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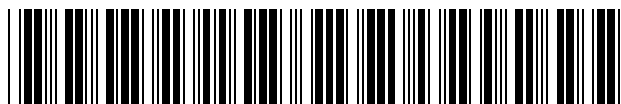
**U.S. COAST GUARD**

**COMDTPUB P5800.7**

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

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**DEPARTMENT OF THE NAVY  
OFFICE OF THE CHIEF OF NAVAL OPERATIONS AND  
HEADQUARTERS, U.S. MARINE CORPS, AND  
DEPARTMENT OF TRANSPORTATION  
U.S. COAST GUARD**





DEPARTMENT OF THE NAVY  
NAVAL DOCTRINE COMMAND  
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October 1995

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2. NWP1-14M/MCWP 5-2.1/COMDTPUB P5800.7 is effective upon receipt and supersedes NWP 9 (Rev. A)/FMFM 1-10, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, which shall be destroyed without report.
3. This publication may be made readily available to the public upon request.

PAUL K. VAN RIPER  
Lieutenant General, U.S. Marine Corps  
Commanding General  
Marine Corps Combat Development Command  
Quantico, Virginia

M. L. BOWMAN  
Rear Admiral, U.S. Navy  
Commander, Naval Doctrine Command

J. E. SHKOR  
Rear Admiral, U.S. Coast Guard  
Chief Counsel



October 1995

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2. Summary: This revision expands the treatment of neutrality, targeting, and weapons, addresses land mines for the first time, and provides a new section on maritime law enforcement and land warfare. This revision also responds to the Navy strategy set forth in "...From the Sea" and its focus on littoral warfare.

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# The Commander's Handbook on the Law of Naval Operations

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## RECORD OF CHANGES

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## RECORD OF CHANGES

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# LIST OF ABBREVIATIONS/ACRONYMS

## A

**ABM.** Antiballistic missile.

**ADIZ.** Air defense identification zone.

**AMC.** Air Mobility Command.

**APF.** Afloat Pre-positioned Force.

## D

**DOD.** Department of Defense.

## E

**EEZ.** Exclusive economic zone.

## F

**FIR.** Flight information region.

## I

**ICAO.** International Civil Aviation Organization.

**ICRC.** International Committee of the Red Cross.

## J

**JCS.** Joint Chiefs of Staff.

## L

**LEDET.** Law enforcement detachment.

**LOS.** Law of the sea.

## M

**MSC.** Military Sealift Command.

## N

**NATO.** North Atlantic Treaty Organization.

**NCA.** National Command Authorities.

**NDRF.** National Defense Reserve Fleet.

**NEO.** Noncombatant evacuation operation.

**nm.** Nautical mile(s).

**NOTAM.** Notice to airmen.

**NOTMAR.** Notice to mariners.

## R

**RRF.** Ready Reserve Force.

## S

**SALT.** Strategic arms limitation talks.

**SROE.** Standing rules of engagement.

**SSR.** Secondary surveillance radar.

## U

**USNS.** United States Naval Ships.



# 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 (SROE)

The National Command Authorities (i.e., the President and the Secretary of Defense or their duly deputized alternates or successors — commonly referred to as the NCA) approve and the Chairman of the Joint Chiefs of Staff promulgates SROE for U.S. forces (Chairman of the Joint Chiefs of Staff Instruction 3121.01 1 October 1994). These rules delineate the circumstances under which U.S. forces will initiate and/or continue engagement with other forces encountered. Combatant commanders may augment the standing rules as necessary to reflect changing political and military policies, threats, and missions specific to their area of responsibility (AOR). Such augmentations to the standing rules are approved by the NCA and promulgated by the Joint Staff, J-3, as annexes to the standing rules.

*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.*

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# **PART I**

## **Law of Peacetime Naval Operations**

Chapter 1 — Legal Divisions of the Oceans and Airspace

Chapter 2 — International Status and Navigation of  
Warships and Military Aircraft

Chapter 3 — Protection of Persons and Property at Sea  
and Maritime Law Enforcement

Chapter 4 — Safeguarding of U.S. National Interests in  
the Maritime Environment



## 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 recent years, new concepts have evolved, such as the exclusive economic zone and archipelagic waters, that have dramatically expanded the jurisdictional claims of coastal and island nations over wide expanses of the ocean 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).

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. Although the Convention, by its terms, would not come into formal effect until one year following deposit with the United Nations of the 60th instrument of ratification, the United States considered that the provisions relating to navigation and overflight codified existing law and practice and reflected customary international law.

On November 16, 1994, the 1982 LOS Convention came into force, with respect to those nations that are parties to it. The concerns of the United States and other industrialized nations with respect to the deep seabed mining provisions of the Convention were successfully resolved by an Agreement adopted without dissent by the United Nations General Assembly on July 28, 1994. The 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 October 7, 1994, the President of the United States submitted the 1982 LOS Convention and the Agreement reforming its deep seabed mining

provisions to the Senate for its advice and consent to accession and ratification, respectively.

### 1.2 RECOGNITION OF COASTAL NATION CLAIMS

In a statement on U.S. oceans policy issued 10 March 1983, the President stated:

“First, the United States is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans [in 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.”

The legal classifications (“regimes”) of ocean and airspace areas directly affect naval 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 methods for measuring maritime jurisdictional claims, and the extent of coastal nation control exercised in those areas, are set forth in the succeeding paragraphs of this chapter. The DOD Maritime Claims Reference Manual (DoD 2005.1-M) contains a listing of the ocean claims of coastal nations.

### 1.3 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.

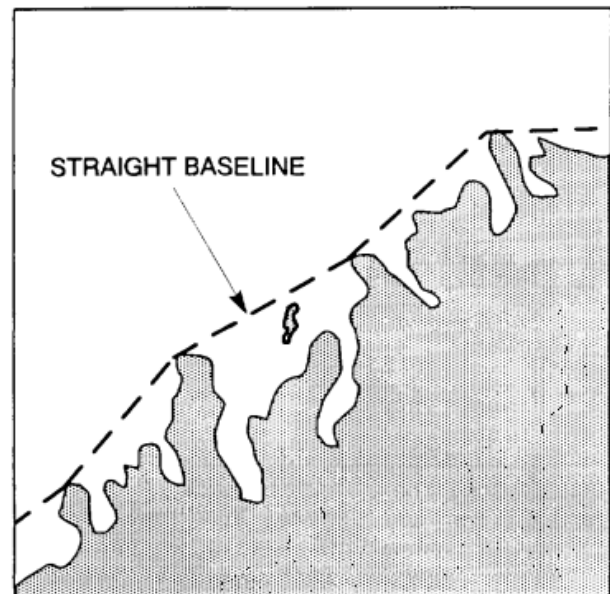
**1.3.1 Low-Water Line.** Unless other special rules apply, the baseline from which maritime claims of a nation are measured is the low-water line along the coast as marked on that nation's official large-scale charts.

**1.3.2 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 which uses straight baselines must either clearly indicate them on its charts or publish a list of geographical coordinates of the points joining them together. See Figure 1-1. The United States, with few exceptions, does not employ this practice and interprets restrictively its use by others.

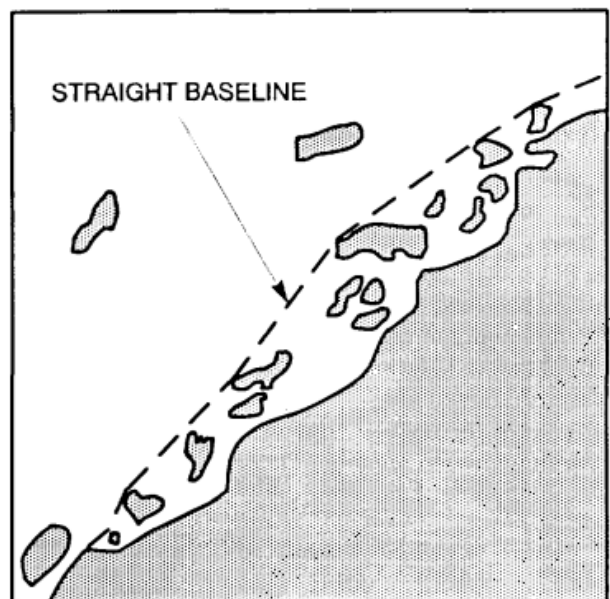
**1.3.2.1 Unstable Coastlines.** Where the coastline is highly unstable due to natural conditions, e.g., deltas, straight baselines may be established connecting appropriate points on the low-water line. These straight baselines remain effective, despite subsequent regression or accretion of the coastline,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

**1.3.2.2 Low-Tide Elevations.** A low-tide elevation is a naturally formed land area surrounded by water and which 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.

**1.3.3 Bays and Gulfs.** 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 greater than that of a semicircle whose diameter is the length of the line drawn across the mouth. See Figure 1-2. 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. See Figure 1-3.



**A. DEEP INDENTED COASTLINE**



**B. FRINGING ISLAND**

Figure 1-1. Straight Baselines

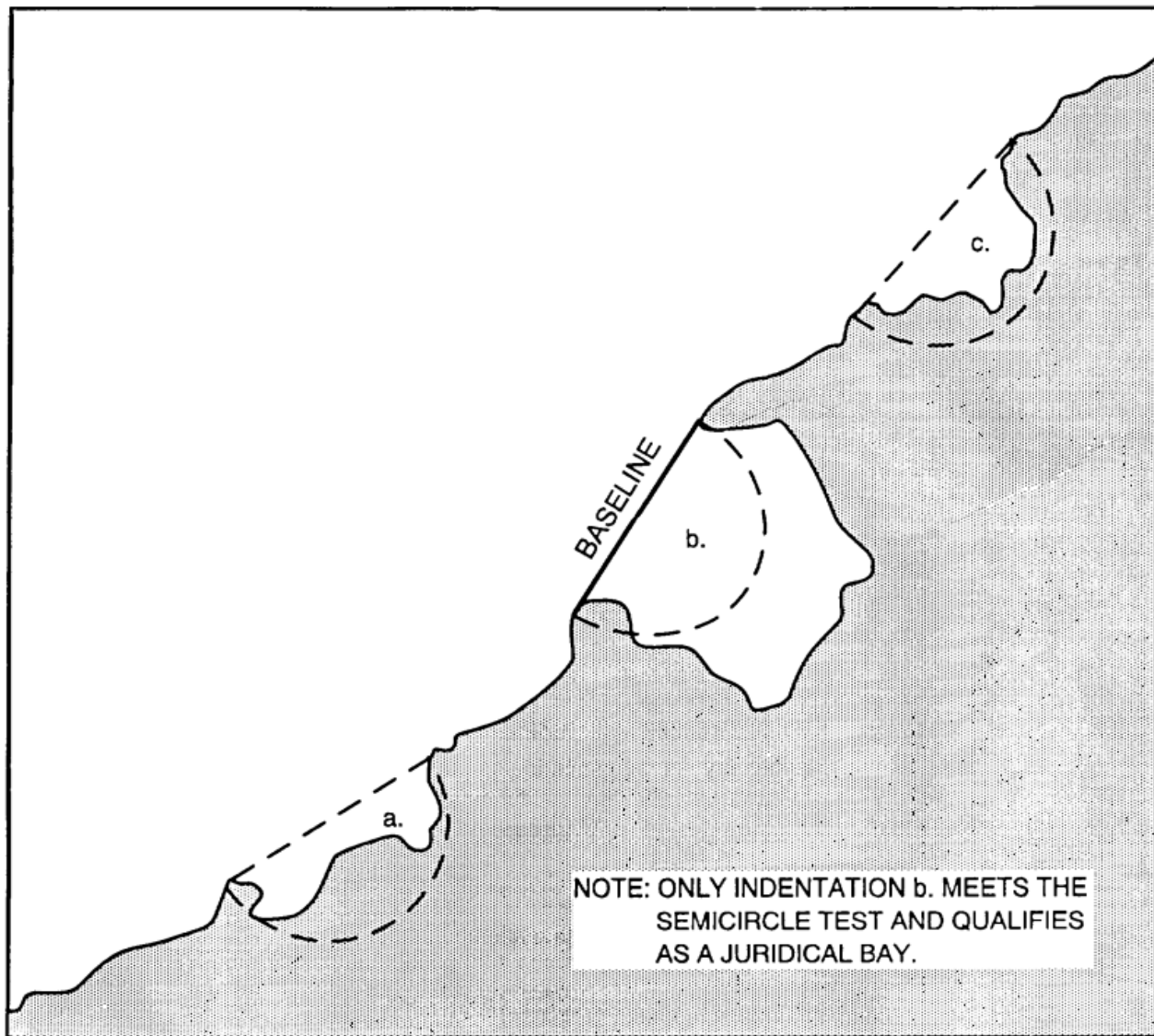


Figure 1-2. The Semicircle Test

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. See Figure 1-4. 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.

