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

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MCTP 11-10B  
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# **THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS**

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**NAVY WARFARE DEVELOPMENT COMMAND  
1528 PIERSEY STREET, BLDG O-27  
NORFOLK, VA 23511-2723**

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**DEPARTMENT OF THE NAVY**  
NAVY WARFARE DEVELOPMENT COMMAND  
1528 PIERSEY STREET BLDG 0-27  
NORFOLK VA 23511-2723



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### LETTER OF PROMULGATION

1. NWP 1-14M/MCTP 11-10B/COMDTPUB P5800.7A (MAR 2022), The Commander's Handbook on the Law of Naval Operations, is approved and hereby promulgated as a doctrinal publication.
2. NWP 1-14M/MCTP 11-10B/COMDTPUB P5800.7A (MAR 2022) provides officers in command and their staffs with an overview of the rules of law governing naval operations in peacetime and during armed conflict. It is intended for the use of operational commanders and supporting staff elements at all levels of command.
3. NWP 1-14M/MCTP 11-10B/COMDTPUB P5800.7A (MAR 2022) was developed in accordance with NTRP 1-01 (JUN 2021), The Navy Warfare Library User Manual. It supersedes NWP 1-14M/MCWP 5-12.1/COMDTPUB 5800.7A (AUG 2017).
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M. R. DURKIN  
Executive Director  
Navy Warfare Development Command

M. BERT  
Rear Admiral, United States Coast Guard  
Judge Advocate General and Chief Counsel

E. R. QUEHL  
Colonel, United States Marine Corps  
Director, Policy and Standards Division  
Training and Education Command

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## SCOPE

This publication sets out fundamental principles of international and domestic law that govern U.S. naval operations at sea. Chapters 1 through 4 provide an overview and general discussion of the law of the sea, including:

1. Definitions and descriptions of the jurisdiction and sovereignty exercised by States over various parts of the world's oceans
2. The international legal status and navigational rights of warships and military aircraft
3. Protection of persons and property at sea
4. The safeguarding of national interests in the maritime environment.

Chapters 5 through 12 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 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 naval commanders and their staff to comprehend more fully the legal foundations upon which the orders issued to them by higher authority are premised and better understand the commander's responsibilities under international and domestic law to execute their missions within that 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, which is generally augmented, limited, or given further clarity by directives issued by operational commanders and their subordinates. It does not supersede guidance issued by the chain of command. It is not directive or a comprehensive treatment of the law. It is not a substitute for definitive legal guidance provided by judge advocates and others responsible for advising commanders on the law.

## 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. 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. The primary sources of international law are customary international law and international agreements.

## **Practice of States**

The general and consistent practice among States with respect to a particular subject, which over time is accepted by them as a legal obligation, is known as customary international law. Customary international law is a principal source of international law and generally binding upon all States. States that have been persistent objectors to a customary international law rule during its development are not bound by that rule.

## **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—bilateral treaties, executive agreements, or multilateral conventions—are another principal source of international law. However, they bind only those States that are party to them or 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.

## **United States 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.

## **INSTRUCTIONS FOR USE**

This and other Navy Warfare Library (NWL) publications, including edition updates, are available on the NWL portal (<https://doctrine.navy.mil/> or <https://doctrine.navy.smil.mil/>). Printed copies may be ordered by following the directions included in Appendix A of NTRP 1-01.

Report urgent changes, routine changes, and administrative discrepancies by letter, general administrative message, or email to COMMANDER, NAVY WARFARE DEVELOPMENT COMMAND, ATTN: DOCTRINE, 1528 PIERSEY STREET, BLDG O-27, NORFOLK, VA 23511-2723. (Email: NWDC\_NRFK\_FLEET\_PUBS@NAVY.MIL)

## **CHANGE BARS**

Revised text is indicated by a black vertical line in the outside margin of the page, like the one printed next to this paragraph. The change bar indicates added or restated information. A change bar in the margin adjacent to the chapter number and title indicates a new or completely revised chapter.

## 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” and “must” indicate 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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## CHAPTER 1

# Legal Divisions of the Oceans and Airspace

### 1.1 INTRODUCTION

The oceans of the world have traditionally 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 (e.g., 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 (nm) 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. The Convention is formally named the United Nations Convention on the Law of the Sea and often referred to as UNCLOS. It is legally distinct from the United Nations (UN), and its treaty bodies are not UN entities.

In 1983, the United States announced it would neither sign nor ratify UNCLOS due to fundamental flaws in its deep seabed—known as the international seabed area (the Area)—mining provisions. Further negotiations resulted in an additional agreement regarding Part XI, which the United States signed on 29 July 1994. It substantially modified the original deep seabed mining provisions. This agreement contains legally binding changes to UNCLOS and is to be applied and interpreted 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. In 2004 and 2007, the Senate Foreign Relations Committee voted in favor of the Convention and recommended Senate advice and consent. On both occasions the full Senate did not hold any hearings on the issue or act on the committee's recommendations. 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 U.S. accession to the Convention.

### 1.2 U.S. OCEANS POLICY

Although the United States is not a party to UNCLOS, it considers the provisions concerning traditional uses of the ocean, such as freedoms of navigation and overflight, as generally reflective of customary international law binding on all States. The United States thus acts in accordance with UNCLOS, except for the deep seabed mining provisions. President Reagan's United States Oceans Policy Statement on 10 March 1983 stated:

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 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 this chapter.

Pursuant DODI S-2005.01, Freedom of Navigation (FON) Program, the Department of Defense (DOD) Representative for Ocean Policy Affairs maintains the Maritime Claims Reference Manual. It 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 discussed in the remainder of this chapter, Figure 1-1 represents a brief summary of the primary zones affecting navigation and overflight.

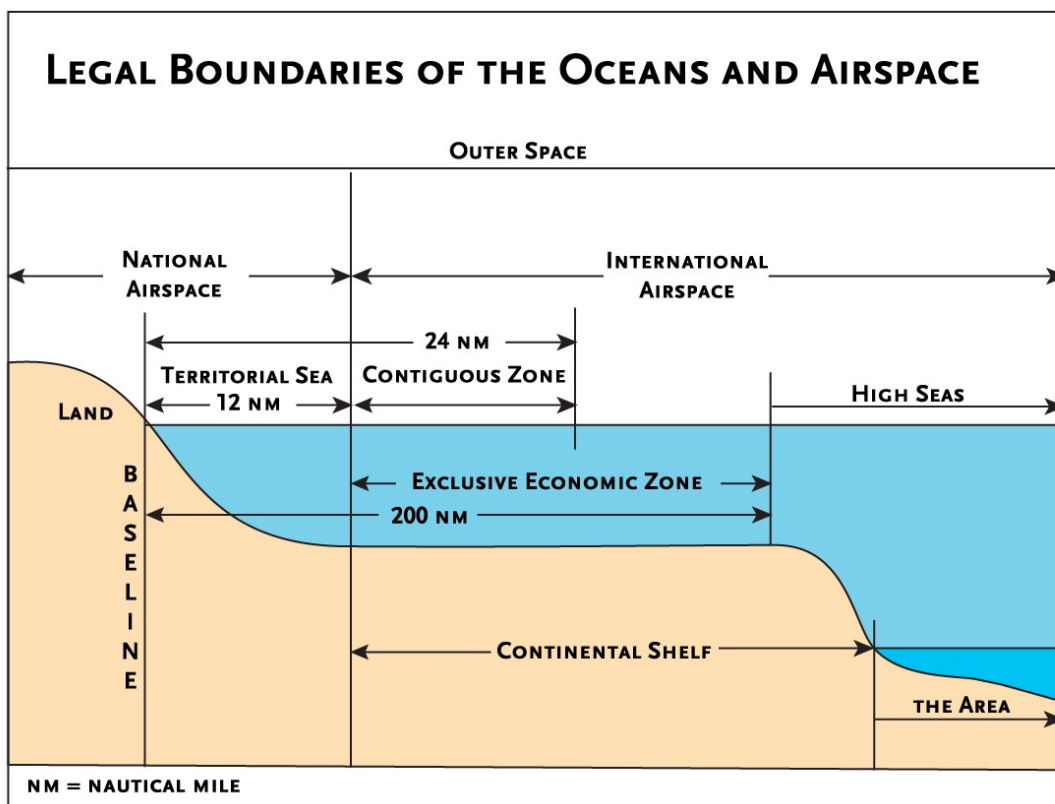


Figure 1-1. Legal Boundaries of the Oceans and Airspace

#### 1.3.1 Internal Waters

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

#### 1.3.2 Territorial Seas

The territorial sea is a belt of ocean established by a coastal State extending seaward up to 12 nautical miles from the baseline of that State and subject to its sovereignty. Ships enjoy the right of innocent passage in the territorial sea. Innocent passage does not include a right of aircraft overflight of the territorial sea. Where an international strait is overlapped by territorial seas, ships and aircraft enjoy the right of transit passage.

### 1.3.3 Contiguous Zones

A contiguous zone is an area extending seaward from the territorial sea for a maximum distance of 24 nautical miles from the baseline 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, or, where a State does not claim an EEZ, seaward of the territorial seas. Ships and aircraft of all States enjoy the freedoms of navigation and overflight with due regard for the interests of other States in their exercise of these same freedoms and other internationally lawful uses of the seas related to those freedoms.

## 1.4 MARITIME BASELINES

Maritime zones are measured from lawfully drawn baselines.

### 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 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. Straight baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level, have been built on them. 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 (e.g., 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 remains above water at low tide but is submerged at high tide. While a low-tide elevation situated wholly or partly within the territorial sea does not in itself enjoy a territorial sea, it may be used to delimit it. Specifically, where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.

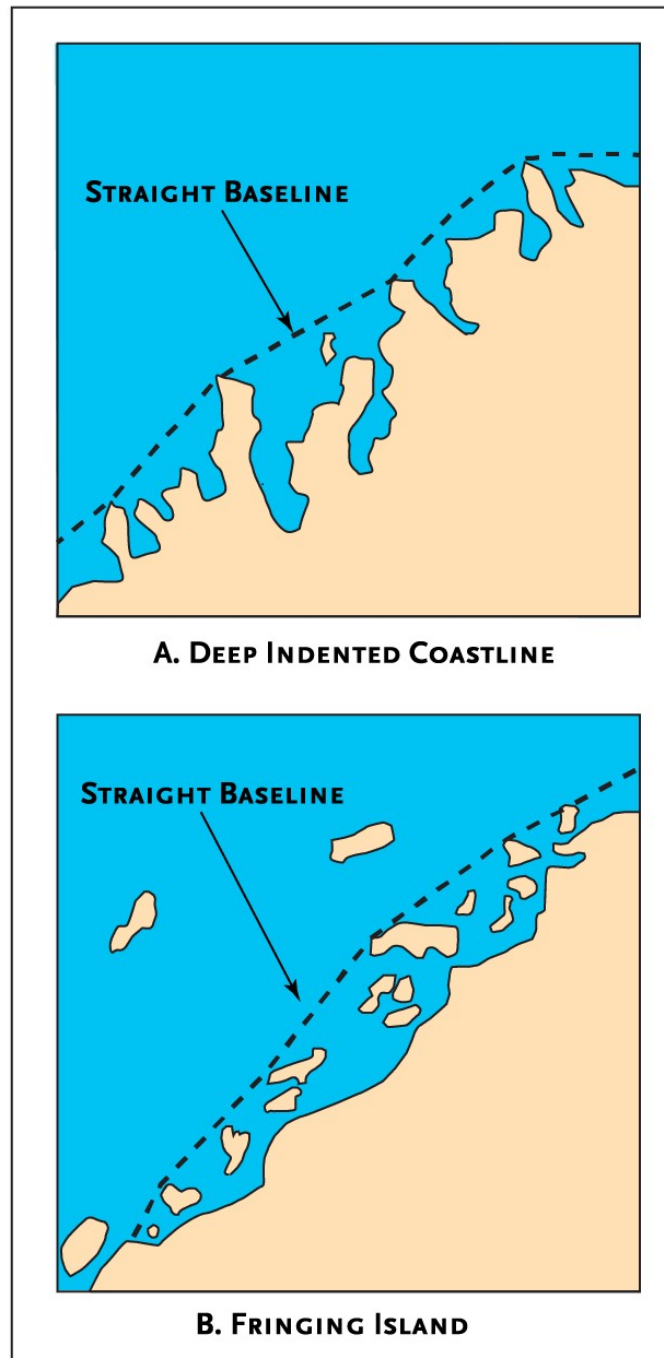


Figure 1-2. Straight Baselines

### 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).

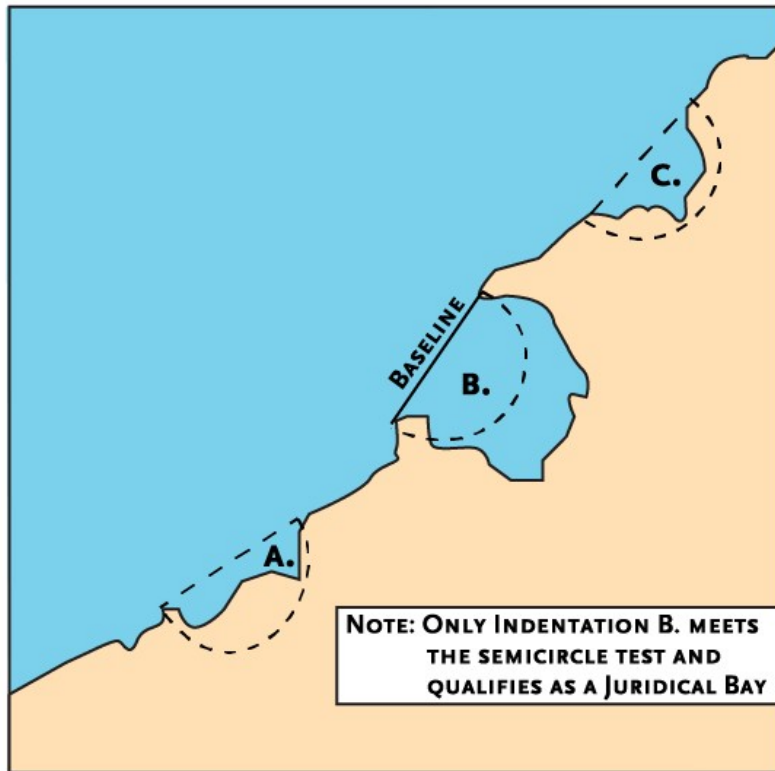


Figure 1-3. The Semicircle Test

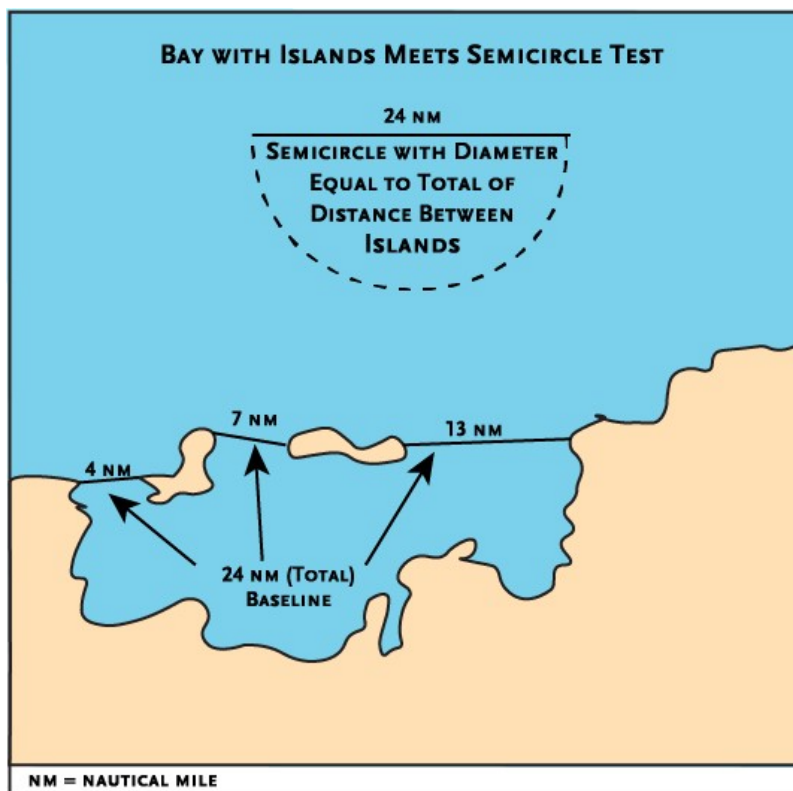


Figure 1-4. Bay with Islands

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 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.

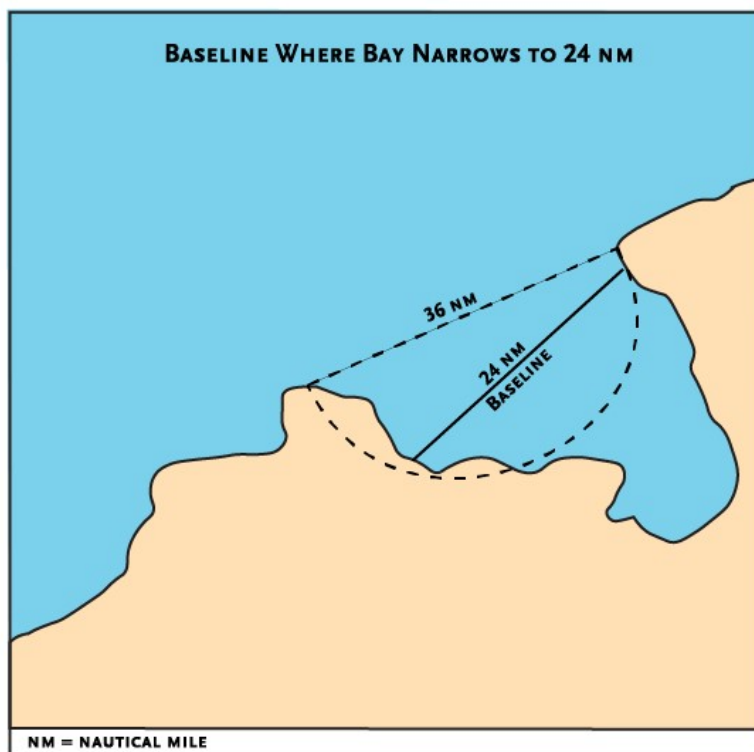


Figure 1-5. Bay with Mouth Exceeding 24 Nautical Miles

So-called historic bays are not determined by the semicircle and 24-nautical-mile closure-line rules previously described. 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.

#### 1.4.5 Reefs

A reef is a mass of rock or coral that reaches close to the sea surface or 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 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 (e.g., 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. These do not include offshore aids to navigation built on submerged reefs or features.

## **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 in 1.6.

### **1.5.1 Internal Waters**

Internal waters are landward of the baseline from which the territorial sea is measured. Examples of internal waters include lakes, rivers, some bays (e.g., the Chesapeake Bay and Cook Inlet), harbors, some canals (e.g., the Panama, Kiel, and Suez Canals), and lagoons. 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 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 possess a territorial sea determined in accordance with the principles discussed in 1.4. Rocks have no EEZ or continental shelf. While a low-tide elevation (above water at low tide but submerged at high tide) situated wholly or partly within the territorial sea does not in itself enjoy a territorial sea, it may be used to delimit it. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea. Where a low-tide elevation is located entirely beyond the territorial sea, it has no territorial sea of its own (Figure 1-6). Maritime boundary delimitation agreements provide evidence of recognized status of islands.

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 1.8.

#### **1.5.3.2 Roadsteads**

Roadsteads normally used for the loading, unloading, and anchoring of ships, and 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.

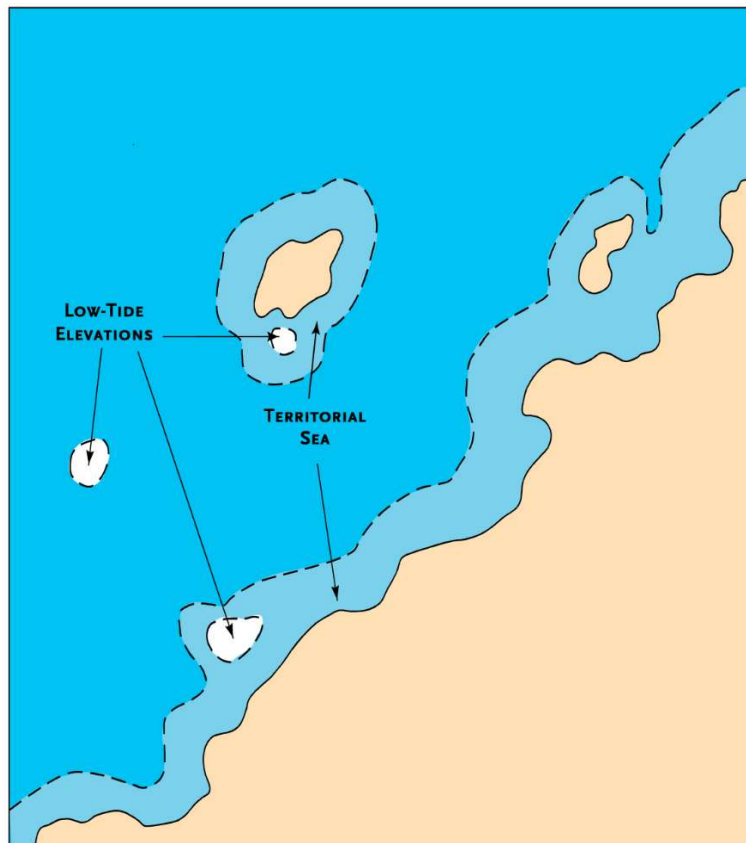


Figure 1-6. Territorial Sea of Islands and Low-tide Elevations

#### 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. Archipelagic baselines are 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 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 sovereignty of a coastal 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 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. 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, subsoil of the zone, and 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 2.6.2.1 and 2.6.2.2. In the EEZ all States enjoy the right to exercise traditional high seas freedoms of navigation and overflight, of laying and maintaining 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 of varying breadth in which they purport to regulate the activities of warships and military aircraft of other States by restrictions such 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. 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 2.5.2.3 for discussion on temporary suspension of innocent passage in territorial seas. See 4.4 for discussion on declared security and defense zones in time of peace. See 7.9 for a discussion on 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 lawfully determined outer edge of the continental margin or a distance of 200 nautical miles from the baseline, whichever is greater. 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. All States have the right to lay submarine cables and pipelines on the continental shelf. The delineation of the course for the laying of pipelines on the continental shelf is subject to the consent of the coastal State.

## **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, 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 national airspace—over the land, internal waters, archipelagic waters, and territorial seas of a State—or international airspace—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 2.5.3) and archipelagic sea lanes (see 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 with due regard for the safety of other aircraft and 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 State public property is protected against the exercise of jurisdiction or control by another State under the doctrine of State immunity. 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 under this doctrine. This means such vessels and all other U.S. Government public property—wherever located—are immune from arrest, search, inspection, or other assertions of jurisdiction by a foreign State. Such vessels and aircraft are immune from:

1. Foreign taxation
2. 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. Foreign flags may be displayed to render honors in accordance with United States Navy regulations.
3. Are entitled to exclusive control over persons on board such vessels with respect to acts performed on board.

Sovereign immunity includes protecting the identity of all personnel, stores, weapons, or other property on board the vessel.

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

The United States asserts all the privileges 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 Department of Defense time-chartered U.S.-flagged vessels. U.S.-flagged, voyage-chartered vessels are entitled to all of the privileges of sovereign immunity when under the direction of the United States and used exclusively in government, noncommercial service, as a matter of policy. The United States ordinarily claims only limited immunity from arrest and taxation for such vessels. The United States does not claim sovereign immunity for foreign-flagged chartered vessels. The United States recognizes reciprocal full sovereign immunity privileges for the equivalent vessels of other States. See Chief of Naval Operations (CNO) NAVADMIN 165/21 (041827Z AUG 21), Sovereign Immunity Policy, for additional information on U.S. Navy sovereign immunity policy. See COMDT COGARD ALCOAST 370/21 (061626Z OCT 21), Sovereign Immunity, for additional information on United States Coast Guard (USCG) sovereign immunity policy.

