

## CHAPTER 7

# The Law of Neutrality

### 7.1 INTRODUCTION

The law of neutrality defines the legal relationship between nations engaged in an armed conflict (belligerents) and nations not taking part in such hostilities (neutrals). The law of neutrality serves to localize war, to limit the conduct of war on both land and sea, and to lessen the impact of war on international commerce.<sup>1</sup>

Developed at a time when nations customarily issued declarations of war before engaging in hostilities,<sup>2</sup> 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,"<sup>3</sup> coupled with the proliferation of collective security arrangements and the extension of the spectrum of warfare to include insurgencies and counterinsurgencies,<sup>4</sup> armed conflict is now seldom accompanied by formal declarations of war.<sup>5</sup> Consequently, it has become increasingly difficult to determine with precision the point in time when

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<sup>1</sup> See McDougal & Feliciano 402; Williams, *Neutrality in Modern Armed Conflicts: A Survey of the Developing Law*, 90 *Mil. L. Rev.* 9 (1980); Norton, *Between the Ideology and the Reality: The Shadow of the Law of Neutrality*, 17 *Harv. Int'l L.J.* 249 (1976); Dinstein, *War, Aggression and Self-defense* (2nd ed. 1994) at 25-30; Schindler, *Commentary: Neutral Powers in Naval War*, in Ronzitti at 211-22; Green 264-67.

<sup>2</sup> See Hague III, art. 1.

<sup>3</sup> The Treaty for the Renunciation of War (Kellogg-Briand Pact), 27 August 1928, 46 Stat. 2343, T.S. No. 796, 2 *Bevans* 732, 94 L.N.T.S. 57 (No. 2137)), and the U.N. Charter, were designed to end the use of force to settle disputes between nations and eliminate war. On this basis, the International Law Commission refused, at the beginning of its activities, to deal with the law of armed conflict:

War having been outlawed, the regulation of its conduct has ceased to be relevant. . . . If the Commission, at the very beginning of its task, were to undertake this study, public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace.

Y.B. *Int'l L. Comm.*, 1949, at 281. Wars having continued to occur, nations and various non-governmental entities (*i.e.*, International Committee of the Red Cross (ICRC)) have continued to develop the law of armed conflict.

<sup>4</sup> See Sarkesian, *The New Battlefield: The United States and Unconventional Conflicts* (1986); *Special Operations in U.S. Strategy* (Barnett, Tovar & Shultz eds. 1984); Asprey, *War in the Shadows: The Guerrilla in History* (1975); Thompson, *Defeating Communist Insurgency: The Lessons of Malaya and Vietnam* (1966); Coll, Ord & Rose.

<sup>5</sup> Paragraph 4.1 & note 3 thereunder (p. 4-1); paragraph 5-1, note 4 (p. 5-2); Greenwood, *The Concept of War in Modern International Law*, 36 *Int'l & Comp. L.Q.* 283 (1987); Green 69-72.

hostilities have become a "war"<sup>6</sup> and to distinguish belligerent nations from neutrals.<sup>7</sup> Notwithstanding these uncertainties, the law of neutrality continues to serve an important role in containing the spread of hostilities, in regulating the conduct of belligerents with respect to nations not participating in the conflict, in regulating the conduct of neutrals with respect to belligerents, and in reducing the harmful effects of such hostilities on international commerce.<sup>8</sup>

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.<sup>9</sup> 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.<sup>10</sup>

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<sup>6</sup> See Greenwood *id.*, generally. The traditional rule is that the law of neutrality regulating the behavior of neutrals and belligerents depends on the existence of a state of war, and not merely an outbreak of armed conflict. Tucker 199-202; Greenwood *id.* 297-301.

<sup>7</sup> See paragraph 7.2, note 13 (p. 7-4), Tucker 196-99 and Greenwood, note 5 (p. 7-1) at 298-99.

<sup>8</sup> See McNeill, Neutral Rights and Maritime Sanctions: the Effects of Two Gulf Wars, 31 Va. J. Intl L. 631 (1991); and Robertson, Interdiction of Iraqi Maritime Commerce in the 1990-1991 Persian Gulf Conflict, 22 Ocean Dev. & Int'l L. 289 (1991). On 8 July 1996, the I.C.J. stated that:

The Court finds that as in the case of the principles of humanitarian law applicable in armed conflict, international law leaves no doubt that the principle of neutrality, whatever its content, which is of a fundamental character similar to that of the humanitarian principles and rules, is applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflict, whatever type of weapons might be used.

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. 8 Jul 1996, *reprinted in* 35 Int'l Leg. Mat'ls 809 (1996) at para. 89. *Compare* Janis, Neutrality, *in* Robertson at 148-55. *Compare also* Wright, 1968 Proc. Am. Soc. Int'l L. 79, who argues that "neutrality in principle cannot exist" within the context of the United Nations Charter.

<sup>9</sup> See Greenwood, note 5 (p. 7-1) at 295-96. *Compare* Common article 2 of the Geneva Conventions which "apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."

<sup>10</sup> NWIP 10-2, para. 230a; Kelsen 141-44; Tucker 196-197. Greenwood correctly states that "the law of neutrality is brought into operation by the acts of the neutral States, not the belligerents." Greenwood note 5 (p. 7-1) at 301. For example, the United States consistently proclaimed its neutrality in the Iran-Iraq War of 1980-1988. President Carter, Remarks, 24 Sep. 1980, 16 Weekly Comp. Pres. Docs. 1922 (1980); President Reagan, Written Responses to Questions, 23 Weekly Comp. Pres. Docs. 556 (19 May 1987); U.S. Dep't of State, U.S. Policy in the Persian Gulf, Special Report No. 166, July 1987, at 8-11. The San Remo Manual (para. 13(d)) provides simply that "'neutral' means any State not party to the conflict." See also Doswald-Beck at 87-88 for commentary on this definition.

## 7.2 NEUTRAL STATUS

Customary international law contemplates that all nations have the option to refrain from participation in an armed conflict by declaring or otherwise assuming neutral status.<sup>11</sup> 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.<sup>12</sup> This customary law has, to some extent, been modified by the United Nations Charter (see paragraph 7.2.1).

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<sup>11</sup> The choice is a political decision. Similarly, recognition of such nonparticipation is also a political decision. NWIP 10-2, para. 230a. Although it is usual, on the outbreak of armed conflict, for nonparticipating nations to issue proclamations of neutrality, a special declaration by nonparticipating nations of their intention to adopt a neutral status is not required. NWIP 10-2, para. 231. Hague III, article 2, obligates belligerents to inform neutrals of the existence of a state of war:

The existence of a state of war must be notified to the neutral Powers without delay, and shall not take effect in regard to them until after the receipt of a notification, which may, however, be given by telegraph. Neutral Powers, nevertheless, cannot rely on the absence of notification if it is clearly established that they were in fact aware of the existence of a state of war.

Art. 2 is binding between a belligerent nation which is a party to Hague III and neutral nations which also are parties to the Convention. Parties include the United States and many of its allies, the former-Soviet Union, and five of the internationally recognized or self-proclaimed permanent neutral nations *e.g.*, Austria, Finland, Ireland, Sweden and Switzerland.

<sup>12</sup> Tucker 202-18, esp. n.14. *Impartiality* obligates neutral nations to fulfill their duties and to exercise their rights in an equal (*i.e.*, impartial or non-discriminatory) manner toward all belligerents, without regard to its differing effect on individual belligerents. Tucker 203-05; Hague XIII, Preamble and art. 9. *Abstention* is the neutral's duty to abstain from furnishing belligerents with certain goods or services. Tucker 206-18; Hague XIII, art. 6. Neutral duties also include *prevention* and *acquiescence*. The neutral has a duty to prevent the commission of certain acts by anyone within its jurisdiction, *e.g.*, to prevent belligerent acts of hostility in neutral waters, or the use of neutral ports and waters as a base of operations. Tucker 218-53; Hague XIII, art. 8. The neutral also has a duty to acquiesce in the exercise by belligerents of those repressive measures international law permits the latter to take against neutral merchantmen engaged in the carriage of contraband, breach or attempted breach of blockade, or in the performance of unneutral service. Tucker 252-58; Green 260-62. The application of these concepts is discussed in the balance of this Chapter. See Figure A7-1 (p. 7-36) for a representation of the reciprocal rights and duties of neutrals and belligerents.

A nation may be neutral, insofar as it does not participate in hostilities, even though it may not be impartial in its attitude toward the belligerents. Whether or not a position of nonparticipation can be maintained, in the absence of complete impartiality, depends upon the reaction of the aggrieved belligerent. NWIP 10-2, para. 230b n.14; Tucker 197 ("the only essential condition for neutral status is that of non-participation in hostilities"). However the Kellogg-Briand Pact (paragraph 7.1, note 3 (p. 7-1)) has been interpreted to permit benevolent neutrality on behalf of victims of aggression.

On the other hand, the fact that a neutral uses force to resist attempts to violate its neutrality does not constitute participation in the hostilities. Hague XIII, art. 26; Levie, 2 *The Code of International Armed Conflict* 788; 11 *Whiteman* 185-90. That nations retain their right of self-defense to enforce maintenance of their neutrality is illustrated by actions of neutral nations in escorting neutral ships in the Persian Gulf during the Iran-Iraq tanker war (1984-88), including the United States policy of providing assistance upon request of other neutral flag vessels coming under unlawful attack by belligerent ships or aircraft. See Dep't St. Bull., July 1988, at 61; McNeill, paragraph 7.1, note 8 (p. 7-2), at 638; and De Guttry & Ronzitti, *The Iran-Iraq War (1980-1988) and the Law of Naval Warfare (1993)* at 173-209. See also the discussion of distress assistance in paragraph 3.10.2, note 45 (p. 3-17).

Neutral status, once established, remains in effect unless and until the neutral nation abandons its neutral stance and enters into the conflict.<sup>13</sup>

**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.<sup>14</sup> In the event of a threat to or breach of the peace or act of aggression, the Security Council is empowered to take enforcement action on behalf of all member nations, including the use of force, in order to maintain or restore international peace and security.<sup>15</sup> When called upon by the Security Council to do so, member nations are obligated to provide assistance to the United Nations, or a nation or coalition of nations implementing a Security Council enforcement action, in any action it takes and to refrain from aiding any nation against whom

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<sup>13</sup> Tucker 202; NWIP 10-2, para. 231, n.16. When the United States is a belligerent, designation of the neutral status of third nations will ordinarily be promulgated by appropriate directives.

To be distinguished from self-proclaimed neutrals -- either "permanent" or temporarily during an armed conflict -- are the two nations currently enjoying internationally recognized permanent neutrality: Switzerland and Austria. 1 Whiteman 342-64. The self-proclaimed (alliance-free) neutrals include Finland, Ireland, Sweden, and the Vatican (Holy See). See Wachtmeister, *Neutrality and International Order*, Nav. War C. Rev., Spring 1990, at 105. On 15 September 1983, Costa Rica proclaimed a policy of "permanent, active and unarmed neutrality" while maintaining its status as a party to the OAS and the 1947 Rio Treaty. N.Y. Times, 18 Nov. 1983, at A12.

<sup>14</sup> U.N. Charter, arts. 2(3) & 2(4). See also paragraphs 4.1.1 (p. 4-2) and 7.2.2 (p. 7-5).