**1.3.3.1 Historic Bays.** 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.

**1.3.4 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.

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

**1.3.6 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

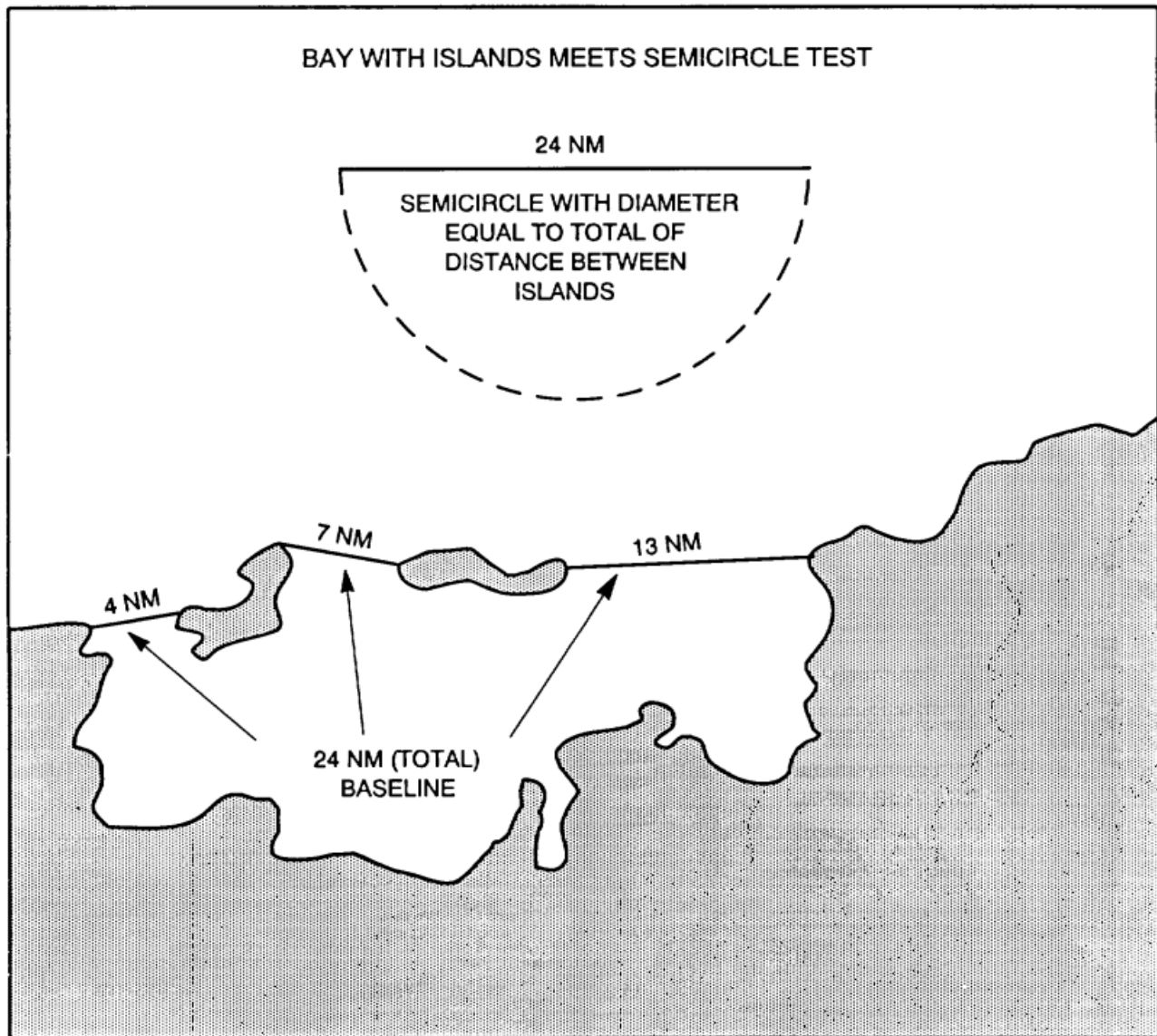


Figure 1-3. Bay With Islands

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.

#### 1.4 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 1.5.

**1.4.1 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 2.3.1), ships and aircraft may not enter or overfly internal waters without the permission of the coastal nation. Where the establishment of a straight baseline has the effect of enclosing as internal waters areas which had previously not been considered as such, a right of innocent passage exists in those waters.

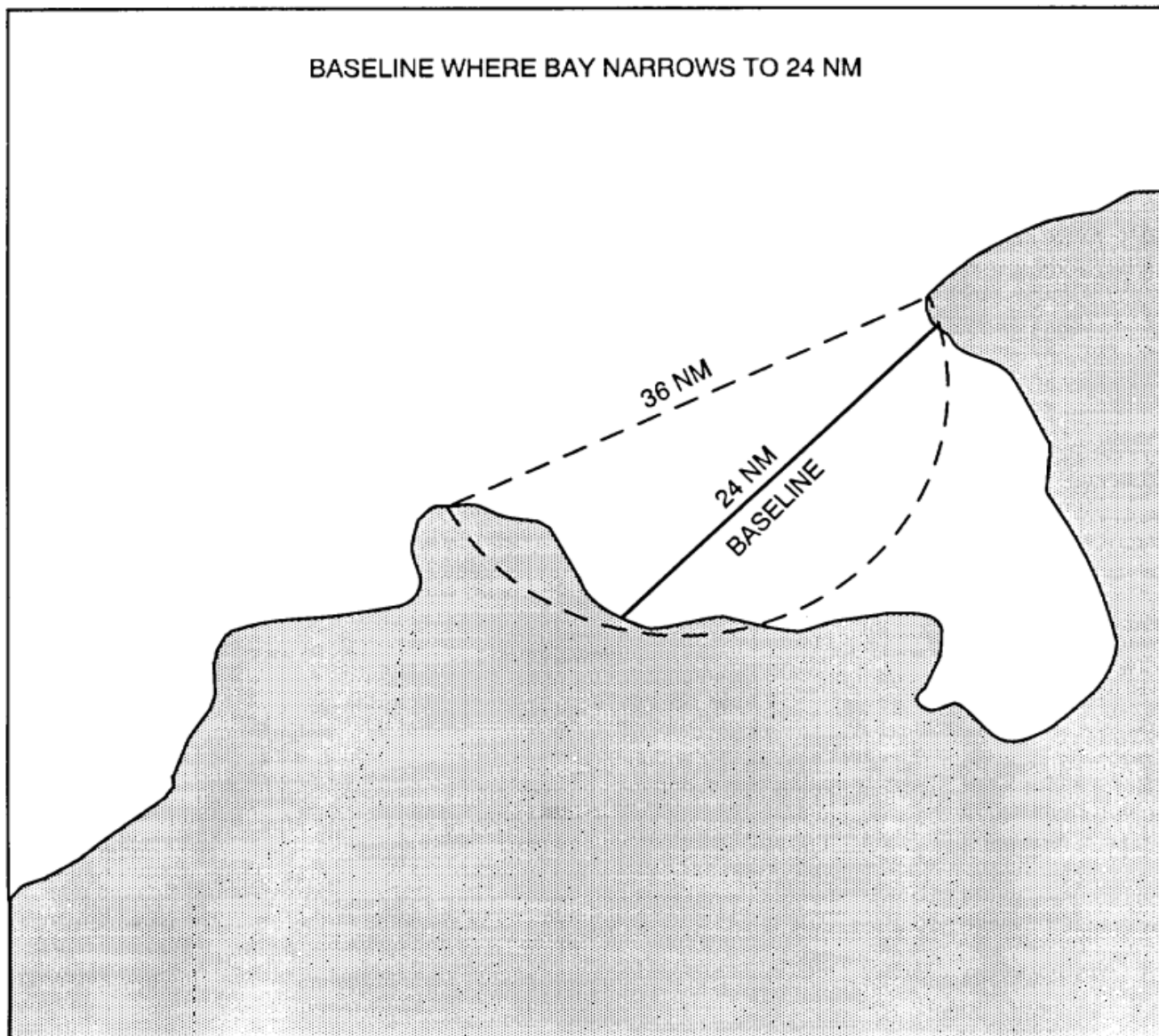


Figure 1-4. Bay With Mouth Exceeding 24 Nautical Miles

**1.4.2 Territorial Seas.** The territorial sea is a belt of ocean which is measured seaward from the baseline of the coastal nation and subject to its sovereignty. The U.S. claims a 12-nautical mile territorial sea and recognizes territorial sea claims of other nations up to a maximum breadth of 12 nautical miles.

**1.4.2.1 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 which 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. 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 territorial sea purposes 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. See Figure 1-5.

**1.4.2.2 Artificial Islands and Off-Shore Installations.** Artificial islands and off-shore installations have no territorial sea of their own.

**1.4.2.3 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.

**1.4.3 Archipelagic Waters.** 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 to 1 and 9 to 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 U.S. 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.

**1.4.3.1 Archipelagic Sea Lanes.** 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.

## 1.5 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.

**1.5.1 Contiguous Zones.** A contiguous zone is an area extending seaward from the territorial sea 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 (but not for so-called security purposes - see paragraph 1.5.4). The U.S. claims a contiguous zone extending 12 nautical miles from the baselines used to measure the territorial sea. The U.S. will respect, however, contiguous zones

extending up to 24 nautical miles from the baseline, provided the coastal nation recognizes U.S. rights in the zone consistent with the provisions of the 1982 LOS Convention.

**1.5.2 Exclusive Economic Zones.** An exclusive economic zone (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 U.S. recognizes the sovereign rights of a coastal nation to prescribe and enforce its law in the exclusive economic zone for the purpose 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). However, 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 which are not resource related. The United States established a 200-nautical mile exclusive economic zone by Presidential Proclamation on 10 March 1983.

**1.5.3 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.

**1.5.4 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 that would restrict the exercise of non-resource-related high seas freedoms beyond the territorial sea. Accordingly, the U.S. does not recognize the validity of any claimed security or military zone seaward of the territorial sea which purports to restrict or regulate the high seas freedoms of navigation and overflight. (See paragraph 2.3.2.3 for a discussion of temporary suspension of innocent passage in territorial seas.)

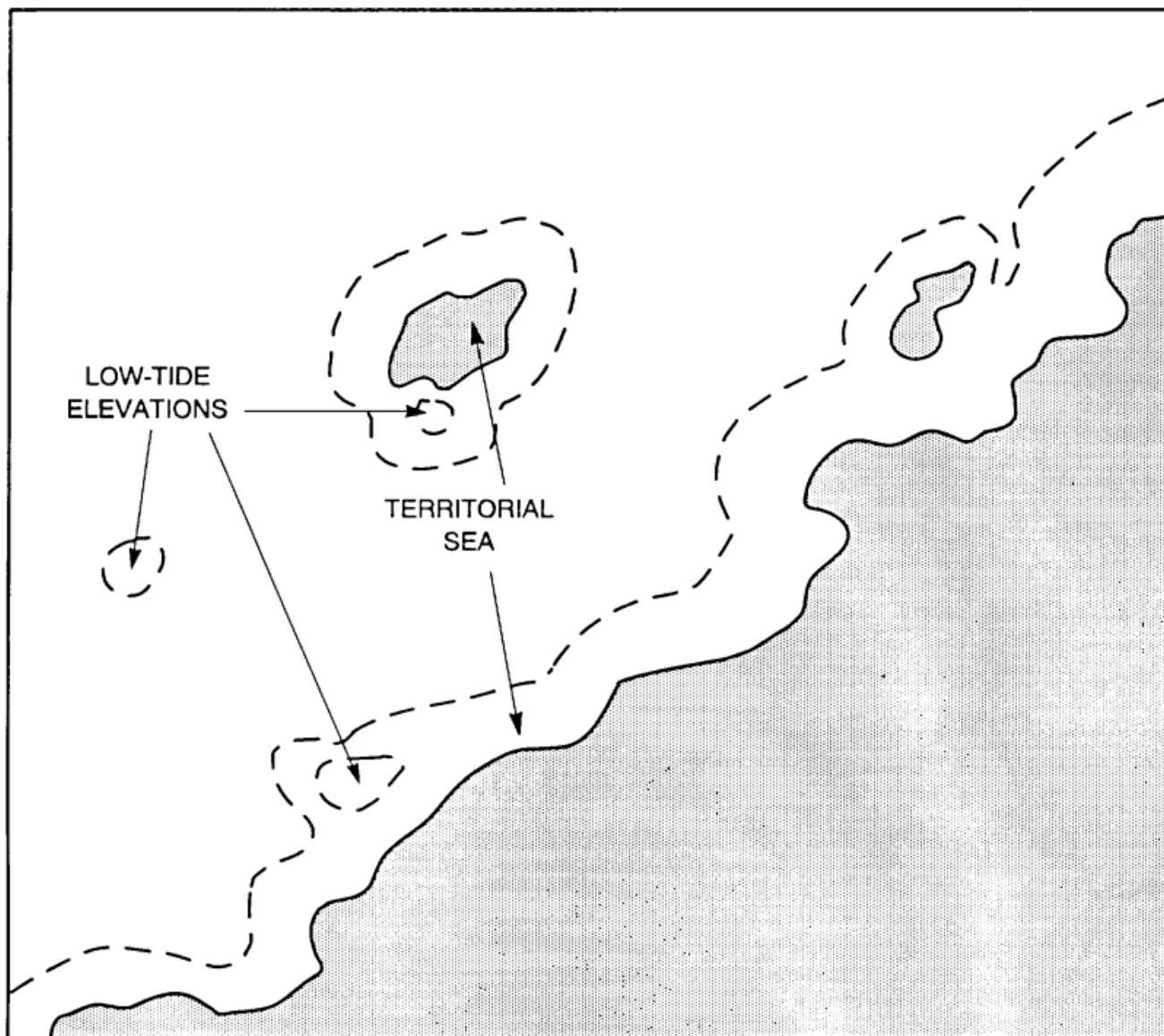


Figure 1-5. Territorial Sea of Islands and Low-Tide Elevations

## 1.6 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.

## 1.7 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 authorized by generally accepted international standards.

## **1.8 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 2.5.1.1) and archipelagic sea lanes (see paragraph 2.5.1.2), 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.

