

Explanation

57.4 Subparagraph (c) prescribes that the breach of conditions of exemption from attack must be extraordinarily harmful to belligerent forces *and* must meet the basic rule on military objectives in paragraph 40.

57.5 Subparagraph (d) is another way to state the basic rule on collateral casualties or damage in paragraph 46(d). In the case of an enemy civil airliner with innocent passengers, only an immediate and imperative military requirement would appear to tip the proportionality scale and justify an attack.

58 In case of doubt whether a vessel or aircraft exempt from attack is being used to make an effective contribution to military action, it shall be presumed not to be so used.

58.1 If a vessel or aircraft does not make an effective contribution to military action, then it does not constitute a military objective and may not be attacked. A presumption that a vessel or aircraft which appears to be entitled to exemption from attack is in fact entitled to such an exemption unless the contrary is established enhances the protection of civilian objects. The presumption is only applicable in case of doubt and is rebuttable. If a party to the conflict is able to establish on a balance of probabilities that the vessel or aircraft is making an effective contribution to military action, it may act accordingly. This rule, the so-called rule of doubt, imposes an obligation on a party to the conflict to gather and assess relevant information before commencing an attack.

Section IV Other enemy vessels and aircraft

Enemy merchant vessels

59 Enemy merchant vessels may only be attacked if they meet the definition of a military objective in paragraph 40.

59.1 If enemy merchant vessels are not legitimate military objectives, they are exempt from attack although they may be captured under certain circumstances (see paragraphs 135–140). Although they may not be the object of attack, they may, in certain circumstances, incur collateral damage as a result of attacks directed against military objectives.

60 The following activities may render enemy merchant vessels military objectives:

- (a) engaging in belligerent acts on behalf of the enemy, e.g., laying mines, minesweeping, cutting undersea cables and pipelines, engaging in visit and search of neutral merchant vessels or attacking other merchant vessels;**
- (b) acting as an auxiliary to an enemy's armed forces, e.g., carrying troops or replenishing warships;**

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- (c) **being incorporated into or assisting the enemy's intelligence gathering system, e.g., engaging in reconnaissance, early warning, surveillance, or command, control and communications missions;**
- (d) **sailing under convoy of enemy warships or military aircraft;**
- (e) **refusing an order to stop or actively resisting visit, search or capture;**
- (f) **being armed to an extent that they could inflict damage to a warship; this excludes light individual weapons for the defence of personnel, e.g., against pirates, and purely deflective systems such as 'chaff'; or**
- (g) **otherwise making an effective contribution to military action, e.g., carrying military materials.**

60.1 As indicated in the discussion concerning paragraph 40, the Round Table eventually agreed that the best approach to the military objective issue was a combination of a general definition and an illustrative list. The Rapporteur on the Military Objective and the Principle of Distinction initially suggested the following list:

- (a) engagement in acts of war on behalf of the enemy;
- (b) acting as a *de facto* auxiliary to the enemy's armed forces;
- (c) incorporation into, or assistance to the intelligence system of the enemy's armed forces;
- (d) being armed;
- (e) active resistance to visit, search and capture;
- (f) refusing to stop upon being duly summoned;
- (g) sailing under convoy of enemy warships or military aircraft; *and*
- (h) integration into the enemy's war-fighting or war-sustaining effort.

60.2 According to the written comments submitted by participants, some of those categories were widely accepted. Others, however, especially categories (b), (c), (d), and (h) needed to be discussed thoroughly. In this context the discussion leader noted that there was obviously some tendency among the participants to exempt enemy merchant vessels from attack, at least if they had no direct connection to the armed conflict.

