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PREFACE TO THE COMMENTARY

The *Commander's Handbook on the Law of Naval Operations* is used in the United States and throughout the world as a restatement of U.S. doctrinal law positions on matters affecting the operations of the U.S. Navy, the U.S. Marine Corps, and the U.S. Coast Guard. Judge advocates and legal advisers have occasion to conduct deeper research to identify the context and source of the rules reflected in *The Commander's Handbook*. Responding to this need, an *Annotated Supplement to The Commander's Handbook* was produced in 1997 and published as volume 73 of *International Law Studies* (1997). In the intervening decades, international law has evolved, and the underlying sources and context have grown considerably. Judge advocates have long used the *Annotated Supplement* as a resource alongside *The Commander's Handbook* and as a point of departure for further inquiry. This 2024 updated *Annotated Supplement* excerpts numerous U.S. government sources to provide clarity and fidelity to the text of the *Handbook*, including U.S. legislation and Executive branch policy proclamations and the Department of Defense *Law of War Manual*.

The research for this publication was supported by the Ocean Law & Policy Institute, Korea Institute of Ocean Science and Technology, and colleagues in the United States and abroad.

We would especially like to thank Mr. Rick Button, Chief, Coordination Division, Office of Search and Rescue, U.S. Coast Guard Headquarters, and CAPT Brian Wilson, USN (Ret.), Deputy Director of the Global Maritime Operational Threat Response Coordination Center, U.S. Coast Guard Headquarters, for their helpful insights and suggestions. We are indebted for research assistance from Juhi Sanjay Khetan, who was especially helpful in providing numerous citations for the *Restatement of the Law Fourth, The Foreign Relations Law of the United States* (2017). These experts provided thoughts in their personal capacity and any shortcomings of this Commentary are the responsibility of the authors. Michelle Nichols provided exacting copyedits.

The Commentary is not an official U.S. government publication and the views reflected in it are the personal views of the authors.

James Kraska
Raul "Pete" Pedrozo
Michael N. Schmitt

ABBREVIATIONS AND RECURRING CITATIONS

1910 Salvage Convention	Convention for the Unification of Certain Rules of Law Respecting Assistance and Salvage at Sea, Sept. 23, 1910, 37 Stat. 1658, T.S. No. 576
1914 Rules of Land Warfare	War Department, Office of the Chief of Staff, Rules of Land Warfare (Apr. 25, 1914)
1914 UK Manual	United Kingdom War Office, Manual of Military Law (1914)
1940 Rules of Land Warfare	War Department, FM 27-10, Rules of Land Warfare (1940)
1958 UK Manual	United Kingdom War Office, Manual of Military Law, Part III: The Law of War on Land (1958)
1989 Salvage Convention	International Convention on Salvage, Apr. 28, 1989, 1953 U.N.T.S. 165
2004 UK Manual	United Kingdom Ministry of Defence, The Joint Service Manual of the Law of Armed Conflict (2004)
2006 Australian Manual	Australian Defence Headquarters, ADDP 06.4, Law of Armed Conflict (2006)
ADIZ	air defense identification zone
AFI	Air Force Instruction
AFP	Air Force Pamphlet
AJIL	American Journal of International Law
ALCOAST	All Coast Guard Message
ALI	American Law Institute

Amended Mines Protocol	Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended on 3 May 1996, May 3, 1996, 2048 U.N.T.S. 93
Antarctic Treaty	Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71
AP I	Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3
AP II	Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609
AP III	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem, Dec. 8, 2005, 2404 U.N.T.S. 261
AR	Army Regulation
Articles on State Responsibility	International Law Commission, Report on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10 (2001), *reprinted in* [2001] 2 Yearbook of the International Law Commission 32, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2)
ASL	archipelagic sea lane
ASLP	archipelagic sea lane passage
Bangkok Treaty	Treaty on the Southeast Asia Nuclear-Weapon-Free Zone, Dec. 15, 1995, 1981 U.N.T.S. 129

Canadian Manual	Chief of Defence Staff (Canada), B-GJ-0 05-104/FP-021, Law of Armed Conflict at the Operational and Tactical Levels (2001)
Charter of the International Military Tribunal	Charter of the International Military Tribunal, Aug. 8, 1945, 82 U.N.T.S. 279
Chemical Weapons Convention	Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 45
Chicago Convention	Convention on International Civil Aviation, Dec. 7, 1944, 15 U.N.T.S. 295
CJCSI	Chairman of the Joint Chiefs of Staff Instruction
CNO	Chief of Naval Operations
COLREGS	International Regulations for Preventing Collisions at Sea
COMDT COGARD	Commandant Coast Guard
COMDTINST	Commandant Instruction
COMDTPUB	Commandant Publication
Continental Shelf Convention	Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311
Conventional Weapons Convention	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, Oct. 10, 1980, 1342 U.N.T.S. 137

CSS	Confederate States Ship
CUES	Code for Unplanned Encounters at Sea
CWC	*See* Conventional Weapons Convention
DOALOS	Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs of the United Nations
DoD	Department of Defense
DoD FLIP	DoD Flight Information Publication
DoD Law of War Manual	Office of the General Counsel, U.S. Department of Defense, Law of War Manual (rev. ed. July 2023)
DoDD	Department of Defense Directive
DoDI	Department of Defense Instruction
DTVIA	Drug Trafficking Vessel Interdiction Act
EEZ	exclusive economic zone
ENMOD Convention	Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, Dec. 10, 1976, 1108 U.N.T.S. 151
FAA	U.S. Department of Transportation, Federal Aviation Administration
FIH	Flight Information Handbook
FIR	flight information region
FM	Field Manual

FM 6-27/MCTP 11-10C	Department of the Army & Marine Corps, FM 6-27/MCTP 11-10C, The Commander's Handbook on the Law of Land Warfare (2019)
FM 27-10	Department of the Army, FM 27-10, The Law of Land Warfare (Ch. 1, 1976)
FON	freedom of navigation
French Manual	Ministère de la Défense, Manuel de droit des conflits armés (2012)
GC	*See* GC IV
GC I	Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31
GC I Commentary	Commentary to Geneva Convention I for the Amelioration of the Condition of The Wounded and Sick in the Armed Forces in the Field (Jean Pictet ed., 1952)
GC II	Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85
GC II Commentary	Commentary to Geneva Convention II for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (Jean Pictet ed., 1960)
GC III	Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135

GC III Commentary	Commentary to Geneva Convention III Relative to the Treatment of Prisoners of War (Jean Pictet ed., 1960)
GC IV	Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287
GC IV Commentary	Commentary to Geneva Convention IV relative to the Protection of Civilian Persons in Time of War (Jean S. Pictet ed., 1958)
German Commander's Handbook	German Navy, SM 3, Commander's Handbook: Legal Bases for the Operations of Naval Forces (2002)
German Manual	Federal Ministry of Defence (Germany), ZDv 15/2, Law of Armed Conflict Manual (2013)
GMCC	Global Maritime Coordination Center
GNCC	Geographic Navy Component Commanders
GPW	*See* GC III
GWS	*See* GC I
GWS Sea	*See* GC II
Hague III	Convention No. III Relative to the Opening of Hostilities, 18 October 1907, 36 Stat. 2259, 1 Bevans 619, 205
Hague IV	Convention No. IV Respecting the Laws and Customs of War on Land, preamble, Oct. 18, 1907, 36 Stat. 2277

Hague V	Convention No. V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310, T.S. No. 540
Hague VI	Convention No. VI Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, Oct. 18, 1907, 205 Consol. T.S. 305
Hague VII	Convention No. VII Relating to the Conversion of Merchant Ships into Warships, Oct. 18, 1907, 205 Consol. T.S. 319
Hague VIII	Convention No. VIII Relative to the Laying of Automatic Submarine Contact Mines, Oct 18, 1907, 36 Stat. 2332, T.S. No. 541
Hague IX	Convention No. IX Concerning Bombardments by Naval Forces in Time of War, Oct 18, 1907, 36 Stat. 2351, T.S. No. 542
Hague X	Convention No. X for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, Oct 18, 1907, 36 Stat. 2371, T.S. No. 543
Hague XI	Convention No. XI Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War, Oct 18, 1907, 36 Stat. 2396, T.S. No. 544
Hague XIII	Convention No. XIII Concerning the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 36 Stat. 2415, T.S. No. 545
Hague Cultural Property Convention	Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240

Hague Regulations	Regulations Respecting the Laws and Customs of War on Land, annexed to Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2227, T.S. No. 539
Hague Rules of Air Warfare	Commission of Jurists, Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare, Feb. 23, 1923, *reprinted in* 32 AJIL Supp. 12 (1938)
Hague Rules on the Control Radio	Commission of Jurists, Rules Concerning the Control of Radio in Time of War, Feb. 23, 1923, *reprinted in* 32 AJIL Supp. 12 (1938)
Havana Convention	Convention on Maritime Neutrality, Feb. 20, 1928, 135 L.N.T.S. 187
High Seas Convention	Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82
IAC	international armed conflict
ICAO	International Civil Aviation Organization
ICC	International Criminal Court
ICC Statute	*See* Rome Statute
ICJ	International Court of Justice
ICJ Statute	Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993
ICRC	International Committee of the Red Cross
ICRC AP Commentary	Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Yves Sandoz, Christophe Swinarski, & Bruno Zimmermann eds., 1987)

ICRC Interpretive Guidance	International Committee of the Red Cross, Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law (2009)
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTY Statute	Statute of the International Criminal Tribunal for the former Yugoslavia, S.C. Res. 827 (May 25, 1993), adopting the Secretary-General Report Pursuant to Paragraph 2 of Security Council Resolution 808
IHO	International Hydrographic Organization
ILC	International Law Commission
ILM	International Legal Materials
ILS	U.S. Naval War College International Law Studies
IMO	International Maritime Organization
Incendiary Weapons Protocol	Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons, Oct. 10, 1980, 1342 U.N.T.S. 171
INCSEA Agreement	United States-Union of Soviet Socialist Republics Agreement on the Prevention of Incidents On and Over the High Seas, May 25, 1972, 23 U.S.T. 1168, T.I.A.S. 7379
INF Code	International Code for the Safe Carriage of Packaged Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Wastes on Board Ships
ITLOS	International Tribunal for the Law of the Sea

JAGINST	Judge Advocate General Instruction
Japan, Rules of Naval War (1914)	Japan, Kaisen Hoki (海戦法規), Gunrei Dai Hachigo, Tai-sho Sannen Jugatus Nanoka (軍令海第八号 大正三年十月七日) [Rules of Naval War, Imperial Ordinance No. 8 (1914)]
Japanese Law of War Manual	Japan, Kaigun Daijin Kanbo (海軍大臣官房), Senji Koku-saihouki Koyo (戦時国際法規綱要), 1937 [Imperial Japanese Navy Minister's Office, The Essentials of International Law of War (1937)]
JMSDF Textbook	Japan, Kaijo Jieitai Kanbugakko (海上自衛隊幹部学校), Shikikan Bakuryonotameno Kokusaihoki (指揮官・幕僚のための国際法規) (2016) [JMSDF Command and Staff College, International Law for Commanders and Staff Officers (2016) Ch. 11]
JP	Joint Publication
Kellogg-Briand Pact	General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57
Lauterpacht, 2 Oppenheim's International Law	Lassa Oppenheim, International Law, Volume 2: Disputes, War and Neutrality (H. Lauterpacht ed., 7th ed. 1952)
Liability Convention	Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 24 U.S.T. 2389, 961 U.N.T.S. 187
Lieber Code	U.S. Department of War, Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, Apr. 24, 1863

Limits in the Seas	U.S. Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, Limits in the Seas
London Convention	Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Dec. 29, 1972, 26 U.S.T. 2403, 1046 U.N.T.S. 120
London Declaration of 1909	Declaration Concerning the Laws of Naval War, Feb. 26, 1909, 208 Consol. T.S. 338
London Protocol of 1936	Procès-Verbal: Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of April 22, 1930, Nov. 6, 1936, 173 L.N.T.S. 353, 3 Bevans 298, *reprinted in* 31 AJIL Supp. 137 (1939)
London Treaty	Treaty for the Limitation and Reduction of Naval Armaments, Apr. 22, 1930, 46 Stat. 2858, T.S. 380, 112 L.N.T.S. 88
LOS Bulletin	United Nations, Division for Ocean Affairs and the Law of the Sea, Law of the Sea Bulletin
LRTWC	United Nations War Crimes Commission, Law Reports of Trials of War Criminals
MARPOL	International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 12 I.L.M. 1319
MASS	maritime autonomous surface ship
MCRM	Department of Defense, Maritime Claims Reference Manual (MCRM), Department of Defense Instruction 2005.1–M, June 2008
MCTP	Marine Corps Tactical Publication

MCWP	Marine Corps Warfighting Publication
MDLEA	Maritime Drug Law Enforcement Act
MMCA	Military Maritime Consultative Agreement, U.S.-China, Jan. 19, 1998, T.I.A.S. 12924
Montreux Convention	Convention regarding the Régime of the Straits, July 20, 1936, 173 L.N.T.S. 213
Moon Agreement	Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, Dec. 18, 1979, 1363 U.N.T.S. 3
MOTR	Maritime Operational Threat Response
MOU	Memorandum of Understanding
MSC	Military Sealift Command
MSR	marine scientific research
NATO	North Atlantic Treaty Organization
NAVADMIN	Naval administrative messages
NDP	Naval Doctrine Publication
Neutrality Treaty	Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, with Annexes and Protocol, Sept. 7, 1977, 33 U.S.T. 1, T.I.A.S. 10029, 1161 U.N.T.S. 177
Newport Manual	James Kraska et al., *Newport Manual on the Law of Naval Warfare*, 101 INTERNATIONAL LAW STUDIES 1 (2023)
NIAC	non-international armed conflict

NLW	non-lethal weapons
NOTAM	notice to airmen
Nuclear Non-Proliferation Treaty	Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161
Nuclear Test Ban Treaty	Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, 480 U.N.T.S. 43
Nuremberg Principles	Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, UN Doc. A/CN.4/SER.A/1950/Add.1 (1950)
NVPZ	Naval Vessel Protection Zone
NWFZ	Nuclear-Weapon-Free Zone
NWIP 10-2	Office of the Chief of Naval Operations, U.S. Navy, Law of Naval Warfare, Naval Warfare Information Publication (NWIP) 10-2 (1955)
NWP	Naval Warfare Publication
NWP 1-14M	U.S. Navy, U.S. Marine Corps & U.S. Coast Guard, NWP 1-14M/MCTP 11-10B/COMDTPUB P5800.7A, The Commander's Handbook on the Law of Naval Operations (2022)
OPNAV	Chief of Naval Operations
OPNAVINST	Chief of Naval Operations Instruction
Outer Space Treaty	Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 610 U.N.T.S. 205

Oxford Manual	Institute of International Law, Manual of the Laws of Naval War (1913), *reprinted in* The Laws of Armed Conflicts 1123 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004)
Paris Convention of 1919	Convention Relating to the Regulation of Aerial Navigation, Oct. 13, 1919, 11 L.N.T.S. 173
Paris Declaration of 1856	Declaration Respecting Maritime Law, Apr. 16, 1856, 115 Consol. T.S. 1, *reprinted in* 1 AJIL Supp. 89 (1907)
Part XI Implementation Agreement	Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of December 10, 1982, July 28, 1994, 1836 U.N.T.S. 3
Persian Gulf War: Final Report	U.S. Department of Defense, Conduct of the Persian Gulf War: Final Report to Congress 240–52 (Apr. 1992)
POW	prisoner of war
RAE	right-of-assistance entry
RCB	Riverine Command Boat
RCC	Rescue Coordination Centers
Refugee Convention	Convention Relating to the Status of Refugees, 19 U.S.T. 6260, 189 U.N.T.S. 150
Registration Convention	Convention on Registration of Objects Launched into Outer Space, Jan. 14, 1975, 28 U.S.T. 695, 1023 U.N.T.S. 15
Rescue Agreement	Agreement on the Rescue of Astronauts and the Return of Objects Launched in Outer Space, Apr. 22, 1968, 19 U.S.T. 7570, 672 U.N.T.S. 119

Roerich Pact	Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, Apr. 15, 1935, 49 Stat. 3267, 167 L.N.T.S. 289
Rome Statute	Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90
Rules for Courts-Martial	Joint Service Committee on Military Justice, Manual for Courts-Martial United States, Part II: Rules for Courts-Martial (2019)
SAR	search and rescue
SAR Convention	International Convention on Maritime Search and Rescue, 1979 (with annex), April 27, 1979, T.I.A.S No. 11,093, 1405 U.N.T.S. 119
Seabed Arms Control Treaty	Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, Feb. 11, 1971, 955 U.N.T.S. 115
SECNAV	Secretary of the Navy
SECNAVINST	Secretary of the Navy Instruction
SOFA	Status of Forces Agreement
SOLAS	International Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47, 1184 U.N.T.S. 2
SORM	Standard Organization and Regulations Manual
SROE	Standing Rules of Engagement
SRUF	Standing Rules for the Use of Force

SUA Convention	Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221
Submarine Cables Convention	Convention for the Protection of Submarine Cables, Mar. 14, 1884, 24 Stat. 989, T.S. 380
Tallinn Manual 2.0	Tallinn Manual 2.0 on the International Law Applicable to Cyber Warfare (Michael N. Schmitt ed., 2017)
Territorial Sea Convention	Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205
TWC	Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1950)
UMS	unmanned maritime system
UN	United Nations
UN Charter	Charter of the United Nations, Oct. 24, 1945
UNCLOS	United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397
UNCLOS II	Second United Nations Conference on the Law of the Sea
UNCLOS III	Third United Nations Conference on the Law of the Sea
Underwater Cultural Heritage Convention	Convention on the Protection of the Underwater Cultural Heritage, Nov. 2, 2001, 2562 U.N.T.S. 3
U.S.C.	United States Code

USCGC	United States Coast Guard Cutter
USNS	United States Naval Ship
USS	United States Ship
USV	unmanned surface vehicle
UUV	unmanned undersea vehicle
VCLT	Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331
Virginia Commentary	United Nations Convention on the Law of the Sea 1982: A Commentary (Myron H. Nordquist, Series Editor-in-Chief)
	Volume 2: Satya N. Nandan & Shabtai Rosenne eds., 1993
	Volume 3: Satya N. Nandan & Shabtai Rosenne eds., 1995
	Volume 4: Shabtai Rosenne and Alexander Yankov eds., 1991
Whiteman Digest	Marjorie M. Whiteman, Assistant Legal Adviser, Department of State, Digest of International Law (15 Volumes, 1963–1973)
WMD	weapons of mass destruction

CONTENTS

CHAPTER 4—SAFEGUARDING U.S. NATIONAL INTERESTS IN THE MARITIME ENVIRONMENT

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PREFACE

NWP 1-14M (MAR 2022), THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, is available in the Navy Warfare Library. It supersedes NWP 1-14M (AUG 2017), THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS.

SCOPE

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

1. Definitions and descriptions of the jurisdiction and sovereignty exercised by States over various parts of the world's oceans

2. The international legal status and navigational rights of warships and military aircraft

3. Protection of persons and property at sea

4. The safeguarding of national interests in the maritime environment.

Chapters 5 through 12 set out principles of law of special concern to the naval commander during any period in which U.S. naval forces are engaged in armed conflict. Although the primary emphasis of these chapters is on the conduct of naval warfare, relevant principles and concepts common to the whole of the law of war are discussed.

Commentary

The U.S. Declaration of Independence reflects the American approach to rule-making and international law, which incorporates a "decent Respect to the Opinions of Mankind."[1] U.S. courts have long held that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate

1. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

> jurisdiction, as often as questions of right depending upon it are duly presented for their determination,"[2] and that "[i]nternational law, in its widest and most comprehensive sense . . . is part of our law, and must be ascertained and administered by the courts of justice."[3] In the earliest cases, the Supreme Court took judicial notice of international law, determining that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[4]
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> The U.S. Navy adheres to international law: "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."[5]
>
> It is the policy of the U.S. Department of Defense (DoD) that
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> > [m]embers of the DoD Components comply with the law of war during all armed conflicts, however characterized. In all other military operations, members of the DoD Components will continue to act consistent with the law of war's fundamental principles and rules, which include those in Common Article 3 of the 1949 Geneva Conventions and the principles of military necessity, humanity, distinction, proportionality, and honor.[6]

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

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2. The Paquette Habana, 175 U.S. 677, 700 (1900).

3. Hilton v. Guyot, 159 U.S. 113, 163 (1895).

4. Murray v. The Schooner Charming Betsy, 6 U.S. 64, 118 (1804). *See also* AMERICAN LAW INSTITUTE, RESTATEMENT (FOURTH) FOREIGN RELATIONS LAW, § 401 reporters' note 1 at 142 (2017).

5. U.S. Navy Regulations (1990) (32 C.F.R. § 700.705 (Observance of international law)).

6. DoDD 2311.01, DoD Law of War Program, ¶ 1.2 (July 2, 2020). *See also* SECNAVINST 3300.1D, Department of the Navy Law of War Program, ¶ 4 (May 19, 2022).

governing naval operations in peacetime and during armed conflict. The explanations and descriptions in this publication are intended to enable naval commanders and their staff to comprehend more fully the legal foundations upon which the orders issued to them by higher authority are premised and better understand the commander's responsibilities under international and domestic law to execute their missions within that law.

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

This publication provides general information and guidance, which is generally augmented, limited, or given further clarity by directives issued by operational commanders and their subordinates. It does not supersede guidance issued by the chain of command. It is not directive or a comprehensive treatment of the law. It is not a substitute for definitive legal guidance provided by judge advocates and others responsible for advising commanders on the law.

Commentary

The United States Naval Code of 1900, the predecessor to this publication, was the first restatement of the law of naval operations during armed conflict.[7] Subsequently, in 1955, the U.S. Navy released NWIP 10-2, Law of Naval Warfare, as a supplement to Naval Warfare Publication 10, Naval Warfare. In 1987, a revised version, titled The Commander's Handbook on the Law of Naval Operations, was released as Naval Warfare Publication 9.[8]

7. United States Naval Code of 1900, *reprinted in* 3 INTERNATIONAL LAW STUDIES 101 (1903).

8. U.S. DEPARTMENT OF THE NAVY, NAVAL WARFARE PUBLICATION 9, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (1987); U.S. DEPARTMENT OF THE NAVY, NWP 1-14M/U.S. MARINE CORPS, MCWP 5-2.1/U.S. COAST GUARD, COMDTPUB P5800.1, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (Oct. 1995); U.S. DEPARTMENT OF THE NAVY & DEPARTMENT OF HOMELAND SECURITY, NWP 1-14M/MCWP 5-12/COMDTPUB P5800.7A, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (2007).

An annotated version with Commentary (similar to this volume) was published in 1989 and updated in 1997.[9] Captain J. Ashley Roach, JAGC, USN (ret.) was the primary author of the first Annotated Supplement. The most recent annotated version was led by Captain Richard J. Grunawalt, JAGC, USN (ret.) and edited by Lt. Col. James C. Duncan, USMC (ret.) and reprinted as volume 73 of International Law Studies in 1999 (the Naval War College "Blue Book"). The Commander's Handbook and the Annotated Supplement were always understood as works in progress that would be revised to reflect the progressive development of international law. This Commentary follows in the tradition of the earlier works.

The Commander's Handbook on the Law of Naval Operations is a Department of the Navy publication. It is therefore not considered a legislative enactment binding upon courts and tribunals applying the law of war. However, its content may possess evidentiary value in matters relating to U.S. custom and practice.

The status of official publications and the British and U.S. military manuals was considered in *The Hostage Case* (*Wilhelm List*),[10] *The Peleus Trial*,[11] *The Belsen Trial*,[12] and *The Abbage Ardenne Case* (*Trial of Kurt Meyer*).[13] Although the courts recognized these publications as "persuasive statements of the law" and noted that, insofar as the provisions of military manuals are acted upon, they mold State practice, it was nevertheless stated that since the publications were not legislative instruments, they possessed no formal binding power. Hence, the provisions of military manuals that purported to interpret the existing law were accepted or rejected by the courts in accordance with their opinion of the accuracy with which the law was set forth.[14]

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9. U.S. DEPARTMENT OF THE NAVY, OFFICE OF THE JUDGE ADVOCATE GENERAL, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP (REV.A)/FMFM 1-10 (1989).

10. United States v. List (The Hostage Case), 11 TWC 1237-38 (1950).

11. The Peleus Trial, 1 LRTWC 19 (1947).

12. The Belsen Trial, 2 LRTWC 48-49 (1947).

13. The Abbage Ardenne Case (Trial of Kurt Meyer), 4 LRTWC 110 (1948).

14. *See* 15 LRTWC 21–22 (1949).

FM 6-27/MCTP 11-10C, The Commander's Handbook on the Law of Land Warfare, states:

> This is an official publication of the U.S. Army and a referenced publication for the U.S. Marine Corps. It does not necessarily reflect the views of other Department of Defense (DOD) components or the DOD as a whole. This publication is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.[15]

FM 6-27/MCTP 11-10C supersedes FM 27-10, The Law of Land Warfare, which similarly provided:

> This Manual is an official publication of the United States Army. However, those provisions of the Manual which are neither statutes nor the text of treaties to which the United States is a party should not be considered binding upon courts and tribunals applying the law of war. However, such provisions are of evidentiary value insofar as they bear upon questions of custom and practice.[16]

INTERNATIONAL LAW

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

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15. FM 27-10/MCTP 11-10C, at v.
16. *Id.* ¶ 1.

This publication seeks to accurately describe the state of international law on the date of the publication's issuance. The primary sources of international law are customary international law and international agreements.

Commentary

International law is made largely by the actions of States. The Statute of the International Court of Justice (ICJ) identifies the sources of international law as treaties between States; customary international law derived from the practice of States; and general principles of law recognized by civilized nations. Additionally, subsidiary means for determining rules of international law include judicial decisions and the writings of "the most highly qualified publicists."[17]

Practice of States

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

Commentary

See § 5.5.2 for further discussion of customary international law and State practice.

International Agreements

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

17. ICJ Statute, art. 38.

they may be regarded as evidence of international law binding upon parties and nonparties alike.

Commentary

The particular name assigned to the instrument—for example, treaty, convention, executive agreement, memorandum of agreement or understanding, exchange of notes or letters, technical arrangement, or plan—does not alter the fact that it is an international agreement if it falls within the definition of international agreement provided in this paragraph.

For the purposes of the Vienna Convention on the Law of Treaties (VCLT), a "treaty" is defined as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."[18] Treaties in force are binding upon the parties to the treaty and must be performed by them in good faith.[19] A treaty may become binding upon third States as a customary rule of international law, recognized as such.[20]

For example, the United States is not a party to the United Nations Convention on the Law of the Sea (UNCLOS). However, the United States considers that the provisions of the Convention with respect to traditional uses of the oceans generally confirm existing maritime law and practice and fairly balance the interests of all States. Accordingly, the United States is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans, such as navigation and overflight. The United States will therefore recognize the rights of other States in waters off their coasts, as reflected in UNCLOS, so long as the rights and freedoms of the United States and other States under international law are recognized by such coastal States. The United States will also 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

18. VCLT, art. 2.
19. *Id.* art. 26.
20. *Id.* art. 38.

> 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.[21]
>
> It is DoD policy to comply with all U.S. laws, regulations, policies, and procedures regarding the negotiation and conclusion of international agreements, and to maintain awareness of, and comply with, the terms of applicable international agreements.[22]
>
> Procedures within the U.S. government for negotiating and concluding international agreements may be found in Title 22, Part 181 of the Code of Federal Regulations, which implements the provisions of 1 U.S.C. §§ 112a and 112b (the Case-Zablocki Act of 1972), and in DoDI 5530.03, International Agreements, which prescribes guidance for initiating, negotiating, concluding, and reporting international agreements; delegates the authorities of the Secretary of Defense to approve, negotiate, and conclude international agreements; and establishes policy and assigns responsibilities for compliance with 1 U.S.C. § 112b. The implementing Navy instruction is OPNAVINST 5710.25, International Agreements. These regulations impose stringent controls on the authority to negotiate and conclude international agreements, as well as a requirement for organizational elements of the DoD to forward the text of international agreements to the Department of State.

United States Navy Regulations

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

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

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21. Statement on United States Oceans Policy, 1 PUB. PAPERS 378 (Mar. 10, 1983). *See also* Letter of Transmittal from President Bill Clinton, United Nations Convention on the Law of the Sea, S. TREATY DOC. NO. 103-39, 103rd Cong. (Oct. 7, 1994).

22. DoDI 5530.03 (series), International Agreements, ¶ 1.2.

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

Commentary

Many of the provisions of U.S. Navy Regulations, such as Article 0705, are considered lawful general orders or regulations. Failure to comply with a lawful general order or regulation is punishable by courts-martial under Article 92 of the Uniform Code of Military Justice.[23]

23. 10 U.S.C. § 892.

CHAPTER 1

LEGAL DIVISIONS OF THE OCEANS AND AIRSPACE

1.1 INTRODUCTION

The oceans of the world have traditionally been classified under the broad headings of internal waters, territorial seas, and high seas. Airspace has been divided into national and international airspace. In the latter half of the 20th century, new concepts evolved (e.g., the exclusive economic zone (EEZ) and archipelagic waters) that dramatically expanded the jurisdictional claims of coastal and island States over wide expanses of the oceans previously regarded as high seas. The phenomenon of expanding maritime jurisdiction, and the rush to extend the territorial sea to 12 nautical miles (nm) and beyond, were the subject of international negotiation from 1973 through 1982 in the course of the Third United Nations Conference on the Law of the Sea. That conference produced the 1982 United Nations Convention on the Law of the Sea (UNCLOS), which came into effect on 16 November 1994. The Convention is formally named the United Nations Convention on the Law of the Sea and often referred to as UNCLOS. It is legally distinct from the United Nations (UN), and its treaty bodies are not UN entities.

Commentary

Rules applicable to national and international airspace are set out in the Chicago Convention on International Civil Aviation and in UNCLOS. See §§ 1.9, 2.7.1, and 2.7.2 for a discussion of national and international airspace, and see §§ 1.10 and 2.11 for a discussion of military activities in outer space.

The United States has an enduring national interest in the oceans and has consistently taken the view that the full range of these interests is best protected through a widely accepted international framework governing the uses of the sea. Since the late 1960s, the basic U.S. strategy has been to conclude a comprehensive treaty on the law of the sea that will be respected by all countries. Each succeeding U.S.

administration has recognized this as the cornerstone of U.S. oceans policy.[1]

The First (1958) and Second (1960) United Nations Conferences on the Law of the Sea sought to develop widely accepted treaties that would govern uses of the oceans and set seaward limits on the permissible breadth of the territorial sea (the part of the ocean nearest the shore, over which the coastal State enjoys sovereignty) and the extent of jurisdiction of coastal States over the resources off their coasts in regions beyond the territorial sea. Many States had declared territorial seas broader than the traditional 3 miles and were asserting various rights in much broader zones off their coasts. The United States and other maritime countries were extremely concerned about this creeping encroachment of coastal State jurisdiction over areas of the high seas. The first conference, held in 1958, produced four treaties: on the Territorial Sea and the Contiguous Zone, on the Continental Shelf, on the High Seas, and on Fishing and the Conservation of Living Resources on the High Seas. That conference, however, could not reach agreement on the maximum breadth of the territorial sea or the seaward extent of national jurisdiction over the continental shelf. The second conference, held in 1960, aimed to standardize the breadth of the territorial sea, but also failed to reach agreement, mainly because the United States and other maritime countries refused to countenance a territorial sea broader than 6 miles.

In 1973, the UN General Assembly convened the Third United Nations Conference on the Law of the Sea (UNCLOS III) to adopt a convention dealing with all matters relating to the law of the sea.[2] The impetus for a holistic convention grew out of two primary concerns. First, the maritime States were concerned that the rapidly proliferating number of expansive claims regarding ocean space would restrict fundamental freedom of navigation rights. Second, the developing countries wanted to guarantee access to resources in the area beyond national jurisdiction, while national and multinational

1. Letter of Transmittal from President William J. Clinton, United Nations Convention on the Law of the Sea, S. TREATY DOC. NO. 103-39, 103rd Cong. (Oct. 7, 1994) [hereinafter S. TREATY DOC. NO. 103-39].

2. G.A. Res. 25/2750C (Dec. 17, 1970); G.A. Res. 27/3029A (Dec. 18, 1972); G.A. Res. 28/3067 (Nov. 16, 1973).

> corporations wanted an international convention that would provide legal certainty to companies interested in deep seabed mining.[3]
>
> Despite achieving most of its objectives during the first ten sessions of the conference, the United States announced in January 1982 that "major elements of the deep seabed mining regime were not acceptable."[4] Unless these issues were adequately addressed, the United States would not support ratification of the convention. U.S. efforts to amend Part XI, on seabed mining, were unsuccessful, and, in July 1982, President Reagan announced that the United States would not sign the convention because, as adopted, Part XI would "deter future development of deep seabed mineral resources," rather than serve the interests of all nations.[5]
>
> UNCLOS was adopted and opened for signature on December 10, 1982, notwithstanding the strong objections of the industrialized States to many of the provisions of Part XI. Many developing countries ratified the Convention during the next few years, but no industrialized State did so.

In 1983, the United States announced it would neither sign nor ratify UNCLOS due to fundamental flaws in its deep seabed—known as the international seabed area (the Area)—mining provisions. Further negotiations resulted in an additional agreement regarding Part XI, which the United States signed on 29 July 1994. It substantially modified the original deep seabed mining provisions. This agreement contains legally binding changes to UNCLOS and is to be applied and interpreted with the Convention as a single treaty. On 7 October 1994, the President of the United States submitted UNCLOS and the Part XI Agreement, amending its deep seabed mining provisions, to the Senate for its advice and consent to accession and ratification. In 2004 and 2007, the Senate Foreign Relations Committee voted in favor of the Convention and recommended Senate advice and consent. On both occasions the full Senate did not hold any hearings on the issue or act

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3. CONVENTION ON THE LAW OF THE SEA, S. EXEC. REP. 110-9 (2007).

4. Statement on United States Participation in the Third United Nations Conference on the Law of the Sea, 1 PUB. PAPERS 92 (Jan. 29, 1982).

5. Statement on United States Actions Concerning the Conference on the Law of the Sea, 2 PUB. PAPERS (July 9, 1982).

on the committee's recommendations. The Senate Foreign Relations Committee held new hearings in 2012 but suspended further discussion of the Convention when 34 senators pledged to vote against providing advice and consent. As of the date of this publication no further action has been taken on U.S. accession to the Convention.

Commentary

The Part XI Implementation Agreement is annexed to UN General Assembly Resolution 48/263.[6] UNCLOS was immediately signed by 119 States, although the United States was not among them. Nonetheless, by 1993, the Convention had still not entered into force, primarily over concerns by the industrialized nations over Part XI. Political changes brought on by the end of the Cold War and growing global recognition of the importance of free market principles by the international community provided an avenue to address those concerns.[7]

Beginning in 1990, the UN Secretary-General convened fifteen informal consultations among States to address the perceived shortcomings of the deep seabed mining regime in an effort to achieve universal participation in the Convention.[8] The new negotiations were designed to resolve objections of the industrialized States. Those negotiations were still in progress on November 16, 1993, when the Convention garnered its sixtieth ratification. The knowledge that, consequently, the Convention would enter into force a year later galvanized the negotiators into resolving their remaining differences.[9] The result was the adoption of the Part XI Implementation Agreement, which paved the way for all States to join the Convention.

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6. G.A. Res. 48/263 (Aug. 17, 1994).

7. S. TREATY DOC. NO. 103-39, *supra* note 1.

8. UN Secretary General, *Consultations of the Secretary-General on Outstanding Issues Relating to the Deep Seabed Mining Provisions of the United Nations Convention on the Law of the Sea: Report of the Secretary-General*, U.N. Doc. A/48/950 (June 9, 1994).

9. LAW OF THE SEA: THE END GAME (Mar. 1996) (U.S. intelligence community assessment).

The United States signed the Implementation Agreement the following day; four months later, UNCLOS entered into force. The Implementation Agreement contains legally binding changes to Part XI and is to be applied together with UNCLOS as a single instrument.[10] These changes addressed the objections of the United States, thus removing the remaining "obstacles to acceptance of the Convention by industrialized nations, including the United States."[11]

On October 7, 1994, President William Clinton submitted UNCLOS and the Implementation Agreement to the U.S. Senate for advice and consent. Nonetheless, the Convention and the Implementation Agreement lay dormant in the Senate Foreign Relations Committee (SFRC) because of ideological opposition to the Convention by the Chairman of the Committee, Senator Jesse Helms. After Helms retired in 2003, the new Chairman, Senator Richard Lugar, held two public hearings on UNCLOS and the Implementation Agreement in October of that year. The SFRC heard testimony from oceans law and policy experts, former U.S. negotiators of UNCLOS, representatives of the Department of State and the DoD, and the U.S. Coast Guard, as well as from representatives of organizations interested in oceans issues. Based on these hearings, the SFRC determined that UNCLOS advances important U.S. national security, economic, and environmental interests, and allows the United States to play a leaderships role in global oceans issues. Accordingly, in March 2004, the SFRC unanimously recommended that the Senate give its advice and consent to accession to UNCLOS and ratification of the Implementation Agreement, subject to several declarations and understandings.[12] The following month, the Senate Armed Services Committee held a hearing to examine the national security implications of UNCLOS; all present and former administration witnesses conveyed their strong support for the Convention.[13] Nevertheless, despite having widespread support, no action was taken by the full Senate. The

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10. Part XI Implementation Agreement, art. 2; S. TREATY DOC. NO. 103-39, *supra* note 1.

11. S. TREATY DOC. NO. 103-39, *supra* note 1.

12. UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, S. EXEC. REP. 108-10, at 6–7 (Mar. 11, 2004).

13. *Military Implications of the United Nations Convention on the Law of the Sea: Hearing Before the Senate Committee on Armed Services*, 108th Cong. 796 (2004).

> Convention and the Implementation Agreement were returned to the SFRC at the end of the 108th Congress.
>
> In 2007, the George W. Bush administration renewed U.S. efforts to join the Convention, resulting in two additional public hearings before the SFRC in September and October. After hearing testimony from government officials, ocean industry representatives, non-governmental organizations, and academics, the SFRC once again recommended, by a vote of seventeen to four, that the Senate give its advice and consent for the same reasons articulated in 2004.[14] Again, despite widespread support within and outside of government, the full Senate failed to act on the Convention and the Implementation Agreement. The SFRC also held three hearings in 2012, but suspended further discussion of the Convention after it became clear that there were insufficient votes to provide advice and consent to accession.[15] To date, no further action has been taken by the SFRC and the United States is still not a party to UNCLOS or the Implementation Agreement.

1.2 U.S. OCEANS POLICY

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

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

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14. S. EXEC. REP. 110-9, *supra* note 3, at 8–10.

15. *The Law of the Sea Convention (Treaty Doc. 103-39): Hearings Before the Senate Committee on Foreign Relations*, 112th Cong. 654 (2012).

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.

Commentary

The U.S. government has long conducted a vigorous Freedom of Navigation Program through which it has asserted its navigational rights in the face of what it has regarded as excessive claims by coastal States of jurisdiction over ocean space or international passages. When remonstrations and protestations are unavailing, elements of U.S. military forces may sail into or fly over disputed regions for the purpose of demonstrating their right and determination to continue to do so.

In March 1983, three months after UNCLOS was opened for signature, President Reagan issued a new U.S. oceans policy statement. Despite the shortcomings of Part XI, the United States recognized that the Convention "contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all states."[16] The intent of the new policy was to promote and protect U.S. oceans interests consistent with the Convention and international law.[17]

First, the United States would "act in accordance with the balance of interests relating to traditional uses of the oceans—such as navigation and overflight." Additionally, the United States would "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." In other words, U.S. recognition of coastal State

16. Statement on United States Oceans Policy, 1 PUB. PAPERS 378 (Mar. 10, 1983).

17. *See* AMERICAN LAW INSTITUTE, RESTATEMENT (FOURTH) THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 408 reporters' note 3 at 197 (2018).

claims in waters off their coast was contingent on coastal State recognition of U.S. navigational rights and freedoms in such waters. For example, the United States will recognize a 12-nautical mile territorial sea claim, but not a restriction that requires a U.S. warship to provide prior notice before it engages in innocent passage in those waters.

Second, consistent with the U.S. Freedom of Navigation Program, the new policy stated that the United States would "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." Additionally, the United States would not "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."

Third, President Reagan indicated that he was proclaiming a 200-nautical mile exclusive economic zone (EEZ) consistent with Part V of the Convention. Both the new policy and the EEZ proclamation emphasized, however, that all nations would continue to "enjoy the high seas freedoms of navigation and overflight, laying of submarine cables and pipelines, and other internationally lawful uses of the seas" within the zone.[18] This provision is consistent with the position advocated by the United States, and accepted by most delegations, at UNCLOS III regarding efforts to expand coastal State authority in the EEZ to include residual competencies, such as restrictions over military activities:

> All States continue to enjoy in the [EEZ] traditional high seas freedoms of navigation and overflight and the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to those freedoms, which remain qualitatively and quantitatively the same as those freedoms when exercised seaward of the zone. Military operations, exercises and activities have always been regarded as internationally lawful uses of the sea. The right to conduct such activities

18. S. TREATY DOC. NO. 103-39, *supra* note 1, at 24.

> will continue to be enjoyed by all States in the exclusive economic zone. This is the import of Article 58 of the Convention.[19]

Thus, military activities such as the launching and landing of aircraft, the operation of military devices, intelligence collection, exercises, operations, the emplacement of listening or other security-related devices on the seabed, and military marine data collection (military surveys) are recognized historic high seas uses that are preserved by Article 58 for all States, subject to the obligation to have due regard to coastal State resource rights.[20]

Five years later, the United States abandoned its long-standing claim to a 3-mile territorial sea and extended this to 12 nautical miles to advance U.S. national security and other significant interests.[21] Consistent with UNCLOS, within the U.S. territorial sea, the ships of all nations "enjoy the right of innocent passage" and the ships and aircraft of all nations "enjoy the right of transit passage through international straits." The United States extended its contiguous zone to the maximum extent allowable by UNCLOS in 1999 to advance U.S. "law enforcement and public health interests" and to protect and prevent the removal of "cultural heritage found within 24 nautical miles of the baseline."[22] Within the U.S. contiguous zone, ships and aircraft of all States "enjoy the high seas freedoms of navigation and overflight and the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to those freedoms . . . and compatible with the other provisions of international law reflected in [UNCLOS]."[23]

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19. 17 OFFICIAL RECORDS OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 244, U.N. Doc. A/CONF.62/WS/37 and ADD.1-2 (1973–82) [hereinafter 17 OFFICIAL RECORDS].

20. S. TREATY DOC. NO. 103-39, *supra* note 1, at 24.

21. Proclamation No. 5928, Territorial Sea of the United States of America, 54 Fed. Reg. 777 (Dec. 27, 1988).

22. Proclamation No. 7219, Contiguous Zone of the United States, 64 Fed. Reg. 48701 (Sept. 2, 1999).

23. *Id.*

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

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

Pursuant DODI S-2005.01, Freedom of Navigation (FON) Program, the Department of Defense (DOD) Representative for Ocean Policy Affairs maintains the Maritime Claims Reference Manual. It contains a listing of coastal States' maritime claims, and the U.S. position regarding those claims. It may be accessed at https://www.jag.navy.mil/national-security/mcrm/.

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

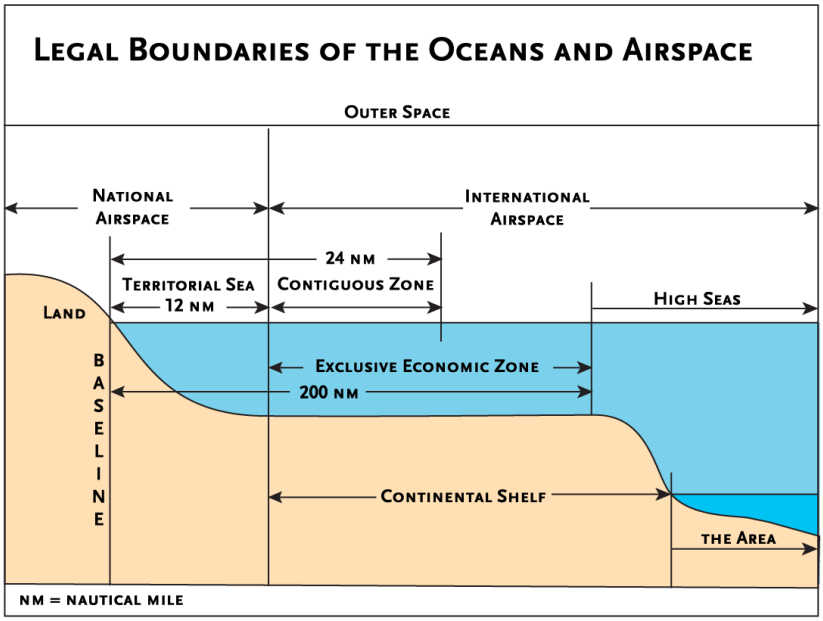

Figure 1-1. Legal Boundaries of the Oceans and Airspace

Commentary

See the Department of State's Limits in the Seas series,[24] which examines the maritime claims and/or boundaries of various coastal States and assesses their consistency with international law.[25]

1.3.1 Internal Waters

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

Commentary

See § 1.5.1 for a detailed discussion of internal waters.

1.3.2 Territorial Seas

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

Commentary

See § 1.5.2 for a detailed discussion of the territorial sea.

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24. The series is available at U.S. DEP'T OF STATE, BUREAU OF OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, LIMITS IN THE SEAS, https://www.state.gov/limits-in-the-seas/ (last visited Mar. 13, 2024).

25. *See, e.g.*, U.S. DEP'T OF STATE, BUREAU OF OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, LIMITS IN THE SEAS No. 36, NATIONAL CLAIMS TO MARITIME JURISDICTION (8th rev. May 25, 2000); U.S. DEP'T OF STATE, BUREAU OF OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, LIMITS IN THE SEAS No. 112, UNITED STATES RESPONSES TO EXCESSIVE NATIONAL MARITIME CLAIMS (1992).

1.3.3 Contiguous Zones

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

Commentary

See § 1.6.1 for a detailed discussion of the contiguous zone.

1.3.4 Exclusive Economic Zones

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

Commentary

See § 1.6.2 for a detailed discussion of the EEZ.

1.3.5 High Seas

The high seas include all parts of the ocean seaward of the EEZ, or, where a State does not claim an EEZ, seaward of the territorial seas. Ships and aircraft of all States enjoy the freedoms of navigation and overflight with due regard for the interests of other States in their exercise of these same freedoms and other internationally lawful uses of the seas related to those freedoms.

Commentary

See § 1.6.3 for a detailed discussion of the high seas.

1.4 MARITIME BASELINES

Maritime zones are measured from lawfully drawn baselines.

Commentary

The rules for delimiting baselines are set out in Articles 5 through 14 of UNCLOS and take into account a wide variety of geographical conditions existing along the world's coastlines. The Convention distinguishes between "normal" baselines (the low-water line along the coast) and "straight" baselines (which can be employed along certain irregular coasts).[26] Illegally drawn baselines can extend maritime jurisdiction significantly seaward in a way that prejudices freedom of navigation and overflight and other internationally lawful uses of the sea related to those freedoms. It is therefore important that the baseline rules contained in the Convention are applied objectively to prevent excessive claims.

In the 1951 *Anglo-Norwegian Fisheries Case* (*United Kingdom v. Norway*), the ICJ noted:

> The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.[27]

Coastal State baseline claims are reflected in the individual country entries of the Maritime Claims Reference Manual (MCRM). They can also be found in the individual country entries on the webpage of the Division for Ocean Affairs and the Law of the Sea (DOALOS) of the UN Office of Legal Affairs.[28]

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26. *See also* Territorial Sea Convention, arts. 3–4.

27. Fisheries (U.K. v. Nor.), Judgment, 1951 I.C.J. 116, 132 (Dec. 18) [hereinafter Fisheries Case].

28. DOALOS, *Major Regions, Subregions and Seas*, https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/regionslist.htm (last visited Mar. 13, 2024).

The discussion of maritime zones in the text of this chapter assumes that the adjacent land area is within the undisputed sovereignty of the claimant nation. However, the legal title to some mainland and island territories is in dispute, thus affecting the offshore zones: for example, the Essequibo region of western Guyana, claimed by Venezuela; Western Sahara, presently occupied by Morocco but claimed by the Polisario supported by Algeria and Mauritania; the southern Kuriles, claimed by Japan and occupied by Russia; various of the Spratly Islands, claimed by China, Vietnam, Malaysia, the Philippines, Taiwan, and Brunei; Pratas Island, administrative dispute between China and Taiwan; the Paracel Islands in the north-western part of the South China Sea, dispute between China, Taiwan, and Vietnam; the Scarborough Shoal, dispute between China, Taiwan, and the Philippines; the Senkakus Islands, dispute among China, Japan, and Taiwan; the Liancourt Rock (Takeshima/Dok-do), dispute between Japan and the Republic of Korea; the Mayotte Island in the Indian Ocean, dispute between France and Comoros; the British Indian Ocean Territory (including Diego Garcia), dispute between Mauritius and the United Kingdom; some small islands in the Mozambique Channel (Bassas da India, Europa Island, the Glorioso Islands, and Juan de Nova Island) situated between Mozambique and Madagascar, dispute between Madagascar and France; the Persian Gulf islands of Abu Musa, Tunb al Sughra, and Tunb al Kabra, dispute between Iran and the United Arab Emirates; the Falklands/Malvinas, dispute between the United Kingdom and Argentina; the two uninhabited islands of Hunter and Matthew, to the east of New Caledonia, dispute between France and Vanuatu; Machias Seal Island, dispute between Canada and the United States; the Corisco Bay Islands (Mbañe and Cocotiers), dispute between Equatorial Guinea and Gabon; Perejil/Leila Island, Peñón de Vélez de la Gomera, Peñón de Alhucemas, and the Chafarinas Islands, dispute between Morocco and Spain; the Doumeira Islands, dispute between Djibouti and Eritrea; the Sapodilla Cays, dispute between Belize and Honduras; Navassa Island, dispute between Haiti and the United States; Wake Island, dispute between the United States and the Marshall Islands; and Conejo Island, dispute between El Salvador and Honduras.

Further, maritime boundary disputes exist on all continents. Of the 460 possible maritime boundaries, only 280 have been agreed, so 180 maritime boundary disputes—39 percent—are outstanding.[29]

1.4.1 Low-water Line

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

Commentary

As a general rule, the normal baseline used to measure coastal State maritime zones is "the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State."[30] The United Nations defines the "low-water line" as the "intersection of the plane of low water with the shore."[31]

The International Law Association (American Branch) Law of the Sea Committee, which undertook a project to define over 200 terms not defined in UNCLOS, defines the "low-water line" (which is synonymous with "low-water mark") as "the intersection of the plane of low water with the shore, or the line along a coast or beach to which the sea recedes at low tide,"[32] while "[t]he actual water level taken as low water for charting purposes is known as the level of chart datum."[33]

The United States similarly defines the "low-water line" as the "intersection of the land with the water surface at an elevation of low water."[34] The U.S. "territorial sea baseline" is

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29. Andreas Østhagen, *Troubled Seas? The Changing Politics of Maritime Boundary Disputes*, 205 OCEAN & COASTAL MANAGEMENT 1 (2021).

30. UNCLOS, art. 5. *See also* Territorial Sea Convention, art. 3.

31. DOALOS, *The Law of the Sea, Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea* ¶ 9, app. I ¶ 50 (1989) [hereinafter DOALOS Baselines].

32. DEFINITIONS FOR THE LAW OF THE SEA: TERMS NOT DEFINED BY THE 1982 CONVENTION § 98(a) (George K. Walker gen. ed., 2012).

33. *Id.* § 98(c).

34. *Glossary*, NOAA SHORELINE WEBSITE, https://shoreline.noaa.gov/glossary.html.

> the line defining the shoreward extent of the territorial sea of the United States drawn according to the principles . . . of the Convention on the Territorial Sea and the Contiguous Zone . . . and [UNCLOS]. Normally, the territorial sea baseline is the mean low water line along the coast of the United States.[35]

> Since 1980, the United States has used a uniform, continuous Chart Datum of Mean Lower Low Water for all tidal waters of the United States, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of Northern Mariana Islands, and its other territories and possessions.[36] Generally, "where the shore directly contacts the open sea, the line on the shore reached by the ordinary low tides comprises the baseline from which the distance of three geographic miles is measured."[37]

1.4.2 Straight Baselines

Where the coastline is deeply indented—or where there is a fringe of islands along the coast in its immediate vicinity—the coastal State may employ straight baselines. The general rule is straight baselines must not depart from the general direction of the coast, and the sea areas they enclose must be closely linked to the land domain. Straight baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level, have been built on them. A coastal State that uses straight baselines must either clearly indicate them on its charts or publish a list of geographical coordinates of the points joining them together (Figure 1-2). The United States does not employ this practice and restrictively interprets its use by others.

Commentary

> In the *Fisheries Case*, the ICJ noted that, in applying the low-water mark rule, drawing the outer limit of the territorial sea by following

35. 33 C.F.R. § 2.20 (2023).

36. 45 Fed. Reg. 70296-97 (Oct. 23, 1980); STEACY D. HICKS, TIDE AND CURRENT GLOSSARY 3, 15 (1989).

37. 33 C.F.R. § 329.12(a)(1) (2023).

the coast in all its sinuosities can "be applied without difficulty to an ordinary coast, which is not too broken."[38] However,

> where a coast is deeply indented and cut into . . . or where it is bordered by an archipelago such as the "skjærgaard" along the western sector of the coast . . . , the baseline becomes independent of the low-water mark, and can only be determined by means of a geometrical construction. In such circumstances the line of the low-water mark can no longer be put forward as a rule requiring the coastline to be followed in all its sinuosities. . . . Such a coast, viewed as a whole, calls for the application of a different method; that is, the method of baselines which, within reasonable limits, may depart from the physical line of the coast.[39]

Consistent with the ICJ opinion, UNCLOS allows for the use of straight baselines "in localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity."[40] In these circumstances, "economic interests peculiar to the region concerned, the reality and importance of which are clearly evidenced by a long usage," can also be considered.[41] Nonetheless, if straight baselines are used, they "must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters."[42] Regrettably, there is no generally agreed test for determining what constitutes "general direction" or the "regime of internal waters."[43] Additionally, "straight baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or except in instances where the drawing of baselines to and from such elevations

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38. Fisheries Case, 1951 I.C.J. 116, 128.

39. *Id.* 128–29.

40. UNCLOS, art. 7(1); Territorial Sea Convention, art. 4(1).

41. UNCLOS, art. 7(5), Territorial Sea Convention, art. 4(4); Fisheries Case, 1951 I.C.J. 116, 133; DOALOS Baselines, *supra* note 31, ¶¶ 58–60.

42. UNCLOS, art. 7(3); Territorial Sea Convention, art. 4(2); Fisheries Case, 1951 I.C.J. 116, 133.

43. DOALOS Baselines, *supra* note 31, ¶¶ 54–57.

has received general international recognition."[44] Nonetheless, only low-tide elevations that are situated wholly or partly within the territorial sea of a coastal State can be used as the baseline for measuring the breadth of the various maritime zones.[45] Finally, "straight baselines may not be applied by a State in such a manner as to cut off the territorial sea of another State from the high seas or an exclusive economic zone."[46]

In determining whether the use of straight baselines is permissible, DOALOS suggests that "it is necessary to focus on the spirit as well as the letter of . . . article 7."[47] The use of straight baselines "is designed to avoid the tedious application of rules dealing with the normal baselines and the mouths of rivers and bays, where their application would produce a complex pattern of territorial seas."[48] An example would be the use of straight baselines that creates "enclaves and deep pockets of non-territorial seas," which would make it considerably more difficult for both observance of the appropriate regime by user States and surveillance by the coastal State.[49] There is no generally accepted objective test to determine if a coast is deeply indented. However, there is general agreement that "there must be several indentations which individually would satisfy the conditions establishing a juridical bay."[50] Through the "judicious" use of straight baselines, a coastal State may be able to "eliminate potentially troublesome enclaves and deep pockets of non-territorial seas without significantly pushing the seaward limits of the territorial seas away from the coast."[51] This last point suggests that the UN considers that straight baselines should only be used sparingly and not as a matter of course.

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44. UNCLOS, art. 7(4); Territorial Sea Convention, art. 4(3); Fisheries Case, 1951 I.C.J. 116, 128; DOALOS Baselines, *supra* note 31, ¶¶ 52–53.

45. UNCLOS, art. 13(1); DOALOS Baselines, *supra* note 31, ¶ 52.

46. UNCLOS, art. 7(6); Territorial Sea Convention, art. 4(5); DOALOS Baselines, *supra* note 31, ¶ 60.

47. DOALOS Baselines, *supra* note 31, ¶ 35.

48. *Id.* ¶ 35.

49. *Id.* ¶ 35.

50. *Id.* ¶ 36.

51. *Id.* ¶ 38.

Similarly, there is no generally accepted objective test to determine "whether a group of islands constitute a fringe in the immediate vicinity of the coast."[52] Clearly, this does not apply to a single island, but there is no general agreement on a minimum number of islands that must be in the fringe. It also does not apply to "islands arranged like stepping-stones perpendicular to the coast," because the fringe must be "along the coast."[53] DOALOS considers, however, that there are "two situations where a fringe of islands is likely to exist."[54] The first is where islands form a unity with, and appear to be a continuation of, the mainland, like the "skjærgaard" in the *Fisheries Case*. The second is where islands mask the coast and form a fringe (e.g., the Croatian coast from Pula to Šibenik and Australia's Recherche Archipelago).[55] There is also no absolute test for determining whether a fringe of islands is in the immediate vicinity of the coast. However, given that coastal States may claim a 12-nautical mile territorial sea, there is general agreement that a distance of 24 miles would satisfy the "immediate vicinity" requirement.[56]

Given the lack of clarity and various interpretations of these rules, the use of straight baselines is one of the most abused provisions of UNCLOS. The United States has diplomatically protested and operationally challenged numerous straight baseline claims that fail to conform to the criteria set out in UNCLOS.[57]

The United States considers that the "purpose of authorizing the use of straight baselines is to allow the coastal State . . . to enclose those waters which, as a result of their close interrelationship with the land, have the character of internal waters."[58] Straight baselines can also

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52. *Id.* ¶ 42.
53. *Id.* ¶ 43.
54. *Id.* ¶ 44.
55. *Id.* ¶¶ 44–45.
56. *Id.* ¶ 46.
57. See individual State entries in the Maritime Claims Reference Manual (MCRM). DEP'T OF DEFENSE REPRESENTATIVE FOR OCEAN POLICY AFFAIRS, MARITIME CLAIMS REFERENCE MANUAL, https://www.jag.navy.mil/national-security/mcrm/ (last visited Mar. 13, 2024) [hereinafter MCRM]. *See also e.g.,* DEP'T OF STATE, BUREAU OF OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, LIMITS IN THE SEAS No. 117, STRAIGHT BASELINE CLAIM: CHINA (1996).
58. S. TREATY DOC. NO. 103-39, *supra* note 1, at 8.

be used to "eliminate complex patterns, including enclaves, in its territorial sea, that would otherwise result from the use of normal baselines."[59] If straight baselines are properly drawn, they will not extend the limits of the territorial sea significantly seaward from those that would result from the use of normal baselines. Straight baselines should therefore be used "sparingly" and, if "they are used, they should be drawn conservatively" in accordance with international law to avoid excessive claims that purport to diminish navigational rights and freedoms of all States.[60]

In determining whether a coastline is "deeply indented and cut into," the United States has taken the position that the configuration of the coastline must satisfy the following criteria:

- there exist at least three deep indentations;
- the deep indentations are in close proximity to one another; and
- the depth of penetration of each deep indentation from the proposed straight baseline enclosing the indentation at its entrance to the sea is, as a rule, greater than half the length of that baseline segment.[61]

In determining whether there is a "fringe of islands along the coast in the immediate vicinity of the coast," the U.S. position is that the fringe of islands must satisfy the following conditions:

- the most landward point of each island lies no more than 24 miles from the mainland coastline;
- each island to which a straight baseline is to be drawn is not more than 24 miles apart from the island from which the straight baseline is drawn; and
- the islands, as a whole, mask at least 50 percent of the mainland coastline in any given locality.[62]

59. *Id.*
60. *Id.*
61. *Id.* at 9.
62. *Id.*

If neither the deeply indented nor the fringing island test is met, then the low-water mark must be used as the baseline in that locality.