## **1.9 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 and Military Aircraft

### 2.1 STATUS OF WARSHIPS

**2.1.1 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 which is under regular armed forces discipline. 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.

**2.1.2 International Status.** A warship enjoys 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, are exempt from foreign taxes and regulation, and exercise exclusive control over all passengers and crew with regard to acts performed on board.

**2.1.2.1 Nuclear Powered Warships.** Nuclear powered warships and conventionally powered warships enjoy identical international legal status.

**2.1.2.2 Sunken Warships and Military Aircraft.** Sunken warships and military aircraft remain the property of the flag nation until title is formally relin-

quished 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.

**2.1.3 Auxiliaries.** Auxiliaries 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, auxiliaries 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. auxiliaries include all vessels which comprise the Military Sealift Command (MSC) Force. The 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. The United States claims full rights of sovereign immunity for all USNS, APF, NRDF and RRF vessels. 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.

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

## 2.2 STATUS OF MILITARY AIRCRAFT

**2.2.1 Military Aircraft Defined.** International law defines military aircraft to 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.

**2.2.2 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 1.8) 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.

**2.2.3 Military Contract Aircraft.** Civilian owned and operated aircraft, the full capacity of which has been contracted by the Air Mobility Command (AMC) and used in the military service of the United States, qualify as “state aircraft” if they are so designated 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 AMC-charter as state aircraft.

## 2.3 NAVIGATION IN AND OVERFLIGHT OF NATIONAL WATERS

**2.3.1 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 auxilia-

ries, 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 non-entry 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 are established that 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 2.3.2.1) or that of transit passage in an international strait (see paragraph 2.3.3.1) may be exercised by all nations in those waters.

### 2.3.2 Territorial Seas

**2.3.2.1 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. Military activities considered to be *prejudicial* to the peace, good order, and 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
2. Any exercise or practice with weapons of any kind
3. The launching, landing, or taking on board of any aircraft or of any military device
4. Intelligence collection activities detrimental to the security of that coastal nation
5. The carrying out of research or survey activities
6. Any act aimed at interfering with any system of communication of the coastal nation
7. Any act of propaganda aimed at affecting the defense or security of the coastal nation
8. 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

9. Any act of willful and serious pollution contrary to the 1982 LOS Convention
10. Any fishing activities
11. 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.

The coastal nation may take affirmative actions in its territorial sea to prevent passage that is not innocent, including, where necessary, the use of force. If a foreign ship enters the territorial sea and engages in non-innocent activities, the appropriate remedy, consistent with customary international law, is first to inform the vessel of the reasons why the coastal nation questions the innocence of the passage, and to provide the vessel a reasonable opportunity to clarify its intentions or to correct its conduct in a reasonably short period of time.

**2.3.2.2 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. 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.

**2.3.2.3 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.

**2.3.2.4 Warships and Innocent Passage.** All warships, including submarines, enjoy the right of innocent passage on an unimpeded and unannounced basis. Submarines, however, are required to navigate on

the surface and to show their flag when passing through foreign territorial seas. If a warship does not comply with coastal nation regulations that conform to established principles of international law and disregards a request for compliance which 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.

**2.3.2.5 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.

### 2.3.3 International Straits

**2.3.3.1 International Straits Overlapped by Territorial Seas.** Straits used for international navigation through the territorial sea 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 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, auxiliaries, 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. This means that submarines are free to transit international straits submerged, since that is their normal mode of operation, and that surface warships may transit in a manner consistent with sound navigational practices and the security of the force, including formation steaming and the launching and recovery of aircraft. All transiting ships and aircraft must proceed without delay; must refrain from the threat or the use of force against the sovereignty, territorial integrity, or political independence of nations bordering the strait; and must otherwise refrain from any activities other than those incident to their normal modes of continuous and expeditious transit.

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) in accordance with generally accepted international standards. Ships in transit must respect properly designated sea lanes and traffic separation schemes.

The regime of *innocent passage* (see paragraph 2.3.2.1), 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.

**2.3.3.2 International Straits Not Completely Overlapped by Territorial Seas.** Ships and aircraft transiting through or above straits used for international navigation which 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.

## **2.3.4 Archipelagic Waters**

**2.3.4.1 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. The right of archipelagic sea lanes passage is substantially identical to the right of transit passage through international straits (see para. 2.3.3.1). 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 coast line than 10 percent of the distance between the nearest islands. See Figure 2-1.

This 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.

**2.3.4.2 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. 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.

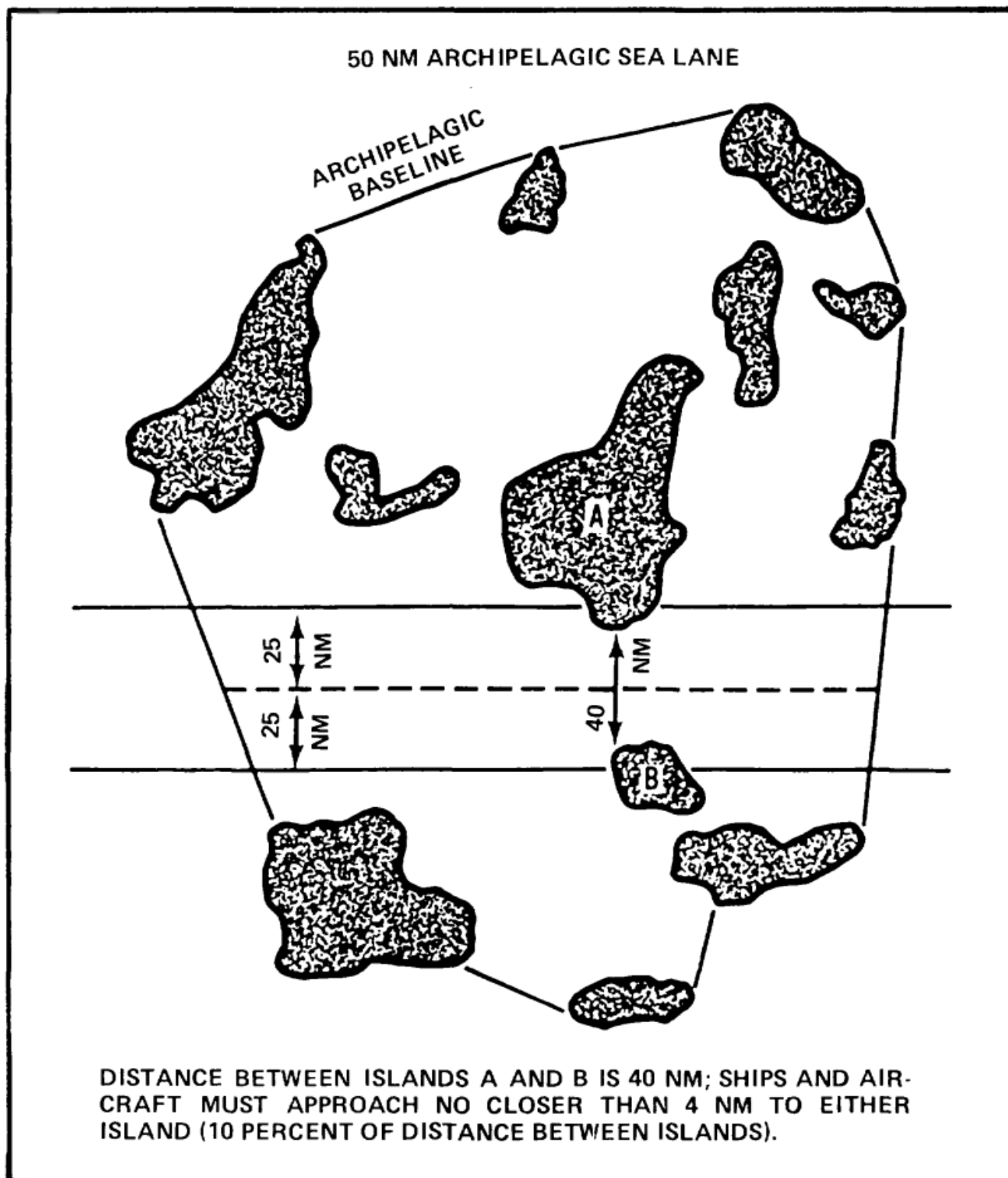


Figure 2-1. A Designated Archipelagic Sea Lane

## 2.4 NAVIGATION IN AND OVERFLIGHT OF INTERNATIONAL WATERS

**2.4.1 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 2.4.3. 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.

**2.4.2 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, in and over those waters, the existence of an exclusive economic zone in an area of naval operations need not, of itself, be of operational concern to the naval commander.

**2.4.2.1 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 knowledge of the marine environment for peaceful purposes, and includes: oceanography, marine biology, geological/geophysical scientific surveying, as well as other activities with a scientific purpose. The United States does not require that other nations obtain its consent prior to conducting marine scientific research in the U.S. EEZ.

**2.4.2.2 Hydrographic Surveys and Military Surveys.** Although coastal nation consent must be obtained in order to conduct marine scientific research in its exclusive economic zone, the coastal nation can-

not 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 of 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 hazards to navigation.

A military survey is the collecting of marine data for military purposes. A military survey may include collection of oceanographic, marine geological, geophysical, chemical, biological, acoustic, and related data.

**2.4.3 High Seas.** 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.

**2.4.3.1 Warning Areas.** 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 U.S. 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 high seas by others. Notice of the establishment of such areas must be promulgated in advance, usually in the form of a Notice to Mariners (NOTMAR) and/or a Notice to Airmen (NOTAM). 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.

**2.4.4 Declared Security and Defense Zones.** International law does not recognize the 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.

## **2.4.5 Polar Regions**

**2.4.5.1 Arctic Region.** The U.S. 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 lawfully claimed territorial seas of littoral states.

**2.4.5.2 Antarctic Region.** 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 U.S. does not recognize the validity of the claims of other nations to any portion of the Antarctic area.

**2.4.5.2.1 The Antarctic Treaty of 1959.** The U.S. 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 U.S. 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. Antarctica has no territorial sea or territorial airspace.

**2.4.6 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 U.S. of navigational rights and freedoms within waters covered by the Treaty of Tlatelolco.

## **2.5 AIR NAVIGATION**

**2.5.1 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 - see paragraph 2.5.2.2), with the sole exception of overflight of international straits and archipelagic sea lanes. 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. Aircraft in distress are entitled to special consideration and should be allowed entry and emergency landing rights. Concerning the right of assistance entry, see paragraph 2.3.2.5. For jurisdiction over aerial intruders, see paragraph 4.4.

**2.5.1.1 International Straits Which Connect EEZ/High Seas to EEZ/High Seas.** 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 2.5.2 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.

**2.5.1.2 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.

**2.5.2 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 na-

tions. 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.

**2.5.2.1 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 AMC-charter aircraft designated as “state aircraft” (see paragraph 2.2.2), 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 Dir. 4540.1 and OPNAVINST 3770.4 (series) and the Coast Guard Air Operations Manual, COMDTINST M3710.1 (series).)

**2.5.2.2 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 U.S. 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 need not identify themselves or otherwise comply with FIR procedures established by other nations, unless the U.S. has specifically agreed to do so.

