International Law and Naval Operations

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IN THE OVER TWO HUNDRED YEARS from American commerce raiding in the Revolutionary War through two World Wars, the Korean and Vietnam wars, and a host of crises along the way, to the Persian Gulf conflict, peacekeeping, and peace enforcement, there has been a continuous evolution in the international law that governs naval operations. Equally changed has been the role of naval officers in applying oceans law and the rules of naval warfare in carrying out the mission of the command. This paper explores that evolution and the challenges that commanders and their operational lawyers will face in the 21st century.

The Early Years and Global Wars

Naval operations have been governed by international law since the early days of the Republic. Soon after the Continental Congress authorized fitting out armed vessels to disrupt British trade and reinforcement, the Colonies established Admiralty and Maritime courts to adjudicate prizes.\(^1\) American captains of warships and privateers were admonished to "respect the rights of neutrality" and "not to commit any such Violation of the Laws of Nations."\(^2\) The first Navy Regulations enjoined a commanding officer to protect and defend his convoy in peace and war.\(^3\) In the War of 1812, frigate captains...
employed the traditional \textit{ruse de guerre} in boarding merchant ships to suppress trade licensed by the enemy.\footnote{4} President Lincoln’s blockade of Confederate ports satisfied the criterion of effectiveness (ingress or egress dangerous) under international law.\footnote{5} The 1870 Navy Regulations directed commanders in chief to strictly observe the laws of neutrality, whether belligerent or neutral, and to comply with the laws of blockade.\footnote{6}

For most of the 19th century, sailor-diplomats, in distant waters and with no means to consult with Washington, were practicing and shaping international law.\footnote{7} Commanders combined naval force with diplomacy in dealing with the Barbary Powers, negotiating treaties with Algiers and Turkey, and facilitating early trade with China. In one of the great historical events of that era, Commodore Matthew Perry, acting alone, concluded a treaty in 1854 which opened Japan to U.S. trade. This was followed by Commodore Robert W. Shufeldt’s 1882 treaty opening Korea. But with the advent of the telephone cable and worldwide communications, a naval officer’s wide latitude to determine foreign policy declined,\footnote{8} but not necessarily his ability to affect war and peace in crisis situations at sea.

Ashore at the Naval War College, then Captain Charles H. Stockton wrote the \textit{Naval War Code of 1900} pursuant to tasking by the Secretary of the Navy.\footnote{9} After a thorough critique by international lawyers, the code, like the Civil War Lieber Code regulating land warfare, strongly influenced the codification of the law of armed conflict in the Hague Conventions of 1907. Professor John Bassett Moore instituted the \textit{International Law Studies} ("Blue Book") series in 1901,\footnote{10} while Professor George Grafton Wilson from Brown University lectured at the War College from 1900 to 1937 and edited over seven thousand pages of “Blue Books,” “every one of which was intended to provide the naval officer at home and alone in foreign ports with precise answers to problems he might face.”\footnote{11} Thus, with the Hague Conventions, Geneva Protocol of 1925, London Protocol of 1936, and the various naval treaties and conferences in the 1930s, the 20th century marked a new partnership of statesmen, naval officers, and international lawyers working together to develop rules of conduct that govern naval operations. This partnership has continued to this day in the variety of conferences and conventions that followed World War II. These included the Geneva Conventions of 1949\footnote{12} and their Protocols Additional;\footnote{13} the Territorial Sea and Contiguous Zone, High Seas, Fisheries, and Continental Shelf Conventions of 1958;\footnote{14} the 1972 US/USSR Incidents at Sea Agreement;\footnote{15} and the 1982 United Nations Convention on the Law of the Sea.\footnote{16} Naval officers have been active participants in all stages of the deliberations and negotiations.
In the actual practice of international law at sea, the global nature of two world wars with powerful belligerents as adversaries stressed the customary and Hague laws of neutrality, particularly contraband, enemy character and blockade, and the rules protecting merchant ships. However, the fundamental principles of a balance between necessity, proportionality and humanity were reaffirmed at Nuremberg, even as it was obvious that the civilian population, and the wounded, sick, shipwrecked, and prisoners of war needed additional formal protection.

The Cold War and Era of Détente

The post-World War II era began with the ratification of the United Nations Charter, whose Articles 51 and 52 recognize the inherent right of self-defense and the right to establish regional organizations to deal with the maintenance of international peace and security. In peacetime operations at sea, the U.S. Navy was guided by both the customary three-mile limit of the territorial sea with the right of innocent passage, and the traditional high seas freedoms that included routine navigation, fleet exercises, naval patrols, flight operations, surveillance, intelligence gathering, and weapon firing, all with due regard for the rights and safety of others. But peace was elusive and the Cold War period from 1945 to 1990 saw at least ten armed conflicts at sea, albeit localized, that involved an application of the laws of naval warfare regarding blockade, quarantine, maritime exclusion zone, mining, visit and search, convoy protection, and targeting merchant ships and neutrals.

The Navy recognized a need for formal guidance and issued The Law of Naval Warfare (NWIP 10-2) in 1955, based exclusively on the Hague and Geneva Conventions and the customary law of war. The Navy also recognized the need for a cadre of international law specialists within the community of naval lawyers, which in 1968 became the Judge Advocate General (JAG) Corps. International law, while continually evolving, was becoming increasingly complex. No longer could the operational commander cope with the myriad of issues involving overseas base agreements, foreign claims, and treaty provisions, as well as the peacetime law of the sea and the rules of naval warfare, without specialized legal advice. During the 1950s and 60s, lawyers from the International Law Division of Navy JAG worked closely with the Politico-Military Branch of the Office of the Chief of Naval Operations to resolve legal issues. Navy lawyers were key players on the delegation to the 1958 Geneva Conventions, and the principal adviser on
national security interests was a vice admiral who was a former Judge Advocate General of the Navy.

