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THE LAW OF WAR AND NEUTRALITY AT SEA

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## CHAPTER 6

# LEGAL RESTRICTIONS UPON WEAPONS AND METHODS EMPLOYED IN NAVAL WARFARE

### 600 SCOPE

This chapter describes the legal limitations governing the employment of weapons and methods in naval warfare. The basic principles which apply in determining the legality of any weapon or method are stated in Section 220.<sup>2</sup> The rules governing the capture and destruction of vessels and aircraft are stated in Article 503.

### 610 WEAPONS

The following articles examine the rules of international law governing mines and torpedoes; chemicals, gases, and bacteria; and nuclear weapons.

### 611 MINES AND TORPEDOES

The only restrictions laid down by a convention governing the belligerent employment of mines and torpedoes are laid down in the Hague Convention No. VIII (1907). Articles 1 through 3 of this Convention read as follows:

Article 1. It is forbidden:

1. To lay unanchored automatic contact mines, except when they are so constructed as to become harmless one hour at most after the person who laid them ceases to control them;
2. To lay anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings;
3. To use torpedoes which do not become harmless when they have missed their mark.

Article 2. It is forbidden to lay automatic contact mines off the coast and ports of the enemy, with the sole object of intercepting commercial shipping.

Article 3. When anchored automatic contact mines are employed, every possible precaution must be taken for the security of peaceful shipping.

The belligerents undertake to do their utmost to render these mines harmless within a limited time, and, should they cease to be under surveillance, to notify the danger zones as soon as military exigencies permit, by a notice addressed to ship-owners, which must also be communicated to the Governments through the diplomatic channel.<sup>3</sup>

(Footnotes at end of chapter)

## 612 CHEMICALS, GASES, AND BACTERIA

a. **CHEMICALS.** Weapons of chemical types which are at times asphyxiating in nature, such as white phosphorus, smoke, and flame throwers, may be employed.<sup>4</sup>

b. **GASES AND BACTERIA.** The United States is not a party to any treaty now in force that prohibits or restricts the use in warfare of poisonous or asphyxiating gases or of bacteriological weapons.<sup>5</sup> Although the use of such weapons frequently has been condemned by states, including the United States,<sup>6</sup> it remains doubtful that, in the absence of a specific restriction established by treaty, a state legally is prohibited at present from resorting to their use.<sup>7</sup> However, it is clear that the use of poisonous gas or bacteriological weapons may be considered justified against an enemy who first resorts to the use of these weapons.<sup>8</sup>

## 613 NUCLEAR WEAPONS

There is at present no rule of international law expressly prohibiting states from the use of nuclear weapons in warfare. In the absence of express prohibition, the use of such weapons against enemy combatants and other military objectives is permitted.<sup>9</sup>

## 620 BOMBARDMENT

The term bombardment as used herein includes both aerial and naval bombardment. This section is not concerned with the legal limitations on land bombardment by land forces.

## 621 GENERAL LIMITATIONS ON BOMBARDMENT

a. **DESTRUCTION OF CITIES.** The wanton destruction of cities, towns, or villages, or any devastation not justified by military necessity, is prohibited.<sup>10</sup>

b. **NONCOMBATANTS.** Belligerents are forbidden to make noncombatants the target of direct attack in the form of bombardment, such bombardment being unrelated to a military objective.<sup>11</sup> However, the presence of noncombatants in the vicinity of military objectives does not render such objectives immune from bombardment for the reason that it is impossible to bombard them without causing indirect injury to the lives and property of noncombatants. In attempting to bombard a military objective, commanders are not responsible for incidental damage done to objects in the vicinity which are not military objectives.

c. **TERRORIZATION.** Bombardment for the sole purpose of terrorizing the civilian population is prohibited.

d. **UNDEFENDED CITIES.** Belligerents are forbidden to bombard a city or town that is undefended and that is open to immediate entry by own or allied forces.<sup>12</sup>

## 622 SPECIFIC LIMITATIONS ON BOMBARDMENT

a. **MEDICAL ESTABLISHMENTS AND UNITS,** fixed or mobile, and vehicles of

wounded and sick or of medical equipment may not be bombarded or attacked; however, belligerents must ensure that such medical establishments and units are, as far as possible, situated in such a manner that attacks against military objectives cannot imperil their safety. The protection afforded ceases if such establishments or units are used to commit harmful acts outside their humanitarian duties and when, after due warning has been given that the performance of harmful acts will remove protection, such warning has remained unheeded. The distinctive emblem—red cross, or red crescent, or the red lion and sun, on a white background—must be hoisted over medical establishments and units entitled to protection.<sup>13</sup>

b. **SPECIAL HOSPITAL ZONES** established by agreement among the belligerents are immune from bombardment provided that the conditions under which they are required to operate are continually observed.<sup>14</sup>

c. **PROTECTED BUILDINGS.** Buildings devoted to religion or to art or to charitable purposes, historic monuments, and the like should, as far as possible, be spared from bombardment on condition that they are not used at the same time for military purposes and are properly located (not near a military objective). It is the duty of inhabitants to indicate such places by distinctive and visible signs. This may be done by large, stiff, rectangular panels divided diagonally into two triangular portions—the upper portion black, the lower portion white. There is however no requirement to observe these signs or any others indicating inviolability of buildings that are known to be used for military purposes.<sup>15</sup>