**2.5.2.3 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 U.S. apply to aircraft bound for U.S. territorial airspace and require the filing of flight plans and periodic position reports. The U.S. 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 U.S. 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 need not identify themselves or otherwise comply with ADIZ procedures established by other nations, unless the U.S. 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.

## **2.6 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.

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

**2.7.1 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 "International Rules of the Road" or "72 COLREGS." 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 U.S. Code. Sections 1601 to 1606). Article 1139, U.S. Navy Regulations, 1990, directs that all persons in the naval service responsible for the operation of naval ships and craft "shall diligently observe" the 1972 COLREGS. Article 4-1-11 of U.S. Coast Guard Regulations (COMDTINST M5000.3 (series)) requires compliance by Coast Guard personnel with all Federal law and regulations.

**2.7.2 National 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 U.S. 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.

**2.7.2.1 U.S. Inland Rules.** The U.S. has adopted special Inland Rules applicable to navigation in U.S. waters landward of the demarcation lines established by U.S. law for that purpose. (See U.S. Coast Guard publication Navigational Rules, International — Inland, COMDTINST M16672.2 (series), title 33 Code of Federal Regulations part 80, and title 33 U.S. Code, sections 2001 to 2073.) The 1972 COLREGS apply seaward of the demarcation lines in U.S. national waters, in the U.S. contiguous zone and exclusive economic zone, and on the high seas.

**2.7.3 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) NATOPS Manual. The same standardized technical principles and policies of ICAO that apply in international and most foreign airspace are also in effect in the continental United States. Consequently, U.S. pilots can fly all major international routes following the same general rules of the air, using the same navigation equipment and communication practices and procedures, and being governed by the same air traffic control services with which they are familiar in the United States. Although ICAO has not yet established an “International Language for Aviation,” English is customarily used internationally for air traffic control.

## **2.8 U.S.-U.S.S.R. 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 Soviet Union in 1972 entered into the U.S.-U.S.S.R. 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 U.S. and former Soviet 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 International Rules of the Road.

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 signalling 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.

## **2.9 MILITARY ACTIVITIES IN OUTER SPACE**

**2.9.1 Outer Space Defined.** As noted in paragraph 2.5.1, 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.

**2.9.2 The Law of Outer Space.** International law, including the United Nations Charter, 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 United Nations Charter 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.

**2.9.2.1 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. As set out in paragraph 2.9.1, outer space begins at the undefined upper limit of the earth’s airspace and extends to infinity. 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.

**2.9.2.2 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.

**2.9.3 International Agreements on 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 Treaty of 1972; and the Space Objects Registration Treaty 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.

**2.9.3.1 Related International Agreements.** Several other international agreements restrict specific types of activity in outer space. The US-USSR Anti-Ballistic Missile (ABM) Treaty of 1972 prohibits the development, testing, and deployment of space-based ABM systems or components. Also prohibited, is any interference with the surveillance satellites both nations use to monitor ABM Treaty compliance. The ABM Treaty continues in force between the U.S. and Russia.

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.

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.

The 1982 International Telecommunication Convention and the 1979 Radio Regulations govern the use of the radio frequency spectrum by satellites and the location of satellites in the geostationary-satellite orbit.

**2.9.4 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 which constitute a danger to astronauts.

**2.9.5 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. Similarly, such objects found in international areas shall be held for or returned to the launching authority. 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.

## 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 *applicable standing rules of engagement* promulgated by the operational chain of command ordinarily require the on-scene commander to report immediately such circumstances to 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 2.3.2.5 for a discussion of “Assistance Entry.”)

**3.2.1.1 Duty of Masters.** In addition, the U.S. 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.** Article 0925, U.S. Navy Regulations, 1990, 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, U.S. Coast Guard Regulations (COMDTINST M5000.3 (series)) imposes a similar duty for the Coast Guard.

**3.2.2 Safe Harbor.** 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. (See paragraph 4.4 for a discussion of aircraft in distress.)

**3.2.2.1 Innocent Passage.** Innocent passage through territorial seas and archipelagic waters includes stopping and anchoring when 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 re-

quest *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 U.S. 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 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. armed forces aircraft, vessel, activity or station. Persons seeking asylum are to be afforded every reasonable care and protection permitted by the circumstances. Under no circumstances will a person seeking asylum in U.S. territory or in international waters be surrendered to foreign jurisdiction or control, unless at the personal direction of the Secretary of the Navy or higher authority. (See Article 0939, U.S. Navy Regulations, 1990; SECNAVINST 5710.22 (series), and U.S. Coast Guard Maritime Law Enforcement Manual, COMDTINST M16247.1 (series) (MLEM), Enclosure 17, 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 U.S., 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.** 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 Department of Defense shore installation, facility, or military vessel within the territorial jurisdiction of a foreign nation or [in international waters], under conditions of urgency in order to secure the life or safety of that person against imminent danger, such as pursuit by a mob.*

It is the policy of the United States to grant temporary refuge in a foreign 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, station, or activity must decide which measures can prudently be taken to provide

temporary refuge. The safety of U.S. personnel and security of the unit must be taken into consideration.

**3.3.2.1 Termination or Surrender of Temporary Refuge.** 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 temporary refuge has been granted, protection may be terminated only when directed by the Secretary of the Navy, or higher authority. (See Article 0939, U.S. Navy Regulations, 1990, and SECNAVINST 5710.22 (series), and the Coast Guard's MLEM.)

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).
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 Article 630.23, OPNAVINST 3120.32B, and paragraph 2.9 of the Coast Guard's 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 title 18 U.S. Code section 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 eco-

nomic 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 Private Purpose.** To constitute the crime of piracy, the illegal acts must be committed for private ends. Consequently, an attack upon a merchant ship at sea for the purpose of achieving some criminal end, e.g., robbery, is an act of piracy as that term is currently defined in international law. Conversely, acts otherwise constituting piracy done for purely political motives, as in the case of insurgents not recognized as belligerents, are not piratical.

**3.5.2.4 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 applicable 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 which 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 which 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 (e.g., CINCPACFLT OPOD 201, CINCLANTFLT OPOD 2000).

## **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 JCS Standing Rules of Engagement for U.S. Forces 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 Joint Chiefs of Staff (JCS) 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 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 U.S. and international law and reflects national policy.

**3.10.1.1 Foreign Internal Waters, Archipelagic Waters, and Territorial Seas.** Unlawful acts of violence directed against U.S. flag vessels and aircraft and U.S. nationals within and over the internal waters, archipelagic waters, or territorial seas of a foreign 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, aircraft and citizens 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 applicable 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 applicable 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 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 U.S. laws and treaty obligations pertaining to fisheries, wildlife, customs, immigration, environmental protection, and marine safety are enforced at sea by agencies of the United States. Since these activities do not ordinarily involve Department of Defense personnel, they are not addressed in this publication.

**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.

**3.11.1.1.1 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 extra-territorial 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.)

**3.11.1.2 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.

**3.11.1.3 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.

**3.11.1.4 Protective Principle.** This principle recognizes the right of a nation to prosecute acts which 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.

**3.11.1.5 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 for 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 U.S. law and, without approval of the U.S. Maritime Administration (MARAD) have been either sold to a non-U.S. 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 non-sovereign 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:

**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.

**a. 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 which enables it to be seen or heard by the foreign ship.

**b. Hot Pursuit by Aircraft.** Where hot pursuit is effected by aircraft:

1. The preceding provisions apply.
2. 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.

**c. 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 which 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 which 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 which 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 (i.e., 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 engage in two other actions in conjunction with maritime law enforcement, neither of which constitute an exercise of jurisdiction over the vessel in question. However, such actions may afford a commander with information which could serve as the basis for subsequent law enforcement.

**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 which 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.

The voluntary consent of the master permits the boarding, but it does not allow the assertion of law enforcement authority (such as arrest or seizure). A consensual boarding is not, therefore, an exercise of maritime law enforcement jurisdiction *per se*. 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.

**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 U.S., 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 U.S.

**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, title 18 U.S. Code section 1385. As a matter of policy, the Posse Comitatus Act is made equally applicable to the U.S. Navy and U.S. Marine Corps. The prohibitions of the Act are not applicable to the U.S. Coast Guard, even when operating as a part of the Department of the Navy. (See SECNAVINST 5820.7 (series).) 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.

**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; and
6. The operation of a base of operations for civilian 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 exception relating to pursuit of pirates.)

**3.11.3.4 Interagency Coordination.** Presidential Directive NSC 27 (PD-27) requires coordination within the Executive Branch of the government for non-military incidents which could have an adverse impact on U.S. 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 (SNO) 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 3.11.2.4)
5. Foreign vessels located within the territorial sea or contiguous zone of the United States (see paragraph 1.5.1)
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 3.11.2.4).

**3.11.4.2 DOD Mission in Counterdrug Operations.** The Department of Defense 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 may employ only such force, pursuant to U.S. Coast Guard Use of Force Policy, as is reasonable and necessary under the circumstances.

**3.11.5.1 Rules of Engagement Distinguished.** U.S. rules of engagement delineate the circumstances and limitations under which U.S. naval, ground and air forces will initiate and/or continue the combat engagement with other forces encountered (see paragraph 4.3.2.2). Use of force in the context of law enforcement is also permitted to be used to terminate criminal activities and to effect the apprehension of those engaged in such unlawful conduct. DOD and Coast Guard units performing law enforcement duties will be guided by the U.S. Coast Guard Use of Force Policy (Coast Guard MLEM) which details the specific circumstances and

limitations under which force may be used to terminate criminal activity and to apprehend those committing such acts. Neither the rules of engagement nor the rules for the use of force in law enforcement 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, when warning shots and further warnings are unheeded, into the steering gear or engine room of a vessel in order to cause the vessel to stop. 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 providing towing and escort services for vessels seized by the U.S. Coast Guard. Naval commanders may also be called upon to provide assistance to law enforcement agencies in the return of apprehended drug traffickers and terrorists to the United States for prosecution. Activities of this nature usually involve extensive advance planning and coordination.

## CHAPTER 4

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

### 4.1 INTRODUCTION

This final chapter of Part I — Law of Peacetime Naval Operations — examines the broad principles of international law that govern the conduct of nations in protecting their interests at sea during time of peace. *As noted in the preface, this publication provides general information, is not directive, and does not supersede guidance issued by the commanders of the combatant commands, and 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 between nations has been divided into rules applicable in peacetime and rules applicable in time of war. In recent years, however, the concepts of both “war” and “peace” have become blurred and no longer lend themselves to clear definition. Consequently, it is not always possible to try to draw neat distinctions between the two. Full scale hostilities continue to break out around the world, but few are accompanied by a formal declaration of war. At the same time, the spectrum of armed conflict has widened and become increasingly complex. At one end of that spectrum is total nuclear war; at the other, insurgencies and state-sponsored terrorism. For the purposes of this publication, however, the conduct of armed hostilities involving U.S. forces, irrespective of character, intensity, or duration, is addressed in Part II — Law of Naval Warfare.

**4.1.1 Charter of the United Nations.** Article 2, paragraph 3, of the Charter of the United Nations 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.*

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 will not use force or the threat of force to impose their will on other nations or to otherwise resolve their international differences.

Under Chapter VI of the Charter, the Security Council has a number of measures short of the use of force available to it to facilitate the peaceful settlement of disputes. If, however, the dispute constitutes a threat to the peace, breach of the peace, or act of aggression, Article 39 of the Charter provides:

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

Such decisions of the Security Council are implemented under Article 41 or Article 42 of the Charter. Article 41 provides:

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

*radio, and other means of communication, and the severance of diplomatic relations.*

Article 42 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 . . . until the Security Council has taken measures necessary to maintain international peace and security.*

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

## **4.2 NONMILITARY MEASURES**

**4.2.1 Diplomatic.** As contemplated by the United Nations Charter, nations 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 nations 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 nations are resolved or accommodated through the normal day-to-day, give-and-take of international diplomacy. The key point is that disputes between the U.S. and other nations 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.

**4.2.2 Economic.** Nations 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 nations 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 nations 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.

**4.2.3 Judicial.** Nations 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.

Nations may also submit their disputes to the International Court of Justice for resolution. Article 92 of the United Nations Charter 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. Nations also have the option of submitting their disputes to ad hoc or other established tribunals.

## **4.3 MILITARY MEASURES**

The mission of U.S. military forces is to deter armed attack against the United States across the range of military operations, defeat an armed attack should deterrence fail, and prevent or neutralize hostile efforts to intimidate or coerce the United States by the threat or use of armed force or terrorist actions. 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 nations that, should the need arise, the U.S. has the will to use its forces in individual or collective self-defense.