Following the failure of the 1960 Conference on the Law of the Sea to reach agreement on the breadth of the territorial sea and the contiguous fishing zone, technology and the rising demand for ocean resources dramatically intensified the race to use the world’s oceans. Navy lawyers were soon immersed in preparations for another law of the sea conference with an ever-expanding community of nations. Emerging and unsettled issues in coastal state jurisdiction, fisheries management, economic zone control, high seas rights, seabed exploitation, environmental protection, scientific research, and dispute settlement had to be reconciled with U.S. security and economic interests. For naval operations the critical challenges were to limit the breadth of the territorial sea to no greater than twelve miles, ensure passage through international straits and archipelagic waters, and maintain traditional high seas freedoms, especially in a new exclusive economic zone. The mobility and presence of naval forces deployed worldwide were, and still are, a cornerstone of U.S. foreign policy—critical to reassuring allies and deterring potential enemies, responding in crisis situations, and carrying out treaty obligations. Navy lawyers participated in all phases of the lengthy negotiations and can rightly claim success in satisfying national security imperatives. Even now, they are in the forefront of efforts to ratify the 1982 Convention, since the deep seabed provisions have been reformed and the U.S. has expressed an intention to become a party.

Along with the law of the sea negotiations in this era of détente were deliberations on the Protocols Additional to the 1949 Geneva Conventions, SALT I, chemical warfare, nuclear testing, and incidents at sea with the Soviet Union, all of which raised issues that affected naval operations and required legal advice. For example, in the Incidents at Sea negotiations with the Soviet Union, a critical issue was whether the U.S. should accede to the Soviet demand that a fixed distance limit the approach of ships and aircraft. The Joint Staff convinced the Office of the Secretary of Defense (OSD) and the State Department that fixed distances would undermine the U.S. position on the freedom and mobility of its naval forces on the high seas, be inconsistent with the U.S. position against limiting warship access to the Indian Ocean under a “Zone of Peace” proposal, interfere with essential intelligence gathering, and generate endless arguments over violations of some arbitrary and meaningless fixed distance. Similarly, following the 1988 Black Sea “bumping” incident, it was important that the U.S. and the Soviet Union hammer out an understanding affirming the customary and conventional right of innocent passage.
In the aftermath of the Vietnam War, the Department of Defense issued instructions requiring not only training in the law of war, but also legal review of operational plans, contingency plans, and rules of engagement to ensure consistency with applicable domestic and international law, including the law of armed conflict. Additionally, new weapon systems and munitions in development were to be examined for compliance with law of war obligations. In 1979, the Joint Chiefs of Staff consolidated a set of worldwide peacetime rules of engagement (ROE) for maritime forces. Operational planners and military lawyers in all services convened to discuss law of war issues, and courses in operational law were established at the Army and Air Force JAG schools, and the Naval Justice School. These seminars and classes were invaluable in clarifying misperceptions as to legal versus policy restrictions. Navy and Marine Corps lawyers were beginning to be trained in oceans law and the law of war. Those assigned to fleet, carrier group, and amphibious commands, and fleet marine force elements, who had been primarily concerned with the administration of military justice, were now expected to render advice in operational law. The culture and requirements were changing rapidly. In this regard, operational law for the Navy and Marine Corps encompasses both the U.S. domestic legislation and public international law that affects naval operations, with special emphasis on oceans law and the rules of naval warfare.

The New World Order

Nineteen hundred eighty-six marked the beginning of a new dimension of international law at the Naval War College that future historians may well refer to as the “Grunawalt era.” Captain Richard J. (Jack) Grunawalt, JAGC, U. S. Navy (Retired), assumed the prestigious Charles H. Stockton Chair of International Law. Grunawalt, a Navy lawyer for twenty-six years, had vast experience in international law, serving as Fleet Judge Advocate, U.S. Seventh Fleet and the senior adviser to both the joint theater commander in the Pacific and the Chief of Naval Operations. With this background and a vision for the future, he instituted a number of initiatives that reinvigorated the international law program at the War College and put the institution in the forefront of the development, debate, and exposition of operational law.

Of great significance, Professor Grunawalt wrote The Commander's Handbook on the Law of Naval Operations (NWP 9), which was promulgated by the Department of the Navy in 1987. The Handbook replaced NWIP 10-2, which, although amended several times, was obsolete. The author wisely chose
to combine in one manual, "The Law of Peacetime Naval Operations," Part I, and "The Law of Naval Warfare," Part II. As has been experienced during the Cold War and is faced even more frequently today, there is no bright line between peace and war. With ethnic conflicts, deep-seated religious animosities, humanitarian tragedies, nations in disarray, and regional aggressors, a crisis anywhere in the world can turn "peace" into war overnight. 29 A commander must be prepared to move easily from Part I to Part II of the manual with the advice and counsel of his military lawyer. In addition, there are areas in the law of naval warfare, like neutrality, that cannot be applied without a thorough understanding of the legal divisions of the oceans and airspace in Part I. Part I also covers the international status and navigation of warships and military aircraft, the protection of persons and property at sea, and the safeguarding of U.S. national interests at sea. While the ocean areas and navigational rights are based primarily on the 1982 UN Law of the Sea Convention, Part I also relies on domestic legislation, general international law, and the UN Charter to provide guidance on matters such as asylum, drug interdiction with the Coast Guard, and the right of self-defense. Part II, "The Law of Naval Warfare," explains the principles and sources of the rules, adherence to and enforcement of the law of armed conflict, neutrality, naval targeting, conventional weapons, weapons of mass destruction (nuclear, chemical, biological), noncombatants, and deception during war.

