THE AIR FORCE
LAW REVIEW

THE MASTER OPERATIONS LAWYER'S EDITION

- CONTRIBUTORS -

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I. INTRODUCTION

Today, more than ever before, military operations are joint, that is, conducted cooperatively by multiple armed services. Indeed, it is quickly becoming the era of combined operations, in which joint forces from different countries come together to pursue common objectives. From classic international armed conflict like Desert Storm to operations other than war (OOTW), such as Northern Watch, jointness is the defining characteristic of the modern warfighting environment.

Joint and combined operations bring with them dramatic changes in the way judge advocates traditionally perform their operational law role. In decades past, JAGs tended to be service-centric. By contrast, today an Air Force judge advocate advises the Army CENTCOM Commander on military operations in the Persian Gulf, the Navy AFSOUTH Commander directs forces in Bosnia based in part on legal advice provided by his Army judge advocate, and a Navy judge advocate serves the Marine USACOM Commander. These examples are but the tip of a growing iceberg.

In light of this reality, understanding what our fellow services bring to the fight is essential. More to the point, knowledge of the law that governs their operations has become a requisite survival skill. In this article, we provide a primer for those who find themselves faced with the prospect of providing legal advice about naval operations, both during deployment and employment. While it is not an exhaustive study of the field (volumes have been written on the subject), it provides the novice enough information to get him or her moving in the right direction.

Section I is a general survey of the law of the sea. As will be seen, the world's waters are subdivided into various legal regimes, each with differing obligations and rights for those who traverse them. Given the multiple regimes, the judge advocate must be able to answer two very basic questions maritime operators inevitably pose: "May I drive my ship or fly my aircraft there" and, if so, "What are the limitations on my activities in the area?" Using the 1982 Law of the Sea Convention as a point of departure, Section I describes how to determine where the regimes lie and what they mean in practical terms for ship drivers, pilots and operational planners.

Armed with the basics, in Section II the reader is introduced to the law of naval operations per se, with emphasis placed on periods of armed conflict. The survey begins with a discussion of the law of neutrality, including the rights of belligerents and neutrals, visit and search operations, and the possible effect of UN operations on neutrality law. It concludes with a brief summary of four traditional concerns during armed conflict at sea - targeting, mine warfare, deception, and maritime zones.
Finally, it should be noted that this article is a broad brush introduction to what is for many readers an unfamiliar topic. We certainly recommend that those tasked with providing actual advice consult the law itself; we have cited that law in the accompanying footnotes. /2/ We also suggest that readers secure a copy of The Commander's Handbook on the Law of Naval Operations, a joint Navy, Marine, and Coast Guard publication? It discusses most of the topics our article addresses, but in greater detail than space allows here. Caveats aside, let us turn to the law of the sea.

II. THE LAW OF THE SEA

As noted, operators are reductionists - they want to know where their ships and aircraft can travel and what they can do while underway. /4/ The answers to these oversimplified questions are to be found in both treaties and customary international law. For the United States, the foundational international agreements are the three 1958 Geneva Conventions on the Law of the Sea. /5/ Unfortunately, the trio left unsettled critical issues, such as the width of the territorial sea; therefore, between 1973 and 1982 the United Nations sponsored a conference (UNCLOS III /6/) designed to update the 1958 law. The resulting Law of the Sea (LOS) Convention came into effect in 1994 after ratification by the requisite 60 countries. /7/ Our own country refused to ratify it on the basis that its provisions on mining seabed resources were objectionable /8/ Those concerns were put to rest in a 1994 U.N.-brokered compromise that amended the Convention. /9/ In response, the Clinton Administration forwarded the treaty to the Senate for its advice and consent, a move strongly supported by the Department of Defense. /10/ To date, the Senate has not taken action on it.

Although the Senate has failed to provide its advice and consent, the LOS Convention is the primary de facto "source" of law for maritime operations. This has been so since President Reagan issued his 1983 Ocean Policy Statement, proclaiming that except for those provisions related to seabed mining the Convention reflects existing (customary) international law." As a result, the LOS Convention provides a practical and very detailed guide to what we see as the binding provisions regulating use of the seas. Indeed, it is fair to say that the Convention establishes the constitution /12/ for the world's oceans - some 70% of the globe.

A. The Starting Point - Determining Baselines

Because the rights and obligations of naval vessels (and aircraft) are usually determined by the legal nature of the waters through which they transit, to provide advice on naval operations one must first understand the legal regimes of the world's waters. Determining the boundaries between these regimes depends on the location of what are known as baselines./13/ Ultimately, every maritime legal regime is measured from them; indeed, they are the starting point in any law of the sea question.

Normally, baselines are set at the low-water mark of a coast as annotated on large-scale charts issued by the coastal nation./14/ Complete sovereignty is enjoyed over the waters
that are landward of this line. Seaward of the baseline, sovereignty fades as the law increasingly takes into account the competing interests of other States in passage through waters lying offshore. Inasmuch as baselines serve as the critical point of departure under international law for delineating ocean regimes, many current law-of-the-sea disputes focus on the placement of this line. /15/ The reason is quite simple; the further the line is pushed seaward, the greater control the coastal State has over resources (primarily fish and oil under the seabed) in the waters that border it.

As important from an operational point of view is the fact that the closer a warship is to the baseline, the greater the restrictions on its activities.

Despite the seeming simplicity of the low-water-mark standard for determining baselines, there are a number of exceptions to the general rule. In most cases, these exceptions exist in order to ease the task of ascertaining baselines; doing so simplifies navigation and, at least in theory, reduces the number of disputes resulting from difficult to determine low-water lines.

The most common exception is the "straight baseline," a straight line drawn between two points. There are three circumstances in which it is appropriate for a State to claim a straight baseline in lieu of the low-water line. The first occurs where a coast is unstable, as with, e.g., deltas. In such cases, the coastal State simply claims a straight line that roughly tracks the low-water mark at the time the claim is made; should the low-water mark subsequently shift, the straight baseline remains constant. /16/

A more prevalent use of straight baselines occurs where a coast is either "deeply indented" or there are "fringing islands" lying off it. /17/ Figures 1 and 2 illustrate these situations. Unfortunately, neither term is precisely defined in the LOS Convention. The United States, however, has suggested that in order to draw straight baselines for a deeply indented coastline, a State must have three or more indentations in close proximity to one another and the depth of each indentation must be greater than one-half the length of its proposed baseline. /18/ Regarding fringing islands, the US proposal is that the islands must mask 50 percent of the coastline in the given location, lie within 24 nautical miles of the coast, and each baseline segment must not exceed 24 nautical miles in length. /19/
When claimed (the coastal State may elect not to), straight baselines must either be clearly annotated on the claimant's nautical charts or a list must be published, setting forth the geographic coordinates of the lines. /20/ In all cases, baselines must closely track the coast's general direction, and the water they enclose must be "closely linked" to the adjacent land mass. /21/ Given the possibility of abuse, the United States currently claims no straight baselines and strictly interprets the rules when deciding whether to acknowledge those asserted by other States. Today, over 35 nations, ranging from Albania to Vietnam, claim baselines that the US considers excessive. Figure 3, Vietnam's claim, offers a particularly egregious example. Such assertions are objectionable because all water landward of a straight baseline is internal water; as such, it may only be entered, absent coastal state consent, in emergency circumstances (see discussion below).

Bays represent a second category of exceptions to the low-water rule for baselines. They fall into two categories, juridical and historic. To qualify as juridical, or legally defined, a bay must first satisfy the semicircle, or "wetness," test. In this test, a line is drawn across the mouth of the bay. That line is then used to draw a semicircle. If the surface area of the water in the bay equals or exceeds that contained within the semicircle, the indenture in
the coastline meets the first prong of the test. However, the line closing the mouth of the bay, i.e., that line which will become the baseline, can be no more than 24 nautical miles (NM) long. If it is longer, the country seeking to claim the juridical bay is required to move the line inward until it is 24 NM or less in length.

The law of the sea also recognizes the right of States to close the mouths of "historic" bays with straight baselines. Before qualifying as historic, the coastal nation must have exercised continuous and open authority over the bay for an extended period, an authority acquiesced to by other States. When the standard is met, the bay is exempt from the juridical bay requirements addressed above. Today, over 15 nations claim historic bays, and the right to use straight baselines across them, in determining the legal status of the waters lying off their coasts. The United States neither claims nor recognizes any historic bays. However, to the north, Canada claims Hudson Bay as historic. More important from a naval operations point of view is Libya's claim that the Gulf of Sidra (and its 300 NM closure line) is historic (see figure 5).

Such claims are significant because passage through waters landward of a valid historic bay closure line is, as noted, subject to coastal State consent; they are internal waters. Therefore, to demonstrate our lack of acquiescence to claims the United States does not recognize, the US Navy and Coast Guard regularly send warships into the contested waters as part of the Freedom of Navigation (FON) Program. This is true not only for historic bays but for excessive claims generally. In the case of the Gulf of Sidra, on multiple occasions FON operations have resulted in the (unsuccessful) use of force by Libya.
Islands have their own baselines, calculated in precisely the same way as those off continental shores - using the low-water line. However, a third exception to the low-water line standard applies where a State consists entirely of islands, as is the case, for example, with Indonesia and the Philippines. These countries, which are known as archipelagic States, are permitted to draw straight baselines of 100 NM or less connecting the outermost points of their constituent islands, provided the ratio of water to land within the baselines is between 1:1 and 9:1. Waters inside the baselines are called "archipelagic waters" and are subject to special rules, discussed infra, regarding passage through them. Seaward of the straight baselines, the ocean's traditional legal regimes apply. Should a State not meet the archipelagic criteria, the islands in the group are treated separately, that is, each receives its own baseline for use in determining the nature of the waters surrounding it.