**4.3.1 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 multi-battle group formations — provide the National Command Authorities 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 battle 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.

**4.3.2 The Right of Self-Defense.** The Charter of the United Nations recognizes that all nations enjoy the inherent right of individual and collective self-defense against armed attack. U.S. doctrine on self-defense, set forth in the JCS Standing Rules of Engagement for U.S. Forces, provides that the use of force in self-defense against armed attack, or the threat of imminent armed attack, rests upon two elements:

1. **Necessity** — The requirement that a use of force be in response to a hostile act or demonstration of hostile intent.
2. **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.

Customary international law has long recognized that there are circumstances during time of peace when nations must resort to the use of armed force to protect their national interests against unlawful or otherwise hostile actions by other nations. A number of legal concepts have evolved over the years to sanction the limited use of armed forces in such circumstances (e.g., intervention, embargo, maritime quarantine). To the extent that such concepts have continuing validity under the Charter of the United Nations, they are premised on the broader principle of self-defense.

The concept of maritime quarantine provides a case in point. Maritime quarantine was first invoked by the United States as a means of interdicting the flow of Soviet strategic missiles into Cuba in 1962. That action involved a limited coercive measure on the high seas applicable only to ships carrying offensive weaponry to Cuba and utilized the least possible military force to achieve that purpose. That action, formally ratified by the Organization of American States (OAS), has been widely approved as a legitimate exercise of the inherent right of individual and collective self-defense recognized in Article 51 of the UN Charter.

**4.3.2.1 Anticipatory Self-Defense.** Included within the inherent right of self-defense is the right of a nation (and its armed forces) to protect itself from imminent attack. International law recognizes that it would be contrary to the purposes of the United Nations Charter 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.

**4.3.2.2 JCS Standing Rules of Engagement (SROE).** The JCS Standing Rules of Engagement establish fundamental policies and procedures governing the actions to be taken by U.S. commanders during military operations, contingencies, or prolonged conflicts. (See also the discussion of SROE in the Preface.) At the national level, rules of engagement are promulgated by the NCA, 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, U.S. 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 National Command Authorities to determine the response that will be made to hostile acts and demonstrations of hostile intent. The SROE provide implementation guidance on the inherent right and obligation of self-defense and the application of force for mission accomplishment. A principal tenet of these ROE is the 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.

#### **4.4 INTERCEPTION OF INTRUDING AIRCRAFT**

All nations have complete and exclusive sovereignty over their national airspace (see paragraphs 1.8 and 2.5.1). With the exception of overflight in transit passage of international straits and in archipelagic sea lanes passage (see paragraphs 2.3.3 and 2.3.4.1), distress (see paragraph 3.2.2.1), and assistance entry to assist those in danger of being lost at sea (see paragraph 2.3.2.5), 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.

Customary international law provides that a foreign 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 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 United Nations Charter.)
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 nations 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 will come into force upon ratification by 102 of ICAO's members in respect of those nations which have ratified it. The Convention, by its terms, does not apply to intruding military aircraft. The U.S. 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.

## **PART II**

# **Law of Naval Warfare**

Chapter 5 — Principles and Sources of the Law of Armed Conflict

Chapter 6 — Adherence and Enforcement

Chapter 7 — The Law of Neutrality

Chapter 8 — The Law of Targeting

Chapter 9 — Conventional Weapons and Weapons Systems

Chapter 10 — Nuclear, Chemical, and Biological Weapons

Chapter 11 — Noncombat Persons

Chapter 12 — Deception During Armed Conflict



## CHAPTER 5

# Principles and Sources of the Law of Armed Conflict

### 5.1 WAR AND THE LAW

Article 2 of the United Nations Charter requires all nations to settle their international disputes by peaceful means and to refrain from the threat or use of force against the territorial integrity or political independence of other nations. The United Nations Charter prohibits the use of force by member nations except as an enforcement action taken by or on behalf of the United Nations (as in the Gulf War) or as a measure of individual or collective self-defense. It is important to distinguish between resort to armed conflict, and the law governing the conduct of armed conflict. Regardless of whether the use of armed force in a particular circumstance is prohibited by the United Nations Charter (and therefore unlawful), the manner in which the resulting armed conflict is conducted continues to be regulated by the law of armed conflict. (For purposes of this publication, the term “law of armed conflict” is synonymous with “law of war.”)

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

The law of armed conflict seeks to prevent unnecessary suffering and destruction by controlling and mitigating the harmful effects of hostilities through minimum standards of protection to be accorded to “combatants” and to “noncombatants” and their property. (See paragraphs 5.3 and 11.1.) To that end, the law of armed conflict provides that:

1. 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.
2. The employment of any kind or degree of force not required for the purpose of the partial or

complete submission of the enemy with a minimum expenditure of time, life, and physical resources, is prohibited.

3. Dishonorable (treacherous) means, dishonorable expedients, and dishonorable conduct during armed conflict are forbidden.

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 forces and is not used to cause purposeless, unnecessary human misery and physical destruction. In that sense, the law of armed conflict complements and supports the principles of warfare embodied in the military concepts of objective, mass, economy of force, surprise, and security. Together, the law of armed conflict and the principles of warfare underscore the importance of concentrating forces against critical military targets while avoiding the expenditure of personnel and resources against persons, places, and things that are militarily unimportant. However, these principles do not prohibit the application of overwhelming force against enemy combatants, units and material.

### 5.3 COMBATANTS AND NONCOMBATANTS

The law of armed conflict is based largely on the distinction to be made between combatants and noncombatants. In accordance with this distinction, the population of a nation engaged in armed conflict is divided into two general classes: armed forces (combatants) and the civilian populace (noncombatants). Each class has specific rights and obligations in time of armed conflict, and no single individual can be simultaneously a combatant and a noncombatant.

The term “combatant” embraces those persons who have the right under international law to participate

directly in armed conflict during hostilities. Combatants, therefore, include all members of the regularly organized armed forces of a party to the conflict (except medical personnel, chaplains, civil defense personnel, and members of the armed forces who have acquired civil defense status), as well as irregular forces who are under responsible command and subject to internal military discipline, carry their arms openly, and otherwise distinguish themselves clearly from the civilian population.

Conversely, the term “noncombatant” is primarily applied to those individuals who do not form a part of the armed forces and who otherwise refrain from the commission or direct support of hostile acts. In this context, noncombatants and, generally, the civilian population, are synonymous. The term noncombatants may, however, also embrace certain categories of persons who, although members of or accompanying the armed forces, enjoy special protected status, such as medical officers, corpsmen, chaplains, technical (i.e., contractor) representatives, and civilian war correspondents. (See Chapter 11.) The term is also applied to armed forces personnel who are unable to engage in combat because of wounds, sickness, shipwreck, or capture.

Under the law of armed conflict, noncombatants must be safeguarded against injury not incidental to military operations directed against combatant forces and other military objectives. In particular, it is forbidden to make noncombatants the object of attack.

Because only combatants may lawfully participate directly in armed combat, noncombatants that do so are acting unlawfully and are considered illegal combatants. See paragraphs 11.5 (Medical Personnel and Chaplains) and 12.7.1 (Illegal Combatants).

## **5.4 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.

**5.4.1 Customary Law.** The customary international law of armed conflict derives from the practice of military and naval forces in the field, at sea, and in the air during hostilities. When such a practice attains a degree of regularity and is accompanied by the general conviction among nations that behavior in confor-

mity with that practice is obligatory, it can 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 to 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, underscore the continuing importance of customary international law in the development of the law of armed conflict.

**5.4.2 International Agreements.** International agreements, whether denominated as treaties, conventions, or protocols, have played a major role in the development of the law of armed conflict. Whether codifying existing rules of customary law or creating new rules to govern future practice, international agreements are a source of the law of armed conflict. Rules of law established through international agreements are ordinarily binding only upon those nations that have ratified or adhered to them. Moreover, rules established through the treaty process are binding only to the extent required by the terms of the treaty itself as limited by the reservations, if any, that have accompanied its ratification or adherence by individual nations. Conversely, to the extent that such rules codify existing customary law or otherwise come, over time, to represent a general consensus among nations of their obligatory nature, they are binding upon party and non-party 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, and the Conventional Weapons Convention of 1980. 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. The most significant of these agreements (for purposes of this publication) are listed chronologically as follows:

1. 1907 Hague Convention Respecting the Laws and Customs of War on Land (Hague IV)
2. 1907 Hague Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague V)
3. 1907 Hague Convention Relative to the Laying of Automatic Submarine Contact Mines (Hague VIII)
4. 1907 Hague Convention Concerning Bombardment by Naval Forces in Time of War (Hague IX)
5. 1907 Hague Convention Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War (Hague XI)
6. 1907 Hague Convention Concerning the Rights and Duties of Neutral Powers in Naval War (Hague XIII)
7. 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare
8. 1936 London Protocol in Regard to the Operations of Submarines or Other War Vessels with Respect to Merchant Vessels (Part IV of the 1930 London Naval Treaty)
9. 1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field\*
10. 1949 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea\*
11. 1949 Geneva Convention (III) relative to the Treatment of Prisoners of War\*
12. 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War\*
13. 1954 Hague Convention for the Protection of Cultural Property in the event of armed conflict
14. 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction
15. 1977 Protocol Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of International Armed Conflict (Additional Protocol I)\*
16. 1977 Protocol Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II)\*
17. 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\*
18. 1993 Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction

## 5.5 RULES OF ENGAGEMENT

During wartime or other periods of armed conflict, U.S. rules of engagement reaffirm the right and responsibility of the operational commander generally to seek out, engage, and destroy enemy forces consistent with national objectives, strategy, and the law of armed conflict.

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\* An asterisk (\*) indicates that signature or ratification of the United States was subject to one or more reservations or understandings. The United States is a party to, and bound by, all of the foregoing conventions and protocols, except numbers 13, 15, 16, and 18. The United States has decided not to ratify number 15 (Additional Protocol I). The United States has ratified number 17, Protocols I and II, but has not ratified Protocol III.



## 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. However, repeated violations not responded to by protests, reprisals, or other enforcement actions may, over time, indicate that a particular rule is no longer regarded as valid.

**6.1.1 Adherence by the United States.** The Constitution of the United States provides that treaties to which the U.S. 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 Supreme Court of the United States 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. Since the law of armed conflict is based on international agreements to which the U.S. is a party and customary law, it is binding upon the United States, its citizens, and its armed forces.

**6.1.2 Department of the Navy Policy.** SECNAVINST 3300.1A 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. Article 0705, U.S. Navy Regulations, 1990, 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.*

It is the responsibility of the Chief of Naval Operations and the Commandant of the Marine Corps (see OPNAVINST 3300.52 and MCO 3300.3) to ensure that:

1. The U.S. Navy and Marine Corps observe and enforce the law of armed conflict at all times. International armed conflicts are governed by the law of armed conflict as a matter of law. However, not all situations are “international” armed conflicts. In those circumstances when international armed conflict does not exist (e.g. internal armed conflicts), law of armed conflict principles may nevertheless be applied as a matter of policy.
2. Alleged violations of the law of armed conflict, whether committed by or against United States or enemy personnel, are promptly reported, thoroughly investigated, and where appropriate, remedied by corrective action.
3. All service members of the Department of the Navy, commensurate with their duties and responsibilities, 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.

**6.1.3 Command Responsibility.** Officers in command are not only responsible for ensuring that they conduct all combat operations in accordance with the law of armed conflict; they are also responsible for the proper performance of their subordinates. While a commander may delegate some or all of his authority, he cannot delegate responsibility for the conduct of the forces he commands. The fact that a commander did not order, authorize, or knowingly acquiesce in a violation of the law of armed conflict by a subordinate will not relieve him of responsibility for its occurrence if it is established that 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 of a noncombatant or the 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 of an order protect a subordinate from the consequences of violation of 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 enquiry. 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, international humanitarian organizations, such as the International Committee of the Red Cross, have been authorized by the parties to the conflict to perform at least some of the functions of a Protecting Power.

**6.2.2 The International Committee of the Red Cross (ICRC).** 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 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 National 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 Reprisal.** A reprisal is an enforcement measure under the law of armed conflict consisting of an act which would otherwise be unlawful but which is justified as a response to the 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. Reprisals may be taken against enemy armed forces, enemy civilians other than those in occupied territory, and enemy property.

**6.2.3.1 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. (For the rule applicable to the United States, see paragraph 6.2.3.3).
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 his 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 desist from its unlawful activities and to comply with the law of armed conflict.

**6.2.3.2 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.

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

**6.2.4 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 of law 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 NCA.