Significantly, both Parts I and II provide guidance on the rules of engagement, with Article 51 the legal foundation for peacetime application and the law of armed conflict the framework for wartime use. In 1981, in airspace over international waters in the south central Mediterranean, two F-14s from the Nimitz battle group exercised their right of unit self-defense when they responded to an attack on them by two Libyan SU-22 fighters. 30 The rules of engagement are flexible in the sense that they can be tailored for a specific situation. For example, during the Iran-Iraq Tanker War of 1980-1988, after the USS Stark was hit by Exocet missiles fired from an Iraqi Mirage F-1, the belligerents were warned by Notices to Mariners and Airmen that U.S. warships would fire if their aircraft approached U.S. ships in a manner indicating hostile intent, unless they provided adequate notification of their intentions. 31 But as the later USS Vincennes-Iranian Airbus incident demonstrated, the most carefully crafted ROE still require the judgment of the operational commander on the scene. 32 Rules of engagement may be issued as general guidance covering a range of contingencies, or they may be tailored for a specific operation.
Part II, "The Law of Naval Warfare," is based on various treaties, conventions, and customary law, and includes the Additional Protocols to the 1949 Geneva Conventions where consistent with U.S. policy. Neutrality under the UN Charter is discussed, as is the London Protocol of 1936 on the protection of merchant ships. Guidance on the latter considers the practice of belligerents during and following World War II. For the benefit of Navy and Marine Corps legal officers responsible for advising commanders, there is an encyclopedic Annotated Supplement to The Commander's Handbook on the Law of Naval Operations, prepared by the Naval War College with the assistance of operational law experts from various commands and organizations. It contains a section-by-section analysis of the Handbook with a full discussion of the concepts and sources of the rules. Volume 64 of the "Blue Book" series contains essays by distinguished and respected authorities in international law commenting on the manual and addressing the more controversial and significant areas of operational law.

Professor Grunawalt explained that the Handbook was to be used by operational commanders and staff at all levels of command; that it constituted general legal guidance; and that it would enable the commander and staff to better understand the legal foundations for orders and their responsibilities under domestic and international law in the execution of the mission. The Handbook serves as an authoritative demonstration of how the U.S. interprets and applies oceans law and the rules of naval warfare, and, hopefully, will influence the behavior of other nations. Military manuals and handbooks are important both in disseminating operational rules and developing international law. The Handbook has been distributed widely to foreign governments and their naval leadership. In the short time since publication, it has guided the development of naval manuals in a number of allied nations and coalition partners. Additionally, international lawyers and naval experts, who from 1988 to 1994 prepared the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, found the Handbook to be a major source in formulating a progressive statement of the law of naval warfare.

For the future, the Joint Law of War Manual is in preparation by a task group of Army, Navy, Air Force, Marine Corps, Joint Staff, and Department of Defense operational law experts. The sections on the war on land and the war in the air and space will replace out-of-date Army and Air Force manuals. The section on war at sea will be an overview with the Handbook remaining intact to provide more detailed guidance. Joint Chiefs of Staff Publication 3-0, Doctrine for Joint Operations, states that "As with all actions of the joint force, targeting and attack functions are accomplished in accordance with international law,
the law of war, and international agreements and conventions, as well as rules of engagement approved by the National Command Authorities for the particular operation. Military commanders, planners, and legal experts must consider the desired end state and political aims when making targeting decisions." As the military services train, plan, and conduct joint and multinational operations in accordance with the Chairman, Joint Chiefs of Staff, Joint Vision 2010, it is entirely necessary and appropriate that there be a joint legal manual to guide joint and multinational commanders.