The necessity of properly understanding how to determine such baselines, and of being aware of another State's improper use of them, was aptly demonstrated in 1992 when the submarine USS BATON ROUGE collided with a Commonwealth of Independent States (Russian) submarine off the Kola Peninsula. Figure 7 shows how this occurred. Russia claimed a straight baseline across the Kola Bay. For the US, the mouth of the bay in question measured 26.7 nautical miles and thus did not qualify for the use of straight baselines under any internationally recognized regime. The US, therefore, assumed that the Russians employed traditional, low-water mark baselines in the area. As can be seen, because of the differing baseline calculations, part of the claimed Russian territorial sea lay in what the US considered to be international waters. The problem is that submarines may not transit submerged, as they are permitted to do in international waters, through another State's territorial sea. In this case, the result was a collision between the two submerged submarines. Based on their respective interpretations of the law of the sea, both sides filed diplomatic protests.
B. Legal Regimes of the Oceans and Their Airspace

Once the baseline has been determined, it is possible to delineate where the various legal regimes of the oceans lie. Doing so is essential, for different obligations and rights attach to each. In particular, the nature of the regimes controls where warships and military aircraft may pass, and what they may do in the process.

In a general sense, the world's oceans may be divided into two categories - national and international waters. The former, consisting of internal waters, archipelagic waters and
the territorial sea, are the coastal State's sovereign territory. Of these, a State's greatest range of rights lies in internal waters, i.e., those (with the exception of archipelagic waters) landward of the baseline (juridical bays, ports, rivers, lakes, etc.). Except in situations where a ship seeks refuge either from weather or because the vessel has become unseaworthy (the right of safe haven/harbor), entry into internal waters is only permissible with the consent of the coastal State. Further, that State may generally place whatever conditions it chooses on entry, for it is, after all, consensual. /33/

Moving seaward from the baseline is the territorial sea. Like internal waters, the territorial sea is the sovereign territory of the coastal State, /34/ though the rights of other States are greater here. The LOS Convention, and its acceptance as customary law by non-signatories, settled a long-standing dispute over the maximum breadth of the territorial sea. Prior to this time, claims ranged from three miles (the former US position) to in excess of 200 NM. By Article 3 of the Convention, the breadth has been set at not more than 12 NM seaward of the baseline. Note that this is a maximum; some States claim less. Turkey, for instance, claims 12 NM in the Black and Mediterranean Seas, but six in the Aegean. /35/ The United States claims 12NM. /36/ Unfortunately, some nations still claim in excess of the permitted breadth. /37/

Territorial seas also surround islands. In fact, this "rule" is at the heart of many disputes, such as that between the Greeks and Turks in the Aegean. Because the hundreds of Greek islands have their own baselines, they acquire their own territorial sea. Therefore, the Aegean has the potential of becoming almost a "Greek lake" if Greece extends its territorial sea out from the currently claimed six NM to the maximum 12 permitted by the law of the sea. This is a prospect which the Turks vehemently oppose. /38/ Similarly, competing claims regarding sovereignty over the Spratley Islands in the South China Sea are a constant source of potential hostilities in the PACOM AOR. /39/

Though aircraft may not enter the airspace above the territorial sea absent coastal State consent, ships of other States enjoy three basic transit rights. First is the right of innocent passage. Innocent passage is continuous and expeditious transit through another State's territorial sea. /40/ It may be exercised in the absence of consent by the coastal State regardless of the type of vessel, its cargo, or how it is propelled. That said, nuclear-powered ships and those carrying inherently dangerous cargo must comply with international law (not coastal State law) regarding precautionary measures and proper documentation. /41/

Despite the requirement for ships in innocent passage to proceed expeditiously, they are not required to take the most direct and logical route through the territorial waters. /42/ In fact, they may anchor due to an inability to navigate at night, because of weather or other distress, or to assist others. /43/ The right of innocent passage can be suspended temporarily for security reasons; /44/ interestingly, neither "temporarily" nor "security reasons" are defined in the LOS Convention. Gun exercises or missile shoots are typical examples meriting suspension of passage rights.
While in innocent passage, ships are obligated to refrain from acts that are "prejudicial" to the peace, good order, or security of the coastal State. The LOS Convention provides an exclusive list of activities that are prejudicial, and thereby forbidden. Among those directly bearing on the activities of naval forces are: threatening the sovereignty, territorial integrity, or political independence of the coastal nation; launching or recovering military devices, including submersibles and helicopters; collecting intelligence; interfering with the coastal State's communications; engaging in propaganda that affects the security of the coastal State; and willfully causing pollution that violates the relevant provisions of the Law of the Sea Convention. Submarines must surface and fly their flag when passing through territorial waters. An oft asked question is whether ships may activate their radar while in passage, even weapon-systems-related radar. They may, for doing so aids in navigation or serves as an integral function of the warship's defensive posture. The list of restrictions closes with a catch-all prohibition on any other activity "not having a direct bearing on passage." If a warship engages in non-innocent passage, the coastal State may request that it take appropriate corrective actions. Failure to do so justifies a demand that the naval vessel depart the territorial seas. Should it not, the coastal State may use minimum force to compel its departure.

The Convention does not require prior notice or authorization before a ship may proceed in innocent passage. Nevertheless, some coastal States have imposed such requirements on warships. Over 25 nations purport to require prior permission, 13 insist on prior notification, and five place impermissible special restrictions on nuclear-powered warships. Understandably, these States have often been selected for FON operations.

A second transit right into the territorial seas of another nation is the right of assistance entry. It arises when it becomes necessary to come to the aid of ships, aircraft or individuals in distress. Because there is an obligation (a maritime, good Samaritan rule of sorts) to assist those in danger of being lost at sea," the coastal State need not consent prior to entry if the location of the vessel or individual in need of aid is reasonably known. That said, permission of the coastal State is required if a commander intends to conduct a search, for that is the responsibility and prerogative of the coastal State. As to the use of aircraft and helicopters, which are otherwise forbidden from entering another State's national airspace without consent, US policy is to employ them when needed in life-threatening situations.

Transit passage through international straits is the third right of entry into territorial waters. An international strait is one lying in the territorial waters of one or more countries which connects two parts of international waters. A classic example is the Strait of Gibraltar, which passes through the territorial waters of Spain and Morocco to connect the Atlantic Ocean with the Mediterranean Sea. Other key international straits of interest for naval operations include the Strait of Hormuz (connecting the Gulf of Oman and the Persian Gulf), and the Strait of Malacca (connecting the South China Sea and the Indian Ocean).
"Transit passage" resembles innocent passage in that it must be continuous and expeditious and not constitute a threat to the bordering coastal States. However, because of the importance to maritime powers of travel through straits, the LOS Convention places fewer restrictions on transit passage. Most importantly, aircraft are permitted to fly through international straits. Indeed, this is how U.S. Air Force aircraft based in England flew to Libya when France refused overflight permission for Operation El Dorado Canyon, the 1986 air strike in response to Libyan terrorism. Further, transit passage is permitted in "normal mode," a fact with direct military implications. Though undefined in the Convention, "normal mode" is interpreted to include launching and recovering aircraft and helicopters. Therefore, carrier task forces may put up combat air patrols as a defensive measure. Additionally, submarines may pass through international straits while submerged. Absent this right, a potential adversary could simply monitor a strait to determine, e.g., how many US submarines were in the Mediterranean Sea, Persian Gulf, etc. at any one time. The advantage of stealth, which submarines offer, would quickly be rendered de minimis.

Unlike innocent passage, transit passage is non-suspendable; were it not, coastal States could effectively block travel into large areas of the world's oceans. Though non-suspendable, a problem does arise in determining where transit passage begins and ends. Specifically, if a ship approaches a strait from territorial waters where it is in innocent passage, when may it go into normal mode? A similar question arises for flight. For example, if an aircraft proceeds towards the Strait of Gibraltar, at what point may it enter Spanish or Moroccan airspace to fly through the strait? These questions are unsettled in the law. The US position is that aircraft and vessels can proceed in the normal mode while in the "approaches" to the strait. An approach is subjectively determined by State practice. Once within the strait, a vessel or aircraft may travel through it anywhere from shore to shore. For warships, this is true regardless of whether there is an International Maritime Organization (IMO) approved vessel traffic separation scheme in effect, as there is, for example, in the Strait of
Hormuz. /59/ Though warships in transit passage need not comply with such schemes, they must still operate with "due regard" (safety) to other vessels.

The last category of national waters addresses those lying within archipelagic baselines - archipelagic waters. It is important not to confuse these with territorial waters, which lie just on the seaward side of the archipelagic baseline. Innocent passage rules apply in the archipelago's territorial seas, as well as its archipelagic waters /60/ with one significant exception, the archipelagic sealane.