<sup>15</sup> U.N. Charter, arts. 39, 41-42; paragraph 4.1.1, note 8 (p. 4-2). U.N.S.C. Resolutions S/1501 (1950), S/1511 (1950), and S/1588 (1950), adopted by the Security Council upon the occasion of North Korea's invasion of South Korea on 24 June 1950, determined that North Korea's aggression constituted a "breach of peace", recommended that member nations "furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack," recommended that such forces and assistance be made available to a "unified commander under the United States," and authorized that unified command to use the U.N. Flag "in the course of operations against North Korean forces." These Resolutions were adopted during the Soviet Union's self-imposed absence from Security Council proceedings. Upon the Soviet Union's return, its veto prevented the Council from taking further action. Thereafter, the General Assembly, having determined that the Security Council was unable (due to the threat of a Soviet veto) to "discharge its responsibilities on behalf of all the Member States," adopted the "Uniting for Peace Resolution" of 3 November 1950 which:

*Resolves* that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace . . . , the General Assembly shall consider the matter immediately with a view to making appropriate recommendations . . . for collective action . . .

U.N.G.A. Res. 377 (V) (1950) (*reprinted in* 13 Whiteman at 564-68, and *in* Stone at 282-84). Thereafter, and as of July 1997, the Security Council has adopted mandatory sanctions only five times: against Southern Rhodesia (U.N.S.C. Res. S/232 (1966) (trade embargo under article 41), 12 Whiteman 394-95 and U.N.S.C. Res. S/253 (1968) (trade embargo expanded under Chapter VII), 12 Whiteman 403-07)); against South Africa (U.N.S.C. Res. S/418 (1977) (arms embargo under Chapter VII), 1977 Digest 934-36)); against Iraq (U.N.S.C. Res. S/661 (1990) (total embargo under Chapter VII) (*reprinted in* 29 Int'l Leg. Mat'ls 1325 (1990)); against Yugoslavia (U.N.S.C. Res. S/713 (1991) (weapons and military equipment embargo under Chapter VII) (*reprinted in* 31 Int'l Leg. Mat'ls 1433 (1992)); and against Haiti (U.N.S.C. Res. S/841 (1993) (trade embargo) (*reprinted in* 32 Int'l Leg. Mat'ls 1206 (1993)). The Iraqi sanctions are still in force.

such action is directed.<sup>16</sup> 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.<sup>17</sup> Similarly, a member nation may be called upon to provide assistance to the United Nations in an enforcement action not involving its armed forces and thereby assume a partisan posture inconsistent with the impartiality required by the traditional law of neutrality.<sup>18</sup> Should the Security Council determine not to institute an enforcement action, each United Nations member remains free to assert neutral status.<sup>19</sup>

**7.2.2 Neutrality Under Regional and Collective Self-Defense Arrangements.** The obligation in the United Nations Charter for member nations to refrain from the threat or use of force against the territorial integrity or political independence of any state is qualified by the right of individual and collective self-defense, which member nations may exercise until such time as the Security Council has taken measures necessary to restore international peace and security. This inherent right of self-defense may be implemented individually, collectively or on an *ad hoc* basis, or through formalized regional and collective security arrangements.<sup>20</sup> The possibility of asserting and maintaining neutral status under such

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<sup>16</sup> U.N. Charter arts. 2(5), 25, 43 & 49; paragraph 4.1.1, note 8 (p. 4-2). For an excellent discussion of this concept see Title V Report, App. O, pp. 626-29.

<sup>17</sup> U.N. Charter arts. 43 & 45; paragraph 4.1.1, note 8 (p. 4-2). See also Doswald-Beck at 155-56. Some States (*e.g.*, Jordan) continued to assert their neutrality and even to trade with Iraq.

<sup>18</sup> U.N. Charter arts. 41 & 49; paragraph 4.1.1, note 8 (p. 4-2).

<sup>19</sup> Traditional concepts of neutral rights and duties are substantially modified when the United Nations authorizes collective action against an aggressor. Absent a Security Council resolution to the contrary, nations may discriminate, and even resort to armed conflict in self-defense, against a nation that is guilty of an illegal armed attack. This follows from art. 51 of the Charter which recognizes the "inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations . . . ." See paragraph 4.1.1, note 9 (p. 4-5). Under the "Uniting For Peace" Resolution, U.N.G.A. Res. 377(V) (1950) (*see* note 15 (p. 7-4)), the General Assembly of the United Nations may, in the event of a breach of the peace and the inability of the Security Council to act due to a veto, make "appropriate recommendations to members for collective measures, including . . . the use of armed force when necessary . . . ." In contrast to a binding Security Council decision, recommendations of the General Assembly do not constitute legal obligations for the member nations. In sum, then, although members may discriminate against an aggressor, even in the absence of any action on the part of the Security Council, they do not have the duty to do so. In these circumstances, neutrality remains a distinct possibility. NWIP 10-2, para. 232 n.17; Tucker 13-20, 171-80; Schindler, *Neutral Powers in Naval War*, Commentary, *in* Ronzitti at 211.

<sup>20</sup> See Kelsen, generally. The Charter recognizes regional collective security arrangements in Chapter VIII, entitled "Regional Arrangements". See paragraph 4.1.1, note 9 (p. 4-5).

Each of the collective security treaties to which the United States is party refers to and expresses recognition of the principles, purposes and/or jurisdiction of the United Nations. Art. 103 of the U.N. Charter states:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

arrangements depends upon the extent to which the parties are obligated to provide assistance in a regional action, or in the case of collective self-defense, to come to the aid of a victim of an armed attack. The practical effect of such treaties may be to transform the right of the parties to assist one of their number under attack into a duty to do so. This duty may assume a variety of forms ranging from economic assistance to the commitment of armed forces.<sup>21</sup>

### 7.3 NEUTRAL TERRITORY<sup>22</sup>

As a general rule of international law, all acts of hostility in neutral territory, including neutral lands, neutral waters, and neutral airspace, are prohibited.<sup>23</sup> A neutral nation has the duty to prevent the use of its territory as a place of sanctuary or a base of operations by belligerent forces of any side.<sup>24</sup> If the neutral nation is unable or unwilling to enforce effectively its right of inviolability, an aggrieved belligerent may take such acts as are necessary in neutral territory to counter the activities of enemy forces, including warships and military aircraft, making unlawful use of that territory.<sup>25</sup> 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.<sup>26</sup>

**7.3.1 Neutral Lands.** Belligerents are forbidden to move troops or war materials and supplies across neutral land territory.<sup>27</sup> Neutral nations may be required to mobilize sufficient armed forces to ensure fulfillment of their responsibility to prevent belligerent

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<sup>21</sup> See NWIP 10-2, para. 233 n. 20.

<sup>22</sup> The rules of neutral territory stated in paragraph 7.3 are customary in nature and were codified in Hague XIII. NWIP 10-2, para. 441 & no. 26.

<sup>23</sup> Hague V, art. 1; Hague XIII, art. 2. See Green 265-66.

<sup>24</sup> Tucker 260-61; Hague V, art. 5. Cf. Hague XIII, art. 25. Resort to force by a neutral nation to prevent violation of its territory by a belligerent does not constitute an act of hostility. Hague V, art. 10.

<sup>25</sup> McDougal & Feliciano 406-07; NWIP 10-2, para. 441 & n. 27; Tucker 220-26, 256, 261-62; Harlow, UNCLOS III and Conflict Management in Straits, 15 *Ocean Dev. & Int'l L.* 197, 204 (1985); Robertson, The "New" Law of the Sea and the Law of Armed Conflict at Sea, in Moore & Turner at 304.

<sup>26</sup> *Ibid.* Compare San Remo Manual paras. 22 & 30, and commentary in Doswald-Beck at 101-02 & 106-07.

<sup>27</sup> Hague V, art. 2; FM 27-10, paras. 516-17. The various ways in which Sweden responded to demands by Germany in 1941 to transport troops and supplies to and from Norway via Swedish territory is summarized in Levie, 1 *The Code of International Armed Conflict* 156.

forces from crossing neutral borders.<sup>28</sup> Belligerent troops that enter neutral territory must be disarmed and interned until the end of the armed conflict.<sup>29</sup>

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.<sup>30</sup>

**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.<sup>31</sup> In any event, Hague Convention XIII requires that a 24-hour grace period in which to depart must be provided to belligerent warships located in neutral ports or roadsteads at the outbreak of armed conflict.<sup>32</sup> Thereafter, belligerent warships may visit only those neutral ports and roadsteads that the neutral nation may choose to open to them for that purpose.<sup>33</sup> Belligerent vessels, including warships, retain a right of entry in distress whether caused by *force majeure* or damage resulting from enemy action.<sup>34</sup>

**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,<sup>35</sup> belligerent warships are forbidden

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<sup>28</sup> Hague V, art. 5; FM 27-10, para. 519b.

<sup>29</sup> Hague V, art. 11; FM 27-10, paras. 532-36.

<sup>30</sup> Hague V, arts. 13-14; FM 27-10, paras. 538-39, 541-43; Green 261-62.

<sup>31</sup> NWIP 10-2, para. 443b(1) n. 29; Tucker 240. *Cf.* Hague XIII, art. 9.

<sup>32</sup> Hague XIII, art. 13. For the most part, Hague XIII is considered as declaratory of the customary rules restricting belligerent use of neutral ports and waters. Tucker 219. Those of its provisions which are not so accepted are identified in the notes which follow. Even in relation to neutral waters and ports, Hague XIII is not considered as being exhaustive. *See* Hague XIII, art. 1 and Tucker 219 n. 52.

<sup>33</sup> 11 Whiteman 265-69; *Compare* Hague XIII, art. 9.

<sup>34</sup> NWIP 10-2, para. 443b(1) n. 29, *quoting* Naval War College, International Law Situations 1939, No. 39, at 43-44 (1940); Tucker 240 & 252. The right of entry in distress does not prejudice the measures a neutral may take after entry has been granted. Under Hague XIII, art. 24(1), should the belligerent vessel fail to leave port as soon as the cause of entry is abated, the neutral is entitled to take such measures as it considers necessary to render the ship incapable of taking to sea during the war, *i.e.*, to intern it. *Levie*, 2 The Code of International Armed Conflict 816-17.

<sup>35</sup> 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.

to remain in a neutral port or roadstead in excess of 24 hours.<sup>36</sup> This restriction does not apply to belligerent warships devoted exclusively to humanitarian, religious, or nonmilitary scientific purposes.<sup>37</sup> (Warships engaged in the collection of scientific data of potential military application are not exempt.<sup>38</sup>) 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.<sup>39</sup> It is the duty of the neutral nation to intern a belligerent warship, together with its officers and crew, that will not or cannot depart a neutral port or roadstead where it is not entitled to remain.<sup>40</sup>

Unless the neutral nation has adopted laws or regulations to the contrary,<sup>41</sup> no more than three warships of any one belligerent nation may be present in the same neutral port or roadstead at any one time.<sup>42</sup> 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.<sup>43</sup> The order of departure is determined by the order of arrival unless an extension of stay has been granted.<sup>44</sup> A belligerent warship may not leave a neutral port or roadstead less than 24 hours after the departure of a merchant ship of its adversary (Hague XIII, art. 16(3)).

**7.3.2.2 War Materials, Supplies, Communications, and Repairs.** Belligerent warships may not make use of neutral ports or roadsteads to replenish or increase their supplies of war materials or their armaments, or to erect or employ any apparatus for communicating with belligerent forces.<sup>45</sup> Although they may take on food and fuel, the law is unsettled as to the

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<sup>36</sup> Hague XIII, arts. 12-13; Tucker 241; San Remo Manual, para. 21. Paragraph 7.3.2.1 has reference only to the *stay* of belligerent warships in neutral ports, roadsteads, or territorial sea--not to *passage* through neutral territorial seas. Passage is discussed in paragraph 7.3.4 (p. 7-11).

<sup>37</sup> See Hague XIII, art. 14(2).

<sup>38</sup> This exception to the exemption from the limitations on stay and departure recognizes the distinction between marine scientific research and military activities. Compare paragraph 1.5.2, note 50 (p. 1-20).