#### 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**

A warship is a ship belonging to the armed forces of a State:

1. Bearing the external markings distinguishing the character and nationality of such ship
2. 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
3. Manned by a crew that is under regular armed forces discipline.

Warships need not be armed and maintain their status, even if civilians form part of the crew. There is no requirement the commanding officer or crew be physically on board the warship. Warships may be remotely commanded, crewed, and operated. In the U.S. Navy, 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 warships under international law.

#### **2.2.1.1 Belligerent Acts at Sea**

Warships, manned or unmanned, may be used by States to exercise belligerent rights at sea. Belligerent rights at sea are those rights to engage in hostilities, including:

1. The right to visit, search, and divert enemy and neutral vessels
2. The right to capture
3. The right to inspect specially protected enemy vessels (e.g., hospital ships)
4. The right to control neutral vessels and aircraft in the immediate vicinity of naval operations
5. The right to establish and enforce a blockade
6. The right to establish and enforce an exclusion zone
7. The right to demand the surrender of enemy military personnel
8. The right to undertake convoy operations.

States are obligated under customary international law of war to ensure belligerent rights at sea are exercised on their behalf by lawful combatants, and combatants use offensive force only as necessary, with distinction, proportionality, without causing unnecessary suffering, and within the bounds of military honor, particularly without resort to perfidy (see 5.3–5.4.1). To meet these obligations, the direction and execution of belligerent rights at sea from any platform, manned or unmanned and however classified, must be conducted by military commanders and military personnel.

### **2.2.2 Warship International Status**

Under customary international law, warships enjoy sovereign immunity from interference by authorities of States other than the flag State. Police and port authorities may board a warship only with permission of the commanding officer. A warship cannot be required to consent to an on board search or inspection or 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 conformity with customary international law as reflected in UNCLOS, a failure of compliance is subject only to diplomatic complaint or to coastal State orders to

leave its territorial sea immediately. 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—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 NAVADMIN 165/21 (041827Z AUG 21) and COMDT COGARD ALCOAST 370/21 (061626Z OCT 21). See USCG COMDTINST 3128.1H, Foreign Port Calls.

It is U.S. policy to refuse host-government requests to:

1. Conduct inspections of U.S. Navy and U.S. Coast Guard vessels
2. Conduct health inspections of crew members
3. 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)
4. Undertake other requested actions beyond the commanding officer's certification on NAVMED form 6210/3.

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, via the NAVMED 6210/3, that there are no indications that personnel entering the host State from the ship will present such hazard. Rules governing medical quarantine are provided in 3.2.3.

### **2.2.4 Quarantine**

See 3.2.3.

### **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, 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 Military Sealift Command (MSC) vessels are auxiliary vessels of the United States and are entitled to sovereign immunity:

1. USNS, to include U.S. Government-owned vessels or those under bareboat charter to the government and assigned to MSC.

2. Privately-owned, U.S.-flagged vessels under charter to MSC, to include ships chartered for a period of time (time-chartered ships) and vessels chartered for a specific voyage or voyages (voyage-chartered ships).
3. U.S. Maritime Administration's National Defense Reserve Fleet and its Ready Reserve Force when activated and assigned to MSC.

USNS vessels are either government-owned, government-operated (GOGO) or government-owned, contractor-operated (GOCO). USNS GOGO vessels are crewed by MSC civil service mariners. USNS GOCO vessels are crewed by private-sector contract mariners (CONMARs) hired by the operating company. U.S.-flagged, time-chartered vessels operated by MSC are contractor-owned, contractor-operated by CONMAR crews hired by the vessel's owner, but are used exclusively in government, noncommercial service and completely and at all times directed by and subject to the instructions (e.g., sailing orders) of MSC. Time-chartered vessels 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 only carry U.S. Government, noncommercial cargo and for the performance of other noncommercial, U.S. Government missions. These MSC U.S.-flagged, time-chartered ships are entitled to sovereign immunity, and the United States asserts the full privileges of sovereign immunity regarding them—just like USNS vessels. A diplomatic clearance request is normally submitted to a foreign port State before these vessels enter a foreign port.

Although MSC U.S.-flagged, voyage-chartered vessels are entitled to the full privileges of sovereign immunity, the United States continues as a matter of policy to claim only limited 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.) These vessels may be boarded and searched by foreign authorities and may provide documents such as crew lists, but masters shall request these authorities to refrain from inspecting or searching U.S. military cargo on board and seek assistance from U.S. authorities, if needed.

As a matter of policy, the United States does not assert 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**

All U.S. Navy and U.S. Coast Guard watercraft, including motor whale boats, air-cushioned landing craft, and all other small boats, craft, and vehicles deployed from larger vessels or from land, are sovereign immune U.S. property. The status of these watercraft is not dependent upon the status of the launching platform. The United States may exercise any internationally lawful use of the seas—including navigational rights and freedoms—with such watercraft.

### **2.3.4 Unmanned Systems**

Unmanned systems (UMSs) are either autonomous or remotely navigated on the surface or underwater. They may operate independently as a ship or be launched from the surface, subsurface, air, or land. Unmanned maritime systems may be used to exercise any internationally lawful use of the seas. Such uses include:

1. Intelligence, surveillance, and reconnaissance
2. Mine countermeasures (MCM)
3. Antisubmarine warfare
4. Surface warfare
5. Inspection/identification
6. Oceanography

7. Communication/navigation network nodes
8. Payload delivery
9. Information operations (IO)
10. Time-critical strike
11. Barrier patrol and operations (e.g., homeland defense, antiterrorism/force protection (AT/FP))
12. Seabase support
13. Electronic warfare (EW)
14. Laying undersea sensor grids, sustainment of at sea operating areas, bottom mapping and survey
15. Special operations.

### **2.3.5 Unmanned System Status**

In all cases, U.S. Navy UMSs are the sovereign property of the United States and immune from foreign jurisdiction. When flagged as a ship, a UMS may exercise the navigational rights and freedoms and other internationally lawful uses of the seas related to those freedoms. Unmanned systems may be designated as USS if they are under the command of a commissioned officer and manned by a crew under regular armed forces discipline, by remote or other means.

## **2.4 MILITARY AIRCRAFT**

### **2.4.1 Military Aircraft Defined**

Military aircraft means:

1. Any aircraft operated by the armed forces of a State
2. Bearing the military markings of that State
3. Commanded by a member of the armed forces
4. 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 1944 Convention on International Civil Aviation (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 military service of the United States—qualify as State aircraft. As a matter of policy, the United States does not normally designate Air Mobility Command charter aircraft as State aircraft.

#### 2.4.4 Unmanned Aircraft Definition and Status

Unmanned aircraft (UA) 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 UA operated by the DOD are considered military aircraft and retain the overflight rights under customary international law, as reflected in UNCLOS. Since DOD-operated UA 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. Unmanned aircraft 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 involves navigation in internal waters and is subject to coastal State conditions of port entry, which can include mandatory pilotage requirements. 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, generally require specific and advance entry permission, unless other bilateral or multilateral arrangements have been concluded or the foreign State's laws permit entry. An exception to the rule of nonentry into internal waters without coastal nation permission, whether specific or implied, arises when rendered necessary by *force majeure* or distress in order to preserve human life. 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 (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. There is no requirement that the passage be the most expeditious means to arrive at the ship's destination or the route minimize the amount of time in the coastal State's territorial waters, so long as it is continuous, expeditious, and innocent. Passage is innocent so long as it is not prejudicial to the peace, good order, or security of the coastal State. The following is an exhaustive list of activities considered to be prejudicial to the peace, good order, or security of the coastal States, and therefore inconsistent with innocent passage:

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 UN
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 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, 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 has a right to take the necessary steps 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 airspace above it and engages in noninnocent activities, the appropriate remedy, consistent with customary international law and 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. They are 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 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. 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—except sovereign-immune vessels—exercising the right of innocent passage to utilize designated sea lanes and traffic separation schemes. Sovereign-immune vessels are not legally required to comply with such sea lanes and traffic separation schemes but may do so voluntarily where practicable and compatible with the military mission and navigational safety dictates.

All ships engaged in innocent passage, including sovereign immune vessels, shall comply with applicable provisions of the 1972 International Regulations for Preventing Collisions at Sea (1972 COLREGS).

### **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 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. The UNCLOS sets forth an exhaustive list of activities that would render passage noninnocent (see 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 leave the territorial sea, in which the warship shall do so immediately.

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

Properly flagged UMS ships enjoy the right of innocent passage in the territorial sea and archipelagic waters of other States, transit passage in international straits, and archipelagic sea lanes passage in archipelagic sea lanes. Unmanned systems not classified as ships may be deployed by larger vessels engaged in innocent passage, transit passage, or archipelagic sea lanes passage as long as their employment complies with the navigational regime of innocent passage, transit passage, or archipelagic sea lanes 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. Ships have the duty to enter into a foreign State's territorial sea without 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. Based on the circumstances on scene, if the ship or aircraft commander has determined that the coastal State is taking inadequate steps to assist the persons in distress, assistance may continue in the coastal State's territorial sea if deemed necessary and appropriate by the commander.

Aircraft have the authority to enter into corresponding airspace without 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., Strait of Hormuz, Strait of Malacca, Strait of Gibraltar, Strait of Bab el Mandeb). Transit passage applies.
2. Straits regulated by long-standing treaties (e.g., Turkish Straits, Strait of Magellan). Treaty terms apply to the extent the United States adheres to them.
3. Straits not completely overlapped by territorial seas (e.g., a high seas corridor exists, such as Japan's approach in the Soya, Tsugara, Tshushima East Channel, Tshushima West Channel, Osumi Straits, and the Taiwan Strait). 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 (e.g., dead-end straits such as Head Harbour Passage, Strait of Tiran, 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(s) or archipelagic waters of the coastal State(s). Under international law, ships and aircraft of all States—including warships, auxiliary vessels, UMS, and military aircraft (including UA)—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 of a strait. Such transit is conducted in the normal modes of continuous and expeditious transit utilized by such ships and aircraft. Ships and aircraft, while exercising the right of transit passage, shall:

1. Proceed without delay through or over the strait
2. Refrain from any threat or use of force against the sovereignty, territorial integrity, or political independence of States bordering the strait
3. 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 (e.g., radar, sonar and depth-sounding devices, formation steaming, and the launching and recovery of aircraft). Military aircraft may operate in an international strait as part of a military formation with surface vessels—flying in a pattern that provides force protection while the entire formation transits the strait. 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 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 that border 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 such as 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 noncommercial service (i.e. sovereign-immune vessels (see 2.1)) are not legally required to comply with such sea lanes and traffic separation schemes while in transit passage. Sovereign-immune vessels must exercise due regard for the safety of navigation. Sovereign-immune vessels may, and often do, voluntarily comply with IMO-approved routing measures in international straits where practicable and compatible with the military mission.

All ships engaged in transit passage, including sovereign-immune vessels, shall comply with applicable provisions of the 1972 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. 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 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. Warships, auxiliaries, and ships operated on exclusive government service (i.e., sovereign-immune vessels (see 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.

#### **2.5.3.5.1 Turkish Straits**

The Turkish Straits (including the Bosphorus, the Sea of Marmara, and the Dardanelles) are governed by a multilateral treaty—the Montreux Convention of 1936—which limits the number and types of warships that may use the Straits, both in times of peace and armed conflict. Although not a signatory to the treaty, the United States respects its provisions, which sets specific standards relevant to passage through the straits and naval operations in the Black Sea. Turkey can be expected to strictly enforce the treaty’s provisions almost without exception.

Specific provisions:

1. Only warships with a displacement of 10,000 tons or less may pass through the straits. Naval auxiliaries may have a displacement of up to 15,000 tons. The definitions of vessels of war and auxiliary vessels, and the method to calculate their tonnage are unique to the Convention and should be interpreted for operational/exercise purposes in consultation with United States Naval Forces Europe and/or United States Sixth Fleet.
2. The maximum aggregate tonnage of all non-Black Sea Powers in transit in the straits at any given moment is 15,000 tons. Transit shall begin in daylight. Aircraft shall not fly during transit.
3. The maximum aggregate tonnage of all non-Black Sea Powers in the Black Sea at any given moment is 45,000 tons. The aggregate tonnage of any single non-Black Sea Power in the Black Sea at any given moment is 30,000 tons.
4. Turkey must be officially notified through diplomatic channels at least 15 days prior to any passage of vessels through the straits. Notification requires name, type, number of ships in transit, destination, and date for return transit. Changes in the date of transit are subject to 3 days prior notice to the Turkish Government.
5. Any vessel from a non-Black Sea Power may operate in the Black Sea for no more than 21 days.

Commanders and commanding officers should refer to specific operation orders and other guidance promulgated by U.S. Naval Forces Europe and U.S. Sixth Fleet when anticipating transit through the Turkish Straits and/or operations/exercises in the Black Sea.

### **2.5.3.5.2 Other International Straits and Canal Passage Governed by Specialized Agreements**

Passage through the following international straits and canals are governed by specialized agreements:

1. Danish Straits. The 1857 Treaty of Redemption of the Sound Dues is a special regime governing the Danish Straits. The United States and Denmark signed the 1857 Convention on Discontinuance of Sound Dues eliminating tolls for passage through the Danish Straits. However, since they provide for free navigation consistent with UNCLOS, these agreements do not impact naval operations. Separately, Denmark passed a 1999 Ordinance Governing the Admission of Foreign Warships and Military Aircraft to Danish Territory in Time of Peace, which requires Danish permission for the passage of more than three warships at once through the Danish Straits. The United States does not recognize this ordinance, because it is inconsistent with UNCLOS.

2. Strait of Magellan. Free navigation is 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). The United States understands the guarantee of free navigation provided for under the 1881 Treaty and confirmed by long-standing practice, demonstrates that flag States may transit the Strait of Magellan under circumstances at least as favorable as the right of transit passage under customary international law as reflected in UNCLOS.

3. Suez Canal. Article I of the Constantinople Convention of 1888 provides:

The Suez Maritime Canal shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag.

4. Panama Canal. Article II of the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal of 1977 provides:

In time of peace and in time of war it shall remain secure and open to peaceful transit by the vessels of all nations on terms of entire equality, so that there will be no discrimination against any nation, or its citizens or subjects.

5. Kiel Canal. Article 380 of the Treaty of Versailles of 1919 provides:

The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality.

## **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 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 surface warships may carry out those activities normally undertaken during passage through such waters, including activities necessary to their security (e.g., formation steaming and

the launching and recovery of aircraft as well as operating devices such as radar, sonar, and depth-sounding devices). Military aircraft may operate in an archipelagic sea lane as part of a military formation with surface vessels—flying in a pattern that provides force protection while the entire formation transits the sea lane.

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 be exercised by all States through routes normally used for international navigation and overflight.

Archipelagic sea lanes are governed by the following rules:

1. An archipelagic sea lane is defined by a series of continuous axis lines 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 sea lanes are required to remain within 25 nautical miles on either side of the axis line.
3. Ships and aircraft engaged in archipelagic sea lanes passage must approach no closer to the coastline than 10 percent of the distance between the nearest point on that coast bordering the sea lane and the axis line (Figure 2-1).

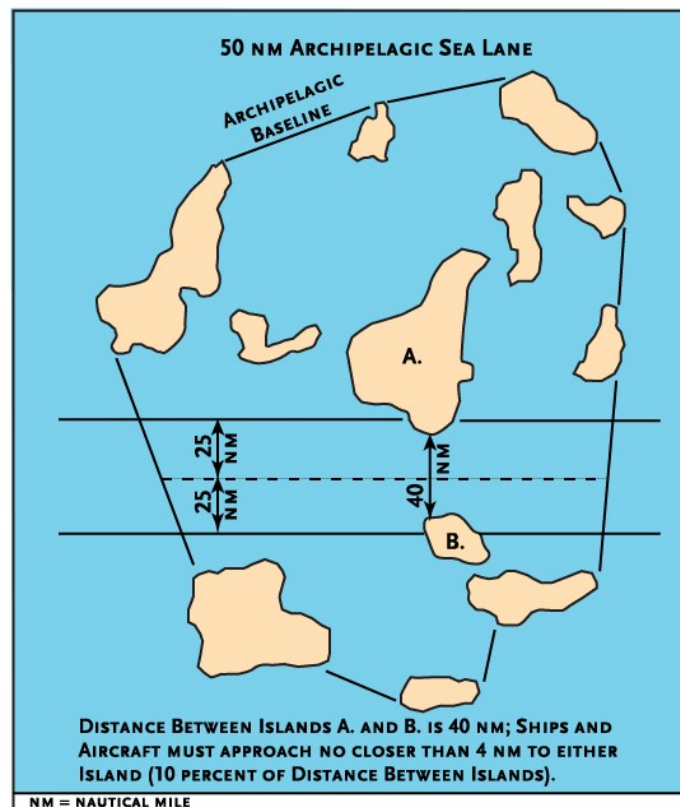


Figure 2-1. A Designated Archipelagic Sea Lane

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 not designated or only partially designated sea lanes, vessels and aircraft may exercise the navigational regime of archipelagic sea lanes passage through all routes normally used for international navigation.

#### **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 manned or unmanned ships and aircraft—including warships, naval auxiliaries, 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), 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 is limited to matters concerning the exploration, exploitation, management, and conservation of the resources of those international waters. The coastal State may 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. 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.

##### **2.6.2.1 Marine Scientific Research**

Coastal States may regulate marine scientific research (MSR) 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 can include:

1. Physical and chemical oceanography
2. Marine biology
3. Fisheries research
4. Scientific ocean drilling and coring
5. Geological/geophysical scientific surveying
6. Other activities with a scientific purpose.

The results of MSR are generally made publicly available. It is the policy of the United States to encourage MSR. The advance consent of the United States is required for MSR conducted within the U.S. territorial sea. U.S. advance consent is required for MSR conducted within the U.S. EEZ and on the U.S. continental shelf per Presidential Proclamation 10071 of 9 September 2020, which is a departure from the 1983 United States Oceans Policy Statement.

### **2.6.2.2 Hydrographic Surveys and Military Surveys**

Although coastal State consent must be obtained in order to conduct MSR 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 collection of information for maritime cartography (commonly used to make 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 collection 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.

OPNAVINST 3128.9G, Diplomatic Clearance for U.S. Navy Marine Data Collection Activities in Foreign Jurisdictions, provides guidance for the determination of requirements and procedures for marine data collection activities by Department of the Navy (DON) marine data collection assets. Marine data collection is a general term used when referring to all types of survey or marine scientific activity (e.g., military surveys, hydrographic surveys, and MSR).

### **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 enjoy the right to lay submarine cables and pipelines on the bed of the high seas and 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 to 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**

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 1945 Charter of the United Nations (Charter of the UN) 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 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 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, subject to the same navigation and overflight regimes for 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. The Northwest Passage is a strait used for international navigation. 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 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. It contains provisions which affect the FON and overflight. It provides Antarctica shall be used for peaceful purposes only, and 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. Classified activities are not conducted by the United States in Antarctica. All classified material is removed from U.S. ships and aircraft prior to visits to the continent. The treaty prohibits nuclear explosions and disposal of nuclear waste anywhere south of latitude 60° south. The treaty does not 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, 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 Treaty on the Nonproliferation of Nuclear Weapons, 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 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. National airspace is the airspace above the State's territory, internal waters, territorial sea, and, in the case of an archipelagic State, 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, archipelagic sea lanes passage, and assistance entry, there is no right of entry for aircraft into foreign national airspace. 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 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 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 UA—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 UA—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 UA—enjoy the right of unimpeded, continuous, and expeditious passage through the airspace above archipelagic sea lanes. The right of overflight of such sea lanes is essentially identical to transit passage through the airspace above international straits overlapped by territorial seas. Military aircraft may transit an archipelagic sea lane as part of a military formation's continuous, unimpeded, and expeditious passage.

### **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. Aircraft—including military aircraft and UA—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 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 part of international straits not overlapped by territorial seas.

### **2.7.2.1 1944 Convention on International Civil Aviation**

The United States is a party to the 1944 Convention on International Civil Aviation (as are most States). That multilateral treaty applies to civil aircraft. It does not apply to military aircraft or other State aircraft, other than to require 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 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 3770.2L, Airspace Procedures and Planning Manual; and COMDTINST M3710.11, U.S. 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. Flight information regions 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. 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 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. 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. An aircraft approaching national airspace with intent to enter such national airspace can be required to identify itself while in international airspace as a condition of entry approval. Air defense identification zone 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 or does the United States apply its ADIZ procedures to foreign aircraft not intending to enter U.S. airspace. 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**

On 22 November 2020, the United States formally withdrew from the 1992 Open Skies Treaty. In June 2021, the Russian Federation announced it would formally withdraw from the treaty.

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

As announced in President Ronald 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 exercise their navigation and overflight rights in the face of such claims. The President's United States 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, 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 through diplomatic protests by the U.S. Department of State and by operational assertions by U.S. Armed Forces. U.S. FON 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 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 COLREGS. For the purposes of the COLREGS, a vessel is defined as every description of watercraft used or capable of being used as a means of transportation on water. Unmanned systems constituting vessels will be governed by the 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. The 1972 COLREGS have been adopted as law by the United States. See 33 United States Code (U.S.C.), § 1601–1608. U.S. Navy Regulations, 1990, Article 1139, directs 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, U.S. Coast Guard Regulations, USCG personnel must comply with all federal laws and regulations.

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

Some 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 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 Amalgamated International and U.S. Inland Navigation Rules (available online only at <https://www.navcen.uscg.gov/?pageName=NavRulesAmalgamated>); 33 Code of Federal Regulations, Part 80, COLREGS Demarcation Lines; and 33 U.S.C., §§ 2071–2072. 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 the Chicago Convention, Annex 2, Rules of the Air; DOD Flight Information Publication General Planning; and OPNAVINST 3710.7V, Naval Air Training and Operating Procedures Standardizations (NATOPS). The same standardized technical principles and policies of ICAO that apply in international and most foreign airspace are in effect in the continental United States. 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.

U.S. Navy Regulations, 1990, Article 1139, directs all persons in the naval service responsible for the operation of aircraft shall diligently observe applicable domestic and international air traffic regulations and such other rules and regulations as may be established by the Secretary of Transportation or other competent authority for regulating traffic and preventing collisions on the high seas, including in the air. In situations where such law, rule, or regulation is not applicable to naval ships, craft, or aircraft, they shall be operated with due regard for the safety of others.

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

### 2.10.1 United States-Union of the Soviet Socialist Republics 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) (now Russian Federation) entered into the U.S.-USSR Agreement on the Prevention of Incidents On and Over the High Seas in 1972, which was renamed the Prevention of Incidents On and Over the Waters Outside the Limits of the Territorial Sea in a 1998 exchange of notes. Following the dissolution of the USSR, the Russian Federation and Ukraine succeeded to the USSR's position in the agreement. This binding bilateral international agreement, popularly referred to as the Incidents at Sea (INCSEA) Agreement, aims to minimize harassing actions and navigational one-upmanship between U.S. and former Soviet Union units operating in close proximity at sea. Although it predates UNCLOS and the maritime zones created therein, INCSEA applies to all waters beyond the territorial sea and to international airspace. The INCSEA Agreement has been amended twice by Protocol in 1973 and through an exchange of notes in 1998.

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 or illuminate their navigation bridges. Under the 1973 Protocol, 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 or launch or drop any objects near nonmilitary ships of the other party in such a manner as to be hazardous to these ships or constitute a hazard to navigation.
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 or drop objects near them.

The agreement provides for annual consultations between Navy representatives of the two parties to review its implementation, which historically have been led by a Navy representative.

OPNAVINST 5711.96D, United States and Russia Incidents At Sea Including Dangerous Military Activities Agreements, provides information on and issues procedures concerning the INCSEA Agreement, including a 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-Union of the Soviet Socialist Republics 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 entered into the U.S.-USSR Agreement on the Prevention of Dangerous Military Activities in 1990. 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 5711.96D provides implementing guidance for the DMA Agreement to Navy department units.