The U.S. position is that, to be consistent with Article 7(3) of UNCLOS, straight baseline segments must:

- not depart to any appreciable extent from the general direction of the coastline, by reference to general direction lines which in each locality shall not exceed 60 miles in length;
- not exceed 24 miles in length; and
- result in sea areas situated landward of the straight baseline segments that are sufficiently closely linked to the land domain to be subject to the regime of internal waters.[63]

Nonetheless, "minor deviations from the foregoing criteria are not necessarily inconsistent with the Convention [UNCLOS]."[64]

With regard to economic interests, the U.S. position is that such "interests alone cannot justify the location of particular straight baselines."[65] To be consistent with Article 7(5), "only those economic interests may be taken into account which are peculiar to the region concerned" and then "only when the reality and importance of the economic interests are clearly evidenced by long usage."[66]

If low-tide elevations are used as basepoints—that is, low-tide elevations with lighthouses or similar installations built on them or basepoints that have received general international recognition (Article 7(4))—the U.S. position is that

- similar installations are those that are permanent, substantial, and actually used for the safety of navigation; and

63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*

- general international recognition includes recognition by the major maritime users over a period of time.[67]

1.4.2.1 Unstable Coastlines

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

Commentary

Three conditions must be met before a State may rely on Article 7(2) of UNCLOS to draw straight baselines. First, the coastline of the delta must satisfy the conditions of Article 7(1)—that is, it must be deeply indented or have fringing islands. Second, there must be a "delta." Finally, the coastline must be "highly" unstable.[68] Article 7(2) was drafted with the Ganges-Brahmaputra River Delta in mind, which is the "largest delta in the world, encompassing some 60,000 square kilometers."[69] Examples of conditions that may be used as a guide to determine the existence of a "highly unstable" coastline include monsoons and storms, "which can cause extremely rapid changes, sweeping away islands, altering the course of channels, and forming new islands."[70]

1.4.2.2 Low-tide Elevations

A low-tide elevation is a naturally-formed land area surrounded by water and remains above water at low tide but is submerged at high tide. While a low-tide elevation situated wholly or partly within the territorial sea does not in itself enjoy a territorial sea, it may be used to delimit it. Specifically, where a low-tide elevation is situated wholly or partly at a distance not exceeding the

67. S. TREATY DOC. NO. 103-39, *supra* note 1, at 10. *See also* LIMITS IN THE SEAS No. 106, DEVELOPING STANDARD GUIDELINES FOR EVALUATING STRAIGHT BASELINES (Aug. 31, 1987).

68. DOALOS Baselines, *supra* note 31, ¶ 48.

69. *Id.* ¶ 50.

70. *Id.*

breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.

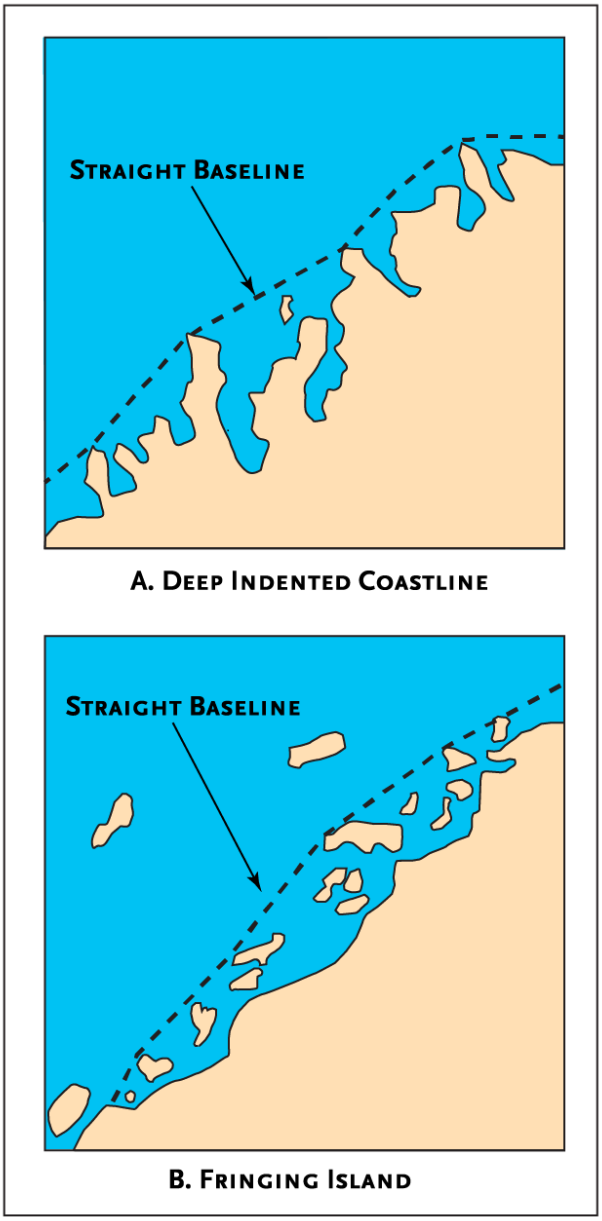

Figure 1-2. Straight Baselines

Commentary

A "low-tide elevation" is defined in UNCLOS as "a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide."[71] Low-tide elevations must be distinguished from "rocks" and "islands," which are defined in Article 121 (see § 1.5.3). "Low-tide elevations can be mud flats, or sand bars."[72] To qualify as a low-tide elevation, the feature must be "naturally formed"—that is, "human modification cannot change the seabed into a low-tide elevation or a low-tide elevation into an island."[73] For example, in the *South China Sea Arbitration* case, the Tribunal concluded that Mischief Reef was a low-tide elevation that was not entitled to maritime zones of its own, even though China had engaged in extensive land reclamation (5,580,000 square meters) and construction (installations and an airstrip) activities on the reef.[74]

Low-tide elevations situated wholly or partly within the territorial sea of the mainland, an island, or a rock may be used as the baseline for measuring the breadth of the territorial sea.[75] In other words, the low-tide elevation can be used to "bump out" the territorial sea of the mainland, an island, or a rock. A low-tide elevation situated wholly outside the territorial sea generates no entitlement to maritime zones of its own.[76]

Additionally, low-tide elevations situated wholly outside the territorial sea of the mainland, an island, or a rock may not be appropriated by any State, by occupation or otherwise. In considering this issue in the *South China Sea Arbitration*, the Tribunal determined that

> low-tide elevations do not form part of the land territory of a State in the legal sense. Rather they form part of the submerged landmass of the State and fall within the legal regimes

71. UNCLOS, art. 13(1); Territorial Sea Convention, art. 11(1).
72. S. TREATY DOC. NO. 103-39, *supra* note 1, at 10.
73. South China Sea Arbitration (Phil. V. China), Case No. 2013-19, Award, ¶ 305 (Perm. Ct. Arb. 2016).
74. *Id.* ¶¶ 306, 378, 888.
75. UNCLOS, art. 13(1); Territorial Sea Convention, art. 11(1).
76. UNCLOS, art. 13(2); Territorial Sea Convention, art. 11(2).

> for the territorial sea or continental shelf, as the case may be. Accordingly . . . , the Tribunal subscribes to the view that low-tide elevations cannot be appropriated, although a coastal State has sovereignty over low-tide elevations which are situated within its territorial sea, since it has sovereignty over the territorial sea itself.[77]

1.4.3 Bays, Gulfs, and Historic Bays

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

Commentary

A bay is defined in UNCLOS as "a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast."[78] To be considered a juridical bay, the area of the indentation must be "as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation."[79] For the purpose of measurement, the area of the bay includes the water lying between the low-water mark around the shore of the bay and a line joining the low-water mark at the bay's natural entrance points.[80] If a bay has more than one mouth due to the presence of islands, "the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths"

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77. South China Sea Arbitration (Phil. V. China), Case No. 2013-19, Award, ¶¶ 309, 1040 (Perm. Ct. Arb. 2016). *See also* Territorial and Maritime Dispute (Nicar v. Colom.), Judgment, 2012 I.C.J. 624, ¶ 26.

78. UNCLOS, art. 10(2); Territorial Sea Convention, art. 7(2).

79. UNCLOS, art. 10(2); Territorial Sea Convention, art. 7(2).

80. UNCLOS, art. 7(3); Territorial Sea Convention, art. 7(3).

and the islands within the bay "shall be included as if they were part of the water area of the indentation."[81] The waters of the bay enclosed by the closing line are considered internal waters.[82]

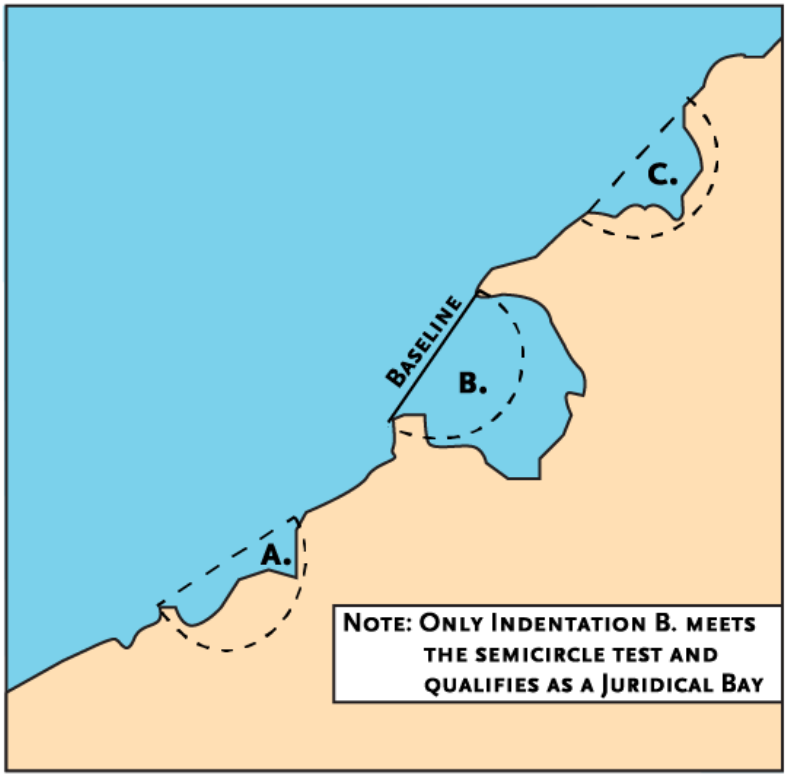

Figure 1-3. The Semicircle Test

81. UNCLOS, art. 7(3); Territorial Sea Convention, art. 7(3).
82. UNCLOS, art. 10(4); Territorial Sea Convention, art. 7(4).

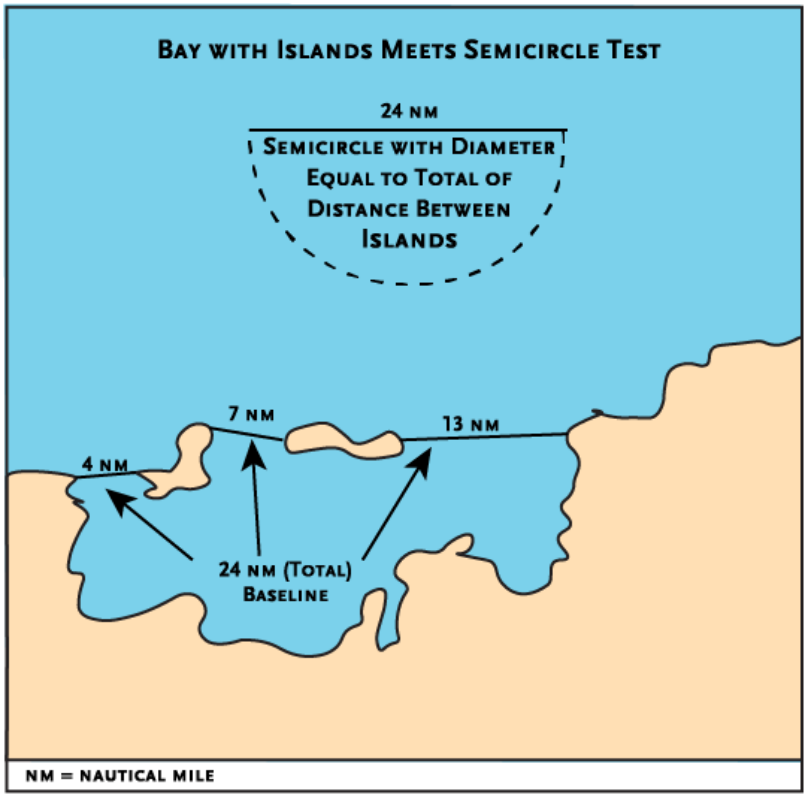

Figure 1-4. Bay with Islands

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

Commentary

The closing line of a juridical bay may not exceed 24 nautical miles.[83] If the distance between the natural entrance points of a bay is greater than 24 nautical miles, "a straight baseline of 24 nautical miles shall

83. UNCLOS, art. 10(4); Territorial Sea Convention, art. 7(4).

> be drawn within the bay in such a manner as to enclose the maximum area of water that is possible."[84]
>
> Long Island Sound and Block Island Sound west of the line between Montauk Point on Long Island and Watch Hill Point in Rhode Island constitute a juridical bay under Article 7 of the 1958 Territorial Sea Convention. The bay is closed by a line connecting Montauk Point and Watch Hill Point; the waters of the bay west of the closing line are internal State waters, and the waters of Block Island Sound east of that line are territorial seas and high seas.[85]

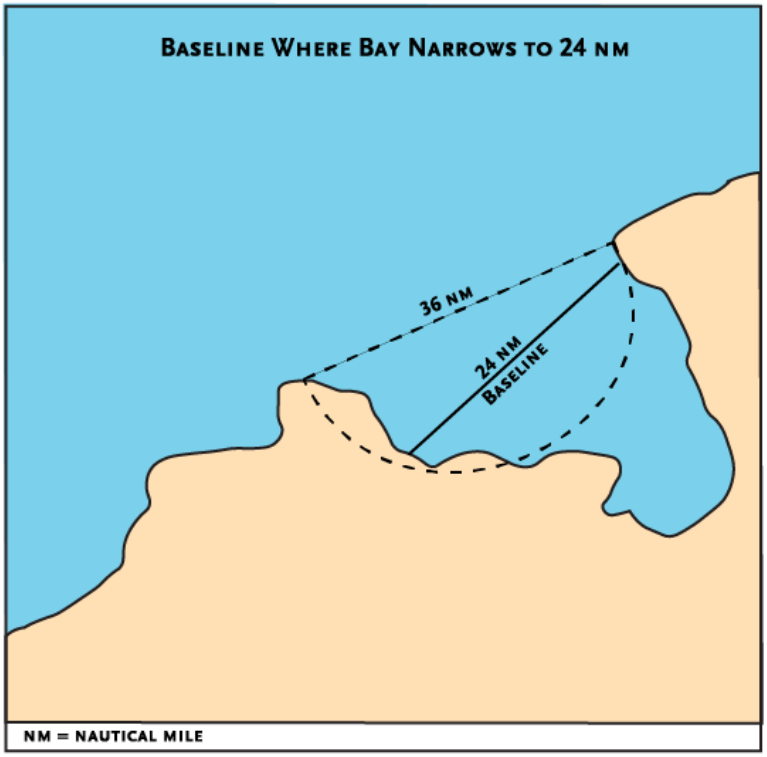

Figure 1-5. Bay with Mouth Exceeding 24 Nautical Miles

84. UNCLOS, art. 10(5); Territorial Sea Convention, art. 7(5).

85. United States v. Maine (Rhode Island and New York Boundary Case), 469 U.S. 504 (1985).

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

Commentary

The above rules regarding juridical bays do not apply to historic bays.[86]

UNCLOS exempts historic bays from the straight baseline requirement for juridical bays, but fails to provide guidance on the criteria required to establish historic claims.[87] As a result, several States claim historic title over vast areas of the seas that adversely affect freedom of navigation and overflight. With the extension of the territorial sea to 12 nautical miles, the creation of the 200-nautical mile EEZ, and a clear rule on closing lines for juridical bays, the rationale for claiming historic waters—security and economic concerns—no longer exists.[88]

Although there is no universally accepted standard for establishing a valid claim to historic waters and bays, a 1962 UN study concluded that, based on State practice, there are three factors that should be considered in determining whether a title to historic waters exists:

(1) there must have been an effective exercise of sovereignty over the area by the claiming State;
(2) the exercise of sovereignty by the claiming State must have continued over a considerable time so as to have developed into a usage; and

86. UNCLOS, art. 10(6); Territorial Sea Convention, art. 7(6).

87. UNCLOS, art. 10(6); Territorial Sea Convention, art. 7(6).

88. U.N. Secretariat, *Juridical Regime of Historic Waters, Including Historic Bays*, ¶¶ 36, 81, U.N. Doc. A/CN.4/143 (Mar. 9, 1962), *reprinted in* 2 YEARBOOK OF THE ILC 1962 at 1 (1964).

> (3) the attitude of foreign States to the activities of the claiming State in the area must have been such that it can be characterized as an attitude of general toleration.[89]

The burden of proof to establish these factors rests with the claiming State.[90]

Regarding the first factor, a claim of sovereignty must be "expressed by deeds and not merely by proclamations."[91] Regarding the second factor, the activity from which the required usage emerges must be a repeated or continued activity by the claiming State.[92] There is no consensus, however, on the exact amount of time "necessary to build the usage on which the historic title" is based.[93] Finally, the claiming State must show acquiescence by other States in its exercise of sovereignty over the area in question. The UN study concluded, however, that acquiescence does not require that other States affirmatively consent to the claim. Inaction by foreign States over a considerable period is sufficient to permit the emergence of a historic title.[94] This conclusion is consistent with the decision of the ICJ in the *Fisheries Case*, which held that the consistent and prolonged application of the Norwegian system of delimiting the country's fisheries zone, combined with the general toleration of foreign States, gave rise to a historic right to apply the system.[95]

Regarding the third factor, the United States takes a contrary view, requiring an "actual showing of acquiescence" by foreign States to a historic claim, "as opposed to a mere absence of opposition."[96] An actual showing of acquiescence requires a failure to protest what is clearly known to a foreign State as a historical claim.

89. *Id.* ¶¶ 185–86.
90. *Id.* ¶ 188.
91. *Id.* ¶ 98.
92. *Id.* ¶ 103.
93. *Id.* ¶ 104.
94. *Id.* ¶¶ 107, 110, 112.
95. Fisheries Case, 1951 I.C.J. 116, 138–39.
96. S. TREATY DOC. NO. 103-39, *supra* note 1, at 11–12.

The United States "has only very few small spots of historic waters, which are of no consequence to the international community, and which could have been incorporated in a straight baseline system had it chosen to do so."[97] For example, Mississippi Sound, a shallow body of water immediately south of the mainland of Alabama and Mississippi, has been held by the U.S. Supreme Court to be a historic bay.[98] Long Island Sound has also been held to be a historic bay.[99]

The Supreme Court has held that straight baselines could be applied in the United States only with the approval of the federal government.[100]

The Supreme Court has also held that certain other bodies of U.S. waters do not meet the criteria for historic waters. These include Cook Inlet, Alaska;[101] Santa Monica and San Pedro Bays, California;[102] Florida Bay;[103] numerous bays along the coast of Louisiana;[104] and Nantucket Sound, Massachusetts.[105] In determining whether Cook Inlet was a historic bay, the Supreme Court decided that

> something more than the mere failure to object must be shown. The failure of other countries to protest is meaningless unless it is shown that the governments of those countries knew or reasonably should have known of the authority being asserted. . . . We believe that the routine enforcement of domestic game and fish regulations in Cook Inlet in the territorial period failed to inform foreign governments of any claim of dominion. In the absence of any awareness on the

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97. John D. Negroponte, *Who Will Protect Freedom of the Seas?*, 86 DEPARTMENT OF STATE BULLETIN 41, 42 (Oct. 1986).

98. United States v. Louisiana (Alabama and Mississippi Boundary Case), 470 U.S. 93 (1985).

99. United States v. Maine, 469 U.S. 509 (1985).

100. United States v. California, 381 U.S. 139, 167–69 (1965); United States v. Louisiana, 394 U.S. 11, 36–38 (1969); Alabama and Mississippi Boundary Case, 470 U.S. 93, 99 (1985).

101. United States v. Alaska, 422 U.S. 184 (held to be high seas).

102. United States v. California, 381 U.S. 139, 173–75 (1965).

103. United States v. Florida, 420 U.S. 531, 533 (1975).

104. United States v. Louisiana (Louisiana Boundary Case), 420 U.S. 529 (1975).

105. United States v. Maine (Massachusetts Boundary Case), 475 U.S. 89 (1986).

> part of foreign governments of a claimed territorial sovereignty over lower Cook Inlet, the failure of those governments to protest is inadequate proof of the acquiescence essential to historic title.[106]

In 1965, the U.S. Supreme Court declined to consider the claim that Monterey Bay, California is historic, noting that it met the 24-nautical mile closing line test.[107] On the other hand, while the Chesapeake and Delaware Bays meet the criteria for historic bays and have been so recognized by other nations,[108] both now qualify as juridical bays and do not depend upon historic bay status for treatment as internal waters.

Of the nineteen claims to historic bays, the United States has protested and/or operationally challenged seventeen on the grounds that they do not qualify as historic waters under international law. Examples include the Rio de la Plata Estuary (Argentina and Uruguay); Anxious, Encounter, Lacepede, and Rivoli Bays (Australia); the Gulf of Thailand (Cambodia and Vietnam); Escocesa Bay and Santo Domingo Bay (Dominican Republic); Palk Strait, Palk Bay, and the Gulf of Mannar (India); the Gulf of Taranto (Italy); the Gulf of Sidra (Libya); the Gulf of Panama (Panama); Peter the Great Bay (Soviet Union); Hudson Bay (Canada); and the Gulf of Tonkin (Vietnam). Hudson Bay, with a 50-mile closing line, is not conceded by the United States to be a historic bay, despite Canada's claim since 1906.[109]

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106. United States v. Alaska, 422 U.S. 184, 200 (1975).

107. United States v. California, 381 U.S. 139, 173 (1965).

108. AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 511 reporters' note 5 at 32 (1987).

109. C. JOHN COLOMBOS, THE INTERNATIONAL LAW OF THE SEA 186 (6th ed. 1967); WILLIAM W. BISHOP, INTERNATIONAL LAW: CASES AND MATERIALS 605 (3d ed. 1971); 1 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW 700–1 (1940); 4 WHITEMAN DIGEST 236–37. *See* MCRM, *supra* note 57; LIMITS IN THE SEAS No. 112, *supra* note 25; 2 1991–99 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1578–80; United States Mission to the United Nations at New York Note dated June 17, 1987, *reprinted in* LOS BULLETIN No. 10, at 23 (1987); Permanent Rep of Thailand to the U.N., Letter dated Dec. 9, 1985 from the Permanent Rep. of Thailand to the Secretary General, annex, U.N. Doc. A/40/1033 (Dec. 12, 1985); Joint Demarche by the United Kingdom and the United States in Relation to the Law of the Dominican Republic Number 66-07 of May 22, 2007 (Oct. 18, 2007), *reprinted in* LOS BULLETIN No. 66, at 98 (2007); LIMITS IN THE

The United Kingdom (December 1961) and the Netherlands (June 1962) have also protested Argentina's/Uruguay's claim that Rio de la Plata Estuary is a historic bay.[110] Thailand, Singapore, and Germany have also protested Cambodia's/Vietnam's historic waters claim to part of the Gulf of Thailand.[111] The United Kingdom filed a joint demarche with the United States objecting to the Dominican Republic's claim that Escocesa and Santo Domingo Bays were historic waters.[112] The United Kingdom has also objected to Italy's historic waters claim to the Gulf of Taranto.[113]

The claim of Libya to historic status for the Gulf of Sidra (Sirte), with a closure line of about 300 miles, first advanced in 1973, has not been accepted by the international community and has been the subject of frequent protests and assertions.[114] Libya's claim that the Gulf of Sidra is a historic bay has additionally been rejected by Australia (1981), France (1986), Germany (1986), Italy (1976), Norway (1986), Spain (1986), and the United Kingdom (1986).[115]

The United States has protested the Soviet Union's 1957 claim that Peter the Great Bay (102 nautical miles) is a historic bay.[116] Canada

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SEAS No. 130, DOMINICAN REPUBLIC: ARCHIPELAGIC AND OTHER MARITIME CLAIMS AND BOUNDARIES 16 (2014); U.S. Dep't of State File No. P74 0020-2088, 1974 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 293; Communication Transmitted to the Permanent Missions of the States Members of the United Nations at the Request of the Permanent Representative of the United States to the United Nations (Ref. NV/85/11) (July 10, 1985), *reprinted in* LOS BULLETIN No. 6, at 40 (1985); LIMITS IN THE SEA No. 107, STRAIGHT BASELINES: U.S.S.R. (PACIFIC OCEAN, SEA OF JAPAN, SEA OF OKHOTSK, AND BERING SEA) 4–5 (1987); LIMITS IN THE SEAS No. 99, STRAIGHT BASELINES: VIETNAM 11–12 (1983).

110. LIMITS IN THE SEAS No. 112, *supra* note 25, at 13.

111. *Id.* at 14; U.N. Doc. A/40/1033, *supra* note 109.

112. Joint Demarche by the United Kingdom and the United States, *supra* note 109, at 98; LIMITS IN THE SEAS No. 130, *supra* note 109, at 16.

113. MCRM, *supra* note 57.

114. 1974 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 293; LOS BULLETIN No. 6, at 40 (1985) (U.S. protests).

115. LIMITS IN THE SEAS No. 112, *supra* note 25, at 18.

116. 4 WHITEMAN DIGEST 250–57; 2 JAPANESE YEARBOOK OF INTERNATIONAL LAW 213–18 (1958).

(1957), France (1957), Germany (1958), Japan (1958), the Netherlands (1957), Sweden (1957), and the United Kingdom (1957) also protested the claim at that time.[117]

Vietnam's historic waters claim to a portion of the Gulf of Tonkin has been protested by France (1983) and Thailand (1985).[118] Several other countries have protested Vietnam's claims to portions of the Gulfs of Tonkin and Thailand as its historic waters.[119]

1.4.4 River Mouths

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

Commentary

If a river flows directly into the sea without forming an estuary, "the baseline shall be a straight line across the mouth of the river between points on the low-water line of its banks."[120] The United States takes the position that "if the river forms an estuary, the baseline is determined under the provisions relating to juridical bays."[121]

An "estuary" is defined as "the tidal mouth of a river where the seawater is measurably diluted by the fresh water from the river."[122] Because it is not always easy to determine exactly where the mouth of a river is located if it enters the sea through an estuary, some States have drawn excessive straight baselines across estuaries rather than

117. LIMITS IN THE SEAS No. 107, *supra* note 109, at 4–5; LIMITS IN THE SEAS No. 112, *supra* note 25, at 19.

118. U.N. Doc. A/40/1033, *supra* note 109. *See also* 1 DOALOS, THE LAW OF THE SEA: CURRENT DEVELOPMENTS IN STATE PRACTICE 146–47 (France and Thailand) (1987).

119. For protests of the claim in the Gulf of Thailand, see LOS BULLETIN No. 10, *supra* note 109, at 23; 1 DOALOS, THE LAW OF THE SEA: CURRENT DEVELOPMENTS IN STATE PRACTICE 147 (Thailand) (1987); 2 DOALOS, THE LAW OF THE SEA: CURRENT DEVELOPMENTS IN STATE PRACTICE 84–85 (Singapore) (1989); LIMITS IN THE SEAS No. 99, *supra* note 109, at 9–10.

120. UNCLOS, art. 9; Territorial Sea Convention, art. 13; S. TREATY DOC. NO. 103-39, *supra* note 1, at 11.

121. S. TREATY DOC. NO. 103-39, *supra* note 1, at 11.

122. DEFINITIONS FOR THE LAW OF THE SEA, *supra* note 32, § 60 at 190.

the mouth of the river. An example is the 120-nautical mile closing line drawn by Uruguay and Argentina across the Rio de la Plata estuary from Punta del Este to Cabo San Antonio. The Rio de la Plata estuary does not fulfill the geographic requirements for a river but rather is an estuary or type of geographic gulf or bay. Where the body of water is determined to be a juridical bay or estuary, the closing line cannot exceed 24 nautical miles.[123] The United Kingdom, the Netherlands, and the United States protested the claim in 1961, 1962, and 1963, respectively.[124]

Similarly, Venezuela closed off the mouth of the Orinoco River with a 98.9-nautical mile closing line. The principal mouth of the Orinoco River is over 30 nautical miles from the closing line, which is situated about 22 nautical miles from the nearest mainland.[125] The United States and the United Kingdom have protested the claim.[126]

Note that UNCLOS distinguishes between rivers and estuaries by requiring States to adopt laws and regulations "to prevent, reduce and control pollution of the marine environment from land-based sources, including rivers, estuaries, pipelines and outfall structures, taking into account internationally agreed rules, standards and recommended practices and procedures."[127]

1.4.5 Reefs

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

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123. LIMITS IN THE SEAS No. 44, STRAIGHT BASELINES: ARGENTINA 4 (1972).

124. LIMITS IN THE SEAS No. 112, *supra* note 25, at 12–13. *See also* Richard B. Bilder et al., *Contemporary Practice of the United States Relating to International Law*, 57 AMERICAN JOURNAL OF INTERNATIONAL LAW 403, 403–04 (1963); 4 WHITEMAN DIGEST 109, 342–43.

125. LIMITS IN THE SEAS No. 21, STRAIGHT BASELINES: VENEZUELA 3 (1970).

126. 4 WHITEMAN DIGEST 343. *See also* MCRM, *supra* note 57 (Venezuela entry).

127. UNCLOS, art. 207(1).

Commentary

Article 6 of UNCLOS provides that, in the case of islands situated on atolls or of islands having fringing reefs, the normal baseline is the seaward low-water line of the "drying reef charted as being above the level of chart datum."[128] Although UNCLOS does not address reef closing lines, the United States position is that any such line should not "adversely affect rights of passage, freedom of navigation, and other rights" provided in the Convention.[129] When computing the water-to-land ratio in Article 47(1) to determine if an archipelagic State can draw straight archipelagic baselines, the "land areas may include waters lying within the fringing reefs of islands and atolls, including that part of a steep-sided oceanic plateau which is enclosed or nearly enclosed by a chain of limestone islands and drying reefs lying on the perimeter of the plateau."[130]

A "reef" is defined as "a mass of rock or coral that reaches close to the sea surface or is exposed at low tide."[131] As used in Articles 6 and 47(7), "fringing reef" means "a reef attached directly to the shore or continental land mass, or located in their immediate vicinity."[132] A "drying reef" is "that part of a reef which is above water at low tide but is submerged at high tide."[133] An "atoll" is defined as "a reef with or without an island situated on it surrounded by the open sea, that encloses or nearly encloses a lagoon."[134]

1.4.6 Harbor Works

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

128. S. TREATY DOC. NO. 103-39, *supra* note 1, at 8.
129. *Id.*
130. UNCLOS, art. 47(7).
131. DEFINITIONS FOR THE LAW OF THE SEA, *supra* note 32, § 140 at 280.
132. *Id.* § 69, at 205.
133. *Id.* § 53, at 175.
134. *Id.* § 12, at 109.

These do not include offshore aids to navigation built on submerged reefs or features.

Commentary

For baselines purposes, the outermost permanent man-made harbor works—such as jetties, moles, quays, wharves, breakwaters, and sea walls—that form an integral part of the harbor system are regarded as forming part of the coast. Off-shore installations and artificial islands, however, are not considered permanent harbor works.[135] "Harbor works" are defined as "permanent human-made structures built along the coast which form an integral part of the harbor system such as jetties, moles, quays, or other port facilities, coastal terminals, wharves, piers, breakwaters, sea walls, etc."[136]

Offshore installations and artificial islands are not considered permanent harbor works for baseline purposes—notwithstanding suggestions that there are uncertainties relating to monobuoys (single point mooring systems for tankers), which may be located some distance offshore. The U.S. government rejects the use of monobuoys as valid base points.[137] The Supreme Court has also held that "dredged channels leading to ports and harbors" are not "harbor works," even if such channels are an integral part of the harbor system, because Article 8 of the Territorial Sea Convention only apples to raised structures.[138]

1.5 WATERS SUBJECT TO STATE SOVEREIGNTY

For operational purposes, the world's oceans are divided into two parts. The first includes internal waters, territorial seas, and archipelagic waters. These waters are subject to the territorial sovereignty of coastal States, with certain navigational rights reserved to the international community. The second part includes contiguous zones, waters of the EEZ, and the high seas. These are

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135. UNCLOS, art. 11; Territorial Sea Convention, art. 8; S. TREATY DOC. NO. 103-39, *supra* note 1, at 11.

136. DEFINITIONS FOR THE LAW OF THE SEA, *supra* note 32, § 79 at 216.

137. ALEXANDER M. LEWIS, NAVIGATIONAL RESTRICTIONS WITHIN THE NEW LOS CONTEXT 17 (1986).

138. United States v. Louisiana, 394 U.S. 11, 36–38 (1969).

international waters in which all States enjoy the high seas freedoms of navigation and overflight. International waters are discussed in 1.6.

Commentary

Although the terms "national waters" and "international waters" are not used in UNCLOS or in the 1958 Geneva Conventions, these terms are used in this publication to distinguish national waters, where the coastal State has a preponderance of jurisdiction, from international waters, where the coastal State's sovereign rights and jurisdiction are limited and foreign States have the preponderance of jurisdiction. These two terms serve as a useful aid in understanding the contrasting operational rights and duties in and over the waters covered by the terms. See § 1.6 for a discussion of "international waters."

Navigation in and overflight of national waters is discussed in § 2.5. Navigation in and overflight of international waters is discussed in § 2.6.

1.5.1 Internal Waters

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

Commentary

All waters landward of the baseline from which the territorial sea is measured are considered internal waters of the State. Lakes, rivers,

some bays, harbors, some canals, and lagoons are examples of internal waters. Article 8 of UNCLOS provides:

> 1. Except as provided in Part IV, waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.
>
> 2. Where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters.[139]

Internal waters include lakes, rivers, juridical bays, and recognized historic bays.[140] If straight baselines drawn in accordance with Article 7 enclose areas that previously were not considered internal waters, a right of innocent passage exists in those waters.[141]

1.5.2 Territorial Seas

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

Commentary

Although the 1958 Geneva Conventions made a historic contribution to the codification and progressive development of the law of the sea, they did not resolve all outstanding issues. On December 10, 1958, the UN General Assembly requested that the Secretary-General convene a Second United Nations Conference on the Law of the Sea to consider "questions on the breadth of the territorial sea and fishery limits" that had not been settled in the 1958 Conventions.[142] The Conference convened in March 1960 but concluded the

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139. *See also* Territorial Sea Convention, art. 5(1).
140. S. TREATY DOC. NO. 103-39, *supra* note 1, at 2–3.
141. UNCLOS, art. 8(2); Territorial Sea Convention, art. 5(2).
142. G.A. Res. 13/1307(XIII) (Dec. 10, 1958).

following month without resolving the outstanding issues. UNCLOS conclusively settled these long-standing disputes.

Traditionally, the breadth of the territorial sea was limited to 3 nautical miles.[143] By 1974, however, only twenty-eight States claimed a 3-nautical mile territorial sea, while eighty-eight States claimed territorial seas ranging from 4 to 200 nautical miles.[144] UNCLOS resolved the issue by establishing the maximum breadth of the territorial sea at 12 nautical miles.[145] Of the twenty States that claimed territorial seas in excess of 12 nautical miles in 1983, nineteen have since rolled back their claims to 12 nautical miles.[146]

Only Benin, Peru, Somalia, and Togo continue to claim territorial seas exceeding 12 nautical miles, compared to one hundred and forty-nine States that claim a 12-nautical mile territorial sea, two that claim a 6-nautical mile territorial sea, and one that claims a 3-nautical mile territorial sea.[147] Coastal States exercise sovereignty over their territorial sea and the air space over the territorial sea.[148]

In 1988, the United States issued a presidential proclamation extending its territorial sea from 3 to 12 nautical miles.[149] Nothing in the proclamation altered existing federal and state law.[150] Therefore, the individual State Seaward Boundary is the limit of the state's jurisdiction under the Submerged Lands Act of 1953.[151] The Act grants jurisdiction to states out to 3 nautical miles, with the exception of Texas, the Gulf Coast of Florida, and Puerto Rico, which retain a 9-nautical mile State Seaward Boundary.[152]

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143. Tullio Treves, *Historical Development of the Law of the Sea*, *in* THE OXFORD HANDBOOK OF THE LAW OF THE SEA 1, 5 (Donald Rothwell et al. eds., 2015).

144. J. ASHLEY ROACH, EXCESSIVE MARITIME CLAIMS 140 (4th ed. 2021).

145. UNCLOS, art. 3; S. TREATY DOC. NO. 103-39, *supra* note 1, at 5.

146. ROACH, *supra* note 144, at 140; MCRM, *supra* note 57.

147. ROACH, *supra* note 144, at 140; MCRM, *supra* note 57.

148. UNCLOS, art. 2; Territorial Sea Convention, arts. 1–2; S. TREATY DOC. NO. 103-39, *supra* note 1, at 2, 5.

149. Proclamation No. 5928, *supra* note 21; S. TREATY DOC. NO. 103-39, *supra* note 1, at 5.

150. Proclamation No. 5928, *supra* note 21.

151 43 U.S.C. §§ 1301–1356c.

152 43 U.S.C. § 1312. *See also* 48 U.S.C. § 749.

1.5.3 Islands, Rocks, and Low-tide Elevations

Each island has its own territorial sea and, like the mainland, has a baseline from which it is calculated. An island is a naturally formed area of land surrounded by water, which is above water at high tide. Rocks are islands that cannot sustain human habitation or economic life of their own. Provided they remain above water at high tide, they possess a territorial sea determined in accordance with the principles discussed in 1.4. Rocks have no EEZ or continental shelf. While a low-tide elevation (above water at low tide but submerged at high tide) situated wholly or partly within the territorial sea does not in itself enjoy a territorial sea, it may be used to delimit it. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea. Where a low-tide elevation is located entirely beyond the territorial sea, it has no territorial sea of its own (Figure 1-6). Maritime boundary delimitation agreements provide evidence of recognized status of islands.

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

Commentary

Land features in the maritime environment are defined in Articles 13 and 121 of UNCLOS. An "island" is a "naturally formed area of land, surrounded by water, which is above water at high tide" and is capable of sustaining "human habitation or economic life" of its own.[153] Islands enjoy the same maritime entitlements—a territorial sea, contiguous zone, EEZ, and continental shelf—as mainland territory.[154] A "rock" is a naturally formed area of land, surrounded by water, which is above water at high tide but is not capable of sustaining "human habitation or economic life" of its own.[155] Rocks are

153. UNCLOS, art. 121(1), (3); Territorial Sea Convention, art. 10(1).

154. UNCLOS, art. 121(2); Territorial Sea Convention, art. 10(2); South China Sea Arbitration (Phil. v. China), Case No. 2013-19, Award, ¶ 280 (Perm. Ct. Arb. 2016).

155. UNCLOS, art. 121(3).

only entitled to a territorial sea—they shall have no EEZ or continental shelf.[156] See § 1.4.2.2 for a discussion of "low-tide elevations." Land features in the maritime environment must be "naturally formed"—human modification of a land feature cannot change the status of that feature, which shall be "ascertained on the basis of its earlier, natural condition, prior to the onset of significant human modification."[157]

In the *South China Sea Arbitration*, the Tribunal assessed the status of certain maritime features and the entitlements to maritime zones that they were capable of generating for the purposes of the Convention.[158] The Tribunal determined that "the entitlements that an island can generate to maritime zones" depend on whether the island has the capacity to "sustain human habitation or economic life of [its] own."[159] It concluded that "none of the high-tide features in the Spratly Islands is capable of sustaining human habitation or an economic life of their own" and that, therefore, none of the features were entitled to an EEZ or continental shelf.[160] In arriving at this conclusion, the Tribunal determined, inter alia:

- The enquiry is not whether a feature is actually "sustaining human habitation or an economic life," but "whether, objectively, the feature is apt, able to, or lends itself to human habitation or economic life."[161]
- "[P]ositive evidence that humans historically lived on a feature or that the feature was the site of economic activity could constitute relevant evidence of a feature's capacity."[162]
- "At a minimum, sustained human habitation require[s] that a feature be able to support, maintain, and provide food, drink,

156. UNCLOS, art. 121(3).

157. South China Sea Arbitration (Phil. v. China), Case No. 2013-19, Award, ¶¶ 305–06, 509–11 (Perm. Ct. Arb. 2016); S. TREATY DOC. NO. 103-39, *supra* note 1, at 12.

158. South China Sea Arbitration (Phil. v. China), Case No. 2013-19, Award, ¶¶ 279–647 (Perm. Ct. Arb. 2016).

159. *Id.* ¶ 280.

160. *Id.* ¶ 626.

161. *Id.* ¶¶ 483, 545.

162. *Id.* ¶ 484.

and shelter to some humans to enable them to reside there permanently or habitually over an extended period of time."[163]

- For "a rock . . . [to be] disentitled from an EEZ and continental shelf, it must lack *both* the capacity to sustain human habitation *and* the capacity to sustain an economic life of its own."[164]
- An "island" that is capable of sustaining "*either* human habitation *or* an economic life of its own is entitled to *both* an exclusive economic zone *and* a continental shelf."[165]
- "[F]or economic activity to constitute the economic life of a feature, the resources around which the economic activity revolves must be local, not imported, as must be the benefit of such activity." This does not include "[e]conomic activity that can be carried on only through the continued injection of external resources," "purely extractive economic activities," or "economic activity derived from a possible exclusive economic zone or continental shelf."[166]
- The status of the feature must be "ascertained on the basis of its earlier, natural condition, prior to the onset of significant human modification."[167]
- Size is not a "dispositive" factor of a feature's status, although it may "correlate to the availability of water, food, living space, and resources for an economic life."[168]
- "The term 'human habitation' should be understood to involve the inhabitation of the feature by a stable community of people for whom the feature constitutes a home and on which they can remain."[169]
- Although the "text of Article 121(3) is disjunctive, . . . as a practical matter, . . .a maritime feature will ordinarily only possess an economic life of its own if it is also inhabited by a stable human community."[170]

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163. *Id.* ¶ 490.
164. *Id.* ¶ 496.
165. *Id.* ¶ 496.
166. *Id.* ¶¶ 500, 502, 503, 543.
167. *Id.* ¶ 511.
168. *Id.* ¶ 538.
169. *Id.* ¶ 542.
170. *Id.* ¶ 544.

- Factors that "contribute to the natural capacity of a feature" include the "presence of water, food, and shelter in sufficient quantities to enable a group of persons to live on the feature for an indeterminate period of time" and the "conditions for inhabiting and developing an economic life on a feature," such as the "prevailing climate, the proximity of the feature to other inhabited areas and populations, and the potential for livelihoods on and around the feature."[171]
- "[T]he most reliable evidence of the capacity of a feature will usually be the historical use to which it has been put." Thus, "a feature that has never historically sustained a human community lacks the capacity to sustain human habitation."[172]
- "[A] purely official or military population, serviced from the outside, does not constitute evidence that a feature is capable of sustaining human habitation." The same analysis would apply to "past or current existence of economic life."[173]
- The "criterion of human habitation is not met by the temporary inhabitation . . . [of a] feature by fishermen, even for extended periods."[174]

1.5.3.1 Artificial Islands and Off-shore Installations

Artificial islands and off-shore installations have no territorial sea of their own. See 1.8.

Commentary

Coastal States have the exclusive right in the EEZ to construct and regulate the construction, operation, and use of artificial islands; resource-related installations and structures; and installations and structures that may interfere with the coastal State's resource right in the EEZ.[175] The coastal State has "exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction

171. *Id.* ¶ 546.
172. *Id.* ¶ 549.
173. *Id.* ¶¶ 549–51.
174. *Id.* ¶ 618.
175. UNCLOS, art. 60(1).

with regard to customs, fiscal, health, safety and immigration laws and regulations."[176] "The coastal State may, where necessary, establish reasonable safety zones around such artificial islands, installations, and structures in which it may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations, and structures."[177] The breadth of the safety zones "shall not exceed . . . 500 meters around them, . . . except as authorized by generally accepted international standards" or as recommended by the International Maritime Organization (IMO).[178] Safety zones must be designed to ensure that they are "reasonably related to the nature and function of the artificial islands, installations, or structures."[179] Artificial islands, installations, and structures and their safety zones may not interfere with the use of "recognized sea lanes essential to international navigation."[180] "Artificial islands, installations, and structures do not possess the status of islands," are not entitled to a territorial sea of their own, and "do not affect the delimitation" of the various maritime zones.[181]

States may also erect and emplace installations for carrying out activities in the Area solely in accordance with Part XI and subject to the rules, regulations, and procedures of the International Seabed Authority.[182] Such installations may not interfere with the "use of recognized sea lanes essential to international navigation or in areas of intense fishing activity."[183] States may establish safety zones around such installations to ensure the safety of both navigation and the installations, but such zones may not impede lawful access of shipping to particular maritime zones or navigation along international sea lanes.[184] These "installations do not possess the status of islands, . . . have no territorial sea of their own," and do not affect the delimitation of the various maritime zones.[185]

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176. *Id.* art. 60(2).
177. *Id.* art. 60(4).
178. *Id.* art. 60(5).
179. *Id.* art. 60(5).
180. *Id.* art. 60(7).
181. *Id.* art. 60(8).
182. *Id.* art. 147(2)(a).
183. *Id.* art. 147(2)(b).
184. *Id.* art. 147(2)(c).
185. *Id.* art. 147(2)(e).

Installations deployed for scientific research purposes do not possess the status of islands, do not have a territorial sea of their own, and do not affect the delimitation of the various maritime zones.[186] The State deploying the installation may establish a safety zone around such installations not to exceed 500 meters.[187] "The deployment and use" of such installations "shall not constitute an obstacle to established international shipping routes."[188]

1.5.3.2 Roadsteads

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

Commentary

A roadstead that is "normally used for the loading, unloading, and anchoring of ships," and that "would otherwise be situated wholly or partly outside the outer limit of the territorial sea," is "included in the territorial sea."[189] A "roadstead" is defined as "an area near the shore where vessels are intended to anchor in a position of safety."[190]

A roadstead does not generate a territorial sea of its own. Only the roadstead itself is considered territorial sea and "the presence of a roadstead does not change the legal status of the water surrounding it."[191] Thus, while the roadstead possesses the status of territorial sea, the waters between an outlying roadstead and the territorial sea are not considered territorial in nature and high seas freedoms apply in these intervening waters. Accordingly, the United States does not

186. *Id.* art. 259.
187. *Id.* art. 260.
188. *Id.* art. 261. *See also* S. TREATY DOC. NO. 103-39, *supra* note 1, at 12.
189. UNCLOS, art. 12; Territorial Sea Convention, art. 9; S. TREATY DOC. No. 103-39, *supra* note 1, at 13.
190. DEFINITIONS FOR THE LAW OF THE SEA, *supra* note 32, § 146.
191. S. TREATY DOC. NO. 103-39, *supra* note 1, at 13.

recognize Germany's claim to extend its territorial sea at one point in the Helgoland Bight of the North Sea to 16 nautical miles.[192]

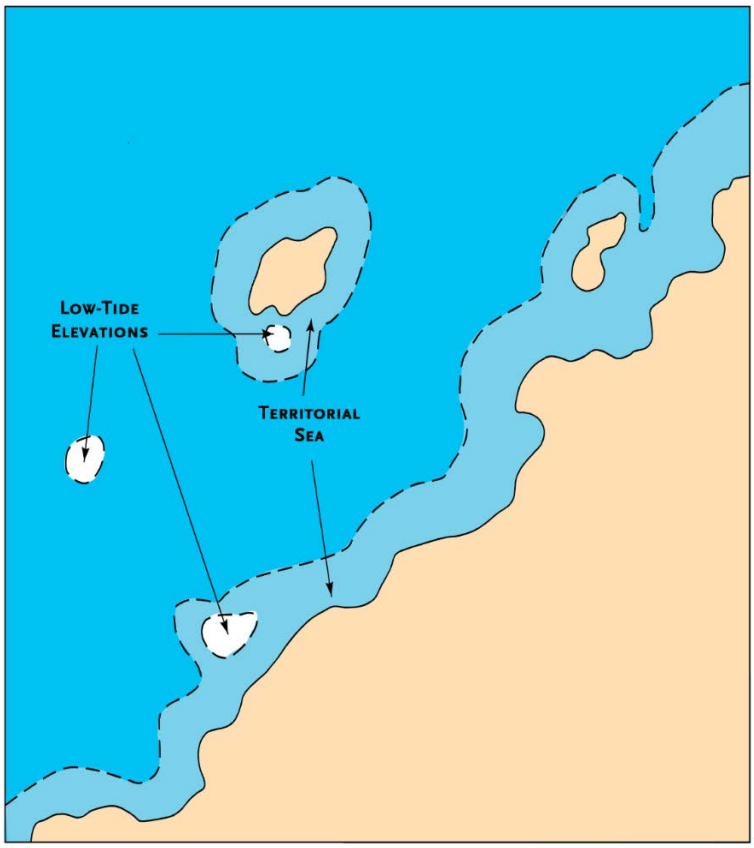

Figure 1-6. Territorial Sea of Islands and Low-tide Elevations

1.5.4 Archipelagic Waters and Sea Lanes

An archipelagic State is a State that is constituted wholly of one or more groups of islands. Such States may draw straight archipelagic baselines joining the outermost points of their outermost islands, provided that the ratio

192. State Department Note to the Embassy of the Federal Republic of Germany in Washington (Mar. 15, 1985), *reported in* State Department telegram 080298 (Mar. 16, 1985), 2 1981–88 CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1762, 1792.

of water to land within the baselines is between 1:1 and 9:1. The waters enclosed within the archipelagic baselines are called archipelagic waters. Archipelagic baselines are the baselines from which the archipelagic State measures seaward its territorial sea, contiguous zone, and EEZ. The United States recognizes the right of an archipelagic State to establish archipelagic baselines enclosing archipelagic waters provided the baselines are drawn in conformity with UNCLOS. See 2.5.4 regarding navigation and overflight of archipelagic waters.

Commentary

Prior to 1982, international law did not recognize the right of mid-oceanic island States to claim archipelagic status. During UNCLOS III, maritime States worked closely with island States, such as Indonesia and the Philippines, to craft an agreement that recognized the right of island States to claim archipelagic status, while guaranteeing the right of all States to freely navigate through and over the archipelago.[193]

An "archipelagic State" is defined as "a State constituted wholly by one or more archipelagos and may include other islands."[194] An "archipelago" is "a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such."[195] Thus, the special regime of Part IV only applies to island States; continental States, such as China (Paracels and Senkakus) and the United States (Hawaiian Islands), may not claim archipelagic waters.[196]

193. S. TREATY DOC. NO. 103-39, *supra* note 1, at 21.
194. UNCLOS, art. 46(a); S. TREATY DOC. NO. 103-39, *supra* note 1, at 21.
195. UNCLOS, art. 46(b); S. TREATY DOC. NO. 103-39, *supra* note 1, at 21.
196. S. TREATY DOC. NO. 103-39, *supra* note 1, at 22.

China established straight baselines around the Paracel Islands in 1996.[197] In 2012, Beijing declared straight baselines connecting several features in the Senkaku Islands (Diaoyu Dao).[198] In both cases, the standards for drawing what are, in effect, archipelagic baselines around these mid-ocean island groups are not met.[199] The proper baseline is the low-water line of the various features. Japan has also protested China's straight baseline claim in the Senkakus, indicating that it is not grounded in international law, including UNCLOS.[200]

Archipelagic States may

> draw straight baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1.[201]

The water-land area ratio of between 1 to 1 and 9 to 1 serves to exclude large-land-area island nations, such as Australia, Japan, New Zealand, and the United Kingdom, where the ratio is less than 1 to 1, and scattered island nations, such as Kiribati and Tuvalu, where the ratio is greater than 9 to 1.

Archipelagic baselines may "not exceed 100 nautical miles, except that up to 3 per cent of the total number of baselines enclosing any archipelago may exceed that length, up to a maximum length of 125

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197. Declaration of the Government of the People's Republic of China on the Baselines of the Territorial Sea (May 15, 1996), https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1996_Declaration.pdf.

198. Statement of the Government of the People's Republic of China on the Baselines of the Territorial Sea of Diaoyu Dao and Its Affiliated Islands (Sept. 10, 2012), https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/chn_mzn89_2012_e.pdf.

199. LIMITS IN THE SEAS No. 117, *supra* note 57.

200. Note Verbale from the Permanent Mission of Japan to the Secretary-General of the United Nations, PM/12/303 (Sept. 24, 2012), *reprinted in* LOS BULLETIN No. 80, at 39 (2013). *See also* LIMITS IN THE SEAS No. 150, PEOPLE'S REPUBLIC OF CHINA: MARITIME CLAIMS IN THE SOUTH CHINA SEA 16, 24 (2022).

201. UNCLOS, art. 47(1).

nautical miles."[202] Archipelagic baselines may "not depart to any appreciable extent from the general configuration of the archipelago" and may "not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the nearest island."[203] Additionally, the system of archipelagic baselines may not be applied in such a manner as to cut off from the high seas or the EEZ the territorial sea of another State.[204] In cases where a part of the archipelagic waters "lies between two parts of an immediately adjacent neighbouring State, existing rights and all other legitimate interests which the latter State has traditionally exercised in such waters and all rights stipulated by agreement between those States shall continue and be respected."[205]

Archipelagic States exercise sovereignty over the archipelagic waters enclosed by the archipelagic baselines, as well as the airspace over the archipelagic waters, subject to the regime of archipelagic sea lanes passage.[206] See § 2.5.4 for a discussion of navigation and overflight of archipelagic waters.

Twenty-two States currently claim archipelagic status: Antigua and Barbuda, the Bahamas, Cabo Verde, Comoros, the Dominican Republic, Fiji, Grenada, Indonesia, Jamaica, Kiribati, the Maldives, the Marshall Islands, Mauritius, Papua New Guinea, the Philippines, Saint Vincent and the Grenadines, São Tomé and Principe, the Seychelles, the Solomon Islands, Trinidad and Tobago, Tuvalu, and Vanuatu.[207] The U.S. State Department and the DoD have examined seventeen of these claims and have found only five to be inconsistent with the provisions of Part IV of UNCLOS: Comoros, the Dominican Republic, the Maldives, the Marshall Islands, and Mauritius.[208]

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202. *Id.* art. 47(2).
203. *Id.* art. 47(3)–(4).
204. *Id.* art. 47(5).
205. *Id.* art. 47(6).
206. *Id.* art. 49.
207. ROACH, *supra* note 144, at 32.
208. LIMITS IN THE SEAS No. 134, COMOROS ARCHIPELAGIC AND OTHER MARITIME CLAIMS AND BOUNDARIES (2014); LIMITS IN THE SEAS No. 130; LIMITS IN THE SEAS No. 126, MALDIVES MARITIME CLAIMS AND BOUNDARIES (2005); LIMITS IN THE SEAS No. 145,

In addition to China, several other continental States illegally purport to draw straight baselines around their claimed mid-ocean island territories and dependencies. These claims are akin to an assertion of archipelagic status for these features and are therefore inconsistent with contemporary international law as reflected in UNCLOS. The States include Australia (Furneaux Group and Houtman Abrolhos); Brazil (Arquipélago dos Abrolhos, Arquipélago de Fernando de Noronha, Ilha da Trindade and Ilhas Martin Vaz, and Penedos de São Pedro e São Paulo); Burma (Preparis Island and Coco Islands); Canada (Canadian Arctic Islands); Denmark (Faroe Islands); Ecuador (Galápagos Islands/Archipiélago de Colón); Ethiopia (Dahlak Archipelago); France (New Caledonia); India (Andaman and Nicobar Islands, Lakshadweep); Norway (Svalbard Archipelago); Portugal (Azores and Madeira Islands); and the United Kingdom (Falkland Islands/Islas Malvinas and Turks and Caicos Islands).[209]

The *travaux préparatoires* of the archipelagic articles in UNCLOS may be found in the legislative history prepared by DOALOS[210] and in a series of articles by the principal U.S. negotiators.[211]

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

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REPUBLIC OF THE MARSHALL ISLANDS: ARCHIPELAGIC AND OTHER MARITIME CLAIMS AND BOUNDARIES (2020); LIMITS IN THE SEAS No. 140, MAURITIUS ARCHIPELAGIC AND OTHER MARITIME CLAIMS AND BOUNDARIES (2014). *See also* MCRM, *supra* note 57.

209. MCRM, *supra* note 57.

210. DOALOS, ARCHIPELAGIC STATES: LEGISLATIVE HISTORY OF PART IV OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, U.N. Sales No. E.90.V.2 (1990).

211. John R. Stevenson & Bernard H. Oxman, *The Preparations for the Law of the Sea Conference*, 68 AMERICAN JOURNAL OF INTERNATIONAL LAW 1, 12–13 (1974); John R. Stevenson & Bernard H. Oxman, *The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session*, 69 AMERICAN JOURNAL OF INTERNATIONAL LAW 1, 21–22 (1975); John R. Stevenson & Bernard H. Oxman, *The Third United Nations Conference on the Law of the Sea: The 1975 Geneva Session*, 69 AMERICAN JOURNAL OF INTERNATIONAL LAW 763, 784–85 (1975); Bernard H. Oxman, *The Third United Nations Conference on the Law of the Sea: The 1977 New York Session*, 72 AMERICAN JOURNAL OF INTERNATIONAL LAW 57, 63–66 (1978); 2 VIRGINIA COMMENTARY at 399–487.

all States through routes normally used for international navigation and overflight. If the archipelagic State makes only a partial designation of archipelagic sea lanes, a vessel or aircraft must adhere to the regime of archipelagic sea lanes passage while transiting in the established archipelagic sea lanes but retains the right to exercise archipelagic sea lanes passage through all normal routes used for international navigation and overflight through other parts of the archipelago.

Commentary

"Archipelagic State[s] may," but are not required to, "designate archipelagic sea lanes (ASLs) suitable for continuous and expeditious passage of ships and aircraft through or over their archipelagic waters and adjacent territorial sea."[212] Such sea lanes and air routes must

> include all normal passage routes used as routes for international navigation or overflight through or over archipelagic waters and, within such routes, so far as ships are concerned, all normal navigational channels, provided that duplication of routes of similar convenience between the same entry and exit points shall not be necessary.[213]

Sea lanes and air routes are "defined by a series of continuous axis lines from the entry points of passage routes to the exit points."[214] If an archipelagic State designates sea lanes, it "may also prescribe traffic separation schemes for the safe passage of ships through narrow channels in such sea lanes."[215]

ASLs and traffic separation schemes "shall conform to generally accepted international regulations" and must be referred to the IMO, with a view to their adoption, before they can be implemented by the archipelagic State.[216] If the archipelagic State does not designate, or makes only a partial designation of, ASLs, vessels and aircraft of all States may continue to exercise the right of archipelagic sea lanes

212. UNCLOS, art. 53(1); S. TREATY DOC. NO. 103-39, *supra* note 1, at 23.
213. UNCLOS, art. 53(4); S. TREATY DOC. NO. 103-39, *supra* note 1, at 23.
214. UNCLOS, art. 54(5); S. TREATY DOC. NO. 103-39, *supra* note 1, at 23.
215. UNCLOS, art. 54(6).
216. *Id.* art. 53(8)-(9); S. TREATY DOC. NO. 103-39, *supra* note 1, at 23.

passage (ASLP) in all normal passage routes used for international navigation and overflight through the archipelago.[217]

To date, the only archipelagic State that has designated ASLs is Indonesia. When it introduced its proposal before the Maritime Safety Committee, Indonesia confirmed that the proposed designation was a "partial" ASL proposal and that the right of ASLP would continue to apply in "all other normal passage routes used for international navigation and overflight," including an east-west route and other associated spurs and connectors, through and over Indonesia's territorial sea and its archipelagic waters.[218] The IMO therefore adopted Indonesia's ASL proposal as a "partial system" because it did not include all normal routes used for international navigation, as required by Article 53 of UNCLOS.[219] Relevant IMO documents reflect that, where a partial ASL proposal has come into effect, the right of ASLP "may continue to be exercised through all normal passage routes used as routes for international navigation or overflight in other parts of archipelagic waters" in accordance with UNCLOS.[220]

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217. UNCLOS, art. 53(12); IMO, Guidance for Ships Transiting Archipelagic Waters, IMO Doc. SN/Circ.206, ¶ 2.1.1 (Mar. 1, 1999); IMO, Guidance for Ships Transiting Archipelagic Waters, IMO Doc. SN/Circ.206/Corr.1 (Mar. 1, 1999); IMO Res. MSC.71(69), Adoption of Amendments to the General Provisions on Ships' Routeing (Resolution A.572(14) as amended) (May 19, 1998); IMO Res. MSC.72(69), Adoption, Designation and Substitution of Archipelagic Sea Lanes (May 19, 1998).

218. IMO, *Report of the Maritime Safety Committee*, IMO Doc. MSC 69/22, ¶ 5.23.2 (May 29, 1998). *See also* IMO, *Report of the Maritime Safety Committee*, IMO Doc. MSC 77/26, ¶ 25.40 (June 10, 2003).

219. IMO Res. MSC.72(69), *supra* note 217; *See also* IMO, Adoption, Designation, and Substitution of Archipelagic Sea Lanes, IMO Doc. SN/Circ.200 (May 26, 1998); IMO, Adoption, Designation, and Substitution of Archipelagic Sea Lanes, IMO Doc. SN/Circ.200/Add.1 (July 3, 2008); IMO, Adoption, Designation, and Substitution of Archipelagic Sea Lanes, IMO Doc. SN/Circ.202 (July 31, 2008).

220. IMO Res. MSC.71(69), *supra* note 217, annex 2 ¶ 6.7; IMO, Guidance for Ships Transiting Archipelagic Waters, IMO Doc. SN/Circ.206, *supra* note 217, ¶ 2.1.1.

1.6 INTERNATIONAL WATERS

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

1.6.1 Contiguous Zones

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

Commentary

Within the contiguous zone, a coastal State has limited jurisdiction to exercise the control necessary to:

> (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; and
> (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.[221]

The contiguous zone is not subject to coastal State sovereignty and may not "extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured."[222]

See § 2.6.1 for a discussion of navigational rights in the contiguous zone.

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221. UNCLOS, art. 33(1); Territorial Sea Convention, art. 24(1); S. TREATY DOC. NO. 103-39, *supra* note 1, at 5.