<sup>39</sup> Hague XIII, art. 14(1).

<sup>40</sup> Hague XIII, art. 24; Tucker 242.

<sup>41</sup> Hague XIII, art. 15; NWIP 10-2. art. 443b(2).

<sup>42</sup> Hague XIII, art. 15.

<sup>43</sup> Hague XIII, art. 16(1).

<sup>44</sup> Hague XIII, art. 16(2).

<sup>45</sup> Hague XIII, arts. 5 & 18. Although Hague XIII, art. 5, addresses the erection of communication apparatus, during World War II, practically all neutral nations prohibited the employment by belligerents of radiotelegraph and radiotelephone apparatus within their territorial sea. NWIP 10-2, para. 443c n. 31.

quantities that may be allowed. In practice, it has been left to the neutral nation to determine the conditions for the replenishment and refueling of belligerent warships, subject to the principle of nondiscrimination among belligerents and the prohibition against the use of neutral territory as a base of operations.<sup>46</sup>

Belligerent warships may carry out such repairs in neutral ports and roadsteads as are absolutely necessary to render them seaworthy. The law is unsettled as to whether repair of battle damage, even for seaworthiness purposes, is permitted under this doctrine. In any event, belligerent warships may not add to or repair weapons systems or enhance any other aspect of their war fighting capability. It is the duty of the neutral nation to decide what repairs are necessary to restore seaworthiness and to insist that they be accomplished with the least possible delay.<sup>47</sup>

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<sup>46</sup> Hague XIII, art. 19; NWIP 10-2, para. 443d; Tucker 243. Art. 19 limits warships to "the peace standard" of food, and, in practice, this standard has been adhered to generally by neutral nations. However, the same art. 19 also establishes two quite different standards for refueling. Warships may take on sufficient fuel "to enable them to reach the nearest port in their own country," or they may take on the fuel "to fill up their bunkers built to carry fuel, when in neutral countries which have adopted this method of determining the amount of fuel to be supplied." The majority of neutral nations appear to have used the former standard, although it is evident that, given the appropriate circumstances, either standard may easily permit warships to continue their operations against an enemy. Para. 20(b) of the San Remo Manual would permit "replenishment by a belligerent warship or auxiliary vessel of its food, water and fuel sufficient to reach a port in its own territory . . . ." Hague XIII, art. 20, forbids warships to renew their supply of fuel in the ports of the same neutral nation until a minimum period of three months has elapsed. NWIP 10-2, para. 443d n. 32; Tucker 243 n. 99.

<sup>47</sup> Hague XIII, art. 17; NWIP 10-2, para. 443e. *See also*, San Remo Manual, para. 20(c). Some nations have interpreted a neutral's duty to include forbidding, under any circumstances, the repair of damage incurred in battle. Hence, a belligerent warship damaged by enemy fire that will not or cannot put to sea once her lawful period of stay has expired, must be interned. However, other nations have not interpreted a neutral's duty to include forbidding the repair of damage produced by enemy fire provided the repairs are limited to rendering the ship sufficiently seaworthy to safely continue her voyage. Art. 17 would appear to allow either interpretation. NWIP 10-2, para. 443e n. 33; Tucker 244-45. These views are illustrated in the case of the German pocket battleship ADMIRAL GRAF SPEE:

On December 13, 1939, the *Graf Spee* entered the Uruguayan port of Montevideo, following an engagement with British naval forces. A request was made to the Uruguayan authorities to permit the *Graf Spee* to remain fifteen days in port in order to repair damages suffered in battle and to restore the vessel's navigability. The Uruguayan authorities granted a seventy-two hour period of stay. Shortly before the expiration of this period the *Graf Spee* left Montevideo and was destroyed by its own crew in the Rio de la Plata. The British Government, while not insisting that Article 17 of Hague XIII clearly prohibited the repair of battle damage, did point to the widespread practice of States when neutral in forbidding the repair of battle damage in their ports. In accordance with this practice it was suggested that the *Graf Spee*'s period of stay be limited to twenty-four hours. Uruguay maintained, however, that the scope of the neutral's duty required it only to prevent those repairs that would serve to augment the fighting force of a vessel but not repairs necessary for safety of navigation.

(continued...)

**7.3.2.3 Prizes.** A prize (i.e., a captured neutral or enemy merchant ship) may only be brought into a neutral port or roadstead because of unseaworthiness, stress of weather, or want of fuel or provisions, and must leave as soon as such circumstances are overcome or cease to prevail.<sup>48</sup> 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.<sup>49</sup>

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<sup>47</sup>(...continued)

Tucker 245 n. 2. Tucker comments that this incident is "noteworthy as an example of the extent to which belligerents seemingly can make use of neutral ports without violating the prohibition against using neutral territory as a base of naval operations." *Ibid.* See O'Connell, *The Influence of Law on Sea Power* (1975) at 27-30; Pope, *The Battle of the River Plate* (1956); and Bennett, *Battle of the River Plate* (1972) for more detailed discussions of this and other aspects of the Battle of the River Plate. See also Churchill, *The Second World War* (1948) at 7-5.

<sup>48</sup> Hague XIII, arts. 21-22. There is a difference of opinion as to whether prizes may be kept in neutral ports pending the decision of a prize court. Hague XIII, art. 23, permits neutrals to allow prizes into their ports "when they are brought there to be sequestered 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.

<sup>49</sup> Hague XIII, arts. 21-22; NWIP 10-2, para. 443f. Illustrative of these rules is the World War II incident involving the CITY OF FLINT:

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 Tromsø, 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 sequestered pending the decision of a prize court." This article has never been accepted generally as a part of international law and was specifically rejected by the United States in ratifying the convention. The situation was complicated by the equivocal position of Soviet Russia which was not a neutral in the traditional sense, in the European war. Under strict rules of international law the U.S.S.R. was derelict in regard to its neutral duties and should not have permitted the *Flint* either to enter Murmansk or to find any sort of a haven there.

(continued...)

**7.3.3 Neutral Internal Waters.** Neutral internal waters encompass those waters of a neutral nation that are landward of the baseline from which the territorial sea is measured, or, in the case of archipelagic states, within the closing lines drawn for the delimitation of such waters.<sup>50</sup> The rules governing neutral ports and roadsteads apply as well to neutral internal waters.<sup>51</sup>

**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.<sup>52</sup> Belligerents are obliged to refrain from all acts of hostility in neutral territorial seas except those necessitated by self-defense or undertaken as self-help enforcement actions against enemy forces that are in violation of the neutral status of those waters when the neutral nation cannot or will not enforce their inviolability.<sup>53</sup>

A neutral nation may, on a nondiscriminatory basis, suspend passage of belligerent warships and prizes through its territorial seas, except in international straits. When properly notified of its closure, belligerents are obliged to refrain from entering a neutral territorial sea except to transit through international straits or as necessitated by distress.<sup>54</sup> A neutral nation may, however, allow the "mere passage" of belligerent warships and prizes through its

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<sup>49</sup>(...continued)

U.S. Naval War College, *International Law Situations 1939*, No. 39 at 24-25 (1940), *quoted in* NWIP 10-2, para. 443f n. 35. *See also* Tucker 246 n. 5; Hyde 2277-82.

<sup>50</sup> *See* paragraph 1.4.1 (p. 1-14).

<sup>51</sup> *See* paragraph 7.3.2 (p. 7-7).

<sup>52</sup> Hague XIII, art. 5; NWIP 10-2, para. 442; Tucker 226-31. The prohibition against the use of neutral territorial waters as a sanctuary was at issue in the ALTMARK incident of February 1940 in which the German ship transporting British prisoners of war to Germany attempted to escape capture by British warships by transiting south through the western Norwegian territorial sea and ultimately being driven into Norwegian internal waters, the Jossingfjord, by a British naval squadron. Over Norwegian objections, HMS COSSACK entered the fjord, boarded ALTMARK and released the prisoners of war. O'Connell, *The Influence of Law on Sea Power* 40-44 and sources listed at 195; Tucker 234-39; 7 Hackworth 568-75; 3 Hyde 2339-40; MacChesney 6-48. *See also* note 55 (p. 7-12) and His Majesty's Stationery Office (H.M.S.O.) Cmd. 8012 (1950).

<sup>53</sup> Hague XIII, art. 1; NWIP 10-2, para. 441 & n. 27; Tucker 219-20. The stated exception reflects the reality that some neutrals either cannot or will not enforce the inviolability of their territory. *See also* paragraph 7.3 and notes 25 & 26 thereunder (p. 7-6).

<sup>54</sup> Territorial Sea Convention, art. 16(3); 1982 LOS Convention, arts. 25(3) & 45(2); Scott, Reports 847-48 (while leaving resolution of the question to the law of nations, "it seems that a neutral State may forbid even innocent passage through limited parts of its territorial waters so far as that seems to it necessary to maintain its neutrality, but that this prohibition cannot extend to straits uniting two open seas"); NWIP 10-2, para. 443a n. 28. *See* paragraphs 2.3.2.3 and 2.3.3.1 and accompanying notes (pp. 2-10 & 2-12). *See also* paragraphs 7.3.5 and 7.3.6 (pp. 7-13 & 7-14) regarding transit passage in neutral straits and archipelagic sea lanes passage through neutral archipelagic waters, respectively.

territorial seas.<sup>55</sup> While in neutral territorial seas, a belligerent warship must also refrain from adding to or repairing its armaments or replenishing its war materials.<sup>56</sup> Although the general practice has been to close neutral territorial seas to belligerent submarines, a neutral nation may elect to allow passage of submarines.<sup>57</sup> 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.<sup>58</sup>

**7.3.4.1 The 12-Nautical Mile Territorial Sea.** When the law of neutrality was codified in the Hague Conventions of 1907, the 3-nautical mile territorial sea was the accepted norm, aviation was in its infancy, and the submarine had not yet proven itself as a significant weapons platform. The rules of neutrality applicable to the territorial sea were designed primarily to regulate the conduct of surface warships in a narrow band of water off neutral coasts.<sup>59</sup> The 1982 Law of the Sea Convention provides that coastal nations may lawfully extend the breadth of claimed territorial seas to 12 nautical miles.<sup>60</sup> The U.S. claims a 12-nautical mile territorial sea and recognizes the right of all coastal nations to do likewise.<sup>61</sup>

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<sup>55</sup> Hague XIII, art. 10; NWIP 10-2, para. 443a. Tucker suggests that the phrase "mere passage," appearing in Hague XIII, art. 10, should be interpreted by reference to Hague XIII, art. 5, which prohibits belligerents from using neutral waters as a base of operations. Tucker 232-39. However, that interpretation is not universally held; Tucker 235 n. 84. MacChesney's examination of the meaning of "mere passage" provides the following insights:

The legislative history provides no conclusive interpretation. The British who introduced the phrase into their draft of [Article 10] indicated that innocent passage in the peacetime sense was what they had in mind. . . . [T]he peacetime analogy serves to indicate the type of passage that belligerents were willing to allow neutrals to grant. The type of passage contemplated is limited by two basic criteria. It must be an innocent passage for bona fide purposes of navigation rather than for escape or asylum. The passage must also be innocent in the sense that it does not prejudice either the security interests of the coastal State, or the interests of the opposing belligerent in preventing passage beyond the type agreed to in Article X.

MacChesney 18-19. Para. 19 of the San Remo Manual eschews both "innocent" and "mere" in describing transit of belligerent warships through neutral territorial waters using simply the term "passage." *See also* the amplifying discussion in Doswald-Beck at 98 & 99.

<sup>56</sup> Hague XIII, art. 18; Tucker 234 n. 81. *See also* paragraph 7.3.2.2 and notes 46 & 47 thereunder (pp. 7-8 & 7-9).