## 623 WARNING BEFORE BOMBARDMENT

Where a military situation permits, commanders should make every attempt to give prior warning of their intention to bombard a place so that the civilian population in close proximity will have an opportunity to seek safety.<sup>16</sup>

## 630 MEASURES OF MARITIME WARFARE AGAINST TRADE

This section deals with the three principal measures of maritime warfare against trade: the control and capture of contraband, the imposition of blockade, and the capture or destruction of enemy property found at sea.<sup>17</sup>

## 631 CONTRABAND

a. **CHARACTER.** Contraband consists of all goods which are destined for an enemy and which may be susceptible of use in war. Contraband goods are divided into two categories: absolute and conditional. Absolute contraband consists of goods which are used primarily for war (or goods whose very character makes them destined to be used in war). Conditional contraband consists of goods which are equally susceptible of use either for peaceful or for warlike purposes.<sup>18</sup>

b. **BELLIGERENT CONTRABAND DECLARATIONS.** Upon the initiation of armed conflict, belligerents may declare contraband lists, setting forth therein the classification of articles to be regarded as contraband as well

as the distinction to be made between goods considered as absolute contraband and goods considered as conditional contraband. The precise nature of a belligerent's contraband list may vary according to the particular circumstances of the armed conflict.<sup>19</sup>

### C. CARRIAGE OF CONTRABAND

(1) *Absolute Contraband.* Goods consisting of absolute contraband are liable to capture if their destination is the territory belonging to or occupied by an enemy, or the armed forces of an enemy. It is immaterial whether the carriage of such goods is direct, or involves transshipment, or transport overland.<sup>20</sup> In the case of absolute contraband a destination of territory belonging to or occupied by an enemy, or the armed forces of an enemy, is presumed to exist in the following circumstances: when the transporting vessel is to call at an enemy port before arriving at a neutral port for which the goods are documented; when goods are documented to a neutral port serving as a port of transit to an enemy, even though the goods are consigned to a neutral; and when goods are consigned "to order," or to an unnamed consignee, but destined to a neutral state in the vicinity of enemy territory.<sup>21</sup>

(2) *Conditional Contraband.* Goods consisting of conditional contraband are liable to capture if destined for the use of an enemy government or its armed forces. It is immaterial whether the carriage of such goods is direct, or involves transshipment, or transport overland.<sup>22</sup>

d. **LIABILITY TO CAPTURE.** Vessels and aircraft carrying goods liable to capture as absolute or conditional contraband may be captured (see subparagraph 503d (1)).<sup>23</sup> However, liability to capture for carriage of contraband ceases once a vessel or aircraft has deposited the contraband goods.<sup>24</sup>

e. **EXCEPTIONS TO CONTRABAND.** The following goods are exempt from capture as contraband:

1. Free articles, i. e., goods not susceptible of use in war.<sup>25</sup>
2. Articles intended exclusively for the treatment of wounded and sick members of the armed forces, and for the prevention of disease. The particulars concerning the carriage of such articles must be transmitted to the adverse state and approved by it.
3. Articles provided for by a convention (treaty)<sup>26</sup> or by special arrangement as between the belligerents.

### 632 BLOCKADE<sup>27</sup>

a. **DEFINITION.** A blockade is a belligerent operation intended to prevent vessels of all states from entering or leaving specified coastal areas which are under the sovereignty, under the occupation, or under the control of an enemy. Such areas may include ports and harbors, the entire coastline, or parts of it.<sup>28</sup> International law does not prohibit the extension of a blockade by sea to include the air space above those portions of the high seas in which the blockading forces are operating.<sup>29</sup>

b. **ESTABLISHMENT.** In order to be binding a blockade must be established by the belligerent government concerned.<sup>30</sup> A blockade may be declared

either by the government of the blockading state or by the commander of the blockading force acting on behalf of his government. The declaration should include the date the blockade begins, the geographical limits of the blockade, and the period granted neutral vessels and aircraft to leave the blockaded area.<sup>31</sup>

c. NOTIFICATION. It is customary for the blockade to be notified in a suitable manner to the governments of all states. The commander of the blockading force usually makes notification to local authorities in the blockaded area.<sup>32</sup>

d. EFFECTIVENESS. A blockade, in order to be binding, must be effective. This means that a blockade must be maintained by a force sufficient to render ingress and egress to or from the blockaded area dangerous.<sup>33</sup>

e. LIMITS OF BLOCKADE. A blockade must not bar access to or departure from neutral ports or coasts.<sup>34</sup>

f. APPLICATION OF BLOCKADE. A blockade must be applied equally (impartially) to the vessels and aircraft of all states.<sup>35</sup>

g. BREACH OF BLOCKADE

(1) *Knowledge of the existence of a blockade* is essential to the offenses of breach of blockade and attempted breach of blockade; presumed knowledge is sufficient.<sup>36</sup>

(2) *Breach of blockade* is the passage of a vessel or aircraft through the blockade.