222. UNCLOS, art. 33(2); S. TREATY DOC. NO. 103-39, *supra* note 1, at 5.

The United States extended its contiguous zone to 24 nautical miles in 1999.[223] It considers that this will advance U.S. law enforcement interests by strengthening the ability to deal with illegal immigration and drug trafficking by sea, as well as U.S. public health interests, and is "an important step in preventing the removal of cultural heritage found within 24 nautical miles of the baseline."[224]

1.6.2 Exclusive Economic Zones

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

Commentary

Unlike the other maritime zones, the EEZ is a creation of UNCLOS. During UNCLOS III, coastal States sought to maximize jurisdiction over their offshore resources. Maritime States sought to preserve traditional high seas freedoms of navigation and overflight beyond the territorial sea. Recognition of the EEZ reconciled these differences

223. Proclamation No. 7219, *supra* note 22, at 49844.

224. *Id.*; S. TREATY DOC. NO. 103-39, *supra* note 1, at 5; 2 VIRGINIA COMMENTARY at 266–75.

and was an integral part of the "package deal" of compromises reflected in the Convention.[225]

Articles 55 and 86 make clear that the zone is not part of the territorial sea or the high seas, but rather is a sui generis regime established by the Convention.[226] Article 56 grants coastal States "sovereign rights for the purpose of exploring . . . exploiting, conserving, and managing" the living and non-living natural resources "of the waters superjacent to the seabed and of the seabed and its subsoil" of the 200-nautical mile EEZ, as well as other activities related to the "economic exploitation and exploration of the zone, such as the production of energy from the water, currents, and winds."[227] States are also granted jurisdiction over (1) "the establishment and use of [resource-related offshore] artificial islands, installations, and structures; (2) marine scientific research; and (3) the protection and preservation of the marine environment"—all of which have a direct relationship with the resource rights and economic interests of coastal States.[228] Nonetheless, as a counterbalance, in exercising its rights and performing its duties in the EEZ, the coastal State shall have "due regard to the rights and duties of other States" in the zone.[229] The seaward limit of the EEZ may not exceed 200 nautical miles from the baseline from which breadth of the territorial sea is measured.[230]

Some States take the position that military activities are prohibited in the EEZ without coastal State consent. For example, during UNCLOS III, Brazil expressed its understanding that the Convention does not "authorize other States to carry out military exercises or manoeuvres within the exclusive economic zone, particularly when these activities involve the use of weapons or explosives, without the prior knowledge and consent of the coastal State."[231] In response, the U.S. delegate stressed that the Convention recognizes coastal

225. S. TREATY DOC. NO. 103-39, *supra* note 1, at 6.
226. UNCLOS, arts. 55, 86; S. TREATY DOC. NO. 103-39, *supra* note 1, at 6.
227. UNCLOS, arts. 56–57; S. TREATY DOC. NO. 103-39, *supra* note 1, at 6.
228. UNCLOS, arts. 56, 60, 220, pt. XIII; S. TREATY DOC. NO. 103-39, *supra* note 1, at 6.
229. UNCLOS, art. 56(2).
230. *Id.* art. 57; S. TREATY DOC. NO. 103-39, *supra* note 1, at 6.
231. 17 OFFICIAL RECORDS, *supra* note 19, ¶¶ 28, 40.

State interests in the resources of the EEZ and authorizes the coastal State to assert jurisdiction over resource-related activities in the zone. However, with regard to other non-resource-related activities in the zone, the U.S. delegate stated that

> all States continue to enjoy in the zone traditional high seas freedoms of navigation and overflight and the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, which remain qualitatively and quantitatively the same as those freedoms when exercised seaward or the zone. Military operations, exercises and activities have always been regarded as internationally lawful uses of the sea. The right to conduct such activities will continue to be enjoyed by all States in the exclusive economic zone. This is the import of article 58 or the Convention. Moreover, Parts XII and XIII of tile Convention have no bearing on such activities.[232]

See § 2.6.2 for a further discussion of military activities in the EEZ. See § 2.6.2.1 for a discussion of marine scientific research. See also § 2.6.2 for a general discussion of navigational rights in the EEZ.

The Convention makes clear that coastal States do not exercise sovereignty over the EEZ. The terms "sovereign rights" and "jurisdiction" were deliberately chosen to clearly distinguish between coastal State resource rights and limited jurisdiction in the EEZ, on the one hand, and coastal State sovereignty over the territorial sea, on the other. Coastal States enjoy a much broader and more comprehensive right of "sovereignty" in the territorial sea.[233]

Article 58 clarifies the rights and duties of other States in the EEZ, providing that all States retain the high seas freedoms of "navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms."[234] "In exercising their rights and performing their duties" in the EEZ, States have a similar "due regard" obligation to respect the

232. 17 OFFICIAL RECORDS, *supra* note 19, at 244 (U.S. statement in right of reply).
233. 2 VIRGINIA COMMENTARY at 531–44.
234. UNCLOS, art. 58(1).

"rights and duties of the coastal State."[235] The United States takes the position that enforcement of the "due regard" requirement rests with the flag State, not the coastal State.[236]

Articles 58 and 86 further clarify that the high seas provisions found in Part VII of the Convention—Articles 88 to 115—and other pertinent rules of international law apply equally to the EEZ to the extent that they are compatible with the EEZ regime. Although Article 86 specifies that the EEZ and high seas are distinct maritime zones, nothing in Article 86 is intended to abridge the freedoms enjoyed by all States in the EEZ in accordance with Article 58.[237] Thus:

- No State may claim sovereignty over the EEZ.[238]
- Flag States retain exclusive jurisdiction over their flag vessels operating in foreign EEZs, subject to a coastal State's jurisdiction over violations of its fisheries laws and regulations.[239]
- Warships and other government-owned or operated noncommercial ships retain complete immunity from the jurisdiction of any State other than the flag State.[240]
- The flag State or the State of nationality retain penal jurisdiction over the master and crew in the event of a collision or other navigational incident in the EEZ, and only the flag State can order the arrest and detention of the vessel.[241]
- All States have a duty to render assistance to persons and ships in distress at sea in the EEZ.[242]
- All States have a duty to prevent and punish the universal crimes of slavery, piracy, and unauthorized broadcasting in the EEZ, to include the right of visit and the right of hot pursuit.[243]

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235. UNCLOS, art. 58(3).
236. S. TREATY DOC. NO. 103-39, *supra* note 1, at 24.
237. UNCLOS, arts. 58(2), 86.
238. *Id.* arts. 58(2), 89.
239. *Id.* arts. 58(2), 73, 92.
240. *Id.* arts. 58(2), 95–96.
241. *Id.* arts. 58(2), 97.
242. *Id.* arts. 58(2), 98.
243. *Id.* arts. 58(2), 99–107, 109–11.

- All States have a duty to cooperate to suppress the illicit traffic in narcotic drugs and psychotropic substances in the EEZ.[244]
- All States are entitled to lay submarine cables and pipelines on the continental shelf, subject to the coastal State's resource rights and environmental jurisdiction. States shall also have due regard to cables or pipelines already in position and "the delineation of the course for laying pipelines is subject to the coastal State consent.[245]

The institution of the EEZ has achieved widespread acceptance and is considered by the ICJ to have become part of customary law.[246]

Presidential Proclamation 5030 states:

Proclamation 5030 of March 10, 1983
Exclusive Economic Zone of the United States of America
48 F.R. 10605
By the President of the United States of America

A Proclamation

WHEREAS the Government of the United States of America desires to facilitate the wise development and use of the oceans consistent with international law;

WHEREAS international law recognizes that, in a zone beyond its territory and adjacent to its territorial sea, known as the Exclusive Economic Zone, a coastal State may assert certain sovereign rights over natural resources and related jurisdiction; and

WHEREAS the establishment of an Exclusive Economic Zone by the United States will advance the development of ocean resources and promote the protection of the marine environment, while not affecting other lawful uses of the

244. *Id.* arts. 58(2), 108.
245. *Id.* arts. 58(2), 79, 112.
246. Continental Shelf (Libya v. Malta), Judgment, 1985 I.C.J. 13 (June 3).

zone, including the freedoms of navigation and overflight, by other States;

NOW, THEREFORE, I, RONALD REAGAN, by the authority vested in me as President by the Constitution and laws of the United States of America, do hereby proclaim the sovereign rights and jurisdiction of the United States of America and confirm also the rights and freedoms of all States within an Exclusive Economic Zone, as described herein.

The Exclusive Economic Zone of the United States is a zone contiguous to the territorial sea, including zones contiguous to the territorial sea of the United States, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands (to the extent consistent with the Covenant and the United Nations Trusteeship Agreement), and United States overseas territories and possessions. The Exclusive Economic Zone extends to a distance 200 nautical miles from the baseline from which the breadth of the territorial sea is measured. In cases where the maritime boundary with a neighboring State remains to be determined, the boundary of the Exclusive Economic Zone shall be determined by the United States and other State concerned in accordance with equitable principles.

Within the Exclusive Economic Zone, the United States has, to the extent permitted by international law, (a) sovereign rights for the purpose of exploring, exploiting, conserving and managing natural resources, both living and non-living, of the seabed and subsoil and the superjacent waters and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; and (b) jurisdiction with regard to the establishment and use of artificial islands, and installations and structures having economic purposes, and the protection and preservation of the marine environment.

> This Proclamation does not change existing United States policies concerning the continental shelf, marine mammals and fisheries, including highly migratory species of tuna which are not subject to United States jurisdiction and require international agreements for effective management.
>
> The United States will exercise these sovereign rights and jurisdiction in accordance with the rules of international law.
>
> Without prejudice to the sovereign rights and jurisdiction of the United States, the Exclusive Economic Zone remains an area beyond the territory and territorial sea of the United States in which all States enjoy the high seas freedoms of navigation, overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the sea.
>
> IN WITNESS WHEREOF, I have hereunto set my hand this tenth day of March, in the year of our Lord nineteen hundred and eighty-three, and of the Independence of the United States of America the two hundred and seventh.
>
> Ronald Reagan[247]

Thus, the U.S. proclamation specifically preserves "high seas freedoms of navigation, overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the sea" for all States.[248]

The EEZ regime properly balances coastal State and maritime State interests. As both a coastal and a maritime State, the United States benefits immensely in both respects. From a coastal State perspective, the U.S. EEZ is one of the world's largest and richest EEZs—second only to the EEZ of France—encompassing nearly 4.4 million

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247. Proclamation No. 5030, Exclusive Economic Zone of the United States of America, 48 Fed. Reg. 10605 (Mar. 10, 1983). *See also* U.S. Dep't of State, Public Notice 2237, Exclusive Economic Zone and Maritime Boundaries, Notice of Limits, 60 Fed. Reg. 43825 (Aug. 23, 1995); S. TREATY DOC. NO. 103-39, *supra* note 1, at 6.

248. Proclamation No. 5030, *supra* note 247.

square miles of ocean with abundant living and non-living resources.[249] As a maritime State, the United States depends on free and open access to the world's oceans for its national security and economic interests. The EEZ regime preserves critical navigation and overflight rights and other related freedoms in foreign EEZs, to include the right to engage in military-related activities without coastal State notice or consent.[250]

1.6.3 High Seas

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

Commentary

The high seas include all parts of the sea that are not included in the EEZ, the territorial sea, or the internal waters of a State.[251] "No State may validly purport to subject any part of the high seas to its sovereignty."[252]

1.6.4 Coastal Security Zones

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

249. *See* Geoffrey Migiro, *Countries with the Largest Exclusive Economic Zones*, THE WORLD ATLAS (June 29, 2018), https://www.worldatlas.com/articles/countries-with-the-largest-exclusive-economic-zones.html; S. TREATY DOC. NO. 103-39, *supra* note 1, at 6.

250. S. TREATY DOC. NO. 103-39, *supra* note 1, at 23.

251. UNCLOS, art. 86.

252. *Id.* art. 89; High Seas Convention, art. 2.

the high seas freedoms of navigation and overflight. See 2.5.2.3 for discussion on temporary suspension of innocent passage in territorial seas. See 4.4 for discussion on declared security and defense zones in time of peace. See 7.9 for a discussion on exclusion zones and war zones during armed conflict.

Commentary

A few coastal States claim the right to establish military security zones beyond their territorial sea, in which they purport to regulate the activities of foreign warships and military aircraft. Some of these restrictions include "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 [(e.g., weapons exercises and the use of explosives)], or complete exclusion."[253] Nothing in the Convention or any other sources of international law permits coastal States to establish security zones in peacetime that purport to restrict non-resource-related high seas freedoms beyond the territorial sea.[254] Accordingly, the United States does not recognize the validity of any security or military zone seaward of the territorial sea that purports to restrict or regulate high seas freedoms of navigation and overflight and other internationally lawful uses of the sea.[255]

Six States—Cambodia, China, Nicaragua, Sudan, Syria, and Vietnam—claim security jurisdiction in their 24-nautical mile contiguous zone. As discussed above (§ 1.6.1), coastal State jurisdiction in the contiguous zone is limited to customs, fiscal, immigration, and sanitary matters.[256] The United States diplomatically protested and operationally challenged these illegal claims on various occasions.[257] In addition, twenty States purport to regulate or prohibit foreign military activities in the EEZ. These States are Bangladesh, Brazil, Burma (Myanmar), Cape Verde, China, Ecuador, India, Indonesia,

253. S. TREATY DOC. NO. 103-39, *supra* note 1, at 26.
254. *Id.* at 26.
255. *Id.*
256. UNCLOS, art. 33.
257. MCRM, *supra* note 57.

> Iran, Kenya, Malaysia, the Maldives, Mauritius, North Korea, Pakistan, the Philippines, Portugal, Thailand, Uruguay, and Vietnam.[258] The United States diplomatically protested and operationally challenged these claims on numerous occasions.[259] North Korea, for example, does not claim a contiguous zone, but claims a maritime boundary zone that extends 50 nautical miles beyond its claimed territorial sea off its east coast and extends to the limits of its EEZ off its west coast. Entry into the zone by foreign military ships and military aircraft is prohibited. Civilian ships (except fishing boats) and civilian aircraft may transit the zone "only with appropriate prior agreement or approval."[260] The United States diplomatically protested and operationally challenged this claim in 1977 and 1988, respectively.[261] Similarly, Greece does not claim a contiguous zone but restricts overflight of foreign aircraft out to 10 nautical miles, even though it only claims a 6-nautical mile territorial sea. Although it is technically not a security zone, the United States does not recognize Greece's territorial airspace claim beyond its territorial sea claim and has diplomatically protested (1983–85) and operationally challenged (1983–84) the claim on various occasions.[262]

1.7 CONTINENTAL SHELVES

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

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258. *Id.*

259. *Id.*

260. Korean Central News Agency, Aug. 1, 1977, *in* 4 FOREIGN BROADCAST INFORMATION SERVICE, Asia and Pacific, Aug. 1, 1977, at D6.

261. MCRM, *supra* note 57. *See also* NEW YORK TIMES, Aug. 2, 1977, at 2.

262. MCRM, *supra* note 57.

right to lay submarine cables and pipelines on the continental shelf. The delineation of the course for the laying of pipelines on the continental shelf is subject to the consent of the coastal State.

Commentary

As used in the 1958 Continental Shelf Convention, the term "continental shelf" referred

> (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.[263]

UNCLOS modified that definition, providing that the continental shelf may extend to a maximum distance of 200 miles from the baselines or, if the continental margin extends beyond that limit, to the outer edge of the continental margin as defined by the Convention.[264] The "continental margin" includes the "submerged prolongation of the land mass of the coastal State" and the "seabed and subsoil of the shelf, the slope and the rise," but does not include the "deep ocean floor with its oceanic ridges or the subsoil thereof."[265]

The outer edge of the continental margin is defined in Article 76(4)–(6) of UNCLOS. If the continental margin extends beyond 200 nautical miles, the coastal State shall establish the outer edge of the continental margin by either

> (i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or

263. Continental Shelf Convention, art. 1.
264. UNCLOS, art. 76(1); S. TREATY DOC. NO. 103-39, *supra* note 1, at 2, 7.
265. UNCLOS, art. 76(3).

> (ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.

Unless there is evidence to the contrary, "the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base."[266] Thus, the "foot of the slope can be determined on the basis of geomorphological and/or geological characteristics."[267] In other words, the coastal State may elect to "present evidence to the contrary" to locate the foot of the slope, or it may "present evidence on the maximum change of gradient at the foot of the slope."[268]

The outer limits of the continental shelf "shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres."[269] The limitation in Article 76(6) setting a 350-nautical mile outer continental shelf limit does not apply to "submarine elevations that are natural components of the continental margin, such as its plateau, rises, caps, banks and spurs."[270] "Submarine elevations" include seabed elevations that are "below the surface of the sea at all times that could be part of the continental margin."[271] "Submarine elevations that are natural components of the continental margin" include features that were not a part of the continental margin or have become detached from it but that, through geological processes, "are or have become so closely linked to the continental margin as to become a part of it."[272] Thus, there may be situations where a coastal State may legally claim an extended continental shelf beyond 350 nautical miles.

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266. *Id.* art. 76(4).
267. DEFINITIONS FOR THE LAW OF THE SEA, *supra* note 32, § 38.
268. *Id.* § 38.
269. UNCLOS, art. 76(5).
270. *Id.* art. 76(6); DEFINITIONS FOR THE LAW OF THE SEA, *supra* note 32, §§ 37, 180.
271. DEFINITIONS FOR THE LAW OF THE SEA, *supra* note 32, § 180.
272. *Id.* § 128.

The "slope" is "that part of the continental margin lying between the continental shelf and the continental rise," which normally has "gradients greater than 1.5 degrees."[273] The "rise" is a "submarine feature which is that part of the continental margin lying between the continental slope and the deep ocean floor," which normally has a "gradient of 0.5 degrees or less and a generally smooth surface consisting of sediment."[274] The "deep ocean floor" is the "surface lying at the bottom of the deep ocean with its oceanic ridges, beyond the continental margin."[275] "Oceanic ride" means a "long elevation of the ocean floor with irregular or smooth topography and smooth sides" and is not synonymous with "submarine ridge."[276] A "submarine ridge" is "an elongated elevation of the sea floor with irregular or relatively smooth topography and steep sides."[277]

Like with the EEZ, the "coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources."[278] The natural resources of the continental shelf include the "mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil."[279]

The regime of the continental shelf applies to the seabed and subsoil and does not affect the status of the superjacent waters or airspace.[280] Thus, high seas freedoms of navigation and overflight and other internationally lawful uses of the seas apply in these waters and airspace. Moreover, when exercising its resource rights in the continen-

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273. *Id.* § 38.
274. *Id.* § 37.
275. *Id.* § 47.
276. *Id.* § 128.
277. *Id.* § 182.
278. UNCLOS, art. 77(1); Continental Shelf Convention, art. 2(1); S. TREATY DOC. No. 103-39, *supra* note 1, at 7.
279. UNCLOS, art. 77(4); Continental Shelf Convention, art. 2(4); S. TREATY DOC. No. 103-39, *supra* note 1, at 7.
280. UNCLOS, art. 78; Continental Shelf Convention, art. 3; S. TREATY DOC. NO. 103-39, *supra* note 1, at 2.

tal shelf, the coastal State "must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided for in this Convention."[281] Additionally, all States may lay submarine cables and pipelines on the continental shelf, subject to certain conditions, and the coastal State "may not impede the laying or maintenance of such cables or pipelines" subject to "its right to take reasonable measures for the exploration of the continental shelf, the exploitation of its natural resources and the prevention, reduction and control of pollution from pipelines."[282] Accordingly, the "delineation of the course for the laying of such pipelines on the continental shelf is subject to the consent of the coastal State" and the coastal State retains its right to "establish conditions for cables or pipelines entering its territory or territorial sea, or its jurisdiction over cables and pipelines constructed or used in connection with the exploration of its continental shelf or exploitation of its resources or the operations of artificial islands, installations and structures under its jurisdiction."[283] All States, when laying submarine cables or pipelines, shall also have "due regard to cables or pipelines already in position" and the "possibilities of repairing existing cables or pipelines shall not be prejudiced."[284]

Article 60 applies *mutatis mutandis* to artificial islands, installations, and structures on the continental shelf.[285] The coastal State also has the "exclusive right to authorize and regulate drilling on the continental shelf for all purposes."[286] Additionally, nothing in Part VI prejudices "the right of the coastal State to exploit the subsoil by means of tunnelling, irrespective of the depth of water above the subsoil."[287]

281. UNCLOS, art. 78(2); Continental Shelf Convention, art. 5(1).
282. UNCLOS, art. 79(1)–(2); Continental Shelf Convention, art. 4.
283. UNCLOS, art. 79(3)–(4).
284. *Id.* art. 79(5).
285. UNCLOS, art. 80. *See also* Continental Shelf Convention, art. 5(2)–(7).
286. UNCLOS, art. 81.
287. *Id.* art. 85; Continental Shelf Convention, art. 7.

1.8 SAFETY ZONES

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

Commentary

See § 1.5.3.1 for a discussion regarding safety zones around artificial islands, installations, and structures.

1.9 AIRSPACE

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

Commentary

The Chicago Convention provides that "every State has complete and exclusive sovereignty over the airspace above its territory," which includes "the land areas and territorial waters adjacent thereto."[288] Similarly, UNCLOS provides that State sovereignty extends to the airspace over the territorial sea and over archipelagic waters.[289] Accordingly, foreign aircraft, including State aircraft, may

288. Chicago Convention, arts. 1, 2.
289. UNCLOS, arts. 2, 49; Territorial Sea Convention, art. 2.

not fly over the territory of another State or land therein without permission, unless otherwise provided by special agreement or *force majeure*.[290] States may, on a nondiscriminatory basis, also restrict or prohibit foreign aircraft from flying over certain areas of their territory, for reasons of military necessity or public safety, provided that such prohibited areas are of a "reasonable extent and location so as not to interfere unnecessarily with air navigation."[291] Additionally, "in exceptional circumstances, . . . during periods of emergency, or in the interest of public safety," States may "temporarily . . . restrict or prohibit" overflight of all or part of their territory, provided such restriction or prohibition is made on a nondiscriminatory basis.[292]

Seaward of the territorial sea, in international airspace, civil and State aircraft of all States enjoy high seas freedoms of navigation and overflight, and other internationally lawful uses of the sea.[293] "No State may validly purport to subject any part of the high seas [or international airspace] to its sovereignty."[294]

Between 1945 and 1977, more than forty U.S. reconnaissance aircraft were shot down in the European and Pacific areas.[295] Most of these attacks were justified on the grounds that the aircraft had violated national airspace.[296]

The issue of aerial reconnaissance was discussed in the Security Council during the 1950s and 60s following several incidents between U.S. and Soviet aircraft. When asked if surveillance aircraft

290. Chicago Convention, arts. 3, 6.
291. *Id.* art. 9(a).
292. *Id.* art. 9(b).
293. UNCLOS, arts. 58, 87; High Seas Convention, art. 2(4).
294. UNCLOS, art. 89; High Seas Convention, art. 2.
295. CENTER FOR CRYPTOLOGIC HISTORY, DEDICATION AND SACRIFICE: NATIONAL AERIAL RECONNAISSANCE IN THE COLD WAR, https://media.defense.gov/2021/Jul/13/2002761784/-1/-1/0/DEDICATION-SACRIFICE.PDF.
296. Oliver J. Lissitzyn, *Electronic Reconnaissance from the High Seas and International Law*, 61 INTERNATIONAL LAW STUDIES 563, 566–67, 574–75, 578–79 (1980); *H-029-3: A Brief History of U.S. Navy Cold War Aviation Incidents (Excluding Korea and Vietnam)*, NAVAL HISTORY AND HERITAGE COMMAND, https://www.history.navy.mil/content/history/nhhc/about-us/leadership/director/directors-corner/h-grams/h-gram-029/h-029-3.html.

could be attacked over the high seas, the Soviet representative rejected the position that coastal States had the right to interfere with intelligence collection activities in international airspace.[297] The U.K. delegations similarly indicated without objection that aerial surveillance directed at a coastal State from international airspace was consistent with international law and the UN Charter.[298]

A recent example of the distinction between national and international airspace is the shootdown of a Turkish RF-4E Phantom reconnaissance aircraft by Syrian forces in June 2012. Damascus claimed that the Turkish spy plane was illegally collecting intelligence from within its national airspace.[299] Similarly, in June 2019, an unmanned U.S. MQ-4C Triton surveillance drone was shot down by the Islamic Revolution Guards Corps (IRGC) in the Persian Gulf. The commander of the IRGC's aerospace force claimed that the MQ-4C was downed by an Iranian missile while it was collecting intelligence in Iran's national airspace. U.S. officials denied the allegation, indicating that the attack was unprovoked and that the MQ-4C was legally operating in international airspace.[300]

U.S. sovereignty over national airspace is set out in 49 U.S.C. § 40103. The Administrator of the Federal Aviation Administration (FAA), in consultation with the Secretary of Defense, may establish areas in U.S. national airspace necessary in the interest of national defense and may restrict or prohibit access to those areas to foreign aircraft.[301] Foreign civil aircraft may navigate in U.S. national airspace

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297. U.N. SCOR, 9th Sess., 679th and 680th mtg., U.N. Docs. S./P.V. 679, 680 (Sept. 10, 1954).

298. U.N. SCOR, 15th Sess., 880th to 883rd mtgs., U.N. Docs. S./P.V. 880-83 (July 22-26, 1960).

299. Eric Schmitt & Sebnem Arsu, *Backed by NATO, Turkey Steps Up Warning to Syria*, NEW YORK TIMES, (June 27, 2012), https://www.nytimes.com/2012/06/27/world/middleeast/turkey-seeks-nato-backing-in-syria-dispute.html.

300. Richard Sisk, *Iran Chose to Take Out Drone Instead of Manned Navy Jet, Iranian General Says*, MILITARY.COM (June 21, 2019), https://www.military.com/daily-news/2019/06/21/iran-chose-take-out-drone-instead-manned-navy-jet-lranian-general-says.html; *Iran's IRGC Force Shoots Down Intruding US Spy Drone*, PRESS TV (June 20, 2019), https://www.presstv.com/Detail/2019/06/20/598942/Iran-IRGC-US-spy-drone.

301. 49 U.S.C. § 40103(b)(3)(A)–(B).

as provided in § 41703.[302] Foreign State aircraft may only navigate in U.S. national airspace when authorized by the Secretary of State.[303] The FAA Aeronautical Information Manual (AIM) provides the aviation community with basic flight information and air traffic control (ATC) procedures for use in the National Airspace System (NAS) of the United States.[304] An international version, called the Aeronautical Information Publication (AIP), contains parallel information, as well as specific information on the international airports for use by the international community.[305]

See §§ 2.7.2.2 and 2.7.2.3 regarding, respectively, flight information regions and air defense identification zones.

1.10 OUTER SPACE

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

Commentary

Space is commonly defined as

> the Kármán Line, an imaginary boundary 100 kilometers (62 miles) above mean sea level. In theory, once this 100-kilometer line is crossed, the atmosphere becomes too thin to provide enough lift for conventional aircraft to maintain flight.

302. 49 U.S.C. § 40103(c).

303. 49 U.S.C. § 40103(d).

304. Federal Aviation Administration, Aeronautical Information Manual (June 17, 2021), https://www.faa.gov/air_traffic/publications/media/aim_bsc_w_chg_1_2_dtd_5-19-22.pdf.

305. U.S. Dep't of Transportation, Federal Aviation Administration, Aeronautical Information Publication (27th ed. May 19, 2022), https://www.faa.gov/air_traffic/publications/media/aip_basic_dtd_5-19-22.pdf.

> At this altitude, a conventional plane would need to reach orbital velocity or risk falling back to Earth.
>
> The world governing body for aeronautic and astronautic records, the Fédération Aéronautique Internationale, and many other organizations use the Kármán Line as a way of determining when space flight has been achieved.[306]

The DoD identifies the "space domain" as the "area above the altitude where atmospheric effects on airborne objects become negligible." The United States Space Command (USSPACECOM) area of responsibility (AOR) is the "area surrounding the Earth at altitudes equal to, or greater than, 100 kilometers (54 nautical miles) above mean sea level."[307]

306. *Where Is Space?*, NATIONAL ENVIRONMENTAL SATELLITE DATA AND INFORMATION SERVICE (Feb. 22, 2016), https://web.archive.org/web/20230308060421/https://www.nesdis.noaa.gov/news/where-space.

307. Chairman, Joint Chiefs of Staff, Joint Publication 3-14, Space Operations (Ch. 1, Oct. 26, 2020).

CHAPTER 2

INTERNATIONAL STATUS AND NAVIGATION OF MILITARY VESSELS AND MILITARY AIRCRAFT

2.1 SOVEREIGN IMMUNITY

As a matter of customary international law, all State public property is protected against the exercise of jurisdiction or control by another State under the doctrine of State immunity. All manned and unmanned vessels and aircraft owned or operated by a State—and used, for the time being—only on government, noncommercial service are entitled to sovereign immunity under this doctrine. This means such vessels and all other U.S. Government public property—wherever located—are immune from arrest, search, inspection, or other assertions of jurisdiction by a foreign State. Such vessels and aircraft are immune from:

1. Foreign taxation

2. Exempt from any foreign State regulation requiring flying the flag of such foreign State either in its ports or while passing through its territorial sea. Foreign flags may be displayed to render honors in accordance with United States Navy regulations.

3. Are entitled to exclusive control over persons on board such vessels with respect to acts performed on board.

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

Commentary

The concept of sovereign immunity is a long-standing rule of customary international law. It provides that State property is immune from interference by another State—that is, it limits the adjudicatory power of national courts against a foreign State and it limits the executive authorities of a State from taking or interfering with the property of another State.

Sovereign immunity of warships and other government ships owned or operated by a State and used, for the time being, only on government, noncommercial service is codified in a number of international agreements. The International Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels provides that the provisions of Articles 1 and 2 of the Convention, regarding jurisdiction over claims relating to the operation of State vessels and their cargoes, do not apply to "ships of war . . . or other craft owned or operated by a State and used at the time a cause of action arises exclusively on Governmental and non-commercial service." Such vessels and their cargoes "shall not be subject to seizure, attachment or detention by any legal process, nor to judicial proceedings *in rem*."[1] Additionally, "State-owned cargoes carried on board merchant vessels for Governmental and non-commercial purposes shall not be subject to seizure, attachment, or detention, by any legal process, nor to judicial proceedings *in rem*."[2] Similarly, the United Nations Convention on the Jurisdictional Immunities of States and Their Property provides that Article 16(1) and (3), regarding jurisdiction over State vessels used for commercial purposes and their cargo, do "not apply to warships, or naval auxiliaries, nor . . . to other vessels owned or operated by a State and used, for the time being, only on government non-commercial service" and their cargoes, as well as "cargo owned by a State and used or intended for use exclusively for government non-commercial purposes."[3]

Sovereign immunity of warships and other government ships used in governmental non-commercial service is also reflected in the Territorial Sea Convention, the High Seas Convention, and UNCLOS. The Territorial Sea Convention and UNCLOS confirm that nothing in the Conventions affects the immunities of government ships operated for non-commercial purposes.[4] "If a warship does not comply with the regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance which is

1. International Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels, art. 3(1)–(2), Apr. 10, 1926, 1937 L.N.T.S. 200.

2. *Id.* art. 3(3).

3. G.A. Res. 59/38, annex, United Nations Convention on Jurisdictional Immunities of States and Their Property arts. 16(2), 16(4) (Dec. 2, 2004).

4. UNCLOS, art. 32; Territorial Sea Convention, art. 22(2).

made to it, the coastal State may require the warship to leave the territorial sea."[5] UNCLOS and the High Seas Convention provide that "warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State"[6] and, similarly, that "[s]hips owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State."[7] UNCLOS additionally exempts "any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service" from the provisions of the Convention regarding the protection and preservation of the marine environment.[8] Nonetheless, each "State shall ensure, by the adoption of appropriate measures not impairing operations or operational capabilities of such vessels or aircraft owned or operated by it, that such vessels or aircraft act in a manner consistent, so far as is reasonable and practicable, with this Convention."[9]

Sovereign immunity exceptions for warships and/or other government non-commercial ships are also contained in numerous conventions under the auspices of the IMO, including the 1974 International Convention for the Safety of Life at Sea (SOLAS);[10] the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL), as modified by the Protocols of 1978 and 1997;[11] the 1978 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, as amended;[12] the 1965 Convention on Facilitation of International Maritime Traffic;[13] the 1966 International Convention on Load Lines;[14] the 1988 Convention for

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5. UNCLOS, art. 30; Territorial Sea Convention, art. 23.
6. UNCLOS, art. 95; High Seas Convention, art. 8(1).
7. UNCLOS, art. 96; High Seas Convention, art. 9.
8. UNCLOS, art. 236.
9. *Id.* art. 236.
10. SOLAS, regs. I/3(a)(i), V/1.1.
11. MARPOL, art. 3(3).
12. International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, art. 3(a), July 7, 1978, 1361 U.N.T.S. 2, 1362 U.N.T.S. 2.
13. Convention on Facilitation of International Maritime Traffic, art. II(3), Apr. 9, 1965, 591 U.N.T.S. 265.
14. International Convention on Load Lines, art. 5(1)(a), Apr. 5, 1966, 640 U.N.T.S. 1333.

the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention), the 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, and the 2005 Protocols;[15] the 1972 London Convention and the 1996 Protocol;[16] the 1990 International Convention on Oil Pollution Preparedness, Response and Co-operation;[17] the 2000 Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances;[18] the 2001 International Convention on the Control of Harmful Anti-fouling Systems on Ships;[19] the 2004 International Convention for the Control and Management of Ships' Ballast Water and Sediments;[20] the 1969 International Convention on Civil Liability for Oil Pollution Damage;[21] the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage;[22] the 1989 Salvage Convention;[23] and the 2007 Nairobi International Convention on the Removal of Wrecks.[24]

The rule of sovereign immunity reflected in UNCLOS was upheld by the International Tribunal for the Law of the Sea (ITLOS) in the *ARA Libertad* case. On October 1, 2012, the Argentine frigate ARA *Libertad* arrived in the port of Tema, Ghana. The ship's departure from port was prevented by Ghanaian authorities pursuant to a decision of the High Court of Accra on October 4, 2012. Argentina

15. SUA Convention, art. 2.

16. London Convention, art. VII(4).

17. International Convention on Oil Pollution Preparedness, Response and Co-operation, art. 1(3), Nov. 30, 1990, 1891 U.N.T.S. 51.

18. Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances, art. 1(3), IMO Doc. HNS-OPRC/CONF/11/Rev 1 (Mar. 15, 2000).

19. International Convention on the Control of Harmful Anti-fouling Systems on Ships, art. 3(2), Oct. 5, 2001, 3356 U.N.T.S. 1.

20. International Convention for the Control and Management of Ships' Ballast Water and Sediments, art. 3(2)(e), IMO Doc. BMW/CONF/36 (Feb. 13, 2004).

21. International Convention on Civil Liability for Oil Pollution Damage, art. XI.1, Nov. 29, 1969, 973 U.N.T.S. 3.

22. International Convention on Civil Liability for Bunker Oil Pollution Damage, art. 4(2), Mar. 23, 2001, IMO.

23. 1989 Salvage Convention, art. 4(1).

24. Nairobi International Convention on the Removal of Wrecks, art. 4(2), May 18, 2007, *reprinted in* 46 INTERNATIONAL LEGAL MATERIALS 694 (2007).

instituted arbitration proceedings against Ghana on October 30 concerning the detention of the frigate. On November 14, 2012, Argentina submitted a request for the prescription of provisional measures under Article 290(5) of UNCLOS. The Tribunal determined that a warship is an expression of the sovereignty of the State whose flag it flies and that a warship enjoys immunity, including in internal waters. Accordingly, the Tribunal ordered that Ghana immediately and unconditionally release the *Libertad* and ensure that the frigate, its commander, and its crew be permitted to leave the port of Tema and the maritime areas under the jurisdiction of Ghana.[25]

U.S. domestic courts likewise recognize the rule of sovereign immunity for warships and other vessels owned or operated by a State and used in governmental non-commercial service. In *The Schooner Exchange v. McFaddon*, the U.S. Supreme Court recognized that U.S. courts do not have jurisdiction over foreign warships of a State at peace with the United States that enter a U.S. port.[26]

U.S. Navy sovereign immunity policy is set out in Chief of Naval Operations (CNO) NAVADMIN 165/21, Sovereign Immunity Policy.[27] U.S. Coast Guard sovereign immunity policy is set out in COMDT COGARD ALCOAST 370/21.[28] Sovereign immune vessels and aircraft, wherever located, are immune from arrest, search, and inspection by foreign authorities, including inspections by or under the supervision of a competent authority of areas, baggage, containers, conveyances, facilities, goods or postal parcels, and relevant data and documentation thereof for most purposes. Moreover, such vessels and aircraft are exempt from certain foreign taxes, duties, or fees, as well as foreign regulations that require flying the flag of a foreign State or a compulsory pilotage requirement. Customary international law further grants to commanding officers, officers-in-

25. ARA Libertad (Arg. v. Ghana), Case No. 20, Order of Dec. 15, 2012, ITLOS Rep. 2012, at 332, ¶¶ 94–95; James Kraska, *The "ARA Libertad,"* 107 AMERICAN JOURNAL OF INTERNATIONAL LAW 404 (2013).

26. The Schooner Exchange v. McFaddon, 11 U.S. 116 (1812).

27. NAVADMIN 165/21 (CNO WASHINGTON DC 041827Z AUG 21), Sovereign Immunity Policy (Aug. 4, 2021).

28. COMDT COGARD ALCOAST 370/21 (061626Z OCT 21), Sovereign Immunity (Oct. 6, 2021).

charge, aircraft commanders, and masters the right to protect the identity of personnel, stores, weapons, and other property aboard a sovereign immune vessel or aircraft, as well as exclusive control over any person aboard a sovereign immune vessel or aircraft concerning acts performed aboard.[29]

U.S. warships (which include combatant craft), aircraft, and sovereign immune auxiliary vessels shall comply with host country requirements regarding traffic control, health, customs, and immigration, to the extent that such requirements do not contravene U.S. sovereign immunity policy.[30] See § 3.2.3 for a discussion of quarantine.

Except as otherwise provided in an international agreement (e.g., Status of Forces Agreement (SOFA)), commanding officers and officers-in-charge shall not permit a warship under their command to be searched or inspected on any pretense whatsoever by foreign authorities or organizations, nor permit any person within the confines of their warship to be removed by foreign authorities, so long as they have the capacity to repel such act.[31] Commanding officers and officers-in-charge shall also not provide vessel documents or other vessel-specific information (except a vessel's public characteristics for purposes of appropriate pilotage or berthing) to foreign authorities and organizations without the approval of the cognizant Geographic Naval Component Commander after consultation with OPNAV N3/N5 (Navy) or higher authority via the chain of command (Coast Guard).[32]

A foreign tax is defined as "all direct or indirect foreign customs duties, import and export taxes, excises, fees and other charges imposed at the national, local, or intermediate level of a foreign country other

29. NAVADMIN 165/21, *supra* note 27, ¶ 2; COMDT COGARD ALCOAST 370/21, *supra* note 28, ¶ 2.

30. NAVADMIN 165/21, *supra* note 27, ¶ 3; COMDT COGARD ALCOAST 370/21, *supra* note 28, ¶ 3.

31. NAVADMIN 165/21, *supra* note 27, ¶ 5.a; U.S. Navy Regulations, arts. 0828, 0860 (1990); COMDT COGARD ALCOAST 370/21, *supra* note 28, ¶ 5.a; U.S. Coast Guard Regulations, §§ 4-1-28A(2)–(3), 4-2-10A(5) (1992).

32. NAVADMIN 165/21, *supra* note 27, ¶ 5.a; COMDT COGARD ALCOAST 370/21, *supra* note 28, ¶ 5.a.

than charges for services requested and received, regardless of how a charge is denominated in foreign law or regulation."[33] Unless there is an international agreement to the contrary, commanding officers and officers-in-charge shall refuse to pay any tax or revenue-generating fee imposed on a warship by a foreign sovereign. These taxes—including port taxes, port tariffs, port tolls, port security surcharges, port dockage fees, and other similar taxes or fees—are impermissible. Commanding officers and officers-in-charge may pay reasonable charges for goods and services requested and received, less taxes and similar charges. If requested to pay impermissible taxes or fees, commanding officers and officers-in-charge should request an itemized list of all charges, pay reasonable charges for goods and services requested and received, and explain that, under customary international law, sovereign immune vessels are exempt from foreign taxes and fees.[34] If port authorities directly insist on payment of an impermissible tax or fee, commanding officers and officers-in-charge should seek assistance from the respective Geographic Naval Component Commander (GNCC) (Navy) or higher authority (Coast Guard) and the U.S. Embassy via the chain of command.[35] If such taxes or fees are levied indirectly through a Husbanding Service Provider as part of a foreign fixed price contract, they may be paid as part of the contract price.[36]

If, after an oil or hazardous substance spill in foreign territorial or internal waters, a commanding officer or officer-in-charge determines that foreign authorities need additional information to properly respond to the spill and prevent serious environmental damage, the commanding officer or officer-in-charge may release information similar to that releasable to U.S. authorities in accordance with the Department of the Navy's Environmental Readiness Program Manual (OPNAV M-5090).[37] Before releasing spill-related information to foreign authorities, the commanding officer or officer-

33. NAVADMIN 165/21, *supra* note 27, ¶ 5.b.

34. *Id.* ¶ 5.b(1); COMDT COGARD ALCOAST 370/21, *supra* note 28, ¶ 5.b(1).

35. NAVADMIN 165/21, *supra* note 27, ¶ 5.b(2); COMDT COGARD ALCOAST 370/21, *supra* note 28, ¶ 5.b(2).

36. NAVADMIN 165/21, *supra* note 27, ¶ 5.b(3); COMDT COGARD ALCOAST 370/21, *supra* note 28, ¶ 5.b(3).

37. OPNAV M-5090.1, Environmental Readiness Program Manual (June 25, 2021).

in-charge shall consult the GNCC (Navy) or higher authority via the chain of command (Coast Guard) and, if release is deemed appropriate, inform the foreign authorities that the ship or vessel is a sovereign immune vessel of the United States, and that spill-related information is being voluntarily provided to help minimize environmental damage.[38]

Commanding officers are authorized to employ pilots when, in the commanding officer's judgment, such employment is prudent. Inherent in such discretion is the authority to refuse use of a pilot or to disregard such pilot's advice regarding the safe navigation of a warship. Accordingly, U.S. vessels may, but are not required to, employ pilots as is prudent. If a nation deems pilot employment as a condition for entering port or transiting its waters, commanding officers shall inform foreign authorities that the ship or vessel is a sovereign immune vessel of the United States and that pilotage services are being accepted voluntarily and not as a condition of entry.[39] Pilotage is mandatory for U.S. vessels transiting the Panama Canal[40] or vessels navigating at a naval shipyard or station or entering or leaving drydock. In these circumstances, the pilot assigned to the vessel shall have control of the navigation and movement of the vessel.[41]

A foreign flag or ensign may be displayed by a U.S. warship during certain circumstances as a matter of policy and courtesy.[42]

Assertion of sovereign immunity is a privilege of the U.S. government. Thus, waiver is not within the discretion of a commanding

38. NAVADMIN 165/21, *supra* note 27, ¶ 5.f; COMDT COGARD ALCOAST 370/21, *supra* note 28, ¶ 5.f.

39. NAVADMIN 165/21, *supra* note 27, ¶ 5.g; COMDT COGARD ALCOAST 370/21, *supra* note 28, ¶ 5.g; U.S. Navy Regulations, art. 0856 (1990); U.S. Coast Guard Regulations, § 4-2-3 (1992).

40. Rules and Regulations Covering Navigation of the Panama Canal and Adjacent Waters, 35 C.F.R. ch. 1.

41. U.S. Navy Regulations, art. 0856 (1990); U.S. Coast Guard Regulations, § 3-1-6.C (1992).

42. *See* U.S. Navy Regulations, arts. 1276–78 (1990); U.S. Coast Guard Regulations, §§ 14-8-19 to 14-8-21 (1992); NAVADMIN 165/21, *supra* note 27, ¶ 5.e; COMDT COGARD ALCOAST 370/21, *supra* note 28, ¶ 5.e.

officer, officer-in-charge, aircraft commander, or master. Geographic Naval Component Commanders (Navy) and officers exercising Tactical Control (Coast Guard) are delegated authority to interpret sovereign immunity policy consistent with overarching U.S. government policies and shall be notified by lower echelons via the chain of command regarding any challenges to asserting sovereign immunity that are unable to be resolved in favor of U.S. sovereign immunity policies. Where a Geographic Naval Component Commander or officer exercising TACON can execute U.S. sovereign immunity policy without conflict with existing guidance, no waiver is required. However, except as provided in existing guidance, any action that may constitute a waiver or potential waiver of sovereign immunity must be coordinated with N3/N5 (Navy) or COMDT/CG-5R (Coast Guard) in advance of taking action on the matter.[43]

While on board ship in foreign waters, the crew of a warship are immune from local jurisdiction. Their status ashore, however, will be governed by the applicable SOFA, if any. Under the SOFA, an obligation may exist to assist in the arrest of crew members and their delivery to foreign authorities.[44] Nonetheless, commanding officers or other persons in authority shall not deliver any person in the naval service to civil authorities except as provided by the Manual of the Judge Advocate General.[45] Commanding officers are not authorized to deliver servicemembers or Navy civilian employees, or their dependents, to foreign authorities except when provided by agreement between the United States and the foreign government.[46]

See § 2.2.3. for a discussion of U.S. policy prohibiting providing a list of crew members or passengers on board USS or USCGC vessels as a condition of port entry or to satisfy port State immigration requirements.

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43. NAVADMIN 165/21, *supra* note 27, ¶ 4; COMDT COGARD ALCOAST 370/21, *supra* note 28, ¶ 4.

44. *See* SECNAVINST 5820.4G, Status of Forces Polices, Procedures, and Information (Jan. 14, 1990).

45. U.S. Navy Regulations, art. 0822 (1990).

46. JAGINST 5800.7G, Manual of the Judge Advocate General, § 0609 (Ch. 1, Feb. 14, 2022).

2.1.1 Sovereign Immunity for U.S. Vessels

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

Commentary

As discussed in § 2.1, the United States asserts all the privileges of sovereign immunity for manned and unmanned United States Ships (USSs) and United States Coast Guard Cutters (USCGCs). The United States also asserts all the privileges of sovereign immunity for all manned and unmanned United States Naval Ships (USNSs), Military Sealift Command (MSC) vessels, the U.S. Maritime Administration National Defense Reserve Fleet and its Ready Reserve Force (when activated and assigned to the DoD), U.S. government-owned vessels or those under bareboat-charter to the U.S. government, and commercially owned U.S.-flagged vessels under time-charter to the U.S. government.[47]

In addition to the general privileges and obligations discussed in § 2.1, which apply in full, the following guidance applies for naval auxiliaries asserting full sovereign immunity:

47. NAVADMIN 165/21, *supra* note 27, ¶ 7.a.

Masters shall not permit a ship or vessel under their command to be searched or inspected on any pretense whatsoever by foreign authorities or organizations, nor permit any of the personnel within the confines of their ship or vessel to be removed by foreign authorities. Additionally, masters shall refuse requests by foreign authorities to interview personnel aboard or to provide any physical evidence. Masters shall not provide vessel documents or other vessel-specific information, including a list of crew members (military and/or nonmilitary), riding gang members, or passengers, to foreign authorities or organizations without the approval of the applicable GNCC via the chain of command and consultation with N3/N5.[48]

Unless there is an international agreement to the contrary, masters shall refuse to pay any tax or revenue-generating fee imposed on USNSs, U.S. government-owned vessels, or U.S.-flagged time- or bareboat-chartered vessels by a foreign sovereign. These taxes, including port taxes, port tariffs, port tolls, port security surcharges, port dockage fees, and other similar taxes or fees, are impermissible. Masters may pay reasonable charges for goods and services requested and received, less taxes and similar charges. If requested to pay impermissible taxes or fees, masters should request an itemized list of all charges, pay reasonable charges for goods and services requested and received, and explain that under customary international law, sovereign immune vessels are exempt from foreign taxes and fees.[49]

If port authorities directly insist on payment of an impermissible tax or fee, masters should seek assistance from the respective GNCC and U.S. Embassy via the chain of command. Whether the U.S. Navy will directly pay such an impermissible tax or fee is a matter of overarching U.S. government policy. This decision may be based on other concerns,

48. *Id.* ¶ 7.a(1).
49. *Id.* ¶ 7.a(2)(a).

> such as operational needs, contracting principles, and potential fiscal liability. If a GNCC determines that risk to mission clearly necessitates the port visit, the fees may be paid and a refund should be sought from the foreign sovereign.[50]
>
> If such taxes or fees are levied indirectly through a Husbanding Service Provider as part of a foreign fixed price contract, such tax or fee may be paid as part of the contract price.[51]
>
> If, after an oil or hazardous substance spill in foreign territorial or internal waters, a Master determines foreign authorities need additional information to properly respond to the spill and prevent serious environmental damage, the Master may release information similar to that releasable to U.S. authorities under . . . [OPNAV M-5090.1]. Before releasing spill-related information to foreign authorities, the Master shall consult the GNCC, via the established chain of command, and, if release is deemed appropriate, inform the foreign authorities that the ship or vessel is a sovereign immune vessel of the United States and that spill-related information is being voluntarily provided to help minimize environmental damage.[52]
>
> While naval auxiliaries asserting full sovereign immunity are exempt from foreign regulations that require flying a foreign State flag, such vessels may fly foreign State flags to render honors in accordance with . . . [Articles 1276–78 of the U.S. Navy Regulations, 1990]. Regional practices to display marks of respect for host nations vary and masters shall consult with the operational chain of command, theater- and fleet-specific guidance, and local embassies for further guidance if the issue is raised by host nation officials.[53]

50. *Id.* ¶ 7.a(2)(b).
51. *Id.* ¶ 7.a(2)(c).
52. *Id.* ¶ 7.a(5).
53. *Id.* ¶ 7.a(6).

> [M]asters may employ pilots when, in the master's judgement, such employment is prudent. Inherent in such discretion is the authority to refuse use of a pilot or to disregard such pilots advice regarding the safe navigation of a vessel. Accordingly, U.S. vessels may, but are not required to, employ pilots as prudent. . . . If a nation deems pilot employment as a condition for entering port or transiting their waters, . . . masters shall inform foreign authorities that the ship or vessel is a sovereign immune vessel of the United States and that pilotage services are being accepted voluntarily and not as a condition of entry.[54]

Pilotage is mandatory for vessels transiting the Panama Canal[55] or vessels navigating at a naval shipyard or station or entering or leaving drydock. In these circumstances, the pilot assigned to the vessel shall have control of the navigation and movement of the vessel.[56]

Although U.S.-flagged voyage-chartered vessels are entitled to assert full privileges of sovereign immunity when under the direction of the United States and used exclusively in government non-commercial service, as a matter of policy, the United States only claims limited immunity from arrest and taxation for such vessels.[57] Nonetheless, the U.S. Navy reserves the right to assert full or limited sovereign immunity on a case-by-case basis, as determined by the respective GNCC via MSC Headquarters or the MSC Area Commander. Masters shall be informed of the U.S. Navy's intention to assert full or limited sovereign immunity.[58] When full sovereign immunity is asserted, masters shall comply with the guidance applicable to naval auxiliaries. "When limited sovereign immunity is asserted, Masters shall refuse attempts to arrest or impose foreign taxes on the vessel

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54. *Id.* ¶ 7.a(7).

55. Rules and Regulations Covering Navigation of the Panama Canal and Adjacent Waters, 35 C.F.R. ch. 1.

56. NAVADMIN 165/21, *supra* note 27, ¶ 7.a(7); U.S. Navy Regulations, art. 0856 (1990).

57. NAVADMIN 165/21, *supra* note 27, ¶ 7.a. *See also* U.S. Department of State, Message 317062 (R 152102Z OCT 85), Status of Military Sealift Command Vessels (Oct. 15, 1985).

58. NAVADMIN 165/21, *supra* note 27, ¶ 7.a(1).

and shall seek assistance from the respective GNCC and U.S. Embassy, in coordination with MSC Headquarters or MSC Area Commander, if foreign authorities attempt to arrest or impose foreign search or inspect U.S. military cargo."[59]

> When limited or no sovereign immunity is asserted, U.S.-flagged voyage-chartered vessels may provide a list of crew members as a condition of entry into a port or to satisfy local immigration officials upon arrival. U.S.-flagged voyage-chartered vessels generally follow the same procedures as commercial vessels when information is requested by foreign authorities, including environmental response information after an oil spill. Foreign authorities may search these vessels, but masters shall request that these authorities to refrain from inspecting or searching U.S. military cargo onboard. Masters should seek assistance from the respective GNCC and U.S. Embassy, via MSC Headquarters or the MSC Area Commander, if foreign authorities attempt to search or inspect U.S. military cargo.[60]

> The U.S. Navy does not claim sovereign immunity for foreign State-flagged chartered vessels. These vessels are in the same position as commercial vessels when interacting with foreign authorities except that U.S. government cargo on such vessels should receive special consideration, protection, and treatment. Foreign authorities may search these vessels, but masters shall request that these authorities refrain from inspecting or searching U.S. military cargo onboard their vessel. Masters should seek assistance from the respective GNCC and U.S. Embassy, via MSC Headquarters or the MSC Area Commander, if foreign authorities attempt to search or inspect U.S. military cargo.[61]

59. *Id.* ¶ 7.a(2).
60. *Id.* ¶ 7.a(3).
61. *Id.* ¶ 7.b.

It is U.S. government policy to extend to all foreign warships, State aircraft, and auxiliary vessels visiting the United States the same sovereign immunity privileges that apply to U.S. vessels and aircraft.[62] Navy commanders should ensure that U.S. federal, state, and local civil authorities "understand the principles of sovereign immunity and respect these principles at all times."[63] "Navy commanders should seek to develop relationships with local U.S. authorities and provide them with planning and liaison assistance, as needed, before, during, and after visits by foreign sovereign immune vessels and aircraft."[64] Doing so will ensure that visits by foreign sovereign immune vessels and aircraft are conducted in accordance with international law and with "the same courtesy and efficiency expected by the U.S. Navy when visiting foreign ports and airports."[65]

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

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

Commentary

Under UNCLOS, all objects of an archaeological and historical nature found in the high seas and deep seabed (the Area) shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical

62. *Id.* ¶ 8.
63. *Id.*
64. *Id.*
65. *Id.*

and archaeological origin.[66] UNCLOS also imposes a duty on States to cooperate and protect objects of an archaeological and historical nature found at sea.[67] In order to control traffic in such objects, the coastal State may, in applying Article 33, presume that their removal from the seabed in the contiguous zone without its approval would result in an infringement of its laws and regulations within its territory or territorial sea.[68] Nothing in Article 303, however, affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.[69] Moreover, Article 303 is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.[70]

"Underwater cultural heritage" includes "all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as . . . vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context."[71] States shall take all appropriate measures to protect underwater cultural heritage.[72] Nevertheless, consistent with State practice and international law, including UNCLOS, nothing in the Convention shall be interpreted as modifying the rules of international law and State practice pertaining to sovereign immunities, nor any State's rights with respect to its State vessels and aircraft.[73] States are encouraged to enter into bilateral, regional, or other multilateral agreements, or to develop existing agreements, for the preservation of underwater cultural heritage.[74]

States, in the exercise of their sovereignty, have the exclusive right to regulate and authorize activities directed at underwater cultural heritage in their internal waters, archipelagic waters, and territorial sea.

66. UNCLOS, art. 149.
67. *Id.* art. 303(1).
68. *Id.* art. 303(2).
69. *Id.* art. 303(3).
70. *Id.* art. 303(4).
71. Underwater Cultural Heritage Convention, art. 1(1)(a)(ii).
72. *Id.* art. 2(4).
73. *Id.* art. 2(8).
74. *Id.* art. 6.

States should inform the flag State of the discovery of identifiable State vessels and aircraft.[75] States may regulate and authorize activities directed at underwater cultural heritage within their contiguous zone.[76] A State in whose EEZ or continental shelf underwater cultural heritage is located has the right to prohibit or authorize any activity directed at such heritage to prevent interference with its sovereign rights or jurisdiction as provided for in UNCLOS.[77] Where there is a discovery of underwater cultural heritage or it is intended that activity shall be directed at underwater cultural heritage in a State's EEZ or on its continental shelf, that State shall consult all other States that have declared an interest on how best to protect the underwater cultural heritage.[78] However, no activity directed at State vessels and aircraft shall be conducted without the agreement of the flag State and the collaboration of the "Coordinating State."[79] The Director-General shall invite all States that have declared an interest and the International Seabed Authority to consult on how best to protect the underwater cultural heritage located in the Area.[80] Nonetheless, no State shall undertake or authorize activities directed at State vessels and aircraft in the Area without the consent of the flag State.[81]

As State property, sunken military vessels and aircraft continue to enjoy sovereign immunity until the State clearly abandons the wreck or relinquishes or transfers title to it.[82]

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75. *Id.* art. 7.
76. *Id.* art. 8.
77. *Id.* art. 10(2).
78. *Id.* art. 10(3).
79. *Id.* art. 10(7).
80. *Id.* art. 12(2).
81. *Id.* art. 12(7).
82. Institute of International Law, Resolution: The Legal Regime of Wrecks of Warships and Other State-Owned Ships in International Law, art. 4 (Aug. 29, 2015), *reprinted in* 76 YEAR BOOK OF THE INSTITUTE OF INTERNATIONAL LAW 362–66 (2016). *See also* Natalino Ronzitti, *The Legal Regime of Wrecks of Warships and Other State-Owned Ships in International Law*, 76 YEAR BOOK OF THE INSTITUTE OF INTERNATIONAL LAW 267, 286–95 (2016); Wolff Heintschel von Heinegg, *Belligerent Obligations Under Article 18(1) of the Second Geneva Convention: The Impact of Sovereign Immunity, Booty of War, and the Obligation to Respect and Protect War Graves*, 94 INTERNATIONAL LAW STUDIES 127 (2018).

> On June 11, 1864, the CSS *Alabama* struck its colors after a brief naval engagement with the USS *Kearsarge* and then sank off the coast of Cherbourg, France. In 1984, the French Navy mine hunter *Circe* discovered the remains of the *Alabama* in about 200 feet of water. Although the *Alabama* was located within the French territorial sea and was therefore subject to French law, the United States claimed ownership of the wreck as the successor State. The Association CSS *Alabama*, a non-profit organization, was founded in 1988 to conduct scientific exploration of the shipwreck.[83] On October 3, 1989, the United States and France signed an agreement that recognized the CSS *Alabama* as an important heritage resource of both nations and established a joint French-American Scientific Committee to oversee archaeological investigation of the wreck.[84] France recognized U.S. ownership of the *Alabama* on October 18, 1991.[85]
>
> The Sunken Military Craft Act of 2004 (SMCA) preserves the sovereign status of sunken U.S. military vessels and aircraft by codifying their protected sovereign status and permanent U.S. ownership, regardless of the passage of time. The purpose of the law is to protect sunken military vessels and aircraft and the remains of their crews from unauthorized disturbance. The SMCA protects sunken U.S. military ships and aircraft wherever they are located, as well as the graves of their lost military personnel, sensitive archaeological artifacts, and historical information. Thus, right, title, and interest of the United States in and to any U.S sunken military craft are not extinguished except by an express divestiture of title by the United States (an express act of abandonment, gift, or sale), regardless of when the craft sank.[86] Title is also lost if the military craft is captured or surrenders during battle before it sinks. The term "sunken military craft" means all or any portion of (A) any sunken warship, naval auxiliary, or other vessel that was owned or operated by a government

83. *CSS Alabama Wreck Site (1864)*, NAVAL HISTORY AND HERITAGE COMMAND (Dec. 2, 2020), https://www.history.navy.mil/research/underwater-archaeology/sites-and-projects/ship-wrecksites/css-alabama.html.

84. Agreement concerning the wreck of the CSS Alabama, U.S.-Fr., Oct. 3, 1989, T.I.A.S. 11687.

85. Note Verbale No. 2826 (Oct. 18, 1991).

86. Pub. L. No. 108-375, Title XIV, §§ 1401–2, Sunken Military Craft Act of 2004, § 1401.

on military noncommercial service when it sank; (B) any sunken military aircraft or military spacecraft that was owned or operated by a government when it sank; and (C) the associated contents of such craft, if title thereto has not been abandoned or transferred by the government.[87] The term "associated contents" means (A) the equipment, cargo, and contents of a sunken military craft that are within its debris field; and (B) the remains and personal effects of the crew and passengers of a sunken military craft that are within its debris field.[88] The SMCA also applies to sunken foreign military craft in U.S. waters, to include U.S. internal waters, the territorial sea, and the contiguous zone.[89]

No person shall engage in any activity that disturbs, removes, or injures any sunken military craft except (1) as authorized by a permit; (2) as authorized by regulations issued pursuant to the SMCA; or (3) as otherwise authorized by law.[90] At the request of any foreign State, the Secretary of the Navy, in consultation with the Secretary of State, may issue permits with respect to any foreign sunken military craft of that foreign State located in U.S. waters.[91] Prohibited activities do not apply to actions taken by, or at the direction of, the United States or to any action by a person who is not a U.S. citizen, national, or resident alien, except in accordance with (A) generally recognized principles of international law; (B) an agreement between the United States and the foreign country of which the person is a citizen; or (C) in the case of an individual who is a crew member or other individual on a foreign vessel or foreign aircraft, an agreement between the United States and the flag State of the foreign vessel or aircraft that applies to the individual.[92] The Department of State, in consultation with the Secretary of Defense, is encouraged to negotiate and conclude bilateral and multilateral agreements with foreign countries with regard to sunken military craft consistent with the SMCA.[93]

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87. *Id.* § 1408(3).
88. *Id.* § 1408(1).
89. *Id.* § 1406(c)(2).
90. *Id.* § 1402(a). *See also id.* § 1403; Guidelines for Permitting Archaeological Investigations and Other Activities Directed at Sunken Military Craft and Terrestrial Military Craft Under the Jurisdiction of the Department of the Navy, 32 C.F.R. pt. 767 (2023).
91. Pub. L. No. 108-375, *supra* note 86, § 1403(d).
92. *Id.* § 1402(c).
93. *Id.* § 1407.