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

Established in January 1998 by an agreement between the U.S. SECDEF and the Minister of National Defense of the People's Republic of China (PRC), the Military Maritime Consultative Agreement (MMCA) provides a forum for exchanges of views between the United States and PRC to strengthen maritime and air safety. The MMCA 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 MMCA 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 2014 Code for Unplanned Encounters at Sea**

The 2014 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 with each other. The participants in CUES are:

1. United States
2. Australia
3. Brunei
4. Cambodia
5. Canada
6. Chile
7. China
8. France
9. Indonesia
10. Japan
11. Malaysia
12. New Zealand
13. Papua New Guinea
14. Peru
15. Philippines
16. Republic of Korea
17. Russian Federation
18. Singapore
19. Thailand
20. Tonga
21. 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; improve operational safety at sea and in the air; enhance mutual trust; and 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). This annex seeks to avert incidents and build trust between U.S. and Chinese surface vessels by reiterating the requirements of international law (e.g., the 1972 COLREGS) and preexisting obligations (e.g., CUES). 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, 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. 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 within national airspace by foreign aircraft is not authorized without the consent of the territorial sovereign. Man-made satellites and other objects in Earth orbit may overfly foreign territory freely while located in outer space. 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 throughout outer space. 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 UN, applies to the outer space activities of States. Outer space is open to exploration and use by all States. It is not subject to national appropriation and should be used for peaceful purposes. The term peaceful purposes does not preclude military uses of outer space (including warfighting) and is therefore similar to the interpretation given to the reservation of the high seas for peaceful purposes in UNCLOS. While acts of aggression in violation of the Charter of the UN 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, through cyberspace, and on and under the sea. In using outer space, States must have due regard for the rights and interests of other States.

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

In general terms, outer space consists of the moon and other celestial bodies and the expanse between these natural objects. The cornerstone of international space law is the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Outer Space Treaty of 1967). The rules of international law applicable to outer space include:

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 should 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. This does not prohibit weapons that are not WMDs (e.g., antisatellite laser weapons or other conventional weapons).
6. Nuclear explosions in outer space are prohibited.
7. States are to avoid harmful contamination of outer space and adverse changes in the environment of the Earth resulting from the introduction of extraterrestrial matter.
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 may be liable for damage inflicted by space objects where they are the State of registry or otherwise a launching State.

### **2.11.2.2 The Moon and Other Celestial Bodies**

Under international law, military bases, installations, and fortifications may not be erected, or may weapons tests or maneuvers be undertaken, on the moon or any other celestial bodies. All equipment, stations, and vehicles located on the moon or other celestial bodies (but not elsewhere in space) are open to representatives of other States on a reciprocal basis. Military personnel may be employed on celestial bodies such as the moon for scientific research and any activities undertaken for peaceful purposes.

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

Both the Outer Space Treaty and the 1968 Rescue and Return of Astronauts Agreement establish specific requirements for coming to the aid of civilian and military astronauts. These include a requirement by States to extend search and rescue assistance if such persons have made an emergency or unintended landing in a State's territorial waters, the high seas, or other place not under the jurisdiction of any State. Rescued personnel are to be safely and promptly returned.

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

The Rescue and Return of Astronauts Agreement includes obligations regarding the return to Earth of outer space objects. For example, where the component part of a space object lands in the sovereign territory of a contracting party, it must take steps to recover and return the object to the launching authority. However, such steps are only required if practicable and assistance is requested by the launching authority of the object. Expenses incurred by a State in assisting the launching authority are to be borne by the latter.

### **2.11.5 Law of Armed Conflict in Outer Space**

The law of armed conflict, as a critical component of international law, would regulate the conduct of hostilities in outer space. The customary law of armed conflict would apply to activities in outer space in the same way it applies to activities in other environments, such as the land, sea, air, or cyberspace domains. Provisions in law of war treaties of a general nature would apply to the conduct of hostilities in outer space. Certain provisions of these treaties may not be applicable between belligerents during international armed conflict See DOD Law of War Manual, 14.10.2.1.

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## CHAPTER 3

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

### 3.1 INTRODUCTION

The protection of 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, storms, mechanical failure, and the actions of others (e.g., pirates, terrorists, and insurgents). 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.

Complex legal, political, and diplomatic considerations may arise in connection with the use of naval forces to protect civilian persons and property at sea. Thus, operational plans, operational orders, and 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. Whenever practicable under the circumstances, the on-the-scene commander should 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 territorial waters of a coastal State to take refuge from extreme perils of sea (*force majeure*) has customarily been recognized under international law. 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. Coastal States may promulgate necessary and appropriate quarantine regulations and restrictions. See 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 every State shall require the master of a ship flying its flag, insofar as they can do so without serious danger to their 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 them. 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 2.5.2.6. A master is 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 their 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 to proceed with all speed to their assistance upon receiving information from any source that persons are in distress, 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 as they can do so without serious danger to themselves 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:

1. Their need for assistance
2. Render assistance to any person found at sea in danger of being lost
3. After a collision, render assistance to the other ship, its crew and passengers, and, where possible, inform the other ship of the officer's identity.

COMDTINST M5000.3B, United States Coast Guard Regulations, § 4-2-5, Assistance, imposes a similar duty for the USCG.

### 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 protect human life and the environment) to avoid loss of life or serious hazard to the vessel. 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. 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 permitted by international law.

### 3.2.3 Quarantine

U.S. Navy Regulations, 1990, Article 0859, requires 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 vessels or aircraft, they shall afford every other assistance to health officials, U.S. or foreign, and shall give all information required, as permitted by the requirements of military necessity and security, and not violate or infringe on sovereign immunity. This includes taking steps to comply with foreign quarantine regulations and provide assurances to foreign officials of such compliance. 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. Commanding officers may refer to CNO NAVADMIN 165/21 (041827Z AUG 21) for additional information on U.S. Navy sovereign immunity policy. See COMDT COGARD ALCOAST 370/21 (061626Z OCT 21) for additional information on U.S. Coast Guard sovereign immunity policy.

See USCG COMDTINST 3128.1H. Information may be disseminated to commercial vessels by the USCG via Marine Safety Information Bulletins (<https://www.dco.uscg.mil/Featured-Content/Mariners/Marine-Safety-Information-Bulletins-MSIB/>). Marine Safety Information Bulletins have discussed, among other issues, reporting requirements for the master of a commercial vessel inbound to a U.S. port for illness or death, and port and facility operations. See U.S. Maritime Advisories and Alerts at <https://www.maritime.dot.gov/msci-alerts>.

## 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 5710.22C, Asylum and Temporary Refuge, defines asylum as:

Protection granted by the United States (U.S.) within the U.S. 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 U.S. 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 U.S. territorial sea, Commonwealth of Puerto Rico, 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 United States 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 Secretary of the Navy (SECNAV) or higher authority.

With respect to the USCG, persons seeking asylum will not be received on board USCG units, except in extreme circumstances. In no case will they be received on board a USCG aircraft. Once such persons are received on board a USCG 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 USCG personnel has become unacceptable, or the person seeking asylum voluntarily departs the unit.

See SECNAVINST 5710.22C and COMDTINST M16247.1H, 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 U.S. 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. If a foreign national is already on board a Navy vessel, such person will not be surrendered to foreign jurisdiction or control unless directed to by the SECNAV or higher authority. If a foreign national is already on board a USCG vessel, 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 USCG personnel has become unacceptable or the individual voluntarily departs the unit. See COMDTINST M16247.1H. If exceptional circumstances exist involving imminent danger to the life or safety of the person, temporary refuge may be granted. See 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 their life or freedom would be threatened on account of their race, religion, nationality, political opinion, or membership in a particular social group, unless they may reasonably be regarded as a danger to the security of the country of asylum or have been convicted of a serious crime and are 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 U.S. Navy Regulations, 1990, Article 0939; SECNAVINST 5710.22C; and COMDTINST M16247.1H.

SECNAVINST 5710.22C defines temporary refuge as:

Protection afforded for humanitarian reasons to a foreign national in a Department of Defense (DoD) 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 a 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 the life or safety of a person in imminent danger, such as pursuit by a mob. Temporary refuge shall not be granted on board a USCG aircraft. The officer in command of the ship, aircraft (not USCG aircraft), station, or unit must decide which measures can prudently be taken to provide temporary refuge. When deciding which measures may be 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 U.S. Navy or U.S. Marine Corps units will be reported immediately, by the most expeditious means, to the CNO or Commandant of the U.S. Marine Corps, as appropriate, in accordance with SECNAVINST 5710.22C. U.S. Coast Guard units will report requests through the chain of command for coordination with the U.S. Department of State in accordance with the MLEM.

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 U.S. Navy or U.S. Marine Corps unit has granted temporary refuge, protection may be terminated only when directed by SECNAV or higher authority. In the case of the USCG, temporary refuge will not be terminated without commandant approval, unless the commanding officer/officer-in-charge determines the risk to the unit or USCG personnel has become unacceptable or the claimant voluntarily departs the unit. See Article 0939, U.S. Navy Regulations, 1990; SECNAVINST 5710.22C; and COMDTINST M16247.1H, 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 5710.22C. The requesting foreign authorities will be advised that the matter has been referred to higher authorities. U.S. Coast Guard units that receive such a request should refer the issue to USCG Headquarters via the Office of Maritime Law Enforcement, USCG Headquarters/Office of Maritime and International Law, USCG 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 3.10 and CJCSI 3121.01B, Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces 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. 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 and to query it for information regarding *inter alia* its destination, cargo, manning, and intent. Unless the vessel encountered is itself a warship or a sovereign-immune 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 3.5)
2. Engaged in the slave trade (see 3.6)
3. Engaged in unauthorized broadcasting, and the flag State of the warship has jurisdiction under UNCLOS, Article 109(3) (see 3.7)
4. Without nationality (see 3.11.2.3 and 3.11.2.4)
5. Though flying a foreign flag, or refusing to show its flag, is, in reality, of the same nationality as the warship.

See OPNAVINST 3120.32D, Change 1, Standard Organization and Regulations of the U.S. Navy, and COMDTINST M16247.1H, for further guidance. For the belligerent right of visit and search, see 7.6.

## 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 provide 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 United States Constitution (Article I, § 8) provides:

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

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

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.

33 U.S.C., § 381 authorizes the President to employ public armed vessels in protecting U.S. merchant ships from piracy. 33 U.S.C., § 382 authorizes the President 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-flagged 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 (e.g., 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 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, other public vessel, a military, or other State aircraft cannot be treated as a pirate unless it is taken over and operated by pirates, or 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 the ship or aircraft is thereafter used to commit acts of piracy, it becomes a pirate ship or pirate aircraft. 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 not usually 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 U.S. vessels or aircraft described in 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. 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. To facilitate subsequent prosecution of the pirates in a court of law, commanders may be directed to safeguard physical evidence associated with the piratical act.

### **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 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. 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. Pursuit must be broken off immediately upon request of the coastal State. In that event, the right to seize the pirate vessel or aircraft and 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 U.S. Marine Corps personnel. Suspected pirates should only be formally arrested by USCG or other law enforcement personnel following consultation with the prosecuting U.S. 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 USCG MLEM, and request guidance from higher authority.

## **3.7 SUPPRESSION OF UNAUTHORIZED BROADCASTING**

The UNCLOS provides 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 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:

1. The flag State of the broadcasting ship.
2. The State of registry of the offshore installation.
3. The State of which the person is a national.

4. Any State where the transmissions can be received.
5. 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 of narcotic drugs and psychotropic substances in international waters. International law permits any State that has reasonable grounds to suspect a ship flying its flag is engaged in such traffic to request the cooperation of other States in effecting its seizure. International law 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. U.S. Coast Guard personnel embarked on USCGCs 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 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 standing rules for engagement (SROE)/standing rules for the use of force (SRUF) and applicable operation orders. See 2.1.2 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 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 self-defense and protection of nationals provide the authority for U.S. Armed Forces to protect U.S.- and, in some circumstances, foreign-flagged vessels, aircraft, property, and persons from violent and unlawful acts of others. 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 USCG MLEM for additional guidance.

#### **3.10.1 Protection of U.S.-flagged 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.-flagged vessels and aircraft, U.S. nationals (whether embarked in U.S.- or foreign-flagged 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 the protection of U.S.-flagged 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.-flagged vessels and aircraft and U.S. nationals within and over 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. 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, flag aircraft, and nationals. Because the coastal State may lawfully exercise jurisdiction and control over nonsovereign-immune, foreign-flagged 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 for 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. 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 3.11.2.2.4) 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-flagged 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-flagged 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 3.10.1.1 and 3.10.1.2 would 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 U.S. Department of State. The Secretaries of State and Defense are assigned lead and support responsibilities, respectively, and within their general geographic areas of responsibility, 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 U.S. agencies. Even though DOD personnel do not have authority to enforce such laws, they are often called upon to assist law enforcement agencies (e.g., the USCG) in carrying out these missions. It is essential that commanders and their legal advisors have a basic understanding of MLE.

### **3.11.1 Authority and Jurisdiction**

The United States may conduct MLE actions when it has both authority and jurisdiction over a vessel, aircraft, or persons in question. Authority is the government's legal power to act. With the exception of those special circumstances in this chapter, the United States must have a statutory basis of authority before taking law enforcement action. Jurisdiction is a government's power to exercise legal authority over persons, vessels, and territory.

### **3.11.2 Jurisdiction to Enforce**

Within the context of MLE, jurisdiction is comprised of four considerations.

1. **Substantive Law.** In a MLE context, this consideration involves the domestic legislation—the criminal law—that proscribes the illicit activity. Key focus areas include the specific elements of the crime (e.g., piracy, drug trafficking, illegal fishing) and whether it applies where the activity occurs.
2. **Vessel Status/Flag.** The general principle of exclusive flag State jurisdiction provides a vessel sails under the flag of a single country and is subject to the exclusive jurisdiction of that country (UNCLOS, Article 92). Only the flag State may take enforcement action on the high seas against a vessel under its registry. Several exceptions to this principle exist, including crimes of universal jurisdiction and actions taken under the authority of a United Nations Security Council resolution, among others. Ships that are without nationality—stateless—may be boarded on the high seas and are subject to the jurisdiction of any State.
3. **Vessel Activity.** This consideration involves identifying what illicit action the vessel may be taking. The reasonable grounds for suspecting, for example, piracy, drug trafficking, or illegal fishing influence the response and whether an exception to the general principle of flag State jurisdiction exists.
4. **Location.** This consideration involves identifying the maritime zone where the illicit activity has taken place. The location—territorial sea, contiguous zone, exclusive economic zone, high seas—when combined with the suspected activity is pivotal to the ability to exercise jurisdiction (or whether consent from a flag State is required).

The United States must have a jurisdictional basis with respect to all four considerations before taking MLE action.

#### **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 USCG worldwide. As a matter of comity and respect for foreign sovereignty, except aboard ships where the United States claims all the privileges of sovereign immunity, enforcement action is generally 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:

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 assert jurisdiction over a nonsovereign-immune, foreign-flagged vessel depends largely on the maritime zone 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 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 (see 3.4). States may provide authorization to foreign law enforcement vessels to board their flagged vessels in certain circumstances. The flag State may grant consent—ad hoc, written arrangement, or in accordance with an international agreement—to another State to board and exercise jurisdiction over its vessels. Special arrangements are discussed in 3.11.2.2.7.

The United States takes the position that the master of a foreign-flagged vessel, as the official representative of the flag State, has plenary authority over all activities on board the vessel while in international waters, to include consensual boardings. The scope of master consent is limited. The master can limit the scope, conduct, and duration of the boarding. No enforcement jurisdiction—such as arrest or seizure—may be exercised during a consensual boarding of a foreign-flagged vessel without the permission of the flag State (whether or not the master consents), even if evidence of illegal activity is discovered. Not all States agree with the U.S. view.

#### 3.11.2.2.2 Enforcement Jurisdiction in the 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 without consulting with or contacting the flag State. 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 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 without consulting with or contacting the flag State.

#### 3.11.2.2.3 Enforcement Jurisdiction in the Territorial Sea, Archipelagic Waters, and Internal Waters

Coastal States have the right to regulate their territorial sea, archipelagic waters, and internal waters. 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* (see 2.5.2.1, 2.5.2.6, 2.5.3.2, and 3.2.2). A coastal State may enforce reasonable, nondiscriminatory conditions on a vessel's entry into its ports. Warships and government vessels in noncommercial service retain their sovereign-immune status in the territorial sea and 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 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 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 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, 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 visual or electronic means. The ship or aircraft giving the order to stop must 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 located at the same place as any other craft with which it is cooperatively engaged in the violation of law. The constructive presence 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 (e.g., internal waters, territorial sea, archipelagic waters, contiguous zone, EEZ, or waters over the continental shelf) and commit an act subjecting it to such jurisdiction
3. Good reason to believe two vessels are working as a team to violate the laws of that State.

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

U.S. Navy units must shift tactical control to the appropriate USCG authority prior to USCG law enforcement detachments boarding suspect vessels and establish communications on the designated law enforcement command and control network. Tactical control remains with the USCG during boardings and any subsequent towing or escort operations. The U.S. Navy unit will fly the USCG ensign from the yard during all such operations. See 3.4. See OPNAVINST 3120.32D, Change 1.

### 3.11.2.2.7 Special Arrangements and International Agreements

International law has long recognized the right of a State to authorize 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 1988 Convention for the Suppression of Unlawful Acts against the Safety of Navigation (SUA Convention) and the 1988 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. 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 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. These restrictions must be strictly observed.

The United States has entered into numerous bilateral agreements and arrangements addressing counterdrug, migrant interdiction, fisheries enforcement, counter-proliferation, and other law enforcement operations with States around the world. Many of the agreements provide USCG law enforcement officers with authority to stop, board, and search the vessels of the other State in international waters. These agreements may allow the USCG to embark its personnel on vessels of that State, to enforce certain laws of that State, 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. Maritime Stability Operations complement bilateral agreements by providing Navy and Coast Guard forces an ability to advance shared priorities. See NWP 3-07, Maritime Stability Operations.

### 3.11.2.3 Enforcement Jurisdiction over Vessels without Nationality

Vessels that are not legitimately registered in any one State are without nationality. They 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. law expressly provides for jurisdiction over vessels without nationality or a vessel assimilated to be a vessel without nationality. (See 46 U.S.C., § 70502). 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 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 engage in the right of approach and perform a consensual boarding, neither of which constitute an exercise of jurisdiction over the vessel in question. 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 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 may be conducted with the approval of the flag State or 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 their vessel while in international waters is well established in international law. It includes the authority to allow anyone, including foreign law enforcement officials, to come aboard the vessel as their guest. 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 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 their discretion. 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.

Where the boarding occurs with the consent of the flag State, approval may be pursuant to an existing agreement, or it may be on an ad hoc basis. Where there are reasonable grounds 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 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, there are legal and policy restrictions on U.S. law enforcement action that must be considered. Within the United States, the doctrine of *posse comitatus* (see 3.11.3.1) limits DOD law enforcement activities. This restriction does not apply to the USCG, which exercises its statutory law enforcement authority when carrying out a law enforcement boarding (see 14 U.S.C., § 522). 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 United States Army or United States Air Force personnel or resources as a *posse comitatus*—a force to aid civilian law enforcement authorities in keeping the peace and arresting felons—or otherwise to execute domestic law, is prohibited by 18 U.S.C., § 1385, the Posse Comitatus Act. 10 U.S.C., § 275, Restriction on Direct Participation by Military Personnel, requires 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.



### **3.11.3.2 Department of Defense 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 is incidental to normal military training or operations is not a violation of the Posse Comitatus Act or DODI 3025.21. 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 Department of Defense Personnel**

Although Congress has enacted legislation expanding the permissible role of the DOD in assisting law enforcement agencies, DOD personnel may not directly participate in a search, seizure, arrest, or similar activity unless otherwise authorized by law. Department of Defense personnel may provide specified limited support to law enforcement operations, such as assisting with security on board a suspect vessel. Other permissible activities presently include training and advising federal, state, and local law enforcement officials in the operation and maintenance of loaned equipment. Department of Defense personnel made available by appropriate authority may 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 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. Transportation of civilian law enforcement personnel
6. Operation of a base of operations for civilian law enforcement personnel
7. 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 DOD 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 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. See COMDTINST M3800.6, Coast Guard Intelligence Manual, for the USCG policy guidance for the dissemination and use of intelligence information, including law enforcement intelligence, and for the use of classified investigative technologies.

#### **3.11.3.2.3 Use of Department of Defense Equipment and Facilities**

The DOD 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 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**

Except aboard U.S. ships entitled to sovereign immunity, 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 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 that implements a whole-of-government response to threats against the United States and its interests in the maritime domain. Triggered when more than one agency is substantially involved, the MOTR Plan contains requirements to ensure timely information sharing and integrated responses to maritime threats. Maritime operational threat response coordination activities identify the lead agency, courses of action, and desired national outcomes. This federal-level process is used almost daily to align the response to challenges that include piracy, drug trafficking, terrorist activities, fisheries violations, cyber incidents, and migrant smuggling.

Operational protocols complement the MOTR Plan by providing process guidance for specific types of events. Last updated in 2018, the protocols include national-level agency points of contact—designated as MOTR Advisory Group members—that are authorized to initiate MOTR, participate in coordination activities, and speak on behalf of their agency. Within the discretion of the national-level agency point of contact, additional agency officials may participate. The Global Maritime Collaboration Center (GMCC) and a USCG/Department of Homeland Security office that is accountable to the National Security Council staff during coordination supports the interagency by facilitating MOTR activities, documenting decisions, and serving as the Plan’s executive secretariat.

The U.S. coordination framework recognizes the importance of partner nation collaboration. Information sharing agreements exist between the GMCC and whole-of-government centers in several countries.

U.S. interagency coordination under the MOTR Plan (Annex II, Maritime Security Communications with Industry; implemented in 2017) involves the development of warnings publicly disseminated to the maritime industry regarding threats throughout the globe. Under this single and integrated federal process, alerts and advisories are transmitted by the National Geospatial-Intelligence Agency and posted on the U.S. Maritime Administration website. Governing references include DODI 3020.48, Guidance for Maritime Operational Threat Response (MOTR)-Related Conferencing Coordination Activities Implementation, and CJCSI 3120.15A, Maritime Operational Threat Response (MOTR) Conference Procedures.

### **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 3.11.2.1)
2. Vessels without nationality (see 3.11.2.3)
3. Vessels assimilated to a statelessness (see 3.11.2.4)
4. Foreign vessels where the flag State authorizes enforcement of U.S. law by the United States (see 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.

18 U.S.C., § 2285, Drug Trafficking Vessel Interdiction Act, prohibits the operation of or embarkation in any submersible vessel or semisubmersible vessel that is without nationality and 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 Department of Defense Mission in Counterdrug Operations**

The 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. The 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 USCG is the primary MLE agency of the United States. It is 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 USCG 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. U.S. 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 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 46 U.S.C., §§ 70501–70508, Maritime Drug Law Enforcement Act. Under the Act, it is unlawful for any person on board a vessel of the United States, on board 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 on board any vessel to knowingly or intentionally manufacture or distribute a controlled substance.

U.S. Coast Guard commissioned, warrant, and petty officers are designated customs officers, which provides them additional law enforcement authority. When acting as customs officers, USCG 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. 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**

Department of Defense personnel engaged in MLE missions under USCG operational control (OPCON) or tactical control (TACON), outside and within the territorial limits of the United States, will follow USCG policy for warning shots and disabling fire. Department of Defense forces under USCG OPCON or TACON always retain the right of self-defense in accordance with CJCSI 3121.01B. COMDTINST M16247.1H prescribes use of force policy for USCG personnel in law enforcement missions and for self-defense.

Neither the USCG Use of Force Policy nor the SROE/SRUF limit a commander's inherent authority and obligation to use all necessary means available and 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. Department of Defense forces under USCG control, conducting operations 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, USCG. It is USCG 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 Chapter 4), the use of warning shots is 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**

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. Department of Defense forces detailed to other federal agencies will operate under common mission-specific rules for the use of force approved by the Secretary of Defense (SECDEF) and the lead federal agency. See CJCSI 3121.01B, 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.

