plan consistent with the requirement to take all possible measures to search for and collect shipwrecked, wounded and sick combatants, without delay following an engagement, in accordance with article 15 of GWS and article 18 of GWS(Sea)?

___ Is the plan consistent with common article 12 of GWS and GWS(Sea) requiring U.S. forces to care for shipwrecked, wounded and sick combatants without adverse distinction other than medical priority?

___ Is the plan consistent with the requirement that enemy wounded, sick

and shipwrecked combatants who fall into the hands of U.S. forces be accorded prisoner of war status in compliance with article 14 of GWS and articles 14 and 16 of GWS(Sea)?

___ Is the plan consistent with the requirement that enemy wounded, sick and shipwrecked religious and medical personnel who fall into the hands of U.S. forces be accorded retained person status in compliance with articles 24, 26 and 28 of GWS?

___ Does the plan provide for the care of enemy wounded and sick and graves registration (see articles 109-110, 112-114 and 120-121 of GPW).

___ Is the plan consistent with the limitations on capture or destruction of enemy medical material, stores and equipment imposed by article 33 of GWS and article 38 of GWS(Sea)?

___ Is the plan consistent with the special obligation imposed by article 16 of GC to give particular protection and respect to civilian wounded and sick, aged and infirm, and expectant mothers?

___ Is the plan consistent with the qualified requirement of articles 23 and 56 of GC for the free passage of medical and hospital stores intended only for civilians of the opponent?

___ If the plan contemplates an occupation does it provide for medical supplies for the occupied population to the fullest extent of the means available (as required by article 55 of GC)?

___ Does the plan recognize the limitations on requisition of medical

material and stores of an occupied population?

___ Are the provisions of the plan for disposition of enemy dead consistent with both the law of war (article 17 of GWS and article 20 of GWS(Sea)) and environmental restrictions?

7. Appendix 7 - Plan for Landing Supplies
8. Appendix 8 - ADPS Support
9. Appendix 9 - Personnel

___ Are personnel provisions consistent with the requirements of DAPam 690-80, Administration of Foreign Labor During Hostilities (1971) (NAVSO P-1910; AFM 40-8; MCO P12190.1) and with any relevant alliance and status of forces agreements?

10. Appendix 10 - Support Agreements

___ Are support agreements consistent with the provisions of DAPam 690-80, Administration of Foreign Labor During Hostilities (1971) (NAVSO P-1910; AFM 40-8; MCO P12190.1) and with any relevant alliance and status of forces agreements?

11. Appendix 11 - Force Landing Support Party

Q. Annex Q - Legal

1. Appendix 1 - Personnel Legal Assistance
2. Appendix 2 - Military Justice

___ Are all members of the force subject to the UCMJ for law of war purposes?

3. Appendix 3 - Claims
4. Appendix 4 - International Law Considerations

___ Have the various elements of the plan been reviewed for law of war considerations by the appropriate staff sections and members of the executive and special staffs?

___ Does the concept of operations contain any limitations on the operational freedom of action of the force which are erroneously attributed to law of war requirements? If so, they should be promptly identified to the issuing authority.

___ Do any of the rules of engagement restrict the operational freedom of action of the force because of an erroneous interpretation of the requirements of the law of war? If so, they should be promptly identified to the issuing authority.

___ Do any of the rules of engagement erroneously make <u>avoidance</u> of collateral civilian casualties and/or damage to civilian objects a primary concern? Only <u>intentional</u> attack of civilians and employment of weapons and tactics which cause <u>excessive</u> collateral civilian casualties are prohibited. Any actions taken to avoid collateral civilian casualties and damage must be consistent with mission accomplishment and force security.

___ Do the rules of engagement recognize the inherent right of self-defense of all persons?

___ Have the requirements for any <u>special</u> law of war training, planning and equipment been met? In particular:

(i) Are any civilians or other non-military personnel accompanying the force equipped with the proper identification provided for such individuals (see, e.g., article 40

of GWS, article 4(A)(4) and Annex IV(A) of GPW, and DOD Instruction 1000.1, "Identity Cards Required by the Geneva Conventions"), and have they been instructed in their rights, duties and obligations under the law of war?

(ii) Does the force include personnel of the American Red Cross Society or other U.S. voluntary aid societies assigned exclusively to medical and medical support duties (see articles 24 and 26 of GWS)? If so:

___ Are they subject to U.S. military laws and regulations?

___ Has their intended assistance been notified to the enemy?

___ Have they been instructed in their rights, duties and obligations under the law of war?

___ Have they been furnished the identity cards required by article 40 of GWS?

(iii) Does the force include personnel of a recognized national red cross society or other voluntary aid societies of a neutral country (see article 27 of GWS)? If so:

___ Are they present with U.S. authorization and the previous consent of their own government?

___ Are they under official U.S. control?

___ Has their intended assistance been notified to the enemy?

___ Have they been instructed in their rights, duties and obligations under the law of war?

___ Have they been furnished the identity cards required by article 40 of GWS?

(iv) Does the force include personnel of the American Red Cross Society whose duties are not exclusively medical? If so:

___ Are they aware of the restrictions on their use of the red cross emblem contained in article 44 of GWS?

(v) Are the medical and religious personnel of the force equipped with the protective identification provided for such individuals (see article 40 and Annex II of GWS and article 42 and the Annex to GWS(Sea)), and have they been trained in their special rights, duties and obligations under the law of war?

___ Has a model of the protective identity card for such personnel been communicated to the enemy as required by article 40 of GWS?

(vi) Are there any theater-specific law of war training requirements or rules of engagement for the area into which the force is to be deployed?

___ Should the plan call for the collection of information about the enemy's policies, attitudes and practices concerning compliance with the law of war?

___ Should the plan call for the collection of information about allied policies, attitudes and practices concerning compliance with the law of war?

___ Should the plan call for the collection of information about enemy and allied protective emblems and insignia?

___ Does the plan include procedures for ascertaining whether various persons who fall into the hands of U.S. forces are entitled to treatment as prisoners of war or retained personnel, or to be released (see articles 4 and 5 of GPW, articles 24-32 of GWS, and articles 36-37 of GWS (Sea))?

___ Is the plan consistent with the requirement that where there is any doubt as to the status of a person who has committed a belligerent act and is in the hands of U.S. forces such person shall be treated as a prisoner of war until such time as his status is determined by a competent tribunal (see article 5 of GPW)?

___ Does the plan provide procedures for setting up and operating an article 5 (GPW) tribunal?

___ Does the plan include appropriate procedures for reporting alleged war crimes and related misconduct committed by the enemy, and alleged misconduct by U.S. and allied POWs, and assign responsibility for the collection and preservation of evidence of all such matters (see, e.g., common article

49/50/129/146 of the Geneva Conventions)?

___ Is the plan consistent with the serious incident reporting requirements of higher headquarters as they pertain to alleged war crimes and related misconduct (see the various directives in the Appendix)?

___ If the plan contemplates an occupation, is it consistent with the obligation of an occupier to restore and preserve public order and safety while respecting, in accordance with article 43 of Hague IV, the laws in force in that country?

___ If the plan includes draft proclamations, laws, or ordinances for use in an occupied territory, do those documents conform to the requirements of international law as set forth in articles 42-56 of Hague IV and articles 64-78 of the GC?

5. Appendix 5 - International Agreements and Congressional Enactments

> If the plan contemplates deployment of U.S. forces into a foreign territory, the following questions should be answered:

___ Will deployment of U.S. forces into the foreign territory be at the request of or with the consent of the lawfully constituted government of the territory?

(i) Consider articles 2 and 51 of the UN Charter.

(ii) Consider relevant provisions of any regional defense treaties, status of forces agreements, or

other agreements applicable to the foreign territory involved.

___ Will deployment of U.S. forces into the foreign territory be part of a peacekeeping mission undertaken pursuant to the UN Charter or other international agreements, including treaties?

(i) Consider articles 11, 12, 14, 24, 39-49, and 52-54 of the UN Charter.

(ii) Consider articles 24, 25 and 43 of the OAS Charter if applicable.

___ Is deployment of U.S. forces into the foreign territory an act of individual or collective self-defense against an armed attack, either direct or indirect?

(i) Consider articles 51 and 103 of the UN Charter.

(ii) Consider any collective defense arrangements involving the foreign territory and the U.S.

(iii) Consider any Congressional enactment which may be applicable.

___ Is deployment of U.S. forces into the foreign territory to protect or extract U.S. or foreign nationals?

(i) Consider the traditional theories of justifiable intervention developed under the customary and codified international law.

___ Is deployment of U.S. forces into the

foreign territory to protect or extract sensitive U.S. material or equipment such as nuclear ordnance or cryptographic material or to protect U.S. (as opposed to private) installations such as embassies, consulates or military sites?

(i) Consider the analogy to traditional theories of justifiable intervention under customary and codified international law to protect U.S. nationals and property.

> If the plan contemplates the deployment of U.S. forces into foreign territory, consider whether the War Powers Resolution is applicable.

___ Does the deployment situation clearly indicate imminent U.S. involvement in hostilities?

___ Will the deployed forces be equipped for combat?

___ Will the deployed forces substantially enlarge U.S. forces already located in the foreign territory?

> If the plan specifies certain methods and routes of deployment, the following questions should be answered:

___ Does the plan contemplate deployment routes which traverse the airspace, territory or territorial seas of any foreign country or the establishment of staging areas or bases within the foreign territory?

(i) Does an agreement exist with the foreign country which grants the U.S. such rights? If so, does the plan make reference to the

agreement and is it consistent with the terms of the agreement?

(ii) If such an agreement exists, does it require consultation with and the consent of the foreign country prior to exercising those rights?

(iii) If consultation and consent are required, does the plan recognize the necessity of securing such consultation or consent through Defense or State Department channels prior to deployment?

(iv) If no such agreement exists, does the plan recognize the necessity of securing such rights through Defense or State Department channels prior to deployment?

___ Are the planned deployment routes, staging areas, en route bases, safehavens, etc., set forth in the plan consistent with applicable international agreements?

(i) If nuclear weapons are to be deployed with U.S. forces, will any deployment route be over or through foreign countries which prohibit or restrict such weapons?

(ii) Will any staging or en route bases be established in areas recognized as demilitarized zones?

(iii) If the plan contemplates deployment by sea route through territorial waters, will such passage conform to the requirements of innocent passage as set forth in articles 1-17 and 23 of the Territorial Sea Convention?

(iv) Is the foreign state a party to the Territorial Sea Convention?

___ Do we have status of forces agreements with the foreign countries which U.S. forces will pass through or be deployed into? If so:

(i) Do the agreements allow U.S. forces sufficient rights and freedom of action to carry out the mission comtemplated by the plan?

(ii) Do the agreements have any provisions changing the status of U.S. personnel in the event of hostilities?

(iii) Do the agreements have any provisions which are either automatically suspended or become subject to review in the event of hostilities?

___ If we have no status of forces agreement with a foreign country through which U.S. forces will pass or be deployed into, or if an existing agreement is inadequate for the planned mission:

(i) Does the plan recognize the need to initiate through Defense or State Department channels discussions with foreign authorities regarding appropriate arrangements governing the status of U.S. forces?

(ii) Does the plan assign responsibility to an appropriate command or staff office for maintaining liaison with the U.S. diplomatic mission and local

authorities on status of forces matters?

R. Annex R - Amphibious Operations

1. Appendix 1 - Advance Force Operations

___ If the plan contemplates deployment by sea route through territorial waters, will such passage conform to the requirements of innocent passage as set forth in articles 1-17 and 23 of the Territorial Sea Convention?

___ Are the planned deployment routes, staging areas, en route bases, safehavens, etc., set forth in the plan consistent with applicable international agreements?

2. Appendix 2 - Embarkation Plan
3. Appendix 3 - Landing Plan
4. Appendix 4 - Rehearsal Plan
5. Appendix 5 - CSS Control Agencies Plan
6. Appendix 6 - Withdrawal Plan

X. Annex X - Execution Checklist

Z. Annex Z - Distribution

APPENDIX OF CHECKLIST REFERENCES AND ABBREVIATIONS

This Appendix is a list of the reference abbreviations used in the checklist with the full titles of the references spelled out. Complete citations to the source(s) of these references will be found in the Table of Treaties or the Table of National Directives, etc., as appropriate. Also included in the Appendix for convenience are certain treaties and directives which, while not referred to in this checklist, have possible law of war application to the preparation and review of Oplans and Conplans. The latter documents are identified by an asterisk (*).

TREATIES

*St. Petersburg Declaration	St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight of 11 December 1868.
*Hague Declaration No. 3	Hague Declaration No. 3 Concerning Expanding Bullets of 29 July 1899.
*Hague III of 1907	Hague Convention No. III Relative to the Opening of Hostilities of 18 October 1907.
Hague IV	Hague Convention No. IV Respecting the Laws and Customs of War on Land of 18 October 1907, with Annexed Regulations.
*Hague V	Hague Convention No. V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land of 18 October 1907.
Hague IX	Hague Convention No. IX Concerning Bombardment by Naval Forces in Time of War of 18 October 1907.
Geneva Gas Protocol	Geneva Protocol for the Prohibition of the Use in War of Asphyxiating Poisonous or

	Other Gases and of Bacteriological Methods of Warfare of 17 June 1925.
*Kellogg-Briand Pact	Paris Treaty Providing for the Renunciation of War as an Instrument of National Policy of 27 August 1929.
Roerich Pact	Washington Inter-American Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments of 15 April 1935.
UN Charter	United Nations Charter of 26 June 1945.
*London Agreement	London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis of 8 August 1945.
*Tokyo Charter	Tokyo Special Proclamation by the Supreme Commander for the Allied Powers Establishing an International Military Tribunal for the Far East of 19 January 1946, with Annexed Charter as Amended on 26 April 1946.
OAS Charter	Bogota Charter of the Organization of American States of 30 April 1948, with Protocol of Amendment of 27 February 1967.
Geneva Conventions	Collectively, the four 1949 Geneva Conventions.
GWS	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949.
GWS(Sea)	Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949.

GPW	Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949.
GC	Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949.
Hague Cultural Property Convention	Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, with Annexed Regulations. (NOTE: The U.S. is not a party but most of our NATO allies are.)
Genocide Convention	United Nations Convention on the Prevention and Punishment of the Crime of Genocide of 11 December 1948.
Territorial Sea Convention	Geneva Convention on the Territorial Sea and Contiguous Zone of 29 April 1958.
*Bacteriological Convention	Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction of 10 April 1972.
UN Environmental Modification Convention	United Nations Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of 18 May 1977.
*Protocol I	Geneva Protocol I Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of International Armed Conflicts of 12 December 1977. (NOTE: The United States has signed but not ratified the 1977 Protocols.)
*Protocol II	Geneva Protocol II Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Non-

	International Armed Conflicts of 12 December 1977. (NOTE: The United States has signed but not ratified the 1977 Protocols.)
*UN Conventional Weapons Convention	United Nations Convention on Prohibitions or Restrictions on Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects of 10 October 1980, with Protocols I, II and III. (NOTE: The United States has signed but not ratified the Conventional Weapons Convention.)

STATUTES

*Displaced Persons Act of 1948, as amended by the Act of 1950, 62 Stat. 1009, 64 Stat. 219.

*Interned Belligerent Nationals Act of 25 June 1948, 62 Stat. 818, 18 U.S.C. sec. 3058.

*Act of 24 May 1949, 63 Stat. 92, 18 U.S.C. sec. 906 (making criminal the unauthorized use of the Red Cross insignia).

Uniform Code of Military Justice of 5 May 1950, as amended by the Act of 10 August 1956, the Military Justice Act of 1968, the Military Justice Amendments of 1981 and the Military Justice Act of 1983, 64 Stat. 108, 82 Stat. 1335, 95 Stat. 1085, 98 Stat. 1393; 10 U.S.C. sec. 801 et seq.

Joint War Powers Resolution of 7 November 1973, P.L. 93-148, 87 Stat. 555-58 (1973); 50 U.S.C. sec. 1541.

*Foreign Sovereign Immunities Act of 21 October 1976, P.L. 94-583, 90 Stat. 2892; 28 U.S.C. secs. 1330, 1602-1611.

*Diplomatic Relations Act of 1978, 22 U.S.C. sec 254a, et seq.

*Nuclear Non-Proliferation Act of 1978, P.L. 95-242, 92 Stat. 120, 130, 134, 137-139, 144, 145, 42 U.S.C. secs. 2153(d), 2155(b), 2157(b), 2158, 2160(f) (1976 ed., and Supp. V).

*Foreign Intelligence Surveillance Act of 25 October 1978, P.L. 95-511, 92 Stat. 1783; 50 U.S.C. sec. 1801 et seq.

*International Security and Development Assistance Authorizations Act of 1983, P.L. 98-151, 97 Stat. 964.

*1984 Act to Combat Terrorism of 19 October 1984, P.L. 98-533, 98 Stat. 2706; 18 U.S.C. secs. 3071-3077.

*International Security and Development Cooperation Act of 1985, P.L. 99-83.

*International Emergency Economic Powers Act, 50 U.S.C. sec. 1701 et seq.

EXECUTIVE ORDERS

*Executive Order 10631 of 17 August 1955, 20 Fed. Reg. 6057, "Code of Conduct for Members of the Armed Forces of the United States," as amended by Executive Order 11382 of 28 November 1967, 32 Fed. Reg. 16247 and Executive Order 12017 of 3 November 1977, 42 Fed. Reg. 57941.

Executive Order 11850 of 8 April 1975, 40 Fed. Reg. 16187, 50 U.S.C. sec. 1511, "Renunciation of Certain Uses in War of Chemical Herbicides and Riot Control Agents."

*Executive Order 12018 of 3 November 1977, amending the Manual for Courts-Martial, United States (1969, rev. ed.), with respect to the chain of command among U.S. prisoners of war.

*Executive Order 12333 of 4 December 1981, 46 Fed. Reg. 59941, "United States Intelligence Activities."

*Executive Order 12543 of 7 January 1986, 51 Fed. Reg. 875, restricting travel of U.S. citizens to Libya.

*Executive Order 12544 of 8 January 1986, 51 Fed. Reg. 1235, blocking the transfer of all property of the government of Libya in the U.S. and in the possession of U.S. persons in their overseas branches.

*Treasury Regulations of 16 January 1986, 51 Fed. Reg. 2462, implementing Executive Orders 12543 and 12544.

SERVICE DIRECTIVES

Department of Defense Directive 2000.11 of 3 March 1972, with Change 1 of 17 May 1973, "Procedures for Handling Requests for Political Asylum and Temporary Refuge."

Department of Defense Directive 5100.69 of 27 December 1972, "DOD Program for Prisoners of War and Other Detainees."

Department of Defense Instruction 1000.1 of 30 January 1974, with Change 1 of 3 June 1975, "Identity Cards Required by the Geneva Conventions."

*Department of Defense Instruction 5500.15 of 16 October 1974, "Review of Legality of Weapons Under International Law."

*Department of Defense Directive 5100.77 of 10 July 1979, "DOD Law of War Program."

*Department of Defense Directive 1300.7 of 19 December 1984, "Training and Education Measures Necessary to Support the Code of Conduct."

*Joint Chiefs of Staff Memorandum 59-83 of 1 June 1983, "Implementation of the DOD Law of War Program."

*Joint Chiefs of Staff Memorandum 75-81 of 13 August 1981 for Directors and Heads of Agencies, OJCS, DJSM, "Providing Legal Assistance on Review of OPLANS/CONPLANS/ROEs."

*Joint Chiefs of Staff Instruction J31 3300.1C of 3 September 1980, "War Powers Reporting System."

Joint Strategic Capabilities Plan.

*Secretary of the Navy Instruction 5711.8 of 14 January 1976, "Review of Legality of Weapons Under International Law."

Secretary of the Navy Instruction 5710.22, "Procedures for Handling Requests for Political Asylum and Temporary Refuge."

*Secretary of the Navy Instruction 3300.1A of 2 May 1980, "Law of Armed Conflict (Law of War) Program to Insure Compliance by the Naval Establishment."

*Secretary of the Navy Instruction 1000.9 of 4 October 1979, "Code of Conduct for Members of the Armed Forces of the United States."

*Marine Corps Order 5740.2D of 9 February 1984, "Reporting Information of Concern to National Command Authorities (NCA)."

*Marine Corps Order 3300.3 of 2 August 1984, "Marine Corps Law of War Program."

*U.S. Navy Regulations of 7 June 1979, articles 0305, 0605, 0746, 0845, 0924, 0925, 1059, "Law of War Considerations for Naval Personnel."

*Chief of Naval Operations Instruction 5530.11 of 30 December 1963, "Enemy Prisoner of War and Civilian Internee Communications Censorship." (Also Army Regulation 380-235 and Air Force Regulation 205-9.)

*Chief of Naval Operations Instruction 3300.52 of 18 March 1983, "Law of Armed Conflict (Law of War) Program to Ensure Compliance by the U.S. Navy and Naval Reserve."

*Chief of Naval Operations Instruction 3120.32A of 27 March 1979, Standard Organization and Regulations of the U.S. Navy, para. 650.3, "Prisoners of War Bill."

*Chief of Naval Operations Instruction 3100.6C of 16 July 1981, with Change 1 of 12 April 1982 and Change 2 of 1 April 1983, "Special Incident Reporting (OPREP-3) Procedures."

*Chief of Naval Operations Instruction 1730.1, Chaplains Manual, paras. 1204, 6404 and 7202 (law of war considerations for chaplains).

*Chief of Naval Operations Instruction 1000.24 of 11 November 1980, "Code of Conduct Training."

*Army Regulation 640-3 of 15 May 1980 (Pay tables and equivalency tables for U.S. personnel who become POWs).

Army Regulation 608-4 of 28 August 1969, "Control and Registration of War Trophies and War Trophy Firearms." (Issued by all services as Chief of Naval Operations Instruction 3460.7A, Air Force Regulation 125-13 and Marine Corps Order 5800.6A.)

*Army Regulation 550-1 of 1 October 1981, "Foreign Countries and Nationals - Procedures for Handling Requests for Political Asylum and Temporary Refuge."

*Army Regulation 350-30 of 10 December 1984, "Code of Conduct/Survival, Evasion, Resistance and Escape (SERE) Training."

*Army Regulation 190-8 of 1 June 1982, "Enemy Prisoners of War: Admission, Employment and Compensation."

*Army Regulation 37-36 of 1 May 1983, "Pay, Allowance and Deposit of Personal Funds - Enemy Prisoners of War and Civilian Internees."

*Army Regulation 27-53 of 1 January 1979, "Review of Legality of Weapons Under International Law."

*Air Force Regulation 110-32 of 2 August 1976, "Training and Reporting to Insure Compliance with the Law of Armed Conflict."

*Air Force Regulation 110-29 of 10 September 1981, "Review of Legality of Weapons Under International Law."

*Air Force Regulation 50-16 of 7 July 1981, "Code of Conduct Training."

PUBLICATIONS

*Naval Warfare Information Publication 10-2, Law of Naval Warfare (U.S. Dept. of the Navy; Washington, D.C.; 25 September 1955, with changes through 15 November 1974).

*Department of the Army Pamphlet 30-101, Communist Interrogation, Indoctrination, and Exploitation of Prisoners of War (U.S. Dept. of the Army; Washington, D.C.; May 1956).

Field Manual 27-10, The Law of Land Warfare (U.S. Dept. of the Army; Washington, D.C.; 18 July 1956; with Change 1 of 15 July 1976).

*Department of the Army Pamphlet 27-1, Treaties Governing Land Warfare (U.S. Dept. of the Army; Washington, D.C.; 7 December 1956).

*Air Force Pamphlet 110-1-3, Treaties Governing Land Warfare (U.S. Dept. of the Air Force; Washington, D.C.; 21 July 1958).

*Department of the Army Pamphlet 27-161-2, International Law, Volume II (U.S. Dept. of the Army; Washington, D.C.; 23 October 1962).

Field Manual 19-40, Enemy Prisoners of War and Civilian Internees (U.S. Dept. of the Army; Washington, D.C.; 27 February 1976).

Field Manual 41-5/NAVMC 2500, Joint Manual for Civil Affairs.

Field Manual 41-10, Civil Affairs Operations (U.S. Dept. of the Army; Washington, D.C.; 20 October 1969).

Department of the Army Pamphlet 690-80, Administration of Foreign Labor During Hostilities (U.S. Dept. of the Army;

Washington, D.C.; 12 February 1971). (Issued by all services as NAVSO P-1910, AFM 40-8, and MCO P12190.1, respectively.)

*Air Force Pamphlet 110-31, The Conduct of Armed Conflict and Air Operations (U.S. Dept. of the Air Force; Washington, D.C.; 19 November 1976).

*Department of the Army Pamphlet 27-24, Selected International Agreements, Volume II (U.S. Dept. of the Army; Washington, D.C.; 1 December 1976).

*Air Force Pamphlet 200-17, An Introduction to Air Force Targeting (U.S. Dept. of the Air Force; Washington, D.C.; 11 October 1978).

*Department of the Army Pamphlet 27-1-1, Protocols to the Geneva Conventions of 12 August 1949 (U.S. Dept. of the Army; Washington, D.C.; 1 September 1979).

*Marine Corps Manual, para. 1006, "Command Responsibility"; para. 2500.2, "Code of Conduct and Law of War" (GPO; Washington, D.C.; 21 March 1980).