Nothing in the SMCA is intended to affect (1) any activity that is not directed at a sunken military craft; or (2) traditional high seas freedoms of navigation, including the laying of submarine cables and pipelines, the operation of vessels, fishing, or other internationally lawful uses of the sea related to such freedoms.[94] The SMCA and its implementing regulations shall be applied in accordance with generally recognized principles of international law and in accordance with the treaties, conventions, and other agreements to which the United States is a party.[95] The law of finds shall not apply to any United States sunken military craft, wherever located, or any foreign sunken military craft located in U.S. waters.[96] No salvage rights or awards shall be granted with respect to any U.S. sunken military craft without the express permission of the United States, or with respect to any foreign sunken military craft located in U.S. waters without the express permission of the relevant foreign State.[97] The SMCA does not alter the international law of capture or prize with respect to sunken military craft.[98]

2.2 WARSHIPS

Commentary

General guidance for the classification of naval vessels and battle force ship counting procedures is set out in Secretary of the Navy Instruction (SECNAVINST) 5030.8D.[99] Enclosures (1) through (5) of the instruction issue guidance for establishing naval ship and craft categories, classifications, types, and type designations.

Battle force ships are commissioned USS warships built or armed for naval combat and capable of contributing to combat operations, or other naval ships, including USNSs, that contribute directly to Navy warfighting or support missions. The battle force inventory will be

94. *Id.* § 1406(a).
95. *Id.* § 1406(b).
96. *Id.* § 1406(c).
97. *Id.* § 1406(d).
98. *Id.* § 1406(e).
99. SECNAVINST 5030.8D, General Guidance for the Classification of Naval Vessels and Battle Force Ship Counting Procedures (June 28, 2022).

maintained in the Naval Vessel Register (NVR). The battle force ship count will only include combat-capable ships and ships that contribute to warfighting missions, specified combat support missions, or service support missions.

Enclosure (1) applies to warship classification, which includes any commissioned ship built or armed for naval combat. These ships are counted in the battle force inventory.

Enclosure (2) applies to auxiliary ship classification, which includes any naval ship designed to operate in the open ocean in a variety of sea States to provide indirect support to combatant forces or services to shore-based establishments and infrastructure. These ships are not part of the battle force inventory.

Enclosure (3) applies to combatant craft classification, which are craft specifically designed to meet various combat-related mission roles, including amphibious warfare, insertion, patrol, overwatch and enemy denial-of-use, and mobility of riverine and littoral areas. These craft are not part of the battle force inventory (except patrol coastal ships).

Enclosure (4) applies to unmanned maritime platform classification. Unmanned maritime vessels and vehicles are platforms designed to operate remotely, independently, or integrated with manned platforms. These systems may possess varying degrees of autonomy, as specified by the platform and system level requirements. Unmanned surface vehicles (USVs) and unmanned undersea vehicles (UUVs) are categorized according to specifying characteristics. Certain unmanned maritime vehicles may, in the future, be part of the battle force inventory. Although unmanned platforms are currently not counted in the battle force, the testing of these platforms and their concepts of employment continue to evolve. When these platforms are deemed capable of contributing to combat operations, the Chief of Naval Operations will recommend their reclassification and inclusion in the battle force count for Secretary of the Navy (SECNAV) approval.

> Enclosure (5) applies to other types of crafts and boats. Support craft are non-commissioned vessels and watercraft designed to provide support for naval operations or shore-based establishments, are command-managed assets, and are not part of the battle force inventory. Service craft (including non-self-propelled) are utilitarian craft designed to operate in coastal and protected waters and provide general support to either combatant forces or shore-based establishments. Sealift support platforms include waterborne systems and craft designed to enable logistics over the shore in support of combatant forces. Navy boats are self-powered waterborne craft not otherwise specifically designed as combatant craft, service craft, or sealift support craft, which are suitable primarily to be carried aboard ships and to operate in and around naval activities or other safe havens. Service craft will be maintained in the NVR; Navy boats will not be maintained in the NVR.

2.2.1 Warship Defined

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

1. Bearing the external markings distinguishing the character and nationality of such ship

2. Under the command of an officer duly commissioned by the government of that State and whose name appears in the appropriate service list of officers

3. Manned by a crew that is under regular armed forces discipline.

Warships need not be armed and maintain their status, even if civilians form part of the crew. There is no requirement the commanding officer or crew be physically on board the warship. Warships may be remotely commanded, crewed, and operated. In the U.S. Navy, ships designated USS are warships, as defined by international law. U.S. Coast Guard vessels designated USCGC under the command of a commissioned officer are warships under international law.

Commentary

The definition of a "warship" first appeared in Hague VII. A merchant ship converted into a warship must be placed under the direct authority, immediate control, and responsibility of the State whose flag it flies. Merchant ships converted into warships must bear the external marks that distinguish the warships of their nationality. The commander must be in the service of the State and duly commissioned by the competent authorities and his or her name must be on the list of the officers of the fighting fleet. Finally, the crew must be subject to military discipline.[100] The High Seas Convention defines a warship as

> a ship belonging to the naval forces of a State and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government and whose name appears in the Navy List and manned by a crew who are under regular naval discipline.[101]

Similarly, UNCLOS defines a warship as

> a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent and manned by a crew which is under regular armed forces discipline.[102]

There is no requirement in any of these instruments that a ship needs to be armed to be designated a warship.

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100. Hague VII, arts. 1–4.
101. High Seas Convention, art. 8(2). *See also* NEWPORT MANUAL, § 3.2.2.
102. UNCLOS, art. 29.

Similar definitions are found in the Oxford Manual,[103] NWIP 10-2,[104] the DoD Law of War Manual,[105] the German Manual, Japan's Rules of Naval War,[106] and the Newport Manual.[107]

The Coast Guard is considered a military service and a branch of the U.S. armed forces.[108] U.S. Coast Guard cutters are distinguished by display of the national ensign and the union jack. The Coast Guard ensign and the Coast Guard commission pennant are displayed whenever a Coast Guard vessel takes active measures in connection with boarding, examining, seizing, stopping, or heaving to a vessel for the purpose of enforcing U.S. laws.[109]

The service list for U.S. naval officers is the Register of Commissioned and Warrant Officers of the U.S. Navy and Marine Corps and Reserve Officers on Active Duty, NAVPERS 15018. The comparable list for the U.S. Coast Guard is CG Personnel Service Center Instruction M1427.1 (series) (PSCINST M1427.1), Register of Officers.

An unmanned maritime systems (UMS) may be autonomous, semi-autonomous, or remotely controlled on the surface or underwater and may operate independently as a ship or be launched from the surface, subsurface, air, or land. Unlike aircraft, international law does not provide a bright-line test for whether a UMS can be designated as a "ship" or "vessel" by the flag State. Regarding operation of a ship, UNCLOS requires that the flag State effectively exercises jurisdiction and control over its master, officers, and crew, but it does not require that these personnel be physically present on the ship.[110] Like unmanned aerial vehicles (UAVs), a UMS may be remotely operated by a crew and under the charge of a master or commanded by

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103. OXFORD MANUAL, art. 12.
104. NWIP 10-2, ¶ 500e.
105. DOD LAW OF WAR MANUAL, § 13.4.1.
106. Japan, Rules of Naval War, art. 1 (1914).
107. NEWPORT MANUAL, § 3.2.1.
108. 10 U.S.C. § 101(a)(4); 14 U.S.C. § 1.
109. U.S. Coast Guard Regulations, §§ 10-2-1, 14-8-2, 14-8-3 (1992); 14 U.S.C. § 638; 33 C.F.R. pt. 23 (2023).
110. UNCLOS, art. 94.

an officer who are shore-based, far-removed from the area of operation, or embarked on a warship or naval auxiliary in the vicinity of the UMS. The only requirement imposed by international law is that the flag State ensure that the master, officers, and crew who are remotely manning and operating a UMS are fully conversant with and observe the applicable international regulations.[111]

"Ship" and "vessel" are defined differently in several of the conventions adopted by the IMO.[112] The one thing they have in common is that human versus autonomous or remote control is not an essential characteristic of what constitutes a ship, vessel, or craft under domestic and international law.[113] Since 2017, the IMO has been discussing the issue of maritime autonomous surface ships (MASSs) and adopted interim guidelines for MASS trials.[114] In 2021, the IMO determined that, depending on the degree of autonomy, many of the existing IMO treaties and instruments apply to UMSs through "equivalences" or interpretation, while others would require amendment of the instruments or the development of a new instrument altogether.[115] The Maritime Safety Committee agreed on a roadmap for developing a goal-based code for MASS with a view to adopting a mandatory MASS Code and associated convention(s) giving effect to the new Code by 2025 (MSC 110).[116]

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111. Comité Maritime International, *CMI International Working Group Position Paper on Unmanned Ships and the International Regulatory Framework* 6 (2017) [hereinafter CMI Position Paper].

112. SOLAS, reg. V/2; MARPOL, art. 2; COLREGS, reg. 3; London Convention, art. 1; SUA Convention, art. 2.

113. CMI Position Paper, *supra* note 111.

114. IMO, *Report of the Maritime Safety Committee on Its One Hundredth Session* annex 2 ¶¶ 1, 3, 4 (Dec. 7, 2018); IMO, Maritime Autonomous Surface Ships: Proposal for a Regulatory Scoping Exercise, IMO Doc. 98/20/2 (Feb. 27, 2017); IMO, Interim Guidelines for MASS Trials, IMO Doc. MSC.1/Circ.1604 (June 14, 2019).

115. IMO, *Regulatory Scoping Exercise for the Use of Maritime Autonomous Surface Ships (MASS)*; *Report of the Working Group*, IMO Doc. MSC.99/WP.9 (May 23, 2018). *See also* IMO, *Report of the Maritime Safety Committee on its Ninety-Ninth Session*, IMO Doc. MSC/99/22 (June 5, 2018); IMO, Outcome of the Regulatory Scoping Exercise for the Use of Maritime Autonomous Surface Ships (MASS), IMO Doc. MSC.1/Circ.1638 (June 3, 2021).

116. IMO, *Report of the Maritime Safety Committee on Its 105th Session* annex 28, IMO Doc. MSC 105/20/Add.2 (May 24, 2022).

The definition of a "warship" must be reinterpreted considering current and emerging technologies. If a UMS can be a "ship," then it can also be designated a "warship" by the flag State if it belongs to the armed forces of the State, bears external markings regarding its nationality, and is manned by a crew subject to armed forces discipline and under the command of a commissioned officer who are not physically present on the platform. Every sovereign decides "to whom he will accord the right to fly his flag and to prescribe the rules governing such grants."[117] Thus, domestic, not international, law governs ship registration, and many States agree that a UMS can be designated a ship under their national laws.[118] In the United States, the Chief of Naval Operations has authority to register, classify, and designate naval water-borne craft as warships.[119] Warship classification applies to any ship built or armed for naval combat that the Service maintains on the NVR and the Chief of Naval Operations is responsible for entering vessels into the battle force ship inventory and the NVR.[120] Neither the U.S. Navy Regulations nor the Secretary of the Navy Instruction distinguish between manned and unmanned vessels. Consequently, there is nothing that prohibits the Chief of Naval Operations from designating a UMS a warship. Thus, a UMS may be designated as a "warship" by the flag State if it is under the command of a commissioned officer and manned by a crew under regular armed forces discipline, by remote or other means.

On May 22, 2019, the Department of the Navy established Surface Development Squadron ONE (SURFDEVRON ONE) to lead fleet integration of USVs and encourage innovation, experimentation, and combat readiness. The new command's primary function is to (1) "execute experimentation to support development of new and emerging surface warfighting capabilities"; (2) "develop material and technical solutions to tactical challenges"; and (3) "coordinate doctrine, organization, training, material, logistics, personnel and facili-

117. The Muscat Dhows Case (Fr. v. Gr. Brit.), Hague Ct. Rep. (Scott) 93, 96 (Perm. Ct. Arb. 1916); UNCLOS, art. 91.

118. IMO, *Report of the Maritime Safety Committee on Its Ninety-Ninth Session* annex 1, IMO Doc. MSC 99/20 (Feb. 13, 2018); 46 C.F.R. § 67.3 (2020); 46 C.F.R. § 67.5 (2020).

119. U.S. Navy Regulations, art. 0406 (1990); 10 U.S.C. § 6011 (2018).

120. SECNAVINST 5030.8D, *supra* note 99.

ties requirements for unmanned surface systems." The SURFDEVRON ONE headquarters is located onboard Naval Base San Diego but will operate throughout various areas of operation.[121]

The command's fleet-manned unmanned operations center (UOC) ashore is staffed with surface warfare-qualified officers who are trained in the 1972 International Regulations for Preventing Collisions at Sea (COLREGS) and ship-handling and senior enlisted personnel in relevant rates. The UOC will also supervise the development of code for the supervisory control system of the vessel to ensure precise and reliable command and control. In 2020 (USV *Ranger*) and 2021 (USV *Nomad*), the large USVs (LUSVs) conducted long-range autonomous transits from the Gulf of Mexico to California, via the Panama Canal, under the command and control of the UOC. Each LUSV was at sea for six weeks and navigated over 4,400 nautical miles, 98 percent of which was in autonomous mode. These transits tested the vessels' endurance, the hull mechanical and electrical systems reliability, and the ability to operate autonomously under the command and control of SURFDEVRON ONE.[122]

In August 2022, four USVs—*Sea Hunter*, *Seahawk*, *Nomad*, and *Ranger*—participated in the six-week multilateral Rim of the Pacific (RIMPAC) exercise. *Nomad* and *Ranger* deployed from Pearl Harbor under the command and control of the UOC in San Diego, while *Sea Hunter* and *Seahawk* were operated by crews embarked on manned

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121. Commander, Naval Surface Force, U.S. Pacific Fleet, *Navy Leadership Accelerates Lethality with Newly Designated Surface Development Squadron*, DEPARTMENT OF THE NAVY, NAVAL SURFACE FORCE, U.S. PACIFIC FLEET (May 23, 2019), https://www.surfpac.navy.mil/Media/News/Article/2473949/navy-leadership-accelerates-lethality-with-newly-designated-surface-development/.

122. Press Release, DoD, Ghost Fleet Overload Unmanned Surface Vessel Program Completes Second Autonomous Transit to the Pacific (June 7, 2021), https://www.defense.gov/News/Releases/Release/Article/2647818/ghost-fleet-overlord-unmanned-surface-vessel-program-completes-second-autonomou/. *See also* Megan Eckstein, *Pentagon "Ghost Fleet" Ship Makes Record-Breaking Trip from Mobile to California*, USNI NEWS, Nov. 10, 2020, https://news.usni.org/2020/11/10/pentagon-ghost-fleet-ship-makes-record-breaking-trip-from-mobile-to-california; Sam LaGrone, *Ghost Fleet Ship "Nomad" Transited Panama Canal, Headed to California*, USNI NEWS, May 20, 2021, https://news.usni.org/2021/05/20/ghost-fleet-ship-nomad-transited-panama-canal-headed-to-california.

destroyers participating in the exercise. Data from the USVs was integrated into the combat systems of nearby destroyers.[123]

2.2.1.1 Belligerent Acts at Sea

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

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

States are obligated under customary international law of war to ensure belligerent rights at sea are exercised on their behalf by lawful combatants, and combatants use offensive force only as necessary, with distinction, proportionality, without causing unnecessary suffering, and within the bounds of military honor, particularly without resort to perfidy (see 5.3–5.4.1). To meet

123. Caitlin M. Kenney, *Robot Ships Debut at RIMPAC, Helping US Navy Sail Toward a Less-Crewed Future*, DEFENSE ONE, Aug. 3, 2022, https://www.defenseone.com/technology/2022/08/robot-ships-debut-rimpac-helping-us-navy-sail-toward-less-crewed-future/375305/; Justin Katz, *After RIMPAC Sailor Feedback Shows Evolving View of Unmanned Vessels: Officials*, BREAKING DEFENSE, Aug. 2, 2022, https://breakingdefense.com/2022/08/after-rimpac-sailor-feedback-shows-evolving-view-of-unmanned-vessels-officials/.

these obligations, the direction and execution of belligerent rights at sea from any platform, manned or unmanned and however classified, must be conducted by military commanders and military personnel.

Commentary

The Paris Declaration of 1856 was signed at the conclusion of the Crimean War and was widely acceded to by most States. The United States, however, did not accede to the Declaration. Nonetheless, at the beginning of the Civil War in 1861, the United States announced that it would respect the principles of the Declaration.[124] The United States reaffirmed its commitment to abide by the Declaration at the beginning of the Spanish-American War.[125] The Declaration abolished privateering, thus limiting the right to engage in hostile belligerent rights to warships.

The rule limiting the right to exercise belligerent rights to warships is reflected in numerous instruments.[126]

2.2.2 Warship International Status

Under customary international law, warships enjoy sovereign immunity from interference by authorities of States other than the flag State. Police and port authorities may board a warship only with permission of the commanding officer. A warship cannot be required to consent to an on board search or inspection nor may it be required to fly the flag of the host State. Although warships are required to comply with coastal State traffic control, sewage,

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124. Message of the President of the United States to the Two Houses of Congress, at the Commencement of the Second Session of the Thirty-Seventh Congress, Instructions and Dispatches: Mr. Seward to Mr. Clay, Sept. 3, 1861, *reprinted in* FOREIGN RELATIONS OF THE UNITED STATES 307 (1861).

125. Secretary of State (Sherman) to Diplomatic Representatives (Apr. 22, 1898), *reprinted in* 1 POLICY OF THE UNITED STATES TOWARDS MARITIME COMMERCE IN WAR 486 (Carlton Savage ed., 1934); War with Spain—Maritime Law, Presidential Proclamation (Apr. 26, 1898), *reprinted in* 63 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 772–73 (1901); Standards of Conduct and Respect of Neutral Rights in the War with Spain, Proclamation No. 413 (Apr. 26, 1898).

126. *See, e.g.*, Hague VII, arts. 1–4; OXFORD MANUAL, art. 12; NWIP 10-2, ¶ 500e; DOD LAW OF WAR MANUAL, § 13.3.3; GERMAN MANUAL; Japan, Rules of Naval War, art. 1 (1914); NEWPORT MANUAL, § 3.1.

health, and quarantine restrictions instituted in conformity with customary international law as reflected in UNCLOS, a failure of compliance is subject only to diplomatic complaint or to coastal State orders to leave its territorial sea immediately. Warships are immune from arrest and seizure, whether in national or international waters, and are exempt from foreign taxes and regulation and exercise exclusive control over all passengers and crew with regard to acts performed on board. U.S. Navy policy requires warships to assert the rights of sovereign immunity.

Commentary

In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject.[127] If a warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith, the coastal State may require it to leave the territorial sea immediately.[128] The flag State bears international responsibility for any loss or damage to the coastal State resulting from the noncompliance by a warship or other government ship operated for non-commercial purposes with the laws and regulations of the coastal State concerning passage through the territorial sea or with other rules of international law.[129]

Commanding officers shall not permit a ship under their command to be searched on any pretense whatsoever by any person representing a foreign State, nor permit any of the personnel within the confines of their command to be removed from the ship, so long as they have the capacity to repel such act. If foreign authorities exert force to compel submission, commanding officers are to resist that force to the utmost of their power.[130]

See §§ 2.1 and 2.1.1 for a detailed discussion of the principle of sovereign immunity.

127. UNCLOS, art. 25(2).
128. *Id.* art. 30; Territorial Sea Convention, art. 23.
129. UNCLOS, art. 31.
130. U.S. Navy Regulations, art. 0828 (1990).

2.2.3 Crew Lists and Inspections

U.S. policy prohibits providing a list of crew members—military and non-military personnel—or any other passengers on board a USS or USCGC vessel as a condition of entry into a port or to satisfy local immigration officials upon arrival. For more information concerning U.S. policy in this regard, see CNO NAVADMIN 165/21 (041827Z AUG 21) and COMDT COGARD ALCOAST 370/21 (061626Z OCT 21). See USCG COMDTINST 3128.1H, Foreign Port Calls.

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

1. Conduct inspections of U.S. Navy and U.S. Coast Guard vessels

2. Conduct health inspections of crew members

3. Provide specific information on individual crew members (including providing access to a crew member's medical record or the completion of an individual health questionnaire)

4. Undertake other requested actions beyond the commanding officer's certification on NAVMED form 6210/3.

In response to questions concerning the presence of infectious diseases on visiting U.S. Navy ships, the U.S. diplomatic post may inform host governments that a commanding officer of a U.S. Navy ship is required under Navy regulations to report at once to local health authorities any condition aboard the ship which presents a hazard of introduction of a communicable disease outside the ship. The commanding officer, if requested, may certify, via the NAVMED 6210/3, that there are no indications that personnel entering the host State from the ship will present such hazard. Rules governing medical quarantine are provided in 3.2.3.

Commentary

Commanding officers and officers-in-charge shall not provide a list of crew members (military and/or nonmilitary) or passengers aboard a warship to foreign officials under any circumstances. In response to requests for a crew list, the host nation should be informed that

> the United States exempts foreign sovereign immune vessels visiting the United States from the requirement to provide crew lists in accordance with the same sovereign immunity principles claimed by U.S. sovereign immune vessels. When a host country maintains a demand for a list of crew members as a condition of entry into a port or to satisfy local immigration officials upon arrival, seek guidance from the GNCC (Navy) or higher authority via the chain of command (Coast Guard).[131]
>
> Navy sovereign immune vessels are generally immune from complying with visa or other entry requirements, which includes immunity from the requirement to provide a crew list. Although personnel become subject to the laws and regulations of a host country upon disembarkation (unless otherwise provided by an international agreement), the request for a list of personnel raises force protection concerns and is inconsistent with long-standing, worldwide naval port visit practices and protocols. Accordingly, commanding officers and officers-in-charge are not authorized to provide such lists, or variations of such lists, without approval from the GNCC, who shall look to use alternative means to avoid providing such information.[132] The initial response to a request from a host nation to provide a crew list is to inform local authorities that U.S. policy exempts foreign sovereign immune vessels visiting the United States from the requirement to provide crew lists in accordance with the same sovereign immune principles that U.S. sovereign immune vessels claim. If the host nation continues to press for more information, commanding officers shall consult with the responsible U.S. Embassy country team and notify their chain of command up to the GNCC. The GNCC may provide additional guidance to commanders/commanding officers as delegated by the Chief of Naval Operations.[133]
>
> Absent an international agreement, a U.S. Coast Guard commanding officer or officer-in-charge of a vessel may provide information about personnel going ashore for a temporary time and for unofficial

131. NAVADMIN 165/21, *supra* note 27, ¶ 5.c(1); COMDT COGARD ALCOAST 370/21, *supra* note 28, ¶ 5.c(1).

132. NAVADMIN 165/21, *supra* note 27, ¶ 5.c(2).

133. NAVADMIN 288/05 (CNO WASHINGTON DC 101814Z NOV 05), Vessel Sovereign Immunity and Crew List Policy (Nov. 5, 2005).

purposes (e.g., liberty) to comply with a host country's immigration laws. However, if information is provided, it should include the minimum amount of information required to comply with the host nation's laws and it should include no more than names (without rank), place of birth, date of birth, and sex. A commanding officer should not provide foreign officials with other sensitive or personal information, such as social security numbers, rank, addresses, or other specific information. Such liberty lists are not the same as crew lists, even though they may contain the names of all crew members.[134]

See § 2.3.2 for guidance concerning providing crew lists and Military Sealift Command vessels.

See § 3.2.3 for guidance concerning medical quarantine.

2.2.4 Quarantine

See 3.2.3.

2.2.5 Nuclear-powered Warships

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

Commentary

States may require foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances to carry documents and observe special precautionary measures established for such ships by international agreements when exercising the right of innocent passage through the territorial sea.[135]

In 1993, the IMO introduced the voluntary Code for the Safe Carriage of Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Wastes on Board Ships (INF Code) to complement existing International Atomic Energy Agency Regulations. The INF Code

134. COMDT COGARD ALCOAST 370/21, *supra* note 28, ¶ 5.c(2).
135. UNCLOS, art. 23.

contains guidance for the design of ships transporting radioactive material and addresses such issues as stability after damage, fire protection, and structural resistance. In January 2001, the INF Code was made mandatory and renamed the International Code for the Safe Carriage of Packaged Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Waste on Board Ships.[136] SOLAS is the umbrella convention for the INF Code. Therefore, the code does not apply to sovereign immune vessels.

2.3 OTHER NAVAL CRAFT

2.3.1 Auxiliary Vessels

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

Commentary

See §§ 2.1 and 2.1.1 for a discussion of sovereign immunity of auxiliary vessels.

Sovereign immunity of auxiliary vessels is codified in the Territorial Sea Convention,[137] the High Seas Convention,[138] and UNCLOS.[139]

Naval auxiliaries—such as ocean surveillance ships, troop transports, and replenishment ships—are under the command of a civilian master and not a duly commissioned officer. They are lawful targets and may be captured as booty of war or made the object of attack, even

136. IMO Res. MSC.88(71), Adoption of the International Code for the Safe Carriage of Packaged Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Wastes on Board Ships (INF Code), annex (May 27, 1999).

137. Territorial Sea Convention, art. 22.

138. High Seas Convention, art. 9.

139. UNCLOS, arts. 32, 96, 236.

if the vessel is unarmed and civilians make up part or all of the crew. Unlike warships, auxiliary vessels are prohibited from exercising belligerent rights. However, auxiliaries can undertake certain roles in direct support of military forces conducting hostilities that are not considered to be belligerent rights. For example, State practice indicates that an auxiliary can (1) disembark military forces and materiel in a port or to another installation as part of an ongoing operation (e.g., 2003 Iraq War); (2) disembark forces and materiel to shore in an amphibious operation; (3) refuel and re-arm helicopters and attack craft being directly employed in maritime attack operations, visit and search operations, and amphibious operations (e.g., Expeditionary Transfer Dock (ESD) and Expeditionary Sea Base (ESB) ships); and (4) serve as a base/support vessel for mine countermeasures (MCM) operations. Naval auxiliaries may also defend themselves, including resisting attacks by enemy forces.[140] Active resistance and other defensive measures taken by an auxiliary do not violate the law of armed conflict.[141]

The right of self-defense is discussed in more detail in § 4.4.1.

2.3.2 Military Sealift Command Vessel Status

The following Military Sealift Command (MSC) vessels are auxiliary vessels of the United States and are entitled to sovereign immunity:

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

2. Privately-owned, U.S.-flagged vessels under charter to MSC, to include ships chartered for a period of time (time-chartered ships) and vessels chartered for a specific voyage or voyages (voyage-chartered ships).

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140. OXFORD MANUAL, art. 12; DOD LAW OF WAR MANUAL, § 13.3.3; GERMAN MANUAL, ¶ 1020.

141. JAPANESE LAW OF WAR MANUAL, 76; Italy, Rule of Naval Warfare, 1924, art. 14; J.A. HALL, THE LAW OF NAVAL WARFARE 24 (1914); Robert W. Tucker, *The Law of War and Neutrality at Sea*, 50 INTERNATIONAL LAW STUDIES 1, 56–57 (1955); LAUTERPACHT, 2 OPPENHEIM'S INTERNATIONAL LAW 466–67.

3. U.S. Maritime Administration's National Defense Reserve Fleet and its Ready Reserve Force when activated and assigned to MSC.

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

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

As a matter of policy, the United States does not assert sovereign immunity for MSC foreign-flagged voyage or MSC foreign-flagged, time-chartered vessels. These vessels are subject to foreign-flag State jurisdiction and will provide the same information to foreign authorities that commercial ships provide.

Commentary

MSC operates approximately 125 civilian-crewed ships that replenish U.S. Navy ships, conduct specialized missions, strategically preposition combat cargo at sea around the world, and move military cargo and supplies used by deployed U.S. forces and coalition partners. Expeditionary Fast Transport vessels (T-EPF) provide rapid transport of military equipment and personnel in theater. Hospital Ships (T-AH) provide afloat, mobile, acute surgical medical facilities in support of the U.S. military, as well as hospital services to support U.S. disaster relief and humanitarian operations worldwide. Dry Cargo/Ammunition ships (T-AKE) are multi-product ships that deliver ammunition, food, mail, dry provisions, limited quantities of fuel, repair parts, and expendable supplies to ships at sea. Underway Replenishment Oilers (T-AO) provide underway replenishment of fuel to U.S. Navy combat ships and jet fuel for aircraft aboard carriers at sea. Cable Laying/Repair (T-ARC) ships transport, deploy, retrieve, and repair undersea cables. Rescue/Salvage Ships (T-ARS) assist in rescue and salvage missions. Submarine Tenders (T-AS) provide repair services to submarines and are commanded by a commissioned naval officer and manned by a combined civil service mariner (CIVMAR)/uniformed navy crew. Fleet Ocean Tugs (T-ATF) provide towing services and operate as platforms for U.S. Navy divers in the recovery of downed aircraft and ships. Command Ship (LCC) is the U.S. Sixth Fleet flagship. It has advanced C4I suites and is commanded by a commissioned naval officer and manned by a combined CIVMAR/uniformed navy crew. Expeditionary Mobile Base (T-ESB) is an AFSB-variant of the mobile landing platform that provides dedicated support for mine countermeasures and special warfare missions. Fast Combat Support vessels (T-AOE) are MSC's largest combat logistics ships that deliver petroleum products, ammunition, food, and other cargo to other ships at sea.[142]

See § 2.1.1 for a discussion of sovereign immunity for MSC vessels.

142. *Ships of MSC*, U.S. DEPARTMENT OF THE NAVY, MILITARY SEALIFT COMMAND, https://sealiftcommand.com/about-msc/ships-msc.

At the master's discretion on non-warships, a shore party list may be provided to the host nation before a port visit for those individuals onboard who intend to go ashore for liberty. This shore party list may contain only the names and passport numbers of those personnel. Other information—such as health record, job description, or employer—shall not be provided. Masters shall comply with applicable U.S. host nation agreements, such as Status of Forces Agreements, that specify particular procedures for port visits to that country.[143]

2.3.3 Small Craft Status

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

Commentary

Small craft, such as Riverine Command Boats (RCBs), are entitled to full sovereign immunity. Sovereign immunity protects the transit of the RCBs and any materiel or personnel onboard from seizure or search, as well as protecting the identity of any crew or cargo, whether in national or international waters.

On January 12, 2016, two U.S. Navy RCBs left Kuwait on a 259-nautical mile transit to Bahrain. From the moment they left port, the two boats deviated from the Plan of Intended Movement, which was to remain outside any territorial seas. The crews' unplanned and unauthorized deviation caused them to transit unknowingly through Saudi Arabian territorial seas and then through Iranian territorial seas off the coast of Farsi Island. When the RCBs were about 1.5 nautical miles from Farsi Island, one of the two boats suffered an engine casualty. The boat went dead in the water to conduct engine repairs,

143. NAVADMIN 165/21, *supra* note 27, ¶ 7.a(3).

while the second RCB stopped and waited. Shortly thereafter, Iranian Revolutionary Guard Corps Navy (IRGCN) patrol craft approached the RCBs in a threatening posture (with weapons uncovered). As the crews briefly attempted to evade and then communicate with the Iranians, two more IRGCN vessels arrived. The RCBs, being overmatched, were then forced to reposition to Farsi Island, where the crews were held overnight and interrogated. The crews were released the next morning.

While it was reasonable for Iran to investigate the unusual appearance of armed U.S. Naval vessels within its territorial waters, the IRGCN's boarding and seizure of the RCBs, followed by the interrogation and video recording of the crew, clearly violated established norms of sovereign immunity. Sovereign immunity also protects personnel onboard a State vessel from search and seizure by foreign authorities to include preserving the sanctity of their identities. Iran therefore further violated sovereign immunity by its detention, search, and video recording of the crew. The violation of sovereign immunity was compounded by the forcible detention of the U.S. crews and by taking down the American flag and replacing it with an Iranian flag, ransacking the vessels, damaging equipment, searching the vessels and crew members, and interrogating the crew members. Additionally, although the protections of Article 13 of Geneva Convention (GC) III from "insults and public curiosity" did not apply, since the U.S. is not in an international armed conflict with Iran and the crew members were not prisoners of war (POWs), the filming of the crew while in Iranian custody further violated sovereign immunity by revealing the identities of the crew.[144]

2.3.4 Unmanned Systems

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

144. U.S. Department of the Navy, Report of the Investigation to Inquire into Incident in the Vicinity of Farsi Island Involving Two Riverine Command Boats (RCB 802 and RCB 805) on or About 12 January 2016, at 3–4, 18–20 (Feb. 28, 2016).

1. Intelligence, surveillance, and reconnaissance

2. Mine countermeasures (MCM)

3. Antisubmarine warfare

4. Surface warfare

5. Inspection/identification

6. Oceanography

7. Communication/navigation network nodes

8. Payload delivery

9. Information operations (IO)

10. Time-critical strike

11. Barrier patrol and operations (e.g., homeland defense, antiterrorism/force protection (AT/FP))

12. Seabase support

13. Electronic warfare (EW)

14. Laying undersea sensor grids, sustainment of at sea operating areas, bottom mapping and survey

15. Special operations.

Commentary

U.S. policy on unmanned systems is addressed in a range of documents.[145]

145. *See* U.S. DEPARTMENT OF THE NAVY, THE NAVY UNMANNED SURFACE VEHICLE (USV) MASTER PLAN (July 23, 2007); U.S. DEPARTMENT OF THE NAVY, THE NAVY UNMANNED UNDERSEA VEHICLE (UUV) MASTER PLAN (Nov. 9, 2004); U.S. DEPARTMENT

2.3.5 Unmanned System Status

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

Commentary

See §§ 2.1 and 2.1.1 for a discussion of sovereign immunity of U.S. property and vessels.

See § 2.2.1 for a discussion of designating UMSs as warships.

2.4 MILITARY AIRCRAFT

2.4.1 Military Aircraft Defined

Military aircraft means:

1. Any aircraft operated by the armed forces of a State
2. Bearing the military markings of that State
3. Commanded by a member of the armed forces

OF THE NAVY, UNMANNED CAMPAIGN FRAMEWORK 10 (Mar. 16, 2021); U.S. NAVY, CHIEF OF NAVAL OPERATIONS, NAVIGATION PLAN 2022, 10 (July 26, 2022); U.S. DEPARTMENT OF THE NAVY, STRATEGIC ROADMAP FOR UNMANNED SYSTEMS (SHORT VERSION) (2021); U.S. DEPARTMENT OF DEFENSE, PUB. NO. 14-S-0553, UNMANNED SYSTEMS INTEGRATED ROADMAP: FY2013–2038, 20 (2014); U.S. DEPARTMENT OF DEFENSE, UNMANNED SYSTEMS ROADMAP (2007–2038) 19 (Dec. 10, 2007); CONGRESSIONAL RESEARCH SERVICE, PUB. NO. R45757, NAVY LARGE UNMANNED SURFACE AND UNDERSEA VEHICLES: BACKGROUND AND ISSUES FOR CONGRESS 2 (July 26, 2022); CONGRESSIONAL RESEARCH SERVICE, PUB. NO. R45757, NAVY LARGE UNMANNED SURFACE AND UNDERSEA VEHICLES: BACKGROUND AND ISSUES FOR CONGRESS 2–3 (Mar. 31, 2022). *See also* NEWPORT MANUAL, § 3.3.

4. Controlled, manned, or preprogrammed by a crew subject to regular armed forces discipline.

Commentary

The term "aircraft" is defined in Annex 1 of the Chicago Convention as "[a]ny machine that can derive support in the atmosphere from the reactions of the air other than the reactions of the air against the earth's surface."[146] The Chicago Convention also refers to pilotless aircraft.[147] Unmanned aircraft are further defined as an "aircraft and its associated elements which are operated with no pilot on board."[148] Although the Chicago Convention does not contain a "manning" or "pilot-in-command" requirement for State aircraft, its predecessor treaty, the Paris Convention of 1919, did contain such a requirement. The Paris Convention provided that "[e]very aircraft commanded by a person in military service detailed for the purpose shall be deemed to be a military aircraft."[149] U.S. domestic law defines "aircraft" as "any contrivance invented, used, or designed to navigate, or fly in, the air."[150]

State aircraft include "aircraft used in military, customs, and police services."[151] State aircraft possess the nationality of the State that operates them. Civil aircraft possess the nationality of the State in which they are registered.[152] The United States defines "military aircraft" to include both manned and unmanned aircraft.[153] DoD military aircraft include any "U.S. military aircraft and DoD-contracted aircraft that have been designated by responsible U.S. authorities as U.S. state aircraft."[154] Military aircraft are operated by the armed forces of a State, bear the military markings of that State, and are commanded

146. Chicago Convention, annex 1 at § 1.1.
147. *Id.* art. 8.
148. ICAO Cir. 328 (AN/190), Unmanned Aircraft Systems (UAS) (2011).
149. Paris Convention of 1919, art. 31.
150. 49 U.S.C. § 40102(a)(6); 14 C.F.R. § 1.1 (2023).
151. Chicago Convention, art. 3(b).
152. DOD LAW OF WAR MANUAL, § 14.3.2.
153. DoDI 4540.01, Use of International Airspace by U.S. Military Aircraft and for Missile and Projectile Firings 11 (Ch. 1, May 22, 2017); DOD LAW OF WAR MANUAL, § 14.3.3.
154. DoDD 4500.54E, DoD Foreign Clearance Program, 12 (May 31, 2022).

by a member of the armed forces of the State.[155] To help distinguish friend from foe and preclude misidentification of neutral and civil aircraft, military aircraft are normally marked to signify both their nationality and their military character. A single marking may be used to signify both an aircraft's nationality and its military character.[156] Military aircraft are commanded by members of the armed forces of that State. The crew may include civilian members.[157]

2.4.2 Military Aircraft International Status

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

Commentary

It is U.S. government policy to assert full sovereign immunity for all manned and unmanned U.S. Navy aircraft and other State aircraft. The general privileges and obligations discussed in § 2.1 apply equally to military and State aircraft.[158]

Aircraft commanders shall not permit an aircraft under their command to be searched or inspected on any pretense whatsoever by foreign authorities or organizations, nor permit any of the personnel within the confines of their aircraft to be removed by foreign authorities. Aircraft commanders shall not provide aircraft documents or

155. DOD LAW OF WAR MANUAL, § 14.3.3.
156. *Id.* § 14.3.3.2.
157. *Id.* § 14.3.3.3.
158. NAVADMIN 165/21, *supra* note 27, ¶ 6.

other aircraft-specific information, including passenger lists, to foreign authorities or organizations without the approval of the applicable GNCC via the chain of command.[159]

Unless there is an international agreement to the contrary, aircraft commanders shall refuse to pay navigation fees, overflight fees, and other similar fees or taxes for transit through the national airspace of a foreign State or Flight Information Regions (FIRs) in international airspace. Additionally, aircraft commanders shall refuse to pay any revenue-generating tax or fee imposed on a State aircraft by a foreign sovereign, including landing fees, parking fees, and other similar use fees or taxes at foreign State-operated airports. Aircraft commanders may pay reasonable charges for goods and services requested and received, less taxes and similar charges. If requested to pay impermissible fees or taxes, aircraft commanders should request an itemized list of all charges, pay reasonable charges for goods and services requested and received, and explain that under customary international law, sovereign immune aircraft are exempt from foreign fees and taxes. If local authorities insist on the payment of an impermissible tax or fee, aircraft commanders should seek assistance from the respective GNCC and U.S. Embassy via the chain of command. Whether the U.S. Navy will directly or indirectly pay such an impermissible tax or fee is a matter of overarching U.S. government policy. This decision may be based on other concerns, such as operational needs, contracting principles, and potential fiscal liability. If a GNCC determines that risk to mission clearly necessitates the visit, the fees may be paid and a refund should be sought from the foreign sovereign.[160] In some cases, Military Basing Agreements may require the United States to reimburse a host nation for costs associated with joint-use air bases located in the host nation.[161]

Aircraft commanders shall not provide a list of crew members (military and/or nonmilitary) or passengers aboard a State aircraft to foreign parties as a condition of landing at a foreign airport or to satisfy local immigration officials upon arrival when there is no intention for crew members or passengers to enter the country, such as for

159. *Id.* ¶ 6.a.
160. *Id.* ¶ 6.b(1)–(3).
161. *Id.* ¶ 6.c.

refueling and cargo transfer stops. Sovereign immune aircraft are generally immune from complying with visa or other entry requirements. Although personnel, absent a superseding international agreement, become subject to the laws and regulations of a host country upon disembarkation for the purposes of entry into the country, the request for a list of personnel raises force protection concerns and is inconsistent with long-standing, worldwide Naval landing practices and protocols. The privilege of sovereign immunity does not extend to individuals once they disembark a sovereign immune aircraft for the purposes of entry into the host country. If leaving the airfield and/or remaining overnight, crew and passengers will comply with host nation immigration regulations in accordance with any Status of Forces Agreement and the Foreign Clearance Guide to include requirements for official passports and entry visas.[162]

Aircraft commanders shall comply with all domestic or foreign State quarantine regulations for the area within which the aircraft is located that do not contravene U.S. sovereign immunity policy. Aircraft commanders, or their representatives, may certify to foreign authorities compliance with foreign State quarantine regulations (i.e., provide a general description of measures taken to comply). However, aircraft commanders shall not permit an aircraft under their command to be searched on any pretense whatsoever by foreign authorities. In response to a request by foreign authorities for health information required by foreign State quarantine regulations, aircraft commanders shall provide all information required by authorized foreign officials, consistent with force protection concerns. If requested, aircraft commanders may provide additional information to the host nation regarding precautionary measures taken onboard due to an ongoing pandemic, without providing any specific individual medical data. Aircraft commanders shall not grant foreign authorities access to individual health records.[163]

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162. *Id.* ¶ 6.d(1)–(3).
163. NAVADMIN 165/21, *supra* note 27, ¶ 6.e(1)–(2).

2.4.3 State Aircraft

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

Commentary

State aircraft include "aircraft used in military, customs, and police services."[164] The Chicago Convention generally does not apply to State aircraft,[165] except that State aircraft may not fly over the territory of another State or land thereon with authorization or as otherwise permitted by special agreement[166] and must fly with "due regard" for the safety of civil aviation.[167] DoD commercial contract aircraft and other U.S. government contract aircraft are not State aircraft unless the particular aircraft is specifically designated as such by the U.S. government. The normal U.S. practice is not to designate contract aircraft as State aircraft.[168]

2.4.4 Unmanned Aircraft Definition and Status

Unmanned aircraft (UA) are aircraft that do not carry a human operator and are capable of flight with or without human remote control. They may be launched from the water's surface, subsurface, air, or land. All UA operated by the DOD are considered military aircraft and retain the overflight rights under customary international law, as reflected in UNCLOS. Since DOD-operated UA are considered military aircraft, all domestic and international law pertaining to military aircraft is applicable. This includes all conventions, treaties, and agreements relating to military aircraft and auxiliary aircraft, as

164. Chicago Convention, art. 3(b).
165. *Id.* art. 3(a).
166. *Id.* art. 3(c).
167. *Id.* art. 3(d).
168. Secretary of State Cable 22631, USG Policy Regarding Status of DOD Commercial Contract Aircraft (Mar. 10, 2010).

well as certain provisions recognizing the special status of military aircraft contained in conventions or treaties pertaining to civil aircraft and civilian airliners. Unmanned aircraft enjoy all of the navigational rights of manned aircraft.

Commentary

See § 2.4.1 for the definition of military aircraft.

2.5 NAVIGATION IN AND OVERFLIGHT OF NATIONAL WATERS

2.5.1 Internal Waters

Coastal States enjoy the same jurisdiction and control over their internal waters and superjacent airspace as they do over their land territory. Because most ports and harbors are located landward of the baseline of the territorial sea, entering a port involves navigation in internal waters and is subject to coastal State conditions of port entry, which can include mandatory pilotage requirements. Because entering internal waters is legally equivalent to entering the land territory of another nation, that State's permission is required. To facilitate international maritime commerce, many States grant foreign merchant vessels standing permission to enter internal waters in the absence of notice to the contrary. Warships and auxiliaries and all aircraft, on the other hand, generally require specific and advance entry permission, unless other bilateral or multilateral arrangements have been concluded or the foreign State's laws permit entry. An exception to the rule of nonentry into internal waters without coastal nation permission, whether specific or implied, arises when rendered necessary by *force majeure* or distress in order to preserve human life. Vessels may exercise innocent passage where straight baselines have the effect of enclosing—as internal waters—areas of the sea previously regarded as territorial seas or high seas.

Commentary

Internal waters are defined as all waters landward of the baseline along the coast.[169] Lakes, rivers, some bays, roadsteads, harbors, canals, and lagoons are examples of internal waters, which lie landward of the baseline. Unless otherwise provided by an international agreement or special arrangement, entering a foreign port requires the consent of the port State. There is no right of innocent passage by foreign vessels in internal waters except in situations where the coastal State has established straight baselines that have the effect of enclosing as internal waters areas that had not previously been considered as such.[170] In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject.[171]

Therefore, transit rights do not exist in internal waters except as authorized by the coastal State or as rendered necessary by *force majeure* or distress. In recent decades, however, coastal States have narrowed the rule on *force majeure* to prevent damaged vessels from entering their ports and harbors because they might cause environmental damage or pollution. Thus, the extent of the classic right of *force majeure* is not well settled.[172] IMO guidelines recognize that there is "no obligation" for the coastal State to grant permission to a foreign ship to access a place of refuge in cases of *force majeure* or distress. The coastal State need only weigh all the factors and risks in a balanced manner and "give shelter whenever reasonably possible."[173] Under U.S. law, the U.S. Coast Guard Captain of the Port or District Commander may deny entry into a U.S. port to any vessel not in

169. UNCLOS, art. 8(1); Territorial Sea Convention, art. 5(1).

170. UNCLOS, art. 8(2); Territorial Sea Convention, art. 5(2).

171. UNCLOS, art. 25(2).

172. JAMES KRASKA & RAUL PEDROZO, INTERNATIONAL MARITIME SECURITY LAW 217 (2013).

173. IMO, Guidelines on Places of Refuge for Ships in Need of Assistance, ¶ 3.12, IMO Doc. A.949(23) (Dec. 5, 2003).

compliance with the provisions of the Port and Tanker Safety Act or regulations issued thereunder.[174]

2.5.2 Territorial Seas

2.5.2.1 Innocent Passage

Ships (not aircraft) of all States enjoy the right of innocent passage for the purpose of continuous and expeditious traversing of the territorial sea or for proceeding to or from internal waters. Innocent passage includes stopping and anchoring—but only insofar as incidental to ordinary navigation or as rendered necessary by *force majeure* or by distress—or for the purpose of rendering assistance to persons, ships, or aircraft in danger or distress. There is no requirement that the passage be the most expeditious means to arrive at the ship's destination or the route minimize the amount of time in the coastal State's territorial waters, so long as it is continuous, expeditious, and innocent. Passage is innocent so long as it is not prejudicial to the peace, good order, or security of the coastal State. The following is an exhaustive list of activities considered to be prejudicial to the peace, good order, or security of the coastal States, and therefore inconsistent with innocent passage:

1. Any threat or use of force against the sovereignty, territorial integrity, or political independence of the coastal nation, or in any other manner in violation of the principles of international law embodied in the Charter of the UN

2. Any exercise or practice with weapons of any kind

3. Any act aimed at collecting information to the prejudice of the defense or security of the coastal nation

4. Any act of propaganda aimed at affecting the defense or security of the coastal nation

5. The launching, landing, or taking on board of any aircraft

6. The launching, landing, or taking on board of any military device

174. 33 C.F.R. § 160.107 (2023).

7. The loading or unloading of any commodity, currency, or person contrary to the customs, fiscal, immigration or sanitary laws, and regulations of the coastal nation

8. Any act of willful and serious pollution contrary to UNCLOS

9. Any fishing activities

10. The carrying out of research or survey activities

11. Any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal nation

12. Any other activity not having a direct bearing on passage.

Commentary

All ships—including warships, regardless of destination, flag, cargo, armaments, or means of propulsion—enjoy the right of innocent passage through the territorial sea.[175] Submarines and other underwater vehicles also enjoy a right of innocent passage but must navigate on the surface and show their flag.[176] Passage must be continuous and expeditious but includes stopping and anchoring if incidental to ordinary navigation or rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships, or aircraft in danger or distress.[177]

Passage is innocent so long as it is not prejudicial to the peace, good order, or security of the coastal State.[178] An inclusive list of activities considered to be non-innocent is contained in Article 19(2)(a)–(k) of UNCLOS.[179]

175. UNCLOS, art. 17; Territorial Sea Convention, art. 14(1).
176. UNCLOS, art. 20; Territorial Sea Convention, art. 14(6).
177. UNCLOS, art. 18(1)(b); Territorial Sea Convention, art. 14(3).
178. UNCLOS, art. 19(1); Territorial Sea Convention, art. 14(4).
179. *See also* Joint Statement with Attached Uniform Interpretation of Rules of International Law Governing Innocent Passage, U.S.S.R.-U.S., Sept. 23, 1989, *reprinted in* 28 INTERNATIONAL LEGAL MATERIALS 1444 (1989) [hereinafter Jackson Hole Agreement].

Foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances shall, when exercising the right of innocent passage through the territorial sea, carry documents and observe special precautionary measures established for such ships by international agreements (e.g., the INF Code).[180]

The INF Code contains guidance for the design of ships transporting radioactive material and addresses such issues as stability after damage, fire protection, and structural resistance.[181]

In 2021, China revised its Maritime Traffic Safety Law (MTSL). The new law requires, inter alia, nuclear-powered vessels, vessels carrying radioactive substances, ultra-large oil tankers, bulk liquefied gas carriers, and bulk dangerous chemicals carriers that may endanger the safety of the port that intend to navigate, anchor, or change berths in the pilotage areas designated by the competent transport department to submit to compulsory pilotage.[182] Additionally, the MTSL requires submersibles, nuclear-powered vessels, vessels carrying radioactive substances or other poisonous and harmful substances, and other vessels that may endanger the maritime traffic safety of the People's Republic of China to provide prior notification to the maritime traffic authority when they enter and leave China's territorial sea.[183]

The MTSL is inconsistent with the right of innocent passage reflected in UNCLOS and the Territorial Sea Convention. The coastal State may adopt laws and regulations relating to innocent passage regarding, inter alia, the safety of navigation, the regulation of maritime traffic, the preservation of the marine environment, and the reduction and control of pollution.[184] However, coastal State laws and regulations may not impose requirements on foreign ships that have the practical effect of denying, impairing, or hampering the right of

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180. UNCLOS, art. 23.

181. IMO Res. MSC.88(71), *supra* note 136, annex.

182. Maritime Traffic Safety Law of the People's Republic of China, art. 30 (promulgated by Standing Committee of the National People's Congress, Apr. 29, 2021, effective Sept. 1, 2021).

183. *Id.* art. 54.

184. UNCLOS, art. 22.

> innocent passage.[185] Prohibiting transits based on the type of propulsion system or cargo on board, or imposing mandatory pilotage requirements, is inconsistent with international law. China may require nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances or materials to use designated sea lanes and traffic separation schemes, as well as carry documents and observe special precautionary measures established for such ships by international agreements, but it may not impose compulsory pilotage or prohibit transits by such ships or require that they provide prior notification before entering the territorial sea.[186] Prior notification was discussed during the UNCLOS negotiations. Efforts by a handful of States to include a prior notification or prior consent requirement in Article 21 failed to achieve a majority vote, so the proponents agreed not to pursue the matter as it was clear that there was insufficient support to adopt the proposal.[187]

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

UNCLOS does not prohibit passage that is noninnocent, such as overflight of or submerged transit in the territorial sea. However, a coastal State has a right to take the necessary steps in and over its territorial sea to prevent passage that is not innocent, including, where necessary, the use of force. If a foreign ship or aircraft enters the territorial sea or airspace above it and engages in noninnocent activities, the appropriate remedy, consistent with customary international law and includes the right of self-defense, is first to inform the ship or aircraft of the reasons the coastal nation questions the in-

185. *Id.* art. 24.

186. *Id.* arts. 22–23.

187. 2 VIRGINIA COMMENTARY at 195–99. *See also* Raul Pedrozo, *China's Revised Maritime Traffic Safety Law*, 97 INTERNATIONAL LAW STUDIES 956 (2021).

nocence of the passage. They are to provide the vessel a reasonable opportunity to clarify its intentions or to correct its conduct in a reasonably short period of time.

Commentary

There is no right of overflight through national airspace without coastal State consent.[188]

One of the activities that is considered to be prejudicial to the peace, good order, or security of the coastal State, and therefore inconsistent with the right of innocent passage, is "any act aimed at collecting information to the prejudice of the defence or security of the coastal State."[189] Similarly, the submerged transit of the territorial sea by a submarine or UUV would be inconsistent with the regime of innocent passage. The coastal State would therefore be authorized to take necessary steps to prevent passage of ships engaged in activities proscribed by Article 19 or Article 20 of UNCLOS.[190] Nevertheless, because warships and other government non-commercial vessels enjoy complete immunity from foreign jurisdiction,[191] the coastal State may only order the noncompliant ship or submarine to leave the territorial sea immediately.[192]

The United States takes the position that the "innocent passage provisions of the Convention set forth conditions for the enjoyment of the right of innocent passage in the territorial sea."[193] They do not, however, "prohibit or otherwise affect activities or conduct that is inconsistent with that right and therefore not entitled to that right."[194] Similarly, although Article 20 requires submarines and other underwater vehicles to navigate on the surface and to show their flag in order to enjoy the right of innocent passage, "failure to

188. UNCLOS, art. 2(2); Territorial Sea Convention, art. 2; Chicago Convention, arts. 1–2.
189. UNCLOS, art. 19(2)(c).
190. *Id.* art. 25(1); Territorial Sea Convention, art. 16(1).
191. UNCLOS, art. 32.
192. *Id.* art. 30; Territorial Sea Convention, art. 23.
193. CONVENTION ON THE LAW OF THE SEA, S. EXEC. REP. 110-9, at 12 (2007).
194. *Id.*

do so is not characterized as inherently not 'innocent.'"[195] For example, Charles Allen, former Assistant Director of Central Intelligence for Collection, has suggested that while submarines engaged in subsurface transit are ineligible for the rights and privileges of innocent passage, their conduct is not necessarily unlawful. In unclassified testimony in 2004, Allen stated that "the overwhelming opinion of Law of the Sea experts and legal advisors is that the Law of the Sea Convention simply does not regulate intelligence activities, nor was it intended to."[196] William H. Taft IV, former Legal Adviser to the Department of State, concurred that UNCLOS does not prohibit or regulate intelligence activities in the territorial sea:

> With respect to whether articles 19 and 20 of the Convention would have any impact on U.S. intelligence collection, the answer is no. . . . A ship does not, of course, under [the 1982 Convention] any more than under the 1958 Convention, enjoy the right of innocent passage in the territorial sea if, in the case of a submarine, it navigates submerged or if, in the case of any ship, it engages in an act aimed at collecting information to the prejudice of the defense or security of the coastal State, however, such activities are not prohibited or otherwise affected by the Convention.[197]

The 2007 Senate Foreign Relations Committee report on UNCLOS reiterates the American position that the provisions concerning innocent passage in the 1958 Convention on the Territorial Sea and the Contiguous Zone and the 1982 Convention "set forth conditions for the enjoyment of the right of innocent passage in the territorial sea but do not prohibit or otherwise affect activities or conduct that is inconsistent with that right and therefore not entitled to that right":[198]

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195. *Id.*

196. Letter from J.M. McConnell, Director of National Intelligence, to Hon. Sen. John D. Rockefeller IV and Hon. Sen. Christopher S. Bond (Aug. 8, 2007), *reprinted* in S. EXEC. REP. 110-9, *supra* note 193, at 32–33.

197. Statement of William H. Taft, Legal Adviser, U.S. Department of State, Before the Senate Select Committee on Intelligence (June 8, 2004), *reprinted in* S. EXEC. REP. 110-9, *supra* note 193, at 34, 36.

198. S. EXEC. REP. 110-9, *supra* note 193, at 12.

> (Article 20 provides that submarines and other underwater vehicles are required to navigate on the surface and to show their flag in order to enjoy the right of innocent passage; however, failure to do so is not characterized as inherently not "innocent.")
>
> The committee further understands that, as in the case of the analogous provisions in the 1958 Convention on the Territorial Sea and Contiguous Zone (Articles 18, 19, and 20), the innocent passage provisions of the Convention set forth conditions for the enjoyment of the right of innocent passage in the territorial sea but do not prohibit or otherwise affect activities or conduct that is inconsistent with that right and therefore not entitled to that right.[199]

> While intelligence collection and submerged transits are inconsistent with the right of innocent passage and with the principle of coastal State sovereignty, they are not a violation of a rule of sovereignty in general international law and therefore do not constitute an internationally wrongful act that gives rise to the use of countermeasures.[200]

2.5.2.2 Permitted Restrictions

For purposes such as resource conservation, environmental protection, and navigational safety, a coastal State may establish certain restrictions upon the right of innocent passage of foreign vessels. Such restrictions upon the right

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199. *Id. See also* James Kraska, *Putting Your Head in the Tiger's Mouth: Submarine Espionage in the Territorial Sea*, 54 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 164 (2016); Robert J. Grammig, *The Yoron Jima Submarine Incident of August 1980: A Soviet Violation of the Law of the Sea*, 22 HARVARD INTERNATIONAL LAW JOURNAL 331 (1981); F. David Froman, *Uncharted: Non-Innocent Passage in the Territorial Sea*, 21 SAN DIEGO LAW REVIEW 625 (1984).

200. *See* Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security, ¶ 20, U.N. Doc. A/68/98 (June 24, 2013); Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security, ¶ 27, U.N. Doc. A/70/174 (July 22, 2015); Official compendium of voluntary national contributions on the subject of how international law applies to the use of information and communications technologies by States submitted by participating governmental experts in the Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security established pursuant to General Assembly Resolution 73/266, at 139/142, U.N. Doc. A/76/136 (July 13, 2021).

of innocent passage through the territorial sea are not prohibited by international law, provided they are reasonable and necessary; do not have the practical effect of denying or impairing the right of innocent passage; and do not discriminate in form or in fact against the ships of any State or those carrying cargoes to, from, or on behalf of any State. These restrictions cannot prohibit transit or otherwise impair the rights of innocent and transit passage of nuclear-powered vessels. The coastal State may, where navigational safety dictates, require foreign ships—except sovereign-immune vessels—exercising the right of innocent passage to utilize designated sea lanes and traffic separation schemes. Sovereign-immune vessels are not legally required to comply with such sea lanes and traffic separation schemes but may do so voluntarily where practicable and compatible with the military mission and navigational safety dictates.

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

Commentary

The coastal State may adopt laws and regulations relating to innocent passage through the territorial sea with respect to (a) the safety of navigation and the regulation of maritime traffic; (b) the protection of navigational aids and facilities and other facilities or installations; (c) the protection of cables and pipelines; (d) the conservation of the living resources of the sea; (e) the prevention of infringement of the fisheries laws and regulations of the coastal State; (f) the preservation of the environment of the coastal State and the prevention, reduction, and control of pollution thereof; (g) marine scientific research and hydrographic surveys; and (h) the prevention of infringement of the customs, fiscal, immigration, or sanitary laws and regulations of the coastal State.[201] These laws may not, however, apply to the design, construction, manning, or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards adopted by the IMO.[202]

201. UNCLOS, art. 21(1).
202. *Id.* art. 21(2).

The coastal State may also, where necessary, having regard to the safety of navigation, require foreign ships exercising the right of innocent passage through its territorial sea to use such sea lanes and traffic separation schemes (TSSs) as it may designate or prescribe for the regulation of the passage of ships. In particular, tankers, nuclear-powered ships, and ships carrying nuclear or other inherently dangerous or noxious substances or materials may be required to confine their passage to such sea lanes.[203] When designating sea lanes and prescribing TSSs, the coastal State shall take into account (a) the recommendations of the IMO; (b) any channels customarily used for international navigation; (c) the special characteristics of particular ships and channels; and (d) the density of traffic.[204]

Except as provided in UNCLOS (e.g., suspension of innocent passage: see § 2.5.2.3 below), a coastal State may not hamper the innocent passage of foreign ships through the territorial sea. Coastal State laws and regulations may not (a) impose requirements on foreign ships that have the practical effect of denying or impairing the right of innocent passage; or (b) discriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from, or on behalf of any State.[205]

Foreign ships exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea (i.e., COLREGS).[206] Coastal State ships' routing systems—including TSSs, ship reporting systems, and vessel traffic services—are adopted and implemented in accordance with Regulations 10, 11, and 12, respectively, of Chapter V of SOLAS. Sovereign immune vessels are exempt from compliance with Chapter V and are not required to comply with these coastal State measures.[207]

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203. *Id.* art. 22(1)–(2).
204. *Id.* art. 22(3).
205. *Id.* art. 24; Territorial Sea Convention, art. 15.
206. UNCLOS, art. 21(4); Territorial Sea Convention, art. 17.
207. SOLAS, reg. V/1.