60.3 At its first stage the discussion concentrated on the definition of enemy merchant vessels. With regard to the term 'merchant vessel' the participants quickly

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agreed that it comprised all vessels that fell neither into the category of warships, nor auxiliary vessels, nor into the category of specially protected vessels. However, as regards the nationality or enemy character of merchant vessels there were two opposing positions. One group pointed at the fact that many ships flying a neutral flag, especially a flag of convenience, were controlled by nationals or even governments of another State. Very often there were economic or financial aspects involved that could not be ascertained easily, at least not by the commander on the bridge. If such vessels were controlled by the enemy government and were operating for the benefit of the enemy's economy they were probably also integrated into the enemy's war-sustaining effort.

60.4 A second group was not inclined, for various reasons, to take those aspects into consideration when establishing the enemy character of merchant vessels. First, they felt that the issue of flags of convenience was part of the law of neutrality and the status of neutral merchant vessels. Secondly, they did not want to complicate the question of a ship's nationality. In law, the difference between enemy and neutral merchant vessels was that the former were liable to capture. Economic or financial interests that might cause doubt on the neutral status could be verified by a prize court. A commander on the bridge would neither look at registration nor at economic or financial interests. Hence, *prima facie* the flag was decisive and the commander would then rely on intelligence material in order to establish whether there were sufficient reasons for suspicion. See also paragraphs 112–117.

60.5 In view of the task to formulate 'bright line rules' that latter position seemingly prevailed. Thus, in the further course of the working session the participants turned to the criteria rendering an enemy merchant vessel liable to attack.

60.6 At the beginning of that part of the discussion reference was made to the different reasons rendering enemy merchant vessels liable to attack. Either, by their nature or function, they were military objectives, or, by their behaviour in the concrete case, they could be attacked without being a military objective *strict sensu*. The latter was true especially in the case of vessels resisting visit, search and capture.

60.7 Then, after it had been stated that in many cases the cargo was the proper objective if it contributed to the war-sustaining effort, the central issue became category (h) (integration into the enemy's war-fighting or war-sustaining effort). In this context some participants proposed to classify generally enemy merchant vessels as legitimate military objectives and then to formulate criteria exempting some of them from attack. The reasons put forward in support of this proposal, however, differed to a considerable extent. While some believed that the status of protected vessels would thus be improved, others invoked primarily military reasons. For example, if enemy merchant vessels were generally classified as military objectives, rules of engagement could be drafted much more easily. A third group sponsoring that proposal considered category (h) to be the main category in the light of the definition of military objective. Even though the wording of category (h) was rather broad it was realistic since in practice, as in the recent Iran–Iraq War, enemy merchant vessels were indeed integrated into the war-sustaining efforts. Hence, in spite of the need to define precisely this category, State practice was supporting the presumption that enemy merchant vessels were military objectives. Others opposed this line of reasoning by referring to the arguments put forward with regard to the protection of the civilian population during

the Geneva Diplomatic Conference that led to the adoption of the Additional Protocols of 1977. On the one hand, there were specially protected persons and, on the other hand, the civilian population was protected as such. The difference lay in the extent of protection. This could be accepted for the various kinds of vessels as well. Moreover, if enemy merchant vessels were *per se* military objectives, the burden of proof for exempt status would be imposed upon those vessels.

60.8 In view of the two opposing standpoints it was considered necessary to elaborate on the questions whether enemy merchant vessels falling into category (h) were in fact military objectives and what was to be understood by 'integration into the enemy's war-sustaining effort' as proposed by the Rapporteur. Those opposing the proposal argued that during the World Wars the practice had been justified by way of reprisals. Hence, the belligerent States themselves had considered attacks on enemy merchant vessels illegal. The Iran–Iraq conflict could not be relied upon since the parties to that conflict obviously had not taken any legal aspects into consideration. In the Falklands conflict the parties had not attacked enemy merchant shipping even though they had had the capacity to do so. Therefore, category (h) had not become part of customary international law. In any event, State practice of the past should not be decisive since the task of the Round Table was to formulate rules for future conflicts. Moreover, if integration into the war-sustaining effort was considered a sufficient reason to justify attack on sight, the standards achieved by API would be jeopardised. Thus, the *opinio juris* of States would develop in a dangerous way. Therefore, category (h) should be replaced by the wording of API Article 52(2). If that could be accepted, it would depend on each single case whether an enemy merchant ship was a legitimate military objective. Finally, practical considerations like the facilitation of the drafting of rules of engagement were of secondary importance. The rule of law had to be first established. Then, it would be the duty of the respective governments to formulate simple rules of engagement enabling the commander on the bridge to comply with the law.