(3) *Attempted breach of blockade* occurs from the time a vessel or aircraft leaves a port or air take-off point with the intent of evading the blockade. It is immaterial that the vessel or aircraft is at the time of visit bound to a neutral port or airfield, if its ultimate destination is the blockaded area, or if the goods found in its cargo are to be transshipped through the blockaded area. There is a presumption of attempted breach of blockade where vessels and aircraft are bound to a neutral port or airfield serving as a point of transit to the blockaded area.<sup>37</sup>

(4) *Capture*. Vessels and aircraft are liable to capture for breach of blockade and attempted breach of blockade (see subparagraph 503d2). The liability of a blockade runner to capture begins and terminates with her voyage or flight. If a vessel or aircraft has succeeded in escaping from a blockaded area, liability to capture continues until the completion of the voyage or flight.<sup>38</sup>

h. SPECIAL PRIVILEGES

1. Neutral warships and neutral military aircraft have no positive right of entry to a blockaded area. However, they may be allowed to enter or leave a blockaded area as a matter of courtesy. Permission to visit a blockaded area is subject to any conditions, such as the length of stay, that the senior officer of the blockading force may deem necessary and expedient.

2. Neutral vessels and aircraft in urgent distress may be permitted to

enter a blockaded area, and subsequently to leave it, under conditions prescribed by the commander to the blockading force.

### 633 ENEMY PROPERTY

a. **ENEMY CHARACTER OF GOODS.** The character of goods found on board a merchant vessel or aircraft is enemy if the commercial domicile of the owner is in territory belonging to or occupied by an enemy belligerent.<sup>39</sup> All goods found on board enemy vessels or aircraft are presumed to be of enemy character in the absence of proof of their neutral character.

b. **ENEMY GOODS IN TRANSIT.** Notwithstanding any transfer of title to enemy goods already at sea, these goods retain their enemy character.

c. **CAPTURE OF ENEMY GOODS.** Goods possessing enemy character may be captured. However, enemy goods, contraband excepted, found in neutral vessels or aircraft, normally are not liable to capture.<sup>40</sup>

### 640 STRATAGEMS AND TREACHERY<sup>41</sup>

a. **STRATAGEMS, OR RUSES OF WAR,** are legally permitted.<sup>42</sup> In particular, according to custom it is permissible for a belligerent warship to use false colors and to disguise her outward appearance in other ways in order to deceive an enemy, provided that prior to going into action such warship shows her true colors.<sup>43</sup>

b. **ACTS OF TREACHERY,** whether used to kill, wound, or otherwise obtain an advantage over an enemy, are legally forbidden.<sup>44</sup>

### 641 IMPROPER USE OF DISTINCTIVE EMBLEMS

The use of the red cross and other equivalent distinctive emblems must be limited to the indication and protection of hospital ships and other authorized medical craft, medical aircraft, medical units and establishments, and medical personnel and materials. It is forbidden to use ships, aircraft and establishments protected by the distinctive emblem of the red cross or other equivalent distinctive emblems, for any military purpose.<sup>45</sup>

## NOTES FOR CHAPTER 6

<sup>2</sup> Unless restricted by customary or conventional international law, belligerents legally are permitted to use any means in conducting hostilities. Article 22 of the Regulations annexed to Hague Convention No. IV (1907), Respecting the Laws and Customs of War on Land, states: "The right of belligerents to adopt means of injuring the enemy is not unlimited." This article, which refers to weapons and methods of warfare, is merely an affirmation that the means of warfare are restricted by rules of conventional (treaty) and customary international law. Although immediately directed to the conduct of land warfare, the principle embodied in Article 22 of the Hague Regulations is applicable equally to the conduct of naval warfare.

Article 23 (e) of the Regulations annexed to Hague Convention No. IV (1907) forbids belligerents: "To employ arms, projectiles, or material calculated to cause unnecessary suffering." This provision is the application to weapons of the general rule, or principle, of humanity which prohibits the employment of any kind or degree of force not necessary for the purpose

of the war, i. e., for the partial or complete submission of the enemy with the least possible expenditure of time, life, and physical resources (see paragraph 22ob).