2.5.2.3 Temporary Suspension of Innocent Passage

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

Commentary

A coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises. The suspension must be duly published before it can take effect.[208]

Note that UNCLOS does not define how large an area of territorial sea may be temporarily closed off. Similarly, UNCLOS does not define the term "temporarily," but clearly the closure may not be permanent. At a minimum, closure areas must be reasonable in extent and location so as not to interfere unnecessarily with surface and air navigation. For example, on April 24, 2021, Russia issued a notice to mariners indicating that it was closing off portions of the Black Sea to foreign warships and other State vessels, twenty-four hours a day, seven days a week, for a period of six months. Russia's announcement is problematic for several reasons. First, the combination of a closure that extends twenty-four hours a day, seven days a week, for six months would not be considered temporary. Second, Russia's declaration applies only to warships and other State vessels and therefore discriminates in fact among types of foreign ships. Thus, Russia's purported suspension of passage to foreign warships and other State vessels operating off the coast of Crimea is inconsistent with international law.

2.5.2.4 Warships and Innocent Passage

All warships, regardless of cargo, armament, or means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance with

208. UNCLOS, art. 25(3); High Seas Convention, art. 16(3).

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

Commentary

See § 2.5.2.1 for a discussion of the right of innocent passage.

The International Law Commission (ILC) drafted provisional articles concerning, inter alia, the regime of the territorial sea in preparation for the negotiations of the Territorial Sea Convention at the Second United Nations Conference on the Law of the Sea (UNCLOS II). Draft Article 25, adopted in 1955, provided that coastal States could "make the passage of warships through the territorial sea subject to previous authorization or notification," except in "straits normally used for international navigation between two parts of the high seas."[209] Nevertheless, the ILC believed that warships should normally not be required to "request a special authorization for each passage" and that coastal State authorization should be provided "in general terms giving vessels the right of passage," provided that warships comply with coastal State laws and regulations.[210]

The ILC reconsidered the issue in 1956 and approved a new Article 24, which also allowed coastal States to condition innocent passage of warships through the territorial sea "to previous authorization or notification" but required coastal States to normally grant passage subject to compliance with Articles 17 (Rights of Protection of the Coastal State) and 18 (Duties of Foreign Ships During Their Passage).[211] The Commission noted that, even though "a large number

209. ILC, Report on Its Seventh Session, U.N. Doc. A/CN.4/94 (1955), *reprinted in* [1955] 2 YEARBOOK OF THE ILC 19, 41.

210. *Id.*

211. ILC, Report on Its Eighth Session, U.N. Doc. A/3159 (1956), *reprinted in* [1956] 2 YEARBOOK OF THE ILC 253, 276.

of States do not require previous authorization or notification," that did not mean that "a State would not be entitled to require such notification or authorization if it deemed it necessary to take this precautionary measure."[212] The ILC reasoned that the "passage of warships through the territorial sea of another State can be considered by that State as a threat to its security."[213] The Commission was, therefore, "not in a position to dispute the right of States to take such a measure."[214] However, prior notification or consent would only be required if the coastal State had enacted and duly published a restriction to that effect.

Notwithstanding the ILC's preparatory work, the diplomatic conference did not adopt the language of draft Article 24. Instead, the Territorial Sea Convention provides that "ships of all States . . . shall enjoy the right of innocent passage through the territorial sea" and passage is considered innocent "so long as it is not prejudicial to the peace, good order or security of the coastal State."[215] If a foreign warship "does not comply with the regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance which is made to it" by the coastal State, the coastal State may require the warship to leave its territorial sea.[216] The requirement for prior notice or consent was not adopted by the majority of delegations present at UNCLOS II.

The issue was revisited during UNCLOS III. An attempt by a few States to include a prior notification or authorization requirement failed to receive sufficient support during the negotiations, so the proponents agreed not to press the proposed amendment to Article 21.[217] At the conclusion of UNCLOS III, Ambassador Koh confirmed on the record that "the Convention is quite clear on this point. Warships do, like other ships, have a right of innocent passage

212. *Id.* at 277.
213. *Id.*
214. *Id.*
215. Territorial Sea Convention, art. 14.
216. *Id.* art. 23.
217. 2 VIRGINIA COMMENTARY at 195–99.

through the territorial sea, and there is no need for warships to acquire the prior consent or even notification of the coastal State."[218] As a result, Articles 17, 19, and 30 of UNCLOS contain language virtually identical to that found in the Territorial Sea Convention.

Despite the unambiguous rejection of the prior notification or consent requirement in the 1958 and 1982 conventions, there are forty-seven States that condition the passage for warships on prior notice or consent.[219] These claims are clearly inconsistent with Article 17 of UNCLOS, which on its face applies to all ships, including military and other sovereign immune vessels. The right of innocent passage of warships is further confirmed by Article 19, which contains a list of military activities that are prohibited when ships are engaged in innocent passage, such as weapons exercises, intelligence collection, and launching or recovering aircraft or military devices. Lack of notification or consent is not one of the listed proscribed activities. This creates a presumption that warships not engaged in one of the prohibited activities automatically enjoy the right of innocent passage. Article 19 would be unnecessary if warships were not entitled to exercise the right. The right of innocent passage for warships was confirmed in ¶ 2 of the Jackson Hole Agreement.[220]

If a warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith, the coastal State may require it to leave the territorial sea immediately.[221]

2.5.2.5 Unmanned Systems and Navigational Rights

Properly flagged UMS ships enjoy the right of innocent passage in the territorial sea and archipelagic waters of other States, transit passage in interna-

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218. Bernard H. Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 VIRGINIA JOURNAL OF INTERNATIONAL LAW 809, 854 n.159 (1984).

219. J. ASHLEY ROACH, EXCESSIVE MARITIME CLAIMS 250–51 tbl.11 (4th ed. 2021).

220. *Supra*, note 179. *See also* U.S. statement in right of reply, *reprinted in* 17 OFFICIAL RECORDS OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 243–44, U.N. Doc. A/CONF.62/WS/37 and ADD.1-2 (1973–82).

221. UNCLOS, art. 30; Territorial Sea Convention, art. 23.

tional straits, and archipelagic sea lanes passage in archipelagic sea lanes. Unmanned systems not classified as ships may be deployed by larger vessels engaged in innocent passage, transit passage, or archipelagic sea lanes passage as long as their employment complies with the navigational regime of innocent passage, transit passage, or archipelagic sea lanes passage.

Commentary

In support of the IMO's work on MASS discussed in § 2.2.1, the Comité Maritime International (CMI) Executive Council established an International Working Group to study the current international legal framework and consider what amendments, adaptions, or clarifications are required in relation to unmanned ships to ensure that the use and operation of such vessels is consistent with international law. To this end, CMI developed a questionnaire for the IMO asking nations whether UMSs are considered "ships" under their national laws. Seventy percent of the States responding to the CMI questionnaire indicated that UMSs could constitute a ship under their national laws.[222]

If a UMS qualifies as a ship or vessel, it is "subject to the same rules of the law of the sea as any ordinarily manned ship."[223] UMSs have an obligation to comply with the same international rules that apply to manned vessels, and "they also enjoy the same passage rights as other ships and cannot be refused access to other states' waters merely because they are not crewed."[224] Seventy percent of the States responding to the aforementioned CMI questionnaire indicated that unmanned ships would enjoy the same rights and duties as manned ships under UNCLOS.[225] The U.S. Maritime Law Association reached a similar conclusion, indicating that, under U.S. law, "ship" is defined without regard to manning and that unmanned ships are probably subject to the same rights and obligations under the law of the sea.[226]

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222. IMO Doc. MSC 99/20, *supra* note 118, annex 1 (Feb. 13, 2018).

223. CMI Position Paper, *supra* note 111, at 3.

224. *Id.*

225. IMO, *Work Conducted by the CMI International Working Group on Unmanned Ships* annex 1, IMO Doc. MSC 99/INF.8 (Feb. 13, 2018).

226. *Id.*

2.5.2.6 Assistance Entry

Long before the establishment of territorial seas, mariners recognized a humanitarian duty to render assistance to persons in distress. Today, ship and aircraft commanders have the same duty to assist those in distress. Ships have the duty to enter into a foreign State's territorial sea without permission of the coastal State when there is reasonable certainty (based on the best available information) that a person is in distress, their location is reasonably well known, and the rescuing unit is in position to render timely and effective assistance. Based on the circumstances on scene, if the ship or aircraft commander has determined that the coastal State is taking inadequate steps to assist the persons in distress, assistance may continue in the coastal State's territorial sea if deemed necessary and appropriate by the commander.

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

Commentary

Mariners have an obligation under customary international law to render assistance to persons in distress at sea to the extent that they can do so without serious danger to their ship, crew, or passengers.[227] This long-standing custom is codified in a number of international treaties adopted under the auspices of the IMO, as well as the High

227. 1979 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1114 (1983).

Seas Convention, UNCLOS, and the Chicago Convention. The obligation is not, however, absolute. Although masters of ships are required to render assistance to persons found in danger of being lost at sea, the duty only arises if they can do so without serious danger to their ships, crew, or passengers.[228] Ships engaged in innocent passage may stop and anchor for the purpose of rendering assistance to persons, ships, or aircraft in danger or distress.[229] Similar obligations are found in the 1910 Salvage Convention, SOLAS, the SAR Convention, and the 1989 Salvage Convention.[230]

States parties to the Chicago Convention are similarly required to devote aviation assets to provide prompt search and rescue services. If a pilot-in-command observes another aircraft or a surface craft in distress, "the pilot shall, if possible and unless considered unreasonable or unnecessary . . . keep the craft in distress in sight until compelled to leave the scene or advised by the rescue coordination centre that it is no longer necessary."[231]

U.S. law imposes a statutory obligation on ships' masters and individuals in charge of vessels to "render assistance to any individual found at sea in danger of being lost, so far as the master or individual in charge can do so without serious danger to [their] vessel or individuals on board."[232] Failure to comply with this obligation subjects a master or individual violating the law to a fine not exceeding $1,000, two years' imprisonment, or both.[233]

The aforementioned obligations do not apply to warships or military aircraft. However, the DoD imposes similar obligations on the commanding officers of warships and aircraft commanders. U.S. Navy Regulations, for example, require the commanding officer or senior officer present, insofar as can be done without serious danger to the ship or crew, to (a) "proceed with all possible speed to the rescue of

228. UNCLOS, art. 98(1)(a); High Seas Convention, art. 12(1)(a).

229. UNCLOS, art. 18(2).

230. 1910 Salvage Convention, art. 11; SOLAS, reg. V/33; SAR Convention, annex ¶¶ 2.1.1, 5.9.1; 1989 Salvage Convention, art. 10.

231. Chicago Convention, annex 12 (Search and Rescue) ¶ 5.6.2.a (2004).

232. 46 U.S.C. § 2304(a)(1).

233. 46 U.S.C. § 2304(b).

persons in distress if informed of their need for assistance, insofar as such action may reasonably be expected of him or her"; (b) "render assistance to any person found at sea in danger of being lost"; and (c) "afford all reasonable assistance to distressed ships and aircraft."[234] Assistance may be rendered inside the territorial sea of a foreign country without the permission of the coastal State in accordance with customary international law, but such assistance is limited to situations in which the location of persons or property in distress is reasonably well known.[235] If the distress is not life-threatening, "U.S. aircraft will remain outside foreign territorial seas pending coordination with the operational chain of command, including the cognizant unified commander and the Department of State."[236] Navy Regulations are lawful general orders under Article 92 of the Uniform Code of Military Justice.[237] Failure to comply with the obligation to render assistance, unless doing so would seriously endanger the ship or its crew, is therefore subject to criminal prosecution at a special or general court-martial.[238]

U.S. Coast Guard Regulations impose a comparable, but more expansive, duty on commanding officers of Coast Guard ships. "Upon receiving information that a vessel or aircraft is in distress within the area of operation of the unit, the commanding officer shall, whenever it is appropriate to do so, assist such vessel or aircraft as soon as possible."[239] When rendering assistance, "the commanding officer shall aid the distressed vessel or aircraft and its passengers and crew until such time as it is able to proceed safely, or until such time as further Coast Guard assistance is no longer required."[240] In the event of a reported distress, the commanding officer of a Coast Guard vessel under way shall, unless otherwise directed by higher authority, "proceed immediately toward the scene of any reported distress

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234. U.S. Navy Regulations, art. 0925(1) (1990).

235. *Id.* art. 0925(2).

236. *Id.* art. 0925(3).

237. Uniform Code of Military Justice, 10 U.S.C. §§ 801–946(a), art. 92.

238. *See* KRASKA & PEDROZO, *supra* note 172, at 684–86, for a discussion of the USS *Dubuque* incident. *See also Navy Checking Report Ship Left Boat People to Die*, NEW YORK TIMES, Aug. 11, 1988, at A7.

239. U.S. Coast Guard Regulations, § 4-1-7B (1992).

240. *Id.* § 4-1-7C.

within the range of operation."[241] Similarly, the commanding officer of a ship in port shall, unless otherwise directed by higher authority, "proceed, as soon as possible, to the scene of any reported distress within that area of operation."[242] When rendering aid and assistance, "the commanding officer shall use sound discretion and shall not unnecessarily jeopardize the vessel or the lives of the personnel assigned to it."[243] Additionally, having due regard for the health of his or her crew, "the commanding officer shall take on board distressed seamen of the United States, shipwrecked persons, and persons requiring medical care."[244] Once on board, "assisted persons shall be furnished rations and may be transported to the nearest or most convenient port of the United States."[245]

Uniform policy for the exercise of the right-of-assistance entry (RAE) by U.S. military ships and aircraft within U.S.-recognized foreign territorial seas and archipelagic waters is set out in CJCSI 2410.01E.[246] Danger or distress includes a "clearly apparent risk of death, disabling injury, loss, or significant damage."[247]

U.S. ship and aircraft commanders have an obligation to assist those in danger of being lost at sea. Entry into the territorial sea by ships or, under certain circumstances, aircraft without permission of the coastal State is permitted to engage in legitimate efforts to render immediate rescue assistance to those in danger or distress at sea. RAE applies only to rescues in which the location of the persons, vessels, or aircraft in danger or distress is reasonably well known.[248]

RAE does not extend to conducting area searches for persons, vessels, or aircraft in danger or distress when their location is not yet reasonably well known. Unless otherwise provided by international

241. *Id.* § 4-2-5A.
242. *Id.* § 4-2-5B.
243. *Id.* § 4-2-5C.
244. *Id.* § 4-2-5F.
245. *Id.* § 4-2-5F.
246. CJCSI 2410.01E, Guidance for the Exercise of Right-of-Assistance Entry, ¶ 1 (Nov. 30, 2017).
247. *Id.* ¶ 5.
248. *Id.* ¶ 4(a).

agreement (e.g., the SAR Convention), area searches within U.S.-recognized foreign territorial seas or archipelagic waters will be conducted only with the permission of the coastal State. When considering conducting area searches within claimed or U.S.-recognized foreign territorial seas or archipelagic waters, commanders must comply with the provisions of the U.S. National Search and Rescue Supplement to the International Aeronautical and Maritime Search and Rescue Manual (May 2000) and the U.S. Standing Rules of Engagement (CJCSI 3121.01 (series)).[249]

The customary international law of RAE is more fully developed for vessels than for aircraft. Given that unauthorized entry into national airspace could be considered a breach of a State's sovereignty, operational commanders who intend to employ military aircraft into national airspace should consider the possible reaction of the coastal or archipelagic State. The U.S. position is that aircraft engaged in RAE are an extension of the vessels conducting rescue operations and, as such, those flights are consistent with the "duty to render assistance" described in Article 98 of UNCLOS.[250] Nonetheless, there are additional coordination steps that may be required for the use of military aircraft, as discussed below.[251]

The following guidance applies to U.S. operational units conducting the RAE in U.S.-recognized territorial seas and archipelagic waters of foreign States. The operational commander of a military ship may exercise RAE and immediately enter a foreign State's U.S.-recognized territorial sea or archipelagic waters when all three of the following conditions are met: (a) "a person, ship, or aircraft within the foreign territorial sea or archipelagic waters is in distress and requires immediate rescue assistance"; (b) "the location is reasonably well known"; and (c) "the U.S. military ship is in a position to render

249. *Id.* ¶ 4(b).

250. *Id.* ¶ 4(d).

251. *See also* U.S. Department of State, Statement of Policy by the Department of State, the Department of Defense, and the United States Coast Guard Concerning Exercise of the Right of Assistance Entry, Aug. 8, 1986, *reprinted in* ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS annex A2-3 (A.R. Thomas & James C. Duncan eds., 1997) (Vol. 73, INTERNATIONAL LAW STUDIES).

timely and effective assistance."[252] An operational commander may render immediate rescue assistance by deploying a U.S. military aircraft (including aircraft embarked aboard military ships conducting RAE operations) into the U.S.-recognized national airspace of a foreign State when all four of the following conditions are met: (a) "a person, ship, or aircraft within the foreign territorial sea or archipelagic waters is in distress and requires immediate rescue assistance"; (b) "the location is reasonably well known"; (c) "the U.S. military aircraft is able to render timely and effective assistance"; and (d) "any delay in rendering assistance could be life-threatening."[253] If the situation is not life-threatening, "the operational commander must request guidance from higher authority via the operational chain of command using the fastest means available" before exercising assistance entry in U.S.-recognized foreign territorial seas or archipelagic waters.[254]

Before executing the RAE, "operational commanders should consider the safety of the crews, military ships, and military aircraft they command, as well as the safety of persons, ships, and aircraft in distress."[255] Operational commanders should also assess force protection considerations based on all available information and, although not required, "whether other rescue units, capable and willing to render timely and effective assistance, are on the scene or immediately en route.[256]

Exercise of RAE does not require coastal or archipelagic State notification or consent. However, if possible, operational commanders should notify coastal or archipelagic State authorities before entry into U.S.-recognized foreign territorial sea or archipelagic waters, "in order to promote international comity, avoid misunderstanding, and alert local rescue and medical assets."[257] Operational commanders should not, however, request consent for entry. If notification can-

252. CJCSI 2410.01E, *supra* note 246, ¶ 6(c)(1).
253. *Id.* ¶ 6(c)(2).
254. *Id.*
255. *Id.* ¶ 6(c)(3).
256. *Id.*
257. *Id.* ¶ 6(c)(4).

not be provided in advance, the operational commander "must notify the coastal or archipelagic state, as soon as possible, of the location, unit(s) involved, nature of the emergency, and government assistance required as well as an estimated time of departure from the territorial sea or archipelagic waters."[258] Contact will normally be with the Rescue Coordination Center of the foreign state involved or the U.S. Embassy Country Team. If RAE is executed in a foreign-claimed territorial sea or archipelagic waters not recognized by the United States, "notification is not required, but may be made if necessary to obtain coastal state assistance."[259] If notification is provided, it "will not indicate that an entry was made into the foreign state's territorial seas or archipelagic waters and will not request consent for such entry."[260]

The duty to render assistance to persons, ships, and aircraft in danger or distress applies throughout the entire sea, including a coastal State's territorial sea.[261] 46 U.S.C. § 2304 (Duty to provide assistance at sea) does not apply to a vessel of war owned by the U.S. appropriated to public service. "Assistance entry" is the entry of vessels or aircraft into a coastal State's territorial sea to render emergency assistance to persons, ships, or aircraft in danger or distress at sea. The coastal State's right to control activities in its territorial sea is balanced with the requirement to rescue persons in distress at sea. Many States view assistance entry solely as a duty, not a right, even a limited one. It is affirmed that the *duty* to render assistance permits a vessel to enter a coastal State's territorial sea without prior notice or consent; however, most States do not subscribe to the U.S. view that the duty to render assistance is, by necessity, supported by a corresponding "right" under international law.

The 1986 Statement of Policy by the Department of State, the Department of Defense, and the United States Coast Guard Concerning Exercise of the Right of Assistance Entry (RAE Statement), states:

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258. *Id.*
259. *Id.*
260. *Id.*
261. 1989 Salvage Convention, art. 11; UNCLOS arts. 18, 98; SOLAS, reg. V/33; SAR Convention, annex ¶ 2.1.10; High Seas Convention, art. 12; 46 U.S.C. § 2304(a)(1).

> The right of assistance entry is not dependent upon seeking or receiving the permission of the coastal State. While the permission of the coastal State is not required, notification of the entry should be given to the coastal State both as a matter of comity and for the purpose of alerting the rescue forces of that State. The right of assistance entry extends only to rescues where the location of the danger or distress is reasonably well known. The right does not extend to conducting searches within the foreign territorial sea without the permission of the coastal State. The determination of whether a danger or distress requiring assistance entry exists properly rests with the operational commander on scene.

The RAE Statement provides U.S. policy concerning assistance entry. When a U.S. military vessel determines that a person, ship, or aircraft is in danger or distress from the perils of the sea, the location of the incident is reasonably well known, and the U.S. military vessel is in a position to render assistance, then the vessel may render the necessary assistance. For U.S. military aircraft, the operational commander should, if possible, request additional guidance. If a delay could be life-threatening, then immediate assistance may be rendered.

A 2012 Coast Guard legal opinion on assistance entry provides clarification on when a vessel is *not* required to render assistance:

> There are certain circumstances where a vessel would not be duty-bound to come to the aid of a mariner in distress. For example, a master is not required to place his own vessel and crew in undue peril in order to attempt to render assistance. Also, there is no duty to attempt to render assistance in instances where doing so would be impracticable or futile. Further, if a coastal State has responded in a timely and effective manner, such that the distress has been addressed and no longer exists, then the prerequisite of distress is absent and engaging in [assistance entry] is not legally justified.

Coast Guard search-and-rescue policy clarifies when assistance entry would not be warranted: (1) to perform a search without the coastal

State's permission prior to entering the territorial sea; (2) to rescue (or salvage) property, except in limited cases incidental to the rescue operation, such as the retrieval of medical supplies or towing a vessel; (3) to assist persons not in distress; or (4) within the internal waters or over the land mass of a coastal State.

2.5.3 International Straits

2.5.3.1 Types of International Straits

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

1. Straits connecting one part of the high seas or EEZ with another part of the high seas or EEZ (e.g., Strait of Hormuz, Strait of Malacca, Strait of Gibraltar, Strait of Bab el Mandeb). Transit passage applies.

2. Straits regulated by long-standing treaties (e.g., Turkish Straits, Strait of Magellan). Treaty terms apply to the extent the United States adheres to them.

3. Straits not completely overlapped by territorial seas (e.g., a high seas corridor exists, such as Japan's approach in the Soya, Tsugara, Tshushima East Channel, Tshushima West Channel, Osumi Straits, and the Taiwan Strait). High seas freedoms apply in the corridor.

4. Straits formed by an island of a State bordering the strait and its mainland and where a route of similar convenience exists to the seaward of the island (e.g., Strait of Messina). Nonsuspendable innocent passage applies.

5. Straits between a part of the high seas or an EEZ and the territorial sea of a foreign state (e.g., dead-end straits such as Head Harbour Passage, Strait of Tiran, and Gulf of Honduras). Nonsuspendable innocent passage applies.

Commentary

See Articles 35(c), 36, 37, 38(1), and 45 of UNCLOS.

2.5.3.2 International Straits between One Part of the High Seas or Exclusive Economic Zone and Another Part of the High Seas or Exclusive Economic Zone

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

Commentary

All ships and aircraft enjoy the unimpeded right of transit passage through international straits used for international navigation between one part of the high seas or EEZ and another part of the high seas or EEZ.[262]

Prior to UNCLOS, most strategic chokepoints—like the Straits of Gibraltar, Hormuz, and Malacca—contained a high seas corridor that allowed for free and unimpeded transit for all surface ships, submarines, and aircraft. With the expansion of the maximum breadth of the territorial sea from 3 to 12 nautical miles, more than one hundred of these straits used for international navigation are today overlapped by territorial seas. Under the prevailing law of the time, these straits would be governed by the regime of innocent passage, which does not include a right of overflight for aircraft or submerged transit for submarines.[263] As a compromise, UNCLOS balances coastal States' interests to expand their territorial seas with the international

262. UNCLOS, art. 38(1).
263. Territorial Sea Convention, arts. 2, 14.

community's interest in unimpeded navigation and overflight on, over, and under these strategic waterways.

The regime of transit passage applies in straits used for international navigation between one part of the high seas or an EEZ and another part of the high seas or an EEZ.[264] Transit passage would also apply in straits where the high seas or EEZ corridor is not suitable for international navigation.[265] Transit passage exists throughout the entire strait and its approaches, not just the area overlapped by the territorial seas of the littoral nation(s).[266]

The criteria for determining whether a strait qualifies as an international strait subject to the regime of transit passage is a geographical test. If the strait connects one part of the high seas or EEZ with another part of the high sea or EEZ, transit passage applies. In the *Corfu Channel* case, the Albanian government argued that, even though it was a strait in the geographical sense, the North Corfu Channel did not belong to the "class of international highways through which a right of passage exists" on the grounds that it was only of secondary importance and was not a necessary route between two parts of the high seas and was used almost exclusively for local traffic.[267] The ICJ held that the decisive criterion in determining whether a strait qualified as an international strait was not the volume of traffic passing through the strait or the importance of the strait, but rather its geographical situation connecting two parts of the high seas and its use for international navigation.[268] The Court, therefore, concluded that the North Corfu Channel belonged to the class of international highways through which passage cannot be prohibited by a coastal State in time of peace.[269]

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264. UNCLOS, art. 37.

265. *Id.* art. 36.

266. *See* ROACH, *supra* note 219, at 302, excerpting U.S. Department of the Navy, Judge Advocate General, telegram 061630Z (June 6, 1988), State Department File No. P92 0140-0820/0822, 2 1981–88 CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 2018; Charles A. Allen, *Persian Gulf Disputes*, *in* SECURITY FLASHPOINTS: OIL, ISLANDS, SEA ACCESS AND MILITARY CONFRONTATION 339, 340–41 (Myron H. Nordquist & John Norton Moore eds., 1998).

267. Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 28 (Apr. 9).

268. *Id.* at 28.

269. *Id.* at 29.

> Some States, like Canada, suggest that a strait must meet two criteria—geographic and functional—to qualify as an international strait. With regard to the second criterion, Canada maintains that potential use of the strait is insufficient; actual use is required to satisfy this requirement.[270] Canada argues that the Northwest Passage does not meet the second criterion articulated by the ICJ in the *Corfu Channel* case—that the strait has been a "useful route for international maritime traffic," as evidenced by the "total number of ships . . . passing through the channel."[271] According to the Canadian government, between 1903 and 2005, the Northwest Passage was transited only sixty-nine times by foreign-flagged vessels.[272] In the *Corfu Channel* case, the Court cited 2,884 transits in a twenty-month period.[273] Given the low number of transits of the strait by foreign-flagged vessels over the past hundred-plus years, as well as the extensive level of control exercised by the Canadian government over those vessels, Canada argues that the Northwest Passage does not have "a history as a useful route for international maritime traffic" and that the Northwest Passage is, therefore, not an international strait subject to the regime of transit passage.[274] The United States diplomatically protested Canada's claim to the Northwest Passage as internal waters in 1985, 1986, and 2010.[275]

Transit passage is defined as the exercise of the freedoms of navigation and overflight solely for the purpose of continuous and expeditious transit of a

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270. Donat Pharand, *The Legal Regime of the Arctic: Some Outstanding Issues*, 39 INTERNATIONAL JOURNAL 742, 787 (1984) [hereinafter Pharand 1]; Donat Pharand, *Canada's Sovereignty Over the Northwest Passage*, 10 MICHIGAN JOURNAL OF INTERNATIONAL LAW 653, 668–69 (1989) [hereinafter Pharand 2]; Donat Pharand, *The Arctic Waters and the Northwest Passage: A Final Revisit*, 38 OCEAN DEVELOPMENT & INTERNATIONAL LAW 3, 30 (2007) [hereinafter Pharand 3].

271. Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 28–29 (Apr. 9).

272. Pharand 1, *supra* note 270, at 789; Pharand 2, *supra* note 270, at 670; Pharand 3, *supra* note 270, at 31–33.

273. Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 29 (Apr. 9).

274. Pharand 1, *supra* note 270, at 790; Pharand 2, *supra* note 270, at 670; Pharand 3, *supra* note 270, at 42.

275. MCRM. *See* James Kraska, *The Law of the Sea Convention and the Northwest Passage*, 22 INTERNATIONAL JOURNAL OF MARINE & COASTAL LAW 257 (2007).

strait. Such transit is conducted in the normal modes of continuous and expeditious transit utilized by such ships and aircraft. Ships and aircraft, while exercising the right of transit passage, shall:

1. Proceed without delay through or over the strait

2. Refrain from any threat or use of force against the sovereignty, territorial integrity, or political independence of States bordering the strait

3. Refrain from any activities other than those incident to their normal modes of continuous and expeditious transit, unless rendered necessary by *force majeure*; distress; or in order to render assistance to persons, ships, or aircraft in danger or distress.

Commentary

Transit passage means the exercise of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait.[276] While exercising the right of transit passage, ships and aircraft shall (a) "proceed without delay through or over the strait"; (b) "refrain from any threat or use of force against the sovereignty, territorial integrity, or political independence of States bordering the strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations"; and (c) "refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress."[277]

Surface warships may transit in a manner consistent with sound navigational practices and the security of the force, including the use of their electronic detection and navigational devices (e.g., radar, sonar and depth-sounding devices, formation steaming, and the launching and recovery of aircraft). Military aircraft may operate in an international strait as part of a military formation with surface vessels—flying in a pattern that provides force protection while the entire formation transits the strait. Submarines are free to

276. UNCLOS, art. 38(2).
277. *Id.* art. 39(1).

transit international straits submerged, since that is their normal mode of operation.

Commentary

> The term "normal mode" means that submarines may transit while submerged, military aircraft are entitled to overfly in combat formation and with normal equipment operation, and surface ships may transit in a manner consistent with vessel security, to include formation steaming and launch and recovery of aircraft, where consistent with sound navigational practices.[278]

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

Commentary

> States bordering straits shall not hamper transit passage and shall give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge. There shall be no suspension of transit passage.[279]
>
> States bordering straits may adopt laws and regulations relating to transit passage through straits, in respect of (a) "the safety of navigation and the regulation of maritime traffic"; (b) "the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait"; (c) "the prevention of fishing, including the stowage of fishing gear"; and (d) "the loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration, or sanitary laws and regulations of

278. Letter of Transmittal from President Bill Clinton, United Nations Convention on the Law of the Sea, S. TREATY DOC. NO. 103-39, 103rd Cong., 19 (Oct. 7, 1994); KRASKA & PEDROZO, *supra* note 172, at 222.

279. UNCLOS, art. 44.

States bordering straits."[280] These laws and regulations "shall not discriminate in form or in fact among foreign ships or . . . have the practical effect of denying, hampering or impairing" the right of transit passage.[281]

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

Commentary

States bordering straits may designate sea lanes and prescribe traffic separation schemes (TSSs) for navigation in straits where necessary to promote the safe passage of ships.[282] Sea lanes and TSSs shall conform to generally accepted international regulations and shall be referred to the IMO for adoption prior to their designation.[283] Merchant ships in transit passage shall respect applicable sea lanes and TSSs.

All ships engaged in transit passage, including sovereign-immune vessels, shall comply with applicable provisions of the 1972 COLREGS.

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280. *Id.* art. 42(1).
281. *Id.* art. 42(2).
282. *Id.* art. 41(1).
283. *Id.* art. 41(3)–(4).

Commentary

> Ships in transit passage shall comply with (a) generally accepted international regulations, procedures, and practices for safety at sea, including the COLREGS; and (b) generally accepted international regulations, procedures, and practices for the prevention, reduction, and control of pollution from ships (MARPOL).[284] Aircraft in transit passage shall observe the Rules of the Air established by the International Civil Aviation Organization (ICAO) as they apply to civil aircraft. State aircraft will normally comply with such safety measures and will at all times operate with due regard for the safety of navigation. Aircraft in transit passage shall, at all times, monitor the radio frequency assigned by the competent internationally designated air traffic control authority or the appropriate international distress radio frequency.[285]

2.5.3.3 International Straits not Completely Overlapped by Territorial Seas

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

284. *Id.* art. 39(2).
285. *Id.* art. 39(3).

Commentary

Transit passage does not apply in a strait that contains a route through the high seas or EEZ that is of similar convenience as the strait, so long as the alternative route meets the test with respect to navigational and hydrographical characteristics.[286] This situation may arise if a coastal State chooses to maintain a high seas corridor between two land territories by not extending its territorial seas to 12 nautical miles. During UNCLOS III, Japan opposed any interpretation of the law regarding straits that would permit the Soviet Union to overfly the Tsugaru Strait.[287]

Japan elected not to claim a 12-nautical mile territorial sea throughout five of its international straits, called "designated areas."[288] The La Perouse or Sōya Strait separates the northernmost part of Hokkaido and Russia's Sakhalin Island. The Tsugaru lies between Honshu and Hokkaido. The Osumi Strait is off the southern tip of Kyushu. The Tsushima and Korea Straits separate Kyushu and South Korea. The Tsushima West Channel connects the Sea of Japan with the Cheju Strait and the East China Sea. In each of these straits, Japan claims a 3-nautical mile territorial sea, thus retaining an EEZ area through each strait in which high seas freedoms of navigation and overflight apply. By claiming only a 3-nautical mile territorial sea, Japan deprived Soviet and North Korean surface ships, submarines, and aircraft of the right to navigate shoreline-to-shoreline through these straits.[289] Korea also claims only 3 nautical miles on its side of the strait.[290]

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286. *Id.* art. 36.

287. National Security Council Memorandum, Evening Report for Zbigniew Brzezinski (Aug. 1, 1978) (Secret/sensitive; declassified, July 26, 2000).

288. Law No. 30 of 1977, Supplementary Provisions, art. 2.

289. *See* YURIKA ISHII, JAPANESE MARITIME SECURITY AND LAW OF THE SEA 93–107 (2022).

290. *See* CHI YOUNG PAK, THE KOREAN STRAITS (1988).

2.5.3.4 International Straits between a Part of the High Seas or Exclusive Economic Zone and the Territorial Seas of a Coastal State (Dead-end Straits)

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

Commentary

A non-suspendable right of innocent passage applies in straits used for international navigation between a part of the high seas or EEZ and the territorial sea of a foreign State.[291] There is no right of overflight through such straits. These so-called "dead-end" straits include Head Harbour Passage, which leads through the Canadian territorial sea to Passamaquoddy Bay, an inlet of the Bay of Fundy between the Canadian province of New Brunswick and Washington County, Maine.[292]

Another example is the Strait of Tiran. The regime of non-suspendable innocent passage for this prominent dead-end strait was incorporated into the Israeli-Egyptian peace treaty as a key pillar of peace between the two nations.[293] Article V of the treaty provides, inter alia, that

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291. UNCLOS, art. 45(1)(b), (2); Territorial Sea Convention, art. 16(4).

292. S. TREATY DOC. NO. 103-39, *supra* note 278, at 19. *See* James Kraska, *The Law of the Sea and LNG: Head Harbor Passage*, 37 CANADA-UNITED STATES LAW JOURNAL 131 (2012).

293. Mohamed ElBaradei, *The Egyptian-Israeli Peace Treaty and Access to the Gulf of Aqaba: A New Legal Regime*, 76 AMERICAN JOURNAL OF INTERNATIONAL LAW 532, 534 (1982); Ruth Lapidoth, *The Strait of Tiran, the Gulf of Aqaba, and the 1979 Treaty of Peace Between Egypt and Israel*, 77 AMERICAN JOURNAL OF INTERNATIONAL LAW 84, 85 (1983).

> the Parties consider the Strait of Tiran and the Gulf of Aqaba to be international waterways open to all nations for unimpeded and non-suspendable freedom of navigation and overflight. The parties will respect each other's right to navigation and overflight for access to either country through the Strait of Tiran and the Gulf of Aqaba.[294]

A similar provision is found in Article 14 of the Israel-Jordan peace treaty, which provides, in part, that

> the Parties consider the Strait of Tiran and the Gulf of Aqaba to be international waterways open to all nations for unimpeded and non-suspendable freedom of navigation and overflight. The Parties will respect each other's right to navigation and overflight for access to either Party through the Strait of Tiran and the Gulf of Aqaba.[295]

Note that both treaties provide for a right of overflight through the strait, even though a right of overflight normally does not apply in dead-end straits. Following the conclusion of UNCLOS III, the Israeli delegation indicated that Part III of the Convention was "a source of great difficulty for us, except to the extent that particular stipulations and understandings for a passage regime for specific straits, giving broader rights to their users, are protected, as is the case for some of the straits in my country's region, or of interest to my country."[296] Egypt's declaration accompanying its ratification of UNCLOS similarly states that

> the provisions of the 1979 Peace Treaty between Egypt and Israel concerning passage through the Strait of Tiran and the Gulf of Aqaba come within the framework of the general régime of waters forming straits referred to in part III of the Convention, wherein it is stipulated that the general régime

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294. Treaty of Peace, Egypt-Isr., art. V, Mar. 26, 1979, *reprinted in* 18 INTERNATIONAL LEGAL MATERIALS 362 (1979).

295. Treaty of Peace, Isr.-Jordan, art. 14(3), Oct. 26, 1994, *reprinted in* 34 INTERNATIONAL LEGAL MATERIALS 43 (1994).

296. Israeli statement in right of reply, *reprinted in* 17 OFFICIAL RECORDS, *supra* note 220, at 84.

> shall not affect the legal status of waters forming straits and shall include certain obligations with regard to security and the maintenance of order in the State bordering the strait.[297]

The United States took a similar position:

> The United States fully supports the continuing applicability and force of freedom of navigation and overflight for the Strait of Tiran and the Gulf of Aqaba as set out in the Peace Treaty between Egypt and Israel. In the United States view, the Treaty of Peace is fully compatible with the LOS Convention and will continue to prevail. The conclusion of the LOS Convention will not affect these provisions in any way.[298]

2.5.3.5 Straits Regulated in Whole or in Part by International Conventions

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

Commentary

> Part III of the Convention does not apply to the legal regime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits.[299]

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297. Egyptian Declaration concerning passage through the Strait of Tiran and the Gulf of Aqaba, Aug. 26, 1983, *Status of Treaties: United Nations Convention on the Law of the Sea*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec.

298. 128 Cong. Rec. S4089 (Apr. 27, 1982); Israeli statement in right of reply, *reprinted in* 17 OFFICIAL RECORDS, *supra* note 220, at 84.

299. UNCLOS, art. 35(c).

2.5.3.5.1 Turkish Straits

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

Specific provisions:

1. Only warships with a displacement of 10,000 tons or less may pass through the straits. Naval auxiliaries may have a displacement of up to 15,000 tons. The definitions of vessels of war and auxiliary vessels, and the method to calculate their tonnage are unique to the Convention and should be interpreted for operational/exercise purposes in consultation with United States Naval Forces Europe and/or United States Sixth Fleet.

2. The maximum aggregate tonnage of all non-Black Sea Powers in transit in the straits at any given moment is 15,000 tons. Transit shall begin in daylight. Aircraft shall not fly during transit.

3. The maximum aggregate tonnage of all non-Black Sea Powers in the Black Sea at any given moment is 45,000 tons. The aggregate tonnage of any single non-Black Sea Power in the Black Sea at any given moment is 30,000 tons.

4. Turkey must be officially notified through diplomatic channels at least 15 days prior to any passage of vessels through the straits. Notification requires name, type, number of ships in transit, destination, and date for return transit. Changes in the date of transit are subject to 3 days prior notice to the Turkish Government.

5. Any vessel from a non-Black Sea Power may operate in the Black Sea for no more than 21 days.

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

Commentary

Access to the Black Sea from the Mediterranean Sea is under the exclusive control of Turkey and is regulated by the 1936 Convention regarding the Régime of the Straits (Montreux Convention). The original parties to the convention include Australia, Bulgaria, France, Greece, Japan, Romania, Turkey, the Soviet Union, the United Kingdom, and Yugoslavia. The treaty affirms the principle of freedom of transit and navigation by sea in the Straits (Dardanelles, Sea of Marmara, and Bosphorus), subject to certain limitations in times of war and peace. There is no right of overflight of the Straits without Turkey's consent.[300]

In time of peace, all merchant ships, regardless of flag or cargo, enjoy complete freedom of transit and navigation in the Straits, subject to certain sanitary controls prescribed by Turkish law.[301] In time of war, if Turkey is not a belligerent, all merchant ships, regardless of flag or cargo, may transit the Straits subject to the same conditions applicable to merchant ships in time of peace.[302] If Turkey is a belligerent, neutral merchant ships may transit the Straits by day through designated routes, but only if they maintain their neutrality and do not assist the enemy.[303] If Turkey considers itself to be threatened with imminent danger of war, the peacetime rules[304] continue to apply, except that ships must transit the Straits by day through designated routes and Turkish authorities may impose mandatory pilotage.[305]

In time of peace, warships also enjoy passage rights through the straits but must provide advance notice to Turkey (eight days for

300. Montreux Convention, art. 1.
301. *Id.* art. 3.
302. *Id.* art. 4.
303. *Id.* art. 5.
304. *Id.* arts. 2, 3.
305. *Id.* art. 6.

Black Sea States and fifteen days for other States) before beginning their transit.[306] Submarines of non-Black Sea States, however, may not pass through the straits.[307] The Convention also imposes maximum aggregate tonnage restrictions and limitations on the number of non-riparian naval forces that can pass through the straits at one time,[308] as well as maximum aggregate tonnage limitations that non-riparian States can have in the Black Sea at one time.[309] Additionally, warships of non-riparian States may only stay in the Black Sea for twenty-one days.[310]

In time of war, if Turkey is not a belligerent, foreign warships enjoy complete freedom of transit and navigation through the straits under the same conditions that apply in peacetime, with one exception—Turkey may prohibit the transit of warships belonging to the belligerent powers unless it is a warship returning to its home port in the Black Sea.[311] If Turkey is a belligerent, the passage of foreign warships is left entirely to the discretion of the Turkish government.[312] Finally, if Turkey considers itself to be threatened with imminent danger of war, it may apply the provisions of Article 20.[313]

On February 24, 2022, Russia invaded Ukraine. That same day, Ukraine requested that Turkey close the Turkish Straits to Russian warships. On February 28, 2022, Turkey invoked Article 19 and announced that it was restricting passage of Ukrainian and Russian warships through the Straits unless they were returning to their home bases in the Black Sea and warned both riparian and non-riparian States not to send warships through the Straits:

> *'When Turkey is not a belligerent in the conflict, it has the authority to restrict the passage of the warring states' warships across the straits. If the warship is returning to its base in the Black Sea, the passage is not*

306. *Id.* art. 13.
307. *Id.* art. 12.
308. *Id.* art. 14.
309. *Id.* art. 18.
310. *Id.*
311. *Id.* art. 19.
312. *Id.* art. 20.
313. *Id.* art. 21.

> *closed. We adhere to the Montreux rules. All governments, riparian and non-riparian, were warned not to send warships across the straits."* Mevlut Cavusoglu, Foreign Minister of Turkey
>
> . . . .
>
> *"Turkiye will use its authority over the Turkish Straits under the 1936 Montreux Convention to prevent the Russia-Ukraine 'crisis' from further escalating."* Recep Tayyip Erdogan, President of Turkey[314]

Prohibiting the transit of all warships, whether belonging to the belligerents or not, exceeds Turkey's authority under Article 19, unless Turkey invoked Article 21 of the Convention. Turkey has not, however, officially announced that it considers itself to be threatened with imminent danger of war as a result of the Russia-Ukraine conflict.

2.5.3.5.2 Other International Straits and Canal Passage Governed by Specialized Agreements

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

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

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314. Tayfun Ozberk, *Turkey Closes the Dardanelles and Bosphorus to Warships*, NAVAL NEWS (Feb. 28, 2022), https://www.navalnews.com/naval-news/2022/02/turkey-closes-the-dardanelles-and-bosphorus-to-warships/.

2. Strait of Magellan. Free navigation is guaranteed through the Strait of Magellan by Article 5 of the 1881 Boundary Treaty between Argentina and Chile (reaffirmed in Article 10 of the 1984 Treaty of Peace and Friendship between Argentina and Chile). The United States understands the guarantee of free navigation provided for under the 1881 Treaty and confirmed by long-standing practice, demonstrates that flag States may transit the Strait of Magellan under circumstances at least as favorable as the right of transit passage under customary international law as reflected in UNCLOS.

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

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

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

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

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

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

Commentary

The Danish Straits are subject to the Treaty for the Redemption of the Sound Dues and a parallel treaty, the Convention between the United States and Denmark for the Discontinuance of Sound

Dues.[315] Both treaties recognize the "entire freedom of the navigation of the Sound and the Belts" and protection of "free and unencumbered navigation." Nonetheless, in 1999, Denmark enacted domestic legislation that requires States to provide prior notification through diplomatic channels if more than three warships of the same nationality are going to simultaneously transit through the Great Belt, the Samsø Belt, or the Sound. The law applies to all sovereign immune vessels.[316] The United State does not recognize the validity of the three-warship notice requirement, as notice requirements for warship innocent passage are inconsistent with international law regardless of the number of warships to which they apply.[317]

The Strait of Magellan is governed by the Boundary Treaty between the Argentine Republic and Chile, which states that the Strait is "neutralized forever, and free navigation is guaranteed to the flags of all nations."[318] Free navigation through the Straits was reaffirmed in the 1984 Treaty of Peace and Friendship between Argentina and Chile, which resolved the Beagle Channel dispute.[319] Traversing the Strait of Magellan requires a voyage from east to west that penetrates the internal waters of Chile along the Southwestern Atlantic and emerges through the internal waters and into the territorial sea of Chile in the Southeastern Pacific.

The geographical definition of a strait contemplates a natural waterway and not an artificially constructed canal. Thus, Part III of the Convention does not apply to man-made canals like the Suez, Panama, and Kiel Canals, which are generally controlled by bilateral or multilateral agreements between the States concerned.

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315. Treaty for the Redemption of the Sound Dues, Mar. 14, 1857, 116 Consol. T.S. 357; Convention on Discontinuance of Sound Dues between the United States and Denmark, Apr. 11, 1857, 116 Consol. T.S. 465.

316. Royal Ordinance No. 224, Ordinance Governing the Admission of Foreign Warships and Military Aircraft to Danish Territory in Time of Peace, §§ 1(1), 1(2), 3(2) (Apr. 16, 1999).

317. MCRM.

318. Boundary Treaty, Arg.-Chile, art. 5, July 23, 1881, 159 Consol. T.S. 45.

319. Treaty of Peace and Friendship, Arg.-Chile, art. 10, Nov. 29, 1984, 1399 U.N.T.S. 102; *see also* HUGO CAMINOS, THE LEGAL REGIME OF STRAITS IN THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 131 (1987).

The Suez Canal is governed by the Constantinople Convention, which provides that the Canal shall always be free and open to all ships, regardless of flag, and the parties agree not to interfere with the free use of the Canal in times of war or peace. The original parties to the Convention were Austria-Hungary, France, Italy, the Netherlands, Russia, Spain, Turkey, and the United Kingdom. The parties further agreed that the Canal shall never be subjected to the exercise of the right of blockade.[320] The Suez Maritime Canal Company was nationalized and replaced by the Suez Canal Authority (SCA) in 1956 to manage and operate the Canal.[321] In October 1956, the UN Security Council adopted a resolution stating that (1) "there should be free and open transit through the Canal without discrimination"; (2) "the sovereignty of Egypt should be respected"; and (3) "the operation of the Canal should be insulated from the politics of any country."[322] Six months later, Egypt announced that the Canal was open for normal traffic. The Egyptian declaration reaffirmed that the government would respect, observe, and implement "the terms and spirit of the Constantinople Convention of 1888 and the rights and obligations arising therefrom" and maintain "free and uninterrupted navigation for all nations within the limits of and in accordance with the provisions of the Constantinople Convention of 1888."[323] In 1975, Egypt once again reaffirmed that the SCA shall (1) not take any procedure that is contrary to the provisions of the Constantinople Convention concerning the free navigation of the Canal; (2) not give any privilege to a vessel that is not given, in the same circumstances, to other vessels; and (3) not discriminate against some vessels in favor of others.[324]

In 1903, Panama and the United States signed a treaty granting the United States an exclusive right to construct a ship canal across the

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320. Convention respecting the Free Navigation of the Suez Canal, Oct. 29, 1888, *reprinted in* 3 AMERICAN JOURNAL OF INTERNATIONAL LAW Supp. 123 (1909).

321. Nationalization Decree, Law No. 285 of 1956.

322. S.C. Res. 118 (Oct. 13, 1956).

323. Declaration on the Suez Canal and the Arrangements for Its Operation, ¶¶ 1, 3, U.N. Doc. A/3576 (S/3818) (Apr. 24, 1957).

324. A Republican Decree, Law No. 30 of 1975, The Organization of the Suez Canal Authority, art. 14. For information and documents relating to the administration of the Suez Canal, see SUEZ CANAL AUTHORITY, https://www.suezcanal.gov.eg/English/About/Pages/default.aspx.

> Isthmus of Panama to connect the Atlantic and Pacific Oceans. The treaty also granted the United States sovereignty over a 10-mile-wide strip of land, in perpetuity, to construct and operate the canal in exchange for a one-time payment of $10 million and an annual payment of $250,000.[325] The Panama Canal was completed in 1914 and was operated by the United States until it was turned over to Panama on December 31, 1999, pursuant to the Neutrality Treaty.[326]
>
> Transit rights through the Panama Canal are governed by the Neutrality Treaty. The Treaty provides that the Canal is an international waterway that in times of peace is permanently neutral and in times of war "shall remain secure and open to peaceful transit by the vessels of all nations on terms of entire equality," and "shall not be the target of reprisals in any armed conflict between other nations of the world."[327] Ships in transit are prohibited from committing hostile acts while in the Canal.[328]
>
> Transit rights are subject to the payment of tolls and other charges for transit and ancillary services, provided that the tolls and other charges are just, reasonable, equitable, and consistent with international law.[329] Ships must also comply with applicable rules and regulations that are just, equitable, and reasonable, and are limited to those necessary for safe navigation and efficient, sanitary operation of the Canal, to include ancillary services necessary for transit.[330] Vessels may also be "required to establish clearly the financial responsibility and guarantees for payment of reasonable and adequate indemnification . . . for damages resulting from acts or omissions of such vessels when passing through the Canal."[331] For sovereign immune vessels, the flag State may certify "that it shall observe its obligations under international law to pay for damages resulting from the act or omission of such vessels when passing through the Canal."[332]

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325. Convention for the Construction of a Ship Canal (Hay-Bunau-Varilla Treaty) arts. II, III, XIV, Nov. 18, 1903, 33 Stat. 2234, T.S. No. 431.
326. Neutrality Treaty, art. II, Sept. 7, 1977, 33 U.S.T. 39.
327. *Id.* art. II.
328. *Id.* art. II(c).
329. *Id.* arts. II(a), III(1)(c).
330. *Id.* arts. II(b), III(1)(a)–(b).
331. *Id.* art. III(1)(d).
332. *Id.*

Warships and naval auxiliaries of all nations are "entitled to transit the Canal, irrespective of their internal operation, means of propulsion, origin, destination or armament [or cargo], without being subjected, as a condition of transit, to inspection, search or surveillance."[333] However, sovereign immune vessels "may be required to certify that they have complied with all applicable health, sanitation and quarantine regulations."[334] Additionally, sovereign immune vessels are not required to "disclose their internal operation, origin, armament, cargo or destination."[335] Nonetheless, naval auxiliaries may be required to present written assurances certifying that they are government-owned or operated and are being used only on government non-commercial service.[336]

U.S. and Panamanian warships and naval auxiliaries get head-of-the-line privileges when transiting the Canal. U.S. and Panamanian vessels are assured transit through the Canal "as quickly as possible, without any impediment, with expedited treatment, and in case of need or emergency, to go to the head of the line of vessels in order to transit the Canal rapidly."[337] The determination of "need or emergency" to go to the head of the line "shall be made by the nation operating such vessel."[338]

Warships and naval auxiliaries are not subject to the rules relative to the transportation of dangerous cargos contained in the regulations.[339] Warships and naval auxiliaries also maintain their sovereign immunity privileges and rights to expeditious transit of the Canal but will comply with Panama Canal Authority regulations to the extent that regulations do not infringe on the vessels' sovereign immunity

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333. *Id.* art. III(1)(e).

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.* art. VI(1); Joint Statement of Oct. 14, 1977, 13 WEEKLY COMP. PRES. DOC. 1547 (Oct. 17, 1977) [hereinafter 1977 Joint Statement].

338. U.S. Senate, Understandings to the Neutrality Treaty, (d)(3). For Panama Canal Authority Maritime Regulations, see https://pancanal.com/en/maritime-services/maritime-regulations/.

339. Regulation for Navigation in Canal Waters, Agreement No. 360, art. 118 (Dec. 12, 2019), https://pancanal.com/wp-content/uploads/2021/07/Acuerdo-360.pdf.

or treaty rights. The toll on warships is "based on their fully loaded displacement."[340]

Effective December 31, 1999, only Panama may maintain military forces, defense sites, and military installations on the Isthmus.[341] Nonetheless, the Treaty provides that both the United States and Panama agree to maintain the neutrality of the Canal so that it "shall remain permanently neutral" and "open and secure to ships of all nations."[342] This means that both nations "shall, in accordance with their respective constitutional processes, defend the Canal against any threat to the regime of neutrality, and consequently shall have the right to act against any aggression or threat directed against the Canal or against the peaceful transit of vessels through the Canal."[343] Any U.S. military action in this regard must only be directed to ensure that the Canal remains "open, secure, and accessible," and must "never be directed against the territorial integrity or political independence of Panama."[344] In addition, notwithstanding Article V or any other provision of the Treaty, if the Canal is closed, or if its operations are interfered with, the United States and Panama "shall each independently have the right to take such steps as each deems necessary, in accordance with its constitutional processes, including the use of military force in the Republic of Panama, to reopen the canal or restore the operations of the canal, as the case may be."[345] This means that either party "may, in accordance with its constitutional processes, take unilateral action to defend the Panama Canal against any threat, as determined by the Party taking such action."[346]

Pursuant to Article VII of the Neutrality Treaty, the United States and Panama sponsored a resolution in the Organization of American States that calls on all States to accede to the Protocol to the

340. Regulation for the Admeasurement of Vessels to Assess Tolls for the Use of the Panama Canal, art. 22, https://pancanal.com/wp-content/uploads/2021/07/Regulation_for_Admeasurement_2019.pdf.

341. Neutrality Treaty, art. V.

342. *Id.* art. IV; 1977 Joint Statement, *supra* note 337.

343. 1977 Joint Statement, *supra* note 337.

344. *Id.*

345. U.S. Senate, Conditions to the Neutrality Treaty, (b)(1).

346. U.S. Senate, Understandings to the Neutrality Treaty, (d)(2).

Treaty.[347] Parties to the Protocol acknowledge the permanent neutrality of the Canal and associate themselves with the Treaty's objectives.[348] The parties also "agree to observe and respect the regime of permanent neutrality of the Canal in time of war as in time of peace, and to ensure that vessels of their registry strictly observe the applicable rules."[349]

The Kiel Canal is governed by the Treaty of Versailles,[350] which ended the First World War. The Treaty provides that the Canal "and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality."[351] In 1921, the SS *Wimbledon* was chartered to transport a cargo of 4,200 tons of munitions and artillery stores to the Polish Naval Base at Danzig. When the vessel presented itself at the entrance of the Kiel Canal, it was refused access by the Director of Canal Traffic. The refusal was based on the German Neutrality Orders of July 25 and 30, 1920, issued by Germany in connection with the Russo-Polish war, which prohibited the transit of military-related cargoes destined for Poland or Russia. France, Italy, Japan, and the United Kingdom brought suit against Germany before the Permanent Court of International Justice, requesting that the Court decide that (1) the German authorities were wrong in refusing free access to the Kiel Canal to the *Wimbledon* and (2) the German government pay damages in the amount of 174,082 francs, 86 centimes, with interest at 6 percent per annum from March 20, 1921. The German government responded by asking the Court to (1) declare that the German authorities were within their rights in refusing to allow the *Wimbledon* to pass through the Kiel Canal; and (2) reject the claim for compensation. The Court held, inter alia, that the German au-

347. Neutrality Treaty, art. VII(1).

348. Protocol to the Neutrality Treaty, art. I.

349. *Id.* art. II.

350. Treaty of Peace between the Allied and Associated Powers and Germany, June 28, *reprinted in* 13 U.S. DEPARTMENT OF STATE, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES: THE PARIS PEACE CONFERENCE (1919).

351. *Id.* art. 380.

> thorities were wrong in refusing access to the Kiel Canal to the *Wimbledon* and that Article 380 of the Treaty of Versailles prevented Germany from applying its Neutrality Orders to the Kiel Canal.[352]

2.5.4 Archipelagic Waters

2.5.4.1 Archipelagic Sea Lanes Passage

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

Archipelagic sea lanes passage may be exercised in a ship or aircraft's normal mode of operation. This means that submarines may transit while submerged and surface warships may carry out those activities normally undertaken during passage through such waters, including activities necessary to their security (e.g., formation steaming and the launching and recovery of aircraft as well as operating devices such as radar, sonar, and depth-sounding devices). Military aircraft may operate in an archipelagic sea lane as part of a military formation with surface vessels—flying in a pattern that provides force protection while the entire formation transits the sea lane.

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

352. S.S. Wimbledon (U.K. v. Ger.), Judgment, 1923 P.C.I.J. (ser. A) No. 1 (Aug. 17).

Commentary

Archipelagic sea lane passage (ASLP) applies within archipelagic waters and the adjacent territorial sea, whether the archipelagic State has designated archipelagic sea lanes (ASLs) or not, and is virtually identical to the transit passage regime. It includes the rights of navigation and overflight in the normal mode of operation solely for the purpose of continuous, expeditious, and unobstructed transit through archipelagic waters. As in the case of transit passage, normal mode includes submerged transit by submarines; the launching and recovery of aircraft and military devices for force protection; formation flying and steaming for force protection; and replenishment at sea and air-to-air refueling. All military and commercial ships and aircraft enjoy the right of ASLP while transiting through, under, or over archipelagic waters and adjacent territorial seas via all normal passage routes used for international navigation or overflight.[353]

Archipelagic States may not impede or suspend the right of ASLP for any reason.[354] Additionally, there is no requirement for ships or aircraft to request diplomatic clearance or provide prior notice to or receive consent from the archipelagic State to engage in ASLP. Archipelagic States may adopt laws and regulations relating to ASLP, but these laws and regulations shall not discriminate in form or in fact among foreign ships and shall not have the practical effect of denying, hampering, or impairing the right of ASLP.[355]

Archipelagic States may, but are not required to, designate ASL through their archipelagic waters suitable for continuous and expeditious passage of ships and aircraft. ASL proposals should include all normal routes used for international navigation and overflight and must be referred to the IMO with a view to their adoption prior to designation.[356] If the archipelagic State does not designate, or makes only a partial designation of, ASLs, vessels and aircraft of all States may continue to exercise the right of ASLP in all normal passage

353. UNCLOS, art. 53.
354. *Id.* arts. 44, 54.
355. *Id.* arts. 42, 44, 54.
356. *Id.* art. 53(9).

> routes used for international navigation and overflight through the archipelago.[357]
>
> To date, the only archipelagic State that has designated ASLs is Indonesia. When it introduced its proposal before the Maritime Safety Committee, Indonesia confirmed that the proposed designation was a "partial" ASL proposal and that the right of ASLP would continue to apply in "all other normal passage routes used for international navigation and overflight . . . including an east-west route and other associated spurs and connectors, through and over Indonesia's territorial sea and its archipelagic waters."[358] The IMO therefore adopted Indonesia's ASL proposal as a "partial system" because it did not include all normal routes used for international navigation, as required by Article 53 of UNCLOS.[359] Relevant IMO documents reflect that, where a partial ASL proposal has come into effect, the right of ASLP "may continue to be exercised through all normal passage routes used for international navigation or overflight in other parts of archipelagic waters" in accordance with UNCLOS.[360]

Archipelagic sea lanes are governed by the following rules:

1. An archipelagic sea lane is defined by a series of continuous axis lines from the point of entry into the territorial sea adjacent to the archipelagic

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357. *Id.* art. 53(12); IMO, Guidance for Ships Transiting Archipelagic Waters, IMO Doc. SN/Circ.206/Corr.1 (Mar. 1, 1999); IMO Res. MSC.71(69), Adoption of Amendments to the General Provisions on Ships' Routeing (Resolution A.572(14) as amended), annex 2 ¶ 6.7 (May 19, 1998); IMO Res. MSC.72(69), Adoption, Designation and Substitution of Archipelagic Sea Lanes (May 19, 1998); IMO, Guidance for Ships Transiting Archipelagic Waters, ¶ 2.1.1, IMO Doc. SN/Circ.206 (Mar. 1, 1999).

358. IMO, *Report of the Maritime Safety Committee*, ¶ 5.23.2, IMO Doc. MSC 69/22 (May 29, 1998); IMO, *Report of the Maritime Safety Committee*, ¶ 25.40, IMO Doc. MSC 77/26 (June 10, 2003).

359. IMO Res. MSC.71(69), *supra* note 357, annex 2 ¶¶ 3.2, 3.12; IMO Res. MSC.72(69), *supra* note 357, ¶ 1; IMO, Adoption, Designation, and Substitution of Archipelagic Sea Lanes, IMO Doc. SN/Circ.200 (May 26, 1998); IMO, Adoption, Designation, and Substitution of Archipelagic Sea Lanes, IMO Doc. SN/Circ.200/Add.1 (July 3, 2008); IMO, Adoption, Designation, and Substitution of Archipelagic Sea Lanes, IMO Doc. SN/Circ.202 (July 31, 2008).