60.9 Those supporting the proposal considered it necessary to agree on a provision that was acceptable for States. In order to establish whether that was the case and whether a rule of law constituted a reasonable balance between humanitarian and military standards, it was indispensable to scrutinise State practice. For example, the failure of the 1936 London Protocol had been caused by the fact that the drafters of that agreement had ignored the different capabilities of the belligerents in the Second World War. While Great Britain had been able to exercise the right of capture effectively, Germany, due to the inferiority of its surface fleet, had been forced to take other measures to infringe upon the enemy's economy. In modern armed conflicts, attacks on an enemy's merchant shipping that is regularly integrated into the war-sustaining effort would be militarily advantageous and, hence, of legal significance. However, two situations had to be kept apart. The crux of category (h) was not, for example, oil tankers sailing to enemy or enemy-controlled territory and supplying his armed forces with fuel. Such ships would not differ from vessels carrying troops. Therefore, they were military objectives and liable to attack. Rather, especially in long-lasting conflicts, category (h) could apply to merchant vessels contributing to the enemy's export economy. If, due to the wording of category (h), doubts remained, those could be met by inserting the term 'effective'. According to an intermediate position the term 'war-sustaining effort' was either to be qualified by 'circumstances prevailing at the time' or to be defined on a case-by-case basis. If the latter was accepted there should be

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a clarification to the effect that in all other cases enemy merchant vessels would only be liable to capture.

60.10. The current manual of the United States Navy suggests that enemy merchant ships may be attacked and destroyed without warning if they are integrated into the enemy's 'war-fighting/war-sustaining effort' and compliance with the 1936 London Protocol would subject the attacking force to imminent danger or otherwise preclude mission accomplishment.¹²⁵ The annotation to this provision states: 'Although the term "war-sustaining" is not subject to precise definition, "effort" that indirectly but effectively supports and sustains the belligerent's war-fighting capability properly falls within the scope of the term.'¹²⁶ Another annotation provides as examples 'imports of raw materials used for the production of armaments and exports of products the proceeds of which are used by the belligerent to purchase arms and armaments'.¹²⁷

60.11. After intense discussion, however, the Round Table accepted the view that the descriptive phrase 'integration into the enemy's war-fighting/war-sustaining effort' was too broad to use for the residual category. The phrase chosen to describe the residual category of merchant vessels which were legitimate military objectives was merchant vessels which make an effective contribution to military action by, for example carrying military materials. This wording is the same as the wording used in paragraph 40 as part of the definition of military objective. It must be noted that the categories of enemy merchant vessels liable to attack is narrower than the categories of enemy merchant vessels liable to capture. All enemy merchant vessels may be captured. Only some may be attacked.

60.12. At the end of the discussion on war-fighting/war-sustaining/military action, a further proposal was made to abolish the distinction between merchant and other vessels and between enemy and neutral vessels. When discussing attack, the reasons for the employment of weapons had to be taken into consideration. Those were twofold: either the warship was threatened or attack was indispensable for mission accomplishment (sea denial/sea control). Neither the category of vessel nor its nationality was of relevance but whether the vessel concerned was a military objective or not. Hence, in accordance with this proposal, it would suffice to agree on the following categories of vessels: (a) ships liable to attack in any case; (b) ships liable to attack under certain circumstances only; and (c) ships not liable to attack. Such a procedure would also facilitate the drafting of adequate rules of engagement. This proposal was not followed up.