However, the rule forbidding the use of weapons calculated to cause unnecessary suffering does not extend to the use of explosives contained in projectiles, mines, rockets, hand grenades, and the like, where a military purpose is apparent and suffering, though unavoidable, is incidental to the purpose of the war. The rule does apply to the use of irregular-shaped bullets, the use of projectiles filled with glass, the use of any substance on bullets that would tend unnecessarily to inflame a wound inflicted by them, and to the scoring of the surface or the filing off of the ends of the hard cases of bullets.

Finally, the principle of humanity places limitations upon the possible use to which weapons, otherwise lawful, may be put. Any weapon may serve an unlawful purpose, e. g., if used to cause unnecessary suffering or devastation not justified by military necessity. Hence, a distinction must be drawn between the legality of a weapon, irrespective of its possible use, and the legal limitations placed upon the possible use of any weapon.

<sup>3</sup> The qualifications contained in Articles 2 and 3 of Hague Convention No. VIII (1907) were sufficient to create, from the very start, serious doubt as to whether the spirit of this Convention as an instrument for providing for the security of peaceful shipping would ever in practice be observed. The experiences of World Wars I and II served to confirm the validity of these doubts. Still further, it is questionable whether or not these provisions (which apply specifically to torpedoes and to automatic, and anchored automatic, contact mines) can be considered as applicable to the newer types of mines (magnetic and acoustic) or to the use of aircraft for mine laying.

<sup>4</sup> It is equally permissible to use weapons employing fire, such as tracer ammunition, flame throwers and other incendiary instruments and projectiles.

<sup>5</sup> The most important of these treaties is the Protocol "for the prohibition of the use in war of asphyxiating, poisonous, or other gases, and of bacteriological methods of warfare" signed at Geneva 17 June 1925, on behalf of the United States and many other states. Although ratified or adhered to by a considerable number of the signatories, and now effective between them, the 1925 Protocol of Geneva was never ratified by the United States. The operative provisions of the Protocol obligate the contracting states not to use in war "asphyxiating, poisonous or other gases, and . . . all analogous liquids, materials, or devices" and to extend this prohibition "to the use of bacteriological methods of warfare." Great Britain, France, the Soviet Union, and a number of other states signed subject to the reservations that the Protocol was to be binding only with respect to those states which ratified it and would cease to be binding with respect to those ratifying states which, in time of war, failed to respect the prohibitions contained in the Protocol. It should be noted that the 1925 Protocol of Geneva forbids only the *use in warfare* of gases and bacteria, not the manufacture of such weapons.

<sup>6</sup> The United States has never used bacteriological weapons and has not used poisonous gases since World War I. During World War II President Roosevelt made the following statement in response to reports that one or more of the Axis Powers "were seriously contemplating use of poisonous or noxious gases or other inhumane devices of warfare":

"Use of such weapons has been outlawed by the general opinion of civilized mankind.

This country has not used them, and I hope that we never will be compelled to use them. I state categorically that we shall under no circumstances resort to the use of such weapons unless they are first used by our enemies." *U. S. Naval War College, International Law Documents, 1942 (1943)*, p. 85.

<sup>7</sup> Despite the frequent condemnation by states of poisonous gases and bacteriological weapons and the equally frequent claim that the use of such weapons must of necessity violate the prohibition against using weapons calculated to cause unnecessary suffering (see Note 2 above) it is difficult to hold that the use of these weapons is prohibited to all states according to customary international law. At the same time, it does seem correct to emphasize that to the extent that these weapons are used either directly upon the noncombatant population or in such circumstances as to cause unnecessary suffering their employment must be considered as unlawful.

<sup>8</sup> See Notes 5 and 6 above. Poisonous gases and bacteriological weapons may be used only if and when authorized by the President.

<sup>9</sup> The employment, however, of nuclear weapons is subject to the basic principles stated in Section 220 and Article 221. Also, see Articles 621 and 622, as well as Note 2 above. Nuclear weapons may be used by United States forces only if and when directed by the President.

<sup>10</sup> The general limitations on bombardment enumerated in paragraphs 621a and d are applications to bombardment of the basic principle of humanity (see paragraph 220b).

<sup>11</sup> The general limitations on bombardment enumerated in subparagraphs 621b and c are applications to bombardment of the customary rule distinguishing between combatants and noncombatants (see Article 221).

<sup>12</sup> Articles 1 and 2 of Hague Convention No. IX (1907) Respecting Bombardment by Naval Forces in Time of War states:

“Article 1. The bombardment by naval forces of undefended ports, towns, villages, dwellings, or buildings is forbidden.

A place cannot be bombarded solely because automatic submarine contact mines are anchored off the harbor.

Article 2. Military works, military or naval establishments, depots of arms or war materiel, workshops or plants which could be utilized for the needs of the hostile fleet or army, and the ships of war in the harbour, are not, however, included in this prohibition. The commander of a naval force may destroy them with artillery, after a summons followed by a reasonable time of waiting, if all other means are impossible, and when the local authorities have not themselves destroyed them within the time fixed.