360. IMO Res. MSC.71(69), *supra* note 357, annex 2 ¶ 6.7; IMO Doc. SN/Circ.206, *supra* note 357, ¶ 2.1.1.

waters, through those archipelagic waters, to the point of exit from the territorial sea beyond.

2. Ships and aircraft engaged in archipelagic sea lanes passage through such sea lanes are required to remain within 25 nautical miles on either side of the axis line.

3. Ships and aircraft engaged in archipelagic sea lanes passage must approach no closer to the coastline than 10 percent of the distance between the nearest point on that coast bordering the sea lane and the axis line (Figure 2-1).

Commentary

ASLs (sea lanes and air routes) shall be defined by a series of continuous axis lines from the entry points of passage routes to the exit points. Ships and aircraft in ASLP shall not deviate more than 25 nautical miles to either side of such axis lines during passage, provided that ships and aircraft shall not navigate closer to the coasts than 10 percent of the distance between the nearest points on islands bordering the sea lane.[361] If an archipelagic State designates ASLs, it may also prescribe traffic separation schemes (TSSs) for the safe passage of ships through narrow channels in such sea lanes.[362] The archipelagic State shall clearly indicate the axis of the ASLs and the TSSs designated or prescribed by it on charts to which due publicity shall be given. Ships in ASLP shall respect applicable ASLs and TSSs.

361. UNCLOS, art. 53(5).
362. *Id.* art. 53(6).

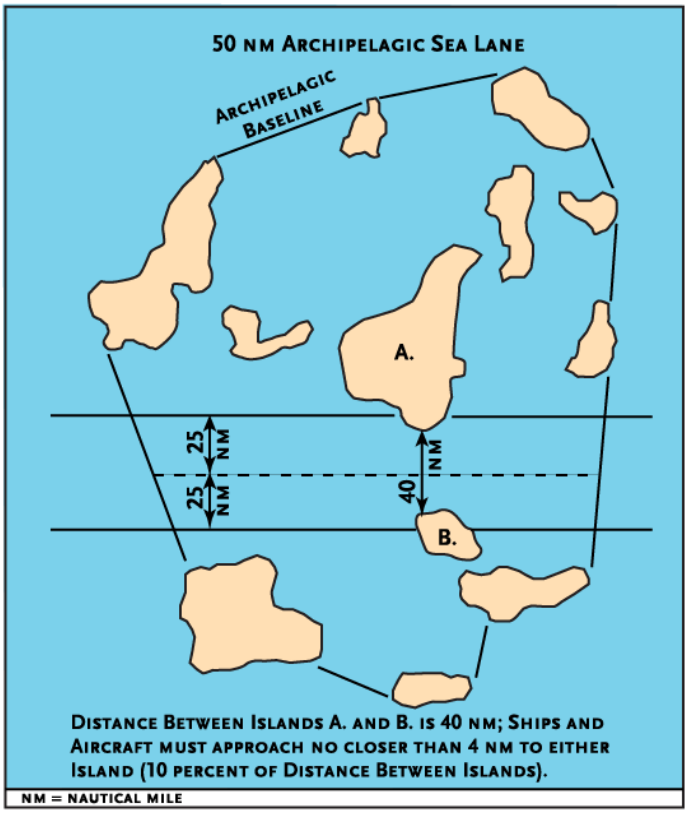

Figure 2-1. A Designated Archipelagic Sea Lane

The right of archipelagic sea lanes passage through designated sea lanes as well as through all normal routes cannot be hampered or suspended by the archipelagic State for any purpose. In situations where an archipelagic State has not designated or only partially designated sea lanes, vessels and aircraft may exercise the navigational regime of archipelagic sea lanes passage through all routes normally used for international navigation.

Commentary

Archipelagic States may not impede or suspend the right of ASLP for any reason.[363] Additionally, there is no requirement for ships or aircraft to request diplomatic clearance or provide prior notice to or

363. *Id.* arts. 44, 54.

receive consent from the archipelagic State to engage in ASLP. Archipelagic States may adopt laws and regulations relating to ASLP, but these laws and regulations shall not discriminate in form or in fact among foreign ships and shall not have the practical effect of denying, hampering, or impairing the right of ASLP.[364]

2.5.4.2 Innocent Passage within Archipelagic Waters

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

Commentary

The right of innocent passage applies in archipelagic waters not covered by the ASLP regime.[365]

2.6 NAVIGATION IN AND OVERFLIGHT OF INTERNATIONAL WATERS

2.6.1 Contiguous Zones

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

364. *Id.* arts. 42, 44, 54.
365. *Id.* art. 52.

Commentary

In the contiguous zone, the coastal State may exercise the control necessary to "(a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; (b) punish infringement of the above laws and regulations committed within its territory or territorial sea."[366] The maximum breadth of the contiguous zone may not exceed 24 nautical miles.[367] In the contiguous zone, all ships and aircraft enjoy high seas freedoms of navigation and overflight and other internationally lawful uses of the sea related to those freedoms.[368]

The contiguous zone is not a security zone. See § 1.6.4 for a discussion of security zones and see § 1.6.1 for a general discussion of the contiguous zone.

Consistent with international law, the U.S. proclamation establishing the contiguous zone preserves "high seas freedoms of navigation and overflight and the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to those freedoms, such as those associated with the operation of ships, aircraft, and submarine cables and pipelines," for ships and aircraft of all nations.[369]

2.6.2 Exclusive Economic Zones

The coastal State's jurisdiction and control over the EEZ is limited to matters concerning the exploration, exploitation, management, and conservation of the resources of those international waters. The coastal State may exercise in the zone jurisdiction over the establishment and use of artificial islands, installations, and structures having economic purposes; over marine scientific research (with reasonable limitations); and over some aspects of marine environmental protection. The coastal State cannot unduly restrict or impede the exercise of the freedoms of navigation in and overflight of the EEZ. Since all ships and aircraft, including warships and military aircraft, enjoy the

366. *Id.* art. 33(1); Territorial Sea Convention, art. 24(1).
367. UNCLOS, art. 33(2).
368. S. TREATY DOC. NO. 103-39, *supra* note 278, at 23.
369. Proclamation No. 7219, Contiguous Zone of the United States, 64 Fed. Reg. 48,701 (Sept. 2, 1999).

high seas freedoms of navigation and overflight and other internationally lawful uses of the sea related to those freedoms—in and over those waters—the existence of an EEZ in an area of naval operations need not, of itself, be of operational concern to the naval commander.

Commentary

The establishment of the EEZ represents a substantial change in the law of the sea. The new zone balances the rights of coastal States to the resources off their coast with the interests of all States in preserving high seas freedoms of navigation and overflight and other international lawful uses of the seas.[370]

The broad principles of the EEZ reflected in Articles 55–75 of UNCLOS were established as customary international law by the broad consensus achieved at UNCLOS III and the practices of nations.[371]

In the EEZ, coastal States have:

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
(b) jurisdiction . . . with regard to:
  (i) the establishment and use of artificial islands, installations and structures;
  (ii) marine scientific research;
  (iii) the protection and preservation of the marine environment;

370. S. TREATY DOC. NO. 103-39, *supra* note 278, at 5–6.

371. Continental Shelf (Tunis. v. Libya), Judgment, 1982 I.C.J. 18; Delimitation of the Maritime Boundary of the Gulf of Maine Area (Can./U.S.), Judgment, 1984 I.C.J. 246, 294; AMERICAN LAW INSTITUTE, RESTATEMENT (FOURTH) FOREIGN RELATIONS LAW § 408 reporters' note 3 at 198 (2017). *See also* 2 VIRGINIA COMMENTARY at 489–821.

(c) other rights and duties provided for in this Convention.[372]

In exercising their rights and performing their duties in the EEZ, coastal States shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of the Convention.[373] The uses of the terms "sovereign rights" and "jurisdiction" are intentional—they denote that coastal States have functional rights over certain matters in the EEZ but do not exercise sovereignty.[374]

Coastal States also have the exclusive right to construct and to authorize and regulate the construction, operation, and use of (a) artificial islands; (b) installations and structures for economic and scientific purposes; and (c) installations and structures that may interfere with the exercise of coastal State resource rights.[375] This provision does not preclude user States from deploying listening or other security-related devices in foreign EEZs.[376] Coastal States have exclusive jurisdiction over such artificial islands, installations, and structures, including jurisdiction with regard to customs, fiscal, health, safety, and immigration laws and regulations.[377] Coastal States may, where necessary, also establish reasonable safety zones (not to exceed 500 meters) around such artificial islands, installations, and structures in which they may take appropriate measures to ensure the safety of navigation and of the artificial islands, installations, and structures.[378] All ships shall respect these safety zones and shall comply with IMO standards regarding navigation in the vicinity of artificial islands, installations, structures, and safety zones.[379] Coastal States may not, however, establish artificial islands, installations, and structures (and safety zones around them) if it may interfere with the use of recognized sea lanes essential to international navigation.[380]

372. UNCLOS, art. 56(1).
373. *Id.* art. 56(2).
374. S. TREATY DOC. NO. 103-39, *supra* note 278, at 23.
375. UNCLOS, art. 60(1).
376. S. TREATY DOC. NO. 103-39, *supra* note 278, at 24.
377. UNCLOS, art. 60(2).
378. *Id.* art. 60(4)–(5).
379. *Id.* art. 60(6).
380. *Id.* art. 60(7).

When exercising their sovereign rights over the living resources in the EEZ, coastal States may take such measures, including boarding, inspection, arrest, and judicial proceedings, as may be necessary to ensure compliance with their laws and regulations.[381] "Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security."[382] Coastal State penalties for violations of fisheries laws and regulations in the EEZ may not include imprisonment, in the absence of an agreement to the contrary, or any form of corporal punishment.[383]

In the EEZ, all States enjoy the high seas freedoms of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft, and submarine cables and pipelines.[384] In exercising their rights and performing their duties in the EEZ, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with UNCLOS and other rules of international law.[385]

Twenty-four States purport either to limit the right of foreign States to conduct military operations, exercises, or maneuvers in the contiguous zone, in the EEZ, or on the continental shelf, or to authorize, construct, and regulate all types of installations and structures on their continental shelf. These States include Bangladesh, Brazil, Burma (Myanmar), Cambodia (contiguous zone security jurisdiction), Cape Verde, China, Ecuador, India, Indonesia, Iran, Kenya, Malaysia, the Maldives, Mauritius, Nicaragua (contiguous zone security jurisdiction), North Korea, Pakistan, the Philippines, Portugal, Sudan (contiguous zone security jurisdiction), Syria (contiguous zone security jurisdiction), Thailand, Uruguay, and Vietnam.[386]

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381. *Id.* art. 73(1).
382. *Id.* art. 73(2).
383. *Id.* art. 73(3).
384. *Id.* art. 58(1).
385. *Id.* art. 58(3).
386. MCRM. *See also* LOS BULLETIN No. 5, at 15–16 (1985); *Status of Treaties: United Nations Convention on the Law of the Sea*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en.

Nearly all of these States, however, take no practical step to vindicate their claim or enforce their law against foreign-flagged warships operating in their EEZ. In the past twenty years, only China has used coercion or threatened the use of force, and even China has done so only occasionally. The United States does not recognize such claims, which are not within the competence of coastal States under the Convention.[387] For example, China argues that military activities, including intelligence collection, are inconsistent with the "peaceful purposes" provisions of the Convention. Article 301 provides that "[i]n exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations."[388] Such an argument is not supported by a plain reading of the Convention, the deliberations of the Security Council, or long-standing State practice.

The text of Article 301 mirrors the text of Article 2(4) of the UN Charter, which prohibits armed aggression in international relations between States. Article 2(4) requires member States to "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."[389]

UNCLOS, however, distinguishes between "threat or use of force" and other military-related activities, such as intelligence collection. Article 19(2)(a) repeats the language of Article 301, prohibiting ships in innocent passage from engaging in "any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State," while Article 19(2)(c) prohibits ships engaged in innocent passage from "collecting information to the prejudice of the defence or security of the coastal State." This differentiation clearly demonstrates that UNCLOS does not equate the "threat or use of force" with intelligence collection. Rather, the test of whether

387. S. TREATY DOC. NO. 103-39, *supra* note 278, at 24.
388. UNCLOS, art. 301.
389. U.N. Charter, art. 2(4).

a military activity is "peaceful" is determined by Article 2(4) of the UN Charter and other obligations under international law, including the inherent right of individual and collective self-defense reflected in Article 51 of the Charter.[390]

Most legal experts who have commented on this issue agree that "based on various provisions of the Convention . . . it is logical . . . to interpret the peaceful . . . purposes clauses as prohibiting only those activities which are not consistent with the UN Charter."[391] Thus, the peaceful purposes clause in the Convention does not "prohibit all military activities on the high seas and in EEZs, but only those that threaten or use force in a manner inconsistent with the Charter."[392]

During the 1960s, the Security Council addressed the issue of peacetime surveillance. Following the shoot down of an American U-2 spy plane near Sverdlovsk in May 1960, a proposal by the Soviet Union to have the Security Council adopt a resolution that would have labelled U-2 flights as "acts of aggression" under the UN Charter was rejected by a vote of 7 to 2 (with 2 abstentions). This decision confirms that peacetime intelligence collection (even in national airspace) does not violate the Charter.[393] Four months later, Soviet forces shot down an American RB-47 surveillance aircraft operating over the Barents Sea off the Kola Peninsula. The United States claimed that the aircraft was operating in international airspace, while the Soviet Union alleged that the aircraft was within its national airspace when it was engaged. Nevertheless, Soviet efforts to have the Security Council designate the U.S. surveillance flight an act of aggression once again failed by a vote of 9 to 2.[394]

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390. 3 VIRGINIA COMMENTARY at 89–91; 5 OFFICIAL RECORDS OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 62, U.N. Doc. A/CONF.62/WS/67 (1973–82); *see also* Oxman, *supra* note 218, at 829–32.

391. Moritaka Hayashi, *Military and Intelligence Gathering Activities in the EEZ: Definition of Key Terms*, 29 MARINE POLICY 123–37 (2005).

392. *Id.*

393. U.N. SCOR, 15th yr., Suppl. for Apr.–June, at 7, U.N. Doc. S/4314 (May 18, 1960); U.N. SCOR, 15th yr., 857th mtg., ¶¶ 9, 99; U.N. SCOR, 15th yr., 860th mtg., ¶ 87.

394. U.N. SCOR, 15th yr., Suppl. for July–Sept., at 12, U.N. Doc. S/4384; U.N. SCOR, 15th yr., 880th mtg., ¶ 58; U.N. SCOR, 15th yr., 883rd mtg., ¶ 187.

A similar conclusion is reflected in a 1985 Report of the Secretary-General of the United Nations. The report finds that the Convention declares that "the high seas shall be reserved for peaceful purposes," but does not define the term "peaceful purposes." Nonetheless, the Convention provides an answer when it declares in Article 301:

> In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.

Thus, the report concludes that "military activities which are consistent with the principles of international law embodied in the Charter . . . , in particular with Article 2, paragraph 4, and Article 51, are not prohibited by the Convention on the Law of the Sea."[395]

Declarations for Italy made upon signature and confirmed upon ratification on January 13, 1995 state:

> Italy wishes also to confirm the following points made in its written statement dated 7 March 1983: according to the Convention, the Coastal State does not enjoy residual rights in the exclusive economic zone. In particular, the rights and jurisdiction of the Coastal State in such zone do not include the right to obtain notification of military exercises or manoeuvres or to authorize them.

In addition to the United States, Germany, Italy, and the Netherlands have each rejected coastal State claims that purport to regulate military activities of foreign naval forces in the EEZ.[396] Similarly, the Declaration for the Netherlands, made on February 13, 2009, states:

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395. U.N. Secretary-General, *Study on the Naval Arms Race*, ¶ 188, U.N. Doc. A/40/535 (Sept. 17, 1985).

396. See the Declaration for Italy with respect to the declaration made by India upon ratification, as well as the similar declarations made previously for Brazil, Cape Verde, and Uruguay, Nov. 24, 1995, and the Declaration for Italy with regard to the declaration made by Ecuador upon accession, Oct. 23, 2013.

> The Convention does not authorize the coastal state to prohibit military exercises in its EEZ. The rights of the coastal state in its EEZ are listed in article 56 of the Convention, and no such authority is given to the coastal state. In the EEZ all states enjoy the freedoms of navigation and overflight, subject to the relevant provisions of the Convention.

Likewise, the Declaration for Germany, made on October 14, 1994, states: "According to the Convention, the coastal State does not enjoy residual rights in the exclusive economic zone. In particular, the rights and jurisdiction of the coastal State in such zone do not include the rights to obtain notification of military exercises or manoeuvres or to authorize them."[397]

Accordingly, "[m]ilitary activities, such as anchoring, launching and landing of aircraft, operating military devices, intelligence collection, exercises, operations and conducting military surveys are recognized historic high seas uses that are preserved by article 58."[398] Thus, all States have the right to conduct military activities within the EEZ consistent with their due regard obligation to coastal State resource and other rights.[399]

The concept of "due regard" balances the obligations of the coastal State and other States within the EEZ. Nonetheless, "it is the duty of the flag State, not the right of the coastal State, to enforce this 'due regard' obligation."[400]

See § 1.6.2 for a general discussion of the EEZ.

The U.S. EEZ proclamation of 1983 preserves for all States high seas rights and freedoms that are not resource-related. The proclamation recognizes that the EEZ "remains an area beyond the territory and territorial sea of the United States in which all States enjoy the high

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397. The declarations supporting foreign military activities in the EEZ are available at *United Nations Convention on the Law of the Seal*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ParticipationStatus.aspx?clang=_en.

398. S. TREATY DOC. NO. 103-39, *supra* note 278, at 24.

399. *Id.*

400. *Id.*

> seas freedoms of navigation and overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the seas."[401] Thus, within the U.S. EEZ, "all nations will continue to enjoy the high seas rights and freedoms that are not resource related."[402]

2.6.2.1 Marine Scientific Research

Coastal States may regulate marine scientific research (MSR) conducted in marine areas under their jurisdiction. This includes the EEZ and the continental shelf. Marine scientific research includes activities undertaken in the ocean and coastal waters to expand general scientific knowledge of the marine environment for peaceful purposes and can include:

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

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

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401. Proclamation No. 5030, Exclusive Economic Zone of the United States, 48 Fed. Reg. 10605 (Mar. 14, 1983); Statement on United States Oceans Policy, 1 PUB. PAPERS 378–79 (Mar. 10, 1983) [hereinafter U.S. Ocean Policy Statement].

402. White House, National Security Decision Directive No. 83 (Mar. 10, 1983) (Confidential; partially declassified on Aug. 10, 1992).

Commentary

More than 80 percent of the world's oceans remain unexplored and unmapped. UNCLOS promotes and facilitates marine scientific research (MSR) throughout the various maritime zones, requiring States and competent international organizations to cooperate in the development and conduct of MSR.[403] UNCLOS, therefore, plays a critical role in helping States understand and manage the marine environment and its resources.

UNCLOS does not define "marine scientific research" but it refers to "those activities undertaken in the ocean and coastal waters to expand knowledge of the marine environment and its processes."[404] It includes "physical oceanography, marine chemistry, marine biology, fisheries research, scientific ocean drilling and coring, geological and geophysical research, and other activities with a scientific purpose."[405] MSR must, however, be distinguished from hydrographic surveys and military surveys (military marine data collection). See § 2.6.2.2.

All States and competent international organizations may conduct MSR subject to certain limitations.[406] Foreign-flag vessels transiting the territorial sea or archipelagic waters in innocent passage are prohibited from carrying out MSR activities without the consent of the coastal or archipelagic State.[407] Similarly, foreign ships engaged in transit passage or archipelagic sea lanes passage may not carry out MSR activities in international straits or archipelagic sea lanes without prior authorization of the bordering States or the archipelagic State.[408] MSR in the EEZ and on the continental shelf also requires coastal State consent.[409] Once a request is made, the researching State may presume that consent has been granted and may proceed with

403. UNCLOS, art. 239.

404. S. TREATY DOC. NO. 103-39, *supra* note 278, at 79–80.

405. National Oceanic and Atmospheric Administration, Office of General Counsel, *Marine Scientific Research* (updated Dec. 9, 2020).

406. UNCLOS, art. 238.

407. *Id.* arts. 19(2)(j), 52, 245.

408. *Id.* arts. 40, 54.

409. *Id.* arts. 56, 77, 246.

its project six months after the date on which it has provided the required information to the coastal State unless, within four months of receiving the information, the coastal State informs the researching State that consent is being withheld.[410] On the high seas and deep seabed (the Area), all States and competent international organizations have a right to conduct MSR.[411]

States and competent international organizations intending to conduct MSR in a foreign EEZ or on a foreign continental shelf must provide the coastal State six-month advance notification. The request shall contain the following information:

> (a) the nature and objectives of the project;
> (b) the method and means to be used, including name, tonnage, type and class of vessels and a description of scientific equipment;
> (c) the precise geographical areas in which the project is to be conducted;
> (d) the expected date of first appearance and final departure of the research vessels, or deployment of the equipment and its removal, as appropriate;
> (e) the name of the sponsoring institution, its director, and the person in charge of the project; and
> (f) the extent to which it is considered that the coastal State should be able to participate or to be represented in the project.[412]

Although permission is normally granted, coastal States may withhold consent if the MSR project (a) "is of direct significance for the exploration and exploitation of natural resources"; (b) "involves drilling into the continental shelf, the use of explosives or the introduction of harmful substances into the marine environment"; (c) "involves the construction, operation or use of artificial islands, installations and structures"; (d) contains information from the researching State regarding the nature and objectives of the project that is inaccurate; or (e) involves a researching State that has "outstanding

410. *Id.* art. 252.
411. *Id.* arts. 87, 256, 257.
412. *Id.* art. 248.

obligations to the coastal State from a prior research project."[413] Thus, coastal State consent may not be arbitrarily withheld, thereby maximizing access for research activities while recognizing coastal State resource interests.

To encourage MSR, coastal State consent is implied unless the coastal State informs the requesting State or organization, within four months of receipt of the request, that (a) it has withheld its consent; (b) the information provided by the requesting State or international organization "regarding the nature or objectives of the project does not conform to the manifestly evident facts"; (c) it "requires supplementary information relevant to conditions and the information" provided by the requesting State or international organization; or (d) outstanding obligations exist with respect to a previous MSR project carried out by the requesting State or organization.[414]

If a coastal State lacks sufficient grounds to withhold consent, it can still protect its interests against potential surreptitious activities by imposing conditions on the researching State. For example, an MSR request may be a subterfuge to collect military intelligence against the coastal State. Under these circumstances, the coastal State could exercise its right to participate or be represented in the MSR project. This could include having a coastal State representative on board the research vessel or scientific research installation without obligation to contribute to the cost of the project.[415] The coastal State may also require the researching State to provide it with preliminary reports, as well as with the final results and conclusions after the project is completed.[416] The coastal State may additionally request the researching State to provide all data, which may be copied, and portions of samples derived from the project, as well as an assessment of such data, samples, and research results.[417] The United States, for example, requires submission of a copy of all data collected during a foreign research project, as well as the project's final report, to the

413. *Id.* art. 246(5).
414. *Id.* art. 252.
415. *Id.* art. 249(1)(a).
416. *Id.* art. 249(1)(b).
417. *Id.* art. 249(1)(c).

National Oceanic and Atmospheric Administration's National Center for Environmental Information.[418]

Additionally, a coastal State may suspend or cease MSR activities in progress within its EEZ or on its continental shelf if (a) the research activities are not being conducted in accordance with the information provided by the requesting State or international organization upon which coastal State consent was based; (b) the requesting State or competent international organization "fails to comply with the provisions of article 249 concerning the rights of the coastal State" with respect to the MSR project; (c) there is a major change to the MSR project or activities; or (d) the requesting State or international organization does not rectify within a reasonable period of time any of the discrepancies identified by the coastal State.[419]

The United States is a recognized leader in MSR and has consistently promoted maximum freedom for such research. It is also U.S. policy to promote the free and full disclosure of the results of MSR and States are encouraged to publicize and disseminate knowledge resulting from their MSR activities.[420] Nonetheless, if release of the data has direct significance on the exploration and exploitation of natural resources in the EEZ or on the continental shelf, coastal States may require their consent before such information is released to the public.[421]

MSR activities by the United States will contribute to the following objectives: (1) accelerate the development of ocean resources; (2) expand human knowledge of the marine environment; (3) encourage private investment in the exploration, technological development, marine commerce, and economic utilization of marine resources; (4) preserve the role of the United States as a leader in MSR and resource development; (5) advance education and training in marine science; (6) develop and improve the capabilities, performance, use, and efficiency of technology used to explore, research, survey, recover re-

418. NOAA, *supra* note 405.
419. UNCLOS, art. 253.
420. *Id.* arts. 239, 242–44, 255; S. TREATY DOC. NO. 103-39, *supra* note 278, at 79.
421. UNCLOS, art. 249(2).

sources, and transmit energy in the marine environment; (7) effectively use scientific and engineering resources in close cooperation between the public and private sectors to avoid unnecessary duplication of effort and waste; and (8) cooperate with other nations and international organizations in MSR activities.[422]

Despite the Convention's provisions on coastal State jurisdiction over MSR in the EEZ, the United States did not avail itself of that right in its 1983 Ocean Policy Statement because of the U.S. interest in encouraging MSR and avoiding unnecessary burdens on researching States.[423] However, in 2020, the United States amended its MSR policy to increase maritime domain awareness and reduce potential exposure to security, economic, and environmental risks. The new policy requires advance consent for all cases of foreign MSR in the U.S. EEZ or on its continental shelf.[424]

Coastal State consent is implied unless the coastal State informs the requesting State or organization within four months of receipt of the request that (a) it has withheld its consent; (b) the information provided by the requesting State or international organization "regarding the nature or objectives of the project does not conform to the manifestly evident facts"; (c) it "requires supplementary information relevant to conditions and the information" provided by the requesting State or international organization; or (d) outstanding obligations exist with respect to a previous MSR project carried out by the requesting State or organization.[425]

There is certain oceanographic research and similar activities that are not governed by the provision of MSR in Part XIII of UNCLOS,

422. 33 U.S.C. § 1101.

423. U.S. Ocean Policy Statement, *supra* note 401.

424. Proclamation No. 10071, Revision to United States Marine Scientific Research Policy, 85 Fed. Reg. 59165 (Sept. 18, 2020).

425. UNCLOS, art. 252.

such as operational oceanography, prospecting for natural resources,[426] environmental monitoring,[427] underwater cultural heritage,[428] biologging, citizen science, aircraft sensing beyond the territorial sea, and satellite remote sensing.[429] Hydrographic surveys and military surveys are also not regulated by Part XIII and do not constitute MSR.[430]

2.6.2.2 Hydrographic Surveys and Military Surveys

Although coastal State consent must be obtained in order to conduct MSR in its EEZ, the coastal State may not regulate hydrographic surveys or military surveys conducted beyond its territorial sea, nor may it require notification of such activities. A hydrographic survey is the collection of information for maritime cartography (commonly used to make navigational charts and similar products to support safety of navigation).

A hydrographic survey may include measurements of the depth of water, configuration and nature of the natural bottom, direction and force of currents, heights and times of tides and water stages, and hazards to navigation.

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

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

426. *Id.* arts. 56, 77.

427. *Id.* art. 204.

428. *Id.* arts. 33, 303; Underwater Cultural Heritage Convention.

429. ROACH, *supra* note 219, ch. 15. *See also* James Kraska et al., *Bio-Logging of Marine Migratory Species in the Law of the Sea*, 51 MARINE POLICY 394 (2014).

430. *See* Raul Pedrozo, *Coastal State Jurisdiction over Marine Data Collection in the Exclusive Economic Zone: U.S. Views*, *in* MILITARY ACTIVITIES IN THE EEZ: A U.S.-CHINA DIALOGUE ON SECURITY AND INTERNATIONAL LAW IN THE MARITIME COMMONS 37–48 (Peter Dutton ed., 2010).

survey or marine scientific activity (e.g., military surveys, hydrographic surveys, and MSR).

Commentary

While coastal States may regulate MSR in their EEZ, they do not have jurisdiction over hydrographic surveys and military surveys (military marine data collection) beyond their territorial sea. States that purport to limit military marine data collection (surveillance operations and oceanographic surveys) in their EEZ argue that such operations are akin to MSR and are therefore subject to coastal State control. That argument is clearly flawed. To the extent that coastal State laws purport to regulate hydrographic surveys and military marine data collection activities, to include military oceanographic surveys and underwater, surface, and aviation surveillance and reconnaissance missions, they are inconsistent with State practice and customary international law, as well as the plain language of UNCLOS.[431]

China, for example, enacted domestic legislation and implementing regulations in 1998 that prohibit all types of marine data collection—MSR, hydrographic surveys, and military marine data collection—in its EEZ without Chinese consent.[432] The law's implementing regulations similarly require Chinese consent for foreign-related marine data collection activities in the EEZ.[433] Additionally, the 2002 Surveying and Mapping Law requires foreign organizations and individuals that want to engage in surveying and mapping operations in "sea areas under the jurisdiction" of China to obtain the prior approval of competent Chinese authorities.[434] Surveying and mapping are

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431. Raul Pedrozo, *Military Activities in the Exclusive Economic Zone: East Asia Focus*, 90 INTERNATIONAL LAW STUDIES 514, 525 (2014).

432. Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf, Order No. 6, art. 8 (promulgated by the Standing Committee National People's Congress, Feb. 26, 1998, effective June 26, 1998).

433. Provisions on the Administration of Foreign-Related Maritime Scientific Research, June 18, 1996 (promulgated by Decree No. 199 of the State Council of the People's Republic of China, June 18, 1996).

434. Law of the People's Republic of China on the Surveying and Mapping, art. 7 (promulgated by the Standing Committee National People's Congress, Aug. 29, 2002, effective Dec. 1, 2002).

broadly defined in the law to include the "surveying, collection and presentation of the shape, size, spatial location and properties of the natural geographic factors or the manmade facilities on the surface, as well as the activities for processing and providing of the obtained data, information and achievements."[435] Beijing's application of the 1998 and 2002 laws is inconsistent with UNCLOS because the laws purport to regulate hydrographic surveys and military marine data collection in the EEZ, in addition to foreign MSR.[436]

Although UNCLOS does not define the different types of marine data collection, it clearly differentiates between MSR, surveys, and military activities in various articles. The term "marine scientific research" was specifically chosen by the drafters of the Convention to distinguish MSR from other types of marine data collection, such as hydrographic surveys and military oceanographic surveys. Ships in innocent passage, for example, may not engage in "research or survey activities."[437] A similar restriction applies to ships engaged in transit passage: "marine scientific research and hydrographic survey ships . . . may not carry out any research or survey activities" without prior authorization of the States bordering the strait.[438] The same prohibition applies to ships engaged in ASLP and ships transiting archipelagic waters in innocent passage.[439] Moreover, coastal State jurisdiction over marine data collection in the EEZ or on the continental shelf is limited to MSR.[440] Similarly, Article 87(1)(f) refers only to "scientific research." Thus, while coastal States may regulate MSR and surveys in the territorial sea, archipelagic waters, international straits, and archipelagic sea lanes, they may not regulate hydrographic surveys in the other maritime zones, including the contiguous zone and the EEZ. Hydrographic surveys and other military marine data collection activities are considered high seas freedom of navigation

435. *Id.* art. 2.
436. Pedrozo, *supra* note 430. *See also* ROACH, *supra* note 219, at 442–58.
437. UNCLOS, art. 19(2)(j).
438. *Id.* art. 40.
439. *Id.* arts. 52, 54.
440. *Id.* art. 56(1)(b)(ii); *Id.* pt. XIII.

and other internationally lawful uses of the sea and are therefore exempt from coastal State jurisdiction in the contiguous zone and EEZ.[441]

2.6.3 High Seas Freedoms and Warning Areas

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

Commentary

Freedom to navigate and operate on, over, and under the high seas is a fundamental tenet of the U.S. Ocean Policy.[442] No State may validly purport to subject any part of the high seas to its sovereignty.[443] Thus, both UNCLOS and the High Seas Convention provide that all ships and aircraft, including warships and military aircraft, enjoy freedom of movement and operation on and over the high seas.[444] For warships and military aircraft, this includes task

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441. *Id.* arts. 58, 86, 87; DOALOS, MARINE SCIENTIFIC RESEARCH: A REVISED GUIDE TO THE IMPLEMENTATION OF THE RELEVANT PROVISIONS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 6, U.N. Sales No. E.10.V.12 (2010). *See also* James Kraska, *Sovereignty at Sea*, 51 SURVIVAL 13 (2009); JAMES KRASKA, MARITIME POWER AND THE LAW OF THE SEA 302–04 (2011); Oxman, *supra* note 218, 844–47. *See also* Raul Pedrozo, *Military Activities in and over the Exclusive Economic Zone*, in FREEDOM OF SEAS, PASSAGE RIGHTS AND THE 1982 LAW OF THE SEA CONVENTION 235 (Myron H. Nordquist, Tommy T.B. Koh, & John Norton Moore eds., 2009); Raul Pedrozo, *Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone*, 9 CHINESE JOURNAL OF INTERNATIONAL LAW 9–29 (Mar. 2010); Raul Pedrozo, *Responding to Ms. Zhang's Talking Points*, 10 CHINESE JOURNAL OF INTERNATIONAL LAW 207–23 (Mar. 2011); Pedrozo, *supra* note 431, at 524–27.

442. S. TREATY DOC. NO. 103-39, *supra* note 278, at 26.

443. UNCLOS, art. 89; High Seas Convention, art. 2.

444. UNCLOS, arts. 87, 90; High Seas Convention, arts. 2, 4.

force maneuvering, flight operations, military exercises, surveillance, intelligence gathering activities, and ordnance testing and firing.[445]

All of these activities must be conducted with due regard for the rights of other States and the safe conduct and operation of other ships and aircraft.[446] The "due regard" standard requires States to be cognizant of the interests of other States in using a high seas area, to balance those interests with their own, and to refrain from activities that unreasonably interfere with the exercise of other States' high seas freedoms in light of that balancing of interests.[447]

All States also enjoy the right to lay and operate submarine cables and pipelines.[448] Subject to its right to take reasonable measures for the exploration of the continental shelf, the exploitation of its natural resources, and the prevention, reduction, and control of pollution from pipelines, the coastal State may not impede the laying or maintenance of submarine cables or pipelines.[449] However, the delineation of the course for the laying of pipelines on the continental shelf is subject to the consent of the coastal State.[450] When laying submarine cables or pipelines, States shall have due regard to cables or pipelines already in position and possibilities of repairing existing cables or pipelines shall not be prejudiced.[451]

The Sound Surveillance System (SOSUS) is a network of hydrophone arrays on the seafloor throughout the Atlantic and Pacific Oceans that is used to track submarines. These arrays may be lawfully emplaced in other nations' continental shelves beyond the territorial sea without coastal State notice or approval.

In peacetime, the 1884 Submarine Cables Convention, the High Seas Convention, and UNCLOS protect submarine cables on the high

445. S. TREATY DOC. NO. 103-39, *supra* note 278, at 26.
446. UNCLOS, art. 87; High Seas Convention, art. 2.
447. S. TREATY DOC. NO. 103-39, *supra* note 278, at 26.
448. UNCLOS, arts. 79(1), 112(1); High Seas Convention, art. 26; Continental Shelf Convention, art. 4; S. TREATY DOC. NO. 103-39, *supra* note 278, at 30.
449. UNCLOS, art. 79(2); High Seas Convention, art. 26(2).
450. UNCLOS, art. 79(3).
451. *Id.* art. 79(5); High Seas Convention, art. 26(3).

seas from intentional damage. The 1884 Convention prohibits the breaking or injury of a submarine cable through willful or culpable negligence, which results in a total or partial interruption of telegraphic communication. This prohibition does not apply, however, to situations of accidental damage, such as by fishers. There is also an exemption for damage caused by parties while trying to protect their lives or vessels if they have taken "all necessary precautions" to avoid damaging cables.[452] If a warship on the high seas has "reason to believe" that a ship (other than a warship) has violated the provisions of the Convention, it may board the suspect vessel to examine the ship's documents and verify its nationality, but it may not seize the vessel or its crew.[453] This boarding authority has been used on only one occasion. In 1959, off the coast of Newfoundland, a boarding party from the USS *Roy O. Hale* boarded the Soviet fishing trawler *Novorossiisk*, which was suspected of cutting five submarine cables.[454] A subsequent investigation revealed that that the *Novorossiisk* had been operating in the immediate vicinity of all five cable breaks at the time the lines were cut. Following the investigation, the United States informed the Soviet Union that the boarding was justified under international law and that there was a "strong presumption" that the Soviet ship had cut the cables.[455] The flag State of the vessel accused of damaging a cable shall prosecute violations of the 1884 Convention.[456] If the flag State does not assert jurisdiction, the courts in each of the contracting States, in the case of its subjects or citizens, shall have jurisdiction.[457] To facilitate criminal prosecution, the parties are required to enact domestic legislation implementing the penal provisions of the Convention.[458]

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452. Submarine Cables Convention, art. 2.

453. *Id.* art. 10.

454. Press Release, U.S. Department of State, U.S. and U.S.S.R. Exchange Notes on Damage to Submarine Cables (Mar. 23, 1959), *reprinted in* 40 DEPARTMENT OF STATE BULLETIN, no. 1034, 555 (1959).

455. *Id.* at 557.

456. Submarine Cables Convention, art. 8.

457. *Id.*

458. *Id.* art. 12.

> Provisions in the High Seas Convention and UNCLOS mirror the prohibition in Article 2 of the Submarine Cables Convention.[459] UNCLOS prohibits "conduct calculated or likely to result" in a break or injury.[460] A State is also required to adopt domestic legislation that makes it a punishable offense for a ship flying its flag or a person subject to its jurisdiction to willfully or through culpable negligence break or injure a submarine cable beneath the high seas, in such manner as to be liable to interrupt or obstruct telegraphic or telephonic communications.[461] An exception applies if the break or injury occurs while the ship or person "acted merely with the legitimate object of saving their lives or their ships, after having taken all necessary precautions to avoid such break or injury."[462] The boarding regime of the 1884 Convention is preserved in Article 30 of the High Seas Convention and is codified in 47 U.S.C. § 26. The High Seas Convention and UNCLOS also reflect the long-standing regime of liability and indemnity, which are derived from the 1884 treaty.[463]
>
> The Submarine Cables Convention is implemented in 47 U.S.C. § 21 et seq. (1982).

2.6.3.1 Warning Areas

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

Ships and aircraft of other States are not required to remain outside a declared warning area but are obliged to refrain from interfering with activities

459. High Seas Convention, art. 27; UNCLOS, art. 113.
460. UNCLOS, art. 113.
461. High Seas Convention, art. 27; UNCLOS, art. 113.
462. High Seas Convention, art. 27; UNCLOS, art. 113.
463. High Seas Convention, arts. 28, 29; UNCLOS, arts. 114, 115.

therein. Consequently, ships and aircraft of one State may operate in a warning area within international waters and airspace declared by another State to collect intelligence and observe the activities involved, subject to the requirement of due regard for the rights of the declaring State to use international waters and airspace for such lawful purposes. The declaring State may take reasonable measures including the use of proportionate force to protect the activities against interference.

Commentary

The Worldwide Navigational Warning Service (WWNWS) was established in 1977 through the joint efforts of the International Hydrographic Organization (IHO) and the IMO. The WWNWS is a coordinated global service for the promulgation of information on hazards to navigation that might endanger international shipping. Maritime safety information includes that hazardous military operations are taking place.[464]

The WWNWS recognizes that military activities at sea, such as naval exercises and missile firings, are lawful uses of the sea, for which "naval area" warnings are to be issued. The subjects considered suitable for transmission as NAVAREA warnings include "information that might affect the safety of shipping, sometimes over wide areas, e.g., naval exercises, missile firings."[465] Annex 15 to the Chicago Convention similarly acknowledges the legitimacy of military activities in international airspace by providing that military exercises that pose hazards to civil aviation are appropriate subjects for notices to airmen: "a NOTAM shall be . . . issued concerning the . . . presence of hazards which affect air navigation (including . . . military exercises . . .)."[466]

These temporary warning areas are not considered prohibited/exclusion zones. Seaward of the territorial sea, ships and aircraft of all

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464. National Geospatial-Intelligence Agency, Notice to Mariners No. 1, NM 1/22, Special Paragraphs ¶¶ 42, 40 (2022).

465. IMO, Amendments to Resolution A.706(17)—World-Wide Navigational Warning Service, annex 1 ¶ 4.2.1.3.13, IMO Doc. MSC.1/Circ.1288/Rev.1 (June 24, 2013).

466. Chicago Convention, annex 15 (Aeronautical Information Services) at § 6.3.2.3 (July 2018).

> nations enjoy high seas freedoms of navigation and overflight and other internationally lawful uses of the seas related to these freedoms.[467] Ships and aircraft, therefore, retain a right to transit through the area with the understanding that there is an increased risk in doing so. For example:
>
> > Firing and bombing practice exercises take place either occasionally or regularly in numerous areas established for those purposes along the coast of practically all maritime countries.
> >
> > . . . the responsibility to avoid accidents rests with the authorities using the areas for firing and/or bombing practice . . . .
> >
> > Warning signals, usually consisting of red flags or red lights, are customarily displayed before and during the practice, but the absence of such warnings cannot be accepted as evidence that a practice area does not exist. Vessels should be on the lookout for local warnings and signals, and should, whenever possible, avoid passing through an area in which practice is in progress, but if compelled to do so should endeavor to clear it at the earliest possible moment.[468]
>
> When conducting military activities, to include naval exercises, beyond the territorial sea, States shall have "due regard" to the rights of other States to exercise their high seas freedoms of navigation and overflight.[469] In exercising their high seas freedoms, States must do so with "due regard" for the right of States to use the high seas for lawful purposes, including conducting military exercises.[470] Intentional interference with a lawful military exercise would violate the due regard obligation.[471]

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467. UNCLOS, arts. 58, 86–87, 89–90.

468. National Geospatial-Intelligence Agency, Notice to Mariners No. 1, NM 1/20, ¶ 30 (Firing Danger Areas) (2020).

469. UNCLOS, arts. 58(3), 87(2).

470. *Id.* art. 87(2).

471. *See also* Pedrozo, *supra* note 187, at 962–63; Raul Pedrozo, *China's Continued Disdain for the International Legal Order*, LAWFARE (Aug. 10, 2021), https://www.lawfareblog.com/chinas-continued-disdain-international-legal-order; Raul Pedrozo, *Fishing for Trouble? EEZs, Military Exercises, Due Regard, and More*, LAWFIRE (Feb. 4, 2022),

2.6.4 Declared Security and Defense Zones

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

Commentary

Several States claim military security zones beyond the territorial sea, in which they purport to regulate the activities of foreign warships and military aircraft. Coastal State restrictions include prior notification or authorization for entry into the zone, limits on the number of foreign ships or aircraft present at any given time in the zone, prohibitions on various operational activities in the zone, or complete exclusion from the zone.[472]

The following States purport to regulate or prohibit foreign military activities in the EEZ: Bangladesh, Brazil, Burma (Myanmar), Cape Verde, China, Ecuador, India, Indonesia, Iran, Kenya, Malaysia, the Maldives, Mauritius, North Korea, Pakistan, the Philippines, Portugal, Thailand, Uruguay, and Vietnam. Indonesia and the Philippines have not enacted domestic regulations restricting military activities in their EEZ, but they have on occasion objected to foreign military activities in the zone.[473] In addition, six nations claim security jurisdiction in their 24-nautical mile contiguous zone: Cambodia, China, Nicaragua, Sudan, Syria, and Vietnam.[474]

These claimed security zones and restrictions on military activities have no basis in international law, including UNCLOS, and illegally

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https://sites.duke.edu/lawfire/2022/02/04/guest-post-professor-pete-pedrozo-on-fishing-for-trouble-eezs-military-exercises-due-regard-and-more/.

472. S. TREATY DOC. NO. 103-39, *supra* note 278, at 26.

473. MCRM; Pedrozo, *Military Activities in and over the Exclusive Economic Zone*, *supra* note 441, at 237.

474. MCRM.

> restrict the exercise of non-resource-related high seas freedoms beyond the territorial sea. Accordingly, the United States does not recognize the peacetime validity of any claimed security or military zone seaward of the territorial sea that purports to restrict or regulate high seas freedoms of navigation and overflight, as well as other internationally lawful uses of the sea.[475]

> North Korea, for example, established an expansive illegal zone off its east and west coasts in August 1977. The "military zone" extends "50 miles from the starting line of the territorial waters in the East Sea and to the boundary line of the economic sea zone in the West Sea." The zone was purportedly established to safeguard the North Korean EEZ and defend the "nation's interests and sovereignty." Foreign military ships and aircraft are prohibited from entering the zone, and "civilian ships and civilian planes (excluding fishing boats) are allowed to navigate or fly only with appropriate prior agreement or approval." Civilian ships and aircraft that have been granted access to the zone may not, however, engage in "acts for military purposes or acts infringing upon the economic interests." Taking photographs and collecting marine data are also strictly prohibited.[476] In effect, North Korea treats the waters and airspace contained within the military zone as internal waters and national airspace, respectively. Such a claim is clearly inconsistent with Part II (the territorial sea and contiguous zone), Part III (the EEZ), and Part VII (the high seas) of UNCLOS, as well as Articles 1–3 of the Chicago Convention.[477]

The 1945 Charter of the United Nations (Charter of the UN) and general principles of international law recognize that a State may exercise measures of individual and collective self-defense against an armed attack or imminent threat of armed attack. Those measures may include the establishment of defensive sea areas or maritime control areas in which the threatened State seeks to enforce some degree of control over foreign entry into those areas.

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475. S. TREATY DOC. NO. 103-39, *supra* note 278, at 26.

476. MCRM; Korean Central News Agency, Aug. 1, 1977, *in* 4 FOREIGN BROADCAST INFORMATION SERVICE, Asia and Pacific, at D6; THE PEOPLE'S KOREA, Aug. 10, 1977, at 2 col. 1, *reprinted in* Choon-Ho Park, *The 50-mile Military Boundary Zone of North Korea*, 72 AMERICAN JOURNAL OF INTERNATIONAL LAW 866, 866–67 n.1 (1978).

477. *See* Pedrozo, *supra* note 431, 539–40.

Historically, the establishment of such areas extending beyond the territorial sea has been restricted to periods of war or to declared national emergency involving the outbreak of hostilities. The geographical scope of such areas and the degree of control a coastal State may lawfully exercise over them must be reasonable in relation to the needs of national security and defense.

Commentary

Measures of protective jurisdiction may be accompanied by a special proclamation defining the area of control and describing the types of control to be exercised therein. Typically, this is done where a state of belligerence exists, such as during the Second World War. In addition, so-called "defensive sea areas," though usually limited to the territorial sea, occasionally have included areas of the high seas.

The United States restricts free access to certain areas, such as military installations, due to their strategic importance. Restricted access to naval defensive sea areas, naval airspace reservations, administrative areas, and the Trust Territory of the Pacific Islands protects military installations and the "personnel, property, and equipment assigned to or located therein."[478] The entry or movement of persons, ships, or aircraft in the areas is controlled. Persons, ships, and aircraft shall not enter designated defense areas without authorization. Every effort is made, however, to avoid unnecessary interference with the free movement through the area.[479] Generally, cameras or photographs are prohibited within a naval defensive sea area.[480] Entry into defense areas will only be authorized if the ship, aircraft, or person will not, under "existing or reasonably foreseeable future conditions," endanger or impose an undue burden upon "the armed forces located within or contiguous to the area."[481]

Note, however, that the controls requiring entry authorization do not apply to foreign flag ships exercising their right of innocent passage under international law, and control of entry into the territorial sea

478. 32 C.F.R. § 761.2(a) (2023).
479. 32 C.F.R. § 761.2(b) (2023).
480. 32 C.F.R. § 761.20(1) (2023).
481. 32 C.F.R. § 761.6(a)(1) (2023).

by foreign flag ships shall be exercised consistently with the right of innocent passage.[482]

Entry into defense areas can be denied for any of the following reasons: (1) prior noncompliance with entry control regulations; (2) willfully furnishing false, incomplete, or misleading information; (3) advocacy of the overthrow or alteration of the government of the United States by unconstitutional means; (4) commission of, or attempt or preparation to commit, an act of espionage, sabotage, sedition, or treason; (5) performing, or attempting to perform, duties, or otherwise acting so as to serve the interest of another government to the detriment of the United States; (6) deliberate unauthorized disclosure of classified defense information; (7) knowing membership with the specific intent of furthering the aims of any foreign or domestic organization that unlawfully advocates or practices acts of force or violence to prevent others from exercising their rights under the Constitution or laws of the United States or of any State, or which seeks to overthrow the government of the United States or any state or subdivision thereof by unlawful means; (8) serious mental irresponsibility; (9) chronic alcoholism or addiction to the use of narcotic drugs; (10) illegal presence in the United States; (11) being the subject of proceedings for deportation; or (12) conviction of larceny of property of the United States.[483] No person, except those aboard public vessels or aircraft of the U.S. armed forces, or those working on behalf of the armed forces or under military orders, shall enter a defense area without the permission of the Entry Control Commander.[484] Privately owned local craft that are pre-approved may enter the areas; foreign vessels traveling with diplomatic or special clearance and ships in distress also may enter the areas, but subject to local clearances and control by the senior officer present.[485]

The following officers of the armed forces are designated Entry Control Commanders with authority to approve or disapprove individual

482. OPNAVINST 5500.11F, Regulations Governing the Issuance of Entry Authorizations for Naval Defensive Sea Areas, Naval Airspace Reservations, and Areas Under Navy Administration, encl. (1) (Entry Regulations) ¶¶ 1.a(3), 1.b, 4.a(1)–(2), 5.a (July 17, 2012).

483. 32 C.F.R. § 761.6(b) (2023).

484. 32 C.F.R. §§ 761.7(a), 761.10 (2023).

485. 32 C.F.R. §§ 761.12, 761.14.601 (2023).

entry authorizations for persons, ships, or aircraft as indicated: (a) Chief of Naval Operations, authorization for all persons, ships, or aircraft to enter all defense areas; (b) Commander in Chief, U.S. Atlantic Fleet, authorization for all persons, ships, or aircraft to enter defense areas in the Atlantic; (c) Commander in Chief, U.S. Pacific Fleet, authorization for all persons, ships, or aircraft to enter defense areas in the Pacific; (d) Commander U.S. Naval Forces Caribbean, authorization for all persons, ships, and aircraft to enter the Guantanamo Bay Naval Defensive Sea Area and the Guantanamo Naval Airspace Reservation (this authority is delegated to the Commander U.S. Naval Base, Guantanamo Bay); (e) Commander U.S. Naval Base, Guantanamo Bay, authorization for all persons, ships, and aircraft to enter the Guantanamo Bay Naval Defensive Sea Area and the Guantanamo Naval Airspace Reservation; (f) Commander Third Fleet, authorization for U.S. citizens and U.S. registered private vessels to enter Midway Island, Kingman Reef, Kaneohe Bay Naval Defensive Sea Area, and Pearl Harbor Defensive Sea Area and for Filipino workers employed by U.S. contractors to enter Wake Island; (g) Commander U.S. Naval Forces, Marianas, authorization in conjunction with the High Commissioner for non-U.S. citizens, ships, or aircraft documented under laws other than those of the United States or the Trust Territory to enter those portions of the Trust Territory where entry is not controlled by the Department of the Army or the Defense Nuclear Agency; (h) senior naval commander in defense area, emergency authorization for persons, ships, or aircraft in cases of emergency or distress; and (i) the U.S. Coast Guard regulates the movement of shipping within the Honolulu Harbor and Commandant, Fourteenth Naval District, as representative of the Secretary of the Navy, retains responsibility for security of the Honolulu Defensive Sea Area.[486] The Commander Seventeenth Coast Guard District is also designated an Entry Control Commander by the Commandant, U.S. Coast Guard.

Naval Defensive Sea Areas and Naval Airspace Reservations may be established by the President by Executive Order.[487] The following

486. 32 C.F.R. § 761.9 (2023).
487. 18 U.S.C. § 2152.

Naval Defensive Sea Areas and Naval Airspace Reservations are under the control of the Secretary of the Navy:

- Guantanamo Bay Naval Defensive Sea Area and Guantanamo Bay Naval Airspace Reservation;[488]
- Honolulu Defensive Sea Area;[489]
- Kaneohe Bay Naval Defensive Sea Area and Kaneohe Bay Naval Airspace Reservation;[490]
- Pearl Harbor Defensive Sea Area;[491]
- Johnston Island, Kingman Reef, Midway Island, Palmyra Island, and Wake Islands Naval Defensive Sea Areas and Naval Airspace Reservations;[492]
- Kiska Island Naval Defensive Sea Area and Kiska Island Naval Airspace Reservation;[493] and
- Kodiak Naval Defensive Sea Area and Unalaska Island Naval Defensive Sea Area and Unalaska Island Naval Air-space Reservation.[494]

The Secretary of the Interior is responsible for the civil administration of Wake Island, whereas the Secretary of the Navy is responsible

488. Exec. Order No. 8749, 6 Fed. Reg. 2252, 3 C.F.R. 1943 Cum. Supp. 931 (May 1, 1941).

489. Exec. Order No. 8987, 6 Fed. Reg. 6675, 3 C.F.R. 1943 Cum. Supp. 1048 (Dec. 20, 1941).

490. Exec. Order No. 8681, 6 Fed. Reg. 1014, 3 C.F.R. 1943 Cum. Supp. 893 (Feb. 14, 1941).

491. Exec. Order No. 8143, 4 Fed. Reg. 2179, 3 C.F.R. 1943 Cum. Supp. 504 (May 26, 1939).

492. Exec. Order No. 8682, 6 Fed. Reg. 1015, 3 C.F.R. 1943 Cum. Supp. 894 (Feb. 14, 1941), *as amended by* Exec. Order No. 8729 (6 Fed. Reg. 1791, 3 C.F.R. 1943 Cum. Supp. 919 (Apr. 2, 1941) and Exec. Order 9881, 12 Fed. Reg. 5325, 3 C.F.R. (1943–48 Comp. 662) (Aug. 4, 1947).

493. Exec. Order No. 8680, 6 Fed. Reg. 1014, 3 C.F.R. 1943 Cum. Supp. 892 (Feb. 14, 1941), *as amended by* Exec. Order 8729, 6 Fed. Reg. 1791, 3 C.F.R. 1943 Cum. Supp. 919 (Apr. 2, 1941).

494. Exec. Order No. 8717, 6 Fed. Reg. 1621, 3 C.F.R. 1943 Cum. Supp. 915 (Mar. 22, 1941); Kodiak Naval Airspace Reservation, Exec. Order No. 8597, 5 Fed. Reg. 4559, 3 C.F.R. 1943 Cum. Supp. 837) (Nov. 18, 1940), *as amended by* Exec. Order 9720 of May 8, 1946 (11 Fed. Reg. 5105; 3 C.F.R. (1943–48 Comp. 527) (May 8, 1946); Exec. Order 8749, 6 Fed. Reg. 2252, 3 C.F.R. 1943 Cum. Supp. 931 (May 1, 1941).

for the civil administration of Midway Island.[495] On June 24, 1972, the Department of the Air Force assumed responsibility for the civil administration of Wake Island pursuant to an agreement between the Department of the Interior and the Department of the Air Force.[496]

Restricted entry into all Naval Airspace Reservations, except the Guantanamo Bay Naval Airspace Reservation, has been suspended. Furthermore, restricted entry into several Naval Defensive Sea Areas and Administrative Areas also has been suspended, including with regard to Honolulu Defensive Sea Area; Kiska Island Naval Defensive Sea Area; Kodiak Island Naval Defensive Sea Area; Unalaska Island Naval Defensive Sea Area; Wake Island Naval Defensive Sea Area (except for entry of foreign flag ships and foreign nationals); and that part of Kaneohe Defensive Sea Area lying beyond a 500-yard buffer zone around the perimeter of the Kaneohe Marine Corps Air Station at Mōkapu Peninsula and eastward to Kapoho Point, Oahu.[497] The suspension of restrictions on entry, however, does not obviate the authority of appropriate commanders to lift the suspension and reinstate controls on entry.[498]

2.6.5 Polar Regions

2.6.5.1 Arctic Region

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

495. Exec. Order No. 11048, Administration of Wake Island and Midway Island, 27 Fed. Reg. 8851, 3 C.F.R. (1959–63 Comp. 632) (Sept. 4, 1962).

496. 32 C.F.R. § 935.11 (2023).

497. 32 C.F.R. § 761.4(d) (2023).

498. 32 C.F.R. § 761.4(e) (2023).

international navigation. The regime of transit passage applies to passage through those straits.

Commentary

The DoD Arctic Strategy sets forth three prioritized, interdependent DoD objectives for the Arctic region: (1) defend the homeland; (2) compete when necessary to maintain favorable regional balances of power; and (3) ensure that common domains remain free and open.[499] The DoD's strategic approach to advance these objectives is to protect U.S. national security interests and prudently address risks to those interests in ways that uphold the region's rules-based order, without fueling strategic competition.[500] Implementing this strategic approach to advance DoD's Arctic objectives will require the DoD to (1) build Arctic awareness; (2) enhance Arctic operations; and (3) strengthen the rules-based order in the Arctic.[501]

The U.S. Coast Guard's new strategic outlook for the Arctic was also released in 2019. The new strategy updates the Coast Guard's vision to ensure safe, secure, and environmentally responsible maritime activity along three lines of effort: (1) enhance capability to operate effectively in a dynamic Arctic to uphold U.S. sovereignty and deliver mission excellence; (2) strengthen the rules-based order by promoting the rule of law and preventing malign influence in the Arctic; and (3) innovate and adapt to promote resilience and prosperity to deliver mission-critical services—including search and rescue, incident management, law enforcement, and marine safety—to this remote region.[502]

The Navy released its new Arctic Strategy in January 2021, outlining how the Navy will provide the right levels and types of presence on, under, and above Arctic water, to ensure that the United States is prepared to compete effectively and efficiently to maintain favorable

499. U.S. DEPARTMENT OF DEFENSE, OFFICE OF THE UNDERSECRETARY OF DEFENSE FOR POLICY, REPORT TO CONGRESS: DEPARTMENT OF DEFENSE ARCTIC STRATEGY, 6–7 (June 2019).

500. *Id.* at 7.

501. *Id.* at 8.

502. U.S. COAST GUARD, ARCTIC STRATEGIC OUTLOOK 42 (Apr. 2019).

balances of power. This includes strengthening cooperative partnerships to ensure coordination with key allies and partners in the region. The Navy will advance enduring U.S. national security interests in the Arctic by pursuing these objectives: (1) maintaining enhanced presence; (2) strengthening cooperative partnerships; and (3) building a more capable Arctic naval force.[503]

The Department of Homeland Security also released its new Arctic Strategy in January 2021, outlining three goals that the Department endeavors to achieve: (1) secure the homeland through persistent presence and all domain awareness; (2) strengthen access, response, and resilience in the Arctic; and (3) advance Arctic governance and a rules-based order through targeted national and international engagement and cooperation.[504]

The United States is a member of the Arctic Council, which was established in 1996 by the Ottawa Declaration.[505] The Council is comprised of the eight Arctic States (Canada, Denmark (Greenland), Finland, Iceland, Norway, the Russian Federation, Sweden, and the United States), six permanent participants that represent the indigenous peoples of the Arctic, and thirty-eight observers (thirteen non-Arctic States (including China), thirteen intergovernmental organizations, and twelve non-governmental organizations).

The Council provides a forum for promoting cooperation, coordination, and interaction among the Arctic States on common Arctic issues, such as issues of sustainable development, environmental protection, scientific cooperation, and search and rescue. Military matters are specifically excluded from the Council's mandate.[506] In 2008, the five Arctic coastal States (Canada, Denmark (Greenland), the Russian Federation, Norway, and the United States) declared that the law of the sea, as reflected in UNCLOS, is the legal framework

503. U.S. DEPARTMENT OF THE NAVY, A STRATEGIC BLUEPRINT FOR THE ARCTIC 10 (Jan. 5, 2021).

504. U.S. DEPARTMENT OF HOMELAND SECURITY, 2021 STRATEGIC APPROACH FOR ARCTIC HOMELAND SECURITY 5 (Jan. 11, 2021).

505. Declaration on the Establishment of the Arctic Council, Sept. 19, 1996, 35 INTERNATIONAL LEGAL MATERIALS 1387 (1996).

506. *Id.* ¶ 1(a).

that governs the Arctic Ocean, and that there is no need for a new legal regime to govern the Arctic Ocean.[507] To date, the Council has adopted three agreements: (1) the Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic (May 12, 2011); (2) the Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic (May 15, 2013); and (3) the Agreement on Enhancing International Arctic Scientific Cooperation (May 11, 2017).

Given the potential hazards of operating in polar regions, the IMO adopted the International Code for Ships Operating in Polar Waters (Polar Code), and related amendments to SOLAS and MARPOL, to make it mandatory, effective January 17, 2017. The Polar Code covers the full range of design, construction, equipment, operational, training, search and rescue, and environmental protection matters relevant to ships operating in Arctic and Antarctic waters. The Code does not apply to sovereign immune vessels.[508]

Article 234 of UNCLOS provides special rules for protecting and preserving the marine environment in ice-covered areas like the Arctic. It authorizes coastal States to

> adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance.