An archipelagic sealane is a route normally used for international passage through archipelagic waters. While in them and the adjacent territorial sea, vessels and aircraft may travel in normal mode. /61/ Thus, overflight of aircraft and submerged sailing by submarines is permissible. This represents a compromise arrived at during UNCLOS III between archipelagic States, which wanted control over nearby waters, and maritime powers, which sought unimpeded and liberal passage through archipelagos like the Philippines and Indonesia.

The location of archipelagic sealanes is not formally set anywhere; they are merely those routes "normally used" for international navigation, a highly subjective standard. Vessels and aircraft may proceed in normal mode up to 25NM from the sealane's centerline, provided they do not come closer to shore than 10 percent of the distance between the land masses bordering the sealane. /62/ While there is a procedure for States to designate sealanes, to date none have done so. /63/ However, once a State, working through IMO, designates sealanes, vessels and aircraft are only authorized to engage in transit passage through those lanes. Finally, although innocent passage through archipelagic waters may be suspended temporarily for security reasons, archipelagic sealane passage is non-suspendable. /64/
Beyond the territorial sea lie international waters - the contiguous zone, the exclusive economic zone, and the high seas. /65/ The contiguous zone may extend out to 24NM from the coastal State's baseline and is used for purposes of regulating customs, fiscal, immigration, and sanitation matters. Reaching up to 200 NM from the baseline is the exclusive economic zone (EEZ), where the coastal State exercises jurisdiction over activities involving resources, such as fishing and research. Lying off the outer edge of the exclusive economic zone are the high seas, an area where the sovereign rights of all States are theoretically equal.
For the purposes of naval operations, activities that may be conducted in international waters differ little, if at all, from regime to regime. Overflight without consent of the coastal State is permitted throughout international waters. So too are intelligence gathering and military exercises, including gun exercises. It must be noted, however, that naval forces are always required to operate with "due regard" to the presence of other vessels and aircraft. Additionally, the rights of warships must be balanced against the rights of coastal States in the affected regime. For instance, while a naval exercise is permissible in the EEZ, it must not significantly interfere with coastal State fishing activities in the area. Balancing the rights of the coastal State and the maritime State would likely require the exercise to shift elsewhere. Similarly, warships in international waters must comply with international law governing pollution.

Certain States have attempted to impose limits inconsistent with international law on activities within international waters and airspace. Nearly 20 nations have declared security zones beyond their territorial seas which purport to restrict various military activities. Vietnam's security zone, e.g., is depicted in Figure 3. As noted above, such zones are permissible only in the territorial sea (or archipelagic waters), and only temporarily. Some States, including the US, have established air defense identification zones (ADIZ) in international airspace. For instance, the US ADIZ on the east coast extends out 200NM. ADIZs are permissible under international law only to the extent they constitute a condition of entry into national airspace. In other words, a State may validly require an aircraft to comply with ADIZ identification requirements before it consents to entry of the aircraft into its territorial airspace. However, if it is merely passing through the ADIZ, the aircraft need not, as a matter of law, abide by the coastal State's conditions. As a matter of comity and safety, however, most usually do.

Finally, mention should be made of sovereign immunity. Regardless of the regime in which it is operating, a warship or military aircraft may not, absent its consent, be arrested (seized), searched, inspected, or boarded by officials of another State. Instead, if the vessel or aircraft entered internal waters pursuant to host-nation consent, the host may simply withdraw that consent, thereby requiring the aircraft or vessel to depart. If the aircraft/vessel subsequently refuses to leave, minimal force may be used to compel it to do so.

III. THE LAW OF NAVAL OPERATIONS

Usually, the judge advocate can solve most of the operational commander's burning maritime conundrums by analyzing issues in terms of three basic questions. First, who is taking or contemplating the action? Next, what juridical regime of the ocean is the action occurring in? Finally, what are the respective parties' interests or rights in the affected area? The law of the sea is the proper starting point for answers to these basic questions; however, in many cases a comprehensive and correct response also requires resort to the law of naval operations. In
the remainder of this article, we consider two key areas of that law - neutrality and the means and methods of warfare at sea.

A. Neutrality

In today's world, where at any given moment some nation is bound to be engaged in armed conflict with another, the operational judge advocate must be well versed in the law of neutrality. Fortunately, it is, in great part, consistent with the law of the sea; the maritime rights and duties States enjoy in peacetime continue to exist, with minor exceptions, during armed conflict. Therefore, the judge advocate who analyzes questions of neutrality in light of law of the sea principles, will routinely provide legal counsel that is on the mark.

The law of neutrality governs the relationship between parties (belligerents) and nonparties (neutrals) to an armed conflict by defining their respective rights and obligations. Neutrality concepts emerged and evolved during the era of sailing, principally the 17th, 18th and 19th centuries, when the world was less interdependent. It was a time when nation-States tended to resolve their own problems without the help of allies, elaborate security agreements, or United Nations resolutions. While the world has changed dramatically over the past century, neutrality continues to serve as a useful framework during international armed conflict for the conduct of participants and nonparticipants alike.

Neutrality law fosters international stability by serving three useful purposes. First, and foremost, it contains the spread of the hostilities by keeping down the number of participants. Second, it defines the legal relationship between parties and nonparties to the conflict. Finally, neutrality law helps limit the impact of the war on nonparticipants, particularly with regard to commerce. In essence, it serves to balance the interests of the belligerents, who want to wage war with few restrictions and to isolate the adversary, with those of neutral nations, who seek to conduct normal activities, such as trading, with minimal interference.

Both neutral and belligerent rights are clearly delineated in neutrality law. In general, a neutral enjoys two basic rights: inviolable territory and the practice of commerce. In return, the neutral must abstain from participating in the conflict and maintain its impartiality. Likewise, a belligerent enjoys reciprocal rights and duties. It must respect a neutral's inviolability and its entitlement to trade, but has its own right to insist on the neutral's abstention and impartiality.

As a general rule, neutral territory is treated as sacred space; it is inviolable. Belligerents are prohibited from conducting hostilities, establishing a base of operations, or seeking sanctuary in neutral territory. Meanwhile, the neutral State is responsible for policing its own territory, using force if necessary, to ensure that it is not being used impermissibly by the belligerents. In the event a neutral is unable or unwilling to police its territory, a belligerent, under the doctrines of self-help or self-defense,
is authorized to take whatever action is necessary, including entering the neutral's otherwise inviolate territory and using force, to put an end to its misuse. /82/

A neutral State's obligation to police its own territory derives from the almost total control it exercises over its sovereign, national waters. Of course, as all States may during peacetime, the neutral is permitted, absent force majeure, to impose conditions on entering its internal waters or close its ports to foreign vessels. /83/ During armed conflict, however, a neutral exercises even greater sovereignty over its territorial waters, at least with respect to belligerent warships. /84/ For instance, notwithstanding the customary right of innocent passage, a neutral may levy conditions on belligerent warships transiting its territorial seas; it may even bar them altogether. /85/ A neutral is not permitted, however, to hamper or impede transit through an international strait or archipelagic sea lane. /86/ Further, whatever the neutral nation elects to do with regard to its national waters, a neutral must treat all belligerents in an impartial, nondiscriminatory manner. /87/

If a neutral State chooses to open its waters to belligerents, the law places certain limitations on their activities therein. For instance, no more than three belligerent warships may remain in port at any given time, /88/ and absent adverse weather or an unseaworthy condition, these vessels must depart within 24 hours of their arrival. /89/ Additionally, a belligerent warship may only replenish food and fuel stores to peacetime levels during its port call; it may not take on any war materials, such as weapons and ammunition. /90/ Likewise, if damaged, a warship may only be repaired to a seaworthy condition; its military capabilities cannot be restored. /91/ Of course, the neutral State retains responsibility for policing its ports and is obligated to intern, for the duration of the conflict, any vessel and crew that fails to comply with these conditions.

While a belligerent is prohibited from conducting hostile activities in neutral waters, /92/ it is generally free to wage war, with few restrictions other than the law of armed conflict, in its own and its adversary's waters, as well as on the high seas. /93/ Besides engaging the enemy in combat in these waters, a belligerent normally seeks to isolate its adversary from the outside world by controlling merchant shipping, thereby curtailing the enemy's ability to sustain its war effort. To balance this desire with the neutral goal of maintaining commerce, the contraband system has developed over time. Simply put, although neutrals are free to engage in commerce with one another, as well as with belligerents, they may not trade in contraband with the belligerents.

Contraband consists of those goods or materials, such as ammunition, that are directly related to warfighting, or that are war-sustaining, such as oil, electronic components, and industrial raw materials. Historically, goods fell into one of three categories: absolute or conditional contraband, or free goods. Absolute contraband is material that by its nature is designed for use in the armed conflict, whereas conditional goods consist of dual-use products. /94/ Free goods, like baby formula, religious objects, or children's clothing, are those items that only have utility to the civilian population. They are not considered contraband and thus may be freely traded, even with belligerents.
Today, the line between absolute and conditional contraband has blurred because of the difficulty, (in an era in which entire populations are involved in the war effort,) of determining whether conditional goods are being used for military or civilian purposes. Therefore, in practice, belligerents publish a list delineating what goods constitute contraband. A belligerent may frame the list either in terms of goods that are considered contraband or those which are not." It is the prevailing view of the international legal community that publication of such a list must proceed any capture of contraband goods. Whether this is true for munitions is unclear. /96/

Though neutral vessels transporting contraband bound for belligerent or occupied territory are subject to capture, it may be difficult to determine their destination. However, contraband is presumed to be destined for a belligerent in the following circumstances /97/

a. when a neutral vessel calls at an enemy port before heading to its final destination, a neutral port;

b. when goods are manifested to a neutral port that is serving as a transit port to the enemy, even if the goods are consigned to the neutral port; 98 and

c. if goods are going to an unnamed consignee in a neutral State near enemy territory.