*Air Force Pamphlet 110-34 Commander's Handbook on the Law of Armed Conflict (U.S. Dept. of the Air Force; Washington, D.C.; 25 July 1980).

*Air Force Pamphlet 110-20, Selected International Agreements (U.S. Dept. of the Air Force; Washington, D.C.; 27 July 1981).

*Guidebook for Marines, chap. 3, "Code of Conduct"; chap. 4, "Law of War" (Marine Corps Association; Quantico, Va.; 14th rev. ed.; 1 July 1984).

*Field Manual 27-2, Your Conduct in Combat Under the Law of War (U.S. Dept. of the Army; Washington, D.C.; 23 November 1984).

*Manual for Courts-Martial, United States, 1984.

JEFFRIES/OPLANREV.LOW 5/9/86

ANNEX AS7-1

U.S. COLLECTIVE SECURITY ARRANGEMENTS*

The North Atlantic Treaty, signed 4 April 1949, entered into force for the US 24 August 1949 (66 Stat. 2241, T.I.A.S. No. 1964, 4 Bevans 828, 34 U.N.T.S. 243, DA Pam 27-24, AFP 110-20) has fifteen parties: Belgium, Canada, Denmark, Federal Republic of Germany, France, Greece, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Turkey, the United Kingdom, and the United States. Spain acceded to membership in NATO on 30 May 1982.

The French Government withdrew its forces committed to NATO commands and its personnel assigned to the staffs of those commands effective July 1, 1966, and has denounced the Paris Protocol on the Status of International Military Headquarters of August 28, 1952, effective March 31, 1967. In a preliminary aide-memoire, delivered to its NATO allies on March 11, 1966, the French Government made the following statement (in translation):

> This . . . does not by any means lead the French Government to call into question the treaty signed at Washington on April 4, 1949. In other words, barring events in the coming years that might come to alter fundamentally the relations between the East and the West, it does not intend to avail itself, in 1969, of the provisions of Article 13 of the treaty and considers that the Alliance must continue as long as it appears necessary.

The collective defense provisions state:

> The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.
>
> Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security. (Article 5)

The Treaty area is:

> . . . an armed attack on one or more of the Parties is deemed to include an armed attack
>
> (i) on the territory of any of the Parties in Europe or North America, on the Algerian Departments of France, on the territory of Turkey or on the islands under the jurisdiction of any of the Parties in the North Atlantic area north of the Tropic of Cancer;
>
> (ii) on the forces, vessels or aircraft of any of the Parties, when in or over these territories or any other area in Europe in which occupation forces of any of the Parties were stationed on the date when the Treaty entered into force or the Mediterranean Sea or the North Atlantic area north of the Tropic of Cancer. (Article 6, as modified by Article 2 of the protocol on the accession of Greece and Turkey, 3 U.S.T. 43, T.I.A.S. No. 2390, 126 U.N.T.S. 350.)

The only outlying areas covered are the islands in the North Atlantic area, the Aleutian Islands, and the islands of the Canadian Arctic. (Sen. Ex. Rep. No. 8, 81st Cong., 1st sess., at 15.) Alaska is now covered as a State; Greenland, as part of the Kingdom of Denmark; Bermuda as an "island under the jurisdiction

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* Sources: U.S. Cong. House Foreign Affairs Comm., Collective Defense Treaties, with maps, Text of Treaties, A Chronology, Status of Forces Agreement, and Comparative Chart, 91st Cong., 1st Sess., at 2-10 (Comm. Print, 1969); AFP 110-34.

of any of the parties in the North Atlantic area north of the Tropic of Cancer" is likewise covered by that Treaty.

The three Algerian departments of France were an integral part of metropolitan France under its constitution at the time the North Atlantic Treaty was signed. However, Algeria became independent on July 3, 1962, and on January 16, 1963, the Council of NATO noted that insofar as the former Algerian departments of France are concerned, the relevant clauses of the North Atlantic Treaty had become inapplicable as from July 3, 1962. (NATO Press Release No. 63, January 24, 1963.)

The area, originally including the western part of the Mediterranean as well as the North Sea and most of the Gulf of Mexico (S. Ex. Rep. No. 8, 81st Cong., 1st Sess., at 15), was broadened by the protocol on the accession of Greece and Turkey to include the forces, vessels and aircraft of the parties in the Eastern Mediterranean. (S. Ex. Rep. No. 1, 82d Cong., 2d Sess., at 5.)

Also, the area was redefined by this protocol so that if in the future occupation forces in Europe of any of the parties ceased to be occupation forces, e.g., in Germany, but were still on European soil, they would still be covered by the Treaty in the event of an attack. (S. Ex. Rep. No. 1, 82d Cong., 2d Sess., at 4.)

# # # # #

The Inter-American Treaty of Reciprocal Assistance (RIO Treaty), signed 2 September 1947, entered into force for the US on 3 December 1948 (62 Stat. 1681, T.I.A.S. No. 1838, 4 Bevans 559, 21 U.N.T.S. 77, DA Pam 27-24) has twenty-three parties: Argentina, Bahamas, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, the United States of America, Uruguay, and Venezuela.

The Organization of American States (OAS) Foreign Ministers voted at Punta del Este (23-31 Jan. 1962) to exclude "the present Government of Cuba" from participation in the inter-American system.

The Collective defense provisions state:

> 1. The High Contracting Parties agree that an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations.
>
> 2. On the request of the State or States directly attacked and until the decision of the Organ of Consultation of the Inter-American System, each one of the Contracting Parties may determine the immediate measures which it may individually take in fulfillment of the obligation contained in the preceding paragraph and in accordance with the principle of continental solidarity. The Organ of Consultation shall meet without delay for the purpose of examining those measures and agreeing upon the measures of a collective character that should be taken.
>
> 3. The provisions of this Article shall be applied in case of any armed attack which takes place within the region described in Article 4 or within the territory of an American State. When the attack takes place outside of the said areas, the provisions of Article 6 shall be applied.
>
> 4. Measures of self-defense provided for under this Article may be taken until the Security Council of the United Nations has taken the measures necessary to maintain international peace and security. (Article 3)

* * * *

> If the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an aggression which is not an armed attack or by an extracontinental or intra-continental conflict, or by any other fact or situation that might endanger the peace of America, the Organ of Consultation shall meet immediately in order to agree on the measures which must be taken in case of aggression to assist the victim of the aggression or, in any case, the measures which should be taken for the common defense and for the maintenance of the peace and security of the Continent. (Article 6)

* * * *

For the purposes of this Treaty, the measures on which the Organ of Consultation may agree will comprise one or more of the following: recall of chiefs of diplomatic missions; breaking of diplomatic relations; breaking of consular relations; partial or complete interruption of economic relations or of rail, sea, air, postal, telegraphic, telephonic, and radiotelephonic or radiotelegraphic communications; and use of armed force. (Article 8)

* * * *

In addition to other acts which the Organ of Consultation may characterize as aggression, the following shall be considered as such:

a. Unprovoked armed attack by a State against the territory, the people, or the land, sea or air forces of another State;

b. Invasion, by the armed forces of a State, of the territory of an American State, through the trespassing of boundaries demarcated in accordance with a treaty, judicial decision, or arbitral award, or, in the absence of frontiers thus demarcated, invasion affecting a region which is under the effective jurisdiction of another State. (Article 9)

* * * *

Decisions which require the application of the measures specified in Article 8 shall be binding upon all the Signatory States which have ratified this Treaty, with the sole exception that no State shall be required to use armed force without its consent. (Article 20)

The Treaty area is stated to be:

The region to which this Treaty refers is bounded as follows: beginning at the North Pole; thence due south to a point 74 degrees north latitude, 10 degrees west longitude; thence by a rhumb line to a point 47 degrees 30 minutes north latitude, 50 degrees west longitude; thence by a rhumb line to a point 35 degrees north latitude, 60 degrees west longitude; thence due south to a point in 20 degrees north latitude; thence by a rhumb line to a point 5 degrees north latitude, 24 degrees west longitude; thence due south to the South Pole; thence due north to a point 30 degrees south latitude, 90 degrees west longitude; thence by a rhumb line to a point on the Equator at 97 degrees west longitude; thence by a rhumb line to a point 15 degrees north latitude, 120 degrees west longitude; thence by a rhumb line to a point 50 degrees north latitude, 170 degrees east longitude; thence due north to a point in 54 degrees north latitude; thence by a rhumb line to a point 65 degrees 30 minutes north latitude 168 degrees 58 minutes 5 seconds west longitude; thence due north to the North Pole. (Article 4)

This description includes more than the land area of the parties to the treaty; it embraces both North and South America, including Canada, Greenland, the Arctic and Antarctic regions of the continents, as well as all the area lying between. (S. Ex. Rep. No. 11, 80th Cong., 1st Sess., at 5.) In addition, the newly independent nations of Antigua and Barbuda, Barbados, Dominica, Grenada, Jamaica, St. Christopher and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, and Trinidad and Tobago fall within the defined region but are not parties to the Rio Treaty although they are members of the OAS. Guyana is party to neither.

In addition to the region as defined, the treaty states that measures to be taken in the event of an armed attack thereon shall be applied if the armed attack is "within the territory of an American State" (para. 3. Art. 3). This includes more than the continental territory of the United States and of the other American states. It includes the State of Hawaii as well as the island of Guam and any other possessions abroad, since they all constitute a part of the "territory of an American State." Canada, while not a signatory state, is included in the term "American State." Furthermore, if the armed attack is directed against an American State and takes place within the region described, it need not be against the territory of an American State but could take place anywhere within the region and might be against the land, sea, or air forces of such American State. (S. Ex. Rep. No. 11, 80th Cong., 1st Sess., at 5.)

Honduras, at the time of the signing of the treaty, made a formal reservation concerning the boundary between itself and Nicaragua, which was included in the treaty. Guatemala, when it deposited its ratification, also made a formal reservation concerning the sovereignty of Belize (British Honduras); and upon Guatemala's declaration that the reservation did not intend to constitute any alteration of the treaty and that it was disposed to act within the limits of international agreements which it had accepted, the contracting states accepted the reservation.

In addition, Ecuador and Nicaragua included a statement and reservation respectively in their instruments of ratification; and, as part of the Final Act of the Rio Conference where this treaty was drawn, Argentina, Guatemala, Mexico, and Chile made formal statements on historic rights and claims to areas within the treaty area. The United States also made the following formal statement there:

> With reference to the reservations made by other Delegations concerning territories located within the region defined in the Treaty, their boundaries, and questions of sovereignty over them, the Delegation of the United States of America wishes to record its position that the Treaty of Rio de Janeiro has no effect upon the sovereignty, national or international status of any of the territories included in the region defined in Article 4 of the Treaty.

A concise historical study of collective security under the Inter-American system appears in Dep't St. Bull., April 1987, at 56.

# # # # #

The Security Treaty Between Australia, New Zealand and the United States (ANZUS Pact), signed 1 September 1951, entered into force for the United States 23 April 1952 (3 U.S.T. 3420, T.I.A.S. No. 2493, 131 U.N.T.S. 83) provides:

> Each Party recognizes that an armed attack in the Pacific Area on any of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes.
>
> Any such armed attack and all measures taken as a result thereof shall be immediately reported to the Security Council of the United Nations. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security. (Article IV)

The Treaty area is:

> . . . an armed attack on any of the Parties is deemed to include an armed attack on the metropolitan territory of any of the Parties, or on the island territories under its jurisdiction in the Pacific or on its armed forces, public vessels or aircraft in the Pacific. (Article V)

Following New Zealand's determination to deny access to its ports and harbors of nuclear-powered and nuclear-armed warships, the United States suspended all military cooperation with New Zealand, including the ANZUS agreement. Dep't St. Bull., Sept. 1986, at 87; Note, The Incompatibility of ANZUS and a Nuclear-Free New Zealand, 26 Va. J. Int'l L. 455 (1986); Recent Developments, International Agreements: United States' Suspension of Security Obligations Toward New Zealand, 28 Harv. Int'l L.J. 139 (1987). See paragraph 2.1.2.1 note 8.

# # # # #

The Southeast Asia Collective Defense Treaty (SEATO), signed 8 September 1954, entered into force for the United States 19 February 1955 (6 U.S.T. 81. T.I.A.S. No. 3170, 209 U.N.T.S. 28) currently has the following States parties: Australia, France, New Zealand, Republic of the Philippines, Thailand, the United Kingdom, and the United States. By a protocol signed on the same date as the treaty, the states of Cambodia and Laos and the free territory under the jurisdiction of the State of Vietnam were designated for the purposes of Article IV, quoted below. Subsequently, Cambodia has indicated disinterest in the protection of the southeast Asia Treaty. The Royal Government of Laos, in the Geneva Declaration on the Neutrality of Laos, signed 23 July 1962, declared that it will not "recognize the protection of any alliance or military coalition including SEATO" and the United States and other nations agreed to "respect the wish of the Kingdom of Laos not to recognize the protection of any alliance or military coalition, including SEATO." Vietnam, now under communist rule, is likewise assumed to no longer have any interest in this alliance. By decision of the SEATO

Council of 24 September 1975, the Organization ceased to exist as of 30 January 1977. The Collective Defense Treaty remains in force.

The collective defense provisions are:

> 1. Each Party recognizes that aggression by means of armed attack in the treaty area against any of the Parties or against any State or territory which the Parties by unanimous agreement may hereafter designate, would endanger its own peace and safety, and agrees that it will in that event act to meet the common danger in accordance with its constitutional processes. Measures taken under this paragraph shall be immediately reported to the Security Council of the United Nations.
>
> 2. If, in the opinion of any of the Parties, the inviolability or the integrity of the territory or the sovereignty or political independence of any Party in the treaty area or of any other State or territory to which the provisions of paragraph 1 of this Article from time to time apply is threatened in any way other than by armed attack or is affected or threatened by any fact or situation which might endanger the peace of the area, the Parties shall consult immediately in order to agree on the measures which should be taken for the common defense.
>
> 3. It is understood that no action on the territory of any State designated by unanimous agreement under paragraph 1 of this Article or on any territory so designated shall be taken except at the invitation or with the consent of the government concerned. (Article IV).

Understanding of the United States of America (included in the treaty):

> The United States of America in executing the present Treaty does so with the understanding that its recognition of the effect of aggression and armed attack and its agreement with reference thereto in Article IV, paragraph 1, apply only to communist aggression but affirms that in the event of other aggression or armed attack it will consult under the provisions of Article IV, paragraph 22.

The Treaty area now includes:

> As used in this Treaty, the 'treaty area' is the general area of Southeast Asia, including also the entire territories of the Asian Parties, and the general area of the Southwest Pacific not including the Pacific area north of 21 degrees 30 minutes north latitude. The Parties may, by unanimous agreement, amend this Article to include within the treaty area the territory of any State acceding to this Treaty . . . or otherwise to change the treaty area. (Article VIII)

The basic area involved comprises Pakistan; Thailand; Laos; the former area of the free territory of Vietnam and Cambodia (by protocol); Malaysia; Australia and New Zealand; and the Philippines. (See above concerning present status of Cambodia, Vietnam, and Laos.) Although the United Kingdom is a party, Hong Kong is excluded because of the limiting clause - "not including the Pacific area north of 21 degrees 30 minutes north latitude" - a line running north of the Philippines. (S. Ex. Rep. No. 1, 84th Cong., 1st Sess., at 11.)

# # # # #

The Mutual Defense Treaty Between the United States and the Republic of the Philippines, signed 30 August 1951, entered into force 27 August 1952 (3 U.S.T. 3947, T.I.A.S. No. 2529, 177 U.N.T.S. 133, AFP 110-20) provides:

> Each Party recognizes that an armed attack in the Pacific Area on either of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common dangers in accordance with its constitutional processes.
>
> Any such armed attack and all measures taken as a result thereof shall be immediately reported to the Security Council of the United Nations. Such measures shall be terminated when, the Security Council has taken the measures necessary to restore and maintain international peace and security. (Article IV)

The Treaty area is:

> . . . an armed attack on either of the Parties is deemed to include an armed attack on the metropolitan territory of either of the Parties, or on the island territories under its jurisdiction in the Pacific or on its armed forces, public vessels or aircraft in the Pacific. (Article V)

# # # # #

The Treaty of Mutual Cooperation and Security Between the United States and Japan, signed 19 January 1960, entered into force 23 June 1960 (11 U.S.T. 1632, T.I.A.S. No. 4509, 373 U.N.T.S. 186, DA PAM 27-24, AFP 110-20) provides:

> Each Party recognizes that an armed attack against either Party in the territories under the administration of Japan would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional provisions and processes.
>
> Any such armed attack and all measures taken as a result thereof shall be immediately reported to the Security Council of the United Nations in accordance with the provisions of Article 51 of the Charter. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security. (Article V)

The Treaty contains no specific language defining the area covered. Article V, however, refers to "an armed attack against either Party in the territories under the administration of Japan" as "dangerous to its own peace and safety." [Emphasis added.]

Article X states that the treaty "shall remain in force until in the opinion of the Governments of the United States of America and Japan there shall have come into force such United Nations arrangements as will satisfactorily provide for the maintenance of international peace and security in the Japan area." [Emphasis added.]

Article VI provides--

> For the purpose of contributing to the security of Japan and the maintenance of international peace and security in the Far East, the United States of America is granted the use by its land, air and naval forces of facilities and areas in Japan.

# # # # #

The Mutual Defense Treaty Between the United States and the Republic of Korea, signed 1 October 1953, entered into force 17 November 1954 (5 U.S.T. 2368, T.I.A.S. No. 3097, 238 U.N.T.S. 199, DA Pam 27-24, AFP 110-20) provides:

> Each Party recognizes that an armed attack in the Pacific area on either of the Parties in territories now under their respective administrative control, or hereafter recognized by one of the Parties as lawfully brought under the administrative control of the other, would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes. (Article III)

The Senate attached to its resolution of ratification the following understanding in connection with Article III:

> It is the understanding of the United States that neither party is obligated, under ARTICLE III of the above treaty, to come to the aid of the other except in case of an external armed attack against such party; nor shall anything in the present treaty be construed as requiring the United States to give assistance to Korea except in the event of an armed attack against territory which has been recognized by the United States as lawfully brought under the administrative control of the Republic of Korea.

* * * *

> The Republic of Korea grants, and the United States of America accepts, the right to dispose United States land, air and sea forces in and about the territory of the Republic of Korea as determined by mutual agreement. (Article IV)

The Senate Committee on Foreign Relations noted in its report that "the testimony of administration witnesses made it clear that the United States would be under no obligation to station forces in South Korea under the treaty. The United States has the right to do so, if it determines that such action would be in its national security interests. The present political and military situation in Korea, however, makes it apparent that the stationing of United States Armed Forces in the Republic of Korea will be in our national interests for the time being." (S. Ex. Rep. No. 1, 83d Cong., 2d Sess., at 5-6.)

There is no separate provision regarding the treaty area. Included in Article III is the phrase "territories now under their respective administrative control, or hereafter recognized by one of the parties as lawfully brought under the administrative control of the other".

The Senate Committee on Foreign Relations in its report on the treaty said in connection with this language: "It does not apply to territories not now under the administrative control of either party; it does not apply to territory which is not at some future time recognized by the United States as having been lawfully brought under the administrative control of the other party; nor does it apply to an armed attack initiated by either party." (S. Ex. Rep. No. 1, 83d Cong., 2d Sess., at 3-4.)

# # # # #

Panama: Although the United States does not have a mutual defense commitment to Panama, under Article IV of the 1977 Panama Canal Treaty (entered into force 1 October 1979, T.I.A.S. No. 10030, 33 U.S.T., AFP 110-20, the United States has primary responsibility to protect and defend the Panama Canal until that treaty terminates on 31 December 1999. Until that time, Article IV also provides:

> 1. The United States of America and the Republic of Panama commit themselves to protect and defend the Panama Canal. Each Party shall act, in accordance with its constitutional processes, to meet the danger resulting from an armed attack or other actions which threaten the security of the Panama Canal or of ships transiting it.

The Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal (entered into force 1 October 1979, T.I.A.S. No. 10029, 33 U.S.T. 1, AFP 110-20, provides:

> The Republic of Panama declares that the Canal, as an international transit waterway, shall be permanently neutral in accordance with the regime established in this Treaty. The same regime of neutrality shall apply to any other international waterway that may be built either partially or wholly in the territory of the Republic of Panama. (Article I)
>
> The Republic of Panama declares the neutrality of the Canal in order that both in time of peace and in time of war it shall remain secure and open to peaceful transit by the vessels of all nations on terms of entire equality, so that there will be no discrimination against any nation, or its citizens or subjects, concerning the conditions or charges of transit, or for any other reason, and so that the Canal, and therefore the Isthmus of Panama, shall not be the target of reprisals in any armed conflict between other nations of the world . . . . (Article II)
>
> The United States of America and the Republic of Panama agree to maintain the regime of neutrality established in this Treaty, which shall be maintained in order that the Canal shall remain permanently neutral, notwithstanding the termination of any other treaties entered into by the two Contracting Parties. (Article IV)

Concerning Article IV, the U.S. Senate's resolution of ratification states:

> At the end of Article IV, insert the following:
>
> A correct and authoritative statement of certain rights and duties of the Parties under the foregoing is contained in the Statement of Understanding issued by the Government of the United States of America on October 14, 1977, and by the Government of the Republic of Panama on October 18, 1977, which is hereby incorporated as an integral part of this Treaty, as follows:
>
> "Under the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal (the Neutrality Treaty), Panama and the United States have the responsibility to assure that the Panama Canal will remain open and secure to ships of all nations.

> The correct interpretation of this principle is that each of the two countries shall, in accordance with their respective constitutional processes, defend the Canal against any threat to the regime of neutrality, and consequently shall have the right to act against any aggression or threat directed against the Canal or against the peaceful transit of vessels through the Canal.
>
> "This does not mean, nor shall it be interpreted as, a right of intervention of the United States in the internal affairs of Panama. Any United States action will be directed at insuring that the Canal will remain open, secure, and accessible, and it shall never be directed against the territorial integrity or political independence of Panama."

The Senate's advice and consent was obtained also on the condition that:

> (1) Notwithstanding the provisions of Article V or any other provision of the Treaty, if the Canal is closed, or its operations are interfered with, the United States of America and the Republic of Panama, shall each independently have the right to take such steps as each deems necessary, in accordance with its constitutional processes, including the use of military force in the Republic of Panama, to reopen the Canal or restore the operations of the canal, as the case may be.

The Protocol to this treaty provides that parties acceding to it agree to adhere to the objectives of the permanent Neutrality Treaty and to "observe and respect the regime of permanent neutrality of the Canal in time of war as in time of peace . . ." (T.I.A.S. No. 10029, AFP 110-20.)

# # # # #

Other Countries: The presence of U.S. military forces or activities in other countries around the world are not pursuant to mutual defense commitments, but in accordance with specific bilateral agreements with the individual countries concerned.

ANNEX AS7-2

ALLIES COLLECTIVE SECURITY ARRANGEMENTS*

Some of the parties to the collective defense agreements to which the United States is a party are also parties to other regional agreements to which the United States is not a party. This involves especially the NATO countries, which, in article 8 of the North Atlantic Treaty, declare

> . . . that none of the international engagements now in force between it and any other of the Parties or any third state is in conflict with the provisions of this Treaty, and undertakes not to enter into any international engagement in conflict with this Treaty.

In the interval between World War II and the establishment of NATO, the United Kingdom, France, Belgium, the Netherlands, and Luxembourg joined in the Brussels Treaty wherein they agree to assist each other in the event of an armed attack. The Brussels Pact nations were the nucleus of European nations who formed the North Atlantic Treaty Organization. The pact is still in effect and was acceded to by the Federal Republic of Germany and Italy on May 6, 1956 in a Protocol Modifying and Completing the Brussels Treaty.

Some NATO countries also have entered into security agreements with non-NATO countries, as follows:

Treaty of Friendship and Alliance between the United Kingdom and Libya, July 29, 1953.

Balkan Pact, August 9, 1954: Treaty of Alliance, Political Cooperation, and Mutual Assistance between Greece, Turkey, and Yugoslavia.

Baghdad Pact, February 24, 1955: Pact of Mutual Cooperation between Turkey, United Kingdom, Pakistan, Iran and Iraq. Iraq gave formal notification on March 24, 1959, of its decision to withdraw. The treaty organization was redesignated the Central Treaty Organization (CENTO) by a resolution of the Council of the Organization adopted August 21, 1959. The United States on July 29, 1958, joined in a Declaration agreeing to cooperate with Iran, Pakistan, Turkey, and the United Kingdom for their security and defense (9 U.S.T. 1077, T.I.A.S. No. 4084, 335 U.N.T.S. 205). The United States was a member of the Military, Economic and Anti-Subversion Committees of CENTO and an observer at the Council meetings.

Agreement between the United Kingdom and Malaysia on External Defense and Mutual Assistance, October 12, 1957.

Agreements between France and former French territories now independent African States.

Treaty of Alliance between Greece, Turkey, and Cyprus, with additional protocols, Treaty of Guarantee, and Treaty concerning the establishment of the Republic of Cyprus, dated August 16, 1960.

Agreement on Mutual Defence and Assistance between Malta and the United Kingdom dated September 21, 1964.

Article 6 of the Southeast Asia Collective Defense Treaty (SEATO) contains the following declaration which is similar to that quoted above from the North Atlantic Treaty:

> . . . none of the international engagements now in force between it and any other of the Parties or any third party is in conflict with the provisions of this Treaty, and undertakes not to enter into any international engagement in conflict with this Treaty.

