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U.S. MARINE CORPS  
U.S. COAST GUARD**

**NWP 1-14M  
MCTP 11-10B  
COMDTPUB P5800.7A**

# **THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS**

**EDITION AUGUST 2017**

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**NAVY WARFARE DEVELOPMENT COMMAND  
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DEPARTMENT OF THE NAVY

NAVY WARFARE DEVELOPMENT COMMAND  
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DEPARTMENT OF HOMELAND SECURITY

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3. NWP 1-14M/MCTP 11-10B/COMDTPUB P5800.7A (AUG 2017) is intended for the use of operational commanders and supporting staff elements at all levels of command. It is designed to provide officers in command and their staffs with an overview of the rules of law governing naval operations in peacetime and during armed conflict.
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2. Summary. This revision updates and expands upon various topics regarding the law of the sea and law of war. In particular, it updates the history of U.S. Senate consideration of the UN Convention on the Law of the Sea, to include its 2012 hearings; emphasizes that islands, rocks, and low-tide elevations are naturally formed and that engineering, construction, and land reclamation cannot convert their legal status; provides more detail on U.S. sovereign immunity policy for Military Sealift Command chartered vessels and for responding to foreign requests for health inspections and medical information; removes language indicating that all USN/USCG vessels under command of a noncommissioned officer are auxiliary vessels; emphasizes that only warships may exercise belligerent rights during international armed conflicts; adds a description of U.S.-Chinese bilateral and multilateral agreements promoting air and maritime safety; updates the international law applicable to vessels seeking a place of refuge; updates the description of vessels assimilated to vessels without nationality; provides detailed descriptions of the five types of international straits; states the U.S. position on the legal status of the Northwest Passage and Northern Sea Route; updates the list of international duties in outer space; updates the law regarding the right of safe harbor; adds “honor” as a law of war principle; adds information about weapons reviews in the Department of the Navy; updates the law regarding unprivileged enemy belligerents; includes information about the U.S. position on the use of landmines; expands on the discussion of the International Criminal Court (ICC); and updates the law of targeting.

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# PREFACE

## SCOPE

This publication sets out those fundamental principles of international and domestic law that govern U.S. naval operations at sea. Chapters 1 through 4 relate to peacetime naval operations. They provide an overview and general discussion of the law of the sea, including definitions and descriptions of the jurisdiction and sovereignty exercised by States over various parts of the world's oceans; the international legal status and navigational rights of warships and military aircraft; protection of persons and property at sea; and the safeguarding of national interests in the maritime environment. Chapters 5 through 12 relate to naval warfare. They set out principles of law of special concern to the naval commander during any period in which U.S. naval forces are engaged in armed conflict. Although the primary emphasis of these chapters is on the conduct of naval warfare, relevant principles and concepts common to the whole of the law of war are also discussed.

## PURPOSE

This publication is intended for the use of operational commanders and supporting staff elements at all levels of command. It is designed to provide officers in command and their staffs with an overview of the rules of law governing naval operations in peacetime and during armed conflict. The explanations and descriptions in this publication are intended to enable the naval commander and his staff to comprehend more fully the legal foundations upon which the orders issued to them by higher authority are premised, and to understand better the commander's responsibilities under international and domestic law to execute his mission within that law. This publication sets forth general guidance. It is not a comprehensive treatment of the law nor is it a substitute for the definitive legal guidance provided by judge advocates and others responsible for advising commanders on the law.

Officers in command of operational units are encouraged to utilize this publication as a training aid for assigned personnel.

This publication provides general information and guidance. It is not directive, and does not supersede guidance issued by the chain of command.

## INTERNATIONAL LAW

For purposes of this publication, international law is defined as that body of rules that States consider binding in their relations with one another. International law is created by States. It derives from the practice of States in the international arena and from international agreements between States. International law provides stability in international relations and an expectation that certain acts or omissions will result in predictable consequences. If one State violates the law, it may expect that others will reciprocate. Consequently, failure to comply with international law ordinarily involves greater political and economic costs than does observance. In short, States comply with international law because it is in their interest to do so. Like most rules of conduct, international law is in a continual state of development and change. This publication seeks to accurately describe the state of international law on the date of the publication's issuance.

### Practice of States

The general and consistent practice among States with respect to a particular subject, which over time is accepted by them generally as a legal obligation, is known as customary international law. Customary international law is the principal source of international law and is binding upon all States.

## **International Agreements**

An international agreement is a commitment entered into by two or more States that reflects their intention to be bound by its terms in their relations with one another. International agreements, whether bilateral treaties, executive agreements, or multilateral conventions, are the second principal source of international law. However, they bind only those States that are party to them or that may otherwise consent to be bound by them. To the extent that multilateral conventions of broad application codify existing rules of customary law, they may be regarded as evidence of international law binding upon parties and nonparties alike.

## **U.S. Navy Regulations**

U.S. Navy Regulations, 1990, require U.S. naval commanders to observe international law. Article 0705, Observance of International Law, states:

At all times, a commander 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.

Throughout this publication, references to other publications imply the effective edition.

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## WARNINGS, CAUTIONS, AND NOTES

The following definitions apply to warnings, cautions, and notes used in this manual:



### WARNING

An operating procedure, practice, or condition that may result in injury or death if not carefully observed or followed.



### CAUTION

An operating procedure, practice, or condition that may result in damage to equipment if not carefully observed or followed.

### Note

An operating procedure, practice, or condition that requires emphasis.

## WORDING

Word usage and intended meaning throughout this publication are as follows:

“Shall” indicates the application of a procedure is mandatory.

“Should” indicates the application of a procedure is recommended.

“May” and “need not” indicate the application of a procedure is optional.

“Will” indicates future time. It never indicates any degree of requirement for application of a procedure.

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a. CHANGE: (Page 1-1, 1.1.1, line 1)  
 Replace "...the ~~National Command Authority~~ President and Secretary of Defense establishes procedures for the..."  
 REASON: SECNAVINST #####, dated #####, instructing the term "National Command Authority" be replaced with "President and Secretary of Defense."

b. ADD: (Page 2-1, 2.2, line 4)  
 Add sentence at end of "See figure 2-1."  
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 Add figure 2-1 (see enclosure) where appropriate.  
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## CHAPTER 1

# Legal Divisions of the Oceans and Airspace

### 1.1 INTRODUCTION

The oceans of the world traditionally have been classified under the broad headings of internal waters, territorial seas, and high seas. Airspace has been divided into national and international airspace. In the latter half of the 20th century, new concepts evolved, such as the exclusive economic zone (EEZ) and archipelagic waters, that dramatically expanded the jurisdictional claims of coastal and island States over wide expanses of the oceans previously regarded as high seas. The phenomenon of expanding maritime jurisdiction and the rush to extend the territorial sea to 12 nautical miles and beyond were the subject of international negotiation from 1973 through 1982 in the course of the Third United Nations Conference on the Law of the Sea. That conference produced the 1982 United Nations Convention on the Law of the Sea (UNCLOS), which came into effect on 16 November 1994.

In 1983, the United States announced that it would neither sign nor ratify UNCLOS due to fundamental flaws in its deep seabed mining provisions. Further negotiations resulted in an additional Agreement regarding Part XI, which the United States signed on 29 July 1994, and which replaced the original deep seabed mining provisions. This Agreement contains legally binding changes to UNCLOS and is to be applied and interpreted together with the Convention as a single treaty.

On 7 October 1994, the President of the United States submitted UNCLOS and the Part XI Agreement amending its deep seabed mining provisions to the Senate for its advice and consent to accession and ratification, respectively. In 2004 and 2007, the Senate Foreign Relations Committee voted in favor of the Convention and recommended Senate advice and consent. On both occasions, however, the full Senate did not hold any hearings on the issue. The Senate Foreign Relations Committee held new hearings in 2012 but suspended further discussion of the Convention when 34 senators pledged to vote against providing advice and consent. As of the date of this publication no further action has been taken on the Convention.

### 1.2 U.S. OCEANS POLICY

Although the United States is not a party to UNCLOS, it considers the navigation and overflight provisions therein reflective of customary international law and thus acts in accordance with UNCLOS, except for the deep seabed mining provisions. President Reagan's 10 March 1983 Oceans Policy Statement provides:

First, the United States is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans [in UNCLOS]—such as navigation and overflight. In this respect, the United States will recognize the rights of other States in the waters off their coasts, as reflected in the Convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal States.

Second, the United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the Convention. The United States will not, however, acquiesce in unilateral acts of other States designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses.

### 1.3 GENERAL MARITIME REGIMES UNDER CUSTOMARY INTERNATIONAL LAW AS REFLECTED IN THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

The legal classifications (“regimes”) of ocean and airspace areas directly affect maritime operations by determining the degree of control that a coastal State may exercise over the conduct of foreign merchant ships, warships, and aircraft operating within these areas. The nature of these regimes, particularly the extent of coastal State control exercised in those areas, is set forth in the succeeding paragraphs of this chapter.

Pursuant to Department of Defense instruction (DoDI) S-2005.01, Freedom of Navigation (FON) Program, the Department of Defense (DoD) Representative for Ocean Policy Affairs (REPOPA) maintains the Maritime Claims Reference Manual, which contains a listing of coastal States maritime claims and the U.S. position regarding those claims. It may be accessed at [www.jag.navy.mil/organization/code\\_10\\_mcrm.htm](http://www.jag.navy.mil/organization/code_10_mcrm.htm).

While the legal classifications are thoroughly discussed in the remainder of this chapter, figure 1 represents a brief summary of the primary zones affecting navigation and overflight.

#### 1.3.1 Internal Waters

Internal waters are landward of the baseline from which the territorial sea is measured.

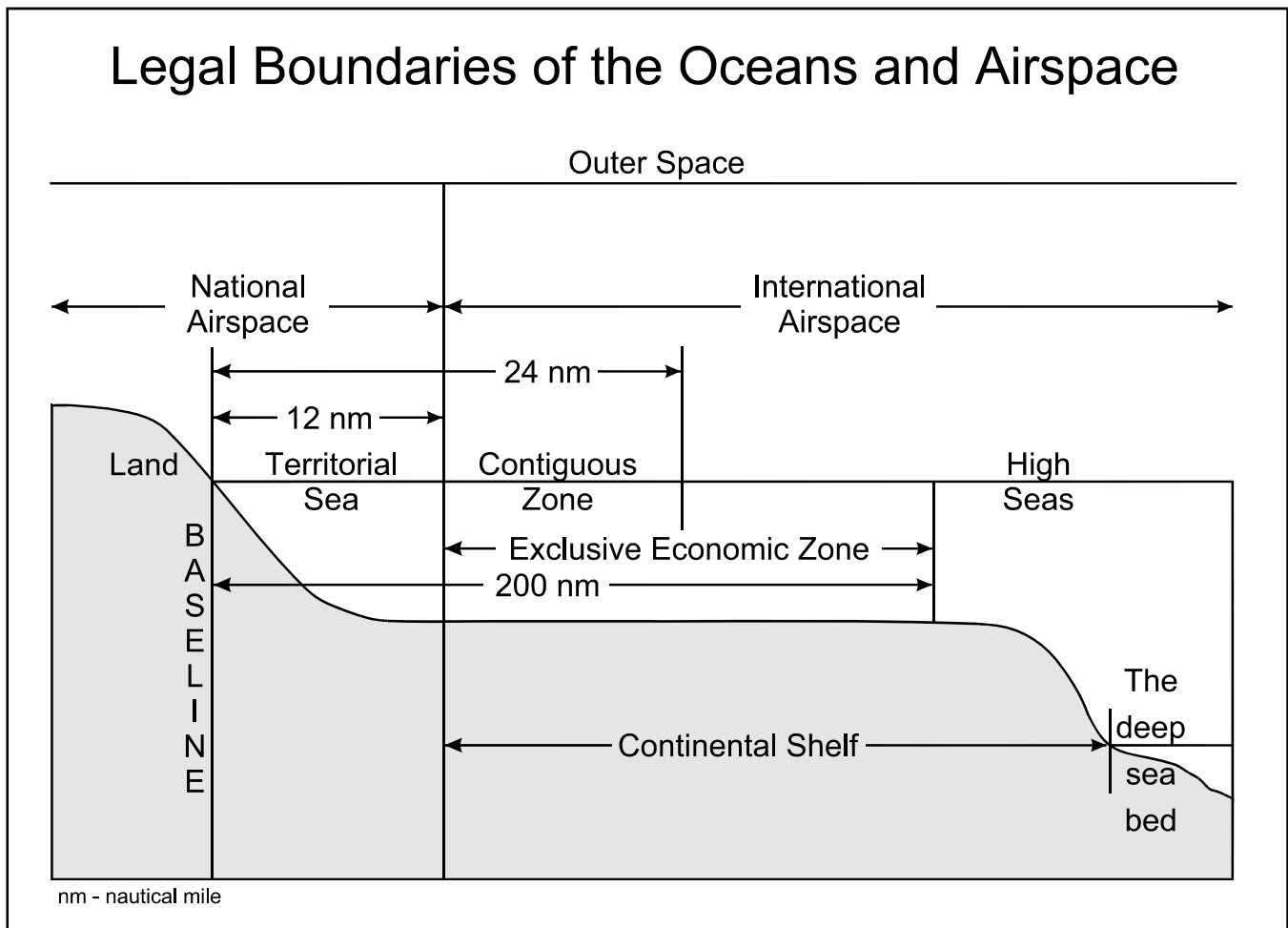


Figure 1-1. Legal Boundaries of the Oceans and Airspace



### **1.3.2 Territorial Seas**

The territorial sea is a belt of ocean that is measured seaward up to 12 nautical miles from the baseline of the coastal State and subject to its sovereignty. Ships enjoy the right of innocent passage in the territorial sea. Innocent passage does not include a right for aircraft overflight of the territorial sea.

### **1.3.3 Contiguous Zones**

A contiguous zone is an area extending seaward from the baseline up to 24 nautical miles in which the coastal State may exercise the control necessary to prevent or punish infringement of its customs, fiscal, immigration, and sanitary laws and regulations that occur within its territory or territorial sea. Ships and aircraft enjoy high seas freedoms, including overflight, in the contiguous zone.

### **1.3.4 Exclusive Economic Zones**

An EEZ is a resource-related zone adjacent to the territorial sea—where a State has certain sovereign rights (but not sovereignty) and may not extend beyond 200 nautical miles from the baseline. Ships and aircraft enjoy high seas freedoms, including overflight, in the EEZ.

### **1.3.5 High Seas**

The high seas include all parts of the ocean seaward of the EEZ.

## **1.4 MARITIME BASELINES**

The territorial sea and all other maritime zones are measured from baselines. In order to calculate the seaward reach of claimed maritime zones, it is first necessary to comprehend how baselines are drawn.

### **1.4.1 Low-Water Line**

Unless other special rules apply, the normal baseline from which maritime claims of a State are measured is the low-water line along the coast as marked on the State's official large-scale charts.

### **1.4.2 Straight Baselines**

Where the coastline is deeply indented or where there is a fringe of islands along the coast in its immediate vicinity, the coastal State may employ straight baselines. The general rule is that straight baselines must not depart from the general direction of the coast, and the sea areas they enclose must be closely linked to the land domain. A coastal State that uses straight baselines must either clearly indicate them on its charts or publish a list of geographical coordinates of the points joining them together (figure 1-2). The United States does not employ this practice and restrictively interprets its use by others.

#### **1.4.2.1 Unstable Coastlines**

Where the coastline is highly unstable due to natural conditions, such as deltas or shoreline migration, straight baselines may be established connecting appropriate points on the low-water line. These straight baselines remain effective, despite subsequent regression or accretion of the coastline, until changed by the coastal State.

#### **1.4.2.2 Low-Tide Elevations**

A low-tide elevation is a naturally formed land area surrounded by water and that remains above water at low tide but is submerged at high tide. As a rule, straight baselines may not be drawn to or from a low-tide elevation unless a lighthouse or similar installation, which is permanently above sea level, has been erected thereon.

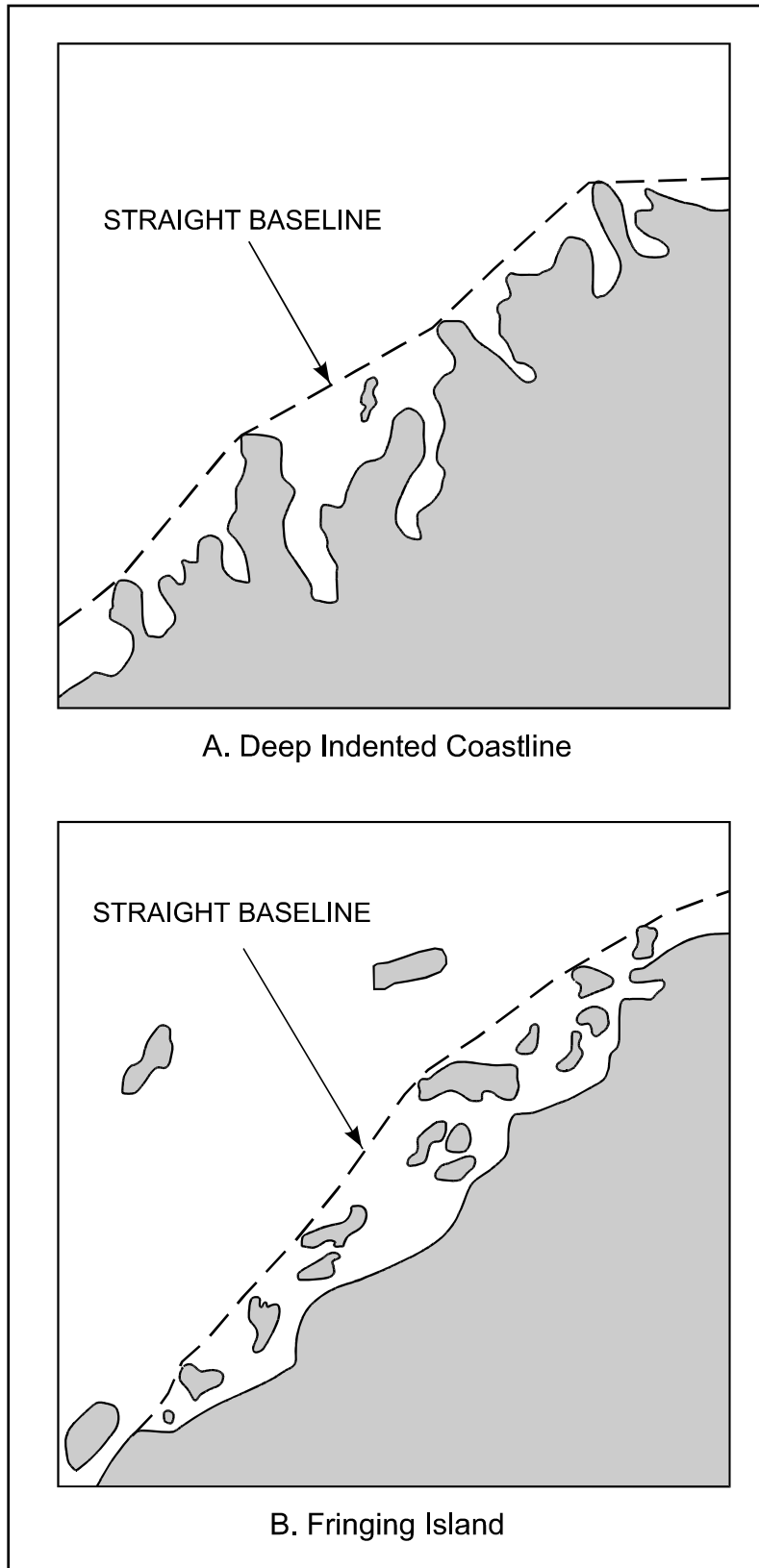


Figure 1-2. Straight Baselines

### 1.4.3 Bays, Gulfs, and Historic Bays

There is a complex formula for determining the baseline closing the mouth of a legal bay or gulf. For baseline purposes, a “bay” is a well-marked indentation in the coastline of such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. The water area of a “bay” must be as large as or larger than that of a semicircle whose diameter is the length of the line drawn across the mouth (figure 1-3). Where the indentation has more than one mouth due to the presence of islands, the diameter of the test semicircle is the sum of the lines across the various mouths (figure 1-4).

The baseline across the mouth of a bay may not exceed 24 nautical miles in length. Where the mouth is wider than 24 nautical miles, a baseline of 24 nautical miles may be drawn within the bay so as to enclose the maximum water area (figure 1-5). Where the semicircle test has been met, and a closure line of 24 nautical miles or less may be drawn, the body of water is a “bay” in the legal sense.

So-called historic bays are not determined by the semicircle and 24-nautical mile closure line rules described above. To meet the international standard for establishing a claim to a historic bay, a State must demonstrate its open, effective, long-term, and continuous exercise of authority over the bay, coupled with acquiescence by foreign States in the exercise of that authority. The United States has taken the position that an actual showing of acquiescence by foreign States in such a claim is required, as opposed to a mere absence of opposition.

### 1.4.4 River Mouths

If a river flows directly into the sea, the baseline is a straight line across the mouth of the river between points on the low-water line of its banks.

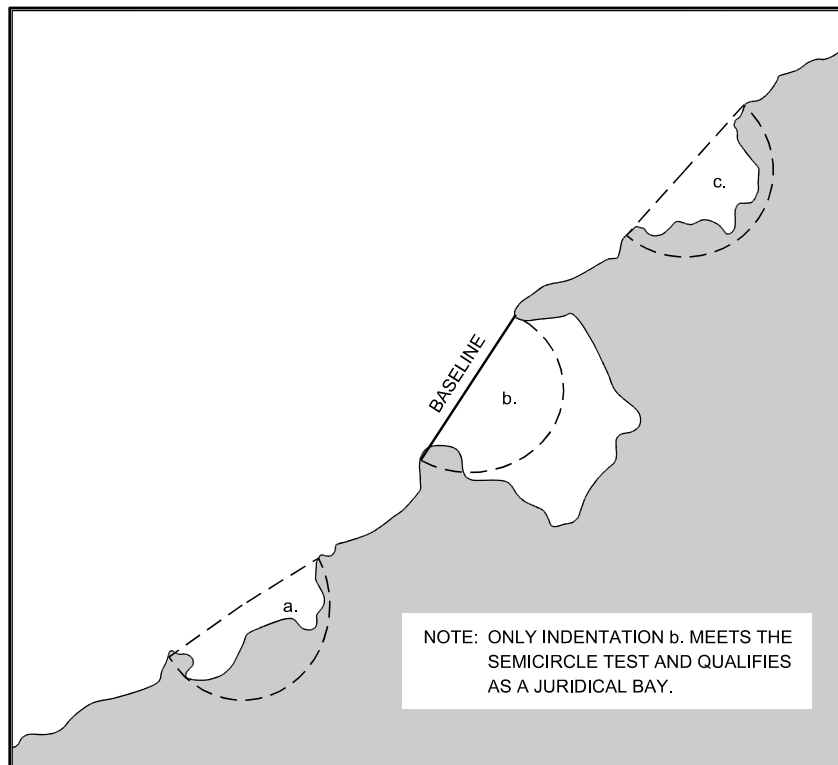


Figure 1-3. The Semicircle Test

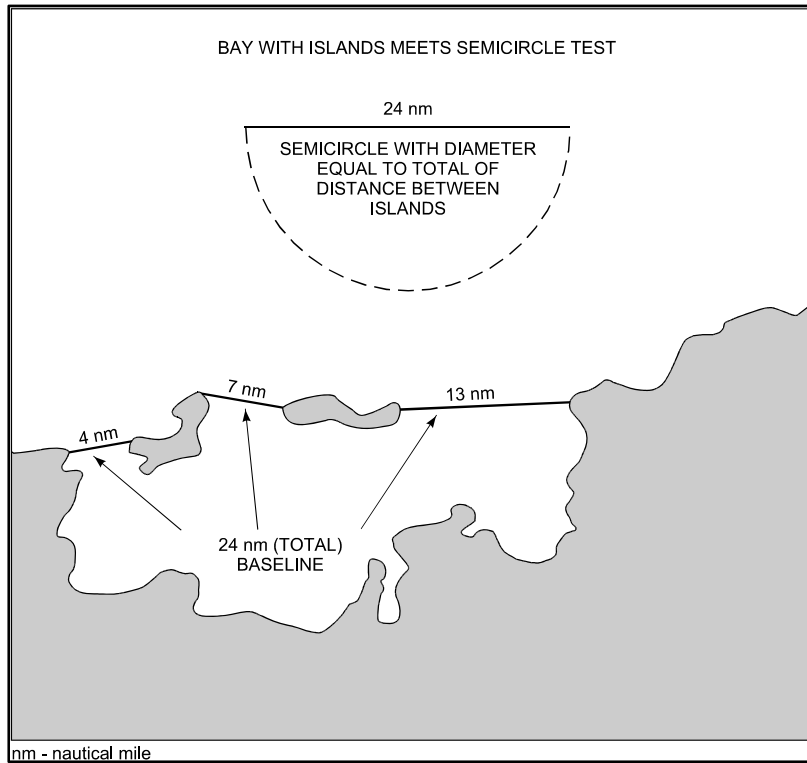


Figure 1-4. Bay with Islands

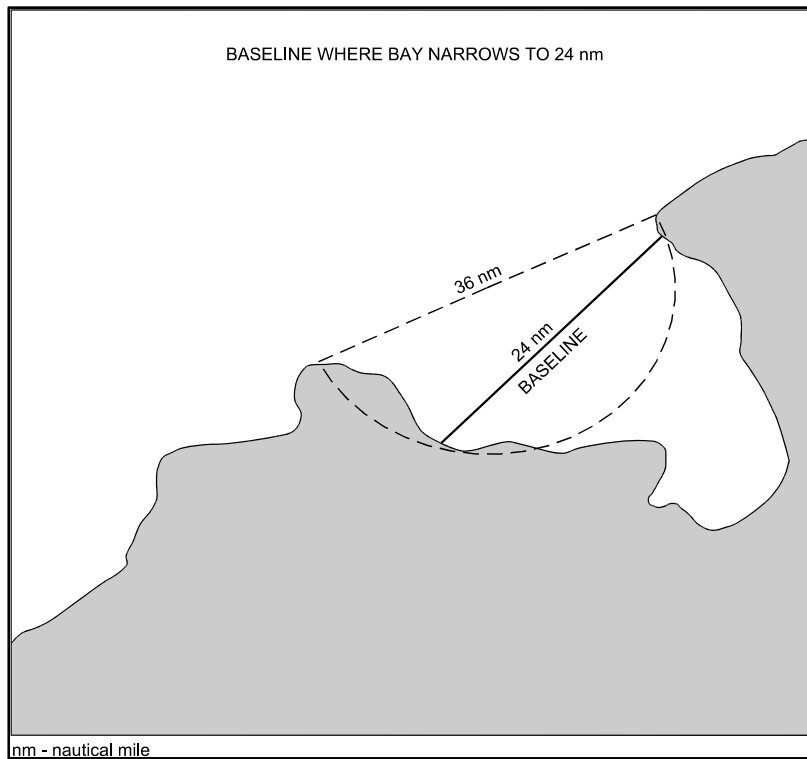


Figure 1-5. Bay with Mouth Exceeding 24 Nautical Miles

### **1.4.5 Reefs**

A reef is a mass of rock or coral that reaches close to the sea surface or is exposed at low tide. Generally, reefs may not be utilized for the purpose of drawing baselines. In the case of islands situated on atolls or of islands having fringing reefs, however, the seaward low-water line of the reef may be used as the baseline.

### **1.4.6 Harbor Works**

The outermost permanent harbor works, which form an integral part of the harbor system, are regarded as forming part of the coast for baseline purposes. Harbor works are structures, such as jetties, breakwaters and groins, erected along the coast at inlets or rivers for protective purposes or for enclosing sea areas adjacent to the coast to provide anchorage and shelter.

## **1.5 WATERS SUBJECT TO STATE SOVEREIGNTY**

For operational purposes, the world's oceans are divided into two parts. The first includes internal waters, territorial seas, and archipelagic waters. These waters are subject to the territorial sovereignty of coastal States, with certain navigational rights reserved to the international community. The second part includes contiguous zones, waters of the EEZ, and the high seas. These are international waters in which all States enjoy the high seas freedoms of navigation and overflight. International waters are discussed further in paragraph 1.6.

### **1.5.1 Internal Waters**

Internal waters are landward of the baseline from which the territorial sea is measured. Lakes, rivers, some bays, harbors, some canals, and lagoons are examples of internal waters. From the standpoint of international law, internal waters have the same legal character as the land itself. There is no right of innocent passage in internal waters, and, unless in distress (see paragraph 2.5.1), ships and aircraft may not enter or overfly internal waters without the permission of the coastal State. Where the establishment of a straight baseline drawn in conformity with UNCLOS has the effect of enclosing as internal waters areas that had previously not been considered as such, a right of innocent passage exists in those waters.

### **1.5.2 Territorial Seas**

The territorial sea is a belt of ocean measured seaward from the baseline of the coastal State and subject to its sovereignty. The United States claims a 12-nautical-mile territorial sea and recognizes territorial sea claims of other States up to a maximum breadth of 12 nautical miles.

### **1.5.3 Islands, Rocks, and Low-Tide Elevations**

Each island has its own territorial sea and, like the mainland, has a baseline from which it is calculated. An island is a naturally formed area of land, surrounded by water, which is above water at high tide. Rocks are islands that cannot sustain human habitation or economic life of their own. Provided they remain above water at high tide, they too possess a territorial sea determined in accordance with the principles discussed in the paragraphs on baselines. Rocks, however, have no EEZ or continental shelf. A low-tide elevation (above water at low tide but submerged at high tide) situated wholly or partly within the territorial sea may be used for delimiting the territorial sea as though it were an island. Where a low-tide elevation is located entirely beyond the territorial sea, it has no territorial sea of its own (figure 1-6).

Islands, rocks, and low-tide elevations are naturally formed. Natural environmental changes over time may convert one into another, but man-made engineering, construction, or reclamation cannot result in such a conversion.

#### **1.5.3.1 Artificial Islands and Off-Shore Installations**

Artificial islands and off-shore installations have no territorial sea of their own. (See, however, paragraph 1.8).

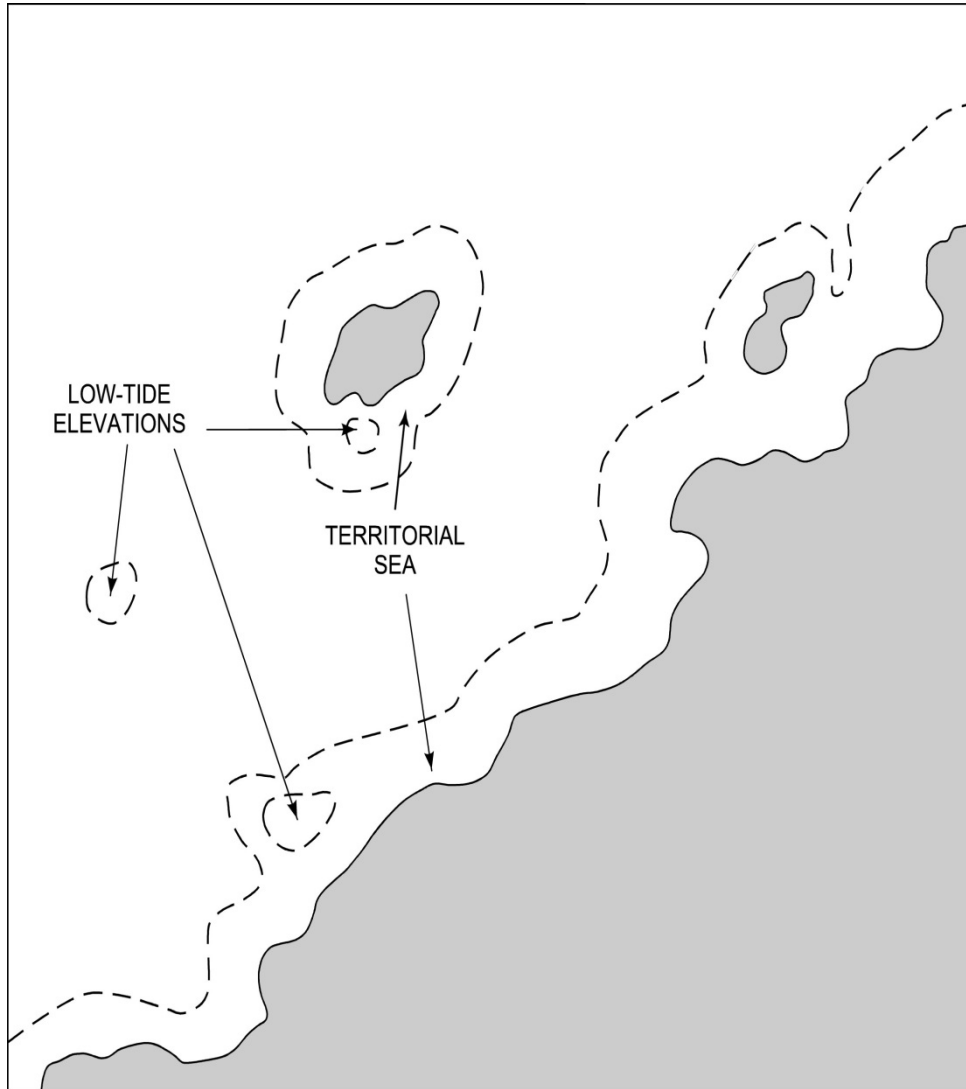


Figure 1-6. Territorial Sea of Islands and Low-Tide Elevations

### 1.5.3.2 Roadsteads

Roadsteads normally used for the loading, unloading, and anchoring of ships, and which would otherwise be situated wholly or partly beyond the outer limits of the territorial sea, are included in the territorial sea. Roadsteads must be clearly marked on charts by the coastal State.

### 1.5.4 Archipelagic Waters and Sea Lanes

An archipelagic State is a State that is constituted wholly of one or more groups of islands. Such States may draw straight archipelagic baselines joining the outermost points of their outermost islands, provided that the ratio of water to land within the baselines is between 1:1 and 9:1. The waters enclosed within the archipelagic baselines are called archipelagic waters. (The archipelagic baselines are also the baselines from which the archipelagic State measures seaward its territorial sea, contiguous zone, and EEZ.) The United States recognizes the right of an archipelagic State to establish archipelagic baselines enclosing archipelagic waters provided the baselines are drawn in conformity with UNCLOS. (See paragraph 2.5.4 regarding navigation and overflight of archipelagic waters.)

Archipelagic States may designate archipelagic sea lanes through their archipelagic waters suitable for continuous and expeditious passage of ships and aircraft. All normal routes used for international navigation and overflight must be included. If the archipelagic State does not designate such sea lanes, the right of archipelagic sea lanes passage may nonetheless be exercised by all States through routes normally used for international navigation and overflight. If the archipelagic State makes only a partial designation of archipelagic sea lanes, a vessel or aircraft must adhere to the regime of archipelagic sea lanes passage while transiting in the established archipelagic sea lanes but retains the right to exercise archipelagic sea lanes passage through all normal routes used for international navigation and overflight through other parts of the archipelago.

## **1.6 INTERNATIONAL WATERS**

For operational purposes, international waters include all ocean areas not subject to the territorial sovereignty of any State. All waters seaward of the territorial sea are international waters in which the high seas freedoms of navigation and overflight are preserved to the international community. International waters include contiguous zones, EEZs, and high seas.

### **1.6.1 Contiguous Zones**

A contiguous zone is an area extending seaward from the territorial sea to a maximum distance of 24 nautical miles from the baseline. In that zone, the coastal State may exercise the control necessary to prevent or punish infringement of its customs, fiscal, immigration, and sanitary laws and regulations that occur within its territory or territorial sea (but not for purported security purposes; see paragraph 1.6.4). The United States claims a 24-nautical-mile contiguous zone.

### **1.6.2 Exclusive Economic Zones**

An EEZ is a resource-related zone adjacent to the territorial sea. An EEZ may not extend beyond 200 nautical miles from the baseline. As the name suggests, its central purpose is economic. The United States recognizes the sovereign rights of a coastal State to prescribe and enforce its laws in the EEZ for the purposes of exploration, exploitation, management, and conservation of the natural resources of the waters, seabed, and subsoil of the zone, as well as for the production of energy from the water, currents, and winds. The coastal State may exercise jurisdiction in the zone over the establishment and use of artificial islands, installations, and structures having economic purposes; over marine scientific research (with reasonable limitations); and over some aspects of marine environmental protection (including implementation of international vessel-source pollution control standards). (For a discussion of marine scientific research, hydrographic surveys, and military surveys in the EEZ, see paragraphs 2.6.2.1 and 2.6.2.2.) In the EEZ all States enjoy the right to exercise the traditional high seas freedoms of navigation and overflight, of the laying of submarine cables and pipelines, and of all other traditional high seas uses by ships and aircraft that are not resource related. The United States established a 200-nautical mile EEZ by Presidential Proclamation 5030 on 10 March 1983.

### **1.6.3 High Seas**

The high seas include all parts of the ocean seaward of the EEZ. When a coastal State has not proclaimed an EEZ, the high seas begin at the seaward edge of the territorial sea.

### **1.6.4 Coastal Security Zones**

Some coastal States have claimed the right to establish military security zones, beyond the territorial sea, of varying breadth in which they purport to regulate the activities of warships and military aircraft of other States by such restrictions as prior notification or authorization for entry, limits on the number of foreign ships or aircraft present at any given time, prohibitions on various operational activities, or complete exclusion. International law does not recognize the right of coastal States to establish zones during peacetime that would restrict the exercise of nonresource-related high seas freedoms beyond the territorial sea. Accordingly, the United States does not recognize the validity of any claimed security or military zone seaward of the territorial sea that purports to restrict or regulate the high seas freedoms of navigation and overflight. (See paragraph 2.5.2.3 for a discussion of

temporary suspension of innocent passage in territorial seas, see paragraph 4.4 for a further discussion of declared security and defense zones in time of peace and paragraph 7.9 for a discussion of exclusion zones and war zones during armed conflict.)

## **1.7 CONTINENTAL SHELVES**

The juridical continental shelf of a coastal State consists of the seabed and subsoil of the submarine areas that extend beyond its territorial sea to the outer edge of the continental margin or to a distance of 200 nautical miles from the baseline used to measure the territorial sea where the continental margin does not extend to that distance. The continental shelf may not extend beyond 350 nautical miles from the baseline of the territorial sea or 100 nautical miles from the 2,500-meter isobath, whichever is greater. Although the coastal State exercises sovereign rights over the continental shelf for purposes of exploring and exploiting its natural resources, the legal status of the superjacent water is not affected. Moreover, all States have the right to lay submarine cables and pipelines on the continental shelf.

## **1.8 SAFETY ZONES**

Coastal States may establish safety zones to protect artificial islands, installations, and structures located in their internal waters, archipelagic waters, territorial seas, and EEZ, and on their continental shelves. In the case of artificial islands, installations, and structures located in the EEZ or on the continental shelf beyond the territorial sea, safety zones may not extend beyond 500 meters from the outer edges of the facility in question, except as otherwise authorized by generally accepted international standards.

## **1.9 AIRSPACE**

Under international law, airspace is classified as either national airspace (that over the land, internal waters, archipelagic waters, and territorial seas of a State) or international airspace (that over contiguous zones, EEZs, the high seas, and territory not subject to the sovereignty of any State). Subject to a right of overflight of international straits (see paragraph 2.5.3) and archipelagic sea lanes (see paragraph 2.5.4.1), each State has complete and exclusive sovereignty over its national airspace. Except as States may have otherwise consented through treaties or other international agreements, the aircraft of all States are free to operate in international airspace without interference by other States.

## **1.10 OUTER SPACE**

The upper limit of airspace subject to national jurisdiction has not been authoritatively defined by international law. International practice has established that airspace terminates at some point below the point at which artificial satellites can be placed in orbit without free-falling to Earth. Outer space begins at that undefined point. All States enjoy a freedom of equal access to outer space and none may appropriate it to its national airspace or exclusive use.



## CHAPTER 2

# International Status and Navigation of Military Vessels and Military Aircraft

### 2.1 SOVEREIGN IMMUNITY

As a matter of customary international law, all manned and unmanned vessels and aircraft owned or operated by a State, and used, for the time being, only on government noncommercial service are entitled to sovereign immunity. This means that such vessels, wherever located, are immune from arrest, search, and inspection. Such vessels and aircraft are also immune from foreign taxation, exempt from any foreign state regulation requiring flying the flag of such foreign state either in its ports or while passing through its territorial sea (although foreign flags may be displayed to render honors in accordance with Navy Regulations), and are entitled to exclusive control over persons onboard such vessels with respect to acts performed on board. The right of sovereign immunity includes protecting the identity of personnel, stores, weapons, or other property on board the vessel.

#### 2.1.1 Sovereign Immunity for U.S. Vessels

The United States asserts the full privilege of sovereign immunity for United States Ships (USSs), United States Naval Ships (USNSs), United States Coast Guard cutters (USCGCs), other vessels owned by the United States, and Military Sealift Command (MSC) time-chartered U.S. flagged vessels. Although MSC U.S. flagged voyage chartered vessels are entitled to full sovereign immunity status, as a matter of policy the United States ordinarily claims only immunity from arrest and taxation for such vessels. The United States does not claim sovereign immunity for MSC foreign flagged chartered vessels. All other United States flagged MSC vessels assert full sovereign immunity. The United States recognizes reciprocal full sovereign immunity privileges for the equivalent vessels of other States.

#### 2.1.2 Sunken Warships, Naval Craft, Military Aircraft, and Government Spacecraft

Sunken warships, naval craft, military aircraft, government spacecraft, and all other sovereign immune objects retain their sovereign immune status and remain the property of the flag State until title is formally relinquished or abandoned, whether the cause of the sinking was through accident or enemy action (unless the warship or aircraft was captured before it sank). As a matter of policy, the U.S. Government does not grant permission to salvage sunken U.S. warships or military aircraft that contain the remains of deceased Service personnel or explosive material. Requests from foreign countries to have their sunken warships or military aircraft, located in U.S. national waters, similarly respected by salvors, are honored.

### 2.2 WARSHIPS

#### 2.2.1 Warship Defined

International law defines a warship as a ship belonging to the armed forces of a State bearing the external markings distinguishing the character and nationality of such ships, under the command of an officer duly commissioned by the government of that State and whose name appears in the appropriate service list of officers, and manned by a crew that is under regular armed forces discipline. Warships maintain their status even if civilians form part of the crew. Ships need not be armed in order to qualify as warships. In the U.S. Navy, those ships designated “USS” are “warships” as defined by international law. U.S. Coast Guard vessels designated “USCGC” under the command of a commissioned officer are also “warships” under international law.

During international armed conflict at sea, warships are the only vessels that may exercise belligerent rights, which include the right to conduct offensive attacks. Other vessels, such as auxiliary vessels and merchant vessels, are not entitled to conduct attacks in offensive combat operations in an international armed conflict. All vessels, however, may defend themselves (including resisting attacks by enemy forces). These limitations do not apply to non-international armed conflicts.

### **2.2.2 Warship International Status**

As a matter of customary international law, warships enjoy sovereign immunity from interference by the authorities of States other than the flag State. Police and port authorities may board a warship only with the permission of the commanding officer. A warship cannot be required to consent to an onboard search or inspection, nor may it be required to fly the flag of the host State. Although warships are required to comply with coastal State traffic control, sewage, health, and quarantine restrictions instituted in conformance with the UNCLOS, a failure of compliance is subject only to diplomatic complaint or to coastal State orders to leave its territorial sea immediately. Moreover, warships are immune from arrest and seizure, whether in national or international waters, and are exempt from foreign taxes and regulation and exercise exclusive control over all passengers and crew with regard to acts performed on board. U.S. Navy policy requires warships to assert the rights of sovereign immunity.

### **2.2.3 Crew Lists and Inspections**

U.S. policy prohibits providing a list of crew members (to include military and nonmilitary personnel) or any other passengers on board a USS or USCGC vessel as a condition of entry into a port or to satisfy local immigration officials upon arrival. For more information concerning U.S. policy in this regard see CNO WASHINGTON, DC 071719Z JUL 16 (NAVADMIN 158/16).

It is U.S. policy to refuse host government requests to conduct inspections of U.S. Navy and Coast Guard vessels, conduct health inspections of crew members, provide specific information on individual crew members (including providing access to a crew member's medical record or the completion of an individual health questionnaire), or undertake other requested actions beyond the commanding officer's certification. In response to questions concerning the presence of infectious diseases on visiting U.S. Navy ships, the U.S. diplomatic post may inform host governments that a commanding officer of a U.S. Navy ship is required under Navy Regulations to report at once to local health authorities any condition aboard the ship which presents a hazard of introduction of a communicable disease outside the ship. The commanding officer, if requested, may certify that there are no indications that personnel entering the host State from the ship will present such hazard.

### **2.2.4 Quarantine**

Article 0859, U.S. Navy Regulations, 1990, requires that the commanding officer or aircraft commander of a ship or aircraft comply with quarantine regulations and restrictions. While commanding officers and aircraft commanders shall not permit inspection of their vessel or aircraft, they shall afford every other assistance to health officials, U.S. or foreign, and shall give all information required, insofar as permitted by the requirements of military necessity and security. To avoid restrictions imposed by quarantine regulations, the commanding officer should request free pratique (clearance granted a ship to proceed into a port after compliance with health or quarantine regulations) in accordance with the sailing directions for that port.

### **2.2.5 Nuclear-Powered Warships**

Nuclear-powered warships and conventionally powered warships enjoy identical international legal status.

## **2.3 OTHER NAVAL CRAFT**

### **2.3.1 Auxiliary Vessels**

Auxiliary vessels are vessels, other than warships, that are owned by or under the exclusive control of the armed forces. Because they are State owned or operated and used for the time being only on government noncommercial service, auxiliary vessels enjoy sovereign immunity. This means that, like warships, they are immune from arrest and search. Like warships, they are exempt from foreign taxes and regulation, and exercise exclusive control over all passengers and crew with respect to acts performed on board.

### **2.3.2 Military Sealift Command Vessel Status**

The following MSC vessels are auxiliary vessels of the United States and are entitled to sovereign immunity: USNS, to include U.S. Government-owned vessels or those under bareboat charter to the government, and assigned to MSC; privately-owned U.S. flag vessels under charter to MSC, including ships chartered for a period of time (time-chartered ships) and vessels chartered for a specific voyage or voyages (voyage-chartered ships); and the U.S. Maritime Administration's National Defense Reserve Fleet and its Ready Reserve Force, when activated and assigned to MSC.

U.S. flagged time-chartered vessels operated by MSC are privately-owned and crewed by civilian private sector crews hired by the vessel's owner, but are used exclusively in government noncommercial service and are completely and at all times directed by and subject to the instructions (e.g., sailing orders) of MSC. These time-chartered vessels also often have government contractor or DoD personnel (military and civilian) aboard to perform government functions, including force protection services. These vessels are exclusively operated by MSC to carry only U.S. Government, noncommercial cargo and for the performance of other noncommercial U.S. Government missions. These MSC U.S.-flag time-chartered ships are entitled to sovereign immunity and assert full privileges of sovereign immunity, just like USNS vessels. Normally, a diplomatic clearance request is submitted to a foreign port State before these vessels enter a foreign port.

Although MSC U.S.-flagged voyage chartered vessels are entitled to assert full privileges of sovereign immunity, the United States continues as a matter of policy to claim only immunity from arrest and taxation for such vessels. (The United States reserves the right to assert full sovereign immunity for MSC U.S.-flagged voyage charter vessels on a case by case basis.) Normally, these vessels may be boarded and searched by foreign authorities and may provide documents such as crew lists.

The United States does not claim sovereign immunity for MSC foreign-flagged voyage or MSC foreign-flagged time-chartered vessels. These vessels are subject to foreign flag state jurisdiction and will provide the same information to foreign authorities that commercial ships provide.

### **2.3.3 Small Craft Status**

U.S. Navy and U.S. Coast Guard motor whale boats, landing craft air cushioned, and all other small boats, craft, and vehicles deployed from larger vessels are sovereign immune craft whose status is not dependent upon the status of the launching platform.

### **2.3.4 Unmanned Surface Vehicles**

Unmanned surface vehicles (USVs) are water craft that are either autonomous or remotely navigated and may be launched from the surface, subsurface, air, or land. The anticipated stealth, mobility, flexibility of employment, and network capabilities of USVs make them extremely valuable as force multipliers, particularly in the littoral environment. Missions envisioned for USVs include laying undersea sensor grids, antisubmarine warfare (ASW) prosecution, barrier operations, sustainment of carrier operating areas, mine countermeasures, intelligence, surveillance, and reconnaissance, bottom mapping and survey, and special operations support.

### **2.3.5 Unmanned Underwater Vehicles**

Unmanned underwater vehicles (UUVs) are underwater craft that are either autonomous or remotely navigated and may be launched from the surface, subsurface, air, or land. Towed systems, hard-tethered devices, systems not capable of fully submerging such as USV, semisubmersible vehicles, or bottom crawlers are not considered UUVs. The sea services may employ UUVs for a wide variety of missions, including, but not limited to: intelligence, surveillance, and reconnaissance; mine countermeasures, ASW, inspection/identification, oceanography, communication/navigation network nodes, payload delivery, information operations (IO), time critical strike, barrier patrol (homeland defense, antiterrorism/force protection (AT/FP)), and barrier patrol (sea base support).

### **2.3.6 Unmanned Surface Vehicle/Unmanned Underwater Vehicle Status**

USVs and UUVs engaged exclusively in government, noncommercial service are sovereign immune craft. USV/UUV status is not dependent on the status of its launch platform.

## **2.4 MILITARY AIRCRAFT**

### **2.4.1 Military Aircraft Defined**

Military aircraft means any aircraft operated by the armed forces of a State; bearing the military markings of that State; commanded by a member of the armed forces; and controlled, manned, or preprogrammed by a crew subject to regular armed forces discipline.

### **2.4.2 Military Aircraft International Status**

Military aircraft are “State aircraft” within the meaning of the Convention on International Civil Aviation of 1944 (the “Chicago Convention”) and, like warships, enjoy sovereign immunity from foreign search and inspection. Subject to the right of transit passage, archipelagic sea lanes passage, and entry in distress, State aircraft may not enter national airspace or land in the sovereign territory of another State without its authorization. Foreign officials may not board the aircraft without the consent of the aircraft commander. Should the aircraft commander fail to certify compliance with local customs, immigration or quarantine requirements, the aircraft may be directed to leave the territory and national airspace of that State immediately.

### **2.4.3 State Aircraft**

State aircraft include military, customs, police, and other aircraft operated by a government exclusively for noncommercial purposes. State aircraft enjoy sovereign immunity. Civilian owned and operated aircraft, the full capacity of which has been contracted by DoD and used in the military service of the United States, qualify as State aircraft. However, as a matter of policy, the United States normally does not designate Air Mobility Command charter aircraft as State aircraft.

### **2.4.4 Unmanned Aircraft Definition and Status**

Unmanned aircraft (UAs) are aircraft that do not carry a human operator and are capable of flight with or without human remote control. They may be launched from the water’s surface, subsurface, air, or land. All UAs operated by the DoD are considered “military aircraft” and retain the overflight rights under customary international law as reflected in UNCLOS. Since DoD-operated UAs are considered “military aircraft,” all domestic and international law pertaining to “military aircraft” is applicable. This includes all conventions, treaties, and agreements relating to “military aircraft” and “auxiliary aircraft,” as well as certain provisions recognizing the special status of military aircraft contained in conventions or treaties pertaining to “civil aircraft” and “civilian airliners.” UAs enjoy all of the navigational rights of manned aircraft.

## 2.5 NAVIGATION IN AND OVERFLIGHT OF NATIONAL WATERS

### 2.5.1 Internal Waters

Coastal States enjoy the same jurisdiction and control over their internal waters and superjacent airspace as they do over their land territory. Because most ports and harbors are located landward of the baseline of the territorial sea, entering a port ordinarily involves navigation in internal waters. Because entering internal waters is legally equivalent to entering the land territory of another nation, that State's permission is required. To facilitate international maritime commerce, many States grant foreign merchant vessels standing permission to enter internal waters, in the absence of notice to the contrary. Warships and auxiliaries, and all aircraft, on the other hand, require specific and advance entry permission, unless other bilateral or multilateral arrangements have been concluded.

Exceptions to the rule of nonentry into internal waters without coastal nation permission, whether specific or implied, arise when rendered necessary by force majeure or by distress. Furthermore, vessels may exercise innocent passage where straight baselines have the effect of enclosing, as internal waters, areas of the sea previously regarded as territorial seas or high seas.

### 2.5.2 Territorial Seas

#### 2.5.2.1 Innocent Passage

Ships (but not aircraft) of all States enjoy the right of innocent passage for the purpose of continuous and expeditious traversing of the territorial sea or for proceeding to or from internal waters. Innocent passage includes stopping and anchoring, but only insofar as incidental to ordinary navigation, or as rendered necessary by force majeure or by distress, or for the purpose of rendering assistance to persons, ships, or aircraft in danger or distress. Passage is innocent so long as it is not prejudicial to the peace, good order, or security of the coastal State. Activities considered to be prejudicial to the peace, good order, or security of the coastal States, and therefore inconsistent with innocent passage, are:

1. Any threat or use of force against the sovereignty, territorial integrity, or political independence of the coastal nation, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations
2. Any exercise or practice with weapons of any kind
3. Any act aimed at collecting information to the prejudice of the defense or security of the coastal nation
4. Any act of propaganda aimed at affecting the defense or security of the coastal nation
5. The launching, landing, or taking on board of any aircraft
6. The launching, landing, or taking on board of any military device
7. The loading or unloading of any commodity, currency, or person contrary to the customs, fiscal, immigration or sanitary laws, and regulations of the coastal nation
8. Any act of willful and serious pollution contrary to UNCLOS
9. Any fishing activities
10. The carrying out of research or survey activities
11. Any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal nation
12. Any other activity not having a direct bearing on passage.

Foreign ships, including warships, exercising the right of innocent passage are required to comply with the laws and regulations enacted by the coastal State in conformity with established principles of international law and, in particular, with such laws and regulations relating to the safety of navigation. Innocent passage does not include a right of overflight. A vessel does not enjoy the right of innocent passage if, in the case of a submarine, it navigates submerged, or if, in the case of any ship, it engages in an act aimed at collecting information to the prejudice of the defense or security of the coastal nation.

UNCLOS does not prohibit passage that is noninnocent, such as overflight of or submerged transit in the territorial sea. However, a coastal State may take affirmative action in and over its territorial sea to prevent passage that is not innocent, including where necessary, the use of force. If a foreign ship or aircraft enters the territorial sea or the airspace above it and engages in noninnocent activities, the appropriate remedy, consistent with customary international law, which includes the right of self-defense, is first to inform the ship or aircraft of the reasons the coastal nation questions the innocence of the passage, and to provide the vessel a reasonable opportunity to clarify its intentions or to correct its conduct in a reasonably short period of time.

### **2.5.2.2 Permitted Restrictions**

For purposes such as resource conservation, environmental protection, and navigational safety, a coastal State may establish certain restrictions upon the right of innocent passage of foreign vessels. Such restrictions upon the right of innocent passage through the territorial sea are not prohibited by international law, provided that they are reasonable and necessary; do not have the practical effect of denying or impairing the right of innocent passage; and do not discriminate in form or in fact against the ships of any State or those carrying cargoes to, from, or on behalf of any State. Further, these restrictions cannot prohibit transit or otherwise impair the rights of innocent and transit passage of nuclear-powered vessels. The coastal State may, where navigational safety dictates, require foreign ships exercising the right of innocent passage to utilize designated sea lanes and traffic separation schemes.

### **2.5.2.3 Temporary Suspension of Innocent Passage**

A coastal nation may temporarily suspend innocent passage in specified areas of its territorial sea when it is essential for the protection of its security. Such a suspension must be preceded by a published notice to the international community and may not discriminate in form or in fact among foreign ships.

### **2.5.2.4 Warships and Innocent Passage**

All warships, regardless of cargo, armament, or means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance with international law, for which neither prior notification nor authorization is required. UNCLOS sets forth an exhaustive list of activities that would render passage noninnocent (see paragraph 2.5.2.1). A ship passing through the territorial sea that does not engage in any of those activities is in innocent passage. If a warship does not comply with coastal nation regulations that conform to established principles of international law and disregards a request for compliance, the coastal State may require the warship immediately to leave the territorial sea in which case the warship shall do so immediately.

### **2.5.2.5 Unmanned Systems and Navigational Rights**

USVs and UUVs enjoy the right of innocent passage in the territorial sea. USVs and UUVs may be deployed by larger vessels engaged in innocent passage as long as their employment complies with the navigational regime of innocent passage.

### **2.5.2.6 Assistance Entry**

Long before the establishment of territorial seas, mariners recognized a humanitarian duty to render assistance to persons in distress. Today, ship and aircraft commanders have the same duty to assist those in distress. In particular, ships have the duty to enter into a foreign State's territorial sea without the permission of the coastal State when there is reasonable certainty (based on the best available information) that a person is in distress, their location is reasonably well known, and the rescuing unit is in position to render timely and effective assistance.

Further, aircraft have the authority to enter into the corresponding airspace without the permission of the coastal State when there is reasonable certainty (based on the best available information) that a person is in distress, their location is reasonably well known, and the rescuing unit is in position to render timely and effective assistance. Though the ship or aircraft conducting the rescue shall not request approval from the coastal State to enter the State's territorial sea to conduct a rescue operation, it shall provide timely notification to the coastal State's search and rescue authorities. Assistance entry into a coastal State's territorial sea does not include the conduct of search operations, the rescue of property, assistance to persons not in distress, or transit into the internal waters or over the land mass of the coastal State. Reasonable doubt as to the immediacy or severity of a situation shall be resolved by assuming the person is in distress and if required, conducting an assistance entry rescue operation.

### **2.5.3 International Straits**

#### **2.5.3.1 Types of International Straits**

International law recognizes five different kinds of straits used for international navigation. Each type of strait has a distinct legal regime governing passage:

1. Straits connecting one part of the high seas or EEZ with another part of the high seas or EEZ (e.g., Straits of Hormuz, Malacca, Gibraltar, Bab el Mandeb): Transit passage applies.
2. Straits regulated by long-standing treaties (e.g., Turkish Straits, Danish Straits, Strait of Magellan): Treaty terms apply.
3. Straits not completely overlapped by territorial seas (i.e., a high seas corridor exists): High seas freedoms apply in the corridor.
4. Straits formed by an island of a State bordering the strait and its mainland and where a route of similar convenience exists to the seaward of the island (e.g., Strait of Messina): Nonsuspendable innocent passage applies.
5. Straits between a part of the high seas or an EEZ and the territorial sea of a foreign state (i.e., "dead end straits" such as Head Harbour Passage and Gulf of Honduras): Nonsuspendable innocent passage applies.

#### **2.5.3.2 International Straits Between One Part of the High Seas or Exclusive Economic Zone and Another Part of the High Seas or Exclusive Economic Zone**

Straits used for international navigation between one part of the high seas or an EEZ and another part of the high seas or an EEZ are subject to the navigational regime of transit passage. Transit passage exists throughout the entire strait (shoreline-to-shoreline) and not just the area overlapped by the territorial sea of the coastal State(s). Under international law, the ships and aircraft of all States, including warships, auxiliary vessels, USVs, UUVs, and military aircraft (including UAs), enjoy the right of unimpeded transit passage through such straits and their approaches.

Transit passage is defined as the exercise of the freedoms of navigation and overflight solely for the purpose of continuous and expeditious transit in the normal modes of operation utilized by ships and aircraft for such passage. Ships and aircraft, while exercising the right of transit passage, shall: (a) proceed without delay through or over the strait; (b) refrain from any threat or use of force against the sovereignty, territorial integrity, or political independence of States bordering the strait and, (c) refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by force majeure, distress, or in order to render assistance to persons, ships, or aircraft in danger or distress. Surface warships may transit in a manner consistent with sound navigational practices and the security of the force, including the use of their electronic detection and navigational devices such as radar, sonar and depth-sounding devices, formation steaming, and the launching and recovery of aircraft. Submarines are free to transit international straits submerged, since that is their normal mode of operation.

Transit passage through international straits cannot be hampered or suspended by the coastal State for any purpose during peacetime. This principle of international law also applies to transiting ships (including warships) of States at peace with the bordering coastal State but involved in armed conflict with another State.

Coastal States bordering international straits overlapped by territorial seas may designate sea lanes and prescribe traffic separation schemes to promote navigational safety. However, such sea lanes and separation schemes must be approved by the competent international organization (the International Maritime Organization (IMO)) in accordance with generally accepted international standards. Merchant ships and government-operated ships operated for commercial purposes must respect properly designated sea lanes and traffic separation schemes. Warships, auxiliaries, and government ships operated on exclusive government service, i.e., sovereign-immune vessels (see paragraph 2.1) are not legally required to comply with such sea lanes and traffic separation schemes while in transit passage. Sovereign immune vessels, however, must exercise due regard for the safety of navigation. Warships and auxiliaries may, and often do, voluntarily comply with IMO-approved routing measures in international straits where practicable and compatible with the military mission. When voluntarily using an IMO-approved traffic separation scheme, such vessels must comply with applicable provisions of the 1972 International Regulations for Preventing Collisions at Sea (COLREGS).

### **2.5.3.3 International Straits Not Completely Overlapped by Territorial Seas**

Ships and aircraft transiting through or above straits used for international navigation that are not completely overlapped by territorial seas and through which there is a high seas or EEZ corridor suitable for such navigation, enjoy the high seas freedoms of navigation and overflight while operating in and over such a corridor. Accordingly, so long as they remain beyond the territorial sea, all ships and aircraft of all States have the unencumbered right to navigate through and over such waters subject only to due regard for the right of others to do so as well. In international straits not completely overlapped by territorial seas, all vessels enjoy high seas freedoms while operating in the high seas corridor beyond the territorial sea. If the high seas corridor is not of similar convenience (e.g., to stay within the high seas corridor would be inconsistent with sound navigational practices), such vessels enjoy the right of unimpeded transit passage through the strait.

### **2.5.3.4 International Straits Between a Part of the High Seas or Exclusive Economic Zone and the Territorial Seas of a Coastal State (“Dead-End” Straits)**

The regime of innocent passage (see paragraph 2.5.2.1), rather than transit passage, applies in straits used for international navigation that connect a part of the high seas or an EEZ with the territorial sea of a coastal State. There may be no suspension of innocent passage through such straits. Additionally, warships, auxiliaries, and ships operated on exclusive government service, i.e., sovereign-immune vessels (see paragraph 2.1), are not legally required to comply with sea lanes and traffic separation schemes while conducting innocent passage but must exercise due regard for the safety of navigation.

### **2.5.3.5 Straits Regulated in Whole or in Part by International Conventions**

The navigational regime that applies in straits regulated by long-standing international conventions is the regime specified in the applicable convention.

## **2.5.4 Archipelagic Waters**

### **2.5.4.1 Archipelagic Sea Lanes Passage**

All ships and aircraft, including warships and military aircraft, enjoy the right of archipelagic sea lanes passage while transiting through, under, or over archipelagic waters and adjacent territorial seas via all routes normally used for international navigation and overflight. (See paragraph 1.5.4 for discussion of archipelagic waters.) Archipelagic sea lanes passage is defined as the exercise of the freedom of navigation (FON) and overflight for the sole purpose of continuous, expeditious, and unobstructed transit through archipelagic waters. The right of archipelagic sea lanes passage is substantially identical to the right of transit passage through international straits.



Archipelagic sea lanes passage may be exercised in a ship or aircraft's normal mode of operation. This means that submarines may transit while submerged and that surface warships may carry out those activities normally undertaken during passage through such waters, including activities necessary to their security, such as formation steaming and the launching and recovery of aircraft as well as operating devices such as radar, sonar, and depth-sounding devices.

Archipelagic States may designate archipelagic sea lanes through their archipelagic waters suitable for continuous and expeditious passage of ships and aircraft. All normal routes used for international navigation and overflight are to be included. If the archipelagic nation does not designate such sea lanes, the right of archipelagic sea lanes passage may nonetheless be exercised by all States through routes normally used for international navigation and overflight.

When archipelagic sea lanes are properly designated by the archipelagic State, the following additional rules apply:

1. Each such designated sea lane is defined by a continuous axis line from the point of entry into the territorial sea adjacent to the archipelagic waters, through those archipelagic waters, to the point of exit from the territorial sea beyond.
2. Ships and aircraft engaged in archipelagic sea lanes passage through such designated sea lanes are required to remain within 25 nautical miles either side of the axis line and must approach no closer to the coastline than 10 percent of the distance between the points on islands bordering the sea lane and the axis line (figure 2-1).

The right of archipelagic sea lanes passage, through designated sea lanes as well as through all normal routes, cannot be hampered or suspended by the archipelagic State for any purpose. In situations where an archipelagic State has only partially designated sea lanes, the navigational regime of archipelagic sea lanes passage applies to those lanes. However, vessels and aircraft retain the right to use all other normal routes for transits through areas of archipelagic waters where there are no designated sea lanes.

#### **2.5.4.2 Innocent Passage within Archipelagic Waters**

Outside of archipelagic sea lanes, all ships, including warships, enjoy the more limited right of innocent passage throughout archipelagic waters just as they do in the territorial sea. (For the exercise of innocent passage, see 2.5.2.1.) There is no right of overflight through airspace over archipelagic waters outside of archipelagic sea lanes.

### **2.6 NAVIGATION IN AND OVERFLIGHT OF INTERNATIONAL WATERS**

#### **2.6.1 Contiguous Zones**

The contiguous zone is comprised of international waters in and over which the ships and aircraft, including warships and military aircraft, of all States enjoy the high seas freedoms of navigation and overflight. Although the coastal State may exercise in those waters the control necessary to prevent and punish infringement of its customs, fiscal, immigration, and sanitary laws that may occur within its territory (including its territorial sea), it cannot otherwise interfere with international navigation and overflight in and above the contiguous zone.

#### **2.6.2 Exclusive Economic Zones**

The coastal State's jurisdiction and control over the EEZ are limited to matters concerning the exploration, exploitation, management, and conservation of the resources of those international waters. The coastal State may also exercise in the zone jurisdiction over the establishment and use of artificial islands, installations, and structures having economic purposes; over marine scientific research (with reasonable limitations); and over some aspects of marine environmental protection. Accordingly, the coastal State cannot unduly restrict or impede the exercise of the freedoms of navigation in and overflight of the EEZ. Since all ships and aircraft, including warships and military aircraft, enjoy the high seas freedoms of navigation and overflight and other internationally lawful uses of the sea related to those freedoms, in and over those waters, the existence of an EEZ in an area of naval operations need not, of itself, be of operational concern to the naval commander.

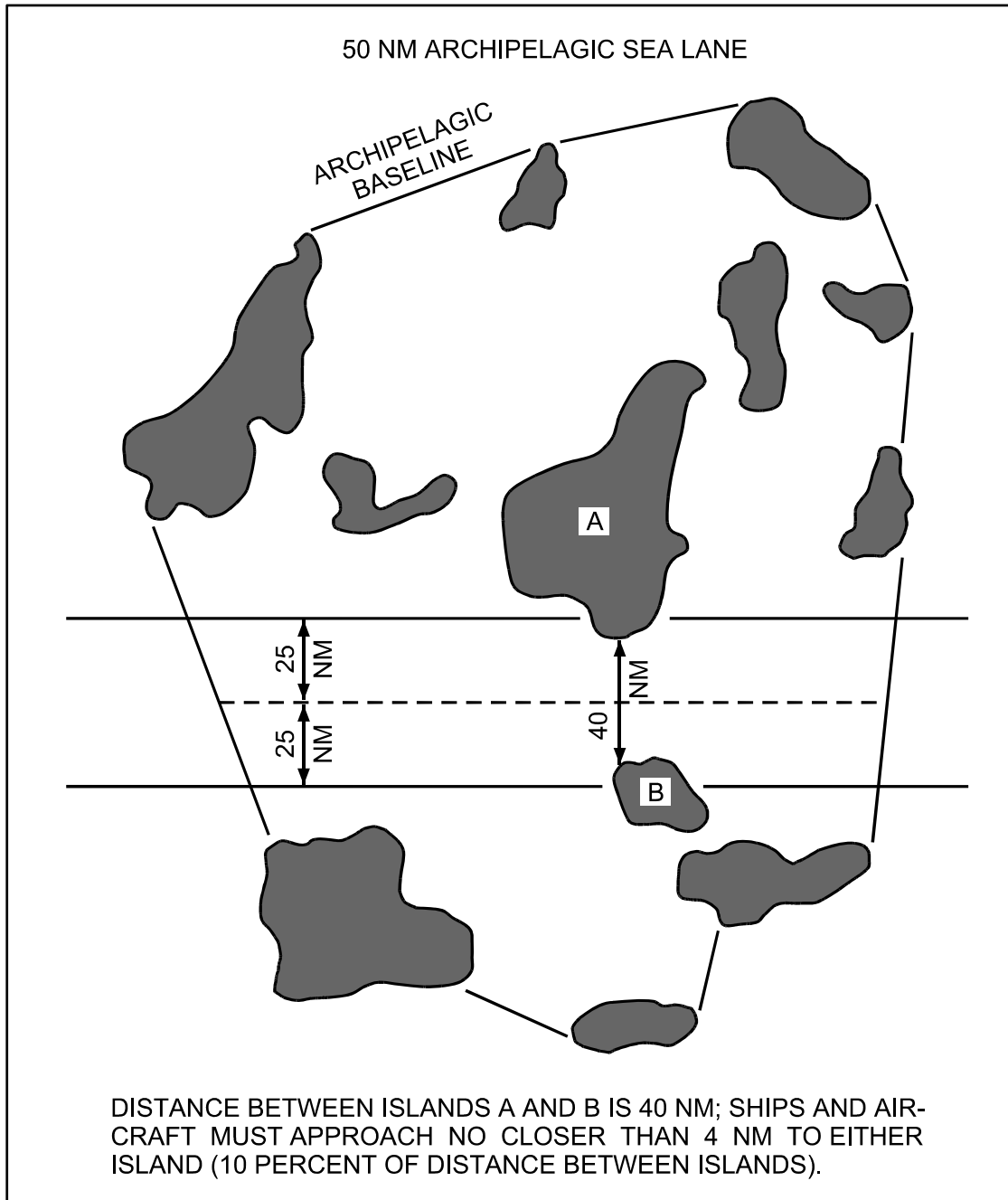


Figure 2-1. A Designated Archipelagic Sea Lane

### 2.6.2.1 Marine Scientific Research

Coastal States may regulate marine scientific research conducted in marine areas under their jurisdiction. This includes the EEZ and the continental shelf. Marine scientific research includes activities undertaken in the ocean and coastal waters to expand general scientific knowledge of the marine environment for peaceful purposes, and includes: physical and chemical oceanography, marine biology, fisheries research, scientific ocean drilling and coring, geological/geophysical scientific surveying, as well as other activities with a scientific purpose. The results of marine scientific research are generally made publicly available. It is the policy of the United States to encourage freedom of marine scientific research. Accordingly, the United States does not require that other States obtain its consent prior to conducting marine scientific research in the U.S. EEZ.

### 2.6.2.2 Hydrographic Surveys and Military Surveys

Although coastal State consent must be obtained in order to conduct marine scientific research in its EEZ, the coastal State may not regulate hydrographic surveys or military surveys conducted beyond its territorial sea, nor may it require notification of such activities.

A hydrographic survey is the obtaining of information in coastal or relatively shallow areas for the purpose of making navigational charts and similar products to support safety of navigation. A hydrographic survey may include measurements of the depth of water, configuration and nature of the natural bottom, direction and force of currents, heights and times of tides and water stages, and hazards to navigation.

A military survey is the collecting of marine data for military purposes and, whether classified or not, is generally not made publicly available. A military survey may include collection of oceanographic, hydrographic, marine geological, geophysical, chemical, biological, acoustic, and related data.

Chief of Naval Operations Instruction (OPNAVINST) 3128.9F, Diplomatic Clearance for U.S. Navy Marine Data Collection Activities in Foreign Jurisdictions, provides guidance for determining requirements and procedures for marine data collection activities by Department of the Navy marine data collection assets. Marine data collection is a general term used when referring to all types of survey or marine scientific activity (i.e., military surveys, hydrographic surveys, and marine scientific research).

### 2.6.3 High Seas Freedoms and Warning Areas

All ships and aircraft, including warships and military aircraft, enjoy complete freedom of movement and operation on and over the high seas. For warships, this includes task force maneuvering, flight operations, military exercises, surveillance, intelligence gathering activities, and ordnance testing and firing. All States also enjoy the right to lay submarine cables and pipelines on the bed of the high seas as well as on the continental shelf beyond the territorial sea, with coastal State approval for the course of pipelines on the continental shelf. All of these activities must be conducted with due regard for the rights of other States and the safe conduct and operation of other ships and aircraft.

#### 2.6.3.1 Warning Areas

Any State may declare a temporary warning area in international waters and airspace to advise other States of the conduct of activities that, although lawful, are hazardous to navigation and/or overflight. The United States and other States routinely declare such areas for missile testing, gunnery exercises, space vehicle recovery operations, and other purposes entailing some danger to other lawful uses of the seas by others. Notice of the establishment of such areas must be promulgated in advance, in the form of a special warning to mariners, notice to mariners, notice to airmen, Hydro Atlantic/Hydro Pacific messages, and the Global Maritime Distress and Safety System.

Ships and aircraft of other States are not required to remain outside a declared warning area, but are obliged to refrain from interfering with activities therein. Consequently, ships and aircraft of one State may operate in a warning area within international waters and airspace declared by another State, collect intelligence and observe the activities involved, subject to the requirement of due regard for the rights of the declaring State to use international waters and airspace for such lawful purposes. The declaring State may take reasonable measures including the use of proportionate force to protect the activities against interference.

### 2.6.4 Declared Security and Defense Zones

As a general rule, international law does not recognize the peacetime right of any nation to restrict the navigation and overflight of foreign warships and military aircraft beyond its territorial sea. Although several coastal States have asserted claims that purport to prohibit warships and military aircraft from operating in so-called security zones extending beyond the territorial sea, such claims have no basis in international law in time of peace, and are not recognized by the United States.

The Charter of the United Nations and general principles of international law recognize that a State may exercise measures of individual and collective self-defense against an armed attack or imminent threat of armed attack. Those measures may include the establishment of “defensive sea areas” or “maritime control areas” in which the threatened State seeks to enforce some degree of control over foreign entry into those areas. Historically, the establishment of such areas extending beyond the territorial sea has been restricted to periods of war or to declared national emergency involving the outbreak of hostilities. The geographical scope of such areas and the degree of control that a coastal State may lawfully exercise over them must be reasonable in relation to the needs of national security and defense.

## **2.6.5 Polar Regions**

### **2.6.5.1 Arctic Region**

The United States considers that the waters, ice pack, and airspace of the Arctic region beyond the lawfully claimed territorial seas of littoral States have international status and are open to navigation by the ships and aircraft of all States. The Arctic region is a maritime domain; as such, existing policies and authorities relating to maritime areas continue to apply. Although several States have, at times, attempted to claim sovereignty over the Arctic on the basis of discovery, historic use, ethnicity, contiguity (proximity), or the so-called “sector” theory, those claims are not recognized in international law. In particular, the Northwest Passage is a strait used for international navigation, and the Northern Sea Route includes straits used for international navigation. The regime of transit passage applies to passage through those straits.

### **2.6.5.2 Antarctic Region**

The United States does not recognize the validity of the claims of other States to any portion of the Antarctic area. The United States is a party to the 1959 Antarctic Treaty governing Antarctica. Designed to encourage the scientific exploration of the continent and to foster research and experiments in Antarctica without regard to conflicting assertions of territorial sovereignty, the Treaty provides that no activity in the area undertaken while the treaty is in force will constitute a basis for asserting, supporting, or denying such claims.

The Antarctic Treaty establishes a special regime for Antarctica and suspends conflicting claims of territorial sovereignty but also contains provisions which affect the FON and overflight. It provides that Antarctica “shall be used for peaceful purposes only,” and that “any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons” are prohibited. All stations and installations, and all ships and aircraft at points of discharging or embarking cargo or personnel in Antarctica, are subject to inspection by designated foreign observers. Therefore, classified activities are not conducted by the United States in Antarctica, and all classified material is removed from U.S. ships and aircraft prior to visits to the continent. In addition, the treaty prohibits nuclear explosions and disposal of nuclear waste anywhere south of 60° South Latitude. The treaty does not, however, affect in any way the high seas freedoms of navigation and overflight in the Antarctic region. The United States recognizes no territorial, territorial sea, or airspace claims in Antarctica.

The 1991 Protocol on Environmental Protection to the Antarctic Treaty, to which the United States is a party, designates Antarctica as a natural reserve, devoted to peace and science, and sets forth basic principles and detailed mandatory rules applicable to human activities in Antarctica, including obligations to accord priority to scientific research.

## **2.6.6 Nuclear-Free Zones**

The 1968 Nuclear Weapons Non-Proliferation Treaty, to which the United States is a party, acknowledges the right of groups of States to conclude regional treaties establishing nuclear-free zones. Such treaties are binding only on parties to them or to protocols incorporating those provisions. To the extent that the rights and freedoms of other States, including the high seas freedoms of navigation and overflight, are not infringed upon, such treaties are not inconsistent with international law. The 1967 Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco) is an example of a nuclear-free zone arrangement that is fully consistent with international law, as evidenced by U.S. ratification of its two Protocols. This in no way affects the exercise by the United States of navigational rights and freedoms within waters covered by the Treaty of Tlatelolco.

## **2.7 AIR NAVIGATION**

### **2.7.1 National Airspace**

Under international law, every State has complete and exclusive sovereignty over its national airspace, that is, the airspace above its territory, its internal waters, its territorial sea, and, in the case of an archipelagic State, its archipelagic waters. There is no right of innocent passage of aircraft through the airspace over the territorial sea or archipelagic waters analogous to the right of innocent passage enjoyed by ships of all States. Subject to the rights of transit passage and archipelagic sea lanes passage, there is no right of entry for aircraft into foreign national airspace. Accordingly, unless party to an international agreement to the contrary, all States have complete discretion in regulating or prohibiting flights within their national airspace, with the sole exception of aircraft in transit passage or archipelagic sea lanes passage. Outside of these circumstances, foreign aircraft wishing to enter national airspace must identify themselves, seek or confirm permission to land or to transit, and must obey all reasonable orders to land, turn back, or fly a prescribed course and/or altitude.

Pursuant to the Convention on International Civil Aviation of 1944 (the Chicago Convention), civil aircraft in distress are entitled to special consideration and should be allowed entry and emergency landing rights. Customary international law recognizes that foreign State aircraft in distress, including military aircraft, are similarly entitled to enter national airspace and to make emergency landings without prior coastal nation permission. The crew of such aircraft are entitled to depart expeditiously and the aircraft must be returned. While on the ground under such circumstances, State aircraft continue to enjoy sovereign immunity.

#### **2.7.1.1 International Straits Between One Part of the High Seas or Exclusive Economic Zone and Another Part of the High Seas or Exclusive Economic Zone**

All aircraft, including military aircraft and UAs, enjoy the right of unimpeded transit passage through the airspace above international straits overlapped by territorial seas. Such transits must be continuous and expeditious, and the aircraft involved must refrain from the threat or the use of force against the sovereignty, territorial integrity, or political independence of the State or States bordering the strait. The exercise of the right of overflight by aircraft engaged in the transit passage of international straits cannot be impeded or suspended in peacetime for any purpose.

In international straits not completely overlapped by territorial seas, all aircraft, including military aircraft and UAs, enjoy high seas freedoms while operating in the high seas corridor beyond the territorial sea. If the high seas corridor is not of similar convenience (e.g., to stay within the high seas corridor would be inconsistent with sound navigational practices), such aircraft enjoy the right of unimpeded transit passage through the airspace of the strait.

#### **2.7.1.2 Archipelagic Sea Lanes**

All aircraft, including military aircraft and UAs, enjoy the right of unimpeded passage through the airspace above archipelagic sea lanes. The right of overflight of such sea lanes is essentially identical to that of transit passage through the airspace above international straits overlapped by territorial seas.

### **2.7.2 International Airspace**

International airspace is the airspace over the contiguous zone, the EEZ, the high seas, and territories not subject to national sovereignty (e.g., Antarctica). All international airspace is open to the aircraft of all States. Accordingly, aircraft, including military aircraft and UAs, are free to operate in international airspace without interference from coastal State authorities. Military aircraft may engage in flight operations, including ordnance testing and firing, surveillance and intelligence gathering, and support of other naval activities. All such activities must be conducted with due regard for the rights of other States and the safety of other aircraft and of vessels. (Note, however, that the Antarctic Treaty prohibits military maneuvers and weapons testing in Antarctic airspace.) These same principles apply with respect to the overflight of high seas or EEZ corridors through that part of international straits not overlapped by territorial seas.

### **2.7.2.1 Convention on International Civil Aviation**

The United States is a party to the Convention on International Civil Aviation of 1944 (as are most States). That multilateral treaty, commonly referred to as the “Chicago Convention,” applies to civil aircraft. It does not apply to military aircraft or other State aircraft, other than to require that they operate with “due regard for the safety of navigation of civil aircraft.” The Chicago Convention established the International Civil Aviation Organization (ICAO) to develop international air navigation principles and techniques and to promote safety of flight in international air navigation.

Various operational situations do not lend themselves to ICAO flight procedures. These include military contingencies, classified missions, politically sensitive missions, or routine aircraft carrier operations. Operations not conducted under ICAO flight procedures are conducted under the “due regard” standard. (For additional information see DoDI 4540.01, Use of International Airspace by U.S. Military Aircraft and for Missile and Projectile Firings; OPNAVINST 3770.2K, Airspace Procedures and Planning Manual; and Coast Guard Commandant Instruction (COMDTINST) M3710.1G, Coast Guard Air Operations Manual.)

### **2.7.2.2 Flight Information Regions**

A flight information region (FIR) is a defined area of airspace within which flight information and alerting services are provided. FIRs are established by ICAO for the safety of civil aviation and encompass both national and international airspace. Ordinarily, but only as a matter of policy, U.S. military aircraft on routine point-to-point flights through international airspace follow ICAO flight procedures and utilize FIR services. As mentioned above, exceptions to this policy include military contingency operations, classified or politically sensitive missions, and routine aircraft carrier operations or other training activities. When U.S. military aircraft do not follow ICAO flight procedures, they must navigate with “due regard” for civil aviation safety.

Some States, however, purport to require all military aircraft in international airspace within their FIRs to comply with FIR procedures, whether or not they utilize FIR services or intend to enter national airspace. The United States does not recognize the right of a coastal State to apply its FIR procedures to foreign military aircraft in such circumstances. Accordingly, U.S. military aircraft not intending to enter national airspace should not identify themselves or otherwise comply with FIR procedures established by other States, unless the United States has specifically agreed to do so.

### **2.7.2.3 Air Defense Identification Zones in International Airspace**

International law does not prohibit States from establishing air defense identification zones (ADIZs) in the international airspace adjacent to their territorial airspace. The legal basis for ADIZ regulations is the right of a State to establish reasonable conditions of entry into its territory. Accordingly, an aircraft approaching national airspace can be required to identify itself while in international airspace as a condition of entry approval. ADIZ regulations promulgated by the United States apply to aircraft bound for U.S. territorial airspace and require the filing of flight plans and periodic position reports. The United States does not recognize the right of a coastal State to apply its ADIZ procedures to foreign aircraft not intending to enter national airspace nor does the United States apply its ADIZ procedures to foreign aircraft not intending to enter U.S. airspace. Accordingly, U.S. military aircraft not intending to enter national airspace should not identify themselves or otherwise comply with ADIZ procedures established by other States, unless the United States has specifically agreed to do so.

It should be emphasized that the foregoing contemplates a peacetime or nonhostile environment. In the case of imminent or actual hostilities, a State may find it necessary to take measures in self-defense that will affect overflight in international airspace.

### **2.7.3 Open Skies Treaty**

Initially proposed by President Eisenhower in 1955 to foster mutual and cooperative aerial observation among North Atlantic Treaty Organization (NATO) and Warsaw Pact States, the 1992 Open Skies Treaty entered into force on 1 January 2002. The Treaty obligates each of its member States to accept overflight of its entire national

territory by other member States using unarmed aircraft equipped with mutually agreed sensors. Overflight quotas are scaled to the physical size of the participating States with the United States and Russia/Belarus (a multiple State entity permitted for this purpose), each being obliged to accept up to 42 such flights annually.

Although the European security environment has changed dramatically since the Treaty was negotiated in 1992, it remains a useful element in the European security framework providing a further means for transparency, mutual understanding, and cooperation among its members. Member States are Belarus, Belgium, Bulgaria, Canada, Czech Republic, Denmark, France, Georgia, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Romania, Russia, Slovak Republic, Spain, Turkey, Ukraine, the United Kingdom, and the United States.

Department of the Navy guidance on the implementation of the Open Skies Treaty is reflected in Secretary of the Navy instruction (SECNAVINST) 5710.26, Compliance and Implementation of the Treaty on Open Skies. Department of the Navy policy is to comply with all provisions of the Open Skies Treaty while also complying with Navy and Marine Corps safety and security directives. When conducting an overflight, Open Skies aircraft have priority in air traffic control systems over all other air traffic except declared emergencies or actual emergency aircraft. Open Skies aircraft are allowed to overfly the entire national territory of a signatory state, regardless of airspace restrictions except for safety of flight issues. Open Skies aircraft are permitted access to the airspace above all Department of the Navy and other military facilities, bases, and programs, as well as to any other airspace in U.S. territory.

## **2.8 EXERCISE AND ASSERTION OF NAVIGATION AND OVERFLIGHT RIGHTS AND FREEDOMS**

As announced in President Reagan's United States Oceans Policy statement of 10 March 1983:

The United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in [UNCLOS]. The United States will not, however, acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses.

When States appear to acquiesce in excessive maritime claims and fail to exercise their rights actively in the face of constraints on international navigation and overflight, those claims and constraints may, in time, be considered to have been accepted by the international community as reflecting the practice of States and as binding upon all users of the seas and superjacent airspace. Consequently, it is incumbent upon maritime States to protest diplomatically all excessive claims of coastal States and to exercise their navigation and overflight rights in the face of such claims. The President's Oceans Policy Statement makes clear that the United States has accepted this responsibility as a fundamental element of its national policy.

Since the early 1970s, the United States, through DoDI S-2005.01 Freedom of Navigation (FON) Program (U), has reaffirmed its long-standing policy of exercising and asserting its FON and overflight rights on a worldwide basis. Under the FON Program, challenges of excessive maritime claims of other States are undertaken both through diplomatic protests by the Department of State and by operational assertions by U.S. Armed Forces. U.S. Freedom of Navigation Program assertions are designed to be politically neutral as well as nonprovocative and have encouraged States to amend their claims and bring their practices into conformity with UNCLOS. Commanders and commanding officers should refer to combatant commander theater-specific guidance and appropriate operation orders for specific guidance on the planning and execution of FON operations in a particular area of operations.

## **2.9 RULES FOR NAVIGATIONAL SAFETY FOR VESSELS AND AIRCRAFT**

### **2.9.1 International Rules**

Most rules for navigational safety governing surface and subsurface vessels, including warships, are contained in the 1972 International Regulations for Preventing Collisions at Sea (1972 COLREGS). These rules apply to all international waters (i.e., the high seas, EEZs, and contiguous zones) and, except where a coastal State has established different rules, in that State's territorial sea, archipelagic waters, and inland waters as well. The

1972 COLREGS have been adopted as law by the United States. (See Title 33, United States Code (U.S.C.), Sections 1601 to 1606 (33 U.S.C. 1601 and 1606).) U.S. Navy Regulations, 1990, Article 1139, directs that all persons in the naval service responsible for the operation of naval ships and craft “shall diligently observe” the 1972 COLREGS. In accordance with COMDTINST M5000.3B, Coast Guard Regulations, Coast Guard personnel must comply with all Federal law and regulations.

### **2.9.2 National U.S. Inland Rules**

Many States have adopted special rules for waters subject to their territorial sovereignty (i.e., internal waters, archipelagic waters, and territorial seas). Violation of these rules by U.S. Government vessels, including warships, may subject the United States to lawsuit for collision or other damage, provide the basis for diplomatic protest, result in limitation on U.S. access to foreign ports, or prompt other foreign action.

The United States has adopted special inland rules applicable to navigation in U.S. waters landward of the demarcation lines established by U.S. law for that purpose. (See COMDTINST M16672.2D, Navigation Rules, International—Inland; Title 33, Code of Federal Regulations, part 80; and 33 U.S.C. 2001 to 2073.) The 1972 COLREGS apply seaward of the demarcation lines in U.S. national waters, in the U.S. contiguous zone and EEZ, and on the high seas.

### **2.9.3 Navigational Rules for Aircraft**

Rules for air navigation in international airspace applicable to civil aircraft may be found in Annex 2 (Rules of the Air) to the Chicago Convention, DoD Flight Information Publication General Planning, and OPNAVINST 3710.7V Naval Air Training and Operating Procedures Standardizations General Flight and Operating Instructions. The same standardized technical principles and policies of ICAO that apply in international and most foreign airspace are also in effect in the continental United States. Consequently, U.S. pilots can fly all major international routes following the same general rules of the air, using the same navigation equipment and communication practices and procedures, and being governed by the same air traffic control services with which they are familiar in the United States. Although ICAO has not yet established an “International Language for Aviation,” English is customarily used internationally for air traffic control.

## **2.10 MILITARY AGREEMENTS AND COOPERATIVE MEASURES TO PROMOTE AIR AND MARITIME SAFETY**

### **2.10.1 United States-Russian Federation Agreement on the Prevention of Incidents On and Over the High Seas**

In order to better assure the safety of navigation and flight of their respective warships and military aircraft during encounters at sea, the United States and the Union of the Soviet Socialist Republics (USSR) in 1972 entered into the U.S.-USSR agreement on the Prevention of Incidents On and Over the High Seas. Following the dissolution of the USSR, the Russian Federation succeeded to the USSR’s position in the agreement. This navy-to-navy agreement, popularly referred to as the “Incidents at Sea (INCSEA)” agreement, aims to minimize harassing actions and navigational one-upmanship between United States and former Soviet Union units operating in close proximity at sea. Although the agreement applies to warships and military aircraft operating on and over the “high seas,” it predates creation of the EEZ and applies beyond the territorial sea and international airspace.

Principal provisions of the INCSEA agreement include:

1. Ships will observe strictly both the letter and the spirit of the 1972 COLREGS.
2. Ships will remain well clear of one another to avoid risk of collision and, when engaged in surveillance activities, will exercise good seamanship so as not to embarrass or endanger ships under surveillance.
3. Ships will utilize special signals for signaling their operation and intentions.



4. Ships of one party will not simulate attacks by aiming guns, missile launchers, torpedo tubes, or other weapons at the ships and aircraft of the other party, and will not launch any object in the direction of passing ships nor illuminate their navigation bridges.
5. Ships conducting exercises with submerged submarines will show the appropriate signals to warn of submarines in the area.
6. Ships, when approaching ships of the other party, particularly those engaged in replenishment or flight operations, will take appropriate measures not to hinder maneuvers of such ships and will remain well clear.
7. Aircraft will use the greatest caution and prudence in approaching aircraft and ships of the other party, in particular ships engaged in launching and landing aircraft, and will not simulate attacks by the simulated use of weapons or perform aerobatics over ships of the other party nor drop objects near them.

The INCSEA agreement was amended in a 1973 protocol to extend certain of its provisions to include nonmilitary ships. Specifically, the 1973 protocol provided that U.S. and Soviet military ships and aircraft shall not make simulated attacks by aiming guns, missile launchers, torpedo tubes, and other weapons at nonmilitary ships of the other party nor launch or drop any objects near nonmilitary ships of the other party in such a manner as to be hazardous to these ships or to constitute a hazard to navigation.

The agreement also provides for an annual review meeting between Navy representatives of the two parties to review its implementation. The INCSEA agreement continues to apply to U.S. and Russian ships and military aircraft and is also in force between the United States and Ukraine.

OPNAVINST 5711.96C, United States/Russian Federation Incidents At Sea and Dangerous Military Activities Agreements, provides information on and issues procedures concerning the INCSEA Agreement, including the Table of Supplementary Signals authorized for use during communications between U.S. and Russian Federation units under the INCSEA agreement.

### **2.10.2 United States-Russian Federation Agreement on the Prevention of Dangerous Military Activities**

To avoid dangerous situations arising between their respective military forces when operating in proximity to each other during peacetime, the United States and the Soviet Union (now Russian Federation) in 1990 entered into the U.S.-USSR. Agreement on the Prevention of Dangerous Military Activities. The agreement, commonly referred to as the “Dangerous Military Activities (DMA) agreement,” addresses four specific activities:

1. Unintentional or distress (force majeure) entry into the national territory of the other party
2. Use of lasers in a manner hazardous to the other party
3. Hampering operations in a manner hazardous to the other party in a “special caution area”
4. Interference with command and control networks in a manner hazardous to the other party.

The DMA agreement continues to apply to U.S. and Russian Federation armed forces. OPNAVINST 5711.96C provides implementing guidance for the DMA agreement to Navy department units. Chairman of the Joint Chiefs of Staff instruction (CJCSI) 2311.01, the Chairman of the Joint Chiefs of Staff implementing directive for the DMA, has been cancelled, while OPNAVINST 5711.96C remains in effect.

### **2.10.3 United States-China Military Maritime Consultative Agreement**

Established in January 1998 by an agreement between the U.S. Secretary of Defense and the Minister of National Defense of the People’s Republic of China, the Military Maritime Consultative Agreement (MMCA) provides a forum for exchanges of views between the United States and the People’s Republic of China to strengthen

maritime and air safety. The Military Maritime Consultative Agreement does not establish legally binding procedures between the countries, but rather provides a mechanism to facilitate consultations between their respective maritime and air forces. The Military Maritime Consultative Agreement forum addresses such measures to promote safe maritime practices as:

1. Search and rescue activities
2. Communications procedures when ships encounter each other
3. Interpretations of the International Rules of the Road
4. Avoidance of accidents at sea.

#### **2.10.4 Code for Unplanned Encounters at Sea**

The 2014 The Code for Unplanned Encounters at Sea (CUES) is an international code designed to reduce uncertainty, enhance safety, facilitate communication, and promote standardized maneuvering practices between naval ships, submarines, auxiliaries, and aircraft. It consists of navigational safety rules, communications procedures, and signals. Although not legally binding, CUES provides a coordinated means of communication and maneuvering practices by utilizing existing international procedures to maximize safety at sea with navies not accustomed to the routine use of maneuvering and signals manuals. The participants in CUES are the United States, Australia, Brunei, Cambodia, Canada, Chile, China, France, Indonesia, Japan, Malaysia, New Zealand, Papua New Guinea, Peru, Philippines, Republic of Korea, Russia, Singapore, Thailand, Tonga, and Vietnam.

#### **2.10.5 United States-China Memorandum of Understanding Regarding the Rules of Behavior for Safety of Air and Maritime Encounters**

In November 2014, the United States and China entered into a memorandum of understanding (MOU) regarding the rules of behavior for the safety of air and maritime encounters. The MOU is not legally binding, but is an effort to strengthen adherence to existing international law; to improve operational safety at sea and in the air; to enhance mutual trust; and to develop a new model of military-to-military relations between the United States and China. The MOU consists of three annexes. The first annex is the terms of reference.

The second annex is the Rules of Behavior for Safety of Surface-to-Surface Encounters (Surface Rules). The annex seeks to avert incidents and build trust between U.S. and Chinese surface vessels by reiterating the requirements of international law, such as the COLREGS, and preexisting obligations, such as CUES. In addition, the Surface Rules encourage early and active communications during air-to-air encounters and reinforce the right to FON and overflight in warning areas. They discourage simulated attacks, acrobatics, discharge of weapons, illumination of bridges and cockpits, use of lasers, unsafe approaches by small craft, and other actions that could be interpreted as threatening by the other State's vessels.

The third annex was concluded in September 2015 and is the Rules of Behavior for Safety of Air-to-Air Encounters (Air Rules). This annex seeks to avert aviation incidents in international airspace between military aircraft of the United States and China. The Air Rules annex, like the rest of the MOU, is not legally binding and does not create any new substantive obligations. Most of the understandings reached in the Air Rules are already binding under international law, which requires military aircraft to fly in accordance with the rules applicable to civilian aircraft to the extent practicable, and to exercise due regard during air-to-air encounters. Additionally, the Air Rules encourage active communication during air-to-air encounters; require intercepted aircraft to avoid reckless maneuvers; reinforce the right to FON and overflight in warning areas; and require aircraft to avoid actions that may be seen as provocative by the other State's aircraft.

### **2.11 MILITARY ACTIVITIES IN OUTER SPACE**

#### **2.11.1 Outer Space**

Except when exercising transit passage or archipelagic sea lanes passage, overflight in national airspace by foreign aircraft is not authorized without the consent of the territorial sovereign. However, man-made satellites

and other objects in Earth orbit may overfly foreign territory freely. Although there is no legally defined boundary between the upper limit of national airspace and the lower limit of outer space, international law recognizes freedom of transit by man-made space objects at Earth orbiting altitude and beyond. A generally acceptable definition is that outer space begins at the undefined upper limit of the Earth's airspace and extends to infinity.

### **2.11.2 The Law of Outer Space**

International law, including the Charter of the United Nations, applies to the outer space activities of States. Outer space is open to exploration and use by all States. However, it is not subject to national appropriation, and must be used for peaceful purposes. The term "peaceful purposes" does not preclude military activities or military uses of outer space (including war-fighting). While acts of aggression in violation of the Charter of the United Nations are precluded, space-based systems may lawfully be employed to perform essential command, control, communications, intelligence, navigation, environmental, surveillance, and warning functions to assist military activities on land, in the air, and on and under the sea. Users of outer space must have due regard for the rights and interests of other users.

#### **2.11.2.1 General Principles of the Law of Outer Space**

International law governing space activities addresses both the nature of the activity and the location in space where the specific rules apply. In general terms, outer space consists of both the Earth's moon and other natural celestial bodies, and the expanse between these natural objects.

The rules of international law applicable to outer space include the following:

1. Access to outer space is free and open to all States.
2. Outer space is free from claims of sovereignty and not otherwise subject to national appropriation.
3. Outer space is to be used for peaceful purposes.
4. Each user of outer space must show due regard for the rights of others.
5. No nuclear or other weapons of mass destruction (WMD) may be stationed in outer space.
6. Nuclear explosions in outer space are prohibited.
7. Exploration of outer space must avoid contamination of the environment of outer space and of the Earth's biosphere.
8. Astronauts must render all possible assistance to other astronauts in distress.
9. Objects in outer space must be registered to a State.
10. States are liable for damage inflicted by outer space objects in their registry.

#### **2.11.2.2 Natural Celestial Bodies**

Natural celestial bodies include the Earth's moon, but not the Earth. Under international law, military bases, installations, and forts may not be erected nor may weapons tests or maneuvers be undertaken on natural celestial bodies. Moreover, all equipment, stations, and vehicles located there are open to inspection on a reciprocal basis. There is no corresponding right of physical inspection of man-made objects located in the expanse between celestial bodies. Military personnel may be employed on natural celestial bodies for scientific research and for other activities undertaken for peaceful purposes.

### **2.11.3 Rescue and Return of Astronauts**

Both the Outer Space Treaty and the Rescue and Return of Astronauts Agreement establish specific requirements for coming to the aid of astronauts. The treaties do not distinguish between civilian and military astronauts.

Astronauts of one State engaged in outer space activities are to render all possible assistance to astronauts of other States in the event of accident or distress. If a nation learns that spacecraft personnel are in distress or have made an emergency or unintended landing in its territory, the high seas, or other international area (e.g., Antarctica), it must notify the launching nation and the Secretary-General of the United Nations, take immediate steps to rescue the personnel if within its territory, and, if in a position to do so, extend search and rescue assistance if a high seas or other international area landing is involved. Rescued personnel are to be safely and promptly returned.

Nations also have an obligation to inform the other parties to the Outer Space Treaty or the Secretary-General of the United Nations if they discover outer space phenomena that constitute a danger to astronauts.

### **2.11.4 Return of Outer Space Objects**

A party to the Rescue and Return of Astronauts Agreement must also notify the Secretary-General of the United Nations if it learns of an outer space object's return to Earth in its territory, on the high seas, or in another international area. If the object is located in sovereign territory and the launching authority requests the territorial sovereign's assistance, the latter must take steps to recover and return the object if practicable. Similarly, such objects found in international areas shall be held for or returned to the launching authority on request. Expenses incurred in assisting the launching authority in either case are to be borne by the launching authority. Should a State discover that such an object is of a "hazardous or deleterious" nature, it is entitled to immediate action by the launching authority to eliminate the danger of harm from its territory.

## CHAPTER 3

# Protection of Persons and Property at Sea and Maritime Law Enforcement

### 3.1 INTRODUCTION

The protection of both U.S. and foreign persons and property at sea by U.S. naval forces in peacetime is governed by international law, domestic U.S. law and policy, and political considerations. Vessels and aircraft on and over the sea, and the persons and cargo embarked in them, are subject to the hazards posed by the ocean itself, by storms, by mechanical failure, and by the actions of others, such as pirates, terrorists, and insurgents. In addition, foreign authorities and prevailing political situations may affect a vessel or aircraft and those on board by involving them in refugee rescue efforts, political asylum requests, law enforcement actions, or applications of unjustified use of force against them.

Given the complexity of the legal, political, and diplomatic considerations that may arise in connection with the use of naval forces to protect civilian persons and property at sea, operational plans, operational orders, and, most importantly, rules of engagement (ROE) promulgated by the operational chain of command ordinarily require the on-scene commander to report immediately such circumstances to a higher authority and, whenever practicable under the circumstances, to seek guidance prior to using armed force.

A State may enforce its domestic laws at sea provided there is a valid jurisdictional basis under international law to do so. Because U.S. naval commanders may be called upon to assist in maritime law enforcement (MLE) actions, or to otherwise protect persons and property at sea, a basic understanding of MLE procedures is essential.

### 3.2 RESCUE, SAFE HARBOR, AND QUARANTINE

The obligation of mariners to render assistance to persons in distress at sea has long been recognized in custom and tradition. A right of emergency entry into the territorial waters of a coastal State to take refuge from extreme perils of sea (force majeure) has customarily been recognized under international law. However, the right of emergency entry is not absolute; coastal States may impose reasonable restrictions upon the entry of vessels into its territorial seas and the movement and anchorage of vessels which enter due to emergencies. Additionally, coastal States may promulgate necessary and appropriate quarantine regulations and restrictions. (See paragraph 3.2.2 for a more detailed discussion of force majeure).

#### 3.2.1 Assistance to Persons, Ships, and Aircraft in Distress

Customary international law has long recognized the affirmative obligation of mariners to render assistance to persons in distress. Both the 1958 Geneva Convention on the High Seas and the 1982 UNCLOS codify this custom by providing that every State shall require the master of a ship flying its flag, insofar as he can do so without serious danger to his ship, crew, or passengers, to render assistance to any person found at sea in danger of being lost, and to proceed with all possible speed to the rescue of persons in distress if informed of their need of assistance, insofar as it can reasonably be expected of him. This right extends, subject to certain limitations, into a foreign territorial sea or archipelagic waters and corresponding airspace without the permission of the coastal state when rendering emergency assistance to those in danger or distress from perils of the sea. (For entry into national waters or airspace of a foreign State, see paragraph 2.5.2.6.) A master is also required, after a collision, to render assistance to the other ship, its crew, and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry, and the nearest port at which it will call.

### **3.2.1.1 Duty of Masters**

The United States is party to the 1974 International Convention for the Safety of Life at Sea. The Convention requires the master of a ship at sea, upon receiving information from any source that persons are in distress, to proceed with all speed to their assistance, provided the ship is in a position to be able to render assistance. This obligation to provide assistance applies regardless of the nationality or status of the persons in distress or the circumstances in which they are found.

### **3.2.1.2 Duty of Naval Commanders**

U.S. Navy Regulations, 1990, Article 0925, requires that, insofar as he can do so without serious danger to his ship or crew, the commanding officer or senior officer present, as appropriate, shall proceed with all possible speed to the rescue of persons in distress if informed of their need for assistance; render assistance to any person found at sea in danger of being lost; and, after a collision, render assistance to the other ship, its crew and passengers, and, where possible, inform the other ship of his identity. U.S. Coast Guard Regulations, Section 4-2-5, Assistance (COMDTINST M5000.3B), imposes a similar duty for the Coast Guard.

### **3.2.2 Place of Refuge/Innocent Passage**

Historically, coastal States would not deny entry to a distressed vessel making a valid claim of force majeure (a force or condition of such severity that it threatens loss of the vessel, cargo, or crew unless immediate corrective action is taken) and requesting a place of refuge (a place where a ship can take action to stabilize its condition and reduce the hazards to navigation, and to protect human life and the environment) to avoid loss of life or serious hazard to the vessel. However, the right of a vessel in distress to make an emergency entry into foreign territorial seas or internal waters to find a place of refuge is no longer absolute. The right of emergency entry under force majeure is a humanitarian concept, developed at a time when ships in distress posed little harm to the coastal State and when rescuing a distressed vessel's crew on the high seas was problematic. With the advent of supertankers, carriage of hazardous cargo by sea, and the development of sophisticated search and rescue capabilities, modern State practice has evolved with respect to the treatment of distressed vessels requesting a place of refuge within territorial seas and internal waters. Some coastal States have denied valid force majeure claims of entry to stricken vessels posing a threat to their marine ecosystems. International Maritime Organization guidelines state that granting a vessel access to a place of refuge within a State's territorial waters is primarily a political decision based upon a case-by-case balancing between the humanitarian needs of the stricken vessel and the risk to the environment posed by the ship's proximity to the coast. In some circumstances, coastal States could actually increase their risk if they deny a vessel the opportunity to enter a place of refuge and make repairs, or delay a decision until no options remain. A vessel should only be denied entry when the coastal State can identify a practical and lower risk alternative to granting a place of refuge. Such alternatives might include continuing the voyage (independently or with assistance), directing the vessel to a specific place of refuge in another locale, or scuttling the vessel in a location where the expected consequences will be relatively low.

A vessel entering foreign territorial seas, archipelagic waters, or internal waters due to distress is generally exempt from coastal State enforcement of domestic laws that were violated by that vessel's entry. For example, the distressed vessel would not be subject to the coastal State's customs or notice-of-entry laws if its entry was truly necessitated by distress. This exemption from coastal State law enforcement authority only applies to laws related to the vessel's entry; it does not give the distressed vessel blanket immunity from coastal State enforcement of its other domestic laws.

Innocent passage through territorial seas and archipelagic waters includes stopping and anchoring when incident to ordinary navigation, necessitated by force majeure or by distress. Stopping and anchoring in such waters for the purpose of rendering assistance to others in similar danger or distress is also permitted by international law.

### **3.2.3 Quarantine**

Article 0859, U.S. Navy Regulations, 1990, requires that the commanding officer or aircraft commander of a ship or aircraft comply with quarantine regulations and restrictions. While commanding officers and aircraft

commanders shall not permit inspection of their vessel or aircraft, they shall afford every other assistance to health officials, U.S. or foreign, and shall give all information required, insofar as permitted by the requirements of military necessity and security. To avoid restrictions imposed by quarantine regulations, the commanding officer should request free pratique (clearance granted a ship to proceed into a port after compliance with health or quarantine regulations) in accordance with the sailing directions for that port.

### **3.3 ASYLUM AND TEMPORARY REFUGE**

#### **3.3.1 Asylum**

International law recognizes the right of a State to grant asylum to foreign nationals already present within or seeking admission to its territory. SECNAVINST 5710.22B defines asylum as:

Protection granted by the U.S. Government within the United States to a foreign national who, due to persecution or a well-founded fear of persecution on account of his or her race, religion, nationality, membership in a particular social group, or political opinion, is unable or unwilling to avail himself or herself of the protection of his or her country of nationality (or, if stateless, of last habitual residence).

Military commanders do not have the authority to grant asylum. That decision is reserved to the Secretary of State.

#### **3.3.1.1 Asylum Requests Made in Territories under the Exclusive Jurisdiction of the United States and International Waters**

Any person requesting asylum in international waters or in territories and internal waters under the exclusive jurisdiction of the United States (including the U.S. territorial sea, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, territories under U.S. administration, and U.S. possessions) will be received on board any U.S. Navy or Marine Corps aircraft, vessel, activity, or station. Persons seeking asylum are to be afforded every reasonable care and protection permitted by the circumstances. Under no circumstances will a person seeking asylum in U.S. territory or in international waters be surrendered to foreign jurisdiction or control, unless at the personal direction of the Secretary of the Navy or higher authority.

With respect to the Coast Guard, persons seeking asylum will not be received on board Coast Guard units except in extreme circumstances, and in no case will they be received on board a Coast Guard aircraft. However, once such persons are received on board a Coast Guard unit, they will not be surrendered to foreign jurisdiction without Commandant approval, unless the commanding officer/officer-in-charge determines the risk to the unit or Coast Guard personnel has become unacceptable or the person seeking asylum voluntarily departs the unit.

See SECNAVINST 5710.22 (series), Political Asylum and Temporary Refuge; and COMDTINST M16247.1D, U.S. Coast Guard Maritime Law Enforcement Manual (MLEM) for specific guidance.

#### **3.3.1.2 Asylum Requests Made in Territories under Foreign Jurisdiction**

Commanders of U.S. warships, military aircraft, and military installations in territories under foreign jurisdiction (including foreign territorial seas, archipelagic waters, internal waters, ports, territories, and possessions), are not authorized to receive on board foreign nationals seeking asylum. Such persons should be referred to the American embassy or nearest U.S. consulate in the country, foreign territory, or foreign possession involved, if any, for assistance in coordinating a request for asylum with the host government. However, if exceptional circumstances exist involving imminent danger to the life or safety of the person, temporary refuge may be granted. (See paragraph 3.3.2.). The final decision as to a person's status is reserved to the Secretary of State.

#### **3.3.1.3 Expulsion or Surrender**

Article 33 of the 1951 Convention Relating to the Status of Refugees provides that a refugee may not be expelled or returned in any manner whatsoever to the frontier or territories of a State where his life or freedom would be threatened on account of his race, religion, nationality, political opinion, or membership in a particular social

group, unless he may reasonably be regarded as a danger to the security of the country of asylum or has been convicted of a serious crime and is a danger to the community of that State. This obligation applies only to persons who have entered territories under the exclusive jurisdiction of the United States. It does not apply to temporary refuge granted abroad.

### **3.3.2 Temporary Refuge/Termination or Surrender**

International law and practice have long recognized the humanitarian practice of providing temporary refuge to anyone, regardless of nationality, who may be in imminent physical danger for the duration of that danger. (See Article 0939, U.S. Navy Regulations, 1990; SECNAVINST 5710.22 (series); and the Coast Guard's MLEM.)

SECNAVINST 5710.22B defines temporary refuge as:

Protection afforded for humanitarian reasons to a foreign national in a Department of Defense shore installation, facility, or military vessel within the territorial jurisdiction of a foreign nation or in international waters, under conditions of urgency in order to secure the life or safety of that person against imminent danger, such as pursuit by a mob.

It is the policy of the United States to grant temporary refuge in a foreign State to nationals of that State, or nationals of a third State, solely for humanitarian reasons when extreme or exceptional circumstances put in imminent danger the life or safety of a person, such as pursuit by a mob. Temporary refuge shall not be granted on board a Coast Guard aircraft. The officer in command of the ship, aircraft (but not Coast Guard aircraft), station, or unit must decide which measures can prudently be taken to provide temporary refuge. When deciding which measures may be prudently taken to provide temporary refuge, the safety of U.S. personnel and security of the unit must be taken into consideration. All requests for temporary refuge received by Navy or Marine Corps units will be reported immediately and by the most expeditious means to Chief of Naval Operations (CNO) or Commandant of the Marine Corps, as appropriate, in accordance with SECNAVINST 5710.22 (series). Coast Guard units will report such requests through the chain of command for coordination with the Department of State in accordance with the MLEM.

Although temporary refuge should be terminated when the period of active danger ends, the decision to terminate protection will not be made by the commander. Once a Navy or Marine Corps unit has granted temporary refuge, protection may be terminated only when directed by the Secretary of the Navy or higher authority. In the case of the Coast Guard, temporary refuge will not be terminated without Commandant approval unless the commanding officer/officer-in-charge determines the risk to the unit or Coast Guard personnel has become unacceptable or the claimant voluntarily departs the unit. (See Article 0939, U.S. Navy Regulations, 1990; SECNAVINST 5710.22 (series), Asylum and Temporary Refuge; and COMDTINST M16247.1D, MLEM, for specific guidance.)

A request by foreign authorities to naval commands and activities for return of custody of a person under the protection of temporary refuge will be reported in accordance with SECNAVINST 5710.22 (series). The requesting foreign authorities will then be advised that the matter has been referred to higher authorities. Coast Guard units that receive such a request should refer the issue to United States Coast Guard (USCG) Headquarters via the Office of Maritime Law Enforcement, U.S. Coast Guard Headquarters/Office of Maritime and International Law, U.S. Coast Guard Headquarters Response duty team.

### **3.3.3 Inviting Requests for Asylum or Refuge**

U.S. Armed Forces personnel shall neither directly nor indirectly invite persons to seek asylum or temporary refuge.

### **3.3.4 Protection of U.S. Citizens**

The limitations on asylum and temporary refuge are not applicable to U.S. citizens. (See paragraph 3.10 and the standing rules of engagement (SROE) for applicable guidance).



### 3.4 RIGHT OF APPROACH AND VISIT

As a general principle, vessels in international waters are immune from the jurisdiction of any State other than the flag State. However, under international law, a warship, military aircraft, or other duly authorized ship or aircraft may approach any vessel in international waters to verify its nationality. Unless the vessel encountered is itself a warship or government vessel of another State, it may be stopped, boarded, and the ship's documents examined, provided there is a reasonable ground for suspecting that it is:

1. Engaged in piracy (see paragraph 3.5)
2. Engaged in the slave trade (see paragraph 3.6)
3. Engaged in unauthorized broadcasting, and the flag State of the warship has jurisdiction under UNCLOS, Article 109(3) (see paragraph 3.7)
4. Without nationality (see paragraphs 3.11.2.3 and 3.11.2.4)
5. Though flying a foreign flag, or refusing to show its flag, the vessel is, in reality, of the same nationality as the warship.

The procedure for ships exercising the right of approach and visit is similar to that used in exercising the belligerent right of visit and search during armed conflict described in paragraph 7.6.1. See OPNAVINST 3120.32D, Standard Organization and Regulations of the U.S. Navy and COMDTINST M16247.1D, Coast Guard Maritime Law Enforcement Manual (MLEM) for further guidance. For the belligerent right of visit and search, see 7.6.1.

### 3.5 REPRESSION OF PIRACY

International law has long recognized a general duty of all States to cooperate in the repression of piracy. This traditional obligation is included in the 1958 Geneva Convention on the High Seas and UNCLOS, both of which provide that "All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State."

#### 3.5.1 U.S. Law

The U.S. Constitution (Article I, Section 8) provides that:

The Congress shall have Power . . . to define and punish piracies and felonies committed on the high seas, and offences against the Law of Nations.

Congress has exercised this power by enacting 18 U.S.C. § 1651, which provides that:

Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.

U.S. law authorizes the President to employ "public armed vessels" in protecting U.S. merchant ships from piracy and to instruct the commanders of such vessels to seize any pirate ship that has attempted or committed an act of piracy against any U.S. or foreign flag vessel in international waters.

#### 3.5.2 Piracy Defined

Piracy is an international crime of universal jurisdiction consisting of illegal acts of violence, detention, or depredation committed for private ends by the crew or passengers of a private ship or aircraft in or over international waters against another ship or aircraft or persons and property on board. Depredation is the act of plundering, robbing, or pillaging.

### **3.5.2.1 Location**

In international law, piracy is a crime that can be committed only on or over international waters, to include the high seas, EEZs, and contiguous zones, in international airspace, and in other places beyond the territorial jurisdiction of any State (for example, off the coast of Antarctica or an unclaimed island). The same acts committed in the internal waters, territorial sea, archipelagic waters, or national airspace of a State do not constitute piracy but may instead be considered armed robbery at sea, within the jurisdiction and sovereignty of the coastal State.

### **3.5.2.2 Private Ship or Aircraft**

Acts of piracy can only be committed by private ships or private aircraft. A warship or other public vessel or a military or other State aircraft cannot be treated as a pirate unless it is taken over and operated by pirates, or unless the crew mutinies and employs it for piratical purposes. By committing an act of piracy, the pirate ship or aircraft, and the pirates themselves, lose the protection of the State whose flag they are otherwise entitled to fly.

### **3.5.2.3 Mutiny or Passenger Hijacking**

If the crew or passengers of a ship or aircraft, including the crew of a warship or military aircraft, mutiny or revolt and convert the ship, aircraft or cargo to their own use, the act is not piracy. If, however, the ship or aircraft is thereafter used to commit acts of piracy, it becomes a pirate ship or pirate aircraft, and those on board voluntarily participating in such acts become pirates.

### **3.5.2.4 Private Ends**

To constitute the crime of piracy, the illegal acts must be committed for private ends. The private end need not involve a profit motive or desire for monetary gain; it can be driven by revenge, hatred, or other personal reasons. State sponsored depredations would usually not constitute piracy.

## **3.5.3 Use of Naval Forces to Repress Piracy**

U.S. warships and aircraft have an obligation to repress piracy on or over international waters directed against any vessel or aircraft, whether U.S. or foreign flagged. Only warships, military aircraft, or other ships or aircraft clearly marked and identifiable as being on governmental service and authorized to that effect, may seize a pirate ship or aircraft.

### **3.5.3.1 Seizure of Pirate Vessels and Aircraft**

A pirate vessel or aircraft encountered in or over U.S. or international waters may be seized and detained by any of the U.S. vessels or aircraft described in paragraph 3.5.3. The pirate vessel or aircraft, and all persons on board, may be taken, sent, or directed to the nearest U.S. port or airfield and delivered to U.S. law enforcement authorities for disposition according to U.S. law. Alternatively, higher authority may arrange with another State to accept and prosecute the pirates and dispose of the pirate vessel or aircraft, since every State has jurisdiction under international law over any act of piracy.

### **3.5.3.2 Pursuit of Pirates into Foreign Territorial Seas, Archipelagic Waters, or Airspace**

If a pirate vessel or aircraft fleeing from pursuit by a warship or military aircraft proceeds from international waters or airspace into the territorial sea, archipelagic waters, or superjacent airspace of another State, every effort should be made to obtain the consent of the State having sovereignty over these zones to continue pursuit (see paragraphs 3.11.2.2.4 and 3.11.3.3). The inviolability of the territorial integrity of sovereign States makes the decision of a warship or military aircraft to continue pursuit into these areas without such consent a serious matter. However, the international nature of the crime of piracy may allow continuation of pursuit if contact cannot be established in a timely manner with the coastal State to obtain its consent. In such a case, pursuit must be broken off immediately upon request of the coastal State, and, in that event, the right to seize the pirate vessel or aircraft and to prosecute the pirates devolves on the State having sovereignty over the territorial seas, archipelagic waters, or airspace.

Pursuit of a pirate vessel or aircraft through or over international straits overlapped by territorial seas or through archipelagic sea lanes or air routes, may proceed with or without the consent of the coastal State or States, provided the pursuit is expeditious and direct and the transit passage or archipelagic sea lanes passage rights of others are not unreasonably constrained.

### **3.5.3.3 Treatment of Detained Persons Suspected of Piracy**

Suspected pirates may be captured and detained by U.S. Navy and Marine Corps personnel. Suspected pirates should only be formally arrested by U.S. Coast Guard or other law enforcement personnel following consultation with the prosecuting United States Attorney's Office. If suspected pirates are detained, they must be treated humanely.

## **3.6 PROHIBITION OF THE TRANSPORT OF SLAVES**

International law strictly prohibits use of the seas for the purpose of transporting slaves. Every State is required to prevent and punish the transport of slaves in ships authorized to fly its flag. If confronted with this situation, commanders should maintain contact, consult the relevant ROE or the Coast Guard's MLEM, and request guidance from higher authority.

## **3.7 SUPPRESSION OF UNAUTHORIZED BROADCASTING**

UNCLOS provides that all States shall cooperate in the suppression of unauthorized broadcasting from international waters. Unauthorized broadcasting involves the transmission of radio or television signals from a ship or offshore installation intended for receipt by the general public, contrary to international regulation.

The right of visit (see section 3.4) can be exercised for suspected unauthorized broadcasting only if the flag State of the warship has jurisdiction over the offense of unauthorized broadcasting. Jurisdiction is conferred on the flag State of the broadcasting ship; the State of registry of the offshore installation; the State of which the person is a national; any State where the transmissions can be received; and any State where authorized radio communication is suffering interference. Commanders should request guidance from higher authority if confronted with this situation.

## **3.8 SUPPRESSION OF INTERNATIONAL NARCOTICS TRAFFIC**

All States shall cooperate in the suppression of the illicit traffic in narcotic drugs and psychotropic substances in international waters. International law permits any State that has reasonable grounds to suspect that a ship flying its flag is engaged in such traffic to request the cooperation of other States in effecting its seizure. International law also permits a State that has reasonable grounds for believing that a vessel of another State is engaged in illegal drug trafficking to request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate action with regard to that vessel. Coast Guard personnel, embarked on Coast Guard cutters or U.S. Navy ships, regularly stop, board, search, and take law enforcement action aboard foreign-flagged vessels pursuant to ad hoc or standing bilateral agreements with the flag State. (See paragraph 3.11.3.2 regarding utilization of U.S. Navy assets in the support of U.S. counterdrug efforts.)

## **3.9 RECOVERY OF GOVERNMENT PROPERTY LOST AT SEA**

The property of a State lost at sea remains vested in that State until title is formally relinquished or abandoned. Aircraft wreckage, sunken vessels, practice torpedoes, test missiles, and target drones are among the types of U.S. Government property which may be the subject of recovery operations. Should such U.S. property be recovered at sea by foreign entities, it is U.S. policy to demand its immediate return. Specific guidance for the on-scene commander in such circumstances is contained in the SROE/standing rules for the use of force (SRUF) and applicable operation orders. See also paragraph 2.1.2.2 for a similar discussion regarding the status of sunken warships and military aircraft.

### **3.10 PROTECTION OF PRIVATE AND MERCHANT VESSELS AND AIRCRAFT, PRIVATE PROPERTY, AND PERSONS**

In addition to the obligation and authority of warships to repress international crimes such as piracy, international law also contemplates the use of force in peacetime in certain circumstances to protect private and merchant vessels, private property, and persons at sea from acts of unlawful violence. The legal doctrines of individual and collective self-defense and protection of nationals provide the authority for U.S. Armed Forces to protect U.S. and, in some circumstances, foreign flag vessels, aircraft, property, and persons from violent and unlawful acts of others. Nonetheless, U.S. Armed Forces should not interfere in the legitimate law enforcement actions of foreign authorities even when those actions are directed against U.S. vessels, aircraft, persons, or property. Consult applicable SROE and the U.S. Coast Guard's MLEM for additional guidance.

#### **3.10.1 Protection of U.S. Flag Vessels and Aircraft, U.S. Nationals, and Property**

International law, embodied in the doctrines of self-defense and protection of nationals, provides authority for the use of proportionate force by U.S. warships and military aircraft when necessary for the protection of U.S. flag vessels and aircraft, U.S. nationals (whether embarked in U.S. or foreign flag vessels or aircraft), and their property against unlawful violence in and over international waters. Standing rules of engagement promulgated by the Chairman of the Joint Chiefs of Staff (CJCS) to the operational chain of command and incorporated into applicable operational orders, operational plans, and contingency plans, provide guidance to the naval commander for the exercise of this inherent authority. Those ROE are carefully constructed to ensure that the protection of U.S. flag vessels and aircraft and U.S. nationals and their property at sea conforms to U.S. and international law and reflects national policy.

##### **3.10.1.1 Foreign Internal Waters, Archipelagic Waters, and Territorial Seas**

Unlawful acts of violence directed against U.S. flag vessels and aircraft and U.S. nationals within and over the internal waters, archipelagic waters, or territorial seas of a foreign State present special considerations. The coastal State is primarily responsible for the protection of all vessels, aircraft, and persons lawfully within its sovereign territory. However, when that State is unable or unwilling to do so effectively, or when the circumstances are such that immediate action is required to protect human life, international law recognizes the right of another State to direct its warships and military aircraft to use proportionate force in or over those waters to protect its flag vessels, its flag aircraft, and its nationals. Because the coastal State may lawfully exercise jurisdiction and control over nonsovereign immune foreign flag vessels and aircraft and foreign nationals within its internal waters, archipelagic waters, and territorial seas, special care must be taken by the warships and military aircraft of other States not to interfere with the lawful exercise of jurisdiction by that State in those waters and superjacent airspace. U.S. naval commanders should consult the SROE for specific guidance as to the exercise of this authority.

##### **3.10.1.2 Foreign Contiguous Zones, Exclusive Economic Zones, and Continental Shelves**

The primary responsibility of coastal States for the protection of foreign shipping and aircraft off their shores ends at the seaward edge of the territorial sea. Beyond that point, each State bears the primary responsibility for the protection of its own flag vessels and aircraft and its own citizens and their property. On the other hand, the coastal State may properly exercise jurisdiction over foreign vessels, aircraft, and persons—subject to principles of sovereign immunity—in and over its contiguous zone to prevent infringement of its customs, fiscal, immigration, and sanitary laws; in its EEZ to enforce its natural resource-related rules and regulations; and on its continental shelf to enforce its relevant seabed resources-related rules and regulations. When the coastal State is acting lawfully in the valid exercise of such jurisdiction or is in hot pursuit (see discussion in paragraph 3.11.2.2) of a foreign vessel or aircraft for violations that have occurred in or over those waters or in its sovereign territory, the flag State should not interfere. U.S. commanders should consult the SROE for specific guidance as to the exercise of this authority.

### 3.10.2 Protection of Foreign Flag Vessels and Aircraft and Persons

International law, embodied in the concept of collective self-defense, provides authority for the use of proportionate force necessary for the protection of foreign flag vessels and aircraft and foreign nationals and their property from unlawful violence, including terrorist or piratical attacks, at sea. In such instances, consent of the flag State should first be obtained unless prior arrangements are already in place or the necessity to act immediately to save human life does not permit obtaining such consent. Should the attack or other unlawful violence occur within or over the internal waters, archipelagic waters, or territorial sea of a third State, or within or over its contiguous zone or EEZ, the considerations of paragraphs 3.10.1.1 and 3.10.1.2, respectively, would also apply. U.S. commanders should consult the SROE for specific guidance.

### 3.10.3 Noncombatant Evacuation Operations

Noncombatant evacuation operations are conducted by the DoD to assist in evacuating U.S. citizens and nationals, DoD civilian personnel, and designated persons (host nation and third country nationals) whose lives are in danger from locations in a foreign nation to an appropriate safe haven, when directed by the Department of State. The Secretaries of State and Defense are assigned lead and support responsibilities, respectively, and within their general geographic areas of responsibility, the combatant commanders are prepared to support the Department of State to conduct noncombatant evacuation operations.

## 3.11 MARITIME LAW ENFORCEMENT

Maritime law enforcement is an armed intervention by authorized maritime forces to detect, suppress and/or punish a violation of applicable law. U.S. naval commanders may be called upon to assist in the enforcement of U.S. laws at sea, principally with respect to the suppression of the illicit traffic in narcotic drugs and psychotropic substances. Activities in this mission area involve international law, U.S. law and policy, and political considerations. Because of the complexity of these elements, commanders should seek guidance from higher authority whenever time permits.

A wide range of U.S. laws and treaty obligations pertaining to fisheries, wildlife, customs, immigration, environmental protection, and marine safety are enforced at sea by agencies of the United States. Even though DoD personnel do not have authority to enforce such laws, they are often called upon to assist law enforcement authorities, such as the Coast Guard, in carrying out these missions. Thus, it is essential that commanders and their legal advisors have a basic understanding of MLE.

### 3.11.1 Jurisdiction

The United States' ability to undertake MLE action is premised upon its authority to assert jurisdiction over the vessel, aircraft, or persons in question. There are three components of overall law enforcement jurisdiction: jurisdiction to proscribe (i.e., the authority of a State to make its laws applicable to particular persons or activities); jurisdiction to adjudicate (i.e., the authority of a State to subject particular persons or things to its judicial processes); and jurisdiction to enforce (i.e., the authority of a State to use its resources to induce or compel compliance with its laws). Each of these components of law enforcement jurisdiction will be discussed in turn.

#### 3.11.1.1 Jurisdiction to Proscribe

International law generally recognizes five bases for a State to exercise its jurisdiction to proscribe:

1. Territorial
2. Nationality
3. Passive personality
4. Protective
5. Universal.

It is important to note that international law governs the rights and obligations between States. While individuals may benefit from the application of that body of law, its alleged violation cannot usually be raised by an individual defendant to defeat a criminal prosecution.

#### **3.11.1.1.1 Territorial Principle**

This principle recognizes the right of a State to make its law applicable to conduct within its territorial borders, including its internal waters, archipelagic waters, and territorial sea.

#### **3.11.1.1.2 Objective Territorial Principle**

This variant of the territorial principle recognizes that a State may apply its laws to acts committed beyond its territory which have their effect in the territory of that State. So-called “hovering vessels” are legally reached under this principle, as well as under the protective principle. The extraterritorial application of U.S. antidrug statutes is based largely on this concept. (See paragraphs 3.11.2.2.2 and 3.11.4.1.)

#### **3.11.1.1.3 Nationality Principle**

This principle is based on the concept that a State may make its law applicable to objects and persons having the nationality of that State. It is the basis for the concept that a ship in international waters is, with few exceptions, subject to the exclusive jurisdiction of the State under whose flag it sails. Under the nationality principle, a State may apply its laws to its nationals wherever they may be and to all persons, activities, and objects on board ships and aircraft having its nationality. As a matter of international comity and respect for foreign sovereignty, the United States refrains from exercising that jurisdiction in foreign territory.

#### **3.11.1.1.4 Passive Personality Principle**

Under this principle, a State is allowed to apply its laws based on the nationality of the victim, irrespective of where the crime occurred or the nationality of the offender. U.S. courts have upheld the assertion of jurisdiction under this principle in cases where U.S. nationals have been taken hostage by foreigners abroad on foreign flag ships and aircraft, and where U.S. nationals have been the intended target of foreign conspiracies to murder. This principle has application to the apprehension and prosecution of international terrorists.

#### **3.11.1.1.5 Protective Principle**

This principle recognizes the right of a State to criminalize acts that have a significant adverse impact on its national security or governmental functions. Prosecution in connection with the murder of a U.S. congressman abroad on official business was based upon this principle. Foreign drug smugglers apprehended on non-U.S. flag vessels on the high seas have been successfully prosecuted under this principle of international criminal jurisdiction.

#### **3.11.1.1.6 Universal Principle**

This principle recognizes that certain offenses are so heinous and so widely condemned that any State may apprehend, prosecute, and punish that offender on behalf of the world community regardless of the nationality of the offender or victim. Piracy and the slave trade have historically fit these criteria. More recently, genocide, certain war crimes, hostage taking, and aircraft hijacking have been widely condemned under various treaties and have arguably become universal crimes.

#### **3.11.1.2 Jurisdiction to Adjudicate**

Courts in the United States may exercise jurisdiction to adjudicate only in conformity with the Constitution and laws of the United States. A court of the United States does not have jurisdiction to adjudicate a foreign State’s penal law; nor can it exercise jurisdiction with respect to an offense which the United States could not lawfully proscribe.

### **3.11.2 Jurisdiction to Enforce**

Jurisdiction to enforce is the authority of a State to use its resources to induce or compel compliance with its laws. In the maritime realm, jurisdiction to enforce depends upon the nationality, the location, the status, and the activity of the vessel or aircraft over which MLE action is contemplated.

#### **3.11.2.1 Enforcement Jurisdiction Over U.S. Flagged Vessels**

U.S. law applies at all times aboard U.S. flagged vessels and is enforceable by the U.S. Coast Guard worldwide. As a matter of comity and respect for foreign sovereignty, generally enforcement action is not undertaken within the territorial seas, archipelagic waters, or internal waters of another State without notification to or consent of that State.

For law enforcement purposes, U.S. vessels are those which:

1. Are documented or numbered under U.S. law
2. Are owned in whole or in part by a U.S. citizen or national (including corporate entities) and not registered in another country
3. Were once documented under U.S. law and, without approval of the U.S. Maritime Administration, have been either sold to a non-U.S. citizen or placed under foreign registry or flag.

#### **3.11.2.2 Enforcement Jurisdiction Over Foreign Flagged Vessels**

The ability of a State to legally assert jurisdiction over a nonsovereign immune foreign flagged vessel depends largely on the maritime zone in which the foreign vessel is located and the activities in which it is engaged. Chapter 2 outlines the internationally recognized interests of coastal States in each of these zones. The following sections discuss the general customary rules and exceptions to asserting jurisdiction over a nonsovereign immune foreign flagged vessel.

##### **3.11.2.2.1 Enforcement Jurisdiction on the High Seas**

A flagged vessel on the high seas is generally subject to the exclusive law enforcement jurisdiction of the State whose flag it is entitled to fly. One exception to this principle is the Right of Approach and Visit, discussed in paragraph 3.4. In addition, States may provide authorization to foreign law enforcement vessels to board their flagged vessels in certain circumstances. Additionally, the flag State may grant consent, either ad hoc or by written arrangement or international agreement, to another State to board and exercise jurisdiction over its vessels. Paragraph 3.11.2.2.7 discusses such special arrangements in more detail.

##### **3.11.2.2.2 Exclusive Economic Zone, Continental Shelf, and Contiguous Zone**

Within the EEZ, the coastal State has sovereign rights over the exploration, exploitation, management, and conservation of the living and nonliving natural resources in the water column and on the seabed and its subsoil. These rights permit the coastal State to exercise jurisdiction over nonsovereign immune foreign vessels violating its resource-related laws. Similarly, the coastal State has exclusive sovereign rights over the exploration and exploitation of natural resources on the continental shelf, and may exercise jurisdiction over nonsovereign immune vessels violating those resource rights.

A coastal State also has limited police powers within its contiguous zone, and may take law enforcement action to “exercise the control necessary” to prevent infringement of its fiscal, immigration, sanitary, or customs laws and regulations within its territory or territorial sea.

### **3.11.2.2.3 Territorial Sea, Archipelagic Waters, and Internal Waters**

Coastal States have the right to regulate their territorial sea, archipelagic waters, and internal waters. In general, the coastal State has absolute power to enforce its domestic law in these waters, subject only to recognized restrictions grounded in international law principles related to FON. These principles include innocent passage, assistance entry, transit passage, and force majeure (discussed in paragraphs 2.5.2.1, 2.5.2.6, 2.5.3.2, and 3.2.2, respectively). Additionally, a coastal State may enforce reasonable, nondiscriminatory conditions on a vessel's entry into its ports. However, warships and government vessels in noncommercial service retain their sovereign-immune status in the territorial sea, and in archipelagic and internal waters. When a coastal State imposes conditions for port entry on sovereign immune vessels which compromise the vessel's status, (e.g., a requirement to provide crew lists or submit to safety inspections), the commander may decide not to enter the coastal State's port. (See paragraph 2.1.)

### **3.11.2.2.4 Hot Pursuit**

Should a ship fail to heed an order to stop and submit to a proper law enforcement action when the coastal State has good reason to believe that the ship has violated the laws and regulations of that State, hot pursuit may be initiated. The pursuit must be commenced when the suspect vessel or one of its boats is within one of the coastal State's maritime zones and is suspected of violating a law relevant to that zone. The right of hot pursuit may be exercised only by warships, military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect. The significance of hot pursuit is that if it is properly conducted and leads to successful interdiction of the vessel being pursued, it preserves the coastal State's law enforcement jurisdiction over that vessel, even if the vessel is no longer present in the maritime zone in which it violated that State's law or regulations.

#### **3.11.2.2.4.1 Commencement of Hot Pursuit**

Hot pursuit is not deemed to have begun unless the coastal State is satisfied by such practicable means as are available that the ship pursued, or one of its boats or other craft working as a team and using the ship pursued as a mother ship, is within the limits of its territorial sea, contiguous zone, or EEZ, or is above its continental shelf, and has violated one or more of its laws that apply in the particular zone. Pursuit officially commences once a visual or auditory signal to stop has been given at a distance that enables it to be seen or heard by the foreign ship. It is not necessary that the ship giving the order to stop should likewise be within the same zone as the foreign ship or associated boat.

#### **3.11.2.2.4.2 Requirement for Continuous Pursuit**

Once successfully initiated, hot pursuit must be continued without interruption, either visually or through electronic means. The ship or aircraft giving the order to stop must itself actively pursue the offending vessel, unless another ship or aircraft authorized by the coastal State arrives to take over the pursuit. Any hand-off between pursuing units must be conducted in a manner that satisfies the continuous pursuit requirement.

#### **3.11.2.2.4.3 Termination of Hot Pursuit**

The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State, unless the coastal State concerned permits the pursuit to continue.

### **3.11.2.2.5 Constructive Presence**

A foreign vessel may be treated as if it were actually located at the same place as any other craft with which it is cooperatively engaged in the violation of law. This doctrine is most commonly used in cases involving mother ships that use contact boats to smuggle contraband into the coastal State's waters. In order to establish constructive presence for exercising law enforcement authority and initiating hot pursuit, there must be:

1. A foreign vessel serving as a mother ship beyond the maritime area over which the coastal State may exercise MLE jurisdiction



2. A contact boat in a maritime area over which that State may exercise jurisdiction (i.e., internal waters, territorial sea, archipelagic waters, contiguous zone, EEZ, or waters over the continental shelf) and committing an act subjecting it to such jurisdiction
3. Good reason to believe that the two vessels are working as a team to violate the laws of that State.

### **3.11.2.2.6 Right of Approach and Visit**

See paragraph 3.4.

### **3.11.2.2.7 Special Arrangements and International Agreements**

International law has long recognized the right of a State to authorize the law enforcement officials of another State to enforce the laws of one or both States on board vessels flying its own flag. Some treaties, such as the Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Navigation (SUA Convention) and the 1988 United Nations (UN) Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, recognize and encourage such arrangements between States in order to accomplish the goals of the treaty. Special arrangements may be formalized in long-term written agreements or consist of messages or voice transmissions via diplomatic channels between appropriate representatives of the requesting and requested States. Every agreement is different in its scope and detail. Typically, the State seeking to conduct a law enforcement boarding of a foreign flagged vessel will ask the vessel's flag State to verify (or refute) the vessel's registry claim, and authorize the boarding and search of the suspect vessel. If evidence of a violation of law is found, the flag State may then authorize the enforcement of the requesting State's criminal law, or may authorize the law enforcement officials of the requesting State to act as the flag State's agent in detaining the vessel for eventual action by the flag State itself. The flag State may put limitations on the grant of law enforcement authority, and these restrictions must be strictly observed.

The United States has entered into numerous bilateral agreements addressing counterdrug, migrant interdiction, fisheries enforcement, and other law enforcement operations with States around the world. Many of the agreements provide U.S. Coast Guard law enforcement officers with authority to stop, board, and search the vessels of the other State in international waters. These agreements also may allow the U.S. Coast Guard to embark its personnel on vessels of that State; to enforce certain of that State's laws; to pursue fleeing vessels or aircraft into the waters or airspace of that State; and to fly into that State's airspace in support of counterdrug operations.

### **3.11.2.3 Enforcement Jurisdiction Over Vessels Without Nationality**

Vessels that are not legitimately registered in any one State are without nationality, and are often referred to as "stateless vessels." They are not entitled to fly the flag of any State and, because they are not entitled to the protection of any State, they are subject to the jurisdiction of all States. U.S. case law, for instance, has expressly held that "because stateless vessels do not fall within the veil of another sovereign's territorial protection, all nations can treat them as their own territory and subject them to their laws." Accordingly, stateless vessels may be boarded upon being encountered in international waters by a warship or other government vessel, and subjected to all appropriate law enforcement actions. Other conduct that could lead a vessel to be treated as one without nationality includes:

1. The vessel displays no name, flag, or other identifying characteristics
2. The master or person in charge, upon request, makes no claim of nationality or registry for that vessel
3. The claim of registry or the vessel's display of registry is either denied or not affirmatively and unequivocally confirmed by the State whose registry is claimed.

### **3.11.2.4 Enforcement Jurisdiction Over Vessels Assimilated to Vessels Without Nationality**

A vessel may be assimilated to a vessel without nationality when the vessel makes multiple claims of nationality (e.g., sailing under two or more flags) or the master's claim of nationality differs from the vessel's papers. Other factors could include the vessel changes flags during a voyage without flag state approval, or the vessel carries removable signboards showing different vessel names and/or homeports.

Determinations regarding vessels without nationality or assimilation usually require utilization of the established interagency coordination procedures (see paragraph 3.11.3.4).

### **3.11.2.5 Law Enforcement Actions Short of Exercising Jurisdiction**

When operating in international waters, warships, military aircraft, and other duly authorized vessels and aircraft on government service (such as auxiliaries), may also engage in the right of approach and perform a consensual boarding, neither of which constitute an exercise of jurisdiction over the vessel in question. However, such actions may afford a commander with information that could serve as the basis for subsequent MLE actions.

#### **3.11.2.5.1 Right of Approach**

See paragraph 3.4 for a discussion of the exercise of the right of approach preliminary to the exercise of the right of visit.

#### **3.11.2.5.2 Consensual Boarding**

A consensual boarding is conducted at the invitation of the master (or person in charge) of a vessel. The master's plenary authority over all activities related to the operation of his vessel while in international waters is well established in international law, and includes the authority to allow anyone, including foreign law enforcement officials, to come aboard the vessel as his guest. However, some States do not recognize a master's authority to assent to a consensual boarding.

The voluntary consent of the master permits the boarding, but it does not allow the assertion of law enforcement authority such as arrest or seizure. A consensual boarding is not, therefore, an exercise of MLE jurisdiction *per se*. The scope and duration of a consensual boarding may be subject to conditions imposed by the master, and may be terminated by the master at his discretion. Nevertheless, such boardings have utility in allowing rapid verification of the legitimacy of a vessel's voyage by obtaining or confirming vessel documents, cargo, and navigation records without undue delay to the boarded vessel.

In cases where the vessel's flag State is a party to a bilateral/multilateral agreement or other special arrangement that includes a ship boarding provision, and reasonable grounds exist to suspect that the vessel is engaged in the illicit activity that is the subject of the agreement, the boarding shall be conducted under the terms of that agreement vice seeking the master's consent. (See paragraph 3.11.2.2.7.)

### **3.11.3 Limitations on the Exercise of Maritime Law Enforcement Jurisdiction**

Even where international and domestic U.S. law would recognize conduct as a criminal violation of U.S. law, there are legal and policy restrictions on U.S. law enforcement action that must be considered. Within the United States, the concept of *posse comitatus* limits U.S. military activities. Outside of the United States, a commander's greatest concerns will be limitations on DoD assistance to civilian law enforcement agencies, the requirement for coastal State authorization to conduct law enforcement in that State's national waters, and the necessity for interagency coordination.

#### **3.11.3.1 Posse Comitatus**

Except when expressly authorized by the Constitution or act of Congress, the use of U.S. Army or U.S. Air Force personnel or resources as a *posse comitatus*—a force to aid civilian law enforcement authorities in keeping the peace and arresting felons—otherwise to execute domestic law, is prohibited by the *Posse Comitatus Act*,

18 U.S.C. § 1385. Additionally, 10 U.S.C. § 275 requires that DoD prescribe regulations to ensure that all DoD Services, including the Navy and Marine Corps, do not directly participate in civilian law enforcement activities, except where authorized by law. (See DoDI 3025.21, Defense Support of Civilian Law Enforcement Agencies, and SECNAVINST 5820.7C, Cooperation with Civilian Law Enforcement Officials.) Restrictions on the participation of military personnel in civilian law enforcement activities also apply to civilian Naval Criminal Investigative Service personnel. Notably, however, no such restrictions are applicable to the U.S. Coast Guard, even when operating as a part of the Department of the Navy.

### **3.11.3.2 DoD Assistance**

Although the Posse Comitatus Act and DoDI 3025.21 forbid military authorities from enforcing, or being directly involved with the enforcement of, civil law, some military activities in aid of civil law enforcement may be authorized under the military purpose doctrine. For example, indirect involvement or assistance to civil law enforcement authorities which is incidental to normal military training or operations is not a violation of the Posse Comitatus Act or DoDI 3025.21. Additionally, Congress has specifically authorized the limited use of military personnel, facilities, platforms, and equipment to assist Federal law enforcement authorities in the interdiction at sea of narcotics and other controlled substances, and in certain circumstances to assist with domestic counterterrorism operations.

#### **3.11.3.2.1 Use of DoD Personnel**

Although Congress has enacted legislation expanding the permissible role of the Department of Defense in assisting law enforcement agencies, DoD personnel may not directly participate in a search, seizure, arrest, or similar activity unless otherwise authorized by law. Permissible activities presently include training and advising Federal, state, and local law enforcement officials in the operation and maintenance of loaned equipment. DoD personnel made available by appropriate authority may also maintain and operate equipment in support of civil law enforcement agencies for the following purposes:

1. Detection, monitoring, and communication of the movement of air and sea traffic
2. Aerial reconnaissance
3. Interception of vessels or aircraft detected outside the land area of the United States for the purposes of communicating with them and directing them to a location designated by law enforcement officials
4. Operation of equipment to facilitate communications in connection with law enforcement programs
5. The transportation of civilian law enforcement personnel
6. The operation of a base of operations for civilian law enforcement personnel
7. The transportation of suspected terrorists to the United States for delivery to Federal law enforcement personnel.

#### **3.11.3.2.2 Providing Information to Law Enforcement Agencies**

The Department of Defense may provide Federal, state, or local law enforcement officials with information acquired during the normal course of military training or operations that may be relevant to a violation of any law within the jurisdiction of those officials. Present law provides that the needs of civilian law enforcement officials for information should, to the maximum extent practicable, be taken into account in planning and executing military training or operations. Intelligence information held by DoD and relevant to counterdrug or other civilian law enforcement matters may be provided to civilian law enforcement officials to the extent consistent with national security and in accordance with SECNAVINST 5820.7C and DoDI 3025.21. USCG policy guidance for the dissemination and use of intelligence information, including law enforcement intelligence, and for the use of classified investigative technologies is found in COMDTINST 3820.14 (series).

### **3.11.3.2.3 Use of DoD Equipment and Facilities**

The Department of Defense may make available equipment (including associated supplies or spare parts) and base or research facilities to Federal, state, or local law enforcement authorities for law enforcement purposes. Designated platforms (surface and air) are routinely made available for patrolling drug trafficking areas with USCG law enforcement detachments (commonly referred to as LEDETs) embarked. The USCG law enforcement detachment personnel on board any U.S. Navy vessel have the authority to search, seize property, and arrest persons suspected of violating U.S. law.

### **3.11.3.3 Law Enforcement in Foreign National Waters**

Law enforcement in foreign internal waters, territorial seas, and archipelagic waters may be undertaken only to the extent authorized by the coastal State. Such authorization may be obtained on an ad hoc basis or be the subject of a written agreement. (See paragraph 3.5.3.2 for a discussion of pursuit of pirates into the territorial seas, archipelagic waters or national airspace of another State.)

### **3.11.3.4 Interagency Coordination**

The U.S. Maritime Operational Threat Response (MOTR) Plan is the presidentially approved process to achieve a whole-of-government response to threats against the United States and its interests in the maritime domain. The MOTR Plan contains coordination requirements to ensure information sharing and decisive action to counter maritime threats that include piracy, drug trafficking, fisheries violations, and migrant smuggling, among others. Operational protocols complement the Plan by providing process guidance for specific types of events and detailed national-level contact information for each government agency. The Global MOTR Coordination Center supports the interagency by facilitating MOTR coordination and serving as the Plan's Executive Secretariat.

### **3.11.4 Counterdrug Operations**

#### **3.11.4.1 U.S. Law**

It is unlawful for any person who is on board a vessel subject to the jurisdiction of the United States, or who is a U.S. citizen or resident alien on board any U.S. or foreign vessel, to manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance. This law applies to:

1. U.S. vessels anywhere (see paragraph 3.11.2.1)
2. Vessels without nationality (see paragraph 3.11.2.3)
3. Vessels assimilated to a statelessness (see paragraph 3.11.2.4)
4. Foreign vessels where the flag State authorizes enforcement of U.S. law by the United States (see paragraphs 3.11.2.2.7)
5. Foreign vessels located within the territorial sea or contiguous zone of the United States
6. Foreign vessels located in the territorial seas or archipelagic waters of another State, where that State authorizes enforcement of U.S. law by the United States.

The Drug Trafficking Vessel Interdiction Act, 18 U.S.C. § 2285, prohibits the operation of or embarkation in any submersible vessel or semisubmersible vessel that is without nationality, and that is navigating or has navigated into, through, or from waters beyond the outer limit of the territorial sea of a single State, or a lateral limit of that State's territorial sea with an adjacent State, with the intent to evade detection. The statute criminalizes the act of operating a submersible.

### **3.11.4.2 DoD Mission in Counterdrug Operations**

DoD has been designated by statute as the lead agency of the Federal government for the detection and monitoring of aerial and maritime transit of illegal drugs into the United States, including its possessions, territories, and commonwealths. DoD is further tasked with integrating the command, control, communications, and technical intelligence assets of the United States that are dedicated to the interdiction of illegal drugs into an effective communications network.

### **3.11.4.3 U.S. Coast Guard Responsibilities in Counterdrug Operations**

The Coast Guard is the primary MLE agency of the United States. It is also the lead agency for maritime drug interdiction, and shares the lead agency role for air interdiction with the Bureau of Customs and Border Protection. The Coast Guard may make inquiries, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction for the prevention, detection, and suppression of violations of the laws of the United States, including maritime drug trafficking. Coast Guard commissioned, warrant, and petty officers may board any vessel subject to the jurisdiction of the United States; address inquiries to those on board; examine the vessel's documents and papers; examine, inspect, and search the vessel; and use all necessary force to compel compliance. When there is probable cause to believe that a violation of U.S. law has been committed, the violator may be arrested and taken into custody. If it appears that the violation rendered the vessel or its cargo liable to fine or forfeiture, the vessel or offending cargo may be seized.

The principal U.S. statute for counterdrug enforcement in the maritime domain is the Maritime Drug Law Enforcement Act, 46 U.S.C. §§ 70501–70507. Under the act, it is unlawful for any person onboard a vessel of the United States or onboard a vessel subject to the jurisdiction of the United States, or who is a citizen of the United States or a resident alien of the United States onboard any vessel to knowingly or intentionally manufacture or distribute a controlled substance.

Coast Guard commissioned, warrant, and petty officers are also designated customs officers, providing them additional law enforcement authority. When acting as customs officers, Coast Guard personnel are bound by the same rules and regulations as other customs officers (e.g., the Bureau of Customs and Border Protection), which include all rules, regulations, and policies that limit customs enforcement authority. Therefore, close coordination with customs enforcement supervisors is necessary to ensure complete compliance with all applicable regulations and policy.

### **3.11.5 Use of Force in Maritime Law Enforcement**

DoD personnel engaged in MLE missions under Coast Guard operational control (OPCON) or tactical control, both outside and within the territorial limits of the United States, will follow the Coast Guard policy for warning shots and disabling fire. DoD forces under Coast Guard OPCON or tactical control always retain the right of self-defense in accordance with CJCSI 3121.01B, Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces. Coast Guard policy prescribes rules both for using force for law enforcement missions and for self-defense.

Neither the Coast Guard Use of Force Policy nor the SROE/Rules for the Use of Force limit a commander's inherent authority and obligation to use all necessary means available and to take all appropriate action in self-defense of the commander's unit and other U.S. forces in the vicinity.

#### **3.11.5.1 Warning Shots and Disabling Fire**

A warning shot is a signal—usually to warn an offending vessel to stop or maneuver in a particular manner or risk the employment of disabling fire or more severe measures. Under international law, warning shots do not constitute a use of force. Disabling fire is firing under controlled conditions into a noncompliant vessel's rudder or propulsion equipment for the sole purpose of stopping it after oral warnings (if practicable) or warning shots (if practicable) have gone unheeded. DoD forces under U.S. Coast Guard control, conducting operations both outside and within the territorial limits of the United States, will follow the Use of Force Policy for warning shots

and disabling fire as issued by the Commandant, U.S. Coast Guard. It is Coast Guard policy that commanders use warning shots as a predicate to disabling fire unless warning shots unreasonably endanger persons or property in the vicinity of the noncompliant vessel.

When U.S. Armed Forces are operating under the CJCS Standing Rules for the Use of Force (discussed in detail in chapter 4), the use of warning shots are prohibited within U.S. territory and territorial seas except as allowed by Enclosure M to CJCSI 3121.01B.

### **3.11.6 Other Maritime Law Enforcement Assistance**

In addition to the direct actions and dedicated assistance efforts discussed above, the naval commander may become involved in other activities supporting law enforcement actions, such as acting in support to U.S. Customs and Border Protection. Activities of this nature usually involve extensive advance planning and coordination. DoD forces detailed to other federal agencies will operate under common mission-specific rules for the use of force approved by the Secretary of Defense and the lead Federal agency. (See CJCSI 3121.01B, Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces, Enclosure L.)

## CHAPTER 4

# Safeguarding U.S. National Interests in the Maritime Environment

### 4.1 INTRODUCTION

This chapter examines the broad principles of international law that govern the conduct of States in protecting their interests in the maritime environment during peacetime. As noted in the preface, this publication provides general information. It is not directive and does not supersede guidance issued by combatant commanders, in particular any guidance they may issue that delineates the circumstances and limitations under which units under their command may initiate and/or continue the use of force.

Historically, international law governing the use of force by States has been divided into rules applicable in peacetime and rules applicable in time of war. However, in the latter half of the twentieth century and continuing today, the concepts of “peace” and “war” have become blurred to the extent that it is not always possible to draw neat distinctions between the two. This chapter will focus specifically on safeguarding national interests in the maritime environment during those times when the State whose interest is at stake is not involved in armed conflict with the entity threatening its interest. With the exception of self-defense, which is discussed in section 4.4.3, the conduct of actual armed conflict involving U.S. forces, is addressed in Part II: The Law of Naval Warfare.

### 4.2 CHARTER OF THE UNITED NATIONS

As States endeavor to protect their national security interests in the maritime environment during peacetime they are guided by international law, including the Charter of the United Nations. As a starting point, Article 2, paragraph 3, of the Charter provides that:

All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

Additionally, Article 2, paragraph 4, provides that:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

In combination, these two provisions establish the fundamental principle of modern international law that States are prohibited from using force or the threat of force to impose their will on other States or to otherwise resolve their international differences. However, history has shown that States, as well as non-State actors, have at times used force or the threat of force to accomplish their objectives. Anticipating that States might resort to the threat or use of force, Chapter VII of the UN Charter vests certain powers in the UN Security Council. For example, Article 39 provides that:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 41 provides that:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members . . . to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 42 further provides that:

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 operations by air, sea, or land forces of Members. . . .

These provisions do not, however, extinguish a State's right of individual and collective self-defense. Article 51 of the Charter provides that:

Nothing in the ... Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member ... until the Security Council has taken measures necessary to maintain international peace and security ... .

The following sections discuss some of the measures that States, acting in conformity with the UN Charter, may take in pursuing and protecting their national interests during peacetime.

### **4.3 NONMILITARY MEASURES**

#### **4.3.1 Diplomatic**

As contemplated by the UN Charter, States generally rely on peaceful means to resolve their differences and to protect their interests. Diplomatic measures include all those political actions taken by one State to influence the behavior of other States within the framework of international law. They may involve negotiation, conciliation, or mediation, and may be cooperative or coercive (e.g., severing of diplomatic relations). The behavior of an offending State may be addressed by appeals to the General Assembly, or, if its misconduct endangers the maintenance of international peace and security, by bringing the issue before the Security Council. Ordinarily, however, differences that arise between States are resolved or accommodated through the normal day-to-day, give-and-take of international diplomacy. The key point is that disputes between the United States and other States arising out of conflicting interests are normally addressed and resolved through diplomatic channels, and do not involve resort to the threat or use of force.

#### **4.3.2 Judicial**

States may also seek judicial resolution of their peacetime disputes, both in national courts and before international tribunals. A State or its citizens may bring a legal action against another State in its own national courts, provided the court has jurisdiction over the matter in controversy (e.g., the action is directed against property of the foreign State located within the territorial jurisdiction of the court) and provided the foreign State does not interpose a valid claim of sovereign immunity. Similarly, a State or its citizens may bring a legal action against another State in the latter's courts, or in the courts of a third State, provided that jurisdiction exists and sovereign immunity is not invoked.

States may also submit their disputes to the International Court of Justice for resolution. Article 92 of the UN Charter establishes the International Court of Justice as the principal judicial organ of the United Nations. No State may bring another before the Court unless that State first consents. That consent can be general and given beforehand, or can be given in regard to a specific controversy. States also have the option of submitting their disputes to ad hoc or other established tribunals.



### 4.3.3 Economic

States often utilize economic measures to influence the actions of others. The granting or withholding of “most favored nation” status to another State is an often used measure of economic policy. Similarly, trade agreements, loans, concessionary credit arrangements, other aid, and investment opportunity are among the many economic measures that States extend, or may withhold, as their national interests dictate. Examples of the coercive use of economic measures to curb or otherwise seek to influence the conduct of other States include suspension of U.S. grain sales, an embargo on the transfer of U.S. technology, a boycott of oil or other exports from the offending State, and suspension of “most favored nation” status.

## 4.4 MILITARY MEASURES

In certain circumstances States may also resort to military measures to protect their interests. The United States uses military forces to ensure the survival, safety, and vitality of the United States, and to maintain a stable international environment consistent with U.S. national interests. U.S. national security interests guide global objectives of deterring, and, if necessary, defeating an armed attack or terrorist actions against the United States, including U.S. forces, and, in certain circumstances, U.S. persons and their property, U.S. commercial assets, persons in U.S. custody, designated non-U.S. military forces, and designated foreign persons and their property.

This section will address various military measures that may be used to safeguard U.S. national interests in the maritime environment during peacetime. It is first necessary to examine the law of self-defense. U.S. military commanders always have the inherent right and obligation to defend their unit and other U.S. units in the vicinity against hostile acts and demonstrated hostile intent. This basic principle derives from international law, and has been operationalized in U.S. military doctrine. It is vital that military commanders have a thorough understanding of the law of self-defense.

### 4.4.1 The Right of Self-Defense

Article 51 of the Charter of the United Nations recognizes that all States enjoy the inherent right of individual and collective self-defense. The ability of a State to use force in the exercise of self-defense is not unlimited, but is instead constrained by two important principles: “necessity” and “proportionality.” These terms are defined as follows:

1. “Necessity” means that the use of force is required under the circumstances—there is no other effective means to counter the hostile act or demonstrated hostile intent. A hostile act is an attack or other use of force against the United States, U.S. forces, or other designated persons or property; it also includes force used directly to preclude or impede the mission and/or duties of U.S. forces. Hostile intent is the imminent threat of the use of force against the United States, U.S. forces, or other designated persons or property.
2. “Proportionality” requires that the nature, intensity, scope, and duration of force used in self-defense not exceed what is required to respond decisively to hostile acts or demonstrations of hostile intent. Proportionality does not require that the force used in response be of the same kind as used in the attack. For example, the response to a cyberattack is not limited to cyberspace means.

Included within the inherent right of self-defense is the right of a State to protect itself from an imminent attack. International law recognizes that it would be contrary to the purposes of the UN Charter if a threatened State were required to absorb an aggressor’s initial and potentially crippling first strike before taking those military measures necessary to thwart an imminent attack. Anticipatory self-defense involves the use of armed force where attack is imminent and no reasonable alternative means is available.

#### 4.4.1.1 U.S. Doctrine Guiding the Exercise of Self-Defense

The U.S. has incorporated and operationalized the governing international principles on the lawful use of force—necessity and proportionality—in CJCSI 3121.01B, Standing Rules of Engagement/Standing Rules for the Use of Force. These doctrines provide implementation guidance on the inherent right and obligation of self-

defense, and also provide rules for the use of force for mission accomplishment (i.e., “nondefensive” use of force). Collectively, these doctrines establish fundamental policies and procedures governing the use of force by U.S. commanders, whether for self-defense or mission accomplishment, during military operations, contingencies, and routine military department functions, including AT/FP.

The rules on the use of force for self-defense are truly “standing” rules; they apply at all times to all U.S. forces. The rules on the use of force for mission accomplishment are more flexible, requiring tailoring to reflect the specific mission being contemplated. Whether a rule is for self-defense or for mission accomplishment, however, ROE must at all times be consistent with the law of armed conflict.

Because ROE also reflect operational and national policy considerations, they often restrict operations and tactics that would otherwise be permitted by international law.

#### **4.4.1.2 SROE or SRUF—Determining Which Doctrine Applies**

The SROE establish fundamental policies and procedures governing the actions to be taken by U.S. commanders and their forces during all military operations and contingencies, and during routine Military Department functions (including AT/FP duties) occurring outside U.S. territory (i.e., outside the 50 states, the Commonwealths of Puerto Rico and the Northern Marianas, U.S. possessions, protectorates, and territories) and outside U.S. territorial seas. The SROE also apply to air and maritime homeland defense missions conducted within U.S. territory and territorial seas, unless otherwise directed by the Secretary of Defense.

The SRUF establish fundamental policies and procedures governing the actions to be taken by U.S. commanders and their forces during all DoD civil support (e.g., military assistance to civil authorities) and routine Military Department functions (including AT/FP duties) occurring within U.S. territory or U.S. territorial waters. The SRUF also apply to land homeland defense missions occurring within U.S. territory, and to DoD forces performing law enforcement and security duties at all DoD installations (and off-installation while conducting official DoD security functions), wherever located, unless otherwise directed by the Secretary of Defense. Examples of civil support missions, during which the SRUF would apply, include the protection of critical U.S. infrastructure, both on and off DoD installations; DoD support during civil disturbances; and DoD cooperation with Federal, state, and local law enforcement authorities, including counterdrug support.

#### **4.4.1.3 Self-Defense Principles Common to Both the SROE and the SRUF**

Many principles on the use of self-defense are common to both the SROE and the SRUF. These common principles will be discussed in this subsection. Subparagraphs 4.4.1.4 and 4.4.1.5 will examine significant differences between the two doctrines.

The central tenet of both the SROE and the SRUF is that unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. A hostile act is an attack or other use of force against the United States, U.S. forces, or other designated persons or property, including force used directly to preclude or impede the mission and/or duties of U.S. forces. Hostile intent is the imminent threat of the use of force against the United States, U.S. forces, or other designated persons or property. The determination of whether or not a threat is imminent will be based on an assessment of all facts and circumstances known to U.S. forces at the time, and may be made at any level.

Also, under both sets of rules military members may exercise individual self-defense in response to a hostile act or demonstrated hostile intent. However, when individuals are assigned and acting as part of a unit, individual self-defense is considered a subset of unit self-defense. Since the unit commander is responsible for the exercise of unit self-defense, he or she may limit the exercise of individual self-defense by unit members.

Both unit and individual self-defense include defense of other U.S. military forces in the vicinity.

#### 4.4.1.4 Self-Defense Pursuant to the SROE

Under the SROE, when necessity exists (i.e., when a hostile act has occurred or hostile intent is demonstrated), units are authorized to use force in self-defense that is proportional to the threat. All necessary means available and all appropriate actions may be used in self-defense. Self-defense includes the authority to pursue and engage forces that have committed a hostile act or demonstrated hostile intent, if those forces continue to commit hostile acts or demonstrate hostile intent. If time and circumstances permit, U.S. units should provide a warning to forces committing hostile acts or demonstrating hostile intent to give them an opportunity to withdraw or cease threatening actions.

#### 4.4.1.5 Self-Defense Pursuant to the SRUF

Under the SRUF, force is normally to be used only as a last resort, and only the minimum necessary force may be used. When time and circumstances permit, the threatening persons should be warned and given the opportunity to withdraw or cease their threatening actions. If force is required, nondeadly force is authorized and may be used to defend U.S. forces and/or to control a situation, when doing so is reasonable under the circumstances. Deadly force is to be used only when all lesser means have failed or cannot be reasonably employed. See CJCSI 3121.01B for more detailed information concerning the use of deadly force under the SRUF.

When operating under the SRUF, warning shots are not authorized within U.S. territory (including U.S. territorial seas), except when in the appropriate exercise of force protection of U.S. Navy and naval service vessels within the limits set forth in enclosure M of the SROE (CJCSI 3121.01B), and Navy tactics, techniques, and procedures (NTTP) 3-07.2.1, Antiterrorism. Warning shots pursuant to the SRUF must be distinguished from the use of warning shots during the conduct of MLE actions under the tactical control of the U.S. Coast Guard and its Use of Force Policy. (See paragraph 3.11.5.2.)

#### 4.4.2 Naval Presence

One measure the United States may use to protect its maritime interests in peacetime is naval presence. Naval forces constitute a key and unique element of the U.S. national military capability. The mobility of forces operating at sea, combined with the versatility of naval force composition—from units operating individually to multicarrier strike group formations—provide the President and Secretary of Defense with the flexibility to tailor U.S. military presence as circumstances may require.

Naval presence, ranging from showing the flag during port visits to forces deployed in response to contingencies or crises, can be tailored to exert the precise influence best suited to U.S. interests. Depending upon the magnitude and immediacy of the problem, naval forces may be positioned near areas of potential discord as a show of force, or as a symbolic expression of support and concern. Unlike land-based forces, naval forces may be so employed without political entanglement, and without the necessity of seeking consent from littoral States. So long as they remain in international waters and international airspace, U.S. warships and military aircraft enjoy the full spectrum of the high seas freedoms of navigation and overflight, including the right to conduct naval maneuvers. Deployment of a naval strike group into areas of tension and augmentation of U.S. naval forces to deter interference with U.S. commercial shipping in an area of armed conflict provide graphic illustrations of the use of U.S. naval forces in peacetime to deter violations of international law and to protect U.S. flag vessels. Peacetime naval missions such as these are becoming more important to fulfill critical 21st century strategic goals.

#### 4.4.3 Interception of Intruding Aircraft

All States have complete and exclusive sovereignty over their national airspace (see paragraph 1.10). With the exception of overflight by aircraft in transit passage of international straits and in archipelagic sea lanes passage (see paragraphs 2.5.4.21 and 2.5.5.1), distress (see paragraph 3.2.2), and assistance entry to assist those in danger of being lost at sea (see paragraph 2.5.3.6), all aircraft must obtain authorization to enter another State's national airspace (see paragraph 2.5). That authorization may be flight-specific, as in the case of diplomatic clearance for the visit of a military aircraft, or general, as in the case of commercial air navigation pursuant to the Chicago Convention.

An aircraft, whether military or civilian, that enters foreign airspace without prior authorization becomes subject to orders and other control mechanisms by the intruded-upon State. It might even become the subject of use of force by that State, if the intrusion is viewed by that State as triggering the right of self-defense.

With regard to military aircraft, State practice suggests that an aircraft with military markings will be presumed to be conducting a military mission unless evidence is produced to the contrary by its State of registry. This is the case both for tactical military aircraft capable of directly attacking the overflown State, and for unarmed military aircraft capable of being used for intelligence-gathering purposes. Though aviation treaties that deal with the issue of unauthorized airspace intrusions (particularly the Chicago Convention) do not apply to military aircraft, the United States takes the position that customary international law standards of reasonableness, necessity, and proportionality should be applied by the State before it resorts to military defensive measures in response to the intrusion.

With regard to civilian aircraft, absent compelling evidence to the contrary from the overflown State, an aircraft with civil markings will be presumed to be engaged in nonmilitary commercial activity. A State is obliged not to endanger the lives of persons on board and the safety of the aircraft, and may not use weapons against an aircraft with civil markings except in the exercise of self-defense. The overflown State has the right to require intruding aircraft to land at some designated airfield, and to resort to appropriate means consistent with international law to require intruding aircraft to desist from activities in violation of international aviation law. All intruding civil aircraft must comply with such orders, and States are required to enact national laws making such compliance by their civil aircraft mandatory.

All States Parties to the Chicago Convention are required to prohibit the deliberate use of their civil aircraft for purposes (such as intelligence collection) inconsistent with the Convention.

#### **4.4.4 Maritime Interception and Interdiction**

States may desire to intercept or interdict vessels at sea in order to protect their national security interests. The act of “intercepting” ships at sea may range from querying the master of the vessel to stopping, boarding, inspecting, searching, and potentially even seizing the cargo or the vessel. As a general principle, vessels in international waters are subject to the exclusive jurisdiction of their flag State. Interference with a vessel in international waters violates the sovereign rights of the flag State unless that interference is authorized by the flag State or otherwise permitted by international law. Additionally, all vessels owned or operated by a State, and used, for the time being, only on government noncommercial service are entitled to sovereign immunity. Such vessels are immune at all times and places from arrest or search. Inside a State’s territorial sea and archipelagic waters, the coastal State exercises sovereignty, subject to the right of innocent passage, transit passage, archipelagic sea lanes passage, and other international law. Given these basic tenants of international law, commanders should be aware of the legal bases underlying the authorization for maritime interception or interdiction when ordered by competent authority to conduct such operations.

##### **4.4.4.1 Legal Bases for Conducting Maritime Interception and Interdiction**

There are several legal bases under which maritime interception and interdiction may be conducted, none of which are mutually exclusive. Depending on the circumstances, one or a combination of these bases can be used to justify permissive and nonpermissive interference with suspect vessels. The bases for conducting lawful boardings of suspect vessels at sea were greatly enhanced by the 2005 Protocols to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (see paragraph 3.14 for a discussion of SUA and the 2005 Protocols). Subject to these limitations, international law does permit the interception or interdiction of foreign flag vessels, as described in the following paragraphs.

###### **4.4.4.1.1 Maritime Interception and Interdiction Pursuant to a United Nations Security Council Resolution**

Under Article 41 of the Charter of the United Nations, the Security Council may authorize the “complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication . . . .” Pursuant to that specific authority, or to the more general authority of Chapter VII, the UN Security Council may authorize member States to use naval forces to intercept vessels and possibly board,

inspect, search, and seize them or their cargoes as necessary to maintain or restore international peace and security. Article 41 measures do not involve the use of military force. In determining exactly what measures the Security Council has authorized, the specific chapter and article of the Charter cited by the Security Council, as well as the operative language in the resolution must be analyzed.

#### **4.4.4.1.2 Flag State Consent**

As a general rule, ships are subject to the exclusive jurisdiction of their flag State (see paragraph 3.11.1.2). As such, the flag State has the right to authorize officials of another State to board vessels flying its flag. Similar to agreements in the law enforcement realm (see 3.11.2.2.4), States may negotiate bilateral or multilateral agreements which provide advance consent to board another State's vessels for other than law enforcement purposes. Alternatively, commanders, via the chain of command, may seek consent to board a vessel from a particular State. Care should be taken to identify and comply with the limits of the flag State's consent. Consent to board a vessel does not automatically extend to consent to inspect or search the vessel or to the seizure of persons or cargo. Commanders need to be aware of the exact nature and extent of flag State consent prior to conducting interceptions at sea.

#### **4.4.4.1.3 Master's Consent**

A boarding may be conducted at the invitation of the master (or person in charge) of a vessel. The master's plenary authority over all activities related to the operation of his vessel while in international waters is well established in international law, and includes the authority to allow anyone, including foreign law enforcement officials, to come aboard the vessel as a guest. However, some States do not recognize a master's authority to assent to a consensual boarding.

The voluntary consent of the master permits the boarding, but it does not allow the assertion of law enforcement authority such as arrest or seizure. A consensual boarding is not, therefore, an exercise of MLE jurisdiction *per se*. The scope and duration of a consensual boarding may be subject to conditions imposed by the master, and may be terminated by the master at his discretion. Nevertheless, such boardings have utility in allowing rapid verification of the legitimacy of a vessel's voyage by obtaining or confirming vessel documents, cargo, and navigation records without undue delay to the boarded vessel.

In cases where the vessel's flag State is a party to a bilateral/multilateral agreement or other special arrangement that includes a ship boarding provision, and reasonable grounds exist to suspect that the vessel is engaged in the illicit activity that is the subject of the agreement, boardings shall be conducted under the terms of that agreement vice seeking the master's consent.

#### **4.4.4.1.4 Right of Approach and Visit**

As a general principle, vessels in international waters are immune from the jurisdiction of any State other than the flag State. However, under international law, a warship, military aircraft, or other duly authorized ship or aircraft may approach any vessel in international waters to verify its nationality. Customary international law as reflected in UNCLOS Article 110, provides that unless the vessel encountered is itself a warship or government vessel of another State, it may be stopped, boarded, and the ship's documents examined, provided there is reasonable ground for suspecting that it is:

1. Engaged in piracy (see paragraph 3.5).
2. Engaged in the slave trade (see paragraph 3.6).
3. Engaged in unauthorized broadcasting, and the flag State of the warship has jurisdiction (see UNCLOS, Article 109(3), paragraph 3.7).
4. Without nationality (see paragraphs 3.11.2.3 and 3.11.2.4).
5. Though flying a foreign flag, or refusing to show its flag, the vessel is, in reality, of the same nationality as the warship.

There are other legal bases distinct from customary international law (including as reflected in UNCLOS) that provide authority to board a foreign flagged vessel (e.g., self-defense, bilateral international agreement, U.N. Security Council Resolution, etc.).

The procedure for ships exercising the right of approach and visit is similar to that used in exercising the belligerent right of visit and search during armed conflict described in paragraph 7.6.1. See OPNAVINST 3120.32D, Standard Organization and Regulations of the U.S. Navy and COMDTINST M16247.1D, Coast Guard Maritime Law Enforcement Manual (MLEM) for further guidance. For the belligerent right of visit and search, see paragraph 7.6.1.

#### **4.4.4.1.5 Vessels Without Nationality**

Vessels that are not legitimately registered in any one State are without nationality, and are referred to as stateless vessels. Such vessels are not entitled to fly the flag of any State and, because they are not entitled to the protection of any State, they are subject to the jurisdiction of all States. Additionally, a ship that sails under more than one flag, using them according to convenience, may not claim any of the nationalities in question and may be assimilated to a ship without nationality. If a warship encounters a stateless vessel or a vessel that has been assimilated to a ship without nationality on the high seas, it may board and search the vessel without the consent of the master.

#### **4.4.4.1.6 Condition of Port Entry**

Under international law, a coastal State may impose any condition on ships entering its ports or internal waters, including a requirement that all ships (other than sovereign immune vessels) entering port will be subject to boarding and inspection. A vessel intending to enter a State's port or internal waters can therefore be boarded and searched without flag State consent, provided the port State has imposed such a measure as a condition of port entry on a nondiscriminatory basis. Such boardings and inspections need not wait until a ship enters port—they can occur at any location, preferably when a ship enters the territorial sea.

#### **4.4.4.1.7 Belligerent Rights under the Law of Armed Conflict**

The law of armed conflict provides authority for belligerent States to intercept other State's vessels under certain circumstances. See paragraphs 7.6 through 7.8 for a detailed discussion.

#### **4.4.4.1.8 Inherent Right of Self-Defense**

States can legally conduct maritime interception operations pursuant to customary international law under circumstances that would permit the exercise of the inherent right of individual, collective, and national self-defense as recognized in Article 51 of the United Nations Charter.

#### **4.4.5 Proliferation Security Initiative**

The Proliferation Security Initiative (PSI) is a global effort to stop shipments of WMD, their delivery systems, and related materials to or from States and non-State actors of proliferation concern. PSI is not a treaty or international organization. Rather, it is an activity supported by participating States committed to a set of principles to halt proliferation of WMD. These principles have been memorialized as a "Statement of Interdiction Principles." The Statement of Interdiction Principles urges States to bolster their domestic nonproliferation laws, encourages participants to execute bilateral nonproliferation boarding agreements, and stresses the importance of routine, joint, and multinational nonproliferation training. As of February 2016, the United States had 11 bilateral PSI shipboarding agreements.

Since PSI is not a formal organization or legally binding treaty, it is best understood as ad hoc partnerships that establish the basis for cooperation on specific activities when the need arises. It does not create formal "obligations" for participating States, but does represent a political commitment to establish "best practices" to stop proliferation-related shipments. PSI seeks to use existing national and international legal authorities for such interdictions. In many cases, such legal authority will be found in a bilateral agreement. In the event that no

bilateral agreement exists, the PSI Statement of Interdiction Principles urges PSI participants to seriously consider providing consent to the boarding and searching of its flag vessels by other States and to the seizure of such WMD-related cargoes as may be identified.

PSI interdiction training exercises and other operational efforts help States work together in a more cooperative, coordinated, and effective manner to stop, search, and seize shipments. The focus of PSI is on establishing greater coordination among its partner States and a readiness to act effectively when a particular action is needed. Actual interdictions usually involve only a single or a few PSI participants with geographic and operational access to a particular PSI target of opportunity (see CJCSI 3520.02B, Proliferation Security Initiative (PSI) Activity Program).

PSI activities include:

1. Undertaking a review and providing information on current national legal authorities to conduct interdictions at sea, in the air, or on land, and indicating a willingness to strengthen authorities, where appropriate
2. Identifying specific national assets that might contribute to PSI efforts (e.g., information sharing, military, and/or law enforcement resources)
3. Providing points of contact for PSI assistance requests and other operational activities, and establishing appropriate internal government processes to coordinate PSI response efforts
4. Being willing to actively participate in PSI interdiction training exercises and actual operations as opportunities arise
5. Being willing to conclude relevant agreements (e.g., boarding arrangements) or otherwise to establish a concrete basis for cooperation with PSI efforts.

#### **4.4.6 Antiterrorism/Force Protection**

When naval forces operate in the maritime environment during peacetime, a constant underlying mission is force protection, both in port and at sea. Commanders possess an inherent right and obligation to defend their units and other U.S. units in the vicinity from a hostile act or demonstrated hostile intent. U.S. naval doctrine provides tactics, techniques, and procedures to deter, detect, defend against, and mitigate terrorist attacks (see NTP 3-07.2.1, Antiterrorism). Antiterrorism/force protection actions are preventive measures designed to mitigate hostile actions against U.S. forces by terrorists or another State's military forces. Force protection does not include offensive operations or protection against accidents, weather, or disease.

#### **4.4.7 Maritime Warning Zones**

As States endeavor to protect their interests in the maritime environment during peacetime, naval forces may be employed in geographic areas where various land, air, surface, and subsurface threats exist. Commanders are then faced with ascertaining the intent of persons and objects (e.g., small boats, "low slow flyers," jet skis, swimmers) proceeding toward their units. In many instances ascertaining their intent is very difficult, especially when operating in the littorals where air and surface traffic is heavy. Given an uncertain operating environment, commanders may want to establish some type of assessment, threat, or warning zone around their units in an effort to help sort the common operational picture and ascertain the intent of inbound entities. This objective may be accomplished during peacetime while adhering to international law as long as the navigational rights of other ships, submarines, and aircraft are respected. Specifically, when operating in international waters, commanders may assert notice (via notices to airmen and notices to mariners) that within a certain geographic area for a certain period of time dangerous military activities will be taking place. Commanders may request that entities traversing the area communicate with them and state their intentions. Moreover, such notice may include reference to the fact that if ships and aircraft traversing the area are deemed to represent an imminent threat to U.S. naval forces, they may be subject to proportionate measures in self-defense. Ships and aircraft are not required to remain outside such zones and force may not be used against such entities merely because they entered the zone. Commanders may use force against such entities only to defend against a hostile act or demonstrated hostile intent, including interference with declared military activities.

#### **4.4.8 Maritime Quarantine**

Maritime quarantine was invoked for the first and only time by the United States as a means of interdicting the flow of Soviet strategic offensive weapons (primarily missiles) into Cuba in 1962. The quarantine only applied to ships carrying offensive weapons to Cuba and utilized the minimum force required to achieve its purpose. As such, the quarantine served the interests of the United States by defending Western Hemisphere interests and security while, to the greatest degree possible, preserving FON in what was otherwise a peacetime environment.

Although it has been compared to and used synonymously with blockade, quarantine is a peacetime military action that bears little resemblance to a true blockade. (For an in-depth discussion of blockade, see paragraph 7.7). Quarantine is distinguished from blockade in that:

1. Quarantine is a measured response to a threat to national security or an international crisis; blockade is an act of war against an identified belligerent.
2. The goal of quarantine is de-escalation and return to the status quo ante or other stabilizing arrangement; the goal of a blockade is denial and degradation of an enemy's capability with the ultimate end-state being defeat of the enemy.
3. Quarantine is selective in proportional response to the perceived threat; blockade requires impartial application to all States—discrimination by a blockading belligerent renders the blockade legally invalid.

Maritime quarantine is an action designed to address crisis-level confrontations during peacetime that present extreme threats to U.S. forces or security interests, with the ultimate goal of returning conditions to a stable status quo.

#### **4.5 U.S. MARITIME ZONES AND OTHER CONTROL MECHANISMS**

The United States employs maritime zones and other control mechanisms pursuant to both domestic and international law. Such zones are grounded in a coastal State's right to exercise jurisdiction (to varying degrees, depending on purpose and exact location) over waters within and adjacent to their territorial land masses. In all cases, the statutory basis and implementing regulations and policies are consistent with international law, and in particular UNCLOS. Under U.S. law only the Coast Guard Captain of the Port in which the zone is to be established is vested with legal authority to establish such zones. Thus, close consultation with the Coast Guard is required before such a zone can be created. As many of these zones and other control mechanisms have as their primary purpose the restriction of access, they can be used as tools by the military to enhance the security and safety of both maritime and land-based units.

When deployed, commanders should be aware of similar sounding maritime zones and control mechanisms declared by other States that purport to be legitimate, but are in fact inconsistent with international law and UNCLOS, and unlawfully impede FON.

##### **4.5.1 Safety Zones**

Safety zones are areas comprised of water or land, or a combination of both, to which access is limited for safety and environmental purposes. No person, vessel, or vehicle may enter or remain within a safety zone unless authorized by the Coast Guard. Such zones may be described by fixed geographical limits or they may be a prescribed area around a vessel, whether at anchor, moored, or underway. In general, safety zones may be established within the navigable waters of the United States seaward to 12 nautical miles from the baseline. However, as explicitly permitted by Article 60 of UNCLOS, safety zones may also be established to promote the safety of life and property on artificial islands, installations, and structures in the EEZ. Such safety zones may extend up to 500 meters from the outer continental shelf (OCS) facility.



## 4.5.2 Security Zones

Security zones are areas comprised of water or land, or a combination of both, to which access is limited for the purposes of:

1. Preventing the destruction, loss, or injury to vessels, harbors, ports or waterfront facilities resulting from sabotage or other subversive acts, accidents, or similar causes.
2. Securing the observance of the rights and obligations of the United States.
3. Preventing or responding to an act of terrorism against an individual, vessel, or structure that is subject to the jurisdiction of the United States.
4. Responding to a national emergency as declared by the President by reason of actual or threatened war, insurrection or invasion, or disturbance or threatened disturbance of the international relations of the United States.

In general, security zones can be established within the navigable waters of the United States seaward to 12 nautical miles from the baseline. However, security zones established to prevent or respond to an act of terrorism against an individual, vessel, or structure may also be in the EEZ or above the OCS, provided the individual, vessel, or structure is subject to the jurisdiction of the United States. Enforcement of security zones is primarily the responsibility of the Coast Guard. Those convicted of security zone violations are subject to civil and criminal penalties.

## 4.5.3 Naval Vessel Protection Zones

The U.S. Coast Guard establishes naval vessel protection zones (NVPZs) under authority contained in 14 U.S.C. § 91 to provide for the regulation of traffic in the vicinity of U.S. naval vessels in the navigable waters of the United States. A U.S. naval vessel is any vessel owned, operated, chartered, or leased by the U.S. Navy, and any vessel under the OPCON of the U.S. Navy or a unified commander. The establishment and enforcement of NVPZs is a vital tool in protecting naval units and personnel, and in ensuring the safe and smooth conduct of military operations.

When an NVPZ is established, all vessels within 500 yards of a U.S. naval vessel must operate at the minimum speed necessary to maintain a safe course and proceed as directed by the “official patrol.” The official patrol are persons designated and supervised by a senior naval officer present in command and tasked to monitor an NVPZ, permit entry into the zone, give legally enforceable orders to persons or vessels within the zone, and take other actions authorized by the U.S. Navy. The official patrol may be a Coast Guard commissioned, warrant, or petty officer, or the commanding officer of a U.S. naval vessel or his or her designee.

Vessels are not allowed within 100 yards of a U.S. naval vessel, unless authorized by the official patrol. Vessels requesting to pass within 100 yards of a U.S. naval vessel must contact the official patrol on VHF-FM channel 16. Under some circumstances, the official patrol may permit vessels that can only operate safely in a navigable channel to pass within 100 yards of a U.S. naval vessel in order to ensure a safe passage in accordance with the navigation rules.

Under similar conditions, commercial vessels anchored in a designated anchorage area may be permitted to remain at anchor within 100 yards of passing naval vessels.

## 4.5.4 Outer Continental Shelf Facilities

Safety zones may also be established on the continental shelf around offshore platforms pursuant to the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333. Outer continental shelf safety zones may be established around OCS facilities being constructed, maintained, or operated on the OCS to promote the safety of life and property on the facilities, their appurtenances and attending vessels, and on the adjacent waters within the safety zones. An

OCS safety zone may extend to a maximum distance of 500 meters around the OCS facility measured from each point on its outer edge or from its construction site, but may not interfere with the use of recognized sea lanes essential to navigation. The following vessels are authorized to enter and remain in an OCS safety zone: vessels owned or operated by the OCS facility, vessels less than 100 feet in overall length not engaged in towing, and vessels authorized by the cognizant Coast Guard commander.

#### **4.5.5 Other Areas**

For more information concerning regulated navigation areas, restricted waterfront areas, restricted areas, danger zones, naval defensive sea areas, and other control and enforcement mechanisms, see COMDTINST M16247.1D Coast Guard Maritime Law Enforcement Manual (MLEM), Appendix O, for specific guidance.

#### **4.6 DETAINEES AT SEA DURING PEACETIME**

On occasion, circumstances may arise where naval commanders detain individuals at sea who are neither involved in an armed conflict (see chapter 11) nor violating domestic U.S. law (see paragraph 3.11). If this should occur, all persons detained by naval forces during peacetime must be treated humanely under international law and by U.S. policy. (See Department of Defense Directive (DoDD) 2310.01E, The Department of Defense Detainee Program, for additional guidance.)

## CHAPTER 5

# Principles and Sources of the Law of Armed Conflict

### 5.1 WAR AND THE LAW

Historically, the application of law to war has been divided into two parts. The first (referred to as *jus ad bellum*) addresses the legality of a State's decision to engage in war. The second (referred to as the *jus in bello*) provides rules and guidance on how to conduct the war. Although it is important for commanders to understand both these areas, the legality of a State's decision to resort to war is primarily the responsibility of its political leadership, while the legality of how the war is conducted is the responsibility of political leadership, military commanders, and individual service members.

#### 5.1.1 Law Governing When States Can Legally Use Force

The present-day legal framework for the *jus ad bellum* is found in the Charter of the United Nations. Article 2(4) of the UN Charter provides:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

The UN Charter provides two exceptions to this requirement. First, a State may use force if authorized by a decision of the UN Security Council pursuant to its authority under Chapter VII of the UN Charter and typically documented in a UN Security Council Resolution. Second, as recognized in customary international law and reflected in Article 51 of the UN Charter, force may be used in individual or collective self-defense (see paragraphs 4.4.3 and 4.4.3.1, for a discussion on the right of self-defense and anticipatory self-defense).

In addition to the two UN Charter exceptions, military action in the territory of another State is not a violation of the Article 2(4) prohibition where that State consents to such military action.

#### 5.1.2 Law Governing How Armed Conflict is Conducted

No State, regardless of its legal basis for using force, has the right to engage in armed conflict without limits. The legal extent of these limits (the *jus in bello*) depends on the type of armed conflict in which the State is engaged.

##### 5.1.2.1 International Armed Conflict

An armed conflict where two or more States oppose one another is known as an "international armed conflict." Treaties governing the *jus in bello* generally provide that they apply to international armed conflicts and define these conflicts as "declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them" (see Common Article 2 of the Geneva Conventions of 1949). This same standard has been understood to result in the application of the customary law of war as well.

The law governing international armed conflict is known as the law of armed conflict or the law of war. These terms are used synonymously in U.S. military publications. The law of armed conflict is that part of international

law that regulates the conduct of armed hostilities. It encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.

Additionally, commanders should be aware that some States are bound by Additional Protocol I to the Geneva Conventions of 1949. The United States has signed but not ratified Additional Protocol I and is therefore not bound by it. Although the United States is not a party, its coalition partners often will be. In addition, some provisions of Additional Protocol I reflect customary international law that is binding on the United States.

### **5.1.2.2 Non-International Armed Conflict**

Non-international armed conflict is defined by Common Article 3 (CA3) of the Geneva Conventions of 1949 as an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties. In general terms, this is civil war or domestic rebellion occurring within the territory of a State. “Small wars” or limited military expeditions may constitute either non-international armed conflict or international armed conflicts, depending on the parties to the conflict. Non-international armed conflict also exists when the armed conflict is not between States. Non-international armed conflicts are classified as such simply based on the status of the parties to the armed conflict, and sometimes occur in more than one State. The mere fact that an armed conflict occurs in more than one State and thus may be characterized as international “in scope” does not render it “international in character.” For example, two non-State armed groups warring against one another or States warring against non-State armed groups may be described as “non-international armed conflict,” even if international borders are crossed in the fighting.

In cases of non-international armed conflict, CA3 of the Geneva Conventions and customary law of armed conflict applies. Additionally, for States that have signed and ratified it, Additional Protocol II to the Geneva Conventions of 1949, also applies to non-international armed conflicts. The United States has signed but not ratified Additional Protocol II and is not bound by it. Commanders should be aware that in coalition operations some partner States may be obligated to follow Additional Protocol II. Customary international law also applies to non-international armed conflicts.

Regardless of the type of armed conflict, as a matter of policy, U.S. forces will comply with the law of armed conflict during all armed conflicts, however such conflicts are characterized, and in all other military operations.

### **5.1.2.3 Other Situations to Which the Law of War is Applicable**

The law of war also applies to certain situations not amounting to international armed conflict or non-international armed conflict. For instance, Common Article 2 of the Geneva Conventions of 1949, states that it applies “to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.” The law of war also establishes the rules between belligerents and neutrals. Some law of war obligations also apply in peacetime. For instance, States are required to disseminate information regarding the law of war, train their armed forces in accordance with the law of war, and take appropriate measures to prepare for the safeguarding of cultural property.

## **5.2 THE LAW OF ARMED CONFLICT AND ITS APPLICATION**

DoDD 2311.01(series), Department of Defense Law of War Program, defines the law of war/law of armed conflict as that part of international law that regulates the conduct of armed hostilities. It is comprised of all international law for the conduct of hostilities that is binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.

As a matter of international law, application of the law of armed conflict between belligerents does not depend on a declaration of war or other formal recognition, but on whether an “armed conflict” exists in fact, and if so, whether the armed conflict is of an “international” or “non-international” character.

It is DoD policy to comply with the law of armed conflict during all armed conflicts, however such conflicts are characterized, and in all other military operations (see DoDD 2311.01 (series)).

### 5.3 GENERAL PRINCIPLES OF THE LAW OF ARMED CONFLICT

The law of armed conflict seeks to minimize unnecessary suffering and destruction by controlling and mitigating the harmful effects of hostilities through standards of protection to be accorded to combatants, noncombatants, civilians, and civilian property. To achieve this goal, the law of armed conflict is based on three general principles: military necessity, humanity, and honor, which provide the foundation for other law of armed conflict principles, such as proportionality and distinction, and most of the treaty and customary rules of the law of armed conflict. These principles must be considered collectively as they impact on and interrelate with each other. No one principle of the law of war can be considered in isolation.

#### 5.3.1 Principle of Military Necessity

The law of armed conflict is not intended to impede the waging of hostilities. Its purpose is to ensure that the violence of hostilities is directed toward the enemy's war efforts and is not used to cause unnecessary human misery and physical destruction. The principle of military necessity recognizes that force resulting in death and destruction will have to be applied to achieve military objectives, but its goal is to limit suffering and destruction to that which is necessary to achieve a valid military objective. Thus, it prohibits the use of any kind or degree of force not required for the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources. It is important to note that the principle of military necessity does not authorize acts that are otherwise prohibited by the law of armed conflict and that military necessity is not a criminal defense for acts expressly prohibited by the law of armed conflict.

In applying the principle of military necessity, a commander should ask whether the object of attack is a valid military objective and, if so, whether the total or partial destruction, capture, or neutralization of the object of attack will constitute a definite military advantage under the circumstances ruling at the time of the attack. An object is a valid military objective if by its nature (e.g., combat ships and military aircraft), location (e.g., bridge over an enemy supply route), use (e.g., school building being used as an enemy headquarters), or purpose (e.g., a civilian airport that is built with a longer than required runway so it can be used for military airlift in time of emergency) it makes an effective contribution to the enemy's war-fighting/war-sustaining effort and its total or partial destruction, capture, or neutralization, in the circumstance ruling at the time, offers a definite military advantage. Purpose is related to use, but is concerned with the intended, suspected, or possible future use of an object rather than its immediate and temporary use.

It is important to note that the principle of military necessity does not prohibit the application of overwhelming force against enemy combatants, units, and material consistent with the principles of distinction and proportionality.

#### 5.3.2 Principle of Humanity

Humanity may be defined as the principle that forbids the infliction of suffering, injury, or destruction unnecessary to accomplish a legitimate military purpose. Humanity underlies certain law of armed conflict rules, such as providing fundamental safeguards for persons who fall into the hands of the enemy; protections for the civilian population and civilian objects; protections for military medical personnel, units, and transports; prohibitions on weapons that are calculated to cause unnecessary suffering; and prohibitions on weapons that are inherently indiscriminate.

Fundamental to the principle of humanity is the prohibition against causing unnecessary suffering. The law of armed conflict prohibits the use of arms, projectiles, or material calculated to cause unnecessary suffering to combatants. Because this principle is difficult to apply in practice, it is usually addressed through treaties or conventions that limit or restrict the use of specific weapons. DoD policy requires that before a new weapon or weapons system is acquired, an authorized attorney must conduct a legal review to ensure the new weapon is consistent with all applicable domestic laws and international agreements, treaties, customary international law, and the law of armed conflict. The review need not anticipate all possible uses or misuses of a weapon. Therefore, commanders should ensure that otherwise lawful weapons or munitions are not being altered or misused to cause greater or unnecessary suffering.

### **5.3.3 Principle of Proportionality**

The principle of proportionality requires a commander to conduct a balancing test to determine if the expected incidental injury resulting from an attack, including harm to civilians and damage to civilian objects, would be excessive in relation to the concrete and direct military advantage anticipated to be gained from the attack. The principle of proportionality is directly linked to the principle of distinction. Note that the principle of proportionality under the law of armed conflict is different than the term proportionality as used in self-defense (see paragraph 4.4.3).

### **5.3.4 Principle of Distinction**

The principle of distinction (sometimes referred to as “discrimination”) is concerned with distinguishing combatants from civilians and military objects from civilian objects so as to minimize harm to civilians and damage to civilian objects. Commanders have two duties under the principle of distinction. First, they must distinguish their own forces from the civilian population. This is why combatants wear uniforms or other distinctive signs. Second, they must distinguish valid military objectives from civilians or civilian objects before attacking.

The principle of distinction, combined with the principle of military necessity, prohibits indiscriminate attacks. Specifically, attacks that are not directed at a specific military objective (e.g., Iraqi SCUD missile attacks on Israeli and Saudi cities during the Persian Gulf War), attacks that employ a method or means of combat that cannot be directed at a specific military objective (e.g., declaring an entire city a single military objective and attacking it by bombardment when there are actually several distinct military objectives throughout the city that could be targeted separately), or attacks that employ a method or means of combat, the effects of which cannot be limited as required by the law of armed conflict (e.g., use of chemical or biological weapons).

### **5.3.5 Principle of Honor**

Honor demands a certain amount of fairness in offense and defense, and a certain mutual respect between opposing forces. In requiring a certain amount of fairness in offense and defense, honor reflects the principle that parties to a conflict must accept that certain limits exist on their ability to conduct hostilities. Honor prohibits the killing or wounding of the enemy by resort to perfidy; the misuse of certain signs; fighting in the enemy’s uniform; feigning nonhostile relations in order to seek a military advantage; and compelling nationals of a hostile party to take part in the operations of war directed against their own country. Honor, however, does not forbid combatants to use ruses and other lawful deceptions against the enemy. In particular, honor requires a party to a conflict to refrain from taking advantage of its opponent’s adherence to the law by falsely claiming the law’s protections. This type of conduct is forbidden because it undermines the protections afforded by the law of armed conflict, impairs nonhostile relations between opposing belligerents, and damages the basis for the restoration of peace short of complete annihilation of one belligerent by another.

Honor requires the humane and respectful treatment of prisoners of war (POWs). Honor also reflects the premise that combatants are professionals who have undertaken to conduct themselves honorably. This underlies the rules for determining who is entitled to the privileges of combatant status.

## **5.4 PERSONS IN THE OPERATIONAL ENVIRONMENT**

There are many categories and subcategories of persons in the operational environment. The categories discussed below are the major categories of persons most commonly encountered. These categories are important as they determine who is entitled to combatant immunity, who can be targeted, and what treatment they are entitled to if detained.

### **5.4.1 Combatants**

Combatants are persons engaged in hostilities during an armed conflict. Combatants may be lawful or unlawful. Unlawful combatants are more appropriately called “unprivileged belligerents” and are persons who engage in

hostilities without being legally entitled to engage in hostilities. Lawful combatants are privileged to engage in hostilities during an armed conflict and, hence, are immune from prosecution by the capturing State for their precapture lawful war-like acts (i.e., combatant immunity). For purposes of combatant immunity, lawful combatants include members of the regular armed forces of a State party to the conflict; militia, volunteer corps, and organized resistance movements belonging to a State party to the conflict, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the laws of war; and members of regular armed forces who profess allegiance to a government or an authority not recognized by the detaining power.

Lawful combatants also include civilians who take part in a *levee en masse*. A *levee en masse* is a spontaneous uprising by the citizens of a nonoccupied territory who take up arms to resist an invading force without having time to form themselves into regular armed units. Combatant immunity for a *levee en masse* ends once the invading forces have occupied the territory.

#### **5.4.1.1 Unprivileged Belligerents**

Unprivileged belligerents include civilians who take a direct part in hostilities, and members of armed groups that fail to meet the criteria for lawful combatant status. Unprivileged belligerents are not entitled to combatant immunity or POW status. Although an unprivileged belligerent's act of conducting hostilities is not, per se, a violation of international law, such war-like acts may be prosecuted as a matter of domestic law.

#### **5.4.2 Noncombatants**

Noncombatants are generally those members of the armed forces who are medical personnel and chaplains. It also can include those combatants who become *hors de combat* (out of combat) by reason of wounds, illness, or capture. If noncombatants take a direct part in hostilities, they lose their protected status and may be attacked.

#### **5.4.3 Civilians**

A civilian is a person who is not a combatant or noncombatant. Civilians may not be made the object of attack and if detained they are entitled to humane treatment and a variety of other protections depending upon the context of the conflict. Civilians who take a direct part in hostilities lose their protection against direct attack. Other than those constituting a *levee en masse*, civilians taking a direct part in hostilities are not entitled to combatant immunity and may be subject to criminal prosecution under the domestic law of the detaining State.

##### **5.4.3.1 Civilians Accompanying the Force**

Persons authorized to accompany the armed forces are often referred to as civilians, but such civilians are treated differently from the civilians who make up the civilian population. For instance, civilians authorized to accompany the force are entitled to POW status if captured. Civilians accompanying the force play critical roles across the full spectrum of military operations. Civilians perform training and maintenance roles, as well as intelligence, planning, logistics, and communications support functions. The Hague and Geneva Conventions recognize that civilians will support and accompany the armed forces. Civilians accompanying the force may not, however, take a direct part in hostilities. Civilians accompanying the force may be prosecuted under the domestic law of the capturing State if they directly participate in hostilities; however, they retain their status as POWs.

Civilian mariners, both government civil-service and contractor employees, serving on MSC auxiliary vessels or USS warships, are civilians accompanying the armed forces of the United States and are entitled to POW status if captured. Civilian mariners serving as crew members on MSC auxiliary vessels, or assigned as crew members on USS vessels (performing deck, engineering, purser, or steward functions), are not directly participating in hostilities by virtue of performing their normal assigned duties.

## **5.5 SOURCES OF THE LAW OF ARMED CONFLICT**

As is the case with international law generally, the principal sources of the law of armed conflict are customary international law, as reflected in the practice of States, and international agreements.

### **5.5.1 Customary International Law**

The customary international law of armed conflict derives from the general and consistent practice of States during hostilities that is done out of a sense of legal obligation. Customary law develops over time. Only when State practice attains a degree of regularity and is generally believed to be legally required can the practice become a rule of customary law. Customary international law is generally binding upon all States, but States that have been persistent objectors to a customary international law rule during its development are not bound by that rule. It is frequently difficult to determine the precise point in time at which a usage or practice of warfare evolves into a customary rule of law. In a period marked by rapid developments in technology, coupled with the broadening of the spectrum of conflict to encompass insurgencies and State-sponsored terrorism, it is not surprising that States often disagree as to the precise content of an accepted practice of armed conflict and its status as a rule of law. This lack of precision in the definition and interpretation of rules of customary international law has been a principal motivation behind efforts to codify the law of armed conflict through written agreements (treaties and conventions.) However, the inherent flexibility of law built on custom, and the fact that it reflects the actual—albeit constantly evolving—practice of States, underscores the continuing importance of customary international law in the development of the law of armed conflict.

### **5.5.2 International Agreements**

Whether codifying existing rules of customary international law or creating new rules to govern future practice, international agreements (treaties, conventions, and protocols) have played a major role in the development of the law of armed conflict and are a major source of it. International agreements are binding only upon the contracting parties, and then only to the extent required by the terms of the treaty, convention, or protocol itself as limited by the reservations, if any, that have accompanied its ratification or adherence by individual States. States that do not express their consent to be bound by a treaty in the manner prescribed by the treaty through signature, ratification, or accession, are not bound by its provisions. There are two exceptions: first, if a treaty is declaratory of customary international law from its inception, then the rules embodied within the treaty are binding on both party and nonparty States (except for persistent objectors); second, to the extent that a treaty's provisions come, over time, to represent a general consensus among States of their obligatory nature, they are binding upon party and nonparty States alike (except for persistent objectors).

Principal among the international agreements reflecting the development and codification of the law of armed conflict are the Hague Regulations of 1907, Geneva Gas Protocol of 1925, Geneva Conventions of 1949 for the Protection of War Victims, 1954 Hague Cultural Property Convention, Biological Weapons Convention of 1972, Conventional Weapons Convention of 1980 (and its five Protocols), and the Chemical Weapons Convention of 1993. Whereas the 1949 Geneva Conventions and 1977 Protocols Additional thereto address, for the most part, the protection of victims of war, the Hague Regulations, Geneva Gas Protocol, 1993 Chemical Weapons Convention, Hague Cultural Property Convention, Biological Weapons Convention, and the Conventional Weapons Convention are concerned, primarily, with controlling the means and methods of warfare.

There are international agreements that the United States has signed and ratified, signed but not ratified, and neither signed nor ratified. If the United States has signed and ratified an agreement, it is binding as law. If the United States has signed but not ratified an agreement, it is not law, but the United States has a duty not to defeat the object and purpose of the agreement until it has made its intention clear not to become a party to the treaty. If the agreement is neither signed nor ratified, the agreement creates no obligations on the part of the United States.

The United States is a party to the following agreements:

1. 1907 Hague Convention Respecting the Laws and Customs of War on Land (Hague IV)
2. 1907 Hague Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague V)



3. 1907 Hague Convention Relative to the Laying of Automatic Submarine Contact Mines (Hague VIII)
4. 1907 Hague Convention Concerning Bombardment by Naval Forces in Time of War (Hague IX)
5. 1907 Hague Convention Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War (Hague XI)
6. 1907 Hague Convention Concerning the Rights and Duties of Neutral Powers in Naval War (Hague XIII)
7. 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare
8. 1936 London Protocol in Regard to the Operations of Submarines or Other War Vessels with Respect to Merchant Vessels (Part IV of the 1930 London Naval Treaty)
9. 1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field\*
10. 1949 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea\*
11. 1949 Geneva Convention (III) relative to the Treatment of Prisoners of War
12. 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War\*
13. 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict\*
14. 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction
15. 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects (with Amendment to Article 1)
  - 15(a). 1980 Protocol I to the Convention on Certain Conventional Weapons (Non-Detectable Fragments)
  - 15(b). 1980 Protocol II to the Convention on Certain Conventional Weapons (Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices)
  - 15(c). 1996 Protocol II Amended to the Convention on Certain Conventional Weapons (Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended on 3 May 1996)
  - 15(d). 1988 Protocol III to the Convention on Certain Conventional Weapons (Prohibitions or Restrictions on the Use of Incendiary Weapons)\*
  - 15(e). 1995 Protocol IV to the Convention on Certain Conventional Weapons (Blinding Laser Weapons)\*
  - 15(f). 2003 Protocol V to the Convention on Certain Conventional Weapons (Explosive Remnants of War)\*
16. 1993 Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction
17. 2005 Protocol III Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem.

An asterisk (\*) indicates that signature or ratification of the United States was subject to one or more reservations or understandings.

## **NWP 1-14M/MCTP 11-10B/COMDTPUB P5800.7A**

The following are law of armed conflict treaties that have been signed, but not yet ratified by the United States. The United States is not a party to these treaties:

1. 1977 Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts
2. 1977 Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts.

The following law of armed conflict treaties have not been signed or ratified by the United States. The United States is not a party to these treaties, but many of our coalition partners are:

1. 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction
2. 1998 Rome Statute of the International Criminal Court (ICC) (Note: the United States effectively withdrew its signature on May 6, 2002)
3. 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict.
4. 2008 Oslo/Dublin Convention on Cluster Munitions.

### **5.6 THE LAW OF ARMED CONFLICT, INTERNATIONAL HUMANITARIAN LAW, AND HUMAN RIGHTS LAW**

The law of armed conflict is often called the law of war. Both terms can be found in DoDDs and training materials. “International humanitarian law” is an alternative term for the law of armed conflict that may be understood to have the same substantive meaning as the law of armed conflict. The term “international humanitarian law” does not cover all aspects of the law of armed conflict, however, and is often confused with human rights law. The more traditional term “law of armed conflict” eliminates this confusion. While there are some areas of overlap, the law of armed conflict and human rights law are separate and distinct bodies of law. Compliance with the law of armed conflict and U.S. domestic law will ensure compliance with human rights law.

## CHAPTER 6

# Adherence and Enforcement

### 6.1 ADHERENCE TO THE LAW OF ARMED CONFLICT

States adhere to the law of armed conflict not only because they are legally obliged to do so but for the very practical reason that it is in their best interest to be governed by consistent and mutually acceptable rules of conduct. The law of armed conflict has long recognized that knowledge of the requirements of the law is a prerequisite to compliance with the law and to prevention of violations of its rules, and has therefore required training of the armed forces. All U.S. Service members, commensurate with their duties and responsibilities, must receive, through publications, instructions, training programs, and exercises, training and education in the law of armed conflict. Heads of DoD components are required to make legal advisors available to advise U.S. military commanders at the appropriate level on the application of the law of armed conflict.

The law of armed conflict is effective to the extent that it is obeyed. Occasional violations do not substantially affect the validity of a rule of law, provided routine compliance, observance, and enforcement continue to be the norm.

#### 6.1.1 Adherence by the United States

The U.S. Constitution, Article VI, clause 2, provides that treaties to which the United States is a party constitute a part of the “supreme law of the land” with a force equal to that of law enacted by the Congress. Moreover, the U.S. Supreme Court has consistently ruled that where there is no treaty and no controlling executive, legislative, or judicial precedent to the contrary, customary international law is a fundamental element of U.S. national law. Accordingly, U.S. Service members are bound by the law of armed conflict as embodied in customary international law and all treaties to which the United States is a party.

#### 6.1.2 Policies

##### 6.1.2.1 Department of Defense

DoDD 2311.01E, DoD Law of War Program, defines the law of war for U.S. personnel and directs that all members of DoD components and U.S. civilians and contractors assigned to or accompanying the armed forces comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations. (The term law of war is synonymous with the law of armed conflict.) Combatant commanders are responsible for the overall execution of the DoD Law of War Program within their respective commands.

Possible, suspected, or alleged violations of the law of armed conflict (i.e., reportable incident), whether committed by or against U.S. personnel, enemy persons, or any other individual, are to be reported promptly, investigated thoroughly, and, where appropriate, remedied through corrective action. Commanders are required to immediately report the alleged violation through the applicable operational command and Military Department. Reporting requirements are concurrent. The initial report shall be made through the most expeditious means available. (See paragraph 6.3.)

Once it has been determined that U.S. persons are not involved in a reportable incident, an additional U.S. investigation shall be continued only at the direction of the appropriate combatant commander. Contracts shall require U.S. contractor employees to report reportable incidents to the commander of the unit they are accompanying, to the installation to which they are assigned, or to the combatant commander.

### **6.1.2.2 Department of the Navy**

SECNAVINST 3300.1C, Department of the Navy Law of War Program, states that the Department of the Navy will comply with the law of armed conflict in the conduct of military operations and related activities in armed conflicts. Navy Regulations, 1990, Article 0705, Observance of International Law, provides that:

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.

All Service members of the Department of the Navy, commensurate with their duties and responsibilities, must receive, through publications, instructions, training programs and exercises, training and education in the law of armed conflict.

Navy and Marine Corps judge advocates responsible for advising operational commanders are specially trained to provide officers in command with advice and assistance in the law of armed conflict on an independent and expeditious basis. The Chief of Naval Operations and the Commandant of the Marine Corps have directed officers in command of the operating forces to ensure that their judge advocates have appropriate clearances and access to information to enable them to carry out that responsibility.

### **6.1.2.3 Coast Guard**

When operating as a Service in the Department of the Navy, Coast Guard personnel are subject to the orders of the Secretary of the Navy and fall within the purview of Department of the Navy policy. At all times, Coast Guard personnel are required to observe the law of armed conflict as a fundamental element of U.S. Federal law. Coast Guard judge advocates are also specially trained to provide law of armed conflict advice and assistance to officers in command.

### **6.1.3 Command Responsibility**

A naval commander may delegate some or all of his authority; however, he cannot delegate his accountability for the conduct of the forces he commands. Under the law of armed conflict, a commander may be held criminally responsible for ordering the commission of a war crime as well as be held responsible for the acts of subordinates when the commander knew, or should have known, that subordinates under his control were going to commit or had committed violations of the law of armed conflict and he failed to exercise properly his command authority or failed otherwise to take reasonable measures to discover and correct violations that may occur.

### **6.1.4 Individual Responsibility**

All members of the naval Service have a duty to comply with the law of armed conflict and, to the utmost of their ability and authority, to prevent violations by others. They also have an affirmative obligation to report promptly violations of which they become aware. Members of the naval Service, like military members of all States, must obey readily and strictly all lawful orders issued by a superior. Under both international law and U.S. law, an order (direct or indirect, explicit or implied) to commit an obviously criminal act, such as the wanton killing or torture of a prisoner, is an unlawful order and will not relieve a subordinate of his responsibility to comply with the law of armed conflict. Only if the unlawfulness of an order is not known by the individual, and he could not reasonably be expected under the circumstances to recognize the order as unlawful, will the defense of obedience to an order protect a subordinate from the consequences of violating the law of armed conflict.

## **6.2 ENFORCEMENT OF THE LAW OF ARMED CONFLICT**

Various means are available to belligerents under international law for inducing compliance with the law of armed conflict. To establish the facts, the belligerents may agree to an ad hoc inquiry. In the event of a clearly established violation of the law of armed conflict, the aggrieved nation may:

1. Publicize the facts with a view toward influencing world public opinion against the offending nation. For example, during Iraq's unlawful occupation of Kuwait in 1990, the Security Council invited all States to

“collate substantiated information in their possession or submitted to them on the grave breaches by Iraq . . . and to make this information available to the Council.” The U.S. submitted such a report as an effort to publicize the grave breaches committed by Iraq.

2. Protest to the offending nation and demand that those responsible be punished and/or that compensation be paid.
3. Seek the intervention of a neutral party, particularly with respect to the protection of POWs and other of its nationals that have fallen under the control of the offending nation.
4. Execute a belligerent reprisal action (see paragraph 6.2.4).
5. Punish individual offenders either during the conflict or upon cessation of hostilities (see paragraph 6.2.6).

### **6.2.1 The Protecting Power**

Under the Geneva Conventions of 1949, the treatment of POWs, interned civilians, and the inhabitants of occupied territory is to be monitored by a neutral State known as the protecting power. Due to the difficulty of finding a State which the opposing belligerents will regard as truly neutral, the parties to the Conventions have authorized international humanitarian organizations, such as the International Committee of the Red Cross (ICRC), to perform at least some of the functions of a protecting power.

### **6.2.2 The International Committee of the Red Cross**

The ICRC is a private, nongovernmental, humanitarian organization based in Geneva, Switzerland. The ruling body of the ICRC is composed entirely of Swiss citizens and the ICRC is staffed by both Swiss nationals and non-nationals. (The ICRC is distinct from and should not be confused with the various national Red Cross societies such as the American Red Cross.)

The ICRC’s principal purpose is to provide protection and assistance to the victims of armed conflict. It bases its activities on the principles of neutrality and humanity. The Geneva Conventions recognize the special status of the ICRC and have assigned specific tasks for it to perform, including visiting and interviewing, without witnesses present, POWs and detained or interned protected persons (civilians), providing relief to the civilian population of occupied territories, searching for information concerning missing persons, and offering its “good offices” to facilitate the establishment of hospital and safety zones.

Under its governing statute, the ICRC is dedicated to work for the faithful application of the Geneva Conventions, to endeavor to ensure the protection of military and civilian victims of armed conflict, and to serve as a neutral intermediary between belligerents. The ICRC may ask the parties to a conflict to agree to its discharging other humanitarian functions in the event of non-international armed conflicts and international armed conflicts.

### **6.2.3 Department of Defense Requirements for Reporting Contact with the International Committee of the Red Cross**

The Secretary of Defense, in his memorandum of 5 October 2007 with the subject line: “Amended Policy Guidance on International Committee of the Red Cross (ICRC) Communications,” requires DoD personnel to report contacts with the ICRC.

1. All ICRC reports, written or oral, received by a military or civilian official of the DoD at any level shall, within 48 hours, be transmitted via e-mail through the operational chain of command to designated representatives within the cognizant combatant command. The combatant command shall then transmit such reports within one day of receipt to the Under Secretary of Defense for Policy (USD(P)) with information copies to the Director, Joint Staff; the DoD General Counsel; and the DoD Executive Secretary. ICRC reports received within a combatant command area of operation shall be transmitted simultaneously to the commander of the combatant command.

2. Oral ICRC reports shall be summarized in writing, and shall contain the following information:
  - a. Dates and location of the ICRC communication
  - b. Subject matter of the communication
  - c. Name of the ICRC and DoD representatives
  - d. Actions taken or planned by the command in response to the ICRC communication.
3. The senior commander or DoD official to which an ICRC communication is addressed shall provide a timely written response to the ICRC acknowledging the communication and, to the extent practicable, provide a written response to the ICRC addressing substantive matters raised by the ICRC, including answering requests for information, and explaining actions taken to resolve alleged deficiencies identified by the ICRC communication. This written response will be forwarded to DoD in the same manner (detailed above) as the original ICRC communication.
4. All ICRC communications shall be marked with the following statement: "ICRC communications are provided to DoD as confidential restricted-use documents." ICRC communications will be safeguarded in the same manner as SECRET NODIS information using classified information channels. Dissemination of ICRC communications outside of DoD is not authorized without the approval of the Secretary or Deputy Secretary of Defense.

#### **6.2.4 Reprisal**

A belligerent reprisal is an enforcement measure under the law of armed conflict consisting of an act that would otherwise be unlawful but which is justified as a response to the previous unlawful acts of an enemy. The sole purpose of a reprisal is to induce the enemy to cease its illegal activity and to comply with the law of armed conflict in the future. Reprisals may be taken against enemy property and enemy armed forces who have not been captured. Under customary international law, members of the enemy civilian population, other than those in occupied territory, may be legitimate objects of reprisal. Note that Additional Protocol I to the Geneva Conventions prohibits reprisals against civilians and civilian objects. The United States is not a Party to Additional Protocol I and has taken the position that its prohibition removes a significant deterrent that presently protects civilians and other war victims on all sides of a conflict.

##### **6.2.4.1 Requirements for Reprisal**

To be valid, a reprisal action must conform to the following criteria:

1. Reprisal must be ordered by an authorized representative of the belligerent government.
2. It must respond to illegal acts of warfare committed by an adversary government, its military commanders, or combatants for which the adversary is responsible. Anticipatory reprisal is not authorized.
3. When circumstances permit, reprisal must be preceded by a demand for redress by the enemy of its unlawful acts.
4. Its purpose must be to cause the enemy to cease its unlawful activity. Therefore, acts taken in reprisal should be brought to the attention of the enemy in order to achieve maximum effectiveness. Reprisal must never be taken for revenge.
5. Reprisal must only be used as a last resort when other enforcement measures have failed or would be of no avail.

6. Each reprisal must be proportional to the original violation. Acts of reprisal need not be of the same kind as the enemy's illegal acts, but should not be excessive or exceed the degree of harm required to deter the enemy from continued unlawful conduct.
7. A reprisal action must cease as soon as the enemy is induced to stop its unlawful activities and to comply with the law of armed conflict.

#### **6.2.4.2 Immunity From Reprisal**

Reprisals are forbidden to be taken against:

1. POWs and interned civilians
2. Wounded, sick, and shipwrecked persons
3. Civilians in occupied territory
4. Hospitals and medical facilities, personnel, and equipment, including hospital ships, medical aircraft, and medical vehicles.

#### **6.2.4.3 Authority to Order Reprisals**

The President alone may authorize the taking of a reprisal action by U.S. forces. Although reprisals are lawful when the foregoing requirements are met, there is always the risk that such reprisals will trigger counter-reprisals by the enemy. The United States has historically been reluctant to resort to reprisal for just this reason.

#### **6.2.5 Reciprocity**

Some obligations under the law of armed conflict are reciprocal in that they are binding on the parties only so long as both sides continue to comply with them. A major violation by one side will release the other side from all further duty to abide by that obligation. The concept of reciprocity is not applicable to humanitarian rules that protect the victims of armed conflict, that is, those persons protected by the 1949 Geneva Conventions. The decision to consider the United States released from a particular obligation following a major violation by the enemy will be made by the President.

#### **6.2.6 War Crimes Under International Law**

While there is not an exhaustive list of war crimes, they consist of serious and intentional violations of the law of armed conflict committed during periods of international or non-international armed conflict. Acts constituting war crimes may be committed by combatants, noncombatants, or civilians. States are obligated under international law to punish their own nationals, whether members of the armed forces or civilians, who commit war crimes. International law also provides that States have the right to punish enemy armed forces personnel and enemy civilians who fall under their control for such offenses.

Grave breaches of the Geneva Conventions are a special type of war crime. The Geneva Conventions define grave breaches and place duties on States to search for persons alleged to have committed grave breaches, bring them to trial, and punish them if found guilty. This duty exists regardless of the nationality of the offender and includes the right to punish enemy armed forces personnel and enemy civilians.

The Geneva Conventions define grave breaches as any of the following acts when committed against persons and property protected by the Conventions:

1. Willful killing
2. Torture or inhumane treatment, including biological experiments
3. Willfully causing great suffering or serious injury to body or health

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4. Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly
5. Compelling a POW or protected person to serve in the forces of a hostile power
6. Willfully depriving a POW or protected person of the rights of a fair and regular trial
7. Deliberate attack upon medical facilities, hospital ships, medical aircraft, medical vehicles, or medical personnel
8. Wounding or mistreating the survivors of ships and aircraft lost at sea; failing to provide for the safety of survivors as military circumstances permit
9. Unlawful deportation or transfer of a protected person or unlawful confinement of a protected person
10. Taking of hostages.

For violations of the Geneva Conventions that do not rise to the level of a grave breach, States are obligated to take measures necessary to suppress them. The following actions, if committed intentionally, could be considered war crimes, but would not be considered grave breaches of the Conventions:

1. Plunder and pillage of public or private property
2. Mutilation or other mistreatment of the dead
3. Employing forbidden arms or ammunition
4. Misuse, abuse, or firing on flags of truce or on the red cross device, and similar protective emblems, signs, and signals
5. Treacherous request for quarter (i.e., feigning surrender in order to gain a military advantage).

Additionally, violation of a treaty to which a state is a party can create a basis for individual criminal liability. For example, the War Crimes Act of 1996 makes it a war crime to willfully kill or cause serious injury to civilians in violation of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, of which the United States is a party.

Common Article 3 of the four Geneva Conventions provides minimum standards that state parties to a conflict are bound to apply in the case of armed conflict not of an international character occurring in the territory of one of the state parties. Although CA3 does not address individual criminal liability for violation of these minimum standards, the U.S. Congress has enacted the War Crimes Act of 1996 (18 U.S.C. § 2441), as amended, that permits prosecution of specific violations of CA3, as defined in the statute, in U.S. Federal court.

Article 8 of the Rome Statute of the International Criminal Court contains by far the most comprehensive list of war crimes, defining them as falling into four groups:

1. Grave breaches of the 1949 Geneva Conventions
2. Other serious violations of the laws and customs applicable in international armed conflict
3. Serious violations of CA3 pertaining to non-international armed conflicts
4. Other serious violations of the laws and customs applicable in non-international armed conflicts.

Although the United States is not a party to the Rome Statute, many of its allies and partners are party to it and may be subject to prosecution for violation of these war crimes.



### 6.2.6.1 Prosecution of War Crimes

Trials for war crimes and other unlawful acts committed by enemy personnel and civilians usually have taken place after hostilities are concluded. Trials during hostilities might provoke undesirable actions from an enemy and complicate humanitarian protections applicable to one's own combatants and other nationals. The Geneva Convention Relative to the Treatment of POWs does not prohibit such trials, but does require that POWs retain, even if convicted, the benefits of that Convention. (See GPW Art. 85.)

Thousands of war crimes trials were held after World War II for crimes committed by Nazi and Japanese personnel. However, for several decades after World War II, there was a general reluctance to undertake such trials following other conflicts. This reluctance changed with the armed conflict in the former Yugoslavia and genocide in Rwanda, leading the UN Security Council to establish two ad hoc international tribunals in 1993 and 1994 to prosecute war crimes, crimes against humanity, and genocide committed in both the former Yugoslavia and in Rwanda.

A number of hybrid international/domestic courts/tribunals have been established to prosecute war crimes. For example, in August 2000, pursuant to UNSC Resolution 1315, the United Nations by agreement with the Government of Sierra Leone established a Special Court for Sierra Leone. This hybrid international/domestic court has the mandate to prosecute those persons who bear the greatest responsibility for serious violations of the law of armed conflict to include crimes against humanity, violations of CA3 and AP II and Sierra Leonean law committed in the territory of Sierra Leone since 1996.

Additionally, a permanent international criminal court was created by the 1998 Rome Statute of the International Criminal Court. The Rome Statute entered into force in 2002. Although the United States is not a party to this treaty, the ICC purports to have jurisdiction over nonparty States, such as the United States, under certain circumstances. These circumstances include: if the UN Security Council refers the situation for investigation by the ICC, the court will have jurisdiction over crimes within the jurisdiction of the court committed by any national involved in the situation; if a non-State party commits a crime within the jurisdiction of the court on the territory of a state party to the ICC, then the ICC purports to assert jurisdiction; and if a non-State party national commits a crime within the jurisdiction of the court on the territory of another non-State party, that non-State party can give ad hoc consent for the ICC to investigate the third-state national.

The United States has signed over 100 bilateral nonsurrender agreements per Article 98 of the Rome Statute, which would preclude the other party to the agreement from surrendering a U.S. citizen to the ICC for prosecution without U.S. Government consent.

### 6.2.6.2 U.S. Domestic Jurisdiction Over Offenses and Individuals

The Geneva Conventions grant universal jurisdiction over grave breaches to all state parties. Each state party then determines how to exercise that jurisdiction. The majority of prosecutions for violations of the law of armed conflict have involved the trial of a State's own forces for breaches of military discipline. Violations of the law of armed conflict by persons subject to U.S. military law will usually constitute violations of the Uniform Code of Military Justice (UCMJ) and, if so, offenders will be prosecuted under that Code. In times of congressionally declared war or during contingency operations, the UCMJ applies to civilians, to include contractors, accompanying the force in the field. In 2008, DoD issued specific guidance on the exercise of UCMJ jurisdiction over DoD civilian employees, DoD contractor personnel, and other persons serving with or accompanying the Armed Forces in the field during declared war and in contingency operations.

Additionally, the War Crimes Act of 1996, as amended in 1997 and 2006, authorizes U.S. courts to prosecute war crimes cases relating to offenses committed either inside or outside the United States only if the offense is committed by or against a member of the U.S. Armed Forces or a U.S. national. This Act gives the court jurisdiction of the following acts:

1. A grave breach of the 1949 Geneva Conventions
2. Violations of certain articles in the Hague Convention

3. Certain violations of CA3 of the Geneva Conventions
4. Violations of Amended Protocol II to the Conventional Weapons Treaty.

In those cases where the offense does not rise to the level of a war crime, the Military Extraterritorial Jurisdiction Act (MEJA) of 2000 provides Federal criminal jurisdiction over persons who are employed by or accompanying the armed forces outside the United States who engage in conduct that would constitute an offense punishable by more than one year imprisonment had the conduct occurred within the special maritime and territorial jurisdiction of the United States. These persons include DoD civilian employees, contractors, DoD dependents, members of the armed forces who commit an offense with someone not subject to the UCMJ, or former members of the armed forces no longer subject to the UCMJ. Members of the armed forces otherwise subject to the UCMJ as well as persons who are “ordinarily resident” in the country where the conduct occurred are excluded under MEJA. Retirees from active duty entitled to pay remain members of the armed forces subject to the UCMJ and are therefore excluded from MEJA. This Act was amended in 2004 to expand jurisdiction to include civilians and contractors from other federal agencies or any provisional authority, to the extent that their employment relates to supporting the mission of DoD overseas. In 2005, DoD issued DoDI 5525.11 implementing the policies and procedures, and assigning responsibilities, under MEJA. All MEJA referrals are to be transmitted to Department of Justice’s Human Rights and Special Prosecutions Section.

Congress also enacted a provision in the USA Patriot Act of 2001, Section 804, which amended 18 U.S.C. § 7, expanding the U.S. Special Maritime and Territorial Jurisdiction Act to give Federal courts jurisdiction over criminal offenses committed by U.S. citizens in U.S.-operated facilities overseas. This provides the Department of Justice an additional source of authority to bring charges against an individual if the act committed constitutes a crime within the statute, namely maiming, assault, kidnapping, murder, and manslaughter, and the offense was committed in a U.S. facility overseas.

The Federal statute with the broadest jurisdictional reach is the Extraterritorial Torture Statute which was passed to implement U.S. obligations as a state party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This statute prohibits torture committed not only by U.S. citizens, but by noncitizens present in the United States.

For offenses committed in the United States, its territories and possessions, jurisdiction is not limited to offenses by U.S. nationals, but also extends to offenses by persons of other nationalities. War crimes committed by enemy nationals may be tried as offenses against international law, which forms part of the law of the United States. Trials of enemy personnel may be held in U.S. Federal courts, military courts, and military tribunals or commissions.

Military commissions, tribunals, or provosts courts have concurrent jurisdiction with that of general courts-martial to try individuals alleged to have committed war crimes. Most recently, in November 2001 the President issued an order that authorized the trial by military commission of non-U.S. citizens who were members of al Qaeda, or aided, abetted, or conspired to commit acts of terrorism against the United States and its citizens. In 2006 the Supreme Court, in *Hamdan v. Rumsfeld*, challenged the President’s unilateral authority to convene military commissions under Art. II, Section 2(1) of the U.S. Constitution. Congress subsequently exercised its authority under Art. I, Section 8(14) of the U.S. Constitution to enact the Military Commissions Act (MCA) of 2006. This Act was amended in 2009 and provides the jurisdictional framework for military commissions.

The MCA 2009 gives the military commission jurisdiction over an alien who is an “unprivileged enemy belligerent” who has engaged in hostilities against the United States or its coalition partners; has purposefully and materially supported hostilities against the United States and its coalition partners; or was part of al Qaeda at the time of the alleged offense. The Act authorizes jurisdiction over not only acts which constitute offenses against the laws and customs of war and violations of CA3 but also domestic prohibitions against terrorism. The Act, however, does not give an alien unprivileged enemy belligerent the right to invoke the Geneva Conventions as basis for a private right of action.

In occupied territories, trials are usually held under occupation law. Trials of such personnel have been held in military courts, military commissions, provost courts, military government courts, and other military tribunals. There is no statute of limitations on the prosecution of a war crime.

### **6.2.6.3 Fair Trial Standards**

The law of armed conflict establishes minimum standards for the trial of individuals charged with war crimes. Failure to provide a fair trial for the alleged commission of a war crime is itself a war crime.

### **6.2.6.4 Defenses**

Individuals charged with war crimes may raise a number of defenses which fall into two groups. One group of defenses normally negates criminal responsibility under general principles of domestic criminal law, such as lack of mental responsibility, self-defense, mistake of fact, mistake of law, and duress. The other group of defenses are those peculiar to war crimes trials such as superior orders, military necessity, and acts done in accordance with national law. Recent practice in international law has been to enumerate and define defenses in the statutes establishing the ad hoc, hybrid international-domestic, or permanent court/tribunals.

#### **6.2.6.4.1 Superior Orders**

The fact that a person committed a war crime under orders of his military or civilian superior does not by itself relieve him of criminal responsibility under international law. It may, however, be considered in mitigation of punishment. To establish responsibility, the person must know, or have reason to know, that an act he is ordered to perform is unlawful under international law. Such an order must be manifestly illegal. The standard is whether under the same or similar circumstances a person of ordinary sense and understanding would know the order to be unlawful. If the person knows the act is unlawful and only does it under duress this circumstance may be taken into consideration either by way of defense or in mitigation of punishment.

#### **6.2.6.4.2 Military Necessity**

The law of armed conflict provides that only that degree and kind of force, not otherwise prohibited by the law of armed conflict, required for the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources may be applied. This principle, often referred to as “military necessity,” is a fundamental concept of restraint designed to limit the application of force in armed conflict to that which is in fact required to carry out a lawful military purpose. Too often it is misunderstood and misapplied to support the application of military force that is excessive and unlawful under the misapprehension that the “military necessity” of mission accomplishment justifies the result. Military necessity cannot justify an act by a military commander which disregards the law of armed conflict and international law or which goes beyond the express limitations set forth in the law of armed conflict. If a commander acts based on military necessity, his actions will be judged based on the information available to him at the time of the act.

#### **6.2.6.4.3 Acts Legal or Obligatory Under National Law**

The fact that a State’s domestic law does not prohibit an act that constitutes a war crime under international law does not relieve the person who committed the act from responsibility under international law. However, the fact that a war crime under international law is made legal and even obligatory under State domestic law may be considered in mitigation of punishment.

### **6.2.6.5 Sanctions**

Under international law, any punishment, including the death penalty, may be imposed on any person found guilty of a war crime. U.S. policy requires that the punishment be deterrent in nature and proportionate to the gravity of the offense.

### **6.3 REPORTABLE VIOLATIONS**

DoDD 2311.01E, DoD Law of War Program, is the DoD source for law of war reporting requirements. This directive defines a reportable incident as “a possible, suspected, or alleged violation of the law of war, for which there is credible information, or conduct during military operations other than war that would constitute a violation of the law of war if it occurred during an armed conflict.” Such incidents must be “promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action.”

All military and U.S. civilian employees and contractor personnel assigned to or accompanying a DoD component shall report incidents through the chain of command. The commander of any unit that obtains information about a reportable incident shall immediately report the incident through command channels to operational and military department higher authorities. Reporting requirements are concurrent.

The following are examples of incidents that must be reported:

1. Offenses against the wounded, the sick, survivors of sunken ships, POWs, and civilian inhabitants of occupied or allied territories including interned and detained civilians: attacking without due cause; willful killing; torture or inhuman treatment, including biological, medical, or scientific experiments; physical mutilation; removal of tissue or organs for transplantation; any medical procedure not indicated by the health of the person and which is not consistent with generally accepted medical standards; willfully causing great suffering or serious injury to body or health or seriously endangering the physical or mental health; and taking hostages.
2. Other offenses against a detainee or POW: compelling a POW to serve in the armed forces of the enemy; causing the performance of unhealthy, dangerous, or otherwise prohibited labor; infringement of religious rights; and deprivation of the right to a fair and regular trial.
3. Other offenses against survivors of sunken ships, the wounded, or the sick: when military interests do permit, failure to search out, collect, make provision for the safety of, or to care for survivors of sunken ships, or to care for members of armed forces in the field who are disabled by sickness or wounds or who have laid down their arms and surrendered.
4. Other offenses against civilian inhabitants, including interned and detained civilians of, and refugees and stateless persons within, occupied or allied territories: unlawful deportation or transfer, unlawful confinement, compelling forced labor, compelling the civilian inhabitants to serve in the armed forces of the enemy or to participate in military operations, denial of religious rights, denaturalization, infringement of property rights, and denial of a fair and regular trial.
5. Attacks on individual civilians or the civilian population, or indiscriminate attacks affecting the civilian population or civilian property, knowing that the attacks will cause loss of life, injury to civilians or damage to civilian property that would be excessive in relation to the concrete and direct military advantage anticipated, and that cause death or serious injury to body or health.
6. Deliberate attacks upon medical transports including hospital ships, coastal rescue craft, and their lifeboats or small craft; medical vehicles; medical aircraft; medical establishments including hospitals; medical units; medical personnel or crews (including shipwrecked survivors); and persons parachuting from aircraft in distress during their descent.
7. Killing or otherwise imposing punishment, without a fair trial, upon spies and other persons suspected of hostile acts while such persons are in custody.
8. Maltreatment or mutilation of dead bodies.
9. Willful or wanton destruction of cities, towns, or villages, or devastation not justified by military necessity; aerial or naval bombardment whose sole purpose is to attack and terrorize the civilian population, or to destroy protected areas, buildings or objects (such as buildings used for religious,

charitable or medical purposes, historic monuments, or works of art); attacking localities which are undefended, open to occupation, and without military significance; attacking demilitarized zones contrary to the terms establishing such zones.

10. Improper use of privileged buildings or localities for military purposes.
11. Attacks on facilities—such as dams and dikes, which, if destroyed, would release forces dangerous to the civilian population—when not justified by military necessity.
12. Pillage or plunder of public or private property.
13. Willful misuse of the distinctive emblem (red on a white background) of the Red Cross, Red Crescent or other protective emblems, signs, or signals recognized under international law.
14. Feigning incapacitation by wounds/sickness that results in the killing or wounding of the enemy; feigning surrender or the intent to negotiate under a flag of truce that results in the killing, capture, or wounding of the enemy; and use of a flag of truce to gain time for retreats or reinforcement.
15. Firing upon a flag of truce.
16. Denial of quarter, unless bad faith is reasonably suspected.
17. Violations of surrender or armistice terms.
18. Using poisoned or otherwise forbidden arms or ammunition.
19. Poisoning wells, streams, or other water sources.
20. Other analogous acts violating the accepted rules regulating the conduct of warfare.

Source: SECNAVINST 3300.1C, The Department of the Navy Law of War Program. Enclosure 1.

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# CHAPTER 7

## The Law of Neutrality

### 7.1 INTRODUCTION

The law of neutrality prescribes the legal relationship between belligerent States and neutral States. Belligerent States are those engaged in an international armed conflict, whether or not a formal declaration of war has been made, while neutral States are those that are not taking part in the armed conflict. A third term, “nonbelligerent” State, is also sometimes used to describe a State not participating in an armed conflict.

The law of neutrality seeks to preserve friendly relations between belligerent and neutral States by permitting States to avoid taking sides in an armed conflict. The law of neutrality also seeks to prevent additional States from being drawn into an armed conflict by establishing a clear distinction between belligerent and neutral States. In particular, the law of neutrality seeks to minimize the effects of armed conflict on States that are not party to the conflict, including by lessening the effect of war on neutral commerce.

The duties of neutral states to refrain from certain types of support to belligerent States are only triggered in international armed conflicts of a certain duration and intensity. However, belligerent States have fundamental duties to respect the sovereignty of neutral States in all international armed conflicts. Furthermore, certain parts of the law of neutrality may apply outside international armed conflict, specifically the duty of nonintervention and neutrality in relation to a non-international armed conflict against a friendly State.

The modern law of neutrality can be difficult to discern. Some of the rules were formulated long ago and must therefore be approached with care. Treaties concerning the law of neutrality might apply only to a limited set of international armed conflicts; may or may not reflect customary law; and may have been superseded in relation to specific issues. In particular, while the Charter of the United Nations may, in some respects, be consistent with the law of neutrality, in other situations it may be understood to modify certain traditional neutrality rules. Notwithstanding all these uncertainties, the law of neutrality continues to serve an important role.

### 7.2 NEUTRAL STATUS

Customary international law contemplates that all States have the option to refrain from participation in an armed conflict by declaring or otherwise assuming neutral status. Although the traditional practice, on the outbreak of armed conflict, was for nonparticipating States to issue proclamations of neutrality, a special declaration by nonparticipating States of their intention to adopt a neutral status is not required.

The law of armed conflict reciprocally imposes duties and confers rights upon neutral States and upon belligerents. The principal right of the neutral State is the inviolability of its territory; its principal duties are those of abstention and impartiality. “Impartiality” obligates neutral States to fulfill their duties and to exercise their rights in an equal (i.e., impartial or nondiscriminatory) manner toward all belligerents, without regard to its differing effect on individual belligerents. “Abstention” is the neutral’s duty to abstain from furnishing belligerents with war-related goods or services, including money and loans. Neutral duties also include “prevention” and “acquiescence.” The neutral has a duty to prevent violations of neutrality within its jurisdiction (e.g., to prevent belligerent acts of hostility in neutral waters, or the use of neutral ports and waters as a base of operations). The neutral also has a duty to acquiesce in the exercise of lawful measures the belligerent may take against neutral merchantmen engaged in the carriage of contraband, breach or attempted breach of blockade, or in the performance of unneutral service. Conversely, it is the duty of a belligerent to respect the inviolability of a neutral and the neutral’s right to insist upon its duties of abstention and impartiality.

Neutral status, once established, remains in effect unless and until the neutral State abandons its neutral stance and enters into the conflict. Neutrals that violate their neutral obligations risk losing their neutral status. On the other hand, the fact that a neutral uses force to resist attempts to violate its neutrality does not constitute participation in hostilities.

### **7.2.1 Qualified Neutrality**

The United States has taken the position that certain duties of neutral States may be inapplicable under the doctrine of qualified neutrality. The law of neutrality has traditionally required neutral States to observe a strict impartiality between parties to a conflict, regardless of which State was viewed as the aggressor. However, after treaties outlawed war as a matter of national policy, it was argued that neutral States could discriminate in favor of States that were victims of wars of aggression. Thus, before its entry into World War II, the United States adopted a position of “qualified neutrality” in which neutral States had the right to support belligerent States that had been the victim of flagrant and illegal wars of aggression. This position was, and remains, controversial.

### **7.2.2 Neutrality Under the Charter of the United Nations**

The customary law of neutrality has, to some extent, been modified by the Charter of the United Nations. Article 2(4) of the Charter provides that “all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” In the event of a threat to or breach of the peace or act of aggression, the Security Council is empowered to take enforcement action on behalf of all member States under Articles 39, 41, and 42, including the use of force, in order to maintain or restore international peace and security. Traditional concepts of neutral rights and duties may be modified when the United Nations authorizes collective action against an aggressor. Article 2(5) of the Charter of the United Nations provides that “all Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.” Obligations pursuant to the UN Charter override other international obligations. Therefore, all member States must comply with the terms of decisions taken by the Security Council under Chapter VII of the Charter. Consequently, member States may be obliged to support a United Nations action at the expense of their pure neutrality. Nevertheless, Article 50 of the Charter does recognize that a State that finds itself confronted with special economic problems arising from carrying out preventive or enforcement measures authorized by the Security Council, has a right to consult the Council with regard to a solution of those problems. However, absent a binding decision of the Security Council, each State is free to determine whether to support the victim of an armed attack (invoking collective self-defense) or to remain neutral. Therefore, although members may discriminate against an aggressor in the absence of any action on the part of the Security Council, they do not have to do so. In these circumstances, neutrality remains a distinct possibility.

### **7.2.3 Neutrality Under Regional and Collective Self-Defense Arrangements**

The obligation in the Charter of the United Nations for member States to refrain from the threat or use of force against the territorial integrity or political independence of any State is qualified by the right of individual and collective self-defense, which member States may exercise until such time as the Security Council has taken measures necessary to restore international peace and security. This inherent right of self-defense may be implemented individually or collectively, on an ad hoc basis or through formalized regional and collective security arrangements. The possibility of asserting and maintaining neutral status under such arrangements depends upon the extent to which the parties are obligated to provide assistance in a regional action, or in the case of collective self-defense, to come to the aid of a victim of an armed attack. The practical effect of such treaties may be to transform the right of the parties to assist one of their number under attack into a duty to do so. This duty may assume a variety of forms ranging from economic assistance to commitment of armed forces.

## **7.3 NEUTRAL TERRITORY**

As a general rule of international law, all acts of hostility in neutral territory, including neutral lands, neutral waters, and neutral airspace, are prohibited. Neutral waters include a neutral State’s territorial sea; its archipelagic waters;



and its ports, roadsteads, and internal waters. Neither its contiguous zone; its EEZ; nor the high seas are considered neutral waters. A neutral State has the duty to prevent the use of its territory, including its neutral waters, as a place of sanctuary or a base of operations by belligerent forces of any side. Resort to force by a neutral State to prevent violation of its territory by a belligerent does not constitute an act of hostility. If the neutral State is unable or unwilling to enforce effectively its right of inviolability, an aggrieved belligerent may take such acts as are necessary in neutral territory to counter the activities of enemy forces, including warships and military aircraft, making unlawful use of that territory. Belligerents are also authorized to act in self-defense when attacked or threatened with attack while in neutral territory or when attacked or threatened from neutral territory.

### **7.3.1 Neutral Lands**

Belligerents are forbidden to move troops or war materials and supplies across neutral land territory. Neutral States may be required to mobilize sufficient armed forces to ensure fulfillment of their responsibility to prevent belligerent forces from crossing neutral borders. Neutral States have discretion whether to allow belligerent forces seeking refuge to enter their territory. However, belligerent troops that do enter neutral territory must be disarmed and interned until the end of the armed conflict.

A neutral may authorize passage through its territory of wounded and sick belonging to the armed forces of either side on condition that the vehicles transporting them carry neither personnel nor material of war. If passage of sick and wounded is permitted, the neutral State assumes responsibility for providing for their safety and control. POWs who have escaped to neutral territory are deemed to have successfully escaped from the Detaining Power. A neutral State may deny the admission of escaped POWs or receive them. A neutral State that receives escaped POWs shall leave them at liberty. If it allows them to remain in its territory, it may assign them a place of residence.

### **7.3.2 Neutral Ports and Roadsteads**

Although neutral States may, on a nondiscriminatory basis, close their ports and roadsteads to belligerent warships, they are not obliged to do so. In any event, Hague Convention XIII requires that a 24-hour (or other time period as prescribed by local regulations) notice to depart must be provided to belligerent warships located in neutral ports or roadsteads at the outbreak of armed conflict. Thereafter, belligerent warships may visit only those neutral ports and roadsteads that the neutral State may choose to open to them for that purpose. Belligerent vessels, including warships, retain a right of entry in distress whether caused by force majeure or damage resulting from enemy action. The right of entry in distress does not prejudice the measures a neutral may take after entry has been granted.

#### **7.3.2.1 Limitations on Stay and Departure**

In the absence of special provisions to the contrary in the legislation of a neutral State, a belligerent State's warships are generally prohibited from remaining in that neutral State's ports, roadsteads, or territorial waters for more than 24 hours. This restriction does not apply to belligerent warships devoted exclusively to philanthropic, religious, or nonmilitary scientific purposes. Warships engaged in the collection of scientific data of potential military application are not exempt. A belligerent warship may not prolong its stay in a neutral port beyond the permissible time except on account of damage or stress of weather. It must depart as soon as the cause of the delay is at an end. It is the duty of a neutral State to prevent a belligerent warship from remaining in its ports, roadsteads or territorial waters longer than it is so entitled. If, despite being given notice, a belligerent warship does not leave a port where it is not entitled to remain, the neutral State is entitled to detain the warship, its officers, and its crew.

A neutral State may adopt laws or regulations governing the presence of belligerent warships in its waters provided that these laws and regulations are nondiscriminatory and apply equally to all belligerents. Unless the neutral State has adopted laws or regulations to the contrary, no more than three warships of any one belligerent State may be present in the same neutral port or roadstead at any one time. When warships of opposing belligerent States are present in a neutral port or roadstead at the same time, not less than 24 hours must elapse between the departures of the respective enemy vessels. The order of departure is determined by the order of arrival unless an extension of the stay of the first to arrive is granted. A belligerent warship may not leave a neutral port or roadstead less than 24 hours after the departure of a merchant ship flying the flag of its enemy.

### **7.3.2.2 War Materials, Supplies, Communications, and Repairs**

Belligerent warships may not make use of neutral ports or roadsteads to replenish or increase their supplies of war materials or their armaments, or to erect or employ any apparatus for communicating with belligerent forces. Although they may take on food and fuel, the law is unsettled as to the quantities that may be allowed. In practice, it has been left to the neutral State to determine the conditions for the replenishment and refueling of belligerent warships, subject to the principle of nondiscrimination among belligerents and the prohibition against the use of neutral territory as a base of operations. Hague XIII, Article 19 limits resupply of food on warships to “the peace standard.” However, Article 19 establishes two different standards for refueling. Warships may take on sufficient fuel “to enable them to reach the nearest port in their own country,” or they may take on the fuel “to fill up their bunkers built to carry fuel, when in neutral countries which have adopted this method of determining the amount of fuel to be supplied.” Article 20 forbids warships to renew their supply of fuel in the ports of the same neutral State until a minimum period of 3 months has elapsed.

Belligerent warships may only carry out such repairs in neutral ports and roadsteads as are absolutely necessary to render them seaworthy. If the 1928 Pan American Maritime Neutrality Convention is applicable, then damage found to have been produced by the enemy’s fire must not be repaired. However, whether such repairs are prohibited by customary international law is less clear. Some States have allowed such repairs provided they are limited to rendering the ship sufficiently seaworthy to continue its voyage safely. The law is unsettled as to whether repair of battle damage, even for seaworthiness purposes, is permitted under this doctrine. Some States have interpreted a neutral’s duty to include forbidding, under any circumstances, the repair of damage incurred in battle. Hence, a belligerent warship damaged by enemy fire that will not or cannot put to sea once her lawful period of stay has expired, must be interned. However, other States have not interpreted a neutral’s duty to include forbidding the repair of damage produced by enemy fire, provided the repairs are limited to rendering the ship sufficiently seaworthy to safely continue her voyage. In any event, belligerent warships may not add to or repair weapons systems or enhance any other aspect of their war-fighting capability. It is the duty of the neutral State to decide what repairs are necessary to restore seaworthiness and to insist that they be accomplished with the least possible delay.

### **7.3.2.3 Prizes**

A prize (i.e., a captured neutral or enemy merchant ship) may only be brought into a neutral port or roadstead because of unseaworthiness, stress of weather, or want of fuel or provisions, and must leave as soon as such circumstances are overcome or cease to prevail. It is the duty of the neutral State to release a prize, together with its officers and crew, and to intern the offending belligerent’s prize master and prize crew, whenever a prize is unlawfully brought into a neutral port or roadstead or, having entered lawfully, fails to depart, when ordered, as soon as the circumstances that justified its entry no longer pertain.

### **7.3.3 Neutral Internal Waters**

Neutral internal waters encompass those waters of a neutral State that are landward of the baseline from which the territorial sea is measured, or, in the case of archipelagic States, within the closing lines drawn for the delimitation of such waters. The rules governing neutral ports and roadsteads apply as well to neutral internal waters.

### **7.3.4 Neutral Territorial Seas**

Neutral territorial seas, like neutral territory generally, must not be used by belligerent forces either as a sanctuary from their enemies or as a base of operations. Belligerents are obliged to refrain from all acts of hostility in neutral territorial seas except those necessitated by self-defense or undertaken as self-help enforcement actions against enemy forces that are in violation of the neutral status of those waters when the neutral State cannot or will not enforce its inviolability.

A neutral State may, on a nondiscriminatory basis, suspend passage of belligerent warships and prizes through its territorial seas, except in international straits and archipelagic sea lanes. When properly notified of its closure, belligerents are obliged to refrain from entering a neutral territorial sea except to transit through international

straits, archipelagic sea lanes or as necessitated by distress. A neutral State may, however, allow the passage of belligerent warships and prizes through its territorial seas. While in neutral territorial seas, a belligerent warship must also refrain from adding to or repairing its armaments or replenishing its war materials. Although the general practice has been to close neutral territorial seas to belligerent submarines, a neutral State may elect to allow passage of submarines. Neutral States customarily authorize passage through their territorial sea of ships carrying the wounded, sick, and shipwrecked, whether or not those waters are otherwise closed to belligerent vessels.

### **7.3.5 The 12 Nautical Mile Territorial Sea**

When the law of neutrality was codified in the Hague Conventions of 1907, the 3 nautical mile territorial sea was the accepted norm, aviation was in its infancy, and the submarine had not yet proven itself as a significant weapons platform. The rules of neutrality applicable to the territorial sea were designed primarily to regulate the conduct of surface warships in a narrow band of water off neutral coasts. UNCLOS provides that coastal States may lawfully extend the breadth of claimed territorial seas to 12 nautical miles. The United States claims a 12 nautical mile territorial sea and recognizes the right of all coastal States to do likewise. The law of neutrality remains applicable in the 12 nautical mile territorial sea and airspace. Belligerents continue to be obliged to refrain from acts of hostility in neutral waters and are forbidden to use the territorial sea of a neutral State as a place of sanctuary from their enemies or as a base of operations. Should belligerent forces violate the neutrality of those waters and the neutral State demonstrates an inability or unwillingness to detect and expel the offender, the other belligerent retains the right to undertake such self-help enforcement actions as are necessary to assure compliance by his adversary and the neutral State with the law of neutrality.

### **7.3.6 International Straits**

Customary international law as reflected in UNCLOS provides that belligerent and neutral surface ships, submarines, and aircraft have a right of transit passage through, over, and under all straits used for international navigation. Neutral States cannot suspend, hamper, or otherwise impede this right of transit passage through international straits. Belligerent forces transiting through international straits overlapped by neutral waters must proceed without delay, must refrain from the threat or use of force against the neutral State, and must otherwise refrain from acts of hostility and other activities not incident to their transit. Belligerent forces in transit may, however, take defensive measures consistent with their security, including the launching and recovery of aircraft and military devices, screen formation steaming, and acoustic and electronic surveillance, and may respond in self-defense to a hostile act or demonstrated hostile intent. Belligerent forces may not use neutral straits as a place of sanctuary or as a base of operations, and belligerent warships may not exercise the belligerent right of visit and search in those waters.

#### **Note**

The Turkish Straits are governed by special rules articulated in the Montreux Convention of 1936, which limit the number and types of warships that may use the straits, both in times of peace and during armed conflict. Free navigation is also guaranteed through the Strait of Magellan by Article 5 of the 1881 Boundary Treaty between Argentina and Chile (reaffirmed in Article 10 of the 1984 Treaty of Peace and Friendship between Argentina and Chile) and through the Baltic Straits by the 1857 Treaty of Redemption of the Sound Dues and 1857 Convention on Discontinuance of Sound Dues between the United States and Denmark. Special regimes also apply to the Suez Canal, the Panama Canal and the Kiel Canal, which do not constitute international straits, but which remain open to neutral transit during armed conflict.

### **7.3.7 Neutral Archipelagic Waters**

The United States recognizes the right of qualifying island States to establish archipelagic baselines enclosing archipelagic waters, provided the baselines are drawn in conformity with UNCLOS. Belligerent forces must refrain from acts of hostility in neutral archipelagic waters and from using them as a sanctuary or a base of operations. Belligerent ships or aircraft, including surface warships, submarines and military aircraft, retain the

right of unimpeded archipelagic sea lanes passage through, under, and over neutral archipelagic sea lanes. Belligerent forces exercising the right of archipelagic sea lanes passage may engage in those activities that are incident to their normal mode of continuous and expeditious passage and are consistent with their security, including formation steaming, acoustic and electronic surveillance, and the launching and recovery of aircraft and military devices. Visit and search is not authorized in neutral archipelagic waters.

A neutral State may close its archipelagic waters, other than archipelagic sea lanes (whether formally designated or not), to the passage of belligerent ships, but it is not obligated to do so. The neutral archipelagic State has an affirmative duty to police its archipelagic waters to ensure that the inviolability of its neutral waters is respected. If a neutral State is unable or unwilling effectively to detect and expel belligerent forces violating its neutrality in its archipelagic waters, the opposing belligerent may undertake such self-help enforcement actions as may be necessary to terminate the violation of neutrality. Such self-help enforcement may include surface, subsurface, and air penetration of archipelagic waters and airspace and the use of proportional force as necessary.

### **7.3.8 Exclusive Economic Zone**

The United States recognizes the concept of the EEZ as embodied in UNCLOS. However, a neutral State's EEZ is not neutral waters and coastal state rights and jurisdiction in the EEZ established in UNCLOS do not modify the law of naval warfare. Consequently, belligerents may conduct hostilities in a neutral state's EEZ.

### **7.3.9 Neutral Airspace and Duties**

Neutral territory extends to the airspace over a neutral State's lands, internal waters, archipelagic waters (if any), and territorial sea. Belligerent military aircraft are forbidden to enter neutral airspace with the following exceptions:

1. The airspace above neutral international straits and archipelagic sea lanes (whether designated or not) remains open at all times to belligerent aircraft, including armed military aircraft, engaged in transit or archipelagic sea lanes passage. Such passage must be continuous and expeditious and must be undertaken in the normal mode of flight of the aircraft involved. Belligerent aircraft must refrain from acts of hostility while in transit, but may engage in activities that are consistent with their security and the security of accompanying surface and subsurface forces.
2. Medical aircraft may, with prior notice, overfly neutral territory, may land therein in case of necessity, and may use neutral airfield facilities as ports of call, subject to such restrictions and regulations as the neutral State may see fit to apply equally to all belligerents.
3. Belligerent aircraft in evident distress may be permitted to enter neutral airspace and to land in neutral territory under such safeguards as the neutral State may wish to impose. The neutral State must require such aircraft to land and must intern both aircraft and crew.

Neutral States have an affirmative duty to prevent violation of neutral airspace by belligerent military aircraft, to compel offending aircraft to land, and to intern both offending aircraft and crew. Should a neutral State be unable or unwilling to prevent the unlawful entry or use of its airspace by belligerent military aircraft, belligerent forces of the other side may undertake such self-help enforcement measures, including the entry of its military aircraft into the neutral airspace, as the circumstances may require.

## **7.4 NEUTRAL COMMERCE**

A principal purpose of the law of neutrality is the regulation of belligerent activities with respect to neutral commerce. For purposes of this publication, neutral commerce comprises all commerce between one neutral State and another not involving materials of war or armaments ultimately destined for a belligerent State, and all commerce between a neutral State and a belligerent that does not involve the carriage of contraband or otherwise contribute to the belligerent's war-fighting/war-sustaining capability. Although war-sustaining commerce is not subject to precise definition, commerce that indirectly but effectively supports and sustains the belligerents war-fighting capability properly falls within the scope of the term. Examples of war-sustaining commerce include imports of raw materials used for the production of armaments and exports of products the proceeds of which are

used by the belligerent to purchase arms and armaments. Neutral merchant vessels and civil aircraft engaged in legitimate neutral commerce are subject to visit and search, but may not be captured or destroyed by belligerent forces. The law of neutrality does not prohibit neutral States from engaging in commerce with belligerent States; however, a neutral government cannot itself supply materials of war or armaments to a belligerent without violating its neutral duties of abstention and impartiality and risking loss of its neutral status. Although a neutral government may forbid its citizens from carrying on nonneutral commerce with belligerent States, it is not obligated to do so. If it does so, however, it must treat all belligerents impartially. In effect, the law establishes a balance-of-interests test to protect neutral commerce from unreasonable interference on the one hand and the right of belligerents to interdict the flow of war materials to the enemy on the other.

### **7.4.1 Contraband**

Contraband consists of goods destined for an enemy of a belligerent and that may be susceptible to use in armed conflict. Traditionally, contraband has been divided into two categories: absolute and conditional. Absolute contraband consists of goods the character of which makes it obvious that they were destined for use in armed conflict, such as munitions, weapons, uniforms, and the like. Conditional contraband consists of goods equally susceptible to either peaceful or warlike purposes, such as foodstuffs, construction materials, and fuel. Belligerents may declare contraband lists at the initiation of hostilities to notify neutral States of the type of goods considered to be absolute or conditional contraband, as well as those not considered to be contraband at all (i.e., exempt or “free goods”). The precise nature of a belligerent’s contraband list may vary according to the circumstances of the conflict.

The practice of belligerents during the Second World War collapsed the traditional distinction between absolute and conditional contraband. Because of the involvement of virtually the entire population in support of the war effort, the belligerents of both sides tended to exercise governmental control over all imports. Consequently, it became increasingly difficult to draw a meaningful distinction between goods destined for an enemy government and its armed forces and goods destined for consumption by the civilian populace. As a result, belligerents treated all imports directly or indirectly sustaining the war effort as contraband without making a distinction between absolute and conditional contraband. Though there has been no conflict of similar scale and magnitude since the Second World War, post–World War II practice indicates that, to the extent international law may continue to require publication of contraband lists, the requirement may be satisfied by a listing of exempt goods.

#### **7.4.1.1 Exemptions to Contraband—Free Goods**

Certain goods are exempt from capture as contraband even though destined for enemy territory. Among these items are free goods such as:

1. Articles intended exclusively for the treatment of wounded and sick members of the armed forces and for prevention of disease. The particulars concerning the carriage of such articles must be transmitted to the belligerent State and approved by it.
2. Medical and hospital stores, religious objects, clothing, bedding, essential foodstuffs, and means of shelter for the civilian population in general, and women and children in particular, provided there is not serious reason to believe that such goods will be diverted to other purpose, or that a definite military advantage would accrue to the enemy by their substitution for enemy goods that would thereby become available for military purposes.
3. Items destined for POWs, including individual parcels and collective relief shipments containing food, clothing, medical supplies, religious objects, and educational, cultural, and athletic articles.
4. Goods otherwise specifically exempted from capture by international convention or by special arrangement between belligerents.

It is customary for neutral States to provide belligerents of both sides with information regarding the nature, timing, and route of shipments of goods constituting exceptions to contraband and to obtain approval for their safe conduct and entry into belligerent owned or occupied territory.

### **7.4.1.2 Enemy Destination**

Contraband goods are liable to capture at any place beyond neutral territory, if their destination is the territory belonging to or occupied by the enemy. Under the doctrine of “continuous voyage” it is immaterial whether the carriage of contraband is direct, involves transshipment, or requires overland transport. A destination of enemy owned or occupied territory may be presumed when:

1. The neutral vessel is to call at an enemy port before arriving at a neutral port for which the goods are documented
2. The goods are documented to a neutral port serving as a port of transit to an enemy, even though they are consigned to a neutral
3. The goods are consigned “to order” or to an unnamed consignee, but are destined for a neutral State in the vicinity of enemy territory.

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

### **7.4.2 Certificate of Noncontraband Carriage**

A certificate of noncontraband carriage is a document issued by a belligerent consular or other designated official to a neutral vessel (navicert) or neutral aircraft (aircert) certifying that the cargo being carried has been examined, usually at the initial place of departure, and has been found to be free of contraband. The purpose of such a navicert or aircert is to facilitate belligerent control of contraband goods with minimal interference and delay of neutral commerce. The certificate is not a guarantee that the vessel or aircraft will not be subject to visit and search or that cargo will not be seized. (Changed circumstances, such as a change in status of the neutral vessel, between the time of issuance of the certificate and the time of interception at sea may cause it to be invalidated.) Conversely, absence of a navicert or aircert is not, in itself, a valid ground for seizure of cargo. Navicerts and aircerts issued by one belligerent have no effect on the visit and search rights of a belligerent of the opposing side. The acceptance of a navicert or aircert by a neutral ship or aircraft does not constitute “unneutral service.”

## **7.5 ACQUIRING ENEMY CHARACTER**

All vessels operating under an enemy flag, and all aircraft bearing enemy markings, possess enemy character. However, the fact that a merchant ship flies a neutral flag, or that an aircraft bears neutral markings, does not necessarily establish neutral character. A neutral State may grant a merchant vessel or aircraft the right to operate under its flag, even though the vessel or aircraft remains substantially owned or controlled by enemy interests. However, any merchant vessel or civilian aircraft owned or controlled by a belligerent possesses enemy character, regardless of whether it is operating under a neutral flag or bears neutral markings. Vessels and aircraft acquiring enemy character may be treated by an opposing belligerent as if they are in fact enemy vessels and civil aircraft. (Paragraphs 8.6.1, Enemy Warships and Military Aircraft, and 8.6.2, Enemy Merchant Vessels and Aircraft set forth the actions that may be taken against enemy vessels and aircraft.)

### **7.5.1 Acquiring the Character of an Enemy Warship or Military Aircraft**

Neutral merchant vessels and civil aircraft acquire enemy character and may be treated by a belligerent as enemy warships and military aircraft when engaged in either of the following acts:

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

(Paragraph 8.6.1 describes the actions that may be taken against enemy warships and military aircraft.)

## 7.5.2 Acquiring the Character of an Enemy Merchant Vessel or Civil Aircraft

Neutral merchant vessels and civil aircraft acquire enemy character and may be treated by a belligerent as enemy merchant vessels or civil aircraft when engaged in either of the following acts:

1. Operating directly under enemy control, orders, charter, employment, or direction
2. Resisting an attempt to establish identity, including resisting visit and search.

(Paragraph 8.6.2 describes the actions that may be taken against enemy merchant vessels and civil aircraft.)

## 7.6 VISIT AND SEARCH

Visit and search is the means by which a belligerent warship or belligerent military aircraft may determine the true character (enemy or neutral) of merchant ships encountered outside neutral territory, the nature (contraband or exempt “free goods”) of their cargo, the manner (innocent or hostile) of their employment, and other facts bearing on their relation to the armed conflict.

Warships are not subject to visit and search. Neutral vessels engaged in government noncommercial service may not be subjected to visit and search. Neutral merchant vessels under convoy of neutral warships of the same nationality are also exempt from visit and search, although the convoy commander may be required to provide in writing to the commanding officer of an intercepting belligerent warship information as to the character of the vessels and of their cargoes, which could otherwise be obtained by visit and search. Should it be determined by the convoy commander that a vessel under his charge possesses enemy character or carries contraband cargo, he is obliged to withdraw his protection of the offending vessel, making it liable to visit and search, and possible capture, by the belligerent warship. The prohibition against visit and search in neutral territory extends to international straits overlapped by neutral territorial seas and to archipelagic waters, including archipelagic sea lanes (whether designated or not).

### 7.6.1 Procedure for Visit and Search of Merchant Vessels

In the absence of specific ROE or other special instructions, such as the issuance of certificates of noncontraband carriage, issued by the operational chain of command during a period of armed conflict, the following procedure should be carried out by U.S. warships exercising the belligerent right of visit and search of merchant vessels:

1. Visit and search should be exercised with all possible tact and consideration.
2. Before summoning a vessel to lie to, the warship should hoist its national flag. The summons is made by firing a blank charge, by international flag signal (SN or SQ), or by other recognized means. The summoned vessel, if a neutral merchant ship, is bound to stop, lie to, display her colors, and not resist. (If the summoned vessel is an enemy ship, it is not so bound and may legally resist, even by force, but thereby assumes all risk of resulting damage or destruction.)
3. Merchant vessels or civil aircraft that comply with instructions given to them may not be made the object of attack; merchant ships or civil aircraft that refuse to comply may be stopped by force. Merchant ships or civil aircraft that resist visit and search assume the risk of resulting damage. Such vessels or aircraft also may be deemed to acquire the character of enemy merchant ships or civil aircraft.
4. When a summoned vessel has been brought to, the warship should send a boat with an officer to conduct the visit and search. If practicable, a second officer should accompany the officer charged with the examination. The officer(s) and boat crew may be armed at the discretion of the commanding officer.
5. If visit and search at sea is deemed hazardous or impracticable, the neutral vessel may be escorted by the summoning, or another, U.S. warship or by a U.S. military aircraft to the nearest place (outside neutral territory) where the visit and search may be conveniently and safely conducted. The neutral vessel is not obliged to lower her flag (she has not been captured) but must proceed according to the orders of the escorting warship or aircraft.

6. The boarding officer should first examine the ship's papers to ascertain her character, ports of departure and destination, nature of cargo, manner of employment, and other facts deemed pertinent. Papers to be examined will ordinarily include a certificate of national registry, crew list, passenger list, logbook, bill of health clearances, charter party (if chartered), invoices or manifests of cargo, bills of lading, and on occasion, a consular declaration or other certificate of noncontraband carriage certifying the innocence of the cargo.
7. Regularity of papers and evidence of innocence of cargo, employment, or destination furnished by them are not necessarily conclusive, and, should doubt exist, the ship's company may be questioned and the ship and cargo searched.
8. Unless military security prohibits, the boarding officer will record the facts concerning the visit and search in the logbook of the visited ship, including the date and position of the interception. The entry should be authenticated by the signature and rank of the boarding officer, but neither the name of the visiting warship nor the identity of her commanding officer should be disclosed.

### **7.6.2 Visit and Search of Merchant Vessels by Military Aircraft**

Although there is a right of visit and search by military aircraft, there is no established international practice as to how that right is to be exercised. Ordinarily, visit and search of a vessel by an aircraft is accomplished by directing and escorting the vessel to the vicinity of a belligerent warship, which will carry out the visit and search, or to a belligerent port.

### **7.6.3 Visit and Search of Civilian Aircraft by Military Aircraft**

The right of a belligerent military aircraft to conduct visit and search of a civilian aircraft to ascertain its true identity (enemy or neutral), the nature of its cargo (contraband or "free goods"), and the manner of its employment (innocent or hostile) is now well established in the law of armed conflict. Upon interception outside of neutral airspace, the intercepted civilian aircraft may be directed to proceed for visit and search to a belligerent airfield that is both reasonably accessible and suitable for the type of aircraft involved. Should such an airfield not be available, the intercepted civilian aircraft may be diverted from its declared destination. Neutral civilian aircraft accompanied by neutral military aircraft of the same flag are exempt from visit and search if the neutral military aircraft warrants that the neutral civilian aircraft is not carrying contraband cargo and provides to the intercepting belligerent military aircraft upon request such information as to the character and cargo of the neutral civilian aircraft as would otherwise be obtained in visit and search.

## **7.7 BLOCKADE**

### **7.7.1 General**

Blockade is a belligerent operation to prevent vessels and/or aircraft of all States, enemy as well as neutral, from entering or exiting specified ports, airfields, or coastal areas belonging to, occupied by, or under the control of an enemy State. While the belligerent right of visit and search is designed to interdict the flow of contraband goods, the belligerent right of blockade is intended to prevent vessels and aircraft, regardless of their cargo, from crossing an established and publicized cordon separating the enemy from international waters and/or airspace.

### **7.7.2 Criteria for Blockades**

To be valid, a blockade must conform to the criteria in the following paragraphs.

#### **7.7.2.1 Establishment**

A blockade must be established by the government of the belligerent State. This is usually accomplished by a declaration of the belligerent government or by the commander of the blockading force acting on behalf of the belligerent government. The declaration should include, as a minimum, the date the blockade is to begin, its



geographic limits, and the grace period granted neutral vessels and aircraft to leave the area to be blockaded. Only the President or the Secretary of Defense can direct establishment of a blockade by U.S. forces. 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 grace period. A belligerent declaring a blockade is free to fix as long a grace period as it considers reasonable under the circumstances.

#### **7.7.2.2 Notification**

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

#### **7.7.2.3 Effectiveness**

To be valid, a blockade must be effective—that is, it must be maintained by a surface, air, or subsurface force or other legitimate methods and means of warfare that is sufficient to render ingress or egress of the blockaded area dangerous. The requirement of effectiveness does not preclude temporary absence of the blockading force, if such absence is due to stress of weather or to some other reason connected with the blockade (e.g., pursuit of a blockade runner). Effectiveness does not require that every possible avenue of approach to the blockaded area be covered. The forces that are necessary to make a blockade effective depend on the specific military circumstances. The blockade may be maintained by forces that are some distance from the shore.

#### **7.7.2.4 Impartiality**

A blockade must be applied impartially to the vessels and aircraft of all States. Discrimination by the blockading belligerent in favor of or against the vessels and aircraft of particular States, including those of its own or those of an allied State, renders the blockade legally invalid.

#### **7.7.2.5 Limitations**

A blockade must not bar access to or departure from neutral ports and coasts. Neutral States retain the right to engage in neutral commerce that does not involve trade or communications originating in or destined for the blockaded area. This means that the blockade must not prevent trade and communication to or from neutral ports or coasts, provided that such trade and communications is neither destined to nor originates from the blockaded area. A blockade is prohibited if the sole purpose is to starve the civilian population or to deny it other objects essential for its survival, and the expected incidental harm to the civilian population may not be excessive in relation to the expected military advantage to be gained from employing the blockade.

#### **7.7.3 Special Entry and Exit Authorization**

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

#### **7.7.4 Breach and Attempted Breach of Blockade**

Breach of blockade is the passage of a vessel or aircraft through a blockade without special entry or exit authorization from the blockading belligerent. Attempted breach of blockade occurs from the time a vessel or

aircraft leaves a port or airfield with the intention of evading the blockade and, for vessels exiting the blockaded area, continues until the voyage is completed. Knowledge of the existence of the blockade is essential to the offenses of breach of blockade and attempted breach of blockade. Knowledge may be presumed once a blockade has been declared and appropriate notification provided to affected governments. It is immaterial that the vessel or aircraft is at the time of interception bound for neutral territory, if its ultimate destination is the blockaded area. There is a presumption of attempted breach of blockade where vessels or aircraft are bound for a neutral port or airfield serving as a point of transit to the blockaded area. A temporary anchorage in waters occupied by the blockading vessels does not justify capture, in the absence of other grounds.

### **7.7.5 Contemporary Practice**

The criteria for valid blockades, as set out above in paragraph 7.7.2, are for the most part customary in nature, having derived their definitive form through the practice of maritime powers during the 19th century. The rules reflect a balance between the right of a belligerent possessing effective command of the sea to close enemy ports and coastlines to international commerce, and the right of neutral States to carry out neutral commerce with the least possible interference from belligerent forces. The law of blockade is, therefore, premised on a system of controls designed to impose only limited interference with neutral trade. This was traditionally accomplished by a relatively “close-in” cordon of surface warships stationed in the immediate vicinity of the blockaded area.

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

Notwithstanding this trend in belligerent practices away from the establishment of blockades that conform to the traditional rules, blockade continues to be a useful means to regulate the competing interests of belligerents and neutrals in more limited armed conflict. The experience of the United States during the Vietnam conflict provides a case in point. The closing of Haiphong and other North Vietnamese ports, accomplished by the emplacement of mines, was undertaken in conformity with traditional criteria of establishment, notification, effectiveness, limitation, and impartiality, although at the time the mining took place the term “blockade” was not used.

## **7.8 BELLIGERENT CONTROL OF THE IMMEDIATE AREA OF NAVAL OPERATIONS AND NEUTRAL COMMUNICATION AT SEA**

Within the immediate area of naval operations, for example in the vicinity of naval units, to ensure proper battlespace management and self-defense objectives, a belligerent may establish special restrictions upon the activities of neutral vessels and aircraft and may prohibit altogether such vessels and aircraft from entering the area. The immediate area of naval operations is that area within which hostilities are taking place or belligerent forces are actually operating. Belligerent control over neutral vessels and aircraft within an immediate area of naval operations is based on a belligerent’s right to attack and destroy its enemy, its right to defend itself without suffering from neutral interference, and its right to ensure the security of its forces. A belligerent may not, however, purport to deny access to neutral States, or to close an international strait to neutral shipping, pursuant to this authority unless another route of similar convenience remains open to neutral traffic. The commanding officer of a belligerent warship may exercise control over the communication of any neutral merchant vessel or civil aircraft whose presence in the immediate area of naval operations might otherwise endanger or jeopardize those operations. A neutral merchant ship or civil aircraft within that area that fails to conform to a belligerent’s directions concerning communications may thereby assume enemy character and risk being fired upon or captured. Legitimate distress communications should be permitted to the extent that the success of the operation is

not prejudiced thereby. Any transmission to an opposing belligerent of information concerning military operations or military forces is inconsistent with the neutral duties of abstention and impartiality and renders the neutral vessel or aircraft liable to capture or destruction.

## 7.9 EXCLUSION ZONES AND WAR ZONES

Belligerent control of an immediate area of naval operations is to be clearly distinguished from the belligerent practice during World Wars I and II, the Falkland/Malvinas Conflict, and the Iran-Iraq War of establishing broad ocean areas as “exclusion zones” or “war zones” in which neutral shipping was either barred or put at special risk. The most extensive use of such zones occurred during World Wars I and II. These zones were initially established by belligerents based on the right of belligerent reprisals against alleged illegal behavior of the enemy and were used to justify the exercise of control over, or capture and destruction of, neutral vessels not otherwise permitted by the rules of naval warfare.

Exclusion or war zones established by belligerents in the type of limited warfare that has characterized post-World War II belligerency at sea, have been justified, at least in part, as reasonable, albeit coercive, measures to contain the geographic area of the conflict or to keep neutral shipping at a safe distance from areas of actual or potential hostilities. To the extent that such zones serve to warn neutral vessels and aircraft away from belligerent activities and thereby reduce their exposure to collateral damage and incidental injury, and to the extent that they do not unreasonably interfere with legitimate neutral commerce, they are undoubtedly lawful; however, the establishment of such a zone does not relieve the proclaiming belligerent of the obligation under the law of armed conflict to refrain from attacking vessels and aircraft that do not constitute lawful targets. In short, an otherwise protected platform does not lose that protection by crossing an imaginary line drawn in the ocean by a belligerent.

Because exclusion and war zones are not simply free fire zones for the warships of the belligerents, the establishment of such a zone carries with it certain obligations for belligerents with respect to neutral vessels entering the zone. Belligerents creating such zones must provide safe passage through the zone for neutral vessels and aircraft where the geographical extent of the zone significantly impedes free and safe access to the ports and coasts of a neutral state and, unless military requirements do not permit, in other cases where normal navigation routes are affected. For this reason, the Total Exclusion Zone announced by the United Kingdom and the Argentine declaration of the South Atlantic as a war zone during the Falklands/Malvinas conflict both were problematic in that they deemed any neutral vessel within the zone without permission as hostile and thus liable to attack. Likewise, the zones declared by both Iran and Iraq during the 1980s Gulf War appeared to unlawfully operate as “free fire zones” for all vessels entering therein.

## 7.10 CAPTURE OF NEUTRAL VESSELS AND AIRCRAFT

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

1. Avoiding an attempt to establish identity
2. Resisting visit and search
3. Carrying contraband
4. Breaching or attempting to breach blockade
5. Presenting irregular or fraudulent papers; lacking necessary papers; or destroying, defacing, or concealing papers
6. Violating regulations established by a belligerent within the immediate area of naval operations
7. Carrying personnel in the military or public service of the enemy
8. Communicating information in the interest of the enemy.

Normally, a neutral merchant vessel is not considered liable to capture for the acts enumerated in examples 7 and 8 if, when encountered at sea, it is unaware of the opening of hostilities, or if the master, after becoming aware of the opening of hostilities, has not been able to disembark those passengers who are in the military or public service of a belligerent. A vessel is deemed to know of the state of armed conflict if it left an enemy port after the opening of hostilities, or if it left a neutral port after a notification of the opening of hostilities had been made in sufficient time to the State to which the port belonged. However, actual knowledge is often difficult or impossible to establish. Because of the existence of modern means of communication, a presumption of knowledge may be applied in all doubtful cases. The final determination of this question properly can be left to the prize court.

Captured merchant vessels and civil aircraft are sent to a port or airfield under belligerent jurisdiction as a prize for adjudication by a prize court. Ordinarily, a belligerent warship will place a prize master and prize crew on board a captured vessel for this purpose. Should that be impracticable, the prize may be escorted into port by a belligerent warship or military aircraft. In the latter circumstances, the prize must obey the instructions of its escort or risk forcible measures. OPNAVINST 3120.32D, Standard Organization and Regulations of the U.S. Navy, Article 630.23 (Visit and Search, Boarding and Salvage, and Prize Crew Bill) set forth the duties and responsibilities of commanding officers and prize masters concerning captured vessels.

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

### **7.10.1 Destruction of Neutral Prizes**

Every reasonable effort should be made to avoid destruction of captured neutral vessels and aircraft. A capturing officer, therefore, should not order such destruction without being entirely satisfied that the prize can neither be sent into a belligerent port or airfield nor, in his opinion, properly be released. Should it become necessary that the prize be destroyed, the capturing officer must provide for the safety of the passengers and crew. In that event, all documents and papers relating to the prize should be saved. If practicable, the personal effects of passengers should also be safeguarded.

### **7.10.2 Personnel of Captured Neutral Vessels and Aircraft**

The officers and crews of captured neutral merchant vessels and civil aircraft who are nationals of a neutral State do not become POWs and must be repatriated as soon as circumstances reasonably permit. This rule applies equally to the officers and crews of neutral vessels and aircraft that assumed the character of enemy merchant vessels or aircraft by operating under enemy control or resisting visit and search. If, however, the neutral vessels or aircraft had taken a direct part in the hostilities on the side of the enemy or had served in any way as a naval or military auxiliary for the enemy, they thereby assumed the character of enemy warships or military aircraft and, upon capture, their officers and crew may be held as POWs.

Enemy nationals found on board neutral merchant vessels and civil aircraft as passengers who are actually embodied in the military forces of the enemy, who are en route to serve in the enemy's armed forces, who are employed in the public service of the enemy, or engaged in, or suspected of service in, the interests of the enemy may be interned until a determination of their status has been made. All such enemy nationals may be removed from the neutral vessel or aircraft whether or not there is reason for its capture as a neutral prize. Enemy nationals not falling within any of these categories are not subject to capture or detention.

## **7.11 BELLIGERENT PERSONNEL INTERNED BY A NEUTRAL GOVERNMENT**

International law recognizes that neutral territory, being outside the region of war, offers a place of asylum to individual members of belligerent forces and as a general rule requires the neutral government concerned to prevent the return of such persons to their own forces. The neutral State must accord equal treatment to the personnel of all the belligerent forces.

Belligerent combatants taken on board a neutral warship or military aircraft beyond neutral waters must be interned by the neutral State. Civilians that are nationals of a belligerent State that are taken on board a neutral warship or military aircraft in such circumstances are to be repatriated.

Aircrew of nonmedical belligerent military aircraft that land in neutral territory, whether intentionally or unintentionally, must be interned by the neutral State.

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# CHAPTER 8

## The Law of Targeting

### 8.1 PRINCIPLES OF LAWFUL TARGETING

The legal principles underlying the law of armed conflict—military necessity, distinction, proportionality, unnecessary suffering, and honor (discussed in chapter 5)—are the basis for the rules governing targeting decisions. The law requires that only military objectives be attacked, but permits the use of sufficient force to destroy those objectives. At the same time, excessive collateral damage must be avoided to the extent possible and, consistent with mission accomplishment and the security of the force, unnecessary harm to civilians and civilian objects must be minimized. The law of targeting, therefore, requires that all feasible precautions must be taken to ensure that only military objectives are targeted so that noncombatants, civilians, and civilian objects are spared as much as possible from the ravages of war. Information operations, which includes targeting with nonlethal force such as military information support operations and cyberspace operations, are addressed in paragraph 8.11.

### 8.2 MILITARY OBJECTIVES

“Military objectives” refers to persons and objects that may be made the object of attack and are thus lawful targets. Military objectives are combatants (see chapter 5), military equipment and facilities (except medical and religious equipment and facilities), and those objects which, by their nature, location, purpose, or use, effectively contribute to the enemy’s war-fighting, war-supporting, or war-sustaining capability and whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack. Military objectives are discussed in detail in chapter 5, paragraph 5.3.1. Military advantage may involve a variety of considerations, including the security of the attacking force.

#### 8.2.1 Combatants

Combatants are subject to attack at any time during hostilities unless they are hors de combat (i.e., “out of the fight” due to detention by friendly forces; defenseless because of unconsciousness, shipwreck, wounds, or sickness; or clearly expressing an intention to surrender; provided in all cases that the person abstains from any hostile act and does not attempt to escape). (See also paragraph 5.4.1.)

#### 8.2.2 Unprivileged Belligerents

Unprivileged belligerents are civilians, other than those taking part in a levee en masse, who are members of organized armed groups or who are directly participating in hostilities (see also 5.4.1.1). Unprivileged belligerents who are members of organized armed groups are subject to attack at any time during the armed conflict unless they are hors de combat. Unprivileged belligerents who are not members of organized armed groups but who are taking a direct part in hostilities may be attacked while they are taking a direct part in hostilities.

The law of armed conflict does not expressly prohibit civilians from directly participating in hostilities, but if they do they may be targeted for so long as they take a direct part. There is no definition of “direct part in hostilities” in international law. At a minimum, it encompasses actions that are hostile per se, that is, by their very nature and purpose can be expected to cause actual harm to the enemy. Some examples include taking up arms or otherwise trying to kill, injure, or capture enemy personnel or destroy enemy property. It would also include certain actions that constitute an integral part of combat operations or that effectively and substantially contribute to an adversary’s ability to conduct, support, or sustain combat operations. Some examples include serving as a

lookout, guarding a military objective, or gathering intelligence for enemy military forces. It does not include actions which provide general support to a State's war effort, such as transmitting propaganda.

In general, the qualification of an act as direct participation in hostilities is a fact-dependent analysis that must be made after analyzing all relevant available facts in the circumstances prevailing at the time. Combatants in the field must make an honest determination as to whether a particular person is or is not taking a direct part in hostilities based on the person's behavior, location, attire, and other information available at the time. The temporal, functional, and geographical proximities of the activity to combat are factors to be considered, but not necessarily dispositive.

It is important to note that civilians do not enjoy the combatant's privilege—that is, they do not have combatant immunity protecting them from criminal prosecution for the violence they commit during armed conflict. If captured, they may be prosecuted for their belligerent acts under the domestic law of the captor. Civilians engaging in belligerent acts may make it more difficult for military personnel to apply the principle of distinction and therefore put all civilians at greater risk.

### **8.2.3 Hors De Combat**

Combatants, whether lawful or unlawful, who are hors de combat are those who cannot, do not, or cease to participate in hostilities due to wounds, sickness, shipwreck, surrender, or capture. They may be detained but they may not be intentionally or indiscriminately attacked. Intentional attack on a combatant who is known to be hors de combat constitutes a grave breach of the law of armed conflict.

#### **8.2.3.1 Shipwrecked Persons**

Shipwrecked persons do not include combatant personnel engaged in seaborne attacks who are proceeding ashore, unless they are clearly in distress and require assistance. They qualify as shipwrecked persons only if they have ceased all active combat activity.

#### **8.2.3.2 Surrender**

Combatants, whether lawful or unlawful, cease to be subject to attack when they cease fighting and clearly indicate their wish to surrender. The law of armed conflict does not precisely define when surrender takes effect or how it may be accomplished in practical terms. Surrender involves an offer by the surrendering party (a unit or individual combatant) and an ability to accept on the part of the opponent. The latter may not refuse an offer of surrender when communicated, but that communication must be made at a time when it can be received and properly acted upon—an attempt to surrender in the midst of an ongoing battle is neither easily communicated nor received. The issue is one of reasonableness. The mere fact that a combatant or enemy force is retreating or fleeing the battlefield, without some other positive indication of intent to surrender, does not constitute an attempt to surrender, even if such combatant or force has abandoned his or its arms or equipment.

#### **8.2.3.3 Airborne Forces versus Parachutists in Distress**

Parachutists descending from disabled aircraft may not be attacked while in the air unless they engage in combatant acts while descending. Upon reaching the ground, such parachutists must be provided an opportunity to surrender. Airborne troops, special warfare infiltrators, and intelligence agents parachuting into combat areas or behind enemy lines are not so protected and may be attacked in the air, as well as on the ground. Such personnel may not be attacked, however, if they clearly indicate in a timely manner their intention to surrender.

### **8.2.4 Noncombatants**

Noncombatants may not be deliberately or indiscriminately attacked, unless they forgo their protection by taking a direct part in hostilities. (See also 5.4.2.)



#### **8.2.4.1 Medical Personnel**

Medical personnel of the armed forces, including medical and dental officers, technicians and corpsmen, nurses, and medical service personnel, have special protected status when engaged exclusively in medical duties. In exchange for this protection, medical personnel must not commit acts harmful to the enemy. If they do, they lose their protection as noncombatants and may be attacked. Medical personnel should display the distinctive emblem of the Red Cross, Red Crescent, or Red Crystal when engaged in medical activities. Failure to wear the distinctive emblem does not, by itself, result in loss of protection. (Note, e.g., Navy corpsmen serving with Marine Corps units do not wear the distinctive emblem.) Medical personnel may possess small arms for self-protection or for the protection of the wounded and sick in their care against marauders and others violating the law of armed conflict. Medical personnel may not use such arms against enemy forces acting in conformity with the law of armed conflict. They may be detained (see chapter 11 for treatment of detainees).

#### **8.2.4.2 Religious Personnel**

Chaplains attached to the armed forces are noncombatants and may not be individually targeted. Chaplains should display the distinctive emblem of the Red Cross, Red Crescent, or Red Crystal, when engaged in their respective religious activities. Failure to wear the distinctive emblem does not, by itself, justify attacking a chaplain, recognized as such. They may be detained (see chapter 11 for treatment of detainees). Chaplains' assistants, such as enlisted religious programs specialists in the Navy, are combatants.

#### **8.2.5 Objects**

Military objectives include those objects which, by their nature, location, purpose, or use, effectively contribute to the enemy's war-fighting, war-supporting, or war-sustaining capability and whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack.

Objects which by their nature effectively contribute to the enemy's war-fighting, war-supporting, or war-sustaining capability, such as warships, military aircraft, naval auxiliaries, military bases and headquarters, warship construction and repair facilities, military depots and warehouses, military airfields, military vehicles, armor, artillery, munitions factories, and ammunition stores, may be attacked at any time.

Objects which by their location, purpose, or use may effectively contribute to the enemy's war-fighting, war-supporting, or war-sustaining capability, such as petroleum/oils/lubricants storage areas, docks, port facilities, harbors, bridges, mountain passes, rail yards, rolling stock, barges, lighters, industrial installations, and power generation plants, may only be attacked when external circumstances regarding their location, purpose, or use convert them to a military objective warranting attack.

### **8.3 CIVILIANS AND CIVILIAN OBJECTS**

Civilians and civilian objects may not be made the object of deliberate or indiscriminate attack. Civilian protection from deliberate attack is contingent on their nonparticipation in hostilities. The intentional destruction of food, crops, livestock, drinking water, and other objects indispensable to the survival of the civilian population, for the specific purpose of denying the civilian population of their use, is prohibited. Civilian objects consist of all objects that are not military objectives. An object that meets the definition of a military objective may be attacked even if the object, such as an electric power plant, also serves civilian functions, subject to the requirement to avoid excessive incidental injury and collateral damage, and the requirement to take precautions in attack. (See discussion in paragraph 8.3.1).

#### **8.3.1 Collateral Damage and Precautions in Attack**

It is not unlawful to cause incidental injury to civilians, or collateral damage to civilian objects, during an attack upon a legitimate military objective. The principle of proportionality requires that the anticipated incidental injury or collateral damage must not be excessive in light of the military advantage expected to be gained. Naval commanders must also take all reasonable precautions, taking into account military and humanitarian considerations, to keep civilian casualties and damage to the minimum consistent with mission accomplishment and the security of the

force. In each instance, the commander must determine whether the anticipated incidental injuries and collateral damage would be excessive, on the basis of an honest and reasonable estimate of the facts available to the commander at the time. Similarly, the commander must decide, in light of all the facts known or reasonably available to the commander, including the need to conserve resources and complete the mission successfully, whether to adopt an alternative method (i.e., tactics) or means (i.e., weapons) of attack, if reasonably available, to reduce civilian casualties and damage.

### **8.3.2 Civilians In or On Military Objectives**

Deliberate use of civilians to shield military objectives from enemy attack is prohibited. Although the principle of proportionality underlying the concept of collateral damage continues to apply in such cases, the presence of civilians within or adjacent to a legitimate military objective does not preclude attack of it. Such military objectives may be lawfully targeted and destroyed as needed for mission accomplishment. In such cases, responsibility for the injury and/or death of such civilians, if any, falls on the belligerent so employing them.

The presence of civilian workers, such as technical representatives aboard a warship or employees in a munitions factory, in or on a military objective, does not alter the status of the military objective. Provided such civilian workers are not taking a direct part in hostilities, they must be considered in a commander's proportionality analysis and feasible precautions must be taken to reduce the risk of harm to them.

Civilians who voluntarily place themselves in or on a military objective as "human shields" in order to deter a lawful attack do not alter the status of the military objective. Based on the facts and circumstances of a particular case, individual civilians acting as voluntary human shields may be considered as taking a direct part in hostilities and may be excluded from the commander's proportionality analysis and the requirement to take precautions in attack to avoid harm to them. Attacks under such circumstances likely raise political, strategic, and operational issues that commanders should identify and consider when making targeting decisions.

## **8.4 ENVIRONMENTAL CONSIDERATIONS**

A commander has an affirmative obligation to avoid unnecessary damage to the environment to the extent that it is practicable to do so consistent with mission accomplishment. To that end, and as far as military requirements permit, methods or means of warfare should be employed with due regard to the protection and preservation of the natural environment. Destruction of the natural environment not necessitated by mission accomplishment and carried out wantonly is prohibited. Therefore, a commander should consider the environmental damage that will result from an attack on a legitimate military objective as one of the factors during targeting analysis. See NWP 4-11, Environment Protection, for specific guidance on environmental protection.

## **8.5 DISTINCTION BETWEEN MILITARY OBJECTIVES AND PROTECTED PERSONS AND OBJECTS**

In order to assist combatants with distinguishing between military objectives and protected persons and objects, a number of agreed upon signs, symbols, and signals have been established.

### **8.5.1 Protective Signs and Symbols**

#### **8.5.1.1 The Red Cross, Red Crescent, and Red Crystal**

A Red Cross on a white field (figure 8-1a) is an internationally accepted symbol of protected medical and religious persons and activities. Some countries utilize a Red Crescent on a white field for the same purpose (figure 8-1b). The third Protocol to the Geneva Conventions authorizes an additional distinctive emblem, a Red Crystal (figure 8-1c). The conditions for use of and respect for the third Protocol emblem are identical to those for the Red Cross and Red Crescent. A Red Lion and Sun on a white field (figure 8-1d) was originally created for use by Iran. In 1980, Iran declared it would no longer use the Red Lion and Sun, but rather use the Red Crescent. In 2000, however, Iran communicated its desire to maintain its right of using the Red Lion and Sun emblem once again. Israel employs a six-pointed Red Star, which it reserved the right to use when it ratified the 1949 Geneva Conventions (figure 8-1e). The United States has not agreed that the Israeli six-pointed Red Star is a protected symbol. Nevertheless, all medical and religious persons or objects recognized as being such are to be treated with care and protection.

### 8.5.1.2 Other Protective Symbols

Other protective symbols specially recognized by international law include an oblique red band on a white background to designate hospital zones and safe havens for noncombatants (figure 8-1f). POW camps are marked by the letters “PW” or “PG” (figure 8-1g); civilian internment camps with the letters “IC” (figure 8-1h). A royal-blue diamond and royal-blue triangle on a white shield is used to designate cultural buildings, museums, historic monuments, and other cultural objects that are exempt from attack (figure 8-1i). In the western hemisphere, a red circle with triple red spheres in the circle, on a white background (the “Roerich Pact” symbol) is used for that purpose (figure 8-1j).

The 1977 Protocol I Additional to the Geneva Conventions of 1949, prescribes protective symbols to mark works and installations containing dangerous forces and civil defense facilities. Although the United States is not a party to Additional Protocol I, these symbols are useful in identifying facilities that may need to be factored into a commander’s proportionality analysis. Works and installations containing forces potentially dangerous to the civilian population, such as dams, dikes, and nuclear power plants, may be marked by three bright orange circles of equal size on the same axis (figure 8-1k). Civil defense facilities and personnel may be identified by an equilateral blue triangle on an orange background (figure 8-1l).

### 8.5.1.3 The 1907 Hague Convention Symbol

A protective symbol of special interest to naval officers is the sign established by the 1907 Hague Convention Concerning Bombardment by Naval Forces in Time of War (Hague IX). The 1907 Hague symbol is used to mark sacred edifices, hospitals, historic monuments, cultural buildings, and other structures protected from naval bombardment. The symbol consists of a rectangular panel divided diagonally into two triangles, the upper black, the lower white (figure 8-1m).

### 8.5.1.4 The 1954 Hague Convention Symbol

A more recent protective symbol for cultural property was established by the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict. Cultural sites that are of artistic, historical, or archaeological interest, whether religious or secular, may be marked with the symbol to facilitate recognition. The symbol may be used alone or repeated three times in a triangular formation. It takes the form of a shield, pointed below, consisting of a royal-blue square, one of the angles of which forms the point of the shield, and of a royal-blue triangle above the square, the space on either side being taken up by a white triangle (figure 8-1i).

### 8.5.1.5 The White Flag

Customary international law recognizes the white flag as symbolizing a request to cease-fire, negotiate, or surrender. Enemy forces displaying a white flag should be permitted an opportunity to surrender or to communicate a request for cease-fire or negotiation. The burden is upon the soldiers or unit displaying a flag of truce to communicate their intentions clearly and unequivocally.

### 8.5.1.6 Permitted Use

Protective signs and symbols may be used only to identify personnel, objects, and activities entitled to the protected status that they designate. Any other use is forbidden by international law.

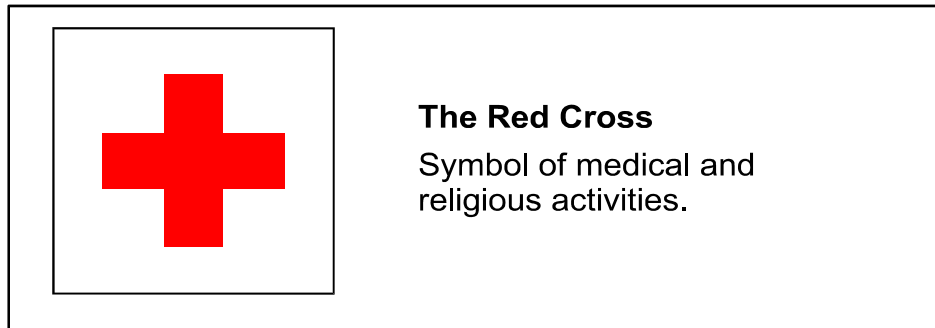


Figure 8-1a. The Red Cross

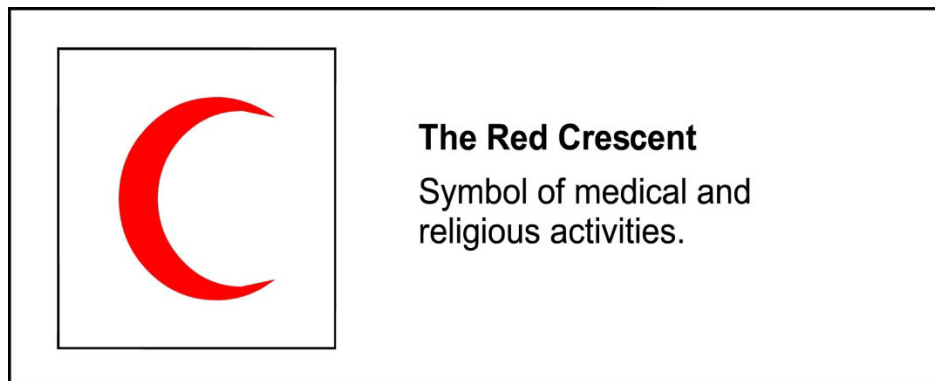


Figure 8-1b. The Red Crescent

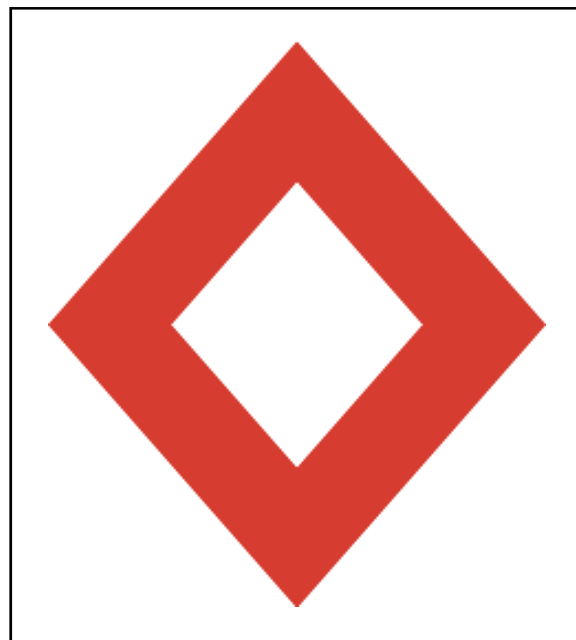


Figure 8-1c. Red Crystal, Symbol of Medical and Religious Activities

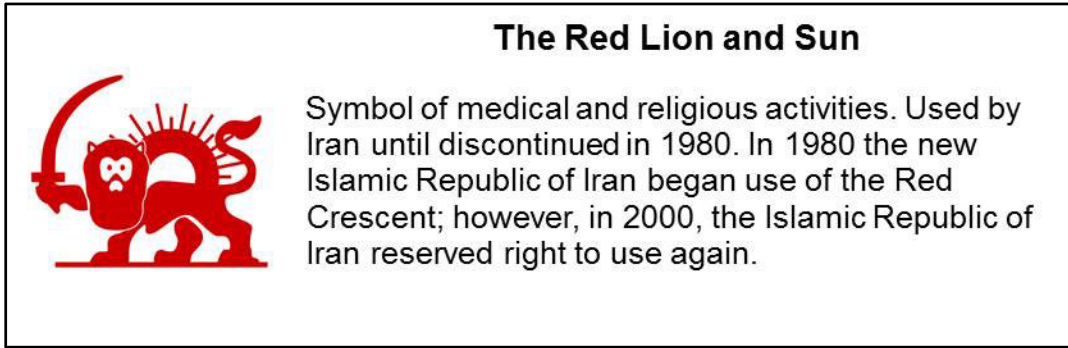


Figure 8-1d. The Red Lion and Sun



Figure 8-1e. The Red Star of David

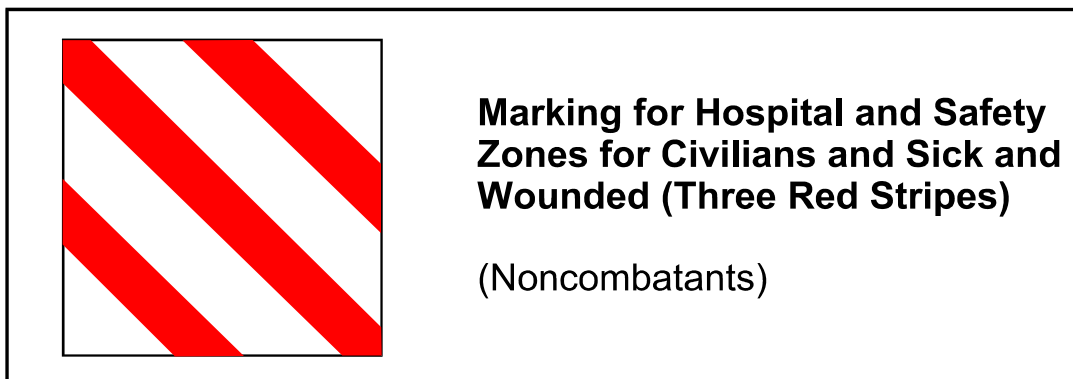


Figure 8-1f. Three Red Stripes

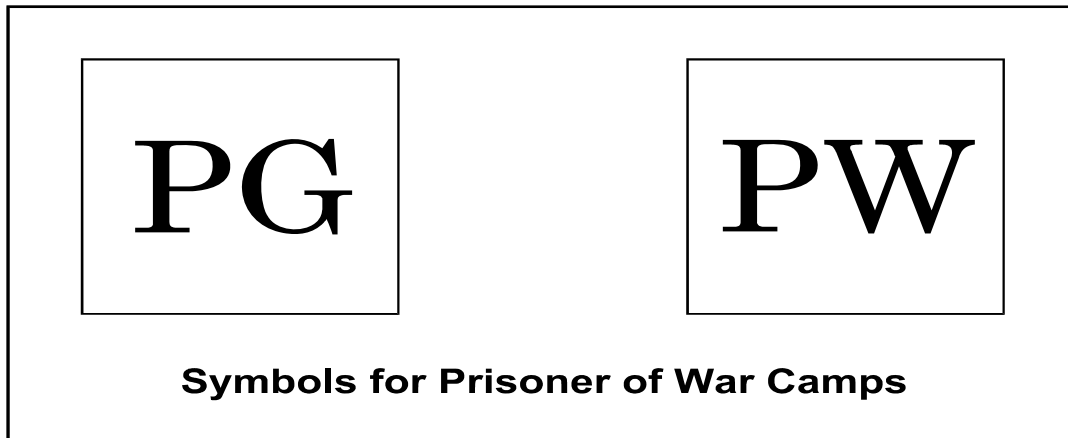


Figure 8-1g. Symbols for Prisoner of War Camps



Figure 8-1h. Civilian Internment Camps

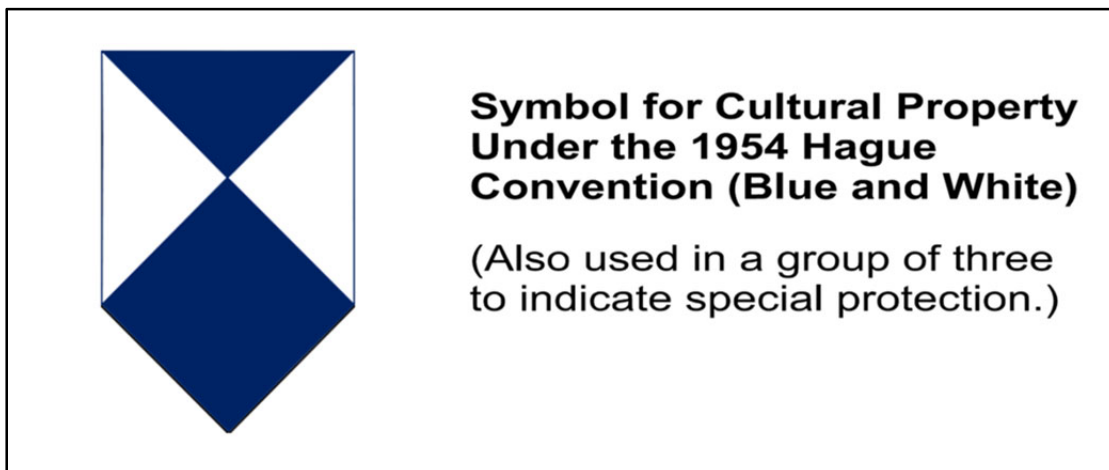


Figure 8-1i. Cultural Property Under the 1954 Hague Convention

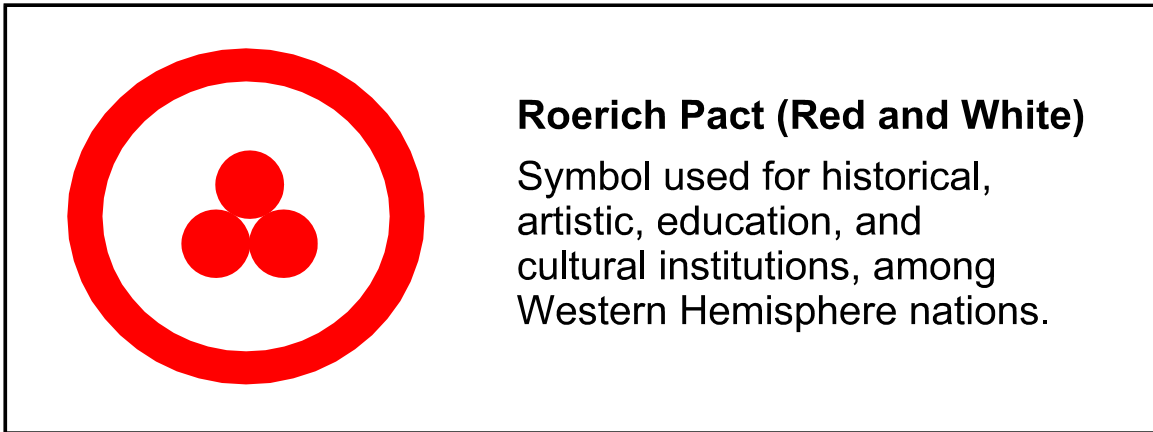


Figure 8-1j. The Roerich Pact

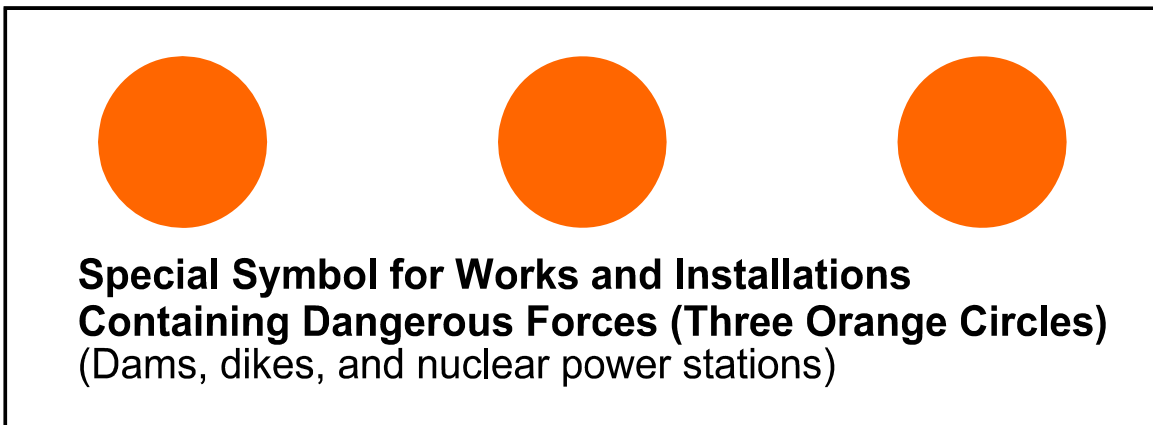


Figure 8-1k. Works and Installations Containing Dangerous Forces

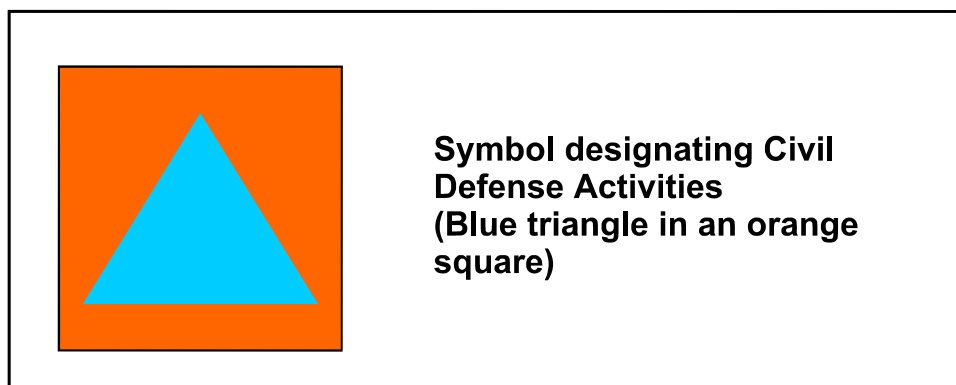


Figure 8-1l. Civil Defense Activities

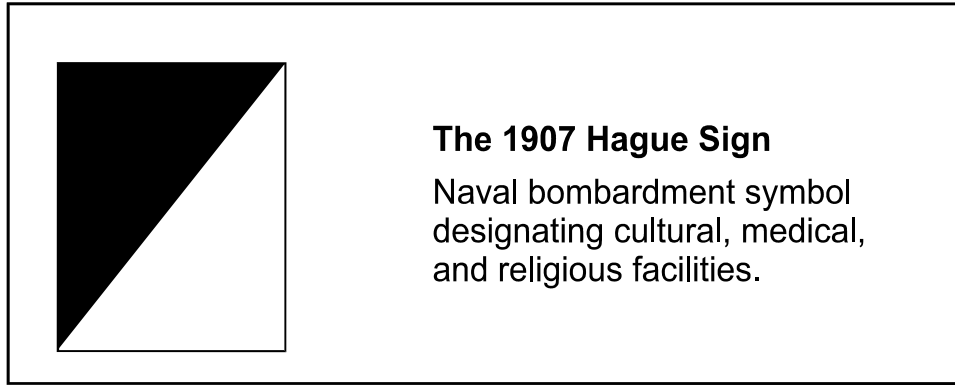


Figure 8-1m. The 1907 Hague Sign

### 8.5.1.7 Failure To Display

When objects or persons are readily recognizable as being entitled to protected status, the lack of protective signs and symbols does not render an otherwise protected object or person a legitimate target. Failure to utilize internationally agreed protective signs and symbols may, however, subject protected persons and objects to the risk of not being recognized by the enemy as having protected status.

### 8.5.2 Protective Signals

Three optional methods of identifying medical units and transports using protective signals have been created internationally. United States hospital ships and medical aircraft do not use these signals, but other States may.

#### 8.5.2.1 Radio Signals

For the purpose of identifying medical transports by radio telephone, the words PAN PAN are repeated three times followed by the word “medical” pronounced as in the French MAY-DEE-CAL. Medical transports are identified in radio telegraph by three repetitions of the group XXX followed by the single group YYY.

#### 8.5.2.2 Visual Signals

On aircraft, the flashing blue light may be used only on medical aircraft. Hospital ships, coastal rescue craft, and medical vehicles may also use the flashing blue light. Only by special agreement between the parties to the conflict may its use be reserved exclusively to those forms of surface medical transport.

#### 8.5.2.3 Electronic Identification

The identification and location of medical ships and craft may be effected by means of appropriate standard maritime radar transponders as established by special agreement to the parties to the conflict. The identification and location of medical aircraft may be effected by use of the secondary surveillance radar specified in annex 10 to the Chicago Convention. The secondary surveillance radar mode and code is to be reserved for the exclusive use of the medical aircraft.

### 8.5.3 Identification of Neutral Platforms

Ships and aircraft of States not party to an armed conflict may adopt special signals for self-identification, location, and establishing communications. Use of these signals does not confer or imply recognition of any special rights or duties of neutrals or belligerents, except as may otherwise be agreed between them.



## 8.6 SURFACE WARFARE

As a general rule, surface warships may attack enemy surface, subsurface, and air targets wherever located beyond neutral territory. (Special circumstances in which enemy warships and military aircraft may be attacked in neutral territory are discussed in chapter 7.) The law of armed conflict pertaining to surface warfare is concerned primarily with the protection of noncombatants and civilians through rules establishing lawful targets of attack. For that purpose, all enemy vessels and aircraft fall into one of three general classes: warships and military aircraft (including military auxiliaries); merchant vessels and civilian aircraft; and exempt vessels and aircraft.

### 8.6.1 Enemy Warships and Military Aircraft

Enemy warships and military aircraft, including naval and military auxiliaries, are subject to attack, destruction, or capture anywhere beyond neutral territory. It is forbidden, however, to target an enemy warship or military aircraft that in good faith unambiguously and effectively conveys a timely offer of surrender. Once an enemy warship has clearly indicated a readiness to surrender, such as by hauling down her flag, by hoisting a white flag, by surfacing (in the case of submarines), by stopping engines and responding to the attacker's signals, or by taking to lifeboats, the attack must be discontinued. Disabled enemy aircraft in air combat are frequently pursued to destruction because of the impossibility of verifying their true status and inability to enforce surrender. Although disabled, the aircraft may or may not have lost its means of combat. Moreover, it still may represent a valuable military asset. Accordingly, surrender in air combat is not generally offered. However, if surrender is offered in good faith so that circumstances do not preclude enforcement, it must be respected. Officers and crews of captured or destroyed enemy warships and military aircraft should be detained. As far as military exigencies permit, after each engagement all possible measures should be taken without delay to search for and collect the shipwrecked, wounded, and sick and to recover the dead.

Prize procedure is not used for captured enemy warships because their ownership vests immediately in the captor's government by the fact of capture.

### 8.6.2 Enemy Merchant Vessels and Civil Aircraft

#### 8.6.2.1 Capture

Enemy merchant vessels and civil aircraft may be captured wherever located beyond neutral territory. Prior exercise of visit and search is not required, provided positive determination of enemy status can be made by other means. When military circumstances preclude sending or taking in such vessel or aircraft for adjudication as an enemy prize, it may be destroyed after all possible measures are taken to provide for the safety of passengers and crew. Claims may be made by neutrals, either with respect to the captured vessel or aircraft, or with respect to the cargo (normally, noncontraband neutral cargo on board a captured enemy vessel is not liable to confiscation). For that reason, it is always preferable that captured enemy prizes be sent into port for adjudication rather than destroyed, if practicable. Every case of destruction of a captured enemy prize should be reported promptly to higher command.

Documents and papers relating to the prize should be safeguarded and, if practicable, the personal effects of passengers should be saved. In accordance with U.S. law the commanding officer of a vessel making a capture shall:

1. Secure the documents of the captured vessel, including the log, and cargo documents, together with all other documents and papers, including letters, found on board.
2. Inventory and seal all the documents and papers.

3. Send the inventory and documents and papers to the court in which proceedings are to be had, with a written statement that:
  - a. The documents and papers sent are all the papers found, or explaining the reasons why any are missing
  - b. The documents and papers sent are in the same condition as found, or explaining the reasons why any are in different condition.
4. Send as witnesses to the prize court the master, one or more of the other officers, the supercargo, purser, or agent of the prize, and any other person found on board whom he believes to be interested in or to know the title, national character, or destination of the prize, and if any of the usual witnesses cannot be sent, send the reasons therefor to the court.
5. Place a competent prize master and a prize crew on board the prize and send the prize, the witnesses, and all documents and papers, under charge of the prize master, into port for adjudication.
  - a. In the absence of instructions from higher authority as to the port to which the prize shall be sent for adjudication, the commanding officer of the capturing vessel shall select the port that he considers most convenient.
  - b. If the captured vessel, or any part of the captured property, is not in condition to be sent in for adjudication, the commanding officer of the capturing vessel shall have a survey and an appraisal made by competent and impartial persons.

Officers and crews of captured enemy merchant ships and civilian aircraft may be detained. (See paragraph 8.2.3.3 and chapter 11 for further discussion of surrender and treatment of detainees, respectively.) Other enemy nationals on board such captured ships and aircraft as private passengers are subject to the discipline of the captor. If necessary, enemy nationals, particularly those in the public service of the enemy, found on board captured enemy merchant vessels may be treated as POWs. Nationals of a neutral nation on board captured enemy merchant vessels and civilian aircraft should not be detained unless they have participated in acts of hostility or resistance against the captor or are otherwise in the service of the enemy.

### **8.6.2.2 Destruction**

Prior to World War II, both customary and conventional international law prohibited the destruction of enemy merchant vessels by surface warships unless the safety of passengers and crew was first assured. This requirement did not apply, however, if the merchant vessel engaged in active resistance to capture or refused to stop when ordered to do so. Specifically, the London Protocol of 1936, to which almost all of the belligerents of World War II expressly acceded, provides in part that:

In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew, and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board.

During World War II, the practice of attacking and sinking enemy merchant vessels by surface warships and submarines without prior warning and without first providing for the safety of passengers and crew was widespread on both sides. Rationale for these apparent departures from the agreed rules of the 1936 London Protocol varied. Initially, such acts were justified as reprisals against illegal acts of the enemy. As the war progressed, however, merchant vessels were regularly armed and convoyed, participated in intelligence collection, and were otherwise incorporated directly or indirectly into the enemy's war-fighting/war-supporting/war-sustaining effort. Consequently, enemy merchant vessels were widely regarded as legitimate military targets subject to destruction on sight.

Although the rules of the 1936 London Protocol continue to apply to surface warships, they must be interpreted in light of current technology, including satellite communications, over-the-horizon (OTH) weapons, and antiship missile systems, as well as the customary practice of belligerents that evolved during and following World War II. Accordingly, enemy merchant vessels may be attacked and destroyed by surface warships, either with or without prior warning, in any of the following circumstances:

1. If persistently refusing to stop upon being duly summoned to do so
2. If actively resisting visit and search or capture
3. If sailing under convoy of enemy warships or enemy military aircraft
4. If armed with systems or weapons beyond that required for self-defense against terrorist, piracy, or like threats
5. If incorporated into, or assisting in any way, the intelligence system of the enemy's armed forces
6. If acting in any capacity as a naval or military auxiliary to an enemy's armed forces
7. If integrated into the enemy's war-fighting/war-supporting/war-sustaining effort and compliance with the rules of the 1936 London Protocol would, under the circumstances of the specific encounter, subject the surface warship to imminent danger or would otherwise preclude mission accomplishment.

Rules relating to surrendering and to the search for and collection of the shipwrecked, wounded, and sick and the recovery of the dead, set forth in paragraph 8.6.1, apply also to enemy merchant vessels and civilian aircraft that may become subject to attack and destruction.

### **8.6.3 Enemy Vessels and Aircraft Exempt from Destruction or Capture**

Certain classes of enemy vessels and aircraft are exempt under the law of naval warfare from capture or destruction provided they are innocently employed in their exempt category. These specially protected vessels and aircraft must not take part in the hostilities, must not hamper the movement of combatants, must submit to identification and inspection procedures, and may be ordered out of harm's way. These specifically exempt vessels and aircraft include:

#### **8.6.3.1 Hospital Ships, Medical Transports, and Medical Aircraft**

Properly designated and marked hospital ships, medical transports, and medical aircraft, as well as coastal rescue craft are exempt from destruction or capture. A hospital ship's medical personnel and crew must not be attacked or captured even if there are no sick or wounded on board. Names and descriptions of hospital ships must be provided to the parties to the conflict not later than 10 days before they are first employed. Thereafter, hospital ships must be used exclusively to assist, treat, and transport the wounded, sick, and shipwrecked. All exterior surfaces of hospital ships are painted white and the distinctive emblem of the Red Cross or Red Crescent is displayed on the hull and on horizontal surfaces.

In the actual employment of hospital ships, the application of some previously well-established principles has adapted to reflect the realities of modern circumstances. Traditionally, hospital ships could not be armed, although crew members could carry light individual weapons for the maintenance of order, for their own defense and that of the wounded, sick, and shipwrecked. However, due to the current threat environment in which the red cross symbol is not recognized by various hostile groups and actors as indicating protected status, the United States views the manning of hospital ships with defensive weapons systems, such as antimissile defense systems or crew-served weapons to defend against small boat threats as prudent AT/FP measures, analogous to arming crew members with small arms, and consistent with the humanitarian purpose of hospital ships and duty to safeguard the wounded and sick. Additionally, weapons and ammunition taken from the wounded, sick, and shipwrecked, may also be retained on board for eventual turn-over to proper authority.

Further, Article 34, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, provides that hospital ships may not use or possess “secret codes” as means of communication so that belligerents could verify that hospital ships’ communications systems were being used only in support of their humanitarian function and not as a means of communicating information that would be harmful to the enemy. However, subsequent technological advances in encryption and satellite navigation, while recognized as legally problematic, have not been specifically addressed by treaty. As a practical matter, modern navigational technology requires that the traditional rule prohibiting “secret codes” be understood to not include modern communications encryption systems. However, such systems must not be used for military purposes in any way harmful to a potential adversary.

Medical aircraft, whether civilian or military, and whether permanently or temporarily so employed, must be used exclusively for the removal and transportation of the wounded, sick, and shipwrecked, or for the transportation of medical personnel or medical equipment. They shall not be armed nor configured for reconnaissance. Medical aircraft shall contain no armament other than small arms and ammunition belonging to the wounded and sick or necessary for the defense of the wounded and sick and the medical personnel. Medical aircraft must also not be used to collect or transmit intelligence data since they must not be used to commit, outside their humanitarian duties, acts harmful to the enemy. This prohibition, however, does not preclude the presence or use on board medical aircraft of communications equipment and encryption materials solely to facilitate navigation, identification, or communication in support of medical operations. Medical aircraft should be clearly marked with the emblem of the Red Cross, Red Crescent, or Red Crystal. Failure to so mark them risks having them not recognized as protected platforms.

Hospital ships, medical transports, and medical aircraft utilized solely for medical purposes and recognized as such, whether or not marked with the appropriate emblem, are not to be deliberately attacked. Before making flights bringing medical aircraft within range of the enemy’s surface-to-air weapons systems the enemy should be notified with a view to ensuring such aircraft will not be attacked. Aeromedical evacuation also may, of course, be conducted by combat-equipped helicopters and airplanes. They are not, however, exempt from attack, and fly at their own risk of being attacked.

Hospital ships can leave port even if the port falls into enemy hands. Hospital ships are not classified as warships with regard to the length of their stay in neutral ports.

Hospital ships must not be used for any other purpose during the conflict, particularly in an attempt to shield military objectives from attack. To ensure this, an opposing force may visit and search hospital ships, put on board a commissioner temporarily or put on neutral observers, detain the ship for no more than 7 days (if required by the gravity of the circumstances), and control the ship’s means of communications. The opposing force may also order hospital ships to depart, make them take a certain course, or refuse assistance to them.

A warship may demand the surrender of enemy military wounded, sick, and shipwrecked personnel found in hospital ships and other craft provided they are in a fit state to be moved and that the warship can provide adequate facilities for necessary medical treatment.

Sick bays and their medical personnel aboard other naval vessels must also be respected by boarding parties and spared as much as possible. They remain subject to the laws of warfare, but cannot be diverted from their medical purposes if required for the care of the wounded or sick. If a naval commander can ensure the proper care of the sick and wounded, and if there is urgent military necessity, sick bays may be used for other purposes.

Medical aircraft must comply with a request to land for inspection. These requests are to be given in accordance with ICAO standard procedures for interception of civil aircraft. Medical aircraft complying with such a request to land must be allowed to continue their flight, with all personnel on board belonging to their forces, to neutral countries, or to countries not a party to the conflict, so long as inspection does not reveal that the aircraft was engaging in acts harmful to the inspecting force or otherwise violating the Geneva Conventions of 1949. Persons of the nationality of the inspecting force found on board may be taken off and retained.

### 8.6.3.2 Other Vessels and Aircraft Exempt from Destruction or Capture

1. Vessels and aircraft designated for and engaged in the exchange of POWs (cartel vessels or aircraft).
2. Vessels charged with religious, nonmilitary scientific, or philanthropic missions. (Vessels engaged in the collection of scientific data of potential military application are not exempt.)
3. Vessels and aircraft guaranteed safe conduct by prior arrangement between the belligerents.
4. Small coastal (not deep-sea) fishing vessels and small boats engaged in local coastal trade. Such vessels and boats are subject to the regulations of a belligerent naval commander operating in the area.
5. Civilian passenger vessels at sea and civil airliners in flight are subject to capture but are exempt from destruction. Although enemy lines of communication are generally legitimate military targets in modern warfare, civilian passenger vessels at sea, and civil airliners in flight, are exempt from destruction, unless at the time of the encounter they are being utilized by the enemy for a military purpose (e.g., transporting troops or military cargo) or refuse to respond to the directions of the intercepting warship or military aircraft. Such passenger vessels in port and airliners on the ground are not protected from destruction.

If an enemy vessel or aircraft assists the enemy's military effort in any manner, it may be captured or destroyed. Refusal to provide immediate identification upon demand is ordinarily sufficient legal justification for capture or destruction. All States have a legal obligation not to take advantage of the harmless character of exempt vessels and aircraft in order to use them for military purposes while preserving their innocent appearance.

## 8.7 SUBMARINE WARFARE

The law of armed conflict imposes essentially the same rules on submarines as apply to surface warships. Submarines may employ their weapons systems to attack enemy surface, subsurface, or airborne targets wherever located beyond neutral territory. Enemy warships and military aircraft, including naval and military auxiliaries, may be attacked and destroyed without warning. Rules applicable to surface warships regarding enemy ships that have surrendered in good faith, or that have indicated clearly their intention to do so, apply as well to submarines. To the extent that military exigencies permit, submarines are also required to search for and collect the shipwrecked, wounded, and sick following an engagement. If such humanitarian efforts would subject the submarine to undue additional hazard or prevent it from accomplishing its military mission, the location of possible survivors should be passed at the first opportunity to a surface ship, aircraft, or shore facility capable of rendering assistance.

### 8.7.1 Interdiction of Enemy Merchant Shipping by Submarines

The rules of naval warfare pertaining to submarine operations against enemy merchant shipping constitute one of the least developed areas of the law of armed conflict. Although the submarine's effectiveness as a weapons system is dependent upon its capability to remain submerged (and thereby undetected) and despite its vulnerability when surfaced, the London Protocol of 1936 (paragraph 8.6.2.2) makes no distinction between submarines and surface warships with respect to attacks upon enemy merchant shipping. The London Protocol specifies that except in case of persistent refusal to stop when ordered to do so, or in the event of active resistance to capture, a warship "whether surface vessel or submarine" may not destroy an enemy merchant vessel "without having first placed passengers, crew, and ship's papers in a place of safety." The impracticality of imposing upon submarines the same targeting constraints as burden surface warships is reflected in the practice of belligerents of both sides during World War II when submarines regularly attacked and destroyed without warning enemy merchant shipping. As in the case of such attacks by surface warships, this practice was justified either as a reprisal in response to unlawful acts of the enemy or as a necessary consequence of the arming of merchant vessels, of convoying, and of the general integration of merchant shipping into the enemy's war-fighting/war-supporting/war-sustaining effort.

The United States considers that the London Protocol of 1936, coupled with the customary practice of belligerents during and following World War II, imposes upon submarines the responsibility to provide for the safety of passengers, crew, and ship's papers before destruction of an enemy merchant vessel unless:

1. The enemy merchant vessel persistently refuses to stop when duly summoned to do so.
2. It actively resists visit and search or capture.
3. It is sailing under convoy of enemy warships or enemy military aircraft.
4. It is armed with systems or weapons beyond that required for self-defense against terrorism, piracy, or like threats.
5. It is incorporated into, or is assisting in any way the enemy's military intelligence system.
6. It is acting in any capacity as a naval or military auxiliary to an enemy's armed forces.
7. The enemy has integrated its merchant shipping into its war-fighting/war-supporting/war-sustaining effort, and compliance with the London Protocol of 1936 would, under the circumstances of the specific encounter, subject the submarine to imminent danger or would otherwise preclude mission accomplishment.

### **8.7.2 Enemy Vessels and Aircraft Exempt From Submarine Interdiction**

The rules of naval warfare regarding enemy vessels and aircraft that are exempt from capture and/or destruction by surface warships also apply to submarines. (See paragraph 8.6.3.)

## **8.8 AIR WARFARE AT SEA**

Military aircraft may employ weapons systems to attack warships and military aircraft, including naval and military auxiliaries, anywhere beyond neutral territory. Enemy merchant vessels and civil aircraft may be attacked and destroyed by military aircraft only under the following circumstances:

1. When persistently refusing to comply with directions from the intercepting aircraft
2. When sailing under convoy of enemy warships or military aircraft
3. When armed with systems or weapons beyond that required for self-defense against terrorism, piracy, or like threats
4. When incorporated into or assisting in any way the enemy's military intelligence system
5. When acting in any capacity as a naval or military auxiliary to an enemy's armed forces
6. When otherwise integrated into the enemy's war-fighting, war-supporting, or war-sustaining effort.

To the extent that military exigencies permit, military aircraft are required to search for the shipwrecked, wounded, and sick following an engagement at sea. Medical aircraft flying pursuant to an agreement between the parties in the contact zone or over areas controlled by the enemy may not search for the wounded, sick, and shipwrecked except by prior agreement with the enemy. The location of possible survivors should be communicated at the first opportunity to a surface vessel, aircraft, or shore facility capable of rendering assistance.

Historically, instances of surrender of enemy vessels to aircraft are rare. If, however, an enemy has surrendered in good faith, under circumstances that do not preclude enforcement of the surrender, or has clearly indicated an intention to do so, the enemy must not be attacked.

The rules of naval warfare regarding enemy vessels and aircraft that are exempt from capture and/or destruction by surface warships also apply to military aircraft. (See paragraph 8.6.3.)

## **8.9 BOMBARDMENT**

For purposes of this publication, the term “bombardment” refers to naval and air bombardment of enemy targets on land with conventional weapons, including naval guns, rockets and missiles, and air-delivered ordnance. Land warfare is discussed in paragraph 8.10. Engagement of targets at sea is discussed in paragraphs 8.6 to 8.8.

### **8.9.1 General Rules**

The United States is a party to Hague Convention No. IX (1907) Respecting Bombardment by Naval Forces in Time of War. That convention establishes the general rules of naval bombardment of land targets. These rules have been further developed by customary practice in World Wars I and II, Vietnam, the Falkland/Malvinas Conflict, Operations DESERT SHIELD/DESERT STORM, and Operations ENDURING FREEDOM and IRAQI FREEDOM. Underlying these rules are the broad principles of the law of armed conflict that belligerents are forbidden to make noncombatants and civilians the target of direct attack, that superfluous injury to, and unnecessary suffering of, combatants are to be avoided, and that wanton destruction of property is prohibited. To give effect to these concepts, the following general rules governing bombardment shall be observed.

#### **8.9.1.1 Destruction of Civilian Habitation**

The wanton or deliberate destruction of areas of concentrated civilian habitation, including cities, towns, and villages, is prohibited. A military objective within a city, town, or village may, however, be attacked if required for the submission of the enemy with the minimum expenditure of time, life, and physical resources, provided the attack meets other law of war requirements. The anticipated incidental injury to civilians, or collateral damage to civilian objects, must not be excessive in light of the military advantage anticipated by the attack. (See paragraphs 8.3, 8.3.1, and 8.3.2.)

An attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in an area containing a concentration of civilians and civilian objects is prohibited.

#### **8.9.1.2 Terrorization**

Bombardment for the sole purpose of terrorizing the civilian population is prohibited. Otherwise legal acts which cause incidental terror to civilians are not prohibited. As a practical matter, some fear and terror will be experienced by civilians whenever military objectives in their vicinity are attacked.

#### **8.9.1.3 Undefended Cities or Agreed Demilitarized Zones**

Belligerents are forbidden to bombard a city or town that is undefended and that is open to immediate physical entry by their own or allied ground forces. A city or town behind enemy lines is, by definition, neither undefended nor open, and military objectives therein may be attacked. An agreed demilitarized zone is also exempt from bombardment.

#### **8.9.1.4 Medical Facilities**

Medical establishments and units (both mobile and fixed), medical vehicles, and medical equipment and stores may not be deliberately bombarded. Belligerents are required to ensure that such medical facilities are, as far as possible, situated in such a manner that attacks against military targets in the vicinity do not imperil their safety. If medical facilities are used for military purposes inconsistent with their humanitarian mission they must be warned about the inconsistent use, if feasible. If appropriate warnings are unheeded, the facilities become subject to attack. The distinctive medical emblem, a Red Cross, Red Crescent, or Red Crystal is to be clearly displayed on medical establishments and units in order to identify them as entitled to protected status. Any object recognized as being a medical facility may not be attacked whether or not marked with a protective symbol.

### **8.9.1.5 Special Hospital Zones and Neutralized Zones**

When established by agreement between the belligerents, hospital zones and neutralized zones are immune from bombardment in accordance with the terms of the agreement concerned.

### **8.9.1.6 Religious, Cultural, and Charitable Buildings and Monuments**

Buildings devoted to religion, the arts, or charitable purposes; historic monuments; and other religious, cultural, or charitable facilities should not be bombarded, provided they are not used for military purposes. It is the responsibility of the local inhabitants to ensure that such buildings and monuments are clearly marked with the distinctive emblem of such sites—a rectangle divided diagonally into two triangular halves, the upper portion black and the lower white (see figure 8-11), or the cultural property sign contained in 1954 Hague for the protection of cultural property in time of war (see figure 8-1h). The latter, for all intents and purposes, has superseded the former. Such buildings—even if displaying a protective emblem—lose their protection from attack if they are used for military purposes.

### **8.9.1.7 Dams and Dikes**

Dams, dikes, levees, and other installations, which if breached or destroyed would release flood waters or other forces dangerous to the civilian population, should not be bombarded if the anticipated harm to civilians would be excessive in relation to the anticipated military advantage to be gained by bombardment.

## **8.9.2 Warning Before Bombardment**

Where the military situation permits, commanders should make every reasonable effort to warn the civilian population located in close proximity to a military objective targeted for bombardment. Warnings may be general rather than specific lest the bombarding force or the success of its mission be placed in jeopardy. Warnings are for the protection of the civilian population and need not be given when civilians are unlikely to be affected by the attack.

## **8.10 LAND WARFARE**

The guidance in this paragraph provides an overview of the basic principles of law governing conflict on land. For a comprehensive treatment of the law of armed conflict applicable to land warfare, see the DoD Law of War Manual and the Army Field Manual (FM) 27-10, *The Law of Land Warfare*. (Note: FM 6-27, *The Commander's Handbook on the Law of Land Warfare*, will replace FM 27-10 in the near future.)

### **8.10.1 Targeting in Land Warfare**

Targeting principles in land warfare are the same as in naval warfare (see paragraph 8.1); however, the characteristics of land warfare, often involving intermingled military objectives, combatants, civilians, and civilian objects, can make the application of targeting decisions more difficult.

### **8.10.2 Special Protection**

Under the law of land warfare, certain persons, places, and objects enjoy special protection against attack. Protection is, of necessity, dependent upon recognition of protected status. Special signs and symbols are employed for that purpose (see paragraph 8.5.1). Failure to display protective signs and symbols does not render an otherwise protected person, place, or object a legitimate target if that status is otherwise apparent (see paragraph 8.5.1.7). However, protected persons directly participating in hostilities lose their protected status and may be attacked while so employed. Similarly, misuse of protected places and objects for military purposes renders them subject to legitimate attack during the period of misuse.



### **8.10.2.1 Protected Status**

Protected status is afforded the wounded, sick, and shipwrecked (see paragraph 8.2.3), certain parachutists (see paragraph 8.2.3.1), and detainees (see chapter 11). Civilians and noncombatants, such as medical personnel and chaplains (see paragraph 8.2.4.1), not taking direct part in hostilities, and interned persons (see paragraph 11.5) also enjoy protected status.

### **8.10.2.2 Protected Places and Objects**

Protected places include undefended cities and towns and agreed demilitarized zones (see paragraph 8.9.1.3), and agreed special hospital zones and neutralized zones (see paragraph 8.9.1.5). Protected objects include historic monuments and structures, works of art, medical facilities and religious, cultural, and charitable buildings and monuments (see paragraph 8.9.1.6).

### **8.10.2.3 The Environment**

A discussion of environmental considerations during armed conflict is contained in paragraph 8.4. The use of herbicidal agents is addressed in paragraph 10.3.3.

## **8.11 INFORMATION OPERATIONS**

IO is the integrated employment, during military operations, of information-related capabilities in concert with other lines of operation to influence, disrupt, corrupt, or usurp the decision making of adversaries and potential adversaries while protecting our own. For the purpose of this discussion on targeting considerations the military capabilities that contribute to IO include cyberspace operations (CO), information assurance, space operations, military information support operations (MISO) (formerly known as psychological operations), intelligence, military deception, operations security, special technical operations, joint electromagnetic spectrum operations. (See Joint Publication (JP) 3-13, Information Operations, for a broader discussion of this subject.)

### **8.11.1 General Information Operations Targeting Considerations**

Legal analysis of intended wartime targets requires traditional law of war analysis. Offensive IO can target human decision processes (human factors), the information and information systems used to support decision making (links), and the information and information systems used to process information and implement decisions (nodes). Offensive IO efforts should examine all three target areas to maximize the opportunity for success. Human factors include national command authorities, commanders, forces, the populace as a whole and/or groups within the populace. In all cases, the selection of offensive IO targets must be consistent with United States objectives, applicable international conventions, the law of armed conflict, and ROE. Department of Defense IO activities will not be directed at or intended to manipulate audiences, public actions, or opinions in the United States and will be conducted in accordance with all applicable U.S. statutes, codes, and laws.

### **8.11.2 Physical Attack/Destruction**

The legal requirement to attack only military objectives and to avoid excessive incidental injury/death and collateral damage to noncombatants, civilians, and civilian objects applies when identifying targets for physical attack/destruction as part of an offensive IO plan. Information operations that do not entail the risk of physical injury or death to protected persons or damage to civilian objects may be targeted at noncombatants and civilians.

### **8.11.3 Military Information Support Operations**

MISO are planned operations to convey selected information and indicators to foreign audiences to influence their emotions, motives, objective reasoning, and ultimately the behavior of foreign governments, organizations, groups, and individuals in a manner favorable to the originator's objectives. MISO must not be confused with psychological impact. U.S. MISO will not target U.S. citizens under any circumstances.

#### **8.11.4 Offensive Cyberspace Operations**

Offensive cyberspace operations (OCO) are cyberspace operations intended to project power by the application of force in or through cyberspace. OCO can be accomplished by lethal and nonlethal means. In employing nonlethal means of OCO against a military objective, factors involved in weighing anticipated incidental injury/death to protected persons can include, depending on the target, indirect effects (for example, the anticipated incidental injury/death that may occur from disrupting an electric generating plant that supplies power to a military headquarters and to a hospital).

Department of Defense doctrine describes cyberspace as a “global domain within the information environment consisting of interdependent networks of information technology infrastructures and resident data, including the Internet, telecommunications networks, computer systems, and embedded processors and controllers.”

There are no international agreements that directly address cyberspace in the context of military operations and state practice is only starting to emerge. Nonetheless, if a cyber operation constitutes a military operation in an armed conflict, then the laws of armed conflict apply. In particular, if a cyber operation constitutes an armed attack, then the law of armed conflict and all of its principles apply to that operation.

## CHAPTER 9

# Conventional Weapons and Weapons Systems

### 9.1 INTRODUCTION

This chapter addresses the legal considerations pertaining to the use of conventional weapons and weapons systems. It is a fundamental tenet of the law of armed conflict that the right of States engaged in armed conflict to choose methods or means of warfare is not unlimited. Weapons which by their nature are incapable of being directed specifically against military objectives, and therefore put civilians and noncombatants at equivalent risk, are forbidden due to their indiscriminate effect. Additionally, the employment of weapons, materiel, and methods of warfare that are designed to cause superfluous injury or unnecessary suffering is prohibited. Some weapons, such as poisoned projectiles, are unlawful per se. Others may be rendered unlawful by alteration, such as by coating ammunition with a poison. Finally, any lawful weapon is capable of being used for an unlawful purpose when it is directed against noncombatants, civilians, and other protected persons and property.

The United States has a formal weapon legal review program. For the purposes of this program, weapons and weapons systems are defined as “all arms, munitions, materiel, instruments, mechanisms, devices, and those components required for their operation, that are intended to have an effect of injuring, damaging, destroying, or disabling personnel or property, to include nonlethal weapons.” For the purposes of this program weapons do not include launch or delivery platforms, such as ships or aircraft. The program addresses the acquisition of weapons and mandates that all weapons newly developed or purchased by the U.S. Armed Forces be reviewed for consistency with the law of armed conflict prior to the engineering development and initial contract for production stages of the acquisition process. These reviews are conducted by the Judge Advocate General of the relevant Service; for the Department of the Navy, legal reviews are conducted by the Office of the Judge Advocate General’s International and Operational Law Division (OJAG Code 10) in the Pentagon.

This chapter does not attempt to individually address each type of weapon and weapon system in the U.S. inventory. It focuses on the rules pertaining to those weapons and weapons systems of particular interest to naval officers, such as naval mines, land mines, torpedoes, cluster and fragmentation weapons, delayed-action devices, incendiary weapons, directed-energy devices, and OTH weapons systems. Each of these weapons or systems will be assessed in terms of its potential for causing unnecessary suffering and superfluous injury or indiscriminate effect.

#### 9.1.1 Unnecessary Suffering

The law of war prohibits the design, use, or modification of weapons calculated to cause unnecessary suffering or superfluous injury. The terms “unnecessary suffering” and “superfluous injury” are regarded as synonymous and are used interchangeably. In determining whether a means or method of warfare causes unnecessary suffering or superfluous injury, the suffering or injury incurred by the combatant must not be manifestly disproportionate to the military advantage to be gained by the weapon’s use. Serious injury or even death is not necessarily prohibited. Under the law of war, combatants can legally kill or wound enemy combatants; such acts are legitimate if accomplished with lawful means or methods. For example, the prohibition of unnecessary suffering does not restrict the use of overwhelming firepower on an opposing military force in order to subdue or destroy it. Rather, the test is whether the suffering or injury is manifestly disproportionate to the military advantage. Certain means of warfare have, therefore, been prohibited from use on the battlefield, either because they are regarded as

causing unnecessary suffering or superfluous injury or for policy reasons. These include poison, chemical weapons, biological (or bacteriological) weapons, munitions containing fragments not detectable by x-ray, and blinding laser weapons.

### **9.1.2 Indiscriminate Effect**

The principle of distinction requires that means and methods of warfare only be directed at military combatants and objects. Civilians and civilian objects cannot be targeted. Weapons that are incapable of being directed at a military objective are forbidden as being indiscriminate in their effect. Examples of weapons incapable of discrimination include drifting armed contact mines, long-range unguided missiles (such as the German V-1 and V-2 rockets and Japanese uncontrolled balloon-borne bombs used during World War II). A weapon is not indiscriminate simply because it may cause incidental or collateral civilian casualties when directed at a legal military objective. Thus, an artillery round that is capable of being directed with a reasonable degree of accuracy at a military target is not an indiscriminate weapon simply because it may miss its mark or inflict collateral damage, provided such collateral damage is not foreseeably excessive in light of the anticipated military advantage to be gained. There is no obligation to employ the most precise weapon available, so long as the weapon employed is capable of discrimination.

### **9.1.3 Proportionality**

The principle of proportionality requires that the anticipated loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained. When targeting a legitimate military objective, effects on civilians and civilian objectives is considered collateral, or incidental, damage. A weapon violates the principle of proportionality only if the anticipated collateral effects on civilians and/or civilian objects is excessive to the military advantage to be gained by the targeting of the military objective.

## **9.2 NAVAL MINES**

Naval mines have been effectively employed for area denial, coastal and harbor defense, antisurface and antisubmarine warfare, and blockade. Naval mines are lawful weapons, but their potential for indiscriminate effects has led to specific regulation of their deployment and employment by the law of armed conflict. The extensive and uncontrolled use of naval mines by both sides in the Russo-Japanese War of 1904–1905 inflicted great damage on innocent shipping both during and long after that conflict, and led to Hague Convention No. VIII of 1907 Relative to the Laying of Automatic Submarine Contact Mines. The purpose of the Hague rules is to ensure, to the extent practicable, the safety of innocent shipping. These rules require that naval mines be so constructed as to become harmless should they break loose from their moorings or otherwise cease to be under the affirmative control of the belligerents that laid them. The Hague rules also require that ship owners be warned of the presence of mines as soon as military exigencies permit.

Although the Hague provisions date from 1907, they remain the only codified rules specifically addressing the emplacement of conventional naval mines. Technological developments have created weapons systems obviously not contemplated by the drafters of these rules. Nonetheless, the general principles of law embodied in the 1907 Convention continue to serve as a guide to lawful employment of naval mines.

### **9.2.1 Current Technology**

Modern naval mines are versatile and variable weapons. They range from relatively unsophisticated and indiscriminate contact mines to highly technical, target-selective devices with state-of-the-art homing guidance capability. Today's mines may be armed and/or detonated by physical contact, acoustic or magnetic signature, or sensitivity to changes in water pressure generated by passing vessels and may be emplaced by air, surface, or subsurface platforms. For purposes of this publication, naval mines are classified as armed or controllable mines. Armed mines are either emplaced with all safety devices withdrawn, or are armed following emplacement, so as to detonate when preset parameters (if any) are satisfied. Controllable mines have no destructive capability until affirmatively activated by some form of arming order (whereupon they become armed mines).

## 9.2.2 Peacetime Mining

Consistent with the safety of its own citizenry, a State may emplace both armed and controllable mines in its own internal waters at any time with or without notification. A State may also mine its own archipelagic waters and territorial sea during peacetime when deemed necessary for national security purposes. If armed mines are emplaced in archipelagic waters or the territorial sea, appropriate international notification of the existence and location of such mines is required. Because the right of innocent passage may be suspended only temporarily, armed mines must be removed or rendered harmless as soon as the security threat that prompted their emplacement has terminated. Armed mines may not be emplaced in international straits or archipelagic sea lanes during peacetime. Emplacement of controllable mines in a nation's own archipelagic waters or territorial sea is not subject to such notification or removal requirements.

Naval mines may not be emplaced in the internal waters, territorial seas, or archipelagic waters of another nation in peacetime without that nation's consent. Controllable mines may, however, be emplaced in international waters (i.e., beyond the territorial sea) if they do not unreasonably interfere with other lawful uses of the oceans. The determination of what constitutes an "unreasonable interference" involves a balancing of a number of factors, including the rationale for their emplacement (i.e., the self-defense requirements of the emplacing nation), the extent of the area to be mined, the hazard (if any) to other lawful ocean uses, and the duration of their emplacement. Because controllable mines do not constitute a hazard to navigation, international notice of their emplacement is not required.

Armed mines may not be emplaced in international waters prior to the outbreak of armed conflict, except under the most demanding requirements of individual or collective self-defense. Should armed mines be emplaced in international waters under such circumstances, then prior notification of their location must be provided. A nation emplacing armed mines in international waters during peacetime must maintain an on-scene presence in the area sufficient to ensure that appropriate warning is provided to ships approaching the danger area. All armed mines must be expeditiously removed or rendered harmless when the imminent danger that prompted their emplacement has passed.

## 9.2.3 Mining During Armed Conflict

Naval mines may be lawfully employed by parties to an armed conflict subject to the following restrictions:

1. International notification of the location of emplaced mines must be made as soon as military exigencies permit.
2. Mines may not be emplaced by belligerents in neutral waters.
3. Anchored mines must become harmless as soon as they have broken their moorings.
4. Unanchored mines not otherwise affixed or imbedded in the bottom must become harmless within an hour after loss of control over them.
5. The location of minefields must be carefully recorded to ensure accurate notification and to facilitate subsequent removal and/or deactivation.
6. Naval mines may be employed to channelize neutral shipping, but not in a manner to deny transit passage of international straits or archipelagic sea lanes passage of archipelagic waters by such shipping.
7. Naval mines may not be emplaced off the coasts and ports of the enemy with the sole objective of intercepting commercial shipping, but may otherwise be employed in the strategic blockade of enemy ports, coasts, and waterways.
8. Mining areas of indefinite extent in international waters is prohibited. Reasonably limited barred areas may be established by naval mines, provided neutral shipping retains an alternate route around or through such an area with reasonable assurance of safety.

### **9.3 LAND MINES**

Land mines are munitions placed on, under, or near the ground or other surface area and designed to be detonated or exploded by the presence, proximity or contact of a person or vehicle. As with all weapons, to be lawful, land mines must be directed at military objectives. The controlled nature of command-detonated land mines provides effective target discrimination. In the case of noncommand-detonated land mines, however, there exists potential for indiscriminate injury to civilians. Accordingly, special care must be taken when employing land mines to ensure civilians are not indiscriminately injured. International law requires that, to the extent possible, belligerents record the location of all minefields in order to facilitate their removal upon the cessation of hostilities. It is the practice of the United States to record the location of minefields in all circumstances.

The 1997 Ottawa Convention imposes a ban on the use, stockpiling, production, and transfer of antipersonnel land mines (APLs), which are designed to be exploded by the presence, proximity, or contact of a person and that will incapacitate, injure, or kill one or more persons. This prohibition does not apply to command detonated weapons (such as claymores in a nontripwire mode) or to anti-vehicle land mines (AVLs), also referred to as mines other than antipersonnel mines. The United States is not a party to the Ottawa Convention, however, many of its allies and coalition partners are, and this may, depending on the circumstances at the time, impact operational planning regarding shipment, resupply, and placement of landmines.

The United States is a party to Amended Protocol II to the Conventional Weapons Convention. This Protocol does not ban APLs, but imposes requirements on State parties regarding use, maintenance, and removal of mines and minefields. Overall, U.S. policy on landmine use regards both APLs and AVLs as necessary and effective weapons when properly employed, but recognizes the primary danger of incidental and or indiscriminate injury to civilians and noncombatants from landmines is a factor of whether or not a particular mine (whether APL or AVL) is “persistent” or “nonpersistent” (i.e., designed to either automatically de-arm or self-destruct, or capable of being controlled). On 23 September 2014, the United States announced a new policy on landmines which aligns its APL policy outside the Korean Peninsula with the key requirements of the Ottawa Convention. Under the policy the United States will:

1. Not use APL outside the Korean Peninsula
2. Not assist, encourage, or induce anyone outside the Korean Peninsula to engage in activity prohibited by the Ottawa Convention
3. Undertake to destroy APL stockpiles not required for the defense of the Republic of Korea.

### **9.4 TORPEDOES**

Torpedoes must be designed to sink or otherwise become harmless when they have missed their intended target. This rule is based upon the premise that a torpedo that misses its target becomes a hazard to innocent shipping in the same manner as a free-floating mine.

### **9.5 CLUSTER AND FRAGMENTATION WEAPONS**

Fragmentation weapons are projectiles, bombs, missiles, submunitions, and grenades that are designed to fragment upon detonation, thereby expanding the radius of their lethality and destructiveness. Cluster munitions are weapons designed to disperse or release explosive submunitions and includes those explosive submunitions. These weapons are lawful when used against combatants and military objects. When used in proximity to civilians or civilian objects, their employment should be carefully monitored to ensure that collateral damage and incidental injury is not excessive in relation to the legitimate military advantage sought.

The Convention on Cluster Munitions (CCM) prohibits the use, development, production, acquisition, stockpiling, retention, or transfer of cluster munitions. The United States is not a party to the CCM and the CCM does not prohibit State parties from engaging in military cooperation and operations with States that are not parties.

In accordance with the Secretary of Defense's 2008 Policy on Cluster Munitions, after 2018 the United States will not employ cluster munitions that possess an unexploded explosive ordnance (UXO) rate greater than 1 percent. Until the end of 2018, cluster munitions exceeding the 1 percent UXO limit may only be used upon approval by the combatant commander. This policy also requires the reduction of excess and obsolete cluster munition inventories.

## **9.6 BOOBY TRAPS AND OTHER DELAYED-ACTION DEVICES**

Booby traps and other delayed-action devices are not unlawful, provided they are not designed to cause unnecessary suffering or employed in an indiscriminate manner. Devices that are designed to simulate items likely to attract and injure noncombatants (e.g., medical supplies) and civilians (e.g., toys and trinkets) are prohibited. Attaching booby traps to protected persons or objects, such as the wounded and sick, dead bodies, medical facilities and supplies, or items with internationally recognized protective emblems, signs, or signals, is similarly prohibited. Belligerents are required to record the location of booby traps and other delayed-action devices in the same manner as land mines. (See paragraph 9.3.)

## **9.7 EXPLOSIVE REMNANTS OF WAR**

Protocol V to the Conventional Weapons Convention defines explosive remnants of war (ERW) as UXO and abandoned explosive ordnance. Unexploded explosive ordnance is explosive ordnance (i.e., conventional munitions containing explosives, with the exception of mines, booby traps, and other devices as defined in Amended Protocol II of the convention) that has been primed, fuzed, armed, or otherwise prepared for use and used in an armed conflict. It includes ordnance that has been fired, dropped, launched, or projected, and failed to explode. Abandoned explosive ordnance means explosive ordnance that has not been used during an armed conflict, that has been left behind or dumped by a party to an armed conflict, and which is no longer under control of the party that left it behind or dumped it. Abandoned explosive ordnance may or may not have been primed, fuzed, armed, or otherwise prepared for use.

States ratifying the protocol, to include the United States, agree to maintain records regarding the use of ERW, and to mark, clear, remove, or destroy ERW in territories under their control as soon as feasible after the cessation of active hostilities. In territory that they do not control, States that used explosive ordnance agree to assist with clearing, removing, or destroying ERW. The protocol applies to land territory and internal waters. It does not apply to ERW existing prior to ratification.

## **9.8 INCENDIARY WEAPONS**

An incendiary weapon is any weapon or munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat, or combination thereof, produced by a chemical reaction of a substance delivered on the target. Incendiary weapons can take the form of, for example, flame throwers, flame fougasses, shells, rockets, grenades, mines, bombs, and other containers of incendiary substances. Incendiary weapons do not include munitions which have incidental incendiary effects, such as illuminants, tracers, signaling flares, etc. It also does not include munitions designed to combine an incendiary effect with penetration, blast, or fragmenting effects, such as armor-piercing rounds, etc., which are designed for use against tanks, aircraft, etc., and are not intended to cause burn injuries to personnel.

Incendiary devices are lawful weapons which may be employed against combatants and military objects. Where incendiary devices are the weapons of choice, they should be employed in a manner that does not cause incidental injury or collateral damage that is excessive in light of the military advantage anticipated by the attack.

The Conventional Weapons Convention's Protocol III on Prohibitions on the Use of Incendiary Weapons places restrictions on attacks on military objectives located within a concentration of civilians. It completely prohibits attacks against military objectives located within concentrations of civilians by air-delivered incendiary weapons. It further prohibits attacks against military objectives located within a concentration of civilians by means other than air-delivery, except when such military objective is clearly separated from the concentration of civilians and all feasible precautions are taken with a view to limiting the incendiary effects to the military objective and to

avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects. It also specifically prohibits incendiary attacks on forests or other plant cover except when those conceal, cover or camouflage combatants or other military objectives, or are themselves military objectives. The United States ratified Protocol III but reserved its right to use incendiary weapons against military objectives located in concentrations of civilians where it is judged that such use would cause fewer casualties and/or less collateral damage than alternative weapons. This reservation could include, for instance, situations where incendiary weapons are the only means which can effectively destroy biological or chemical weapons facilities (since resort to high explosives against such targets could risk widespread release of dangerous substances).

## **9.9 DIRECTED-ENERGY DEVICES**

Directed-energy devices, such as laser, high-powered microwave, particle-beam devices, and active-denial systems using millimeter electromagnetic waves are not proscribed by the law of armed conflict. Lasers may be employed as a rangefinder or for target acquisition, despite the possibility of incidental injury to enemy personnel. Laser “dazzlers” designed to temporarily disorient may also be employed.

The Conventional Weapons Convention’s Protocol IV on Blinding Laser Weapons, prohibits the use or transfer of laser weapons specifically designed to cause blindness to unenhanced vision (e.g., to the naked eye or to the eye with corrective lenses). While blinding as an incidental effect of the legitimate military employment of range finding or target acquisition lasers is not prohibited by Protocol IV, parties thereto are obligated to take all feasible precautions to avoid such injuries. Laser weapons utilized to counter adversary optical equipment which causes incidental permanent blindness are also not prohibited. The United States has ratified Protocol IV.

## **9.10 OVER-THE-HORIZON WEAPONS SYSTEMS**

Missiles and projectiles with OTH or beyond-visual-range capabilities are lawful provided they are equipped with sensors or are employed in conjunction with external sources of targeting data that are sufficient to ensure effective target discrimination. (See paragraph 9.1.2.)

## **9.11 NONLETHAL WEAPONS**

Nonlethal weapons (NLWs) are weapons, devices, and munitions that are explicitly designed and primarily employed to incapacitate targeted personnel or materiel immediately, while minimizing fatalities, permanent injury to personnel, and undesired damage to property and the environment. Unlike conventional (lethal) weapons, which utilize blast, penetration, and fragmentation to destroy their targets, NLWs employ means other than gross physical destruction to incapacitate the target. NLW are generally intended to have reversible effects on personnel or material.

Nonlethal weapons are not required to have a zero probability of producing fatalities or permanent injuries. When properly employed, NLWs should significantly reduce injurious effects as compared with physically destroying the same target. The mere fact that NLWs are in a unit’s inventory does not mean that the law requires that such weapons be employed prior to using conventional (lethal) weapons. The availability of NLWs will not limit the commander’s inherent right or obligation to exercise unit self-defense in response to a hostile act or demonstration of hostile intent, or to use lethal force when authorized by competent authority pursuant to the SROE or SRUF. NLWs are merely another option for commanders to use, as appropriate, in exercising the right and obligation of self-defense and in carrying out assigned missions. Their availability does not create a higher standard for the use of force, under the applicable law, ROE, or other rules for the use of force.



## CHAPTER 10

# Chemical, Biological, Radiological, and Nuclear Weapons

### 10.1 INTRODUCTION

Chemical, biological, radiological, and nuclear weapons, often referred to as WMD, and their delivery systems present special law of armed conflict problems due to their potential for indiscriminate effect. This chapter addresses legal considerations pertaining to the development, possession, deployment, and employment of these weapons.

### 10.2 NUCLEAR WEAPONS

#### 10.2.1 General

There are no rules of customary or conventional international law prohibiting States from employing nuclear weapons in armed conflict. In the absence of such an express prohibition, the use of nuclear weapons against enemy combatants and other military objectives is not unlawful. Employment of nuclear weapons is, however, subject to the following principles: the right of the parties to the conflict to adopt means of injuring the enemy is not unlimited; it is prohibited to launch attacks against the civilian population as such; and distinction must be made at all times between combatants and civilians to the effect that the latter be spared as much as possible. Given their destructive potential, the decision to authorize employment of nuclear weapons should emanate from the highest level of government. For the United States, that authority resides solely with the President.

#### 10.2.2 Treaty Obligations

Nuclear weapons are regulated by a number of arms control agreements restricting their development, possession, deployment, and use. Some of these agreements (e.g., the 1963 Limited Test Ban Treaty) may not apply during time of war.

##### 10.2.2.1 Seabed Arms Control Treaty

This multilateral convention prohibits emplacement of nuclear weapons on the seabed and the ocean floor beyond 12 nautical miles from the baseline from which the territorial sea is measured. The prohibition extends to structures, launching installations, and other facilities specifically designed for storing, testing, or using nuclear weapons. This treaty prohibits emplacement of nuclear mines on the seabed and ocean floor or in the subsoil thereof. It does not, however, prohibit the use of nuclear weapons in the water column, provided they are not affixed to the seabed (e.g., nuclear-armed depth charges and torpedoes).

##### 10.2.2.2 Outer Space Treaty

This multilateral convention prohibits the placement in Earth orbit, installation on the moon and other celestial bodies, and stationing in outer space in any other manner, of nuclear and other WMD. Suborbital missile systems are not included in this prohibition.

### **10.2.2.3 Antarctic Treaty**

The Antarctic Treaty is a multilateral convention designed to ensure that Antarctica, defined to include the area south of 60° south latitude, is used for peaceful purposes only. The treaty prohibits in Antarctica “any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons.” Nuclear explosions are specifically prohibited. Ships and aircraft at points of discharging or embarking personnel or cargoes in Antarctica are subject to international inspection. This treaty does not, however, affect in any way the high seas freedoms of navigation and overflight in the Antarctic region.

### **10.2.2.4 Treaty of Tlatelolco**

This treaty is an agreement among the Latin American countries not to introduce nuclear weapons into Latin America. The treaty does not, however, prohibit Latin American States from authorizing nuclear-armed ships and aircraft of nonmember States to visit their ports and airfields or to transit through their territorial sea or national airspace. The treaty is not applicable to the means of propulsion of any vessel.

Protocol I to the Tlatelolco treaty is an agreement among non-Latin American States that exercise international responsibility over territory within the treaty area to abide by the denuclearization provisions of the treaty. France, the Netherlands, the United Kingdom, and the United States are parties to Protocol I. For purposes of this treaty, U.S.-controlled territory in Latin America includes Guantanamo Bay in Cuba, the Virgin Islands, and Puerto Rico. Consequently, the United States cannot maintain nuclear weapons in those areas. Protocol I States retain, however, competence to authorize transits and port visits by ships and aircraft of their own or other armed forces in their Protocol I territories, irrespective of armament, cargo, or means of propulsion.

Protocol II to the Tlatelolco treaty is an agreement among several nuclear-armed States (China, France, Russia, the United Kingdom, and the United States) to respect the denuclearization aims of the treaty, to not use nuclear weapons against Latin American States that are party to the treaty, and to refrain from contributing to a violation of the treaty by State parties.

### **10.2.2.5 Additional Nuclear Weapon-Free Zones**

Although not currently ratified by the United States, several additional treaties seek to create nuclear weapon-free zones. These treaties are: the 1985 Treaty of Rarotonga (South Pacific); the 1995 Treaty of Bangkok (Southeast Asia); the 1996 Treaty of Pelindaba (Africa); and the 2006 Treaty of Semipalatinsk (Central Asia).

### **10.2.2.6 Limited Test Ban Treaty**

This multilateral treaty prohibits the testing of nuclear weapons in the atmosphere, in outer space, and underwater. Over 100 States are party to the treaty, including Russia, the United Kingdom, and the United States (France and China are not parties). Underground testing of nuclear weapons is not included within the ban.

### **10.2.2.7 Nonproliferation Treaty**

This multilateral treaty obligates nuclear-weapons States to refrain from transferring nuclear weapons or nuclear weapons technology to nonnuclear-weapons States, and obligates nonnuclear-weapons States to refrain from accepting such weapons from nuclear-weapons States or from manufacturing nuclear weapons themselves. The treaty does not apply in time of war, and parties may withdraw from the treaty if the “supreme interests of a nation are at stake.”

### **10.2.2.8 Bilateral Nuclear Arms Control Agreements**

The United States and Russia (as the successor State to the USSR) are parties to a number of bilateral agreements designed to either restrain the growth or reduce the number of nuclear warheads and launchers and to reduce the risk of miscalculation that could trigger a nuclear exchange. Among these agreements are the Hotline Agreements of 1963 and 1971, the Accidents Measures Agreement of 1971, the 1973 Agreement on Prevention of Nuclear War, the Threshold Test Ban Treaty of 1974, the 1976 Treaty on Peaceful Nuclear Explosions, the Strategic Arms

Limitation Talks (SALT) Agreements of 1972 and 1977 (SALT I—Interim Agreement has expired; SALT II was never ratified), the Intermediate Range Nuclear Forces Treaty of 1988, and the Strategic Arms Reduction Treaties (START) of 1991 (START I) and 1993 (START II). The START treaties initiated the process of physical destruction of strategic nuclear warheads and launchers by the United States, Russia, Ukraine, Belarus, and Kazakhstan (the latter four being recognized as successor States to the USSR for this purpose).

On 14 June 2002, Russia announced its withdrawal from START II. On 24 May 2002, the United States and Russia concluded the Strategic Offensive Reductions Treaty whereby they agreed to reduce and limit their respective strategic nuclear warheads to an aggregate number not to exceed 1,700–2,000 for each party by 31 December 2012. In April 2010, the United States and Russia signed the New START treaty, which entered into force on 5 February 2011 and has a 10-year duration. Like the START treaties before it, New START continues efforts to reduce and limit nuclear warheads and launchers.

### **10.3 CHEMICAL WEAPONS**

International law prohibits the use of chemical weapons under any circumstances.

#### **10.3.1 Treaty Obligations**

Prior to 1993, the 1925 Geneva Gas Protocol for the Prohibition of the use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (the “1925 Gas Protocol”) was the principle international agreement in force relating to the regulation of chemical weapons in armed conflict. The far more comprehensive 1993 Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (the “1993 Chemical Weapons Convention” or “CWC”) prohibits the development, production, stockpiling, and use of chemical weapons, and mandates the destruction of chemical weapons and chemical weapons production facilities for all States that are party to it. Specific chemicals are identified in three lists, referred to as “Schedules.” The Chemical Weapons Convention does not, however, modify existing international law with respect to herbicidal agents. The Chemical Weapons Convention also forbids the use of riot control agents (RCAs) when employed as a “method of warfare.” The United States is a party to both treaties.

#### **10.3.2 Riot Control Agents**

The Chemical Weapons Convention defines RCAs as any chemical not listed in a schedule that can produce rapidly in humans sensory irritation or disabling physical effects that disappear within a short time following termination of exposure. States agree not to use RCAs as a “method of warfare;” however, the Convention does not define the term. The United States ratified the Chemical Weapons Convention subject to the understanding that nothing in the Convention prohibited the use of RCAs in accordance with Executive Order 11850.

##### **10.3.2.1 Riot Control Agents in Armed Conflict**

Under Executive Order 11850, Renunciation of certain uses in war of chemical herbicides and RCAs, the United States renounced the first use of RCAs in armed conflict except in defensive military modes to save lives, in situations such as:

1. Riot control situations in areas under effective U.S. military control, to include control of rioting POWs.
2. Situations in which civilians are used to mask or screen attacks and civilian casualties can be reduced or avoided.
3. Rescue missions in remotely isolated areas involving downed aircrews and passengers, or escaping POWs.
4. Protection of convoys in rear echelon areas from civil disturbances, terrorist activities, or paramilitary operations.

Such employment of RCAs by U.S. forces in armed conflict requires presidential approval.

The United States considers that the prohibition on the use of RCAs as a “method of warfare” applies in international and non-international armed conflict, but that it does not apply in normal peacekeeping operations, law enforcement operations, humanitarian and disaster relief operations, counterterrorist and hostage rescue

operations, noncombatant rescue operations, and any other operations not considered international or internal armed conflict. CJCSI 3110.07D, Guidance Concerning Employment of Riot Control Agents and Herbicides (U), provides further guidance.

### **10.3.2.2 Riot Control Agents in Time of Peace**

Employment of RCAs in peacetime is not proscribed by either the 1925 Gas Protocol or the 1993 Chemical Weapons Convention and may be authorized by the Secretary of Defense or in limited circumstances by the commanders of the combatant commands. Circumstances in which RCAs may be authorized for employment in peacetime include:

1. Civil disturbances in the United States, its territories and possessions.
2. Protection and security on U.S. bases, posts, embassy grounds, and installations overseas, including riot control purposes.
3. Law enforcement:
  - a. On-base and off-base in the United States, its territories and possessions
  - b. On-base overseas
  - c. Off-base overseas when specifically authorized by the host government.
4. Noncombatant evacuation operations.
5. Security operations regarding the protection or recovery of nuclear weapons.

### **10.3.3 Herbicidal Agents**

Herbicidal agents are gases, liquids, and analogous substances that are designed to defoliate trees, bushes, or shrubs, or to kill long grasses and other vegetation that could shield the movement of enemy forces. The United States considers that use of herbicidal agents in wartime is not prohibited by either the 1925 Gas Protocol or the 1993 Chemical Weapons Convention, but has formally renounced, in Executive Order 11850, the first use of herbicides in time of armed conflict except for control of vegetation within U.S. bases and installations or around their immediate defensive perimeters. Use of herbicidal agents during armed conflict requires presidential approval. Use of herbicidal agents in peacetime may be authorized by the Secretary of Defense or, in limited circumstances, by commanders of the combatant commands. See CJCSI 3110.07D, Guidance Concerning Employment of Riot Control Agents and Herbicides (U) for further guidance.

## **10.4 BIOLOGICAL WEAPONS**

International law prohibits all biological weapons or methods of warfare whether directed against persons, animals, or plant life. United States domestic law prohibits the use of biological weapons for any purpose, including antimaterial purposes. (See 18 U.S.C. § 175 *et seq.*). Biological weapons include microbial or other biological agents or toxins whatever their origin (i.e., natural or artificial) or methods of production.

### **10.4.1 Treaty Obligations**

The 1925 Gas Protocol prohibits the use in armed conflict of biological weapons. The 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (the “1972 Biological Weapons Convention” or “BWC”) prohibits the production, testing, and stockpiling of biological weapons. The Convention obligates States that are a party thereto not to develop, produce, stockpile, or acquire biological agents or toxins “of types and in quantities that have no justification for prophylactic, protective, or other peaceful purposes,” as well as “weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.” All such materials were to be destroyed by 26 December 1975. The United States, Russia, and most other NATO and former Warsaw Pact States are parties to both the 1925 Gas Protocol and the 1972 Biological Weapons Convention.

#### **10.4.2 U.S. Policy Regarding Biological Weapons**

The United States considers the prohibition against the use of biological and toxin weapons during armed conflict to be part of customary international law and thereby binding on all States whether or not they are parties to the 1925 Gas Protocol or the 1972 Biological Weapons Convention.

The United States has, therefore, formally renounced the use of biological weapons under any circumstance. Pursuant to its treaty obligations, the United States has destroyed all its biological and toxin weapons and restricts its research activities to development of defensive capabilities.

#### **10.5 RADIOLOGICAL WEAPONS**

Radiological weapons include radiological dispersal devices and radiological exposure devices. A radiological dispersal device, other than a nuclear explosive device, is designed to disseminate radioactive material in order to cause panic, chaos, and fear. A radiological exposure device is a highly radioactive source which is placed in a location where people could be exposed. Radiological weapons are not considered to be militarily useful for a State-sponsored military, but may be desirable for non-State actors and terrorist organizations wishing to inflict psychological and economic damage.

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## CHAPTER 11

# Treatment of Detained Persons

### 11.1 INTRODUCTION

The law of armed conflict requires humane treatment for all persons who are detained. What treatment detained persons receive above and beyond this minimum standard is dependent on their status at the time they are detained. This chapter examines standards of treatment required for combatants, unprivileged belligerents, noncombatants, and civilians (see paragraph 5.4, Persons in the Operational Environment, for definitions).

### 11.2 HUMANE TREATMENT

Pursuant to international law and U.S. policy, all persons under the control of DoD personnel (military, civilian, or contractor employee) during any military operation must be treated humanely and protected against any cruel, inhuman, or degrading treatment until their final release, transfer, or repatriation. At a minimum, humane treatment includes compliance with CA3 of the Geneva Conventions of 1949. During international armed conflict, Article 75 of Additional Protocol I to the Geneva Conventions, provides additional fundamental guarantees. The U.S. is not a party to Additional Protocol I, but complies with Article 75 out of a sense of legal obligation. In those cases of non-international armed conflict where dissident armed forces or other armed groups are as organized and disciplined as regular armed forces, Article 4 of Additional Protocol II to the Geneva Conventions, provides additional humane treatment and fair trial guarantees that the United States complies with.