60.13. The remaining time was devoted to category (d) concerning the arming of enemy merchant vessels. The only controversial issue was whether the traditional rule according to which merchant vessels could be armed defensively without rendering them liable to attack was to be maintained. In the beginning some participants considered it necessary to allow armament of a purely defensive character. The majority, however, rejected that view since in modern warfare conditions it was impossible to distinguish between offensive and defensive weapons. After it had been clarified that small arms necessary for the maintenance of order on board or for defence

125 NWP9A, *The Commander's Handbook*, para. 8.2.2.2.

126 *Ibid.*, pp. 8–12, footnote 52.

127 *Ibid.*, pp. 7–23, footnote 90.

against pirate attacks were not to be included into that category, the question whether, for example, anti-missile systems belonged to it was discussed. While there was agreement that chaff was not to be considered armament in the sense of category (d), some doubts remained with regard to those systems that could not be directed against ships but only against missiles and projectiles.

60.14 In the final result, the Round Table adopted what is now paragraph 60. Paragraph 60(a)–(e) essentially restates the traditional law. Under the traditional law, however, enemy merchant vessels could be equipped with defensive weapons but were subject to attack on sight if they were equipped with offensive weapons. Paragraph 60(f) changes the traditional law because in light of modern weapons, it is impossible to determine, if it ever was possible, whether the armament on merchant ships is to be used offensively or merely defensively. It is unrealistic to expect enemy forces to be able to make that determination. Enemy merchant vessels which are armed to the extent that they could damage any warship, including a submarine, may be attacked on sight. In this context, the ship's bow, which could be used to ram a submarine, is not considered to be a weapon. The ship's crew may be armed with personal weapons such as rifles or pistols, particularly in waters where piracy is prevalent, and the ship may be equipped with deflective systems such as 'chaff' without the vessel being classified as armed.

61 Any attack on these vessels is subject to the basic rules set out in paragraphs 38–46.

61.1 See commentary on paragraphs 38–46. These basic rules must be followed when any targeting decision is made.

Enemy civil aircraft

62 Enemy civil aircraft may only be attacked if they meet the definition of a military objective in paragraph 40.

62.1 This paragraph, like that pertaining to enemy merchant vessels in paragraph 59, places a general limitation on attacks on enemy civil aircraft. In addition to engaging in a specific military-related activity, the enemy civil aircraft by its nature, location, purpose or use must be making an effective contribution to military action. Its total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, must also offer a definite military advantage. The definition of military objective in paragraph 40 is identical to Article 52(2) of API.

62.2 Civil aircraft, whether enemy or neutral, are broadly defined in paragraph 13(1) as aircraft other than military, auxiliary, or other State aircraft such as customs and police aircraft, that are engaged in commercial or private service. The enemy civil aircraft addressed in paragraphs 62–64 are civil aircraft other than medical aircraft, aircraft granted safe conduct and civil airliners which are exempt from attack.

63 The following activities may render enemy civil aircraft military objectives:

- (a) engaging in acts of war on behalf of the enemy, e.g., laying mines, minesweeping, laying or monitoring acoustic sensors, engaging in electronic warfare, intercepting or attacking other civil aircraft, or providing targeting information to enemy forces;**
- (b) acting as an auxiliary aircraft to an enemy's armed forces, e.g., transporting troops or military cargo, or refuelling military aircraft;**
- (c) being incorporated into or assisting the enemy's intelligence-gathering system, e.g., engaging in reconnaissance, early warning, surveillance, or command, control and communications missions;**
- (d) flying under the protection of accompanying enemy warships or military aircraft;**
- (e) refusing an order to identify itself, divert from its track, or proceed for visit and search to a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible, or operating fire control equipment that could reasonably be construed to be part of an aircraft weapon system, or on being intercepted clearly manoeuvring to attack the intercepting belligerent military aircraft;**
- (f) being armed with air-to-air or air-to-surface weapons; or**
- (g) otherwise making an effective contribution to military action.**

63.1 Advances in propulsion and materials technologies have dramatically changed the role of aircraft in armed conflict at sea since the First World War. Speed, endurance, lift, manoeuvrability and capacity have enabled aircraft to perform a variety of missions in addition to launching weapons. Aircraft are regularly employed at sea in surveillance, targeting, electronic warfare, command, control, communications, visit and search, refuelling, search and rescue, transporting troops and military supplies, and medical support. Aircraft can be fixed or rotary wing, sea or land based, manned or unmanned. Weapons carried can be missiles, rockets, guns and bombs. A number of weapon systems are portable and can be quickly installed in small, fixed-wing aircraft or helicopters.

63.2 Subparagraphs (a)–(c) are examples of military-related activities that may render an enemy civil aircraft a military objective. Some of these activities would require extensive modification to a civil aircraft. Others, such as providing targeting information, gathering intelligence, relaying vital communications or transporting troops and military cargo, can be performed without changing the visible characteristics of a civil aircraft.

63.3 Subparagraph (d) is similar to paragraph 60(d) which includes sailing under convoy of enemy warships or military aircraft, an activity that may render an enemy merchant vessel a military objective. An enemy civil aircraft that flies under the protection of accompanying enemy warships or military aircraft places itself at risk in the immediate area of hostilities since the enemy warships or military aircraft are military objectives. Belligerent forces might assume that the protected enemy civil aircraft is acting as an auxiliary aircraft to the enemy's armed forces, or, in pressing an attack, belligerent forces may misidentify the enemy civil aircraft. The 1990 International Civil Aviation Organisation (ICAO) *Manual Concerning Safety Measures Relating to Military Activities Potentially Hazardous to Civil Aircraft Operations* states that normally civil aircraft should not operate in an area of hazardous military operations.¹²⁸

63.4 Subparagraph (e) addresses the tactical situation in which belligerent forces encounter an enemy civil aircraft that may not be engaging in a military-related activity. The enemy civil aircraft is obliged to identify itself when so ordered. It can also be ordered to divert from its track or to proceed to a belligerent airfield for visit and search. Refusal to comply with these orders may render the enemy civil aircraft a military objective. The rules governing interception, diversion, and visit and search of civil aircraft are indicated in paragraphs 125–134 of this Manual.

63.5 Under the rules of engagement practised by most belligerents, warships and military aircraft are not obliged to wait until actually being fired upon before acting in self-defence if there are clear and unmistakable hostile actions indicating that they are about to be attacked. An enemy civil aircraft that illuminates a warship or military aircraft with fire control sensors indicates that a missile could immediately be fired. Similarly, an enemy civil aircraft that manoeuvres to take a firing position on an intercepting military aircraft indicates an intention to immediately attack. The usual procedures for intercepting civil aircraft advise civil aircraft to maintain heading, speed and altitude on being intercepted by a military aircraft. Committing either of these hostile acts may render the enemy civil aircraft a military objective and result in immediate defence measures by belligerent forces.

63.6 Subparagraph (f) is a prohibition against arming an enemy civil aircraft with weapons that could be used to attack warships or military aircraft. This excludes light individual weapons for defence of the crew, and equipment that deflects an attacking weapon or warns of an attack. Technology has enabled air-to-air and air-to-surface weapons to be compact, accurate and lethal. It is important that belligerent forces be reasonably assured that such weapons are not carried on enemy civil aircraft. In this regard, the 1923 Hague Rules of Aerial Warfare state the customary rule that no private aircraft, when outside the jurisdiction of its own country, shall be armed in time of war.

63.7 Subparagraph (g) covers other military-related activities by enemy civil aircraft that make an effective contribution to enemy military action and thus may render the enemy civil aircraft a military objective. In this regard, the 1923 Hague Rules of Aerial Warfare state the customary rule that no aircraft other than a belligerent military aircraft shall engage in hostilities in any form.

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