<sup>57</sup> Tucker 240 n. 89.

<sup>58</sup> Hague XIII, art. 14(2); Tucker 242.

<sup>59</sup> Swarztrauber 32 & 116.

<sup>60</sup> 1982 LOS Convention, art. 3.

<sup>61</sup> *See* paragraph 1.2 (p. 1-2) and accompanying notes.

In the context of a universally recognized 3-nautical mile territorial sea, the rights and duties of neutrals and belligerents in neutral territorial seas were balanced and equitable.<sup>62</sup> 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,<sup>63</sup> 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.<sup>64</sup> Should belligerent forces violate the neutrality of those waters and the neutral nation demonstrate an inability or unwillingness to detect and expel the offender, the other belligerent retains the right to undertake such self-help enforcement actions as are necessary to assure compliance by his adversary and the neutral nation with the law of neutrality.<sup>65</sup>

**7.3.5 Neutral International Straits.** Customary international law as reflected in the 1982 Law of the Sea Convention provides that belligerent and neutral surface ships, submarines, and aircraft have a right of transit passage through, over, and under all straits used for international navigation.<sup>66</sup> Neutral nations cannot suspend, hamper, or otherwise impede this right of transit passage through international straits.<sup>67</sup> 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.<sup>68</sup> 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

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<sup>62</sup> Harlow, *The Law of Neutrality at Sea for the 80's and Beyond*, 3 *Pacific Basin L.J.* 51 (1984).

<sup>63</sup> Swartrauber 240.

<sup>64</sup> See Robertson, paragraph 7.3, note 25 (p. 7-6) at 278-80.

<sup>65</sup> 2 O'Connell 1156; NWIP 10-2, para. 441 & n. 27; Waldock, *The Release of the Altmark's Prisoners*, 24 *Brit. Y.B. Int'l L.* 216, 235-36 (1947) (self-preservation). Tucker 262 n. 40 justifies the British actions in the ALTMARK incident (paragraph 7.3.4, note 52 (p. 7-11)) as a "reprisal measure directed against Norway for the latter's refusal to carry out neutral obligations."

<sup>66</sup> See paragraph 2.3.3.1 and accompanying notes (pp. 2-12 to 2-16).

<sup>67</sup> 1982 LOS Convention, art. 44; paragraph 2.3.3.1 and note 42 thereto (p. 2-16); Tucker 232 & n. 80; San Remo Manual, para. 29.

<sup>68</sup> 1982 LOS Convention, art. 39(1); paragraph 2.3.3.1 (p. 2-12). Neutral forces must similarly conform to these requirements in the exercise of transit passage through straits.

surveillance.<sup>69</sup> Belligerent forces may not use neutral straits as a place of sanctuary nor as a base of operations, and belligerent warships may not exercise the belligerent right of visit and search in those waters.<sup>70</sup> (Note: The Turkish Straits are governed by special rules articulated in the Montreux Convention of 1936, which limit the number and types of warships which may use the Straits, both in times of peace and during armed conflict.)<sup>71</sup>

**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.<sup>72</sup> The balance of neutral and belligerent rights and duties with respect to neutral waters, is, however, at its most difficult in the context of archipelagic waters.<sup>73</sup>

Belligerent forces must refrain from acts of hostility in neutral archipelagic waters and from using them as a sanctuary or a base of operations.<sup>74</sup> 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.<sup>75</sup> Belligerent forces exercising the right of archipelagic sea lanes passage may engage in those activities that are incident to their normal mode of continuous and expeditious passage and are consistent with their security, including formation steaming and the launching and recovery of aircraft.<sup>76</sup> Visit and search is not authorized in neutral archipelagic waters.<sup>77</sup>

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<sup>69</sup> For a discussion of the exercise of self-defense in neutral straits *see* Harlow, paragraph 7.3, note 25 (p. 7-6), at 206. *See also* paragraph 7.3.7 (p. 7-15); and San Remo Manual, para. 30. Neutral forces similarly are entitled to take such defensive measures in neutral straits.

<sup>70</sup> *See* NWIP 10-2, para. 441; *cf.* Hague XIII, art. 5; paragraph 7.3.4 (p. 7-11), and paragraph 7.6 & note 116 thereto (p. 7-23). The belligerent right of visit and search is, of course, to be distinguished from the warship's peacetime right of approach and visit (discussed in paragraph 3.4 (p. 3-8)) and to board in connection with drug-interdiction efforts (discussed in paragraph 3.11.2.2 (p. 3-21)).

<sup>71</sup> Convention Regarding the Regime of Straits (Montreux Convention) of 20 July 1936, 173 L.N.T.S. 213, 31 Am. J. Int'l L. Supp. 4; paragraph 2.3.3.1 note 36 (p. 2-12). Special regimes also apply to the Suez Canal, the Panama Canal and the Kiel Canal, all of which remain open to neutral transit during armed conflict. *See* paragraph 2.3.3.1, note 36 (p. 2-14).

<sup>72</sup> White House Fact Sheet, Annex A1-8 (p. 1-68); paragraph 1.4.3 and note 41 thereto (p. 1-17).

<sup>73</sup> The application of the customary rules of neutrality to the newly recognized concept of the archipelagic nation remains largely unsettled as a doctrine of international law. *See* Harlow, paragraph 7.3, note 25 (p. 7-6) at 24-29; Robertson *id.* at 292-94.

<sup>74</sup> *See* NWIP 10-2, para. 441; San Remo Manual, paras. 16 & 17; *compare* Hague XIII, arts. 1, 2 & 5.

<sup>75</sup> 1982 LOS Convention, arts. 53, 54 & 44; paragraph 2.3.4.1 and notes 47 & 48 (p. 2-17).

<sup>76</sup> 1982 LOS Convention, art. 53(3); paragraph 2.3.4.1 (p. 2-17); San Remo Manual, para. 30.

<sup>77</sup> Since visit and search is a belligerent activity unrelated to navigational passage, it cannot lawfully be exercised in neutral territory; San Remo Manual, para. 16(d). *Compare* Hague XIII, arts. 1 & 2. *See* NWIP 10-2, para. 441. The belligerent right of  
(continued...)

A neutral nation may close its archipelagic waters (other than archipelagic sea lanes whether designated or those routes normally used for international navigation or overflight) to the passage of belligerent ships but it is not obliged to do so.<sup>78</sup> The neutral archipelagic nation has an affirmative duty to police its archipelagic waters to ensure that the inviolability of its neutral waters is respected.<sup>79</sup> 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.<sup>80</sup>

**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.<sup>81</sup> Belligerent military aircraft are forbidden to enter neutral airspace<sup>82</sup> 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.<sup>83</sup>
2. Medical aircraft may, with prior notice, overfly neutral territory, may land therein in case of necessity, and may use neutral airfield facilities as ports of call, subject to

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<sup>77</sup>(...continued)

visit and search is, of course, to be distinguished from the warship's peacetime right of approach and visit (discussed in paragraph 3.4 (p. 3-8)) and to board in connection with drug-interdiction efforts (discussed in paragraph 3.11.2.2 (p. 3-21)).

<sup>78</sup> San Remo Manual, para. 19. *Compare* 1982 LOS Convention, arts. 52(2) & 54; Hague XIII, art. 9; paragraph 2.3.4.1 (p. 2-17); *compare* paragraph 7.3.5 (p. 7-13).

<sup>79</sup> San Remo Manual, para. 22. *Compare* Hague XIII, art. 25.

<sup>80</sup> *See* NWIP 10-2, para. 441 n. 27; paragraph 7.3, note 25 (p. 7-6).

<sup>81</sup> *See* paragraph 1.8 (p. 1-24); San Remo Manual, para. 14.

<sup>82</sup> Art. 40, Draft 1923 Hague Rules of Aerial Warfare, The Hague, 19 February 1923, *reprinted in* Am. J. Int'l L., vol. 17 (1923), Supp., pp. 245-60 (although never having entered into force, the draft rules are generally regarded as declaratory of customary law); NWIP 10-2, para. 444a; Tucker 251; Spaight 420-460. The practice in World Wars I and II was in general conformity with the rules stated in paragraph 7.3.7. Spaight 424. *See also* San Remo Manual, para. 181.

<sup>83</sup> *See* paragraphs 7.3.5 & 7.3.6 (pp. 7-13 & 7-14).

such restrictions and regulations as the neutral nation may see fit to apply equally to all belligerents.<sup>84</sup>

3. Belligerent aircraft in evident distress may be permitted to enter neutral airspace and to land in neutral territory under such safeguards as the neutral nation may wish to impose. The neutral nation must require such aircraft to land and must intern both aircraft and crew.<sup>85</sup>

**7.3.7.1 Neutral Duties In Neutral Airspace.** Neutral nations have an affirmative duty to prevent violation of neutral airspace by belligerent military aircraft, to compel offending aircraft to land, and to intern both aircraft and crew.<sup>86</sup> Should a neutral nation be unable or unwilling to prevent the unlawful entry or use of its airspace by belligerent military aircraft, belligerent forces of the other side may undertake such self-help enforcement measures as the circumstances may require.<sup>87</sup>

## 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 contribute to the belligerent's war-fighting/war-sustaining capability.<sup>88</sup> Neutral merchant

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<sup>84</sup> GWS-Sea, art. 40; GP I, art. 31; NWIP 10-2, para. 444a(1); Tucker 130-31; Spaight 443-44. *See also* San Remo Manual, paras. 182 & 183.

<sup>85</sup> Hague V, art. 11; GP I, art. 31(4); Spaight 436-37; Tucker 252; AFP 110-31, para. 2-6c; and San Remo Manual para. 18. *See* paragraph 7.11 and accompanying notes 168 & 169 (p. 7-35). NWP 9, para. 7.3.74; NWP 9 (Rev. A), para. 7.3.7(4) and NWIP 10-2, para. 444b, provided that while the neutral nation could intern belligerent aircraft and crews in such circumstances, they were not obliged to do so, given the varied practice in WW II. Paragraph 7.3.7(3) has been revised to reflect the prevailing view. *See also* paragraph 7.11 (p. 7-34).

<sup>86</sup> NWIP 10-2, para. 444b; Tucker 251; San Remo Manual, para. 18.

<sup>87</sup> AFP 110-31, para. 2-6c. *See also* paragraph 7.3 (p. 7-6).

<sup>88</sup> Although war-sustaining commerce is not subject to precise definition, commerce that indirectly but effectively supports and sustains the belligerent's war-fighting capability properly falls within the scope of the term. *See* paragraph 8.1.1 & note 11 thereto (pp. 8-2 & 8-3). Examples of war-sustaining commerce include *imports* of raw materials used for the production of armaments and *exports* of products the proceeds of which are used by the belligerent to purchase arms and armaments.

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.<sup>89</sup>

The law of neutrality does not prohibit neutral nations from engaging in commerce with belligerent nations;<sup>90</sup> however, a neutral government cannot itself supply materials of war or armaments to a belligerent without violating its neutral duties of abstention and impartiality and risking loss of its neutral status.<sup>91</sup> Although a neutral may forbid its citizens from carrying on non-neutral commerce with belligerent nations, it is not obliged to do so.<sup>92</sup> In effect, the law establishes a balance-of-interests test to protect neutral commerce from unreasonable interference on the one hand and the right of belligerents to interdict the flow of war materials to the enemy on the other.<sup>93</sup>

**7.4.1 Contraband.** Contraband consists of goods which are destined for the enemy of a belligerent and which may be susceptible to use in armed conflict. Traditionally, contraband had been divided into two categories: absolute and conditional. Absolute contraband consisted of goods whose character made it obvious that they were destined for use in armed conflict, such as munitions, weapons, uniforms, and the like. Conditional contraband were goods equally susceptible to either peaceful or warlike purposes, such as foodstuffs, construction materials, and fuel.<sup>94</sup> Belligerents often declared contraband lists at the initiation of

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<sup>89</sup> Visit and search is discussed in paragraph 7.6 (p. 7-23). The limited circumstances under which capture and destruction of neutral merchant vessels and civil aircraft is permitted are discussed in paragraph 7.10 (p. 7-32).