Reorganization of the Naval War College in 1972 had terminated the long-standing International Law Week in which international law scholars met with students to discuss subjects in the field related to naval operations. Although international law was integrated on a piecemeal basis into various naval warfare courses, the study of international law was left without a place in the core curricula of the resident courses. This fragmentation and de-emphasis of international law also reduced the effectiveness of the Stockton Chair, with the result that there was no international law support within the Center for Naval Warfare Studies, which provides the College's strategic research and war-gaming focus. In early 1988, at a meeting with the President and the Dean of the Center for Naval Warfare Studies, Professor Grunawalt proposed that an oceans law and policy research activity be established in the Center to support the War College, the Judge Advocate General, and the entire Navy in the study, instruction, war gaming, and research in international and operational law. Following up immediately in a letter to the Chief of Naval Operations, endorsing the initiative, the President noted that "the range of international law issues currently at play in the Persian Gulf encompasses such diverse yet critically important areas of the law of the sea and the law of armed conflict as the high seas freedoms of navigation and overflight, innocent passage of the territorial sea, transit passage of straits, neutral and belligerent rights, naval targeting, mine and counter-mine warfare, the inherent right of self-defense, and flag nation authority and responsibility over merchant shipping. Each of these oceans law and policy concepts impact upon and are reflected in the rules of engagement provided to the operating forces by the National Command Authorities. While the situation in the Persian Gulf provides sharp and immediate focus to the application of international law in crisis management, the role of oceans law and policy in routine peacetime operations, in strategic and contingency planning, and in the execution of the Freedom of Navigation Program, is no less important." Thus, the Oceans Law and Policy Department was born, and Jack Grunawalt accepted the appointment as the first Director in July 1989.
With eventual staffing of Navy, Marine Corps, Army, Air Force, and Coast Guard officers experienced in operational law, the Oceans Law and Policy Department in ten short years has revolutionized the role of the Naval War College in operational law. At the tenth annual meeting of the Operational Law Workshop and Advisory Board, the many activities of the Department were reviewed. The instruction programs on the national level include courses in oceans law, the law of armed conflict, and rules of engagement. They are taught at the War College, Surface Warfare Officers School, Naval Justice School, Submarine School, Naval Strike and Air Warfare Center, Joint Targeting School, Coast Guard Prospective Commanding Officers and Executive Officers School, Naval and Air Force Academies, Submarine Group 10, and the Military Sealift Command. Both line officers and lawyers receive instruction. Internationally, the courses are taught in a number of countries by Grunawalt and his staff—Argentina, Chile, Colombia, Ecuador, Germany, Japan, Mexico, Panama, Peru, South Korea, Uruguay, and Venezuela. Operational law instruction on a seminar basis is also provided to operational commanders and staffs at the fleet level in the Navy, Marine Corps, and Coast Guard. The sessions with the operational commanders and planners are critical in fostering understanding, respect, and a spirit of teamwork between the commanders and their military lawyers in dealing with the complex and evolving challenges in operational law.

A typical three-day course in operational law covers general principles of international law, the U.S. national security organization, law of the sea, freedom of navigation operations, protection of persons and property at sea, maritime law enforcement, law of armed conflict, weapons and targeting, neutrality, blockade, maritime interception operations, and rules of engagement. The ROE portion includes lessons learned from operations in Libya, Beirut, Grenada, Panama, Somalia, Haiti, Bosnia, the USS Stark and Vincennes incidents, Desert Shield and Desert Storm, and the "friendly fire" shootdown of the Army Black Hawk helicopter in northern Iraq. In addition, UN military operations other than war and noncombatant evacuations are analyzed.

In conjunction with these activities, the Department updates the Commander's Handbook and the Annotated Supplement, publishes the "Blue Book" series, coordinates the activities of the Stockton Chair, periodically holds conferences in operational law, and conducts research into such diverse areas as the legal regime for the Straits of Hormuz, Greek-Turkish confidence-building, intervention, and Bosnian Implementation Force (IFOR) operations.
With these new initiatives and programs, the Naval War College has become the focal point and corporate memory for matters of oceans law and policy affecting operations at sea by U.S. and allied navies. With operational law firmly established, the War College has the capability to conduct long-range planning in the law of the sea and naval warfare, detached from the day-to-day legal issues that consume the time and resources of the various agencies in Washington and the fleet staffs. The consolidation of the Navy's Doctrine Command, Maritime Battle Center, and Concepts Development Group and Strategic Studies Group with the Naval War College will greatly facilitate the integration of oceans law and policy with command and operational doctrine. Integrating doctrine with long-range thinking, teaching, war gaming, research, and naval studies will be invaluable in sorting out Navy requirements, priorities, and programs, as well as strategy and tactics. Operational law should be a part of that process. With staffing and support from all the services, constant interaction with the military lawyers in the battle groups and expeditionary units, the fleet and theater commands, the Joint Staff, and OSD, and the attendance at ocean law conferences convened by operational commanders, the War College is a key player in the joint arena. In this regard, the College's Operational Law Workshop and Advisory Board (another Jack Grunawalt initiative) is important in the oversight of the Oceans Law and Policy Department and provides a unique forum for an exchange of fresh ideas.

In reflecting on the history of international law at the Naval War College, it can be said without exaggeration that Professor Jack Grunawalt's legacy as Director, Oceans Law and Policy Department, Center for Naval Warfare Studies, will equal or surpass the mark made by Professors Charles H. Stockton and George Grafton Wilson in the early days of the institution.

In the actual practice of operational law during the Persian Gulf War, the Department of Defense observed that training in the law of war was reflected in U.S. operations. Furthermore, adherene to the law of war impeded neither coalition planning nor execution. The willingness of commanders to seek legal advice at every stage of operational planning ensured respect for the law of war throughout Desert Shield and Desert Storm. There were difficult issues that had to be dealt with at every echelon of command, e.g., targeting to avoid collateral damage and injury to civilians, the use of civilians and hostages as human shields, environmental terrorism, ruses and perfidy, treatment and repatriation of prisoners of war, war crimes, the conduct of neutral nations, the role of the International Committee of the Red Cross and human rights groups,
and responding to disinformation. In a politically charged atmosphere, commanders and their lawyers were under constant media scrutiny as they planned and carried out joint operations.41

Between April 1992 and November 1995, U.S. armed forces participated in a wide range of air and naval operations in support of United Nations Security Council Resolutions aimed at terminating the ethnic-based conflicts raging within the former Yugoslavia.42 By the time the fighting ended in late 1995, the U.S. and its allies had flown more than 109,000 sorties, just slightly less than the number flown by Coalition forces during the Persian Gulf War. Navy and Marine Corps aircraft were involved in the following operations:

Provide Promise (2/93-1/96)—providing air cover for air delivery of relief supplies;

Deny Flight (4/93-12/95)—enforcing the ban on military flights over Bosnia and Herzegovina;

Sharp Guard (6/93-6/95)—enforcing the complete embargo on deliveries of weapons and military equipment to Yugoslavia;

Deliberate Force (8/95-9/95)—conducting air strikes against the Bosnian-Serb Army and providing air defense suppression, close air support, combat air patrol, and search and rescue, supplemented by Tomahawk missiles launched from a U.S. Navy Aegis cruiser.

These military operations in the other-than-war category (MOOTW) illuminated complicated issues of law and policy that had to be dealt with by commanders and their military lawyers in a political environment in which UN and NATO participants held differing views regarding the future of Bosnia and its neighbor States. Procedures for coordination and liaison at each level of the command chain were required since both the UN and NATO had to consent before military force could be applied. Detailed rules of engagement and other operational constraints had to be formulated in order to avoid both casualties within NATO and UN forces and unnecessary loss of life or damage to property within Bosnia itself. U.S. commanders and staff had to take the lead in devising the complex and sensitive terms of reference, mission statements, command arrangements, rules of engagement, and target selection that are mandatory in MOOTW coalition operations that involve a wide variety of aircraft types from various nations. The Bosnian air operations were successful in that there was an overall lack of significant collateral damage to life and property. However, there were instances of an inability to deliver ordnance on specific ground targets because of an immediate and serious threat to NATO forces, UN peacekeeping forces, or to Bosnian civilians. Furthermore, NATO’s ability to suppress helicopter flights in the no-fly zone was only partially effective due
to the political costs of mistakenly shooting down a helicopter with civilians aboard or a UN helicopter. The tragic shoot-down of the Black Hawk helicopter during this same time period illustrates the importance of effective coordination, communications, identification, and deconfliction procedures, in addition to detailed ROE.

In a counterpart to the air operations over Bosnia and pursuant to UN Security Council Resolutions, NATO and Western European Union (WEU) warships began maritime interception operations (MIO) in the Adriatic Sea to monitor compliance with the embargo on goods in and out of Yugoslavia. After several months of interrogations which determined that violations were indeed occurring, the Security Council authorized action by boardings, inspections, and diversions under chapters VII and VIII of the UN Charter. Enforcement was extended to prohibit all commercial maritime traffic from entering the territorial sea of Yugoslavia when it was discovered that “contraband” ships were making an end run through the territorial sea to avoid enforcement. NATO and WEU forces were then consolidated into one operation called Sharp Guard. From 1992 to 1996, Sharp Guard surface ships challenged nearly 75,000 merchant ships, boarded and inspected 5,951 at sea, and diverted and inspected 1,480 in port. Maritime patrol aircraft flew 7,151 sorties in support. As a result of these efforts, no ships were reported to have broken the embargo or sanctions during the almost four years that the operations were in effect.

The critical issues to be sorted out in maritime interception operations are command and control, rules of engagement, and communications. The Adriatic MIO began in a parallel command structure with NATO and the WEU each controlling their respective warships. This structure was similar to the Persian Gulf MIO in that the U.S. and the UK each exercised control over their own forces, with the added feature that Arab/Islamic nations utilized a lead nation concept for controlling their ships. This trifurcated command arrangement was developed on an ad hoc basis and required extensive coordination. The Coalition Coordination, Communications, and Integration Center (C3IC) was used to exchange intelligence and operational information, and coordinate enforcement action. In the Adriatic, once Sharp Guard was in effect, operational command of NATO and WEU ships was centralized under the Commander in Chief, Allied Forces Southern Europe. This was a highly effective and ideal structure with NATO ships well trained in NATO procedures. However, future MIOs with coalition forces will probably have to formulate their own ad hoc command and control structure.
In rules of engagement, the Sharp Guard unified command used NATO ROE, which greatly simplified the problem. However, there was a confusion factor since French, U.S., and UK ships were in the Adriatic operating under their respective national ROE and then would rotate into the MIO and change to NATO ROE. But even under the ideal, single NATO ROE, commanders and staff still had to sort out issues of interpretation such as what constitutes a hostile act or hostile intent, and what kind of disabling fire is authorized. Communications connectivity and interoperability have been continuing challenges in multinational operations. In Sharp Guard, communications were facilitated by common training, language, publications, similar equipment, and NATO procedures. For future MIOs, a great deal of prior planning will be necessary to resolve technical problems and insure that compatible communication equipment is available.

Maritime interception operations have become an important method of enforcing economic sanctions. Legally, they are in a category of their own, but have features of blockade (probably pacific blockade), visit and search, contraband, and quarantine. Whether the particular MIO is pursuant to a Security Council resolution or justified by individual or collective self-defense, notification of the terms, conditions, limitations, area affected, and enforcement action is required. It is interesting to note that the enforcement action often included diversion for inspection in port or just diversion, as well as boarding and inspection at sea, rather than detention, capture, or confiscation. The San Remo Manual provides for diversion as an alternative to visit and search.\textsuperscript{45}

The Challenges Ahead

For the foreseeable future, U.S. naval forces will be deployed worldwide in support of national interests. This was emphasized when the \textit{Nimitz} Carrier Battle Group was ordered into the Persian Gulf ahead of schedule in 1997 as a warning to Iran and Iraq to stop incursions into the U.S.-enforced "no-fly" zone in southern Iraq.\textsuperscript{46} As the Chief of Naval Operations has stated, "Our global presence insures freedom of navigation in international trade routes and supports U.S. efforts to bring excessive maritime claims into compliance with the law of the sea."\textsuperscript{47} Volume 66 of the "Blue Book" series documents excessive claims that affect the territorial sea, international straits, overflight, archipelagic sea-lanes passage, and navigation in the exclusive economic zone.\textsuperscript{48} Many of the actions taken under the U.S. Freedom of Navigation Program, including diplomatic efforts and peaceful assertions of the rights and
freedoms of navigation and overflight recognized in international law, are described. The volume also details how international agreements, as well as U.S. domestic legislation on the protection of the marine environment and marine resources, have the potential, in their application and enforcement, to infringe on the exercise of traditional high seas freedoms of navigation and overflight. Excessive maritime claims can also hamper military operations in international waters and airspace to stem the flow of illegal drugs into the United States. In addition to countering excessive maritime claims, the challenges ahead affecting naval operations in “peacetime” include protecting the sea routes of international trade, particularly straits, insuring access to critical oil and gas resources, maintaining access to the high seas for telecommunications, upholding the sovereign immunity of warships and other public vessels and aircraft, continuing to participate in efforts to protect the marine environment and enhance the management of fisheries, and modifying naval operational practices to limit sources of pollution from warships. Protection of the marine environment is a major issue of concern and cannot be compartmentalized. For example, technical solutions and new equipment are required to process waste from ships. Continued U.S. leadership in the International Maritime Organization is essential.

In the area of naval warfare, there are factors that must be considered before the commander and his lawyer can deal with the individual rules. Much of modern international law has been a movement to limit state sovereignty. There have been remarkable advances in human rights and the protection of the environment as a result of the initiatives and efforts of non-governmental organizations (NGOs), thus presaging an increasing role for NGOs in international law. Joint Vision 2010 points out that “future leaders at all levels of command must understand the interrelationships among military power, diplomacy, and economic pressure, as well as the role of the various government agencies and branches, and non-governmental actors, in achieving our security objectives.” In actions under chapter VII of the UN Charter, effective participation will most likely be limited to the great powers, i.e., States with a resource base and an internal political organization that enable the leadership to clarify global interests and, if necessary, mobilize sufficient domestic support to enable them to deploy an adequate military force. For the U.S., this will mean working through Presidential Decision Directive 25 (PDD-25) to ascertain whether the two-tier criteria are met in order to permit U.S. involvement in UN peacekeeping operations. Also, there are Congressional concerns about involving U.S. forces in UN operations, expressed, e.g., in proposed legislation prohibiting U.S. forces from serving
under foreign operational control and restricting the sharing of intelligence information.  

In what has been termed the third great revolution in history, developments in computers and telecommunications have dramatically reduced the effects of time and distance. The ability of television to broadcast instantaneous images of international crises has created new challenges for diplomats, government officials, and military commanders and their lawyers, and a demand for an immediate policy and legal response. Enormous pressure is put on the military commanders not only because their tactics and casualties are scrutinized instantaneously, but also because media reports impact the morale of soldiers, sailors, and airmen.  

Military Operations Other than War are focused on deterring war and promoting peace but, as recent experience indicates, often involve the use or threat of force. In such cases, Joint Pub 3-0, Doctrine for Joint Operations, directs that military force be applied prudently. "The actions of military personnel and units are framed by the disciplined application of force, including specific ROE. In operations other than war, ROE will often be more restrictive, detailed, and sensitive to political concerns than in war. Moreover, these rules may change frequently during operations. Restraints on weaponry, tactics, and levels of violence characterize the environment."  

In future MOOTW, achieving a balance between the level of violence necessary to accomplish the mission and the force essential to protect our own and friendly forces will be a challenge. This balance was reached in Deny Flight and Deliberate Force by limiting strikes to air defense sites and only expanding the target base on a graduated basis when Serbian forces violated UN conditions. To minimize collateral damage, precision-guided munitions comprised more than 90 percent of the air-to-ground ordnance delivered by naval aircraft, in contrast with less than 2 percent used during the Persian Gulf War. Restraints on target selection will sometimes be decided at the political level with UN and coalition participation. In Operation Earnest Will (reflagging and protecting Kuwati tankers during the Iran-Iraq Tanker War), after the USS Samuel B. Roberts hit an Iranian laid mine, the National Command Authority decided that the appropriate and proportionate response was to attack Iranian oil platforms, attacking Iranian ships only if they fired on U.S. ships. More recently, in the Bosnian operation under the Dayton Accords, the former Implementation Force (IFOR) commander and his military lawyer had to take a strong stand in the political negotiations to get rules of engagement with the flexibility to use force commensurate with accomplishing the mission. In the area of individual and unit self-defense, a difficult issue will be to define in the
ROE what constitutes a hostile act or intent in the light of new technology, weapons, means of delivery, countermeasures, and tactics so that defensive action can be taken in anticipation of an imminent attack in accordance with the Commander's Handbook.\textsuperscript{58}