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. In the latter half of the twentieth century and continuing today, the concepts of peace and war have become blurred to the extent it is not always possible to draw distinctions between the two. This chapter will focus specifically on safeguarding national interests in the maritime environment during times when the State whose interest is at stake is not involved in armed conflict with the entity threatening its interest.

### 4.2 1945 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 UN. As a starting point, Article 2, Paragraph 3, of the Charter of the UN provides:

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

Article 2, Paragraph 4, 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.

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. History has shown that States, as well as non-State actors, have used force or the threat of force to accomplish their objectives. Anticipating States might resort to the threat or use of force, Chapter VII of the Charter of the UN vests certain powers in the UN Security Council. For example, Article 39 provides:

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:

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:

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 extinguish a State's right of individual and collective self-defense. Article 51 of the Charter of the UN provides:

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

### **4.3 NONMILITARY MEASURES**

#### **4.3.1 Diplomatic**

As contemplated by the Charter of the UN, 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, 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 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 seek judicial resolution of their peacetime disputes, 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. 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 submit their disputes to the International Court of Justice for resolution. Article 92 of the Charter of the UN 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 given in regard to a specific controversy. States 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. 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 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 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 following addresses various military measures that may be used to safeguard U.S. national interests in the maritime environment during peacetime. It is 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 self-defense.

### 4.4.1 The Right of Self-defense

Article 51 of the Charter of the UN 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 the two important principles of necessity and proportionality. These terms are defined as:

1. Necessity means 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 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 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 the force used in response be of the same kind as used in the attack. For example, the response to a cyberspace attack 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 it would be contrary to the purposes of the Charter of the UN 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. The right of a State to self-defense includes the use of armed force where attack is imminent and no reasonable alternative means is available. Allies and partners engaged in combined operations may have a separate and distinct legal position on the use of force in self-defense.

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

Rules of engagement serve three purposes:

1. Provide guidance from the President and SECDEF, as well as subordinate commanders, to deployed units on the use of force
2. Act as a control mechanism for the transition from peacetime to combat operations
3. Provide a mechanism to facilitate planning. Rules of engagement provide a framework that encompasses national policy goals, mission requirements, and the law.

The United States has incorporated and operationalized the governing international principles on the lawful use of force—necessity and proportionality—in CJCSI 3121.01B and DODD 5210.56, Arming and the Use of Force. U.S. SROE implements the right and obligation of self-defense and sets out delegation of authority to use force

for mission accomplishment during military operations, contingencies, and routine military department functions, including AT/FP. Under United States use of force doctrine, unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Rules of engagement, including mission-specific ROE, reflect operational and national policy considerations that may restrict operations and tactics that would otherwise be permitted by international law.

#### **4.4.1.2 CJCSI 3121.01B, Standing Rules of Engagement or Standing Rules for Use of Force—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, contingencies, and routine military department functions (including AT/FP duties) occurring outside U.S. territory (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 apply to air and maritime homeland defense missions conducted within U.S. territory and territorial seas, unless otherwise directed by the SECDEF.

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 seas. The SRUF apply to land homeland defense missions occurring within U.S. territory and 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 SECDEF. Examples of civil support missions during which SRUF would apply include the protection of critical U.S. infrastructure 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 in CJCSI 3121.01**

Many principles on the use of self-defense are common to both the SROE and SRUF. Significant differences between the two doctrines will be examined in 4.4.1.4 and 4.4.1.5.

The central tenet of both the SROE and the SRUF is 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.

Under both sets of rules, military members may exercise individual self-defense in response to a hostile act or demonstrated hostile intent. 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, they 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 CJCSI 3121.01, Standing Rules of Engagement**

Under the SROE, when necessity exists—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 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 CJCSI 3121.01, Standing Rules for the Use of Force**

Under the SRUF, force is to be used only as a last resort, and only the minimum necessary force may be used. When time and circumstances permit, the threatening person(s) 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 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 USCG and its Use of Force Policy. See 3.11.5.1.

#### **4.4.1.6 Self-defense Pursuant to the Department of Defense Directive 5210.56**

DODD 5210.56 establishes policy and standards for the arming of and use of force by DOD personnel performing security and protection, law and order, investigative, or counterintelligence duties; and for personal protection when related to the performance of official duties. This includes DOD contractor personnel (U.S. persons or non-U.S. persons) required to carry a firearm in accordance with applicable DOD contracts. It does not apply to DOD personnel engaged in military operations subject to the SROE or other ROE.

DOD personnel armed in accordance with DODD 5210.56 are authorized to use force in the performance of their official duties. When force is necessary to perform official duties, DOD personnel will use a reasonable amount of force and will not use excessive force. The reasonableness of any use of force is determined by assessing the totality of the circumstances that led to the need to use force. Deadly force is justified only when there is a reasonable belief that the subject of such force poses an imminent threat of death or serious bodily harm to a person or under the other specific circumstances described in DODD 5210.56. Less than deadly force may be used when there is probable cause to believe it is reasonable to accomplish the lawful performance of assigned duties. The amount of force used must be reasonable when assessed under the totality of the circumstances leading to the need for force.

When using force pursuant to DODD 5210.56, warning shots are prohibited in the United States. Warning shots are prohibited outside the United States, unless otherwise authorized by applicable host-nation law and status of forces agreements (SOFAs) and in accordance with SRUF in non-U.S. locations. Warning shots to protect U.S. Navy and naval-service vessels and piers in the territorial seas and internal waters of the United States are authorized if all the factors set forth in the DODD are present.

### **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 SECDEF 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 employed without political entanglement and without the necessity of seeking consent from littoral States. 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 1.9). With the exception of overflight by aircraft in transit passage of international straits and in archipelagic sea lanes passage (see 2.5.3 and 2.5.4.2), distress (see 3.2.1), and assistance entry to assist those in danger of being lost at sea (see 2.5.2.6), all aircraft must obtain authorization to enter another State's national airspace (see 2.5). Authorization may be flight-specific (in the case of diplomatic clearance for the visit of a military aircraft) or general (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 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.

In regard to military aircraft, State practice suggests 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 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.

In 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 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. States are required to enact national laws making compliance by their civil aircraft mandatory.

All States party 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 or interdicting 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. 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. 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 tenets 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 3.11.2.2.7 for a discussion of SUA and the 2005 Protocols. Subject to these limitations, international law does permit the interception or interdiction of foreign-flagged vessels, as described in the following.

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

Under Article 41 of the Charter of the UN, 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. In a 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 of the UN cited by the Security Council and the operative language in the resolution must be analyzed.

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

Ships are subject to the exclusive jurisdiction of their flag State (see 3.11.2). 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 3.11.2.2.7), States may negotiate bilateral or multilateral agreements which provide advance consent to board another State's vessels for other than law enforcement purposes. 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 seize persons or cargo. The master may not alter the scope of the consent granted by the flag State. 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 their 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. 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 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 their discretion. 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**

Vessels in international waters are immune from the jurisdiction of any State other than the flag State. 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 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 it is:

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

There are other legal bases distinct from customary international law (reflected in UNCLOS) that provide authority to board a foreign-flagged vessel (e.g., self-defense, bilateral international agreement, UN Security Council Resolution, etc.). See 3.4 for additional information on the right to query any ship. See OPNAVINST 3120.32D, Change 1, and COMDTINST M16247.1H for further guidance. For the belligerent right of visit and search, see 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, are subject to the jurisdiction of all States. 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 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 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 Charter of the UN.

#### 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. The PSI is not a treaty or international organization. It is an undertaking 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 September 2021, the United States has 11 bilateral PSI ship boarding 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. The PSI seeks to use existing national and international legal authorities for such interdictions. 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.

Proliferation Security Initiative 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 involve only a single or a few PSI participants with geographic and operational access to a particular PSI target of opportunity. See CJCSI 3520.02C, Proliferation Security Initiative (PSI) Activity Program.

Proliferation Security Initiative 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. Willing to actively participate in PSI interdiction training exercises and operations as opportunities arise
5. 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 NTPP 3-07.2.1). 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 faced with ascertaining the intent of persons and objects (e.g., small boats; low, slow flyers; jet skis; swimmers, UMS; unmanned aerial vehicles) proceeding toward their units. In many instances, ascertaining their intent is very difficult, especially when operating in 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. 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 entities traversing the area communicate with them and state their intentions. Such notices may include references 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. The quarantine served the interests of the United States by defending Western Hemisphere interests and security while preserving FON in what was otherwise a peacetime environment to the greatest degree possible.

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 a discussion of blockade, see 7.7. Quarantine is distinguished from blockade in:

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.

#### **4.4.9 Information Operations**

Information operations provide additional capabilities to protect U.S. forces and advance mission objectives in the maritime environment, during peacetime and armed conflict. Information operations are the integrated employment, during military operations, of information-related capabilities (IRCs) 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. These IRCs support tactical operations, intelligence collection, military deception, electromagnetic spectrum operations, cyber operations, space operations, and military information support operations. The offensive employment of IO is part of what is termed information warfare by the Navy and

operations in the information environment by the U.S. Marine Corps. Information warfare is the integrated employment of U.S. Navy's information-based capabilities (communications, networks, intelligence, oceanography, meteorology, cryptology, electronic warfare, cyberspace operations, and space) to degrade, deny, deceive, or destroy an enemy's information environment or to enhance the effectiveness of friendly operations. See NDP 1, Naval Warfare and JP 3-13, Information Operations.

Employment of some IRCs may implicate diplomatic relations, impact the U.S. ability to detect similar capabilities, or lead to unintended escalation. Due to the potential national and international implications of some IRCs and their associated risks, commanders should be aware the authority to employ such capabilities may be held at a higher echelon. Use of the electromagnetic spectrum by the U.S. military is subject to international agreements to which the United States is a party, customary international law, and domestic law and policy.

#### **4.4.9.1 Military Information Support Operations**

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. They occur during both armed conflict and peacetime. U.S. MISO will not target U.S. citizens under any circumstances. See JP 3-13.2, Military Information Support Operations.

#### **4.4.9.2 Military Deception**

Military deception is an action executed to deliberately mislead adversary military, paramilitary, or violent extremist organization decision-makers, thereby causing the adversary to take specific actions (or inactions) that will contribute to the accomplishment of the friendly mission. Military deception actions include the misallocation of resources, attacking at a time and place advantageous to friendly forces, or avoiding taking action at all. See JP 3-13.4, Military Deception. See JP 3-13, Information Operations and SECNAVINST S3490.1, (U) Deception Activities.

#### **4.4.9.3 Intelligence**

Intelligence is the product resulting from the collection, processing, integration, evaluation, analysis, and interpretation of available information concerning foreign nations, hostile or potentially hostile forces or elements, or areas of actual or potential operations. It is a vital military capability that supports all warfighting areas to include IO. See JP 2-0, Joint Intelligence.

#### **4.4.9.4 Key Leader Engagement**

Key leader engagements are deliberate, planned engagements between U.S. military leaders and the leaders of foreign audiences that have defined objectives, such as a change in policy or supporting the Joint Force Commander's objectives. These engagements can be used to shape and influence foreign leaders at the strategic, operational, and tactical levels and may be directed toward specific groups, such as religious leaders, academic leaders, and tribal leaders (e.g., to solidify trust and confidence in U.S. forces). See JP 3-13, Information Operations.

#### **4.4.9.5 Joint Electromagnetic Spectrum Operations**

Joint electromagnetic spectrum operations (JEMSO), consisting of EW and joint electromagnetic spectrum (EMS) management operations, enable EMS-dependent systems to function in their intended operational environment. During peacetime, JEMSO are conducted to ensure adequate access to the EMS and may include deconflicting use of the EMS between joint users and coordinating with a host nation. As a crisis escalates toward armed conflict, JEMSO shift from EMS access coordination to EMS superiority, with coordinated military actions executed to exploit, attack, protect, and manage the electromagnetic operational environment. See JP 3-85, Joint Electromagnetic Spectrum Operations.

#### **4.4.9.6 Cyberspace Operations**

Cyberspace operations involve the employment of cyberspace capabilities to achieve objectives in or through cyberspace. Cyberspace operations:

1. Use cyber capabilities (e.g., computers, software tools, or networks)
2. Have the primary purpose of achieving objectives or creating effects in or through cyberspace.

For example, cyberspace operations include exploitation of networks to gain information about an adversary's military capabilities and the use of malware to disrupt, deny, degrade, or destroy information resident in computer networks or computers and networks themselves. See JP 3-12, Cyberspace Operations.

##### **4.4.9.6.1 Cyberspace Operations and Use of Force**

The threat or use of force by States is prohibited under Article 2(4) of the Charter of the UN and customary international law. Cyberspace operations may rise to the level of a use of force within the meaning of Article 2(4) if their scale and effects are analogous to other kinetic and nonkinetic operations that are tantamount to the use of force. For example, cyberspace operations that trigger a nuclear plant meltdown or disable air traffic control resulting in airplane crashes are liable to be considered a use of force due to the foreseeable destructive effects. There is no single formula to determine whether cyberspace operations constitute the use of force, although elements that inform a State's determination include:

1. Severity
2. Immediacy
3. Directness
4. Invasiveness
5. Measurability of effects
6. Military character
7. State involvement
8. Presumptive legality of the operations.

A cyberspace operation that qualifies as a use of force constitutes an armed attack under Article 51 of the Charter of the UN and customary international law. An armed attack or imminent threat of an armed attack gives rise to a right to take necessary and proportionate force in self-defense, including cyberspace activities at the use of force level. The SROE address the authority of the U.S. armed forces to act in self-defense in response to any use of force (hostile act) or any imminent threat of a use of force (demonstration of hostile intent). Some States, including certain U.S. allies and partners, are of the view that only the most grave uses of force constitute an armed attack, thereby triggering the right to use force in self-defense under Article 51.

##### **4.4.9.7 Operations Security**

Operations security is a standardized process designed to meet operational needs by mitigating risks associated with specific vulnerabilities in order to deny adversaries critical information and observable indicators. See JP 3-13.3, Operations Security, and JP 3-13.



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

The United States employs maritime zones and other control mechanisms pursuant to 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 UNCLOS. Under U.S. law only the USCG Captain of the Port in which the zone is to be established is vested with legal authority to establish such zones. Close consultation with the USCG is required before such a zone can be created. As many of these zones and other control mechanisms have their primary purpose as the restriction of access, they can be used as tools by the military to enhance the security and safety of maritime and land-based units.

When deployed, commanders should be aware of similar sounding maritime zones and control mechanisms declared by other States. While some of these are consistent with international law and UNCLOS, some are 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 in a safety zone unless authorized by the USCG. Such zones may be described by fixed geographical limits, or they may be a prescribed area around a vessel, whether anchored, moored, or underway. Safety zones may be established within the navigable waters of the United States seaward to 12 nautical miles from the baseline. As explicitly permitted by Article 60 of UNCLOS, safety zones may 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.

Security zones can be established within the navigable waters of the United States seaward to 12 nautical miles from the baseline. Security zones established to prevent or respond to an act of terrorism against an individual, vessel, or structure may 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 USCG. Those convicted of security zone violations are subject to civil and criminal penalties.

### 4.5.3 Naval Vessel Protection Zones

The USCG establishes naval vessel protection zones (NVPZs) under authority contained in 14 U.S.C., § 527 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 command and control 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 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 USCG commissioned, warrant, or petty officer, or the commanding officer of a U.S. naval vessel or their 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 very high-frequency, modulated 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 be established on the continental shelf around offshore platforms pursuant to 43 U.S.C., § 1331–1356b, Outer Continental Shelf Lands Act. Outer continental shelf (OCS) 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. It 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:

1. Vessels owned or operated by the OCS facility
2. Vessels less than 100 feet in overall length not engaged in towing
3. Vessels authorized by the cognizant USCG commander.

#### **4.5.5 Other Areas**

For specific guidance concerning regulated navigation areas, restricted waterfront areas, restricted areas, danger zones, naval defensive sea areas, and other control and enforcement mechanisms, see COMDTINST M16247.1H, Appendix O.

### **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 3.11). If this should occur, all persons detained by naval forces during peacetime must be treated humanely.

## 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*—is that part of international law that regulates the circumstances in which States may resort to the use of force in international relations. The second—referred to as *jus in bello*—is the part of international law relating to the conduct of hostilities and the protection of combatants, noncombatants, and civilians. 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 national leadership. The legality of how the war is conducted is the responsibility of national leadership, military commanders, and individual service members. Concepts on application of the law of war to conflict on land are set out in greater detail in the DOD Law of War Manual. There are law of war rules unique to naval operations that have developed separately from the law of land warfare, which are addressed in the following.

#### 5.1.1 Law Governing when States can Legally Use Force

The legal framework of *jus ad bellum* is found in the Charter of the UN and customary international law. Article 2(4) of the Charter of the UN 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.

There are circumstances where the resort to force will not violate this prohibition. This includes when the use of force is authorized by the UN Security Council under Chapter VII of the Charter of the UN, when undertaken with the consent of the territorial State, and when undertaken in the lawful exercise of the inherent right of individual or collective self-defense as reflected in Article 51 of the Charter of the UN. See 4.4.1 for discussion on the right of self-defense.

#### 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 (*jus in bello*) depends on the type of armed conflict in which the State is engaged.

##### 5.1.2.1 International Armed Conflict

An international armed conflict (IAC) refers to any declared war between States or any other armed conflict between States, 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. The Geneva Conventions apply to all cases of IAC and all cases of partial or total occupation of a territory, even if the occupation meets no armed resistance. The United States has interpreted armed conflict in Common Article 2 to include any situation in which there is hostile action between the armed forces of two parties, regardless of the duration, intensity, or scope of fighting.

The law governing IAC 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 part of international law that regulates the conduct of armed hostilities and the protection of war victims in both international and noninternational armed

conflict; belligerent occupation; and the relationship between belligerent, neutral, and nonbelligerent States. 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. See 7.1 for discussion on belligerent, nonbelligerent, and neutral States.

Although the law of war is part of international law, it is important to understand different States may have different law of war obligations. Understanding where these differences may arise is often important in dealing with an enemy. It becomes critical when working with allies and other foreign partners. 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. Some provisions of Additional Protocol I reflect customary international law that is binding on the United States. Partner States may have different interpretations of law of war obligations even where the same treaty provision is at issue. Consequently, those partners often adopt conditions or caveats during multinational operations that express those States' interpretations or their differences on issues of national policy.

### **5.1.2.2 Noninternational Armed Conflict**

Noninternational armed conflict (NIAC) 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. A NIAC is an armed conflict not between States, but rather a conflict between a State and a non-State armed group, as in a civil war or domestic rebellion occurring within the territory of a State or a conflict between two non-State armed groups. In assessing whether a NIAC exists, triggering the applicable law of armed conflict rules, situations of internal disturbances and tensions—such as riots, isolated and sporadic acts of violence, and other acts of a similar nature—do not amount to armed conflict. The intensity of the conflict and organization of the parties are criteria that have to be assessed to distinguish between a NIAC and internal disturbances and tensions. Noninternational 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 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 NIAC, even if international borders are crossed in the fighting. Small wars or limited military expeditions may constitute NIACs or IACs, depending on the parties to the conflict.

In cases of NIAC, CA3 of the Geneva Conventions and customary law of armed conflict applies. For States that have signed and ratified it, Additional Protocol II to the Geneva Conventions of 1949 also applies to NIACs. The United States has signed but not ratified Additional Protocol II and is not bound by it, but has an obligation to refrain, in good faith, from acts that would defeat the object and purpose of the treaty. The United States considers some provisions of Additional Protocol II to reflect customary international law. Commanders should be aware that in coalition operations, some partner States may be obligated to follow Additional Protocol II.

Any State vessel, including warships and naval auxiliaries, may be used to conduct attacks against non-State armed groups during NIAC. For example, a State may use a Coast Guard or other MLE vessel as part of operations against members of such groups.

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

The law of war applies to certain situations not amounting to IAC or NIAC. For instance, Common Article 2 of the Geneva Conventions of 1949 states 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 establishes the rules between belligerents and neutrals. Some law of war obligations 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, Department of Defense Law of War Program, defines the law of war/law of armed conflict as the treaties and customary international law binding on the United States that regulate: the resort to armed force; the conduct of hostilities and the protection of war victims in international and noninternational armed conflict; belligerent occupation; and the relationships between belligerent, neutral, and nonbelligerent States.

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. It depends on whether an armed conflict exists in fact, and if so, whether the armed conflict is of an international or noninternational 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.

## 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 the three general principles of military necessity, humanity, and honor. These principles 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. No one principle of the law of war can be considered in isolation.

### 5.3.1 Principle of Military Necessity

Military necessity is the principle that justifies the use of all measures not prohibited by the law of armed conflict needed to defeat the enemy quickly and efficiently. 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 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 which is necessary to achieve a valid military objective. 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. The principle of military necessity does not authorize acts that are otherwise prohibited by the law of armed conflict. 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 its nature (e.g., combat ships and military aircraft), location (e.g., bridge on an enemy supply route), 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), or use (e.g., school building being used as an enemy headquarters) makes it an effective contribution to the enemy's warfighting or 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.

The principle of military necessity does not prohibit the application of overwhelming force against enemy combatants, units, and materiel consistent with the principles of distinction and proportionality. Military necessity may justify the use of overwhelming force to defeat enemy forces because the object of war is not simply to prevail, but to prevail as quickly and efficiently as possible. Military necessity does not require commanders to use the minimum force possible in a given situation. Such an interpretation of military necessity would prolong the fighting and increase suffering.

The law of armed conflict seeks to ameliorate difficulties in applying military necessity in three ways. First, in evaluating military necessity, one may consider the broader imperatives of winning the war as quickly and efficiently as possible and is not restricted to considering only the demands of the specific situation. Second, the law of armed conflict recognizes certain types of actions are militarily necessary per se. For example, an attack on enemy forces is generally lawful. Third, commonly called the Rendulic Rule, the law of armed conflict recognizes that commanders must assess the military necessity of an action based on the information available to them at the relevant time. They cannot be judged based on information that subsequently comes to light.

### **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:

1. Provide fundamental safeguards for persons who fall into the hands of the enemy
2. Protect the civilian population and civilian objects
3. Protect military medical personnel, units, and transports
4. Protect enemy wounded, sick, and shipwrecked, as well as respect for the dead
5. Prohibit or restrict weapons that are calculated to cause unnecessary suffering to combatants
6. Prohibit weapons that are inherently indiscriminate, or restrict weapons that are indiscriminate in their effects on civilians and civilian objects without special precautions.

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. Department of Defense policy requires 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. Commanders should ensure 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 evaluate whether the expected injury to civilians and damage to civilian objects resulting from an attack would be excessive in relation to the concrete and direct military advantage anticipated from the attack. At sea, the principle of proportionality is applied using a vessel-based construct, which evaluates whether any anticipated harm to surrounding civilian vessels or objects is excessive in relation to the expected military advantage in attacking a target vessel. See 8.3. Except for exempted ships identified in 8.6.3, and absent specific knowledge, an individualized proportionality assessment is not required once the vessel has been deemed a lawful military objective. Note that the principle of proportionality under the law of armed conflict is different than the term proportionality used in self-defense. See 4.4.1.

### **5.3.4 Principle of Distinction**

The principle of distinction (sometimes referred to as discrimination) is concerned with distinguishing combatants from civilians and military objectives from civilian objects 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. During naval conflict, commanders

identify military objectives by assessing the status or use of vessels overall, rather than individualized assessment of embarked individuals. Distinction at sea is primarily between those vessels associated with a belligerent State and those associated with a neutral State. Unless innocently employed, vessels associated with or in the service of a belligerent State will be military objects by their nature, purpose, use, war-sustaining, or war-supporting roles.

The principle of distinction, combined with the principle of military necessity, prohibits indiscriminate attacks, specifically:

1. 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)
2. 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 several distinct military objectives throughout the city that could be targeted separately)
3. 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 is a core U.S. Navy, U.S. Marine Corps, and U.S. Coast Guard value. Honor, also called chivalry, 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 certain limits exist on their ability to conduct hostilities. Honor prohibits 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 does not forbid combatants to use ruses and other lawful deceptions against the enemy. 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 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 in the following 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 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:

1. Members of the regular armed forces of a State party to the conflict

2. 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
3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the detaining power.

Lawful combatants 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 those members of the armed forces who are medical personnel and chaplains. It 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. See 8.2.1.

#### **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 feasible precautions must be taken to reduce the risk of harm to them. 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. 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. Note, that there are special cases, such as persons authorized to accompany the armed forces, members of the merchant marine, and others.

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

Persons authorized to accompany the armed forces are referred to as civilians, but such civilians are treated differently from 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, to include training and maintenance roles and intelligence, planning, logistics, and communications support functions. The 1907 Hague Regulations and Geneva Convention III recognize that civilians will support and accompany the armed forces. Civilians accompanying the force may not 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. They retain their status as POWs.

##### **5.4.3.2 Civilian Mariners**

Civilian mariners—government civil-service and contractor employees—including those serving on MSC auxiliary vessels or USS warships, are entitled to POW status if captured. Merchant mariners serving aboard merchant vessels and belligerent vessels may lawfully resist attack by enemy forces, including efforts by enemy warships to capture their vessel. They are permitted to carry out defensive measures through to eventual seizure of the attacking vessel or aircraft, if possible. 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 or by using force in self-defense, to include operating shipboard weapons in defense against the attack of an enemy vessel or aircraft.



## 5.5 SOURCES OF THE LAW OF ARMED CONFLICT

As is the case with international law, the principal sources of the law of armed conflict are customary international law, as reflected in the practice of States and treaties (or conventions).

### 5.5.1 Treaties

A treaty is defined as an international agreement concluded between States in written form and governed by international law. Treaties are often referred to by different terms, such as Conventions or Protocols, but regardless of how titled, all treaties in force are legally binding on States parties as a matter of international law. The U.S. Department of State publishes an annual listing of Treaties in Force for the United States.

States sometimes need to enact domestic legislation to implement treaty provisions. This implementing legislation may help interpret treaty provisions or reflect a State's interpretation of those provisions. If there is a doubt as to the applicability of a specific U.S. treaty obligation, the commander should seek legal advice from a judge advocate. Judge advocates should refer specific questions through their operational chain of command for resolution to ensure that there are common understandings of the applicability of treaty obligations during military operations.

Principal among the international agreements reflecting the development and codification of the law of armed conflict are:

1. Hague Regulations of 1907
2. Geneva Gas Protocol of 1925
3. Geneva Conventions of 1949 for the Protection of War Victims
4. 1954 Hague Cultural Property Convention
5. Biological Weapons Convention of 1972
6. 1980 Convention on Conventional Weapons (and its five Protocols)
7. Chemical Weapons Convention of 1993.

The 1949 Geneva Conventions and 1977 Protocols address the protection of victims of war, for the most part. The previously listed international agreements reflecting the development and codification of the law of armed conflict are primarily concerned with controlling the means and methods of warfare.

There are international agreements the United States has signed and ratified, signed but not ratified, or 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 not signed or 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) and the Annex entitled Regulations Respecting the Laws and Customs of War on Land
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 (GWS)\*
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 (GPW)
12. 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (GC)\*
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)
16. 1980 Protocol I to the Convention on Certain Conventional Weapons (Non-Detectable Fragments)
17. 1980 Protocol II to the Convention on Certain Conventional Weapons (Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices)
18. 1988 Protocol III to the Convention on Certain Conventional Weapons (Prohibitions or Restrictions on the Use of Incendiary Weapons)\*
19. 1993 Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1993 Chemical Weapons Convention or CWC)
20. 1995 Protocol IV to the Convention on Certain Conventional Weapons (Blinding Laser Weapons)\*
21. 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)\*
22. 2003 Protocol V to the Convention on Certain Conventional Weapons (Explosive Remnants of War)\*
23. 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.

The following are law of armed conflict treaties that have been signed but not 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.

## 5.5.2 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 (*opinio juris*). Customary law develops over time. Only when State practice attains a degree of regularity and is believed to be legally required, can the practice become a rule of customary law. Customary international law is 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 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). The inherent flexibility of law built on custom and fact 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. Commanders should recognize their actions can influence the development of customary international law and operate in a manner consistent with U.S. positions. Unlike a treaty provision—which is readily accessible in an identifiable document that sets forth an agreed-upon, codified rule—it can be difficult to identify and assess evidence of State practice and *opinio juris* when seeking to determine whether State actions in a particular area have resulted in a rule of customary international law. As with issues of treaty applicability and interpretation, questions on customary international law should be referred to judge advocates, who should refer specific questions through their operational chain of command for resolution to ensure there are common understandings of the customary international law requirements during military operations.

## **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. Some States consider international humanitarian law as 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. In other cases, international humanitarian law is understood more narrowly than the law of armed conflict (e.g., by understanding international humanitarian law not to include the law of neutrality). The term international humanitarian law does not cover all aspects of the law of armed conflict and is often confused with human rights law. The more traditional term law of armed conflict eliminates this confusion and is the term employed by the United States. Law of war is often used interchangeably with law of armed conflict. 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. Commanders must exercise leadership to ensure the forces under their command comply with the law of armed conflict. In addition to being legally required, compliance with the law of armed conflict reinforces military effectiveness, helps maintain public support and political legitimacy, and can encourage reciprocal adherence by the adversary or adherence by adversaries in future conflicts. The law of armed conflict has long recognized 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 training and education in the law of armed conflict through publications, instructions, training programs, and exercises. 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. 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. 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 2311.01 defines the law of war for U.S. personnel and directs 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 characterized. In all other military operations, members of the DOD components will continue to act consistent with the law of war's fundamental principles and rules, which include those in CA3 of the 1949 Geneva Conventions and the principles of military necessity, humanity, distinction, proportionality, and honor (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.

The commander of any unit that obtains information about an alleged violation of the law of armed conflict must assess whether the allegation is based on credible information and constitutes a reportable incident. The unit commander must immediately report reportable incidents, by operational incident reporting procedures or other expeditious means, through the chain of command to the combatant commander. Commanders will report reportable incidents up their respective service chain of command by the most expeditious means.

If the unit or superior commander determines U.S. persons are not involved in a reportable incident, a U.S. investigation or review will be continued at the direction of the appropriate combatant commander only.

Such incidents must be reported in accordance with DOD regulations. Incidents that involve allegations of partner forces violating the law of armed conflict will be reported with a view to ensuring compliance with the requirements of Title 10, U.S.C., § 362 and associated DOD policies. 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 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:

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 DON—commensurate with their duties and responsibilities—must receive—through publications, instructions, training programs, and exercises—training and education in the law of armed conflict.

U.S. Navy and U.S. 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 CNO and Commandant of the U.S. Marine Corps have directed officers in command of the operating forces to ensure their judge advocates have appropriate clearances and access to information to enable them to carry out that responsibility.

### **6.1.2.3 U.S. Coast Guard**

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

## **6.1.3 Who may be Held Accountable**

Those personnel who commit a war crime may be held individually responsible. In addition to the individual, others may be held responsible, such as the commander, those who aided and abetted an offense, and those who conspired with them to commit the crime—even those who conspire to commit a war crime that does not occur. Other theories of criminal responsibility under international law include joint criminal enterprise responsibility; command responsibility; and responsibility for planning, instigating, or ordering the crime. Under the Uniform Code of Military Justice (UCMJ), a person who aids, abets, counsels, commands, or procures the commission of an offense may be punished. See UCMJ, Article 77.

### **6.1.3.1 Command Responsibility**

Commanders have a duty to take necessary and reasonable measures to ensure their subordinates do not commit violations of the law of armed conflict, maintain order and discipline within their command, and ensure compliance with applicable law by those under their command or control. Command responsibility is a distinct offense that can be punished under the UCMJ as dereliction of duty or violation of orders. In some cases, commanders are not punished directly for breaches of those duties, but instead by imputing responsibility for the offense committed by their subordinates. Commanders may be liable for the criminal acts of their subordinates or other persons subject to their control, even if the commander did not directly participate in the underlying offenses. See DOD Law of War Manual, 18.23.3. In order for the commander to be liable, the commander's personal dereliction must have contributed to or failed to prevent the offense.

For instance, if U.S. Marines/U.S. Sailors commit massacres or atrocities against POWs or against the civilian population of occupied territory, the responsibility may rest not only with the actual perpetrators, but with the commander if the commander's dereliction contributed to the offense as well. If the commander concerned ordered such acts be carried out, then the commander would have direct criminal responsibility. UCMJ, Article 77 provides:

Any person punishable under this chapter who . . . commits an offense punishable by this chapter, or . . . commands . . . its commission . . . is a principal.

Under international law, criminal responsibility may fall on commanders or certain civilian superiors with similar authorities and responsibilities as military commanders if they had actual knowledge or constructive knowledge of their subordinates' actions and failed to take necessary and reasonable measures to prevent or repress those violations. Commanders may be held responsible if they knew or should have known, through reports received by them or other means, that personnel subject to their control were about to commit or have committed a war crime and did nothing to prevent such crimes or punish the violators. Once established that a commander has knowledge (actual or constructive) of a subordinate's actions, the commander may be liable under international law only where failure to supervise subordinates properly constitutes criminal negligence on the commander's part. The commander may be criminally liable where there is personal neglect amounting to a wanton, immoral disregard of the action of the commander's subordinates that amounts to acquiescence in the crimes.

### **6.1.3.2 Individual Responsibility**

Any person who commits an act that constitutes a crime under international law; who aids, abets, or counsels such a crime; or orders the commission of, conspires to commit, or attempts to commit such a crime is responsible for the crime and is liable to punishment (see DOD Law of War Manual, 18.22.1). Even if the act is not punishable as a crime in the person's own State, the individual is not relieved from criminal responsibility under international law (see DOD Law of War Manual, 18.22.2). A person acting pursuant to an order of their government or a superior is not relieved from responsibility under international law for acts that constitute a crime under international law, providing it was possible for the person to make a moral choice. See DOD Law of War Manual, 18.22.4. See 6.2.12.1 for describing when superior orders might constitute a legitimate defense.

All naval personnel have a duty to comply with the law of armed conflict in good faith; prevent violations by others to the utmost of their ability; and refuse to comply with clearly illegal orders to commit violations of the law of armed conflict. Naval personnel have an affirmative obligation to promptly report violations which they become aware. When appropriate, naval personnel should ask questions through appropriate channels and consult with the command legal advisor on issues relating to the law of armed conflict. Naval personnel should adhere to regulations, procedures, and training, as these policies and doctrinal materials have been reviewed for consistency with the law of armed conflict. Commands and orders should not be understood as implicitly authorizing violations of the law of armed conflict where other interpretations are reasonably available. For additional discussion, see DOD Law of War Manual, 18.3.

## **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, belligerents may agree to an ad hoc inquiry. The following is a nonexhaustive list of actions which the aggrieved nation could pursue:

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 make this information available to the Council. The United States submitted such a report as an effort to publicize the grave breaches committed by Iraq.
2. Protest to the offending nation and demand those responsible be punished and/or 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 6.2.4).
5. Punish individual offenders either during the conflict or upon cessation of hostilities (see 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 the opposing belligerents will regard as truly neutral, the Conventions contemplate that international humanitarian organizations, such as the International Committee of the Red Cross (ICRC), subject to the consent of the parties to the conflict, provide humanitarian aid and seek to ensure the protection of war victims in armed conflict.

The humanitarian organization must remain impartial. Impartiality distinguishes these organizations from humanitarian organizations that have an allegiance to a party to the conflict (such as the American Red Cross, which is a voluntary aid society under GWS Article 26). Impartial humanitarian organizations must act within the terms of their humanitarian mission. These organizations must refrain from acts harmful to either side, such as direct participation in the conflict. Performing their humanitarian function is not direct participation, even if it assists one side or the other by providing medical relief.

States may control access to their territory, and belligerents may control access to their military operations. The entry of the ICRC or other nongovernmental organizations into a State's sovereign territory, or into a theater of military operations, is subject to the consent of relevant States and exceptions for imperative military necessity (see GWS, Article 9; 1949 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (GWS Sea), Article 9; GPW, Articles 9 and 10; and GC, Articles 10 and 11). States may attach conditions to their consent, to include necessary security measures, but commanders have discretion, based on legitimate military reasons, to deny requests from impartial humanitarian organizations for military support, including classified or sensitive information, or dedicated security. The Amended Mines Protocol, for example, provides for protecting humanitarian organization personnel from the effects of mined areas so far as possible. See Amended Mines Protocol, Article 12.

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

The ICRC is a private, nongovernmental, humanitarian organization based in Geneva, Switzerland. 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, to include 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. The President has recognized the role of the ICRC in visiting individuals detained in armed conflict. See Executive Order (EO) 13491, Ensuring Lawful Interrogations.

Under its governing statute, the ICRC is dedicated to work for the faithful application of the Geneva Conventions, endeavor to ensure the protection of military and civilian victims of armed conflict, and 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 NIAC and international armed conflicts.



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

The Deputy Secretary of Defense (DepSecDef), in a 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 email through the operational chain of command to designated representatives within the cognizant combatant command. The combatant command shall then transmit such reports within 1 day of receipt to the Under SECDEF for Policy with information copies to the Director, Joint Staff; DOD General Counsel; and DOD Executive Secretary. The 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, to include 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 as the original ICRC communication.
4. All ICRC communications shall be marked with the statement:

ICRC communications are provided to DOD as confidential, restricted-use documents. ICRC communications will be safeguarded in the same manner as SECRET NODIS (no distribution) information using classified information channels. Dissemination of ICRC communications outside of DOD is not authorized without the approval of the SECDEF or DepSecDef.

It is anticipated the DepSecDef memorandum may be superseded by a new DODD 2310.1E, Department of Defense Detainee Program.

### 6.2.4 Reprisal

Reprisals are acts that are otherwise not permitted by the law of armed conflict in order to persuade a party to the conflict to cease violating the law of armed conflict. They are taken in response to a prior act in violation of the law of armed conflict that was committed by or is attributable to that party. This could include the use of weapons forbidden by the 1907 Hague Regulations to counter the use of the same weapons by an enemy on combatants who have not yet fallen into the hands of the enemy. Reprisals are extreme measures that are only adopted as a last resort to induce the party to desist from violations of the law of armed conflict. Under customary international law, members of the enemy civilian population, other than protected persons covered under the Fourth Geneva Convention, may be legitimate objects of reprisal. 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 reprisal provisions are counterproductive and remove a significant deterrent that protects civilians and other war victims on all sides of a conflict.

#### **6.2.4.1 Conditions for Reprisal**

Customary international law permits reprisals, subject to certain conditions. Reprisals are highly restricted in treaty provisions (see 6.2.4.2), and practical considerations may counsel against their use (see DOD Law of War Manual, 18.18.4). The conditions in 6.2.4.1.1 to 6.2.4.1.5 are drawn from U.S. practice (see DOD Law of War Manual, 18.18).

##### **6.2.4.1.1 Careful Inquiry that Reprisals are Justified**

Reprisals shall be resorted to only after a careful inquiry into the facts to determine the enemy has, in fact, violated the law (DOD Law of War Manual, 18.18.2.). In many cases, whether a law of armed conflict rule has been violated will not be apparent to the opposing side or outside observers.

##### **6.2.4.1.2 Proportionality in Reprisal**

To be legal, reprisals must respond in a proportionate manner to the preceding illegal act by the party against which they are taken. Identical reprisals are the easiest to justify as proportionate, because subjective comparisons are not involved. The acts resorted to by way of reprisal do not need to be identical or of the same type as the violations committed by the enemy. A reprisal should not be unreasonable or excessive compared to the enemy's violation (e.g., considering the death, injury, damage, or destruction the enemy's violation caused).

##### **6.2.4.1.3 Exhaustion of Other Means of Securing Compliance**

Before resorting to reprisals, a party must consider other means of securing compliance with the law of armed conflict. Other means of securing compliance should be exhausted before resorting to reprisals. For example, the enemy should be warned in advance of the specific conduct that may be subject to reprisal and given an opportunity to cease its unlawful acts. Leaders should consider whether reprisals will lead to retaliation rather than compliance. In certain situations, the enemy may be more likely to be persuaded to comply by a steady adherence to the law of armed conflict by U.S. forces.

##### **6.2.4.1.4 Who may Authorize**

Individual service members may not take reprisal action on their own initiative. The authority is retained at the national level (see DOD Law of War Manual, 18.18.2.3). Commanders who believe a reprisal is warranted should report the enemy's violation promptly through command channels in accordance with DODD 2311.01, as well as any proposal for reprisal action.

##### **6.2.4.1.5 Public Announcement of Reprisals**

In order to fulfill their purpose of dissuading further illegal conduct, reprisals must be made public and announced as such to the offending party.

#### **6.2.4.2 Treaty Limitations on Reprisal**

Certain treaties limit the individuals and objects against which reprisals may be directed. The following categories are protected from reprisals:

1. Combatant personnel who are wounded, sick, or shipwrecked (GWS, Article 46 and GWS Sea, Article 47)
2. Medical and religious personnel, medical units and facilities, and hospital ships (GWS, Article 46 and GWS, Sea Article 47)
3. POWs (GPW, Article 13)
4. Persons protected by the GC and their property (GC, Article 33)
5. Cultural property (1954 Hague Convention, Article 4(4)).

### 6.2.5 Reciprocity

Some obligations under the law of armed conflict are reciprocal in 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—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 in International Armed Conflict

All naval personnel must promptly report alleged war crimes and other violations of the law of armed conflict. In line with our international legal obligations, U.S. law provides a basis for prosecution of violations of the law of armed conflict. Commanders are responsible for taking all measures necessary to suppress violations of the law of armed conflict through focused training, reporting, and investigation of inappropriate and illegal actions (e.g., GC, Article 146).

#### 6.2.6.1 Grave Breaches of the Geneva Conventions

To reflect the particular seriousness of some violations, the Geneva Conventions characterize certain breaches as grave. These include:

1. Willful killing of protected persons
2. Torturing or inhumane treatment (e.g., biological experiments)
3. Willfully causing great suffering or serious injury to body or health
4. Extensively destroying or appropriating of property not justified by military necessity and carrying out unlawfully and wantonly
5. Compelling a protected person to serve in the forces of a hostile power
6. Willfully depriving a protected person of the rights of a fair and regular trial
7. Unlawfully deporting, transferring, or confining a protected person
8. Taking of hostages.

#### 6.2.6.2 Other Violations

Other law of armed conflict violations punishable, and may be serious enough to merit characterization as war crimes, include, but are not limited to:

1. Using poisonous weapons or weapons calculated to cause unnecessary suffering
2. Attacking or bombarding of undefended cities, towns, or villages
3. Pillaging of public or private property
4. Maltreating dead bodies
5. Poisoning of wells or streams
6. Resorting to perfidy (e.g., using a white flag to conduct an attack treacherously)

7. Abusing or intentionally firing on a flag of truce
8. Intentionally targeting protected places, objects, or persons.

See Hague Convention (IV), Articles 23a, 23g, 25, 28, and 47 and 18 U.S.C., § 2441, War Crimes Act of 1996.

### **6.2.7 War Crimes in Noninternational Armed Conflict**

Common Article 3 of the 1949 Geneva Conventions provides minimum standards that States party 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 States parties (i.e., NIAC.) These standards are widely considered to apply to all armed conflicts. It explicitly prohibits violence to life and person for those taking no active part in hostilities and protects them from:

1. Murder
2. Mutilation
3. Cruel treatment
4. Torture
5. Being taken hostage
6. Outrages upon personal dignity, in particular, humiliating and degrading treatment
7. Sentences passed and executions carried out without a judgment pronounced by a regularly constituted court affording all the judicial guarantees recognized as indispensable by civilized peoples.

Although CA3 does not address individual criminal liability for violation of these minimum standards, the U.S. Congress enacted the War Crimes Act of 1996 and Public Law 109–366, Military Commissions Act of 2006, which criminalize specific violations of CA3, as defined in the War Crimes Act, in U.S. Federal court (e.g., 18 U.S.C., § 2441(c)(3) (as amended by the Military Commissions Act of 2006)).

### **6.2.8 Other Violations of the Law of Armed Conflict**

The United States has an obligation to take all measures necessary to prevent acts contrary to the Geneva Conventions. Violations of the law of armed conflict that are not sufficiently serious are not characterized as war crimes, but may be prosecuted under a State's domestic law or addressed via administrative measures. In the United States, this may include referring charges to a court martial under the UCMJ (e.g., UCMJ, Article 93, Cruelty and Maltreatment) or taking other actions (e.g., changing doctrine or tactics, providing additional training, taking administrative or corrective measures, imposing nonjudicial punishment, or initiating prosecution before a civilian court) as appropriate.

### **6.2.9 Prosecution of War Crimes**

Trials for war crimes and other unlawful acts committed by enemy personnel and civilians 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, Article 85.)

On a number of occasions, since the beginning of the 20th century, war crimes, crimes against humanity, genocide, and crimes against peace were prosecuted by special international tribunals. These tribunals were established to address crimes committed during specific periods or in connection with specific conflicts. These tribunals have applied international law, including the Geneva Conventions, their Additional Protocols, as well as

the Hague (IV) Regulations. The statute governing each tribunal stipulates the specific types of crimes addressed by the tribunal and the standards for culpability. The decisions of these tribunals do not bind the United States and its courts. Their decisions provide useful examples of the application of international law. Created in 1945 by Great Britain, France, the United States, and the USSR, the International Military Tribunal is an example of a special international tribunal. This tribunal conducted the landmark Trial of Major War Criminals, with 21 Axis defendants, in Nuremberg, Germany, from November 1945 to October 1946. Another post-war tribunal was established in Tokyo to try war criminals in the Pacific Theater of World War II. The jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY), established by the UN Security Council in 1993, provides numerous examples of war crimes prosecutions.

In 1998, 120 nations at a Diplomatic Conference in Rome voted to approve the final text of the Rome Statute, adopting a treaty that established an International Criminal Court (ICC). The Rome Statute entered into force on July 1, 2002. The United States is not party to the Rome Statute. The Rome Statute provides that the ICC has jurisdiction with respect to the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.

The Rome Statute, Article I, provides the ICC shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern that were committed after its establishment and shall be complementary to national criminal jurisdictions. The latter principle that the ICC's jurisdiction is complementary means the ICC should not investigate or prosecute allegations when a State is or has already genuinely done so.

The Rome Statute only confers jurisdiction on the ICC when the accused is a national of a Rome Statute party; when the conduct occurs on the territory of a Rome Statute party; or when the conduct occurs in a situation that has been referred to the ICC by the UN Security Council. The ICC will not prosecute an individual when a State has exercised or is in the process of exercising jurisdiction over the matter, unless that State is unwilling or unable to genuinely investigate or prosecute the case (Rome Statute, Article 17). While the ICC purports to exercise jurisdiction over non-State parties to the Rome Statute, the United States has a long-standing and continuing objection to any assertion of jurisdiction by the ICC with respect to nationals of States not party to the Rome Statute in the absence of consent from such States or a referral by the Security Council (see DOD Law of War Manual, 18.20.3.1). The U.S. Government has negotiated SOFAs and other agreements with many countries, which under a provision of the Rome Statute, Article 98, clarify that U.S. personnel may not be turned over to the ICC by those countries absent U.S. consent.

In multinational operations or peace operations U.S. personnel may be asked to cooperate with ICC prosecutors who are investigating allegations of genocide, crimes against humanity, or war crimes. Any requests for cooperation by the ICC should be forwarded to DOD because such requests implicate U.S. policy toward the ICC and U.S. law, including the American Service Members' Protection Act, which imposes certain restrictions on any support to the ICC.

#### **6.2.9.1 U.S. Domestic Jurisdiction over Offenses and Individuals**

The 1949 Geneva Conventions grant universal jurisdiction over grave breaches to all State parties. The State's obligation under the 1949 Geneva Conventions is to prosecute or, under certain circumstances, transfer to another State for prosecution alleged perpetrators regardless of their nationality (e.g., GPW, Article 129). Historically, neutral or nonbelligerent States have not exercised jurisdiction in relation to alleged war crimes and such efforts in recent years have sometimes met strong objections and have not been successful without the consent of belligerent States. 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 constitute violations of the UCMJ. Persons subject to the UCMJ are charged with violations of a specific provision of the UCMJ rather than a violation of the law of armed conflict, because charging offenses as specific UCMJ violations prevent adjudication of complex issues, such as proving a state of armed conflict existed. Persons who are subject to the UCMJ include members of the Active and Reserve components of the U.S. armed forces, POWs in the custody of the United States, and in times of declared war or during contingency operations, persons, to include contractors, serving with or accompanying the U.S. armed forces in the field (UCMJ, Article 2 and 10 U.S.C., § 802). 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 U.S. armed forces in the field during declared war and in contingency operations. See SECDEF Memorandum, UCMJ Jurisdiction Over DOD Civilian Employees, DOD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations, March 10, 2008.

### **6.2.9.2 War Crimes Act**

Prosecutions can occur under U.S. domestic law for certain violations of the law of armed conflict. For example, the War Crimes Act of 1996, as amended in 1997 and 2006, authorizes U.S. courts to prosecute individuals for certain war crimes, whether such crimes are committed inside or outside the United States, if the victim or perpetrator is either a member of the U.S. armed forces or a U.S. national (18 U.S.C., § 2441). Under this law, war crimes means any conduct:

1. Defined as a grave breach of any of the 1949 Geneva Conventions or any Protocol to one of those conventions the United States is a party (currently only Additional Protocol III)
2. Which violates certain listed articles in the Hague (IV) Regulation
3. Which constitutes a grave breach of CA3 of the 1949 Geneva Conventions (more specifically defined in the War Crimes Act)
4. In relation to an armed conflict and contrary to the provisions of the Amended Protocol II to the Conventional Weapons Treaty, when a person willfully kills or causes serious injury to civilians.

### **6.2.9.3 Military Extraterritorial Jurisdiction Act and Other Laws**

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. 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 the DOD overseas. In 2005, the DOD issued 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, which implemented the policies and procedures and assigned responsibilities under MEJA. All MEJA referrals are to be transmitted to the Department of Justice's Human Rights and Special Prosecutions section.

Congress enacted a provision in Public Law 107-56, § 804, USA Patriot Act of 2001, 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.

Other laws criminalize acts of torture, attempts to commit torture, and conspiracy to commit torture outside the United States when the offender is a U.S. national or is located within the United States (18 U.S.C., § 2340A). Other relevant provisions of the law allow for the prosecution of:

1. Genocide (18 U.S.C., § 1091)

2. Murder or manslaughter of foreign officials, official guests, or internationally protected persons (18 U.S.C., § 1116)
3. Piracy (18 U.S.C., § 1651–1661, Piracy Under the Law of Nations)
4. Terrorism and material support to terrorists (18 U.S.C., § 2331–2339D)
5. Various acts involving biological weapons, chemical weapons, WMD, or nuclear weapons (18 U.S.C., § 175, 229, 832 and 2332a).

A number of these provisions limit their application to offenses committed within the United States, or by or against citizens of the United States, but others—such as piracy—apply regardless of the location of the offense or the nationality of the offender or victim(s).

### 6.2.10 Military Commissions

In the past, military commissions have been used by the United States and other States to prosecute enemy belligerents for violations of the law of armed conflict and for acts of unprivileged belligerency (see 5.4.1.1). Military commissions have been used for the trial of offenses under U.S. law where local courts were not open and functioning, such as when martial law applies and the trial of violations of occupation ordinances (DOD Law of War Manual, § 18.19.3.7).

Courts martial may be used in lieu of military commissions to try POWs in U.S. military custody (GPW, Article 102 and UCMJ, Article 2(a)(9)). Military commissions are used to try others—including alien unprivileged belligerents—for law of armed conflict violations and other offenses. Procedures for military commissions are similar to those for general courts martial under the UCMJ (e.g., 10 U.S.C., § 948b(c) and Manual for Military Commissions (MMC)).

Under the Military Commissions Act (MCA) of 2009, 32 substantive crimes are triable by military commissions (10 U.S.C., § 950t). The jurisdiction of military commissions under the MCA is limited to individuals who are alien unprivileged enemy belligerents (10 U.S.C., § 948c). The term unprivileged enemy belligerent, for purposes of the statute, means an individual (other than a privileged belligerent) who:

1. Has engaged in hostilities against the United States or its coalition partners
2. Has purposefully and materially supported hostilities against the United States or its coalition partners
3. Was part of al Qaeda at the time of the alleged offense under the MCA (10 U.S.C., § 948a(7)).

Under the MCA, an individual subject to a military commission is entitled to fair trial guarantees, including:

1. Defense counsel
2. Notice of charges alleged
3. The exclusion of evidence obtained by torture or cruel, inhumane, or degrading treatment
4. Protection against self-incrimination and the inappropriate admission of hearsay evidence
5. The right to be present at proceedings, offer evidence, and confront witnesses
6. Protection against former jeopardy.

Procedures for military commissions address the treatment, admissibility, and discovery of classified information, limits on sentencing, execution of confinement, and post-trial review procedures (10 U.S.C., § 948q(b)–950j).

## 6.2.11 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.

## 6.2.12 Defenses

Individuals charged with war crimes may raise a number of defenses which fall into two groups. One group of defenses 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 (e.g., Statute of the International Criminal Tribunal for the Former Yugoslavia). The availability of legal defenses to charges of war crimes may depend on the specific jurisdiction and forum in which charges are brought. The following general information regarding affirmative defenses that negate criminal responsibility under general principles of criminal law may be helpful, but commanders should request legal advice if they have specific questions.

### 6.2.12.1 Superior Orders

The fact that a person committed a war crime under orders of their government or of a superior does not relieve that person from responsibility under international law provided it was possible, in fact, for that person to make a moral choice. See DOD Law of War Manual, 18.22.4. Under the Rules for Court Martial (RCM) and MMC, it is a defense to any offense that the accused was acting pursuant to orders, unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful (RCM, 916(d) and MMC, Part II, Rule 916(d)). An order requiring the performance of a military duty to act may be inferred to be lawful, and it is disobeyed at the peril of the subordinate. This inference does not apply to a patently illegal order, such as one that directs the commission of a crime (e.g., an order directing the murder of a civilian, a noncombatant, a combatant who is *hors de combat*, or the abuse or torture of a prisoner) (e.g., see MCM, Part IV, Paragraph 14c(2)(a)(i)). The fact an offense was committed pursuant to superior orders may be considered as mitigation to reduce the level of punishment (e.g., *United States v. Sawada*, Law of Trials of War Crimes, Volume V, 7–8, 13–22, UN War Crimes Commission, (1948); ICTY, Article 7(4)).

### 6.2.12.2 Military Necessity

The principle of military necessity justifies the use of all measures required to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of armed conflict. Following World War II, war crime tribunals specifically rejected defense arguments that military necessity (*Kriegsraison*) could be used to justify law of armed conflict violations (see DOD Law of War Manual, § 2.2.2.1, which cites the *Krupp* case and others). One may not justify law of armed conflict violations by invoking the need to win the war.

### 6.2.12.3 Acts Legal or Obligatory under National Law

The fact 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. The fact a war crime under international law is made legal and even obligatory under State domestic law may be considered in mitigation of punishment.

## 6.2.13 Penalties

Penalties vary depending on the war crime committed and the law pursuant to which the crime is being prosecuted. Authorized punishments can range from fines or letters of reprimand to death. For instance, for the offense of murder under the UCMJ, the accused may be subject to death or life imprisonment (UCMJ, Article 118). Crimes under the War Crimes Act, MCA, or other U.S. law carry significant penalties. Violations of the War Crimes Act that result in the death of a victim may be punishable by death (18 U.S.C., § 2441(a)). Grave breaches that authorize the death penalty include willful killing, torture, inhumane treatment, or willfully causing great suffering or injury (GWS, Article 50; GWS Sea, Article 51; GPW, Article 130; and GC, Article 147).



### 6.3 REPORTABLE VIOLATIONS

DODD 2311.01 governs law of war reporting requirements. A reportable incident is defined as an incident that a unit commander or other responsible official determines, based on credible information, potentially involves a war crime, other violations of the law of war, or conduct during military operations that would be a war crime if the military operations occurred in the context of an armed conflict. The unit commander or responsible official need not determine a potential violation occurred, only that credible information merits further review of the incident.

Credible information is defined as information that a reasonable military commander would believe to be sufficiently accurate to warrant further review of an alleged violation. The totality of the circumstances is to be considered, including the reliability of the source (e.g., the source's record in providing accurate information in the past and how the source obtained the information) and whether there is contradictory or corroborating information. See DODD 2311.01, G.2.

All military and U.S. civilian employees, contractor personnel, and subcontractors assigned to or accompanying a DOD component must report through their chain of command all reportable incidents, including those involving allegations of non-DOD personnel having violated the law of war. The commander of any unit that obtains information about an alleged violation of the law of war must assess whether the allegation is based on credible information and constitutes a reportable incident. The unit commander must immediately report reportable incidents, by operational incident reporting procedures or other expeditious means, through the chain of command to the combatant commander.

If the unit commander or a superior commander determines an allegation is not supported by credible information, the allegation will be forwarded through the chain of command to the appropriate combatant commander with this determination. The combatant commander may provide additional guidance on making and forwarding such determinations, including regarding the timing and manner of doing so. Military Department and Service regulations require concurrent reporting up the Service chain of command.

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 is not consistent with generally accepted medical standards; willfully causing great suffering or serious injury to body or health or seriously endangering 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 permit, failure to search out, collect, make provision for the safety of, or to care for survivors of sunken ships; 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 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 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. To kill or otherwise impose 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 (e.g., buildings used for religious, charitable or medical purposes, historic monuments, or works of art); attacking undefended localities, 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. Feign incapacitation by wounds/sickness that results in the killing or wounding of the enemy; feign surrender or the intent to negotiate under a flag of truce that results in the killing or wounding of the enemy; and use of a flag of truce to gain time for retreats or reinforcement
15. Fire upon a flag of truce
16. Denial of quarter, unless bad faith is reasonably suspected
17. Violations of surrender or armistice terms
18. Use of poisoned or otherwise forbidden arms or ammunition
19. Poison wells, streams, or other water sources
20. Other analogous acts violating the accepted rules regulating the conduct of warfare.

Source: SECNAVINST 3300.19, Enclosure 1.

## CHAPTER 7

# The Law of Neutrality

### 7.1 INTRODUCTION

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 seeks to prevent additional States from being drawn into an armed conflict by establishing a clear distinction between belligerent and neutral States. The law of neutrality seeks to minimize the effects of armed conflict on States that are not party to the conflict, to include lessening the effect of war on neutral commerce.

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. Neutral States are those that are not taking part in the armed conflict. A third term, nonbelligerent State, is sometimes used to describe a State not participating in an armed conflict.

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. Belligerent States have fundamental duties to respect the sovereignty of neutral States in all international armed conflicts. Certain parts of the law of neutrality may apply outside international armed conflict, specifically, the duty of nonintervention and neutrality in relation to a noninternational armed conflict against a friendly State.

States' duties and obligations under the law of neutrality may be affected by treaties (see 7.2.2 and 7.2.3).

### 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 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 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). If a neutral State is unable or unwilling to enforce its inviolability, the agreed belligerent may take necessary measures in neutral territory to counter the acts of the enemy force, including the use of force. The neutral has a duty to acquiesce in the exercise of lawful measures the belligerent may take against neutral merchant vessels engaged in the carriage of contraband, breach or attempted breach of blockade, or in the performance of unneutral service. Failure to acquiesce may subject a neutral merchant vessel to capture (see 7.10). 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 by a belligerent to violate its neutrality does not constitute participation in hostilities.

### **7.2.1 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. After treaties outlawed war as a matter of national policy, the United States and other States took the position that neutral States could discriminate in favor of States that were victims of wars of aggression, referred to as qualified neutrality. Not all States agree with this position.

### **7.2.2 Neutrality Under the 1945 Charter of the United Nations**

The customary law of neutrality has, to some extent, been modified by the Charter of the UN. The Charter of the UN, Article 2(4) 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. In the event of a threat to or breach of the peace or act of aggression, the UN 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 UN authorizes collective action against an aggressor. The Charter of the UN, Article 2(5) provides all members shall give the UN 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 UN is taking preventive or enforcement action. Obligations pursuant to the Charter of the UN override other international obligations.

The Charter of the UN, Article 25 requires member States to accept and carry out the decisions of the UN Security Council in accordance with the present Charter. All member States must comply with the terms of decisions taken by the UN Security Council under Chapter VII of the Charter of the UN. Member States may be obliged to support a UN action at the expense of their pure neutrality. The Charter of the UN, Article 50 does recognize a State that finds itself confronted with special economic problems arising from carrying out preventive or enforcement measures authorized by the UN Security Council, has a right to consult the Council with regard to a solution of those problems. Absent a binding decision of the UN 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. Although members may discriminate against an aggressor in the absence of any action on the part of the UN 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 UN 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 UN 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, archipelagic waters, and 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 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. 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 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. Prisoners of war who have escaped to neutral territory are deemed to have successfully escaped from the detaining power. A neutral State may deny 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 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. See Hague Convention XIII. 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 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 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 Convention XIII, Article 19 limits resupply of food on warships to the peace standard. 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 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. 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. 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. 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 warfighting capability. It is the duty of the neutral State to decide what repairs are necessary to restore seaworthiness and insist 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 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 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, must not be used by belligerent forces as either 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 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 allow the passage of belligerent

warships and prizes through its territorial seas. While in neutral territorial seas, a belligerent warship must 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 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. The UN Convention on the Law of the Sea provides 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 their adversary and the neutral State with the law of neutrality.

### **7.3.6 International Straits Overlapped by Neutral Waters**

Customary international law, as reflected in UNCLOS, provides 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 take defensive measures consistent with their security, to include 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.

### **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 to effectively 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. 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. 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 seas. 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 consistent with their security and the security of accompanying surface and subsurface forces.
2. Medical aircraft may, with prior notice, overfly neutral territory, land therein in case of necessity, and 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 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, compel offending aircraft to land, and 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 warfighting/war-sustaining capability. Commanders participating in coalition operations should be aware that some of our allies and partners do not believe contraband includes war-sustaining materials. Although war-sustaining commerce is not subject to precise definition, commerce that indirectly, but effectively supports and sustains the belligerents' warfighting 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. 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, it must treat all belligerents impartially. The law establishes a balance-of-interests test to protect neutral commerce from unreasonable interference on 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 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 World War II 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. 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 World War II, post-World War II practice indicates, 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 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 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 trans-shipment, 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 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 the vessel or aircraft will not be subject to visit and search or 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.) The 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. The fact that a merchant ship flies a neutral flag, or 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. 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. Actions that may be taken against enemy vessels and aircraft are set forth in 8.6.1 and 8.6.2.

#### **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. Actions that may be taken against enemy warships and military aircraft are described in 8.6.1.

#### **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. Actions that may be taken against enemy merchant vessels and civil aircraft are described in 8.6.2.

## 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 and naval auxiliaries are not subject to visit and search. Other neutral vessels engaged in government noncommercial service may not be subjected to visit and search. Clarification on this point should be issued by the operational chain of command. Neutral merchant vessels under convoy of neutral warships of the same nationality are 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 their cargoes, which could otherwise be obtained by visit and search. Should it be determined by the convoy commander that a vessel under their charge possesses enemy character or carries contraband cargo, they are obliged to withdraw their 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 (e.g., 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 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 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 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, to include 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. 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 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 the neutral civilian aircraft is not carrying contraband cargo and provides to the intercepting belligerent military aircraft upon request information as to the character and cargo of the neutral civilian aircraft that 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 and 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.

#### **7.7.2.1 Establishment**

A blockade must be established by the government of the belligerent State. This is 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, at 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 SECDEF can direct establishment of a blockade by U.S. forces. Although it is the customary practice of States when declaring a blockage 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 7.7.4), neutral vessels and aircraft are always entitled to notification. The commander of the blockading forces will 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 every possible avenue of approach to the blockaded area be covered. The forces 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 the blockade must not prevent trade and communication to or from neutral ports or coasts, provided 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 deny it other objects essential for its survival.

## **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). 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 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 (see 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 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 completely isolate 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. 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. 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, blockades continue to be 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 (e.g., 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 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 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 purport to deny access to neutral States or close an international strait to neutral shipping, pursuant 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 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 where 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 zones 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 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 the extent that they do not unreasonably interfere with legitimate neutral commerce, they are undoubtedly lawful. 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. An otherwise protected platform does not lose protection by crossing an imaginary line drawn in the ocean by a belligerent.

Because exclusion zones 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 zones for neutral vessels and aircraft where the geographical extent of the zones significantly impede 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. The total exclusion zone announced by the United Kingdom and Argentine declaration of the South Atlantic as a war zone during the Falklands/Malvinas conflict were problematic in that they deemed any neutral vessel within the zones without permission as hostile and liable to attack. 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.

See 7.5.2 for situations where neutral merchant vessels and civil aircraft that acquire enemy character and may be engaged.

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 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. 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. 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 circumstance, the prize must obey the instructions of its escort or risk forcible measures. OPNAVINST 3120.32D, Change 1, Article 6.3.21, Visit and Search, Boarding and Salvage, and Prize Crew Bill, sets forth the duties and responsibilities of commanding officers and prize masters concerning captured vessels. Neutral vessels or aircraft attempting to resist proper capture lay themselves open to forcible measures by belligerent warships and military aircraft and assume all risk of resulting damage.

### **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 should not order such destruction without being entirely satisfied that the prize can neither be sent into a belligerent port or airfield nor, in their opinion, properly released. Should it become necessary 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 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 the neutral vessels or aircraft had taken a direct part in the hostilities on the side of the enemy or served in any way as a naval or military auxiliary for the enemy, they 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, en route to serve in the enemy's armed forces, 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 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. Civilian 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.



## 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 only military objectives be attacked, but permits the use of sufficient force to destroy those objectives. 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 requires all feasible precautions must be taken to ensure that only military objectives are targeted so noncombatants, civilians, and civilian objects are spared as much as possible from the ravages of war. Warfare in the information environment, which includes targeting with nonlethal force, such as military information support operations and cyberspace operations, are addressed in 4.4.9 and 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 warfighting, 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 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 5.4.1.

#### 8.2.2 Unprivileged Belligerents

Unprivileged belligerents include members of organized armed groups and civilians directly participating in hostilities (see 5.4.1.1). Members of organized armed groups are subject to attack at any time during the armed conflict unless they are *hors de combat*. Unprivileged belligerents placed *hors de combat* are not considered POWs, but must be treated humanely. Civilians directly participating in hostilities forfeit the protections from attack afforded to civilians under the law of armed conflict and may be attacked while they are taking a direct part in hostilities. If captured, they are not considered POWs and may be tried and punished under domestic law. Taking a direct part in hostilities extends beyond merely engaging in combat, but includes acts that are an integral part of combat operations or effectively and substantially contribute to an adversary's ability to conduct or sustain combat operations. Civilians assessed to be engaged in a pattern of taking a direct part in hostilities do not regain protection from being made the object of attack in the time period between instances of direct participation.

The law of armed conflict does not expressly prohibit civilians from directly participating in hostilities, but those who do so may be targeted 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. Examples include taking up arms or otherwise trying to kill, injure, capture enemy personnel, or destroy enemy property. It would include certain actions that constitute an integral part of combat operations or effectively and substantially contribute to an adversary's ability to

conduct, support, or sustain combat operations. 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.

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.

Civilians do not enjoy the combatant's privilege. 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 and unprivileged belligerents 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 and unprivileged belligerents 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 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 their 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 and on the ground. Such personnel may not be attacked 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 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 a 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 (e.g., U.S. Navy corpsmen serving with U.S. 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. Medical personnel 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. Religious personnel may be detained. See Chapter 11 for treatment of detainees. Chaplains' assistants, such as enlisted religious programs specialists in the U.S. Navy, are combatants.

## 8.2.5 Objects

Military objectives include objects which, by their nature, location, purpose, or use, make an effective contribution to military action (including warfighting, war-supporting, or war-sustaining capabilities) and whose total or partial destruction, capture, or neutralization, in the circumstances at the time, offers a definite military advantage. Part of the analysis is whether the object, by its nature, location, purpose, or use makes an effective contribution to the enemy's military action. The issue is whether an effective contribution is made. One factor or multiple factors may provide the effective contribution. Nature, location, purpose, or use need not be viewed as mutually exclusive concepts; rather, these concepts may be understood to overlap.

Nature refers to the type of object and may be understood to refer to objects that are per se military objectives, or, because of their intrinsic nature, may be used for military purposes. Such objects include:

1. Warships
2. Military aircraft
3. Naval auxiliaries
4. Military bases and headquarters
5. Warship construction and repair facilities
6. Military depots and warehouses
7. Military airfields
8. Military vehicles
9. Armor
10. Artillery
11. Munitions factories
12. Ammunition stores.

Location includes areas that are militarily important, because they must be captured from or denied to an enemy, or the enemy must be made to surrender or retreat from them. An area of land or water, such as a mountain pass or harbor, may be a military objective. A port, town, village, or city may become a military objective—even if it does not contain military objectives—if its seizure is necessary (e.g., to protect a vital line of communications) or for other legitimate military reasons.

Use refers to the object's present function. For example, using an otherwise civilian vessel to provide targeting data or command and control or a building to billet combatant forces, makes the vessel or building a military objective.

Purpose means the intended or possible use in the future. A decision to classify an object as a military objective does not necessarily depend on its present use. The potential or intended future use of an otherwise civilian object for military purposes may make it a military objective. For example, runways at a civilian airport could qualify as military objectives, because they may be subject to immediate military use in the event runways at military air bases have been rendered unserviceable or inoperable. Civilian ship repair facilities may be used in the future to repair military vessels may qualify as military objective by purpose.

The words nature, location, purpose, or use allow for wide discretion, but whether an object is a military objective is subject to qualifications stated later in the definition, it must make an effective contribution to military action and its destruction, capture, or neutralization must offer a definite military advantage. Effective contribution and military advantage do not have to have a geographical connection between them. Attacks on military objectives in the enemy rear and diversionary attacks away from the area of military operations as such (the contact zone) are lawful.

Military action is used in the ordinary sense of the words and is not intended to encompass a limited or specific military operation. Military action has a broad meaning and is understood to mean the general prosecution of the war. To be a military objective does not require the attack of the object provides immediate tactical or operational gains or the object makes an effective contribution to a specific military operation. Rather, the object's effective contribution to the warfighting or war-sustaining capability of an opposing force is sufficient. Although terms such as warfighting, war-supporting, and war-sustaining are not explicitly reflected in the Additional Protocol I definition of 'military objective,' the United States has interpreted the military objective definition to include these concepts. Commanders participating in coalition operations should be aware that some allies and partners do not believe objects that provide war-sustaining objects are military objectives.

### **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 (e.g., an electric power plant) serves civilian functions, subject to the requirement to avoid excessive incidental injury and collateral damage, and the requirement to take precautions in attack. See 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 the anticipated incidental injury or collateral damage must not be excessive in light of the military advantage expected to be gained. Naval commanders must 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. The commander must decide, in light of all the facts known or reasonably available to the them, 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 employing 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 requirement to take precautions in attack to avoid harm to them. Attacks under such circumstances are likely raise political, strategic, and operational issues that commanders should identify and consider when making targeting decisions.

The presence of civilian workers (e.g., 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. Because the primary military objectives at sea are vessels, and the principle of proportionality is applied using a vessel-based construct, absent particular information, naval commanders are not generally required to conduct an individualized proportionality assessment of embarked personnel on the vessel once it has been deemed a lawful military objective. See 5.3.3.

## 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. 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, Environmental 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 8-1) 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 8-2). The third Protocol to the Geneva Conventions authorizes an additional distinctive emblem, a Red Crystal (Figure 8-3). The conditions for use of and respect for the Additional Protocol III emblem are identical to those for the Red Cross and Red Crescent. A Red Lion and Sun on a white field (Figure 8-4) was originally created for use by Iran. In 1980, Iran declared it would no longer use the Red Lion and Sun, but use the Red Crescent. In 2000, Iran communicated its desire to maintain its right to use 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 8-5). The United States has not agreed the Israeli six-pointed Red Star is a protected symbol. All medical and religious persons or objects recognized as being such are to be treated with care and protection.

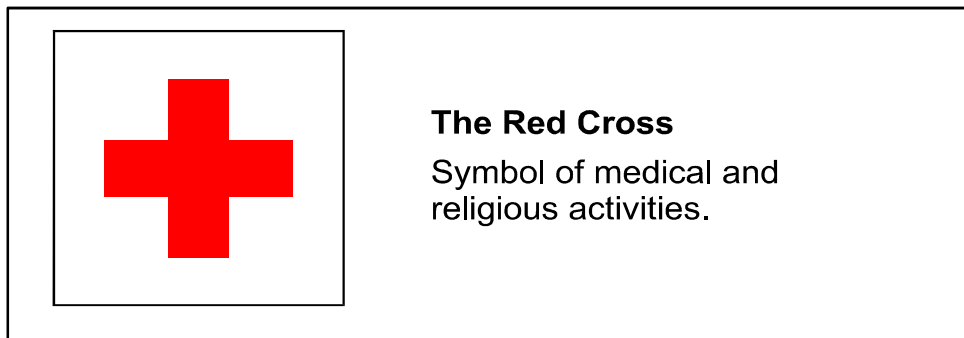


Figure 8-1. The Red Cross

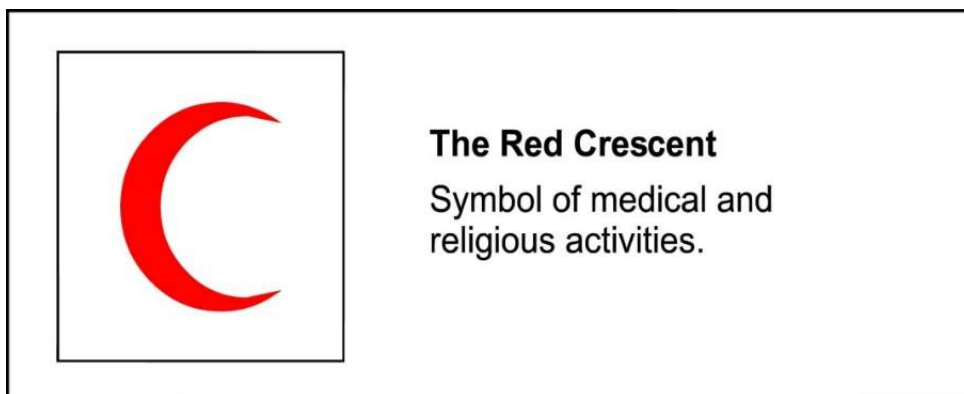


Figure 8-2. The Red Crescent

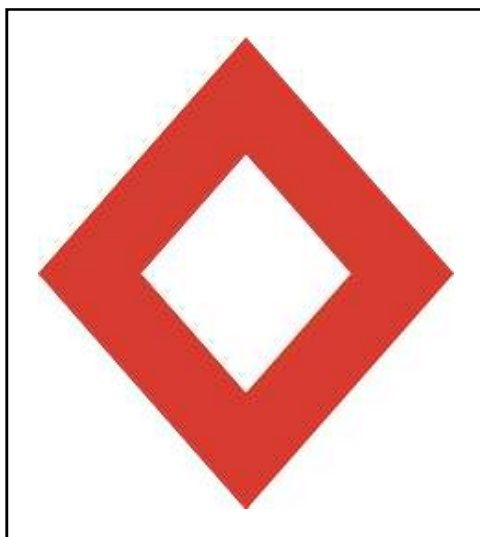


Figure 8-3. Red Crystal, Symbol of Medical and Religious Activities

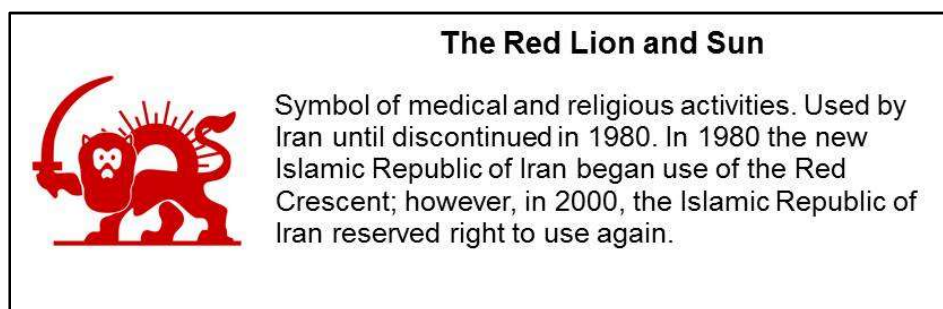


Figure 8-4. The Red Lion and Sun



Figure 8-5. The Red Star of David

### 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 civilians and the wounded and sick (Figure 8-6). Prisoner of war camps are marked by the letters PW (prisoners of war) or PG (*prisonniers de guerre*) (Figure 8-7). Civilian internment camps with the letters IC (internment camp) (Figure 8-8). 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 8-9). 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 the same purpose as the royal-blue diamond and royal-blue triangle on a white shield (Figure 8-10).

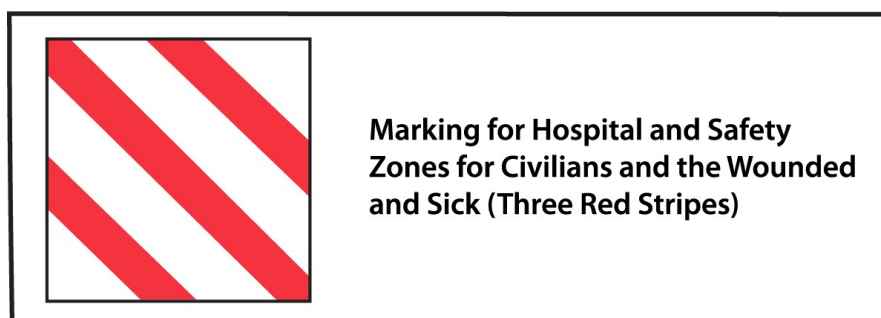


Figure 8-6. Three Red Stripes

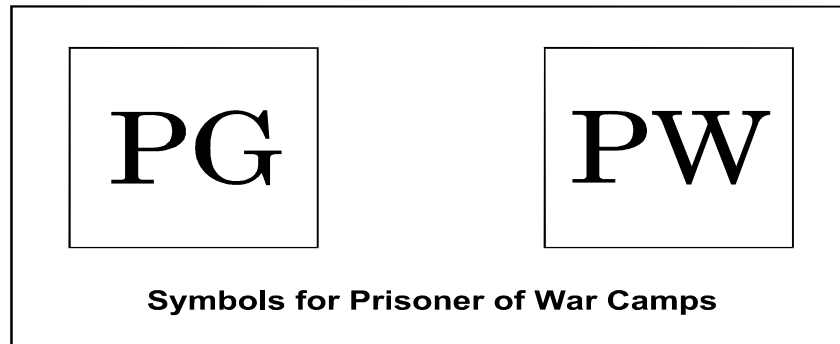


Figure 8-7. Symbols for Prisoner of War Camps



Figure 8-8. Civilian Internment Camps

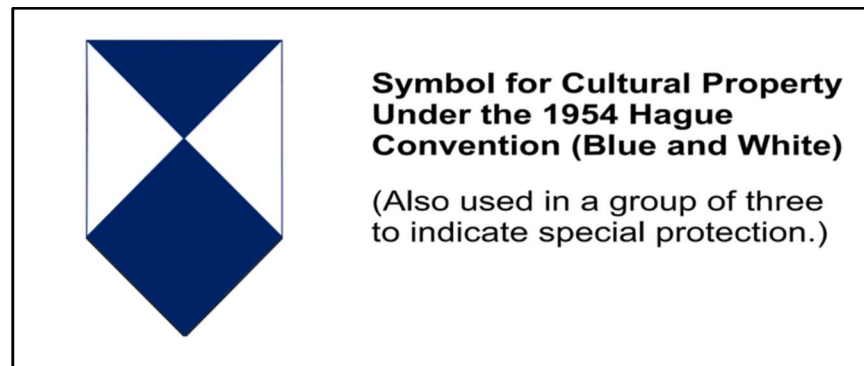


Figure 8-9. Cultural Property Under the 1954 Hague Convention

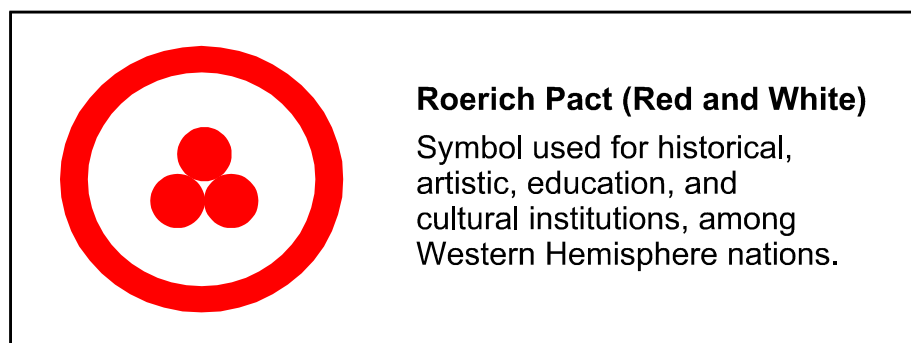


Figure 8-10. The Roerich Pact



The 1977 Additional Protocol I 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 (e.g., dams, dikes, and nuclear power plants) may be marked by three bright orange circles of equal size on the same axis (Figure 8-11). Civil defense facilities and personnel may be identified by an equilateral blue triangle on an orange background (Figure 8-12).

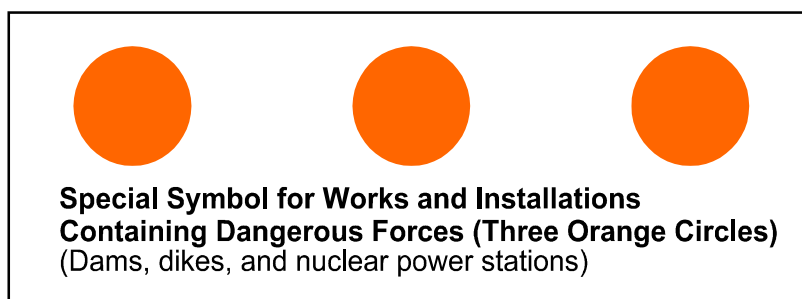


Figure 8-11. Works and Installations Containing Dangerous Forces

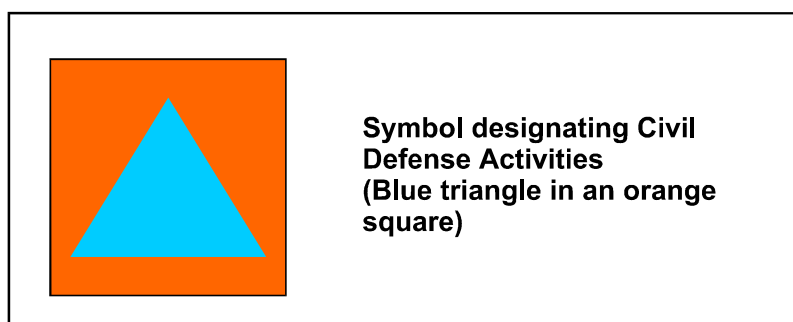


Figure 8-12. Civil Defense Activities

### 8.5.1.3 The 1907 Hague Convention Symbol

A protective symbol of special interest to naval officers is the sign established by Hague IX. The 1907 Hague Convention 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 and lower white (Figure 8-13).

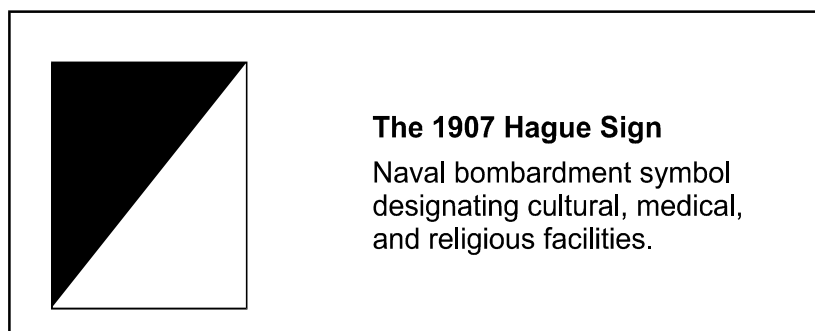


Figure 8-13. The 1907 Hague Sign

#### **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 of 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 8-9).

#### **8.5.1.5 The White Flag**

Customary international law recognizes the white flag as a symbol to request a cease-fire, negotiate, or surrender. Enemy forces displaying a white flag should be permitted an opportunity to surrender or communicate a request for cease-fire or negotiation. The burden is upon the soldiers or unit displaying a white flag 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 they designate. Any other use is forbidden by international law.

#### **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 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. U.S. hospital ships and medical aircraft do not use these signals, but other States may.

#### **8.5.2.1 Radio Signals**

To identify 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 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. All enemy vessels and aircraft fall into one of three general classes:

1. Warships and military aircraft (including military auxiliaries)
2. Merchant vessels and civilian aircraft
3. Exempt vessels and aircraft.

### 8.6.1 Enemy Warships, Naval Auxiliaries, 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 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 (e.g., 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 or damaged 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 or damaged, the aircraft may or may not have lost its means of combat. It may still represent a valuable military asset. Surrender in air combat is not generally offered. 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 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 (noncontraband neutral cargo on board a captured enemy vessel is not liable to confiscation). 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 they believe 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, 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 they consider 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 appraisal made by competent and impartial persons.

Officers and crews of captured enemy merchant ships and civilian aircraft may be detained. See 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 State on board captured enemy merchant vessels and civilian aircraft should not be detained, unless they participated in acts of hostility or resistance against the captor or are otherwise in the service of the enemy.

### **8.6.2.2 Destruction**

With or without prior warning, surface warships may attack and destroy enemy merchant vessels as military objectives by their nature, purpose, use, war-sustaining, or war-supporting roles, unless such vessels are innocently employed. See 8.2.5. An enemy merchant vessel is not innocently employed if:

1. Persistently refusing to stop upon being duly summoned to do so
2. Actively resisting visit and search or capture
3. Sailing under convoy of enemy warships or enemy military aircraft
4. Armed with systems or weapons beyond that required for self-defense against terrorist, piracy, or like threats.

Rules relating to surrendering and the search for and collection of the shipwrecked, wounded, and sick and the recovery of the dead, set forth in 8.6.1, apply 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 follow.

### **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 no 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 been 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 and their own defense and of the wounded, sick, and shipwrecked. 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 (e.g., 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. Weapons and ammunition taken from the wounded, sick, and shipwrecked, may be retained on board for eventual turn-over to the proper authority.

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, Article 34, provides hospital ships may not use or possess secret codes as means of communication so that belligerents could verify 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. 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 the traditional rule prohibiting secret codes be understood to not include modern communications encryption systems. Such systems must not be used for military purposes in any way harmful to a potential adversary.

Medical aircraft—civilian or military—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 or 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 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 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 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 ensure such aircraft will not be attacked. Aeromedical evacuation may, of course, be conducted by combat-equipped helicopters and airplanes. They are not 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, 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 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 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 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**

The following are vessels and aircraft exempt from destruction or capture, unless otherwise noted.

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 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 have indicated clearly their intention to do so, apply to submarines. To the extent

that military exigencies permit, submarines are 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**

Either with or without prior warning, submarines may attack and destroy enemy merchant vessels as military objectives by their nature, purpose, use, war-supporting, or war-sustaining roles, unless such vessels are innocently employed (see 8.2.5). An enemy merchant vessel is not innocently employed if:

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 required for self-defense against terrorism, piracy, or like threats.

If not resisting visit and search, enemy merchant vessels targetable because of integration into the enemy's war-sustaining effort may be destroyed without warning and without providing a place of safety for the passengers, crew, and ship's papers only where, under the circumstances of the specific encounter, doing so subjects the submarine to imminent danger or would otherwise preclude mission accomplishment. 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.

An enemy merchant vessel is innocently employed if not engaged in the previously stated actions, and used exclusively as a small, coastal-fishing or trading vessel.

Rules relating to surrendering and the search for and collection of the shipwrecked, wounded, and sick and the recovery of the dead, set forth in 8.6.1, apply to enemy merchant vessels and civilian aircraft that may become subject to attack and destruction.

### **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 apply to submarines. See 8.6.3.

## **8.8 AIR WARFARE AT SEA**

Military aircraft may employ weapon 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 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 warfighting, 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 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 apply to military aircraft. See 8.6.3.

## **8.9 BOMBARDMENT**

For purposes of this publication, 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 8.10. Engagement of targets at sea is discussed in 8.6 thru 8.8.

### **8.9.1 General Rules**

The United States is a party to Hague IX. That convention established 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 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 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 8.3, 8.3.1, and 8.3.2.

An attack by bombardment by any methods or means which treats a number of clearly separated and distinct military objectives located in an area as a single military objective 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 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 exempt from bombardment.

### **8.9.1.4 Medical Facilities**

Medical establishments and units (mobile and fixed), medical vehicles, and medical equipment and stores may not be deliberately bombarded. Belligerents are required to ensure 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 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 8-12), or the cultural property sign contained in 1954 Hague Convention for the protection of cultural property in time of war (see Figure 8-8). The latter 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 section 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 FM 6-27/MCTP 11-10C, The Commander's Handbook on the Law of Land Warfare.

### **8.10.1 Targeting in Land Warfare**

Targeting principles in land warfare are the same as in naval warfare. See 8.1. 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 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 8.5.1.7). Protected persons directly participating in hostilities lose their protected status and may be attacked while so employed. 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 to the wounded, sick, and shipwrecked (see 8.2.3), certain parachutists (see 8.2.3.1), and detainees (see Chapter 11). Civilians and noncombatants, (e.g., medical personnel and chaplains (see 8.2.4.1)) not taking direct part in hostilities, and interned persons (see 11.5) enjoy protected status.

#### **8.10.2.2 Protected Places and Objects**

Protected places include undefended cities and towns, agreed demilitarized zones (see 8.9.1.3), and agreed special hospital zones and neutralized zones (see 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 8.9.1.6).

#### **8.10.2.3 The Environment**

A discussion of environmental considerations during armed conflict is contained in 8.4. The use of herbicidal agents is addressed in 10.3.3.

## **8.11 WARFARE IN THE INFORMATION ENVIRONMENT**

The law of armed conflict is applicable to warfare in the information environment (IE), to include cyberspace operations conducted in the context of an international or noninternational armed conflict.

### **8.11.1 General Targeting Considerations**

Legal analysis of intended wartime targets requires traditional law of armed conflict analysis. Warfare in the IE 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). Human factors include national command authorities, commanders, forces, populace as a whole and/or groups within the populace (e.g., target audience and relevant actors). Planned warfare in the IE targeting efforts should examine all three target areas to maximize the opportunity for success. In all cases, the selection of targets must be consistent with U.S. objectives, applicable international conventions, the law of armed conflict, and ROE. Department of Defense warfare in the IE 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. laws.

### **8.11.2 Cyberspace Attacks**

The law of armed conflict regarding the conduct of hostilities, including the requirements to attack only military objectives, avoid excessive incidental injury/death and collateral damage to civilians and civilian objects, and take

precautions to minimize harm to civilians and civilian objects, applies when the cyberspace operation results in physical damage or injury because such operations qualify as attacks under the law of armed conflict. The law governing cyberspace operations that do not entail the risk of physical injury or death to protected persons or damage to protected objects is unsettled among States. Cyberspace operations that cause only inconvenience are not attacks under the law of armed conflict and are not subject to these rules, unless the target enjoys special protection (i.e., medical systems). Examples of cyberspace operations that do not amount to attacks include defacing a government webpage; a minor, brief disruption of internet services; briefly disrupting, disabling, or interfering with communications; and disseminating propaganda.

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## 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. The employment of weapons, materiel, and methods of warfare designed to cause superfluous injury or unnecessary suffering is prohibited. Some weapons (e.g., poisoned projectiles) are unlawful per se. Others may be rendered unlawful by alteration (e.g., coating ammunition with a poison). 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. See SECNAVINST 5000.2F, Defense Acquisition System and Joint Capabilities Integration and Development System Implementation. 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 National Security 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 (e.g., naval mines, landmines, torpedoes, cluster and fragmentation weapons, delayed-action devices, incendiary weapons, directed-energy devices, and over-the-horizon (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. The test is whether the suffering or injury is manifestly disproportionate to the military advantage. Certain means of warfare have 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 means and methods of warfare amounting to attacks only be directed at combatants and objectives. Civilians and civilian objects may not be attacked, unless they lose their protected status. 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 (e.g., 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. 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 the anticipated loss of civilian life and damage to civilian 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 objects 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 during and long after that conflict, and led to Hague VIII. The purpose of the Hague VIII rules is to ensure, to the extent practicable, the safety of innocent shipping. These rules require 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 require ship owners be warned of the presence of mines as soon as military exigencies permit.

Although the Hague Convention 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. The general principles of law embodied in the 1907 Hague 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. They 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 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 armed and controllable mines in its own internal waters at any time with or without notification. A State may 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 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., 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, 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 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 (seabed) must become harmless within 1 hour after loss of control over them.
5. The location of minefields must be carefully recorded to ensure accurate notification and 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. They may otherwise be employed in the strategic blockade of enemy ports, coasts, and waterways.
8. It is prohibited to mine areas of indefinite extent in international waters. 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 LANDMINES**

The United States is a party to Amended Mines Protocol II on the Convention on Conventional Weapons. It applies to the use on land of mines, booby-traps, and other devices, including mines laid to interdict beaches, waterway crossings, or river crossings. It does not apply to the use of antiship mines at sea or in inland waterways. The Amended Mines Protocol II defines a mine as a munition 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. The Amended Mines Protocol II does not ban antipersonnel landmines (APL)—defined as those mines primarily designed to be exploded by the presence, proximity, or contact of a person and will incapacitate, injure, or kill one or more persons. It imposes requirements on State parties regarding use, maintenance, and removal of mines and minefields. It does not restrict the use of anti-vehicle landmines (AVL).

The Amended Mines Protocol II imposes important restrictions and rules governing use of landmines—including restrictions on landmine transfers—in order to curb the risks to civilians and noncombatants. It distinguishes between persistent landmines (which can remain a hazard indefinitely when used irresponsibly) and landmines possessing self-destruction mechanisms and self-deactivation features (which do not pose a long-term hazard). Nonpersistent landmines that reliably self-destruct and self-deactivate in timeframes consistent with the threat posed appropriately minimize humanitarian risks.

On 31 January 2020, the DOD issued a new policy on landmines, replacing the landmine policy issued on 23 September 2014. The DOD policy requires the DOD to adhere to all applicable international legal obligations concerning landmines. For example, the military departments and combatant commands (CCMDs), in keeping with U.S. obligations under the Amended Mines Protocol II, will use remotely delivered APL only if they have compliant self-destruction mechanisms and self-deactivation features, and they are detectable by commonly available technical mine detection equipment. In addition, consistent with the Amended Mines Protocol II, the military departments and CCMDs will take feasible precautions to protect civilians from the use of landmines, record all necessary information concerning mined areas, and address such mines without delay after the cessation of active hostilities.

The DOD maintains or establishes the following restrictions regarding landmines:

1. The DOD will not employ persistent landmines (i.e., landmines that do not incorporate self-destruction mechanisms and self-deactivation features). The DOD will only employ, develop, produce, or otherwise acquire landmines that are nonpersistent (they must possess self-destruction mechanisms and self-deactivating features).
2. The DOD will adhere to certain restrictions that are more protective of civilians and noncombatants than the Amended Mines Protocol II—such as self-destruct timelines no longer than 30 days, but in some cases as short as 2 hours or 48 hours—for all activated landmines, whether remotely delivered or not.
3. The policy removes express geographical limits on employment of nonpersistent landmines. Appropriate geographical limitations will be formulated based on specific operational contexts and will be reflected in relevant ROE, consistent with existing DOD policy and practice.
4. The DOD may pursue on/off area denial systems that can be remotely activated when an imminent threat emerges and deactivated once the threat subsides. The DOD should explore acquiring landmines and landmine alternatives that could further reduce the risk of unintended harm to civilians and noncombatants.
5. Combatant commanders are the approval authority to employ nonpersistent landmines.
6. Military departments and CCMDs will maintain a robust surveillance program to ensure the operational quality and reliability of landmines, particularly the reliability of the self-destruct mechanisms and self-deactivating features.
7. The DOD will not seek to transfer landmines, except as provided for under U.S. law.
8. Military departments will continue to demilitarize any persistent landmines in existing inactive stockpiles. Notwithstanding this policy, the DOD may acquire, retain, and transfer a limited number of persistent



landmines for the purposes of training personnel engaged in demining and countermining operations and improving countermine operations. The stocks of such persistent landmines will not exceed the minimum number absolutely necessary for such purposes.

The 1997 Ottawa Convention imposes a ban on the use, stockpiling, production, and transfer of APLs. This prohibition does not apply to command detonated weapons (such as claymores in a nontripwire mode) or to AVLs (referred to as mines other than antipersonnel mines). The United States is not a party to the Ottawa Convention. 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.

## **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 objectives. 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.

### **9.5.1 Convention on Cluster Munitions**

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.

### **9.5.2 U.S. Policy on Cluster Munitions**

The 2017 DepSecDef Memorandum, DOD Policy on Cluster Munitions, established DOD policy regarding cluster munitions and adjusted the SECDEF's 2008 policy on cluster munitions, which included standards for the procurement of new cluster munitions and the authority to retain and use cluster munitions currently in active inventories. The new policy allows the DOD to retain cluster munitions currently in active inventories until the capabilities they provide are replaced with are enhanced with more reliable munitions.

The policy directed the military departments, starting in fiscal year 2019, to program capabilities into their budgets to replace cluster munitions currently in active inventories that do not meet the standards prescribed in the 2017 policy memorandum for procuring new cluster munitions. The DOD will only procure cluster munitions containing submunitions or submunition warheads that do not result in more than 1 percent unexploded ordnance across the range of intended operational environments or possess advanced features to minimize the risks posed by unexploded submunitions.

The approval authority to employ cluster munitions that do not meet the standards prescribed in the 2017 policy for procuring new cluster munitions rests with the combatant commanders. In extremis, to meet immediate warfighting demand, combatant commanders may accept transfers of cluster munitions that do not meet the standards prescribed in the 2017 policy for procuring new cluster munitions.

The DOD will not transfer cluster munitions, except as provided for under U.S. law. Cluster munitions that do not meet the standards prescribed in the 2017 policy for procuring new cluster munitions will be removed from active inventories and demilitarized after their capabilities have been replaced by sufficient quantities of munitions that meet the standards of the 2017 policy.

## **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 (e.g., the wounded and sick, dead bodies, medical facilities and supplies, or items with internationally recognized protective emblems, signs, or signals) is prohibited. Belligerents are required to record the location of booby traps and other delayed-action devices in the same manner as landmines. See 9.3.

## **9.7 EXPLOSIVE REMNANTS OF WAR**

Protocol V to the Convention on Certain Conventional Weapons defines explosive remnants of war (ERW) as unexploded explosive ordnance 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, fused, 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, has been left behind or dumped by a party to an armed conflict, and 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, fused, 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 flame throwers, flame fougasses, shells, rockets, grenades, mines, bombs, other containers of incendiary substances, etc.

Incendiary weapons do not include munitions which have incidental incendiary effects, such as illuminants, tracers, signaling flares, etc. It 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 excessive in light of the military advantage anticipated by the attack.

The Protocol III to the Convention on Certain Conventional 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 limit the incendiary effects to the military objective and to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians, and damage to civilian objects. It 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 such use would cause fewer casualties and/or less collateral damage than alternative weapons. This reservation could include 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 can have nondestructive or destructive effects. Lasers may be employed despite the possibility of incidental injury to enemy personnel. Laser dazzlers designed to temporarily disorient may be employed.

The Protocol IV to the Convention on Certain Conventional Weapons prohibits the use or transfer of laser weapons specifically designed to cause blindness to unenhanced vision (e.g., to the naked eye or the eye with corrective lenses). While blinding as an incidental effect of the legitimate military employment of 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 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 9.1.2.

## 9.11 NONLETHAL WEAPONS

Nonlethal weapons (NLWs) are weapons, devices, or munitions that are explicitly designed and primarily employed to incapacitate personnel or materiel immediately, while minimizing fatalities, permanent injury to personnel, and undesired damage to property in the target area or 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. Nonlethal weapons 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 NLWs are in a unit's inventory does not mean 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. Nonlethal weapons 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.

## 9.12 AUTONOMOUS WEAPON SYSTEMS

DODD 3000.09, Autonomy in Weapon Systems, imposes requirements regarding the development and use of autonomous and semiautonomous weapon systems in order to ensure that commanders and operators are able to exercise appropriate levels of human judgment over the use of force.

Autonomous weapon systems are systems that, once activated, can select and engage targets without further intervention by a human operator. This includes human-supervised autonomous weapon systems that are designed to allow human operators to override operation of the weapon system, but can select and engage targets without further human input after activation.

Semiautonomous weapon systems only engage individual targets or specific target groups that have been selected by a human operator. Semiautonomous weapon systems can employ autonomy for engagement-related functions including, but not limited to, acquiring, tracking, and identifying potential targets; cueing potential targets to human operators; prioritizing selected targets; timing of when to fire; or providing terminal guidance to home in on selected targets, provided that human control is retained over the decision to select individual targets and

specific target groups for engagement. Semiautonomous systems include fire and forget or lock-on-after-launch homing munitions that engage individual targets or specific target groups that have been selected by a human operator.

DODD 3000.09 establishes rigorous standards for system design, testing of hardware and software, and training of personnel on the proper use of autonomous and semiautonomous systems. The policy requires that military commanders use autonomous and semiautonomous weapon systems in a manner consistent with their design, testing, certification, operator training, and doctrine.

The law of war does not prohibit the use of autonomy in weapon systems. The general rules applicable to all weapons would apply to weapons with autonomous functions (see 5.3). The United States currently employs weapon systems with autonomous functions, such as the Aegis ship defense system and the counter-rocket, artillery, and mortar system.

Although no law of war rule specifically restricts the use of autonomy in weapon systems, some weapon systems with autonomous functions (e.g., mines) may be controlled by existing regulations (see 9.2).

## 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 an express prohibition, the use of nuclear weapons against enemy combatants and other military objectives is not unlawful. Employment of nuclear weapons is subject to the following principles:

1. The right of the parties to the conflict to adopt means of injuring the enemy is not unlimited.
2. It is prohibited to launch attacks against the civilian population as such.
3. Distinction must be made at all times between combatants and civilians to the effect 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, 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., 1963 Limited Test Ban Treaty) may not apply during time of war.

##### 10.2.2.1 1971 Seabed Arms Control Treaty

The 1971 Seabed Arms Control Treaty is a multilateral convention that prohibits emplacement of nuclear weapons and mines on the seabed and the ocean floor or in the subsoil thereof 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. It does not 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 of 1967

The Outer Space Treaty of 1967 is a multilateral convention that 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 1959 Antarctic Treaty**

The 1959 Antarctic Treaty is a multilateral convention designed to ensure that Antarctica, defined to include the area south of 60 degrees south latitude, is used for peaceful purposes only. The treaty prohibits, in Antarctica, any measures of a military nature (e.g., 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 affect in any way the high seas freedoms of navigation and overflight in the Antarctic region.

### **10.2.2.4 Treaty of Tlatelolco**

The Treaty of Tlatelolco is an agreement among the Latin American countries not to introduce nuclear weapons into Latin America. The treaty does not 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 Treaty of Tlatelolco 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. The United States cannot maintain nuclear weapons in those areas. Protocol I States retain 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 Treaty of Tlatelolco is an agreement among several nuclear-armed States (China, France, Russian Federation, 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 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. Those treaties are:

1. The 1985 Treaty of Rarotonga (South Pacific)
2. The 1995 Treaty of Bangkok (Southeast Asia)
3. The 1996 Treaty of Pelindaba (Africa)
4. The 2006 Treaty of Semipalatinsk (Central Asia).

### **10.2.2.6 1963 Limited Test Ban Treaty**

The 1963 Limited Test Ban Treaty is a multilateral treaty that prohibits the testing of nuclear weapons in the atmosphere, in outer space, and underwater. Over 100 States are party to the treaty, including Russian Federation, 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 1968 Treaty on the Nonproliferation of Nuclear Weapons**

The 1968 Treaty on the Nonproliferation of Nuclear Weapons is a multilateral treaty obligates nuclear-weapons States to refrain from transferring nuclear weapons or nuclear-weapons technology to nonnuclear-weapons States. It 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 Russian Federation (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 reduce the risk of miscalculation that could trigger a nuclear exchange. Among these agreements are:

1. Hotline Agreements of 1963 and 1971
2. Accidents Measures Agreement of 1971
3. 1973 Agreement on Prevention of Nuclear War
4. Threshold Test Ban Treaty of 1974
5. 1976 Treaty on Peaceful Nuclear Explosions
6. Strategic Arms Limitation Talks (SALT) Agreements of 1972 and 1977 (SALT I—Interim Agreement has expired and SALT II was never ratified)
7. Intermediate Range Nuclear Forces Treaty of 1988
8. Strategic Arms Reduction Treaties (START) of 1991 (START I) and 1993 (START II). The START initiated the process of physical destruction of strategic nuclear warheads and launchers by the United States, Russian Federation, Ukraine, Belarus, and Kazakhstan (the latter four being recognized as successor States to the USSR for this purpose).

On 14 June 2002, the Russian Federation announced its withdrawal from START II. On 24 May 2002, the United States and Russian Federation concluded the Strategic Offensive Reductions Treaty, whereby they had 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 Russian Federation signed the New START, which entered into force on 5 February 2011 and has a 10-year duration. The United States and the Russian Federation agreed to extend the treaty until 3 February 2026. Like the START before it, New START continues efforts to reduce and limit nuclear warheads and launchers. In 2019, the United States withdrew from the Intermediate Range Nuclear Forces Treaty.

## 10.3 CHEMICAL WEAPONS

International law prohibits the use of chemical weapons under any circumstances.

### 10.3.1 Treaty Obligations

Prior to 1993, the Geneva Gas Protocol of 1925 for the Prohibition of the use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (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 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 CWC does not modify existing international law with respect to herbicidal agents. The CWC 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 CWC defines RCAs as any chemical, not listed in a Schedule of the CWC, that can produce rapidly in human's 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. The CWC does not define the term. The United States ratified the CWC subject to the understanding that nothing in the CWC prohibited the use of RCAs in accordance with EO 11850, Reunification of Certain Uses in War of Chemical Herbicides and Riot Control Agents.

#### **10.3.2.1 Riot Control Agents in Armed Conflict**

Under EO 11850 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 the prohibition on the use of RCAs as a method of warfare applies in international and noninternational armed conflict, but 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, 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 SECDEF or, in limited circumstances, by the commanders of the CCMDs. 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 kill long grasses and other vegetation that could shield the movement of enemy forces. The United States considers use of herbicidal agents in wartime is not prohibited by either the 1925 Gas Protocol or



the 1993 Chemical Weapons Convention, but formally renounced, in EO 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 SECDEF or, in limited circumstances, by commanders of the CCMDs. See CJCSI 3110.07D 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 antimateriel 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 of biological weapons in armed conflict. The 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (1972 Biological Weapons Convention or BWC) prohibits the production, testing, and stockpiling of biological weapons. The BWC 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, Russian Federation, and most other North Atlantic Treaty Organization and former Warsaw Pact States are parties to 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 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 is an improvised assembly or process—other than a nuclear explosive device—designed to disseminate radioactive material to cause destruction, damage, or injury. A radiological exposure device is a radioactive source placed to cause injury or death. 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. 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 5.4 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 in both international and noninternational armed conflict. During international armed conflict, Additional Protocol I, Article 75 to the Geneva Conventions, provides additional fundamental guarantees. Although not a party to Additional Protocol I, the United States applies the fundamental guarantees reflected in Article 75 in all international armed conflicts.

Humane treatment is, at a minimum, protection from unlawful threats or acts of violence and deprivation of basic human necessities. It 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. The following acts are prohibited with respect to all detainees in DOD custody and control:

1. Violence, torture, and cruel treatment
2. Humiliating or degrading treatment
3. Public curiosity and insults
4. Rape, enforced prostitution, and other indecent assault
5. Biological or medical experiments
6. Threats to commit any of the acts above.

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, 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 detained may qualify for POW status under the 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 2310.1E
2. DODD 3115.09, Department of Defense Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning
3. JP 3-63, Detainee Operations
4. AR 190-8/OPNAVINST 3461.6/AFJI 31-304/MCO 3461.1, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees
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 qualify as combatants by meeting certain requirements. See 5.4 for more information.

#### **11.3.1 Standard of Treatment**

Combatants (see 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 noninternational armed conflict. 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 known as an Article 5 tribunal based on GPW, Article 5. 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 1949 Geneva Conventions.

Prisoner of war 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. Prisoners of war 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. Prisoners of war 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 be subjected to nonjudicial disciplinary punishment for minor offenses committed during captivity, punishments may not exceed 30 days duration. Prisoners of war 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**

Prisoners of war 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 11.3.2 may be imposed upon them for the escape attempt. Prisoners of war who make good their escape by rejoining friendly forces or leaving enemy-controlled territory must not be subjected to disciplinary punishment if recaptured. 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 on board 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 on board naval vessels while being transported between land facilities.
3. They may be temporarily held on board 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 SECDEF approval.

## **11.4 UNPRIVILEGED BELLIGERENTS**

Unprivileged belligerents (see 5.4.1.2) do not have a right to engage in hostilities and do not receive combatant immunity for their hostile acts. They are not entitled to POW status if detained. 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 11.2.

Because unprivileged belligerents do not have combatant immunity, they may be prosecuted for their hostile actions. 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. 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 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 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 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 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. See 5.4.2.

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. 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 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 DODD 3115.09, Subparagraph 4.1. Anyone conducting tactical questioning must ensure all detained persons receive humane treatment. If the detained person is entitled to POW status additional restrictions on questioning apply. See 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
3. JP 2-01.2, Counterintelligence and Human Intelligence in Joint Operations
4. FM 2-22.3.

## 11.9 QUESTIONING OF PRISONERS OF WAR

Detainees 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. Prisoners of war 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 be regarded as having the lowest rank of that force, and shall be treated accordingly. Prisoners of war 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 the enemy, deter the enemy from taking action, or induce the enemy 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 to convey false information or deny information to opposing forces. They can include:

1. Physical, technical, or administrative means, such as electronic warfare measures
2. Flares, smoke, and chaff
3. Camouflage
4. Deceptive lighting
5. Dummy ships and other armament.
6. Decoys
7. Simulated forces
8. Feigned attacks and withdrawals
9. Ambushes
10. False intelligence information
11. Utilization of enemy codes, passwords, and countersigns
12. Transmission of a false position through an automatic identification system or other electronic identification systems.

#### 12.1.2 Prohibited Deceptions

It is unlawful to injure or kill persons by means of perfidy. Acts of perfidy are acts that invite the confidence of the enemy to lead them to believe that they are 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**

Certain signs, signals, and symbols (see 8.5.1 and 8.5.2) reflect a status that receive special protection under the law of armed conflict. These signs may not be improperly used. They may not be used:

1. While engaging in attacks
2. In order to shield, favor, or protect one's own military operations
3. To impede enemy military operations.

Their use may be improper even when that use does not involve killing or wounding. They may not be used to facilitate espionage (except for signs, emblems, or uniforms of a neutral or nonbelligerent State). The prohibited acts are unlawful because they undermine the effectiveness of protective signs, signals, and symbols and thereby jeopardize the safety of noncombatants and civilians, as well as 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. 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 to fly false colors, including those of a neutral State, from a belligerent warship or naval auxiliary and to disguise their outward appearance, or employ other methods and means in other ways in order to deceive the enemy into believing the vessel is of neutral nationality or is other than a military ship. 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 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**

Under the customary international law of naval warfare, it is permissible to fly false colors, including those of an enemy State, from a belligerent warship or auxiliary and to disguise their outward appearance in other ways or employ other methods and means in order to deceive the enemy into believing the vessel is of neutral nationality or is other than a military ship. It is unlawful for a warship to go into action without first showing her true colors. Use of enemy flags, insignia, or uniforms during an actual armed engagement at sea is forbidden.

### **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 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.

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 for downed airmen 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 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 it is permissible to feign disablement or other distress as a means to induce the enemy to break off an attack. There is no obligation in air warfare to cease attacking a belligerent military aircraft that appears to be disabled. 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 (see 12.3.1). An attack by a person feigning shipwreck, sickness, or wounds undermines the protected status of those rendered incapable of combat. 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. Personnel conducting reconnaissance missions behind enemy lines while properly uniformed are not spies.

Crew members of warships, naval auxiliaries (even if crew members 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 markings.

Spying during armed conflict is not a violation of international law. Captured spies are not 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, they are immune from punishment for their 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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# 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)

**antisubmarine warfare.** Operations conducted with the intention of denying the enemy the effective use of submarines. Also see **ASW**. (DOD Dictionary)

**cyberspace capability.** A device or computer program, including any combination of software, firmware, or hardware, designed to create an effect in or through cyberspace. (DOD Dictionary)

**exclusive economic zone.** 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. Also called **EEZ**. (DOD Dictionary)

**information operations.** 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. Also called **IO**. See also **electromagnetic warfare; military deception; military information support operations; operations security**. (DOD Dictionary)

**military information support operations.** 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. Also called **MISO**. (DOD Dictionary)

**Military Sealift Command.** 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. Also called **MSC**. See also **transportation component command**. (DOD Dictionary)

**naval personnel.** Members of the U.S. Navy, U.S. Marine Corps, U.S. Coast Guard, and DOD civilian merchant mariners.

**naval vessel protection zone.** A 500-yard regulated area of water surrounding large United States naval vessels that is necessary to provide for the safety or security. Also called **NVPZ**. (NTRP 1-02)

**noncombatant evacuation operation.** 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. Also called **NEO**. See also **evacuation; noncombatant evacuees; operation; safe haven**. (DOD Dictionary)

**nonlethal weapon.** A weapon, device, or munition that is explicitly designed and primarily employed to incapacitate personnel or materiel immediately, while minimizing fatalities, permanent injury to personnel, and undesired damage to property in the target area or environment. Also called **NLW**. (DOD Dictionary)

**offensive cyberspace operations.** Missions intended to project power in or through cyberspace. Also called **OCO**. (DOD Dictionary)

**prisoner of war.** A detained person (as defined in Articles 4 and 5 of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949) who, while engaged in combat under orders of his or her government, is captured by the armed forces of the enemy. Also called **POW**. (DOD Dictionary)

**radiological dispersal device.** An improvised assembly or process, other than a nuclear explosive device, designed to disseminate radioactive material to cause destruction, damage, or injury. Also called **RDD**. (DOD Dictionary)

**radiological exposure device.** A radioactive source placed to cause injury or death. Also called **RED**. (DOD Dictionary)

**riot control agent.** 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. Also called **RCA**. See also **chemical warfare**. (DOD Dictionary)

**rules of engagement.** 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. Also called **ROE**. See also **law of war**. (DOD Dictionary)

**standing rules for the use of force.** Preapproved directives to guide United States forces on the use of force during various operations. Also called **SRUF**. (DOD Dictionary)

**United States Naval Ship.** A public vessel of the United States that is in the custody of the Navy and operated by the Military Sealift Command with a civil service crew or operated by a commercial company under contract to the Military Sealift Command with a merchant marine crew. Also called **USNS**. See also **Military Sealift Command**. (DOD Dictionary)

**unmanned aircraft.** An aircraft that does not carry a human operator and is capable of flight with or without human remote control. Also called **UA**. (DOD Dictionary)

**weapons of mass destruction.** Chemical, biological, radiological, or nuclear weapons capable of a high order of destruction or causing mass casualties, excluding the means of transporting or propelling the weapon where such means is a separable and divisible part from the weapon. Also called **WMD**. See also **special operations**. (DOD Dictionary)

# LIST OF ACRONYMS AND ABBREVIATIONS

<b>ADIZ</b>	air defense identification zone
<b>AFJI</b>	Air Force Joint instruction
<b>aircert</b>	air certification
<b>ALCOAST</b>	All Coast Guard Message
<b>APL</b>	antipersonnel landmine
<b>AR</b>	Army regulation
<b>AT/FP</b>	antiterrorism/force protection
<b>AVL</b>	anti-vehicle landmine
<b>CA3</b>	Common Article 3
<b>CCM</b>	Convention on Cluster Munitions
<b>CCMD</b>	combatant command
<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>COGARD</b>	Coast Guard
<b>COLREGS</b>	International Regulations for Preventing Collisions at Sea
<b>COMDTINST</b>	Commandant instruction
<b>CONMAR</b>	contract mariner
<b>CUES</b>	Code for Unplanned Encounters at Sea
<b>CWC</b>	1993 Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction
<b>DepSecDef</b>	Deputy Secretary of Defense
<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>DON</b>	Department of the Navy
<b>EEZ</b>	exclusive economic zone
<b>EMS</b>	electromagnetic spectrum
<b>EO</b>	executive order
<b>ERW</b>	explosive remnants of war
<b>EW</b>	electronic warfare
<b>FIR</b>	flight information region
<b>FM</b>	field manual
<b>FON</b>	Freedom of Navigation (operations)
<b>GC</b>	1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War
<b>GMCC</b>	Global Maritime Collaboration Center
<b>GOCO</b>	government-owned, contractor-operated

<b>GOGO</b>	government-owned, government-operated
<b>GPW</b>	1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War
<b>GWS</b>	1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
<b>GWS Sea</b>	1949 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea
<b>ICAO</b>	International Civil Aviation Organization
<b>ICC</b>	International Criminal Court
<b>ICRC</b>	International Committee of the Red Cross
<b>ICTY</b>	International Criminal Tribunal for the former Yugoslavia
<b>IRC</b>	information-related capability
<b>IE</b>	information environment
<b>IMO</b>	International Maritime Organization
<b>INCSEA</b>	incidents at sea
<b>IO</b>	information operations
<b>JEMSO</b>	joint electromagnetic spectrum operations
<b>JP</b>	joint publication
<b>MCM</b>	mine countermeasures
<b>MCO</b>	Marine Corps order
<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>MCA</b>	Military Commissions Act
<b>MMC</b>	Manual for Military Commissions
<b>MMCA</b>	Military Maritime Consultative Agreement
<b>MOTR</b>	maritime operational threat response
<b>MOU</b>	memorandum of understanding
<b>MSC</b>	Military Sealift Command
<b>MSR</b>	marine scientific research
<b>NAVADMIN</b>	naval administrative (message)
<b>navicert</b>	navigation certification
<b>NAVMED</b>	Navy Medical Command
<b>NDP</b>	naval doctrine publication
<b>NIAC</b>	noninternational armed conflict
<b>NLW</b>	nonlethal weapon
<b>Nm</b>	nautical mile
<b>NTRP</b>	Navy tactical reference publication
<b>NTTP</b>	Navy tactics, techniques, and procedures
<b>NVPZ</b>	naval vessel protection zone
<b>NWP</b>	Navy warfare publication
<b>OCS</b>	outer continental shelf
<b>OPCON</b>	operational control



<b>OTH</b>	over the horizon
<b>POW</b>	prisoner of war
<b>PRC</b>	People's Republic of China
<b>PSI</b>	Proliferation Security Initiative
<b>RCA</b>	riot control agent
<b>RCM</b>	rules for court martial
<b>ROE</b>	rules of engagement
<b>SALT</b>	Strategic Arms Limitation Talks
<b>SECDEF</b>	Secretary of Defense
<b>SECNAVINST</b>	Secretary of the Navy instruction
<b>SOFA</b>	status of forces agreement
<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>TACON</b>	tactical control
<b>U.S.C.</b>	United States Code
<b>UA</b>	unmanned aircraft
<b>UCMJ</b>	Uniform Code of Military Justice
<b>UMS</b>	unmanned system
<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>WMD</b>	weapons of mass destruction

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