<sup>90</sup> Hague XIII, art. 7.

<sup>91</sup> See paragraphs 7.2 (p. 7-3) and 7.4.1 (p. 7-17); Hague XIII, art. 6; and Tucker 206-18.

<sup>92</sup> Hague V, art. 7. For example, see the U.S. Neutrality Act, 18 U.S. Code 963 *et seq.*, and the Arms Export Control Act, 22 U.S.C. 2271 *et seq.* See also Green 262-63.

<sup>93</sup> 10 Whiteman 792, quoting an unofficial translation of Rousseau, *Droit International Public* 700-01 (1953). Iran's attacks on neutral ships carrying neutral commerce during the 1984-88 Tanker War as herein defined upset that balance and were unlawful. Roach, *Missiles on Target: The Law of Targeting and The Tanker War*, 82 Proc. Am. Soc. Int'l L. 154 (1988). See also De Guttry & Ronzitti, note 12 (p. 7-3) at 128-29.

<sup>94</sup> 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

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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.<sup>95</sup>

The practice of belligerents since 1939 has collapsed the traditional distinction between absolute and conditional contraband.<sup>96</sup> 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 treated all imports directly or indirectly sustaining the war effort as contraband without making a distinction between absolute and conditional contraband.<sup>97</sup> To the extent that international law may continue to require publication of

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<sup>94</sup>(...continued)

be applied is whether, in the special circumstances of a particular war, the article concerned is by its character destined to be made use of for military, naval, or air-fleet purposes because it is essential to those purposes. If not, it ought not to be declared absolute contraband. However, it may well happen that an article which is not by its very nature destined to be made use of in war, acquires this character in a particular war and under particular circumstances; and in such case it may be declared absolute contraband. Thus, for instance, foodstuffs cannot, as a rule, be declared absolute contraband; but if the enemy, for the purpose of securing sufficient [foodstuffs] for his military forces, takes possession of all the foodstuffs in the country, and puts the whole population on rations, foodstuffs acquire the character essential to articles of absolute contraband, and can therefore be declared to be such.

<sup>2</sup> Oppenheim-Lauterpacht 801 & 803. *See also* Green 158. On starvation as an impermissible method of warfare, *see* paragraph 8.1.2, note 15 (p. 8-4).

<sup>95</sup> NWIP 10-2, art. 631b, *quoted with approval in* McDougal & Feliciano 482-83; Green 158.

<sup>96</sup> NWIP 10-2, art. 631b n.18; Tucker 266-67. O'Connell has correctly noted that "the central principle is the actual commitment of goods to the prosecution of war, and it is obvious that the principle is differentially applicable in different circumstances. . . . What is likely to occur in the event of resuscitation of the law of contraband in future limited wars is a readjustment of the items on the various lists." 2 O'Connell 1144. In December 1971, Pakistan and India each declared contraband lists containing items traditionally considered to be absolute contraband. The lists are *reprinted in* 66 Am. J. Int'l L. 386-87 (1972). Although neither Iran nor Iraq declared contraband lists in their 1980-88 war, the fact that both nations attacked neutral crude oil carriers, loaded and in ballast, indicated both Iran and Iraq regarded oil (as an export commodity) to be contraband since oil and the armaments which its sale or barter on international markets brought were absolutely indispensable to the war efforts of the Persian Gulf belligerents. *See* Viorst, *Iraq at War*, 65 Foreign Affairs 349, 350 (Winter 1986/87); Bruce, *U.S. Request Stretches Iraq's Patience*, 8 *Jane's Defence Weekly* 363 (29 Aug. 1987); N.Y. Times, 4 Sep. 1986, at A1 & A11.

<sup>97</sup> The San Remo Manual does not define contraband in terms of it being absolute or conditional. San Remo Manual, para. 148. *See also* the commentary on that paragraph *in* Doswald-Beck at 215-16.

contraband lists, recent practice indicates that the requirement may be satisfied by a listing of exempt goods.<sup>98</sup>

**7.4.1.1 Enemy Destination.** Contraband goods are liable to capture at any place beyond neutral territory, if their destination is the territory belonging to or occupied by the enemy. It is immaterial whether the carriage of contraband is direct, involves transshipment, or requires overland transport.<sup>99</sup> When contraband is involved, a destination of enemy owned or occupied territory may be presumed when:

1. The neutral vessel is to call at an enemy port before arriving at a neutral port for which the goods are documented
2. The goods are documented to a neutral port serving as a port of transit to an enemy, even though they are consigned to a neutral
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.<sup>100</sup>

These presumptions of enemy destination of contraband render the offending cargo liable to seizure by a belligerent from the time the neutral merchant vessel leaves its home or other neutral territory until it arrives again in neutral territory. Although conditional

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<sup>98</sup> *But see* San Remo Manual, paras. 149 & 150 which would require publication of lists of goods considered to be contraband; all else being "free goods" not subject to capture.

<sup>99</sup> Tucker 267-68. Stone explains this rule as follows:

"Continuous voyage" is where, in order to obtain immunity during a part of its voyage to the enemy port, the vessel breaks its journey at a neutral intermediate port, the contraband being ostensibly destined there. At the neutral port, for appearance's sake it may unload and reload the same contraband cargo, but in any case it then proceeds with the cargo on the shortened span of its journey to the enemy port. The *doctrine* of continuous voyage prescribes that such a vessel and its cargo are to be deemed to have an enemy destination (and, therefore, to be liable to seizure) from the time she leaves her home port. Similarly, "continuous transports" is where the guilty cargo is unloaded at the neutral port, and is then carried further to the enemy port or destination by another vessel or vehicle. The corresponding *doctrine* of continuous transports applies with similar effect, rendering the cargo liable to seizure from the time it leaves its home port.

Stone 486. The principles underlying the so-called doctrines of "continuous voyage" and "continuous transports" or "ultimate destination" were applied by prize courts in both World Wars I and II. NWIP 10-2, para. 631c(1) n. 19. Development of the doctrine of continuous voyage is succinctly discussed in 2 O'Connell 1146-47.

<sup>100</sup> NWIP 10-2, art. 631c(1). The circumstances creating a presumption of ultimate destination of absolute contraband here enumerated are of concern to the operating commander for the reason that circumstances held to create a presumption of enemy destination constitute sufficient cause for capture. Before a prize court, each of these presumptions is rebuttable and whether or not a prize court will, in fact, condemn the captured cargo and vessel (or aircraft) will depend upon a number of complex considerations with which the commander need not be concerned. NWIP 10-2, para. 631c(1) n. 20. *See also* Green 158.

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.<sup>101</sup>

**7.4.1.2 Exemptions to Contraband.** Certain goods are exempt from capture as contraband even though destined for enemy territory.<sup>102</sup> Among them are:

1. Exempt or "free goods"<sup>103</sup>
2. Articles intended exclusively for the treatment of wounded and sick members of the armed forces and for prevention of disease<sup>104</sup>
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<sup>105</sup>
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<sup>106</sup>

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<sup>101</sup> NWIP 10-2, art. 631c(2); Tucker 270-75. *See* paragraph 7.4.1.1, note 100 (p. 7-19). Regarding capture of a vessel carrying contraband, *see* paragraph 7.10, note 153 (p. 7-32).

<sup>102</sup> *See* Tucker 263.

<sup>103</sup> NWIP 10-2, para. 631e(1) & n. 17.

<sup>104</sup> GWS-Sea, art. 38; NWIP 10-2, para. 631e(2). The particulars concerning the carriage of such articles must be transmitted to the belligerent nation and approved by it.

<sup>105</sup> GC, arts. 23 & 59; Tucker 265 n. 4. For nations bound thereby, GP I, art. 70, modifies the conditions of GC, art. 23, that a nation may impose before permitting free passage of these relief supplies. The United States supports the principle contained in GP I, art. 70. The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 Am. U.J. Int'l L. & Policy 426 (1987) (remarks of U.S. Department of State Deputy Legal Adviser Matheson: the United States supports the principle reflected in GP I, arts. 54 & 70, "subject to the requirements of imperative military necessity, that impartial relief actions necessary for the survival of the civilian population be permitted and encouraged").

<sup>106</sup> The conditions that may be set on these shipments are set forth in arts. 72-75 and Annex III of GPW.

5. Goods otherwise specifically exempted from capture by international convention or by special arrangement between belligerents.<sup>107</sup>

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.<sup>108</sup>

**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.<sup>109</sup> The acceptance of a navicert or aircert by a neutral ship or aircraft does not constitute "unneutral service".<sup>110</sup>

## 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 merchant vessel or civilian aircraft owned or controlled by a belligerent possesses enemy character, regardless of whether it is operating under a neutral flag or bears neutral

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<sup>107</sup> NWIP 10-2, para. 631e(3). *See* GC, arts. 23 & 59.

<sup>108</sup> Compare GC, art. 23(4) and 4 Pictet 184.

<sup>109</sup> *See* NWIP 10-2, para. 631d n. 22 and sources cited therein; 1 Medlicott, *The Economic Blockade* (United Kingdom Official History of the Second World War. Civil Series) 94 & 95 (1952); Tucker 280-82, 312-15 & 322-23; McDougal & Feliciano 509-13; 2 O'Connell 1147-48; Green 164. A similar procedure was used during the Cuban Missile Crisis, when the United States issued "clearcerts." Dep't St. Bull., 12 Nov. 1962, at 747; and Mallison, *Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defense Claims Valid Under International Law*, 31 *Geo. Wash. L. Rev.* 389-90 (1962). *See also* San Remo Manual, paras. 122-124.

<sup>110</sup> "Unneutral service" is discussed in paragraph 7.5.1, note 112 (p. 7-22).

markings.<sup>111</sup> Vessels and aircraft acquiring enemy character may be treated by an opposing belligerent as if they are in fact enemy vessels and aircraft. (Paragraphs 8.2.1 and 8.2.2 set forth the actions that may be taken against enemy vessels and aircraft.)

**7.5.1 Acquiring the Character of an Enemy Warship or Military Aircraft.** Neutral merchant vessels and civil aircraft acquire enemy character<sup>112</sup> and may be treated by a belligerent as enemy warships and military aircraft when engaged in either of the following acts:

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<sup>111</sup> See NWIP 10-2, para. 501; Tucker 76-86; Green 162-63.

A neutral nation may grant a merchant vessel or aircraft the right to operate under its flag, even though the vessel or aircraft remains substantially owned or controlled by enemy interests. According to the international law of prize, such a vessel or aircraft nevertheless possesses enemy character and may be treated as enemy by the concerned belligerent. In view of current commercial practices, determination of true ownership or control may be difficult.

There is no settled practice among nations regarding the conditions under which the transfer of enemy merchant vessels (and, presumably, aircraft) to a neutral flag legitimately may be made. Despite agreement that such transfers will not be recognized when fraudulently made for the purpose of evading belligerent capture or destruction, nations differ in the specific conditions that they require to be met before such transfers can be considered as *bona fide*. However, it is generally recognized that, at the very least, all such transfers must result in the complete divestiture of enemy ownership and control. The problem of transfer is mainly the proper concern of prize courts rather than of an operating naval commander, and the latter is entitled to seize any vessel transferred from an enemy to a neutral flag when such transfer has been made either immediately prior to, or during, hostilities. NWIP 10-2, para. 501 n. 5. Compare San Remo Manual, paras. 112-117. See also Doswald-Beck at 187-95.