Humane treatment is, at a minimum, protection from unlawful threats or acts of violence and deprivation of basic human necessities and will be afforded to all detained persons without adverse distinction based on race, color, religion or faith, sex, birth or wealth, national or social origin, political opinion, or any other similar criteria. Specifically, the following acts are prohibited with respect to all detainees in DoD custody and control:

1. Violence to life and person, in particular murder, mutilation, cruel treatment, torture, and any form of corporal punishment.
2. Taking of hostages.
3. Outrages upon personal dignity, in particular humiliating and degrading treatment.
4. Passing sentences and carrying out executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees that are recognized as indispensable by civilized peoples.
5. Rape, enforced prostitution, and other indecent assault.
6. Protection against public curiosity and insults.
7. Prohibition against biological or medical experiments.
8. Threats to commit any of the acts above are also prohibited.

Any violation of these rules is strictly prohibited and is not justified by the stress of combat or provocation.

All detainees shall:

1. Receive appropriate medical attention and treatment.
2. Receive sufficient food, drinking water, shelter, and clothing.
3. Be allowed the free exercise of religion, consistent with the requirements for safety and security.
4. Be removed as soon as practicable from the point of capture and transported to detainee collection points, holding facilities, or other internment facilities operated by DoD components.
5. Have their person registered and their property accounted for and records maintained according to applicable law, policy, and regulation; including notice of their detention to the ICRC, and timely access for an ICRC representative to visit them.
6. Be respected as human beings.

Detainees may have appropriate contact with the outside world subject to security measures, practical considerations and other military necessities, including through correspondence, videos, and family contact.

Beyond the baseline humane treatment standard set forth in this section, some persons who are detained may also qualify for POW status under the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949 (GPW). If doubt exists as to how to treat a particular detainee, U.S. military personnel should seek guidance through their chain of command. Until this doubt has been resolved, detainees must receive the protections of a POW under the GPW.

The commander should have and be familiar with the following references in making any determinations or seeking guidance relative to detainees. These are in addition to any mission-specific or theater-specific operational orders:

1. DoDD 2310.01 (series), DoD Detainee Program
2. DoDD 3115.09, DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning
3. JP 3-63, Detainee Operations
4. Army Regulation 190-8/OPNAVINST 3461.6/Air Force Joint Instruction 31-304/Marine Corps Order 3461.1, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (multi-Service regulation)
5. FM 3-63, Detainee Operations
6. FM 2-22.3, Human Intelligence Collector Operations.

### **11.3 COMBATANTS**

Generally, combatants are members of the armed forces of a State, with the exception of medical personnel and clergy. Militias and irregular forces can also qualify as combatants by meeting certain requirements. See paragraph 5.4 for more information.

#### **11.3.1 Standard of Treatment**

Combatants (see paragraph 5.4.1) who are captured or detained during an international armed conflict are entitled to POW status. Which detainees are entitled to POW status is determined by the capturing State applying the rules provided in the GPW. Because the GPW only applies during international armed conflict, there is no legal entitlement to POW status in a non-international armed conflict. However, persons in those conflicts who meet the definition of combatants (e.g., members of the armed forces) receive some of the same protections.



If there is any doubt as to whether a person is entitled to POW status, that individual must be accorded the protections afforded POWs until a competent tribunal convened by the detaining power determines the status to which that individual is entitled. This is generally known as an Article 5 tribunal based on Article 5, GPW. Also, as a matter of policy a State can grant POW protections to individuals who do not qualify as a matter of law. Detainees who do not qualify for POW status must still be afforded the protections of CA3 of the Geneva Conventions.

POW status carries with it extensive rights and privileges. The GPW details the rights and obligations of both prisoners and detaining powers and should be consulted if a commander is charged with the care of POWs. When POWs are given medical treatment, differences in treatment among detainees may only be based on medical grounds. When treated together with members of U.S. Armed Forces, differences in treatment may be based only on medical grounds. POWs may be questioned upon capture but are required to disclose only their name, rank, date of birth, and military serial number. Humane treatment must be afforded at all times, and torture, threats, or other coercive acts are prohibited.

### **11.3.2 Trial and Punishment**

Unlike unprivileged belligerents, combatants who are captured must not be punished for hostile acts directed against opposing forces prior to capture, unless those acts constituted violations of the law of armed conflict. POWs prosecuted for war crimes committed prior to capture, or for serious offenses committed after capture, are entitled to be tried by the courts that try the captor's own forces and are to be accorded the same procedural rights. These rights must include the assistance of a fellow prisoner, lawyer counsel, witnesses, and as required, an interpreter.

Although POWs may also be subjected to nonjudicial disciplinary punishment for minor offenses committed during captivity, punishments may not exceed 30 days duration. POWs may not be subjected to collective punishment, nor may reprisal action be taken against them.

### **11.3.3 Labor**

Enlisted POWs may be required to engage in labor having no military character or purpose. Noncommissioned officers may be required to perform only supervisory work. Officers may not be required to work. Any prisoner made to work must have the benefit of working considerations and safeguards similar to the local population.

### **11.3.4 Escape**

POWs must not be judicially punished for acts committed in attempting to escape, unless they injure or kill someone in the process. Disciplinary punishment within the limits described in paragraph 11.3.2 may, however, be imposed upon them for the escape attempt. POWs who make good their escape by rejoining friendly forces or leaving enemy-controlled territory must not be subjected to disciplinary punishment if recaptured. However, they remain subject to punishment for causing death or injury in the course of their escape.

### **11.3.5 Temporary Detention of Prisoners of War, Civilian Internees, and Other Detained Persons Aboard Naval Vessels**

International treaty law expressly prohibits "internment" of POWs other than on land, but does not address temporary detention on board vessels. U.S. policy permits temporary detention of POWs, civilian internees, and detained persons on naval vessels for operational or humanitarian needs as follows:

1. When picked up at sea, they may be temporarily held onboard as operational needs dictate, pending a reasonable opportunity to transfer them to a shore facility or to another vessel for evacuation to a shore facility.
2. They may be temporarily held onboard naval vessels while being transported between land facilities.
3. They may be temporarily held onboard naval vessels if such detention would appreciably improve their safety or health prospects.

Detention on board vessels must be temporary, limited to the minimum period necessary to evacuate such persons from the combat zone or to avoid significant harm such persons would face if detained on land. Commanders

should seek guidance from the chain of command regarding any temporary detention aboard a naval vessel. Use of immobilized vessels for temporary detention of POWs, civilian internees, or detained persons is not authorized without Secretary of Defense approval.

#### **11.4 UNPRIVILEGED BELLIGERENTS**

Unprivileged belligerents (see paragraph 5.4.1.2) do not have a right to engage in hostilities and do not receive combatant immunity for their hostile acts. Additionally, they are not entitled to POW status if detained. However, as with any person detained by the United States, they are entitled to humane treatment as a matter of law and U.S. policy. (See paragraph 11.2.)

Because unprivileged belligerents do not have combatant immunity, they may be prosecuted for their hostile actions. However, prosecution is not required, and unprivileged belligerents may be detained until the cessation of hostilities without being prosecuted for their acts. If prosecuted and convicted, unprivileged belligerents may be detained for the duration of their sentence, even if it extends beyond the cessation of hostilities. Likewise, even if their criminal sentence has been served but hostilities have not ceased, they may be held until the cessation of hostilities. Regardless of the fact that hostilities have not ceased or the full sentence has not been served, a detaining State may release an unprivileged belligerent at any time. For example, a detaining State may decide to end detention before the cessation of hostilities if it determines the detained unprivileged belligerent no longer poses a threat.

#### **11.5 NONCOMBATANTS**

Noncombatants are medical personnel or chaplains in the armed forces who do not take a direct part in hostilities. Because they do not take a direct part in hostilities, noncombatants receive special protections under the law of armed conflict. Medical personnel and chaplains falling into enemy hands do not become POWs. They are given a special status as retained persons, and unless their retention by the enemy is required to provide for the medical or religious needs of POWs, medical personnel and chaplains must be repatriated at the earliest opportunity.

#### **11.6 CIVILIANS**

In international armed conflict and any occupation that follows, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 governs the treatment of civilians. Enemy civilians falling under the control of the armed forces may be interned if security considerations make it absolutely necessary to do so. Civilians sentenced for offenses committed in occupied territory may also be ordered into internment in lieu of punishment. Civilians of an enemy State must not be interned as hostages. Interned persons must not be removed from the occupied territory in which they reside except as their own security or imperative military considerations may require. All interned persons must be treated humanely (see paragraph 11.2) and must not be subjected to reprisal action or collective punishment.

War correspondents, supply contractors, members of organizations responsible for the welfare of Service members, and other persons who accompany the armed forces, although civilians, may be accredited by the armed forces that they accompany. While such persons are not combatants and may not be individually targeted, their close proximity to combatants means that they may be incidentally killed or injured during a lawful attack on a military objective. They are entitled to POW status upon capture provided they have been properly accredited by the armed forces they accompany. Possession of a Geneva Conventions identification card by a civilian accompanying an armed force provides evidence of accreditation by the armed forces of the State issuing the card. Service as a civilian mariner in the crew of an auxiliary vessel or warship is also evidence of accreditation by the armed forces of that State, even if the civilian mariner is not in possession of a Geneva Conventions identification card.

#### **11.7 PERSONNEL HORS DE COMBAT**

Combatants who have been rendered incapable of combat (hors de combat) by wounds, sickness, shipwreck, surrender, or capture are entitled to special protections including assistance and medical attention if necessary. Parties to the conflict must, after each engagement and without delay, take all possible measures to search for and collect the wounded and sick on the field of battle, protect them from harm, and ensure their care. When

circumstances permit, a cease-fire should be arranged to enable the wounded and sick to be located and removed to safety and medical care. Wounded and sick personnel falling into enemy hands must be treated humanely and cared for without adverse distinction along with the enemy's own casualties. Priority in order of treatment may only be determined according to medical considerations. The physical and mental well-being of enemy wounded and sick personnel may not be unjustifiably endangered, nor may the wounded and sick be subjected to any medical procedure not called for by their condition or inconsistent with accepted medical standards.

Likewise, a similar duty extends to shipwrecked persons, whether military or civilian. Shipwrecked persons include those in peril at sea or in other waters as a result of the sinking, grounding, or other damage to a vessel in which they are embarked, or of the downing or distress of an aircraft. It is immaterial whether the peril was the result of enemy action or nonmilitary causes. Following each naval engagement at sea, the belligerents are obligated to take all possible measures, consistent with the security of their forces, to search for and rescue the shipwrecked.

The status of persons detained—combatant, unprivileged belligerent, noncombatant, or civilian—does not change as a result of becoming incapacitated by wounds, sickness, shipwreck, or surrender. Consequently, the decision to continue detention of persons hors de combat and the status of such detainees will be determined by their prior classification.

## **11.8 QUESTIONING AND INTERROGATION OF DETAINED PERSONS**

Commanders may order the tactical questioning of detained persons. Tactical questioning is defined in DoDD 3115.09, DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning, as “the field-expedient initial [direct] questioning for information of immediate tactical value of a captured or detained person at or near the point of capture and before the individual is placed in a detention facility.” Tactical questioning is not an interrogation, but a timely and expedient method of questioning by a noninterrogator seeking information of immediate value. It may be conducted by any DoD personnel trained in accordance with subparagraph 4.1 of DoDD 3115.09. Anyone conducting tactical questioning must ensure all detained persons receive humane treatment. Additionally, if the detained person is entitled to POW status additional restrictions on questioning apply. (See paragraph 11.9.)

If questioning beyond tactical questioning is necessary, it is considered interrogation and must only be conducted by DoD-certified personnel who have received specific training in interrogation techniques. Masters-at-arms or other security personnel must not actively participate in interrogations, as their function is limited to security, custody, and control of the detainees. Interrogators may conduct debriefs of the masters-at-arms or other security personnel regarding the detainees for whom they are responsible.

If interrogation is necessary, in addition to securing the services of certified interrogators, reference should be made to the following:

1. Geneva Convention Relative to the Treatment of Prisoners of War, of 12 August 1949
2. DoDD 3115.09, DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning
3. JP 2-01.2, Counterintelligence and Human Intelligence in Joint Operations
4. FM 2-22.3, Human Intelligence Collector Operations.

## **11.9 QUESTIONING OF PRISONERS OF WAR**

Detainees who are entitled to protections set forth in the GPW may not be denied rights or have rights withheld in order to obtain information. Interrogators may offer incentives exceeding basic amenities in exchange for cooperation. POWs are only required to provide name, rank, serial number (if applicable), and date of birth. Failure to provide these items does not result in any loss of protections from inhumane or degrading treatment; a POW who refuses to provide such information shall, however, be regarded as having the lowest rank of that force, and shall be treated accordingly. POWs who refuse to answer questions may not be threatened, insulted, or exposed to unpleasant or disparate treatment.

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## CHAPTER 12

# Deception During Armed Conflict

### 12.1 GENERAL

The law of armed conflict permits deceiving the enemy through ruses of war intended to mislead him, to deter him from taking action, or to induce him to act recklessly, provided the ruses do not constitute perfidy or otherwise violate the rules of international law applicable to armed conflict.

#### 12.1.1 Permitted Deceptions

Ruses of war are methods, resources, and techniques that can be used either to convey false information or deny information to opposing forces. They can include physical, technical, or administrative means, such as electronic warfare measures; flares, smoke, and chaff; camouflage; deceptive lighting; dummy ships and other armament; decoys; simulated forces; feigned attacks and withdrawals; ambushes; false intelligence information; and utilization of enemy codes, passwords, and countersigns.

#### 12.1.2 Prohibited Deceptions

The use of unlawful deceptions is called “perfidy.” Acts of perfidy are acts that invite the confidence of the enemy to lead him to believe that he is entitled to, or is obliged to accord, protected status under the law of armed conflict, with the intent to betray that confidence. Perfidy is prohibited because it may undermine the protections afforded by the law of war to certain classes of persons and objects; diminish legitimate activities that depend upon trust between hostile forces, and damage the basis for the restoration of peace short of the complete annihilation of one belligerent by another. Feigning surrender and then attacking; feigning an intent to negotiate under a flag of truce and then attacking; and feigning death or incapacitation by wounds or sickness and then attacking are examples of acts of perfidy.

### 12.2 IMPROPER USE OF PROTECTIVE SIGNS, SIGNALS, AND SYMBOLS

Improperly using protective signs, signals, and symbols (see paragraphs 8.5.1 and 8.5.2) to injure, kill, or capture the enemy is an act of perfidy. Additionally, use of protective signs, signals, and symbols to impede enemy military operations or to protect one’s own military operations is also prohibited. Such acts are prohibited because they undermine the effectiveness of protective signs, signals, and symbols and thereby jeopardize the safety of noncombatants and the immunity of protected structures and activities. For example, using an ambulance or medical aircraft marked with the Red Cross or Red Crescent to carry armed combatants, weapons, or ammunition with which to attack or elude enemy forces is prohibited. Similarly, use of the white flag to gain a military advantage over the enemy is unlawful.

### 12.3 NEUTRAL FLAGS, INSIGNIA, AND UNIFORMS

#### 12.3.1 At Sea

Under the customary international law of naval warfare, it is permissible for a belligerent warship to fly false colors and disguise its outward appearance in other ways in order to deceive the enemy into believing the vessel is of neutral nationality or is other than a warship. However, it is unlawful for a warship to go into action without first showing her true colors. Use of neutral flags, insignia, or uniforms during an actual armed engagement at sea is forbidden.

### **12.3.2 In the Air**

Use in combat of false or deceptive markings to disguise belligerent military aircraft as being of neutral nationality is prohibited.

### **12.3.3 On Land**

The law of armed conflict applicable to land warfare has no rule of law analogous to that which permits belligerent warships to display neutral colors. Belligerents engaged in armed conflict on land are not permitted to use the flags, insignia, or uniforms of a neutral nation to deceive the enemy.

## **12.4 THE UNITED NATIONS FLAG AND EMBLEM**

The flag of the United Nations and the letters “UN” may not be used in armed conflict for any purpose without the authorization of the United Nations.

## **12.5 ENEMY FLAGS, INSIGNIA, AND UNIFORMS**

### **12.5.1 At Sea**

Naval surface and subsurface forces may fly enemy colors and display enemy markings to deceive the enemy. Warships must, however, display their true colors prior to an actual armed engagement.

### **12.5.2 In the Air**

The use in combat of enemy markings by belligerent military aircraft is forbidden.

### **12.5.3 On Land**

The law of land warfare does not prohibit the use by belligerent land forces of enemy flags, insignia, or uniforms to deceive the enemy either before or following an armed engagement. Once an armed engagement begins, a belligerent is prohibited from deceiving an enemy by wearing an enemy uniform, or using enemy flags and insignia. Combatants risk severe punishment if they are captured while displaying enemy colors or insignia or wearing enemy uniforms in combat.

Similarly, combatants caught behind enemy lines wearing the uniform of their adversaries run the risk of being denied POW status or protection and, historically, have been subjected to severe punishment. It is permissible, however, for downed aircrews and escaping POWs to use enemy uniforms to evade capture, so long as they do not attack enemy forces, collect military intelligence, or engage in similar military operations while so attired.

Captured enemy equipment and supplies may be seized and used. Enemy markings, however, should be removed from captured enemy equipment before it is used in combat.

## **12.6 FEIGNING DISTRESS**

It is unlawful to feign distress through the false use of internationally recognized distress signals such as SOS and MAYDAY. In air warfare, however, it is permissible to feign disablement or other distress as a means to induce the enemy to break off an attack. Consequently, there is no obligation in air warfare to cease attacking a belligerent military aircraft that appears to be disabled. However, if one knows the enemy aircraft is disabled so as to permanently remove it from the conflict (e.g., major fire or structural damage) there is an obligation to cease attacking to permit evacuation by crew or passengers.

## **12.7 FALSE CLAIMS OF NONCOMBATANT OR CIVILIAN STATUS**

It is a violation of the law of armed conflict to attack the enemy by false indication of intent to surrender or by feigning shipwreck, sickness, wounds, noncombatant or civilian status (but see paragraph 12.3.1). An attack by a person feigning shipwreck, sickness, or wounds undermines the protected status of those rendered incapable of combat. Similarly, attacking enemy forces while posing as a civilian puts all civilians at hazard. Such acts of perfidy are punishable as war crimes.

## **12.8 SPIES**

A spy is someone who, while in territory under enemy control or the zone of operations of a belligerent force, seeks to obtain information while operating under a false claim of civilian or friendly forces status with the intention of passing that information to an opposing belligerent. Members of the armed forces who penetrate enemy-held territory in civilian attire or enemy uniform to collect intelligence are spies. Conversely, personnel conducting reconnaissance missions behind enemy lines while properly uniformed are not spies.

Crewmembers of warships, naval auxiliaries (even if crewmembers do not wear uniforms), and military aircraft engaged in intelligence collection missions in enemy waters or airspace are not spies unless the ship or aircraft displays false civilian, neutral, or enemy marking.

Spying during armed conflict is not a violation of international law. Captured spies are not, however, entitled to POW status. The captor nation may try and punish spies in accordance with its domestic criminal law. Should a spy succeed in eluding capture and return to friendly territory, he is immune from punishment for his past espionage activities. If subsequently captured during some other military operation, the former spy cannot be tried or punished for the earlier act of espionage.

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## APPENDIX A

# Maritime Administration (MARAD) Advisory 2013-05—High Risk Waters of the Gulf of Guinea

Advisory #: 2013-05

Date Issued: Jul 23 2013

To: MARINERS

Subject: HIGH RISK WATERS OF THE GULF OF GUINEA

ALL OPERATORS OF U.S. FLAG, EFFECTIVE U.S. CONTROLLED VESSELS, U.S. MERCHANT MARINERS AND OTHER MARITIME INTERESTS

1. THIS MARAD ADVISORY PROVIDES GUIDANCE TO VESSELS TRANSITING AND OPERATING IN THE WATERS OF THE GULF OF GUINEA.
2. U.S.-FLAG OPERATORS WITH SHIPS IN THE AFFECTED AREA ARE REQUESTED TO FORWARD THIS ADVISORY TO THEIR SHIPS BY THE MOST EXPEDITIOUS MEANS.
3. PIRATES/ARMED GROUPS OPERATING IN GULF OF GUINEA REGION CONTINUE TO CARRY OUT ATTACKS ON VESSELS USING AUTOMATIC WEAPONS. HIJACKINGS OF TANKERS FOR CARGO THEFT (REFINED PETROLEUM PRODUCTS), ROBBERY OF CREW, PASSENGERS, AND SHIPS PROPERTY, AND KIDNAPPINGS FOR RANSOM (KFR) CONTINUE TO BE THE MOST COMMON TYPE OF INCIDENTS.
4. DURING 2011, PIRATES/ARMED GROUPS HIJACKED TANKERS LADEN WITH REFINED PETROLEUM PRODUCTS FOR FUEL THEFT OFF THE NIGERIAN AND BENIN COASTS. IN 2012, PIRATES/ARMED GROUPS EXPANDED THEIR OPERATIONS WESTWARD AND BEGAN ALSO HIJACKING TANKERS OFF TOGO AND THE IVORY COAST. IN MID-JULY 2013, PIRATES/ARMED GROUPS HIJACKED A TANKER NEAR PORT GENTIL OFF THE COAST OF GABON AND AN UNIDENTIFIED GROUP ATTEMPTED TO BOARD A U.S. FLAG VESSEL AT ANCHOR IN LOME, TOGO BUT WERE REPELLED BY THE CREW USING FIRE HOSES.
5. PIRATES/ARMED KFR GROUPS CONTINUE TO TARGET SMALL TUGS AND SUPPLY VESSELS SUPPORTING OIL DRILLING AND EXPLORATION OFF THE NIGER DELTA, BUT IN RECENT MONTHS HAVE ALSO BEGUN TO TARGET MERCHANT VESSELS (TANKER AND CARGO SHIPS) TRANSITING AND OPERATING IN THE REGION. PIRATES/ARMED GROUPS HAVE USED MOTHERSHIPS TO SUPPORT SOME KFR OPERATIONS AND HAVE OPERATED UP TO 150 NAUTICAL MILES FROM THE COAST.
6. PIRATES/ARMED KFR GROUPS SOMETIMES FIRE UPON VESSELS BEFORE BOARDING THEM. THEY NORMALLY TAKE THE MASTER AND SEVERAL OTHER CREWMEMBERS OFF THE VESSEL AND DEMAND A RANSOM IN EXCHANGE FOR THEIR SAFE RETURN.

**NWP 1-14M/MCTP 11-10B/COMDTPUB P5800.7A**

7. U.S.-FLAG OPERATORS WITH SHIPS IN THE SUBJECT HIGH RISK WATERS (HRW) SHOULD TRANSIT WITH EXTREME CAUTION AND VIGILANCE.

8. U.S. FLAG VESSELS TRANSITING AND OPERATING IN SUBJECT WATERS MUST COMPLY WITH U.S. COAST GUARD MARSEC DIRECTIVE 104-6 (current version) AND ACCORDINGLY, SHOULD CONDUCT A PRE-VOYAGE RISK ASSESSMENT AND INCORPORATE APPROPRIATE PROTECTIVE MEASURES INTO THEIR VESSEL SECURITY PLAN.

9. A SHIP HOSTILE ACTION REPORT (SHAR) SHOULD BE SENT TO THE NATIONAL GEOSPATIAL INTELLIGENCE AGENCY (NGA) AT [HTTP://MSI.NGA.MIL/NGAPORTAL/MSI.PORTAL](http://MSI.NGA.MIL/NGAPORTAL/MSI.PORTAL) AS SOON AS POSSIBLE FOLLOWING ANY INCIDENT/SUSPICIOUS ACTIVITY, INCLUDING APPARENT SURVEILLANCE BEING CONDUCTED BY SMALL VESSELS/BOATS. REFERENCE NGA PUB 117 FOR FURTHER GUIDANCE.

10. MARAD ADVISORIES ARE PUBLISHED ON THE MARAD WEB SITE AT [WWW.MARAD.DOT.GOV](http://WWW.MARAD.DOT.GOV) AND THE MARITIME SAFETY INFORMATION WEB SITE: [HTTP://MSI.NGA.MIL/NGAPORTAL/MSI.PORTAL](http://MSI.NGA.MIL/NGAPORTAL/MSI.PORTAL) UNDER "BROADCAST WARNINGS", SELECT MARAD ADVISORIES TO DETERMINE MARITIME ADVISORIES THAT REMAIN IN FORCE. CONSULT THE MARITIME ADMINISTRATION WEB SITE AT [HTTP://WWW.MARAD.DOT.GOV](http://WWW.MARAD.DOT.GOV) OR THE MOST RECENT U.S. NOTICE TO MARINERS.

11. FOR FURTHER INFORMATION, CONTACT CAPTAIN ROBERT FORD, MARITIME ADMINISTRATION, OFFICE OF SECURITY, CODE: MAR-420, ROOM W25-207, 1200 NEW JERSEY AVE, S.E., WASHINGTON, DC 20590, TELEPHONE 202-366-0223, FACSIMILE 202-366-3954, TLX II 710.822.9426 (MARAD DOT WSH), OR EMAIL: [MARADSECURITY@DOT.GOV](mailto:MARADSECURITY@DOT.GOV)

12. FOR FURTHER INFORMATION ON THE U.S. COAST GUARD MARSEC DIRECTIVE CONTACT LCDR AARON DEMO, COMMANDANT (CG-CVC-1), 2100 2ND STREET SW, STOP 7581, WASHINGTON DC, 20593, TELEPHONE 202-372-1038, OR EMAIL [AARON.W.DEMO@USCG.MIL](mailto:AARON.W.DEMO@USCG.MIL).

13. CANCEL ADVISORY 2010-07.

July 23, 2013

## APPENDIX B

# MARAD Advisory 2014-01—Guidance to Vessels Transiting and Operating in the Waters of the Mediterranean Sea

Advisory #: 2014 - 01

THIS MARAD ADVISORY PROVIDES GUIDANCE TO VESSELS TRANSITING AND OPERATING IN THE WATERS OF THE MEDITERRANEAN SEA.

U.S.-FLAG OPERATORS WITH SHIPS IN THE AFFECTED AREA ARE REQUESTED TO FORWARD THIS ADVISORY TO THEIR SHIPS BY THE MOST EXPEDITIOUS MEANS.

UNDER OAE NATO SHIPS ARE PATROLLING THE MEDITERRANEAN AND MONITORING SHIPPING TO HELP DETER, DEFEND, DISRUPT AND PROTECT AGAINST TERRORIST ACTIVITY. THE OPERATION, CARRIED OUT UNDER ARTICLE 5 OF THE NATO CHARTER AND CONSISTENT WITH INTERNATIONAL LAW, EVOLVED OUT OF NATO'S IMMEDIATE RESPONSE TO THE TERRORIST ATTACKS AGAINST THE UNITED STATES OF 11 SEPTEMBER 2001 AND, IN VIEW OF ITS SUCCESS, IS BEING CONTINUED. SEE NATO WEBSITE AT [http://www.nato.int/cps/en/natolive/topics\\_7932.htm](http://www.nato.int/cps/en/natolive/topics_7932.htm).

UNDER OAE NATO SHIPS HAIL VESSELS AND REQUEST IDENTIFICATION AND OTHER INFORMATION. BOARDING OF VESSELS MAY BE REQUESTED, AND IS CARRIED OUT ONLY WITH THE CONSENT OF THE MASTER AND/OR THE FLAG STATE. NON-COMPLIANT VESSELS ARE REPORTED TO APPROPRIATE LAW ENFORCEMENT ORGANIZATIONS AND SHADOWED UNTIL ACTION IS TAKEN BY A RESPONSIBLE AGENCY/AUTHORITY OR UNTIL IT ENTERS A COUNTRY'S TERRITORIAL SEA.

U.S.-FLAG VESSELS HAILED BY NATO WARSHIPS UNDER OAE SHOULD COOPERATE TO THE EXTENT POSSIBLE WITHOUT JEOPARDIZING THE SAFETY AND SECURITY OF THE VESSEL, CREW, OR CARGO. IN THE EVENT THE VESSEL CANNOT FULLY COOPERATE WITH OAE, PROVIDE THE HAILING WARSHIP THE VESSEL NAME, IMO NUMBER AND COMPANY SECURITY OFFICER CONTACT INFORMATION, AND REPORT THE CIRCUMSTANCES IMMEDIATELY TO THE COMPANY SECURITY OFFICER.

REPORT ANY SUSPICIOUS ACTIVITY OR INFORMATION TO NATO WARSHIPS OR NATO SHIPPING CENTER, PHONE: 44 192 395 6574, E-MAIL: [INFO@SHIPPING.NATO.INT](mailto:INFO@SHIPPING.NATO.INT).

MARAD ADVISORIES ARE PUBLISHED ON THE MARAD WEB SITE AT [WWW.MARAD.DOT.GOV](http://WWW.MARAD.DOT.GOV) AND ON THE MARITIME SAFETY INFORMATION WEB SITE: <http://msi.nga.mil/NGAPortal/MSI.portal> UNDER "BROADCAST WARNINGS", SELECT MARAD ADVISORIES.

FOR FURTHER INFORMATION REGARDING THIS ADVISORY, CONTACT CAPTAIN ROBERT FORD, MARITIME ADMINISTRATION, OFFICE OF SECURITY, CODE: MAR-420, ROOM W25-308, 1200 NEW JERSEY AVE, S.E., WASHINGTON, DC 20590, TELEPHONE 202-366-0223, FAX 202-366-3954, TLX II 710.822.9426 (MARAD DOT WSH), OR EMAIL: [MARADSECURITY@DOT.GOV](mailto:MARADSECURITY@DOT.GOV).

August 28, 2014

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## APPENDIX C

# MARAD Advisory 2015-01—Guidance to Vessels Operating In or Near the Strait of Hormuz

Advisory #: 2015-01

Date Issued: 1 MAY 2015

To: ALL OPERATORS OF U.S. FLAG, EFFECTIVE U.S. CONTROLLED VESSELS, U.S. MERCHANT MARINERS AND OTHER MARITIME INTERESTS

Subject: GUIDANCE TO VESSELS OPERATING IN OR NEAR THE STRAIT OF HORMUZ

1. THIS ADVISORY SUPERSEDES MARAD ADVISORY 2013-01 AND UPDATES SPECIAL WARNING 114 TO REFLECT A RECENT INCREASE IN CHALLENGES INVOLVING COMMERCIAL SHIPS TRANSITING THE PERSIAN GULF (STRAIT OF HORMUZ) AND PROVIDE GUIDANCE TO MARINERS IN SUCH CIRCUMSTANCES. U.S.-FLAG OPERATORS WITH SHIPS IN THE AFFECTED AREA ARE REQUESTED TO FORWARD THIS ADVISORY TO THEIR SHIPS BY THE MOST EXPEDITIOUS MEANS.

2. MARAD ADVISORIES ARE PUBLISHED ON THE MARAD WEB SITE AT [WWW.MARAD.DOT.GOV/NEWSROOM\\_LANDING\\_PAGE/MARITIME\\_ADVISORIES/ADVISORY\\_SUMMARY.HTM](http://WWW.MARAD.DOT.GOV/NEWSROOM_LANDING_PAGE/MARITIME_ADVISORIES/ADVISORY_SUMMARY.HTM) AND ON THE MARITIME SAFETY INFORMATION WEB SITE AT [MSI.NGA.MIL/NGAPORTAL/MSI.PORTAL](http://MSI.NGA.MIL/NGAPORTAL/MSI.PORTAL). SELECT BROADCAST WARNINGS, SCROLL DOWN TO SEARCH BOX AND SELECT MARAD ADVISORIES.

3. BACKGROUND:

A. AT APPROXIMATELY 0905Z ON 28 APRIL, WHILE TRANSITING THE STRAIT OF HORMUZ IN THE INTERNATIONAL TRAFFIC SEPARATION SCHEME IN THE VICINITY OF 26-39.43N 056-15.0E, M/V MAERSK TIGRIS WAS APPROACHED BY FIVE SMALL IRANIAN PATROL BOATS, HAILED OVER VHF RADIO, AND CONTACTED VIA SATELLITE TELEPHONE. THE MASTER DID NOT INITIALLY COMPLY WITH THE HAILS OR THE DIRECTION OF THE IRANIAN VESSELS. SUBSEQUENTLY, THE IRANIAN VESSELS FIRED THREE WARNING SHOTS ACROSS THE BOW OF M/V MAERSK TIGRIS. THE MASTER COMPLIED WITH IRANIAN DIRECTION AND PROCEEDED TO A POSITION 2 NM EAST OF JUZIRH-YE LARAK, WHERE THE M/V MAERSK TIGRIS WAS BOARDED BY IRANIAN PERSONNEL.

B. AT APPROXIMATELY 0655Z ON 24 APRIL, WHILE TRANSITING IN THE VICINITY OF 25-42N 055-16E (APPROXIMATELY 17 NM OFF THE COAST OF UAE AND 15 NM OFF THE COAST OF ABU MUSA ISLAND), M/V MAERSK KENSINGTON WAS APPROACHED BY FOUR IRANIAN PATROL BOATS AND HAILED OVER VHF RADIO. THE MASTER DID NOT RESPOND TO THE HAILS. SUBSEQUENTLY, THE IRANIAN VESSELS MANEUVERED AROUND M/V MAERSK KENSINGTON AND TOOK A POSITION ASTERN OF THE SHIP. AT APPROXIMATELY 0720Z, ALL IRANIAN VESSELS BROKE PURSUIT.

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4. WHETHER THESE ARE ISOLATED INCIDENTS IS NOT KNOWN. U.S. MERCHANT VESSELS AND MARITIME INTERESTS OPERATING IN ACCORDANCE WITH THE INTERNATIONAL LAW OF THE SEA IN THE WATERS OF THE PERSIAN GULF, STRAIT OF HORMUZ AND GULF OF OMAN ARE ADVISED TO TAKE THE FOLLOWING ACTIONS WHEN TRANSITING THE AREA:

A. IF A U.S.-FLAG VESSEL ENGAGED IN TRANSIT THROUGH THE STRAIT OF HORMUZ OR ITS APPROACHES IS HAILED BY IRANIAN FORCES, IT SHOULD PROVIDE ITS VESSEL NAME AND AFFIRM THAT IT IS EXERCISING THE RIGHT OF TRANSIT PASSAGE IN ACCORDANCE WITH THE INTERNATIONAL LAW OF THE SEA.

B. IF BOARDING OF A U.S.-FLAG VESSEL ENGAGED IN TRANSIT THROUGH THE STRAIT OF HORMUZ OR ITS APPROACHES IS REQUESTED BY IRANIAN FORCES, THE SHIP'S MASTER SHOULD, IF THE SAFETY OF THE SHIP AND CREW WOULD NOT BE COMPROMISED, DECLINE PERMISSION TO BOARD BY NOTING THAT THE VESSEL IS IN TRANSIT PASSAGE AND NOT SUBJECT TO COASTAL STATE ENFORCEMENT JURISDICTION.

C. IF A BOARDING BY IRANIAN FORCES OCCURS EVEN AFTER DECLINING PERMISSION, THE BOARDING SHOULD NOT BE FORCIBLY RESISTED BY PERSONS ON THE U.S.-FLAG MERCHANT VESSEL. REFRAINING FROM FORCIBLE RESISTANCE IN NO WAY INDICATES CONSENT OR AGREEMENT THAT SUCH A BOARDING IS LAWFUL.

D. U.S.-FLAG VESSELS ARE ADVISED TO REPORT SUCH INCIDENTS IMMEDIATELY TO COALITION NAVAL VESSELS ON VHF CHANNEL 16, VIA E-MAIL TO CUSNC.BWC@ME.NAVY.MIL, AND BY PHONE TO 011-973-1785-3879.

E. U.S.-FLAG VESSELS ARE ALSO ENCOURAGED TO REPORT SUCH ACTIVITY TO THE MARITIME ADMINISTRATION AT OPCENT1R@DOT.GOV

5. ALL VESSELS SHOULD BE AWARE THAT COALITION NAVAL FORCES MAY CONDUCT MARITIME AWARENESS CALLS, QUERIES AND APPROACHES IN ORDER TO ENSURE THE SAFETY OF VESSELS TRANSITING THE PERSIAN GULF, STRAIT OF HORMUZ AND GULF OF OMAN. U.S.-FLAG VESSELS APPROACHING COALITION NAVAL FORCES ARE ADVISED TO MAINTAIN RADIO CONTACT ON VHF CHANNEL 16.

6. U.S.-FLAG VESSELS BOUND FOR THE STRAIT OF HORMUZ (IN EITHER DIRECTION) ARE ENCOURAGED TO CONTACT THE U.S. NAVY 5th FLEET NAVAL COOPERATION AND GUIDANCE FOR SHIPPING WATCH AT 011-973-1785-3695 OR AT CUSNC.NCAGS\_bw@ME.NAVY.MIL AT LEAST TWO DAYS PRIOR TO AN ANTICIPATED TRANSIT.

7. THIS ADVISORY IS EFFECTIVE IMMEDIATELY AND WILL REMAIN IN EFFECT UNTIL FURTHER NOTICE.

8. FOR FURTHER INFORMATION REGARDING THIS ADVISORY, CONTACT CAMERON NARON, MARITIME ADMINISTRATION, DIRECTOR OF SECURITY, CODE: MAR-420, ROOM W28-340, 1200 NEW JERSEY AVE, S.E., WASHINGTON, DC 20590, TELEPHONE 202-366-1883, FAX 202-366-3954, TLX II 710.822.9426 (MARAD DOT WSH), OR EMAIL: MARADSECURITY@DOT.GOV.

9. CANCEL ADVISORY 2013-01.

# REFERENCES

## INTERNATIONAL LAW CONCERNING THE LAW OF THE SEA

- 1951 Convention Relating to the Status of Refugees
- 1958 Geneva Convention on the High Seas
- 1959 Antarctic Treaty
- 1972 International Regulations for Preventing Collisions at Sea (COLREGS)
- 1972 U.S.–USSR Agreement on the Prevention of Incidents On and Over the High Seas
- 1974 International Convention for the Safety of Life at Sea (SOLAS)
- 1982 United Nations Convention on the Law of the Sea
- 1988 Convention for the Suppression of Unlawful Acts against the Safety of Navigation (SUA Convention)
- 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances
- 1990 U.S.–U.S.S.R. Agreement on the Prevention of Dangerous Military Activities
- 1991 Protocol on Environmental Protection to the Antarctic Treaty
- 1998 U.S.–China Military Maritime Consultative Agreement
- 2005 Protocols to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation
- 2014 The Code for Unplanned Encounters at Sea
- 2014 U.S.–China Memorandum of Understanding Regarding the Rules of Behavior for Safety of Air and Maritime Encounters
- Convention on International Civil Aviation of 1944 (Chicago Convention)

## INTERNATIONAL LAW CONCERNING THE LAW OF WAR

- 1907 Hague Convention Concerning Bombardment by Naval Forces in Time of War (Hague IX)
- 1907 Hague Convention Concerning the Rights and Duties of Neutral Powers in Naval War (Hague XIII)
- 1907 Hague Convention Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War (Hague XI)
- 1907 Hague Convention Relative to the Laying of Automatic Submarine Contact Mines (Hague VIII)

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1907 Hague Convention Respecting the Laws and Customs of War on Land (Hague IV)

1907 Hague Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague V)

1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare

1936 London Protocol in Regard to the Operations of Submarines or Other War Vessels with Respect to Merchant Vessels

1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field

1949 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea

1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War

1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War

1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict

1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction

1977 Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts

1977 Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts

1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects (with Amendment to Article 1)

1980 Protocol I to the Convention on Certain Conventional Weapons (Non-Detectable Fragments)

1980 Protocol II to the Convention on Certain Conventional Weapons (Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices)

1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

1988 Protocol III to the Convention on Certain Conventional Weapons (Prohibitions or Restrictions on the Use of Incendiary Weapons)

1993 Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction

1995 Protocol IV to the Convention on Certain Conventional Weapons (Blinding Laser Weapons)

1996 Protocol II Amended to the Convention on Certain Conventional Weapons (Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended on 3 May 1996)



1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction

1998 Rome Statute of the International Criminal Court

1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict

2003 Protocol V to the Convention on Certain Conventional Weapons (Explosive Remnants of War)

2005 Protocol III Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem

2008 Oslo/Dublin Convention on Cluster Munitions

Charter of the United Nations, 1945

### **INTERNATIONAL STRAITS TREATIES**

1857 Convention on Discontinuance of Sound Dues (United States and Denmark)

1857 Treaty of Redemption of the Sound Dues

1881 Boundary Treaty between Argentina and Chile

1984 Treaty of Peace and Friendship between Argentina and Chile

1936 Montreux Convention

### **MULTILATERAL ARMS CONTROL AGREEMENTS**

1959 Antarctic Treaty

1963 Limited Test Ban Treaty

1967 Outer Space Treaty

1967 Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco)

1968 Nonproliferation Treaty

1968 Rescue and Return of Astronauts Agreement

1971 Seabed Arms Control Treaty

1985 Treaty of Rarotonga (South Pacific)

1992 Open Skies Treaty

1995 Treaty of Bangkok (Southeast Asia)

1996 Treaty of Pelindaba (Africa)

2006 Treaty of Semipalatinsk (Central Asia)

**U.S. CASES**

Hamdan v. Rumsfeld, 548 U.S. 557 (2006)

**U.S. LAW**

COLREGS Demarcation Lines, 33 Code of Federal Regulations, part 80

Drug Trafficking Vessel Interdiction Act, 18 U.S.C. § 2285

Executive Order 11850, Renunciation of Certain Uses in War of Chemical Herbicides and Riot Control Agents

Maritime Drug Law Enforcement Act, 46 U.S.C. §§ 70501–70507

Military Commissions Act of 2006, Public Law 109–366

Military Commissions Act of 2009, Public Law 111–84

Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. §§ 3261–3267

Naval Vessel Protection Zones, 14 U.S.C. § 91

Navigation and Navigable Waters, 33 U.S.C. §§ 2001–2073

Outer Continental Shelf Lands Act, 43 U.S.C. § 1333

Piracy Under the Law of Nations, 18 U.S.C. § 1651

Posse Comitatus Act, 18 U.S.C. § 1385

Restriction on Direct Participation by Military Personnel, 10 U.S.C. § 275

U.S. Constitution

U.S. Oceans Policy Statement, 10 March 1983

Uniform Code of Military Justice, 10 U.S.C. §§ 801–946

USA Patriot Act of 2001, Public Law 107–56

War Crimes Act of 1996, 18 U.S.C. § 2441

**U.S. MILITARY DOCUMENTS**

Army Regulation 190-8/OPNAVINST 3461.6/Air Force Joint Instruction 31-304/Marine Corps Order 3461.1, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees

CJCS Instruction 3110.07D, Guidance Concerning Employment of Riot Control Agents and Herbicides (U)

CJCSI 3121.01B, Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces

CJCSI 3520.02B, Proliferation Security Initiative (PSI) Activity Program

CNO NAVADMIN 158/16, Sovereign Immunity Policy

COMDTINST M16247.1D, U.S. Coast Guard Maritime Law Enforcement Manual (MLEM)

COMDTINST M16672.2D, Navigation Rules, International—Inland

COMDTINST M3710.1G, Coast Guard Air Operations Manual

COMDTINST M5000.3B, U.S. Coast Guard Regulations

DoDD 2310.01E, DoD Detainee Program

DoDD 2311.01, DoD Law of War Program

DoDD 3115.09, DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning

DoDI S-2005.01, Freedom of Navigation (FON) Program

DoDI 3025.21, Defense Support of Civilian Law Enforcement Agencies

DoDI 4540.01, Use of International Airspace by U.S. Military Aircraft and for Missile and Projectile Firings

DoDI 5525.11, Criminal Jurisdiction Over Civilians Employed by or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members

DoD Law of War Manual, 2015

Field Manual 2-22.3, Human Intelligence Collector Operations

Field Manual 27-10, The Law of Land Warfare

Field Manual 3-63, Detainee Operations

Field Manual 6-27, The Commander's Handbook on the Law of Land Warfare

Joint Publication 3-13, Information Operations

Joint Publication 3-63, Detainee Operations

NTTP 3-07.2.1, Antiterrorism

OPNAV Instruction 3120.32D, Standard Organization and Regulations of the U.S. Navy

OPNAV Instruction 3128.9F, Diplomatic Clearance for U.S. Navy Marine Data Collection Activities in Foreign Jurisdictions

OPNAV Instruction 3710.7V, Naval Air Training and Operating Procedures Standardizations (NATOPS)

OPNAV Instruction 3770.2K, Airspace Procedures and Planning Manual

OPNAV Instruction 5711.96C, United States/Russian Federation Incidents At Sea and Dangerous Military Activities Agreements

SECNAV Instruction 3300.1C, Department of the Navy Law of War Program

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SECNAV Instruction 5710.22B, Asylum and Temporary Refuge

SECNAV Instruction 5710.26, Compliance and Implementation of the Treaty on Open Skies

SECNAV Instruction 5820.7C, Cooperation with Civilian Law Enforcement Officials

U.S. Maritime Operational Threat Response (MOTR) Plan, 2006

U.S. Navy Regulations, 1990

## **U.S.–RUSSIA NUCLEAR ARMS CONTROL TREATIES**

1973 Agreement on Prevention of Nuclear War

1976 Treaty on Peaceful Nuclear Explosions

Accidents Measures Agreement of 1971

Hotline Agreements of 1963 and 1971

Intermediate Range Nuclear Forces Treaty of 1988

Strategic Arms Limitation Talks (SALT) Agreements of 1972 and 1977

Strategic Arms Reduction Treaties of 1991 (START I), 1993 (START II), and 2010 (New START)

Threshold Test Ban Treaty of 1974

# GLOSSARY

- air defense identification zone (ADIZ).** Airspace of defined dimensions within which the ready identification, location, and control of airborne vehicles are required. (DoD Dictionary. Source: JP 3-52)
- antisubmarine warfare (ASW).** That segment of naval warfare that involves sensors, weapons, platforms, and targets in the subsurface environment. Also see DoD Dictionary.
- exclusive economic zone (EEZ).** A maritime zone adjacent to the territorial sea that may not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. (DoD Dictionary. Source: JP 3-15)
- information operations (IO).** The integrated employment, during military operations, of information-related capabilities in concert with other lines of operation to influence, disrupt, corrupt, or usurp the decision-making of adversaries and potential adversaries while protecting our own. (DoD Dictionary. Source: JP 3-13)
- military information support operations (MISO).** Planned operations to convey selected information and indicators to foreign audiences to influence their emotions, motives, objective reasoning, and ultimately the behavior of foreign governments, organizations, groups, and individuals in a manner favorable to the originator's objectives. (DoD Dictionary. Source: JP 3-13.2)
- Military Sealift Command (MSC).** A major command of the United States Navy reporting to Commander Fleet Forces Command, and the United States Transportation Command's component command responsible for designated common-user sealift transportation services to deploy, employ, sustain, and redeploy United States forces on a global basis. (DoD Dictionary. Source: JP 4-01.2)
- naval vessel protection zone (NVPZ).** A 500-yard regulated area of water surrounding large United States naval vessels that is necessary to provide for the safety or security of these United States naval vessels. (NTRP 1-02)
- noncombatant evacuation operation (NEO).** An operation whereby noncombatant evacuees are evacuated from a threatened area abroad, which includes areas facing actual or potential danger from natural or manmade disaster, civil unrest, imminent or actual terrorist activities, hostilities, and similar circumstances, that is carried out with the assistance of the Department of Defense. (DoD Dictionary. Source: JP 3-68)
- nonlethal weapon.** Weapons, devices, and munitions that are explicitly designed and primarily employed to incapacitate targeted personnel or materiel immediately, while minimizing fatalities, permanent injury to personnel, and undesired damage to property in the target area or environment. NLWs are intended to have reversible effects on personnel and materiel. (Source: DoDD 3000.03E)
- offensive cyberspace operations (OCO).** Cyberspace operations intended to project power by the application of force in or through cyberspace. (DoD Dictionary. Source: JP 3-12)
- prisoner of war (POW).** A detained person (as defined in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949)- Source: GPW, article 4)

**radiological dispersal device (RDD).** An improvised assembly or process, other than a nuclear explosive device, designed to disseminate radioactive material in order to cause destruction, damage, or injury. (DoD Dictionary. Source: JP 3-11)

**radiological exposure device (RED).** A radioactive source placed to cause injury or death. (DoD Dictionary. Source: JP 3-11)

**riot control agent (RCA).** Any chemical, not listed in a schedule of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction that can produce rapidly in humans sensory irritation or disabling physical effects that disappear within a short time following termination of exposure. (DoD Dictionary. Source: JP 3-11)

**rules of engagement (ROE).** Directives issued by competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered. (DoD Dictionary. Source: JP 1-04)

**standing rules for the use of force (SRUF).** Preapproved directives to guide United States forces on the use of force during various operations. (DoD Dictionary. Source: JP 3-28)

**United States Naval Ship (USNS).** A public vessel of the United States that is in the custody of the Navy and is: a. Operated by the Military Sealift Command and manned by a civil service crew; or b. Operated by a commercial company under contract to the Military Sealift Command and manned by a merchant marine crew. (DoD Dictionary. Source: JP 4-01.2)

**unmanned aircraft (UA).** An aircraft that does not carry a human operator and is capable of flight with or without human remote control. (DoD Dictionary. Source: JP 3-30)

**weapons of mass destruction (WMD).** Chemical, biological, radiological, or nuclear weapons capable of a high order of destruction or causing mass casualties, and excluding the means of transporting or propelling the weapon where such means is a separable and divisible part from the weapon. (DoD Dictionary. Source: JP 3-40)

# LIST OF ACRONYMS AND ABBREVIATIONS

<b>ADIZ</b>	air defense identification zone
<b>APL</b>	antipersonnel land mine
<b>ASW</b>	antisubmarine warfare
<b>AT/FP</b>	antiterrorism/force protection
<b>AVL</b>	anti-vehicle land mine
<b>CA3</b>	Common Article 3
<b>CCM</b>	Convention on Cluster Munitions
<b>CJCS</b>	Chairman of the Joint Chiefs of Staff
<b>CJCSI</b>	Chairman of the Joint Chiefs of Staff instruction
<b>CNO</b>	Chief of Naval Operations
<b>COLREGS</b>	International Regulations for Preventing Collisions at Sea
<b>COMDTINST</b>	Coast Guard Commandant Instruction
<b>CUES</b>	Code for Unplanned Encounters at Sea
<b>DMA</b>	dangerous military activities
<b>DoD</b>	Department of Defense
<b>DoDD</b>	Department of Defense directive
<b>DoDI</b>	Department of Defense instruction
<b>EEZ</b>	exclusive economic zone
<b>ERW</b>	explosive remnants of war
<b>FIR</b>	flight information region
<b>FM</b>	field manual
<b>FON</b>	freedom of navigation
<b>GPW</b>	Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949

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<b>ICAO</b>	International Civil Aviation Organization
<b>ICC</b>	International Criminal Court
<b>ICRC</b>	International Committee of the Red Cross
<b>IMO</b>	International Maritime Organization
<b>INCSEA</b>	incidents at sea
<b>IO</b>	information operations
<b>JP</b>	joint publication
<b>MEJA</b>	Military Extraterritorial Jurisdiction Act
<b>MISO</b>	military information support operations
<b>MLE</b>	maritime law enforcement
<b>MLEM</b>	Maritime Law Enforcement Manual (USCG)
<b>MOTR</b>	maritime operational threat response
<b>MOU</b>	memorandum of understanding
<b>MSC</b>	Military Sealift Command
<b>NATO</b>	North Atlantic Treaty Organization
<b>NLW</b>	nonlethal weapon
<b>NTTP</b>	Navy tactics, techniques, and procedures
<b>NVPZ</b>	naval vessel protection zone
<b>OCO</b>	offensive cyberspace operations
<b>OCS</b>	outer continental shelf
<b>OPCON</b>	operational control
<b>OTH</b>	over the horizon
<b>POW</b>	prisoner of war
<b>PSI</b>	Proliferation Security Initiative
<b>RCA</b>	riot control agent
<b>ROE</b>	rules of engagement
<b>SALT</b>	Strategic Arms Limitation Talks



<b>SECNAVINST</b>	Secretary of the Navy instruction
<b>SROE</b>	standing rules of engagement
<b>SRUF</b>	standing rules for the use of force
<b>START</b>	Strategic Arms Reduction Treaty
<b>U.S.C.</b>	United States Code
<b>UA</b>	unmanned aircraft
<b>UCMJ</b>	Uniform Code of Military Justice
<b>UN</b>	United Nations
<b>UNCLOS</b>	United Nations Convention on the Law of the Sea
<b>USCG</b>	United States Coast Guard
<b>USCGC</b>	United States Coast Guard cutter
<b>USNS</b>	United States Naval Ship
<b>USS</b>	United States Ship
<b>USSR</b>	Union of the Soviet Socialist Republics
<b>USV</b>	unmanned surface vehicle
<b>UUV</b>	unmanned underwater vehicle
<b>UXO</b>	unexploded explosive ordnance
<b>WMD</b>	weapons of mass destruction

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