**6.2.5 War Crimes Under International Law.** For the purposes of this publication, war crimes are defined as those acts which violate the law of armed conflict, that is, the rules established by customary and conventional international law regulating the conduct of warfare, and which have been generally recognized as war crimes. Acts constituting war crimes may be committed by the armed forces of a belligerent or by individuals belonging to the civilian population. Belligerents have the obligation 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 belligerents have the right to punish enemy armed forces personnel and enemy civilians who fall under their control for such offenses.

The following acts are representative war crimes:

1. Offenses against prisoners of war, including killing without just cause; torture or inhuman treatment; subjection to public insult or curiosity; unhealthy, dangerous, or otherwise prohibited labor; infringement of religious rights; and denial of fair trial for offenses
2. Offenses against civilian inhabitants of occupied territory, including killing without just cause, torture or inhuman treatment, forced labor, deportation, infringement of religious rights, 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 hors de combat or 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
8. Plunder and pillage of public or private property
9. Mutilation or other mistreatment of the dead
10. Employing forbidden arms or ammunition
11. Misuse, abuse, or firing on flags of truce or on the Red Cross device, and similar protective emblems, signs, and signals
12. Treacherous request for quarter (i.e., feigning surrender in order to gain a military advantage).

**6.2.5.1 Trials During Hostilities.** Although permitted under international law, nations rarely try enemy combatants while hostilities are in progress. Such trials might provoke undesirable actions from an enemy and complicate humanitarian protections applicable to one's own nationals. Trials of unlawful combatants have been held. Yet, for similar reasons, such trials may be less than rigorously pursued during the course of hostilities. (Regarding trials of a nation's own forces, see paragraph 6.2.5.3.)

**6.2.5.2 Trials After Hostilities.** Even after the close of hostilities, criminal trials against lawful enemy combatants have been the exception, not the rule. After World War I, responsibility for initiating that conflict was formally assigned to Kaiser Wilhelm, and an extensive report of alleged atrocities committed by German troops was prepared by the Allies. No international trials were held against World War I combatants. Some trials were held by German authorities of German personnel as required by the Allies. Due to the gross excesses of the Axis Powers during World War II, involving not only initiation of aggressive war but also wholesale execution of ethnic groups and enslavement of occupied territories, the Allied Powers determined that large scale assignment of individual criminal responsibility was necessary. Crimes against peace and crimes against humanity were charges against the principal political, military and industrial leaders responsible for

the initiation of the war and various inhumane policies. The principal offenses against combatants directly related to combat activities were the willful killing of prisoners and others in temporary custody. Since World War II such prosecutions after conflicts have not occurred.

**6.2.5.3 Jurisdiction Over Offenses.** Except for war crimes trials conducted by the Allies after World War II, the majority of prosecutions for violations of the law of armed conflict have been trials of one's own forces for breaches of military discipline. Violations of the law of armed conflict committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice and, if so, will be prosecuted under that Code.

Although jurisdiction extends to enemy personnel, trials have almost exclusively been against unlawful combatants, such as persons who take part in combat operations without distinguishing themselves clearly from the civilian population during battle or those acting without state sanction for private ends.

In the United States, its territories and possessions, jurisdiction is not limited to offenses against U.S. nationals, but extends to offenses against persons of other nationalities. Violations by enemy nationals may be tried as offenses against international law, which forms part of the law of the United States. 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. (On jurisdiction generally, see paragraph 3.11.1.)

**6.2.5.4 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.

#### **6.2.5.5 Defenses**

**6.2.5.5.1 Superior Orders.** The fact that a person committed a war crime under orders of his military or civilian superior does not relieve him from responsibility under international law. It may 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.

**6.2.5.5.2 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 ci-

vilian 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.

**6.2.5.5.3 Acts Legal or Obligatory Under National Law.** The fact that national law does not prohibit an act which 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.

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



# 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 and counterinsurgencies, armed conflict is now seldom accompanied by formal declarations of war. Consequently, it has become increasingly difficult to determine with precision the point in time when hostilities have become a “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 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 United Nations Charter (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.

**7.2.1 Neutrality Under the Charter of the United Nations.** The Charter of the United Nations imposes upon its members the obligation to settle international disputes by peaceful means and to refrain from the threat or use of force in their international relations. 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. When called upon by the Security Council to do so, member nations are obligated to provide assistance to the United Nations, or a nation or coalition of nations implementing a Security Council enforcement action, in any action it takes and to refrain from aiding any nation against whom such action is directed. Consequently, member nations may be obliged to support a United Nations action with elements of their armed forces, a result incompatible with the abstention requirement of neutral status. Similarly, a member nation may be called upon to provide assistance to the United Nations in an enforcement action not involving its armed forces and thereby assume a partisan posture inconsistent with the impartiality required by the traditional law of neutrality. Should the Security Council determine not to institute an enforcement action, each United Nations member remains free to assert neutral status.

**7.2.2 Neutrality Under Regional and Collective Self-Defense Arrangements.** The obligation in the United Nations Charter 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, collectively or 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 the 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 that 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 a 24-hour grace period in which 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.

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 which 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 their 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 "mere 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.

#### **7.3.4.1 The 12-Nautical Mile Territorial Sea.**

When the law of neutrality was codified in the Hague Conventions of 1907, the 3-nautical mile territorial sea was the accepted norm, aviation was in its infancy, and the submarine had not yet proven itself as a significant weapons platform. The rules of neutrality applicable to the territorial sea were designed primarily to regulate the conduct of surface warships in a narrow band of water off neutral coasts. The 1982 Law of the Sea Convention provides that coastal nations may lawfully extend the breadth of claimed territorial seas to 12 nautical miles. The U.S. claims a 12-nautical mile territorial sea and recognizes the right of all coastal nations to do likewise.

In the context of a universally recognized 3-nautical mile territorial sea, the rights and duties of neutrals and belligerents in neutral territorial seas were balanced and equitable. Although extension of the breadth of the territorial sea from 3 to 12 nautical miles removes over 3,000,000 square miles of ocean from the arena in which belligerent forces may conduct offensive combat operations and significantly complicates neutral nation enforcement of the inviolability of its neutral waters, the 12-nautical mile territorial sea is not, in and of itself, incompatible with the law of neutrality. 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.

**7.3.5 Neutral International Straits.** Customary international law as reflected in the 1982 Law of the Sea 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 aircraft, screen formation steaming, and acoustic and electronic surveillance. Belligerent forces may not use neutral straits as a place of sanctuary nor 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 which may use the Straits, both in times of peace and during armed conflict.)

**7.3.6 Neutral Archipelagic Waters.** The United States recognizes the right of qualifying island nations to establish archipelagic baselines enclosing archipelagic waters, provided the baselines are drawn in conformity with the 1982 LOS Convention. The balance of neutral and belligerent rights and duties with respect to neutral waters, is, however, at its most difficult in the context of archipelagic waters.

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 submarines, surface warships, and military aircraft, retain the right of unimpeded archipelagic sea lanes passage through, over, and under 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 and the launching and recovery of aircraft. Visit and search is not authorized in neutral archipelagic waters.

A neutral nation may close its archipelagic waters (other than archipelagic sea lanes whether designated or those routes normally used for international navigation or overflight) to the passage of belligerent ships but it is not obliged 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.

**7.3.7 Neutral Airspace.** 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:

1. 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.
2. Medical aircraft may, with prior notice, overfly neutral territory, may land therein in case of necessity, and may use neutral airfield facilities as ports of call, subject to such restrictions and regulations as the neutral nation may see fit to apply equally to all belligerents.
3. Belligerent aircraft in evident distress may be permitted to enter neutral airspace and to land in neutral territory under such safeguards as the neutral nation may wish to impose. The neutral nation must require such aircraft to land and must intern both aircraft and crew.

**7.3.7.1 Neutral Duties in Neutral Airspace.** 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 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 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 nonpublic 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 may forbid its citizens from carrying on non-neutral commerce with belligerent nations, it is not obliged to do so. 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 which are destined for the enemy of a belligerent and which may be susceptible to use in armed conflict. Traditionally, contraband had been divided into two categories: absolute and conditional. Absolute contraband consisted of goods whose character made it obvious that they were destined for use in armed conflict, such as munitions, weapons, uniforms, and the like. Conditional contraband were goods equally susceptible to either peaceful or warlike purposes, such as foodstuffs, construction materials, and fuel. Belligerents often declared 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 varied according to the circumstances of the conflict.

The practice of belligerents since 1939 has 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 during the Second World

War 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. To the extent that international law may continue to require publication of contraband lists, recent practice indicates that the requirement may be satisfied by a listing of exempt goods.

**7.4.1.1 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
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.

**7.4.1.2 Exemptions to Contraband.** Certain goods are exempt from capture as contraband even though destined for enemy territory. Among them are:

1. Exempt or "free goods"
2. Articles intended exclusively for the treatment of wounded and sick members of the armed forces and for prevention of disease

3. 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
4. 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
5. 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.

#### **7.4.2 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 8.2.1 and 8.2.2 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 8.2.1 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 visit and search.

(Paragraph 8.2.2 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.** 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:

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 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. Visit and search of an aircraft by an aircraft may be accomplished by directing the aircraft to proceed under escort to the nearest convenient belligerent landing area.

## **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. A belligerent's purpose in establishing a blockade is to deny the enemy the use of enemy and neutral vessels or aircraft to transport personnel and goods to or from enemy territory. 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 Traditional Rules.** In order to be valid under the traditional rules of international law, a blockade must conform to the following criteria.

**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 his 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.** In order to be valid, a blockade must be effective. To be effective, it must be maintained by a surface, air, or subsurface force or other mechanism 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). Nor does effectiveness 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.

**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.

**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 traditional rules of blockade, as set out above, 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 justified instead upon the belligerent right of reprisal against illegal acts of warfare on the part of the enemy. Moreover, recent 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.

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 mining 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**

Within the immediate area or vicinity of naval operations, 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.

**7.8.1 Belligerent Control of Neutral Communications at Sea.** 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 of establishing broad ocean areas as “exclusion zones” or “war zones” in which neutral shipping was either barred or put at special risk. Operational war/exclusion zones established by the belligerents of both sides were based on the right of reprisal 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 8.1.2.1), 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 which 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.

## **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. Breaking or attempting to break 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 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. (Article 630.23 of OPNAVINST 3120.32 (series), Standard Organization and Regulations of the U.S. Navy, 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 which have 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, it thereby assumed the character of an enemy warship or military aircraft and, upon capture, its 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 non-medical 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 law of targeting is premised upon the three fundamental principles of the law of armed conflict:

1. The right of belligerents to adopt means of injuring the enemy is not unlimited.
2. It is prohibited to launch attacks against the civilian population as such.
3. Distinctions must be made between combatants and noncombatants, to the effect that noncombatants be spared as much as possible.

These legal principles governing targeting generally parallel the military principles of the objective, mass, and economy of force. The law requires that only objectives of military importance be attacked but permits the use of sufficient mass to destroy those objectives. At the same time, unnecessary collateral destruction 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 civilians and civilian objects are spared as much as possible from the ravages of war.

**8.1.1 Military Objectives.** Only military objectives may be attacked. Military objectives are combatants 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.

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

**8.1.2 Civilians and Civilian Objects.** Civilians and civilian objects may not be made the object of attack. Civilian objects consist of all civilian property and activities other than those used to support or sustain the enemy's war-fighting capability. Attacks on installations such as dikes and dams are prohibited if their breach or destruction would result in the loss of civilian lives disproportionate to the military advantage to be gained. (See also paragraph 8.5.1.7.) Similarly, 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.

**8.1.2.1 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. Incidental injury or collateral damage must not, however, be excessive in light of the military advantage anticipated by the attack. In making this determination, “military advantage” refers to the advantage anticipated from the military operation of which the attack is a part, taken as a whole, and not from isolated or particular parts of that operation. 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 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.

**8.1.3 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 which will result from an attack on a legitimate military objective as one of the factors during targeting analysis.

## **8.2 SURFACE WARFARE**

As a general rule, surface warships may employ their conventional weapons systems to 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, i.e., warships and military aircraft, merchant vessels and civilian aircraft, and exempt vessels and aircraft.

### **8.2.1 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 clearly conveys a timely offer of surrender. Once an enemy warship has clearly indicated a readiness to surrender 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, military aircraft, and naval and military auxiliaries should be made prisoners of war. (See Chapter 11 for further discussion of surrender and prisoners of war.) 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 and naval auxiliaries because their ownership vests immediately in the captor’s government by the fact of capture.

### **8.2.2 Enemy Merchant Vessels and Civil Aircraft**

**8.2.2.1 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 made prisoners of war. 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 are not made prisoners of war unless they have participated in acts of hostility or resistance against the captor or are otherwise in the service of the enemy.

**8.2.2.2 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 weapons, and anti-ship 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
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 8.2.1, apply also to enemy merchant vessels and civilian aircraft that may become subject to attack and destruction.