On the mid-1987 reflagging of eleven Kuwaiti tankers to U.S. registration, see Weinberger, A Report to the Congress on Security Arrangements in the Persian Gulf, 26 Int'l Leg. Mat'ls 1450-51 (1987); De Guttry & Ronzitti, paragraph 7.2, note 12 (p. 7-3), at 121-23.

<sup>112</sup> NWIP 10-2, para. 501a; Tucker 319-21. Compare San Remo Manual, paras. 67 (neutral merchant vessels) & 68 (neutral civil aircraft). With the exception of resistance to visit and search, the acts defined here (and in examples 7 and 8 of paragraph 7.10 (pp. 7-32 & 7-33)) have been traditionally considered under the heading of "unneutral service." Although originally established for and applied to the conduct of neutral vessels, the rules regarding unneutral service have been considered generally applicable to neutral aircraft as well.

The term "unneutral service" does not refer to acts performed by, and attributable to, a neutral nation itself. Rather, it refers to certain acts which are forbidden to neutral merchant vessels and civilian aircraft. Attempts to define the essential characteristics common to acts constituting unneutral service have not been very satisfactory. However, it is clear that the types of unneutral service which a neutral merchant vessel or civilian aircraft may perform are varied; hence, the specific sanctions applicable for acts of unneutral service may vary. The services enumerated in paragraph 7.5.1 are of such a nature as to identify a neutral merchant vessel or civilian aircraft with the armed forces of the opposing belligerent for whom these acts are performed, and, for this reason, such vessels or aircraft may be treated in the same manner as enemy warships or military aircraft. The acts identified in paragraph 7.5.2 (p. 7-23) involve neutral merchant vessels and aircraft operating at the direction or under the control of the belligerent, but not in direct support of the belligerent's armed forces. Such vessels and aircraft are assimilated to the position of, and may be treated in the same manner as, enemy merchant vessels and aircraft. The acts of unneutral service cited in paragraph 7.10 (examples 7 and 8) (pp. 7-32 & 7-33) 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.

1. Taking a direct part in the hostilities on the side of the enemy
2. Acting in any capacity as a naval or military auxiliary to the enemy's armed forces.

(Paragraph 8.2.1 describes the actions that may be taken against enemy warships and military aircraft.)

**7.5.2 Acquiring the Character of an Enemy Merchant Vessel or Civil Aircraft.** Neutral merchant vessels and civil aircraft acquire enemy character and may be treated by a belligerent as enemy merchant vessels or civil aircraft when engaged in either of the following acts:

1. Operating directly under enemy control, orders, charter, employment, or direction<sup>113</sup>
2. Resisting an attempt to establish identity, including visit and search.<sup>114</sup>

(Paragraph 8.2.2 describes the actions that may be taken against enemy merchant ships and civil aircraft.)

## 7.6 VISIT AND SEARCH

Visit and search is the means by which a belligerent warship or belligerent military aircraft may determine the true character (enemy or neutral) of merchant ships encountered outside neutral territory, the nature (contraband or exempt "free goods") of their cargo, the manner (innocent or hostile) of their employment, and other facts bearing on their relation to the armed conflict.<sup>115</sup> Warships are not subject to visit and search.<sup>116</sup> The prohibition against visit and search in neutral territory<sup>117</sup> extends to international straits overlapped by neutral territorial seas and archipelagic sea lanes.<sup>118</sup> Neutral vessels engaged in government

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<sup>113</sup> This would include neutral merchant vessels in belligerent convoy. *See* San Remo Manual, para. 67(e).

<sup>114</sup> NWIP 10-2, para. 501b; Tucker 322-23. *See* paragraph 7.5.1, note 112 (p. 7-22).

<sup>115</sup> Hague XIII, art. 2; Tucker 332-33; Green 163; San Remo Manual, para. 118. The peacetime right of approach and visit is discussed in paragraph 3.4 (p. 3-8).

<sup>116</sup> Stone 591-92; 11 Whiteman 3. *See also* paragraph 2.1.2 (p. 2-1).

<sup>117</sup> Hague XIII, art. 2; NWIP 10-2, para. 441.

<sup>118</sup> Harlow, paragraph 7.3, note 25 (p. 7-6), at 205-06, and 1982 LOS Convention, arts. 39 & 54. *See* paragraphs 7.3.5 (p. 7-13) and 7.3.6 (p. 7-14).

noncommercial service may not be subjected to visit and search.<sup>119</sup> 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.<sup>120</sup> 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.<sup>121</sup>

**7.6.1 Procedure for Visit and Search.** In the absence of specific rules of engagement or other special instructions<sup>122</sup> issued by the operational chain of command during a period of armed conflict, the following procedure should be carried out by U.S. warships exercising the belligerent right of visit and search:

1. Visit and search should be exercised with all possible tact and consideration.
2. Before summoning a vessel to lie to, the warship should hoist its national flag. The summons is made by firing a blank charge, by international flag signal (SN or SQ), or by other recognized means. The summoned vessel, if a neutral merchant ship, is bound to stop, lie to, display her colors, and not resist. (If the summoned vessel is an enemy ship, it is not so bound and may legally resist, even by force, but thereby assumes all risk of resulting damage or destruction.)
3. If the summoned vessel takes flight, she may be pursued and brought to by forcible measures if necessary.

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<sup>119</sup> Oxford Manual, art. 32, Schindler & Toman 862; paragraph 2.1.3 (p. 2-4); *but see* Tucker 335-36 & n. 10.

<sup>120</sup> This has been the consistent position of the United States which, while previously not commonly accepted (NWIP 10-2, para. 502a & n. 10, Tucker 334-35) appears to have recently achieved such acceptance. *See* San Remo Manual, para. 120(b). Certainly, the experience of the convoying by several nations in the Persian Gulf during the tanker war between Iran and Iraq (1984-1988) supports the U.S. position. *See* De Guttry & Ronzitti, paragraph 7.2, note 12 (p. 7-3) at 105, 188-89 & 197. It is unsettled as to whether this rule would also apply to a neutral merchant vessel under convoy of a neutral warship of another flag. The San Remo Manual would apply it if there exists an agreement to that effect between the flag State of the merchant vessel and the flag State of the convoying warship. San Remo Manual, para. 120(b).

<sup>121</sup> NWIP 10-2, para. 502a n. 10, *quoting* paras. 58-59 of the 1941 Tentative Instructions for the Navy of the United States Governing Maritime and Aerial Warfare.

<sup>122</sup> The issuance of certificates of noncontraband carriage are one example of special instructions. *See* paragraph 7.4.2 (p. 7-21). The Visit and Search Bill, contained in paragraph 630.23.5 of OPNAVINST 3120.32 (series), Standard Organization and Regulations of the U.S. Navy, provides instructions which are to be implemented in conjunction with the guidance set forth in this publication, including paragraph 7.6.1. *See also* Tucker 336-38.

4. When a summoned vessel has been brought to, the warship should send a boat with an officer to conduct the visit and search. If practicable, a second officer should accompany the officer charged with the examination. The officer(s) and boat crew may be armed at the discretion of the commanding officer.

5. If visit and search at sea is deemed hazardous or impracticable, the neutral vessel may be escorted by the summoning, or another, U.S. warship or by a U.S. military aircraft to the nearest place (outside neutral territory) where the visit and search may be conveniently and safely conducted. The neutral vessel is not obliged to lower her flag (she has not been captured) but must proceed according to the orders of the escorting warship or aircraft.<sup>123</sup>

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.<sup>124</sup>

**7.6.2 Visit and Search by Military Aircraft.** Although there is a right of visit and search by military aircraft, there is no established international practice as to how that right is to be exercised.<sup>125</sup> 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.<sup>126</sup> Visit and search of an aircraft by an

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<sup>123</sup> See Tucker 338-44.

<sup>124</sup> See OPNAVINST 3120.32 (series), note 122 (p. 7-24).

<sup>125</sup> NWIP 10-2, para. 502 n. 8, 502b(5) & nn. 14-15; Tucker 333, 355 & n. 62; 11 Whiteman 3-5.

<sup>126</sup> NWIP 10-2, para. 502 n. 8, 502b(5) & nn. 14-15; Tucker 333, 355 & n. 62; 11 Whiteman 3-5.

aircraft may be accomplished by directing the aircraft to proceed under escort to the nearest convenient belligerent landing area.<sup>127</sup>

## 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.<sup>128</sup> A belligerent's purpose in establishing a blockade is to deny the enemy the use of enemy and neutral vessels or aircraft to transport personnel and goods to or from enemy territory. While the belligerent right of visit and search is designed to interdict the flow of contraband goods, the belligerent right of blockade is intended to prevent vessels and aircraft, regardless of their cargo, from crossing an established and publicized cordon separating the enemy from international waters and/or airspace.<sup>129</sup>

**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.<sup>130</sup>

**7.7.2.1 Establishment.** A blockade must be established by the government of the belligerent nation. This is usually accomplished by a declaration of the belligerent government or by the commander of the blockading force acting on behalf of his government.<sup>131</sup> 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.<sup>132</sup>

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<sup>127</sup> NWIP 10-2, para. 502b(5) & nn. 14-15; Tucker 333 & 342.

<sup>128</sup> NWIP 10-2, para. 502 n. 8; Tucker 354-55; Green 170-72.

<sup>129</sup> 10 Whiteman 861-64.

<sup>130</sup> Concise statements of these criteria and the rationale for their development appear in ICRC, Commentary (GP I) 654, para. 2094, and 2 O'Connell 1150-51. *See also* Mallison & Mallison, *A Survey of the International Law of Naval Blockade*, U.S. Naval Inst. Proc., Feb. 1976, at 44-53.

<sup>131</sup> Declaration of London, Concerning the Laws of Naval Warfare, London, 26 February 1909 [hereinafter Declaration of London], art. 9, *reprinted in* Schindler & Toman at 846; NWIP 10-2, para. 632b; Tucker 287. A blockade may also be ordered by the U.N. Security Council pursuant to the specific language of art. 42. It is not possible to say whether, or to what extent, a U.N. blockade would be governed by the traditional rules. NWIP 10-2, para. 632b, at n. 30. Art. 42 has never been applied by the Security Council. For a discussion of the continuing significance of the Declaration of London *see* Kalshoven, *Commentary on the Declaration of London*, *in* Ronzitti at 257, 259-62, 274.

<sup>132</sup> Declaration of London, art. 9. Only the NCA can direct establishment of a blockade by U.S. forces. Although it is the customary practice of nations when declaring a blockade to specify a period during which neutral vessels and aircraft may leave the blockaded area, there is no uniformity with respect to the length of the period of grace. A belligerent declaring a blockade is free to fix such a period of grace as it may consider to be reasonable under the circumstances.  
(continued...)

**7.7.2.2 Notification.** It is customary for the belligerent nation establishing the blockade to notify all affected nations of its imposition. Because knowledge of the existence of a blockade is an essential element of the offenses of breach and attempted breach of blockade (see paragraph 7.7.4), neutral vessels and aircraft are always entitled to notification. The commander of the blockading forces will usually also notify local authorities in the blockaded area. The form of the notification is not material so long as it is effective.<sup>133</sup>

**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.<sup>134</sup>

**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.<sup>135</sup>

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<sup>132</sup>(...continued)

NWIP 10-2, para. 632b n. 31; Tucker 287; Alford, *Modern Economic Warfare (Law and the Naval Participant)* 345-51 (U.S. Naval War College, *International Law Studies* 1963, No. 61, 1967).

<sup>133</sup> Declaration of London, arts. 11 & 16; NWIP 10-2, para. 632c & n. 32; Tucker 288. *See also* San Remo Manual, para. 93.

<sup>134</sup> Declaration of London, arts. 2 & 3; NWIP 10-2, para. 632d & n. 33; Tucker 288-89. One commentator has noted that:

"Effective," in short, comes to mean sufficient to render capture probable under ordinary weather or other similar conditions. But even on this view, due no doubt to the fact that the lines of controversy were set before the rise of steampower, mines, or submarines, aircraft and wireless communication, at least one man-o'-war must be present. Aircraft and submarines, however, as well as mines, concrete blocks, or other sunken obstacles, may be used as auxiliary to blockading surface vessel or vessels. How many surface vessels, with what speed and armament, are necessary, along with auxiliary means, and how close they must operate for effectiveness in view of the nature of the approaches to the blockaded port, are questions of nautical expertise in each case.

Stone 496 (footnotes omitted), *quoted in* NWIP 10-2, para. 632d n. 33. The presence of at least one surface warship is no longer an absolute requirement to make a blockade legally effective, as long as other sufficient means are employed. *See* paragraph 7.7.5 (p. 7-29); San Remo Manual, paras. 95-97; Doswald-Beck, at 177-78.

<sup>135</sup> Declaration of London, art. 5; NWIP 10-2, para. 632f & n. 35; Tucker 288 & 291; San Remo Manual, para. 100.

**7.7.2.5 Limitations.** A blockade must not bar access to or departure from neutral ports and coasts.<sup>136</sup> Neutral nations retain the right to engage in neutral commerce that does not involve trade or communications originating in or destined for the blockaded area.

**7.7.3 Special Entry and Exit Authorization.** Although neutral warships and military aircraft enjoy no positive right of access to blockaded areas, the belligerent imposing the blockade may authorize their entry and exit. Such special authorization may be made subject to such conditions as the blockading force considers to be necessary and expedient. Neutral vessels and aircraft in evident distress should be authorized entry into a blockaded area, and subsequently authorized to depart, under conditions prescribed by the officer in command of the blockading force or responsible for maintenance of the blockading instrumentality (e.g., mines). Similarly, neutral vessels and aircraft engaged in the carriage of qualifying relief supplies for the civilian population and the sick and wounded should be authorized to pass through the blockade cordon.<sup>137</sup>

**7.7.4 Breach and Attempted Breach of Blockade.** Breach of blockade is the passage of a vessel or aircraft through a blockade without special entry or exit authorization from the blockading belligerent. Attempted breach of blockade occurs from the time a vessel or aircraft leaves a port or airfield with the intention of evading the blockade, and for vessels exiting the blockaded area, continues until the voyage is completed.<sup>138</sup> 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.<sup>139</sup> 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.<sup>140</sup> There is a presumption of attempted breach of blockade where vessels or aircraft are bound for a neutral port or airfield serving as a point of transit to the blockaded area. Capture of such vessels is discussed in paragraph 7.10.

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<sup>136</sup> Declaration of London, art. 18; NWIP 10-2, para. 632e; Tucker 289-90. This rule means that the blockade must not prevent trade and communication to or from neutral ports or coasts, provided that such trade and communication is neither destined to nor originates from the blockaded area. It is a moot point to what extent conventions providing for free navigation on international rivers or through international canals (see paragraph 2.3.3.1, note 36 (p. 2-13) and 2 Oppenheim-Lauterpacht 771-75) have been respected by blockading nations. The practice of nations in this matter is far from clear. NWIP 10-2, para. 632e, at n. 34.

<sup>137</sup> Declaration of London, art. 6; NWIP 10-2, para. 632h; Tucker 291-92; ICRC, Commentary (GP I) 654, paras. 2095-96; Matheson, Remarks, paragraph 7.4.1.2, note 105 (p. 7-20). Compare San Remo Manual, para. 103.

<sup>138</sup> Hall, Law of Naval Warfare 205-06 (1921).

<sup>139</sup> Declaration of London, arts. 14 & 15; NWIP 10-2, para. 632g & n. 36; Tucker 292-93.

<sup>140</sup> NWIP 10-2, para. 632g(3); 2 O'Connell 1157. The practice of nations has rendered obsolete the contrary provisions of the Declaration of London, arts. 17 & 19. See paragraph 7.4.1.1 (p. 7-19) regarding presumption of ultimate enemy destination.

**7.7.5 Contemporary Practice.** The traditional rules of blockade, as set out above, are for the most part customary in nature, having derived their definitive form through the practice of maritime powers during the nineteenth century. The rules reflect a balance between the right of a belligerent possessing effective command of the sea to close enemy ports and coastlines to international commerce, and the right of neutral nations to carry out neutral commerce with the least possible interference from belligerent forces. The law of blockade is, therefore, premised on a system of controls designed to effect only a limited interference with neutral trade. This was traditionally accomplished by a relatively "close-in" cordon of surface warships stationed in the immediate vicinity of the blockaded area.

The increasing emphasis in modern warfare on seeking to isolate completely the enemy from outside assistance and resources by targeting enemy merchant vessels as well as warships, and on interdicting all neutral commerce with the enemy, is not furthered substantially by blockades established in strict conformity with the traditional rules. In World Wars I and II, belligerents of both sides resorted to methods which, although frequently referred to as measures of blockade, cannot be reconciled with the traditional concept of the close-in blockade. The so-called long-distance blockade of both World Wars departed materially from those traditional rules and were justified instead upon the belligerent right of reprisal against illegal acts of warfare on the part of the enemy. Moreover, recent developments in weapons systems and platforms, particularly submarines, supersonic aircraft, and cruise missiles, have rendered the in-shore blockade exceedingly difficult, if not impossible, to maintain during anything other than a local or limited armed conflict.<sup>141</sup>

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 mining of Haiphong and other North Vietnamese ports, accomplished by the emplacement of mines, was undertaken in conformity with traditional criteria of establishment, notification, effectiveness, limitation, and impartiality, although at the time the mining took place the term "blockade" was not used.<sup>142</sup>

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<sup>141</sup> 2 O'Connell 1151-56; NWIP 10-2, para. 632a n. 28; Tucker 305-15. *See also* Goldie, *Maritime War Zones & Exclusion Zones*, in Robertson at 168-71.

<sup>142</sup> McDougal & Feliciano 493-95; Swayze, *Traditional Principles of Blockade in Modern Practice: United States Mining of Internal and Territorial Waters of North Vietnam*, 29 JAG J. 143 (1977); Clark, *Recent Evolutionary Trends Concerning Naval Interdiction of Seaborne Commerce as a Viable Sanctioning Device*, 27 JAG J. 160 (1973). *Compare* Tucker 316-17. *See* 2 O'Connell 1156 (who erroneously states only three hours were allowed between notification and activation of the minefield; actually three daylight periods were allowed). *But see* Levie, *Mine Warfare at Sea* 151-57 (1992) who correctly argues that the mining of North Vietnamese ports did not constitute a blockade in the traditional sense and that it was not claimed to be a blockade by U.S. spokesmen at the time. O'Connell (at 1156) suggests that since in conditions of general war "close blockade is likely in the missile age to be a tactically unavailable option, and long-distance blockade to be a  
(continued...)

## 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<sup>143</sup> 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.<sup>144</sup> A belligerent may not, however, purport to deny access to neutral nations, or to close an international strait to neutral shipping, pursuant to this authority unless another route of similar convenience remains open to neutral traffic.<sup>145</sup>

**7.8.1 Belligerent Control of Neutral Communications at Sea.** The commanding officer of a belligerent warship may exercise control over the communication of any neutral merchant vessel or civil aircraft whose presence in the immediate area of naval operations might otherwise endanger or jeopardize those operations. A neutral merchant ship or civil aircraft within that area that fails to conform to a belligerent's directions concerning communications may thereby assume enemy character and risk being fired upon or captured. Legitimate distress communications should be permitted to the extent that the success of the operation is not prejudiced thereby. Any transmission to an opposing belligerent of information concerning military operations or military forces is inconsistent with the neutral duties of abstention and impartiality and renders the neutral vessel or aircraft liable to capture or destruction.<sup>146</sup>

## 7.9 EXCLUSION ZONES AND WAR ZONES

Belligerent control of an immediate area of naval operations is to be clearly distinguished from the belligerent practice during World Wars I and II of establishing broad ocean areas as "exclusion zones" or "war zones" in which neutral shipping was either barred

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<sup>142</sup>(...continued)

politically unavailable one," the twelve-mile territorial sea "may have facilitated naval operations in finding a compromise between close and long-distance blockade." *See also* paragraph 9.2.3 (p. 9-7).

<sup>143</sup> *See*, for example, paragraph 7.8.1 (p. 7-30) and note 146. *See also* San Remo Manual, para. 146; Doswald-Beck, at 214.

<sup>144</sup> NWIP 10-2, para. 430b & n. 17; Tucker 300-01. Belligerent control over neutral vessels and aircraft within an immediate area of naval operations, a limited and transient claim, is based on a belligerent's right to attack and destroy its enemy, its right to defend itself without suffering from neutral interference, and its right to ensure the security of its forces.

<sup>145</sup> *See* Declaration of Paris, para. 4, *reprinted in* Schindler & Toman at 788; Declaration of London, art. 1; Oxford Manual, art. 30; NWIP 10-2, para. 632a.

<sup>146</sup> 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).

or put at special risk. Operational war/exclusion zones established by the belligerents of both sides were based on the right of reprisal against alleged illegal behavior of the enemy and were used to justify the exercise of control over, or capture and destruction of, neutral vessels not otherwise permitted by the rules of naval warfare.<sup>147</sup> Exclusion or war zones established by belligerents in the context of limited warfare that has characterized post-World War II belligerency at sea, have been justified, at least in part, as reasonable, albeit coercive, measures to contain the geographic area of the conflict or to keep neutral shipping at a safe distance from areas of actual or potential hostilities. To the extent that such zones serve to warn neutral vessels and aircraft away from belligerent activities and thereby reduce their exposure to collateral damage and incidental injury (see paragraph 8.1.2.1), and to the extent that they do not unreasonably interfere with legitimate neutral commerce, they are undoubtedly lawful. However, the establishment of such a zone does not relieve the proclaiming belligerent of the obligation under the law of armed conflict to refrain from attacking vessels and aircraft which do not constitute lawful targets.<sup>148</sup> In short, an otherwise protected platform does not lose that protection by crossing an imaginary line drawn in the ocean by a belligerent.<sup>149</sup>

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<sup>147</sup> See Tucker 301-17.

<sup>148</sup> See San Remo Manual, paras. 105-108. As to when enemy merchant vessels and civil aircraft constitute lawful targets, see paragraph 8.2.2 (p. 8-9). Rules pertaining to the permissible targeting of neutral merchant vessels and civil aircraft that have acquired enemy character, have resisted visit and search, or have attempted to breach blockade, are addressed in paragraphs 7.5 (p. 7-21), 7.6 (p. 7-23) and 7.7.4 (p. 7-28), respectively. See also discussion of the Iran-Iraq War and the war zones proclaimed by the two belligerents in De Guttry & Ronzitti, paragraph 7.2, note 12 (p. 7-3) at 133-38.

<sup>149</sup> In assessing Iran's proclaimed "exclusion zone" during the Iran/Iraq Tanker War (1980-88), McNeill stated that:

[I]nternational law has never legitimized attacks upon neutral merchant vessels simply because they ventured into a specified area of the high seas. . . . Iran's attempts to deny "responsibility for merchant ships failing to comply" with [the Iranian proclaimed exclusion zone] could not operate to excuse Iran from its legal obligations to avoid attacks on protected vessels wherever located . . . .