In future wars, the "goal is to win as quickly as possible and with as few casualties as possible, achieving national objectives and concluding hostilities on terms favorable to the United States and its multinational partners."\textsuperscript{59} However, there will still be challenging issues to resolve involving targeting, collateral damage, over-the-horizon weapons, protection of merchant ships, medical transport, civilian aircraft, noncombatants,\textsuperscript{60} the environment, and self-defense, especially if the armed conflict is limited in scope and area. The mingling of civilians with combatants will present problems in targeting to avoid civilian casualties, particularly with the increasing use of "stand-off" weapons to minimize exposure to casualties.\textsuperscript{61} In the Iraqi Mirage attack on USS \textit{Stark}, the pilot followed standard Iraqi policy on target discrimination by firing on the largest radar return believed to be in the Iranian war zone. Iraq accepted responsibility for an erroneous attack.\textsuperscript{62} In the regime of self-defense during the Persian Gulf War, the former Commander of the Naval Forces had to resolve convoy escort responsibilities among multinational ships, particularly as to whether a convoy commander operating under national rules of engagement could respond in self-defense to an attack on a foreign flag ship in his convoy.\textsuperscript{63} In this regard, it is important to remember that the rules of engagement have to be clear and concise for implementation by commanders and subordinates who may not have an operational lawyer or access to legal advice. In the environmental arena, international outrage at the depredations visited upon Kuwait and upon the waters of the Persian Gulf during the Gulf War drew renewed attention to the ongoing debate among environmentalists, scientists, lawyers, policy makers, and military officials as to whether international law was adequate to protect our natural heritage. Volume 69 of the "Blue Book" series documents the proceedings of the Symposium on the Protection of the Environment during Armed Conflict held in 1995 at the Naval War College and attended by national and international government officials, legal scholars, scientists, and operational commanders.\textsuperscript{64} It is obvious that in future armed conflicts, the protection of the environment will be a major issue. The Persian Gulf War, Bosnian peacekeeping, maritime interception operations, and other events since emergence of the New World Order demonstrate that there continue to be more than enough legal issues of substance to focus the attention of the commander and his operational lawyer. The Commander of U.S. Naval Forces Europe reported that in a twelve-
month period during 1996-1997, his naval forces participated in thirteen joint and combined operations involving peacekeeping, peace enforcement, noncombatant evacuations, and humanitarian missions.\textsuperscript{65}

The Commander and Operational Lawyer

The practice of operational law in the Navy and Marine Corps has matured significantly since the days of line officers acting alone and a few international law specialists at the Washington level grappling with issues of oceans law and the rules of naval warfare. Now, there are trained and experienced operational lawyers working in the Office of the Secretary of Defense, the Joint Chiefs of Staff, the Offices of the Chief of Naval Operations, Commandant of the Marine Corps, Judge Advocate General, the Naval War College, and most importantly, on the staffs of joint, theater, fleet, battle groups, expeditionary units, and other major operational commands. With satellite communications and secure radios, these experts can rapidly communicate, share opinions, receive guidance, make recommendations, get additional material, and do all that is necessary to develop the best legal advice for the commander. Then, using the \textit{Commanders Handbook}, the Joint Chiefs of Staff peacetime rules of engagement, the National Command Authorities wartime rules of engagement, and policy directives, detailed guidance can be formulated and promulgated to subordinate commanders and those tasked to perform the mission. In this process, it is important that operational lawyers have the latitude to exchange ideas, opinions, and tentative recommendations with their counterparts up and down the chain of command, keeping their leaders fully apprised of these contacts and sensitive to concerns about premature disclosure of options that have not yet been approved either as recommendations or directives. In searching for reasoned legal advice, “turf considerations” and “not invented here” attitudes are unhelpful, to say the least. The best operational lawyers are activists—speaking out, offering advice in the planning process, and seeking ways to support the commander in carrying out the mission under the law, but mindful that the commander is ultimately accountable and must weigh political and policy considerations, along with legal, in reaching a decision. In addition, a thorough understanding of what the individual ship, aircraft, expeditionary unit, soldier, sailor, marine and airman are trained to do is essential in this era of joint and combined operations.

For their part, commanders and operational planners at all levels must have an understanding of the fundamental principles of oceans law and the rules of
naval warfare. They must be able to evaluate the advice of operational lawyers, know what questions to ask, and when to listen or not listen. In the worst case, a commander who defers entirely to his lawyer may jeopardize the mission. Mutual trust and respect between the commander and his lawyer are essential in getting the best legal advice. The tone the commander sets with the staff can be critical as to the stature of the lawyer. The operational lawyer who is expected to routinely and actively participate in the planning and decision process can be counted on to render effective legal advice.

Coping with the complex and changing issues of oceans law and the rules of naval warfare in the 21st century requires a team effort by the commander and the operational lawyer. The former Commander, Implementation Force and Allied Forces, Southern Europe, states that his military lawyer was a key player and part of his daily planning and war council team, sitting right next to him, actively participating in evaluating options, and offering advice in reaching decisions. In a similar vein, the former Commander Naval Forces, Central Command, during the Persian Gulf war, observed that he had great rapport with his lawyer, who was an active participant on the staff and was invaluable in dealing with the legal and policy issues during the war. At the National Security Council level, the former Chairman, Joint Chiefs of Staff, observed that his Navy lawyer was indispensable in sorting out the legal and policy issues involved in the use of force and rules of engagement, and ensuring that the Chairman's views on these issues were represented in interagency debates and the decision-making process.