He incurs no responsibility for any unavoidable damage which may be caused by a bombardment under such circumstances.

If for military reasons immediate action is necessary, and no delay can be allowed the enemy, it is understood that the prohibition to bombard the undefended town holds good, as in the case given in paragraph 1, and that the commander shall take all due measures in order that the town may suffer as little harm as possible.”

The provisions of Article 2 of Hague Convention No. IX (1907) are obviously inapplicable where the “undefended” locality is open to immediate entry by own or allied forces.

“An open town properly so-called is one which is so completely undefended that the enemy may enter and take possession. Such a town is exempted from lawful bombardment, for in these circumstances bombardment would be contrary to the fundamental principle forbidding destruction superfluous to military requirements. This rule does not apply to a town behind the front line, for it cannot properly be said to be either open or undefended, and the enemy, being unable to take possession of its military resources, must be allowed to attempt their destruction by bombardment from the air. Such bombardment is, however (apart from the question of reprisals), strictly limited to military objectives. Therefore, a town without military objectives would be exempt.” R. Y. Jennings, “Open Towns,” Vol. XXII, *British Yearbook of International Law* (1945), pp. 263-4.

<sup>13</sup> See Articles 19 and 21 of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick. Articles 42, 43, and 44 of this Convention deal with the distinctive emblem over medical establishments and units entitled to protection.

“Article 19. Fixed establishments and mobile medical units of the Medical Service may in no circumstances be attacked, but shall at all times be respected and protected by the Parties to the conflict. Should they fall into the hands of the adverse Party, their personnel shall be free to pursue their duties, as long as the capturing Power has not itself ensured the necessary care of the wounded and sick found in such establishments and units.

The responsible authorities shall ensure that the said medical establishments and units are, as far as possible, situated in such a manner that attacks against military objectives cannot imperil their safety.

Article 21. The protection to which fixed establishments and mobile medical units of the Medical Service are entitled shall not cease unless they are used to commit, outside their

humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after a due warning has been given, naming, in all appropriate cases, a reasonable time limit, and after such warning has remained unheeded."

<sup>14</sup> Article 23 of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field provides for the establishment through agreement of the Parties concerned of hospital zones and localities. A similar provision, though extended to include so-called "safety zones," is included in Article 14 of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War. In the annex to each of these conventions, draft agreements relating to the establishment of these zones are provided.

<sup>15</sup> Article 5 of Hague Convention No. IX (1907) Respecting Bombardment by Naval Forces in Time of War states:

"Article 5. In bombardments by naval forces all the necessary measures must be taken by the commander to spare as far as possible sacred edifices, buildings used for artistic, scientific, or charitable purposes, historic monuments, hospitals, and places where the sick or wounded are collected, on the understanding that they are not used at the same time for military purposes.

It is the duty of the inhabitants to indicate such monuments, edifices, or places by visible signs, which shall consist of large stiff rectangular panels divided diagonally into two coloured triangular portions, the upper portion black, the lower portion white."

<sup>16</sup> Article 6 of Hague Convention No. IX (1907) Respecting Bombardment by Naval Forces in Time of War states:

"Article VI. If the military situation permits, the commander of the attacking naval force, before commencing the bombardment, must do his utmost to warn the authorities."

Article 27 of the regulations annexed to Hague Convention No. IV (1907) Respecting the Laws and Customs of War on Land states:

"Article XXVI. The officer in command of an attacking force must, before commencing the bombardment, except in cases of assault, do all in his power to warn the authorities."

<sup>17</sup> The principal aim of maritime warfare against trade is to *shut off* the trade of an enemy; that is, to prevent all imports to or exports from enemy territory by sea or by air over the sea, without regard to whether this trade is carried in enemy or neutral vessels or aircraft.

<sup>18</sup> "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*. . . although belligerents must be free to take into consideration the circumstances of the particular war, as long as the distinction between absolute and conditional contraband is upheld it ought not to be left altogether to their discretion to declare any articles they like to be absolute contraband. The test to be applied is whether, in the special circumstances of a particular war, or considering the development of the means used in making war, the article concerned is by its character destined to be made use of for military, naval, or air-fleet purposes. If not, it ought 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." Oppenheim-Lauterpacht, *International Law*, Vol. II (7th ed., 1952), pp. 801-3.

According to the traditional law, the specific meaning attached to the concept of "hostile (or enemy) destination" depends upon the nature or character of goods carried. Indeed, the real significance of the distinction made between absolute and conditional contraband becomes apparent only upon considering the destination required of either category in order to justify belligerent capture. In the case of absolute contraband, capture is justified if the goods are destined to territory belonging to or occupied by an enemy, or the armed forces of an enemy. The nature of absolute contraband makes it highly probable that a belligerent will appropriate such goods as long as they are anywhere within his jurisdiction. In the case of conditional contraband, capture is justified if the goods are destined for the use of an enemy government or its armed forces. The ambiguous character of conditional contraband is resolved when it is established that such goods are directly intended for military use by an enemy. Finally, goods which are not susceptible of use in war, i. e., so called "free goods," are not liable to capture by a belligerent.