**8.2.3 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. Hospital ships may not be armed although crew members may carry light individual weapons for the maintenance of order, for their own defense and that of the wounded, sick and shipwrecked. Use or possession of cryptographic means of transmitting message traffic by hospital ships is prohibited under current law. 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 must be clearly marked with the emblem of the red cross or red crescent. Hospital ships, medical transports and medical aircraft utilized solely for medical purposes and recognized as such are not to be deliberately attacked.

3. Vessels charged with religious, non-military 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.

### 8.3 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.

**8.3.1 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 8.2.2.2) 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
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.

**8.3.2 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 8.2.3.)

## **8.4 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
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.

**8.4.1 Enemy Vessels and Aircraft Exempt From Aircraft 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 military aircraft. (See paragraph 8.2.3.)

## **8.5 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 8.6. Engagement of targets at sea is discussed in paragraphs 8.2 to 8.4.

**8.5.1 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, and the Persian Gulf. Underlying these rules are the broad principles of the law

of armed conflict that belligerents are forbidden to make noncombatants the target of direct attack, that superfluous injury and unnecessary suffering are to be avoided, and that wanton destruction of property is prohibited. To give effect to these concepts of humanitarian law, the following general rules governing bombardment must be observed.

**8.5.1.1 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 bombarded if required for the submission of the enemy with the minimum expenditure of time, life, and physical resources. 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 Paragraph 8.1.2.1.)

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

**8.5.1.3 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.

**8.5.1.4 Medical Facilities.** Medical establishments and units (both mobile and fixed), medical vehicles, and medical equipment and stores may not be deliberately bombarded. Belligerents are required to ensure that such medical facilities are, as far as possible, situated in such a manner that attacks against military targets in the vicinity do not imperil their safety. If medical facilities are used for military purposes inconsistent with their humanitarian mission, 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 or red crescent, 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.

**8.5.1.5 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.

**8.5.1.6 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 11.9.3.)

**8.5.1.7 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 potential for harm to noncombatants would be excessive in relation to the 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.

**8.5.2 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.

## **8.6 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 FMFM 0-25 “Department of the Army Field Manual FM 27-10, The Law of Land Warfare.”

**8.6.1 Targeting in Land Warfare.** Only combatants and other military objectives may be attacked (see paragraph 8.1.1). Noncombatants and civilian objects may not be objects of attack. Incidental injury to noncombatants and collateral damage to civilian objects incurred during an attack upon a legitimate military objective must not be excessive in relation to the military advantage to be achieved by the attack (see paragraph 8.1.2.1). When circumstances permit, advance warning should be given of attacks that might endanger noncombatants in the vicinity (see paragraph 11.2).

**8.6.2 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 and special signs and symbols are employed for that purpose (see paragraph 11.9). 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 11.9.6). However, protected persons participating directly 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.

**8.6.2.1 Protected Persons.** Protected persons include the wounded, sick, and shipwrecked (see paragraph 11.4), certain parachutists (see paragraph 11.6), and prisoners of war (see paragraph 11.7). Civilians and other noncombatants, such as medical personnel

and chaplains (see paragraph 11.5), and interned persons (see paragraph 11.8) also enjoy protected status.

**8.6.2.2 Protected Places and Objects.** Protected places include undefended cities and towns and agreed demilitarized zones (see paragraph 8.5.1.3), and agreed special hospital zones and neutralized zones (see paragraph 8.5.1.5). Protected objects include historic monuments and structures, works of art, medical facilities and religious, cultural, and charitable buildings and monuments (see paragraph 8.5.1.6).

**8.6.2.3 The Environment.** A discussion of environmental considerations during armed conflict is contained in paragraph 8.1.3. The use of herbicidal agents is addressed in paragraph 10.3.3.



## 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 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 and other protected persons and property. (See Chapter 11 —Noncombatant Persons.)

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 over-the-horizon 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 controlled (i.e., directed at a military target) 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 expected 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 pre-set 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 in-

ternational 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 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 non-command detonated land mines, however, there exists potential for indiscriminate injury to noncombatants. Accordingly, special care must be taken when employing land mines to ensure noncombatants 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.

### 9.4 TORPEDOES

Torpedoes which 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 noncombatants 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., 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 INCENDIARY WEAPONS

Incendiary devices, such as tracer ammunition, 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.

### 9.8 DIRECTED ENERGY DEVICES

Directed energy devices, which include laser, high-powered microwave, and particle beam devices, are not proscribed by the law of armed conflict. Lasers may be employed as a rangefinder or for target acquisition, with the possibility of ancillary injury to enemy personnel. As a matter of policy, U.S. military forces will not employ laser weapons specifically designed to cause permanent blindness.

## **9.9 OVER-THE-HORIZON WEAPONS SYSTEMS**

Missiles and projectiles with over-the-horizon 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.

## CHAPTER 10

# Nuclear, Chemical, and Biological Weapons

### 10.1 INTRODUCTION

Nuclear, chemical, and biological weapons 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 noncombatants 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 in 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 Nuclear 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 non-member 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 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 U.K., and the U.S. 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 U.S. 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 is an agreement among nuclear-armed nations (China, France, Russia, the U.K., and the U.S.) to respect the denuclearization aims of the treaty, to not use nuclear weapons against Latin American nations party to the treaty, and to refrain from contributing to a violation of the treaty by Latin American nations.

**10.2.2.5 Nuclear 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 U.K., and the U.S. (France and China are not parties.) Underground testing of nuclear weapons is not included within the ban.

**10.2.2.6 Non-Proliferation Treaty.** This multilateral treaty obligates nuclear-weapons-nations to refrain from transferring nuclear weapons or nuclear weapons technology to non-nuclear-weapons nations, and obligates non-nuclear-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 Anti-Ballistic Missile Treaty of 1972 and its Protocol of 1974, the Threshold Test Ban Treaty of 1974, the 1976 Treaty on Peaceful Nuclear Explosions, the SALT Agreements of 1972 and 1977 (SALT II Interim Agreement has expired; SALT II was never ratified), the INF Treaty of 1988, and the START treaties of 1991 (START I) and 1993 (START II). The START treaties have initiated the process of physical destruction of strategic nuclear warheads and launchers by the U.S., Russia, Ukraine, Belarus and Kazakhstan (the latter four being recognized as successor states to the U.S.S.R. for this purpose).

## 10.3 CHEMICAL WEAPONS

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

**10.3.1 Treaty Obligations.** 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”) is the principal 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”) will enter into force for those nations party to it in the near future.

**10.3.1.1 The 1925 Gas Protocol.** The United States is a party to the 1925 Gas Protocol, as are all other NATO nations and all former Warsaw Pact nations. The United States, the U.S.S.R., and most other NATO and Warsaw Pact nations conditioned their adherence to the 1925 Gas Protocol on the understanding that the prohibition against use of chemical weapons ceases to be binding with respect to nations whose armed forces, or the armed forces of their allies, fail to respect that prohibition. This, in effect, restricted the prohibition to the “first use” of such munitions, with parties to the Protocol reserving the right to employ chemical weapons for retaliatory purposes.

The 1925 Gas Protocol does not prohibit the development, production, testing, or stockpiling of chemical weapons, nor does it prevent equipping and training military forces for chemical warfare. The United States considers the Protocol to be applicable to lethal and incapacitating agents but not to riot control agents (see paragraph 10.3.2) or herbicidal agents (see paragraph 10.3.3).

The United States considers the prohibition against first use of lethal and incapacitating chemical weapons to be part of customary international law and, therefore, binding on all nations whether or not they are parties to the 1925 Gas Protocol. Lethal chemical agents are those asphyxiating, poisonous, or other gases; analogous liquids; or materials that cause immediate death. Incapacitating agents are those producing symptoms that persist for appreciable periods of time after exposure to the agent has terminated. Consistent with its first-use reservation to the 1925 Gas Protocol, the United States maintained a lethal and incapacitating chemical weapons capability for deterrence and possible retaliatory purposes only. National Command Authorities (NCA) approval was required for retaliatory use of lethal or incapacitating chemical weapons by U.S. Forces.

Retaliatory use of lethal or incapacitating chemical agents was to be terminated as soon as the enemy use of such agents that prompted the retaliation had ceased and any tactical advantage gained by the enemy through unlawful first use had been redressed. Upon coming into force of the 1993 Chemical Weapons Convention, any use of chemical weapons by a party to that convention, whether or not in retaliation against unlawful first use by another nation, will be prohibited. (See paragraph 10.3.1.2.)

**10.3.1.2 The 1993 Chemical Weapons Convention.** This comprehensive Convention will, upon entry into force, prohibit the development, production, stockpiling and use of chemical weapons, and mandate the destruction of chemical weapons and chemical weapons production facilities for all nations that are party to it. The Convention specifically prohibits the use of riot control agents as a “method of warfare.” It does not, however, modify existing international law with respect to herbicidal agents.

The United States signed the 1993 Chemical Weapons Convention on 13 January 1993. The President transmitted the Convention to the Senate on 23 November 1993 for its advice and consent to ratification.

**10.3.2 Riot Control Agents.** Riot control agents are those gases, liquids and analogous substances that are widely used by governments for civil law enforcement purposes. Riot control agents, in all but the most unusual circumstances, cause merely transient effects that disappear within minutes after exposure to the agent has terminated. Tear gas and Mace are examples of riot control agents in widespread use by law enforcement officials.

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

**10.3.2.1.1 Under the 1925 Gas Protocol.** The United States considers that use of riot control agents in armed conflict was not prohibited by the 1925 Gas Protocol. However, the United States formally renounced first use of riot control agents in armed conflict except in defensive military modes to save lives. Uses of riot control agents in time of armed conflict which the United States considers not to be violative of the 1925 Gas Protocol include:

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 of 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 required NCA approval.

**10.3.2.1.2 Under the 1993 Chemical Weapons Convention.** Use of riot control agents as a “method of warfare” is prohibited by the 1993 Chemical Weapons Convention. However, that term is not defined by the Convention. The United States considers that this prohibition applies in international as well as internal armed conflict but that it does not apply in normal peacekeeping operations, law enforcement operations, humanitarian and disaster relief operations, counter-terrorist and hostage rescue operations, and noncombatant rescue operations conducted outside of such conflicts.

The United States also considers that it is permissible to use riot control agents against other than combatants in areas under direct U.S. military control, including to control rioting prisoners of war and to protect convoys from civil disturbances, terrorists and paramilitary organizations in rear areas outside the zone of immediate combat.

**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 for riot control purposes.
3. Law enforcement
  - a. On-base and off-base in the United States, its territories and possessions;
  - b. On-base overseas;
  - c. Off-base overseas when specifically authorized by the host government.

4. Noncombatant evacuation operations involving U.S. 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 NCA 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.

## **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 United States 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

## Noncombatant Persons

### 11.1 INTRODUCTION

As discussed in Chapter 5, the law of armed conflict is premised largely on the distinction to be made between combatants and noncombatants. Noncombatants are those individuals who do not form a part of the armed forces and who otherwise refrain from the commission of hostile acts. Noncombatants also include those members of the armed forces who enjoy special protected status, such as medical personnel and chaplains, or who have been rendered incapable of combat by wounds, sickness, shipwreck, or capture. This chapter reviews the categories of noncombatants and outlines the general rules of the law of armed conflict designed to protect them from direct attack.

### 11.2 PROTECTED STATUS

The law of armed conflict prohibits making noncombatant persons the object of intentional attack and requires that they be safeguarded against injury not incidental to military operations directed against military objectives. When circumstances permit, advance warning should be given of attacks that might endanger noncombatants in the vicinity. Such warnings are not required, however, if mission accomplishment requires the element of surprise or the security of the attacking forces would be otherwise compromised. On the other hand, 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 targets of likely enemy attack. Deliberate use of noncombatants to shield military objectives from enemy attack is prohibited. Although the principle of proportionality underlying the concept of collateral damage and incidental injury continues to apply in such cases, the presence of noncombatants within or adjacent to a legitimate target does not preclude attack of it.

### 11.3 THE CIVILIAN POPULATION

The civilian population as such, as well as individual civilians, may not be the object of attack or of threats or acts of intentional terrorization. The civilian population

consists of all persons not serving in the armed forces, militia, or paramilitary forces and not otherwise taking a direct part in the hostilities. Women and children are entitled to special respect and protection. Unlike military personnel (other than those in a specially protected status such as medical personnel and the sick and wounded) who are always subject to attack whether on duty or in a leave capacity, civilians, as a class, are not to be the object of attack. However, civilians that are engaged in direct support of the enemy's war-fighting or war-sustaining effort are at risk of incidental injury from attack on such activities.