With that kind of teamwork, and mutual trust and respect, there is no doubt that commanders and operational lawyers, in the Jack Grunawalt tradition, will meet the challenges of the 21st century.

Notes


6. U.S. NAVY REGULATIONS, 1870, art. 94. See also current U.S. NAVY REGULATIONS, 1990, art. 0705 ("At all times, commanders shall observe and require their commands to observe, the principles of international law. Where necessary to fulfill this responsibility, a departure from other provisions of Navy Regulations is authorized.")
7. See CHARLES O. PAULLIN, DIPLOMATIC NEGOTIATIONS OF AMERICAN NAVAL OFFICERS 1778-1883 (1912).
11. Id. at 56.


27. See Parks, supra note 26, on the roots and evolution of operational law following the watershed My Lai massacre during the Vietnam War.

28. Revised in 1989 as NWP 9A, and further revised and promulgated in 1995 as NWP 1-14M/FMFM 1-10/COMDT PUB P5800.7. The 1995 edition expands on the treatment of neutrality, targeting, and weapons; addresses land mines for the first time; and provides a new section on maritime law enforcement and land warfare.


31. See Walker, supra note 19, at 162.

32. The Chairman, Joint Chiefs of Staff, after thorough investigation, found that the commanding officer obeyed the rules of engagement in exercising the right of self-defense. In personally briefing Middle East Force major commanders during Earnest Will (reflagging and protecting Kuwaiti tankers), Admiral Crowe said, "If the rules of engagement are going to tilt in any direction, I want them to tilt toward saving American lives." ADMIRAL WILLIAM J. CROWE, JR., THE LINE OF FIRE 208 (1993).


35. See W. Michael Reisman & William K. Leitzau, Moving International Law from Theory to Practice: the Role of Military Manuals in Effectuating the Law of Armed Conflict, in id. at 1.

36. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (Louise Doswald-Beck ed., 1995) contains sections on general principles, regions of operations, basic rules and target discrimination, methods and means of warfare at sea, measures short of attack, interception, visit, search, diversion, and capture, and protected persons, medical transports, and medical aircraft. Innovations in the Manual include the effect of UN Security Council Resolutions, clarifying the concept of military objective, discussing the rules applicable to zones, elaborating on military operations in various sea areas, and introducing new rules regarding aircraft operations in armed conflict and in the "gray" area between peace and war. The second part of the Manual contains an explanation of each paragraph (rule). These explanations were authored by Professor Salah El-Din Amer, Louise Doswald-Beck, Vice
Admiral James H. Doyle, Jr., Commander William Fenrick, Christopher Greenwood, Professor Wolff Heintschel von Heinegg, Professor (Rear Admiral) Horace B. Robertson, Jr., and Gert-Jan F. Van Hegelsom.

37. Memorandum from Hays Parks, Special Assistant for Law of War Matters, Department of the Army, for the Tenth Annual Operational Law Symposium and Advisory Board, Naval War College (Feb. 27, 1997) (on file with author).


40. Letter from Rear Admiral Ronald J. Kurth, USN, President, Naval War College, to the Chief of Naval Operations (Feb. 11, 1988) (on file with author).


42. See Dean Simmons et al., Air Operations over Bosnia, NAVAL INST. PROC., May 1997, at 58, for an assessment of the operational lessons learned.


46. SAN REMO MANUAL, supra note 36 at 196.


51. See Reisman, supra note 49.


54. See Diplomacy and Conflict Resolution in the Information Age, 3 PEACE WATCH (June 1997).


56. See Crowe, supra note 32, at 187–211.
57. Conversation with Admiral Leighton Smith, USN (Ret.), former Commander International Force (IFOR) and Allied Forces, Southern Europe (Oct. 8, 1997).
58. NWP 1–14M, supra note 28, at 4.3.2.1.
60. See Louise Doswald-Beck, Vessels, Aircraft and Persons Entitled to Protection During Armed Conflict at Sea, 1994 BRIT. Y.B. INT’L L. 211, in which a Senior Legal Adviser, International Committee of the Red Cross, analyzes the state of the law and makes recommendations for improvement.
61. See W. Michael Reisman, The Lessons of Qana, 22 YALE J. INT’L L. 381 (1997) (analysis of Israeli artillery fire on a UN compound containing civilians and the right of self-defense). See also Horace B. Robertson, Jr., Modern Technology and the Law of Armed Conflict at Sea, in THE LAW OF NAVAL OPERATIONS, supra note 34, at 362–83, for a selective review of some of the new technology weapon systems, e.g., Tomahawk and Harpoon cruise missiles, Captor mines, directed energy devices, and depleted uranium ammunition, that are not unlawful per se, but can be employed in such a way as to make their use unlawful.
63. Conversation with Admiral Stanley Arthur, USN (Ret.), former Commander, U.S. Central Command, Commander Seventh Fleet, and Vice Chief of Naval Operations (Oct. 9, 1997).
64. See PROTECTION OF THE ENVIRONMENT DURING ARMED CONFLICT (69 International Law Studies, Richard Grunawalt et al. eds., 1996).
65. Lopez, supra note 44.
66. Smith, supra note 57.
67. Arthur, supra note 63.
68. Conversation with Admiral William J. Crowe, USN (Ret.), former Chairman, Joint Chiefs of Staff, Commander in Chief Pacific Forces, and Commander Allied Forces, Southern Europe (Oct. 18, 1997).