<sup>19</sup> In view of the practices of belligerents during World Wars I and II it is difficult to estimate the extent to which the distinctions forming the basis of the traditional law of contraband, discussed in paragraph 631a and Note 18 above, still may be considered as valid. The categories of goods which are not susceptible of use in war are now extremely limited. During World Wars I and II, the practice of the belligerents was to treat as conditional contraband almost all goods which were formerly regarded as free. In addition, and much more important, the distinction between absolute and conditional contraband, although formally adhered to by most of the belligerents, came to have little, if any, real significance. The extensive control exercised by belligerents over all imports did not allow, in practice, a clear distinction to be made between goods destined to an enemy government, or its armed forces, and goods destined to the civilian population. The principal result of this extensive control exercised by belligerents over all imports was to consider goods as absolute contraband which had formerly been considered only as conditional contraband. The test of enemy destination, formerly applied only to a restricted number of articles constituting absolute contraband, came to be applied to all goods susceptible of use in war. Thus, one writer summarizes this experience of World Wars I and II as follows:

"The distinction between absolute and conditional contraband dates from the time when armies were small, so that levies . . . did not cause a reorientation of the belligerent's national life. Major wars of the present century are waged by nations in arms, with mobilized manpower and pooled and rationed resources. Imports are controlled from the moment they land, even when they are not licensed and controlled in advance; and no clear distinction between destination of goods to military and to the civilian elements is maintainable. That distinction may still be important in localized conflicts; but its general importance is likely to become increasingly merely a *point de depart* for the drafting of more efficient belligerent regulations. By 1941 the British Crown was arguing before the prize court that it was not obliged to issue lists at all, and that, in relation to a totalitarian enemy, the line between absolute and conditional contraband was in any case indistinguishable." Julius Stone, *Legal Controls of International Conflict* (1954), pp. 481-2.

It is in any event clear that a belligerent has the right to draft its contraband regulations in accordance with the particular circumstances in which an armed conflict is being conducted.

<sup>20</sup> "'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." Julius Stone, *Legal Controls of International Conflict* (1954), p. 486.

The principles underlying the so-called doctrines of "continuous voyage" and "continuous transport" were applied by prize courts in both World Wars I and II.

<sup>21</sup> The circumstances creating a presumption of ultimate enemy destination enumerated in subparagraphs 631c 1 and 2 are of concern to operating naval commanders 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 an operating naval commander need not be concerned.

<sup>22</sup> See Note 20 above.

<sup>23</sup> There are a number of methods available to belligerents for the control of contraband trade, in addition to the belligerent right to capture vessels and aircraft found carrying contraband. In World Wars I and II the two major techniques of contraband control, used principally by Great Britain, were "navicerting" and "rationing."

"The term *navicert* (or *letters of assurance*) is applied to documents issued by officials of a belligerent state, indicating that the cargo of a vessel sailing from a neutral port corresponds to the manifest. Its purpose is to serve as a 'sort of commercial passport,' to facilitate the passage of the vessel and avoid the necessity of search of the cargo by the belligerent, but it does not convey any guaranty that the vessel and cargo will be free from seizure or interference." Hackworth, *Digest of International Law*, Vol. 7 (1943), p. 212.

". . . it is clear that *in its origin* a navicert is simply a facility which the belligerent is not in any way obliged to afford and the grant or refusal of which in any given case he cannot be legally obliged to justify. Since the absence of a navicert is not in itself a ground for seizure or condemnation, and only entails the exercise of a contraband control which the belligerent in any case has an absolute legal right to exercise, the grant or refusal of any certificate on the basis of which the belligerent is prepared to forego or modify his strict rights, must legally be within his absolute discretion." G. G. Fitzmaurice, "Some Aspects of Modern Contraband Control and the Law of Prize," *British Yearbook of International Law*, Vol. 22 (1945), p. 84.

In practice a vessel covered by a navicert, in the absence of later suspicious circumstances, was normally considered free from capture. The important feature of the navicert system was that cargo examination was conducted in port before a voyage started.

The technique of contraband control termed "rationing" has been explained as follows:

"The idea underlying this process (i. e., rationing) expressed in a non-legal manner, is that it is only by limiting neutrals who have land communications with enemy territory to their own strict necessities in the matter of overseas imports that it is possible to ensure that no substantial proportion of these will reach the enemy. Failing that, however innocent many shipments may appear, or indeed be in themselves at the time, it is certain that some considerable part of them, or of goods processed or manufactured from them, will find its way to the enemy. Put in legal terms, the foundation of a rationing system is that, where a neutral country is found to be importing greater quantities of any commodity on the contraband list than can be accounted for by its reasonable domestic needs, having regard to all the circumstances, including manufacture for export to innocent destination, a presumption arises that the surplus is going to the enemy." G. G. Fitzmaurice, "Some Aspects of Modern Contraband Control and The Law of Prize," *British Yearbook of International Law*, Vol. XXII (1945), p. 89.