France and the United Kingdom, which are parties to the Brussels Treaty and NATO, also are parties to SEATO. Australia and New Zealand, parties with the United States to a security treaty, and the Philippines, with which the United States has a mutual defense treaty, are all also parties to SEATO.

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* Source: U.S. Cong. House Foreign Affairs Comm., Collective Defense Treaties, with Maps, Text of Treaties, A Chronology, Status of Forces Agreement, and Comparative Chart, 91st Cong., 1st Sess., at 19-20 (Comm. Print 1969).

OPNAVINST 3120.32B
STANDARD ORGANIZATION AND REGULATIONS OF THE U.S. NAVY

Paragraph
630.23 VISIT AND SEARCH, BOARDING AND SALVAGE, AND PRIZE CREW BILL

630.23.1 PURPOSE. To set forth an organization to which personnel shall be assigned for visiting and searching, boarding and salvaging, and placing a prize crew on board ship on the high seas; and to prescribe appropriate responsibilities and procedures.

630.23.2 RESPONSIBILITY FOR THE BILL. The Operations Officer is responsible for this bill and shall advise the Executive Officer of required changes or other matters affecting the bill.

630.23.3 INFORMATION. Investigating or taking possession of ships on the high seas is normally done in three phases: (1) visiting and searching the ships; (2) boarding and, if necessary, salvaging the ships; (3) placing a prize crew on board. The officers and personnel assigned in accordance with this bill shall be governed by U. S. Navy Regulations, 1973, Law of Naval Warfare (NWP-9) (NOTAL), and the responsibilities and procedures outlined here.

630.23.4 RESPONSIBILITIES AND PROCEDURES

a. THE EXECUTIVE OFFICER shall:

(1) Designate, subject to the approval of the Commanding Officer, an Examining Officer to train and direct the visit and search party.

(2) Designate, subject to the approval of the Commanding Officer, a Boarding Officer to train and direct the boarding and salvage party.

(3) Designate, subject to the approval of the Commanding Officer, a Prize Master to organize, train, and direct the prize crew.

(4) Coordinate all departments in organizing, training, and equipping personnel necessary for the various parties and crews required by this bill.

b. HEADS OF DEPARTMENTS shall require division officers to assign and equip qualified personnel for the parties and crews prescribed by this bill.

c. DIVISION OFFICERS shall:

(1) Assign qualified personnel.

(2) Post all assignments required by this bill on division watch, quarter, and station bills.

(3) Ensure that designated division personnel participate in required training and equip themselves with the basic equipment.

630.23.5 VISIT AND SEARCH. The purpose of visit and search is to determine the nationality of ships, character of their cargo, nature of their employment, and other pertinent factors. Visit and search shall be in strict conformity with International Law and existing treaty provisions.

a. DUTIES OF THE EXAMINING OFFICER. Personnel in the boat sent by a man-of-war may carry arms, but only the Examining Officer and Assistant Examining Officer may wear side arms while on board the visited ship. The Examining Officer shall examine the ship's papers to determine nationality, character of cargo, ports of departure and destination, and other pertinent data. The Examining Officer shall recommend to his/her Commanding Officer one of the following actions:

(1) That the ship be released (when papers or detailed search and inspection prove the innocent character of the ship, cargo, and voyage).

(2) That the ship be detained or seized and sent in for adjudication (if papers, questioning of personnel, search, and inspections do not result in satisfactory proof of ship's innocence).

b. PAPERS TO BE EXAMINED. The ship's papers to be examined are:

(1) A certificate of registery or bill of sale (if the ship has been transferred recently from enemy to neutral ownership).

(2) The crew list.

(3) The passenger list.

(4) The ship's log (to determine whether the ship has deviated from her direct course).

(5) The bill of health.

(6) The ship's clearance papers.

(7) The certificate of charter.

(8) The invoices or manifests of cargo.

(9) The bills of lading.

(10) A consular declaration certifying the innocence of the cargo may be included but is not considered conclusive evidence of innocence.

c. REPORTS. The Examining Officer's report to the Commanding Officer of the visiting warship shall include the following information:

(1) Name and nationality of visited ship.

(2) Registry Number.

(3) Gross tonnage.

(4) Port and date of departure and destination.

(5) Number of passengers.

(6) General character of cargo.

(7) Any additional pertinent remarks and recommendations.

d. RECORD OF ACTION TAKEN. After the Commanding Officer of the visiting ship is advised of the findings, appropriate entries shall be written in the visited ship's log as follows:

If the visited ship is cleared by the visiting ship's Commanding Officer:

The _____ (given name, nationality and class of ship, as steamer or sailing ship) was visited by me at _____ (give hour and date). I have examined the papers concerning the ship and her cargo, produced by the master, which show that her voyage is lawful. The circumstances have been reported to the Commanding Officer of the visiting ship, who has directed that the ship be allowed to proceed on her voyage.

The ship is accordingly allowed to proceed on her voyage.

Entered _____ (give hour, date, and geographical position when entry is made).

(Signed name) _____

(Grade) _____, U.S.

Navy Examining Officer

Note

The name of the visiting ship and the name or grade of its Commanding Officer shall not be disclosed.

If the visited ship is to be detained for search or other appropriate action:

The _____ (give name, nationality and class of ship, as steamer or sailing ship) was visited by me at _____ (give hour and date). I have examined the ship's papers concerning the ship and her cargo, produced by the master, which were _____ (irregular; fraudulent; defaced; in part destroyed; in part concealed; found to show the presence of contraband; apparently regular but owing to suspicions having been aroused by (state reasons), a search appeared to me to be warranted. The circumstances have been reported to the Commanding Officer of the visiting ship, who has directed that the ship be detained for the following reason _____ (state reason, whether one of those noted immediately above or any other, such as breach of blockade, or other than neutral service, or great deviation from direct course, or any other reason justifying detention).

The ship is accordingly detained.

Entered _____ (give hour, date and geographical position when entry is made).

(Signed name) _____
(Grade) _____, U.S. Navy
Examining Officer

Note

The name of the visiting ship and the name or grade of its Commanding Officer shall not be disclosed.

e. BOARDING AND SALVAGE

(1) General. Should the inspections by the Examining Officer or other circumstances reveal a need for further detention or seizure, the boarding and salvage party shall be directed by the Commanding Officer to board and take command of the ship, restrain the crew, and conduct salvage operation as necessary.

The composition of the boarding and salvage party shall be dictated by the size and mission of the visited ship. A portion

of the boarding and salvage party shall consist of the rescue and assistance party.

The boarding and salvage party shall be alert for attempts at sabotage such as scuttling, fire, explosions, damage to power plant, and equipment, and contamination of fuel oil, water, and provisions.

(2) Duties of the Boarding Officer. The Boarding Officer shall organize, train, and equip the boarding and salvage party and direct boarding and salvage operations on board ships to be taken as prizes or the salvage of any abandoned ship.

f. SPECIFIC DUTIES OF COMMANDING OFFICER OF CAPTURING VESSEL AND OF PRIZE MASTER

(1) Commanding Officer of Capturing Vessel

(a) Section 7657 of Title 10, United States Code, specifies duties of the Commanding Officer of the capturing vessel as follows:

1. Secure the documents of the captured vessel, including the log, and the documents of cargo, together with all other documents and papers, including letters, found on board;

2. Inventory and seal all the documents and papers;

3. Send the inventory and documents and papers to the court in which proceedings are to be held, with a written statement -- (1) Showing that the documents and papers are all the papers found, or explaining why any are missing, and (2) Showing that the documents and papers are in the same condition as found, or explaining why any are in different condition;

4. Send as witnesses to the prize court the master, one or more of the other officers; the supercargo, purser, or agent of the prize; and any other person on board who is interested in or knows the title, national character, or destination of the prize; or if any of the usual witnesses cannot be sent, send the reasons therefore to the court; and

5. Place a competent prize master and a prize crew on board the prize and send the prize, the witnesses, and all documents and papers, under charge of the prize master, into port for adjudication.

(b) In the absence of instructions from higher authority as to which port to deliver the prize for adjudication, the Commanding Officer of the capturing vesssel shall select the port most convenient in view of the interests of possible claimants.

(c) If the captured vessel or any part of the captured property is not in condition to be sent in for adjudication, the Commanding Officer of the capturing vessel shall have a survey and an appraisal made by competent and impartial persons. The reports of the survey and the appraisal shall be sent to the court in which proceedings are to be held. Property so surveyed and appraised, unless appropriated for the use of the United States, shall be sold under authority of the commanding officer present. Proceeds of the sale shall be deposited with the Treasurer of the United States or in the public depository most accessible to the court in which proceedings are to be had and subject to its order in the cause.

(2) Prize Master

Section 7658 of Title 10, United States Code, specifies that the prize master shall take the captured vessel to the selected port. On arrival he/she shall:

(a) Immediately deliver to a prize commissioner the documents and papers and the inventory thereof;

(b) Make affidavit that the documents and papers and the inventory and the prize property are the same and are in the same condition as when received, or explain any loss or change in this condition;

(c) Report all information regarding the prize and her capture to the United States attorney;

(d) Deliver witnesses to the custody of the United States marshal; and

(e) Retain custody of the prize until it is taken therefrom by process from the prize court.

g. PRIZE CREW AND THEIR DUTIES. The prize crew is organized and trained to navigate, operate, and administer a seized, captured, or abandoned ship with or without the cooperation of the crew; to bring it safely into port; and to deliver it to the appropriate authorities for examination or adjudication.

(1) The Prize Master shall, when ordered by the Commanding Officer, command the prize or abandoned ship and

ANNEX AS7-4

INSTRUCTIONS FOR PRIZE MASTERS, NAVAL PRIZE COMMISSIONERS AND SPECIAL NAVAL PRIZE COMMISSIONERS

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This document replaces NAVEXOS P-825, Instructions for Prize Masters and Special Prize Commissioners, 1950.

INSTRUCTIONS FOR PRIZE MASTERS, NAVAL PRIZE COMMISSIONERS AND SPECIAL NAVAL PRIZE COMMISSIONERS

PREFACE

This document is designed to provide specific guidance for naval officers appointed, during time of armed conflict, to serve as Prize Master, Naval Prize Commissioner, or Special Naval Prize Commissioner. Prize law is governed by statute last amended in 1956, 10 U.S. Code sections 7651-7681 (text at Annex AS7-5). U.S. District Courts have prize jurisdiction, along with admiralty and maritime jurisdiction, based upon 28 U.S. Code section 1333. Guidance is provided respecting the seizure or capture of:

- enemy warships
- enemy military aircraft
- enemy merchant vessels
- enemy aircraft not engaged in government service
- enemy cargo
- neutral merchant vessels in violation of their neutrality
- neutral aircraft not in government service in violation of their neutrality
- contraband.

INTRODUCTION

These instructions have been prepared for the guidance of Prize Masters, Naval Prize Commissioners, and Special Naval Prize Commissioners in the performance of their duties during armed conflict relative to the capture of prize property by the United States. They relate to the duties to be performed by Prize Commissioners within the United States and its territorial waters as well as in the territorial waters of a consenting co-belligerent nation and the territory occupied by the armed forces of the United States.

1. Appointment

1.1 **PRIZE MASTER.** The Prize Master is traditionally designated by the Commanding Officer of the warship making a capture or seizure at sea. Where the capture is made in a port or in the territorial waters of the enemy, a Commanding Officer of forces afloat or ashore may order the capture and appoint the Prize Master. The captured vessel is thereafter in the charge of the Prize Master, who has the full responsibility of a Commanding Officer for the safe navigation, security and materiel condition of the Prize while she is in his custody. He is supplied, as a Prize crew, with such additional personnel as are required to carry out the directions of the appointing officer. The Prize Master is instructed to take the Prize to a Commissioner for the institution of Prize proceedings in the United States, in a designated port of a consenting co-belligerent nation, or in territory in the temporary or permanent possession of the armed forces of the United States. (See OPNAVINST 3320.32B, section 630.23, Annex AS7-3.)

1.2 **COMMISSIONERS.** Commissioners are appointed by the District Courts of the United States. As such they are officers of the Federal Court. Of the three prize commissioners appointed for a federal district at least one must be a lawyer of three years standing with experience in the taking of depositions. Special prize commissioners generally perform their duties overseas, while prize commissioners generally operate within the District. Naval officers appointed as Commissioners must be approved by the Secretary of the Navy and are denominated as Naval Prize Commissioners or Special Naval Prize Commissioners. At least one of the three prize commissioners for each district must be a naval officer on the active or retired list. At least one special prize commissioners must be a naval officer in the active or retired list.

2. Prize Master's Initial Actions

Upon appointment, in accordance with section 630.23, OPNAVINST 3120.32B, the Prize Master shall:

2.1 Board the Prize, identify himself to the Master or other responsible Officer in charge, and notify him that the vessel is seized by the United States.

2.2 If taken in port, post guards and order all enemy nationals to remain on board until a system of passes is established to permit them to go ashore only as authorized by the Prize Master.

2.2.1 Officers and crew of enemy merchant vessels are not made prisoners of war if they give a formal written promise not to undertake, while hostilities last, any service connected with the operations of the armed conflict. They are entitled to be treated at least as favorably as prisoners of war. When the Prize is captured after hostilities have ended, the written promise, described above, need not be obtained.

2.2.2 Neutral officers and the crew of captured neutral ships shall not be made prisoners of war.

2.2.3 Only those referred to in paragraph 2.9 below, need be retained on board, so far as Prize proceedings are concerned, after there has been a determination of those who are necessary as witnesses.

2.3 Hoist the National Ensign at the usual place, peak or staff, over the enemy flag. But, if the Prize is a neutral vessel, the neutral flag continues to be flown as usual until she is held to be a lawful prize by the Court. The United States flag is, however, hoisted at the fore.

2.4 Demand and make secure all documents of the vessel and cargo. The following are among the original records which must be preserved and forwarded:

1. Quartermaster's Notebook.
2. Smooth Deck Log.
3. Bell Book.
4. Engineering Log.
5. Charts in use and others on hand.
6. Bearing Book.
7. Satellite navigation fixes.
8. Magnetic Compass Record.
9. Deviation data and azimuth records.
10. Radio Telephone or Telex messages addressed to or from the captured vessel.
11. Radar Logs.
12. DRT plot and course recorder.
13. Radar plots.
14. Communications and signal logs.
15. Voice Radio Log.

16. Master's Standing Orders.
17 Night Order Book.
18. Fathometer Record.

Those documents, letters and papers, which tend to establish the ownership, identity, nationality and employment of the Prize, or to identify the personnel on board at the time of seizure, should be secured and delivered to the Commissioner. Those needed for the operation of the Prize, if not useful for the purposes above listed, should be left on board and should be listed and identified in the Prize Master's log.

2.5 Make a complete inventory and photocopies of the documents (1-18) listed in paragraph 2.4 above.

2.5.1 If there is reason to believe that some documents are missing, every effort should be made to locate them or to obtain information as to their whereabouts and the reason for their absence.

2.6 Make an entry in the Prize Vessel's Log, indicating the fact of seizure and the authority for it. (See Form 8, Annex AS7-6.) The entry must be written, not pasted, in the Log.

2.7 Commence the Prize Master's Log with a similar entry.

2.8 Make a complete inventory of all cargo, all stores, furniture and equipment on board. It is preferable that separate inventories be made for cargo and for the deck, engine and steward's departments, respectively.

2.9 After interview, determine which of the Prize Vessel's crew, in addition to the Master and one or more of the mates or other officers, should be retained on board and brought in to testify before the Commissioner. (It is assumed that the services of an interpreter, if required, will be available to the Prize Master.)

2.9.1 Since, in the first instance, the testimony, other than the affidavit of the Prize Master, must come from persons on board the Prize at the time of capture, care should be used to retain any person, who is thought to be interested in or to have knowledge as to the title, national character or employment of the Prize and her cargo.

2.9.2 If any usual witness, such as the Master or First Mate (Chief Officer) or any important witness, such as one of the type referred to in paragraph 2.9.1 above, cannot be brought before the Commissioner, the Prize Master should be prepared to explain, in detail, the absence of the witness.

2.10 Advise the Commissioner by the most expeditious secure form of communication of the identity of the vessel captured, the date and place of capture, the name and rank of the Prize Master, by whose authority the capture was made, and the condition of the vessel with respect to seaworthiness and fitness for operation, indicating the estimated time required, if any, to effect necessary repairs. Where possible, give the international call sign and particulars of the vessel to avoid any question as to identity, arising from similarity of names or possible garbling of the name in transmission.

2.11 If a survey of the Prize has been made, or is made while she is in the possession of the Prize Master, obtain copies of the Survey Report for delivery to the Commissioner. No formal Survey Report need be prepared by the Navy, except in the situation where the vessel is appropriated for use, manning and operation by the United States or is not to be sent to the Commissioner for adjudication.

2.12 Prepare a Certificate, for the signature of the Commanding Officer of the vessel making or ordering the capture, or for the signature of a subordinate officer (possibly the Prize Master) empowered to sign for him by direction, listing the documents and papers specified in paragraph 2.4 above, and certifying that they are all the papers found and are in the condition in which they were found, or explaining the absence of any papers or of any change in their condition. (See "Certificate of Captor", Form 9, Annex AS7-6.)

2.13 Prepare a certificate as to money and valuables found on board (See Form 9, Annex AS7-6.)

3. Message Report

On receipt of notice of seizure (paragraph 2.10 above), the Commissioner advises the Judge Advocate General (attention Codes 10 and 31) by message concerning the capture, together with any other relevant facts then known to him.

4. Prize Master's Duties Prior to Delivery to Commissioner

En route to port outside the United States, the Prize Master shall:

1. Most carefully discharge his responsibility for the security, material condition and safe navigation of the Prize.

2. Maintain the Prize Master's Log.

3. Keep the Naval Prize Commissioner advised of the Prize's movements and ETA at the place where Prize proceedings will be commenced.

5. Duties on Arrival at OUTUS Delivery Port

5.1 On arrival at the port, outside the jurisdiction of the United State where the Special Naval Prize Commissioner will act, or on his arrival at such port where the Prize is located:

1. The Prize Master shall advise the nearest representative of the agency authorized to appropriate captured vessels for U.S. use of the vessel's arrival or of the place where the proceedings are to be held. (The most expeditious secure means of communication should be used.)

2. The Special Naval Prize Commissioner, Prize Master and representatives of the interested parties inspect the Prize.

5.2 The Commissioner thereupon shall:

1. If there is cargo on board and bulk has been broken while in Prize custody, obtain information as to when and under what circumstances this occurred.

2. Examine to ascertain whether packages have been opened or if any property has been hidden or taken away.

3. The Commissioner shall advise the Secretary of the Navy by message whether, in his judgment, the vessel may be useful to the United States in war. (See Form 15, Annex AS7-6.)

5.3 The Prize Master delivers to the Special Naval Prize Commissioner:

1. The documents and papers. (Advise the Commissioner of the absence of any documents, or of any alteration in the condition of the material delivered, giving the reason therefor.)
2. The Inventories.
3. The Certificate of the Captor.
4. The Certificate as to Money and Valuables.
5. The Prize Master's Log.
6. A list of the witnesses to be produced. (If any usual or important witness is missing, explain the nonproduction.)
7. Copies of all available Survey Reports.

5.4 The Commissioner shall number the documents and other papers (if the Prize Master has not already done so). He and the Prize Master initial them.

5.5 The Commissioner shall take the affidavit of the Prize Master as to the circumstances of the capture, the documents or other papers found and the condition of the Prize. (See Form 9, Annex AS7-6.)

5.6 The Prize Master produces the witnesses from the Prize Vessel before the Commissioner at the time and place designated by the Commissioner for their examination.

6. Prize Master's Duties on Arrival at U.S. Port

6.1 On arrival at the port within the jurisdiction of the United States where the prize is located the Prize Master shall:

1. Immediately deliver to a prize commissioner the documents and papers and the inventory thereof (see paragraph 5.3 above).

2. Make affidavit that the documents and papers and the inventory thereof and the prize property are the same and are in the same condition as delivered to him, or explain any loss or absence or change in their condition.

3. Report all information respecting the prize and her capture to the United States Attorney and naval prize commissioner.

4. Retain the prize in his custody until it is taken therefrom by process from the prize court.

6.2 The Commissioner, Prize Master and representatives of the interested parties inspect the prize. The Commissioner thereupon shall:

1. If there is cargo on board and bulk has been broken while in Prize custody, obtain information as to when and under what circumstances this occurred.

2. Ascertain whether packages have been opened or if any property has been hidden or taken away.

6.2.1 The Commissioner shall advise the Secretary of the Navy by message whether, in his judgment, the vessel may be useful to the United States in war efforts. (See Form 15, Annex AS7-6.)

6.3 The Prize Master shall deliver to the Naval Prize Commissioner:

1. The documents and papers. (Advise the Commissioner of the absence of any documents, or of any alteration in the condition of the material delivered, giving the reason therefor.)

2. The Inventories (see paragraphs 2.5 and 2.8 above).

3. The Prize Master's affidavit with Certificate of the Captor and Certificate as to Money and Valuables (paragraph 2.13 above).

4. The Prize Master's Log.

5. A list of the witnesses to be produced. (If any usual or important witness is missing, explain nonproduction.)

6. Copies of any available Survey Reports.

6.4 The Commissioner shall number the documents and other papers if the Prize Master has not already done so. He and the Prize Master initial them.

6.5 Make a complete inventory of all cargo, all stores, bunkers, furniture and equipment on board. It is preferable that separate inventories be made for cargo, the deck, engine and steward's departments, respectively.

6.6 After interview, determine which of the prize vessel's crew, in addition to the Master and one or more of the mates or other officers, should be delivered to the custody of the U.S. Marshal and brought in to testify before the Commissioner. (It is assumed that the services of an interpreter, if required, will be available to the Prize Master.)

6.6.1 Since, in the first instance, the testimony, other than the affidavit of the Prize Master, must come from persons on board the Prize at the time of capture, care should be used to retain any person, who is thought to be interested in or to have knowledge as to the title, national character or employment of the Prize and her cargo.

6.6.2 If any usual witness, such as the Master or First Mate (Chief Officer) or any important witness, such as one of the type referred to in paragraph 2.9.1 above, cannot be brought before the Commissioner, the Prize Master should be prepared to explain, in detail, the absence of the witness.

6.7 Advise the Commissioner by the most expeditious form of communication of the identity of the vessel captured, the date and place of capture, the name and rank of the Prize Master, by whose authority the capture was made, and the condition of the vessel with respect to seaworthiness and fitness for operation, indicating the estimated time required, if any, to effect necessary repairs. Where possible, give the international call sign of the vessel to avoid any question as to identity, arising from similarity of names or possible garbling of the name in transmission.

6.8 If a survey of the Prize has been made, or is made while she is in the possession of the Prize Master, obtain copies of the Survey Report for delivery to the Commissioner. No formal Survey Report need be prepared by the Navy except in the situation where the vessel is appropriated for Navy use, manning and operation or is not to be sent to the Commissioner for adjudication.

7. Duties of Prize Commissioners Generally

7.1 Generally one or more of the prize commissioners shall:

1. receive from the prize master the documents and papers of the captured vessel and the inventory thereof

2. take the affidavit of the Prize Master required by section 7658 of title 10 U.S. Code.

3. take promptly, in the manner prescribed by section 7661 of title 10 U.S. Code, the testimony of the witnesses sent in

4. take, at the request of the United States Attorney, on interrogatories prescribed by the court, the depositions de bene esse of the prize crew and others

5. examine and inventory the prize property

6. apply to the court for an order to the Marshal to unload the cargo, if this is necessary to that examination and inventory

7. report to the court, and notify the United States Attorney, whether any of the prize property requires immediate sale in the interest of all parties

8. report to the Court, from time to time, any matter relating to the condition, custody, or disposal of the prize property requiring action by the court

9. return to the Court sealed and secured from inspection:

9.1 the documents and papers received, duly scheduled and numbered, and

9.2 the preparatory evidence.

7.2 The question of belligerent seizure of vessels or cargo and their subsequent condemnation or release is for the Courts of the captor nation. The purpose of bringing in the captured ship or cargo for adjudication is to have a sentence of condemnation pronounced by a proper tribunal, a Prize Court, declaring the capture to have been rightly made. Such sentence of condemnation is necessary in order to vest title to the property in the captor. The proceeding is in rem and, if the Prize Court has jurisdiction, transfers a title to the property which should be universally recognized. Scope of prize jurisdiction extends to all captures made on the sea jure belli or in the non-neutral airspaces to all captures in foreign ports and harbors; to all captures made on land by naval forces and upon surrender to naval forces, either solely or by joint operations with land forces; and this, whether the property so captured be goods or mere choses in action; to captures made in rivers, ports, harbors of the captor's own country, to money received as a ransom or commutation on a capitulation to naval forces alone or jointly with land forces.

7.3 Title to captured enemy public vessels, such as warships, and military aircraft, passes immediately to the captor state. Thus, the subjects of prize adjudication are the merchant vessels and cargoes of a belligerent and neutral vessels engaged in unneutral trade or service.

7.4 Certain classes of enemy vessels are exempt under the 1907 Hague Convention XI from condemnation as prize unless participating in hostilities. These are:

1. vessels used exclusively for fishing along the coast

2. small boats employed in local trade

3. vessels charged with religious, nonmilitary scientific or philanthropic missions, such as hospital ships.

7.5 It is an essential for the existence of jurisdiction in Prize matters that the prize be brought within the territorial jurisdiction of the country in which condemnation is sought. This does not always apply where the prize property has been appropriated for use of the United States and the validity cited according to statute or where the prize is taken within the jurisdiction of an ally with whom the United States has a treaty of reciprocity.

A further requirement of the Prize Law is that the evidence upon which the case must be heard in the first instance, and on which the property must be condemned or released, must come from the captured vessel, from the papers on board the vessel and from the testimony of the master, officers and other persons attached to the vessel or on board at the time of the capture. This testimony, taken on the standing interrogatories published by the Court, is taken before the Prize Commissioner. This particular requirement is the essence of the administration of Prize Law. These principles underlie and explain some of the requirements of Prize procedure. Generally the common law practice (i.e., Federal Rules of Civil Procedure and Federal Rules of Evidence) have no relation to this subject.

7.6 The jurisdiction of the United States District Courts extends to prizes brought into the territorial waters of a co-belligerent and to prizes taken or appropriated for the use of the United States, provided that the Government having jurisdiction over such territorial waters consent to such exercise of jurisdiction or to such taking or appropriation (10 U.S. Code section 1356).

7.7 The District Courts are authorized to appoint Special Prize Commissioners to exercise abroad the duties prescribed for such Commissioners in cases outside the District. Prize Commissioners are officers of the Federal District Court and subject to its direction and control. They perform such duties as may be imposed upon them by law and by the Court. The other officers of the Court, the U.S. Attorney, the Clerk and the Marshal perform their respective functions in prize cases as in civil cases.

7.8 Appropriation is a broad procedure whereby the United States can make immediate use of the captured vessel and avoid the necessity for applying to the Prize Court for a requisition of the captured vessel. This use of the vessel, immediately after capture, without awaiting the institution of prize proceedings, may be made by an officer or agency designated by the President. While any prize may thus be legally converted to immediate public use, and would be under compelling circumstances, it may be inadvisable so to convert neutral property taken as a prize because indemnification will follow if the prize court fails to condemn the property.

7.9 The appropriation of the prize by the President's designee before it comes into the custody of the Prize Court does not obviate the necessity of taking the steps for the condemnation of the captured vessel as a prize.

7.10 The specific duties of Prize Commissioners are prescribed by:

1. Federal statutes, and
2. Court rules.

7.11 These duties are briefly summarized:

7.11.1 Federal Statutes. Annex AS7-5 sets forth the statutory duties of Prize Commissioners. Some of these duties are repeated in the various Court rules.

7.11.2 Prize Rules. As stated, many of the District Court Prize Rules are based upon statutory requirements. The Prize Commissioner, within the territorial limits of the United States, will be concerned with the rules.

7.12 The following summary deals with the duties of Prize Commissioners.

7.12.1 Notice of Arrival. As soon as the prize arrives in port or is taken or appropriated in port, notice shall be given without delay to a Prize Commissioner of the arrival and where the prize may be found.

7.12.2 Examination and Care of the Property. A Commissioner shall go to the place where the prize property is and, if it is a ship, or aircraft check its moorings or tie downs. He shall examine whether bulk has been broken and, if it has been broken, obtain all the information available concerning the reasons why. If the prize be goods or cargo, the Commissioner shall examine the property to determine whether any of the containers have been opened and whether anything has been hidden or taken away and he shall not leave until the property or hatches are sealed, as the case may require. If the property is not a hull, he shall take a detailed account of it and shall cause it to be deposited in a safe place to await further orders of the Court.

7.12.3 Procedure Where Notice Not Given Promptly. If not notified by the captors within a reasonable time and upon being informed by other means of the arrival of the captured vessel, the Commissioner shall proceed as if notice had been given.

7.12.4 Delivery and Marking of Documents. The captor shall deliver all documents and papers found on the ship, together with his inventory of the same to the Commissioner. The Commissioner shall then mark and number the papers and documents and take the affidavit of the captor or prize master concerning said papers.

7.12.5 Taking of Testimony and Forwarding of all Papers to the Court. The Commissioners or one of them shall next take the testimony of the witnesses produced by the captors, on the standing interrogatories prescribed by the Court and such other matters as necessary or convenient, ordinarily within three days, in the manner prescribed by Rules and shall sign and certify the same. The testimony of the witnesses is under oath and the witnesses separate from each other. The evidence, together with all the papers and documents, the affidavit of the prize master, and the Commissioner's inventory shall be forwarded to the Court, sealed and secured from inspection. Upon the evidence the Court will condemn or release the prize.

7.12.6 Other Duties. The Commissioners may be designated to take further depositions or perform other duties by the Court.

7.12.7 Stenographic Assistance. The Commissioner will cause a verbatim record of the testimony to be made. The record should show that the stenographer was sworn by the Commissioner to truly record and transcribe the answers of the witnesses.

7.12.8 Translators. The record should show that the translator was sworn by the Commissioner to accurately and truly translate the testimony of those witnesses who do not speak English.

7.13 Prize Law applies to all captures made as prize by authority of the United States or adopted and ratified by the President of the United States. The law defines "vessels of the Navy" as all armed vessels officered and manned by the United States and under the control of the Department of the Navy.

7.14 The Prize Commissioners will note the directions of the Court Rules with respect to the manner in which the witnesses are to be examined and the restrictions upon the witnesses communicating with others.

7.15 After the Prize Commissioners have performed their statutory and Court ordered duties and obtained the necessary testimony, they transmit a report of the proceedings, together with all of the papers, testimony, etc. to the appropriate Federal Court. Form 21, Annex AS7-6, is a suggested form of report which may be of use to Commissioners in this connection.

7.16 Witnesses who have the rights of neutrals shall be discharged as soon as practicable.

7.17 It is, of course, essential in dealing with such situations that a very complete and accurate record be maintained as to what was done and the necessity therefor.

8. Prize Commissioner's Duty to Take Testimony

8.1 The Commissioners, within three days, examine the witnesses produced by the Prize Master.

8.2 The reporter, interpreter and witnesses are sworn.

8.3 The witnesses are examined separately.

8.3.1 They are not permitted to see the interrogatories, documents or papers, or to communicate with interested parties, their agents or counsel, without order of the Court.

8.3.2 Those who have the rights of neutrals are discharged as soon as practicable.

8.4 All witnesses must be produced in succession. A special Court Order is not required to permit the captors to offer further witnesses after the Commissioner has transmitted to the Court the testimony of those first produced, but may do so in the interest of justice.

8.5 The examination of each witness need not be completed on the same day it is commenced.

8.6 The questions put to the witness may be:

8.6.1 such of the Standing Interrogatories promulgated by the Court as the Commissioner deems appropriate;

8.6.2 such other questions as may be directed by the court; and

8.6.3 such other questions as the Commissioner deems appropriate to elicit the facts. The Court, by order, may modify the standing interrogatories.

8.7 The answer to each question must be reported separately.

8.8 If a witness states that he cannot answer a question, the Commissioner admonishes him that, by virtue of his oath he must answer to the best of his knowledge or, when he does not know absolutely, then to the best of his belief as to any fact.

8.9 If a witness refuses to answer, the Commissioner certifies the facts to a Court.

8.10 Interested parties, their attorneys or representative, may attend the examination but they may not:

8.10.1 ask or object to questions;

8.10.2 take notes except such as are to be used before the Court; or

8.10.3 communicate with the witnesses during the examination without special authority from the Court.

8.11 All objections as to the regularity or legality of the proceedings must be made to Court.

8.12 Each witness signs the record of his examination; the Certificate of the Commissioner is added and is signed by the Commissioner.

9. Formal Delivery OUTUS

9.1 It is necessary that a formal record be obtained of the transfer of the Prize from the Prize Master to the appropriate Department or Agency. During this process, the Special Commissioner must obtain, for a certain period, which may be of short duration, absolute possession of the Prize in order to perfect the jurisdiction of the District Court. To accomplish this:

9.2 The Prize Master makes formal delivery of the Prize and her cargo to the Commissioner, noting the date, time and place of delivery in the Prize Master's log, and accepting a written receipt from the Commissioner. (See Form 16, Annex AS7-6.)

9.2.1 The Commissioner advises the Judge Advocate General (Attention Codes 10 and 11) by message of the delivery of the vessel to him. (See Form 20, Annex AS7-6.)

9.2.2 The Prize Master is then relieved of further personal responsibility for the Prize and her cargo except so far as he may, at a later date, be obligated to deliver further documents, if discovered, and except that, if necessary, the Commissioner may request the Prize Master and Prize crew to remain on board the Prize to assure proper maintenance pending formal delivery of the vessel to the designated Government agency.

9.3 The Commissioner delivers the prize to the representative of the appropriating Department or Agency and obtains a receipt, to which may be attached copies of Survey Reports and Inventories. (See Form 19, Annex AS7-6.)

9.3.1 The Commissioner advises the Judge Advocate General (Attention Codes 10 and 11) by message of the appropriation and delivery of the prize. (See Form 20, Annex AS7-6.)

10. Formal Delivery in the United States

A formal record should be obtained of the transfer of the Prize from the Prize Master to the appropriate Department or Agency. To accomplish this:

10.1 Upon receipt of a court order so authorizing, the Prize Master makes formal delivery of the Prize and her cargo to the Marshal, noting the date, time and place of delivery in the Prize Master's log, and accepting a written receipt from the Marshal. (See Form 17, Annex AS7-6.)

10.1.1 The Naval Prize Commissioner advises the Judge Advocate General (Attention Codes 10 and 11) by message of the delivery of the vessel to the Marshal. (See Form 20, Annex AS7-6.)

10.1.2 The Prize Master is then relieved of further personal responsibility for the Prize and her cargo except so far as he may, at a later date, be obligated to deliver further documents, if discovered, and except that, if necessary, the Commissioner may request the Prize Master and Prize crew to remain in the Prize to assure proper maintenance pending formal delivery of the vessel to the Navy or to another designated Government agency.

10.2 The Commissioner delivers the prize to the representative of the appropriating Department or Agency and obtains a receipt, to which may be attached copies of Survey Reports and Inventories. (See Form 19, Annex AS7-6.) The Commissioner advises the Judge Advocate General (Attention Codes 10 and 31) by message of the appropriation and delivery of the prize. (See Form 20, Annex AS7-6.)

11. Survey

The Department or Agency, to which the Prize is appropriated for the use of the United States, has a complete survey, inventory and appraisal made of the vessel by persons as competent and impartial as can be obtained.

11.1 The Prize Master attends the survey or authorizes a representative to attend for him.

11.2 The survey may be held either before or after the formal deliveries.

11.3 See Chapter XII JAG Manual (JAGINST 5800.7B) for guidance regarding surveys. In view of the nature of hostilities, it is improbable that an enemy party would be able to participate in a joint survey. Other claimants including neutrals and U.S. Nationals, however, may be in a position to participate or may be appointed to act on behalf of neutral or enemy interests.

12. Prize Commissioner's Final Report

Because of his dual capacity as an officer of the Court and as a naval officer, the Naval Prize Commissioner submits:

12.1 A formal Report to the Court (Form 21, Annex AS7-6) with which he forwards the transcript of the testimony of the witnesses, the documents and papers received from the Prize Master copies of the receipts given and received and his Inventory of the documents and papers. The Report is forwarded, sealed and secured from inspection, to the Clerk of the Court, showing on the cover:

1. what captured property is involved;

2. who claim to be the captors; and

3. from whom the Commissioner received information of the capture.

12.2 A formal report in triplicate to the Judge Advocate General (attention Codes 10 and 31) concerning the case, including copies of his Report to the Court and, as far as practicable, of all the enclosures in triplicate.

ANNEX AS7-5

UNITED STATES PRIZE STATUTES
10 U.S. CODE CHAPTER 655 (1982)

Sec.

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§ 7651. Scope of chapter

(a) This chapter applies to all captures of vessels as prize during war by authority of the United States or adopted and ratified by the President. However, this chapter does not affect the right of the Army or the Air Force, while engaged in hostilities, to capture wherever found and without prize procedure—

(1) enemy property; or

(2) neutral property used or transported in violation of the obligations of neutrals under international law.

(b) As used in this chapter—

(1) "vessel" includes aircraft; and

(2) "master" includes the pilot or other person in command of an aircraft.

(c) Property seized or taken upon the inland waters of the United States by its naval forces is not maritime prize. All such property shall be delivered promptly to the proper officers of the courts.

(d) Nothing in this chapter may be construed as contravening any treaty of the United States.

§ 7652. Jurisdiction

(a) The United States district courts have original jurisdiction, exclusive of the courts of the States, of each prize and each proceeding for the condemnation of property taken as prize, if the prize is—

(1) brought into the United States, or the Territories, Commonwealths, or possessions;

(2) brought into the territorial waters of a cobelligerent;

(3) brought into a locality in the temporary or permanent possession of, or occupied by, the armed forces of the United States; or

(4) appropriated for the use of the United States.

(b) The United States district courts, exclusive of the courts of the States, also have original jurisdiction of a prize cause in which the prize property—

(1) is lost or entirely destroyed; or

(2) cannot be brought in for adjudication because of its condition.

(c) The jurisdiction conferred by this section of prizes brought into the territorial waters of a cobelligerent may not be exercised, nor may prizes be appropriated for the use of the United States within those territorial waters, unless the government having jurisdiction over those waters consents to the exercise of the jurisdiction or to the appropriation.

§ 7653. Court in which proceedings brought

(a) If a prize is brought into a port of the United States, or the Territories, Commonwealths, or possessions, proceedings for the adjudication of the prize cause shall be brought in the district in which the port is located.

(b) If a prize is brought into the territorial waters of a cobelligerent, or is brought into a locality in the temporary or permanent possession of, or occupied by, the armed forces of the United States, or is appropriated for the use of the United States, before proceedings are started, the venue of the proceedings for adjudication of the cause shall be in the judicial district selected by the Attorney General, or his designee, for the convenience of the United States.

(c) If the prize property is lost or entirely destroyed or if, because of its condition, no part of it has been or can be sent in for adjudication, proceedings for adjudication of the cause may be brought in any district designated by the Secretary of the Navy. In such cases the proceeds of anything sold shall be deposited with the Treasurer of the United States or public depositary in or nearest the district designated by the Secretary, subject to the orders of the court for that district.

§ 7654. Effect of failure to start proceedings

If a vessel is captured as prize and no proceedings for adjudication are started within a reasonable time, any party claiming the captured property may, in any district court as a court of prize—

(1) move for a monition to show cause why such proceedings shall not be started; or

(2) bring an original suit for restitution.

The monition issued in either case shall be served on the United States Attorney for the district, on the Secretary of the Navy, and on such other persons as are designated by order of the court.

§ 7655. Appointment of prize commissioners and special prize commissioners

(a) In each judicial district there may be not more than three prize commissioners, one of whom is the naval prize commissioner. They shall be appointed by the district court for service in connection with any prize cause in which proceedings are brought under section 7653(a) or (c) of this title. The naval prize commissioner must be an officer of the Navy whose appointment is approved by the Secretary of the Navy. The naval prize commissioner shall protect the interests of the Department of the Navy in the prize property. At least one of the other commissioners must be a member of the bar of the court, of not less than three years' standing, who is experienced in taking depositions.

(b) A district court may appoint special prize commissioners to perform abroad, in connection with any prize cause in which proceedings are brought under section 7653(b) of this title, the duties prescribed for prize commissioners, and, in connection with those causes, to exercise anywhere such additional powers and perform such additional duties as the court considers proper, including the duties prescribed by this chapter for United States marshals. The court may determine the number and qualifications of the special prize commissioners it appoints, except that for each cause there shall be at least one naval special prize commissioner. The naval special prize commissioner must be an officer of the Navy whose appointment is approved by the Secretary. The naval special prize commissioner shall protect the interests of the Department of the Navy in the prize property.

§ 7656. Duties of United States attorney

(a) The interests of the United States in a prize cause shall be represented by the United States attorney for the judicial district in which the prize cause is adjudicated. The United States attorney shall protect the interests of the United States and shall examine all fees, costs, and expenses sought to be charged against the prize fund.

(b) In a judicial district where one or more prize causes are pending the United States attorney shall send to the Secretary of the Navy, at least once every three months, a statement of all such causes in the form and covering the particulars required by the Secretary.

§ 7657. Duties of commanding officer of capturing vessel

(a) The commanding officer of a vessel making a capture shall—

(1) secure the documents of the captured vessel, including the log, and the documents of cargo, together with all other documents and papers, including letters, found on board;

(2) inventory and seal all the documents and papers;

(3) send the inventory and documents and papers to the court in which proceedings are to be had, with a written statement—

(A) that the documents and papers sent are all the papers found, or explaining the reasons why any are missing; and

(B) that the documents and papers sent are in the same condition as found, or explaining the reasons why any are in different condition;

(4) send as witnesses to the prize court the master, one or more of the other officers, the supercargo, purser, or agent of the prize, and any other person found on board whom he believes to be interested in or to know the title, national character, or destination of the prize, and if any of the usual witnesses cannot be sent, send the reasons therefor to the court; and

(5) place a competent prize master and a prize crew on board the prize and send the prize, the witnesses, and all documents and papers, under charge of the prize master, into port for adjudication.

(b) In the absence of instructions from higher authority as to the port to which the prize shall be sent for adjudication, the commanding officer of the capturing vessel shall select the port that he considers most convenient in view of the interests of probable claimants.

(c) If the captured vessel, or any part of the captured property, is not in condition to be sent in for adjudication, the commanding officer of the capturing vessel shall have a survey and an appraisal made by competent and impartial persons. The reports of the survey and the appraisal shall be sent to the court in which proceedings are to be had. Property so surveyed and appraised, unless appropriated for the use of the United States, shall be sold under authority of the commanding officer present. Proceeds of the sale shall be deposited with the Treasurer of the United States or in the public depositary most accessible to the court in which proceedings are to be had and subject to its order in the cause.

§ 7658. Duties of prize master

The prize master shall take the captured vessel to the selected port. On arrival he shall—

(1) deliver immediately to a prize commissioner the documents and papers and the inventory thereof;

(2) make affidavit that the documents and papers and the inventory thereof and the prize property are the same and are in the same condition as delivered to him, or explaining any loss or absence or change in their condition;

(3) report all information respecting the prize and her capture to the United States at-

torney;

(4) deliver the persons sent as witnesses to the custody of the United States marshal; and

(5) retain the prize in his custody until it is taken therefrom by process from the prize court.

§ 7659. Libel and proceedings by United States attorney

(a) Upon receiving the report of the prize master directed by section 7658 of this title, the United States attorney for the district shall promptly—

(1) file a libel against the prize property;

(2) obtain a warrant from the court directing the marshal to take custody of the prize property; and

(3) proceed to obtain a condemnation of the property.

(b) In connection with the condemnation proceedings the United States attorney shall insure that the prize commissioners—

(1) take proper preparatory evidence; and

(2) take depositions de bene esse of the prize crew and of other transient persons who know any facts bearing on condemnation.

§ 7660. Duties of prize commissioners

One or more of the prize commissioners shall—

(1) receive from the prize master the documents and papers of the captured vessel and the inventory thereof;

(2) take the affidavit of the prize master required by section 7658 of this title;

(3) take promptly, in the manner prescribed by section 7661 of this title, the testimony of the witnesses sent in;

(4) take, at the request of the United States attorney, on interrogatories prescribed by the court, the depositions de bene esse of the prize crew and others;

(5) examine and inventory the prize property;

(6) apply to the court for an order to the marshal to unload the cargo, if this is necessary to that examination and inventory;

(7) report to the court, and notify the United States attorney, whether any of the prize property requires immediate sale in the interest of all parties;

(8) report to the court, from time to time, any matter relating to the condition, custody, or disposal of the prize property requiring action by the court;

(9) return to the court sealed and secured from inspection—

(A) the documents and papers received, duly scheduled and numbered;

(B) the preparatory evidence;

(C) the evidence taken de bene esse; and

(D) their inventory of the prize property; and

(10) report to the Secretary of the Navy, if, in their judgment, any of the prize property is useful to the United States in the prosecution of war.

§ 7661. Interrogation of witnesses by prize commissioners

Witnesses before the prize commissioners shall be questioned separately, on interrogatories prescribed by the court, in the manner usual in prize courts. Without special authority from the court, the witnesses may not see the interrogatories, documents, or papers, or consult with counsel or with other persons interested in the cause. Witnesses who have the rights of neutrals shall be discharged as soon as practicable.

§ 7662. Duties of marshal

The marshal shall—

(1) keep in his custody all persons found on board a prize and sent in as witnesses, until they are released by the prize commissioners or the court;

(2) keep safely in his custody all prize property under warrant from the court;

(3) report to the court any cargo or other property that he thinks should be unloaded and stored or sold;

(4) insure the prize property, if in his judgment it is in the interest of all concerned;

(5) have charge of the sale of the property, if a sale is ordered, and be responsible for the conduct of the sale in the manner required by the court, for the collection of the gross proceeds, and for their immediate deposit with the Treasurer of the United States or public depositary nearest the place of sale, subject to the order of the court in the cause; and

(6) submit to the Secretary of the Navy, at such times as the Secretary designates, a full statement of the condition of the prize and of the disposal made thereof.

§ 7663. Prize property appropriated for the use of the United States

(a) Any officer or agency designated by the President may appropriate for the use of the United States any captured vessel, arms, munitions, or other material taken as prize. The department or agency for whose use the prize property is appropriated shall deposit the value of the property with the Treasurer of the United States or with the public depositary nearest to the court in which the proceedings are to be had, subject to the orders of the court.

(b) Whenever any captured vessel, arms, munitions, or other material taken as prize is appropriated for the use of the United States before that property comes into the custody of the prize court, it shall be surveyed, appraised, and inventoried by persons as competent and impartial as can be obtained, and the survey, appraisal, and inventory sent to the court in which the proceedings are to be had. If the property is appropriated after it comes into the custody of the court, sufficient notice shall be given to enable the court to have the property appraised for the protection of the rights of the claimants.

(c) Notwithstanding subsections (a) and (b), in any case where prize property is appropri-

ated for the use of the United States, a prize court may adjudicate the cause on the basis of an inventory and survey and an appropriate undertaking by the United States to respond for the value of the property, without either an appraisal or a deposit of the value of the prize with the Treasurer of the United States or a public depositary.

§ 7664. Delivery of property on stipulation

(a) Prize property may be delivered to a claimant on stipulation, deposit, or other security, if—

(1) the claimant satisfies the court that the property has a peculiar and intrinsic value to him, independent of its market value;

(2) the court is satisfied that the rights and interests of the United States or of other claimants will not be prejudiced;

(3) an opportunity is given to the United States attorney and the naval prize commissioner or the naval special prize commissioner to be heard as to the appointment of appraisers; and

(4) a satisfactory appraisal is made.

(b) Money collected on a stipulation, or deposited instead of it, that does not represent costs shall be deposited with the Treasurer of the United States or a public depositary in the same manner as proceeds of a sale.

§ 7665. Sale of prize

(a) The court shall order a sale of prize property if—

(1) the property has been condemned;

(2) the court finds, at any stage of the proceedings, that the property is perishable, liable to deteriorate, or liable to depreciate in value; or

(3) the cost of keeping the property is disproportionate to its value.

(b) The court may order a sale of the prize property if, after the return-day on the libel, all the parties in interest who have appeared in the cause agree to it.

(c) An appeal does not prevent the order of a sale under this section or the execution of such an order.

§ 7666. Mode of making sale

(a) If a sale of prize property is ordered by the court, the marshal shall—

(1) prepare and circulate full catalogues and schedules of the property to be sold and return a copy of each to the court;

(2) advertise the sale fully and conspicuously by posters and in newspapers ordered by the court;

(3) give notice to the naval prize commissioner at least five days before the sale; and

(4) keep the goods open for inspection for at least three days before the sale.

(b) An auctioneer of known skill in the business to which the sale pertains shall be employed by the Secretary of the Navy to make the sale. The auctioneer, or his agent, shall collect and deposit the gross proceeds of the sale. The auctioneer and his agent are responsible to the marshal for the conduct of the sale and the collection and deposit of the gross proceeds.

§ 7667. Transfer of prize property to another district for sale

(a) In the case of any prize property ordered to be sold, if the court believes that it will be in the interest of all parties to have the property sold in a judicial district other than the one in which the proceedings are pending, the court may direct the marshal to transfer the property to the district selected by the court for the sale, and to insure it. In such a case the court shall give the marshal proper orders as to the time and manner of conducting the sale.

(b) When so ordered the marshal shall transfer the property and keep it safely. He is responsible for its sale in the same manner as if the property were in his own district and for the deposit of the gross proceeds with the Treasurer of the United States or public depositary nearest to the place of sale, subject to the order of the court for the district where the adjudication is pending.

(c) The necessary expenses of insuring, transferring, receiving, keeping, and selling the property are a charge upon it and upon the proceeds. Whenever any such expense is paid in advance by the marshal, any amount not repaid to him from the proceeds shall be allowed to him as in the case of expenses incurred in suits in which the United States is a party.

(d) If the Secretary of the Navy believes that it will be in the interest of all parties to have the property sold in a judicial district other than the one in which the proceedings are pending, he may, either by a general regulation or by a special direction in the cause, require the marshal to transfer the property from the district in which the judicial proceedings are pending to any other district for sale. In such a case proceedings shall be had as if the transfer had been made by order of the court.

§ 7668. Disposition of prize money

The net proceeds of all property condemned as prize shall be decreed to the United States and shall be ordered by the court to be paid into the Treasury.

§ 7669. Security for costs

The court may require any party to give security for costs at any stage of the cause and upon filing an appeal.

§ 7670. Costs and expenses a charge on prize property

(a) Costs and expenses allowed by the court incident to the bringing in, custody, preservation, insurance, and sale or other disposal of prize property are a charge upon the property and shall be paid from the proceeds thereof, unless the court decrees restitution free from such a charge.

(b) Charges for work and labor, materials furnished, or money paid must be supported by affidavit or vouchers.

§ 7671. Payment of costs and expenses from prize fund

(a) Payment may not be made from a prize fund except upon the order of the court. The court may, at any time, order the payment, from the deposit made with the Treasurer or public depositary in the cause, or costs or charges accrued and allowed.

(b) When the cause is finally disposed of, the court shall order the Treasurer or public depositary to pay the costs and charges allowed and unpaid. If the final decree is for restitution, or if there is no money subject to the order of the court in the cause, costs or charges allowed by the court and not paid by the claimants shall be paid out of the fund for paying the expenses of suits in which the United States is a party or is interested.

§ 7672. Recaptures: award of salvage, costs, and expenses

(a) If a vessel or other property that has been captured by a force hostile to the United States is recaptured, and the court believes that the property had not been condemned as prize by competent authority before its recapture, the court shall award an appropriate sum as salvage.

(b) If the recaptured property belonged to the United States, it shall be restored to the United States, and costs and expenses ordered to be paid by the court shall be paid from the Treasury.

(c) If the recaptured property belonged to any person residing within or under the protection of the United States, the court shall restore the property to its owner upon his claim and on payment of such sum as the court may award as salvage, costs, and expenses.

(d) If the recaptured property belonged to any person permanently residing within the territory and under the protection of any foreign government in amity with the United States, and, by the law or usage of that government, the property of a citizen of the United States would be restored under like circumstances of recapture, the court shall, upon the owner's claim, restore the property to him under such terms as the law or usage of that government would require of a citizen of the United States under like circumstances. If no such law or usage is known, the property shall be restored upon the payment of such salvage, costs, and expenses as the court orders.

(e) Amounts awarded as salvage under this section shall be paid to the United States.

§ 7673. Allowance of expenses to marshals

The marshal shall be allowed his actual and necessary expenses for the custody, care, preservation, insurance, and sale or other disposal of the prize property, and for executing any order of the court in the prize cause. Charges of the marshal for expenses or disbursements shall be allowed only upon his oath that they have been necessarily incurred for the purpose stated.

§ 7674. Payment of witness fees

If the court allows fees to any witness in a prize cause, or fees for taking evidence out of the district in which the court sits, and there is no money subject to its order in the cause, the marshal shall pay the fees. He shall be repaid from any money deposited to the order of the court in the cause. Any amount not so repaid to the marshal shall be allowed him as witness fees paid by him in cases in which the United States is a party.

§ 7675. Commissions of auctioneers

(a) The Secretary of the Navy may establish a scale of commissions to be paid to auctioneers employed to make sales of prize property. These commissions are in full satisfaction of expenses as well as services. The scale may in no case allow a commission in excess of—

(1) ½ of 1 percent on any amount exceeding $10,000 on the sale of a vessel; and

(2) 1 percent of any amount exceeding $10,000 on the sale of other prize property.

(b) If no such scale is established, auctioneers in prize causes shall be paid such compensation as the court considers just under the circumstances of each case.

§ 7676. Compensation of prize commissioners and special prize commissioners

(a) Naval prize commissioners and naval special prize commissioners may not receive compensation for their services in prize causes other than that to which they are entitled as officers of the Navy.

(b) Prize commissioners and special prize commissioners, except naval prize commissioners and naval special prize commissioners, are entitled to just and suitable compensation for their services in prize causes. The amount of compensation in each cause shall be determined by the court and allowed as costs.

(c) Annually, on the anniversary of his appointment, each prize commissioner and special prize commissioner, except a naval prize commissioner or a naval special prize commissioner, shall submit to the Attorney General an account of all amounts received for his services in prize causes within the previous year. Of the amounts reported, each such commissioner may retain not more than $3,000, which is in full satisfaction for all his services in prize causes for that year. He shall pay any excess over that amount into the Treasury.

§ 7677. Accounts of clerks of district courts

(a) The clerk of each district court, for the purpose of the final decree in each prize cause, shall keep account of—

(1) the amount deposited with the Treasurer or public depositary, subject to the order of the court in the cause; and

(2) the amounts ordered to be paid therefrom as costs and charges.

(b) The clerk shall draw the orders of the court for the payment of costs and allowances and for the disposition of the residue of the prize fund in each cause.

(c) The clerk shall send to the Secretary of the Treasury and the Secretary of the Navy—

(1) copies of final decrees in prize causes; and

(2) a semi-annual statement of the amounts allowed by the court, and ordered to be paid, within the preceding six months to the prize commissioners and special prize commissioners for their services.

§ 7678. Interfering with delivery, custody, or sale of prize property

Whoever willfully does, or aids or advises in the doing of, any act relating to the bringing in, custody, preservation, sale, or other disposition of any property captured as prize, or relating to any documents or papers connected with the property or to any deposition or other document or paper connected with the proceedings, with intent to defraud, delay, or injure the United States or any claimant of that property, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

§ 7679. Powers of district court over prize property notwithstanding appeal

Notwithstanding an appeal, the district court may make and execute all necessary orders for the custody and disposal of prize property.

§ 7680. Appeals and amendments in prize causes

(a) A United States Court of Appeals may allow an appeal in a prize cause if it appears that a notice of appeal was filed with the clerk of the district court within thirty days after the final decree in that cause.

(b) A United States Court of Appeals, if in its opinion justice requires it, may allow amendments in form or substance of any appeal in a prize cause.

§ 7681. Reciprocal privileges to cobelligerent

(a) A cobelligerent of the United States that consents to the exercise of jurisdiction conferred by section 7652(a) of this title with respect to any prize of the United States brought into the territorial waters of the cobelligerent or appropriated for the use of the United States within those territorial waters shall be given, upon proclamation by the President of the United States, like privileges with respect to any prize captured under the authority of that cobelligerent and brought into the territorial waters of the United States or appropriated for the use of the cobelligerent within the territorial waters of the United States.

(b) Reciprocal recognition shall be given to the jurisdiction acquired by courts of a cobelligerent under this section and full faith and credit shall be given to all proceedings had or judgments rendered in the exercise of that jurisdiction.

RECIPROCAL PRIVILEGES

The Governments listed below are accorded like privileges with respect to prizes captured under authority of the said Governments and brought into the territorial waters of the United States or taken or appropriated in the territorial waters of the United States for the use of the said Governments, namely: Australia, Proc. No. 2617, Aug. 16, 1944, 9 F.R. 9969; Canada, Proc. No. 2594, Sept. 27, 1943, 8 F.R. 13217; India, Proc. No. 2601, Dec 6, 1943, 8 F.R. 16351; New Zealand, Proc. No. 2582, April 2, 1943, 8 F.R. 4275; United Kingdom, Proc. No. 2575, Feb. 2, 1944, 8 F.R. 1429.

ANNEX AS7-6

FORMS FOR USE BY PRIZE MASTERS AND COMMISSIONERS

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FORM 1

OPREP TO BE SENT REPORTING INTENT OR CAPTURE OF PRIZE

IMMEDIATE
FM:
TO: CNO WASHINGTON DC
AREA CDR
TYPE CDR
FLT CDR
INFO: ADDES AS APPROPRIATE
NAVY JAG ALEXANDRIA VA
SECRET //N05880//
OPREP NAVY BLUE 1100_____#
1. INCIDENT. HAVE (INTEND TO) CAPTURE (SHIP) A (FLAG) VESSEL AS PRIZE. VESSEL FLYING (ENEMY'S) (NEUTRAL) ENSIGN SUSPECTED TO BE LADEN WITH CONTRABAND, CONFIRMED BY SEARCH AND VISIT
2. CDR'S ESTIMATE.
3. REFERENCE (AS APPROPRIATE)
4. DETAILS
A. TIME
B. LOCATION
C. NARRATIVE
5. REMARKS
6. AMPLIFYING INFO TO FOLLOW.
DECL
BT

FORM 2

OPREP TO BE SENT REPORTING CLEARANCE OF NEUTRAL MERCHANT VESSEL

IMMEDIATE
FM:
TO: CNO WASHINGTON DC
AREA CDR
FLT CDR
TYPE CDR
INFO: ADDEES AS APPROPRIATE
NAVY JAG ALEXANDRIA VA
A. _____ MSG DTG_____Z XXX XX
SECRET //N05880//
OPREP-3 NAVY BLUE 1100-#
1. INCIDENT. HAVE CLEARED (SHIP) NEUTRAL (FLAG) VESSEL AFTER VISIT AND SEARCH.
2. CDR'S ESTIMATE. (ADVERSE)(NO ADVERSE) EFFECT MAY BE EXPECTED (EXPLAIN BRIEFLY).
3. REFERENCE AS APPROPRIATE.
4. DETAILS
A. TIME
B. LOCATION
C. NARRATIVE
5. LOSS/DAMAGE
6. REMAINDER
7. AMPLIFYING INFORMATION TO FOLLOW.
DECL
BT

FORM 3

SITREP TO BE SENT REPORT CAPTURE OF
PRIZE AND APPOINTMENT OF PRIZE MASTER

FM:
TO: CNO WASHINGTON DC
NAVY JAG ALEXANDRIA VA
TYPE CDR
FLEET CDR
INFO: ADDEES AS NECESSARY
SUBJ: PRIZE SITREP ICO (VESSEL)
A. NWP 9
B.
SECRET //COMMANDER'S SITREP//
1. IAW REF A THIS REPORTS CAPTURE OF (NAVAL VESSEL) (MERCHANT VESSEL) (AIRCRAFT) AT (TIME DATE) (LAT. LONG.)(OR C'TY).
2. PARTICULARS OF CAPTURED HULL
A. TYPE
B. PROPULSION
C. ARMAMENT
D. NAME DISPLAYED
E. REGISTERED NAME
F. ENSIGN DISPLAYED
G. FLAG OF REGISTRY
H. DISPLAYED HOMEPORT
I. REGISTERED HOMEPORT
J. MASTER'S NATIONALITY
K. NUMBER AND NATIONALITY OF OFFICERS
L. NUMBER AND NATIONALITY OF CREW
M. NUMBER AND NATIONALITY OF PASSENGERS
N. HULL LENGTH
O. BEAM
P. DISPLACEMENT
Q. DRAFT (FWD, AFT, MEAN)
R. CARGOES ON BOARD
S. BUNKERS ON HAND
T. CONDITION OF HULL AND CARGO
U. VOYAGE PORTS OF DEPARTURE AND DESTINATION (REFLECTED IN LOGS)
V. VOYAGE PARTICULAR OF TRAVEL FROM CREW AND DOCUMENTS
3. SYNOPSIS OF BOARDING PARTY
A. CASUALTIES, FATALITIES
B. DAMAGE TO CAPTURED HULL
C. DAMAGE TO CAPTURED CARGOES
D. DAMAGE TO CAPTURING HULL
E. PRIZE MASTER AND CREW ASSIGNED.

4. INTENTIONS
A. SUBJ VESSEL IS STEERING (ABOVE) FOR PORT OF (XXXXXXX)
B. VESSEL AND ALL CARGO WAS LOST AS A RESULT OF SCUTTLING EFFORTS BY ITS CREW BEFORE BOARDING PARTY TOOK CONTROL.
C. CAPTURED VESSEL SUNK/DAMAGED BY NAVAL GUNFIRE (TORPEDOES, AIRCRAFT) BECAUSE OF (UNSEAWORTHY CONDITION) (INADEQUATE RESOURCES) (THREAT TO OPERATIONAL UNIT) AFTER REMOVAL OF VESSELS CREW AND CARGO WHICH WILL BE TRANSFERRED FOR PRIZE PROCEEDINGS
5. SYNOPSIS OF EVENTS LEADING TO CAPTURE/SEIZURE: (PARAGRAPH)
6. STATUS OF DOCUMENTS AND PAPERS TAKEN FROM SUBJ VESSEL.
(DETAILED DESCRIPTION OF WHAT WAS PRESERVED AND WHAT WAS NOT, WITH REASONS)
EXPLAIN INTENTIONS TO RETURN DOCUMENTS AND PAPERS FOR PRIZE COURT'S USE.
7. INITIAL EVALUATION OF HULL FOR FUTURE USE BY U.S. OR ALLIES.

FORM 4

LOG ENTRY TO BE MADE IN DECK LOG OF NEUTRAL MERCHANT VESSEL CLEARED AFTER VISIT AND SEARCH

The _____(give name, nationality and class of ship, as steamer or sailing ship) has this day been visited by me at _____ (give hour and date). I have examined the ship's papers concerning the ship and her cargo, produced by the master, which were found by me to be regular and show that the voyage of the ship is lawful. The circumstances have been reported to the commanding officer of the visiting ship, who has directed that the ship be allowed to proceed on her voyage.

The ship is accordingly allowed to proceed on her voyage, by direction of the commanding officer of the visiting ship.

Entered _____ (give hour, date, and geographical position when entry is made).

(Signed name)_____
(Grade) _____, U.S. Navy
Examining Officer

Notes

1. The name of the visiting ship and the name or grade of its commanding officer shall not be disclosed.

2. This form also appears in OPNAVINST 3120.32B, para. 630.23.5d, Annex AS7-5.

FORM 5

LOG ENTRY TO BE MADE IN DECK LOG OF VESSEL DETAINED FOR SEARCH OR OTHER APPROPRIATE ACTION

The _____ (give name, nationality and class of ship, as steamer or sailing ship) has this day been visited by me at _____(give hour and date). I have examined the ship's papers concerning the ship and her cargo, produced by the master, which were found by me to be _____(irregular; fraudulent; defaced; in part destroyed; in part concealed; to show the presence of contraband; apparently regular but owing to suspicions having been aroused by (state reasons), a search appeared to me to be warranted). The circumstances have been reported to the commanding officer of the visiting ship, who has directed that the ship be detained for the following reason _____(state reason, whether one of those noted immediately above or any other, such as breach of blockade, other than neutral service, great deviation from direct course, or any other reason justifying detention).

The ship is accordingly detained by direction of the commanding officer of the visiting ship.

Entered _____(give hour, date and geographical position when entry is made.)

(Signed name) _____
(Grade)_____, U.S. Navy
Examining Officer

Notes

1. The name of the visiting ship and the name or grade of its commanding officer shall not be disclosed.

2. This form also appears in OPNAVINST 3120.32B, para. 630.23.5d, Annex AS7-5.

FORM 6

LOG ENTRY TO BE MADE IN DECK LOG OF U.S.
WARSHIP REGARDING CLEARANCE OF NEUTRAL
VESSEL AFTER VISIT AND SEARCH

At (time, date, latitude, longitude) by direction of (name, rank and title of commanding officer of visiting and searching vessel on force) the (flag) (class) (name) (length, beam, draft displacement) has this day been visited and searched. The vessel was initially boarded by a visit and search party under the command of (name and grade) as Examining Officer. The following personnel were assigned to the visit and search party: (list names and grades, rate and rank). The party was armed with (describe)(unarmed). The Examining Officer reported that based upon his examination of the ship's document papers and cargo there was no reasonable suspicion that she was engaged in the service of an enemy of the United States. By direction of Commanding Officer USS _____ (ship) was cleared and permitted to continue on her voyage.

FORM 7

LOG ENTRY TO BE MADE IN DECK LOG OF U.S. WARSHIP
REGARDING CAPTURE OF VESSEL AS PRIZE

At (time, date, latitude, longitude) by direction of (name, rank and title of commanding officer of capturing vessel on force) the (flag) (class) (name) (length, beam, draft displacement) has this day been captured as a vessel engaged in (the service of an enemy of the United States)(carriage of contraband). The vessel was initially boarded by a visit and search party under the command of (name and grade) as Examining Officer. The following personnel were assigned to the visit and search party: (list names and grades and ranks).

The party was armed with (describe) (unarmed). The Examining Officer reported that based upon his examination of the ship's document papers and cargo there was reasonable suspicion that she was engaged in the service of an enemy of the United States by reason of (specify). Subsequently a boarding party under the command of (name and grade) was dispatched. The following personnel were assigned to the boarding party: (list name, grade, rate and rank). The party was armed with (describe). The Boarding Party Officer concurred in the report of the Examining Officer. Subsequently (name and grade) was appointed as Prize Master of (vessel). At (time) the Prize Master informed the master of (vessel) that he had seized (vessel) as a prize of war. The U.S. ensign was broken over the enemy flag. By direction of commanding officer USS _____ under the command of (name, grade) Prize Master set sail for (port).

FORM 8

LOG ENTRY TO BE MADE IN DECK
LOG OF SEIZED PRIZE OF WAR

By direction of _____(name, rank and title of Commanding Officer of capturing vessel or force), the __(flag)_____ ____(class)____ ____(name)__ has this day been captured as a vessel engaged in the service of an enemy of the United States and has been placed in my charge as Prize Master, with directions to take her to a United States Special Prize Commissioner for proceedings in preparatorio.

The officers and men of the Prize Crew are as follows:

_____
_____
_____

Entered at _____(name of port, or latitude and longitude if at sea) at _____ (hours) on _____ (date).

_____
(name)
_____, U.S. (Navy)(Naval Reserve),
(rank)
Prize Master

FORM 9

AFFIDAVIT OF PRIZE MASTER WITH CERTIFICATE OF CAPTOR AS TO VALUABLES FOUND ON BOARD

United States District Court
for_____ District of

(Affidavit and
(Certificate of
(Captor

United States of America and Captor
Plaintiff

Against

_____ Prize _____

M/V
border, tackle etc
as Prize of War
Defendant

(Name, grade, service) being duly sworn, deposes and says:

I am a commissioned officer in the service of the United States (Navy) (Naval Reserve) and make this affidavit as Prize Master of _____(Flag)_____ ( ) (name) and as fully familiar with all facts and circumstances surrounding the capture of this prize of war.

On ___(date)_____ at _____, in compliance with orders issued by _____ _____ (title of command only) I boarded and took possession of the _____ (flag) (class) (name) (place) accompanied by a Prize Crew, identified myself to the _____ and notified him that I (master, or other officer) was taking possession of the vessel in the name of the United States Navy.

I caused guards to be posted and thereafter controlled all passage of persons or property to and from the vessel.

I demanded, received and made secure all documents of the ship and cargo, including the logs and all other documents, letters and other papers on board as listed in the attached Inventory, "Schedule A". These documents are all the papers found on the Prize. They have been marked, numbered and initialed by the Special Prize Commissioner.(1) I have also initialed the documents. They have been delivered up to the Special Prize Commissioner as they were found, without any fraud, subduction or embezzlement.(2)

I do swear that if, at any time hereafter and before the final condemnation or acquittal of the Prize property, any further or other papers relating to the said captured property shall be found or discovered to my knowledge, they also will be delivered up or information thereof given to the Special Prize Commissioner or to the United States District Court for the _____ District of _____.

Exhibit (A) is a copy of the Inventory of documents and papers found on board the Prize at the time of capture. I hereby certify that the documents and papers listed in Exhibit (A) constitute all the papers found on the vessel. I further certify that all these papers have been forwarded to a Prize Commissioner for delivery to the District Court of the United States for the _____ District of _____ and that they are in the condition in which they were found.

I further hereby certify that the following list of money and valuables is a full and complete list of all such property found on board the _____ _____
(flag) (class) _____at the time of the capture of said (name) vessel on _____ at _____ (date)
(port or latitude and longitude) by U.S. Navy personnel at the direction of _____
or thereafter discovered while said vessel was in my custody as Prize Master, except such money and valuables

as were discovered on the persons or among the personal effects of the officers and members of the crew of said vessel, and which, after due investigation, were determined to be the personal property of said officers and members of the crew.

_____
_____
_____
_____

_____
(name)
_____, U.S.(Navy)(Naval Reserve)
(rank)

Subscribed and sworn to before me this _____day of _____, 19 , at the port of _____.

_____
(name)
_____, U.S.(Navy)(Naval Reserve),
(rank)
Special Prize Commissioner

Notes

(1) (or) All the documents except those numbered _____and _____in "Schedule A" . . . . . .(then add). The documents, numbered _____and _____, were not delivered up to the Special Prize Commissioner because. . . . .

(2) (or) except that the condition of document number _____ in "Schedule A" has been changed as a result of ..... caused by ..... .
N.B.: Attach copy of "Inventory of Documents and Papers" as "Schedule A".

FORM 10

APPOINTMENT OF PRIZE COMMISSIONER

United States District Court
For the _____ District of _____

Pursuant to the authority vested in this Court by Title 10 United States Code, section 7655, (name) is hereby appointed as a Prize Commissioner for the United States District Court for the _____ District of _____. His/her service to be at the pleasure of this Court.

Done at _____ this _____ day of _____ 19 .

In witness thereof I have hereto set my hand and affixed the seal of this court at the place and date mentioned above.

Chief Judge

FORM 11

APPOINTMENT OF NAVAL PRIZE COMMISSIONER

United States District Court
For the _____ District of _____

Pursuant to the authority vested in this Court by Title 10 United States Code, section 7655, and with the approval of the Secretary of the Navy, (name grade) United States Navy (Naval Reserve) is hereby appointed as a Naval Prize Commissioner for the United States District Court for the _____ District of _____, such service to be at the pleasure of this Court and the Secretary of the Navy.

Done at _____ this _____ day of _____ 19 .

In witness thereof I have hereto set my hand and affixed the Seal of this Court at the place and date mentioned above.

Chief Judge

FORM 12

APPOINTMENT OF PRIZE COMMISSIONER QUALIFIED AS LAWYER

United States District Court
For the _____ District of _____

Pursuant to the authority vested in this Court by Title 10 United States Code, section 7655, (name), a member of the Bar of this Court and otherwise fully qualified in accordance with 10 U.S.C. section 7655(a), is hereby appointed as a Prize Commissioner for the United States District Court for the _____ District of _____. Such service to be at the pleasure of this Court.

Done at _____ this _____ day of _____ 19 .

In witness thereof I have hereto set my hand and affixed the Seal of this Court at the place and date mentioned above.

Chief Judge

FORM 13

APPOINTMENT OF SPECIAL PRIZE COMMISSIONER

United States District Court
For the _____ District of _____

Pursuant to the authority vested in this Court by Title 10 United States Code section 7655(b) (name) is hereby appointed as a Special Prize Commissioner to serve for the United States District Court for the _____ District of _____. Such service to be at the pleasure of this Court.

Done at _____ this _____ day of _____ 19 .

In witness thereof I have hereto set my hand and affixed the Seal of this Court at the place and date mentioned above.

Chief Judge

FORM 14

APPOINTMENT OF SPECIAL NAVAL PRIZE COMMISSIONER

United States District Court
For the _____ District of _____

Pursuant to the authority vested in this Court by Title 10 United States Code section 7655 and with the approval of the Secretary of the Navy, (name, grade), (US Navy)(Naval Reserve) is hereby appointed as a Special Naval Prize Commissioner to serve abroad for the United States District Court for the _____ District of _____. Such service to be at the pleasure of this Court and the Secretary of the Navy.

Done at _____ this _____ day of _____ 19 .

In witness thereof I have hereto set my hand and affixed the Seal of this Court at the place and date mentioned above.

Chief Judge

FORM 15

MESSAGE FROM SPECIAL NAVAL PRIZE COMMISSIONER
REPORTING USEFULNESS OF PRIZE PROPERTY

FM: (COMMAND TO WHICH SPECIAL NAVAL PRIZE COMMISSIONER IS ATTACHED)
TO: SECNAV
INFO: CNO WASHINGTON DC
NAVY JAG ALEXANDRIA VA
UNCLAS //N05880//
SUBJ: APPROPRIATION OF PRIZE (SHIP)
A. 10 U.S.C. SECTION 7660
B. 10 U.S.C. SECTION 7663
1. NAVY JAG PASS TO CODES 10 AND 31.
2. IAW REF A SPECIAL PRIZE COMMISSIONER REPORTS THAT IN HIS JUDGMENT (FLAG, CLASS, NAME) CAPTURED AS PRIZE AT _____ ON _____ MAY BE USEFUL TO U.S. IN WAR. VESSEL NOW AT (PORT). RECOMMEND APPROPRIATION IAW REF B.
3. REQUEST INSTRUCTIONS WHETHER VESSEL TO BE APPOINTED TO USE OF U.S.G. OR OTHER DISPOSITION.

FORM 16

SPECIAL PRIZE COMMISSIONER'S RECEIPT FOR
PRIZE PROPERTY OUTUS

PURSUANT TO Title 10, U.S. Code, section 7660, and the Prize Rules of the U.S. District Court for the _____ District of _____, (rank) (name) _____, U.S. (Navy)(Naval Reserve), Prize Master, has at (hours) _____ on (date) _____, at the port of _____ delivered to me the (flag) (class) _____ (name) _____, of _____ gross and _____ net tons, call _____, _____ feet in length overall, _____ feet beam, built in _____ at _____, her engines, boilers, tackle, apparel and equipment, receipt of which is hereby acknowledged.