To ensure that neutrals do not trade contraband with the enemy, belligerent warships in the exercise of their right of visit and search may board neutral merchant vessels outside neutral waters and inspect their cargo. /99/ Visit and search is a belligerent's right during armed conflict to stop all merchant vessels, enemy or neutral, and search them to ascertain if they are transporting contraband. Only warships and naval auxiliary vessels are authorized to exercise this right, and they must do so in non-neutral waters. /100/ If conducting visit and search at sea is impossible or unsafe (e.g., due to weather conditions), a belligerent warship may divert a merchant vessel to a belligerent port where the inspection can be conducted safely. For example, during the Gulf War, coalition forces routinely diverted merchant vessels, particularly container vessels (which are practically impossible to inspect completely and safely at sea), into port for the purpose of searching them. /101/

Not all vessels are subject to visit and search. Under international law, a warship is a sovereign platform, thereby exempt from visit and search. Additionally, a belligerent may not interfere with neutral merchant vessels sailing in convoy with warships flying the same flag, provided the warship certifies in writing that the vessel is not carrying contraband and provides the belligerent with other relevant information that it would be entitled to obtain during a visit and search, such as port of departure and destination. /102/ While the technical requirement is for a written certification, a belligerent generally accepts verbal assurances.

If a neutral merchant vessel carries contraband, attempts to conceal its identity, resists visit and search, carries irregular or fraudulent papers, attempts to or breaks a blockade,
or violates regulations in the immediate vicinity of naval operations, the vessel and its cargo are subject to capture (seizure), though not destruction. /103/ Once captured, the merchant vessel is escorted to a port under belligerent control, where a tribunal known as a prize court adjudicates the legality of the capture. /104/ If the prize court finds that the vessel was carrying contraband, it awards the seized vessel and its contents to the belligerent. The crew of the vessel is repatriated immediately; they are not prisoners of war.

To avoid undue interference with neutral shipping, belligerents may employ a system whereby its consular officials inspect vessels and containers prior to their loading. If all is in order, a navicert is issued to the vessel. /105/

Then, absent changed or unusual circumstances, a belligerent will generally not visit and search the vessel at sea. /106/

As noted, visit and search is a belligerent right, recognized under the law of armed conflict. One must carefully distinguish it from the rights of "approach and visit" and "stop and inspect." Approach and visit is a law enforcement term, which encompasses two actions. Approach simply means to pose questions to the master of a vessel, usually to inquire about the vessel's nationality, type of cargo being carried, and where it is coming from and transiting to. Under the right of visit, a sovereign vessel such as a Coast Guard cutter is authorized to board a foreign-flag vessel (that is not entitled to sovereign immunity under the LOS Convention) /107/ and inspect its documents when there is reasonable suspicion to believe the vessel is engaged in piracy, unauthorized broadcasting, or slave trade, or is without nationality. /108/ Notwithstanding the Posse Comitatus Act, U.S. Navy vessels are authorized to exercise the right of approach and visit."

The right of stop and inspect, on the other hand, is a term employed during maritime interception operations (MIO), which are measures used to enforce a United Nations' sanctioned embargo. For instance, following the Iraqi invasion of Kuwait, the United States and other countries, acting under the authority of UN Security Council Resolutions 661 and 665, conducted MIOs in the Persian Gulf, the Gulf of Oman, and the Red Sea, diverting almost all goods headed into or out of Iraq. /110/

A final issue involving neutrality is whether the concept exists at all during enforcement actions authorized pursuant to Chapter VII of the United Nations Charter. Under Article 39 of that chapter, the Security Council determines if a State's actions constitute a "threat to peace, breach of the peace, or act of aggression." /111/ If it does, the Council decides what steps are necessary to "restore international peace and security." /112/ Among the actions it may authorize is the use of force under Article 42. /113/ Such force may be employed either by UN troops (Blue Helmets) or by member States acting individually or collectively, as in Desert Storm. The dilemma vis-a-vis neutrality is that once the Security Council has acted, member States are obligated to "accept and carry out (its) decisions" and "join in
affording mutual assistance in carrying out the measures (it has) decided on." /114/ Thus, a fair argument can be made that a nation cannot simply declare itself neutral and sit by on the sidelines during Chapter VII operations.

The issue is of more than academic interest. Consider the implications if this approach is valid. In the absence of neutrality, trade restrictions beyond contraband would apply. Also, since by definition there would be no neutral waters, target-State warships could no longer escape attack by entering the territorial sea of a neutral. Further, neutrals have an obligation to intern belligerent military personnel who come into their hands during a conflict and to police its territory, ensuring that belligerents do not conduct operations or seek sanctuary therein. However, if obligated to support UN-authorized operations, an avowed neutral state would be required to capture and intern military personnel of the declared aggressor, while immediately returning those supporting the UN operation. Moreover, the world community would expect the "neutral" to preclude the aggressor from operating in or entering its territory, but to allow UN-authorized forces to operate there.

It is not the purpose of this article to resolve this complex issue. However, even assuming the approach is correct, neutrality law retains its importance in military operations. First, when the UN does not act, (and it has failed to act in the overwhelming majority of international armed conflicts since its creation,) neutrality law applies. Second, even when the Security Council responds under Chapter VII, e.g., to Iraq's invasion of Kuwait, it is unrealistic to expect all nations, notwithstanding their Charter obligations, to support the action. For example, in Desert Storm both Iran and Jordan declared their "neutrality." Though the world community merely recognized them as "nonparticipants," vice neutrals, it is nevertheless essential that the legal obligations they assume by so characterizing themselves are understood. Thus, neutrality remains a vital body of law even in the "new world order."

B. Methods and Means of Armed Conflict at Sea

1. Targeting

Although enemy warships are obviously subject to attack at any time outside neutral territorial waters, a belligerent generally may only capture, not destroy, enemy merchant vessels. /115/ If, however, a merchant vessel refuses to heave to after being ordered to do so, resists visit and search, carries offensive weapons, sails in convoy with enemy warships, or carries absolute contraband, it becomes a military target and is subject to attack in the same fashion as a warship. /116/ That said, a belligerent may destroy a merchant ship when it is impractical to seize the vessel and take it to one's own or an allied port. Before doing so, however, the belligerent warship must ensure the safety of the ship's crew, passengers, and papers in light of the prevailing circumstances, such as weather. /117/

Neutral vessels, by virtue of their conduct and actions, may sometimes acquire the character of an enemy merchant vessel or warship. For example, neutral merchant vessels that take part in the hostilities, serve as naval auxiliaries, are incorporated into the intelligence and communications system of the enemy, or sail in convoy with the enemy
are treated like enemy warships. /118/ As such, they are valid military objects, subject to
attack and destruction under the law of armed conflict. Similarly, neutral merchant
vessels operating directly under enemy control or direction (e.g., chartered by the enemy)
or resisting attempts to determine their identity (e.g., during a visit and search operation)
acquire the character of enemy merchant vessels. /119/

Regardless of the flag they are flying, certain vessels, called protected platforms, are
immune from capture or attack unless they act in a manner that is inconsistent with their
protected status. For example, cartel vessels and aircraft (those carrying prisoners of
war), hospital ships, medical aircraft,
rescue craft, lifeboats and life rafts, and small coastal fishing vessels may not be targeted.
/120/ A belligerent, however, can certainly board and inspect protected platforms to
ensure that they are being used appropriately. /121/ Should a protected platform fail to
stop and allow a boarding, interfere with belligerent activities at sea, disobey lawful
orders, or otherwise act in a non-innocent manner, it is subject to capture and, if
circumstances necessitate, possibly to attack. /122/

Vessels that have surrendered are also immune from attack. Surrender must be allowed if
it is unambiguous, effectively communicated, conveyed in a timely manner, and can be
accepted. /123/ A vessel usually communicates its desire to surrender by stopping, raising
a white flag, hauling down its ensign, and lowering and manning the lifeboats. /124/
Following an engagement, a commander is duty bound to rescue the survivors and pick
up the deceased, regardless of their nationality, provided it is possible without hazarding
the vessel. /125/

2. Mine Warfare

Mines are key weapons, not only in blockades, but in naval warfare generally. This is
particularly true for less powerful countries. /126/ There are two types of mines, armed
(or contact) and controlled. Armed mines are those that are tethered to the ocean bottom
or floating free waiting for a vessel to strike them and detonate on impact. Controlled
mines, by contrast, require an affirmative act to become armed. Sophisticated devices
with remotely controlled triggering devices, they are incapable of causing damage unless
they are activated.

By their very design, armed mines are indiscriminate weapons capable of wreaking havoc
on both military objectives and innocent third parties. The use of such naval mines,
therefore, is regulated by international agreement. /127/ Generally, belligerents must
provide notice of their use and location to the
international community. /128/ They are also required to become harmless (go inert)
immediately upon breaking loose from their mooring or within one hour of the
belligerent losing control over them if they are free-floating or unanchored contact mines.
/129/ Finally, any State laying armed mines is required
to record their location in order to allow for appropriate notification of mariners and to
retrieve them when they are no longer needed. /130/
When deciding whether to employ naval mines, the commander needs to answer three basic questions: is it peacetime or wartime; what type of mine, armed or controlled, is being deployed; and where is the mine being placed? Prior to the outbreak of hostilities, i.e., peacetime, a nation may mine its internal waters with contact or controlled mines without providing notice. It may also temporarily employ armed mines in its territorial sea and archipelagic waters for national security purposes, provided international notice is given. Whereas archipelagic sea lanes and international straits can never be mined during peacetime so as to deny transit passage rights, controlled mines may be laid in international waters without notice, so long as they do not impede other lawful uses of these waters. Obviously, during peacetime a State may not place armed mines in international waters, except in self-defense. In such cases, the State must give notice, maintain an on-scene presence, and remove the mines as soon as the threat is eliminated.

**FIGURE 13: PEACETIME MINING**

Mining by Country 1?   Mining by Country 2?

Point A  No  Yes

Point B  No, absent consent   Yes, but requires notice

    if armed

Point C  Yes, but controlled only and  Yes, but controlled only

    cannot interfere with lawful use  and cannot interfere
by others with lawful use

by others

Point D  No (international strait)  No (international strait)

Point E  Yes, but requires notice if armed  No, absent consent

During armed conflict, the rules for employing controlled mines are unchanged, with the exception, of course, that a belligerent may place them in its opponent's national waters without consent. However, because armed conflict is occurring, belligerent rights regarding the use of armed mines expand. A belligerent may mine its own national waters, as well as those of the enemy, provided international notification is given and the mines are not solely targeting commercial vessels. /131/ On the other hand, a belligerent is never authorized to place naval mines in the national waters of a neutral State without its consent. /132/ It may, however, employ mines to channel (force into set corridors) neutral shipping through international straits and archipelagic sea lanes, so long as it does not deny a neutral vessel its right of transit passage. /133/ Finally, during armed conflict a belligerent may employ armed mines in international waters so long as the extent of the mining is not indefinite and notice is provided. /134/ Once the direct need for the emplacement ends, the belligerent must take steps to remove any mines it laid, wherever located. /135/

FIGURE 14: WARTIME MINING
B = Belligerent  N = Neutral

Mining by Country B1?  Mining by Country B2?

Point A  No  No
3. Deception

Deception, ruses, and stratagems have always played a major role in naval warfare. The use of decoys, false communications, and feigned movements are perfectly lawful. /136/ Also, under customary international law, naval commanders are authorized to fly the flag of a neutral or enemy State, wear neutral or enemy uniforms, and otherwise disguise their warships, provided that prior to engaging the enemy the vessel and her personnel display their true colors. /137/ On the other hand, perfidy, i.e., misusing protected symbols, signs, or status to gain a military advantage, is illegal. /138/ Issuing false maydays, raising a white flag when not intending to surrender, and using protected places, such as a hospital ship, to stage counterattacks against the enemy are examples of perfidious conduct and constitute war crimes. /139/

4. Zones

When hostilities occur, belligerents typically establish exclusionary or war zones. /140/ While there is nothing illegal about creating such areas, they are not "free-fire" zones, authorizing belligerents to shoot anything that moves in the area without complying with the law of armed conflict principles of discrimination, necessity, and proportionality. Indeed, the mere presence of a vessel in the zone confers no additional rights or authorities on a belligerent. /141/ Rather, the zones simply serve as warning areas, designed to advise others that a war is taking place and that, because they are entering an area in which hostilities are likely, they are at greater risk and should exercise caution should they elect to enter the zone. Specifically, belligerents may not prevent mariners from navigating through the area. In essence, an exclusionary zone is nothing more than a notice to mariners or airmen, which serves to limit the extent of the conflict and help neutral vessels remain out of harm's way. /142/

Exclusion zones should not be confused with a belligerent's right under customary international law to control the immediate area of naval operations. The operative word in this case is "immediate." Within the immediate area of naval operations and hostilities, a commander may establish special restrictions on neutral vessels and aircraft, including denying them access to the area. Generally, restrictions are placed on communications emanating from the area and on how vessels may maneuver, so that neutral shipping will not interfere with or endanger ongoing military operations. Any neutral vessel that fails to
comply with a commander's orders assumes the character of an enemy merchant vessel and is thus subject to capture and possibly attack. /143/

It is also important not to confuse operations zones, such as those discussed above, with blockade practices. A blockade is a traditional method of isolating the enemy from the outside resources and support needed to maintain its war effort by preventing all vessels or aircraft from entering and departing specified ports and areas under enemy control. /144/ A blockade, however, cannot bar access to neutral territory or international straits. /145/ Under traditional rules, to establish a valid and effective blockade, /146/ a belligerent must establish the geographic boundaries of the blockade, set a start date for its enforcement, effectively notify the international community, maintain sufficient force in the area to render transit dangerous, and impartially enforce the blockade. /147/ In modern warfare, a belligerent need not be on scene to enforce its blockade. /148/ Rather, it is sufficient to employ mines or over-the-horizon weapon systems, which will significantly deter others from transiting through the area. /149/

IV. CONCLUSION

Hopefully, this article has highlighted the critical issues involved in maritime operations, whether during periods of peace or armed conflict, for those who do not regularly handle them. The key is to remember what questions to ask, not to have full recall of the nuances of the law of the sea and naval operations. Reduced to basics, what you need to know is: Who wants to do what, to whom, where, and under what circumstances. Armed with this information, you can systematically attack the legal issues you confront with confidence.

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3 The Commander's Handbook on the Law of Naval Operations (NWP 1-14M, MCWP 5-2.1, COMDTTPUB P5800.7) (1995) [hereinafter NWP 1-14M]. The Commander's Handbook does not contain any legal authorities. However, the Annotated Supplement to the Handbook is specifically designed for the
judge advocate and is replete with citations. Part I of the Supplement, dealing with peacetime operations and the law of the sea, was revised in 1997.

4 The Navy has set forth its doctrine in Naval Doctrine Publication (NDP) 1, Naval Warfare (1994). It is the first in a planned series of six doctrine publications. The others address intelligence, operations, logistics, planning, and command and control.


11 The President specifically stated that the Convention contained " provisions with respect to the traditional uses of the oceans which generally confirm existing maritime law and practices and fairly balance the interests of all States." United States Ocean Policy, 19 Weekly Comp. Pres. Doc. 383 (Mar. 14, 1983). See also Law of the Sea Negotiations: Hearings before the Subcomm. on Arms Control, Oceans, Intl' Operations and Env't of the Senate Comm. on Foreign Relations, 97th Cong., 2d Sess. 107 (Statement of Theodore G. Kronmiller, Deputy Assistant Secretary of State). For the purposes of this article, Law of the Sea Convention articles will be treated, pursuant to US policy, as reflecting customary international law.

12 As of February 1997, 115 States, including most maritime powers, have ratified the Convention.


14 LOS Convention, supra note 7, art. 5.


16 LOS Convention, supra note 7, art. 7(1).
17 The US and Russia are currently working on a joint interpretation of the terms.


19 Id. at 17-30.

20 LOS Convention, supra note 7, art. 16.

21 Id. art. 7(3).

22 Id. art. 10. Islands within the bay are treated as water-surface area for the purpose of the test.

23 Id. art. 10(5). The actual position of the line moved inwards to comply with the 24 NM requirement is the prerogative of the coastal State. To determine where a particular State has placed the line, consult the Maritime Claims Reference Manual, supra note 13.

24 LOS Convention, supra note 7, art. 10(6).

25 The United States argues that acquiescence is an affirmative act; therefore, a failure to protest a claimed historic bay does not suffice. Arthur W. Rovine, 1973 Digest of US Practice in International Law 244-45 (1974). The International Court of Justice, in addressing the issue of acquiescence, held to the contrary in Fisheries Case (U.K. v. Norway), 1951 I.C.J. Rep. 116 (Dec. 18). The Fisheries Case is also instructive on the issues of deeply indented coastlines and fringing islands.

26 Amendment to Fisheries Act, July 13, 1906, cited in Roach and Smith, supra note 15, at 23.


28 In 1996, the US Navy conducted 14 freedom of navigation operations.


30 LOS Convention, supra note 7, art. 121. Uncovering (wet) rocks, however, do not. Uncovering rocks are low-tide elevations, i.e., rocks and shoals that only break the surface at low tide. The sole exception to this rule is for those wet rocks that lie within the territorial sea of the coastal State. In such cases, the uncovering rock "baseline" pushes out the coastal State's territorial sea. Id. art. 13.

31 Id. arts. 46-54. A number of States, which are not constituted wholly by islands, have drawn straight baselines around non-independent archipelagoes. The US position is that they do not qualify because the countries are not comprised exclusively of islands, as required by the LOS Convention. The US, therefore, can not use archipelagic baselines around Hawaii, even though it is an archipelago, as it is not an archipelagic State. Non-island States that impermissibly claim archipelagic baselines include Denmark (Faroes), Ecuador (Galapagos), Portugal (Azores), and the United Kingdom (Falklands and Anguila). See Roach and Smith, supra note 15, at 63-67. Note that an island State which cannot meet the criteria may elect to draw archipelagic baselines around a subset of its islands which can. In such cases, the remaining islands are treated as islands, i.e., each having its own individual baseline.
32 The incident was widely reported. See, e.g., David Evans, Insider to Probe Sub Collision, Chicago Tribune,

33 For procedures regarding warship entry into internal waters, see OPNAVINST 3128.3 (series), Visits by US Navy Ships to Foreign Countries.

34 LOS Convention, supra note 7, art. 2.


37 As of 1 January 1997, Angola (20), Benin (200), Cameroon (50), Congo (200), Ecuador (200), El Salvador (200), Liberia (200), Nicaragua (200), Nigeria (30), Nigeria (30), Peru (200), Philippines (varied), Sierra Leone (200), Somalia (200), Syria (35), Togo (30), and Uruguay (200) claimed territorial seas in excess of 12 nautical miles.


40 LOS Convention, supra note 7, arts. 17-18.

41 Id. art. 23.

42 For instance, a ship may take a zigzag route (as is usually the case with a sailing ship which is tacking) or enter territorial waters and then reverse course (a route that might be justified, e.g., by receipt of new mission orders).

43 LOS Convention, supra note 7, art. 18(2).

44 Id. art. 25(3). The Convention specifically cites gun exercises. Note that the suspension must be published in advance. Id. This is done through Notices to Mariners (NOTMAR), the maritime equivalent of the Notice to Airmen (NOTAM). Note also that innocent passage may not be suspended in straits used for international navigation.

45 Id. art. 19.

46 Id. art. 20.

47 This is the traditional US view.

48 Id. art. 19 (2) (1).
49 LOS Convention, supra note 7, art. 25(1). The Convention does not outline specific remedies. However, the right to employ minimum necessary force once other remedies have been exhausted is a reasonable derivation of State sovereignty over the territorial sea. Note that Cambodia justified the 1975 seizure of the SS Mayaguez by alleging that its passage was not innocent. Though it was actually outside the territorial sea, even if it had been within Cambodian waters there should have been a request to depart prior to the use of force. See Eleanor C. McDowell, Digest of US Practice in International Law 423-26 (1975). See also Comment, The Mayaguez: The Right of Innocent Passage and the Legality of Reprisal, 13 San Diego L. Rev. 765 (1976).

50 As of 1 January 1997, the following countries require prior permission for warship transit of the territorial sea: Albania, Algeria, Antigua & Barbuda, Bangladesh, Barbados, Brazil, Bulgaria, Burma, Cambodia, Cape Verde, China, Congo, Denmark, Grenada, Iran, Maldives, Oman, Pakistan, Philippines, Poland, Romania, St. Vincent & the Grenadines, Somalia, Sri Lanka, Sudan, Syria, United Arab Emirate, Vietnam, and Yemen. Prior notification is required by: Croatia, Egypt, Finland, Guyana, India, Libya, Indonesia, Malta, Mauritius, Seychelles, South Korea, Yugoslavia, and North Korea. The five with restrictions on nuclear power/materials are: Djibouti, Egypt, Oman, Pakistan, and Yemen.

51 LOS Convention, supra note 7, art. 98 is the high seas codification of this customary international law duty.

52 The right of assistance entry is not explicitly provided for in the LOS Convention. However, it is considered customary international law. DOD guidance on assistance entry is contained in Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 2410.01A, Guidance for the Exercise of Right of Assistance Entry (1997).

53 LOS Convention, supra note 7, arts. 37-39.


55 LOS Convention, supra note 7, art. 39(1)(c).


57 LOS Convention, supra note 7, art. 44. The argument has been made that transit passage was already customary international law at the time of UNCLOS III. See Richard J. Grunawalt, United States Policy on International Straits, 18 Ocean Dev. & Int'l L. 445 (1987). For an excellent discussion of the issue in terms of national security concerns, see W. Michael Reisman, The Regime of Straits and National Security: An Appraisal of International Lawmaking, 74 Am. J. Int'l L. 48 (1980).

58 NWP 1-14M, supra note 3, para. 2.3.3.1.

59 Traffic separation schemes are established by the International Maritime Organization in congested areas. Reduced to basics, they separate inbound and outbound traffic. It is the US position that sovereign platforms, like warships, are exempt from the requirements as a matter of law. That said, US policy is to generally follow such routing when operational considerations permit. US Navy Regulations, art. 1139 (1990).

60 LOS Convention, supra note 7, art. 52(1).
61 Id. art. 53.

62 Id. art. 53(5).

63 Indonesia is currently before the IMO seeking to designate archipelagic sealanes through its waters.

64 Id. art. 54, applying article 44 mutatis mutandis.

65 Id. art. 33, pt. V and pt. VII, respectively.

66 Id. art. 87; NWP 1-14M, supra note3, paras. 2.4.1., 2.4.2., and 2.4.5..

67 As of Jan. 1, 1977, those countries include Bangladesh, Burma, Cambodia, China, Egypt, Haiti, Iran, North Korea, Nicaragua, Pakistan, Saudi Arabia, Sri Lanka, Sudan, Syria, United Arab Emirates, Venezuela, Vietnam, and Yemen.

68 US ADIZs are set out at: 14 C.F.R. part 99.42 (contiguous States); part 99.43 (Alaska); part 99.45 (Guam); and part 99.47 (Hawaii).

69 See Air Force Pamphlet (AFP) 110-31, International Law--The Conduct of Armed Conflict and Air Operations (1976), at para. 2-1g. ADIZs should not be confused with Flight Information Regions (FIRS), which are established by the International Civil Aviation Organization to provide flight control of civil aircraft in set regions, usually a heavily traversed area. Technically, they are not applicable to State aircraft (such as military aircraft), but for safety reasons State aircraft often comply with FIR reporting requirements.

70 See LOS Convention, supra note 7, arts. 32, 58(2), 95, and 236. See also NWP 1-14M, supra note 3, paras. 2.1.2. and 2.2.2.


72 The law of neutrality recognizes that nations, at times, resort to armed conflict to resolve their differences. These hostilities, however, adversely affect innocent third parties, particularly those engaged in neutral commerce. The law of neutrality seeks to minimize this disruption.

73 Neutral territory includes all national waters and airspace, i.e., land, internal waters, territorial seas, and archipelagic waters, as well as the airspace above them.

74 While a neutral State is precluded from trading contraband with one of the belligerents, it is not required to prohibit or prevent its nationals from doing so. Hague V, supra note 71, art. 7. Of course, a nation could exercise its discretion and preclude its citizens from trading or exporting certain commodities to a belligerent. See, e.g., 18 U.S.C. 963 (1994) (making it a felony to use warlike vessel to commit hostilities against a State with whom the US is at peace, or to deliver said vessel to a belligerent); 18 U.S.C. 965 (1994) (forbidding vessels to depart US ports if carrying contraband to belligerent).

75 Impartiality appears to be a particular problem in current practice. In fact, one could argue that over the last century the standard has evolved into one of nonparticipation. For example, during the early stages of
World War II, the United States supported Great Britain through its lend-lease program. During the Persian Gulf Tanker War between Iran and Iraq, Kuwait, an avowed neutral, allowed items destined for Iraq to cross its borders. While the United States and Kuwait refrained from participating in the hostilities, their actions in the two cases were hardly impartial. Certainly, the aggrieved belligerents, Germany and Iran respectively, could have treated the United States and Kuwait as belligerents; however, for political and policy reasons they elected not to do so.

76 Hague XIII, supra note 71, art. 2 (forbidding acts of war, including exercise of right of visit and search in neutral waters). Belligerents are also barred from launching and recovering aircraft, laying mines, capturing enemy merchant vessels, or exercising the right of prize in neutral waters. See Michael Bothe, The Law of Neutrality, in The Handbook of Humanitarian Law in Armed Conflicts 485, 501-02 (Dieter Fleck ed. 1995) [hereinafter Fleck].

77 Hague XIII, supra note 71, art. 5.

78 Hague XIII does not explicitly state that belligerents may not use neutral waters as a sanctuary; however, taken as a whole, the Convention supports such a reading. See San Remo Manual, supra note 2, at 97.

79 Hague XIII, supra note 71, art. 8.

80 A classic example of the doctrine of self-help in a maritime setting is the case of the Altmark. In 1940, the Altmark, a German naval auxiliary vessel with British prisoners on board, sailed into the neutral waters of Norway in an attempt to evade interception. When Norway failed to exercise its duty as a neutral, under articles 1, 2, and 5 of Hague XIII, to expel or seize the belligerent vessel that was using its waters as a base of operation or sanctuary, the British warship Cossack entered Norwegian waters, seized the Altmark, and released the prisoners. See Gerhard von Blahn, Law Among Nations 849-50 (6th rev. ed. 1992).

81 Article 51 of the UN Charter explicitly recognizes a nation's inherent right of self-defense. Under this inherent right, a nation may take necessary and proportional measures to protect itself against hostile acts and demonstrations of hostile intent. For a detailed discussion of the United States' policy on self-defense, including what constitutes necessary and proportional measures, see CJCSI 3121.01, Standing Rules of Engagement for U.S. Forces, 01 Oct. 1994, at A-4 to -6.

82 For example, during the Vietnam war, the North Vietnamese staged numerous operations out of, and sought sanctuary in, Cambodia. Due to Cambodia's failure to police its territory, the United States made several incursions into the country under the doctrine of self-help. Before a belligerent takes such an extreme step, the State should contact, if time permits, the neutral government to apprise it of the situation and request it correct matters. Under the doctrine of self-defense, by contrast, a belligerent force may immediately respond to an imminent or ongoing attack even though it is originating from a neutral territory.

83 See Hague XIII, supra note 71, art. 9.

84 A warship is a vessel owned or operated by the armed forces, bearing distinctive external markings, under the command of a commissioned officer and employing a crew that is subject to military discipline. See LOS Convention, supra note 7, art. 29; High Seas Convention, supra note 5, art. 8(2).

85 Hague XIII, supra note 71, art. 9 (authorizing neutral to impose conditions, limitations, and prohibitions on admission to neutral ports and territorial seas). A neutral's ability to regulate warship entry also arguably extends to naval auxiliaries, such as the Altmark. San Remo Manual, supra note 2, at 98-99. See also supra note 80. A State certainly is not required to preclude belligerent warships from transiting its waters. In fact, a State does not violate the law of neutrality simply because it allows such vessels to engage in "mere
86 While a belligerent warship or military aircraft is entitled to transit an international strait or archipelagic sea lane, it must do so expeditiously, without threatening the coastal nation and refraining from engaging in hostile acts. A belligerent operating in a strait, however, is always authorized to defend itself against illegal attacks. All rights associated with transit passage apply, so submarines can navigate submerged and aircraft can fly anywhere within the strait and its approaches. See supra notes 52-58.

87 Hague XIII, supra note 71, art. 9. A neutral may close its ports to belligerent vessels that fail to comply with the neutral's regulations or violate its neutrality and still comply with the requirement of impartiality. Id.

88 Id. art. 15.

89 Id. arts. 12-14. If a warship is in port when hostilities break out, the vessel is obligated to depart the port within 24 hours. Id. art. 13. Also, if warships from both belligerent States are in port simultaneously, then they depart the port in alternating fashion with a 24-hour interval between departures. Id. art. 16.

90 Id. arts. 18-19.

91 Id. art. 17.

92 Belligerent activities include, but are not limited to, visit, search, diversion, capture, and confiscation. Visit is the act of ordering a vessel to heave to and inspecting its papers. Search entails questioning the vessel's complement and examining the vessel's cargo and spaces. Diversion, meanwhile, is the act of ordering a vessel to a non-neutral port for the purpose of conducting visit and search. A vessel is captured when a belligerent takes control of a vessel by placing a prize crew on board. Finally, confiscation occurs when a prize court finds that a belligerent's act of capture was legal and awards ownership of the vessel (condemns it) to the belligerent.

93 In waging war in a neutral's exclusive economic zone, a belligerent must always give due regard to a neutral's valuable resources and any artificial islands, installations, and structures. The belligerent must also give due regard to protecting the environment.

94 Weapons and military vehicles are examples of absolute contraband, whereas food and fuel are examples of conditional contraband. For a discussion of the differences, see San Remo Manual, supra note 2, at 215-16; NWP 1-14M, supra note 3, para. 7.4.1.

95 For example, and though not a classic belligerent/neutral situation for reasons to be discussed infra, during the UN-authorized embargoes of Iraq and Haiti, the international community was advised that medical supplies could be shipped to the affected countries. Contrast today's practice with that of World War I and World War II, when belligerents were required to provide neutrals with a list of contraband items that could not enter or exit an adversary's territory. See Knight & Chiu, supra note 2, at 846-47.

96 San Remo Manual, supra note 2, at 216.

97 NWP 1-14M, supra note 3, para. 7.4.1.1. The presumption only pertains to absolute contraband, not conditional contraband. When dealing with conditional goods, the belligerent must factually prove to the prize court, without benefit of the presumption, that the seized material was ultimately headed to the enemy. See Robert W. Tucker, The Law of War and Neutrality at Sea 270 (50 Naval War College
International Law Studies 1957); Green, supra note 71, at 157-58.

98 During Desert Storm many ports in Jordan served as transit ports for Iraq. Coalition forces relied on the presumption to seize absolute contraband manifested for Jordanian ports. Later, they would have to prove to the relevant prize courts that the material was, in fact, really destined for Iraq, not Jordan. See Tucker, supra, at 332-44. The United States set up two prize courts, one in the southern district of New York and one in the northern district of California, to adjudicate prize cases arising out of Desert Storm. Prize courts are typically established under domestic law, but they apply international law. See Green, supra, at 158.

99 See L. Oppenheim, International Law 740 (H. Lauterpacht 7th ed., 1952); 11 Whiteman, Digest of International Law, ch. XXXII (1968); Knight & Chin, supra note 2, at 849-50; NWP 1-14M, supra note 3, para. 7.6. There is disagreement in the international community over whether a belligerent may conduct visit and search in the part of an international strait that comprises its own territorial sea. The United States' position is that a belligerent can exercise this right in its part of a strait provided no other location is reasonably available and the belligerent is not impeding someone's right of transit passage. In fact, in 1984 Iran routinely conducted visit and search operations in that portion of the Strait of Hormuz that constituted Iran's territorial sea. There is no dispute, however, over exercising this belligerent right in a strait overlapping the territory of one or more neutrals or in a neutral's archipelagic sea lanes; it is strictly forbidden.

100 The first step in conducting visit and search is to order the suspected vessel to heave to or stop and to stand by for boarding. This is normally accomplished by firing a blank charge, flag hoist (SN or SQ), or raising the vessel on the radio. If the vessel does not heave to, the warship pursues it and uses force, if necessary, to compel the commercial vessel to stop. Once the vessel is stopped, an armed boarding party led by an officer boards the vessel. Initially, they check the vessel's papers, including the cargo manifest and bills of lading. Normally, checking the vessel's papers is sufficient. If, however, the boarding party suspects the vessel is carrying illegal cargo, they will search the vessel and its cargo. See NWP 1-14M, supra note 3, para. 7.6.

101 During the Gulf War, Coalition forces challenged over 7,500 vessels, boarded and inspected more than 950 of these vessels and diverted another 50 or so, which were carrying over 1 million tons of illegal cargo. See San Remo Manual, supra note 2, at 196.

102 NWP 1-14M, supra note 3, para. 7.6. Of course, if one of its country's merchant vessels is carrying contraband, the commanding officer of the warship must allow the belligerent to conduct visit and search. Id. Further, the exemption only applies to vessels in convoy with warships from the same flag State. This is why several Kuwaiti tankers were reflagged in the United States during the Gulf Tanker War. The only way to preclude Iran, which was conducting atrocities such as tossing grenades into a vessel's wheelhouse after it was searched, from conducting visit and search on Kuwaiti vessels was to flag them in the US and then to sail them under the umbrella of a US convoy. See Francis V. Russo, Jr., Neutrality at Sea in Transition: State Practice in the Gulf as Emerging International Customary Law, 19 Ocean Dev. & Int'l. Law 381, 392-95 (1988); David L. Peace, Major Maritime Events in the Persian Gulf Between 1984 and 1991: A Juridical Analysis, 31 Va. J. Int'l. L. 545, 553-54 (1991).

103 Under exceptional circumstances, a belligerent may destroy a captured neutral merchant vessel, provided the safety of the crew, passengers, and ships' papers is assured. Final Protocol of the Naval Conference, Feb. 26, 1909, art. 49, 208 Parry's T.S. 338, reprinted in 3 Treaties, Conventions, International Act, Protocols and Agreements Between the United States and Other Powers 268 (G. Charles ed. 1913) [hereinafter Declaration of London]. The belligerent should also take steps to safeguard the personal effects of the passengers and crew. NWPI-14M, supra note 3, para. 7.10.1. Note that though the London Declaration remains unratified, it was applied by both sides during the Turco-Italian War and the War of the Balkans. Indeed, at the beginning of World War
I, efforts were made to follow its principles. Today, many of its principles continue to be considered customary law. Michael N. Schmitt, Blockade Law: Research Design and Sources 20-21 (1991).

104 Prize decisions are particularly useful as a source of maritime law. Early American Supreme Court decisions have been collected in the three volume set, Prize Cases Decided in the United States Supreme Court: 1789-1918 (J. Scott ed. 1923). English decisions of the First World War are in Lloyd's Reports of Prize Cases (10 vols.) (Lloyds, 1915-1924).

105 See J. G. Starke, Introduction to International Law 561-69 (9th ed. 1984). The Navicert system was developed by the British during World War II as a means to facilitate economic warfare against the enemy, cutting off its supply of contraband, while reducing the economic hardship on neutrals. Id.; San Remo, supra note 2, at 200. Although not belligerents, the United States and others enforcing UN-sanctioned embargoes against Iraq and Haiti, used the navicert system. After inspecting large containers ashore before they were loaded on neutral platforms, Coast Guard personnel would seal the container in a fashion that allowed boarding parties at sea to quickly ascertain if someone had tampered with it. A vessel, carrying a navicert, which had its cargo holds or containers sealed, was allowed to proceed on its voyage without further delay.

106 The navicert, however, is no a guarantee against the belligerent boarding and inspecting the vessel, and it certainly does not affect the rights of other belligerents.

107 LOS Convention, supra note 7, arts. 95-96.

108 See id. art. 110. See also NWP 1-14M, supra note 3, para. 3.4.

109 The Navy is not addressed in the Act. 18 USC 1385.

110 See S.C. Res. 661, reprinted in 29 I.L.M. 1325-27 (1990) (barring all goods except medical supplies and limited foodstuffs); S.C. Res. 665, reprinted in 29 I.L.M. 1329-30 (1990). See also Knight & Chiu, supra note 2, at 844-46. To illustrate the scale of the maritime interception operation, over a two-year period multinational forces intercepted over 17,800 vessels, boarding approximately 7,400 and diverting 410 of them.

111 UN Charter art. 39.

112 Id.

113 Id. art. 42.

114 Id. arts. 25 & 49 respectively.

115 See San Remo, supra note 2, at 146-51. For an excellent discussion of this issue, see Wolff Heintschel von Heinegg, The Law of Armed Conflict at Sea, in Fleck, supra note 76, at 405, 428-30. Probably the most exhaustive study on the subject of targeting merchant vessels is contained in the Law of Naval Warfare: Targeting Enemy Merchant Shipping (65 Naval War College International Law Studies) (Grunawalt ed., 1993).

116 The San Remo Manual subscribes to the position that an enemy merchant vessel must be part of the enemy's war-fighting effort before it acquires the character of a military target. San Remo, supra note 2, at 146-51. The US Navy, on the other hand, espouses that an enemy merchant vessel that is integrated into the war-sustaining as well as the war-fighting effort of the enemy is subject to attack, if complying with the London Protocol would endanger the
mission of the attacking military vessel, submarine, or aircraft. NWP1-14M, supra note 3, paras. 8.2.2.2, 8.3.1, and 8.4.


118 See discussion at San Remo Manual, supra note 2, at 154-61. See also NWP 1-14M, supra note 3, para. 7.5.1.

119 NWP 1-14M, supra note 3, para. 7.5.2; San Remo Manual, supra note 2, at 212.

120 Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, arts. 22-27, Aug. 12, 1949, 6 U.S.T. 3114; 75 U.N.T.S. 85 [hereinafter Geneva Convention II]. These vessels and aircraft also may not be the subject of a reprisal, Id. at art. 47. Small fishing vessels are addressed in Hague XI, Convention Relative to Certain Restrictions with regard to the Exercise of the Right of Capture in Naval War, Oct. 18, 1907, 36 Stat. 2396, T.S. 544, 1 Bevans 711.

121 The Second Geneva Convention lists activities that are deemed innocent. For example, the mere fact that a hospital vessel carries weapons on board does not mean it loses its protected status. If, however, the vessel is integrated into the enemy’s communication network and using crypto gear to transmit messages to the enemy, the vessel would be subject to capture. Generally, a hospital ship enjoys super-immune status from attack. A commander should only target a hospital ship after delivering a warning to the vessel and affording its operators an opportunity to clarify the situation or rectify the problem. Geneva Convention II, supra, arts. 34-35.


123 Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 41(2)(b), U.N. Doc. A/32/144, 16 I.L.M. 1391 [hereinafter Additional Protocol 1]; NWP 1-14M, supra note 3, para. 8.2.1. Consider whether a vessel has effected a timely surrender or the belligerent has the ability to accept the surrender when an enemy unit indicates its desire to give up the fight at the moment B-52s appear overhead. The answer is probably "no," as the B-52s can not take the platform in tow or accept the prisoners and in a short time will most likely be out of fuel and have to depart the scene.

124 NWP 1-14M, supra, para. 8.2.1; San Remo Manual, supra note 2, at 135. At night, a vessel will come to all stop and illuminate all its deck lights. A submarine, on the other hand, typically surrenders by coming to the surface and raising a white flag.

125 Geneva Convention II, supra note 120, art. 18. Likewise, a commander is obligated to assist the sick, wounded and shipwrecked that are encountered at sea.

126 Korea held the United States in check using 50-year old mines deployed from dilapidated and outdated vessels. Meanwhile, during Desert Storm the Iraqis’ use of mines proved rather successful in deterring amphibious assaults by Coalition forces.


128 Id. arts. 3-4. See also The Corfu Channel Case, 1949 I.C.J. Reports 4, 18-22 (finding Albania was required to advise international community that contact mines were placed in its territorial sea). A belligerent typically provides notice through the Notice to Mariners (NOTMAR) system and to the
International Maritime Organization (IMO). A nation, however, may mine its internal waters with any type of device and without providing notice.

129 Id. arts. 1-2; San Remo Manual, supra note 2, at para. 82.

130 Hague Convention VIII, supra note 127, at art. 5; see also San Remo Manual, supra note 2, paras. 84, 90.

131 See Heitschel von Heinegg, supra note 115, at 455.

132 Hague Convention XIII, supra note 71, at art. 2; San Remo Manual, supra note 2, at 173.

133 NWP 1-14M, supra note 3, para. 9.2.3.

134 See NWP1-14M, supra note 3, para. 9.2.3; Heitschel von Heinegg, supra note 115, at 453.54. See also Howard S. Levine, Mine Warfare at Sea 147 & n.40 (1992) (noting that Hague VIII does not explicitly limit the placement of mines on the high seas, but that their use must not deny high seas freedoms of navigation).

135 Hague VIII, supra note 127, art. 2. After the Vietnam War, the United States attempted to remove approximately 8,000 mines it placed in North Vietnamese waters. Heintschel von Heinegg, supra note 115, at 456, n. 270.

136 The infamous Trojan horse is a classic example of a legal ruse. An example of a false communication occurred during the Battle of Midway. US Forces had broken the Japanese code and knew an attack was forthcoming, but did not know where because the Japanese were using a codeword for the objective. The Navy transmitted false signals regarding the water supply at Midway, and, when the information was retransmitted by the Japanese using the codeword, the US was able to identify Midway Island as the intended object. Another legal deception that is routinely employed during armed conflict is the feint. During Desert Storm, the Coalition forces feigned an amphibious assault on the shore of Kuwait, thus occupying Iraqi troops, while the 7th Corps swept the left flank, where the real offensive assault took place.

137 NWP 1-14M, supra note 3, paras. 12.3, 12.5.

138 Protected symbols include the red cross, red crescent, white flag, the UN flag, the Hague Convention symbol for the protection of cultural property, and an oblique red band on a white background that signifies a hospital zone or safe haven for noncombatants. Additional Protocol I, supra note 123, art. 37-38. Distinctive emblems are reproduced in Fleck, supra note 76, at 553-54.

139 For restrictions on perfidy, see Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 23 (b)(f), 36 Stat. 2277, 205 Consol T.S. 277 (Hague IV); Additional Protocol I, supra note 123, arts. 37-38, 44, 85.

140 During the Falkland War, both Argentina and Great Britain declared war zones around the Falkland Islands. Iran and Iraq, likewise, declared exclusionary zones during the 1980-1988 Gulf Tanker War, although they both impermissibly used them as "free-fire" zones, targeting anything that moved in the other's area. See Russo, supra note 102, at 389-92.

141 Conversely, the mere fact that a valid military target is located outside an exclusion or war zone does not make the target immune from attack. During the Falkland War, Argentina claimed that the sinking of the warship Belgrano outside the war zone established by the British was illegal. This is an incorrect assertion; as a warship of the enemy the Belgrano constituted a valid military target regardless of its location.
142 Id.

143 NWP 1-14M, supra note 3, para. 7.8.


145 Declaration of London, supra note 103, art. 18.

146 Declaration Respecting Maritime Laws (Declaration of Paris), Mar. 30, 1856, para. 4, 115 Parry's T.S. 1, reprinted in J. Moore, A Digest of International Law 561 (1906).

147 See Declaration of London, supra note 103, arts. 2, 3, 5, 9, 11, & 16. A belligerent routinely provides neutrals with a 24-hour grace period, allowing them to depart port, before putting a blockade into effect. Also, a belligerent expends considerable effort in notifying the world of its blockade. The form of the notice is irrelevant, but to take action against someone who breaches the zone, the belligerent must prove that the alleged violator had notice of its existence. Additionally, a belligerent need not maintain a continuous on-scene presence or block every possible approach to establish an effective blockade, but it must be more than a paper blockade. Finally, the belligerent must enforce the blockade against all vessels, including those owned or operated by allies.

148 The last traditional blockade, employing forces on scene to enforce the zone, was established by the United States in Korea in 1951. After Korea, the United States began to enforce zones using long range missiles and mines, such as the mining of Haiphong Harbor in Vietnam.

149 In selecting a weapon system, the commander must always remember the principle of distinction and target discrimination. If torpedoes are used, they must sink or go inert after completion of their run. See Hague VIII, supra note 127, at art. 1(3).