McNeill, Neutral Rights and Maritime Sanctions: The Effect of Two Gulf Wars, 31 Va. J. Int'l L. 631, 636 (1991).

For a detailed examination of this subject see Fenrick, The Exclusion Zone Device in the Law of Naval Warfare, 24 Can. Y.B. Int'l L. 91 (1986) and Goldie, Maritime War Zones & Exclusion Zones, in Robertson at 156-204. See also Russo, Neutrality at Sea in Transition: State Practice in the Gulf War as Emerging International Law, 19 Ocean Dev. & Int'l L. 381, 389-92, 396 (1988) and Leckow, The Iran-Iraq Conflict in the Gulf: The Law of War Zones, 37 Int'l & Comp. L.Q. 629 (1988). Compare San Remo Manual, paras. 105 & 106; Doswald-Beck, at 181-83.

## 7.10 CAPTURE OF NEUTRAL VESSELS AND AIRCRAFT

Neutral merchant vessels and civil aircraft<sup>150</sup> are liable to capture by belligerent warships and military aircraft if engaged in any of the following activities:

1. Avoiding an attempt to establish identity<sup>151</sup>
2. Resisting visit and search<sup>152</sup>
3. Carrying contraband<sup>153</sup>
4. Breaking or attempting to break blockade<sup>154</sup>
5. Presenting irregular or fraudulent papers; lacking necessary papers; or destroying, defacing, or concealing papers<sup>155</sup>
6. Violating regulations established by a belligerent within the immediate area of naval operations<sup>156</sup>
7. Carrying personnel in the military or public service of the enemy<sup>157</sup>

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<sup>150</sup> See paragraph 7.5.1, note 112 (p. 7-22) for a discussion of how the rules may be applied to neutral civil aircraft engaging in unneutral service.

<sup>151</sup> NWIP 10-2, para. 503d(5); Tucker 336. See also 11 Whiteman 30-38 for a discussion of resistance and evasion.

<sup>152</sup> NWIP 10-2, para. 503d(5). See paragraph 7.6 (p. 7-23).

<sup>153</sup> NWIP 10-2, para. 503d(1). Exceptions may exist when the owner of the vessel is unaware that some or all of the cargo being carried on his vessel was contraband. Tucker 295; 2 O'Connell 1148-49. See paragraph 7.4.1 (p. 7-17) for a discussion of what constitutes contraband.

<sup>154</sup> NWIP 10-2, para. 503d(2). See paragraph 7.7.4 (p. 7-28).

<sup>155</sup> NWIP 10-2, para. 503d(6); Tucker 338 n. 14.

<sup>156</sup> NWIP 10-2, para. 503d(7). See paragraph 7.8 (p. 7-30).

<sup>157</sup> NWIP 10-2, para. 503d(3); Tucker 325-30.

Normally, a neutral merchant vessel is not considered liable to capture for the acts enumerated in examples 7 and 8 of paragraph 7.10 if, when encountered at sea, it is unaware of the opening of hostilities, or if the master, after becoming aware of the opening of hostilities, has not been able to disembark those passengers who are in the military or public service of a belligerent. A vessel is deemed to know of the state of armed conflict if it left an enemy port after the opening of hostilities, or if it left a neutral port after a notification of the opening of hostilities had been made in sufficient time to the

(continued...)

## 8. Communicating information in the interest of the enemy.<sup>158</sup>

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.<sup>159</sup> (Article 630.23 of OPNAVINST 3120.32 (series), Standard Organization and Regulations of the U.S. Navy, sets forth the duties and responsibilities of commanding officers and prize masters concerning captured vessels.)

Neutral vessels or aircraft attempting to resist proper capture lay themselves open to forcible measures by belligerent warships and military aircraft and assume all risk of resulting damage.<sup>160</sup>

**7.10.1 Destruction of Neutral Prizes.** Every reasonable effort should be made to avoid destruction of captured neutral vessels and aircraft. A capturing officer, therefore, should not order such destruction without being entirely satisfied that the prize can neither be sent into a belligerent port or airfield nor, in his opinion, properly be released.<sup>161</sup> Should it become necessary that the prize be destroyed, the capturing officer must provide for the safety of the passengers and crew.<sup>162</sup> In that event, all documents and papers relating to the prize should

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<sup>157</sup>(...continued)

nation to which the port belonged. However, actual knowledge is often difficult or impossible to establish. Because of the existence of modern means of communication, a presumption of knowledge may be applied in all doubtful cases. The final determination of this question properly can be left to the prize court. NWIP 10-2, para. 503d n. 25; Tucker 13, 263 & 325.

<sup>158</sup> 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 (p. 7-30).

<sup>159</sup> Tucker 345 n. 36 and accompanying text.

<sup>160</sup> Tucker 336-37 & n. 11.

<sup>161</sup> Compare San Remo Manual, para. 151. It should be noted that paragraph 7.10.1 refers to destruction of neutral merchant vessels whose capture for any of the acts mentioned in paragraph 7.10 has already been effected. Paragraph 7.10.1 does not refer to neutral merchant vessels merely under detention and directed into port for visit and search; such vessels are not prizes.

<sup>162</sup> See paragraph 8.2.2.2 (p. 8-10) and accompanying notes. The obligations laid down in the London Protocol of 1936, insofar as they apply to neutral merchant vessels and aircraft, remain valid, exception being made only for those neutral merchant vessels and aircraft performing any of the acts enumerated in paragraphs 7.5.1 (p. 7-22), 7.5.2 (p. 7-23) and 7.8 (p. 7-30). In its judgment on Admiral Doenitz, the International Military Tribunal at Nuremberg found the accused guilty of violating the London Protocol by proclaiming "operational zones" and sinking neutral merchant vessels entering those zones. The Tribunal noted that:

(continued...)

be saved.<sup>163</sup> If practicable, the personal effects of passengers should also be safeguarded.<sup>164</sup>

**7.10.2 Personnel of Captured Neutral Vessels and Aircraft.** The officers and crews of captured neutral merchant vessels and civil aircraft who are nationals of a neutral nation do not become prisoners of war and must be repatriated as soon as circumstances reasonably permit. This rule applies equally to the officers and crews of neutral vessels and aircraft which have assumed the character of enemy merchant vessels or aircraft by operating under enemy control or resisting visit and search. If, however, the neutral vessels or aircraft had taken a direct part in the hostilities on the side of the enemy or had served in any way as a naval or military auxiliary for the enemy, it thereby assumed the character of an enemy warship or military aircraft and, upon capture, its officers and crew may be interned as prisoners of war.<sup>165</sup>

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.<sup>166</sup>

## 7.11 BELLIGERENT PERSONNEL INTERNED BY A NEUTRAL GOVERNMENT

International law recognizes that neutral territory, being outside the region of war, offers a place of asylum to individual members of belligerent forces and as a general rule

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<sup>162</sup>(...continued)

[T]he protocol made no exception for operational zones. The order of Doenitz to sink neutral ships without warning when found within these zones was, therefore, in the opinion of the Tribunal, a violation of the protocol.

U.S. Naval War College, *International Law Documents 1946-1947*, No. 45, at 300 (1948). *See also* paragraph 7.9 (p. 7-30). The San Remo Manual, para. 140, would prohibit the sinking of a passenger vessel, carrying only passengers, in such circumstances.

<sup>163</sup> London Protocol, art. 22; Tucker 325; San Remo Manual, para. 151(b).

<sup>164</sup> NWIP 10-2, para. 503e; San Remo Manual, para. 151(c).

<sup>165</sup> Hague XI, arts. 5 & 8; NWIP 10-2, art. 513a & n. 40. *See also* San Remo Manual, para. 166. Auxiliaries are defined in paragraph 2.1.3 (p. 2-4).

<sup>166</sup> GPW, art. 4A; Hague XI, art. 6; NWIP 10-2, art. 513b & n. 41.

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.<sup>167</sup>

Belligerent combatants taken on board a neutral warship or military aircraft beyond neutral waters must be interned.<sup>168</sup> Belligerent civilians taken on board a neutral warship or military aircraft in such circumstances are to be repatriated.

With respect to aircrews of non-medical belligerent aircraft that land in neutral territory, whether intentionally or inadvertently, the neutral nation must intern them.<sup>169</sup>

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<sup>167</sup> Hague V, art. 11; Hague XIII, arts. 9 & 24; Tucker 242 & n. 97. *See* paragraph 7.3 (p. 7-6).

<sup>168</sup> During the Iran-Iraq Tanker War, U.S. forces rescued 26 crewmembers who abandoned the Iranian minelayer IRAN AJR following the TF 160 MH-60A helicopter attacks of 21 September 1987 while the IRAN AJR was laying mines in international waters off Bahrain. Five days later they were handed over to Omani Red Crescent officials and shortly thereafter were turned over to Iranian officials, along with the remains of three others killed in the attack on the IRAN AJR. *See* De Guttry & Ronzitte note. On 8 October 1987, U.S. Navy SEALs rescued six Iranian Revolutionary Guardsmen overboard from Iranian small craft that had been attacked following their firing at three trailing Army helicopters about 15 NM southwest of Farsi Island, two of whom subsequently died on board USS RALEIGH. They, and the bodies of the dead, were similarly returned to Iran. 1987 Int'l Rev. Red Cross 650. It is unknown whether Iraq consented to these arrangements, as contemplated by GWS-Sea, art. 17(1); in any event it does not appear that Iraq objected to these actions which seem to be inconsistent with the requirements of GWS-Sea, art. 15; Hague XIII, art. 24; and Hague V, art. 11, to intern them for the duration of the conflict.

<sup>169</sup> Hague V, art. 11; Draft 1923 Hague Rules of Aerial Warfare, art. 42; AFP 110-31, para. 2-6c; Tucker 251-52; 2 Levie, *The Code of International Armed Conflict* 807.

On 31 August 1987, in the course of escorting U.S. flag tankers, USS GUADALCANAL rescued an Iraqi fighter pilot downed by an Iranian air-to-air missile in international waters of the Persian Gulf. While apparently inconsistent with GWS-Sea, art. 15, he was repatriated through officials of the Saudi Arabian Red Crescent Society. *N.Y. Times*, 2 Sep. 1987, at A6; *Washington Post*, 2 Sep. 1987, at A18. Although the situation never arose, the United States advised Iran during the 1991 Gulf War that in light of U.N.S.C. Resolution 678 which called upon all U.N. member nations to "provide appropriate support" for coalition actions, and despite Iran's declaration of "neutrality" in that conflict, Iran would be obligated to return coalition aircraft and aircrew (rather than intern them) that might be downed in Iranian territory. Title V Report, App. O, p. 628. This again illustrates the modified nature of neutrality in circumstances where the Security Council has issued binding resolutions. *See* paragraph 7.2.1 (p. 7-4).

**FIGURE A7-1**

**RECIPROCAL RIGHTS AND DUTIES**

	<b>NEUTRALS</b>	<b>BELLIGERENTS</b>
<b><u>RIGHTS</u></b>	<ul style="list-style-type: none"><li>○ INVIOALABILITY</li><li>○ NEUTRAL COMMERCE</li></ul>	<ul style="list-style-type: none"><li>○ INSIST ON NEUTRAL IMPARTIALITY, ABSTENTION AND PREVENTION</li><li>○ ENFORCE ITS RIGHTS</li></ul>
<b><u>DUTIES</u></b>	<ul style="list-style-type: none"><li>○ IMPARTIALITY</li><li>○ ABSTENTION</li><li>○ PREVENTION</li><li>○ ACQUIESCENCE</li></ul>	<ul style="list-style-type: none"><li>○ RESPECT NEUTRAL INVIOALABILITY AND COMMERCE</li></ul>