(name)
(rank), U.S. (Navy)(Naval Reserve)
Special Prize Commissioner

FORM 17

U.S. MARSHAL'S RECEIPT FOR PRIZE PROPERTY RECEIVED
WITHIN THE JURISDICTION OF THE UNITED STATES

PURSUANT TO Title 10, U.S. Code, section 7662, and the Prize Rules of the U.S. District Court for the _____ District of _____, and the order of that Court dated _____ signed by the Honorable _____ United States District Judge, (rank) (name) _____, U.S. (Navy)(Naval Reserve), Prize Master, has at (hours) _____ on (date) _____, at the port of _____ delivered to me the (flag) _____ (class) _____ (name) _____, _____ gross and _____ net tons, call _____, _____ feet in length overall, _____ feet beam, built in _____ at _____, her engines, boilers, tackle, apparel and equipment, receipt of which is hereby acknowledged.

(name)
U.S. Marshal for the _____
District of _____

FORM 18

ORDER OF APPROPRIATION OF PRIZE PROPERTY
FOR USE OF THE UNITED STATES

To all who these presents come:

Be it known that pursuant to Executive Order _____ dated _____ issued _____ ____ under the authority of Title 10 United States Code section 7663, I, _____ as officer (or officer of an agency) designated for the President to appropriate prize property for the use of the United States hereby appropriates (describe property).

Further, I have directed that the sum of _____ dollars, the value of the property appropriated, be deposited with the Treasurer of the United States (or in public deposit).[1]

_____
(Name and Title)

Seal of Agency

Note

[1] In the case of warships, enemy owned aircraft, enemy owned merchant vessels and weapons no deposit need be made and the general paragraph shall be omitted.

FORM 19

RECEIPT AND CERTIFICATE

S.S._____

This is to certify that the Secretary of the Navy, acting pursuant to the provisions of (10 U.S.C. 7663), hereby acknowledges receipt from _____, as Special Prize Commissioner of the District Court of the United States for the _____ District of _____, and appropriates for the use of the United States at _____ hours this _____ day of ___ _____, at the port of _____, the (steam) vessel _____, a _____ (steamer) of _____ gross and _____ net tons, call _____ _____, _____ feet in length overall, _____ feet beam, built in _____ at _____, her engines, boilers, tackle, apparel and equipment, more particularly described in Exhibit "A" hereto annexed.

UNITED STATES OF AMERICA

By: _____
(Name and Title)

N.B.: "Exhibit A" will usually include copies of Survey Report and Inventories.

FORM 20

MESSAGE FROM PRIZE COMMISSIONER ON RECEIPT OF PRIZE
PROPERTY FROM PRIZE MASTER AND APPROPRIATION

FM: (COMMAND TO WHICH COMMISSIONER IS ATTACHED)
TO: NAVY JAG ALEXANDRIA VA
INFO: CNO WASHINGTON DC
SECRET //N05880//
SUBJ: RECEIPT OF PRIZE PROPERTY
A.
1. PRIZE MASTER DELIVERED FLAG (VESSEL) (CLASS) TO SPECIAL PRIZE COMMISSIONER AT (TIME, DATE, PLACE).
2. SUBJ VESSEL APPROPRIATED TO USE OF USG BY ORDER OF _____ AND DELIVERED TO _____ AT (TIME, DATE, PLACE).
BT

(N.B.: if receipt and delivery not simultaneous, two separate msgs shall be sent)

FORM 21

REPORT OF SPECIAL PRIZE COMMISSIONER

UNITED STATES DISTRICT COURT FOR
DISTRICT OF

UNITED STATES GOVERNMENT
AS CAPTOR, PLAINTIFF

AGAINST

HER ENGINE, BOILERS, TACKLE AND
ETC, IN AS PRIZE OF WAR
DEFENDANT

(REPORT OF SPECIAL
(PRIZE COMMISSIONER

PRIZE No.

REPORT OF SPECIAL PRIZE COMMISSIONER

In re steamer _____ and cargo (date) (place)

Prize Number _____

TO THE HONORABLE THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE _____DISTRICT OF _____:

I respectfully forward herewith:

A. Affidavit of Prize Master with certificate of captor and certificate as to money and valuables found on board.
B. Prize Master's Inventory of Cargo.
C. Prize Master's Inventory of Documents.
D. Prize Master's Inventory of Stores, Furniture and Equipment.
E. Special Prize Commissioner's Inventory of Documents.
F. Prize Master's Log.
G. The depositions of the following witnesses:
   1. _____
   2. _____
J. The following documents marked "Prize No. _____,_____, inclusive, each initialed by the Special Prize Commissioner and the Prize Master.
   1._____
   2._____
K. Copy of "Receipt for Vessel", dated _____ from Special Prize Commissioner to Prize Master.
L. Copy of "Receipt and Certificate", dated _____ from officer or agency designated by President to Special Prize Commissioner.

The vessel _____ was captured by U.S. Navy personnel at direction of (title of command) on (date) at (name of port or latitude and longitude) and brought to the port of (place) on (date) by[1] a Prize Master and crew.

Notice of the vessel's arrival[2] was received by the Special Prize Commissioner at (hours) (date) and an examination of the vessel[3] was made commencing at (hours) the same day.

On (date) the witnesses whose depositions are listed above were produced by the Prize Master[4] together with the documents and papers listed in the Prize Master's Inventory of Documents. The witnesses were examined in the manner and under the conditions set forth in the certificates appearing at the end of the depositions.

The vessel was delivered by the Prize Master to the Special Prize Commissioner at (hours) on (date) at (place) and a receipt given therefor, a copy of which is enclosed as Attachment "K".

The Secretary of the Navy has been advised that the vessel has been captured and that in the Commissioner's judgment she would be useful to the United States in war. The Secretary of the Navy has directed delivery of the vessel to under authority of Title 10, U.S. Code, section 7663.

The vessel was thereafter appropriated for the use of the United States, pursuant to said authority, by the _____, and delivery made to _____(name)_____ , the duly authorized representative of said _____ on _____(date)_____ at _____(place)_____. A copy of the receipt given by the officer or agency designated by the President is enclosed as Attachment "L".

(Add any material facts required.)

Respectfully submitted,

_____(name)_____
_____(rank)_____, U.S. (Navy)(Naval Reserve)
Special Prize Commissioner.

Notes:

([1]) (or) retained at said port in the custody of

([2]) (or) presence

([3]) (or) vessel and her cargo

([4]) (or) except the documents therein numbered _____ and _____ which were . . . . . .

ANNEX AS7-7

DECLARATION OF BLOCKADE*

I hereby declare that at [hour and date] the [give exact description of the port or coast blockaded, with limits] is placed in a state of blockade by a naval force under my command, and now is in such state.

All measures authorized by international law and by treaties with neutral powers to which the United States is a party will be enforced on behalf of the United States against vessels which may attempt to, or do, violate the blockade.

Vessels of neutral powers which are in the blockaded region are given a period of grace expiring at [hour and date] in which to leave the blockaded region. This period of grace is granted only on the express condition that such neutral vessels in leaving the blockaded region do not in any way violate the law of nations.

Given at

[Signed]

---

* See paragraph 7.7.2.1.

Source: NWIP 10-2, Appendix H, Form No. 1. See also Presidential Proclamation No. 3504, 23 October 1962, Interdiction of the Delivery of Offensive Weapons to Cuba, 3 C.F.R. 232 (1959-63 Comp.), revoked by Proclamation No. 3507, 3 id. 236.

ANNEX AS7-8

NOTIFICATION OF THE DECLARATION OF BLOCKADE*

[To be sent, under flag of truce, to the
local authorities of the blockaded region.]

_____ (give name, rank, and title) has the honor to inform the local authorities of _____ (the blockaded region), by means of this notification, that the blockade declared in now in effect. Copies of the notification of blockade are enclosed.

The local authorities of the blockaded region are requested to notify the blockade immediately to foreign diplomatic and consular officers within the blockaded region, and to furnish each of them with a copy of the declaration.

Give on board USS _____ this _____ (give hour and date).

(Signed)
(Name) _____
(Rank) _____ U.S. Navy,

(Title of officer declaring blockade) _____.

---

* See paragraph 7.7.2.2.

Source: NWIP 10-2, Appendix H, Form No. 2.

ANNEX AS7-9

SPECIAL NOTIFICATION OF THE DECLARATION OF BLOCKADE TO NEUTRAL VESSEL*

[To be written, not pasted, in the log of the neutral vessel and also upon the document fixing her nationality.]

The _____ (give name, nationality, and class of vessel, as steamer or sailing vessel) has this day been visited by me by direction of _____ (give name, rank, and title of commanding officer of blockading vessel), and her master has been notified of the existence of the blockade by the United States naval forces of _____ (state region and limits of blockade) and has been furnished with a copy of the declaration of blockade.

Entered _____ (give hour, date, and geographical position when entry is made).

(Signed)
(Name) _____

(Rank) _____, U.S. Navy
Boarding Officer

(Signed)
(Name) _____
Master.

NOTE: The Master should also sign.

---

* See paragraph 7.7.2.2.

Source: NWIP 10-2, Appendix H, Form No. 3.

ANNEX AS7-10

DECLARATION OF PROHIBITION (RESTRICTION) OF RADIO SERVICE*

I, the undersigned, do hereby declare that from _____ o'clock _____m local time on the _____ day of __ _____, 19__, all vessels of whatever nationality provided with radio [need a more encompassing term here] apparatus are prohibited from using the same apparatus within the immediate area of naval operations from __ _____ to _____ (or within the area of the sea inside the circle drawn with _____ radius _____ as its center) for the following purposes:

(1) _____ (Mention what is to be prohibited or
(restricted, according to the provisions
(2) _____ (of article.

I do further declare that the vessels which knowingly violate this prohibition (restriction) shall be liable to capture.

Given on board USS _____, this _____day of _____, 19 .

_____

Commander Joint Task Force _____

---

* See paragraph 7.8.1.

Source: NWIP 10-2, App. H, Form No. 4.

650.3 PRISONERS OF WAR BILL

650.3.1 PURPOSE. To assign responsibilities and provide procedures for handling prisoners of war.

650.3.2 RESPONSIBILITY FOR THE BILL. The Executive Officer is responsible for this bill.

650.3.3 INFORMATION. This bill applies equally to combatant forces of the enemy and to individuals traveling with an armed force. Individuals following the armed forces of the enemy (such as newspaper correspondents, contractors, technicians, vendors) and the officers and crews of enemy merchant ships, if detained, shall be entitled to treatment as prisoners of war if in possession of proper identification. Prisoners of war are subject to the Uniform Code of Military Justice.

650.3.4 RESPONSIBILITIES

a. THE FIRST LIEUTENANT shall:

(1) Take custody of prisoners, and ensure that they are properly searched, separated, guarded, and deprived of means of escape, revolt, or acts of sabotage.

(2) Prepare muster lists of prisoners.

(3) Have the prisoners photographed for record purposes.

(4) Arrange with the Supply Officer for provision of standard rations.

(5) Arrange with the Wardroom Mess Treasurer and Personnel Officer for provision of bedding and suitable living spaces for both officer and enlisted prisoners.

(6) Prepare identification papers for each prisoner, using description, fingerprints, and photographs.

b. THE WARDROOM MESS TREASURER AND PERSONNEL OFFICER shall provide bedding and suitable living spaces.

c. THE MEDICAL OFFICER shall:

(1) Examine all prisoners and provide necessary medical treatment.

(2) Prescribe personal effects necessary for prisoner's health.

d. THE SUPPLY OFFICER shall:

(1) Provide the standard rations as requested.

(2) Issue items of clothing or small stores as directed by the Commanding Officer or as requested by the First Lieutenant/Commanding Officer of the Marine Detachment.

(3) Provide suitable storage for the safekeeping of valuables removed from prisoners and delivered to his/her custody.

e. THE INTELLIGENCE OFFICER (IF ASSIGNED) OR COMMUNICATIONS OFFICER shall take possession of all arms, military equipment, and military documents in the possession of the prisoners. All effects and articles of personal use shall remain in the possession of the prisoners, including protective clothing. In particular, the identity card issued to the prisoner pursuant to the Geneva Convention relative to the treatment of Prisoners of War of 12 August 1949 shall not be taken from him/her. Badges of rank and nationality, decorations, and articles having a personal or sentimental value may not be taken from prisoners of war. Sums of money carried by prisoners of war may not be taken from them except by order of an officer and only after the amount and particulars of the owner have been recorded in a special register and an itemized receipt has been given, legibly inscribed with the name, rank, and unit of the person issuing the receipt. Articles of value may be taken from prisoners only for reasons of security; and when such articles are taken away, the procedure for impounding sums of money shall apply.

f. THE PERSONNEL OFFICER shall maintain a list of qualified interpreters aboard.

g. THE PHOTOGRAPHIC OFFICER shall provide photographs of all prisoners of war as requested by the Commanding Officer of the Marine Detachment.

h. THE CHIEF MASTER-AT-ARMS shall provide suitable stowage for personal gear, other than valuables, removed from prisoners and delivered to his/her custody.

650.3.5 PROCEDURES

a. Upon being taken, prisoners will be thoroughly searched and immediately delivered to the First Lieutenant/Commanding Officer of the Marine Detachment for safekeeping. He/she shall then be charged with the primary administrative responsibility for ensuring compliance with the provisions of this bill.

b. Prisoners of war shall be treated with humanity and shall not be subjected to abuse, deprivation, or ridicule. They shall be accorded their rights under existing treaties, conventions, and other valid provisions of International Law dealing with the treatment of prisoners of war.

c. Pending interrogation for intelligence purposes, insofar as practical, no communication shall be allowed between officer prisoners, noncommissioned officer prisoners, and their personnel. Insofar as possible, prisoners shall be separated individually; or, if this is not possible, they shall be separated by units, and such units or individuals shall not be allowed to mingle at any time.

d. Prisoners of war aboard a naval unit may be required to disclose only their name, rank and serial number. They shall be interrogated only by a designated, qualified officer and then only for information of a routine nature or when it is believed that the prisoners may volunteer information of immediate operational assistance. No physical torture, mental torture, or any other form of coercion may be inflicted on prisoners of war to secure information of any kind. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.

e. No member of the Armed Forces of the United States shall be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the Armed Forces of the United States.

ANNEX AS11-2

CODE OF CONDUCT FOR MEMBERS OF THE ARMED FORCES*

By virtue of the authority vested in me as President of the United States, and as Commander in Chief of the armed forces of the United States, I hereby prescribe the Code of Conduct for Members of the Armed Forces of the United States which is attached to this order and hereby made a part thereof.

All members of the Armed Forces of the United States are expected to measure up to the standards embodied in this Code of Conduct while in combat or captivity. To ensure achievement of these standards, members of the armed forces liable to capture shall be provided with specific training and instruction designed to better equip them to counter and withstand all enemy efforts against them, and shall be fully instructed as to the behavior and obligations expected of them during combat or captivity.

The Secretary of Defense (and the Secretary of Transportation with respect to the Coast Guard except when it is serving as part of the Navy) shall take such action as is deemed necessary to implement this order and to disseminate and make the said Code known to all members of the armed forces of the United States.

DWIGHT D. EISENHOWER

CODE OF CONDUCT FOR MEMBERS
OF THE UNITED STATES ARMED FORCES

I

I am an American, fighting in the forces which guard my country and our way of life. I am prepared to give my life in their defense.

II

I will never surrender of my own free will. If in command, I will never surrender the members of my command while they have the means to resist.

III

If I am captured I will continue to resist by all means available. I will make every effort to escape and aid others to escape. I will accept neither parole nor special favors from the enemy.

IV

If I become a prisoner of war, I will keep faith with my fellow prisoners. I will give no information or take part in any action which might be harmful to my comrades. If I am senior, I will take command. If not, I will obey the lawful orders of those appointed over me and will back them up in every way.

V

When questioned, should I become a prisoner of war, I am required to give name, rank, service number and date of birth. I will evade answering further questions to the utmost of my ability. I will make no oral or written statements disloyal to my country and its allies or harmful to their cause.

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* See paragraph 11.8.

Sources: Exec. Order No. 10,631, 17 August 1955, 3 C.F.R. 266 (1954-58 Comp.), as amended by Exec. Order No. 11,382, 28 November 1967, 3 C.F.R. 696 (1966-70 Comp.) (recognizing transfer of U.S. Coast Guard from Department of Treasury to Department of Transportation); Exec. Order No. 12,017, 3 November 1977, 3 C.F.R. 152 (1977 Comp.) (amending Article V "to clarify the meaning of certain words"); Exec. Order No. 12,633, 28 March 1988, 24 Weekly Comp. Pres. Docs. 410 (4 April 1988) (revising the second paragraph of the Order and Articles I, II and VI "to remove gender specific terms").

I will never forget that I am an American, fighting for freedom, responsible for my actions, and dedicated to the principles which made my country free. I will trust in my God and in the United States of America.

Department of Defense
DIRECTIVE

December 19, 1984
NUMBER 1300.7

ASD(MI&L)

SUBJECT: Training and Education Measures Necessary to Support the Code of Conduct

References: (a) DoD Directive 1300.7, subject as above, May 23, 1980 (hereby canceled)
(b) Executive Order 10631, "Code of Conduct for Members of the Armed Forces of the United States," August 17, 1955, as amended
(c) Report of the 1976 Defense Review Committee for the Code of Conduct[1]
(d) through (i), see enclosure 1

A. REISSUANCE AND PURPOSE

This Directive reissues reference (a) to:

1. Establish policies and procedures and provide guidance for the development and execution of training in furtherance of the aims and objectives of the Code of Conduct promulgated by reference (b) for members of the Armed Forces of the United States; and

2. Provide training for members of the Armed Forces in support of the Code of Conduct.

B. APPLICABILITY

This Directive applies to the Office of the Secretary of Defense (OSD) and the Military Departments. The term "Military Services," as used herein, refers to the Army, the Navy, the Air Force, the Marine Corps, and, by agreement with the Department of Transportation, the Coast Guard.

C. DEFINITIONS

Fighting Man. Is used in the generic sense and refers to all members of the Armed Forces of the United States.

D. OBJECTIVES

The objectives of this Directive are to ensure that:

[1]Available from DASD(MI&L)(MP&FM)

1. The Military Departments maintain energetic, uniform, and continuing training programs in support of the Code of Conduct, including instruction in the methods of combat survival, evasion, escape, and resistance under varying degrees of hostile exploitation.

2. The meaning and interpretation of the Code of Conduct are uniform at all levels of Armed Forces' training, and that such training develops in each participant the levels of learning indicated in enclosure 2.

3. There is consistency in all DoD Code of Conduct training programs, materials, and instructional information.

4. Code of Conduct-related instructional material develops in all members of the Armed Forces a uniform, positive attitude that they must and can resist captor efforts to exploit them to the disadvantage of themselves, their fellow prisoners, and their country. The theme of all instruction shall encourage this positive attitude.

5. Training programs impress upon all trainees that the inherent responsibilities of rank and leadership, military bearing, order and discipline, teamwork, devotion to fellow members, and the duty to resist the enemy are not lessened by capture.

E. POLICIES

1. DoD personnel who plan, schedule, commit, or control the use of the Armed Forces shall fully understand the Code of Conduct, Executive Order 10631, (reference (b)), and ensure that personnel have the training and education necessary to support the Code of Conduct. Executive Order 10631 (reference (b)) and this Directive are the basic policy documents for training and education.

2. Examples, statements, writings, and materials of a defeatist nature shall not be used in training programs, except when directed towards positive learning outcomes.

3. Indoctrination in the Code of Conduct shall be initiated without delay upon the entry of members into the Armed Forces, and shall continue throughout their military careers.

4. While realistic, stressful training is appropriate and is authorized, it must be closely supervised to prevent abuse.

5. Code of Conduct-related training shall be focused on three levels of training, which is given to:

a. Level A. All members of the Armed Forces.

b. Level B. Personnel whose military role entails moderate risk of capture.

c. Level C. Personnel whose roles entail a relatively high risk of capture or make them vulnerable to greater-than-average exploitation by a captor.

6. Detailed training policy guidance for instruction in support of the Code of Conduct is prescribed in enclosure 2.

7. Guidance for peacetime conduct of U.S. military personnel in detention, captive, or hostage situations is set forth in enclosure 3.

8. Training related to peacetime conduct of U.S. military personnel must be consistent with the threat and be conducted at three levels of learning as related in subsection E.5., above.

F. RESPONSIBILITIES

1. The Assistant Secretary of Defense (Manpower, Installations, and Logistics) (ASD(MI&L)) shall:

a. Ensure that the Code of Conduct-related training programs conducted for members of the Military Departments are adequate, appropriately uniform, and consistent with this Directive and the Report of the 1976 Defense Review Committee for the Code of Conduct (reference (c)).

b. Serve as the central point of contact within OSD for Code of Conduct-related training matters.

c. Serve as the OSD focal point for the annual Military Service evaluations of Code of Conduct-related training.

d. Maintain cognizance of the executive agent's performance of mission assigned in subsection F.3., below.

e. Review Service-level implementing instructions for Code of Conduct-related training programs to ensure conformity to this Directive. To assist in this function, the Assistant Secretary of Defense for International Security Affairs (ASD(ISA)) and the General Counsel, Department of Defense (GC, DoD), shall participate to ensure compliance with the Department of State and other agencies of the executive branch.

f. Investigate, or cause to be investigated by the Interservice Training Review Organization (ITRO), the feasibility of the future establishment of a joint-Service school for all high-risk-of-capture personnel of the Armed Forces.

2. The Assistant Secretary of Defense (Public Affairs) shall provide joint-Service information materials in support of the Code of Coduct for dissemination within the Military Departments. While such material is not prescribed specifically for training and education use, it is intended to augment the service member's understanding and appreciation of the Code of Conduct. Material prepared for this purpose will be coordinated with the executive agent.

3. The Secretary of the Air Force, as executive agent, shall:

a. Develop, in coordination with the other Military Departments, and distribute multimedia training materials to support Code of Conduct-related training throughout the Armed Forces. Materials will include guidance concerning the application of realistic, well-monitored training.

b. Conduct research, develop appropriate training programs when necessary, and modify existing programs in the areas of combat survival, evasion, captivity, and escape, to ensure adequate and appropriately uniform training throughout the Department of Defense.

c. Establish clear, expeditious lines of communication between the executive agent and training facilities throughout the Armed Forces.

d. Ensure that:

(1) Training materials conform to this Directive and the report of the 1976 Defense Review Committee for the Code of Conduct (reference (c)) and clearly identify Service-unique training requirements.

(2) Doctrinal materials allow sufficient flexibility in its level of interpretation and implementations to meet Service-unique training needs.

e. Perform the function of historian or librarian in all matters related to the Code of Conduct and provide for the identification, collection, and control of a copy or copies of all documentation extant or produced in the future concerning the Code of Conduct and related topics.

(1) Documentation will include but not be limited to, the reports of the 1955 Defense Advisory Committee on Prisoners of War and the 1976 Defense Review Committee for the Code of Conduct (reference (c)), Code of Conduct training materials (manuals, pamphlets, and audiovisual presentations), reports, scholarly papers, and other publications or manuscripts.

(2) These materials will be available for use, review, and research by the Military Services, other agencies, and personnel.

f. Monitor and evaluate ongoing training programs for the ASD(MI&L) to achieve and maintain adequacy and appropriate uniformity of Service Code of Conduct-related implementation documents and training programs.

g. Coordinate with the Military Services to achieve adequate and appropriately uniform training among the Services.

h. Establish and disseminate policies, procedures, and guidance for the ASD(MI&L) relevant to training in support of the Code of Conduct and specialized related programs within the Military Services.

i. Keep the ASD(MI&L) informed of all efforts related to executive agent initiatives, accomplishments, and difficulties.

4. The Secretaries of the Military Departments shall:

a. Conduct Code of Conduct training, using qualified instructors and materials provided by the executive agent to ensure that all personnel have appropriate knowledge as prescribed in enclosure 1. Service training shall conform to the policies and training guidance contained in this Directive.

b. Forward for resolution by the ASD(MI&L) doctrinal or training issues that cannot be resolved in coordination with the executive agent.

c. Use existing Military Service inspection programs to conduct scheduled evalutions to ensure that Code of Conduct-related training programs, conducted for members of the respective Services, meet the requirements established in this Directive. Ensure that the Military Services provide inspection results to the ASD(MI&L) and to the executive agent within 30 days of the close of each calendar year.

d. Support the executive agent.

G. INFORMATION REQUIREMENTS

Records will be maintained by the Military Services to indicate completion by individual personnel of Code of Conduct-related instruction. All information requirements shall be consistent with procedures established in DoDD 5000.19 (reference (d)), DoDI 5000.21 (reference (h)), and DoDD 5000.11 (reference (i)).

H. EFFECTIVE DATE AND IMPLEMENTATION

This Directive is effective immediately. Forward two copies of implementing documents to the Assistant Secretary of Defense (Manpower, Installations, and Logistics) within 120 days.

William H. Taft, IV
Deputy Secretary of Defense

Enclosures - 3
1. References
2. Guidance for Instruction in Support of the Code of Conduct
3. Guidance for Instruction in Support of U.S. Military Personnel

REFERENCES, continued

(d) DoD Directive 5000.19, "Policies for the Management and Control of Information Requirements," March 12, 1976
(e) Executive Order 12017, "Amending the Code of Conduct for Members of the Armed Forces of the United States," November 3, 1977
(f) Geneva Conventions of 1949
(g) Uniform Code of Military Justice (UCMJ)
(h) DoD Instruction 5000.21, "Forms Management Program," December 5, 1973
(i) DoD Directive 5000.11, "Data Elements and Data Codes Standardization," December 7, 1964

GUIDANCE FOR INSTRUCTION IN SUPPORT OF THE CODE OF CONDUCT

A. Instructional Requirement

1. The Code of Conduct, as promulgated by E.O. 10631 (reference (b)) and as amended by E.O. 12017 on November 3, 1977 (reference (e)), outlines basic responsibilities and obligations of members of the Armed Forces of the United States. All members of the Armed Forces are expected to measure up to the standards embodied in the Code of Conduct. Although designed for Prisoner of War (PW) situations, the spirit and intent of the Code is applicable to service members subjected to other hostile detention, and such members should conduct themselves, consistently, in a manner that will avoid discrediting themselves and their country.

2. The Code of Conduct, in six brief Articles, addresses those situations and decision areas that, to some degree, will be encountered by all personnel. It includes basic information useful to prisoners of war (PWs), in their tasks of surviving honorably while resisting their captor's efforts to exploit them to the advantage of the enemies' cause and the disadvantage of their own. Such survival and resistance requires varying degrees of knowledge of the meanings of the six statements that make up the Code of Conduct.

3. The degree of knowledge required by members by the Armed Forces is dictated by the (a) Military Service members' susceptibility to capture; (b) amount of sensitive information possessed by the captive; and (c) captor's or detaining power's likely assessment of the captive's usefulness and value.

a. Consequently, the military jobs, specialties, assignments, levels of position, rank, and seniority of some individuals require detailed training in the principles, procedures, and techniques of evasion, captivity survival, and resistance to exploitation. For others, basic explanations of the problems, duties, and obligations of the captive will suffice.

b. The complex circumstances of detention that are not incident to an armed conflict by a foreign power will require special instructions.

c. The degrees of knowledge required by individual service members will change with changes in job assignment and levels of responsibility. New information may become available concerning potential enemies' PW management techniques. Supplementary training will be provided as required.

d. As a convenience to training managers, trainers, and those being trained, required levels of understanding are provided based on knowledge needed. Designation of personnel to these levels will be determined by the Military Service concerned.

4. To facilitate such designation and training, Section B, of this enclosure, is outlined, as follows, for each Article of the Code of Conduct:

a. Statement of the Article of the Code of Conduct.

b. Basic explanatory material pertaining to that Article.

c. Training guidance for:

(1) Level A. Represents the minimum level of understanding for all members of the Armed Forces, to be imparted during entry training of all personnel.

(2) Level B: Minimum level of understanding for service members whose military jobs, specialties, or assignments entail moderate risk of capture; for example, members of ground combat units and crews of naval vessels. Training will be conducted for such members as soon as their assumption of duty makes them eligible.

(3) Level C. Minimum level of understanding for service members whose military jobs, specialties, or assignments entail significant or high risk of capture and whose position, rank, or seniority make them vulnerable to greater-than-average exploitation efforts by a captor. Examples: Aircrews of Military Service and special mission forces such as Navy special warfare combat swimmers, Army special forces and rangers, Marine Corps force reconnaissance units, Air Force pararescue teams, and military attaches. Training will be conducted for these members as soon as assumption of such duties or responsibilities makes them eligible.

5. The intent in providing subject matter guidance for use in ascending levels of understanding is to direct the Military Services to increase each member's depth of knowledge depending upon his or her needs, not to provide a checklist of topics or number of hours of instruction required. Training towards Levels B and C, for example, should include more detailed information concerning coping skills and more complex problem-solving concerning leadership and command topics that were first introduced to the member during Level A training.

B. Articles Of The Code Of Conduct and Implementing Instructions

1. Articles I. I AM AN AMERICAN FIGHTING MAN. I SERVE IN THE FORCES WHICH GUARD MY COUNTRY AND OUR WAY OF LIFE. I AM PREPARED TO GIVE MY LIFE IN THEIR DEFENSE.

a. Explanation

(1) Article I of the Code of Conduct applies to all service members at all times. A member of the Armed Forces has a duty to support the interests and oppose the enemies of the United States regardless of the circumstances, whether in active participation in combat or in captivity.

(2) Medical personnel and chaplains are granted, by virtue of their special retained status under the Geneva Conventions (reference (f)), certain latitude under the Code of Conduct. This flexibility is directly related to the policies of the captors as to whether they adhere to the Geneva Conventions' requirement to let medical personnel and chaplains perform their professional duties. All personnel, medical, chaplain, and other, should understand the latitude and limits of this flexibility (see Section C., this enclosure).

b. Training Guidance Levels, A, B, C: Familiarity with the wording and basic meaning of Article I is necessary to understand that:

(1) Past experience of captured Americans reveal that honorable survival of captivity requires that a member possess a high degree of dedication and motivation. Maintaining these qualities requires knowledge of and a strong belief in:

(a) The advantages of this country's democratic institutions and concepts.

(b) Love of and faith in this country and a conviction that the country's cause is just;

(c) Faith in and loyalty to fellow prisoners.

(2) Possessing the dedication and motivation fostered by such beliefs and trust will enable prisoners to survive long, stressful periods of captivity and return to country and family honorably and with their self-esteem intact.

2. Article II. I WILL NEVER SURRENDER OF MY OWN FREE WILL. IF IN COMMAND I WILL NEVER SURRENDER MY MEN WHILE THEY STILL HAVE THE MEANS TO RESIST.

a. Explanation. Members of the Armed Forces may never voluntarily surrender. Even when isolated and no longer able to inflict casualties on the enemy or otherwise defend themselves, it is their duty to evade capture and rejoin the nearest friendly force.

(1) Only when evasion by members is impossible and further fighting would lead only to their death with no significant loss to the enemy might the means to resist or evade be considered exhausted.

(2) The responsibility and authority of a commander never extends to the surrender of command, even if isolated, cut off, or surrounded, while the unit has the power to resist, break out, or evade to rejoin friendly forces.

b. Training Guidance

(1) Levels A, B, C. Training should ensure that each individual is familiar with the wording and basic meaning of Article II as stated above.

(2) Levels B and C. Training should be oriented specifically toward additional depth of knowledge on the following topics, first introduced at Level A. Specifically, member must:

(a) Understand that when they are cut off, shot down, or otherwise isolated in enemy-controlled territory, they must make every effort to avoid capture. The courses of action available include concealment until recovered by friendly rescue forces; evasive travel to a friendly or neutral territory; and evasive travel to other prebriefed areas.

(b) Understand that capture does not constitute a dishonorable act if all reasonable means of avoiding it have been exhausted and the only alternative is certain death.

(3) Level C. Training should ensure that members understand and have confidence in the procedures and techniques of rescue by search and recovery forces, and the procedures for properly utilizing specified evasion destinations.

3. Article III. IF I AM CAPTURED I WILL CONTINUE TO RESIST BY ALL MEANS AVAILABLE. I WILL MAKE EVERY EFFORT TO ESCAPE AND AID OTHERS TO ESCAPE. I WILL ACCEPT NEITHER PAROLE NOR SPECIAL FAVORS FROM THE ENEMY.

a. Explanation. The duty of a member of the Armed Forces to continue resistance to enemy exploitation by all means available is not lessened by the misfortune of capture. Contrary to the 1949 Geneva Conventions (reference (f)), enemies which U.S. forces have engaged since 1949 have regarded the PW compound as an extension of the battlefield. The United States Prisoner of War (USPW) must be prepared for this fact.

(1) In disregarding provisions of the Geneva Conventions (reference (f)), the enemy has used a variety of tactics to exploit PWs for propaganda purposes or to obtain military information. Resistance to captor exploitation efforts is required by the Code of Conduct. Physical and mental harassment, general mistreatment and torture, medical neglect, and political indoctrination have all been used against USPWs in the past.

(2) The enemy has tried to tempt PWs to accept special favors or privileges not given to other PWs in return for statements or information desired by the enemy or for a pledge by the PW not to try to escape.

(3) A USPW must not seek special privileges or accept special favors at the expense of his fellow PWs.

(4) The Geneva Conventions (reference (f)) recognize that the regulations of a PW's country may impose the duty to escape and that PWs may attempt to escape. Under the guidance and supervision of the senior military person and PW organization, PWs must be prepared to take advantage of escape opportunities whenever they arise. In communal detention, the welfare of the PWs who will remain behind must be considered. A PW must "think escape," must try to escape if able to do so, and must assist others to escape.

(5) The Geneva Conventions authorize the release of PWs on parole only to the extent authorized by the PW's country, and prohibit compelling a PW to accept parole. Parole agreements and promises given the captor by a prisoner of war to fulfill stated conditions, such as not to bear arms or not to escape, in consideration of special privileges, such as release from captivity or lessened restraint. The United States does not authorize any service member to sign or enter into any such parole agreement.

b. Training Guidance

(1) Levels A, B, C. Training should ensure that members are familiar with the wording and basic meaning of Article III, as stated above.

(2) Levels B and C. Training should be oriented toward an additional depth of knowledge on the following topics, first introduced at Level A. Specifically, members must:

(a) Understand that captivity is a situation involving continuous control by a captor who may attempt to use the PW as a source of military information, for political purposes, and as a potential subject for political indoctrination.

(b) Be familiar with the rights and obligations of both the prisoner of war and the captor under the provisions of the Geneva Conventions of 1949 (reference (f)) and be aware of the increased significance of resistance should the captor refuse to abide by the provisions of the Geneva Conventions. Be aware that the resistance required by the Code of Conduct is directed at captor exploitation efforts, because such efforts violate the Geneva Conventions. Understand that resistance beyond that identified above subjects the USPW to possible punishment by the captor, punishment the captor reserves for serious offenses against order and discipline or criminal offenses against the detaining power.

(c) Be familiar with, and prepared for, the implications of the Communist Block Reservation to Article 85 of the Geneva Conventions (reference (f)). Article 85 offers protection to a PW legally convicted of a crime committed prior to capture. Understand that Communist captors often threaten to use their reservation to Article 85 as a basis for adjudging all members of opposing armed forces as "war criminals." As a result, PWs may find themselves accused of being "war criminals" simply because they waged war against their Communist captors prior to capture. The U.S. Government does not recognize the validity of this argument.

1 Understand the advantages of early escape in that members of the ground forces are usually relatively near friendly forces. For all captured individuals, an early escape attempt takes advantage of the fact that the initial captors are usually not trained guards, that the security system is relatively lax, and that the prisoner is not yet in a debilitated physical condition.

2 Be familiar with the complications of escape after arrival at an established prisoner of war camp; such as, secure facility and experienced guard system, usually located far from friendly forces, debilitated physical condition of prisoners, psychological factors which reduce escape motivation ("barbed-wire syndrome"), and the often differing ethnic characteristics of escape and enemy population.

3 Understand the importance of being alert for escape opportunities, especially for PWs immediately after capture or when confined alone.

4 Understand the command supervisory role of the senior military person and the PW organization in escapes from established prisoner of war camps. Understand the responsibilities of escapes to their fellow prisoners.

(e) Understand that acceptance of parole means a PW has agreed not to engage in a specified act, such as to escape or to bear arms, in exchange for a stated privilege, and that U.S. policy forbids a PW to accept such parole.

(f) Understand the effects on prisoner organization and morale, as well as the possible legal consequences, of accepting a favor from the enemy that results in gaining benefits or privileges not available to all prisoners. Such benefits and privileges include acceptance of release prior to the release of sick or wounded prisoners or those who have been in captivity longer. Special favors include improved food, recreation, and living conditions not available to other PWs.

(3) Level C. Training should be oriented toward additional details concerning the above, as well as understanding the necessity for and the mechanics of convert organizations in captivity. These organizations serve the captive ends, such as effecting escape.

4. Article IV. IF I BECOME A PRISONER OF WAR, I WILL KEEP FAITH WITH MY FELLOW PRISONERS. I WILL GIVE NO INFORMATION OR TAKE PART IN ANY ACTION WHICH MIGHT BE HARMFUL TO MY COMRADES. IF I AM SENIOR, I WILL TAKE COMMAND. IF NOT, I WILL OBEY THE LAWFUL ORDERS OF THOSE APPOINTED OVER ME AND WILL BACK THEM UP IN EVERY WAY.

a. Explanation. Officers and noncommissioned officers will continue to carry out their responsibilities and to exercise their authority in captivity.

(1) Informing, or any other action detrimental to a fellow PW, is despicable and is expressly forbidden. Prisoners of war must especially avoid helping the enemy to identify fellow PWs who may have knowledge of value to enemy and who may, therefore, be made to suffer coercive interrogation.

(2) Strong leadership is essential to discipline. Without discipline, camp organization, resistance, and even survival may be impossible.

(3) Personal hygiene, camp sanitation, and care of the sick and wounded are imperative.

(4) Wherever located, USPWs, for their own benefit, should organize in a military manner under the senior person eligible for command. The senior person (whether officer or enlisted) within the PW camp or with a group of PWs shall assume command according to rank without rank to Service. This responsibility and accountability may not be evaded. (See Section C., this enclosure.)

(5) When taking command, the senior person will inform the other PWs and will designate the chain of command. If the senior person is incapacitated or is otherwise unable to act for any reason, command will be assumed by the next senior person. Every effort will be made to inform all PWs in the camp (or group) of the members of the chain of command who will represent them in dealing with enemy authorities. The responsibility of subordinates to obey the lawful orders of ranking American military personnel remains unchanged in captivity.

(6) U.S. policy concerning PW camp organization, as set forth in the foregoing paragraphs, specifies that the senior military person shall assume command. The Geneva Conventions (reference (f)) on prisoners of war provide additional guidance to the effect that in PW camps containing enlisted personnel only, a prisoners' representative will be elected. USPWs should understand that such a representative is regarded by U.S. policy as only spokesman for the senior military person. The prisoners' representative does not have command, unless the PWs elect as the representative, the senior military person. The senior military person shall assume and retain actual command, covertly if necessary.

(7) Maintaining communications is one of the most important ways that PWs can aid one another. Communication breaks down the barriers of isolation which an enemy may attempt to construct and helps strengthen a PW's will to resist. Each PW will, immediately upon capture, try to make contact with fellow USPWs by any means available and will thereafter continue to communicate and participate vigorously as part of the PW organization.

(8) As with other provisions of this Code, common sense and the conditions in the PW camp will determine the way in which the senior person and the other PWs structure their organization and carry out their responsibilities. What is important is that:

(a) The senior person establish an organization; and,

(b) The PWs in that organization understand their duties and know to whom they are responsible.

b. Training Guide

(1) Levels A, B, C. Training should ensure that members are familiar with the wording and basic meaning of Article IV, as stated above, and understand that:

(a) Leadership and obedience to those in command are essential to the discipline required to effect successful organization against captor exploitation. In captivity situations involving two or more prisoners, the senior ranking prisoner shall assume command; all others will obey the orders and abide by the decisions of the senior military person regardless of differences in Service affiliations. Failure to do so will result in the weakening of organization, a lowering of resistance, and, after repatriation, may result in legal proceedings under the Uniform Code of Military Justice (UCMJ) (reference (g)).

(b) Faith, trust, and individual group loyalties have great value in establishing and maintaining an effective prisoner of war organization.

(c) A volunteer informer or collaborator is a traitor to fellow prisoners and country and, after repatriation, is subject to punishment under the UCMJ for such actions.

(2) Levels B and C. Training should be specifically oriented toward additional depth of knowledge on the following topics, first introduced at Level A. Specifically, members must:

(a) Be familiar with the principles of hygiene, sanitation, health maintenance, first aid, physical conditioning, and food utilization, including recognition and emergency self-treatment of typical PW camp illnesses by emergency use of primitive materials and available substances (for example, toothpaste, salt, and charcoal). Such knowledge exerts an important influence on prisoner ability to resist and assists an effective PW organization.

(b) Understand the importance of and the basic procedures for establishing secure communications between separated individuals and groups of prisoners attempting to establish and maintain an effective organization.

(c) Be familiar with the major ethnic, racial, and national characteristics of the enemy that can effect prisoner-captor relationships to the detriment of individual prisoners and prisoner organization.

(d) Further understand that:

1 An informer or collaborator should be insulated from sensitive information concerning PW organization, but that continuing efforts should be made by members of the PW organization to encourage and persuade the collaborator to cease such activities;

2 Welcoming a repentent collaborator "back to the fold" is generally a more effective PW organization resistance technique than continued isolation, which may only encourage the collaborator to continue such treasonous conduct; and,

3 There is a significant difference between the collaborator who must be persuaded to return and the resistant who, having been physically or mentally tortured into complying with a captor's improper demand (such as information or propaganda statement), should be helped to gather strength and be returned to resistance.

(e) Understand that, in situations where military and civilian personnel are imprisoned together, the senior military prisoner should make every effort to persuade civilian prisoners that the military member's assuming overall command leadership of the entire prisoner group, based upon experience and specific training, is advantageous to the entire prisoner community.

(3) Level C. Understand the need for and the mechanics of establishing an effective covert organization in situations where the captor attempts to prevent or frustrate a properly constituted organization.

5. Article V. WHEN QUESTIONED, SHOULD I BECOME A PRISONER OF WAR, I AM REQUIRED TO GIVE NAME, RANK, SERVICE NUMBER, AND DATE OF BIRTH. I WILL EVADE ANSWERING FURTHER QUESTIONS TO THE UTMOST OF MY ABILITY. I WILL MAKE NO ORAL OR WRITTEN STATEMENTS DISLOYAL TO MY COUNTRY AND ITS ALLIES OR HARMFUL TO THEIR CAUSE.

a. Explanation. When questioned, a prisoner of war is required by the Geneva Conventions (reference (f)), this Code, and is permitted by the UCMJ (reference (g)) to give name, rank, service number, and date of birth. Under the Geneva Conventions, the enemy has no right to try to force a USPW to provide any additional information. However, it is unrealistic to expect a PW to remain confined for years reciting only name, rank, identification number, and date of birth. There are many PW camp situations in which certain types of conversation with the enemy are permitted. For example, a PW is allowed but not required by this Code, the UCMJ, or the Geneva Conventions to fill out a Geneva Convention "capture card," to write letters home, and to communicate with captors on matters of health and welfare.

(1) The senior military person is required to represent the prisoners under his control in matters of camp administration, health, welfare, and grievances. However, it must be borne constantly in mind that the enemy has often viewed PWs as valuable sources of military information and of propaganda that can be used to further the enemy's war effort.

(2) Accordingly, each prisoner must exercise great caution when filling out a "capture card", when conducting authorized communication with the captor, and when writing letters. A USPW must resist, avoid, or evade, even when physically and mentally coerced, all enemy efforts to secure statements or actions that will further the enemy's cause.

(3) Such statements or actions constitute giving the enemy unauthorized information. Examples of statements or actions PWs should resist include oral or written confessions, questionnaires, personal history statements, propaganda recordings and broadcast appeals to other prisoners of war to comply with improper captor demands, appeals for surrender or parole, self-criticisms, or oral or written statements or communication on behalf of the enemy or harmful to the United States, its allies, the Armed Forces, or other PWs.

(4) A PW should recognize that any confession signed or any statement made may be used by the enemy as part of a false accusation that the captive is a war criminal rather than a PW. Moreover, certain countries have made reservations to the Geneva Conventions (reference (f)) in which they assert that a war criminal conviction has the effect of depriving the convicted individual of prisoner of war status, thus removing him from protection under the Geneva Conventions. They thus revoke the right to repatriation until a prison sentence is served.

(5) If a PW finds that, under intense coercion, unauthorized information was unwillingly or accidentally disclosed, then the member should attempt to recover and resist with a fresh line of mental defense.

(a) Experience has shown that, although enemy interrogation sessions can be harsh and cruel, it is usually possible to resist, provided there is a will to resist.

(b) The best way for a prisoner of war to keep faith with country, fellow prisoners of war, and oneself is to provide the enemy with as little information as possible.

b. Training Guidance

(1) Levels A, B, C. Training should ensure that members are familiar with the wording and basic meaning of Article V, as stated above.

(2) Levels B and C. In addition to the fundamentals introduced at Level A, additional understanding should be acquired at Levels B and C. Specifically, members must:

(a) Be familiar with the various aspects of the interrogation process, its phases, the procedures, methods and techniques of interrogation, and the interrogator's goals, strengths, and weaknesses.

(b) Understand that a prisoner of war is required by the Geneva Convention (reference (f)) and the Code of Conduct to disclose name, rank, service number, and date of birth, when questioned. Understand that answering further questions must be avoided. A prisoner is encouraged to limit further disclosure by use of such resistance techniques as claiming inability to furnish additional information because of previous orders, poor memory, ignorance of answer or lack of comprehension. The prisoner may never willingly give the captor additional information, but must resist doing so even if it involves withstanding mental and physical duress.

(c) Understand that, short of death, it is unlikely that a USPW can prevent a skilled enemy interrogator, using all available psychological and physical methods of coercion, from obtaining some degree of compliance by the PW with captor demands. However, understand that if taken past the point of maximum endurance by the captor, the PW must recover as quickly as possible and resist each successive captor exploitation effort to the utmost. Understand that a forced answer on one point does not authorize continued compliance. Even the same answer must be resisted again at the next interrogation session.

(d) Understand that a prisoner is authorized by the Code of Conduct to communicate with the captor on individual health or welfare matters and, when appropriate, on routine matters of camp administration. Conversations on these matters are not considered to be giving unauthorized information as defined in 5.a.(3).

(e) Understand that the PW may furnish limited information concerning family status and address in filling out a Geneva Conventions card. Be aware that a prisoner may write personal correspondence. Be aware that the captor will have full access to both the information on the capture card and the contents of personal correspondence.

(f) Be familiar with the captor's reasons for and methods of attempting to involve prisoners in both internal and external propaganda activities. Understand that a prisoner must utilize every means available to avoid participation in such activities and must not make oral or written statements disloyal to country and allies, or detrimental to fellow prisoners of war.

(g) Be familiar with the captor's reasons for and methods of attempting to indoctrinate prisoners politically. Be familiar with the methods of resisting such indoctrination.

(3) Level C. Training should provide additional details, and members should specifically:

(a) Understand that, even when coerced beyond name, rank, service number, date of birth, and claims of inabilities, it is possible to thwart an interrogator's efforts to obtain useful information by the use of certain additional ruses and stratagems.

(b) Understand and develop confidence in the ability to use properly the ruses and stratagems designed to thwart interrogation.

6. Article VI. I WILL NEVER FORGET THAT I AM AN AMERICAN FIGHTING MAN, RESPONSIBLE FOR MY ACTIONS, AND DEDICATED TO THE PRINCIPLES WHICH MAY BE COUNTRY FREE. I WILL TRUST IN MY GOD AND IN THE UNITED STATES OF AMERICA.

a. Explanation. A member of the Armed Forces remains responsible for personal actions at all times. This Article is designed to assist members of the Armed Forces to fulfill their responsibilities and to survive captivity with honor. The Code of Conduct does not conflict with the UCMJ, and the latter continues to apply to each military service member during captivity (or in other hostile detention).

(1) Upon repatriation, PWs can expect their actions to be subject to review, both as to circumstances of capture and as to conduct during detention. The purpose of such reviews is to recognize misconduct.

(2) Such reviews will be conducted with due regard for the rights of the individual and consideration for the conditions of captivity.

(3) A member of the Armed Forces who is captured has a continuing obligation to resist all attempts at indoctrination and to remain loyal to country, service, and unit.

(4) The life of a prisoner of war can be very hard. PWs who stand firm and united against enemy pressures will aid one another immeasurably in surviving this ordeal.

b. Training Guidance-Levels A, B, C. Training should ensure that members are familiar with the wording and basic meaning of Article VI as stated above, and:

(1) Understand the relationship between the Uniform Code of Military Justice (reference (g)) and the Code of Conduct, and realize that failure to follow the guidance of the Code of Conduct may result in violation of the provisions of the UCMJ (reference (g)). Every member of the Armed Forces of the United States should understand that members can be held legally accountable for personal actions while detained.

(2) Be knowledgeable of the national policy expressed by the President in promulgating the Code of Conduct:

> "No American prisoner of war will be forgotten by the United States. Every available means will be employed by our government to establish contact with, to support and to obtain the release of all our prisoners of war. Furthermore, the laws of the United States provide for the support and care of dependents of the armed forces including those who become prisoners of war. I assure dependents of such prisoners that these laws will continue to provide for their welfare."

(3) Understand that both the PW and dependents will be taken care of by the Armed Forces and that pay and allowances, eligibility and procedures for promotion, and benefits for dependents continue while the PW is detained.

(4) Understand the importance of Military Service members ensuring that their personal affairs and family matters (pay, powers of attorney, will, car payments, and children's schooling) are kept current through discussion, counselling or filing of documents prior to being exposed to risk of capture.

(5) Understand that failure to accomplish the above has resulted in an almost overwhelming sense of guilt on the part of the USPWs and has placed unnecessary hardship on family members.

C. Special Allowances for Medical Personnel and Chaplains

The additional flexibility afforded medical personnel and chaplains, under the circumstance cited in the explanation to Article I, is further clarified as follows:

1. Article I

a. Medical personnel and chaplains are granted, by virtue of their special retained status under the Geneva Conventions (reference (f)), certain latitude under the Code of Conduct if the policies of the captors adhere to the Geneva Conventions' requirement permitting these personnel to perform their professional duties.

b. If the captors allow medical personnel and chaplains to perform their professional duties, these personnel may exercise a degree of flexibility concerning some of the specific provisions of the Code of Conduct to perform their professional duties.

c. This degree of flexibility can only be employed if it is in the best interests of the medical and spiritual needs of their fellow Military Service members and their country. Like all members of the Armed Forces, medical personnel and chaplains are accountable for all of their actions.

2. Article II. No additional flexibility.

3. Article III. Under the Geneva Conventions (reference (f)) medical personnel and chaplains who fall into the hands of the enemy are entitled to be considered "retained personnel" and are not to be considered prisoners of war. The enemy is required by the Conventions to allow such persons to continue to perform their medical or religious duties, preferably for PWs of their own country. When the services of these "retained personnel" are no longer needed for these duties, the enemy is obligated to return them to their own forces.

a. The medical personnel and chaplains of the U.S. Armed Forces who fall into the hands of the enemy must assert their rights as "retained personnel" to perform their medical and religious duties for the benefit of the PWs and must take every opportunity to do so.

b. If the captor permits medical personnel and chaplains to perform their professional functions for the welfare of the PW community, special latitude is authorized these personnel under the Code of Conduct as it applies to escape.

c. Medical personnel and chaplains do not, as individuals, have a duty to escape or to actively aid others in escaping as long as they are treated as "retained personnel" by the enemy. However, U.S. experience since 1949, when the Geneva Conventions were written, reflects no compliance by captors of U.S. personnel with these provisions of the Conventions. U.S. medical and chaplain personnel must be prepared to be subjected to the same treatment as other USPWs.

d. In the event the captor does not permit medical personnel and chaplains to perform their professional functions, they are considered identical to all other PWs with respect to their responsibilities under the Code of Conduct. Under no circumstances will the latitude granted medical personnel and chaplains be interpreted to authorize any actions or conduct detrimental to the PWs or the interest of the United States.

4. Article IV. Medical personnel are generally prohibited from assuming command over nonmedical personnel and chaplains are generally prohibited from assuming command over military personnel of any branch. Military Service regulations which restrict eligibility of these personnel for command will be explained to personnel of all Services at an appropriate level of understanding to preclude later confusion in a PW camp.

5. Article V. This Article and its explanation also apply to medical personnel and chaplains ("retained personnel"). They are required to communicate with a captor in connection with their professional responsibilities, subject to the restraints discussed in Articles I and VI.

6. Article VI. No additional flexibility.

GUIDANCE FOR INSTRUCTION IN SUPPORT OF U.S. MILITARY PERSONNEL

A. POLICY

This policy concerning the conduct of U.S. military personnel isolated from U.S. control applies at all times. U.S. military personnel finding themselves isolated from U.S. control are required to do everything in their power to follow DoD policy. The DoD policy in this situation is to survive with honor.

B. SCOPE

The Code of Conduct is a moral guide designed to assist military personnel in combat or being held prisoners of war to live up to the ideals contained in the DoD policy. This guidance shall assist U.S. military personnel who find themselves isolated from U.S. control in peacetime, or in a situation not related specifically in the Code of Conduct. This is the special guidance referred to in paragraph A.3.b., enclosure 2. Procedures shall be established by the Military Departments to ensure all U.S. military personnel under their control are made aware of this guidance, and these dissemination procedures should parallel those used to ensure proper education and training in support of the Code of Conduct throughout the Department of Defense.

C. RATIONALE

U.S. military personnel, because of their wide range of activities, are subject to peacetime detention by unfriendly governments or captivity by terrorist groups. This guidance seeks to help U.S. military personnel survive these situations with honor and does not constitute a means for judgment or replace the UCMJ as a vehicle for enforcement of proper conduct. This guidance, although exactly the same as the Code of Conduct in some areas, applies only during peacetime. The term "peacetime" means that armed conflict does not exist or where armed conflict does exist but the United States is not involved directly. For specific missions or in areas of assignment where U.S. military personnel may have a high risk of peacetime detention or terrorist captivity, the Military Services are obligated to provide training and detailed guidance to such personnel to ensure their adequate preparation for the situation. Training will be reviewed and monitored for adequacy and consistency with this guidance by the executive agent for the ASD(MI&L).

D. GENERAL

U.S. military personnel captured or detained by hostile foreign governments or terrorists often are held for purposes of exploitation of the detainees or captives, or the U.S. Government, or all of them. This exploitation can take many forms, but each form of exploitation is designed to assist the foreign government or the terrorist captors. In the past, detainees have been exploited for information and propaganda efforts, including confessions to crimes never committed, all of which assisted or lent credibility to the detainer. Governments also have been exploited in such situations to make damaging statements about themselves or to force them to appear weak in

relation to other governments. Ransoms for captives of terrorists have been paid by governments, and such payments have improved terrorist finances, supplies, status, and operations--often prolonging the terror carried on by such groups.

E. RESPONSIBILITY

U.S. military personnel, whether detainees or captives, can be assured that the U.S. Government will make every good faith effort to obtain their earliest release. Faith in one's country and its way of life, faith in fellow detainees or captives, and faith in one's self are critical to surviving with honor and resisting exploitation. Resisting exploitation and having faith in these areas are the responsibility of all Americans. On the other hand, the destruction of such faith must be the assumed goal of all captors determined to maximize their gains from a detention or captive situation.

F. GOAL

Every reasonable step must be taken by U.S. military personnel to prevent exploitation of themselves and the U.S. Government. If exploitation cannot be prevented completely, every step must be taken to limit exploitation as much as possible. In a sense, detained U.S. military personnel often are catalysts for their own release, based upon their ability to become unattractive sources of exploitation. That is, one who resists successfully may expect detainers to lose interest in further exploitation attempts. Detainees or captives very often must make their own judgments as to which actions will increase their chances of returning home with honor and dignity. Without exception, the military member who can say honestly that he or she has done his or her utmost in a detention or captive situation to resist exploitation upholds DoD policy, the founding principles of the United States, and the highest traditions of military service.

G. MILITARY BEARING AND COURTESY

Regardless of the type of detention or captivity, or harshness of treatment, U.S. military personnel will maintain their military bearing. They should make every effort to remain calm, courteous, and project personal dignity. This is particularly important during the process of capture and the early stages of internment when the captor may be uncertain of his control over the captives. Discourteous, unmilitary behavior seldom serves the long term interest of a detainee, captive, or hostage. Additionally, it often results in unnecessary punishment which serves no useful purpose. Such behavior, in some situations, can jeopardize survival and severely complicate efforts to gain release of the detained, captured, or hostage-held military member.

H. CLASSIFIED INFORMATION

There are no circumstances in which a detainee or captive should voluntarily give classified information or materials to those who are unauthorized to receive them. To the utmost of their ability, U.S. military personnel held as detainees, captives, or hostages will protect all classified information. An unauthorized disclosure of classified information, for whatever reason, does not justify further disclosures. Detainees, captives, and hostages must resist, to the utmost of their ability, each and every attempt by their captor to obtain such information.

I. CHAIN OF COMMAND

In group detention, captivity, or hostage situations, military detainees, captives, or hostages will organize, to the fullest extent possible, in a military manner under the senior military member present and eligible to command. The importance of such organization cannot be overemphasized. Historically, in both peacetime and wartime, establishment of a military chain of command has been a tremendous source of strength for all captives. Every effort will be made to establish and sustain communications with other detainees, captives, or hostages. Military detainees, captives, or hostages will encourage civilians being held with them to participate in the military organization and accept the authority of the senior military member. In some circumstances, such as embassy duty, military members may be under the direction of a senior U.S. civilian official. Notwithstanding such circumstances, the senior military member still is obligated to establish, as an entity, a military organization and to ensure that the guidelines in support of the DoD policy to survive with honor are not compromised.

J. GUIDANCE FOR DETENTION BY GOVERNMENTS

Once in the custody of a hostile government, regardless of the circumstances that preceded the detention situation, detainees are subject to the laws of that government. In light of this, detainees will maintain military bearing and should avoid any aggressive, combative, or illegal behavior. The latter could complicate their situation, their legal status, and any efforts to negotiate a rapid release.

1. As American citizens, detainees should be allowed to be placed in contact with U.S. or friendly embassy personnel. Thus, detainees should ask immediately and continually to see U.S. embassy personnel or a representative of an allied or neutral government.

2. U.S. military personnel who become lost or isolated in a hostile foreign country during peacetime will not act as combatants during evasion attempts. Since a state of armed conflict does not exist, there is no protection afforded under the Geneva Convention (reference (f)). The civil laws of that country apply. However, delays in contacting local authorities can be caused by injuries affecting the military member's mobility, disorientation, fear of captivity, or a desire to see if a rescue attempt could be made.

3. Since the detainer's goals may be maximum political exploitation, U.S. military personnel who are detained must be extremely cautious of their captors in everything they say and do. In addition to asking for a U.S. representative, detainees should provide name, rank, social security account number, date of birth, and the innocent circumstances leading to their detention. Further discussions should be limited to and revolve around health and welfare matters, conditions of their fellow detainees, and going home.

a. Historically, the detainers have attempted to engage military captives in what may be called a "battle of wits" about seemingly innocent and useless topics as well as provocative issues. To engage any detainer in such useless, if not dangerous, dialogue only enables a captor to spend more time

with the detainee. The detainee should consider dealings with his or her captors as a "battle of wills"--the will to restrict discussion to those items that relate to the detainee's treatment and return home against the detainer's will to discuss irrelevant, if not dangerous, topics.

b. As there is no reason to sign any form or document in peacetime detention, detainees will avoid signing any document or making any statement, oral or otherwise. If a detainee is forced to make a statement or sign documents, he or she must provide as little information as possible and then continue to resist to the utmost of his or her ability. If a detainee writes or signs anything, such action should be measured against how it reflects upon the United States and the individual as a member of the military, or how it could be misused by the detainer to further the detainer's ends.

c. Detainees cannot earn their release by cooperation. Release will be gained by the military member doing his or her best to resist exploitation, thereby reducing his or her value to a detainer, and thus prompting a hostile government to negotiate seriously with the U.S. Government.

4. U.S. military detainees should not refuse to accept release unless doing so requires them to compromise their honor or cause damage to the U.S. Government or its allies. Persons in charge of detained U.S. military personnel will authorize release of any personnel under almost all circumstances.

5. Escape attempts will me made only after careful consideration of the risk of violence, chance of success, and detrimental effects on detainees remaining behind. Jailbreak in most countries is a crime, thus, escape attempts would provide the detainer with further justification to prolong detention by charging additional violations of its criminal or civil law and result in bodily harm or even death to the detainee.

K. GUIDANCE FOR CAPTIVITY BY TERRORIST

Capture by terrorists is generally the least predictable and structured form of peacetime captivity. The captor qualifies as an international criminal. The possible forms of captivity vary from spontaneous hijacking to a carefully planned kidnapping. In such captivities, hostages play a greater role in determining their own fate since the terrorists in many instances expect or receive no rewards for providing good treatment or releasing victims unharmed. If U.S. military personnel are uncertain whether captors are genuine terrorists or surrogates of government, they should assume that they are terrorists.

1. If assigned in or traveling through areas of known terrorist activity, U.S. military personnel shall exercise prudent antiterrorism measures to reduce their vulnerability to capture. During the process of capture and initial internment, they should remain calm and courteous, since most casualties among hostages occur during this phase.

2. Surviving in some terrorist detentions may depend on hostages conveying a personal dignity and apparent sincerity to the captors. Hostages, therefore, may discuss nonsubstantive topics such as sports, family, and clothing, to convey to the terrorists the captive's personal dignity and human qualities.

They will make every effort to avoid embarrassing the United States and the host government. The purpose of this dialogue is for the hostage to become a "person" in the captor's eyes, rather than a mere symbol of his or her ideological hatred. Such a dialogue also should strengthen the hostage's determination to survive and resist. A hostage also may listen actively to the terrorist's feeling about his or her cause to support the hostage's desire to be a "person" to the terrorist; however, he or she should never pander, praise, participate, or debate the terrorist's cause with him or her.

3. U.S. military personnel held hostage by terrorists should accept release using guidance in subsection J.4., above. U.S. military personnel must keep faith with their fellow hostages and conduct themselves according to the guidelines of this enclosure. Hostages and kidnap victims who consider escape to be their only hope are authorized to make such attempts. Each situation will be different and the hostage must weigh carefully every aspect of a decision to attempt to escape.

OPNAV INSTRUCTION 1000.24A

From: Chief of Naval Operations
To: All Ships and Stations (less Marine [illegible] field addressees not having Navy personnel attached)

Subj: CODE OF CONDUCT TRAINING

Ref: (a) U.S. Navy Regulations, Art. 1122

Encl: (1) DOD Directive 1300.7 of 19 Dec 84

1. **Purpose.** To revise Code of Conduct training policies.

A) 2. **Cancellation.** OPNAVINST 1000.24.

3. **Applicability.** The provisions of this instruction apply to all members of the U.S. Navy.

R) 4. **Policy**

a. **Indoctrination.** Code of Conduct training shall be initiated without delay upon entry of members into the Navy and shall continue throughout their military careers, providing periodic and progressive training appropriate to risk of capture or exploitation.

b. **Wartime Application.** Code of Conduct training for wartime will be conducted as outlined in enclosure (2) to enclosure (1). The articles of the Code of Conduct addressed there examine situations and decision areas likely to be encountered by all prisoners of war (POWs). The degree of knowledge required by Navy personnel is dictated by the member's susceptibility to capture, sensitive information possessed by the captive and captor's assessment of the captive's usefulness and value.

c. **Peacetime Application.** Code of Conduct training for peacetime will be conducted as outlined in enclosure (3) to enclosure (1). The term "peacetime" means that armed conflict does not exist or where armed conflict does exist, the United States is not involved directly. Personnel captured or detained by hostile foreign governments or terrorists are usually exploited for purposes designed to assist the captors. Ransoms for captives, false confessions or information and propaganda efforts are examples of captor's designed to make either the captives or their governments appear weak or discredited. Personnel detained or held captive can be assured that the U.S. Government will make every good faith effort to obtain their earliest release. The degree of knowledge required by Navy personnel in peacetime depends upon their risk of detention or capture by a hostile government or terrorists.

d. **Training Levels.** Code of Conduct training for wartime and peacetime applications is focused on three levels: (A

(1) **Level A.** Represents the minimum level of understanding for all members of the Navy and is conducted during entry level training.

(2) **Level B.** Represents the level of knowledge needed by Navy personnel whose assignments or specialties entail a moderate risk of detention or capture. Crews of naval vessels would be personnel requiring wartime application of Level B training. For peacetime application, personnel receiving Level B training would include those assigned shore duty in overseas activities where terrorism is a real threat, or personnel who are uniquely exploitable if detained or held captive anywhere in the world.

(3) **Level C.** Represents the training required for personnel whose assignments or specialties entailed a high risk of capture or make them vulnerable to greater-than-average exploitation by a captor. Special forces personnel, aviators and military attaches are examples of those requiring Level C training.

e. All training programs will be conducted in accordance with enclosure (1). While realistic, stressful training is appropriate for all levels, it is authorized only for Level C and must be supervised closely to prevent abuse.

5. **Responsibilities**

a. Chief of Naval Operations

(1) The Deputy Chief of Naval Operations (Plans, Policy and Operations) (OP-06):

(a) Establishes Navy Code of Conduct Evasion, Resistance, Escape and Prisoner of War/Detainee policy; and

(b) Coordinates overall Code of Conduct policy matters of the Navy.

(2) The Deputy Chief of Naval Operations (Manpower, Personnel and Training) (OP-01):

(a) Monitors Navy Code of Conduct training programs and ensures consistency with other related training programs; and

(b) Assesses new or modified training requirements for validity.

b. The Chief of Naval Education and Training

(1) Reviews Navy Code of Conduct training programs, including General Military Training, and materials for conformance with enclosure (1); and

(2) Coordinates with Air Force, Executive Agent of the Department of Defense (DoD), to assure that adequate supplies of up-to-date DoD training materials are available to the Navy; and

(3) Cooperates with Air Force and other Military Departments in the development of new training programs and materials for training at all levels.

c. Officers in command of activities or units having Navy members shall:

(1) Comply with the provisions of reference (a) and enclosure (1) regarding the instruction of military personnel in the Code of Conduct for members of the Armed Forces of the United States, and the conspicuous posting of the Code of Conduct in places readily accessible to such personnel; and

(2) Ensure training record entries are made of training accomplished.

RONALD J. HAYS
Vice Chief of Naval Operations

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PRACTICAL USE AND CONSTRUCTION OF PROTECTIVE SIGNS

1. *Real value*

For a sign to give protection it must be visible:

- from all directions,
- from as far as possible,
- in the day-time and as much as possible in bad weather and at night,
- with the naked eye and with infra-red detection techniques or a light amplifying system.

2. *Shape and nature*

To be effective, the sign must be:

- placed on a flat surface, in all directions, vertical and horizontal,
- as large as possible, as appropriate under the circumstances,
- illuminated or lighted, in case of bad weather and at night; fluorescent paints are only effective when there is an increase in the ultra-violet rays, with artificial light or for a short period of time at dawn or dusk,
- made of materials rendering it recognizable by technical means of detection; reflecting materials facilitate the identification of the protective sign, seen and illuminated in a narrow visual field.

3. *Visual range*

Example:

From an aircraft at an altitude of 3500 m, a horizontal red cross of 6 metres with an arm 0.80 m wide, on a white square 6 × 6 m, on a ground of green grass, is imperceptible to the naked eye. As this example demonstrates, the visual range of protective signs is on the whole restricted. These signs ought to be as large as possible.

4. *Location of protective signs*

They can be painted on flat surfaces, directly on roof-tops and the front of buildings and works to be protected.

On roofs, the protective signs must not be astride two sections of the roof but must be painted on each section. If it is not possible to mark a large sign on the roof, a horizontal space must be sought next to the building, on the ground if necessary, to place a large sign, visible from the air, very close to the building to be protected.

The flags must be fixed in such a way that they cannot be ripped off or stolen.

The protective sign can be placed on walls, panels, dykes, roads, paved surfaces, etc., so as to prevent their removal.

5. *Protection of transport*

The protective sign, if so authorized, should be of the same dimensions as the object to be protected.

For road vehicles and aircraft in particular, the sign may be made with self-adhesive strips or paint to suit the finish of the body in question. For this, it is better to seek the advice of an expert in case the sticker or paint has to be removed after the temporary use of the protective sign.

Source: P. Eberlin, Protective Signs 63-65 (1983)

AS11-4

RADIO SIGNALS FOR MEDICAL TRANSPORTS*

Excerpts from Article 40, Urgency and Safety Transmissions, and Medical Transports, of the Radio Regulations (Geneva 1979), effective from 1 January 1982, as modified at the World Administrative Radio Conference for Mobile Services, Geneva 1983 (Mob-83), effective from 15 January 1985:

3210 For the purpose of announcing and identifying medical transports which are protected under the [1949 Geneva Conventions and Additional Protocol I] a complete transmission of the urgency signals described in Nos. 3196 and 3197 shall be followed by the addition of the single group "YYY" in radiotelegraphy and by the addition of the single word MAY-DEE-CAL, pronounced as in French "medical," in radiotelephony.

3196 In radiotelegraphy, the urgency signal consists of three repetitions of the group XXX, sent with the letters of each group and the successive groups clearly separated from each other. It shall be transmitted before the call.

3197 In radiotelephony, the urgency signal consists of three repetitions of the group of words PAN PAN, each word of the group pronounced as the French word "panne." The urgency signal shall be transmitted before the call.

3211 The frequencies specified in No. 3201 may be used by medical transports for the purpose of self-identification and to establish communications. As soon as practicable, communications shall be transferred to an appropriate working frequency.

MOD 3201 Mob-83 The urgency signal and the message following it shall be sent on one or more of the international distress frequencies 500 kHz, 2182 kHz, 156.8 MHz, the supplementary distress frequencies 4125 kHz and 6215.5 kHz, the aeronautical emergency frequency 121.5 MHz, the frequency 243 MHz, or on any other frequency which may be used in case of distress.

3212 The use of the signals described in No. 3210 indicates that the message which follows concerns a protected medical transport. The message shall convey the following data:

3213 a) the call or other recognized means of identification of the medical transport;
3214 b) position of the medical transport;
3215 c) number and type of medical transports;
3216 d) intended route;
3217 e) estimated time en route and of departure and arrival, as appropriate; and
3218 f) any other information, such as flight altitude, radio frequencies guarded, languages used and secondary surveillance radar modes and codes.

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* International Code of Signals, H.O. Pub No. 102, at 137 (rev. 1981); 1984 Int'l Rev. Red Cross 54-57.

See paragraph S11.11.1.

ANNEX AS11-5

VISUAL SIGNAL FOR MEDICAL TRANSPORTS*

Adopted by the Intergovernmental Maritime Organization's International Code of Signals, chapter XIV, for hospital ships, and by Additional Protocol I to the 1949 Geneva Conventions for the Protection of War Victims, for medical aircraft:

1. The light signal, consisting of a flashing blue light, is established for the use of hospital ships and medical aircraft to signal their identity. No other aircraft shall use this sign. The recommended blue color is obtained by using, as trichromatic coordinates:

green boundary	$y = 0.065 + 0.805x$
white boundary	$y = 0.400 - x$
purple boundary	$x = 0.133 + 0.600y$

The flashing rate of the blue light is to be between 60 and 100 flashes per minute.

2. Medical aircraft should be equipped with such lights as may be necessary to make the light signal visible in as many directions as possible. The light or lights on hospital ships shall be placed as high above the hull as practicable and in such a way that at least one light shall be visible from any direction. The visibility of the lights on hospital ships shall be not less than 3 nautical miles in accordance with Annex I to the COLREGS 1972.

3. In the absence of a special agreement between the Parties to the conflict reserving the use of flashing blue lights for the identification of medical vehicles and ships and craft, the use of such signals for other vehicles or ships is not prohibited.

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* International Code of Signals, H.O. 102, rev. 1981, change 136A, Notice to Mariners 52/85, at II-2.5.

See paragraph S11.11.2.

IDENTIFICATION AND LOCATION OF NEUTRAL PLATFORMS

ITU
RADIO REGULATIONS

RESOLUTION No. 18 (Mob-83)

Relating to the Procedure for Identifying and Announcing the Position of Ships and Aircraft of States Not Parties to an Armed Conflict

The World Administrative Radio Conference for the Mobile Services, Geneva, 1983,

considering

a) **that ships and aircraft encounter considerable risk in the vicinity of an area of armed conflict;**

b) **that for the safety of life and property it is desirable for ships and aircraft of States not parties to an armed conflict to be able to identify themselves and announce their position in such circumstances;**

c) **that radiocommunication offers such ships and aircraft a rapid means of self-identification and providing location information prior to their entering areas of armed conflict and during their passage through the areas;**

d) **that it is considered desirable to provide a supplementary signal and procedure for use, in accordance with customary practice, in the area of armed conflict by ships and aircraft of States representing themselves as not parties to an armed conflict;**

resolves

1. that the frequencies specified in No. 3201 of the Radio Regulations may be used by ships and aircraft of States not parties to an armed conflict for self-identification and establishing communications. The transmission will consist of the urgency or safety signals, as appropriate, described in Article 40 followed by the addition of the single group "NNN" in radiotelegraphy and by the addition of the single word "NEUTRAL" pronounced as in French "neutral" in radiotelephony. As soon as practicable, communications shall be transferred to an appropriate working frequency;

2. that the use of the signal as described in the preceding paragraph indicates that the message which follows concerns a ship or aircraft of a State not party to an armed conflict. The message shall convey at least the following data:

- ***a)*** **call sign or other recognized means of identification of such ship or aircraft;**
- ***b)*** **position of such ship or aircraft;**
- ***c)*** **number and type of such ships or aircrafts;**
- ***d)*** **intended route;**

e) estimated time en route and of departure and arrival, as appropriate;

f) any other information, such as flight altitude, radio frequencies guarded, languages and secondary surveillance radar modes and codes;

3. that the provisions of Sections I and III of Article 40 shall apply as appropriate to the use of the urgency and safety signals, respectively, by such ship or aircraft;

4. that the identification and location of ships of a State not party to an armed conflict may be effected by means of appropriate standard maritime radar transponders. The identification and location of aircraft of a State not party to an armed conflict may be effected by the use of the secondary surveillance radar (SSR) system in accordance with procedures to be recommended by the International Civil Aviation Organization (ICAO);

5. that the use of the signals described above would not confer or imply recognition of any rights or duties of a State not party to an armed conflict or a party to the conflict, except as may be recognized by common agreement between the parties to the conflict and a non-party;

6. to encourage parties to a conflict to enter into such agreements;

requests the Secretary-General

to communicate the contents of this Resolution to the International Maritime Organization (IMO) and the International Civil Aviation Organization (ICAO) for such action as they may consider appropriate;

requests the CCIR

to recommend an appropriate signal in the digital selective calling system for use in the maritime mobile service and other appropriate information as necessary.

See paragraph S11.12.

Sources: Eberlin, Protective Signs 70-71 (1983);
1984 International Review of the Red Cross 58-59;
effective 15 January 1985.

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