A system of rationing may either be the subject of an agreement between a neutral state and a belligerent, or may be imposed on a neutral by a belligerent. In practice, rationing systems have been instituted through agreement between neutral and belligerent. Rationing agreements usually fix the annual amount of each rationed commodity to be imported and the specific procedure to be followed for licensing the agreed shipments. Shipments of commodities to a neutral state in excess of a quota agreed on by neutral and belligerent, or imposed by a belligerent,

erent on a neutral, have been considered as creating the presumption of ultimate enemy destination and hence as justifying capture. However, before a British prize court this presumption may be rebutted. In neither World War were goods condemned by prize courts on "statistical evidence" alone.

<sup>24</sup> As an exception, British and American practices have allowed for the capture of a vessel which has already deposited contraband goods, if such goods were carried under simulated or false papers.

<sup>25</sup> See Notes 18 and 19 above.

<sup>26</sup> The provisions of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Articles 23 and 59, cover the types of articles contemplated in this paragraph.

<sup>27</sup> Article 632 refers to blockade as a normal measure of naval warfare between belligerents. A blockade, in the sense of this article, should not be confused with a so-called "pacific blockade."

<sup>28</sup> The traditional rules governing the operation of blockade in naval warfare are, for the most part, customary in character. They received their definitive form during the nineteenth century. Although the general principle underlying the law of blockade has been defined as the right of a belligerent possessing effective command of the sea

" . . . to deprive his opponent of the use thereof for the purpose either of navigation by his own vessels or of conveying on neutral vessels such goods as are destined to or originate from him." (Oppenheim-Lauterpacht, *International Law*, Vol. II (7th ed., 1952), pp. 796-7.) the traditional rules governing the operation of blockade tended in fact to represent a compromise between the above-mentioned claim by belligerents and the desire of neutral states to suffer the least possible interference in their trade with both belligerent and neutral states. The result of these conflicting claims was a system of rules designed to effect only a limited interference with neutral trade. In practice, these rules were at once the product of, and intended to regulate, inshore ("close-in") blockades; that is blockades maintained by a line of vessels stationed in the immediate vicinity of the blockaded coast.

Recent developments in the weapons for waging warfare at sea have now rendered the inshore blockade exceedingly difficult and unlikely, save in exceptional circumstances (e. g., local or limited war). In addition, the increasing importance of measures directed against an enemy's economy has led to a strong emphasis by belligerents upon the complete abolition of an enemy's seaborne trade, an aim which normally is not furthered substantially by the establishment of blockades in strict conformity with the traditional rules. Hence, during World Wars I and II several of the major belligerents resorted to methods which, though frequently referred to as measures of blockade, could not easily be reconciled with the traditional rules governing blockade. In particular, the so-called "long distance" blockades of Germany by Great Britain departed in a number of respects from these traditional rules. The British Government chose to base the legality of these so-called "long distance" blockades upon the belligerent right of retaliation against illegitimate acts of warfare rather than upon the right to establish blockade.

<sup>29</sup> However, the practical difficulties of visit and search of aircraft suspected of breach of blockade (e. g., the absence of suitable landing places under belligerent control, etc.) may preclude such extension by analogy. See Chapter 5, Note 16, for application of U. S. prize law to aircraft. The commander of blockading forces should request instructions from higher authority regarding enforcement procedures to be followed in the case of a blockade extended to include the air space.

<sup>30</sup> A blockade also may be ordered by the Security Council of the United Nations pursuant to Article 42 of the Charter which states:

"Should the Security Council consider that measures provided for in Article 41 would be inadequate, or have proved to be inadequate, it may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security. Such action

may include demonstrations, blockade, and other other operations by air, sea or land forces of members of the United Nations.”

It is not possible to say whether, or to what extent, a United Nations blockade would be governed by the traditional rules.

<sup>31</sup> A blockade shall not be established by naval forces of the United States unless directed by the President. Although it is the customary practice of states 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.

<sup>32</sup> Because the requirement of knowledge of the existence of a blockade is an essential element of the offenses of breach of blockade and attempted breach of blockade (see paragraph 632g), neutral vessels (and aircraft) are always entitled to notification. However, the specific form such notification may take is not material.

<sup>33</sup> The customary requirement that a blockade must be effective in order to be binding is intended to prevent a so-called “paper blockade”; that is, a declaration of a blockade by a belligerent that does not possess the power necessary to render the blockade effective. Originally intended to apply to the relatively restricted areas covered by (close-in) blockades, the requirement of effectiveness remains applicable to blockading forces that may operate at considerable distances from an enemy’s coasts. In particular, a belligerent cannot argue that the necessity of patrolling large areas excuses it from the requirement of effectively maintaining the blockade.