These laws and regulations must, at a minimum, apply international rules and standards, but they may be more stringent and they do not

507. Ilulissat Declaration, Arctic Ocean Conference, May 27–28, 2008.

508. IMO Res. MSC.385(94), International Code for Ships Operating in Polar Waters (Polar Code) (Nov. 21, 2014); IMO Res. MEPC.264(68), International Code for Ships Operating in Polar Waters (Polar Code) (May 15, 2015).

require review by the IMO. Nonetheless, any law or regulation enacted pursuant to Article 234 must have "due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence."[509] In addition, it must be "consistent with other relevant provisions of the Convention and international law, including the exemption for vessels entitled to sovereign immunity in Article 236."[510]

Article 234 was negotiated directly between Canada, the Soviet Union, and the United States to provide a legal basis for implementing the provisions of the 1970 Canadian Arctic Waters Pollution Prevention Act (AWPPA) to commercial and private vessels, while at the same time protecting U.S. national security interests in preserving navigational rights and freedoms throughout the Arctic.[511] The AWPPA was widely considered to violate international law when it was originally enacted by Canada.[512] Russia and Canada have misused Article 234 to bolster their excessive maritime claims in the Arctic.

Both Russia[513] and Canada[514] draw excessive straight baselines in the Arctic. These baselines have the effect of restricting the right of transit passage in various international straits in the Arctic, including

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509. UNCLOS, art. 234; James Kraska, *Governance of Ice-Covered Areas: Arctic Ocean Rules*, 46 OCEAN DEVELOPMENT & INTERNATIONAL LAW 260 (2014).

510. 4 VIRGINIA COMMENTARY at 396; S. TREATY DOC. NO. 103-39, *supra* note 278, at 40; UNCLOS, art. 236.

511. 4 VIRGINIA COMMENTARY at 392–98; S. TREATY DOC. NO. 103-39, *supra* note 278, at 40.

512. Press Release, U.S. Department of State, U.S. Opposes Unilateral Extension by Canada of High Seas Jurisdiction (Apr. 15, 1970), *reprinted in* 62 DEPARTMENT OF STATE BULLETIN 610–11 (May 11, 1970); 4 VIRGINIA COMMENTARY at 392–98.

513. List of Geographical Coordinates of the Points Determining the Baselines Position for Measuring the Breadth of the Territorial Waters, Economic Zone and Continental Shelf of the U.S.S.R., Adopted by Decrees of the U.S.S.R. Council of Ministers on Feb. 7, 1984; List of Geographical Coordinates of the Points Determining the Baselines Position for Measuring the Breadth of the Territorial Waters, Economic Zone and Continental Shelf of the U.S.S.R., Adopted by Decrees of the U.S.S.R. Council of Ministers on Jan. 15, 1985; Federal Act on the internal maritime waters, territorial sea and contiguous zone of the Russian Federation, Adopted by the State Duma on July 16, 1998, Approved by the Federation Council on July 17, 1998.

514. Territorial Sea Geographical Coordinates (Area 7) Order, P.C., SOR/1985-872 (Can.).

the Northeast Passage, the Northwest Passage, and various other straits located within Russia's Northern Sea Route (NSR)—the Demitri, Laptev, and Sannikov Straits. Russia's straight baselines closing the NSR straits and Canada's straight baselines around its Arctic Islands do not meet the legal criteria under international law.[515] Accordingly, the correct baseline for these areas is the low-water line.[516] Additionally, Russia's and Canada's restrictions on passage through various international straits are clearly inconsistent with the right of transit passage through international straits, which cannot be suspended or impeded by the bordering States.[517] The United States has diplomatically protested and operationally challenged these excessive straight baseline claims.[518]

Russia and Canada have also enacted domestic laws and regulations to regulate maritime traffic in their Arctic waters, citing Article 234 of UNCLOS as their legal basis. Both the Russian and Canadian laws and regulations in question, however, exceed what is permissible under international law, including SOLAS and UNCLOS.

The NSR is defined in Article 14 of the 1998 Federal Act of the Russian Federation, as amended by Article 2 of the 2012 Federal Law No. 132-FZ:

> Navigation in the waters of the Northern Sea Route, a historically established national transport communication route of the Russian Federation, shall be carried out in accordance with the generally recognized principles and norms of international law, the international treaties of the Russian Federation, this Federal Law, and other federal laws, as well as regulations issued in accordance with them.[519]

515. UNCLOS, arts. 5, 7.
516. *Id.* art. 5.
517. *Id.* arts. 38, 42.
518. MCRM.
519. Russia, Federal Law No. 132-FZ of July 28, 2012, On Amendments to Certain Legislative Enactments of the Russian Federation concerning State Regulation of Commercial Navigation in the Waters of the Northern Sea Route, art. 2, *reprinted in* MCRM.

Article 3(3) of the 2012 law also amended the Code of Commercial Navigation of the Russian Federation, adding, inter alia, a new Article 5, which defines the waters of the NSR as the water that adjoins the northern littoral of the Russian Federation, comprising the internal maritime waters, territorial sea, contiguous zone, and EEZ of the Russian Federation.[520]

Guidelines for navigating through the NSR, which ensure the safety of navigation and the protection of the marine environment, include (1) procedures for the navigation of vessels; (2) rules for the icebreaker pilotage of vessels; (3) rules for the pilotage of vessels by an ice-qualified pilot; (4) rules for the pilotage of vessels along routes in the NSR; (5) guidelines on navigational-hydrographic and hydrometeorological support; (6) rules for radio communication; and (7) other guidelines pertaining to the organization of the navigation of vessels.

Applications to obtain a permit to navigate through the NSR shall be submitted to the NSR Administration. Permits are issued if "the vessel fulfills the requirements pertaining to safe navigation and protection of the marine environment" that are established by the international treaties and laws of the Russian Federation and the aforementioned rules. Vessels are also required to submit documents certifying that they possess "insurance or other financial guarantee of civil liability . . . for harm resulting from pollution or for other harm caused by the vessels."[521]

The United States protested the NSR regulatory scheme on May 29, 2015, objecting to several of its provisions, including (1) a requirement to obtain permission to enter and transit the Russian EEZ and territorial sea and provide certification of adequate insurance; (2) the characterization of international straits that form part of the NSR as internal waters; (3) the characterization of the NSR as a "historically established national transport communication route"; and (4) the "lack of any express exemption for sovereign immune vessels." The

520. *Id.* art. 3(3).
521. *Id.*

> United States additionally encouraged Russia to submit relevant aspects of the regulatory scheme to the IMO for its consideration and adoption, in particular the provisions regarding the use of designated routes and the use of icebreakers and ice pilots. The United States also sought confirmation that the NSR scheme does not apply to sovereign immune vessels, and clarification on whether the provisions for the use of Russian icebreakers and ice pilots were mandatory. The United States believes that Article 234 does not support the imposition of mandatory icebreaker or pilotage requirements, that the exclusion of the use of foreign-flagged icebreakers is inconsistent with the nondiscrimination aspects of Article 234, and that the charges levied for these services are of concern.[522]
>
> In March 2019, the Russian Federation announced new rules for the NSR that are more problematic. The new rules require foreign warships and naval auxiliaries to provide forty-five days' advance notice and obtain permission to transit the NSR. The advance notice must include the ship's "name, purpose, route, timetable, and technical specifications, as well as the military rank and identity of its captain." Foreign ships are also required to take a Russian pilot on board before transiting through the Arctic, and transit can be denied without explanation. Unauthorized transits can result in the arrest or destruction of the noncompliant vessel. Russian authorities cite Article 234 and national security concerns as their legal authority for the new measures, which are clearly inconsistent with international law, including UNCLOS.[523]
>
> Canada's Arctic mandatory ship reporting system is equally problematic and has been challenged by the United States and several other nations. The Northern Canada Vessel Traffic Services Zone Regulations (NORDREG)[524] were adopted under the Canada Shipping

522. 2015 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 526–27, 537–38.

523. Alexey Kozachenko et al., *Cold Wave: Foreigners Created the Rules of Passage of the Northern Sea Route*, IZVESTIA (Mar. 6, 2019), https://iz.ru/852943/aleksei-kozachenko-bogdan-stepovoi-elnar-bainazarov/kholodnaia-volna-inostrantcam-sozdali-pravila-prokhoda-sevmorputi.

524. SOR/2010-127 (June 10, 2010). *See* 2010 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 514; ROACH, *supra* note 219, at 589–94.

Act[525] and took effect on July 1, 2010 in Canadian-claimed Arctic waters. The regulations have two main elements. First, they establish the NORDREG Zone that covers Canada's claimed northern waters, extending up to 200 nautical miles. A vessel may not enter, leave, or proceed within the zone unless it has previously obtained a clearance from Canadian authorities. Noncompliant persons and vessels are liable to a monetary fine and/or imprisonment. Second, the regulations establish a mandatory ship reporting system within the zone. Canada cites Article 234 as the legal basis for the regulations.[526]

The United States protested the regulations in August 2010, indicating that the NORDREGs are "inconsistent with important law of the sea principles related to navigational rights and freedoms" and recommending that Canada submit the system to the IMO for adoption. The United States noted that the prior permission requirement to enter and transit the EEZ and territorial sea, as well as the enforcement provisions for noncompliance, were inconsistent with navigational rights and freedoms in the EEZ, the right of innocent passage in the territorial sea, and the right of transit passage through straits, such as the Northwest Passage, used for international navigation. Moreover, conditioning transit on prior permission is inconsistent with Article 234, which requires coastal State laws and regulations to have due regard to navigation. The United States also expressed concern that the NORDREGs did not contain an express exemption for sovereign immune vessels and that any enforcement action would be inconsistent with international law, including Article 236 of UNCLOS. The United States additionally noted that Canada's unilateral imposition of mandatory ship reporting and mandatory ship routing should be submitted to the IMO for adoption consistent with Regulations V/10, V/11, and V/12 of SOLAS.[527]

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525. Canada Shipping Act, S.C. 2001, c. 26 (Can.).

526. *See* James Kraska, *The Northern Canada Vessel Traffic Services Zone Regulations (NORDREG) and the Law of the Sea*, 30 INTERNATIONAL JOURNAL OF MARINE & COASTAL LAW 225 (2015).

527. Diplomatic Note from the United States to Canada Commenting on Canada's Proposed NORDREGS (Mar. 19, 2010), 2010 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 515, 516–18.

> In September 2010, the United States and the International Association of Independent Tanker Owners made a joint submission to the IMO's Maritime Safety Committee expressing concern over the NORDREGs. In particular, the joint submission highlights that the mandatory ship reporting system applies to ships seeking to enter and transit Canada's EEZ and it is therefore inconsistent with Regulations V/11 and V/12 of SOLAS. Beyond the territorial sea, SOLAS does not permit coastal States to unilaterally adopt mandatory ship reporting systems. The IMO is the only international body competent to develop guidelines and criteria for regulations of ship reporting systems on an international level. Similarly, vessel traffic services may only be made mandatory in a State's territorial sea.[528]
>
> Regulation V/10 of SOLAS provides, in part, that "Ships' routeing systems . . . may be made mandatory . . . when adopted and implemented in accordance with the guidelines and criteria developed by the [IMO]" and that "Governments shall refer proposals for the adoption of ships' routeing systems to the [IMO]." Regulation V/11 provides, in part, that a "ship reporting system, when adopted and implemented in accordance with the guidelines and criteria developed by the [IMO] . . . , shall be used by all ships" and that "Government[s] shall refer proposals for the adoption of ship reporting systems to the [IMO]." Regulation V/12 stipulates, in part, that "[t]he use of [vessel traffic services] may only be made mandatory in sea areas within the territorial seas of a coastal State." Finally, Regulations V/10(10), V/11(9), and V/12(5) specify that "[n]othing in this regulation or its associated guidelines and criteria shall prejudice the rights and duties of Governments under international law or the legal regimes of straits used for international navigation and archipelagic sea lanes."
>
> See § 2.5.3.2 for a discussion of Canada's position on the Northwest Passage.

528. United States and INTERTANKO, *Safety of Navigation: Northern Canada Vessel Traffic Services Zones Regulations*, IMO Doc. MSC 88/11/2 (Sept. 22, 2010); ROACH, *supra* note 219, at 589–94.

In 1988, the United States and Canada entered into an agreement—the Arctic Cooperation Agreement—to help reduce tensions between the two allies over their ongoing dispute concerning the Northwest Passage. Although it does not resolve the underlying dispute over the status of the Northwest Passage or the waters of the Arctic Archipelago, the agreement recognizes the importance of cooperation between the two neighbors to "advance their shared interests in Arctic development and security." Accordingly, the parties agreed to "facilitate navigation by their icebreakers in their respective Arctic waters and to develop cooperative procedures for this purpose" and to "develop and share research information . . . in order to advance their understanding of the marine environment of the area." The United States also agreed that "all navigation by U.S. icebreakers within waters claimed by Canada to be internal will be undertaken with the consent of . . . Canada." However, nothing in the agreement or its implementation is intended to affect the respective positions of the two governments on the law of the sea in the Arctic or other maritime areas, or their respective positions regarding third parties. Moreover, the agreement was limited to icebreaker transits; it did not apply to other types of vessels, such as warships or commercial merchant ships.[529]

In October 1988, the United States made its first request under the agreement asking Canada's consent to allow the USCGC *Polar Star* to "navigate within waters covered by the Agreement, and to conduct marine scientific research [MSR] during such navigation." After assisting the Canadian icebreakers *Pierre Radisson* and *Martha L. Black*, the U.S. icebreaker was compelled by heavy ice conditions to alter course and proceed east through the Northwest Passage to exit the Arctic. The U.S. request welcomed the presence of a Canadian scientist and Coast Guard officer on board the *Polar Star* and indicated that the United States would be pleased if a Canadian Coast Guard ship could accompany the U.S. icebreaker through the Northwest Passage. The request additionally indicated that the *Polar Star* would "operate in a manner consistent with the pollution control standards and other standards of the [AWPPA] and other relevant Canadian laws and regulations" and that the United States would pay for any

529. Agreement on Arctic Cooperation, Can.-U.S., Jan. 11, 1988, 1852 U.N.T.S. 59.

damages caused by transit.[530] The Canadian government granted consent for the transit and the conduct of MSR in the Northwest Passage, noting that the Canadian Coast Guard icebreaker *John A. MacDonald* would accompany the *Polar Star* and that a Coast Guard officer would be made available to be on board the U.S. icebreaker during its transit of the Northwest Passage.[531] Six additional transits of the Northwest Passage were conducted by U.S. icebreakers pursuant to the agreement in 1989, 1990, 2000, 2003, 2005, and 2021.[532] The USCGC *Maple* transited and conducted MSR in the Northwest Passage during a joint exercise with the Canadian icebreaker *Terry Fox* in 2017.[533]

At a joint press conference following the adoption of the U.S.-Canada MSR agreement, both sides reaffirmed that the status of the Northwest Passage and Canada's Arctic waters is still in dispute. Canada's Minister of External Affairs, Joe Clark, stated that the agreement is a

> practical step that leaves the differing views of Canada and the United States on the question of sovereignty intact. The United States has its view, we have a different view. They have not accepted ours. We have not accepted theirs. But we have come to a pragmatic agreement by which the United States will undertake to seek Canadian permission before any voyage of an icebreaker goes through these waters.

U.S. Secretary of State George Schultz echoed Minister Clark's sentiments. When asked if the United States would recognize Canada's sovereignty claims to Arctic waters if U.S. warships and submarines

530. American Embassy Ottawa Note No. 425 (Oct. 10, 1988), U.S. Department of State File No. P88 0129-0576, *reprinted in* 28 INTERNATIONAL LEGAL MATERIALS 144 (1989).

531. U.S. Department of State File No. P88 0129-0579, *reprinted in* 28 INTERNATIONAL LAW STUDIES 145 (1989); *see also* ROACH, *supra* note 219, at 368–69.

532. ROACH, *supra* note 219, at 368–69; Melody Schreiber, *US Icebreaker Departs on a Voyage That Will Transit the Northwest Passage*, ARCTIC TODAY (Aug. 26, 2021), https://www.arctictoday.com/us-coast-guard-science-joint-mission-northwest-passage/#:~:text=Healy%20last%20transited%20the%20passage,a%20joint%20exercise%20with%20Canada; Pharand 3, *supra* note 270, at 40.

533. Schreiber, *supra* note 532.

were guaranteed access to those waters in times of crisis, Secretary Schultz responded that "the answer to your question is no."[534]

2.6.5.2 Antarctic Region

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

Commentary

By the 1950s, seven nations—Argentina, Australia, Chile, France, New Zealand, Norway, and the United Kingdom—claimed territorial sovereignty over areas of Antarctica. Eight other nations—Belgium, Germany, Japan, Poland, South Africa, the Soviet Union, Sweden, and the United States—had engaged in exploration but had not claimed territory on the continent. Both the United States and the Soviet Union did not recognize the claims of other governments and reserved their right to assert claims in the future.[535]

On December 1, 1959, twelve nations—Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, the Soviet Union, the United Kingdom, and the United States—signed the Antarctic Treaty in Washington, DC. The Treaty entered into force on June 23, 1961.[536] The original contracting parties have the right to participate in consultative meetings provided for in Article

534. Press Release, U.S. Department of State, Joint Press Conference, Jan. 11, 1988 (Jan. 14, 1988), *reprinted in* 1 1981–88 CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 2050; *see also* ROACH, *supra* note 219, at 367.

535. *Antarctic Treaty*, U.S. DEPARTMENT OF STATE, https://2009-2017.state.gov/t/avc/trty/193967.htm.

536. *The Antarctic Treaty*, NATIONAL SCIENCE FOUNDATION, https://www.nsf.gov/geo/opp/antarct/anttrty.jsp.

IX of the Treaty for the "purpose of exchanging information, consulting together on matters of common interest pertaining to Antarctica, and formulating and considering, and recommending to their Governments, measures in furtherance of the principles and objectives of the Treaty."[537]

Since 1959, forty-three additional nations have acceded to the Treaty. The new parties may participate in consultative meetings once they demonstrate their interest in Antarctica "by conducting substantial scientific research activity there, such as the establishment of a scientific station or the despatch of a scientific expedition."[538] Of the forty-three new parties, seventeen States—Brazil, Bulgaria, China, the Czech Republic, Ecuador, Finland, Germany, India, Italy, the Netherlands, Peru, Poland, the Republic of Korea, Spain, Sweden, Ukraine, and Uruguay—have had their activities in Antarctica recognized as "substantial scientific research activity" and have, thereby, achieved consultative party status. The remaining twenty-six non-consultative parties may attend consultative meetings but may not participate in any decision-making.[539]

Nothing contained in the Treaty shall be interpreted as (a) a renunciation by any State of "previously asserted rights of or claims to territorial sovereignty in Antarctica"; (b) a renunciation or diminution by any State of "any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise"; or (c) prejudicing the position of any State as regards its "recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica."[540] Moreover, no acts or activities taking place while the treaty is in force "shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica."[541] Additionally,

537. Antarctic Treaty, art. IX(1).

538. *Id.* art. IX(2).

539. *The Antarctic Treaty*, NATIONAL SCIENCE FOUNDATION, https://www.nsf.gov/geo/opp/antarct/anttrty.jsp; *Parties*, SECRETARIAT OF THE ANTARCTIC TREATY, https://www.ats.aq/devAS/Parties?lang=e.

540. Antarctic Treaty, art. IV(1).

541. *Id.* art. IV(2).

"[n]o new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted" while the Treaty is in force.[542]

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

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

Commentary

The Antarctic Treaty demilitarizes the Antarctic continent and provides for its cooperative exploration and future use. The Treaty provides that Antarctica shall be used for peaceful purposes only and prohibits "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."[543] Military personnel and equipment may, however, be used for scientific research or for any other peaceful purpose.[544] Any nuclear explosions

542. *Id.*
543. *Id.* art. I(1).
544. *Id.* art. I(2).

and the disposal of radioactive waste material in Antarctica are prohibited.[545] The Treaty applies to the area south of 60° South Latitude, including all ice shelves, but nothing in the Treaty prejudices or in any way affects "the rights, or the exercise of the rights, of any State under international law with regard to the high seas within that area."[546]

The Treaty provides for freedom of, and international cooperation in, scientific investigation in Antarctica.[547] Accordingly, to the greatest extent feasible and practicable, "(a) information regarding plans for scientific programs . . . shall be exchanged to permit maximum economy and efficiency of operations; (b) scientific personnel shall be exchanged . . . between expeditions and stations; [and] (c) scientific observations and results from Antarctica shall be exchanged and made freely available."[548]

In order to ensure that the parties observe their obligations, the Treaty provides for designation of observers to carry out inspections in all areas of Antarctica, including all stations, installations and equipment, and ships and aircraft at discharge or embarkation points. Each observer has complete freedom of access at any time to any or all areas of Antarctica. Aerial observations may also be conducted.[549] In addition, each contracting party shall inform the other contracting parties in advance of "(a) all expeditions to and within Antarctica, on the part of its ships or nationals, and all expeditions to Antarctica organized in or proceeding from its territory; (b) all stations in Antarctica occupied by its nationals; and (c) any military personnel or equipment intended to be introduced by it into Antarctica."[550]

Disputes arising between the parties concerning the interpretation or application of the treaty shall be resolved through consultation among themselves with a "view to having the dispute resolved by

545. *Id.* art. V(1).
546. *Id.* art. VI.
547. *Id.* arts. II, III.
548. *Id.* art. III(1).
549. *Id.* art. VII.
550. *Id.* art. VII(5).

> negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice."[551] Disputes that cannot be resolved shall, with the consent of all parties to the dispute, be referred to the ICJ for settlement.[552]
>
> By ratifying the Antarctic Treaty, "the United States and all signatories undertook to use Antarctica for peaceful purposes only, and to prohibit '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.'"[553] When replying to any inquiry regarding the nuclear capabilities of U.S. Navy forces located in Antarctica (south of 60 degrees south latitude), Navy personnel shall indicate:
>
> > It is the position of the U.S. Government that nothing in the Antarctica Treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law concerning the high seas within that area. We are aware of our commitments under that Treaty and are in full compliance with those commitments.[554]

2.6.6 Nuclear-free Zones

The 1968 Treaty on the Nonproliferation of Nuclear Weapons, which the United States is a party, acknowledges the right of groups of States to conclude regional treaties establishing nuclear-free zones. Such treaties are binding only on parties to them or to protocols incorporating those provisions. To the extent the rights and freedoms of other States, including the high seas freedoms of navigation and overflight, are not infringed upon, such treaties are not inconsistent with international law. The 1967 Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco) is an example of a nuclear-free zone arrangement that is fully consistent with international law, as evidenced by U.S. ratification of its two protocols. This in

551. *Id.* art. XI(1).
552. *Id.* art. XI.
553. OPNAVINST 5721.1H, Release of Information on Nuclear Weapons and on Nuclear Weapons Capabilities of U.S. Navy Forces, ¶ 4.b (Sept. 24, 2019).
554. *Id.* ¶ 5.c(4).

no way affects the exercise by the United States of navigational rights and freedoms within waters covered by the Treaty of Tlatelolco.

Commentary

The Principal objectives of the Nuclear Non-Proliferation Treaty are to prevent the spread of nuclear weapons and weapons technology, promote cooperation in the peaceful uses of nuclear energy, and further the goal of achieving nuclear disarmament and general and complete disarmament.[555] The Nuclear Non-Proliferation Treaty entered into force in 1970 and currently has 191 States parties, including the original five nuclear-weapon States (P5): China, France, Russia, the United Kington, and the United States. The Treaty allows "any group of States to conclude regional treaties in order to assure the total absence of nuclear weapons in their respective territories."[556]

A Nuclear-Weapon-Free Zone (NWFZ) is defined as

> any zone, recognized as such by the General Assembly of the United Nations, which any group of States, in the free exercises of their sovereignty, has established by virtue of a treaty or convention whereby:
>
> (a) The statute of total absence of nuclear weapons to which the zone shall be subject, including the procedure for the delimitation of the zone, is defined;
>
> (b) An international system of verification and control is established to guarantee compliance with the obligations deriving from that statute.[557]

555. Nuclear Non-Proliferation Treaty, arts. I–II.

556. *Id.* art. VII. *See* AMERICAN LAW INSTITUTE, RESTATEMENT (FOURTH) FOREIGN RELATIONS LAW § 304 comment b, at 28 (2017).

557. G.A. Res. 3472 (XXX), B (Dec. 11, 1975). For principles and guidelines for the establishment of an NWFZ as recommended by the U.S. Disarmament Commission, see Report of the Disarmament Commission, annex I, U.N. Doc. A/54/42 (1999).

An NWFZ agreement provides a legally binding framework to prohibit the use, possession, or deployment of nuclear weapons in a geographically defined zone. The United States has historically supported the establishment of NWFZs. When properly crafted and fully implemented, such zones can contribute to international peace, security, and stability, as well as reinforce the Nuclear Non-Proliferation Treaty and the worldwide nuclear nonproliferation regime. Each NWFZ treaty contains protocols in which the P5 provide negative security assurances. By ratifying the relevant protocols, the P5 give legally binding assurances to the parties to the treaty that they will not use or threaten to use nuclear weapons against them.

The United States makes decisions on whether to sign these protocols on a case-by-case basis, based on the following criteria:

- the initiative for the creation of the zone should come from the States in the region concerned;
- all States whose participation is deemed important should participate;
- the zone arrangement should provide for adequate verification of compliance with its provisions;
- the establishment of the zone should not disturb existing security arrangements to the detriment of regional and international security or otherwise abridge the inherent right of individual or collective self-defense guaranteed in the UN Charter;
- the zone arrangement should effectively prohibit its parties from developing or otherwise possessing any nuclear device for whatever purpose;
- the establishment of the zone should not affect the existing rights of its parties under international law to grant or deny other States transit privileges within their respective land territory, internal waters, and airspace to nuclear powered and nuclear capable ships and aircraft of non-party nations, including port calls and overflights; and
- the zone arrangement should not seek to impose restrictions on the exercise of rights recognized under international law, particularly the high seas freedoms of navigation and over-

> flight, the right of innocent passage of territorial and archipelagic seas, the right of transit passage of international straits, and the right of archipelagic sea lanes passage of archipelagic waters.[558]

There are currently five NWFZ treaties in force:

- the Treaty of Tlatelolco covers Latin America and the Caribbean;
- the Treaty of Pelindaba covers Africa;
- the Treaty of Rarotonga covers the South Pacific;
- the Treaty of Bangkok covers Southeast Asia; and
- the Treaty of Semipalatinsk covers Central Asia.

The United States has signed and ratified the relevant Protocols to the Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Treaty of Tlatelolco).[559] Protocol I calls on nations outside the Treaty zone to apply the denuclearization provisions of the Treaty to the territories in the zone "for which, de jure or de facto, they are internationally responsible."[560] Senate advice and consent to the ratification of Protocol I was made subject to three understandings:

- that the provisions of the Treaty made applicable by the protocol do not affect the rights of the contracting parties regarding the exercise of freedom of the seas or passage through or over waters subject to the sovereignty of a State;
- that the understandings and declarations the United States attached to its ratification of Protocol II apply also to its ratification of Protocol I; and
- that the provisions of the Treaty made applicable by the Protocol do not affect the rights of the contracting parties to grant or deny transport and transit privileges to their own or other vessels or aircraft regardless of cargo or armaments.

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558. *Nuclear Weapon Free Zones*, U.S. DEPARTMENT OF STATE, https://2009-2017.state.gov/t/isn/anwfz/index.htm.

559. Feb. 14, 1967, 22 U.S.T. 762, 634 U.N.T.S. 281.

560. Additional Protocol I to the Treaty of Tlatelolco, art. 1, Feb. 14, 1967, 33 U.S.T. 1972, 634 U.N.T.S. 362.

In Protocol II, nuclear-weapon States undertake (1) to respect the denuclearized status of the zone; (2) not to contribute to acts involving violation of obligations of the parties; and (3) not to use or threaten to use nuclear weapons against the contracting parties.[561] Senate advice and consent to the ratification of Protocol II was made subject to the following understandings and declarations:

- The Treaty does not affect the rights of the contracting parties to grant or deny transport and transit privileges to non-contracting parties.
- With respect to the undertaking in Article 3 of Protocol II not to use or threaten to use nuclear weapons against the Treaty parties, the United States would "have to consider that an armed attack by a Contracting Party, which it was assisted by a nuclear-weapon state, would be incompatible with the Contracting Party's corresponding obligations under Article I of the Treaty."
- Considering the technology for producing nuclear explosive devices for peaceful purposes to be indistinguishable from that for making nuclear weapons, the United States regards the Treaty's prohibitions as applying to all nuclear explosive devices. However, the Treaty would not prevent the United States, as a nuclear-weapon State, from making nuclear explosion services for peaceful purposes available "in a manner consistent with our policy of not contributing to the proliferation of nuclear weapons capabilities."
- Although not required to do so, the United States will act, with respect to the territories of Protocol I adherents that are within the Treaty zone, in the same way as Protocol II requires it to act towards the territories of the Latin American Treaty parties.
- The Treaty and its protocols have no effect upon the international status of territorial claims.[562]

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561. Additional Protocol II to the Treaty of Tlatelolco arts. 1–3, Feb. 14, 1967, 22 U.S.T. 754, 634 U.N.T.S. 364.

562. *See Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean*, U.S. DEPARTMENT OF STATE, https://2009-2017.state.gov/p/wha/rls/70658.htm.

> The United States has signed but has not yet ratified the relevant Protocols to the African Nuclear-Weapon-Free Zone Treaty (Treaty of Pelindaba).[563] The Treaty document was transmitted to the Senate for advice and consent to ratification on May 2, 2011. Under Protocol I, the Protocol parties undertake not to use or threaten to use a nuclear explosive device against any party to the Treaty or against territories within the zone of parties to Protocol III and not to contribute to a violation of the Treaty or Protocol I. Under Protocol II, the Protocol parties undertake not to test, or assist or encourage the testing of, any nuclear explosive device anywhere within the zone or to contribute to any violation of the Treaty or Protocol II. Under Protocol III, the Protocol parties agree to apply certain of the Treaty's substantive provisions "in respect of the territories for which [they are] internationally responsible" within the zone. The United States maintains a large military base in Diego Garcia, which is within the geographic area described in Article 2 and the Annex of the Treaty. However, Diego Garcia is part of the British Indian Ocean Territories (BIOT) and is under the sovereign control of the United Kingdom. The BIOT is not part of the "territory" of the "Zone" as defined in the Treaty. Thus, neither the Treaty nor its Protocols apply to U.S. operations on Diego Garcia.[564]
>
> The United States signed but has not yet ratified the South Pacific Nuclear Free Zone Treaty (Treaty of Rarotonga).[565] The Treaty was transmitted to the Senate for advice and consent to ratification on May 2, 2011. Protocol 1 undertakes to apply certain prohibitions under the Treaty to the territories for which the United States is internationally responsible situated within the zone (American Samoa and Jarvis Island). Protocol 2 parties undertake not to use or threaten to use any nuclear explosive device against parties to the Treaty or

563. African Nuclear-Weapon-Free Zone Treaty, Apr. 11, 1996, 35 INTERNATIONAL LEGAL MATERIALS 698. *See African Nuclear Weapon Free Zone Treaty (Treaty of Pelindaba)*, UNITED NATIONS OFFICE FOR DISARMAMENT AFFAIRS TREATY DATABASE, https://treaties.unoda.org/t/pelindaba.

564. *African Nuclear-Weapon-Free Zone Treaty and Protocols*, U.S. DEPARTMENT OF STATE, https://2009-2017.state.gov/t/isn/4699.htm.

565. South Pacific Nuclear Free Zone Treaty, Aug. 6, 1985, 24 INTERNATIONAL LEGAL MATERIALS 1442. *See South Pacific Nuclear Free Zone Treaty*, UNITED NATIONS OFFICE FOR DISARMAMENT AFFAIRS TREATY DATABASE, https://treaties.unoda.org/t/rarotonga.

> against any territory within the zone for which a State party to Protocol 1 is internationally responsible. In addition, Protocol 2 parties are prohibited from contributing to any act of a Treaty party that would constitute a violation of the Treaty or to any act of another Protocol party that would constitute a violation of a Protocol. Protocol 3 parties undertake not to test any nuclear explosive device anywhere within the zone.[566]
>
> The Treaty on the Southeast Asia Nuclear-Weapon-Free Zone (Bangkok Treaty) has one Protocol. The Protocol provides for legally binding security assurances from the P5 States not to use or threaten to use nuclear weapons against any State party to the Treaty and not to use or threaten to use nuclear weapons within the Southeast Asia Nuclear-Weapon-Free Zone. None of the P5 States have signed the Protocol to the Bangkok Treaty. The P5 States object to the inclusion of continental shelves and EEZs within the zone of application; to the restriction not to use nuclear weapons against any contracting State or protocol party within the zone of application, or from within the zone against targets outside the zone; and to the restriction on high seas freedom of navigation of nuclear-powered ships through the zone. The United States additionally
>
> > expressed concerns with the nature of the legally binding negative security assurances to be expected of the parties to the protocol, the alleged ambiguity of the treaty's language concerning the permissibility of port calls by ships, which may carry nuclear weapons, and the procedural rights of the parties to the protocol to be represented before the various executive bodies set up by the treaty to ensure its implementation.[567]

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566. *South Pacific Nuclear Free Zone Treaty and Protocols*, U.S. DEPARTMENT OF STATE, https://2009-2017.state.gov/t/isn/5189.htm.

567. *Protocols to the Nuclear-Weapon-Free-Zone Treaties*, UNITED NATIONS PLATFORM FOR NUCLEAR-WEAPON-FREE ZONES, https://www.un.org/nwfz/content/protocols-nuclear-weapon-free-zone-treaties; *Nuclear-Weapon-Free Zones at a Glance*, ARMS CONTROL ASSOCIATION (Mar. 2022), https://www.armscontrol.org/factsheets/nwfz.

The Central Asian Nuclear-Weapon-Free Zone Treaty (Treaty of Semipalatinsk) has one Protocol, which provides for legally binding security assurances from the P5 States not to use or threaten to use a nuclear weapon or other nuclear explosive device against any party to the Treaty. The United States has signed but has not ratified the Treaty.[568]

2.7 AIR NAVIGATION

2.7.1 National Airspace

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

Commentary

Airspace is classified as national airspace (airspace over the land territory, internal waters, archipelagic waters, and territorial sea of a nation) and international airspace (airspace over the contiguous zone, the EEZ, and the high seas, and over unoccupied territory—territory, such as Antarctica, that is not subject to the sovereignty of any nation).

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568. Central Asian Nuclear-Weapon-Free Zone Treaty (Treaty of Semipalatinsk), Sept. 8, 2006, https://treaties.unoda.org/t/canwfz; *Protocols to the Nuclear-Weapon-Free-Zone Treaties*, *supra* note 567.

All States have complete and exclusive sovereignty over the airspace above their territory, which includes the "land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate" of such States.[569] No State aircraft or scheduled commercial international air service may operate over or into the territory of a State without the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization.[570] There is no right of innocent passage for aircraft in national airspace over the territorial sea.[571]

States are entitled to require civil aircraft flying over their territory without authority or being used for any purpose inconsistent with the Chicago Convention to land at a designated airport. For this purpose, States may resort to any appropriate means consistent with relevant rules of international law.[572] Civil aircraft shall comply with an order to land.[573] Unless warranted by the right of self-defense reflected in Article 51 of the UN Charter, States should refrain from using weapons against civil aircraft in flight. In case of interception, the lives of persons on board and the safety of aircraft must not be endangered.[574]

U.S. sovereignty over and use of national airspace is set out in 49 U.S.C. § 40103. The Administrator of the FAA, in consultation with the Secretary of Defense, may establish areas in U.S. national airspace necessary in the interest of national defense and may restrict or prohibit access to those areas to foreign aircraft.[575] Foreign civil aircraft may navigate in U.S. national airspace as provided in § 41703.[576] Foreign State aircraft may only navigate in U.S. national

569. Chicago Convention, arts. 1–2.

570. *Id.* arts. 3(c), 6. *See also* UNCLOS, art. 2; Territorial Sea Convention, arts. 1–2.

571. UNCLOS, arts. 17, 19(2)(e)–(f); Territorial Sea Convention, art. 14(1); AMERICAN LAW INSTITUTE, RESTATEMENT (FOURTH) FOREIGN RELATIONS LAW §§ 404, 408 reporters' notes 11, 2 at 179, 197 (2017).

572. Chicago Convention, art. 3*bis*(b).

573. *Id.* art. 3*bis*(c).

574. *Id.* art. 3*bis*(a).

575. 49 U.S.C. § 40103(b)(3)(A)–(B).

576. 49 U.S.C. § 40103(c).

> airspace when authorized by the Secretary of State.[577] The FAA Aeronautical Information Manual provides the aviation community with basic flight information and air traffic control procedures for use in the National Airspace System of the United States.[578] An international version, called the Aeronautical Information Publication, contains parallel information, as well as specific information on the international airports for use by the international community.[579]
>
> U.S. regulations regarding the limits of controlled airspace and the applicability of air traffic rules are contained in 14 C.F.R Parts 71 and 91. Foreign governments seeking diplomatic clearance for State aircraft to transit or land within U.S. territorial airspace must obtain a Diplomatic Clearance Number (DCN) issued in advance by the U.S. Department of State, Bureau of Political-Military Affairs, Office of Global Programs and Initiatives (PM/GPI). A DCN authorizes the aircraft to transit or land in the United States and its territories in accordance with the approved itinerary.[580]

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

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577. 49 U.S.C. § 40103(d).

578. FAA, Aeronautical Information Manual (June 17, 2021), https://www.faa.gov/air_traffic/publications/media/aim_bsc_w_chg_1_2_dtd_5-19-22.pdf.

579. FAA, Aeronautical Information Publication (May 19, 2022), https://www.faa.gov/air_traffic/publications/media/aip_basic_dtd_5-19-22.pdf.

580. *See* U.S. Department of State, Diplomatic Aircraft Clearance Procedures for Foreign State Aircraft to Operate in United States National Airspace (Dec. 14, 2022), https://www.state.gov/diplomatic-aircraft-clearance-procedures-for-foreign-state-aircraft-to-operate-in-united-states-national-airspace/.

Commentary

The Chicago Convention prohibits State aircraft from flying over or landing in the territory of another State without authorization by special agreement or otherwise, and in accordance with the terms thereof.[581] The Convention similarly prohibits scheduled commercial international air service from operating over or into the territory of another State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization.[582] There is an exception, however, for commercial aircraft in distress. A State shall

> provide such measures of assistance to aircraft in distress in its territory as it may find practicable, and to permit, subject to control by its own authorities, the owners of the aircraft or authorities of the State in which the aircraft is registered to provide such measures of assistance as may be necessitated by the circumstances.[583]

The question of whether State aircraft enjoy a similar right of distress entry is unsettled. Some States, like China, take the position that State aircraft do not have a right of distress entry. For example, on April 1, 2001, a U.S. Navy EP-3 collided with a PLAN J-8II fighter jet over the South China Sea about 70 miles from Hainan Island. The EP-3 was conducting a routine surveillance operation when it was intercepted by two PLAN fighters. After making a number of aggressive close passes of the EP-3, one of the PLAN fighters collided with the EP-3. The collision resulted in significant damage to the EP-3, forcing it to make an emergency landing at Lingshui military airfield on Hainan Island. The plane and its twenty-four crew members were detained for eleven days until their release was negotiated by U.S. officials. The EP-3 was not returned until July 2001.[584]

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581. Chicago Convention, art. 3(c).

582. *Id.* art. 6.

583. *Id.* art. 25.

584. *EP-3 Collision, Crew Detainment, Release, and Homecoming, Collection Number: AR/695, Deployment Dates: 2–20 July 2001*, NAVAL HISTORY AND HERITAGE COMMAND, https://www.history.navy.mil/research/archives/Collections/ncdu-det-206/2001/ep-3-collision--crew-detainment-and-homecoming.html.

> U.S. State practice recognizes the right of distress entry into national airspace by foreign State aircraft. For example, in February 1974, a Soviet AN-24 reconnaissance aircraft that was conducting a surveillance mission off the coast of Alaska ran low on fuel and had to make an emergency landing at Gambell Airfield in Alaska. The crew remained overnight and was provided space heaters and food by the U.S. personnel. The plane was refueled the next day and allowed to depart without further incident. Similarly, in March 1994, a Russian surveillance aircraft monitoring a NATO antisubmarine warfare exercise ran low on fuel and made an emergency landing at Thule Air Base in Greenland. Again, the crew was fed, and the aircraft was refueled and allowed to depart without further delay.[585]

Further:

> Despite the unqualified assertions of the sovereignty of the subjacent states over the airspace and the express prohibitions of unauthorized entry of foreign state aircraft which are found in international conventions, there is a right of entry for all foreign aircraft, state or civil, when such entry is due to distress not deliberately caused by persons in control of the aircraft and there is no reasonably safe alternative.[586]

2.7.1.1 International Straits between one part of the High Seas or Exclusive Economic Zone and Another Part of the High Seas or Exclusive Economic Zone

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

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585. News Briefing, Secretary of Defense Donald Rumsfeld on EP-3 Collision, CNN (Apr. 13, 2001), https://transcripts.cnn.com/show/se/date/2001-04-13/segment/02.

586. Oliver J. Lissitzyn, *The Treatment of Aerial Intruders in Recent Practice and International Law*, 47 AMERICAN JOURNAL OF INTERNATIONAL LAW 559 (1953).

Commentary

See § 2.5.3.2 for a discussion of the right of transit passage.

Civil aircraft in transit passage shall observe the ICAO Rules of the Air. State aircraft will normally comply with such safety measures and will at all times operate with due regard for the safety of navigation. Aircraft shall at all times monitor the radio frequency assigned by the competent internationally designated air traffic control authority or the appropriate international distress radio frequency.[587]

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

Commentary

See § 2.5.3.3 for a discussion of transit rights through straits not completely overlapped by territorial seas.

2.7.1.2 Archipelagic Sea Lanes

All aircraft—including military aircraft and UA—enjoy the right of unimpeded, continuous, and expeditious passage through the airspace above archipelagic sea lanes. The right of overflight of such sea lanes is essentially identical to transit passage through the airspace above international straits overlapped by territorial seas. Military aircraft may transit an archipelagic sea lane as part of a military formation's continuous, unimpeded, and expeditious passage.

587. UNCLOS, art. 39(3).

Commentary

See § 2.5.4.1 for a discussion of archipelagic sea lanes passage (ASLP).

Civil aircraft in ASLP shall observe the ICAO Rules of the Air. State aircraft will normally comply with such safety measures and will at all times operate with due regard for the safety of navigation. Aircraft shall at all times monitor the radio frequency assigned by the competent internationally designated air traffic control authority or the appropriate international distress radio frequency.[588]

2.7.2 International Airspace

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

Commentary

Seaward of the territorial sea, in international airspace, civil and State aircraft of all States enjoy high seas freedoms of navigation and overflight, and other internationally lawful uses of the sea.[589] No State may validly purport to subject any part of the high seas or international airspace to its sovereignty.[590]

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588. *Id.* arts. 39(3), 54.
589. *Id.* arts. 58, 87; High Seas Convention, art. 2(4).
590. UNCLOS, art. 89.

See § 2.6 for a discussion of overflight rights of international waters.

2.7.2.1 1944 Convention on International Civil Aviation

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

Commentary

The Chicago Convention does not apply to State aircraft, which are defined as aircraft used in military, customs, and police services. State aircraft may not fly over or land in the territory of another State without authorization by special agreement or otherwise, and in accordance with the terms thereof. States undertake, when issuing regulations for their State aircraft, that they will have due regard for the safety of navigation of civil aircraft.[591]

The objectives of the Convention are set out in Article 44.

Various operational situations do not lend themselves to ICAO flight procedures. These include military contingencies, classified missions, politically sensitive missions, or routine aircraft carrier operations. Operations not conducted under ICAO flight procedures are conducted under the due regard standard. For additional information, see DODI 4540.01, Use of International Airspace by U.S. Military Aircraft and for Missile and Projectile Firings; OPNAVINST 3770.2L, Airspace Procedures and Planning Manual; and COMDTINST M3710.11, U.S. Coast Guard Air Operations Manual.

Commentary

Procedures for U.S. military aircraft operations and missile and projectile firing activities in international airspace consistent with the

591. Chicago Convention, art. 3.

> Chicago Convention and the applicable navigational provisions reflected in UNCLOS are set out in DoD Instruction (DoDI) 4540.01.[592] Normally, military aircraft on routine point-to-point and navigation flights follow ICAO flight procedures.[593] Some operations in international airspace, through straits used for international navigation and through air routes over archipelagic waters, however, do not lend themselves to ICAO flight procedures. This may include, inter alia, military contingencies, classified missions, politically sensitive missions, routine aircraft carrier operations, and some training activities. Operations not conducted under ICAO flight procedures are conducted with due regard for the safety of all other aircraft.[594]
>
> Department of the Navy policy and procedures for use in the administration and management of all airspace matters are contained in OPNAVINST 3770.2L.[595] U.S. Coast Guard policy, standards, instructions, and capabilities pertinent to all phases of Coast Guard flight operations are set out in COMDTINST M3710.11.[596]

2.7.2.2 Flight Information Regions

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

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592. DoDI 4540.01, *supra* note 153, ¶ 1.b.
593. *Id.* encl. 3 ¶ 3.b.
594. *Id.* encl. 3 ¶ 3.c.
595. OPNAVINST 3770.2L, Airspace Procedures and Planning Manual (Mar. 6, 2017).
596. COMDTINST M3710.11, U.S. Coast Guard Air Operations Manual (Mar. 29, 2021).

Commentary

The ICAO allocates, through regional air navigation agreements, responsibility for civil air traffic management in international airspace adjacent to coastal States in specified flight information regions (FIRs). States responsible for managing FIRs generally establish rules and procedures relating to civil aviation operations to carry out their responsibilities for providing air navigation facilities and air traffic management services both in national airspace and in assigned FIRs that may include international airspace. Nonetheless, these FIR rules and procedures do not apply as a matter of international law to State aircraft, including U.S. military aircraft.[597] However, U.S. military aircraft commanders will operate consistently with FIR rules and procedures when operating under ICAO flight procedures (see § 2.7.2.1 above).[598]

Military aircraft transiting through a FIR without intending to penetrate foreign national airspace over territorial seas are not required to and will not submit a request for diplomatic clearance. Military aircraft exercising the right of transit passage, or the right of archipelagic sea lanes passage, are also not required to and will not submit a request for diplomatic clearance. If penetration of foreign national airspace is required, a diplomatic clearance must be obtained (if required by the DoD Foreign Clearance Guide) from the State whose airspace will be penetrated.[599]

Acceptance by a government of responsibility in international airspace for a FIR region does not grant such government sovereign rights in international airspace. Consequently, military and State aircraft are exempt from the payment of air navigation, overflight, or similar fees for transit. The normal practice of States is to exempt military aircraft from such charges even when operating in national airspace or landing in national territory. The only fees properly chargeable against State aircraft are those which can be related di-

597. Chicago Convention, art. 3; DoDI 4540.01, *supra* note 153, encl. 3 ¶ 3.c(2).
598. DoDI 4540.01, *supra* note 153, encl. 3 ¶ 3.c(2).
599. *Id.* encl. 3 ¶ 3.c.

> rectly to services provided at the specific request of the aircraft commander or by other appropriate officials of the nation operating the aircraft.[600]

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

Commentary

> Some States purport to require military aircraft to comply with FIR procedures at all times. The United States has protested such claims by Burma, Cuba, Ecuador, Iran, and Venezuela.[601]

2.7.2.3 Air Defense Identification Zones in International Airspace

International law does not prohibit States from establishing air defense identification zones (ADIZs) in the international airspace adjacent to their territorial airspace. The legal basis for ADIZ regulations is the right of a State to establish reasonable conditions of entry into its territory. An aircraft approaching national airspace with intent to enter such national airspace can be required to identify itself while in international airspace as a condition of entry approval. Air defense identification zone regulations promulgated by the United States apply to aircraft bound for U.S. territorial airspace and require the filing of flight plans and periodic position reports. The United States does not recognize the right of a coastal State to apply its ADIZ procedures to foreign aircraft not intending to enter national airspace or does the United States apply its ADIZ procedures to foreign aircraft not intending to enter U.S. airspace. U.S. military aircraft not intending to enter national airspace should not identify themselves or otherwise comply with

600. DoDD 4500.54E, *supra* note 154, ¶ 3.4.
601. ROACH, *supra* note 219, at 394–406.

ADIZ procedures established by other States, unless the United States has specifically agreed to do so.

Commentary

International law does not prohibit a State from establishing an air defense identification zone (ADIZ) in national and international airspace adjacent to its coast to the extent that the ADIZ does not impede high seas freedom of overflight and other internationally lawful uses of international airspace provided for in international law. In times of peace, all States have a right to establish reasonable conditions of entry into their land territory, internal waters, and national airspace. Thus, aircraft approaching national airspace may be required to provide identification even while in international airspace, but only as a condition of entry approval.[602]

An ADIZ is defined in Annex 15 to the Chicago Convention as a special designated airspace of defined dimensions within which aircraft are required to comply with special identification and/or reporting procedures that supplement those related to civil air traffic services.[603] The United States defines an ADIZ as an area of airspace over land or water in which the ready identification, location, and control of all aircraft, except military and other State aircraft, is required in the interest of national security.[604]

The United States and Canada jointly established the first ADIZ in 1950. The United States currently maintains four ADIZs: the Contiguous U.S. ADIZ (with Canada), the Alaska ADIZ, the Guam ADIZ, and the Hawaii ADIZ.[605] These ADIZs were established to assist in the early identification of aircraft in international airspace approaching U.S. national airspace. The United States established the Japanese ADIZ in 1951 and transferred management of the zone to Japan in 1969. The United States also established the South Korean ADIZ in 1951 during the Korean War. A number of other States

602. DoDI 4540.01, *supra* note 153, ¶ 3.c(1).

603. Chicago Convention, annex 15.

604. 14 C.F.R. § 99.3 (2023).

605. 14 C.F.R. § 99.43 (2004) (Contiguous U.S.); 14 C.F.R. § 99.45 (2004) (Alaska); 14 C.F.R. § 99.47 (2004) (Guam); 14 C.F.R. § 99.49 (2004) (Hawaii).

claim ADIZs, including Bangladesh, China, India, Pakistan, and Taiwan.

U.S. ADIZ rules are contained in Chapter 5 of the FAA's Aeronautical Information Manual.[606] All aircraft intending to enter U.S. national airspace must file flight plans, provide periodic reports, and have a functioning two-way radio.[607] Foreign civil aircraft may not enter the United States through an ADIZ unless the pilot reports the position of the aircraft when it is not less than one hour and not more than two hours average direct cruising distance from the United States.[608] An aircraft may deviate from the above rules during an emergency that requires an immediate decision and action for the safety of flight.[609] Executive Order No. 10854 extends the application of 49 U.S.C. § 40103 to the overlying airspace of water outside the United States beyond the 12-nautical mile territorial sea in which the United States has appropriate jurisdiction or control.[610]

The United States does not recognize any claim by a State to apply its ADIZ procedures to foreign aircraft not intending to enter national airspace, nor does the United States apply its ADIZ procedures to foreign aircraft not intending to enter U.S. airspace. U.S. military aircraft transiting through a foreign ADIZ that do not intend to enter foreign national airspace normally will not identify themselves or otherwise comply with ADIZ procedures, unless the United States has specifically agreed that they will do so. If a U.S. military aircraft intends to penetrate the national airspace of the ADIZ country, the aircraft commander will follow the applicable ADIZ procedures.[611]

An example of an illegal ADIZ is the Chinese zone in the East China Sea, which was established in November 2013. The ADIZ regulations require all aircraft entering the zone to file a flight plan and

606. 14 C.F.R. §§ 99.1–99.49 (2023).
607. 14 C.F.R. §§ 99.9(a)–(c), 99.11(a), 99.17(b)–(c), 99.15(a), 91.183 (2023).
608. 14 C.F.R. § 99.15(c) (2023).
609. 14 C.F.R. § 99.5 (2023).
610. Exec. Order No. 10854, Extension of the Application of the Federal Aviation Act of 1958, 24 Fed. Reg. 9565, 3 C.F.R. (1959–63 Comp. 389) (Nov. 27, 1959).
611. DoDI 4540.01, *supra* note 153, ¶ 3.c(2), encl. 3 ¶ 3.d.

> maintain communications with Chinese authorities, operate a radar transponder, and be clearly marked with their nationality and registration identification. Aircraft that fail to comply with the identification procedures or follow the instructions of Chinese authorities will be subject to undefined "defensive emergency measures."[612] China's application of its ADIZ procedures to all transiting aircraft, regardless of whether they intend to enter Chinese national airspace, interferes with high seas freedom of overflight in international airspace and is, therefore, inconsistent with international law.[613]

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

Commentary

See § 2.6.4 for a discussion of declared security and defense zones.

2.7.3 Open Skies Treaty

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

Commentary

The DoD made the following statement on the U.S. withdrawal from the Open Skies Treaty:

> Tomorrow the United States will formally submit its notification of its decision to withdraw from the Open Skies

612. Ministry of National Defense, People's Republic of China, Announcement of the Aircraft Identification Rules for the East China Sea Air Defense Identification Zone of the People's Republic of China, *reprinted in* CHINA DAILY (Nov. 23, 2013), https://www.chinadaily.com.cn/china/2013-11/23/content_17126618.htm.

613. UNCLOS, arts. 58(1), 87(1)(b), 89; Chicago Convention, arts. 1, 3, 9.

Treaty. After careful consideration, including input from Allies and key partners, it has become abundantly clear that it is no longer in the United States' best interest to remain a party to this Treaty when Russia does not uphold its commitments. U.S. obligations under the Treaty will effectively end in six months.

The Open Skies Treaty was designed decades ago to increase transparency, cooperation, and mutual understanding. Instead, Russia has increasingly used the Treaty to support propaganda narratives in an attempt to justify Russian aggression against its neighbors and may use it for military targeting against the United States and our Allies.

Russia has also continuously violated its obligations under the Treaty, despite a host of U.S. and Allied efforts over the past several years. Since 2017, the United States has declared Russia in violation of the Treaty for limiting flight distances over the Kaliningrad Oblast to 500 kilometers (km) and for denying flights within 10 km of portions of the Georgian-Russian border. Most recently, in September 2019, Russia violated the Treaty again by denying a flight over a major military exercise, preventing the exact transparency the Treaty is meant to provide.

We will not allow Russia's repeated violations to undermine America's security and our interests. We remain committed to effective, verifiable, and enforceable arms control policies that advance U.S., Allied, and partner security, and we will continue to work together to achieve those ends. The United States has been in close communication with our Allies and partners regarding our review of the Treaty and we will explore options to provide additional imagery products to Allies to mitigate any gaps that may result from this withdrawal.

> In this era of Great Power Competition, we will strive to enter into agreements that benefit all sides and that include parties who comply responsibly with their obligations.[614]

2.8 EXERCISE AND ASSERTION OF NAVIGATION AND OVERFLIGHT RIGHTS AND FREEDOMS

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

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

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

Since the early 1970s, the United States, through DODI S-2005.01, has reaffirmed its long-standing policy of exercising and asserting its FON and overflight rights on a worldwide basis. Under the FON Program, challenges of excessive maritime claims of other States are undertaken through diplomatic protests by the U.S. Department of State and by operational assertions by U.S. Armed Forces. U.S. FON Program assertions are designed to be politically neutral, as well as nonprovocative, and have encouraged States to

614. Press Release, DoD, Statement on Open Skies Treaty Withdrawal (May 21, 2020), https://www.defense.gov/News/Releases/Release/Article/2195239/dod-statement-on-open-skies-treaty-withdrawal/.

amend their claims and bring their practices into conformity with UNCLOS. Commanders and commanding officers should refer to combatant commander theater-specific guidance and appropriate operation orders for specific guidance on planning and execution of FON operations in a particular area of operations.

Commentary

Excessive maritime claims unlawfully restrict the freedoms of navigation and overflight and other lawful uses of the sea guaranteed to all nations under international law. These claims are made through coastal State laws, regulations, or other pronouncements that are inconsistent with international law as reflected in UNCLOS and the Chicago Convention. If left unchallenged, these claims can infringe the rights, freedoms, and lawful uses of the sea enjoyed by the United States and other nations.

The DoD is tasked with securing access to the world's oceans in order to retain global freedom of action to maintain international peace and security and to facilitate and enhance global trade and commerce. To counter the proliferation of excessive maritime claims, the United States operates a Freedom of Navigation (FON) Program to influence States either to avoid new excessive maritime claims or to renounce existing ones.

By the late 1970s, the United States realized that diplomatic protests were insufficient to counter excessive maritime claims. On February 1, 1979, the Carter administration completed a "definitive" study of navigation rights and American interests towards the freedom of the Sea.[615] The NSC Staff Secretary memo was prepared by the Law of the Sea Contingency Planning Group on Navigation at the National Security Council. The paper set forth the scope of essential American interests in commercial and military navigation, overflight, and related national security interests at sea. The study outlined how unilateral measures by some coastal States to extend various forms of

615. *See* Memorandum from the National Security Council to the Vice President, Subject: Navigation and Overflight Policy Paper 3 (Feb. 1, 1979), *reprinted in* COOPERATION AND ENGAGEMENT IN THE ASIA-PACIFIC REGION 223 (Myron H. Nordquist et al. eds., 2019).

national jurisdiction beyond traditionally recognized limits, singly and in combination, pose a challenge to traditional high seas freedoms. The United States was concerned that unilateral measures to extend various forms of national jurisdiction beyond traditionally recognized limits posed a challenge to access to the oceans:[616]

NAVIGATION AND OVERFLIGHT POLICY AND PLANNING

I. Issue

What should United States policy be regarding the protection of navigation, overflight, and related national security interests in the oceans in the event of failure to conclude a widely accepted Law of the Sea (LOS) Treaty that the U.S. can ratify or during the period until such a treaty enters into force for the United States.

II. Background

The Law of the Sea Conference commenced in 1973 and it is not at all clear when, or if, we will conclude a comprehensive, widely acceptable LOS Treaty which could be submitted to national governments for ratification. It is also unclear how long the ratification process might take or whether agreement can be secured at the LOS Conference to provisionally apply all or selected parts of the treaty after signature but before the international ratification process and entry into force is accomplished. It is, therefore, timely to consider what our navigation and overflight policy should be both in the event of failure to conclude a treaty and during the pre-treaty period.

616 *See also* AMERICAN LAW INSTITUTE, RESTATEMENT (FOURTH) FOREIGN RELATIONS LAW § 408 reporters' note 3 at 197 (2017).

III. The United States Interests

The United States has an essential interest in protecting commercial and military navigation, overflight and related national security and other interests in and over the oceans. Recent developments, particularly unilateral measures to extend various forms of national jurisdiction beyond traditionally recognized limits, singly and in combination, pose a challenged to traditional high seas freedoms in general and the aforementioned interests in particular. The United States is physically separated from most of its major allies and trading partners by vast ocean areas. We are separated from our NATO and ANZUS allies as well as from allies with whom we have bilateral defense agreements. Our commitments and interests vary but they include requirements for naval and air support and resupply of land forces. Our interest in the unimpeded deployment of our general-purpose forces includes the traditional Sixth Fleet deployments in the Mediterranean and Seventh Fleet deployments in the Pacific. Moreover, we have both short and long range interests in ensuring that our naval and air forces maintain the unhampered right to range over other areas of the oceans, including the Indian Ocean. Such deployments to other areas are important *inter alia* in order to ensure that our military forces are familiar with various areas for purposes of contingency planning and as a stabilizing deterrent. We also have a significant interest in gathering intelligence throughout the world by the use of naval vessels, aircraft and ocean devices.

Our commercial interests include keeping worldwide lines of communication open in order to protect and foster trade with and between other countries as well as protect the economic interests of consumers, shippers and carriers. This applies not only to the transportation of oil and natural gas in ships and pipelines but is also applicable to the general transport of food and natural and finished products into and out of the United States as well as to our key allies and trading partners. As a world leader in civil aviation, we have a major

interest in fostering the maintenance of a civil aviation regime which facilitates efficient and economic air transport. These commercial interests are important not only to the maintenance of a healthy national and world economy, but also for the maintenance of a free world merchant marine, whether flying the U.S. flag or otherwise.

We have a general interest in maintaining good relations with coastal States including those in the Group of 77, while at the same time preserving our various interests noted above.

Finally, it is a substantial U.S. interest not to provoke new claims to offshore jurisdiction that affect navigation, or act in such a manner as to provoke changes to the important navigation texts contained in the Informal Composite Negotiating Text (ICNT) before the Conference, which are satisfactory to the United States.

IV. Trends in the Regime of the Oceans

Prior to the commencement of the LOS Conference in 1973, there were numerous and accelerating claims to extended jurisdiction in the oceans beyond those that the United States recognized as matter of law or policy. The LOS negotiations themselves have created a greater awareness of the potential benefits of extended coastal state jurisdiction and have had the effect of accelerating the making of such claims, although they have moderated certainly claims to conform to texts evolved at the conference. Some of these claims are consistent with the evolving consensus at the conference, but some—particularly territorial sea claims made before the conference—extend far beyond anything that might be recognized under any likely LOS Treaty.

Some of the claims that we do not recognize as a matter of law or policy at the present time we would recognize as part of an LOS treaty that we would ratify, e.g., archipelagic State status as defined in the ICNT. An acceptable treaty would presumably represent a balance of various U.S. interests and

would draw certain distinctions and contain certain safeguards that would not obtain in the absence of such a treaty. In this regard any LOS treaty is likely to contain provisions for the compulsory and peaceful settlement of disputes, including those involving navigation questions, subject to a military exemption. This would create a new deterrent to undesirable claims and expand the options for response by the U.S.