Civilians who take a direct part in hostilities by taking up arms or otherwise trying to kill, injure, or capture enemy personnel or destroy enemy property lose their immunity and may be attacked. Direct participation may also include civilians serving as guards, intelligence agents, or lookouts on behalf of military forces. Direct participation in hostilities must be judged on a case-by-case basis. Combatants in the field must make an honest determination as to whether a particular civilian is or is not subject to deliberate attack based on the person's behavior, location and attire, and other information available at the time.

### 11.4 THE WOUNDED, SICK, AND SHIPWRECKED

Members of the armed forces incapable of participating in combat due to injury or illness may not be the object of attack. Moreover, 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, an armistice or 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 they be subjected to any medical procedure not called for by their condition or inconsistent with accepted medical standards.

Similarly, shipwrecked persons, whether military or civilian, may not be the object of attack. Shipwrecked persons include those in peril at sea or in other waters as a result of either 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 non-military 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.

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. Shipwrecked combatants falling into enemy hands become prisoners of war.

## **11.5 MEDICAL PERSONNEL AND CHAPLAINS**

Medical personnel, including medical and dental officers, technicians and corpsmen, nurses, and medical service personnel, have special protected status when engaged exclusively in medical duties and may not be attacked. Possession of small arms for self-protection, for the protection of the wounded and sick, and for protection from marauders and others violating the law of armed conflict does not disqualify medical personnel from protected status. Medical personnel may not use such arms against enemy forces acting in conformity with the law of armed conflict. Chaplains attached to the armed forces are entitled to respect and protection. Medical personnel and chaplains should display the distinctive emblem of the red cross or red crescent when engaged in their respective medical and religious activities. Failure to wear the distinctive emblem does not, by itself, justify attacking a medical person or chaplain, recognized as such. Medical personnel and chaplains falling into enemy hands do not become prisoners of war. 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.

## **11.6 PARACHUTISTS**

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.

## **11.7 PRISONERS OF WAR**

Combatants cease to be subject to attack when they have individually laid down their arms to surrender, when they are no longer capable of resistance, or when the unit in which they are serving or embarked has surrendered or been captured. However, 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 a hard-fought battle is neither easily communicated nor received. The issue is one of reasonableness.

Combatants that have surrendered or otherwise fallen into enemy hands are entitled to prisoner-of-war status and, as such, must be treated humanely and protected against violence, intimidation, insult, and public curiosity. When prisoners of war are given medical treatment, no distinction among them will be based on any grounds other than medical ones. (See paragraph 11.4 for further discussion of the medical treatment to be accorded captured enemy wounded and sick personnel.) 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.

Persons entitled to prisoner-of-war status upon capture include members of the regular armed forces, the militia and volunteer units fighting with the regular armed forces, and civilians accompanying the armed forces. Militia, volunteers, guerrillas, and other partisans not fighting in association with the regular armed forces qualify for prisoner-of-war status upon capture, provided they are commanded by a person responsible for their conduct, are uniformed or bear a fixed

distinctive sign recognizable at a distance, carry their arms openly, and conduct their operations in accordance with the law of armed conflict.

Should a question arise regarding a captive's entitlement to prisoner-of-war status, that individual should be accorded prisoner-of-war treatment until a competent tribunal convened by the captor determines the status to which that individual is properly entitled. Individuals captured as spies or as illegal combatants have the right to assert their claim of entitlement to prisoner-of-war status before a judicial tribunal and to have the question adjudicated. Such persons have a right to be fairly tried for violations of the law of armed conflict and may not be summarily executed.

**11.7.1 Trial and Punishment.** Prisoners of war 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 or after capture are entitled to be tried by the same courts as 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 be subjected to 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.

**11.7.2 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.

**11.7.3 Escape.** Prisoners of war may not be punished for acts committed in attempting to escape, unless they cause death or injury to 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 previous escape.

**11.7.4 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 NCA approval.

## 11.8 INTERNED PERSONS

Enemy civilians falling under the control of a belligerent 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. Enemy civilians 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 and may not be subjected to reprisal action or collective punishment.

## 11.9 PROTECTIVE SIGNS AND SYMBOLS

**11.9.1 The Red Cross and Red Crescent.** A red cross on a white field (Figure 11-1a) 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 11-1b). 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 11-1c). The United States has not agreed that it is a protected symbol. Nevertheless, all medical and religious persons or objects recognized as being so marked are to be treated with care and protection.

**11.9.2 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 11-1d). Prisoner-of-war camps are marked by the letters “PW” or “PG” (Figure 11-1e); civilian internment camps with the letters “IC” (Figure 11-1f). 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 11-1g). 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 11-1h).

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 11-1i). Civil defense facilities and personnel may be identified by an equilateral blue triangle on an orange background (Figure 11-1j).

**11.9.3 The 1907 Hague 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 11-1k).

**11.9.4 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 11-1g).

**11.9.5 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.

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

**11.9.7 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.

## 11.10 PROTECTIVE SIGNALS

Three optional methods of identifying medical units and transports have been created internationally. United States hospital ships and medical aircraft do not use these signals.

**11.10.1 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.

**11.10.2 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.

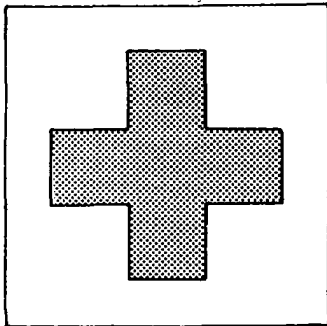
**11.10.3 Electronic Identification.** The identification and location of medical ships and craft may be effected by means of appropriate standard maritime radar transponders as established by special agreement to the parties to the conflict. The identification and location of medical aircraft may be 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.

### **11.11 IDENTIFICATION OF NEUTRAL PLATFORMS**

Ships and aircraft of nations not party to an armed conflict may adopt special signals for self-identifica-

tion, 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.

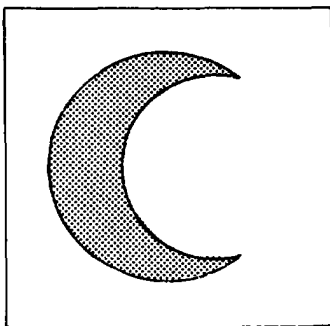
a.



**The Red Cross**

Symbol of medical and religious activities.

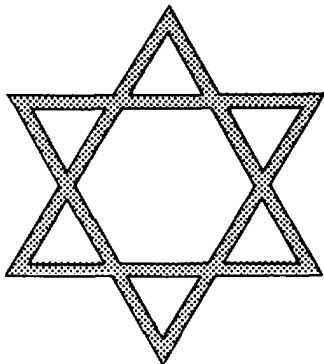
b.



**The Red Crescent**

Symbol of medical and religious activities.

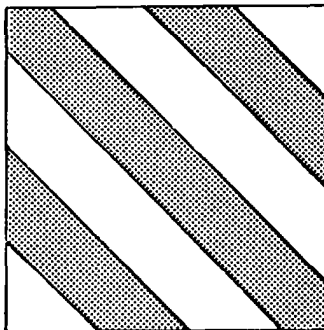
c.



**The Red Star of David**

Israeli emblem for medical and religious activities. Israel reserved the right to use the Red Star of David when it ratified the 1949 Conventions.

d.

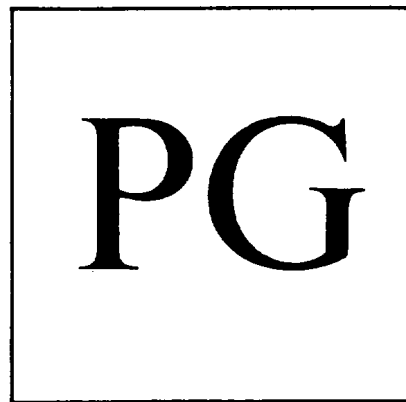
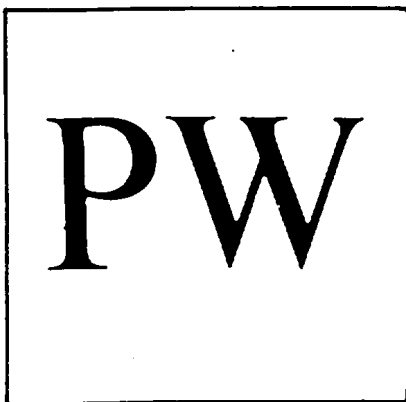


**Marking for Hospital and Safety Zones for Civilians and Sick and Wounded (Three Red Stripes)**

(Noncombatants)

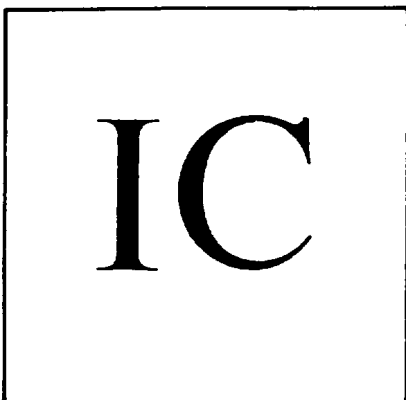
Figure 11-1. Protective Signs and Symbols (Sheet 1 of 3)

e.



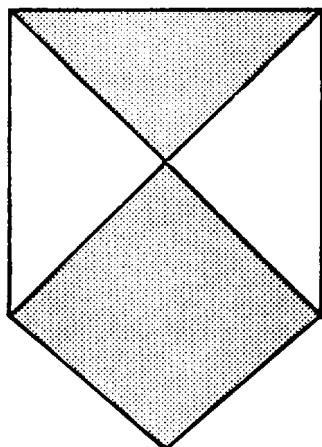
**Symbols for Prisoner of War Camps**

f.



**Civilian Internment Camps**

g.

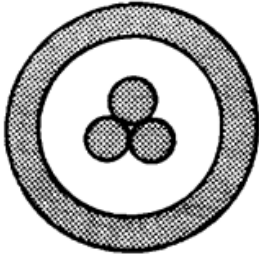


**Symbol for Cultural Property Under the 1954 Hague Convention (Blue and White)**

(Also used in a group of three to indicate special protection.)

Figure 11-1. Protective Signs and Symbols (Sheet 2 of 3)

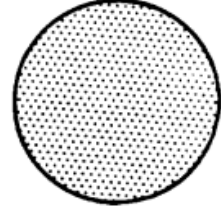
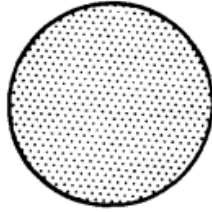
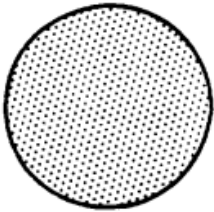
h.



**Roerich Pact (Red and White)**

Symbol used for historical, artistic, education, and cultural institutions, among Western Hemisphere nations.

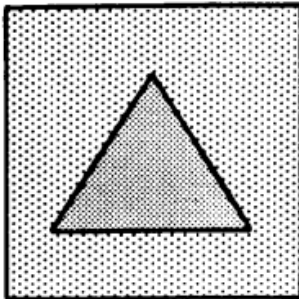
i.



**Special Symbol for Works and Installations Containing Dangerous Forces  
(Three Orange Circles)**

(Dams, dikes, and nuclear power stations)

j.



**Symbol designating Civil Defense Activities  
(Blue triangle in an orange square)**

k.



**The 1907 Hague Sign**

Naval bombardment symbol designating cultural, medical, and religious facilities.

Figure 11-1. Protective Signs and Symbols (Sheet 3 of 3)

## 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 an act of perfidy.

### 12.2 MISUSE OF PROTECTIVE SIGNS, SIGNALS, AND SYMBOLS

Misuse of protective signs, signals, and symbols (see paragraphs 11.9 and 11.10) in order to injure, kill, or capture the enemy constitutes 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, therefore, 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. Combatants risk severe punishment, however, 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 are not entitled to 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. As a general rule, enemy markings should be removed from captured enemy equipment before it is used in combat.

## **12.6 FEIGNING DISTRESS**

It is unlawful to feign distress through the false use of internationally recognized distress signals such as SOS and MAYDAY. In air warfare, 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 possible evacuation by crew or passengers.

## **12.7 FALSE CLAIMS OF NONCOMBATANT STATUS**

It is a violation of the law of armed conflict to kill, injure, or capture the enemy by false indication of an 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.

**12.7.1 Illegal Combatants.** It is prohibited to kill, injure or capture an adversary by feigning civilian, non-combatant status. If determined by a competent tribunal of the captor nation to be illegal combatants, such persons may be denied prisoner-of-war status and be tried and punished. It is the policy of the United States, however, to accord illegal combatants prisoner-of-war protection if they were carrying arms openly at the time of capture.

## **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.

**12.8.1 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, liability to punishment terminates. 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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