The requirement of effectiveness does not preclude the temporary absence of the blockading force, if such absence is due to stress of weather or to some reason connected with the blockade, e. g., the chase of a blockade runner. Furthermore, a blockade ceases to be effective, and hence ceases to be binding, if the blockading force is driven away by the enemy, or if the blockading force leaves the blockaded area for reasons other than those stated above.

There is no requirement that a blockade must prevent access to every portion of an enemy’s coast in order to be effective. Nor need a blockade cover every possible approach to the ports of the blockaded coast.

“‘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.” Julius Stone, *Legal Controls of International Conflict* (1954), p. 496.

<sup>34</sup> The rule that a blockade must not bar access to neutral ports and coasts should be interpreted to mean that a blockade must not prevent trade and communication to or from neutral ports or coasts, provided that such trade and communication is neither destined to nor originates from the blockaded area (see subparagraph 632g (3)). It is a moot point to what extent conventions providing for free navigation on international rivers or through international canals have been respected by blockading states. The practice of states in this matter is far from clear (see paragraph 412b).

<sup>35</sup> The requirement that a belligerent must apply a blockade impartially to the vessels and aircraft of all states is intended to prevent measures of discrimination by the blockading belligerent in favor of or against the vessels and aircraft of particular states, including its own or allied vessels and aircraft.

<sup>36</sup> A presumption of knowledge should be held to exist once a blockade has been declared and notified.

<sup>37</sup> See Note 21 above.

<sup>38</sup> See subparagraphs 502b2 and 3 for acts which when performed by a blockade runner render her liable to forcible measures.

<sup>39</sup> "Under the Anglo-American practice the word 'enemy' in this connection (i. e., as used to determine the character of goods or property) has a special meaning . . . It does not connote either enemy nationality or enemy sympathy. The test is commercial residence or 'domicile,' which means that all those must be treated as enemies who carry on their business in the enemy country or in territory under enemy control. The reason for the rule is that the enemy economy is enriched by all trade that is carried on in his territory, and every profitable transaction increases his resources for waging war. Here, as elsewhere, the basic principle is that power at sea may lawfully be used to prevent any commerce which may assist the enemy in carrying on the war." H. A. Smith, *The Law and Custom of the Sea* (2nd ed., 1950), p. 128.

Although the enemy character of goods depends upon the enemy character of their owners, there are no universally accepted rules by which the enemy character of individuals may be determined. British and American practice has been to regard the commercial domicile of the owner as the criterion for determining enemy character, but many states have considered the nationality of the owner, irrespective of resident, to be the proper test for determining enemy character.

<sup>40</sup> Article 2 of the Declaration of Paris, 1856, generally considered as expressive of a rule of customary law, states: "The neutral flag covers enemy goods with the exception of contraband of war."

This exception to the seizure of enemy goods becomes less significant in the light of recent developments in the law of contraband and the law of blockade (see Articles 631 through 633).

<sup>41</sup> The following provisions of the Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention No. IV (1907), are considered equally applicable to the conduct of naval warfare.

"Article 23, para. b. In addition to the prohibitions provided by special conventions, it is especially forbidden to kill or wound treacherously individuals belonging to the hostile nation or army.

"Article 24. Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible."

<sup>42</sup> Legally permissible ruses include, but are not limited to, the following: surprises, feigned attacks; ambushes, retreats, or flights; simulation of quiet and inactivity, use of small units to simulate large units; transmittal of false or misleading messages or deception of the enemy by false instructions; utilization of the enemy's signals; deliberate planting of false information; and use of dummy ships, aircraft, airfields, and other installations.

<sup>43</sup> "The ruse which is of most practical importance in naval warfare is the use of the false flag. It now seems to be fairly well established by the custom of the sea that a ship is justified in wearing false colors for the purpose of deceiving the enemy, provided that she goes into action under her true colors. The celebrated German cruiser *Emden* made use of this stratagem in 1914 when she entered the harbour of Penang under Japanese colors, hoisted her proper ensign, and then torpedoed a Russian cruiser lying at anchor. It is equally permissible for a warship to disguise her outward appearance in other ways and even to pose as a merchant ship, provided that she hoists the naval ensign before opening fire. Merchant vessels themselves are also at liberty to deceive enemy cruisers in this way." H. A. Smith, *The Law and Custom of the Sea* (2nd ed., 1950), p. 91.

On the other hand, the attitude and practices of belligerents during World Wars I and II appear to indicate that belligerent military aircraft are not considered as permitted, by analogy with warships, to use false markings in order to deceive an enemy.

<sup>44</sup> It is, for example, an act of treachery to make improper use of a flag of truce.

<sup>45</sup> See Articles 30, 34, 35, 41, and 45 of the 1949 Geneva Convention For the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea.