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U.S. COAST GUARD

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THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS

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U.S. COAST GUARD**



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June 2007

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PREFACE

SCOPE

This publication sets out those fundamental principles of international and domestic law that govern U.S. naval operations at sea. Part I, Law of Peacetime Naval Operations, provides an overview and general discussion of the law of the sea, including definitions and descriptions of the jurisdiction and sovereignty exercised by nations over various parts of the world's oceans; the international legal status and navigational rights of warships and military aircraft; protection of persons and property at sea; and the safeguarding of national interests in the maritime environment. Part II, Law of Naval Warfare, sets out those 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 Part II is upon the rules of international law concerned with the conduct of naval warfare, attention is also directed to relevant principles and concepts common to the whole of the law of armed conflict.

PURPOSE

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

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

APPLICABILITY

Part I of this publication is applicable to U.S. naval operations during time of peace. Part I also complements the more definitive guidance on maritime law enforcement promulgated by the U.S. Coast Guard.

Part II applies to the conduct of U.S. naval forces during armed conflict. It is the policy of the United States to apply the law of armed conflict to all circumstances in which the armed forces of the United States are engaged in combat operations, regardless of whether such hostilities are declared or otherwise designated as "war." Relevant portions of Part II are, therefore, applicable to all hostilities involving U.S. naval forces irrespective of the character, intensity, or duration of the conflict. Part II may also be used for information and guidance in situations in which the United States is a nonparticipant in hostilities involving other nations. Part II complements the more definitive guidance on land and air warfare promulgated, respectively, by the U.S. Army and U.S. Air Force.

STANDING RULES OF ENGAGEMENT

The President and the Secretary of Defense or their duly deputized alternates or successors approve and the Chairman of the Joint Chiefs of Staff promulgates standing rules of engagement (SROE) for US forces (Chairman of the Joint Chiefs of Staffs Instruction 3121.01B). These rules delineate the circumstances under which forces will initiate and/or continue engagement with other forces encountered. Combatant commanders may augment the SROE as necessary to reflect changing political and military policies, threats, and missions specific to their area of responsibility. Such augmentations to the standing rules are approved by the President and/or Secretary of Defense and promulgated by the Joint Staff, J-3, as annexes to the SROE.

This publication provides general information, is not directive, and does not supersede guidance issued by such commanders or higher authority.

INTERNATIONAL LAW

For purposes of this publication, international law is defined as that body of rules that nations consider binding in their relations with one another. International law derives from the practice of nations in the international arena and from international agreements. International law provides stability in international relations and an expectation that certain acts or omissions will effect predictable consequences. If one nation violates the law, it may expect that others will reciprocate. Consequently, failure to comply with international law ordinarily involves greater political and economic costs than does observance. In short, nations 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.

Practice of Nations

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

International Agreements

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

U.S. Navy Regulations

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

At all times, a commander shall observe, and require their commands to observe, the principles of international law. Where necessary to fulfill this responsibility, a departure from other provisions of Navy Regulations is authorized.

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

Report administrative discrepancies by letter, message, or e-mail to:

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Procedures for recommending changes are provided below.

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URGENT CHANGE RECOMMENDATIONS

When items for changes are considered urgent (as described in Paragraph 3.4.2), send this information by message to the Primary Review Authority, info NWDC. Clearly identify and justify both the proposed change and its urgency. Information addressees should comment as appropriate. See accompanying sample for urgent change recommendation format on page 23.

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Submit routine recommended changes to this publication at any time by using the accompanying routine change recommendation letter format on page 24 and mailing it to the address below, or posting the recommendation on the NWDC Doctrine Discussion Group site.

COMMANDER
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DOCTRINE DIRECTOR (N5)
686 CUSHING ROAD
NEWPORT RI 02841-1207

CHANGE SYMBOLS

Revised text in changes is indicated by a black vertical line in either margin of the page, like the one printed next to this paragraph. The change symbol indicates added or restated information. A change symbol 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 is as follows:

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

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

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

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

FM ORIGINATOR
TO NAVAL WAR COLLEGE NEWPORT RI//JJJ//
INFO COMNAVWARDEVCOM NEWPORT RI//N5//
NAVY JAG ALEXANDRIA VA//10//

CLASSIFICATION//N03510//
MSGID/GENADMIN/*(Organization ID)*//
SUBJ/URGENT CHANGE RECOMMENDATION FOR NWP 1-14M COMDTPUB P5800.7//
REF/A/DOC/NTTP 1-01//
POC/*(Command Representative)*//
RMKS/

1. IAW REF A URGENT CHANGE IS RECOMMENDED FOR NWP 1-14M COMDTPUB P5800.7
2. PAGE _____ ART/PARA NO _____ LINE NO _____ FIG NO _____
3. PROPOSED NEW TEXT *(Include classification)*

4. JUSTIFICATION

Message provided for subject matter; ensure that actual message conforms to MTF requirements.



DEPARTMENT OF THE NAVY

NAME OF ACTIVITY
STREET ADDRESS
CITY, STATE XXXXX-XXXX

5219
Code/Serial
Date

FROM: (Name, Grade or Title, Activity, Location)
TO: (Primary Review Authority)

SUBJECT: ROUTINE CHANGE RECOMMENDATION TO (Publication Short Title,
Revision/Edition, Change Number, Publication Long Title)

ENCL: (List Attached Tables, Figures, etc.)

1. The following changes are recommended for NTPP X-XX, Rev. X, Change X:

a. CHANGE: (Page 1-1, Paragraph 1.1.1, Line 1)

Replace "...the ~~National Command Authority~~ President and Secretary of Defense establishes procedures for the..."

REASON: SECNAVINST #####, dated #####, instructing the term "National Command Authority" be replaced with "President and Secretary of Defense."

b. ADD: (Page 2-1, Paragraph 2.2, Line 4)

Add sentence at end of paragraph "See Figure 2-1."

REASON: Sentence will refer reader to enclosed illustration.

Add Figure 2-1 (see enclosure) where appropriate.

REASON: Enclosed figure helps clarify text in Paragraph 2.2.

c. DELETE: (Page 4-2, Paragraph 4.2.2, Line 3)

Remove "Navy Tactical Support Activity."

"...~~Navy Tactical Support Activity~~, and the Navy Warfare Development Command are is responsible for..."

REASON: Activity has been deactivated.

2. Point of contact for this action is (Name, Grade or Title, Telephone, E-mail Address).

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Routine Change Recommendation Letter Format

CHAPTER 1

Legal Divisions of the Oceans and Airspace

1.1 INTRODUCTION

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

In 1983, the United States announced that it would neither sign nor ratify the 1982 LOS Convention due to fundamental flaws in its deep seabed mining provisions. Further negotiations resulted in an additional Agreement regarding Part XI, which replaced the original deep seabed mining provisions. This Agreement contains legally binding changes to the 1982 LOS Convention and is to be applied and interpreted together with the Convention as a single treaty.

On 7 October 1994, the President of the United States submitted the 1982 LOS Convention and the Part XI Agreement reforming its deep seabed mining provisions to the Senate for its advice and consent to accession and ratification, respectively. In February 2004, the Senate Foreign Relations Committee unanimously recommended Senate advice and consent. As of the date of this publication the Senate has not acted on this recommendation.

1.2 U.S. OCEANS POLICY

Although the United States is not a party to the 1982 LOS Convention, it considers the navigation and overflight provisions therein reflective of customary international law and thus acts in accordance with the 1982 LOS Convention, except for the deep seabed mining provisions. President Reagan's 10 March 1983 Oceans Policy Statement provides:

First, the United States is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans [in the 1982 LOS Convention]—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 1982 LOS CONVENTION

The legal classifications (“regimes”) of ocean and airspace areas directly affect maritime operations by determining the degree of control that a coastal nation 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 nation control exercised in those areas, is set forth in the succeeding paragraphs of this chapter. The Department of Defense (DOD) 2005.1-M, Maritime Claims Reference Manual contains a listing of the ocean claims of coastal nations and may be accessed at www.dtic.mil/whs/directives/corres/html/20051m.htm.

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

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

1.3.3 Contiguous Zones

A contiguous zone is an area extending seaward from the baseline up to 24 nautical miles in which the coastal nation 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 (EEZ)

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

1.3.5 High Seas

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

1.4 MARITIME BASELINES

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

1.4.1 Low-Water Line

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

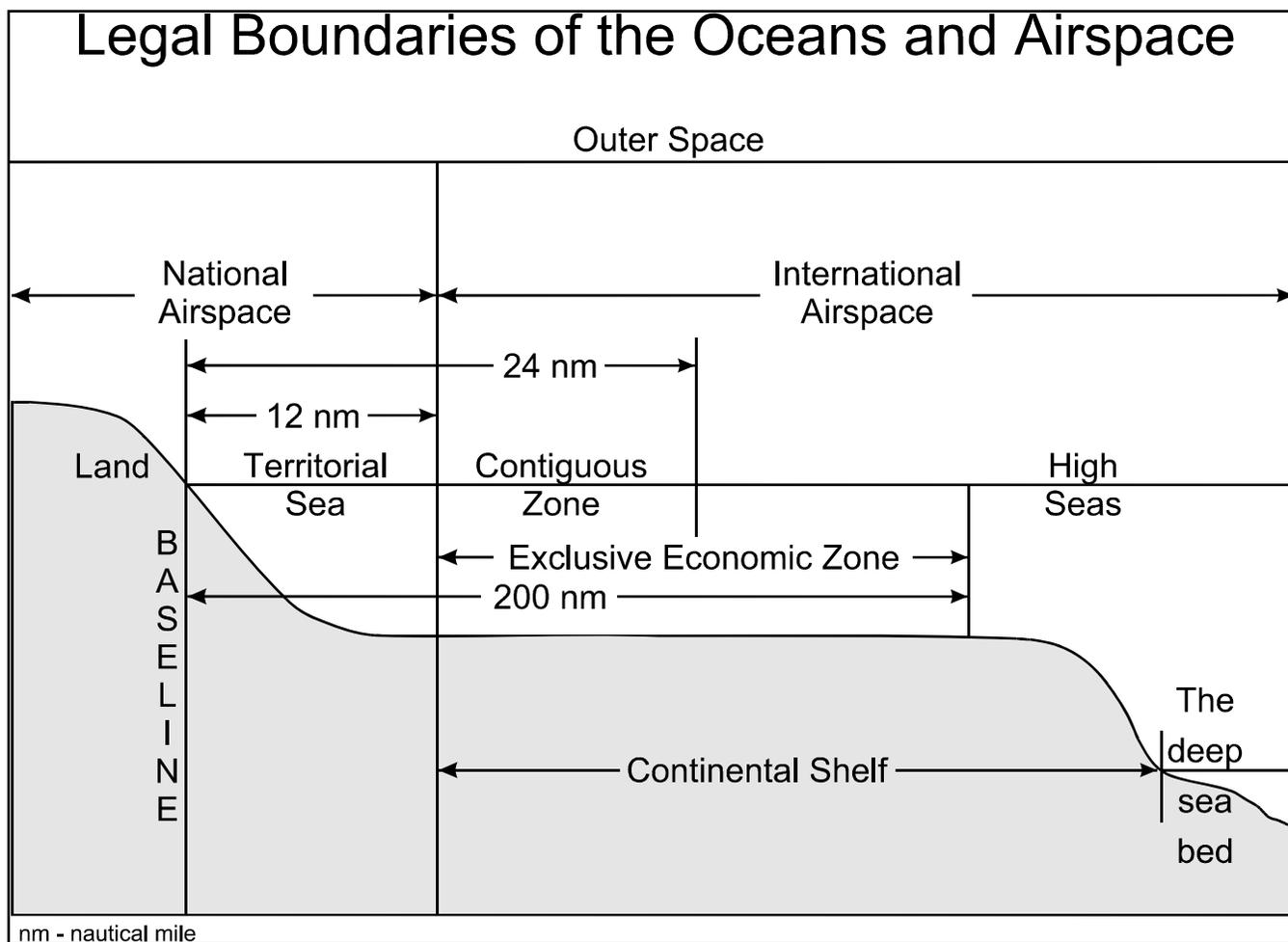


Figure 1-1. Legal Boundaries of the Oceans and Airspace

1.4.2 Straight Baselines

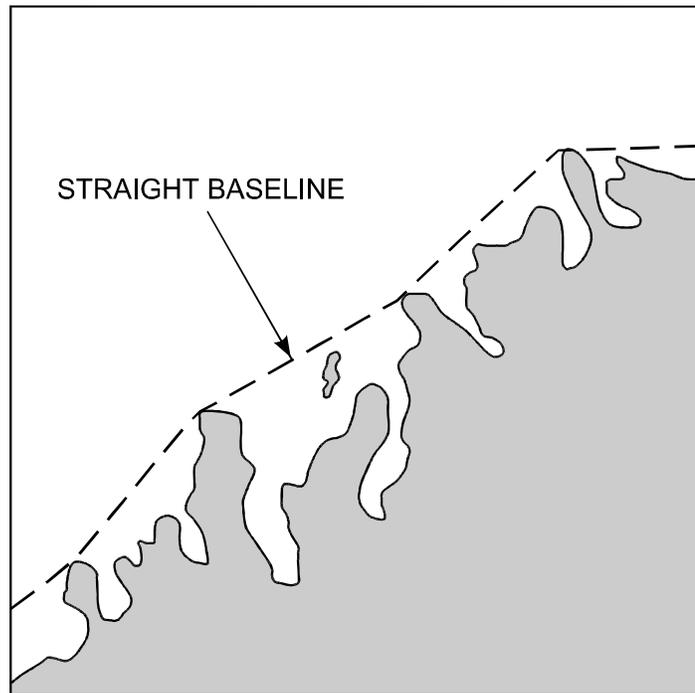
Where the coastline is deeply indented or where there is a fringe of islands along the coast in its immediate vicinity, the coastal nation may employ straight baselines. The general rule is that straight baselines must not depart from the general direction of the coast, and the sea areas they enclose must be closely linked to the land domain. A coastal nation 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

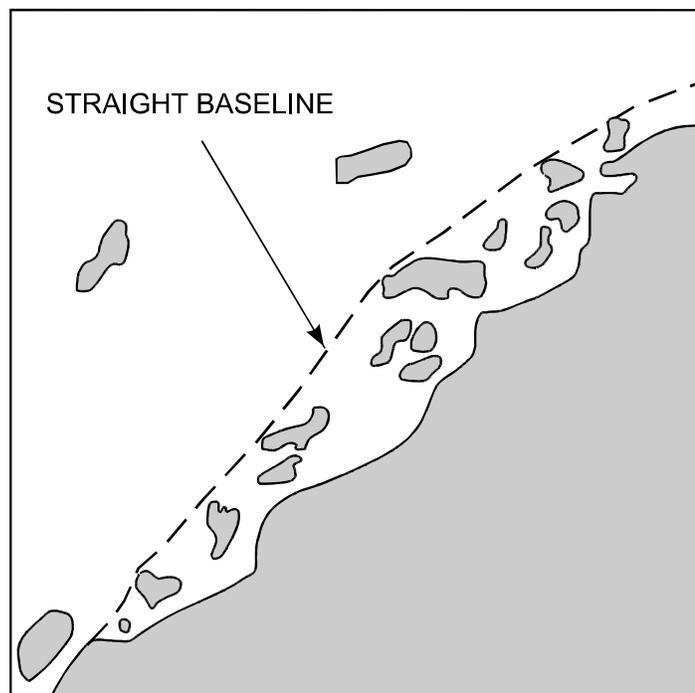
Where the coastline is highly unstable due to natural conditions, e.g., deltas, straight baselines may be established connecting appropriate points on the low-water line. These straight baselines remain effective, despite subsequent regression or accretion of the coastline, until changed by the coastal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

1.4.2.2 Low-Tide Elevations

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



A. Deep Indented Coastline



B. Fringing Island

Figure 1-2. Straight Baselines

1.4.3 Bays, Gulfs, and Historic Bays

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

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

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



Figure 1-3. The Semicircle Test

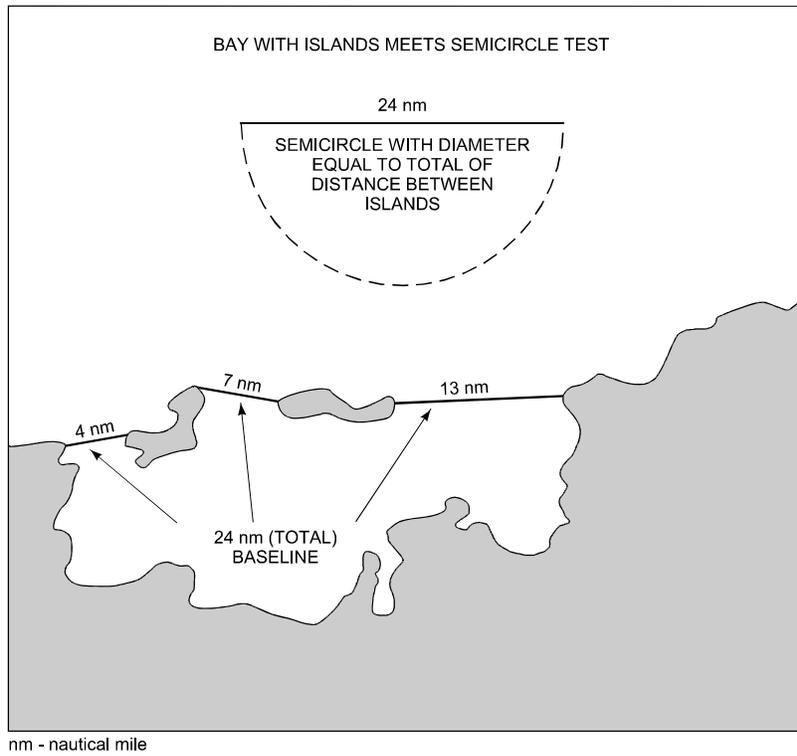


Figure 1-4. Bay with Islands

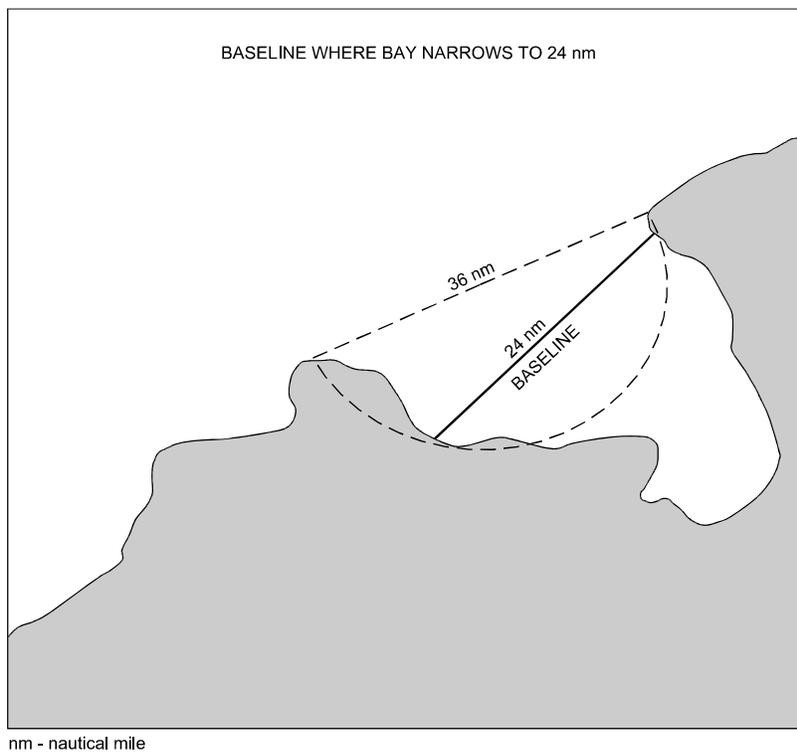


Figure 1-5. Bay with Mouth Exceeding 24 Nautical Miles

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

The low-water line of a reef may be used as the baseline for islands situated on atolls or having fringing reefs.

1.4.6 Harbor Works

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

1.5 NATIONAL WATERS

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

1.5.1 Internal Waters

Internal waters are *landward* of the baseline from which the territorial sea is measured. Lakes, rivers, some bays, harbors, some canals, and lagoons are examples of internal waters. From the standpoint of international law, internal waters have the same legal character as the land itself. There is no right of innocent passage in internal waters, and, unless in distress (see paragraph 2.5.1), ships and aircraft may not enter or overfly internal waters without the permission of the coastal nation. Where the establishment of a straight baseline drawn in conformity with the 1982 LOS Convention 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 nation and subject to its sovereignty. The United States claims a 12-nautical-mile territorial sea and recognizes territorial sea claims of other nations 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 defined as a naturally formed area of land, surrounded by water, which is above water at high tide. Rocks are islands that cannot sustain human habitation or economic life of their own. Provided they remain above water at high tide, they too possess a territorial sea determined in accordance with the principles discussed in the paragraphs on baselines. Rocks, however, have no exclusive economic zone or continental shelf. A low-tide elevation (above water at low tide but submerged at high tide) situated wholly or partly *within* the territorial sea may be used for delimiting the territorial sea as though it were an island. Where a low-tide elevation is located entirely *beyond* the territorial sea, it has no territorial sea of its own (Figure 1-6).

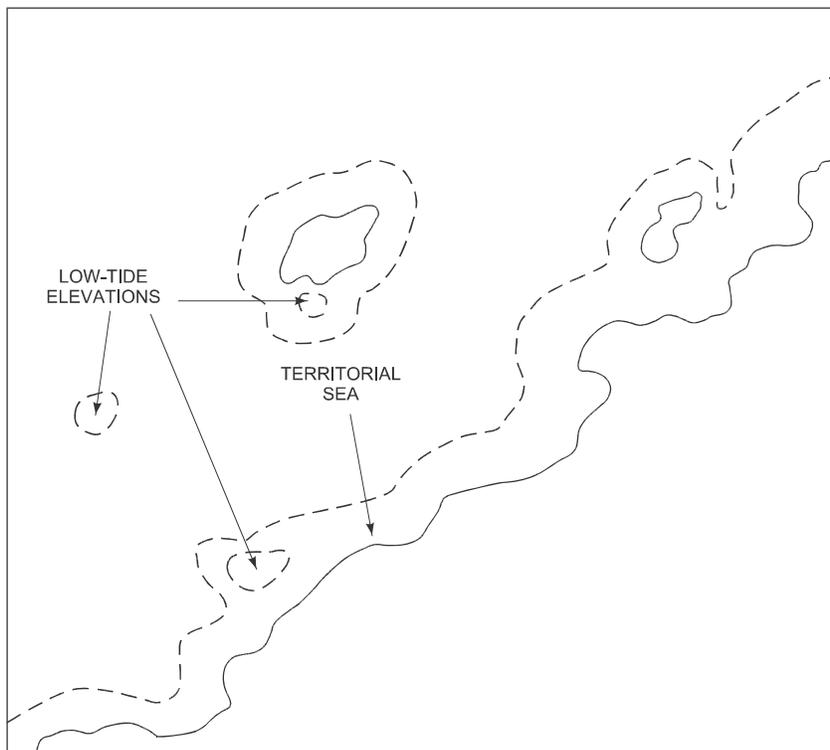


Figure 1-6. Territorial Sea of Islands and Low-Tide Elevations

1.5.3.1 Artificial Islands and Off-Shore Installations

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

1.5.3.2 Roadsteads

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

1.5.4 Archipelagic Waters and Sea Lanes

An archipelagic nation is a nation that is constituted wholly of one or more groups of islands. Such nations may draw straight archipelagic baselines joining the outermost points of their outermost islands, provided that the ratio of water to land within the baselines is between 1:1 and 9:1. The waters enclosed within the archipelagic baselines are called *archipelagic waters*. (The archipelagic baselines are also the baselines from which the archipelagic nation measures seaward its territorial sea, contiguous zone, and exclusive economic zone.) The United States recognizes the right of an archipelagic nation to establish archipelagic baselines enclosing archipelagic waters provided the baselines are drawn in conformity with the 1982 LOS Convention. (See paragraph 2.5.4 regarding navigation and overflight of archipelagic waters.)

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

archipelagic sea lanes but retains the right to exercise archipelagic sea lanes passage through all normal routes used for international navigation and overflight through other parts of the archipelago.

1.6 INTERNATIONAL WATERS

For operational purposes, international waters include all ocean areas *not* subject to the territorial sovereignty of any nation. 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, exclusive economic zones, 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 nation may exercise the control necessary to prevent or punish infringement of its customs, fiscal, immigration, and sanitary laws and regulations that occur within its territory or territorial sea (but not for purported security purposes; see paragraph 1.6.4.). The United States claims a 24-nautical-mile contiguous zone.

1.6.2 Exclusive Economic Zones

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

1.6.3 High Seas

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

1.6.4 Coastal Security Zones

Some coastal nations have claimed the right to establish military security zones, beyond the territorial sea, of varying breadth in which they purport to regulate the activities of warships and military aircraft of other nations by such restrictions as prior notification or authorization for entry, limits on the number of foreign ships or aircraft present at any given time, prohibitions on various operational activities, or complete exclusion. International law does not recognize the right of coastal nations to establish zones during peacetime that would restrict the exercise of nonresource-related high seas freedoms beyond the territorial sea. Accordingly, the United States does not recognize the validity of any claimed security or military zone seaward of the territorial sea that purports to restrict or regulate the high seas freedoms of navigation and overflight. (See paragraph 2.5.2.3 for a discussion of temporary suspension of innocent passage in territorial seas. See also paragraph 4.4 for a further discussion of declared security and defense zones in time of peace and paragraph 7.9 for a discussion of exclusion zones and war zones during armed conflict.)

1.7 CONTINENTAL SHELVES

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

1.8 SAFETY ZONES

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

1.9 AIRSPACE

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

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 nations 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 Warships, Naval Craft, and Military Aircraft

2.1 SOVEREIGN IMMUNITY

2.1.1 Sovereign Immunity Defined

As a matter of customary 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. This means that such vessels are immune from arrest or search, whether in national or international waters. Such vessels are also immune from foreign taxation, exempt from any foreign state regulation requiring flying the flag of such foreign state either in its ports or while passing through its territorial sea, and are entitled to exclusive control over persons onboard such vessels with respect to acts performed on board. The privilege of sovereign immunity includes protecting the identity of personnel, stores, weapons, or other property on board the vessel. The United States asserts the privilege of sovereign immunity for all United States ship (USS) and United States Coast Guard cutter (USCGC) vessels described below.

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

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

2.2 WARSHIPS

2.2.1 Warship Defined

International law defines a warship as a ship belonging to the armed forces of a nation bearing the external markings distinguishing the character and nationality of such ships, under the command of an officer duly commissioned by the government of that nation and whose name appears in the appropriate service list of officers, and manned by a crew that is under regular armed forces discipline (the mere presence of a number of civilians onboard a warship does not alter the status of the vessel). In the U.S. Navy, those ships designated “USS” are “warships” as defined by international law. U.S. Coast Guard vessels designated “USCGC” under the command of a commissioned officer are also “warships” under international law.

2.2.2 Warship International Status

As a matter of customary international law, warships enjoy sovereign immunity from interference by the authorities of nations other than the flag nation. Police and port authorities may board a warship only with the permission of the commanding officer. A warship cannot be required to consent to an onboard search or inspection, nor may it be required to fly the flag of the host nation. Although warships are required to comply with coastal nation traffic control, sewage, health, and quarantine restrictions instituted in conformance with the

1982 LOS Convention, a failure of compliance is subject only to diplomatic complaint or to coastal nation orders to leave its territorial sea immediately. Moreover, warships are immune from arrest and seizure, whether in national or international waters, and are exempt from foreign taxes and regulation and exercise exclusive control over all passengers and crew with regard to acts performed on board. U.S. Navy policy requires warships to assert the rights of sovereign immunity.

2.2.3 Crew Lists

It is US policy that providing a list of crew members (to include military and nonmilitary personnel) or any other passengers on board a USS or USCGC vessel as a condition of entry into a port or to satisfy local immigration officials upon arrival is prohibited. For more information concerning US policy in this regard see CNO WASHINGTON DC 101814Z Nov 05 (NAVADMIN 288/05).

2.2.4 Nuclear-Powered Warships

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

2.3 OTHER NAVAL CRAFT

2.3.1 Auxiliary Vessels

Auxiliary vessels are vessels, other than warships, that are owned by or under the exclusive control of the armed forces. Because they are State owned or operated and used for the time being only on government noncommercial service, auxiliary vessels enjoy sovereign immunity. This means that, like warships, they are immune from arrest and search, whether in national or international waters. 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.

U.S. Navy, U.S. Coast Guard and U.S. Army vessels that, except for the lack of a commissioned officer as commanding officer would be warships, are also auxiliary vessels.

2.3.2 Military Sealift Command (MSC) Vessel Status

The Military Sealift Command (MSC) Force includes: (1) United States Naval Ships (USNS) (i.e., U.S. owned vessels or those under bareboat charter, and assigned to MSC); (2) the National Defense Reserve Fleet (NDRF) and the Ready Reserve Force (RRF) (when activated and assigned to MSC); (3) privately owned vessels under time charter assigned to the Afloat Prepositioned Force (APF); and (4) those vessels chartered by MSC for a period of time or for a specific voyage or voyages. All USNS, APF, NDRF and RRF vessels are entitled to full rights of sovereign immunity. As a matter of policy, however, the U.S. claims only freedom from arrest and taxation for those MSC Force time and voyage charters not included in the APF. The United States, also as a matter of policy, does not currently claim sovereign immunity for MSC foreign flagged voyage or MSC foreign flagged time-chartered vessels. For more information concerning MSC Sovereign Immunity Policy, to include information concerning the provision of crew lists, see CNO WASHINGTON DC 101814Z Nov 05 (NAVADMIN 288/05).

2.3.3 Small Craft Status

US Navy and US Coast Guard motor whale boats and other small boats deployed from larger vessels are sovereign immune craft whose status is not dependent upon the status of the launching platform.

2.3.4 Unmanned Surface Vehicles Defined

Unmanned surface vehicles (USVs) are water craft that are either autonomous or remotely navigated and may be launched from surface, subsurface, or aviation platforms. The anticipated stealth, mobility, flexibility of employment, and network capabilities of USVs are expected to make them extremely valuable as force multipliers, particularly in the littoral environment. Potential missions envisioned for USVs include laying

undersea sensor grids, antisubmarine warfare (ASW) prosecution, barrier operations, sustainment of carrier operating areas, mine countermeasures (MCM), intelligence, surveillance, and reconnaissance (ISR), bottom mapping and survey, and special operations support.

2.3.5 Unmanned Underwater Vehicles Defined

Unmanned underwater vehicles (UUVs) are underwater craft that are either autonomous or remotely navigated and may be launched from surface, subsurface, or aviation platforms. Towed systems, hard-tethered devices, systems not capable of fully submerging such as USV, semi-submersible vehicles, or bottom crawlers are not considered UUVs. The sea services may employ UUVs for a wide variety of missions, including, but not limited to: ISR, MCM, ASW, Surveillance, Inspection/Identification, oceanography, communication/navigation network nodes, payload delivery, information operations (IO), time critical strike, barrier patrol (homeland defense, antiterrorism/force protection), and barrier patrol (sea base support).

2.3.6 Unmanned Service Vehicles/Unmanned Underwater Vehicles Status

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

2.4 MILITARY AIRCRAFT

2.4.1 Military Aircraft Defined

Military aircraft include all aircraft operated by commissioned units of the armed forces of a nation bearing the military markings of that nation, commanded by a member of the armed forces, and manned by a crew subject to regular armed forces discipline, as well as unmanned aerial vehicles (see paragraph 2.4.4).

2.4.2 Military Aircraft International Status

Military aircraft are “State aircraft” within the meaning of the Convention on International Civil Aviation of 1944 (the “Chicago Convention”), and, like warships, enjoy sovereign immunity from foreign search and inspection. Subject to the right of transit passage, archipelagic sea lanes passage, and entry in distress (see paragraph 2.5.1), State aircraft may not enter national airspace (see paragraph 1.9) or land in the sovereign territory of another nation 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 nation immediately.

2.4.3 Auxiliary Aircraft

Auxiliary aircraft are State aircraft, other than military aircraft, that are owned by or under the exclusive control of the armed forces. Civilian owned and operated aircraft, the full capacity of which has been contracted by the DOD and used in the military service of the United States, qualify as “auxiliary aircraft” if they are designated as “State aircraft” by the United States. In those circumstances they too enjoy sovereign immunity from foreign search and inspection. As a matter of policy, however, the United States normally does not designate Air Mobility Command-charter aircraft as State aircraft.

2.4.4 Unmanned Aerial Vehicles Defined/Status

Unmanned aerial vehicles (UAVs) are pilotless aircraft that are either autonomous or remotely piloted and may be launched from surface or aviation platforms or land bases. Per DOD Directive 4540.1, use of Airspace by US Military Aircraft and Firing Over the High Seas, manned and unmanned aircraft and remotely piloted vehicles are to be considered “military aircraft.” UAVs have been integrated into all levels of military operations and offer an unprecedented reconnaissance and intelligence capability.

All UAVs operated by the DOD shall be considered “military aircraft” and retain the overflight rights under customary international law as reflected in the LOS Convention. Since DOD-operated UAVs 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,” “auxiliary aircraft,” “civil aircraft” and “civilian airliners.”

2.5 NAVIGATION IN AND OVERFLIGHT OF NATIONAL WATERS

2.5.1 Internal Waters

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

Exceptions to the rule of nonentry into internal waters without coastal nation permission, whether specific or implied, arise when rendered necessary by *force majeure* or by distress, or when straight baselines established in accordance with customary international law as reflected in the 1982 LOS Convention have the effect of enclosing, as internal waters, areas of the sea previously regarded as territorial seas or high seas. In the latter event, international law provides that the right of innocent passage (see paragraph 2.5.2.1) or that of transit passage in an international strait (see paragraph 2.5.3) may be exercised by all nations in those waters.

2.5.2 Territorial Seas

2.5.2.1 Innocent Passage

International law provides that ships (but not aircraft) of all nations 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. Passage is innocent so long as it is not prejudicial to the peace, good order, or security of the coastal nation. Activities considered to be prejudicial to the peace, good order, or security of the coastal nation, and therefore inconsistent with innocent passage, are:

1. Any threat or use of force against the sovereignty, territorial integrity, or political independence of the coastal nation, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations
2. Any exercise or practice with weapons of any kind
3. Any act aimed at collecting information to the prejudice of the defense or security of the coastal nation
4. Any act of propaganda aimed at affecting the defense or security of the coastal nation
5. The launching, landing, or taking on board of any aircraft
6. The launching, landing, or taking on board of any military device
7. The loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws, and regulations of the coastal nation
8. Any act of willful and serious pollution contrary to the 1982 LOS Convention

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

While the 1982 LOS Convention does not prohibit noninnocent passage, such as overflight of or submerged transit in the territorial sea, the coastal state may take affirmative actions in and over its territorial sea to prevent passage that is not innocent, including, where necessary, the use of force. If a foreign ship or aircraft enters the territorial sea or the airspace above it and engages in noninnocent activities, the appropriate remedy, consistent with customary international law, which includes the right of self-defense, is first to inform the ship or aircraft of the reasons the coastal nation questions the innocence of the passage, and to provide the vessel a reasonable opportunity to clarify its intentions or to correct its conduct in a reasonably short period of time. (See paragraph 2.5.2.4 as to warships.)

2.5.2.2 Permitted Restrictions

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

2.5.2.3 Temporary Suspension of Innocent Passage

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

2.5.2.4 Warships and Innocent Passage

All warships enjoy the right of innocent passage on an unimpeded and unannounced basis. If a warship does not comply with coastal nation regulations that conform to established principles of international law and disregards a request for compliance that is made to it, the coastal nation may require the warship immediately to leave the territorial sea in which case the warship shall do so immediately.

2.5.2.5 USV/UUV and Navigational Rights

Customary international law as reflected in the 1982 LOS Convention gives vessels of all nations the right to engage in innocent passage as well as in transit passage and archipelagic sea lanes passage. The size, purpose, or type of cargo is irrelevant. The same rules apply to USV and UUV transit and navigation. USVs and UUVs retain independent navigation rights and may be deployed by larger vessels as long as their employment complies with the navigational regimes of innocent passage, transit passage, archipelagic sea lanes passage as applicable.

2.5.2.6 Assistance Entry

All ship and aircraft commanders have an obligation to assist those in danger of being lost at sea. See paragraph 3.2.1. This long-recognized duty of mariners permits assistance entry into the territorial sea by ships or, under certain circumstances, aircraft without permission of the coastal nation to engage in *bona fide* efforts to render emergency assistance to those in danger or distress at sea. This right applies only when the location of the danger or distress is reasonably well known. It does not extend to entering the territorial sea or superjacent airspace to conduct a search, which requires the consent of the coastal nation.

2.5.3 International Straits

2.5.3.1 International Straits Between One Part of the High Seas/EEZ and Another Part of the High Seas/EEZ

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

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

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

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

IMO-approved traffic separation scheme, such vessels must comply with applicable provisions of the 1972 International Regulations for Preventing Collisions at Sea (72 COLREGS).

2.5.3.2 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 exclusive economic zone corridor suitable for such navigation, enjoy the high seas freedoms of navigation and overflight while operating in and over such a corridor. Accordingly, so long as they remain beyond the territorial sea, all ships and aircraft of all nations 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.

2.5.3.3 International Straits Between a Part of the High Seas/EEZ and the Territorial Seas of a Coastal State

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

2.5.4 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. Archipelagic sea lanes passage is defined under international law as the exercise of the freedom of navigation and overflight for the sole purpose of continuous, expeditious and unobstructed transit through archipelagic waters, in the normal modes of operations, by the ships and aircraft involved. This means that submarines may transit while submerged and that surface warships may carry out those activities normally undertaken during passage through such waters, including activities necessary to their security, such as formation steaming and the launching and recovery of aircraft as well as operating devices such as radar, sonar, and depth-sounding devices. The right of archipelagic sea lanes passage is substantially identical to the right of transit passage through international straits (see paragraph 2.5.3.1). When archipelagic sea lanes are properly designated by the archipelagic nation, the following additional rules apply:

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

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

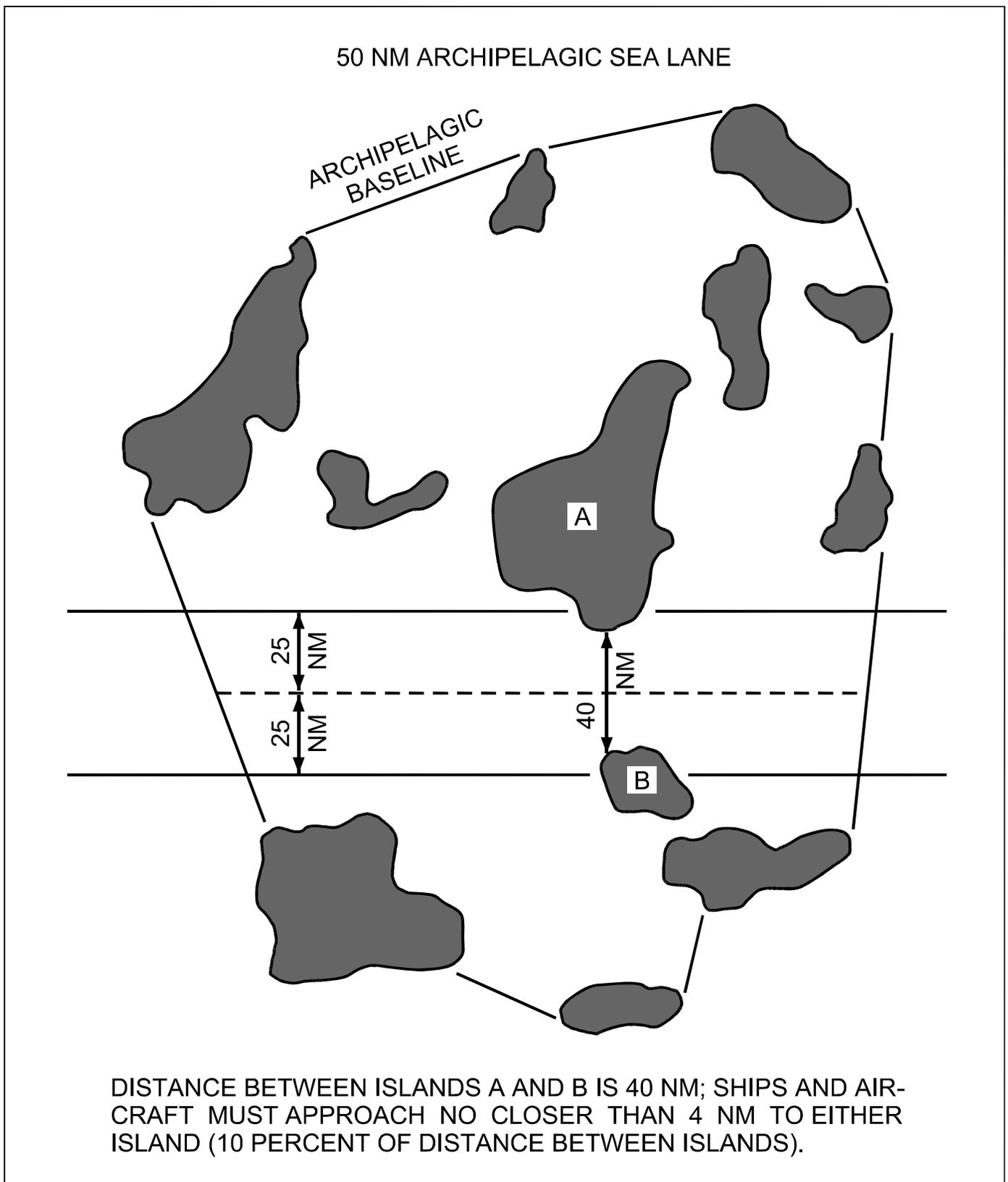


Figure 2-1. A Designated Archipelagic Sea Lane

2.5.4.2 Innocent Passage

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 (see paragraph 2.5.2.1). Submarines must remain on the surface and fly their national flag. Any threat or use of force directed against the sovereignty, territorial integrity, or political independence of the archipelagic nation is prohibited. Launching and recovery of aircraft are not allowed, nor may weapons exercises be conducted. The archipelagic nation may promulgate and enforce reasonable restrictions on the right of innocent passage through its archipelagic waters for reasons of navigational safety and for customs, fiscal, immigration, fishing, pollution, and sanitary purposes. Innocent passage may be suspended temporarily by the archipelagic nation in specified areas of its archipelagic waters when essential for the protection of its security, but it must first promulgate notice of its intentions to do so and must apply the suspension in a nondiscriminating manner. There is no right of overflight through airspace over archipelagic waters outside of archipelagic sea lanes.

2.6 NAVIGATION IN AND OVERFLIGHT OF INTERNATIONAL WATERS

2.6.1 Contiguous Zones

The contiguous zone is comprised of international waters in and over which the ships and aircraft, including warships and military aircraft, of all nations enjoy the high seas freedoms of navigation and overflight as described in paragraph 2.6.3. Although the coastal nation may exercise in those waters the control necessary to prevent and punish infringement of its customs, fiscal, immigration, and sanitary laws that may occur within its territory (including its territorial sea), it cannot otherwise interfere with international navigation and overflight in and above the contiguous zone.

2.6.2 Exclusive Economic Zones

The coastal nation's jurisdiction and control over the exclusive economic zone are limited to matters concerning the exploration, exploitation, management, and conservation of the resources of those international waters. The coastal nation may also exercise in the zone jurisdiction over the establishment and use of artificial islands, installations, and structures having economic purposes; over marine scientific research (with reasonable limitations); and over some aspects of marine environmental protection. Accordingly, the coastal nation cannot unduly restrict or impede the exercise of the freedoms of navigation in and overflight of the exclusive economic zone. 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 (see paragraph 2.6.3), 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 nations may regulate marine scientific research conducted in marine areas under their jurisdiction. This includes the EEZ and the continental shelf. Marine scientific research includes activities undertaken in the ocean and coastal waters to expand general scientific knowledge of the marine environment for peaceful purposes, and includes: physical and chemical oceanography, marine biology, fisheries research, scientific ocean drilling and coring, geological/geophysical scientific surveying, as well as other activities with a scientific purpose. The results of marine scientific research are generally made publicly available. It is the policy of the United States to encourage freedom of marine scientific research. Accordingly, the United States does not require that other nations obtain its consent prior to conducting marine scientific research in the U.S. EEZ.

2.6.2.2 Hydrographic Surveys and Military Surveys

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

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

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

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

2.6.3 High Seas Freedoms and Warning Areas

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

Any nation may declare a temporary warning area in international waters and airspace to advise other nations of the conduct of activities that, although lawful, are hazardous to navigation and/or overflight. The United States and other nations 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 (NOTMAR), notice to airmen (NOTAM), Hydro Atlantic/Hydro Pacific (HYDROLANT/HYDROPAC) messages, and the Global Maritime Distress and Safety System.

Ships and aircraft of other nations 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 nation may operate in a warning area within international waters and airspace declared by another nation, collect intelligence and observe the activities involved, subject to the requirement of due regard for the rights of the declaring nation to use international waters and airspace for such lawful purposes. The declaring nation may take reasonable measures including the use of proportionate force to protect the activities against interference. (See paragraph 4.3.7 for a discussion of the establishment of warning zones during periods of heightened tensions not rising to the level of international armed conflict.)

2.6.4 Declared Security and Defense Zones

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

The Charter of the United Nations and general principles of international law recognize that a nation 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 nation 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. International law does not determine the geographic limits of such areas or the degree of control that a coastal nation may lawfully exercise over them, beyond laying down the general requirement of reasonableness in relation to the needs of national security and defense. (See paragraphs 7.8 and 7.9 for further discussions of the establishment and limitations of such zones in the course of an international armed conflict.)

2.6.5 Polar Regions

2.6.5.1 Arctic/Antarctica Regions

The United States considers that the waters, ice pack, and airspace of the Arctic region beyond the lawfully claimed territorial seas of littoral nations have international status and are open to navigation by the ships and aircraft of all nations. Although several nations have, at times, attempted to claim sovereignty over the Arctic on the basis of discovery, historic use, contiguity (proximity), or the so-called “sector” theory, those claims are not recognized in international law. Accordingly, all ships and aircraft enjoy the freedoms of high seas navigation and overflight on, over, and under the waters and ice pack of the Arctic region beyond the lawfully claimed territorial seas of littoral states.

A number of nations have asserted conflicting and often overlapping claims to portions of Antarctica. These claims are premised variously on discovery, contiguity, occupation and, in some cases, the “sector” theory. The United States does not recognize the validity of the claims of other nations to any portion of the Antarctic area.

2.6.5.2 The Antarctic Treaty of 1959

The United States is a party to the multilateral treaty of 1959 governing Antarctica. Designed to encourage the scientific exploration of the continent and to foster research and experiments in Antarctica without regard to conflicting assertions of territorial sovereignty, the 1959 accord 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 treaty also provides that Antarctica “shall be used for peaceful purposes only,” and that “any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons” shall be prohibited. All stations and installations, and all ships and aircraft at points of discharging or embarking cargo or personnel in Antarctica, are subject to inspection by designated foreign observers. Therefore, classified activities are not conducted by the United States in Antarctica, and all classified material is removed from U.S. ships and aircraft prior to visits to the continent. In addition, the treaty prohibits nuclear explosions and disposal of nuclear waste anywhere south of 60° South Latitude. The treaty does not, however, affect in any way the high seas freedoms of navigation and overflight in the Antarctic region. The United States recognizes no territorial, territorial sea or territorial airspace claims in Antarctica.

On 14 January 1998, the 1991 Protocol on Environmental Protection to the Antarctic Treaty, to which the United States is a party, entered into force. The protocol designates Antarctica as a natural reserve, devoted to peace and science, and sets forth basic principles and detailed mandatory rules applicable to human activities in Antarctica, including obligations to accord priority to scientific research.

2.6.6 Nuclear-Free Zones

The 1968 Nuclear Weapons Non-Proliferation Treaty, to which the United States is a party, acknowledges the right of groups of nations to conclude regional treaties establishing nuclear-free zones. Such treaties or their provisions are binding only on parties to them or to protocols incorporating those provisions. To the extent that the rights and freedoms of other nations, 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 nation has complete and exclusive sovereignty over its national airspace, that is, the airspace above its territory, its internal waters, its territorial sea, and, in the case of an archipelagic nation, its archipelagic waters. *There is no right of innocent passage of aircraft through the airspace over the territorial sea or archipelagic waters analogous to the right of innocent passage enjoyed by ships of all nations.* Accordingly, unless party to an international agreement to the contrary, all nations have complete discretion in regulating or prohibiting flights within their national airspace (as opposed to a flight information region (FIR)—see paragraph 2.7.2.2), with the sole exceptions of overflight of international straits pursuant to transit passage and archipelagic sea lanes pursuant to archipelagic sea lanes passage. Foreign aircraft wishing to enter national airspace must identify themselves, seek or confirm permission to land or to transit, and must obey all reasonable orders to land, turn back, or fly a prescribed course and/or altitude. Pursuant to the Convention on International Civil Aviation of 1944 (the Chicago Convention), civil aircraft in distress are entitled to special consideration and should be allowed entry and emergency landing rights. Customary international law recognizes that foreign State aircraft in distress, including military aircraft, are similarly entitled to enter national airspace and to make emergency landings without prior coastal nation permission. The crew of such aircraft are entitled to depart expeditiously and the aircraft must be returned. While on the ground under such circumstances, State aircraft continue to enjoy sovereign immunity (see paragraph 2.4.2). (Concerning the right of assistance entry, see paragraph 2.5.2.6. For jurisdiction over aerial intruders, see paragraph 4.3.2.)

2.7.1.1 International Straits Between One Part of the High Seas/EEZ and Another Part of the High Seas/EEZ

All aircraft, including military aircraft, 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 nation or nations 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, enjoy high seas freedoms while operating in the high seas corridor beyond the territorial sea. (See paragraph 2.7.2 for a discussion of permitted activities in international airspace.) 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, enjoy the right of unimpeded passage through the airspace above archipelagic sea lanes. The right of overflight of such sea lanes is essentially identical to that of transit passage through the airspace above international straits overlapped by territorial seas.

2.7.2 International Airspace

International airspace is the airspace over the contiguous zone, the exclusive economic zone, the high seas, and territories not subject to national sovereignty (e.g., Antarctica). All international airspace is open to the aircraft of all nations. Accordingly, aircraft, including military aircraft, are free to operate in international airspace without interference from coastal nation 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 nations and the safety of other aircraft and of vessels.

(Note, however, that the Antarctic Treaty prohibits military maneuvers and weapons testing in Antarctic airspace.) These same principles apply with respect to the overflight of high seas or EEZ corridors through that part of international straits *not* overlapped by territorial seas.

2.7.2.1 Convention on International Civil Aviation

The United States is a party to the 1944 Convention on International Civil Aviation (as are most nations). That multilateral treaty, commonly referred to as the “Chicago Convention,” applies to civil aircraft. It does *not* apply to military aircraft or U.S. government charter aircraft designated as “State aircraft” (see paragraph 2.4.2), other than to require that they operate with “due regard for the safety of navigation of civil aircraft.” The Chicago Convention established the International Civil Aviation Organization (ICAO) to develop international air navigation principles and techniques and to “promote safety of flight in international air navigation.”

Various operational situations do not lend themselves to ICAO flight procedures. These include military contingencies, classified missions, politically sensitive missions, or routine aircraft carrier operations. Operations not conducted under ICAO flight procedures are conducted under the “due regard” standard. (For additional information see DOD Directive 4540.1, Use of Airspace by US Military Aircraft and Firings Over the High Seas, and OPNAVINST 3770.4, Use of Airspace by US Military Aircraft and Firing Over the High Seas, and Commandant, United States Coast Guard Instruction COMDTINST M3710.1, Coast Guard Air Operations Manual.)

2.7.2.2 Flight Information Regions

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

Some nations, however, purport to require all military aircraft in international airspace within their FIRs to comply with FIR procedures, whether or not they utilize FIR services or intend to enter national airspace. The United States does not recognize the right of a coastal nation to apply its FIR procedures to foreign military aircraft in such circumstances. Accordingly, U.S. military aircraft not intending to enter national airspace should not identify themselves or otherwise comply with FIR procedures established by other nations, 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 nations from establishing air defense identification zones (ADIZ) in the international airspace adjacent to their territorial airspace. The legal basis for ADIZ regulations is the right of a nation to establish reasonable conditions of entry into its territory. Accordingly, an aircraft approaching national airspace can be required to identify itself while in international airspace as a condition of entry approval. ADIZ regulations promulgated by the United States apply to aircraft bound for U.S. territorial airspace and require the filing of flight plans and periodic position reports. The United States does not recognize the right of a coastal nation to apply its ADIZ procedures to foreign aircraft not intending to enter national airspace nor does the United States apply its ADIZ procedures to foreign aircraft not intending to enter U.S. airspace. Accordingly, U.S. military aircraft not intending to enter national airspace should not identify themselves or otherwise comply with ADIZ procedures established by other nations, 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 nation may find it necessary to take measures in self-defense that will affect overflight in international airspace.

2.7.3 Open Skies Treaty

Initially proposed by President Eisenhower in 1955 to foster mutual and cooperative aerial observation among NATO and Warsaw Pact nations, the 1992 Open Skies Treaty entered into force on 1 January 2002. The Treaty obligates each of its member nations to accept overflight of its entire national territory by other member nations using unarmed aircraft equipped with mutually agreed sensors. Overflight quotas are scaled to the physical size of the participating nations with the United States and Russia/Belarus (a multiple nation entity permitted for this purpose) each being obliged to accept up to 42 such flights annually.

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

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

2.8 EXERCISE AND ASSERTION OF NAVIGATION AND OVERFLIGHT RIGHTS AND FREEDOMS

As announced in the president'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 the [1982 LOS] 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.

When maritime nations 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 nations and as binding upon all users of the seas and superjacent airspace. Consequently, it is incumbent upon maritime nations to protest diplomatically all excessive claims of coastal nations and to exercise their navigation and overflight rights in the face of such claims. The president's Oceans Policy Statement makes clear that the United States has accepted this responsibility as a fundamental element of its national policy.

Since the early 1970s, the United States, through DOD Instruction C2005.1 Freedom of Navigation (FON) Program (U), has reaffirmed its long-standing policy of exercising and asserting its freedom of navigation and overflight rights on a worldwide basis. Under the FON Program, challenges of excessive maritime claims of other nations are undertaken both through diplomatic protests by the Department of State and by operational assertions by US Armed Forces. U.S. Freedom of Navigation Program assertions are designed to be politically neutral as well as nonprovocative and have encouraged nations to amend their claims and bring their practices into conformity with the Convention. Commanders and commanding officers should refer to combatant commander theater-specific guidance and appropriate operational orders (OPORDs) for specific guidance on the planning and execution of FON operations in a particular area of operations.

2.9 RULES FOR NAVIGATIONAL SAFETY FOR VESSELS AND AIRCRAFT

2.9.1 International Rules

Most rules for navigational safety governing surface and subsurface vessels, including warships, are contained in the International Regulations for Preventing Collisions at Sea, 1972, known informally as the or 72 COLREGS informally as the “International Rules of the Road.” These rules apply to all international waters (i.e., the high seas, exclusive economic zones, and contiguous zones) and, except where a coastal nation has established different rules, in that nation’s territorial sea, archipelagic waters, and inland waters as well. The 1972 COLREGS have been adopted as law by the United States. (See Title 33, US Code (USC), Sections 1601 to 1606 (33 USC 1601 and 1606).) US Navy Regulations, 1990 Article 1139, directs that all persons in the naval service responsible for the operation of naval ships and craft “shall diligently observe” the 72 COLREGS. In accordance with COMDTINST M5000.3, Coast Guard Regulations, Coast Guard personnel must comply with all Federal law and regulations.

2.9.2 National US Inland Rules

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

The United States has adopted special inland rules applicable to navigation in US waters landward of the demarcation lines established by US law for that purpose. (See COMDTINST M16672.2D, Navigation Rules, International — Inland; Title 33, Code of Federal Regulations, part 80; and 33, USC 2001 to 2073.) The 72 COLREGS apply seaward of the demarcation lines in US national waters, in the US contiguous zone and EEZ, and on the high seas.

2.9.3 Navigational Rules for Aircraft

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

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

2.10.1 United States-Union of Soviet Socialist Republic Agreement on the Prevention of Incidents On and Over the High Seas

In order better to assure the safety of navigation and flight of their respective warships and military aircraft during encounters at sea, the United States and the former Union of the Soviet Republics (USSR) in 1972 entered into the US-USSR agreement on the Prevention of Incidents On and Over the High Seas. This Navy-to-Navy agreement, popularly referred to as the “Incidents at Sea” or “INCSEA” agreement, has been highly successful in minimizing the potential for harassing actions and navigational one-upmanship between United States and former Soviet Union units operating in close proximity at sea. Although the agreement applies to warships and military aircraft operating on and over the “high seas,” it is understood to embrace such units operating in all international waters and international airspace, including that of the exclusive economic zone and the contiguous zone.

Principal provisions of the INCSEA agreement include:

1. Ships will observe strictly both the letter and the spirit of the 72 COLREGS.
2. Ships will remain well clear of one another to avoid risk of collision and, when engaged in surveillance activities, will exercise good seamanship so as not to embarrass or endanger ships under surveillance.
3. Ships will utilize special signals for signaling their operation and intentions.
4. Ships of one party will not simulate attacks by aiming guns, missile launchers, torpedo tubes, or other weapons at the ships and aircraft of the other party, and will not launch any object in the direction of passing ships nor illuminate their navigation bridges.
5. Ships conducting exercises with submerged submarines will show the appropriate signals to warn of submarines in the area.
6. Ships, when approaching ships of the other party, particularly those engaged in replenishment or flight operations, will take appropriate measures not to hinder maneuvers of such ships and will remain well clear.
7. Aircraft will use the greatest caution and prudence in approaching aircraft and ships of the other party, in particular ships engaged in launching and landing aircraft, and will not simulate attacks by the simulated use of weapons or perform aerobatics over ships of the other party nor drop objects near them.

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

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

OPNAVINST 5711.96 (series), US/USSR Incidents At Sea and Dangerous Military Activities Agreements, provides information on and issues procedures concerning the INCSEA Agreement including the Table of Supplementary Signals authorized for use during communications between US and Russian Federation units under the INCSEA agreement.

2.10.2 United States-Union of Soviet Socialist Republic 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 former Soviet Union in 1990 entered into the U.S.-U.S.S.R. Agreement on the Prevention of Dangerous Military Activities. The agreement, commonly referred to as the “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”; and
4. Interference with command and control networks in a manner hazardous to the other party.

The DMA agreement continues to apply to US and Russian Federation armed forces. OPNAVINST 5711.96B provides implementing guidance for the DMA agreement to Navy department units.

2.10.3 U.S.-China Military Maritime Consultative Agreement

Established on 19 January 1998 by an agreement between the US Secretary of Defense and the Minister of National Defence of the People's Republic of China (PRC), the Military Maritime Consultative Agreement (MMCA) provides a forum for conducting military exchanges 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.

2.11 MILITARY ACTIVITIES IN OUTER SPACE

2.11.1 Outer Space Defined

As noted in paragraph 1.9, each nation has complete and exclusive control over the use of its national airspace. Except when exercising transit passage or archipelagic sea lanes passage, overflight in national airspace by foreign aircraft is not authorized without the consent of the territorial sovereign. However, man-made satellites and other objects in earth orbit may overfly foreign territory freely. Although there is no legally defined boundary between the upper limit of national airspace and the lower limit of outer space, international law recognizes freedom of transit by man-made space objects at earth orbiting altitude and beyond. A generally acceptable definition is that outer space begins at the undefined upper limit of the earth's airspace and extends to infinity.

2.11.2 The Law of Outer Space

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

2.11.2.1 General Principles of the Law of Outer Space

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

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

1. Access to outer space is free and open to all nations.
2. Outer space is free from claims of sovereignty and not otherwise subject to national appropriation.
3. Outer space is to be used for peaceful purposes.

4. Each user of outer space must show due regard for the rights of others.
5. No nuclear or other weapons of mass destruction may be stationed in outer space.
6. Nuclear explosions in outer space are prohibited.
7. Exploration of outer space must avoid contamination of the environment of outer space and of the earth's biosphere.
8. Astronauts must render all possible assistance to other astronauts in distress.

2.11.2.2 Natural Celestial Bodies

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

2.11.3 International Agreements

1. Outer Space Activities. The key legal principles governing outer space activities are contained in four widely ratified multilateral agreements: the 1967 Outer Space Treaty; the 1968 Rescue and Return of Astronauts Agreement; the Liability Convention of 1972; and the Space Objects Registration Convention of 1975. A fifth, the 1979 Moon Treaty, has not been widely ratified. The United States is a party to all of these agreements except the Moon Treaty.
2. Related. Several other international agreements restrict specific types of activity in outer space. The U.S.-U.S.S.R. Anti-Ballistic Missile (ABM) Treaty of 1972, which is no longer in force, prohibited the development, testing, and deployment of space-based ABM systems or components. Also prohibited was any interference with the surveillance satellites both nations used to monitor ABM Treaty compliance. The ABM Treaty was continued in force between the United States and Russia, the United States and Belarus, the United States and Kazakhstan, and the United States and Ukraine. However, on 13 December 2001, the United States provided notice of its withdrawal from the Treaty effective 13 June 2002.
 - a. The 1963 Limited Test Ban Treaty (a multilateral treaty) includes an agreement not to test nuclear weapons or to carry out any other nuclear explosions in outer space.
 - b. The 1977 Environmental Modification Convention (also a multilateral treaty) prohibits military or other hostile use of environmental modification techniques in several environments, including outer space.
 - c. The 1992 Constitution and Convention of the International Telecommunication Union and the associated Radio Regulations govern the use of the radio frequency spectrum by satellites and the location of satellites in the geostationary-satellite orbit.

2.11.4 Rescue and Return of Astronauts

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

Astronauts of one nation engaged in outer space activities are to render all possible assistance to astronauts of other nations in the event of accident or distress. If a nation learns that spacecraft personnel are in distress or have made an emergency or unintended landing in its territory, the high seas, or other international area (e.g., Antarctica), it must notify the launching nation and the secretary-general of the United Nations, take immediate

steps to rescue the personnel if within its territory, and, if in a position to do so, extend search and rescue assistance if a high seas or other international area landing is involved. Rescued personnel are to be safely and promptly returned.

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

2.11.5 Return of Outer Space Objects

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

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CHAPTER 3

Protection of Persons and Property at Sea and Maritime Law Enforcement

3.1 INTRODUCTION

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

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

A nation 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 actions, or to otherwise protect persons and property at sea, a basic understanding of maritime law enforcement procedures is essential.

3.2 RESCUE, SAFE HARBOR, AND QUARANTINE

Mishap at sea is a common occurrence. The obligation of mariners to provide material aid in cases of distress encountered at sea has long been recognized in custom and tradition. A right to enter and remain in a safe harbor without prejudice, at least in peacetime, when required by the perils of the sea or *force majeure* is universally recognized. At the same time, a coastal nation may lawfully promulgate quarantine regulations and restrictions for the port or area in which a vessel is located.

3.2.1 Assistance to Persons, Ships, and Aircraft in Distress

Customary international law has long recognized the affirmative obligation of mariners to go to the assistance of those in danger of being lost at sea. Both the 1958 Geneva Convention on the High Seas and the 1982 LOS Convention codify this custom by providing that every nation shall require the master of a ship flying its flag, insofar as he can do so without serious danger to his ship, crew, or passengers, to render assistance to any person found at sea in danger of being lost and to proceed with all possible speed to the rescue of persons in distress if informed of their need of assistance, insofar as it can reasonably be expected of him. He is also to be required, after a collision, to render assistance to the other ship, its crew, and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry, and the nearest port at which it will call. (See paragraph 2.5.2.6 for a discussion of “Assistance Entry.”)

3.2.1.1 Duty of Masters

In addition, the United States is party to the 1974 London Convention on Safety of Life at Sea, which requires the master of every merchant ship and private vessel not only to speed to the assistance of persons in distress, but to broadcast warning messages with respect to dangerous conditions or hazards encountered at sea.

3.2.1.2 Duty of Naval Commanders

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

3.2.2 Safe Harbor/Innocent Passage

Under international law, no port may be closed to a foreign ship seeking shelter from storm or bad weather or otherwise compelled to enter it in distress, unless another equally safe port is open to the distressed vessel to which it may proceed without additional jeopardy or hazard. The only condition is that the distress must be real and not contrived and based on a well-founded apprehension of loss of or serious damage or injury to the vessel, cargo, or crew. In general, the distressed vessel may enter a port without being subject to local regulations concerning any incapacity, penalty, prohibition, duties, or taxes in force at that port.

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

3.2.3 Quarantine

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

3.3 ASYLUM AND TEMPORARY REFUGE

3.3.1 Asylum

International law recognizes the right of a nation to grant asylum to foreign nationals already present within or seeking admission to its territory. The United States defines “asylum” as:

Protection and sanctuary granted by the United States Government within its territorial jurisdiction or in international waters to a foreign national who applies for such protection because of persecution or fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

Whether to grant asylum is a decision reserved to higher authority.

3.3.1.1 Territories under the Exclusive Jurisdiction of the United States and International Waters

Any person requesting asylum in international waters or in territories and internal waters under the exclusive jurisdiction of the United States (including the U.S. territorial sea, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, territories under U.S. administration, and U.S. possessions), will be received on board any U.S. Navy or Marine Corps aircraft, vessel, activity or station. Persons seeking asylum are to be afforded every reasonable care and protection permitted by the circumstances. Under no circumstances will a person seeking asylum in U.S. territory or in international waters be surrendered by the Navy or Marine Corps to foreign jurisdiction or control, unless at the personal direction of the Secretary of the Navy or higher authority. With respect to the Coast Guard, individuals seeking asylum will not be received on board Coast Guard units except in extreme circumstances and in no case will they be received on board a Coast Guard aircraft. However, once such individuals are received on board a Coast Guard unit, they will not be surrendered to foreign jurisdiction without Commandant approval unless the commanding officer/officer-in-charge determines the risk to the unit or Coast Guard personnel has become unacceptable or the individual voluntarily departs the unit. (See US Navy Regulations 1990, Article 0939; SECNAVINST 5710.22A, Political Asylum and Temporary Refuge, and COMDTINST M16247.1, Coast Guard Maritime Law Enforcement Manual, (MLEM), Appendix L, for specific guidance.)

3.3.1.2 Territories under Foreign Jurisdiction

Commanders of U.S. warships, military aircraft, and military installations in territories under foreign jurisdiction (including foreign territorial seas, archipelagic waters, internal waters, ports, territories, and possessions) are not authorized to receive on board foreign nationals seeking asylum. Such persons should be referred to the American Embassy or nearest U.S. consulate in the country, foreign territory, or foreign possession involved, if any, for assistance in coordinating a request for asylum with the host government insofar as practicable. Because warships are extensions of the sovereignty of the flag nation and because of their immunity from the territorial sovereignty of the foreign nation in whose waters they may be located, they have often been looked to as places of asylum. The United States, however, considers that asylum is generally the prerogative of the government of the territory in which the warship is located.

However, if exceptional circumstances exist involving imminent danger to the life or safety of the person, temporary refuge may be granted. (See paragraph 3.3.2.)

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 nation where his life or freedom would be threatened on account of his race, religion, nationality, political opinion, or membership in a particular social group, unless he may reasonably be regarded as a danger to the security of the country of asylum or has been convicted of a serious crime and is a danger to the community of that country. This obligation applies only to persons who have entered territories under the exclusive jurisdiction of the United States. It does not apply to temporary refuge granted abroad.

3.3.2 Temporary Refuge/Termination or Surrender

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

SECNAVINST 5710.22 defines "temporary refuge" as:

Protection afforded for humanitarian reasons to a foreign national in a 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 pursuit by a mob.

It is the policy of the United States to grant temporary refuge in a foreign country to nationals of that country, or nationals of a third nation, solely for humanitarian reasons when extreme or exceptional circumstances put in imminent danger the life or safety of a person, such as pursuit by a mob. The officer in command of the ship, aircraft (but not Coast Guard aircraft), station, or activity must decide which measures can prudently be taken to provide temporary refuge. Temporary refuge shall not be granted on board a Coast Guard aircraft. When deciding which measures may be prudently taken to provide temporary refuge, the safety of U.S. personnel and security of the unit must be taken into consideration.

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

A request by foreign authorities for return of custody of a person under the protection of temporary refuge will be reported in accordance with SECNAVINST 5710.22 (series). The requesting foreign authorities will then be advised that the matter has been referred to higher authorities.

3.3.3 Inviting Requests for Asylum or Refuge

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

3.3.4 Protection of U.S. Citizens

The limitations on asylum and temporary refuge are not applicable to U.S. citizens. See paragraph 3.10 and the standing rules of engagement 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 nation other than the flag nation. However, under international law, a warship, military aircraft, or other duly authorized ship or aircraft may *approach* any vessel in international waters to verify its nationality. Unless the vessel encountered is itself a warship or government vessel of another nation, it may be stopped, boarded, and the ship's documents examined, *provided* there is reasonable ground for suspecting that it is:

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

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

3.5 REPRESSION OF PIRACY

International law has long recognized a general duty of all nations to cooperate in the repression of piracy. This traditional obligation is included in the 1958 Geneva Convention on the High Seas and the 1982 LOS Convention, both of which provide:

[A]ll States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.

3.5.1 U.S. Law

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

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

Congress has exercised this power by enacting 18 USC 1651, which provides that:

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

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

3.5.2 Piracy Defined

Piracy is an international crime 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 (including the high seas, exclusive economic zone, and the contiguous zone), in international airspace, and in other places beyond the territorial jurisdiction of any nation. The same acts committed in the internal waters, territorial sea, archipelagic waters, or national airspace of a nation do not constitute piracy in international law but are, instead, crimes within the jurisdiction and sovereignty of the littoral nation.

3.5.2.2 Private Ship or Aircraft

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

3.5.2.3 Mutiny or Passenger Hijacking

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

3.5.3 Use of Naval Forces to Repress Piracy

Only warships, military aircraft, or other ships or aircraft clearly marked and identifiable as being on governmental service and authorized to that effect, may seize a pirate ship or aircraft.

3.5.3.1 Seizure of Pirate Vessels and Aircraft

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

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

If a pirate vessel or aircraft fleeing from pursuit by a warship or military aircraft proceeds from international waters or airspace into the territorial sea, archipelagic waters, or superjacent airspace of another country, every effort should be made to obtain the consent of the nation having sovereignty over the territorial sea, archipelagic waters, or superjacent airspace to continue pursuit (see paragraphs 3.11.2.2. and 3.11.3.3). The inviolability of the territorial integrity of sovereign nations makes the decision of a warship or military aircraft to continue pursuit into these areas without such consent a serious matter. However, the international nature of the crime of piracy may allow continuation of pursuit if contact cannot be established in a timely manner with the coastal nation to obtain its consent. In such a case, pursuit must be broken off immediately upon request of the coastal nation, and, in any event, the right to seize the pirate vessel or aircraft and to try the pirates devolves on the nation to which the territorial seas, archipelagic waters, or airspace belong.

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 nation or nations, provided the pursuit is expeditious and direct and the transit passage or archipelagic sea lanes passage rights of others are not unreasonably constrained in the process.

3.6 PROHIBITION OF THE TRANSPORT OF SLAVES

International law strictly prohibits use of the seas for the purpose of transporting slaves. The 1982 LOS Convention requires every nation 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 standing rules of engagement and Coast Guard use of force policy, and request guidance from higher authority.

3.7 SUPPRESSION OF UNAUTHORIZED BROADCASTING

The 1982 LOS Convention provides that all nations 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 off-shore facility intended for receipt by the general public, contrary to international regulation. Commanders should request guidance from higher authority if confronted with this situation.

3.8 SUPPRESSION OF INTERNATIONAL NARCOTICS TRAFFIC

All nations are required to cooperate in the suppression of the illicit traffic in narcotic drugs and psychotropic substances in international waters. International law permits any nation that has reasonable grounds to suspect that a ship flying its flag is engaged in such traffic to request the cooperation of other nations in effecting its seizure. International law also permits a nation that has reasonable grounds for believing that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying the marks of registry of another nation is engaged in illegal drug trafficking to request confirmation of registry and, if confirmed, request authorization from the flag nation to take appropriate action with regard to that vessel. Coast Guard personnel,

embarked on Coast Guard cutters or U.S. Navy ships, regularly board, search and take law enforcement action aboard foreign-flagged vessels pursuant to such special arrangements or standing, bilateral agreements with the flag state. (See paragraph 3.11.3.2 regarding utilization of U.S. Navy assets in the support of U.S. counterdrug efforts.)

3.9 RECOVERY OF GOVERNMENT PROPERTY LOST AT SEA

The property of a sovereign nation lost at sea remains vested in that sovereign 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 of engagement and applicable operation order. See also paragraph 2.1.2.2 for a similar discussion regarding the status of sunken warships and military aircraft.

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

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

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

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

3.10.1.1 Foreign Internal Waters, Archipelagic Waters, and Territorial Seas

Unlawful acts of violence directed against U.S. flag vessels and aircraft and U.S. nationals within and over the internal waters, archipelagic waters, or territorial seas of a foreign nation present special considerations. The coastal nation is primarily responsible for the protection of all vessels, aircraft, and persons lawfully within its sovereign territory. However, when that nation 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 nation to direct its warships and military aircraft to use proportionate force in or over those waters to protect its flag vessels, its flag aircraft, and its nationals. Because the coastal nation may lawfully exercise jurisdiction and control over foreign flag vessels and aircraft and *foreign* nationals within its internal waters, archipelagic waters, territorial seas, and national airspace, special care must be taken by the warships and military aircraft of other nations not to interfere with the lawful exercise of jurisdiction by that nation in those waters and superjacent airspace. U.S. naval commanders should consult the standing rules of engagement for specific guidance as to the exercise of this authority.

3.10.1.2 Foreign Contiguous Zones and Exclusive Economic Zones and Continental Shelves

The primary responsibility of coastal nations for the protection of foreign shipping and aircraft off their shores ends at the seaward edge of the territorial sea. Beyond that point, each nation bears the primary responsibility for the protection of its own flag vessels and aircraft and its own citizens and their property. On the other hand, the coastal nation may properly exercise jurisdiction over foreign vessels, aircraft, and persons; in and over its contiguous zone to enforce its customs, fiscal, immigration, and sanitary laws; in its exclusive economic zone 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 nation is acting lawfully in the valid exercise of such jurisdiction or is in hot pursuit (see discussion in paragraph 3.11.2.2) of a foreign vessel or aircraft for violations that have occurred in or over those waters or in its sovereign territory, the flag nation should not interfere. U.S. commanders should consult the standing rules of engagement for specific guidance as to the exercise of this authority.

3.10.2 Protection of Foreign Flag Vessels and Aircraft and Persons

International law, embodied in the concept of collective self-defense, provides authority for the use of proportionate force necessary for the protection of foreign flag vessels and aircraft and foreign nationals and their property from *unlawful* violence, including terrorist or piratical attacks, at sea. In such instances, consent of the flag nation 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 nation, or within or over its contiguous zone or exclusive economic zone, the considerations of paragraphs 3.10.1.1 and 3.10.1.2, respectively, would also apply. U.S. commanders should consult applicable standing rules of engagement for specific guidance.

3.10.3 Noncombatant Evacuation Operations (NEO)

The Secretary of State is responsible for the safe and efficient evacuation of U.S. government personnel, their family members and private U.S. citizens from foreign nations when their lives are endangered by war, civil unrest, man-made or natural disaster. The Secretaries of State and Defense are assigned lead and support responsibilities, respectively, and, within their general geographic areas of responsibility, the combatant commanders are prepared to support the Department of State to conduct NEOs.

3.11 MARITIME LAW ENFORCEMENT

As noted in the introduction to this Chapter, 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 into the United States. 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 US laws and treaty obligations pertaining to fisheries, wildlife, customs, immigration, environmental protection, and marine safety are enforced at sea by agencies of the United States. Since these activities do not ordinarily involve DOD personnel, they are not addressed in this publication. However, naval commanders should consult Navy Warfare Publication (NWP) 4-11, Environmental Protection, for guidance on environmental requirements to which the Navy is subject. NWP 4-11 provides environmental doctrine for progressively demanding postures, from peacetime through war and it also integrates environmental planning into the operational planning process by requiring that all operation plans/OPORDERS contain an environmental protection annex (Annex L). Coast Guard commanders should likewise consult Commandant Publication P5090.1A, Commanding Officer's Environmental Guide, a desktop guide to federal environmental stewardship requirements for commanding officers and officers in charge of Coast Guard shore units, vessels, and aircraft.

3.11.1 Jurisdiction to Proscribe

Maritime law enforcement action is premised upon the assertion of jurisdiction over the vessel or aircraft in question. Jurisdiction, in turn, depends upon the nationality, the location, the status, and the activity of the vessel or aircraft over which maritime law enforcement action is contemplated.

International law generally recognizes five bases for the exercise of criminal jurisdiction: (a) territorial, (b) nationality, (c) passive personality, (d) protective, and (e) universal. It is important to note that international law governs the rights and obligations between nations. While individuals may benefit from the application of that body of law, its alleged violation cannot usually be raised by an individual defendant to defeat a criminal prosecution.

3.11.1.1 Territorial Principle

This principle recognizes the right of a nation to proscribe conduct within its territorial borders, including its internal waters, archipelagic waters, and territorial sea.

3.11.1.2 Objective Territorial Principle

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

3.11.1.3 Nationality Principle

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

3.11.1.4 Passive Personality Principle

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

3.11.1.5 Protective Principle

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

3.11.1.6 Universal Principle

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

3.11.2 Jurisdiction to Enforce

3.11.2.1 Over U.S. Vessels

U.S. law applies at all times aboard U.S. vessels as the law of the flag nation and is enforceable on U.S. vessels by the U.S. Coast Guard anywhere in the world. As a matter of comity and respect of foreign sovereignty, enforcement action is not undertaken in foreign territorial seas, archipelagic waters, or internal waters without the consent of the coastal nation.

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

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

3.11.2.2 Over Foreign Flag Vessels

The ability of a coastal nation to assert jurisdiction legally over nonsovereign immune foreign flag vessels depends largely on the maritime zone in which the foreign vessel is located and the activities in which it is engaged. The internationally recognized interests of coastal nations in each of these zones are outlined in Chapter 2.

Maritime law enforcement action may be taken against a flag vessel of one nation within the national waters of another nation when there are reasonable grounds for believing that the vessel is engaged in violation of the coastal nation's laws applicable in those waters, including the illicit traffic of drugs. Similarly, such law enforcement action may be taken against foreign flag vessels without authorization of the flag nation in the coastal nation's contiguous zone (for fiscal, immigration, sanitary, and customs violations), in the exclusive economic zone (for all natural resources violations), and over the continental shelf (for seabed resource violations). In the particular case of counter-drug law enforcement (of primary interest to the Department of Defense), coastal nation law enforcement can take place in its internal waters, archipelagic waters, territorial sea, or contiguous zone without the authorization of the flag nation. Otherwise, such a vessel is generally subject to the exclusive jurisdiction of the nation of the flag it flies. Important exceptions to that principle are detailed in the following paragraphs.

3.11.2.2.1 Hot Pursuit

Should a foreign ship fail to heed an order to stop and submit to a proper law enforcement action when the coastal nation has good reason to believe that the ship has violated the laws and regulations of that nation, hot pursuit may be initiated. The pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea, or the contiguous zone of the pursuing nation, and may only be continued outside the territorial sea or contiguous zone if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone. If the foreign ship is within a contiguous zone, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own nation or of a third nation. 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 right of hot pursuit applies also to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal nation applicable to the exclusive economic zone or the continental shelf, including such safety zones.

1. **Commencement of Hot Pursuit.** Hot pursuit is not deemed to have begun unless the pursuing ship 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 the territorial sea, within the contiguous zone or the exclusive economic zone, or above the continental shelf. Pursuit may only be commenced after 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.
2. **Hot Pursuit by Aircraft.** Where hot pursuit is effected by aircraft:
 - a. The preceding provisions apply; and
 - b. The aircraft must do more than merely sight the offender or suspected offender to justify an arrest outside the territorial sea. It must first order the suspected offender to stop. Should the suspected offender fail to comply, pursuit may be commenced alone or in conjunction with other aircraft or ships.
3. **Requirement for Continuous Pursuit.** Hot pursuit must be continuous, either visually or through electronic means. The ship or aircraft giving the order to stop must itself actively pursue the ship until another ship or aircraft of or authorized by the coastal nation, summoned by the ship or aircraft, arrives to take over the pursuit, unless the ship or aircraft is itself able to arrest the ship.

3.11.2.2.2 Constructive Presence

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

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

3.11.2.2.3 Right of Approach and Visit

See paragraph 3.4.

3.11.2.2.4 Special Arrangements and International Agreements

International law has long recognized the right of a nation to authorize the law enforcement officials of another nation to enforce the laws of one or both on board vessels flying its flag. The 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances specifically recognizes and encourages such arrangements and agreements to aid in the suppression of this illegal traffic. Special arrangements may be formalized in written agreements or consist of messages or voice transmissions via diplomatic channels between appropriate representatives of the requesting and requested nations. International agreements authorizing foreign officials to exercise law enforcement authority on board flag vessels take many forms. They may be bilateral or multilateral; authorize in advance the boarding of one or both nations' vessels; and may permit law enforcement action or be more limited. Typically, the flag nation will 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 nation may then authorize the enforcement of the requesting nation's criminal law (usually with respect to narcotics trafficking) or may authorize the law enforcement officials of the requesting nation to act as the flag nation's agent in detaining

the vessel for eventual action by the flag nation itself. The flag nation may put limitations on the grant of law enforcement authority and these restrictions must be strictly observed.

3.11.2.3 Over Stateless Vessels

Vessels that are not legitimately registered in any one nation are without nationality and are referred to as “stateless vessels.” They are not entitled to fly the flag of any nation and, because they are not entitled to the protection of any nation, they are subject to the jurisdiction of all nations. Accordingly, stateless vessels may be boarded upon being encountered in international waters by a warship or other government vessel and subjected to all appropriate law enforcement actions.

3.11.2.4 Over Vessels Assimilated to Statelessness

Vessels may be assimilated to a ship without nationality, that is, regarded as a stateless vessel, in some circumstances. The following is a partial list of factors that should be considered in determining whether a vessel is appropriately assimilated to stateless status:

1. No claim of nationality
2. Multiple claims of nationality (e.g., sailing under two or more flags)
3. Contradictory claims or inconsistent indicators of nationality (e.g, master’s claim differs from vessel’s papers; homeport does not match nationality of flag)
4. Changing flags during a voyage
5. Removable signboards showing different vessel names and/or homeports
6. Absence of anyone admitting to be the master; displaying no name, flag or other identifying characteristics
7. Refusal to claim nationality.

Determinations of statelessness or assimilation to statelessness usually require utilization of the established interagency coordination procedures (see paragraph 3.11.3.4).

3.11.2.5 Other Actions

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

3.11.2.5.1 Right of Approach

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

3.11.2.5.2 Consensual Boarding

A consensual boarding is conducted at the invitation of the master (or person in charge) of a vessel that is not otherwise subject to the jurisdiction of the boarding officer. The plenary authority of the master over all activities related to the operation of his vessel while in international waters is well established in international law and

includes the authority to allow anyone to come aboard his vessel as his guest, including foreign law enforcement officials. However, some nations 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. A consensual boarding is not, therefore, an exercise of maritime law enforcement jurisdiction *per se*. The scope and duration of a consensual boarding may be subject to conditions imposed by the master and may be terminated by the master at his discretion. Nevertheless, such boardings have utility in allowing rapid verification of the legitimacy of a vessel's voyage by obtaining or confirming vessel documents, cargo, and navigation records without undue delay to the boarded vessel.

In cases where the vessel's flag state is a party to a bilateral/multilateral agreement that includes a ship boarding provision and there exists reasonable grounds 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. See 3.11.2.2.4.

3.11.3 Limitations on the Exercise of Maritime Law Enforcement Jurisdiction

Even where international and domestic U.S. law would recognize certain conduct as a criminal violation of U.S. law, there are legal and policy restrictions on U.S. law enforcement actions that must be considered. 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 nation authorization to conduct law enforcement in that nation's national waters; and the necessity for interagency coordination. Similarly, a fourth restriction, the concept of *posse comitatus*, limits U.S. military activities within the United States.

3.11.3.1 Posse Comitatus

Except when expressly authorized by the Constitution or act of Congress, the use of U.S. Army or U.S. Air Force personnel or resources as a *posse comitatus*—a force to aid civilian law enforcement authorities in keeping the peace and arresting felons—or otherwise to execute domestic law, is prohibited by the Posse Comitatus Act, 18 USC 1385. Additionally, 10 USC 375 required that DOD prescribe regulations to ensure that all DOD Services, including the US Navy and US Marine Corps, do not directly participate in civilian law enforcement activities, except where authorized by law. (See DOD Directive 5525.5, DOD Cooperation with Civilian Law Enforcement Officials, and SECNAVINST 5820.7C.) Notably however, no such restrictions are applicable to the U.S. Coast Guard, even when operating as a part of the Department of the Navy. Further, the Justice Department has opined that the Posse Comitatus Act itself does not apply outside the territory of the United States. (Memorandum from the Office of Legal Counsel to National Security Council re: Extraterritorial Effect of the Posse Comitatus Act (Nov. 3, 1989).)

3.11.3.2 DOD Assistance

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

3.11.3.2.1 Use of DOD Personnel

Although Congress has enacted legislation in recent years expanding the permissible role of the Department of Defense in assisting law enforcement agencies, DOD personnel may not directly participate in a search, seizure, arrest or similar activity unless otherwise authorized by law. Permissible activities presently include training and advising federal, state and local law enforcement officials in the operation and maintenance of loaned equipment.

DOD personnel made available by appropriate authority may also maintain and operate equipment in support of civil law enforcement agencies for the following purposes:

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

3.11.3.2.2 Providing Information to Law Enforcement Agencies

The Department of Defense may provide federal, state or local law enforcement officials with information acquired during the normal course of military training or operations that may be relevant to a violation of any law within the jurisdiction of those officials. Present law provides that the needs of civilian law enforcement officials for information should, to the maximum extent practicable, be taken into account in planning and executing military training or operations. Intelligence information held by DOD and relevant to counterdrug or other civilian law enforcement matters may be provided to civilian law enforcement officials, to the extent consistent with national security.

3.11.3.2.3 Use of DOD Equipment and Facilities

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

3.11.3.3 Law Enforcement in Foreign National Waters

Law enforcement in foreign national waters may be undertaken only to the extent authorized by the coastal nation. Such authorization may be obtained on an ad hoc basis or be the subject of a written agreement. (See paragraph 3.5.3.2 for exceptions related to the pursuit of pirates.)

3.11.3.4 Interagency Coordination

Presidential Directive 27 in Procedures for Dealing with Non-Military Incidents, requires coordination within the executive branch of the government for nonmilitary incidents that could have an adverse impact on US foreign relations. This coordination includes consultation with the Department of State and other concerned agencies prior to taking actions that could potentially have such an impact. The Coast Guard has developed an internal notification mechanism that results in the provision or denial of a statement of no objection from the appropriate superior authority, which constitutes authorization to conduct the specific action requested. Interagency coordination initiated for law enforcement actions on naval vessels will be made through appropriate law enforcement agency channels by the embarked Coast Guard LEDET.

3.11.4 Counterdrug Operations

3.11.4.1 U.S. Law

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

1. U.S. vessels anywhere (see paragraph 3.11.2.1);
2. Vessels without nationality (see paragraph 3.11.2.3);
3. Vessels assimilated to a status without nationality (see paragraph 3.11.2.4);
4. Foreign vessels where the flag nation authorizes enforcement of U.S. law by the United States (see paragraph 3.11.2.2.4);
5. Foreign vessels located within the territorial sea or contiguous zone of the United States (see paragraph 1.5); or
6. Foreign vessels located in the territorial seas or archipelagic waters of another nation, where that nation authorizes enforcement of U.S. law by the United States (see paragraph 3.11.2.2.4).

3.11.4.2 DOD Mission in Counterdrug Operations

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

3.11.4.3 U.S. Coast Guard Responsibilities in Counterdrug Operations

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

Coast Guard–commissioned warrant and petty officers are also designated customs officers providing them additional law enforcement authority.

3.11.5 Use of Force in Maritime Law Enforcement

In the performance of maritime law enforcement missions, occasions will arise where resort to the use of force will be both appropriate and necessary. U.S. armed forces personnel engaged in maritime law enforcement actions under Coast Guard operational or tactical control (OPCON or TACON) both outside and within territorial limits of the United States will follow the Coast Guard Use of Force Policy for warning shots and disabling fire. DOD forces under Coast Guard OPCON or TACON inside the territorial limits of the United States retain the right of

self-defense in accordance with the CJCS Instruction (CJCSI) 3121B.01, Standing Rules of Engagement/Standing Rules for the Use of Force for US Forces, Enclosure L.

3.11.5.1 Standing Rules of Engagement and Standing Rules for the Use of Force for U.S. Forces Distinguished

The standing rules of engagement and standing rules for the use of force by U.S. forces delineate fundamental policies and procedures governing the actions to be taken by U.S. commanders during military operations, contingencies, and routine military department functions, including AT/FP. (See paragraphs 4.3.3.2, 4.3.3.3 and 4.3.3.4.) However, Coast Guard units performing law enforcement duties, as well as DOD units supporting such Coast Guard units, will be guided by the Coast Guard's Use of Force Policy (found in Chapter 4 of the MLEM). Neither the standing rules of engagement or the Coast Guard's Use of Force Policy limit a commander's inherent authority and obligation to use all necessary means available and to take all appropriate action in self-defense of the commander's unit and other U.S. forces in the vicinity.

3.11.5.2 Warning Shots

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, propeller area/outboard engine, or engine room for the sole purpose of stopping it after warning shots or oral warnings have gone unheeded. U.S. armed forces personnel employing warning shots and disabling fire in a maritime law enforcement action will comply with the U.S. Coast Guard Use of Force Policy.

3.11.6 Other Maritime Law Enforcement Assistance

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

3.12 HOMELAND SECURITY VS. HOMELAND DEFENSE

The Coast Guard is the lead federal agency for homeland security in the maritime environment. Homeland security is a concerted national effort to prevent terrorist acts within the US, reduce its vulnerability to terrorism, and minimize the damage and recover from attacks that do occur. DOD contributes to homeland security through its military missions overseas, homeland defense, and support to civil authorities. Homeland defense is the protection of US sovereignty, territory, domestic population, and critical defense infrastructure against external threats and aggression, or other threats as directed by the President. US Northern Command has the lead for homeland defense for the air, land, and sea approaches and encompasses the continental United States, Alaska, and the surrounding water out to approximately 500 nautical miles, the Gulf of Mexico, Puerto Rico, and the US Virgin Islands. The defense of Hawaii and US territories and possessions in the Pacific remain the responsibility of US Pacific Command. The Coast Guard acts in support of DOD theater commanders for homeland defense in the maritime environment.

3.13 PROLIFERATION SECURITY INITIATIVE

Proliferation Security/Initiative (PSI) is a global effort that aims to stop shipments of weapons of mass destruction (WMD), their delivery systems, and related materials worldwide. (See paragraph 4.3.5 for greater detail on PSI.)

3.14 UNITED NATIONS CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF MARITIME NAVIGATION (SUA)

The 1988 UN convention, adopted in response to the 1986 hijacking of the Italian-flag cruise ship, *Achille Lauro*, and the murder of an American tourist on board, filled a gap in international law by providing a legal regime governing acts of violence on board or against ships engaged in maritime navigation and fixed platforms on the continental shelf. In 2005, significant anti-terrorism and non-proliferation amendments were made to suppression of unlawful acts (SUA). These amendments are an essential element of PSI (see paragraph 3.13), as they include a comprehensive framework for boarding suspect vessels at sea. In addition, the amended SUA establishes additional offenses, including using a ship to commit terrorist acts, nonproliferation offenses, the transport of persons alleged to have committed an offense under 12 UN terrorism conventions (including SUA), attempts, accomplice liability, and organizing or directing others to commit offenses.

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CHAPTER 4

Protecting National Security Interests in the Maritime Environment during Peacetime

4.1 INTRODUCTION

This chapter examines the broad principles of international law that influence the conduct of nations as they endeavor to protect their interests in the maritime environment during peacetime. As noted in the preface, this publication provides general information. It is not directive and does not supersede guidance issued by combatant commanders, in particular any guidance they may issue that delineates the circumstances and limitations under which the forces under their command will initiate and/or continue engagement with other forces encountered.

Historically, international law governing the use of force by nations has been divided into rules applicable in peacetime and rules applicable in time of war. However, in the last half century, the concepts of “peace” and “war” have become blurred to the extent that it is not always possible to draw neat distinctions between the two. This chapter will focus specifically on safeguarding national interests in the maritime environment during those times when the nation state whose interest is at stake is not involved in armed conflict with the entity threatening its interest. The conduct of actual armed conflict involving US forces, irrespective of character, intensity, or duration, is addressed in Part II: The Law of Naval Warfare.

4.2 CHARTER OF THE UNITED NATIONS

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

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

Additionally, Article 2, paragraph 4, provides that:

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

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

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

Article 41 provides that:

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

And Article 42 provides that:

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

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

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

The following sections discuss some of the measures that nations, acting in conformity with the Charter of the United Nations, may take in protecting their national interests during peacetime.

4.3 NONMILITARY MEASURES

Wholly apart from military measures designed to influence the conduct of States, insurgents, or terrorist groups by force of arms, nations, to varying degrees, possess less compulsory means of exerting influence in order to secure their own national interests. Such measures include diplomatic pressure, judicial intervention, economic influence, and even certain military measures falling short of the actual use of force. Each of these measures is examined in more detail in the sections that follow.

4.3.1 Diplomatic

As contemplated by the Charter of the United Nations, 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 nation 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 nation may be curbed by appeals to world public opinion as in the General Assembly or, if their misconduct endangers the maintenance of international peace and security, by bringing the issue before the Security Council. Ordinarily, however, differences that arise between States are resolved or accommodated through the normal day-to-day, give-and-take of international diplomacy. The key point is that disputes between the United States and other States arising out of conflicting interests are normally addressed and resolved through diplomatic channels and do not involve resort to the threat or use of force.

4.3.2 Judicial

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

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

4.3.3 Economic

States often utilize economic measures to influence the actions of others. The granting or withholding of “most favored nation” status to another country is an often used measure of economic policy. Similarly, trade agreements, loans, concessionary credit arrangements and 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 the suspension of U.S. grain sales and the embargo on the transfer of U.S. technology to the offending nation, boycott of oil and other export products from the offending nation, suspension of “most favored nation” status, and the assertion of other economic sanctions.

4.4 MILITARY MEASURES

The goal of U.S. national security policy is to ensure the survival, safety, and vitality of the United States and to maintain a stable international environment consistent with U.S. national interests. U.S. national security interests guide global objectives of deterring, and if necessary, defeating 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.

In order to deter armed attack, U.S. military forces must be both capable and ready, and must be perceived to be so by potential aggressors. Equally important is the perception of other States and non-State actors that, should the need arise, the United States has the will to use its forces in individual or collective self-defense. The following are military measures nations may employ in the maritime environment during peacetime in order to safeguard their security interests.

4.4.1 Naval Presence

U.S. naval forces constitute a key and unique element of our national military capability. The mobility of forces operating at sea combined with the versatility of naval force composition—from units operating individually to multicarrier strike group formations—provide the President and Secretary of Defense with the flexibility to tailor U.S. military presence as circumstances may require.

Naval presence, whether as a showing of the flag during port visits or as forces deployed in response to contingencies or crises, can be tailored to exert the precise influence best suited to U.S. interests. Depending upon the magnitude and immediacy of the problem, naval forces may be positioned near areas of potential discord as a show of force or as a symbolic expression of support and concern. Unlike land-based forces, naval forces may be so employed without political entanglement and without the necessity of seeking littoral nation consent. So long as they remain in international waters and international airspace, U.S. warships and military aircraft enjoy the full spectrum of the high seas freedoms of navigation and overflight, including the right to conduct naval maneuvers, subject only to the requirement to observe international standards of safety, to recognize the rights of other ships and aircraft that may be encountered, and to issue NOTAMs and NOTMARs as the circumstances may require. Deployment of a carrier strike group into the vicinity of 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 shipping.

4.4.2 Interception of Intruding Aircraft

All nations have complete and exclusive sovereignty over their national airspace (see paragraphs 1.9 and 2.5.1). With the exception of overflight in transit passage of international straits and in archipelagic sea lanes passage (see paragraphs 2.5.3 and 2.5.4.1), distress (see paragraph 3.2.1.1), and assistance entry to assist those in danger of being lost at sea (see paragraph 2.5.2.6), authorization must be obtained for any intrusion by a foreign aircraft (military or civil) into national airspace (see paragraph 2.5). That authorization may be flight-specific, as in the case of diplomatic clearance for the visit of a military aircraft, or general, as in the case of commercial air navigation pursuant to the Chicago Convention.

A state's right to use force against an aircraft in flight during peacetime is based on the degree to which that aircraft poses a threat to the vital interests of the state using force and the availability and effectiveness of lesser measures. Military aircraft intruding into foreign airspace on a military mission may constitute a sufficient threat to justify the use of force in self-defense. This appears true both for tactical military aircraft capable of directly attacking the overflown state and for unarmed military aircraft capable of being used for intelligence-gathering purposes. State practice also suggests that an aircraft with military markings may be presumed to be on a military mission unless evidence is produced to the contrary by its state of registry. A state may not use weapons against an aircraft with civil markings except in the exercise of self-defense. 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.

Customary international law provides that a foreign civil aircraft entering national airspace without permission due to distress or navigational error may be required to comply with orders to turn back or to land. In this connection the Convention on International Civil Aviation of 7 December 1944 (Chicago Convention) has been amended to provide, in effect:

1. That all nations must refrain from the use of weapons against civil aircraft, and, in the case of the interception of intruding civil aircraft, that the lives of persons on board and the safety of the aircraft must not be endangered. (This provision does not, however, detract from the right of self-defense recognized under Article 51 of the Charter of the United Nations.)
2. That all nations have the right to require intruding aircraft to land at some designated airfield and to resort to appropriate means consistent with international law to require intruding aircraft to desist from activities in violation of the Convention.
3. That all intruding civil aircraft must comply with the orders given to them and that all States must enact national laws making such compliance by their civil aircraft mandatory.
4. That all nations shall prohibit the deliberate use of their civil aircraft for purposes (such as intelligence collection) inconsistent with the Convention.

The amendment was approved unanimously on 10 May 1984 and entered into force on 1 October 1998. The Convention, by its terms, does not apply to intruding military aircraft. The United States takes the position that customary international law establishes similar standards of reasonableness and proportionality with respect to a nation's response to military aircraft that stray into national airspace through navigational error or that are in distress.

4.4.3 The Right of Self-Defense

The Charter of the United Nations, as reflected in Article 51, recognizes that all nations are vested with an inherent right of individual and collective self-defense. US doctrine on self-defense, set forth in CJCSI 3121.01B, Standing Rules of Engagement/Standing Rules for the Use of Force for US Forces, provides that the use of force in self-defense against armed attack or the threat of imminent armed attack, rests upon two elements:

Necessity: The requirement that a use of force be in response to a hostile act or demonstration of hostile intent, and;

Proportionality: The requirement that the use of force be in all circumstances limited in intensity, duration, and scope to that which is reasonably required to counter the attack or threat of attack and to ensure the continued safety of U.S. forces.

4.4.3.1 Anticipatory Self-Defense

Included within the inherent right of self-defense is the right of a nation to protect itself from imminent attack. Imminent does not necessarily mean immediate or instantaneous. The determination of whether or not an attack is imminent will be based on an assessment of all facts and circumstances known at the time. International law recognizes that it would be contrary to the purposes of the Charter of the United Nations if a threatened nation were required to absorb an aggressor's initial and potentially crippling first strike before taking those military measures necessary to thwart an imminent attack. Anticipatory self-defense involves the use of armed force where attack is imminent and no reasonable choice of peaceful means is available.

4.4.3.2 The CJCS Standing Rules of Engagement (SROE)/Standing Rules for the Use of Force (SRUF)

CJCSI 3121.01B, Standing Rules of Engagement/Standing Rules for the Use of Force for US Forces, establishes fundamental policies and procedures governing the actions to be taken by U.S. commanders during military operations, contingencies, and routine military department functions including AT/FP. At the national level, rules of engagement are promulgated by the President and Secretary of Defense, through the Chairman of the Joint Chiefs of Staff, to the combatant commanders to guide them in the employment of their forces toward the achievement of broad national objectives. At the tactical level, rules of engagement are task-and mission-oriented. At all levels, rules of engagement are consistent with the law of armed conflict.

Because rules of engagement also reflect operational and national policy factors, they often restrict combat operations far more than do the requirements of international law. A full range of options is reserved to the President and Secretary of Defense to determine the response that will be made to hostile acts and demonstrations of hostile intent. The CJCSI 3121.01B, Standing Rules of Engagement/Standing Rules for the Use of Force for US Forces, provides implementation guidance on the inherent right and obligation of self-defense and the application of force for mission accomplishment. A principal tenet of U.S. SROE/SRUF is that commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Unit self-defense includes defense of other U.S. military forces in the vicinity. Individual self-defense is a subset of unit self-defense and can be limited by the unit commander.

4.4.3.3 Standing Rules of Engagement (SROE)

The SROE establish fundamental policies and procedures governing the actions to be taken by U.S. commanders and their forces during all military operations and contingencies and routine Military Department functions occurring outside U.S. territory (which includes the 50 states, the Commonwealths of Puerto Rico and Northern Marianas, U.S. possessions, protectorates, and territories) and outside U.S. territorial seas. Routine military department functions include antiterrorism/force protection duties. However, routine military department functions exclude all law enforcement and security duties on DOD installations, and off installation while conducting official DOD security functions, outside U.S. territory and territorial seas. The SROE also apply to air and maritime homeland defense missions conducted within U.S. territory and territorial seas, unless otherwise directed by the Secretary of Defense.

4.4.3.4 Standing Rules for the Use of Force (SRUF)

The SRUF establish fundamental policies and procedures governing the actions to be taken by U.S. commanders and their forces during all DOD civil support (e.g., military assistance to civil authorities) and routine Military Department functions (including AT/FP duties) occurring within U.S. territory or U.S. territorial waters. The

SRUF also apply to land homeland defense missions occurring within U.S. territory and to DOD forces, civilians, and contractors performing law enforcement and security duties at all DOD installations (and off-installation while conducting official DOD security functions), within or outside U.S. territory unless otherwise directed by the Secretary of Defense.

4.4.3.5 Self-Defense Pursuant to the SROE

Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Hostile intent is the threat of the imminent use of force against the United States, U.S. forces, or other designated persons or property. The determination of whether or not an attack 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. Unless otherwise directed by a unit commander 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 should be considered a subset of unit self-defense. As such, unit commanders may limit individual self-defense by members of their unit. Both unit and individual self-defense includes defense of other U.S. military forces in the vicinity.

4.4.3.6 Self-Defense Pursuant to the SRUF

Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Hostile intent is the imminent threat of the use of force against the United States, U.S. forces, or other designated persons or property. Unless otherwise directed by a unit commander 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 should be considered a subset of unit self-defense. As such, unit commanders may limit individual self defense by members of their unit. Both unit and individual self-defense includes defense of other U.S. military forces in the vicinity.

The determination of whether the danger of death or serious bodily harm is imminent will be based on an assessment of all facts and circumstances known to DOD forces at the time and may be made at any level. Individuals with the capability to inflict death or serious bodily harm and who demonstrate the intent to do so may be considered an imminent threat. Per the SRUF, normally force is to be used only as a last resort, and the force must be the minimum necessary. If force is required, nondeadly force is authorized and may be used 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 force in self-defense.

4.4.3.7 Warning Shots Pursuant to SRUF

When operating under SRUF, warning shots are not authorized within U.S. territory (including U.S. territorial waters), except when in the appropriate exercise of force protection of U.S. Navy and naval service vessels within the limits set forth in CJCSI 3121.01B, Standing Rules of Engagement/Standing Rules for the use of Force for US Forces, Enclosure M and Navy Tactics, Techniques, and Procedures (NTTP) 3-07.2.1, Antiterrorism/Force Protection, Appendix E.

4.4.4 Maritime Interception Operations (MIO)

Nations may desire to intercept vessels at sea in order to protect their national security interests. The act of “intercepting” ships at sea may range from querying the master of the vessel to stopping, boarding, inspecting, searching, and potentially even seizing the cargo or the vessel. As a general principle, vessels in international waters are subject to the exclusive jurisdiction of their flag state. Moreover, 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. Finally, inside a coastal nation’s national waters, the coastal nation exercises sovereignty, subject to the right of innocent passage and other international law. Given these basic tenets of international law, commanders should be aware of the legal bases underlying the authorization of MIO when ordered by competent authority to conduct such operations.

4.4.4.1 Legal Bases for Conducting MIO

There are several legal bases available to conduct MIO, 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 SUA Convention (see paragraph 3.14 for a discussion of SUA and the 2005 Protocols).

4.4.4.1.1 MIO Pursuant to a United Nations Security Council Resolution

One legal justification for maritime interception operations is authorization by the UN Security Council. Under Article 41 of the Charter of the United Nations the Security Council may authorize the “complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication...” As such, the UN Security Council may authorize member nations 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. On three separate occasions since 1990 the UN Security Council authorized States to halt shipping into and out of Iraq, Haiti, and the Federal Republic of Yugoslavia, respectively, to ensure strict implementation of other Security Council resolutions.

4.4.4.1.2 Flag State Consent

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

4.4.4.1.3 Master’s Consent

(See paragraph 3.11.2.5.2.)

4.4.4.1.4 Right of Visit

International law allows nonpermissive interference with ships where there are reasonable grounds to suspect that the ship is engaged in, *inter alia*, piracy, slave trade, or unauthorized broadcasting. If a warship encounters a foreign-flagged vessel on the high seas, it may board the ship without the flag or master’s consent if there are reasonable grounds to suspect that the ship is engaged in one of these unauthorized activities.

4.4.4.1.5 Stateless Vessels

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

4.4.4.1.6 Condition of Port Entry

Under international law, a coastal state may impose any condition on ships entering its ports or internal waters, including a requirement that all ships (other than sovereign immune vessels) entering port will be subject to

boarding and inspection. A vessel intending to enter a nation's port or internal waters can therefore be boarded and searched without flag state consent provided the port state has imposed such a measure as a condition of port entry on a nondiscriminatory basis. Such boardings and inspections need not wait until a ship enters port—they can occur at any location, preferably when a ship enters the territorial sea.

4.4.4.1.7 Bilateral/Multilateral Agreements

Flag consent to board and search can be provided in advance using a bilateral or multilateral agreement. Such agreements greatly expedite the process by which officials from one State can board suspect vessels of another state.

4.4.4.1.8 Belligerent Rights Under the Law of Armed Conflict

(See paragraph 7.6.)

4.4.4.1.9 Inherent Right of Self-Defense

States can legally conduct MIO pursuant customary international law under circumstances that would permit the exercise of the inherent right of individual and collective self-defense.

4.4.5 Proliferation Security Initiative

PSI is a global effort that aims to stop shipments of WMD, their delivery systems, and related materials worldwide. The goal of PSI is to establish a more dynamic, creative, and proactive approach to preventing proliferation to or from nation States and non-State actors of proliferation concern. This approach includes at-sea interdiction by committed nations acting in support of PSI. As such, the PSI is a set of activities, not a formal treaty-based organization. It is best understood as a set of partnerships that establishes the basis for cooperation on specific activities, when the need arises. It does not create formal “obligations” for participating states, but does represent a political commitment to establish “best practices” to stop proliferation-related shipments. PSI seeks to use existing national and international legal authorities for such interdictions. In many cases, such legal authority will be found in a bilateral agreement. In the event that no bilateral agreement exists, the PSI statement of interdiction principles urges PSI participants and “all States concerned with this threat (PSI activity) to international peace and security” to “seriously consider providing consent under appropriate circumstances to the boarding and searching of its own flag vessels by other States and to the seizure of such WMD-related cargoes in such vessels that may be identified by such States.”

PSI-interdiction training exercises and other operational efforts will 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 will likely involve only a few PSI participants with geographic and operational access to a particular PSI target of opportunity (see CJCSI 3520.02, Proliferation Security Initiative (PSI) Activity Program).

PSI activities include:

1. Undertaking a review and providing information on current national legal authorities to undertake interdictions at sea, in the air, or on land, and indicating 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 assets)
3. Providing points of contact for PSI-assistance requests and other operational activities, and establishing appropriate internal government processes to coordinate PSI response efforts

4. Being willing to actively participate in PSI-interdiction training exercises and actual operations as opportunities arise
5. Being willing to conclude relevant agreements (e.g., boarding arrangements) or otherwise to establish a concrete basis for cooperation with PSI efforts.

4.4.6 Antiterrorism/Force Protection

When naval forces operate in the maritime environment during peacetime, a constant underlying mission is force protection, both in port and at sea. Commanders possess an inherent right and obligation to defend their units and other US units in the vicinity from a hostile act or demonstrated hostile intent. US naval doctrine provides tactics, techniques, and procedures to deter, detect, defend against, and mitigate terrorist attacks (see NTTP 3-07.2.1 Navy Tactics, Techniques, and Procedures for Antiterrorism/Force Protection (Rev.A)). AT/FP actions are designed to conserve the force's fighting potential so it can be applied at the decisive time and place while degrading opportunities for the enemy. Force protection does not include actions to defeat the enemy or protect against accidents, weather, or disease.

4.4.7 Maritime Warning Zones

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

4.4.8 Maritime Quarantine

Maritime quarantine was invoked for the first and only time by the United States as a means of interdicting the flow of Soviet strategic offensive weapons (primarily missiles) into Cuba in 1962 involving a limited coercive measure on the high seas applicable only to ships carrying offensive weaponry to Cuba and utilizing minimum force required to achieve its purpose. The quarantine was an action by the United States, which dealt with the need to act in defense of western hemisphere interests and security while, to the greatest degree possible, maintaining the rights of freedom of navigation in what was otherwise a peacetime environment.

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

1. Quarantine is a measured response to a threat to national security or an international crisis; blockade is an act of war against an identified belligerent.

2. The goal of quarantine is de-escalation and return to the *status quo ante* or other stabilizing arrangement; the goal of a blockade is denial and degradation of an enemy's capability with the ultimate end-state being capitulation in armed conflict.
3. Quarantine is selective in proportional response to the perceived threat; blockade requires impartial application to all nations—discrimination by a blockading belligerent renders the blockade legally invalid.

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

4.5 U.S. MARITIME ZONES AND OTHER CONTROL MECHANISMS

The United States employs maritime zones and other control mechanisms pursuant to both domestic and international law. These 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 polices are consistent with international law, and in particular the LOS convention. However, when deployed, commanders should be aware of similar sounding maritime zones and control mechanisms declared by other nations that purport to be legitimate but are in fact inconsistent with international law and the LOS convention and unlawfully impede freedom of navigation.

As many of these zones and other control mechanisms have as their primary purpose the restriction of access (for assorted reasons), they can be used as tools by the military to enhance the security and safety of both maritime and land-based units.

4.5.1 Safety Zones

Safety zones are areas comprised of water or shoreline, or a combination of both, to which access is limited for safety and environmental purposes. No person, vessel, or vehicle may enter or remain within a safety zone unless authorized by the Coast Guard. Such zones may be described by fixed geographical limits or they may be a prescribed area around a vessel, whether at anchor, moored, or underway. In general, safety zones may be established within the navigable waters of the United States seaward to 12 nautical miles from the baseline. However, as explicitly permitted by Article 60 of the LOS Convention, safety zones may also be established to promote the safety of life and property on an outer continental shelf facility, an attending vessel, or adjacent waters. Such safety zones may extend up to 500 meters from the outer continental shelf 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; or
4. Responding to a national emergency as declared by the president by reason of actual or threatened war, insurrection or invasion, or disturbance or threatened disturbance of the international relations of the United States.

In general, security zones can be established within the navigable waters of the United States seaward to 12 nautical miles from the baseline. However, security zones established to prevent or respond to an act of terrorism

against an individual, vessel, or structure may also be in the exclusive economic zone or on the outer continental shelf, provided the individual, vessel, or structure is subject to the jurisdiction of the United States. Enforcement of security zones is primarily the responsibility of the Coast Guard. Those convicted of security zone violations are subject to civil and criminal penalties.

4.5.3 Naval Vessel Protection Zones (NVPZs)

Following the terrorist attacks on New York and Washington, D.C. in 2001, to provide for the safety and security of United States naval vessels in the navigable waters of the United States, the U.S. Coast Guard established naval vessel protection zones (NVPZs) under authority contained in 14 USC 91. NVPZs 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; any vessel under the operational control of the U.S. Navy or a unified commander. As a result, the establishment and enforcement of NVPZs are a function directly involved in and necessary to military operations and the safety and security of naval commanders and personnel.

The official patrol may be a Coast Guard commissioned officer, a Coast Guard warrant or petty officer, the Commanding Officer of a US naval vessel or his or her designee.

All vessels within 500 yards of a US naval vessel must operate at the minimum speed necessary to maintain a safe course and proceed as directed by the official patrol.

Vessels are not allowed within 100 yards of a US naval vessel, unless authorized by the official patrol. Vessels requesting to pass within 100 yards of a US naval vessel must contact the official patrol on VHF-FM channel 16. Under some circumstances, the official patrol may permit vessels that can only operate safely in a navigable channel to pass within 100 yards of a US 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.

Though restrictive in nature, the effects of NVPZs have not been significant because the protection zones are limited in size and the official patrol may allow access to the zone. Additionally, the naval vessel protection zones will affect a given location for a limited time while the vessel is in transit, along with notifications made by the Coast Guard so mariners can make adjustments.

4.5.4 Outer Continental Shelf Facilities

Safety zones may also be established on the continental shelf around offshore platforms pursuant to the Outer Continental Shelf Lands Act (43 USC 1333). 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, but may not interfere with the use of recognized sea lanes essential to navigation. The following vessels are authorized to enter and remain in an OCS safety zone: vessels owned or operated by the OCS facility, vessels under 100 feet in overall length not engaged in towing, and vessels authorized by the cognizant Coast Guard commander.

4.5.5 Other Areas

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

4.6 DETAINEES AT SEA DURING PEACETIME

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

CHAPTER 5

Principles and Sources of the Law of Armed Conflict

5.1 WAR AND THE LAW

Historically, the application of law to war has been divided into two parts. The first addresses the legality of a nation's decision to engage in war. The second provides rules and guidance on how to conduct the war. Although it is important for commanders to have some understanding of both these areas, as a general rule, the legality of why a nation goes to war is primarily the responsibility of political leadership, while the legality of how the war is conducted is the responsibility of political leadership, military commanders, and individual service members.

5.1.1 Law Governing When Nations Can Legally Use Force

Article 2(4) of the Charter of the United Nations provides:

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

The Charter of the United Nations does, however, provide two exceptions to this requirement. First, a State may use force if authorized by a decision of the UN Security Council, typically documented in a United Nations Security Council Resolution. Second, as recognized in customary international law and reflected in Article 51 of the Charter of the United Nations, force may be used in individual or collective self-defense.

5.1.2 Law Governing How Armed Conflict is Conducted

No nation, regardless of its legal basis for using force, has the right to engage in armed conflict without limits. The extent of these limits depends on the type of armed conflict in which States are engaged.

5.1.2.1 International Armed Conflict

International armed conflict is "declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them" (see common Article 2 of the Geneva Conventions of 1949). Generally speaking this is war between two nation states. The law governing international armed conflict is known as the law of armed conflict or the law of war. These terms are used synonymously in U.S. military publications. The law of armed conflict is comprised of all international law for the conduct of hostilities that is binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law. Additionally, commanders should be aware that some countries are bound by Additional Protocol I to the Geneva Conventions of 1949. The United States has signed but not ratified Additional Protocol I and is not bound by it. However, in coalition operations some partner nations may be obligated to follow Additional Protocol I.

5.1.2.2 Noninternational Armed Conflict

Noninternational armed conflict is defined in common Article 3 of the Geneva Conventions of 1949 as armed conflict not of an international character occurring in the territory of one of the High Contracting Parties. In

general terms, this is civil war or other forms of domestic rebellion occurring within the territory of a nation state. In cases of noninternational armed conflict, common Article 3 of the Geneva Conventions applies. Additionally, for countries that have signed and ratified it, Additional Protocol II to the Geneva Conventions of 1949 also applies to noninternational armed conflicts. The United States has signed but not ratified Additional Protocol II and is not bound by it. Commanders should be aware that in coalition operations some partner nations may be obligated to follow Additional Protocol II. It is also possible that customary international law may apply to noninternational armed conflicts.

5.1.2.3 International Armed Conflict Between Nation States and Non-State Actors

Since 11 September 2001, a new type of armed conflict has emerged: international armed conflict between nation States and non-State actors. The Global War on Terror is an example of this new type of conflict. International armed conflict between nation States and non-State actors differs from international armed conflict in that it is not between two or more high contracting parties (e.g. nation States). It also differs from noninternational armed conflict in that it is international in character. What law applies in this type of conflict is still being settled. As a matter of policy, however, all DOD personnel will comply with the law of armed conflict during all armed conflict, however such conflicts are characterized, and in all other military operations (see paragraph 5.2).

5.2 THE LAW OF ARMED CONFLICT AND ITS APPLICATION

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

It is DOD policy to comply with the law of armed conflict during all armed conflict, however such conflicts are characterized, and in all other military operations (see DOD Directive 2311.01 (series)). Consistent with this policy, this manual will apply the law of armed conflict to all three of the types of armed conflicts discussed above.

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. (See paragraphs 5.4 and 11.1.) To achieve this goal, the law of armed conflict is based on four general principles: military necessity, unnecessary suffering, distinction, and proportionality. These principles must be considered collectively as they impact on and interrelate with each other. No one principle of the law of war can be considered in isolation.

5.3.1 Principle of Military Necessity

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

In applying the principle of military necessity a commander should ask whether the object of attack is a valid military objective and, if so, whether the total or partial destruction, capture, or neutralization of the object of attack will constitute a definite military advantage under the circumstances at the time of the attack. An object is a valid military objective if by its nature (e.g., combat ships and aircraft), location (e.g., bridge over enemy supply

route), use (e.g., school building being used as an enemy headquarters), or purpose (e.g., a civilian airport that is built with a longer than required runway so it can be used for military airlift in time of emergency) it makes an effective contribution to the enemy's war fighting/war sustaining effort and its total or partial destruction, capture, or neutralization, in the circumstance at the time, offers a definite military advantage. Purpose is related to use, but is concerned with the intended, suspected, or possible future use of an object rather than its immediate and temporary use.

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

5.3.2 Principle of Distinction

The principle of distinction is concerned with distinguishing combatants from civilians and military objects from civilian objects so as to minimize damage to civilians and civilian objects. Commanders have two duties under the principle of distinction. First, they must distinguish their forces from the civilian population. This is why combatants wear uniforms or other distinctive signs. Second, they must distinguish valid military objectives from civilians or civilian objects before attacking (see Chapter 8).

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

5.3.3 Principle of Proportionality

The principle of proportionality is directly linked to the principle of distinction. While distinction is concerned with focusing the scope and means of attack so as to cause the least amount of damage to protected persons and property, proportionality is concerned with weighing the military advantage one expects to gain against the unavoidable and incidental loss to civilians and civilian property that will result from the attack. The principle of proportionality requires the commander to conduct a balancing test to determine if the incidental injury, including death to civilians and damage to civilian objects, is excessive in relation to the concrete and direct military advantage expected to be gained. Note that the principle of proportionality under the law of armed conflict is different than the term proportionality as used in self-defense (see paragraph 4.3.3).

5.3.4 Principle of Unnecessary Suffering

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

5.4 PEOPLE IN THE OPERATIONAL ENVIRONMENT

There are many categories and subcategories of people in the operational environment. The categories discussed below are the major categories of people most commonly encountered. These categories are important as they determine who can be targeted (see Chapter 8) and the treatment they are entitled to if detained (see Chapter 11).

5.4.1 Combatants

Combatants are persons engaged in hostilities during an armed conflict. Combatants can be lawful or unlawful. The term “enemy combatant” refers to a person engaged in hostilities against the United States or its coalition partners during an armed conflict. The term “enemy combatant” also includes both “lawful enemy combatants” and “unlawful enemy combatants.”

5.4.1.1 Lawful Enemy Combatants

Lawful enemy combatants include members of the regular armed forces of a State party to the conflict; militia, volunteer corps, and organized resistance movements belonging to a State party to the conflict, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the laws of war; and members of regular armed forces who profess allegiance to a government or an authority not recognized by the detaining power. Lawful combatants are entitled to combatant immunity—that is, they cannot be prosecuted for their lawful military actions prior to capture.

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

5.4.1.2 Unlawful Enemy Combatants

Unlawful enemy combatants are persons not entitled to combatant immunity, who engage in acts against the United States or its coalition partners in violation of the laws and customs of war during armed conflict.

5.4.2 Noncombatants

Noncombatants are those members of the armed forces who do not take direct part in hostilities because of their status as medical personnel and chaplains.

5.4.3 Civilians

A civilian is a person who is not a combatant or noncombatant (see definitions above). Civilians are not entitled to combatant immunity.

5.5 SOURCES OF THE LAW OF ARMED CONFLICT

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

5.5.1 Customary Law

The customary international law of armed conflict derives from the general practice of military and naval forces on land, at sea, and in the air during hostilities. Customary law develops over time. Consequently, only when state practice attains a degree of regularity and is accompanied by the general conviction among nations that behavior in conformity with that practice is obligatory, can it be said to have become a rule of customary law binding upon all nations. 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 nations often disagree as to the precise content of an accepted practice of armed conflict and its status as a rule of law. This lack of precision in the definition and interpretation of rules of customary law has been a principal motivation behind efforts to codify the law of armed conflict through written agreements (treaties and conventions.) However, the inherent flexibility of law built on custom, and the fact that it reflects the actual—

albeit constantly evolving—practice of nations, underscores the continuing importance of customary international law in the development of the law of armed conflict.

5.5.2 International Agreements

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

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

There are international agreements that the United States has signed and ratified, signed but not ratified, and those which are 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 shall have made its intention clear not to become a party to the treaty. If the agreement is neither signed nor ratified, the agreement has no effect on the United States.

The United States is a party to the following agreements:

1. 1907 Hague Convention Respecting the Laws and Customs of War on Land (Hague IV)
2. 1907 Hague Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague V)
3. 1907 Hague Convention Relative to the Laying of Automatic Submarine Contact Mines (Hague VIII)
4. 1907 Hague Convention Concerning Bombardment by Naval Forces in Time of War (Hague IX)
5. 1907 Hague Convention Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War (Hague XI)
6. 1907 Hague Convention Concerning the Rights and Duties of Neutral Powers in Naval War (Hague XIII)
7. 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare
8. 1936 London Protocol in Regard to the Operations of Submarines or Other War Vessels with Respect to Merchant Vessels (Part IV of the 1930 London Naval Treaty)
9. 1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field

10. 1949 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea*
11. 1949 Geneva Convention (III) relative to the Treatment of Prisoners of War
12. 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War
13. 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction
14. 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, Protocols I, II, and Amended II (only)
15. 1980 Protocol I to the Convention on Certain Conventional Weapons—non-detectable fragments
16. 1980 Protocol II to the Convention on Certain Conventional Weapons—prohibitions or restrictions on the use of mines, booby-traps and other devices
17. 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
18. 1993 Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction.

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

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

1. 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict
2. 1977 Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts
3. 1977 Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts
4. 1988 Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III).
5. 2005 Protocol III Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem.

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

Some countries and organizations refer to the law of armed conflict as “international humanitarian law.” The term “international humanitarian law” is often confused with human rights law. The more traditional term “law of armed conflict” eliminates this confusion. While there are some areas of overlap, the law of armed conflict and human rights law are separate and distinct bodies of law. Compliance with the law of armed conflict and U.S. domestic law will ensure compliance with human rights law.

CHAPTER 6

Adherence and Enforcement

6.1 ADHERENCE TO THE LAW OF ARMED CONFLICT

Nations adhere to the law of armed conflict not only because they are legally obliged to do so but for the very practical reason that it is in their best interest to be governed by consistent and mutually acceptable rules of conduct. The law of armed conflict 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. Where repeated violations, however, do not result in protests, reprisals, or other enforcement actions, this may, over time, indicate that a particular rule is no longer regarded as valid.

6.1.1 Adherence by the United States

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

6.1.2 Policies

6.1.2.1 Department of the Navy

SECNAVINST 3300.1B, Law of Armed Conflicts (Law of War) Program to Ensure Compliance by the Naval Establishment, states that the Department of the Navy will comply with the law of armed conflict in the conduct of military operations and related activities in armed conflicts. Navy Regulations, 1990, Article 0705, Observance of International Law, provides that:

At all times, commanders shall observe, and require their commands to observe, the principles of international law. Where necessary to fulfill this responsibility, a departure from other provisions of Navy Regulations is authorized.

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

Alleged violations of the law of armed conflict, whether committed by or against U.S., allied, or enemy personnel, are to be reported promptly through appropriate command channels. War crimes alleged to be committed by U.S. personnel or its allies, must be investigated thoroughly, and where appropriate, remedied by corrective action. War crimes committed by enemy personnel will be reviewed for appropriate responsive action.

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

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

6.1.2.2 Coast Guard

When operating as a service in the Department of the Navy, Coast Guard personnel are subject to the orders of the Secretary of the Navy and fall within the purview of Department of the Navy policy set out in paragraph 6.1.2. At all times, Coast Guard personnel are required to observe the law of armed conflict as a fundamental element of U.S. federal law. Coast Guard judge advocates are also specially trained to provide law of armed conflict advice and assistance to officers in command.

6.1.3 Command Responsibility

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

6.1.4 Individual Responsibility

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

6.2 ENFORCEMENT OF THE LAW OF ARMED CONFLICT

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

1. Publicize the facts with a view toward influencing world public opinion against the offending nation.
2. Protest to the offending nation and demand that those responsible be punished and/or that compensation be paid.
3. Seek the intervention of a neutral party, particularly with respect to the protection of prisoners of war and other of its nationals that have fallen under the control of the offending nation.
4. Execute a belligerent reprisal action (see paragraph 6.2.3).

5. Punish individual offenders either during the conflict or upon cessation of hostilities.

6.2.1 The Protecting Power

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

6.2.2 The International Committee of the Red Cross

The ICRC is a private, nongovernmental, humanitarian organization based in Geneva, Switzerland. The ruling body of the ICRC is composed entirely of Swiss citizens and the ICRC is staffed mainly by Swiss nationals. (The ICRC is distinct from and should not be confused with the various national Red Cross societies such as the American Red Cross.) Its principal purpose is to provide protection and assistance to the victims of armed conflict. The Geneva Conventions recognize the special status of the ICRC and have assigned specific tasks for it to perform, including visiting and interviewing prisoners of war, providing relief to the civilian population of occupied territories, searching for information concerning missing persons, and offering its “good offices” to facilitate the establishment of hospital and safety zones. Under its governing statute, the ICRC is dedicated to work for the faithful application of the Geneva Conventions, to endeavor to ensure the protection of military and civilian victims of armed conflict, and to serve as a neutral intermediary between belligerents.

6.2.3 DOD Requirements for Reporting Contact with the ICRC

Army Regulation (AR) 190-8/OPNAVINST 3461.6/Air Force Joint Instruction (AFJI) 31-304/Marine Corps Order (MCO) 3461.1, Enemy Prisoner of War, Retained Personnel, Civilian Internees, and Detained Persons (a multiservice regulation referenced as OPNAVINST 3416.1 and MCO 3461.1), requires DOD personnel to report contacts with the ICRC.

1. All ICRC reports received by a military or civilian official of the DOD at any level shall, within 24 hours, be transmitted to the Under Secretary of Defense for Policy (USD [P]) with information copies to the Director, Joint Staff; the Assistant Secretary of Defense for Public Affairs; the DOD General Counsel; and the DOD Executive Secretary. ICRC reports received within a combatant command area of operation shall be transmitted simultaneously to the commander of the combatant command.
2. Oral ICRC reports shall be summarized in writing, and shall contain the following information:
 - a. Description of the ICRC visit or meeting to include the location and date-time group
DTG of the visit and what corrective action has been initiated (if warranted)
 - b. Identification of specific detainee(s) reported upon (if applicable)
 - c. Name of the ICRC representative
 - d. Identification of the U.S. official who received the report and identification of the U.S. official submitting the report.
3. All ICRC communications shall be marked with the following statement: “ICRC communications are provided to DOD as confidential restricted-use documents.” ICRC communications will be safeguarded in the same manner as SECRET NODIS information using classified information channels. Dissemination of ICRC communications outside of DOD is not authorized without the approval of the Secretary or Deputy Secretary of Defense.

6.2.4 Reprisal

A belligerent reprisal is an enforcement measure under the law of armed conflict consisting of an act that would otherwise be unlawful but which is justified as a response to the previous unlawful acts of an enemy. The sole purpose of a reprisal is to induce the enemy to cease its illegal activity and to comply with the law of armed conflict in the future. Reprisals may be taken against enemy armed forces, enemy civilians other than those in occupied territory, and enemy property.

6.2.4.1 Requirements for Reprisal

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

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

6.2.4.2 Immunity From Reprisal

Reprisals are forbidden to be taken against:

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

6.2.4.3 Authority to Order Reprisals

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

6.2.5 Reciprocity

Some obligations under the law of armed conflict are reciprocal in that they are binding on the parties only so long as both sides continue to comply with them. A major violation by one side will release the other side from all

further duty to abide by that obligation. The concept of reciprocity is not applicable to humanitarian rules that protect the victims of armed conflict, that is, those persons protected by the 1949 Geneva Conventions. The decision to consider the United States released from a particular obligation following a major violation by the enemy will be made by the president.

6.2.6 War Crimes under International Law

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

Grave breaches of the Geneva Conventions are a special type of war crime. The Geneva Conventions define grave breaches and place duties on States to search for persons alleged to have committed grave breaches, bring them to trial, and punish them if found guilty. This duty exists regardless of the nationality of the offender and includes the right to punish enemy armed forces personnel and enemy civilians. For violations of the Conventions that do not rise to the level of a grave breach, States are obligated to take measures necessary to suppress them. The Geneva Conventions define grave breaches as:

acts committed against persons or property protected by the Conventions; willful killing, torture or inhumane treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

The following acts, if committed intentionally, are examples of war crimes that could be considered grave breaches:

1. Offenses against prisoners of war, including killing without just cause; torture or inhumane treatment; subjection to public insult or curiosity; unhealthy, dangerous, or otherwise prohibited labor; and denial of fair trial for offenses
2. Offenses against civilian inhabitants of occupied territory, including killing without just cause, torture or inhumane treatment, forced labor, deportation, and denial of fair trial for offenses
3. Offenses against the sick and wounded, including killing, wounding, or mistreating enemy forces disabled by sickness or wounds
4. Denial of quarter (i.e., killing or wounding an enemy unable to fight due to sickness or wounds or one who is making a genuine offer of surrender) and offenses against combatants who have laid down their arms and surrendered
5. Offenses against the survivors of ships and aircraft lost at sea, including killing, wounding, or mistreating the shipwrecked; and failing to provide for the safety of survivors as military circumstances permit
6. Wanton destruction of cities, towns, and villages or devastation not justified by the requirements of military operations; and bombardment, the sole purpose of which is to attack and terrorize the civilian population
7. Deliberate attack upon medical facilities, hospital ships, medical aircraft, medical vehicles, or medical personnel.

The following acts, if committed intentionally, are examples of acts that could be considered war crimes, but would not be considered grave breaches of the Conventions:

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

6.2.6.1 Trials

Trials for war crimes and other unlawful acts committed by enemy personnel and civilians usually have taken place after hostilities are concluded. Trials during hostilities might provoke undesirable actions from an enemy and complicate humanitarian protections applicable to one's own combatants and other nationals. There are exceptions to this general rule however.

War crimes trials numbered in the thousands were held after World War II for crimes committed by Nazi and Japanese personnel. However, for several decades after World War II, there was a general reluctance to undertake such trials following other conflicts. This reluctance changed with the armed conflict in the former Yugoslavia and genocide in Rwanda leading the UN Security Council to establish two *ad hoc* international tribunals in 1993 and 1994 to prosecute war crimes against humanity and genocide committed in both the former Yugoslavia and in Rwanda. Additionally, a permanent international criminal court was created by the 1998 Rome Statute. The Rome Statute entered into force in 2002 creating the International Criminal Court, and although the United States is not a party to this treaty, the ICC purports to have jurisdiction over non-Party States, such as the United States, under certain circumstances.

6.2.6.2 Jurisdiction over Offenses

The majority of prosecutions for violations of the law of armed conflict have involved the trial of a nation's own forces for breaches of military discipline. Violations of the law of armed conflict by persons subject to U.S. military law will usually constitute violations of the Uniform Code of Military Justice (UCMJ) and, if so, offenders will be prosecuted under that Code. Additionally, if war crimes are committed by U.S. civilians or contractors assigned to or accompanying the armed forces, the War Crimes Act of 1996 provides jurisdiction. In those cases where the offense does not rise to the level of a war crime, the Military Extraterritorial Jurisdiction Act provides jurisdiction where the offense also is a violation of U.S. law punishable by more than one year imprisonment. In times of congressionally declared war or during contingency operations, the UCMJ would apply to civilians accompanying the force in the field.

For offenses committed in the United States, its territories and possessions, jurisdiction is not limited to offenses by U.S. nationals, but also extends to offenses by persons of other nationalities. War crimes committed by enemy nationals may be tried as offenses against international law, which forms part of the law of the United States. Trials of enemy personnel may be held in U.S. federal courts, military courts, and military tribunals or commissions. In occupied territories, trials are usually held under occupation law. Trials of such personnel have been held in military courts, military commissions, provost courts, military government courts, and other military tribunals. There is no statute of limitations on the prosecution of a war crime.

6.2.6.3 Fair Trial Standards

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

6.2.6.4 Defenses

6.2.6.4.1 Superior Orders

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

6.2.6.4.2 Military Necessity

The law of armed conflict provides that only that degree and kind of force, not otherwise prohibited by the law of armed conflict, required for the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources may be applied. This principle, often referred to as “military necessity,” is a fundamental concept of restraint designed to limit the application of force in armed conflict to that which is in fact required to carry out a lawful military purpose. Too often it is misunderstood and misapplied to support the application of military force that is excessive and unlawful under the misapprehension that the “military necessity” of mission accomplishment justifies the result. While the principle does recognize that some amount of collateral damage and incidental injury to civilians and civilian objects may occur in an attack upon a legitimate military objective, it does not excuse the wanton destruction of life and property disproportionate to the military advantage to be gained from the attack.

6.2.6.4.3 Acts Legal or Obligatory Under National Law

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

6.2.6.5 Sanctions

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

6.3 REPORTABLE VIOLATIONS

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

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

The following are examples of incidents that must be reported:

1. Offenses against the wounded, sick, survivors of sunken ships, prisoners of war, and civilian inhabitants of occupied or allied territories including interned and detained civilians: attacking without due cause; willful

- killing; torture or inhuman treatment, including biological, medical or scientific experiments; physical mutilation; removal of tissue or organs for transplantation; any medical procedure not indicated by the health of the person and which is not consistent with generally accepted medical standards; willfully causing great suffering or serious injury to body or health or seriously endangering the physical or mental health; and taking hostages
2. Other offenses against a detainee or prisoners of war: compelling a prisoner of war 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 sick: when military interests do permit, failure to search out, collect, make provision for the safety of, or to care for survivors of sunken ships, or to care for members of armed forces in the field who are disabled by sickness or wounds or who have laid down their arms and surrendered
 4. Other offenses against civilian inhabitants, including interned and detained civilians of, and refugees and stateless persons within, occupied or allied territories: unlawful deportation or transfer, unlawful confinement, compelling forced labor, compelling the civilian inhabitants to serve in the armed forces of the enemy or to participate in military operations, denial of religious rights, denaturalization, infringement of property rights, and denial of a fair and regular trial
 5. Attacks on individual civilians or the civilian population, or indiscriminate attacks affecting the civilian population or civilian property, knowing that the attacks will cause loss of life, injury to civilians or damage to civilian property that would be excessive or disproportionate in relation to the concrete and direct military advantage anticipated, and that cause death or serious injury to body or health
 6. Deliberate attacks upon medical transports including hospital ships, coastal rescue craft, and their lifeboats or small craft; medical vehicles; medical aircraft; medical establishments including hospitals; medical units; medical personnel or crews (including shipwrecked survivors); and persons parachuting from aircraft in distress during their descent
 7. Killing or otherwise imposing punishment, without a fair trial, upon spies and other persons suspected of hostile acts while such persons are in custody
 8. Maltreatment or mutilation of dead bodies
 9. Willful or wanton destruction of cities, towns, or villages, or devastation not justified by military necessity; aerial or naval bombardment whose sole purpose is to attack and terrorize the civilian population, or to destroy protected areas, buildings or objects (such as buildings used for religious, charitable or medical purposes, historic monuments or works of art); attacking localities which are undefended, open to occupation, and without military significance; attacking demilitarized zones contrary to the terms establishing such zones
 10. Improper use of privileged buildings or localities for military purposes
 11. Attacks on facilities—such as dams and dikes, which, if destroyed, would release forces dangerous to the civilian population—when not justified by military necessity
 12. Pillage or plunder of public or private property
 13. Willful misuse of the distinctive emblem (red on a white background) of the Red Cross, Red Crescent or other protective emblems, signs or signals recognized under international law

14. Feigning incapacitation by wounds/sickness that results in the killing, wounding, or capture of the enemy; feigning surrender or the intent to negotiate under a flag of truce that results in the killing, capture, or wounding of the enemy; and use of a flag of truce to gain time for retreats or reinforcement.
15. Firing upon a flag of truce
16. Denial of quarter, unless bad faith is reasonably suspected
17. Violations of surrender or armistice terms
18. Using poisoned or otherwise forbidden arms or ammunition
19. Poisoning wells, streams, or other water sources
20. Other analogous acts violating the accepted rules regulating the conduct of warfare.

Source: SECNAVINST 3300.1B, Law of Armed Conflict (Law of War) Program to Ensure Compliance by the Naval Establishment.

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CHAPTER 7

The Law of Neutrality

7.1 INTRODUCTION

The law of neutrality defines the legal relationship between nations engaged in an armed conflict (belligerents) and nations not taking part in such hostilities (neutrals). The law of neutrality serves to localize war, to limit the conduct of war on both land and sea, and to lessen the impact of war on international commerce.

Developed at a time when nations customarily issued declarations of war before engaging in hostilities, the law of neutrality contemplated that the transition between war and peace would be clear and unambiguous. With the advent of international efforts to abolish “war” coupled with the proliferation of collective security arrangements and the extension of the spectrum of warfare to include insurgencies, counterinsurgencies and terrorism/counterterrorism, armed conflict is now rarely, if ever, accompanied by formal declarations of war. Consequently, it has become increasingly difficult to determine with precision the point in time when hostilities become “war” and to distinguish belligerent nations from neutrals. Notwithstanding these uncertainties, the law of neutrality continues to serve an important role in containing the spread of hostilities, in regulating the conduct of belligerents with respect to nations not participating in the conflict, in regulating the conduct of neutrals with respect to belligerents, and in reducing the harmful effects of such hostilities on international commerce.

For purposes of this publication, a belligerent nation is defined as a nation engaged in an international armed conflict, whether or not a formal declaration of war has been issued. Conversely, a neutral nation is defined as a nation that, consistent with international law, either has proclaimed its neutrality or has otherwise assumed neutral status with respect to an ongoing conflict.

7.2 NEUTRAL STATUS

Customary international law contemplates that all nations have the option to refrain from participation in an armed conflict by declaring or otherwise assuming neutral status. The law of armed conflict reciprocally imposes duties and confers rights upon neutral nations and upon belligerents. The principal right of the neutral nation is that of inviolability; its principal duties are those of abstention and impartiality. Conversely, it is the duty of a belligerent to respect the former and its right to insist upon the latter. This customary law has, to some extent, been modified by the Charter of the United Nations (see paragraph 7.2.1).

Neutral status, once established, remains in effect unless and until the neutral nation abandons its neutral stance and enters into the conflict. Neutrals that violate their neutral obligations risk losing their neutral status.

7.2.1 Neutrality under the Charter of the United Nations

Article 2(4) of the Charter of the United Nations provides that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” In the event of a threat to or breach of the peace or act of aggression, the Security Council is empowered to take enforcement action on behalf of all member nations, including the use of force, in order to maintain or restore international peace and security. Article 2(5) of the Charter of the United Nations provides that “[a]ll Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.” Obligations pursuant to the Charter of the United Nations override other obligations. Therefore, all member states must comply with the

terms of decisions taken by the Security Council under Chapter VII of the Charter of the United Nations. Consequently, member states may be obliged to support a United Nations action at the expense of their pure neutrality. However, absent a binding decision of the Security Council, each state is free to determine whether to support the victim of an armed attack (invoking collective self-defense) or to remain neutral.

7.2.2 Neutrality under Regional and Collective Self-Defense Arrangements

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

7.3 NEUTRAL TERRITORY

As a general rule of international law, all acts of hostility in neutral territory, including neutral lands, neutral waters, and neutral airspace, are prohibited. A neutral nation has the duty to prevent the use of its territory as a place of sanctuary or a base of operations by belligerent forces of any side. If the neutral nation is unable or unwilling to enforce effectively its right of inviolability, an aggrieved belligerent may take such acts as are necessary in neutral territory to counter the activities of enemy forces, including warships and military aircraft, making unlawful use of that territory. Belligerents are also authorized to act in self-defense when attacked or threatened with attack while in neutral territory or when attacked or threatened from neutral territory.

7.3.1 Neutral Lands

Belligerents are forbidden to move troops or war materials and supplies across neutral land territory. Neutral nations may be required to mobilize sufficient armed forces to ensure fulfillment of their responsibility to prevent belligerent forces from crossing neutral borders. Belligerent troops that enter neutral territory must be disarmed and interned until the end of the armed conflict.

A neutral may authorize passage through its territory of wounded and sick belonging to the armed forces of either side on condition that the vehicles transporting them carry neither combatants nor materials of war. If passage of sick and wounded is permitted, the neutral nation assumes responsibility for providing for their safety and control. Prisoners of war who have escaped their captors and made their way to neutral territory may be either repatriated or left at liberty in the neutral nation, but must not be allowed to take part in belligerent activities while there.

7.3.2 Neutral Ports and Roadsteads

Although neutral nations may, on a nondiscriminatory basis, close their ports and roadsteads to belligerents, they are not obliged to do so. In any event, Hague Convention XIII requires that 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 nation 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.

7.3.2.1 Limitations on Stay and Departure

In the absence of special provisions to the contrary in the laws or regulations of the neutral nation, belligerent warships are forbidden to remain in a neutral port or roadstead in excess of 24 hours. This restriction does not

apply to belligerent warships devoted exclusively to humanitarian, religious, or nonmilitary scientific purposes. Warships engaged in the collection of scientific data of potential military application are not exempt. Belligerent warships may be permitted by a neutral nation to extend their stay in neutral ports and roadsteads on account of stress of weather or damage involving seaworthiness. It is the duty of the neutral nation to intern a belligerent warship, together with its officers and crew, that will not or cannot depart a neutral port or roadstead where it is not entitled to remain.

A neutral nation may adopt laws or regulations governing the presence of belligerent warships in its waters provided that these laws and regulations are nondiscriminatory and apply equally to all belligerents. Unless the neutral nation has adopted laws or regulations to the contrary, no more than three warships of any one belligerent nation may be present in the same neutral port or roadstead at any one time. When warships of opposing belligerent nations are present in a neutral port or roadstead at the same time, not less than 24 hours must elapse between the departure of the respective enemy vessels. The order of departure is determined by the order of arrival unless an extension of stay has been granted. A belligerent warship may not leave a neutral port or roadstead less than 24 hours after the departure of a merchant ship of its adversary (Hague XIII, art. 16(3)).

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 nation 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.

Belligerent warships may carry out such repairs in neutral ports and roadsteads as are absolutely necessary to render them seaworthy. The law is unsettled as to whether repair of battle damage, even for seaworthiness purposes, is permitted under this doctrine. In any event, belligerent warships may not add to or repair weapons systems or enhance any other aspect of their war fighting capability. It is the duty of the neutral nation to decide what repairs are necessary to restore seaworthiness and to insist that they be accomplished with the least possible delay.

7.3.2.3 Prizes

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

7.3.3 Neutral Internal Waters

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

7.3.4 Neutral Territorial Seas

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

A neutral nation may, on a nondiscriminatory basis, suspend passage of belligerent warships and prizes through its territorial seas, except in international straits. When properly notified of its closure, belligerents are obliged to refrain from entering a neutral territorial sea except to transit through international straits or as necessitated by distress. A neutral nation may, however, allow the passage of belligerent warships and prizes through its territorial seas. While in neutral territorial seas, a belligerent warship must also refrain from adding to or repairing its armaments or replenishing its war materials. Although the general practice has been to close neutral territorial seas to belligerent submarines, a neutral nation may elect to allow passage of submarines. Neutral nations 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 three-nautical-mile territorial sea was the accepted norm, aviation was in its infancy, and the submarine had not yet proven itself as a significant weapons platform. The rules of neutrality applicable to the territorial sea were designed primarily to regulate the conduct of surface warships in a narrow band of water off neutral coasts. The 1982 LOS Convention provides that coastal nations 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 nations to do likewise.

The law of neutrality, including the limitations on stay and departure, 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 remain forbidden to use the territorial sea of a neutral nation 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 nation demonstrate an inability or unwillingness to detect and expel the offender, the other belligerent retains the right to undertake such self-help enforcement actions as are necessary to assure compliance by his adversary and the neutral nation with the law of neutrality.

7.3.6 Neutral International Straits

Customary international law as reflected in the 1982 LOS Convention provides that belligerent and neutral surface ships, submarines, and aircraft have a right of transit passage through, over, and under all straits used for international navigation. Neutral nations 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 nation, and must otherwise refrain from acts of hostility and other activities not incident to their transit. Belligerent forces in transit may, however, take defensive measures consistent with their security, including the launching and recovery of military devices, screen formation steaming, and acoustic and electronic surveillance, and may respond in self-defense to a hostile act or hostile intent. Belligerent forces may not use neutral straits as a place of sanctuary or as a base of operations, and belligerent warships may not exercise the belligerent right of visit and search in those waters. (Note: The Turkish Straits are governed by special rules articulated in the Montreux Convention of 1936, which limit the number and types of warships that may use the straits, both in times of peace and during armed conflict).

7.3.7 Neutral Archipelagic Waters

The United States recognizes the right of qualifying island nations (see paragraph 1.5.3) to establish archipelagic baselines enclosing archipelagic waters, provided the baselines are drawn in conformity with the 1982 LOS Convention. 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 military devices. Visit and search is not authorized in neutral archipelagic waters.

A neutral nation 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 nation has an affirmative duty to police its archipelagic waters to ensure that the inviolability of its neutral waters is respected. If a neutral nation is unable or unwilling effectively to detect and expel belligerent forces unlawfully present 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 Neutral Exclusive Economic Zone

The United States recognizes the concept of EEZ as embodied in the 1982 United Nations Convention on the Law of the Sea. (For a discussion of the rights and duties possessed by coastal and other states in the EEZ during peacetime, see paragraphs 1.6.2, 2.6.2, and 2.6.3). A neutral State's EEZ is equivalent to the high seas in terms of belligerent rights to conduct hostilities therein.

7.3.9 Neutral Airspace and Duties

1. Neutral territory extends to the airspace over a neutral nation's lands, internal waters, archipelagic waters (if any), and territorial sea. Belligerent military aircraft are forbidden to enter neutral airspace with the following exceptions:
 - a. The airspace above neutral international straits and archipelagic sea lanes remains open at all times to belligerent aircraft, including armed military aircraft, engaged in transit or archipelagic sea lanes passage. Such passage must be continuous and expeditious and must be undertaken in the normal mode of flight of the aircraft involved. Belligerent aircraft must refrain from acts of hostility while in transit, but may engage in activities that are consistent with their security and the security of accompanying surface and subsurface forces.
 - b. Medical aircraft may, with prior notice, overfly neutral territory, may land therein in case of necessity, and may use neutral airfield facilities as ports of call, subject to such restrictions and regulations as the neutral nation may see fit to apply equally to all belligerents.
 - c. Belligerent aircraft in evident distress may be permitted to enter neutral airspace and to land in neutral territory under such safeguards as the neutral nation may wish to impose. The neutral nation must require such aircraft to land and must intern both aircraft and crew.
2. Neutral nations have an affirmative duty to prevent violation of neutral airspace by belligerent military aircraft, to compel offending aircraft to land, and to intern both offending aircraft and crew. Should a neutral nation 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 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 nation and another not involving materials of war or armaments ultimately destined for a belligerent nation, and all commerce between a neutral nation and a belligerent that does not involve the carriage of contraband or otherwise contribute to the belligerent's war-fighting/war-sustaining capability. 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 nations from engaging in commerce with belligerent nations; however, a neutral government cannot itself supply materials of war or armaments to a belligerent without violating its neutral duties of abstention and impartiality and risking loss of its neutral status. Although a neutral

government may forbid its citizens from carrying on nonneutral commerce with belligerent nations, it is not obligated to do so. If it does so, however, it must treat all belligerents impartially. In effect, the law establishes a balance-of-interests test to protect neutral commerce from unreasonable interference on the one hand and the right of belligerents to interdict the flow of war materials to the enemy on the other.

7.4.1 Contraband

Contraband consists of goods destined for the enemy of a belligerent and that may be susceptible to use in armed conflict. Traditionally, contraband has been divided into two categories: absolute and conditional. Absolute contraband consisted of goods the character of which made it obvious that they were destined for use in armed conflict, such as munitions, weapons, uniforms, and the like. Conditional contraband consisted 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 nations of the type of goods considered to be absolute or conditional contraband, as well as those not considered to be contraband at all (i.e., exempt or “free goods”). The precise nature of a belligerent’s contraband list may vary according to the circumstances of the conflict.

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

7.4.1.1 Exemptions to Contraband—Free Goods

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

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

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

7.4.1.2 Enemy Destination

Contraband goods are liable to capture at any place beyond neutral territory, if their destination is the territory belonging to or occupied by the enemy. It is immaterial whether the carriage of contraband is direct, involves transshipment, or requires overland transport. When contraband is involved, 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; or
3. The goods are consigned “to order” or to an unnamed consignee, but are destined for a neutral nation 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. Although conditional contraband is also liable to capture if ultimately destined for the use of an enemy government or its armed forces, enemy destination of conditional contraband must be factually established and cannot be presumed.

7.4.2 Certificate of Noncontraband Carriage

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

7.5 ACQUIRING ENEMY CHARACTER

All vessels operating under an enemy flag, and all aircraft bearing enemy markings, possess enemy character. However, the fact that a merchant ship flies a neutral flag, or that an aircraft bears neutral markings, does not necessarily establish neutral character. 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 aircraft. (Paragraphs 8.6.1 and 8.6.2 set forth the actions that may be taken against enemy vessels and aircraft.)

7.5.1 Acquiring the Character of an Enemy Warship or Military Aircraft

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

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

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

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

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

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

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

7.6 VISIT AND SEARCH

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

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

7.6.1 Procedure for Visit and Search of Merchant Vessels

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

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

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

7.6.2 Visit and Search of Merchant Vessels by Military Aircraft

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

7.6.3 Visit and Search of Civilian Aircraft by Military Aircraft

The right of a belligerent military aircraft to conduct visit and search of a civilian aircraft to ascertain its true identity (enemy or neutral), the nature of its cargo (contraband or "free goods"), and the manner of its employment (innocent or hostile) is now well established in the law of armed conflict. If, upon interception outside of neutral airspace, reasonable grounds exist for suspecting that the intercepted civilian aircraft is carrying contraband cargo or that, despite its neutral markings, it is, in fact, enemy, it 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 (1) warrants that the neutral civilian aircraft is not carrying contraband cargo and (2) provides to the intercepting belligerent military aircraft upon request such information as to the character and cargo of the neutral civilian aircraft as would otherwise be obtained in visit and search.

7.7 BLOCKADE

7.7.1 General

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

7.7.2 Criteria for Blockades

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

7.7.2.1 Establishment

A blockade must be established by the government of the belligerent nation. This is usually accomplished by a declaration of the belligerent government or by the commander of the blockading force acting on behalf of the

belligerent government. The declaration should include, as a minimum, the date the blockade is to begin, its geographic limits, and the grace period granted neutral vessels and aircraft to leave the area to be blockaded.

7.7.2.2 Notification

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

7.7.2.3 Effectiveness

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

7.7.2.4 Impartiality

A blockade must be applied impartially to the vessels and aircraft of all nations. Discrimination by the blockading belligerent in favor of or against the vessels and aircraft of particular nations, including those of its own or those of an allied nation, 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 nations retain the right to engage in neutral commerce that does not involve trade or communications originating in or destined for the blockaded area. A blockade is prohibited if the sole purpose is to starve the civilian population or to deny it other objects essential for its survival.

7.7.3 Special Entry and Exit Authorization

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

7.7.4 Breach and Attempted Breach of Blockade

Breach of blockade is the passage of a vessel or aircraft through a blockade without special entry or exit authorization from the blockading belligerent. Attempted breach of blockade occurs from the time a vessel or aircraft leaves a port or airfield with the intention of evading the blockade, and for vessels exiting the blockaded area, continues until the voyage is completed. Knowledge of the existence of the blockade is essential to the offenses of breach of blockade and attempted breach of blockade. Knowledge may be presumed once a blockade has been declared and appropriate notification provided to affected governments. It is immaterial that the vessel or aircraft is at the time of interception bound for neutral territory, if its ultimate destination is the blockaded area. There is a presumption of attempted breach of blockade where vessels or aircraft are bound for a neutral port or

airfield serving as a point of transit to the blockaded area. (Capture of such vessels is discussed in paragraph 7.10.)

7.7.5 Contemporary Practice

The criteria for valid blockades, as set out above in paragraph 7.7.2, are for the most part customary in nature, having derived their definitive form through the practice of maritime powers during the nineteenth 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 nations to carry out neutral commerce with the least possible interference from belligerent forces. The law of blockade is, therefore, premised on a system of controls designed to effect only a limited interference with neutral trade. This was traditionally accomplished by a relatively “close-in” cordon of surface warships stationed in the immediate vicinity of the blockaded area.

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

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

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

Within the immediate area or vicinity of naval operations, to ensure proper battle space management and self-defense objectives, a belligerent may establish special restrictions upon the activities of neutral vessels and aircraft and may prohibit altogether such vessels and aircraft from entering the area. The immediate area or vicinity of naval operations is that area within which hostilities are taking place or belligerent forces are actually operating. A belligerent may not, however, purport to deny access to neutral nations, or to close an international strait to neutral shipping, pursuant to this authority unless another route of similar convenience remains open to neutral traffic. (An example that fits this pattern—though the notice did not specifically refer to belligerent control of the immediate area of naval operations as the legal rationale—is provided by HYDROLANT 597/03, March 20, 2003, at Appendix A.)

The commanding officer of a belligerent warship may exercise control over the communication of any neutral merchant vessel or civil aircraft whose presence in the immediate area of naval operations might otherwise endanger or jeopardize those operations. A neutral merchant ship or civil aircraft within that area that fails to conform to a belligerent’s directions concerning communications may thereby assume enemy character and risk being fired upon or captured. Legitimate distress communications should be permitted to the extent that the success of the operation is not prejudiced thereby. Any transmission to an opposing belligerent of information concerning military operations or military forces is inconsistent with the neutral duties of abstention and impartiality and renders the neutral vessel or aircraft liable to capture or destruction.

7.9 EXCLUSION ZONES AND WAR ZONES

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

Exclusion or war zones established by belligerents in the context of limited warfare that has characterized post-World War II belligerency at sea, have been justified, at least in part, as reasonable, albeit coercive, measures to contain the geographic area of the conflict or to keep neutral shipping at a safe distance from areas of actual or potential hostilities. To the extent that such zones serve to warn neutral vessels and aircraft away from belligerent activities and thereby reduce their exposure to collateral damage and incidental injury (see paragraph 8.3.1), and to the extent that they do not unreasonably interfere with legitimate neutral commerce, they are undoubtedly lawful; however, the establishment of such a zone does not relieve the proclaiming belligerent of the obligation under the law of armed conflict to refrain from attacking vessels and aircraft that do not constitute lawful targets. In short, an otherwise protected platform does not lose that protection by crossing an imaginary line drawn in the ocean by a belligerent.

On 20 March 2003, the United States announced a special warning, asserting general belligerent rights in the course of the maritime phase of Operation Iraqi Freedom. Though not announced as an exclusion zone asserting belligerent rights in a specific area, the special warning served to advise neutral shipping of the heightened application of unit self-defense within the specified general regions. A copy of this special warning is provided at Appendix B. On 3 May 2004, after terrorists conducted suicide attacks in small boats against Iraqi oil terminals, the United States announced warning zones around a number of oil terminals in the Persian Gulf. It also announced exclusion zones around two oil terminals and the suspension of the right of innocent passage around those oil terminals within Iraq’s territorial sea. A copy of this announcement is provided at Appendix C.

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

7.10 CAPTURE OF NEUTRAL VESSELS AND AIRCRAFT

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

1. Avoiding an attempt to establish identity
2. Resisting visit and search
3. Carrying contraband
4. Breaching or attempting to breach blockade

5. Presenting irregular or fraudulent papers; lacking necessary papers; or destroying, defacing, or concealing papers
6. Violating regulations established by a belligerent within the immediate area of naval operations
7. Carrying personnel in the military or public service of the enemy
8. Communicating information in the interest of the enemy.

Captured vessels and aircraft are sent to a port or airfield under belligerent jurisdiction as a prize for adjudication by a prize court. Ordinarily, a belligerent warship will place a prize master and prize crew on board a captured vessel for this purpose. Should that be impracticable, the prize may be escorted into port by a belligerent warship or military aircraft. In the latter circumstances, the prize must obey the instructions of its escort or risk forcible measures. OPNAVINST 3120.32C, Standard Organization and Regulations of the U.S. Navy, Article 630.23 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, therefore, should not order such destruction without being entirely satisfied that the prize can neither be sent into a belligerent port or airfield nor, in his opinion, properly be released. Should it become necessary that the prize be destroyed, the capturing officer must provide for the safety of the passengers and crew. In that event, all documents and papers relating to the prize should be saved. If practicable, the personal effects of passengers should also be safeguarded.

7.10.2 Personnel of Captured Neutral Vessels and Aircraft

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

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

7.11 BELLIGERENT PERSONNEL INTERNED BY A NEUTRAL GOVERNMENT

International law recognizes that neutral territory, being outside the region of war, offers a place of asylum to individual members of belligerent forces and as a general rule requires the neutral government concerned to prevent the return of such persons to their own forces. The neutral nation 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. Belligerent civilians taken on board a neutral warship or military aircraft in such circumstances are to be repatriated.

With respect to aircrews of nonmedical, belligerent aircraft that land in neutral territory, whether intentionally or inadvertently, the neutral nation must intern them.

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, and unnecessary suffering (discussed in Chapter 5)—are the basis for the rules governing targeting decisions. The law requires that only military objectives be attacked, but permits the use of sufficient force to destroy those objectives. At the same time, excessive collateral damage must be avoided to the extent possible and, consistent with mission accomplishment and the security of the force, unnecessary human suffering prevented. The law of targeting, therefore, requires that all reasonable precautions must be taken to ensure that only military objectives are targeted so that noncombatants, civilians, and civilian objects are spared as much as possible from the ravages of war. Note that these principles, and their application to specific situations, presuppose the use of kinetic force and are addressed in paragraphs 8.2 through 8.10.2.3. Information operations, which include targeting with non-kinetic force such as psychological operations and computer network attack, are addressed in paragraph 8.11.

8.2 MILITARY OBJECTIVES

Only military objectives may be attacked. Military objectives are combatants (see Chapter 5), military equipment and facilities (except medical and religious equipment and facilities), and those objects which, by their nature, location, purpose, or use, effectively contribute to the enemy's war-fighting 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 advantage may involve a variety of considerations, including the security of the attacking force.

8.2.1 Lawful Combatants

Lawful combatants (see paragraph 5.4.1.1) are subject to attack at anytime during hostilities unless they are *hors de combat* (see paragraph 8.2.3).

8.2.2 Unlawful Combatants

Unlawful combatants (see paragraph 5.4.1.2) who are members of forces or parties declared hostile by competent authority are subject to attack at anytime during hostilities unless they are *hors de combat* (see paragraph 8.2.3).

Unlawful combatants who are not members of forces or parties declared hostile but who are taking a direct part in hostilities may be attacked while they are taking a direct part in hostilities, unless they are *hors de combat*. Direct participation in hostilities must be judged on a case-by-case basis. Some examples include taking up arms or otherwise trying to kill, injure, or capture enemy personnel or destroy enemy property. Also, civilians serving as lookouts or guards, or intelligence agents for military forces may be considered to be directly participating in hostilities. 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 and attire, and other information available at the time.

8.2.3 Hors de combat

Combatants, whether lawful or unlawful, who are *hors de combat* are those who cannot, do not, or cease to participate in hostilities due to wounds, sickness, shipwreck, surrender, or capture. They may not be intentionally or indiscriminately attacked. They may be detained (see Chapter 11 on treatment of detainees).

8.2.3.1 Airborne Forces versus Parachutists in Distress

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

8.2.3.2 Shipwrecked persons

Shipwrecked persons do not include combatant personnel engaged in amphibious, underwater, or airborne attacks who are proceeding ashore, unless they are clearly in distress and require assistance. In the latter case they may qualify as shipwrecked persons only if they cease all active combat activity and the enemy has an opportunity to recognize their condition of distress.

8.2.3.3 Surrender

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

8.2.4 Noncombatants

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

8.2.4.1 Medical personnel

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

8.2.4.2 Religious personnel

Chaplains attached to the armed forces are entitled to respect and protection. Chaplains should display the distinctive emblem of the Red Cross, Red Crescent, or Red Crystal, when engaged in their respective religious activities. Failure to wear the distinctive emblem does not, by itself, justify attacking a chaplain, recognized as such. They may be detained (see Chapter 11 for treatment of detainees).

8.2.5 Objects

Proper objects of attack include, but are not limited to, such military objectives as enemy warships and military aircraft, naval and military auxiliaries, naval and military bases ashore, warship construction and repair facilities, military depots and warehouses, petroleum/oils/lubricants storage areas, docks, port facilities, harbors, bridges, airfields, military vehicles, armor, artillery, ammunition stores, troop concentrations and embarkation points, lines of communication and other objects used to conduct or support military operations. Proper objects of attack also include geographic features, such as a mountain pass, and buildings and facilities that provide administrative and personnel support for military and naval operations such as barracks, communications and command and control facilities, headquarters buildings, mess halls, and training areas.

Proper objects of attack also include enemy lines of communication, rail yards, bridges, rolling stock, barges, lighters, industrial installations producing war-fighting products, and power generation plants. Economic objects of the enemy that indirectly but effectively support and sustain the enemy's war-fighting capability may also be attacked.

8.3 CIVILIANS AND CIVILIAN OBJECTS

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

8.3.1 Incidental Injury and Collateral Damage

It is not unlawful to cause incidental injury to civilians, or collateral damage to civilian objects, during an attack upon a legitimate military objective. The principle of proportionality requires that the anticipated incidental injury or collateral damage must not, however, 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 him. Similarly, the commander must decide, in light of all the facts known or reasonably available to him, including the need to conserve resources and complete the mission successfully, whether to adopt an alternative method of attack, if reasonably available, to reduce civilian casualties and damage.

8.3.2 Civilians in or on Military Objectives

A party to an armed conflict has an affirmative duty to remove civilians under its control (as well as the wounded, sick, shipwrecked, and prisoners of war) from the vicinity of objects of likely enemy attack. Deliberate use of civilians to shield military objectives from enemy attack is prohibited. Although the principle of proportionality underlying the concept of collateral damage continues to apply in such cases, the presence of civilians within or adjacent to a legitimate military objective does not preclude attack of it. Such military objectives may be lawfully targeted and destroyed as needed for mission accomplishment. In such cases, responsibility for the injury and/or death of such civilians, if any, falls on the belligerent so employing them.

The presence of civilian workers, such as technical representatives aboard a warship or employees in a munitions factory, in or on a military objective, does not alter the status of the military objective. These civilians may be excluded from the proportionality analysis.

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. While the law of armed conflict is not fully developed in such cases, such persons may also be considered to be taking a direct part in hostilities or contributing directly to the enemy’s warfighting/war-sustaining capability, and may be excluded from the proportionality analysis. Attacks under such circumstances likely raise political, strategic, and operational issues that commanders should identify and consider when making targeting decisions.

8.4 ENVIRONMENTAL CONSIDERATIONS

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

8.5 DISTINCTION BETWEEN MILITARY OBJECTIVES AND PROTECTED PERSONS AND OBJECTS

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

8.5.1 Protective Signs and Symbols

8.5.1.1 The Red Cross, Red Crescent, and Red Crystal

A red cross on a white field (Figure 8-1a) is the internationally accepted symbol of protected medical and religious persons and activities. Moslem countries utilize a red crescent on a white field for the same purpose (Figure 8-1b). The third Protocol to the Geneva Conventions authorizes an additional distinctive emblem, a red crystal (Figure 8-1c). The conditions for use of and respect for the third Protocol emblem are identical to those for the red cross and red crescent. A red lion and sun on a white field, once employed by Iran, is no longer used. Israel employs a red six-pointed star, which it reserved the right to use when it ratified the 1949 Geneva Conventions (Figure 8-1d). The United States has not ratified the third Protocol nor agreed that the Israeli six-pointed star is a protected symbol. Nevertheless, all medical and religious persons or objects recognized as being such are to be treated with care and protection.

8.5.1.2 Other Protective Symbols

Other protective symbols specially recognized by international law include an oblique red band on a white background to designate hospital zones and safe havens for noncombatants (Figure 8-1e). Prisoner-of-war camps are marked by the letters “PW” or “PG” (Figure 8-1f); civilian internment camps with the letters “IC” (Figure 8-1g). 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 8-1h). In the western hemisphere, a red circle with triple red spheres in the circle, on a white background (the “Roerich Pact” symbol) is used for that purpose (Figure 8-1i).

Two protective symbols established by the 1977 Protocol I Additional to the Geneva Conventions of 1949, to which the United States is not a party, are described as follows for informational purposes only. Works and

installations containing forces potentially dangerous to the civilian population, such as dams, dikes, and nuclear power plants, may be marked by three bright orange circles of equal size on the same axis (Figure 8-1j). Civil defense facilities and personnel may be identified by an equilateral blue triangle on an orange background (Figure 8-1k).

8.5.1.3 The 1907 Hague Convention Symbol

A protective symbol of special interest to naval officers is the sign established by the 1907 Hague Convention Concerning Bombardment by Naval Forces in Time of War (Hague IX). The 1907 Hague symbol is used to mark sacred edifices, hospitals, historic monuments, cultural buildings, and other structures protected from naval bombardment. The symbol consists of a rectangular panel divided diagonally into two triangles, the upper black, the lower white (Figure 8-1l).

8.5.1.4 The 1954 Hague Convention Symbol

A more recent protective symbol was established by the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict. Cultural sites that are of artistic, historical, or archaeological interest, whether religious or secular, may be marked with the symbol to facilitate recognition. The symbol may be used alone or repeated three times in a triangular formation. It takes the form of a shield, pointed below, consisting of a royal-blue square, one of the angles of which forms the point of the shield, and of a royal-blue triangle above the square, the space on either side being taken up by a white triangle (Figure 8-1h).

8.5.1.5 The White Flag

Customary international law recognizes the white flag as symbolizing a request to cease-fire, negotiate, or surrender. Enemy forces displaying a white flag should be permitted an opportunity to surrender or to communicate a request for cease-fire or negotiation.

8.5.1.6 Permitted Use

Protective signs and symbols may be used only to identify personnel, objects, and activities entitled to the protected status that they designate. Any other use is forbidden by international law.

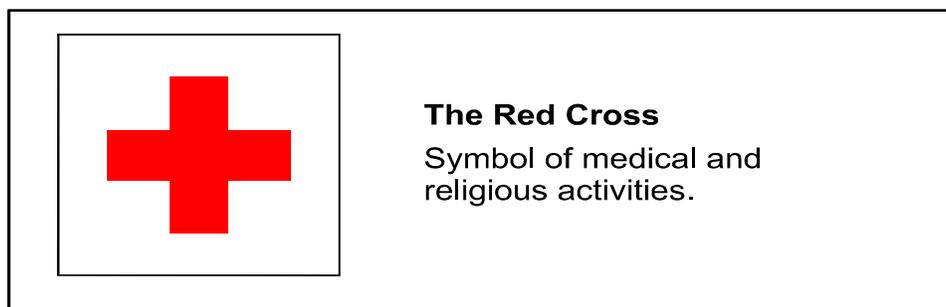


Figure 8-1a. The Red Cross

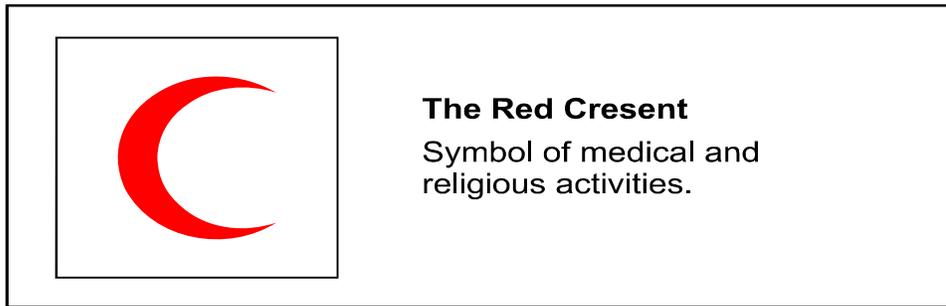


Figure 8-1b. The Red Crescent

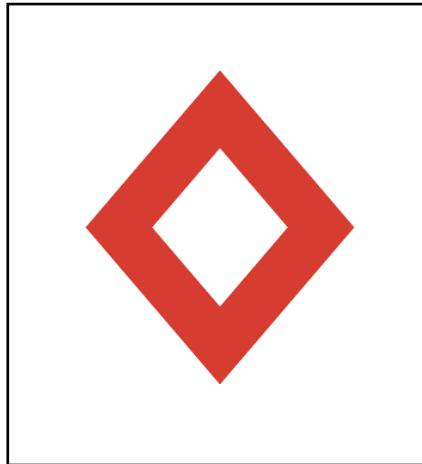


Figure 8-1c. Red Crystal, symbol of medical and religious activities



Figure 8-1d. The Red Star of David

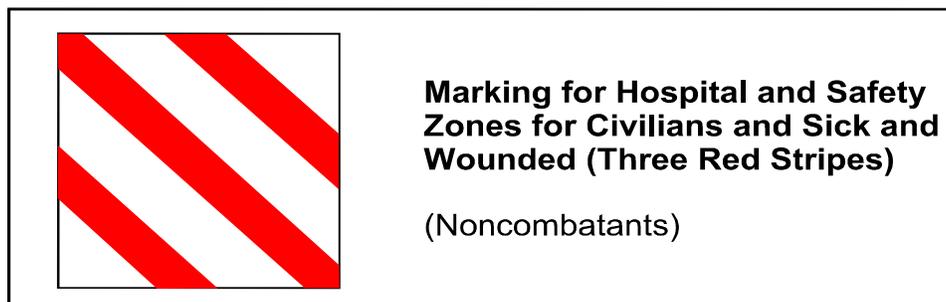


Figure 8-1e. Three Red Stripes

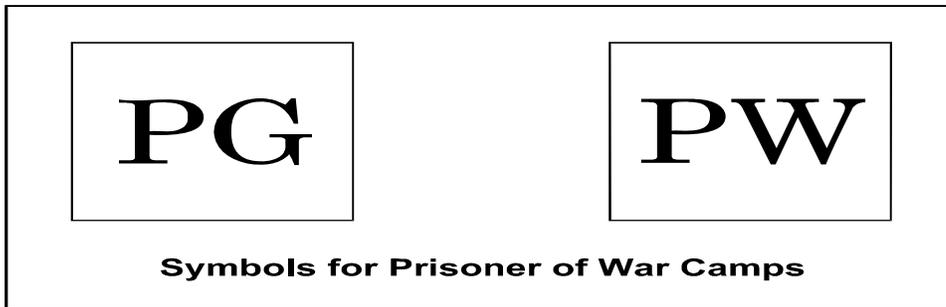


Figure 8-1f. Symbols for Prisoner of War Camps



Figure 8-1g. Civilian Internment Camps

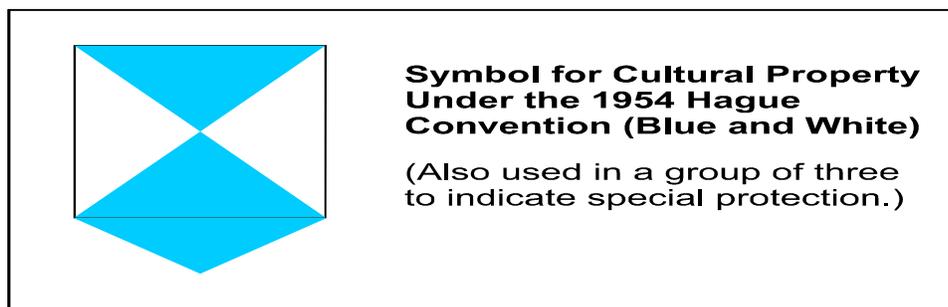


Figure 8-1h. Cultural Property under the 1954 Hague Convention



Figure 8-1i. The Roerich Pact

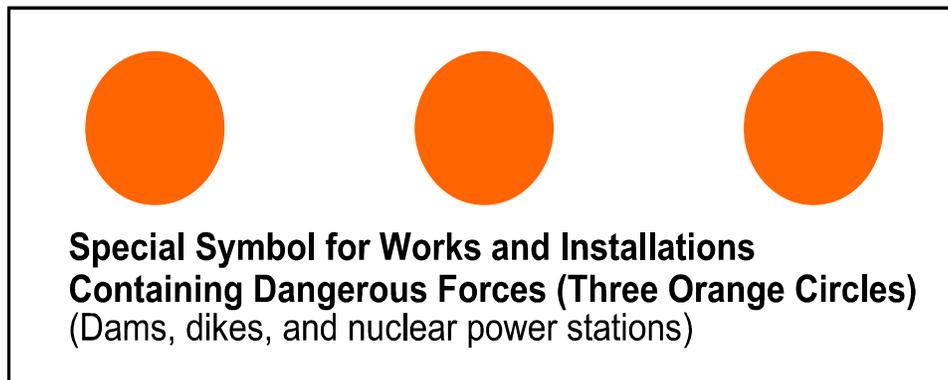


Figure 8-1j. Works and Installations Containing Dangerous Forces

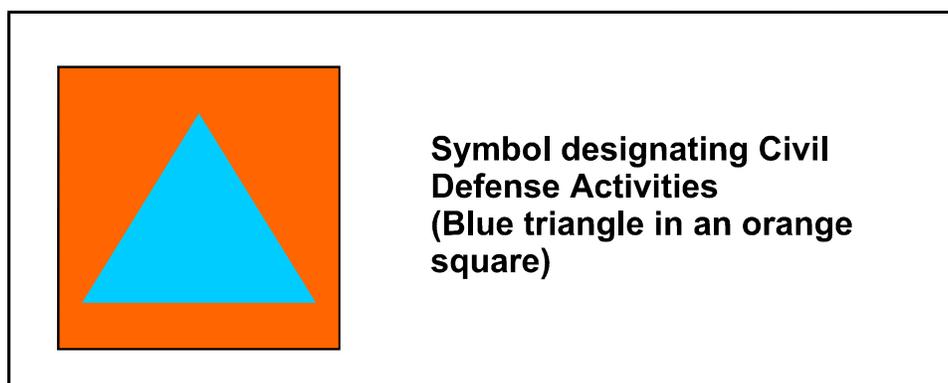


Figure 8-1k. Civil Defense Activities

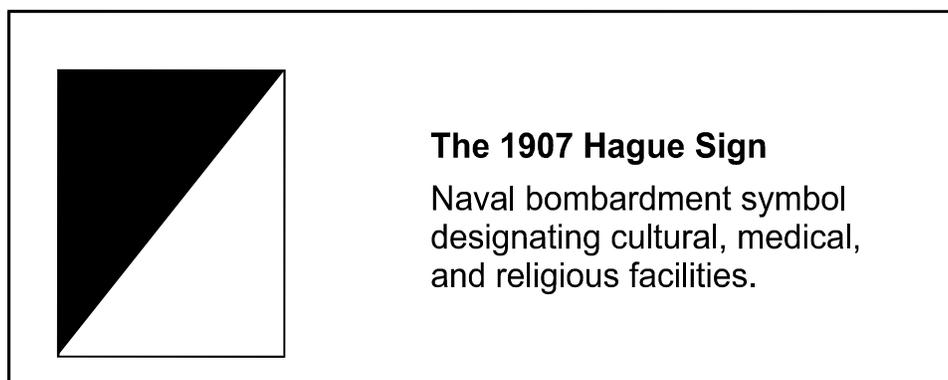


Figure 8-1l. The 1907 Hague Sign

8.5.1.7 Failure to Display

When objects or persons are readily recognizable as being entitled to protected status, the lack of protective signs and symbols does not render an otherwise protected object or person a legitimate target. Failure to utilize internationally agreed protective signs and symbols may, however, subject protected persons and objects to the risk of not being recognized by the enemy as having protected status.

8.5.2 Protective Signals

Three optional methods of identifying medical units and transports using protective signals have been created internationally. United States hospital ships and medical aircraft do not use these signals, but other nations may.

8.5.2.1 Radio Signals

For the purpose of identifying medical transports by radio telephone, the words PAN PAN are repeated three times followed by the word “medical” pronounced as in the French MAY-DEE-CAL. Medical transports are identified in radio telegraph by three repetitions of the group XXX followed by the single group YYY.

8.5.2.2 Visual Signals

On aircraft, the flashing blue light may be used only on medical aircraft. Hospital ships, coastal rescue craft, and medical vehicles may also use the flashing blue light. Only by special agreement between the parties to the conflict may its use be reserved exclusively to those forms of surface medical transport.

8.5.2.3 Electronic Identification

The identification and location of medical ships and craft may be effected by means of appropriate standard maritime radar transponders as established by special agreement to the parties to the conflict. The identification and location of medical aircraft may be effected by use of the secondary surveillance radar (SSR) specified in Annex 10 to the Chicago Convention. The SSR 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 nations 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 through rules establishing lawful targets of attack. For that purpose, all enemy vessels and aircraft fall into one of three general classes: warships and military aircraft, merchant vessels and civilian aircraft, and exempt vessels and aircraft.

8.6.1 Enemy Warships and Military Aircraft

Enemy warships and military aircraft, including naval and military auxiliaries, are subject to attack, destruction, or capture anywhere beyond neutral territory. It is forbidden, however, to target an enemy warship or military aircraft that in good faith unambiguously and effectively conveys a timely offer of surrender. Once an enemy warship has clearly indicated a readiness to surrender, such as by hauling down her flag, by hoisting a white flag, by surfacing (in the case of submarines), by stopping engines and responding to the attacker’s signals, or by taking to lifeboats, the attack must be discontinued. Disabled enemy aircraft in air combat are frequently pursued

to destruction because of the impossibility of verifying their true status and inability to enforce surrender. Although disabled, the aircraft may or may not have lost its means of combat. Moreover, it still may represent a valuable military asset. Accordingly, surrender in air combat is not generally offered. However, if surrender is offered in good faith so that circumstances do not preclude enforcement, it must be respected. Officers and crews of captured or destroyed enemy warships and military aircraft should be detained. (See paragraph 8.2.3.3 and Chapter 11 for further discussion of surrender and treatment of detainees, respectively.) As far as military exigencies permit, after each engagement all possible measures should be taken without delay to search for and collect the shipwrecked, wounded, and sick and to recover the dead.

Prize procedure is not used for captured enemy warships because their ownership vests immediately in the captor's government by the fact of capture.

8.6.2 Enemy Merchant Vessels and 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. Documents and papers relating to the prize should be safeguarded and, if practicable, the personal effects of passengers should be saved. Every case of destruction of a captured enemy prize should be reported promptly to higher command.

Officers and crews of captured enemy merchant ships and civilian aircraft may be detained. (See paragraph 8.2.3.3 and Chapter 11 for further discussion of surrender and treatment of detainees, respectively.) Other enemy nationals on board such captured ships and aircraft as private passengers are subject to the discipline of the captor. Nationals of a neutral nation on board captured enemy merchant vessels and civilian aircraft should not be detained unless they have participated in acts of hostility or resistance against the captor or are otherwise in the service of the enemy.

8.6.2.2 Destruction

Prior to World War II, both customary and conventional international law prohibited the destruction of enemy merchant vessels by surface warships unless the safety of passengers and crew was first assured. This requirement did not apply, however, if the merchant vessel engaged in active resistance to capture or refused to stop when ordered to do so. Specifically, the London Protocol of 1936, to which almost all of the belligerents of World War II expressly acceded, provides in part that:

In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board.

During World War II, the practice of attacking and sinking enemy merchant vessels by surface warships and submarines without prior warning and without first providing for the safety of passengers and crew was widespread on both sides. Rationale for these apparent departures from the agreed rules of the 1936 London Protocol varied. Initially, such acts were justified as reprisals against illegal acts of the enemy. As the war progressed, however, merchant vessels were regularly armed and convoyed, participated in intelligence collection, and were otherwise incorporated directly or indirectly into the enemy's war-fighting/war-sustaining effort. Consequently, enemy merchant vessels were widely regarded as legitimate military targets subject to destruction on sight.

Although the rules of the 1936 London Protocol continue to apply to surface warships, they must be interpreted in light of current technology, including satellite communications, over-the-horizon (OTH) weapons, and antiship missile systems, as well as the customary practice of belligerents that evolved during and following World War II. Accordingly, enemy merchant vessels may be attacked and destroyed by surface warships, either with or without prior warning, in any of the following circumstances:

1. 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. If armed with systems or weapons beyond that required for self-defense against terrorist, piracy, or like threats
5. If incorporated into, or assisting in any way, the intelligence system of the enemy's armed forces
6. If acting in any capacity as a naval or military auxiliary to an enemy's armed forces
7. If integrated into the enemy's war-fighting/war-sustaining effort and compliance with the rules of the 1936 London Protocol would, under the circumstances of the specific encounter, subject the surface warship to imminent danger or would otherwise preclude mission accomplishment.

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

8.6.3 Enemy Vessels and Aircraft Exempt from Destruction or Capture

Certain classes of enemy vessels and aircraft are exempt under the law of naval warfare from capture or destruction provided they are innocently employed in their exempt category. These specially protected vessels and aircraft must not take part in the hostilities, must not hamper the movement of combatants, must submit to identification and inspection procedures, and may be ordered out of harm's way. These specifically exempt vessels and aircraft include:

1. Vessels and aircraft designated for and engaged in the exchange of prisoners of war (cartel vessels or aircraft).
2. Properly designated and marked hospital ships, medical transports, and medical aircraft. Names and descriptions of hospital ships must be provided to the parties to the conflict not later than ten days before they are first employed. Thereafter, hospital ships must be used exclusively to assist, treat, and transport the wounded, sick, and shipwrecked. All exterior surfaces of hospital ships are painted white and the distinctive emblem of the red cross or red crescent is displayed on the hull and on horizontal surfaces. In the actual employment of hospital ships, the application of some previously well-established principles has adapted to reflect the realities of modern circumstances. Traditionally, hospital ships could not be armed, although crew members could carry light individual weapons for the maintenance of order, for their own defense and that of the wounded, sick, and shipwrecked. However, due to the changing threat environment in which the red cross symbol is not recognized by various hostile groups and actors as indicating protected status, the United States views the manning of hospital ships with defensive weapons systems, such as anti-missile defense systems or crew-served weapons to defend against small boat threats as prudent AT/TP 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. Further, Article 34, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, provides that hospital ships may not use or possess "secret codes" as means of communication so that belligerents could verify that hospital ships' communications systems were being used only in support of their humanitarian function and not as a means of

communicating information that would be harmful to the enemy. However, subsequent technological advances in encryption and satellite navigation, while recognized as problematic, have not been specifically addressed by treaty. As a practical matter, modern navigational technology requires that the traditional rule prohibiting “secret codes” be understood to not include modern encryption communications systems. However, such systems must not be used for military purposes in any way harmful to a potential adversary. Medical aircraft, whether civilian or military, and whether permanently or temporarily so employed, must be used exclusively for the removal and transportation of the wounded, sick, and shipwrecked, or for the transportation of medical personnel or medical equipment. They may not be armed nor may they be reconnaissance-configured. Medical aircraft should be clearly marked with the emblem of the red cross or red crescent. Failure to so mark them risks having them not recognized as protected platforms. Hospital ships, medical transports, and medical aircraft utilized solely for medical purposes and recognized as such, whether or not marked with the appropriate emblem, are not to be deliberately attacked.

3. Vessels charged with religious, nonmilitary scientific or philanthropic missions. (Vessels engaged in the collection of scientific data of potential military application are not exempt.)
4. Vessels and aircraft guaranteed safe conduct by prior arrangement between the belligerents.
5. 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.
6. 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 nations 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. For example, the utilization by North Vietnam of innocent-appearing small coastal fishing boats as logistic craft in support of military operations during the Vietnam conflict was in violation of this obligation.

8.7 SUBMARINE WARFARE

The law of armed conflict imposes essentially the same rules on submarines as apply to surface warships. Submarines may employ their conventional weapons systems to attack enemy surface, subsurface, or airborne targets wherever located beyond neutral territory. Enemy warships and military aircraft, including naval and military auxiliaries, may be attacked and destroyed without warning. Rules applicable to surface warships regarding enemy ships that have surrendered in good faith, or that have indicated clearly their intention to do so, apply as well to submarines. To the extent that military exigencies permit, submarines are also required to search for and collect the shipwrecked, wounded, and sick following an engagement. If such humanitarian efforts would subject the submarine to undue additional hazard or prevent it from accomplishing its military mission, the location of possible survivors should be passed at the first opportunity to a surface ship, aircraft, or shore facility capable of rendering assistance.

8.7.1 Interdiction of Enemy Merchant Shipping by Submarines

The rules of naval warfare pertaining to submarine operations against enemy merchant shipping constitute one of the least developed areas of the law of armed conflict. Although the submarine’s effectiveness as a weapons system is dependent upon its capability to remain submerged (and thereby undetected) and despite its vulnerability when surfaced, the London Protocol of 1936 (paragraph 8.6.2.2) makes no distinction between

submarines and surface warships with respect to attacks upon enemy merchant shipping. The London Protocol specifies that except in case of persistent refusal to stop when ordered to do so, or in the event of active resistance to capture, a warship “whether surface vessel or submarine” may not destroy an enemy merchant vessel “without having first placed passengers, crew and ship’s papers in a place of safety.” The impracticality of imposing upon submarines the same targeting constraints as burden surface warships is reflected in the practice of belligerents of both sides during World War II when submarines regularly attacked and destroyed without warning enemy merchant shipping. As in the case of such attacks by surface warships, this practice was justified either as a reprisal in response to unlawful acts of the enemy or as a necessary consequence of the arming of merchant vessels, of convoying, and of the general integration of merchant shipping into the enemy’s war-fighting/war-sustaining effort.

The United States considers that the London Protocol of 1936, coupled with the customary practice of belligerents during and following World War II, imposes upon submarines the responsibility to provide for the safety of passengers, crew, and ship’s papers before destruction of an enemy merchant vessel unless:

1. The enemy merchant vessel persistently refuses to stop when duly summoned to do so.
2. It actively resists visit and search or capture.
3. It is sailing under convoy of enemy warships or enemy military aircraft.
4. It is armed with systems or weapons beyond that required for self-defense against terrorism, piracy, or like threats.
5. It is incorporated into, or is assisting in any way the enemy’s military intelligence system.
6. It is acting in any capacity as a naval or military auxiliary to an enemy’s armed forces.
7. The enemy has integrated its merchant shipping into its war-fighting/war-sustaining effort, and compliance with the London Protocol of 1936 would, under the circumstances of the specific encounter, subject the submarine to imminent danger or would otherwise preclude mission accomplishment.

8.7.2 Enemy Vessels and Aircraft Exempt From Submarine Interdiction

The rules of naval warfare regarding enemy vessels and aircraft that are exempt from capture and/or destruction by surface warships also apply to submarines. (See paragraph 8.6.3.)

8.8 AIR WARFARE AT SEA

Military aircraft may employ conventional weapons systems to attack warships and military aircraft, including naval and military auxiliaries, anywhere beyond neutral territory. Enemy merchant vessels and civil aircraft may be attacked and destroyed by military aircraft only under the following circumstances:

1. When persistently refusing to comply with directions from the intercepting aircraft
2. When sailing under convoy of enemy warships or military aircraft
3. When armed with systems or weapons beyond that required for self-defense against terrorism, piracy, or like threats
4. When incorporated into or assisting in any way the enemy’s military intelligence system
5. When acting in any capacity as a naval or military auxiliary to an enemy’s armed forces
6. When otherwise integrated into the enemy’s war-fighting 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. The location of possible survivors should be passed at the first opportunity to a surface vessel, aircraft, or shore facility capable of rendering assistance.

Historically, instances of surrender of enemy vessels to aircraft are rare. If, however, an enemy has surrendered in good faith, under circumstances that do not preclude enforcement of the surrender, or has clearly indicated an intention to do so, the enemy must not be attacked.

The rules of naval warfare regarding enemy vessels and aircraft that are exempt from capture and/or destruction by surface warships also apply to military aircraft. (See paragraph 8.6.3.)

8.9 BOMBARDMENT

For purposes of this publication, the term “bombardment” refers to naval and air bombardment of enemy targets on land with conventional weapons, including naval guns, rockets and missiles, and air-delivered ordnance. Land warfare is discussed in paragraph 8.10. Engagement of targets at sea is discussed in paragraphs 8.6 to 8.8.

8.9.1 General Rules

The United States is a party to Hague Convention No. IX (1907) Respecting Bombardment by Naval Forces in Time of War. That convention establishes the general rules of naval bombardment of land targets. These rules have been further developed by customary practice in World Wars I and II, Vietnam, the Falkland/Malvinas Conflict, the Arabian Gulf, and Operations Enduring Freedom and Iraqi Freedom. Underlying these rules are the broad principles of the law of armed conflict that belligerents are forbidden to make noncombatants and civilians the target of direct attack, that superfluous injury to, and unnecessary suffering of, combatants are to be avoided, and that wanton destruction of property is prohibited. To give effect to these concepts, the following general rules governing bombardment must be observed.

8.9.1.1 Destruction of Civilian Habitation

The wanton or deliberate destruction of areas of concentrated civilian habitation, including cities, towns, and villages, is prohibited. A military objective within a city, town, or village may, however, be bombed if required for the submission of the enemy with the minimum expenditure of time, life, and physical resources. The anticipated incidental injury to civilians, or collateral damage to civilian objects, must not be excessive in light of the military advantage anticipated by the attack. (See paragraphs 8.3, 8.3.1, and 8.3.2.)

8.9.1.2 Terrorization

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

8.9.1.3 Undefended Cities or Agreed Demilitarized Zones

Belligerents are forbidden to bombard a city or town that is undefended and that is open to immediate entry by their own or allied forces. A city or town behind enemy lines is, by definition, neither undefended nor open, and military targets therein may be destroyed by bombardment. An agreed demilitarized zone is also exempt from bombardment.

8.9.1.4 Medical Facilities

Medical establishments and units (both mobile and fixed), medical vehicles, and medical equipment and stores may not be deliberately bombed. Belligerents are required to ensure that such medical facilities are, as far as possible, situated in such a manner that attacks against military targets in the vicinity do not imperil their safety. If medical facilities are used for military purposes inconsistent with their humanitarian mission, and if appropriate warnings that continuation of such use will result in loss of protected status are unheeded, the facilities become subject to attack. The distinctive medical emblem, a red cross, red crescent, or red square on edge is to be clearly

displayed on medical establishments and units in order to identify them as entitled to protected status. Any object recognized as being a medical facility may not be attacked whether or not marked with a protective symbol.

8.9.1.5 Special Hospital Zones and Neutralized Zones

When established by agreement between the belligerents, hospital zones and neutralized zones are immune from bombardment in accordance with the terms of the agreement concerned.

8.9.1.6 Religious, Cultural, and Charitable Buildings and Monuments

Buildings devoted to religion, the arts, or charitable purposes; historic monuments; and other religious, cultural, or charitable facilities should not be bombarded, provided they are not used for military purposes. It is the responsibility of the local inhabitants to ensure that such buildings and monuments are clearly marked with the distinctive emblem of such sites—a rectangle divided diagonally into two triangular halves, the upper portion black and the lower white. (See paragraph 8.5.1.4.)

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. Conversely, installations containing such dangerous forces that are used by belligerents to shield or support military activities are not so protected. (See paragraph 8.5.1.2.)

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.

8.10 LAND WARFARE

The guidance in this paragraph provides an overview of the basic principles of law governing conflict on land. For a comprehensive treatment of the law of armed conflict applicable to land warfare, see Army Field Manual (FM) 27-10, 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 paragraph 8.1); however, the characteristics of land warfare, often involving intermingled military objectives and civilians and civilian objects, can make the application of targeting decisions more difficult.

8.10.2 Special Protection

Under the law of land warfare, certain persons, places, and objects enjoy special protection against attack. Protection is, of necessity, dependent upon recognition of protected status. Special signs and symbols are employed for that purpose (see paragraph 8.5.1). Failure to display protective signs and symbols does not render an otherwise protected person, place or object a legitimate target if that status is otherwise apparent (see paragraph 8.5.1.7). However, protected persons directly participating in hostilities lose their protected status and may be attacked while so employed. Similarly, misuse of protected places and objects for military purposes renders them subject to legitimate attack during the period of misuse.

8.10.2.1 Protected Status

Protected status is afforded the wounded, sick, and shipwrecked (see paragraph 8.2.3), certain parachutists (see paragraph 8.2.3.1), and detainees (see Chapter 11). Civilians and noncombatants, such as medical personnel and chaplains (see paragraph 8.2.4.1), not taking direct part in hostilities, and interned persons (see paragraph 11.5) also enjoy protected status.

8.10.2.2 Protected Places and Objects

Protected places include undefended cities and towns and agreed demilitarized zones (see paragraph 8.9.1.3), and agreed special hospital zones and neutralized zones (see paragraph 8.9.1.5). Protected objects include historic monuments and structures, works of art, medical facilities and religious, cultural, and charitable buildings and monuments (see paragraph 8.9.1.6).

8.10.2.3 The Environment

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

8.11 INFORMATION OPERATIONS

IO are actions taken to affect adversary information and information systems, while defending one's own information and information systems. There are two major subdivisions within IO: offensive IO and defensive IO. For the purpose of this discussion on targeting considerations, major capabilities to conduct offensive IO are physical attack/destruction, PSYOPs, and CNA. (See JP 3-13, Information Operations, for a broader discussion of this subject.)

8.11.1 General IO Targeting Considerations

Legal analysis of intended wartime targets requires traditional law of war analysis. Offensive IO can target human-decision processes (human factors), the information and information systems used to support decision making (links), and the information and information systems used to process information and implement decisions (nodes). Offensive IO efforts should examine all three target areas to maximize opportunity for success. Human factors include national command authorities, commanders, forces, the populace as a whole, and/or groups within the populace. In all cases, the selection of offensive IO targets must be consistent with U.S. objectives, applicable international conventions, law of war principles, and ROE.

8.11.2 Physical Attack/Destruction

The legal requirement to attack only military objectives and to avoid excessive incidental injury/death and collateral damage to noncombatants, civilians, and civilian objects applies when identifying targets for kinetic attack as part of an offensive IO plan.

8.11.3 Psychological Operations (PSYOPs)

PSYOPs 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. The purpose of psychological operations is to induce or reinforce foreign attitudes and behavior favorable to the originator's objectives. PSYOPs must not be confused with psychological impact. Actions such as shows of force or limited strikes may have a psychological impact, but they are not PSYOPs unless the primary purpose is to influence the emotions, motives, objective reasoning, decision making, or behavior of the foreign target audience. PSYOPs that do not entail the risk of physical injury or death to protected persons or damage to their property may be targeted at noncombatants and civilians.

8.11.4 Computer Network Attack (CNA)

CNA is defined as operations to disrupt, deny, degrade, or destroy information resident in computers and computer networks or the computers and networks themselves. CNA can be accomplished by kinetic and nonkinetic means. In employing nonkinetic means of CNA against a military objective, factors involved in weighing anticipated incidental injury/death to protected persons can include, depending on the target, indirect effects (for example, the anticipated incidental injury/death that may occur from disrupting an electricity-generating plant that supplies power to a military headquarters and to a hospital).

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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 nations engaged in armed conflict to choose methods or means of warfare is not unlimited. This rule of law is expressed in the concept that the employment of weapons, material, and methods of warfare that are designed to cause superfluous injury or unnecessary suffering is prohibited. A corollary concept is that weapons, which by their nature are incapable of being directed specifically against military objectives, and therefore that put civilians and noncombatants at equivalent risk, are forbidden due to their indiscriminate effect. A few weapons, such as poisoned projectiles, are unlawful no matter how employed. Others may be rendered unlawful by alteration such as by coating ammunition with a poison. Still others may be unlawfully employed such as by setting armed contact naval mines adrift so as to endanger innocent as well as enemy shipping. And finally, any weapon may be set to an unlawful purpose when it is directed against noncombatants, civilians, and other protected persons and property. (See Chapter 8.)

Of particular interest to naval officers are law of armed conflict rules pertaining to naval mines, land mines, torpedoes, cluster and fragmentation weapons, delayed-action devices, incendiary weapons, directed-energy devices, and OTH weapons systems. Each of these weapons or systems will be assessed in terms of its potential for causing unnecessary suffering and superfluous injury or indiscriminate effect.

9.1.1 Unnecessary Suffering

Antipersonnel weapons are designed to kill or disable enemy combatants and are lawful notwithstanding the death, pain, and suffering they inflict. Weapons that are designed to cause unnecessary suffering or superfluous injury are, however, prohibited because the degree of pain or injury, or the certainty of death they produce is needlessly or clearly disproportionate to the military advantage to be gained by their use. Poisoned projectiles and small arms ammunition intended to cause superfluous injury or unnecessary suffering fall into this category. Similarly, using materials that are difficult to detect or undetectable by field x-ray equipment, such as glass or clear plastic, as the injuring mechanism in military ammunition is prohibited, since they unnecessarily inhibit the treatment of wounds. Use of such materials as incidental components in ammunition, e.g., as wadding or packing, is not prohibited. Use of .50-caliber weapons against individual enemy combatants does not constitute a violation of this proscription against unnecessary suffering or superfluous injury.

9.1.2 Indiscriminate Effect

Weapons that are incapable of being directed at a military objective are forbidden as being indiscriminate in their effect. Drifting armed contact mines and long-range unguided missiles (such as the German V-1 and V-2 rockets of World War II) fall into this category. A weapon is not indiscriminate simply because it may cause incidental or collateral civilian casualties, provided such casualties are not foreseeably excessive in light of the anticipated military advantage to be gained. 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. Conversely, uncontrolled balloon-borne bombs, such as those released by the Japanese against the west coast of the United States and Canada in World War II, lack that capability of direction and are, therefore, unlawful.

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 1904–5 inflicted great damage on innocent shipping both during and long after that conflict, and led to Hague Convention No. VIII of 1907 Relative to the Laying of Automatic Submarine Contact Mines. The purpose of the Hague rules is to ensure, to the extent practicable, the safety of innocent shipping. These rules require that naval mines be so constructed as to become harmless should they break loose from their moorings or otherwise cease to be under the affirmative control of the belligerents that laid them. The Hague rules also require that shipowners be warned of the presence of mines as soon as military exigencies permit.

Although the Hague provisions date from 1907, they remain the only codified rules specifically addressing the emplacement of conventional naval mines. Technological developments have created weapons systems obviously not contemplated by the drafters of these rules. Nonetheless, the general principles of law embodied in the 1907 Convention continue to serve as a guide to lawful employment of naval mines.

9.2.1 Current Technology

Modern naval mines are versatile and variable weapons. They range from relatively unsophisticated and indiscriminate contact mines to highly technical, target-selective devices with state-of-the-art homing guidance capability. Today's mines may be armed and/or detonated by physical contact, acoustic or magnetic signature, or sensitivity to changes in water pressure generated by passing vessels and may be emplaced by air, surface, or subsurface platforms. For purposes of this publication, naval mines are classified as armed or controlled mines. Armed mines are either emplaced with all safety devices withdrawn, or are armed following emplacement, so as to detonate when preset parameters (if any) are satisfied. Controlled 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 nation may emplace both armed and controlled mines in its own internal waters at any time with or without notification. A nation may also mine its own archipelagic waters and territorial sea during peacetime when deemed necessary for national security purposes. If armed mines are emplaced in archipelagic waters or the territorial sea, appropriate international notification of the existence and location of such mines is required. Because the right of innocent passage can 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 controlled 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 internal waters, territorial seas, or archipelagic waters of another nation in peacetime without that nation's consent. Controlled mines may, however, be emplaced in international waters (i.e., beyond the territorial sea) if they do not unreasonably interfere with other lawful uses of the oceans. The determination of what constitutes an "unreasonable interference" involves a balancing of a number of factors, including the rationale for their emplacement (i.e., the self-defense requirements of the emplacing nation), the extent of the area to be mined, the hazard (if any) to other lawful ocean uses, and the duration of their emplacement. Because controlled 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 that appropriate warning is provided to ships approaching the danger area. All armed mines

must be expeditiously removed or rendered harmless when the imminent danger that prompted their emplacement has passed.

9.2.3 Mining during Armed Conflict

Naval mines may be lawfully employed by parties to an armed conflict subject to the following restrictions:

1. International notification of the location of emplaced mines must be made as soon as military exigencies permit.
2. Mines may not be emplaced by belligerents in neutral waters.
3. Anchored mines must become harmless as soon as they have broken their moorings.
4. Unanchored mines not otherwise affixed or imbedded in the bottom must become harmless within an hour after loss of control over them.
5. The location of minefields must be carefully recorded to ensure accurate notification and to facilitate subsequent removal and/or deactivation.
6. Naval mines may be employed to channelize neutral shipping, but not in a manner to deny transit passage of international straits or archipelagic sea lanes passage of archipelagic waters by such shipping.
7. Naval mines may not be emplaced off the coasts and ports of the enemy with the sole objective of intercepting commercial shipping, but may otherwise be employed in the strategic blockade of enemy ports, coasts, and waterways.
8. Mining of areas of indefinite extent in international waters is prohibited. Reasonably limited barred areas may be established by naval mines, provided neutral shipping retains an alternate route around or through such an area with reasonable assurance of safety.

9.3 LAND MINES

Land mines are munitions placed on, under, or near the ground or other surface area and designed to be detonated or exploded by the passage of time; the presence, proximity or contact of a person or vehicle; or upon command. As with all weapons, to be lawful, land mines must be directed at military objectives. The controlled nature of command-detonated land mines provides effective target discrimination. In the case of noncommand-detonated land mines, however, there exists potential for indiscriminate injury to civilians. Accordingly, special care must be taken when employing land mines to ensure civilians are not indiscriminately injured. International law requires that, to the extent possible, belligerents record the location of all minefields in order to facilitate their removal upon the cessation of hostilities. It is the practice of the United States to record the location of minefields in all circumstances.

The 1997 Ottawa Convention imposes a ban on the use, stockpiling, production, and transfer of antipersonnel land mines (APLs), which are designed to be exploded by the presence, proximity, or contact of a person and that will incapacitate, injure, or kill one or more persons. This prohibition does not apply to command detonated weapons (such as claymore mines in a nontripwire mode) or to antitank/vehicle landmines (AVLs), also referred to as mines other than anti-personnel mines. The United States is not a party to the Ottawa Convention, however, many of its allies and coalition partners are, and this may, depending on the circumstances at the time, impact operational planning regarding shipment, resupply, and placement of landmines.

The United States is a party to Amended Protocol II to the Conventional Weapons Convention. This Protocol does not ban APLs, but imposes requirements on State parties regarding use, maintenance, and removal of mines and minefields. Overall, U.S. policy on landmine use recognizes that both APLs and AVLs are necessary and effective weapons when properly employed, and that the primary danger of incidental and or indiscriminate injury

to noncombatants and civilians from landmines is a factor of whether or not a particular mine (whether APL or AVL) is “persistent” or “nonpersistent” (i.e., designed to either automatically de-arm or self-destruct or capable of being controlled). To that end, it is U.S. policy to:

1. Continue to develop nonpersistent APLs and AVLs that meet or exceed international standards for self-destruction and self-deactivation.
2. Remove nondetectable mines of any type (APL and AVL) in its arsenal.
3. Stockpile persistent APLs only for use by the United States in fulfillment of treaty obligations to the Republic of Korea.
4. Employ persistent AVLs outside the Republic of Korea only when authorized by the president, and only until 2010. After 2010, the United States will not employ persistent landmines.
5. Begin the destruction of those persistent landmines that are not needed for the protection of Korea.

9.4 TORPEDOES

Torpedoes that do not become harmless when they have missed their mark constitute a danger to innocent shipping and are therefore unlawful. All U.S. Navy torpedoes are designed to sink to the bottom and become harmless upon completion of their propulsion run.

9.5 CLUSTER AND FRAGMENTATION WEAPONS

Cluster and 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. These weapons are lawful when used against combatants. 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.

9.6 BOOBY TRAPS AND OTHER DELAYED-ACTION DEVICES

Booby traps and other delayed-action devices are not unlawful, provided they are not designed to cause unnecessary suffering or employed in an indiscriminate manner. Devices that are designed to simulate items likely to attract and injure noncombatants (e.g., medical supplies), and civilians (e.g., toys and trinkets) are prohibited. Attaching booby traps to protected persons or objects, such as the wounded and sick, dead bodies, or medical facilities and supplies, is similarly prohibited. Belligerents are required to record the location of booby traps and other delayed-action devices in the same manner as land mines (see paragraph 9.3).

9.7 EXPLOSIVE REMNANTS OF WAR

Protocol V to the Conventional Weapons Convention defines explosive remnants of war (ERWs) as unexploded ordnance and abandoned explosive ordnance. Unexploded 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 may have been fired, dropped, launched, or projected, and should have exploded but failed to do so. Abandoned explosive ordnance means explosive ordnance that has not been used during an armed conflict, that has been left behind or dumped by a party to an armed conflict, and which is no longer under control of the party that left it behind or dumped it. Abandoned explosive ordnance may or may not have been primed, fused, armed, or otherwise prepared for use.

Nations ratifying the protocol agree to maintain records regarding the use of ERW, and to mark, clear, remove, or destroy ERW in affected territories under their control after the cessation of active hostilities, and as soon as feasible. In territory that they do not control, nations 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. As of the date of this instruction, the United States has not ratified the protocol.

9.8 INCENDIARY WEAPONS

Incendiary devices, such as thermite bombs, flame throwers, napalm, and other incendiary weapons and agents, are lawful weapons. Where incendiary devices are the weapons of choice, they should be employed in a manner that does not cause incidental injury or collateral damage that is excessive in light of the military advantage anticipated by the attack.

9.9 DIRECTED-ENERGY DEVICES

Directed-energy devices, such as laser, high-powered microwave, particle-beam devices, and active-denial systems using millimeter electromagnetic waves are not proscribed by the law of armed conflict. Lasers may be employed as a rangefinder or for target acquisition, despite the possibility of incidental injury to enemy personnel. Laser “dazzlers” designed to temporarily disorient may also be employed. As a matter of policy, U.S. military forces will not employ laser weapons specifically designed to cause permanent blindness.

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.

9.11 NONLETHAL WEAPONS

Weapons explicitly designed and primarily employed so as to incapacitate personnel or materiel, while minimizing fatalities, permanent injury to personnel, and undesired damage to property and the environment, are termed “nonlethal weapons” (NLWs). Unlike conventional (lethal) weapons, which utilize blast, penetration, and fragmentation to destroy their targets, NLWs employ means other than gross physical destruction to accomplish their purpose. The mere fact that one or more types of NLWs is in a unit’s authorized inventory does not mean that the law requires that such weapons be employed prior to using conventional (lethal) weapons. They are intended as another option for commanders to use, as appropriate, in exercising the right and obligation of self-defense and in carrying out assigned missions.

Per DOD Directive 3000.3, Policy for Non-Lethal Weapons:

1. NLWs, doctrine, and concepts of operation shall be designed to reinforce deterrence and expand the range of options available to commanders.
2. NLWs should enhance the capability of U.S. forces to accomplish the following objectives:
 - a. Discourage, delay, or prevent hostile actions.
 - b. Limit escalation.
 - c. Take military action in situations where use of lethal force is not the preferred option.
 - d. Better protect our forces.
 - e. Temporarily disable equipment facilities, and personnel.

3. NLWs should also be designed to help decrease the postconflict costs of reconstruction.
4. The availability of NLWs shall not limit a commander's inherent authority and obligation to use all necessary means available and to take all appropriate action in self-defense. (See paragraphs 4.3.3.5 and 4.3.3.6.)
5. Neither the presence nor the potential effect of NLWs shall constitute an obligation for their employment or a higher standard for employment of force than provided for by applicable law. In all cases, the United States retains the option for immediate use of lethal weapons, when appropriate, consistent with international law.
6. NLWs shall not be required to have a zero probability of producing fatalities or permanent injuries. However, while complete avoidance of these effects is not guaranteed or expected, when properly employed, NLWs should significantly reduce them as compared with physically destroying the same target.
7. NLWs may be used in conjunction with lethal weapon systems to enhance the latter's effectiveness and efficiency in military operations. This shall apply across the range of military operations to include those situations where overwhelming force is employed.

CHAPTER 10

Nuclear, Chemical, and Biological Weapons

10.1 INTRODUCTION

Nuclear, chemical, and biological 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 nations from employing nuclear weapons in armed conflict. In the absence of such an express prohibition, the use of nuclear weapons against enemy combatants and other military objectives is not unlawful. Employment of nuclear weapons is, however, subject to the following principles: the right of the parties to the conflict to adopt means of injuring the enemy is not unlimited; it is prohibited to launch attacks against the civilian population as such; and distinction must be made at all times between combatants and civilians to the effect that the latter be spared as much as possible. Given their destructive potential, the decision to authorize employment of nuclear weapons should emanate from the highest level of government. For the United States, that authority resides solely with the President.

10.2.2 Treaty Obligations

Nuclear weapons are regulated by a number of arms control agreements restricting their development, possession, deployment, and use. Some of these agreements (e.g., the 1963 Limited Test Ban Treaty) may not apply during time of war.

10.2.2.1 Seabed Arms Control Treaty

This multilateral convention prohibits emplacement of nuclear weapons on the seabed and the ocean floor beyond 12 nautical miles from the baseline from which the territorial sea is measured. The prohibition extends to structures, launching installations, and other facilities specifically designed for storing, testing, or using nuclear weapons. This treaty prohibits emplacement of nuclear mines on the seabed and ocean floor or in the subsoil thereof. It does not, however, prohibit the use of nuclear weapons in the water column, provided they are not affixed to the seabed (e.g., nuclear armed depth charges and torpedoes).

10.2.2.2 Outer Space Treaty

This multilateral convention prohibits the placement in earth orbit, installation on the moon and other celestial bodies, and stationing in outer space in any other manner, of nuclear and other weapons of mass destruction. Suborbital missile systems are not included in this prohibition.

10.2.2.3 Antarctic Treaty

The Antarctic Treaty is a multilateral convention designed to ensure that Antarctica, defined to include the area south of 60° south latitude, is used for peaceful purposes only. The treaty prohibits in Antarctica “any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons.” Nuclear explosions are specifically prohibited. Ships

and aircraft at points of discharging or embarking personnel or cargoes in Antarctica are subject to international inspection. Ships operating on and under and aircraft operating over the high seas within the treaty area are not subject to these prohibitions.

10.2.2.4 Treaty of Tlatelolco

This treaty is an agreement among the Latin American countries not to introduce nuclear weapons into Latin America. The treaty does not, however, prohibit Latin American nations from authorizing nuclear-armed ships and aircraft of nonmember nations to visit their ports and airfields or to transit through their territorial sea or airspace. The treaty is not applicable to the means of propulsion of any vessel.

Protocol I to the Tlatelolco treaty is an agreement among non-Latin American nations that exercise international responsibility over territory within the treaty area to abide by the denuclearization provisions of the treaty. France, the Netherlands, the United Kingdom, and the United States are parties to Protocol I. For purposes of this treaty, U.S.-controlled territory in Latin America includes Guantanamo Bay in Cuba, the Virgin Islands, and Puerto Rico. Consequently the United States cannot maintain nuclear weapons in those areas. Protocol I nations retain, however, competence to authorize transits and port visits by ships and aircraft of their own or other armed forces in their Protocol I territories, irrespective of armament, cargo, or means of propulsion.

Protocol II to the Tlatelolco treaty is an agreement among nuclear-armed nations (China, France, Russia, the United Kingdom, and the United States) to respect the denuclearization aims of the treaty, to not use nuclear weapons against Latin American nations that are party to the treaty, and to refrain from contributing to a violation of the treaty by Latin American nations.

10.2.2.5 Limited Test Ban Treaty

This multilateral treaty prohibits the testing of nuclear weapons in the atmosphere, in outer space, and underwater. Over 100 nations are party to the treaty, including Russia, the United Kingdom, and the United States (France and China are not parties). Underground testing of nuclear weapons is not included within the ban.

10.2.2.6 Nonproliferation Treaty

This multilateral treaty obligates nuclear-weapons nations to refrain from transferring nuclear weapons or nuclear weapons technology to nonnuclear-weapons nations, and obligates nonnuclear-weapons nations to refrain from accepting such weapons from nuclear-weapons nations or from manufacturing nuclear weapons themselves. The treaty does not apply in time of war.

10.2.2.7 Bilateral Nuclear Arms Control Agreements

The United States and Russia (as the successor state to the U.S.S.R.) are parties to a number of bilateral agreements designed to either restrain the growth or reduce the number of nuclear warheads and launchers and to reduce the risk of miscalculation that could trigger a nuclear exchange. Among these agreements are the Hotline Agreements of 1963 and 1971, the Accidents Measures Agreement of 1971, the 1973 Agreement on Prevention of Nuclear War, the Threshold Test Ban Treaty of 1974, the 1976 Treaty on Peaceful Nuclear Explosions, the Strategic Arms Limitation Talks (SALT) Agreements of 1972 and 1977 (SALT I—Interim Agreement has expired; SALT II was never ratified), the Intermediate Range Nuclear Forces Treaty of 1988, and the Strategic Arms Reduction Treaties (START) of 1991 (START I) and 1993 (START II). The START treaties initiated the process of physical destruction of strategic nuclear warheads and launchers by the United States, Russia, Ukraine, Belarus and Kazakhstan (the latter four being recognized as successor states to the U.S.S.R. for this purpose). On 14 June 2002, Russia announced its withdrawal from START II. On 24 May 2002, the United States and Russia concluded the Strategic Offensive Reductions Treaty (SORT) whereby they agreed to reduce and limit their respective strategic nuclear warheads to an aggregate number not to exceed 1700–2000 for each party by 31 December 2012.

10.3 CHEMICAL WEAPONS

International law prohibits the use of chemical weapons in armed conflict.

10.3.1 Treaty Obligations

Prior to 1993, the 1925 Geneva Gas Protocol for the Prohibition of the use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (“the 1925 Gas Protocol”) was the principle international agreement in force relating to the regulation of chemical weapons in armed conflict. The far more comprehensive 1993 Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (the “1993 Chemical Weapons Convention”) prohibits the development, production, stockpiling and use of chemical weapons, and mandates the destruction of chemical weapons and chemical weapons production facilities for all nations that are party to it. Specific chemicals are identified in three lists, referred to as “Schedules.” The Chemical Weapons Convention does not, however, modify existing international law with respect to herbicidal agents. The United States is a party to both treaties.

10.3.2 Riot Control Agents (RCAs)

The Chemical Weapons Convention defines RCAs as any chemical not listed in a schedule that can produce rapidly in humans sensory irritation or disabling physical effects that disappear within a short time following termination of exposure. States agreed not to use RCAs as a “method of warfare”; however, the Convention does not define that term. The United States ratified the Chemical Weapons Convention subject to the understanding that nothing in the Convention prohibited the use of RCAs in accordance with Executive Order 11850.

10.3.2.1 Riot Control Agents in Armed Conflict

Under Executive Order 11850, Renunciation of certain uses in war of chemical herbicides and riot control agents, the United States renounced the first use of riot control agents 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 prisoners of war
2. Situations in which civilians are used to mask or screen attacks and civilian casualties can be reduced or avoided
3. Rescue missions involving downed aircrews or escaping prisoners or war
4. Protection of military supply depots, military convoys, and other military activities in rear echelon areas from civil disturbances, terrorist activities, or paramilitary operations.

Such employment of riot control agents by U.S. forces in armed conflict requires presidential approval.

The United States considers that the prohibition on the use of RCAs as a “method of warfare” applies in international and internal armed conflict, but that it does not apply in normal peacekeeping operations, law enforcement operations, humanitarian and disaster relief operations, counterterrorist and hostage rescue operations, noncombatant rescue operations, and any other operations not considered international or internal armed conflict. CJCSI 3110.07B(S), Nuclear, Biological, and Chemical Defense: Riot Control Agent; and Herbicides (U), provides further guidance.

10.3.2.2 Riot Control Agents in Time of Peace

Employment of riot control agents in peacetime is not proscribed by either the 1925 Gas Protocol or the 1993 Chemical Weapons Convention and may be authorized by the Secretary of Defense or in limited circumstances by the commanders of the combatant commands. Circumstances in which riot control agents 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, and
 - c. Off-base overseas when specifically authorized by the host government
4. NEO involving United States or foreign nationals.

10.3.3 Herbicidal Agents

Herbicidal agents are gases, liquids, and analogous substances that are designed to defoliate trees, bushes, or shrubs, or to kill long grasses and other vegetation that could shield the movement of enemy forces. The United States considers that use of herbicidal agents in wartime is not prohibited by either the 1925 Gas Protocol or the 1993 Chemical Weapons Convention but has formally renounced the first use of herbicides in time of armed conflict except for control of vegetation within U.S. bases and installations or around their immediate defensive perimeters. Use of herbicidal agents during armed conflict requires presidential approval. Use of herbicidal agents in peacetime may be authorized by the Secretary of Defense or, in limited circumstances, by commanders of the combatant commands. See CJCSI 3110.07B(S), Nuclear, Biological, and Chemical Defense Riot Control Agent; and Herbicides (U), for further guidance.

10.4 BIOLOGICAL WEAPONS

International law prohibits all biological weapons or methods of warfare whether directed against persons, animals, or plant life. Biological weapons include microbial or other biological agents or toxins whatever their origin (i.e., natural or artificial) or methods of production.

10.4.1 Treaty Obligations

The 1925 Gas Protocol prohibits the use in armed conflict of biological weapons. The 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (the “1972 Biological Weapons Convention”) prohibits the production, testing, and stockpiling of biological weapons. The Convention obligates nations that are a party thereto not to develop, produce, stockpile, or acquire biological agents or toxins “of types and in quantities that have no justification for prophylactic, protective, or other peaceful purposes,” as well as “weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.” All such materials were to be destroyed by 26 December 1975. The United States, Russia, and most other NATO and former Warsaw Pact nations are parties to both the 1925 Gas Protocol and the 1972 Biological Weapons Convention.

10.4.2 U.S. Policy Regarding Biological Weapons

The United States considers the prohibition against the use of biological weapons during armed conflict to be part of customary international law and thereby binding on all nations whether or not they are parties to the 1925 Gas Protocol or the 1972 Biological Weapons Convention.

The United States has, therefore, formally renounced the use of biological weapons under any circumstance. Pursuant to its treaty obligations, the United States has destroyed all its biological and toxin weapons and restricts its research activities to development of defensive capabilities.

CHAPTER 11

Treatment of Detained Persons

11.1 INTRODUCTION

The law of armed conflict requires humane treatment for all persons who are detained. What treatment detained persons receive above and beyond this minimum standard is dependant on their status at the time they are detained. This chapter examines standards of treatment required for lawful combatants, unlawful combatants, noncombatants, and civilians (see Chapter 5 for definitions).

11.2 HUMANE TREATMENT

All persons in the control of DOD personnel (military, civilian, or contractor employee) during armed conflict, or any other military operation, must be treated humanely under international law and U.S. policy until their final release, transfer, or repatriation. Humane treatment includes compliance with Common Article III of the Geneva Conventions of 1949. Some persons who are detained may also qualify for prisoner-of-war status, which provides benefits beyond the baseline humane treatment standard. If doubt exists as to how to treat a particular detainee, you should seek guidance through your chain of command. Until this doubt has been resolved, you must provide the detainee the protections of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949.

The inhumane treatment of detainees is prohibited and is not justified by the stress of combat or deep provocations. Humane treatment is at a minimum protection from unlawful threats or acts of violence and deprivation of basic human necessities and will be afforded to all detained persons without adverse distinction based on race, color, religion or faith, sex, birth or wealth, or any other similar criteria (see DOD Dir 2310.01E, DOD Law of War Program. Specifically, the following acts are prohibited with respect to detainees in DOD custody and control:

- a. Violence to life and person, in particular murder, mutilation, cruel treatment, and torture
- b. Taking of hostages
- c. Outrages upon personal dignity, in particular humiliating and degrading treatment
- d. Passing sentences and carrying out executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees that are recognized as indispensable by civilized peoples.

All detainees shall:

- a. Receive appropriate medical attention and treatment
- b. Receive sufficient food, drinking water, shelter, and clothing
- c. Be allowed the free exercise of religion, consistent with the requirements for safety and security
- d. 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
- e. Have their person and their property accounted for and records maintained.

- f. Be respected as human beings. They will not be subjected to medical or scientific experiments. They will not be subjected to sensory deprivation.

The Secretary of the Army is the DOD Executive Agent for the administration of the DOD Enemy Prisoners of War/Detainee Program. Accordingly, coordination with Army authorities should be initiated expeditiously. 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 applicable theater-specific operational orders:

- a. DOD Directive 2310.1 (series) (Detainee Program)
- b. DOD Directive 3115.09 (DOD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning)
- c. Joint Publication (JP) 3-63 (Detainee Operations)
- d. Joint Publication 2-0 (Intelligence)
- e. AR 190-8/OPNAVINST 3461.6/AFJI 31-304/MCO 3461.1, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (multi-service regulation) (In draft)
- f. Army FM 19-40 (Enemy Prisoners of War, Civilian Internees, and Detained Persons) (In draft).

11.3 COMBATANTS

The standard of treatment for a combatant is determined by whether the combatant is lawful or unlawful. A lawful combatant is entitled to prisoner of war status while an unlawful combatant is not.

11.3.1 Lawful Combatants

Lawful combatants (see paragraph 5.4.1.1) who are captured or detained are entitled to prisoner-of-war status. Which detainees are entitled to prisoner of war status is determined by the capturing state applying the rules provided in the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (GPW). Before the issue of prisoner-of-war status even arises, however, the person must have been captured or detained during international armed conflict as the GPW only applies during international armed conflict.

If there is any doubt as to whether a person is entitled to prisoner-of-war status, that individual must be accorded prisoner-of-war treatment until a competent tribunal convened by the detaining power determines the status to which that individual is entitled. This is generally known as an Article 5 tribunal based on Article 5, GPW. Also, as a matter of policy a nation can grant prisoner-of-war status to individuals who do not qualify as a matter of law.

Prisoner-of-war status carries with it extensive rights and privileges. The GPW provides in detail the rights and obligations of both prisoners and detaining powers and should be consulted if a commander is charged with the care of prisoners-of-war. When prisoners of war are given medical treatment, no distinction among them will be based on any grounds other than medical ones. Prisoners of war may be interrogated upon capture but are required to disclose only their name, rank, date of birth, and military serial number. Torture, threats, or other coercive acts are prohibited.

11.3.1.1 Trial and Punishment

Unlike unlawful combatants, lawful combatants who are captured may 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. At a minimum, these rights must include the assistance of lawyer counsel, an interpreter, and a fellow prisoner.

Although prisoners of war may also be subjected to nonjudicial disciplinary action for minor offenses committed during captivity, punishment may not exceed 30 days confinement. Prisoners of war may not be subjected to collective punishment nor may reprisal action be taken against them.

11.3.1.2 Labor

Enlisted prisoners of war 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.

11.3.1.3 Escape

Prisoners of war may not be judicially punished for acts committed in attempting to escape, unless they injure or kill someone in the process. Disciplinary punishment may, however, 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 may not be subjected to such disciplinary punishment if recaptured. However, they remain subject to punishment for causing death or injury in the course of their escape.

11.3.1.4 Temporary Detention of Prisoners of War, Civilian Internees, and Other Detained Persons aboard Naval Vessels.

International treaty law expressly prohibits “internment” of prisoners of war other than in premises on land, but does not address temporary stay on board vessels. U.S. policy permits detention of prisoners-of-war, civilian internees, and detained persons on naval vessels 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 truly 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. Use of immobilized vessels for temporary detention of prisoners of war, civilian internees, or detained persons is not authorized without Secretary of Defense approval.

11.3.2 Unlawful Combatants

Unlawful combatants (see paragraph 5.4.1.2) do not have a right to engage in hostilities and do not receive combatant immunity for their hostile acts. Additionally, they are not entitled to prisoner of war status if detained. However, as with any person detained by the United States they are entitled to humane treatment as a matter of law and U.S. policy (see paragraph 11.2).

Because unlawful combatants do not have combatant immunity, they may be prosecuted for their unlawful actions. However, prosecution is not required and unlawful combatants may be detained until the cessation of hostilities without being prosecuted for their acts. If prosecuted and convicted, unlawful combatants may be detained for the duration of their sentence, even if it extends beyond the cessation of hostilities. Likewise, even if their criminal sentence has been served but hostilities have not ceased, they may be held until the cessation of hostilities. Regardless of the fact that hostilities have not ceased or the full sentence has not been served, a detaining nation may release an unlawful combatant at any time. For example, a detaining nation may decide to end detention before the cessation of hostilities if it determines the detained combatant no longer poses a threat.

11.4 NONCOMBATANTS

Noncombatants are those members of the armed forces who do not take a direct part in hostilities because of their status as medical personnel or chaplains. 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 prisoners of war. 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 prisoners of war, medical personnel and chaplains must be repatriated at the earliest opportunity.

11.5 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 August 12, 1949 governs the treatment of civilians. Civilians of an enemy nation falling under the control of the armed forces may be interned if security considerations make it absolutely necessary to do so. Civilians sentenced for offenses committed in occupied territory may also be ordered into internment in lieu of punishment. Civilians of an enemy nation may not be interned as hostages. Interned persons may not be removed from the occupied territory in which they reside except as their own security or imperative military considerations may require. All interned persons must be treated humanely (see paragraph 11.2) and may not be subjected to reprisal action or collective punishment.

War correspondents, although civilians, may be accredited by the armed forces that they accompany. While war correspondents are not combatants, their close proximity to combatants means that they may be incidentally killed or injured during a lawful attack on a military objective. War correspondents are entitled to prisoner-of-war status on capture provided they have been properly accredited by the armed forces they accompany.

11.6 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 justified by urgent medical considerations. The physical or mental well-being of enemy wounded and sick personnel may not be unjustifiably endangered, nor may the wounded and sick be subjected to any medical procedure not called for by their condition or inconsistent with accepted medical standards.

Likewise, a similar duty extends to shipwrecked persons, whether military or civilian. Shipwrecked persons include those in peril at sea or in other waters as a result of the sinking, grounding, or other damage to a vessel in which they are embarked, or of the downing or distress of an aircraft. It is immaterial whether the peril was the result of enemy action or nonmilitary causes. Following each naval engagement at sea, the belligerents are obligated to take all possible measures, consistent with the security of their forces, to search for and rescue the shipwrecked.

The status of persons detained—lawful or unlawful combatant, noncombatant, or civilian—does not change as a result of becoming incapacitated by wounds, sickness, shipwreck, surrender. Consequently, the decision to continue detention of persons *hors de combat* and the status of such detainees will be determined by their prior classification.

11.7 QUESTIONING AND INTERROGATION OF DETAINED PERSONS

Commanders may order the tactical questioning of detained persons to the extent necessary and proper to efficiently conduct military operations, including determining the strength and plans of opposing forces. Tactical questioning is defined in DOD Directive 3115.09, DOD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning, as “direct questioning by any DOD personnel of a captured or detained person to obtain time-sensitive tactical intelligence, at or near the point of capture or detention and consistent with applicable law.”

Tactical questioning is not an interrogation, but a timely and expedient method of questioning by a noninterrogator seeking information of immediate value. It may be conducted by any DOD personnel trained in accordance with subparagraph 4.6.5 of DOD Directive 3115.09. Anyone conducting tactical questioning must ensure all detained persons receive humane treatment. Additionally, if the detained person is entitled to prisoner-of-war status additional restrictions on questioning apply, see paragraph 11.7.1.

If questioning beyond tactical questioning is necessary, it is considered interrogation and can only be conducted by DOD-certified intelligence or counterintelligence personnel (DOD Directive 3115.09, paragraph 3.4.2). Generally, masters at arms or other security personnel may not actively participate in interrogations, as their function should be 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:

- a. Geneva Conventions Relative to the Treatment of Prisoners of War, of August 12, 1949
- b. DOD Directive 3115.09 (DOD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning)
- c. JP 2-01.2 (Counterintelligence)
- d. Army FM 2-22.3 (Human Intelligence Collector Operations).

11.8 QUESTIONING OF PRISONERS OF WAR

Detainees who are entitled to protections as set forth in the Geneva Conventions Relative to the Treatment of Prisoners of War of 1949 cannot 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 prisoner of war who refuses to provide such information shall, however, be regarded as having the lowest rank of that force, and 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 stratagems and ruses of war intended to mislead him, to deter him from taking action, or to induce him to act recklessly, provided the ruses do not violate rules of international law applicable to armed conflict.

12.1.1 Permitted Deceptions

Stratagems and ruses of war permitted in armed conflict include such deceptions as camouflage; deceptive lighting; dummy ships and other armament; decoys; simulated forces; feigned attacks and withdrawals; ambushes; false intelligence information; electronic deceptions; and utilization of enemy codes, passwords, and countersigns.

12.1.2 Prohibited Deceptions

The use of unlawful deceptions is called “perfidy.” Acts of perfidy are deceptions designed to invite the confidence of the enemy to lead him to believe that he is entitled to, or is obliged to accord, protected status under the law of armed conflict, with the intent to betray that confidence. Feigning surrender in order to lure the enemy into a trap is one example of an act of perfidy.

12.2 IMPROPER USE OF PROTECTIVE SIGNS, SIGNALS, AND SYMBOLS

Improperly using protective signs, signals, and symbols (see paragraphs 8.5.1 and 8.5.2) to injure, kill, or capture the enemy is an act of perfidy. Such acts are prohibited because they undermine the effectiveness of protective signs, signals, and symbols and thereby jeopardize the safety of noncombatants and the immunity of protected structures and activities. For example, using an ambulance or medical aircraft marked with the red cross or red crescent to carry armed combatants, weapons, or ammunition with which to attack or elude enemy forces is prohibited. Similarly, use of the white flag to gain a military advantage over the enemy is unlawful.

12.3 NEUTRAL FLAGS, INSIGNIA, AND UNIFORMS

12.3.1 At Sea

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

12.3.2 In the Air

Use in combat of false or deceptive markings to disguise belligerent military aircraft as being of neutral nationality is prohibited.

12.3.3 On Land

The law of armed conflict applicable to land warfare has no rule of law analogous to that which permits belligerent warships to display neutral colors. Belligerents engaged in armed conflict on land are not permitted to use the flags, insignia, or uniforms of a neutral nation to deceive the enemy.

12.4 THE UNITED NATIONS FLAG AND EMBLEM

The flag of the United Nations and the letters “UN” may not be used in armed conflict for any purpose without the authorization of the United Nations.

12.5 ENEMY FLAGS, INSIGNIA, AND UNIFORMS

12.5.1 At Sea

Naval surface and subsurface forces may fly enemy colors and display enemy markings to deceive the enemy. Warships must, however, display their true colors prior to an actual armed engagement.

12.5.2 In the Air

The use in combat of enemy markings by belligerent military aircraft is forbidden.

12.5.3 On Land

The law of land warfare does not prohibit the use by belligerent land forces of enemy flags, insignia, or uniforms to deceive the enemy either before or following an armed engagement. Once an armed engagement begins, a belligerent is prohibited from deceiving an enemy by wearing an enemy uniform, or using enemy flags and insignia; combatants risk severe punishment if they are captured while displaying enemy colors or insignia or wearing enemy uniforms in combat.

Similarly, combatants caught behind enemy lines wearing the uniform of their adversaries run the risk of being denied prisoner-of-war status or protection and, historically, have been subjected to severe punishment. It is permissible, however, for downed aircrews and escaping prisoners of war to use enemy uniforms to evade capture, so long as they do not attack enemy forces, collect military intelligence, or engage in similar military operations while so attired.

Captured enemy equipment and supplies may be seized and used. Enemy markings, however, should be removed from captured enemy equipment before it is used in combat.

12.6 FEIGNING DISTRESS

It is unlawful to feign distress through the false use of internationally recognized distress signals such as SOS and MAYDAY. In air warfare, however, it is permissible to feign disablement or other distress as a means to induce the enemy to break off an attack. Consequently, there is no obligation in air warfare to cease attacking a belligerent military aircraft that appears to be disabled. However, if one knows the enemy aircraft is disabled so as to permanently remove it from the conflict (e.g., major fire or structural damage) there is an obligation to cease attacking to permit evacuation by crew or passengers.

12.7 FALSE CLAIMS OF NONCOMBATANT OR CIVILIAN STATUS

It is a violation of the law of armed conflict to kill, injure, or capture the enemy by false indication of intent to surrender or by feigning shipwreck, sickness, wounds, or civilian status (but see paragraph 12.3.1). A surprise attack by a person feigning shipwreck, sickness, or wounds undermines the protected status of those rendered incapable of combat. Similarly, attacking enemy forces while posing as a civilian puts all civilians at hazard. Such

acts of perfidy are punishable as war crimes. It is also prohibited to kill, injure, or capture an adversary by feigning civilian or noncombatant status.

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 noncombatant or friendly forces status with the intention of passing that information to an opposing belligerent. Members of the armed forces who penetrate enemy-held territory in civilian attire or enemy uniform to collect intelligence are spies. Conversely, personnel conducting reconnaissance missions behind enemy lines while properly uniformed are not spies.

Crewmembers of warships and military aircraft engaged in intelligence collection missions in enemy waters or airspace are not spies unless the ship or aircraft displays false civilian, neutral, or enemy marking.

12.9 LEGAL STATUS

Spying during armed conflict is not a violation of international law. Captured spies are not, however, entitled to prisoner-of-war status. The captor nation may try and punish spies in accordance with its national law. Should a spy succeed in eluding capture and return to friendly territory, he is immune from punishment for his past espionage activities. If subsequently captured during some other military operation, the former spy cannot be tried or punished for the earlier act of espionage.

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APPENDIX A**HYDROLANT 597/03 (54,56)
EASTERN MEDITERRANEAN SEA.
(202135Z MAR 2003)**

1. U.S. FORCES IN THE EASTERN MEDITERRANEAN HAVE ESTABLISHED A MARITIME SAFETY ZONE AND ARE CONDUCTING COMBAT OPERATIONS IN INTERNATIONAL WATERS THAT POSE A HAZARD TO NAVIGATION. ALL VESSELS ARE ADVISED TO EXERCISE EXTREME CAUTION AND TO REMAIN CLEAR OF THE FOLLOWING DESIGNATED OPERATION AREA BOUND BY 32-28.0N 033-22.0E, 31-40.0N 033-22.0E, 31-55.0N 032-20.0E, 32-46.8N 032-20.0E.
2. ALL VESSELS SHOULD MAINTAIN A SAFE DISTANCE FROM U.S. FORCES SO THAT INTENTIONS ARE CLEAR AND UNDERSTOOD BY U.S. FORCES. VESSELS THAT ENTER THE MARITIME SAFETY ZONE WHICH ARE APPROACHING U.S. FORCES, OR VESSELS WHOSE INTENTIONS ARE UNCLEAR ARE SUBJECT TO BOARDING AND VISIT BY U.S. FORCES. ALL VESSELS APPROACHING U.S. FORCES ARE REQUESTED TO MAINTAIN RADIO CONTACT WITH U.S. FORCES ON BRIDGE-TO-BRIDGE CHANNEL 16.
3. U.S. FORCES WILL EXERCISE APPROPRIATE MEASURES IN SELF-DEFENSE IF WARRANTED BY THE CIRCUMSTANCES. VESSELS APPROACHING U.S. FORCES WILL HELP MAKE THEIR INTENTIONS CLEAR AND AVOID UNNECESSARY INITIATION OF SUCH DEFENSIVE MEASURES BY MAKING PRIOR CONTACT AS DESCRIBED ABOVE.
4. NOTHING IN THIS WARNING IS INTENDED TO LIMIT OR EXPAND THE INHERENT SELF-DEFENSE RIGHTS OF U.S. FORCES. THIS WARNING IS PUBLISHED SOLELY FOR SAFETY OF NAVIGATION AND TO WARN VESSELS AWAY FROM COMBAT ACTIVITIES.

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APPENDIX B**Maritime Liaison Office (MARLO) Bahrain
MARLO Advisory Bulletin 06-03
20 March 2003**

With the intention of providing widest distribution, MARLO is forwarding the following NOTICE TO MARINERS in an attempt to ensure the maritime safety of crews and vessels operating in the Arabian Gulf. We request you pass this information throughout your own commercial circles.

COALITION NAVAL FORCES MAY CONDUCT MILITARY OPERATIONS IN THE EASTERN MEDITERRANEAN SEA, RED SEA, GULF OF ADEN, ARABIAN SEA, GULF OF OMAN, AND ARABIAN GULF. THE TIMELY AND ACCURATE IDENTIFICATION OF ALL VESSELS AND AIRCRAFT IN THESE AREAS IS CRITICAL TO AVOID THE INADVERTENT USE OF FORCE.

ALL VESSELS ARE ADVISED THAT COALITION NAVAL FORCES ARE PREPARED TO EXERCISE APPROPRIATE MEASURES IN SELF-DEFENSE TO ENSURE THEIR SAFETY IN THE EVENT THEY ARE APPROACHED BY VESSELS OR AIRCRAFT. COALITION FORCES ARE PREPARED TO RESPOND DECISIVELY TO ANY HOSTILE ACTS OR INDICATIONS OF HOSTILE INTENT. ALL MARITIME VESSELS OR ACTIVITIES THAT ARE DETERMINED TO BE THREATS TO COALITION NAVAL FORCES WILL BE SUBJECT TO DEFENSIVE MEASURES, INCLUDING BOARDING, SEIZURE, DISABLING, OR DESTRUCTION, WITHOUT REGARD TO REGISTRY OR LOCATION. CONSEQUENTLY, SURFACE VESSELS, SUBSURFACE VESSELS, AND ALL AIRCRAFT APPROACHING COALITION NAVAL FORCES ARE ADVISED TO MAINTAIN RADIO CONTACT ON BRIDGE-TO-BRIDGE CHANNEL 16, INTERNATIONAL AIR DISTRESS (121.5 MHZ VHF) OR MILITARY AIR DISTRESS (243.0 MHZ UHF).

VESSELS OPERATING IN THE MIDDLE EAST, EASTERN MEDITERRANEAN SEA, RED SEA, GULF OF OMAN, ARABIAN SEA, AND ARABIAN GULF ARE SUBJECT TO QUERY, BEING STOPPED, BOARDED AND SEARCHED BY U.S./COALITION WARSHIPS OPERATING IN SUPPORT OF OPERATIONS AGAINST IRAQ. VESSELS FOUND TO BE CARRYING CONTRABAND BOUND FOR IRAQ OR CARRYING AND/OR LAYING NAVAL MINES ARE SUBJECT TO DETENTION, SEIZURE AND DESTRUCTION. THIS NOTICE IS EFFECTIVE IMMEDIATELY AND WILL REMAIN IN EFFECT UNTIL FURTHER NOTICE.

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APPENDIX C**HYDROPAC 795/2004 (62).
PERSIAN GULF. (030850Z MAY 2004)**

1. ON 24 APR, TERRORISTS CONDUCTED SUICIDE ATTACKS IN SMALL BOATS AGAINST ABOT AND A COALITION WARSHIP IN THE VICINITY OF KAAOT. THE TERRORISTS USED ORDINARY DHOWS, FISHING BOATS AND SPEEDBOATS TO CONDUCT THE ATTACK IN CONTRAVENTION OF THE LAW OF ARMED CONFLICT. THEIR UNLAWFUL ACTIONS ARE INTENTIONALLY DESIGNED TO PUT INNOCENT PERSONS AT RISK.
2. ALL MARINERS ARE ADVISED TO REMAIN CLEAR OF COALITION MARITIME SECURITY FORCES AND TO IDENTIFY THEMSELVES AND MAKE THEIR INTENTIONS KNOWN WHEN OPERATING IN THE VICINITY OF COALITION WARSHIPS. IF QUERIED, MARINERS SHOULD CLEARLY IDENTIFY THEMSELVES AND STATE THEIR INTENTIONS AND IF GIVEN DIRECTIONS FROM COALITION WARSHIPS, THEY SHOULD PROMPTLY EXECUTE SUCH DIRECTIONS SO AS TO MAKE THEIR INTENTIONS KNOWN. MARINERS ARE REMINDED THAT COALITION WARSHIPS ARE PREPARED TO TAKE DEFENSIVE MEASURES, INCLUDING IF NECESSARY THE USE OF DEADLY FORCE, AGAINST ANY CONTACT WHOSE IDENTITY OR INTENTIONS ARE UNKNOWN AND WHICH POSES A THREAT.
3. EFFECTIVE IMMEDIATELY, WARNING ZONES ARE ESTABLISHED AROUND THE KHAWR AL'AMAYA OIL TERMINAL (29-46.8N 048-48.5E) AND THE AL BASRA OIL TERMINAL, FORMERLY KNOWN AS THE MINA AL BAKR OIL TERMINAL (29-40.8N 048-48.5E) AS FOLLOWS:
4. KHAWR AL'AMAYA OIL TERMINAL (29-46.8N 048-48.5E). THE WARNING ZONE EXTENDS 3000 METERS FROM THE OUTER EDGE OF THE TERMINAL STRUCTURE, IN ALL DIRECTIONS, CREATING A RACETRACK SHAPE 6990 METERS LONG BY 6107 METERS WIDE, ORIENTED NORTHWEST TO SOUTHEAST, CENTERED ON THE TERMINAL. THIS WARNING ZONE IS DISTINCT FROM AND IN ADDITION TO THE EXCLUSION ZONE ESTABLISHED LATER IN THIS ADVISORY.
5. AL BASRA OIL TERMINAL, FORMERLY KNOWN AS THE MINA AL BAKR OIL TERMINAL (29-40.8N 048-48.5E). THE WARNING ZONE EXTENDS 3000 METERS FROM THE OUTER EDGE OF THE TERMINAL STRUCTURE, IN ALL DIRECTIONS, CREATING A RACETRACK SHAPE 7030 METERS LONG BY 6107 METERS WIDE, ORIENTED NORTHWEST TO SOUTHEAST, CENTERED ON THE TERMINAL. THIS WARNING ZONE IS DISTINCT FROM, AND IN ADDITION TO, THE EXCLUSION ZONE ESTABLISHED LATER IN THIS ADVISORY.
6. VLCC TRAFFIC TO THE TERMINALS HAS INCREASED DRAMATICALLY IN THE PAST SIX MONTHS AND IS EXPECTED TO REMAIN AT HIGH LEVELS INDEFINITELY. IN ADDITION TO BERTHING AND DEPARTING VLCCS AND ASSISTING TUGS, COALITION WARSHIPS CONDUCTING MARITIME SECURITY PATROLS MANEUVER UNPREDICTABLY WITHIN THE ZONE.
7. VESSELS ARE ADVISED TO REMAIN CLEAR OF THE WARNING ZONES FOR ALL BUT ESSENTIAL TRANSITS. IF TRANSIT REQUIRES ENTRY INTO THE ZONE, VESSELS ARE

ADVISED TO CONTACT COALITION MARITIME SECURITY FORCES VIA MARINE VHF CHANNEL 16, IDENTIFY THEMSELVES AND MAKE TRANSIT INTENTIONS KNOWN. IF COALITION MARITIME SECURITY FORCES ADVISE A VESSEL TO DEPART THE WARNING AREA, THE VESSEL SHOULD IMMEDIATELY DEPART. SUCH DIRECTION WILL BE GIVEN ONLY WHEN NECESSARY TO KEEP THE VESSEL FROM STANDING INTO DANGER.

8. ADDITIONALLY, EFFECTIVE IMMEDIATELY, EXCLUSION ZONES ARE ESTABLISHED AND THE RIGHT OF INNOCENT PASSAGE IS TEMPORARILY SUSPENDED IN ACCORDANCE WITH INTERNATIONAL LAW AROUND THE KAAOT AND ABOT OIL TERMINALS WITHIN IRAQI TERRITORIAL WATERS. THE EXCLUSION ZONES EXTEND 2000 METERS FROM THE OUTER EDGES OF THE TERMINAL STRUCTURES IN ALL DIRECTIONS.
9. ONLY TANKERS AND SUPPORT VESSELS AUTHORIZED BY TERMINAL OPERATORS OR COALITION MARITIME SECURITY FORCES ARE ALLOWED TO ENTER THE EXCLUSION ZONES. VESSELS ATTEMPTING TO ENTER THE ZONES WITHOUT AUTHORIZATION MAY BE SUBJECT TO DEFENSIVE MEASURES, INCLUDING WHEN NECESSARY, THE USE OF DEADLY FORCE. ALL REASONABLE EFFORTS WILL BE TAKEN TO WARN VESSELS AWAY BEFORE EMPLOYING DEADLY FORCE. HOWEVER, DEADLY FORCE WILL BE EMPLOYED WHEN NECESSARY TO PROTECT COALITION MARITIME SECURITY FORCES, LEGITIMATE SHIPPING PRESENT IN THE EXCLUSION ZONES AND THE OIL TERMINALS.
10. QUESTIONS REGARDING THIS ADVISORY MAY BE DIRECTED TO COMMANDER, U.S. NAVAL FORCES CENTRAL COMMAND, IZMS COORDINATOR (N31CGA), FPO AE 09501 6008, PHONE: 973 1785 4627 OR 973 1785 4839, FAX: 973 1785 9117 OR 973 1785 4344 OR THE U.S. MARITIME LIAISON OFFICE (MARLO) BAHRAIN, PHONE: 973 1785 3925, FAX: 973 1785 3930.
11. CANCEL HYDROPAC 790/04.

ACRONYMS AND ABBREVIATIONS

72 COLREGS	International Regulations for Preventing Collisions at Sea, 1972
1982 LOS CONVENTION	1982 United Nations Convention on the Law of the Sea
ABM	antiballistic missile
ADIZ	air defense identification zone
AFJI	Air Force Joint instruction
AMC	Air Mobility Command
APF	afloat prepositioned force
APL	antipersonnel land mine
AR	Army Regulation
ASW	antisubmarine warfare
AT	antiterrorism
AVL	antiland/vehicle mine
CJCS	Joint Chiefs of Staff
CJCSI	Chairman of the Joint Chiefs of Staff instruction
CNA	computer network attack
COMDTINST	Commandant, United States Coast Guard Instruction
DMA	dangerous military activities
DOD	Department of Defense
EEZ	exclusive economic zone
ERW	explosive remnants of war
FIR	flight information region
FM	field manual (Army)
FON	freedom of navigation
FP	force protection
HYDROLANT	Hydro Atlantic
HYDROPAC	Hydro Pacific

ICAO	International Civil Aviation Organization
ICRC	International Committee of the Red Cross
INCSEA	incident at sea
IMO	International Maritime Organization
IO	information operations
ISR	intelligence, surveillance, and reconnaissance
JP	joint publication
LEDET	law enforcement detachment
LOS	law of the sea
MARLO	maritime liaison office
MCM	mine countermeasurers
MCO	Marine Corps order
MIO	Maritime International Operations
MMCA	Military Maritime Consultative Agreement
MSC	Military Sealift Command
NATO	North Atlantic Treaty Organization
NAVADMIN	Navy/naval administration message
NDRF	National Defense Reserve Fleet
NEO	noncombatant evacuation operations
NLW	nonlethal weapons
NOTAM	notice to airmen
NOTMAR	notice to mariners
NTTP	Navy tactics, techniques, and procedures
NVPZ	naval vessel protection zone
NWDC	Navy Warfare Development Command
NWP	Navy warfare publication
OCS	outer continental shelf
OPCON	operation control

OPNAVINST	Chief of Naval Operations Instruction
OPORD	operation order
OTH	over the horizon
PRC	People's Republic of China
PSI	proliferation security initiative
PSYOP	psychological operations
RCA	riot control agent
ROE	rules of engagement
RRF	Ready Reserve Force
SALT	Strategic Arms Limitation Talks
SECNAVINST	Secretary of the Navy instruction
SROE	standing rules of engagement
SRUF	standing rules for the use of force
SSR	secondary surveillance radar
SUA	suppression of unlawful acts
TACON	tactical control
UAV	unmanned aerial vehicle
UCMI	Uniform Code of Military Justice
UN	United Nations
USC	United States Code
USCG	United States Coast Guard
USCGC	United States Coast Guard cutter
USNS	United States Naval Ships
USS	United States Ship
USV	unmanned surface vehicle
UUV	unmanned underwater vehicle
WMD	weapons of mass destruction

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