A. The Territorial Sea

The territorial sea (including the superjacent airspace) is an area adjacent to the coast in which the coastal state is sovereign, subject only to a right of innocent passage by foreign flag vessels, whether merchant ships or warships. Except as may be otherwise agreed, in the territorial sea there is no right of overflight by foreign aircraft or submerged transit by foreign submarines. Territorial sea claims in excess of three nautical miles have proliferated in the last few years. At the present time, of the 131 independent coastal States, only 20, including the United States, claim a territorial sea of three nautical miles in breadth. Eight States claim territorial seas greater than three miles but less than twelve miles. Seventy-five States claim territorial seas of 12 miles and 28 States claim territorial seas greater than 12 miles, some extending to 200 miles from shore. With respect to the regime for the territorial sea, certain States call for prior notification or authorization for passage by warships, nuclear powered ships, or oil tankers contrary to our interpretation of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone and customary international law.

B. The Contiguous Zone

The contiguous zone is an area of the high seas adjacent to the territorial sea in which an international law recognizes that the coastal State has certain competence regarding customs, immigration, sanitary and fiscal matters. In accordance with the 1958 Geneva Convention on the Territorial Sea and

Contiguous Zone the contiguous zone may extend a maximum of 12 nautical miles from the coast. Approximately 39 States claim contiguous zones of 12 miles or less, while approximately 23 claim contiguous zones in excess of 12 miles. In addition, some States claim within their contiguous zone competence over security matters which are not in our view sanctioned by international law. The latter claims directly affect our uses of the sea for defense purposes.

C. Historic Waters, Archipelagos and Other Baseline Systems

A number of States have incorporated into their national legislation various types of baseline systems which are inconsistent with our interpretation of international law. Some States, such as the Philippines, claim as historic waters areas of the sea ranging from one-half mile to approximately 300 miles from shore. Within these claimed "historical waters" high seas freedoms are not recognized by the claimants. Other States, such as Burma, have drawn straight baselines which include as internal waters vast areas of the high seas. A limited number of States, i.e., Indonesia, Fiji, Cape Verde, and Sao Tome and Principe have declared themselves to be archipelagos. They have drawn straight baselines connecting the outermost points of the outermost islands and declared the waters landward of such baselines inland waters or archipelagic waters. (The Philippines have done the same within their claimed historic waters.) This is contrary to our review of existing international law, as we only recognize the right of States to draw baselines around individual islands, with various types of offshore jurisdiction, including territorial seas, measured from shore, although we are under occasional pressure from certain elements in Alaska and Hawaii to alter this view.

D. Fisheries or Economic Zones

A number of States have claimed jurisdiction to 200 miles, not always as an assertion of full sovereignty but rather as a

fisheries zone, as in the case of the United States, or in the more expansive form of an exclusive economic zone. The exclusive economic zone is a concept of extended jurisdiction which has developed in the course of the LOS negotiations. While 44 States have claimed fishing jurisdiction beyond 12 miles, including 35 claims to 200 miles, 40 States have claimed 200 mile economic zones. The provisions of these economic zone claims vary widely but they usually include authority over fishing, Marine scientific research, and the prevention of pollution. In addition, certain States include in their economic zones authority over artificial islands and installations, pipelines and cables. Although most disclaim any restrictions on navigation and overflight, a few include such restrictions. These latter claims have many of the trappings of a territorial sea. It should be stressed that each variant of economic zone must be addressed on its own merit, as they range from essentially fishery conservation zones to the near functional equivalent of a territorial sea.

E. Security Zones

Approximately 20 States claim security zones separate from the contiguous zone noted above, with the distances in some cases extending up to 200 miles from the coast. These States seek to prevent passage by warships and aircraft of all or certain states within such zones. North Korea for example recently declared a 50-mile military zone which purports to prohibit or severely limit navigation and overflight.

F. Continental Shelf

The 1958 Geneva Convention on the continental shelf recognizes the sovereign rights of the coastal State over the continental shelf for the purpose of exploring it and exploiting its natural resources to the 200 meter isobath and beyond to where the depth of water admits of exploitation. Thus, the extent of permissible coastal State jurisdiction would increase as technology advances. This rule is a part of customary international law as well. At the same time States which claim

jurisdiction over an economic zone of 200 miles include the seabed and subsoil out to 200 miles. Thus, these States have claimed sovereign rights over the bed of the sea which may not admit of exploitation at this time and indeed in many cases extends beyond the geomorphological continental shelf and includes part of the deep seabed. Other States maintain that as a matter of customary law they have sovereign rights over the continental shelf to the edge of the continental margin, which is not defined and which is viewed by certain States as extending hundreds of miles offshore. Some States view their jurisdiction over the margin to include control over non-resource activities, including the emplacement of military devices.

V. United States Position vis-a-vis Extended Jurisdiction

The United States currently claims and recognizes a three-mile territorial sea (including the superjacent airspace) drawn from baselines established in accordance with the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone, to which it is a party, a contiguous zone extending 12 miles from the base line in accordance with that Convention, a 200-mile fishery management and conservation zone as set forth in the Fishery Conservation and Management Act, and continental shelf jurisdiction in accordance with the 1958 Geneva Convention on the Continental Shelf, to which it is party. At the same time, the U.S. maintains the high seas freedoms of navigation, overflight, and related uses as well as the laying of submarine pipelines and cables beyond the territorial sea. Moreover, we maintain the freedom of marine scientific research in the water column beyond the territorial sea although we recognize a consent regime for research concerning the continental shelf and undertaken there, which we (but few others) interpret to mean physical contact with the shelf. We do not recognize the archipelago theory but rather recognize the rights of individual islands to the various offshore jurisdictional entitlements as noted above.

The U.S. has indicated that as a part of a comprehensive and widely acceptable LOS treaty we could accept a 12-mile territorial sea provided it was coupled with transit passage (freedom of navigation and overflight for transit purposes) through, over and under straits used for international navigation. We are also prepared to accept a contiguous zone extending 24 miles from the baseline. We are prepared to accept a 200-mile exclusive economic zone which, with respect to fisheries, is generally consistent with our legislation. We are prepared to accept a system of vessel source pollution control based upon a mix of flag State, port State and coastal State competence. We are prepared to accept limitations on the conduct of scientific research within a 200-mile economic zone and on the continental shelf. We are prepared to accept coastal State sovereign rights over the resources of the continental margin to a precisely defined outer limit beyond 200 miles. Our acceptance of various coastal State competence beyond a 12-mile territorial sea is, of course, conditioned on the maintenance of the traditional high seas freedoms of navigation, overflight, and related national security uses. With the exception of marine scientific research and a precise definition of the continental margin the texts before the Conference regarding those matters are satisfactory.

The first and second Geneva Conferences on the Law of the Sea were unable to agree on the maximum breadth of the territorial sea. The 1958 Geneva Convention on the Territorial Sea and Contiguous Zone envisaged that the territorial sea and contiguous zone together could not extend more than 12 miles from the baseline. This uncertainty in the convention, coupled with the fact that a plurality of States now claim territorial seas of 12 miles in breadth, while approximately 28 States claim territorial seas in excess of 12 miles, indicates the nature of our position that we do not recognize territorial sea claims greater in breadth than three miles. Moreover, it should be noted that although we recognize only a 3-mile territorial sea, we have claimed certain attributes of a territorial sea out to 12 miles, including pollution control jurisdiction. Indeed, we are under periodic domestic

pressure to expand our pollution control claims off our own coast in ways that would subject us to navigational restraints off foreign coasts, particularly as foreign coastal States could be expected to expand on our precedents. The absence of clear international treaty law on the subject has made our dealings with Congress and the public more difficult in this regard. Claims of territorial seas of 12 miles or greater and indeed certain claims between three and 12 miles result in situations wherein straits used for international navigation which we view as having a high seas corridor are overlapped by territorial seas. While the 1958 Geneva Convention provides for non-suspendable innocent passage through straits, this is not satisfactory for ensuring the movement of ships and aircraft through, over and under straits used for international navigation. Innocent passage confers no rights of overflight or submerged passage. Certain States which claim a 12-mile territorial sea, e.g., the Soviet Union and France, maintain a customary law right of free navigation through straits. The U.S. should promote the view that there is freedom of navigation and overflight through straits used for international navigation regardless of the width of the straits, but without endorsing territorial sea claims in excess of three miles.

Assertions of jurisdiction over navigation, overflight, and related activities beyond a narrow territorial sea are illegal in our view and cannot diminish our rights in the oceans. Furthermore, claims of archipelago status by certain island nations are illegal in our view and not binding on other nations. Finally, while the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone and customary law envisage the drawing of straight baselines under certain geographic conditions as well as claims for historic bays, it is clear that many States have gone beyond what is permitted by the Convention and our view of customary law.

In singling out extended territorial sea claims, assertions of jurisdiction over navigation, overflight, and related matters to 200 miles, assertions of archipelago status, and assertions

of certain baseline and historic bay claims, it is not suggested that these are the only assertions of jurisdiction that are contrary to our view of international law and offensive to U.S. interests. These four types of claims, however, engage the most critical security and economic interests of the U.S. and should be considered at this time. Since essential U.S. interests are placed in jeopardy, it is clear that the U.S. should seek ways to put a lid on objectionable unilateral claims, to negate them if possible, or to direct such unilateral actions in a manner most consistent with our interests. In sum, we must seek ways to preserve U.S. rights and interests in the oceans. It should be noted, however, that the enactment by the U.S. in 1976 of the Fishery Management and Conservation Act probably encouraged other countries to make similar claims, legitimized some of the claims that have been made previously, and clearly made it more difficult for us to argue that States do not have the right to unilaterally define their own interests and act accordingly. Thus, some may argue that if we can unilaterally eliminate freedom of fishing on the high seas, they can take unilateral action with respect to other freedoms.

VI. Elements in Preserving Rights

A. General Statements of Positions

The U.S. has made official statements at the LOS Conference and in other fora concerning its present policy and what it is willing to accept as part of an LOS treaty. Our statements have been given wide enough currency to be viewed as giving some notice of our general position to other States. We have also indicated in notices to mariners that we do not necessarily recognize certain jurisdictions claimed by other countries. Moreover, the Office of the Geographer in the Department of State has prepared a *Limits in the Seas* series which comments on the claims of other countries in a factual and in some cases legal manner. This series is publicly available.

These statements, notices, and studies are useful in publicizing our juridical position regarding certain claims in the oceans.

B. Diplomatic Measures

Short of formal diplomatic protests, one can make informal approaches at an appropriate level to individual governments which have asserted or intend to make a claim contrary to international law. We can approach officials at the appropriate level and indicate the U.S. position and concern and this may serve as a vehicle for urging modification of the legislative or executive action taken or contemplated. In some cases, such approaches may most usefully be made in military rather than diplomatic channels. We have flexibility concerning the formality or informality of the approach and the level at which it will be made. Our particular approach would depend upon the circumstances of each case, including the seriousness of the action taken or contemplated and other aspects of our relations with the country concerned.

At a more formal level we can lodge a diplomatic protest of actions that we do not acquiesce in or recognize. Such a protest is a formal communication from one State to another that it objects to an action performed or contemplated by the latter. It serves the important purpose of preserving rights and making it known that the protesting State does not acquiesce in and does not recognize certain actions. A State can lodge a protest against other States' actions which have been notified to the protesting State or which have become otherwise known. On the other hand, if a State requires knowledge of an action which it considers internationally illegal and in violation of its rights and does not protest, this attitude may imply a renunciation of such rights. Further, express or tacit acquiescence in an act which a State has previously protested may have the effect of overriding the earlier protest. Thus, a simple protest without further action, may not in itself be entirely sufficient in all cases to preserve the rights in behalf of which the protest was made. Nevertheless, a diplomatic

protest enhances the status of the protesting State's position and detracts from the standing of the claim that is opposed.

At the same time, it is true that when an act is in violation of an existing rule of customary or conventional international law, it is tainted with invalidity and is incapable of producing legal results beneficial to the wrongdoer in the form of a new title or otherwise. That invalidity may be wholly or partially mitigated by an individual or collective act of other States that can be taken as an act of recognition or acquiescence. Thereafter, the new assertion may be viewed as valid notwithstanding the initial illegality of the act on which it was based. At some point the law confirms established practice and expectations.

The U.S. is now faced with a situation in which many States are asserting extended claims of jurisdiction, which we view as invalid, over ocean areas. To the extent that certain claimants have asserted the jurisdiction which is generally consistent with the Informal Composite Negotiating Text (whose provisions are likely to find their way into any ultimate LOS treaty), we are faced with a difficult problem, since a treaty may not be attainable or may only be attained several years hence. In such cases, and others, we should preserve our juridical position by protesting claims which we view as illegal, but at the same time we must be realistic and try to channel certain claims, which cannot be prevented, in a direction which, while still illegal in our view, is less harmful to U.S. interests in the absence of a treaty than the claim would otherwise be. Thus, while we could not dissuade Japan from extending its territorial sea to 12 miles, we did persuade her to exclude certain straits from the extended claim. In summary, our policy should be one of trying to discourage or negate illegal claims, to direct claims in a direction least offensive to us, and otherwise to preserve our position.

Until approximately 1973 or 1974, the early stages of the LOS Conference, the U.S. had protested various types of claims that it did not recognize. Since that time, however, we

have *generally* failed to protest navigation, overflight and related restrictive claims, in part because of uncertainty as to what claims the Congress would be making regarding fisheries and control of navigation for pollution purposes. No formal policy decision was taken to cease protests, although some were stopped at high levels for bilateral political reasons. Protests were made only in certain selected instances. It is generally agreed that the U.S. should regularize its protests of claims that it does not recognize now that our own fisheries and pollution positions are clearer.

1. Arguments Regarding Regularizing Protests

In moving ahead with protests the U.S. would indicate its resolve to protect its rights with or without a treaty and this could contribute to moving the LOS negotiations forward. We would provide leadership that some of our allies are looking for in the face of widespread assertions of jurisdiction. We might reassure the Soviets that we are committed to protecting navigation rights and allay some of their concerns regarding our reluctance to be as forceful on certain aspects of the economic zone as they are. Moving ahead now would tend to counter the stepped-up pace of adverse claims, many of which pose a serious threat to navigation, over-flight and other security and economic interests. For example, the French have recently incorporated a notice requirement for the entry of oil tankers in their territorial sea (a position which has been rejected at the Conference). Cape Verde, Fiji, and Sao Tome and Principe have recently declared themselves archipelagos. We must consider the adverse effect of no protest or a prolonged delay in protesting on those States, as well as on Indonesia which has claimed archipelago status for some time. Indeed, Indonesia in recent bilateral negotiations have sought to insert a territory clause into a tax treaty and science and technology agreement with the U.S., which would tend to imply recognition of the archipelago. We have resisted such a clause. Papua New Guinea has recently instituted a baseline system, which is the first step to moving to

the declaration of an archipelago. Most of the States in South Asia have recently asserted claims of 200-mile economic zones which have many of the attributes of a territorial sea and are clearly connected with the most undesirable aspects of various proposals regarding the Indian Ocean as a zone of peace.

Moving ahead now with protests would also indicate to the Congress that the Executive Branch is truly concerned with the unilateral actions of others with possible restraining effects on unilateral tendencies of the Congress. Moving ahead now is also important because we are not merely dealing with a contingency matter in the case of failing to conclude a treaty. A treaty will not be signed for at least two years and will not be ratified for some time thereafter.

At the same time, because we have generally held our protests in abeyance for some years, it may be argued that no significant prejudice would result while waiting until the prospects of a treaty are more clear. Postponement would not upset the on-going LOS negotiations or indicate that we are giving up on the negotiations. However, a postponement can be viewed as acquiescence and the longer we delay the less tenable some positions will become. For example, only 21 States now support a three-mile territorial sea. We can expect that number to decrease in the future. The longer we delay the more we will be faced with claims contrary to our position. Putting off protests further into the future, in essence, would be a policy not to protest.

2. Specific Objects of Protest Policy

With respect to navigation and overflight we should generally protest unilateral claims that we do not now recognize and will not recognize as part of a treaty, as well as certain claims which we do not recognize but which would be acceptable in the context of an acceptable LOS treaty. We should be mindful of the fact that recognizing certain claims in the absence of a treaty may reduce the incentive for such

claimants to work for the successful conclusion of a treaty. At the same time, we should recognize the possible adverse impact of inundating the international community with diplomatic protest. It is proposed, therefore, that the U.S. first focus on those claims which most adversely impact on our critical interests. At the same time, we must avoid acquiescing in other claims that are contrary to our interests.

We should protest all territorial sea claims in excess of 12 nautical miles and at least some of the claims greater than three miles but no greater than 12 miles. In this latter category we should protest at least those claims which overlap (or in combination with another State's claim overlap) a straight used for international navigation when no explicit provision is made to provide for either freedom of navigation and overflight or transit passage along the lines of the ICNT. In any case, we must not concede, and the coastal State must be made aware that we do not recognize, that a State may inhibit or condition freedom of navigation and overflight through and over waters which we view as a high seas corridor, as that is a right we already have under international law. All claims should be protested which contain requirements for advance notification or authorization for warships or which purport to exclude warships or purport to subject warships to a more onerous regime than other vessels. Moreover, protests should be made regarding rules for innocent passage through the territorial sea (not in straits) which are substantially different from the ICNT provisions on innocent passage. The reference is made to the ICNT provisions on innocent passage because they generally codify existing law and are, therefore, satisfactory to the U.S., with or without a treaty. With respect to not protesting a State which has provided for transit passage through Straits along the lines of the ICNT, a judgment has been made that realistically this is a satisfactory result even in the absence of a treaty, because of the significant number of territorial sea claims greater than three and not more than 12 miles, although the regime of complete freedom of navigation and

overflight is preferable. This is not meant, of course, to be an exclusive list but seeks to identify the main problem areas.

We should also protest assertions of jurisdiction over navigation and overflight and associated and related high seas uses beyond the territorial sea. Such assertions include provisions which differentiate warships from other ships or purport to apply a more onerous regime for nuclear warships or vessels carrying nuclear weapons or assert plenary pollution control. Once again, this listing is illustrative, not exclusive. We must, of course, be mindful of restrictions on commercial as well as military activities.

We should also protest all claims of archipelago status. We accepted privately the archipelago concept as part of a treaty only with great difficulty and with the full recognition that vast areas of the high seas would fall under coastal State sovereignty. The provisions for navigation and overflight in the ICNT are an adequate, not a full substitute for the high seas freedoms that we now enjoy. Moreover, we should not reduce the incentive for archipelago claimants to join an ultimate treaty by explicitly or implicitly recognizing the concept in the absence of a treaty.

Finally, we should protest certain baseline and historic bay/water claims. These would have to be considered on a case-by-case basis although clear examples of injurious assertions include those by Argentina, Uruguay, Libya, the Philippines and Burma.

In singling out these four types of claims as prime candidates for protests it is not meant to imply that other claims are acceptable. Claims regarding marine scientific research, for example, need further study.

It must be recognized that certain claims that have not been protested are in fact several years old. It might seem somewhat anomalous should we now send out a protest. Further consideration should be given to the possibility of preparing

a circular note to all States, perhaps through the U.N. system, indicating the claims of offshore jurisdiction that we recognize and reserve our rights and those of our nationals with respect to all other claims.

The policy of other developed countries regarding protests seems to be somewhat spotty. Most of the protests of which we are aware address territorial sea claims in excess of 12 nautical miles although certain protests have been made of archipelago claims. In this regard, a NATO NAC meeting in early 1979 will explore further the question of preservation of rights with a view to encouraging our allies to oppose certain types of claims, especially those noted above. We should also, at an appropriate time, consult with Japan, Australia, New Zealand, and perhaps certain members of the Group of 77. We might also consult with the Soviet Union which has a major interest in freedom of navigation and overflight. A demonstrated willingness of the U.S. to take a firm position on protests may facilitate cooperation with at least certain of the above mentioned countries.

C. Exercise of Rights

As noted above, a diplomatic protest is only one means of preserving rights and may not be sufficient to preserve our rights. We must at the same time exercise our rights in the illegally claimed areas or in opposition to an illegal restriction. Our naval and air forces should exercise traditional freedoms and rights in the face of illegal claims whenever doing so is practicable and taking into account other missions of these forces as well as fiscal constraints, although in certain cases we must consider going out of our way to contest the claim. We must clearly avoid an irrational disposition of forces but we must ensure that we are seen to be exercising our rights in an unequivocal manner. We should consider whether any of our current practices could be misconstrued as acquiescence in an illegal claim. We should consider, for example, distinguishing exercises conducted in cooperation with a coastal State or as a prelude to or aftermath of a port visit

from the exercise of rights which are not so associated. Such exercises should normally be conducted in a low-key and non-threatening manner but without special attempt at concealment. It should also become a matter of public knowledge that our military forces customarily exercise these freedoms and rights.

Bilateral and regional considerations must be factored into any decisions concerning exercise of rights. Furthermore, we should consider whether other States are exercising their rights in the face of particular claims.

In sum, it should be emphasized that juridical, as well as other, considerations should be factored into the planned deployments of our military forces.

A brief review of the history of U.S. exercise of rights indicates that our record is not as unequivocal as we would desire. The United States routinely deploys military forces to the Mediterranean and the Pacific as well as to the Baltic Sea, Indian Ocean and Black Sea. Our military forces in these areas are generally exercising our rights and freedoms of the sea, but it is not clear in many cases whether we, in fact, penetrate illegally claimed areas. In addition, on a non-routine basis we deploy forces to the Sea of Okhotsk and areas off the coast of Libya. Some deployments to sensitive areas, such as the Black Sea, the Baltic Sea, and the Sea of Okhotsk, are conducted in consultation with DOD, JCS, and the Department of State and are important as visible demonstrations of our willingness to exercise our rights and as a counter to Soviet and other assertions that these areas are either Soviet lakes or the preserve of the littoral States.

We have not exercised our rights for the most part off South America. Our deployments in this area are generally in cooperation and consultation with the coastal States concerned and, consequently, may not be viewed by others as an exercise of freedom of the seas.

At the same time, the question arises of whether we engage in certain practices which may undermine our rights. In certain instances it may facilitate the normal operations of military forces to alter operating routines to make them consistent with LOS claims of other countries. No formal recognition of the validity of such claims is involved and the alterations of normal operations are generally minor. We should study, however, these practices to determine what they are, how widespread they are, whether they could be deemed by others to be acquiescence, and whether they should be continued, altered, or eliminated.

VII. Recommendations

A. The U.S. should protest claims of other States that are inconsistent with international law and U.S. policy, with particular reference to extended territorial sea claims as well as the regime therein, assertions of jurisdiction over navigation, overflight, and related matters on the high seas beyond the territorial sea, assertions of archipelago status, and assertions of certain baseline and historic bay/water claims. The Department of State should maintain a current compilation of illegal claims made by coastal States and the dates and nature of U.S. protests with respect thereto.

B. The U.S. should exercise its rights in the face of the illegal claims noted above to the extent practicable and should avoid actions which may be viewed as acquiescence in such illegal claims. Juridical as well as other considerations should be factored into the deployment planning of our military forces. the Department of Defense should maintain a current compilation of data regarding U.S. exercise of rights contrary to coastal State claims. This compilation should include dates and places as well as information concerning unusual circumstances which may occur incident to the exercise of rights.

C. The U.S. should promote the view that there is freedom of navigation and overflight at least for purposes of

> transit (as in the ICNT) through straits used for international navigation, but without endorsing territorial sea claims in excess of three miles.
>
> D. The NSC working group on navigation and overflight contingency planning should continue to function as a review group, meeting, as necessary, to review the timely implementation of this policy and to make recommendations on further action which may be required.[617]

Based on the recommendation of the NSC Paper, on March 20, 1979, the National Security Adviser tasked the DoD to operationally assert U.S rights through warship transits and aircraft overflights in areas where excessive maritime claims were maintained.[618] As a result, the Carter administration established the FON Program in 1979 as a tangible demonstration of U.S. resolve to counter excessive maritime claims.[619]

President Reagan reaffirmed the Program in the 1983 U.S. Ocean Policy Statement, which provides that the United States will not "acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight," and that the United States will "exercise and assert its rights, freedoms, and uses of the sea on a worldwide basis in a manner that is consistent with the balance of interests" reflected in UNCLOS:

> United States Ocean Policy
> March 10, 1983
>
> The United States has long been a leader in developing customary and conventional law of the sea. Our objectives have

617. Memorandum from the National Security Council to the Vice President, *supra* note 615 (footnotes omitted).

618. *See* Lt. Gen. John A. Wickham, Jr., Director, Joint Staff, Memorandum for the Assistant Secretary of Defense (International Security Affairs), Navigational Freedom and U.S. Security Interests (Apr. 18, 1979).

619. Memorandum from Lincoln P. Bloomfield, National Security Council Staff, to Zbigniew Brzezinski, U.S. National Security Advisor (July 31, 1979).

consistently been to provide a legal order that will, among other things, facilitate peaceful, international uses of the oceans and provide for equitable and effective management and conservation of marine resources. The United States also recognizes that all nations have an interest in these issues.

Last July, I announced that the United States will not sign the United Nations Law of the Sea Convention that was opened for signature on December 10. We have taken this step because several major problems in the Convention's deep seabed mining provisions are contrary to the interests and principles of industrialized nations and would not help attain the aspirations of developing countries.

The United States does not stand alone in those concerns. Some important allies and friends have not signed the Convention. Even some signatory States have raised concerns about these problems.

However, the Convention also contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all States.

Today I am announcing three decisions to promote and protect the oceans interests of the United States in a manner consistent with those fair and balanced results in the Convention and international law.

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

Third, I am proclaiming today an Exclusive Economic Zone in which the United States will exercise sovereign rights in living and nonliving resources within 200 nautical miles of its coast. This will provide United States jurisdiction for mineral resources out to 200 nautical miles that are not on the continental shelf. Recently discovered deposits there could be an important future source of strategic minerals.

Within this Zone all nations will continue to enjoy the high seas rights and freedoms that are not resource-related, including the freedoms of navigation and overflight. My Proclamation does not change existing United States policies concerning the continental shelf, marine mammals, and fisheries, including highly migratory species of tuna which are not subject to United States jurisdiction. The United States will continue efforts to achieve international agreements for the effective management of these species. The Proclamation also reinforces this government's policy of promoting the United States fishing industry.

While international law provides for a right of jurisdiction over marine scientific research within such a zone, the Proclamation does not assert this right. I have elected not to do so because of the United States interest in encouraging marine scientific research and avoiding any unnecessary burdens. The United States will nevertheless recognize the right of other coastal States to exercise jurisdiction over marine scientific research within 200 nautical miles of their coasts, if that jurisdiction is exercised reasonably in a manner consistent with international law.

> The Exclusive Economic Zone established today will also enable the United States to take limited additional steps to protect the marine environment. In this connection, the United States will continue to work through the International Maritime Organization and other appropriate international organizations to develop uniform international measures for the protection of the marine environment while imposing no unreasonable burdens on commercial shipping.
>
> The policy decisions I am announcing today will not affect the application of existing United States law concerning the high seas or existing authorities of any United States government agency.
>
> In addition to the above policy steps, the United States will continue to work with other countries to develop a regime, free of unnecessary political and economic restraints, for mining deep seabed minerals beyond national jurisdiction. Deep seabed mining remains a lawful exercise of the freedom of the high seas open to all nations. The United States will continue to allow its firms to explore for and, when the market permits, exploit these resources.
>
> The administration looks forward to working with the Congress on legislation to implement these new policies.[620]

The FON Program preserves U.S. national interests and global mobility by challenging excessive maritime claims and demonstrating U.S. non-acquiescence in unilateral acts of other States that are designed to restrict navigation and overflight rights and freedoms of the international community and other lawful uses of the seas related to those rights and freedoms. The Program underscores U.S. willingness to fly, sail, and operate wherever international law allows and exemplifies our unwavering commitment to a stable, rules-based legal regime for the world's oceans. Since its inception in 1979, hundreds of operational challenges and diplomatic protests have been

620. Statement on United States Oceans Policy, *supra* note 1, at 378–79.

conducted to demonstrate U.S. non-acquiescence in excessive maritime claims.[621]

The Program operates along three tracks: diplomatic protests and other communications by the Department of State; operational assertions by U.S. ships and aircraft; and U.S. bilateral and multilateral consultations with other governments. Freedom of Navigation Operations (FONOPS) are intended to be non-provocative exercises of rights, freedoms, and lawful use of the sea and airspace recognized under international law. They are conducted on a worldwide basis to a wide range of excessive maritime claims, without regard to current events or the identity of the State advancing the claim. Routinely applying the Program on a nondiscriminatory basis to excessive claims of allies, partners, competitors, and adversaries alike maintains the legitimacy of the Program and demonstrates U.S. resolve to uphold navigational rights and freedoms guaranteed to all nations. FONOPS are deliberately planned, legally reviewed, properly approved by higher authority, and safely and professionally conducted in a non-escalatory manner.[622]

UNCLASSIFIED EXCERPTS

January 23, 1995

PRESIDENTIAL DECISION DIRECTIVE/NSC-32

This directive provides current guidance for protecting U.S. navigation, overflight rights and freedoms, and related interests on, under, and over the seas against excessive maritime claims. The purpose of this policy is to preserve the global mobility of U.S. forces by avoiding acquiescence in excessive maritime claims of other nations . . . .

Policy

621. *See* John D. Negroponte, *Who Will Protect Freedom of the Seas?*, 86 DEPARTMENT OF STATE BULLETIN 41 (Oct. 1986); Bureau of Public Affairs, U.S. Department of State, GIST: U.S. Freedom of Navigation Program (Dec. 1988); MCRM.

622. *See* DoDI S-2005.01, Freedom of Navigation Program (Oct. 20, 2014).

> The United States considers the 1982 Convention on the Law of the Sea (LOS Convention) to accurately reflect the customary rules of international law concerning maritime navigation and overflight rights and freedoms.
>
> It is U.S. policy to respect those maritime claims that are consistent with the navigational provisions of the LOS Convention. Additionally, the United States will exercise and assert its navigation and overflight rights on a worldwide basis in a manner consistent with the LOS Convention. The United States will not acquiesce in unilateral acts of other States designed to restrict the rights and freedoms of the international community in navigation and overflight and other traditional uses of the high seas.[623]

2.9 RULES FOR NAVIGATIONAL SAFETY FOR VESSELS AND AIRCRAFT

2.9.1 International Rules

Most rules for navigational safety governing surface and subsurface vessels—including warships—are contained in the 1972 COLREGS. For the purposes of the COLREGS, a vessel is defined as every description of watercraft used or capable of being used as a means of transportation on water. Unmanned systems constituting vessels will be governed by the COLREGS. These rules apply to all international waters (i.e., the high seas, EEZs, and contiguous zones) and, except where a coastal State has established different rules, in that State's territorial sea, archipelagic waters, and inland waters. The 1972 COLREGS have been adopted as law by the United States. See 33 United States Code (U.S.C.), § 1601–1608. U.S. Navy Regulations, 1990, Article 1139, directs all persons in the naval service responsible for the operation of naval ships and craft shall diligently observe the 1972 COLREGS. In accordance with COMDTINST M5000.3B, U.S. Coast Guard Regulations, USCG personnel must comply with all federal laws and regulations.

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623. Presidential Decision Directive/NSC-32, Freedom of Navigation (Jan. 23, 1995). The DoD's annual FON reports are available at https://policy.defense.gov/ousdp-offices/fon/.

Commentary

The COLREGS include forty-one rules that are divided into six sections: Part A (General), Part B (Steering and Sailing), Part C (Lights and Shapes), Part D (Sound and Light Signals), Part E (Exemptions), and Part F (Verification of Compliance with the Convention). There are also four annexes that contain technical requirements concerning lights and shapes and their positioning; sound signaling appliances; additional signals for fishing vessels when operating in close proximity; and international distress signals. The rules apply to all vessels, including sovereign immune vessels, beyond the territorial sea (Rule 1). Rule 2 covers the responsibility of the master, owner, and crew to comply with the rules.[624]

2.9.2 National U.S. Inland Rules

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

The United States has adopted special inland rules applicable to navigation in U.S. waters landward of the demarcation lines established by U.S. law for that purpose. See Amalgamated International and U.S. Inland Navigation Rules (available online only at https://www.navcen.uscg.gov/?pageName=NavRulesAmalgamated); 33 Code of Federal Regulations, Part 80, COLREGS Demarcation Lines; and 33 U.S.C. §§ 2071–2072. The 1972 COLREGS apply seaward of the demarcation lines in U.S. national waters, in the U.S. contiguous zone and EEZ, and on the high seas.

Commentary

The lines of demarcation delineating those waters upon which mariners shall comply with the COLREGS and those waters upon which

624. Convention on the International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 U.S.T. 3459, T.I.A.S. 8587; 33 U.S.C. § 1602 note (1988); 33 C.F.R. pt. 81 (2023).

mariners shall comply with the Inland Navigation Rules are established in 33 C.F.R. Part 80. The waters inside of the lines are Inland Rules waters and the waters outside the lines are COLREGS waters.[625]

2.9.3 Navigational Rules for Aircraft

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

Commentary

The Chicago Convention requires States to "adopt measures to insure that every aircraft flying over or maneuvering within its territory and that every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and maneuver of aircraft there in force." States are also required to keep their "own regulations in these respects uniform, to the greatest possible extent, with those established . . . under this Convention." The rules established under the Convention apply over the high seas.[626] In adopting Annex 2 (1948) to the Convention and its Amendment 1 (1951), the Council decided that the Annex constitutes rules relating to the flight and maneuver of aircraft within the meaning of Article 12 of the Convention. Thus, Annex 2 applies over the high seas without exception.[627]

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625. 33 C.F.R. § 80.01 (2023).
626. Chicago Convention, art. 12.
627. *Id.* annex 2.

> DoD Flight Information Publication (FLIP) product groups are aligned with the three flight phases: planning, enroute, and terminal. No single publication contains all of the information that may be required by aircrews. Planning documents and charts, enroute charts and supplements, terminal procedures, and notice to airmen (NOTAM) files must be consulted prior to flight. International flight planners must also refer to the Foreign Clearance Guide.[628] Guidance for military flight operations in international airspace and air routes over international straits and archipelagic sea lanes is contained in Chapter 8 of the FLIP. Guidance on filing flight plans, pilot procedures (e.g., visual flight rules and instrument flight rules), and ICAO procedures is contained in Chapters 4, 6, and 7 of the FLIP, respectively.
>
> OPNAVINST 3710.7V establishes the Naval Air Training and Operating Procedures Standardization (NATOPS) Program.[629] The NATOPS General Flight and Operating Instruction Manual details the policies and procedures in support of this instruction, which is applicable to all NATOPS users, and prescribes general flight and operating instructions and procedures pertinent to the operation of all naval aircraft and related activities.[630] The NATOPS Manual is not intended to cover every contingency that may arise and every rule of safety and good practice.[631] In a tactical environment, military exigency may require on-site deviations from instructions and procedures contained in the Manual. The existing risk of deviation must be weighed against the benefit of deviating from the Manual. Deviation from specified flight and operating instructions is authorized in emergency situations when, in the judgment of the pilot in command, safety justifies such a deviation.[632]

628. DoD FLIP, General Planning (May 23, 2019).

629. OPNAVINST 3710.7V, Naval Air Training and Operating Procedures Standardization Program, ¶ 1 (Nov. 22, 2016).

630. *Id.* ¶ 4; Chief of Naval Operations, CNAF M-3710.7, NATOPS General Flight and Operating Instruction Manual, ¶ 1.1 (July 15, 2017).

631. CNAF M-3710.7, *supra* note 623, ¶ 1.1.1.1.

632. *Id.* ¶ 1.1.1.3.

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

Commentary

All persons in the naval service responsible for the operation of naval ships, craft, and aircraft shall diligently observe the COLREGS, the Inland Navigation Rules, domestic and international air traffic regulations, and such other rules and regulations as may be established by the Secretary of Transportation or other competent authority for regulating traffic and preventing collisions on the high seas, in inland waters, or in the air, where such laws, rules, and regulations are applicable to naval ships and aircraft. In those situations where such laws, rules, or regulations are not applicable to naval ships, craft, or aircraft, they shall be operated with due regard for the safety of others. Any significant infraction of the laws, rules, and regulations governing traffic or designed to prevent collisions on the high seas, in inland waters, or in the air that is observed by persons in the naval service shall be promptly reported to the chain of command, including the Chief of Naval Operations or the Commandant of the Marine Corps when appropriate.[633]

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

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

In order to better assure the safety of navigation and flight of their respective warships and military aircraft during encounters at sea, the United States and

633. U.S. Navy Regulations, art. 1139 (1990).

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

Commentary

A series of dangerous incidents between U.S. and Soviet naval forces during the 1960s—close passes by low-flying aircraft, intentional shouldering (bumping) of surface ships, threatening maneuvers by ships and aircraft, and simulated surface and air attacks—laid the groundwork for the negotiation of the Incidents at Sea (INCSEA) Agreement. On May 25, 1972, the INCSEA Agreement was signed by Secretary of the Navy John Warner and Soviet Admiral Sergei Gorshkov in Moscow and immediately entered into force.

Over the past fifty years, INCSEA has significantly reduced unsafe and unprofessional aerobatics and ship handling when U.S. and Soviet (and later Russian) forces operate in close proximity to one another on the high seas. For example, two years after INCSEA entered into force, the number of dangerous incidents fell from one hundred to forty per year.[634] A Protocol was signed in 1973, extending the prohibition on simulated attacks to nonmilitary ships.[635]

Principal provisions of the INCSEA Agreement include:

634. Eric A. McVadon, *The Reckless and the Resolute: Confrontation in the South China Sea*, 5 CHINA SECURITY (2009).

635. Protocol to the Agreement on the Prevention of Incidents On and Over the High Seas, May 22, 1973, 24 U.S.T. 1063, 1063 T.I.A.S. 7624.

1. Ships will observe strictly both the letter and the spirit of the 1972 COLREGS.

2. Ships will remain well clear of one another to avoid risk of collision and, when engaged in surveillance activities, will exercise good seamanship so as not to embarrass or endanger ships under surveillance.

3. Ships will utilize special signals for signaling their operation and intentions.

4. Ships of one party will not simulate attacks by aiming guns, missile launchers, torpedo tubes, or other weapons at the ships and aircraft of the other party, and will not launch any object in the direction of passing ships or illuminate their navigation bridges. Under the 1973 Protocol, U.S. and Soviet military ships and aircraft shall not make simulated attacks by aiming guns, missile launchers, torpedo tubes, and other weapons at nonmilitary ships of the other party or launch or drop any objects near nonmilitary ships of the other party in such a manner as to be hazardous to these ships or constitute a hazard to navigation.

5. Ships conducting exercises with submerged submarines will show the appropriate signals to warn of submarines in the area.

6. Ships, when approaching ships of the other party, particularly those engaged in replenishment or flight operations, will take appropriate measures not to hinder maneuvers of such ships and will remain well clear.

7. Aircraft will use the greatest caution and prudence in approaching aircraft and ships of the other party, in particular ships engaged in launching and landing aircraft, and will not simulate attacks by the simulated use of weapons or perform aerobatics over ships of the other party or drop objects near them.

Commentary

The INCSEA Agreement was signed several months prior to the adoption of the COLREGS. Moreover, the COLREGS did not enter

into force until July 15, 1977. Consequently, INCSEA reaffirmed the parties' obligations under Article 18 of the VCLT to refrain from acts that would defeat the object and purpose of the COLREGS.[636] INCSEA specifically requires ship commanders to strictly observe the letter and spirit of the COLREGS.[637] Consistent with the COLREGS, Article III provides:

- When operating in close proximity, ships shall remain well clear to avoid risk of collision.
- When operating in the vicinity of a formation, ships shall avoid maneuvering in a manner that would hinder the evolutions of the formation.
- Formations shall not conduct maneuvers in internationally recognized traffic separation schemes.
- Ships engaged in surveillance shall stay at a distance that avoids the risk of collision and shall avoid executing maneuvers embarrassing or endangering the ship under surveillance.
- When operating in sight of one another, ships shall use signals prescribed in the COLREGS, the International Code of Signals (ICS), or other mutually agreed signals.
- Ships shall not simulate attacks, launch any object in the direction of a passing ship, or illuminate the navigation bridge of a passing ship.
- When conducting exercises with submerged submarines, exercising ships shall show the appropriate signals prescribed by the ICS.
- When approaching ships engaged in launching or recovering aircraft, as well as ships engaged in replenishment underway, ships shall take appropriate measures not to hinder maneuvers of such ships and shall remain well clear.

Guidance for U.S. aircraft commanders to ensure compliance with INCSEA is contained in the FLIP. Commanders of U.S. aircraft shall use the greatest caution and prudence in approaching aircraft and ships of the Russian Federation operating on and over the high seas,

636. VCLT, art. 18.
637. INCSEA Agreement, art. II.

> in particular ships engaged in launching or landing aircraft, and in the interest of mutual safety shall not permit simulated attacks by the simulated use of weapons against aircraft and ships, or performance of various aerobatics over ships, or dropping various objects near them in such a manner as to be hazardous to ships or to constitute a hazard to navigation.[638] U.S. ships and aircraft shall not make simulated attacks by aiming guns, missile launchers, torpedo tubes, and other weapons at Russian nonmilitary ships, nor launch or drop any objects near Russian nonmilitary ships in such a manner as to be hazardous to these ships or to constitute a hazard to navigation.[639] U.S. ships operating in sight of Russian ships shall give proper signals concerning the intent to begin launching or landing aircraft.[640] U.S. aircraft flying over the high seas in darkness or under instrument conditions shall, whenever feasible, display navigation lights.[641] U.S. unit Commanders shall provide through the established system or radio broadcasts of information and warning to mariners, not less than three to five days in advance, notification of actions on the high seas that represent a danger to navigation or to aircraft in flight.[642] In the event of an incident between U.S. and Russian naval or air forces, the United States and Russia shall exchange appropriate information concerning instances of collisions, incidents that results in damage, or other incidents at sea between ships and aircraft of the United States and Russia. The U.S. Navy shall provide such information through the Russian Naval Attaché in Washington and the Russian Navy shall provide such information through the U.S. Naval Attaché in Moscow.[643]

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

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638. DoD FLIP, General Planning, ¶ 8-8.b (May 23, 2019).
639. *Id.* ¶ 8-8c.
640. *Id.* ¶ 8-8d.
641. *Id.* ¶ 8-8e.
642. *Id.* ¶ 8-8f.
643. *Id.* ¶ 8-8g.

Commentary

> The annual INCSEA consultations are professional discussions reviewing the implementation of the agreement and reaffirming the enduring commitment of both sides to risk reduction dialogue. The consultations address air-to-air intercepts of each other's aircraft in international airspace, and interactions between the ships of the two nations that occurred in international waters over the past year. The discussions did not take place in 2020 due to the COVID-19 pandemic. The U.S. Navy hosted the last meeting in Washington, D.C. on July 18, 2019.[644]
>
> The United States also has an INCSEA Agreement with Ukraine.[645] Russia has INCSEA Agreements with Canada, France, Germany, Greece, Italy, Japan, the Republic of Korea, the Netherlands, Norway, Spain, and the United Kingdom.[646]

OPNAVINST 5711.96D, United States and Russia Incidents At Sea Including Dangerous Military Activities Agreements, provides information on and issues procedures concerning the INCSEA Agreement, including a table of supplementary signals authorized for use during communications between U.S. and Russian Federation units under the INCSEA Agreement.

Commentary

> The INCSEA Agreement applies to U.S. Navy, U.S. Marine Corps, MSC, U.S. Coast Guard, U.S. Air Force, and U.S. Army units when

644. Press Release, U.S. Department of the Navy, U.S. and Russian Navies Hold Annual INCSEA Consultations in Moscow (May 25, 2021), https://www.navy.mil/Press-Office/Press-Releases/display-pressreleases/Article/2631199/us-and-russian-navies-hold-annual-incsea-consultations-in-moscow/.

645. *See Treaties in Force*, U.S. DEPARTMENT OF STATE, https://www.state.gov/treaties-in-force/.

646. KRASKA & PEDROZO, *supra* note 172, at 8–9; Pedrozo, *supra* note 431, at 531. See the various Agreements Concerning the Prevention of Incidents at Sea Beyond the Territorial Sea: U.K.-U.S.S.R., July 15, 1986, 1505 U.N.T.S. 89; Ger.-U.S.S.R., Oct. 25, 1988, 1546 U.N.T.S. 203; U.S.S.R.-Fr., July 4, 1989, 1548 U.N.T.S. 223, amended by Protocol, Dec. 17, 1997, 2090 U.N.T.S. 219; U.S.S.R.-It., Nov. 30, 1989, 1590 U.N.T.S. 22; U.S.S.R.-Can., Nov. 20, 1989, 1568 U.N.T.S. 11; Ger.-Pol., Nov. 27, 1990, 1910 U.N.T.S. 39; Spain-U.S.S.R., Oct. 26, 1990, 1656 U.N.T.S. 429; U.S.S.R.-Neth., June 19, 1990, 1604 U.N.T.S. 3.

operating on and over waters beyond the territorial sea.[647] USNSs are U.S. naval auxiliaries and are subject to INCSEA.[648] The remainder of the MSC fleet consists of commercial ships under charter for various lengths of time. These ships bear the usual commercial markings of their owners. All commercial, nonmilitary U.S. ships are protected from harassment by Russian naval and naval auxiliary ships and military aircraft under the provisions of the 1973 Protocol. No specific action, such as the use of special signals, is required of nonmilitary ships.[649] On the Russian side, naval and naval auxiliary ships (ships authorized to fly a Russian naval auxiliary flag) are bound by INCSEA, to include Russian electronic reconnaissance ships.[650] Submarines are covered by INCSEA but only when they operate on the surface.[651]

INCSEA is intended to (a) reduce the risk of serious, unintended confrontation between U.S. and Russian forces on and over waters outside the limits of the territorial sea; and (b) promote the safety of operations where U.S. and Russian naval and air forces operate in proximity to each other.[652] In this regard, INCSEA is consistent, and requires compliance, with the COLREGS. Because surveillance activities are not fully accounted for by the COLREGS, INCSEA provides guidance in these situations, as well as guidance in aircraft-to-ship and aircraft-to-aircraft situations for which there are no internationally recognized rules of conduct.[653]

When operating in close proximity to Russian ships or aircraft, U.S. commanding officers and aircraft commanders will, to the maximum degree possible, establish radio communications and use the appropriate signals from the ICS and Flight Information Handbook (FIH)[654] and enclosures (1) and (2) of OPNAVINST 5711.96D to

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647. OPNAVINST 5711.96D, United States and Russian Federation Incidents at Sea Including Dangerous Military Activities Agreements, ¶ 4.a(2) (Apr. 5, 2021).

648. *Id.* ¶ 4.a(2)(a).

649. *Id.* ¶ 4.a(2)(b).

650. *Id.* ¶ 4.a(2)(d).

651. *Id.* ¶ 4.a(2)(c).

652. *Id.* ¶ 4.a(3)(a)–(b).

653. *Id.* ¶ 4.a(4).

654. DoD Flight Information Publication (Enroute), Flight Information Handbook, at A-44 (Mar. 1, 2018) [hereinafter FIH].

> indicate maneuvering intentions to Russian counterparts. At night, in conditions of reduced visibility, or under conditions of lighting and distance when signal flags are not discernable, flashing light, supplemented by radio communications, should be used to pass appropriate signals between U.S. and Russian units. Communication between military aircraft or between ships and military aircraft of the sides will utilize radio communication procedures set forth in INCSEA. Communication between ships may also use the INCSEA radio communication procedures. In addition, procedures for aircraft interception, specific to the Russian Federation, outlined in the FIH, are to be used when necessary. Commanders of ships and military aircraft should use appropriate signals from Enclosure (1) of OPNAVINST 5711.96D when they want to communicate information or describe an action that may constitute danger for ships and military aircraft of the sides. To ensure ship and aircraft safety, clear voice radio communications in English may also be used.[655]
>
> INCSEA incidents must be reported promptly to the chain of command. The message reports should provide sufficient detail (e.g., signals exchanged, position, course, speed, bearing, and range information on the units involved) to support timely discussions with the Russian Naval Attaché. Detailed written reports serve as the basis for detailed discussions at the annual INCSEA consultation.[656]

2.10.2 United States-Union of the Soviet Socialist Republics Agreement on the Prevention of Dangerous Military Activities

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

1. Unintentional or distress (*force majeure*) entry into the national territory of the other party

655. OPNAVINST 5711.96D, *supra* note 647, ¶ 6.a(1).
656. *Id.* ¶ 6.a(2)–(3).

2. Use of lasers in a manner hazardous to the other party

3. Hampering operations in a manner hazardous to the other party in a special caution area

4. Interference with command and control networks in a manner hazardous to the other party.

The DMA Agreement continues to apply to U.S. and Russian Federation armed forces. OPNAVINST 5711.96D provides implementing guidance for the DMA Agreement to Navy department units.

Commentary

The Agreement on the Prevention of Dangerous Military Activities (DMA Agreement) seeks to ensure the safety of U.S. and Russian personnel and equipment by avoiding certain dangerous military activities and expeditiously and peacefully resolving related incidents.[657]

When in proximity to one another, the armed forces of each country are to refrain from (1) the dangerous use of lasers; (2) dangerous interference with command-and-control systems; and (3) certain activities in mutually agreed upon Special Caution Areas. The parties have also agreed to follow special procedures when the armed forces of one country enter, either unintentionally or as a result of *force majeure*, into the national territory of the other country.[658]

If it becomes necessary to immediately land in Russia, the U.S. aircraft should:

1. Attempt to establish radio contact with Russian air traffic control using frequencies, call signs, and procedures specified in the FIH.

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657. Agreement on the Prevention of Dangerous Military Activities, U.S.-U.S.S.R., June 12, 1989, 28 INTERNATIONAL LEGAL MATERIALS 879; DoD FLIP, ¶ 8–9.

658. FIH, *supra* note 654, at A-44(b)–(c). For more specific guidance on procedures regarding Dangerous Military Activities, see CDRNORAD CONPLAN 3310-07, annex C app. 34 at C-34-1 (Jan. 23, 2007).

2. Advise the Russian controlling agency or interceptor with the phrase "Request Landing" or the appropriate visual signal from Table I in the FIH. The Russian controlling agency or interceptor should provide assistance if possible.
3. Expect to be directed or escorted to a suitable airport.
4. Upon landing, expect to be parked on an isolated part of the airport or a separate hangar.
5. Use the U.S./Russia Checklist in Table III in the FIH to communicate minimum essential information to the Russian airport manager. Request billeting, messing, and transportation for aircrew and passengers. U.S. aircrews should expect assistance in arranging billeting, messing, and transportation, and in filing flight plans.
6. Secure the aircraft. It may be necessary to use aircrew members or passengers to provide a continuous presence at the airport.
7. The aircraft is not subject to any inspection except in cases where it poses a clear hazard to the environment or the health of personnel. Action may be taken to terminate the hazard. Refer questions involving inspections to higher U.S. and Russian representatives for resolution.
8. Request assistance to contact the U.S. Defense Attaché at the U.S. Embassy in Moscow as soon as possible.
9. Determine the maintenance and logistic support needed to launch the aircraft. Inform Russian officials and the U.S. Defense Attaché of the required support.
10. Sign no documents. Request that all bills be forwarded to the U.S. Embassy for payment. Request copies of all bills.
11. Depart the Russian airport as soon as practical.[659]

2.10.3 United States-China Military Maritime Consultative Agreement

Established in January 1998 by an agreement between the U.S. SECDEF and the Minister of National Defense of the People's Republic of China, the Military Maritime Consultative Agreement (MMCA) provides a forum for ex-

659. FIH, *supra* note 654, at A-44(i).

changes of views between the United States and China to strengthen maritime and air safety. The MMCA does not establish legally binding procedures between the countries, but rather provides a mechanism to facilitate consultations between their respective maritime and air forces. The MMCA forum addresses such measures to promote safe maritime practices as:

1. Search and rescue activities

2. Communications procedures when ships encounter each other

3. Interpretations of the International Rules of the Road

4. Avoidance of accidents at sea.

Commentary

The Military Maritime Consultative Agreement is designed to facilitate consultations between the DoD and China's Ministry of National Defense (MND) for the purpose of promoting common understandings regarding activities undertaken by their maritime and air forces.[660] The mechanisms for consultation include an annual meeting, working groups, and special meeting (as mutually agreed).[661] Agenda items include search and rescue, communication procedures when ships encounter each other, interpretation of the COLREGS, and avoidance of accidents-at-sea.[662]

2.10.4 2014 Code for Unplanned Encounters at Sea

The 2014 Code for Unplanned Encounters at Sea (CUES) is an international code designed to reduce uncertainty, enhance safety, facilitate communication, and promote standardized maneuvering practices between naval ships, submarines, auxiliaries, and aircraft. It consists of navigational safety rules, communications procedures, and signals. Although not legally binding, CUES provides a coordinated means of communication and maneuvering practices by utilizing existing international procedures to maximize safety at

660. MMCA, art. I.
661. *Id.* art. II.
662. *Id.* art. II(1).

sea with navies not accustomed to the routine use of maneuvering and signals manuals with each other. The participants in CUES are:

1. United States
2. Australia
3. Brunei
4. Cambodia
5. Canada
6. Chile
7. China
8. France
9. Indonesia
10. Japan
11. Malaysia
12. New Zealand
13. Papua New Guinea
14. Peru
15. Philippines
16. Republic of Korea
17. Russian Federation
18. Singapore

19. Thailand

20. Tonga

21. Vietnam.

Commentary

The Western Pacific Naval Symposium (WPNS) is a biannual meeting among navies with strategic interests in the Western Pacific. The WPNS aims to increase cooperation and the ability to operate together, as well as build trust and confidence among navies, by providing them a venue to discuss maritime issues of mutual interest as a group and through bilateral meetings. The WPNS adopted the Code for Unplanned Encounters at Sea (CUES) in 2014.

CUES offers safety procedures, a basic communications plan, and basic maneuvering instructions for naval ships and naval aircraft during unplanned encounters at sea.[663] It offers safety measures and means to limit mutual interference, to limit uncertainty, and to facilitate communication when naval ships and naval aircraft encounter each other in an unplanned manner.[664] An "unplanned encounter at sea" occurs when naval ships or naval aircraft of one State meet casually or unexpectedly with a naval ship or naval aircraft of another State.[665]

WPNS navies shall comply with the COLREGS and any action to avoid collision shall, if the circumstances permit, be positive, made in ample time, and made with due regard to the observance of good seamanship.[666] Commanding officers and masters should at all times maintain a safe separation between their vessel and those of other nations.[667]

663. CUES, ¶ 1.2.1.
664. CUES, ¶ 1.1.2.
665. CUES, ¶ 1.3.2.
666. CUES, ¶¶ 2.0, 2.1.1.
667. CUES, ¶ 2.6.2.

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

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

The second annex is the Rules of Behavior for Safety of Surface-to-Surface Encounters (Surface Rules). This annex seeks to avert incidents and build trust between U.S. and Chinese surface vessels by reiterating the requirements of international law (e.g., the 1972 COLREGS) and preexisting obligations (e.g., CUES). The Surface Rules encourage early and active communications during air-to-air encounters and reinforce the right to FON and overflight in warning areas. They discourage simulated attacks, acrobatics, discharge of weapons, illumination of bridges and cockpits, use of lasers, unsafe approaches by small craft, and other actions that could be interpreted as threatening by the other State's vessels.

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

Commentary

The DoD-MND Memorandum of Understanding (MOU) and its Annexes are designed to strengthen adherence to existing international law and norms, improve operational safety at sea and in the air, and enhance mutual trust.[668] By signing the MOU, both sides affirmed their commitment to the rules of behavior for the safety of military vessels and military aircraft when they encounter each other at sea or in the air.[669] Of note, nothing in the MOU prejudices either side's policies with respect to military activities in the EEZ.[670] Nothing in the MOU or its Annexes absolves a commander or master of the consequences of any neglect of precautions to avoid collision or avoid taking any other course of action that may be required by the ordinary practice of seamen, or by the special circumstances of the case.[671] Additionally, the flag State is responsible for taking such measures for military vessels flying its flag as are necessary to ensure safety at sea.[672]

The MOU further provides that those military vessels that encounter each other at sea are to abide by the COLREGs and implement CUES in good faith.[673] When military vessels encounter each other at sea, they should maintain a safe distance to avoid the risk of collision. However, "safe distance" is not defined in the MOU. Rather, the relevant provisions of the COLREGS and CUES, and the circumstances at sea at the time, will be used to determine "safe distance."[674] If either side establishes a warning area, military vessels and military aircraft should refrain from interfering with the activities (such as a military exercise or live weapons firing) in the warning area without prejudice to high seas freedoms of navigation and overflight and other internationally lawful uses of the sea related to those freedoms.[675]

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668. Memorandum of Understanding Regarding the Rules of Behavior for Safety of Air and Maritime Encounters, U.S.-China, § I, Nov. 9 & 10, 2014.
669. *Id.* § I.
670. *Id.* § V.
671. *Id.* annex I § II(i).
672. *Id.* annex I § II(ii).
673. *Id.* annex II t § I.
674. *Id.* annex II § IV.
675. *Id.* annex II at § V(3).

2.11 MILITARY ACTIVITIES IN OUTER SPACE

2.11.1 Outer Space

Except when exercising transit passage or archipelagic sea lanes passage, overflight within national airspace by foreign aircraft is not authorized without the consent of the territorial sovereign. Man-made satellites and other objects in Earth orbit may overfly foreign territory freely while located in outer space. Although there is no legally defined boundary between the upper limit of national airspace and the lower limit of outer space, international law recognizes freedom of transit by man-made space objects throughout outer space. Outer space begins at the undefined upper limit of the Earth's airspace and extends to infinity.

Commentary

The DoD identifies the "space domain" as the "area above the altitude where atmospheric effects on airborne objects become negligible." The United States Space Command (USSPACECOM) area of responsibility (AOR) is the "area surrounding the Earth at altitudes equal to, or greater than, 100 kilometers (54 nautical miles) above mean sea level."[676] See § 1.10 for a further discussion of space activities.

The DoD released a new Space Policy in August 2022.[677] The new directive establishes policy and assigns responsibilities for DoD space-related activities in accordance with the National Space Policy, the U.S. Space Priorities Framework, the National Defense Strategy, the Defense Space Strategy, and U.S. law, including Titles 10, 50, and 51 of the United States Code.

2.11.2 The Law of Outer Space

International law, including the Charter of the UN, applies to the outer space activities of States. Outer space is open to exploration and use by all States. It is not subject to national appropriation and should be used for peaceful

676. JP 3-14, Space Operations (Ch. 1, Oct. 26, 2020).
677. DoDD 3100.10, Space Policy (Aug. 30, 2022).

purposes. The term peaceful purposes does not preclude military uses of outer space (including warfighting) and is therefore similar to the interpretation given to the reservation of the high seas for peaceful purposes in UNCLOS. While acts of aggression in violation of the Charter of the UN are precluded, space-based systems may lawfully be employed to perform essential command, control, communications, intelligence, navigation, environmental, surveillance, and warning functions to assist military activities on land, in the air, through cyberspace, and on and under the sea. In using outer space, States must have due regard for the rights and interests of other States.

Commentary

In December 1963, the UN General Assembly adopted Resolution 1962, which sets forth nine principles for conducting activities in outer space.[678] The resolution states that space is reserved for the benefit and in the interests of all mankind. All States are free to explore and utilize, on the basis of equality, outer space and celestial bodies, which are not subject to appropriation. The exploration and use of outer space shall be conducted in accordance with international law and the UN Charter. States are responsible for their space activities. States also shall have due regard to the interests of other States in outer space. The State of registry retains jurisdiction and control over its space objects, and any personnel thereon, while in outer space, and such objects and component parts shall be returned to the State of registry. States are internationally liable for damage to a foreign State or to its natural or juridical person caused by an object launched into outer space. Finally, astronauts shall be regarded as envoys of mankind in outer space, and States shall render assistance if they need help and quickly return them to the State of registry of their space vehicle in the event of distress.

The codified law of outer space arises principally from four major peacetime treaties: (1) the Outer Space Treaty; (2) the Rescue Agree-

678. G.A. Res 1962(XVII), Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space (Dec. 13, 1963).

ment; (3) the Liability Convention; and (4) the Registration Convention. However, some of the provisions in these conventions may not apply between belligerents during international armed conflict.[679]

Generally, the law of armed conflict applies as a regime *lex specialis* during armed conflict.[680] In such case, the peacetime principle of non-interference with space systems may be displaced by the rules governing war. However, the ILC's Draft Articles on the Effects of Armed Conflicts on Treaties (Draft Articles) state that armed conflict does not *ipso facto* terminate or suspend peacetime treaties.[681] Article 6 of the Draft Articles states that the nature of the treaty, including its object and purpose, and the characteristics of the armed conflict, determine whether it continues to apply during armed conflict. Thus, the major outer space treaties set forth a framework that likely would exert a latent normative influence during an international armed conflict.

The United States interprets the use of outer space for "peaceful purposes" to mean "non-aggressive and beneficial" purposes consistent with the UN Charter and other international law.[682] This interpretation of "peaceful purposes" is similar to the interpretation given to the U.S. position regarding the peaceful purposes provisions of UNCLOS (see § 2.6.2). For example, observation or information-gathering from satellites in space is not an act of aggression under the UN Charter and thus would be a use of space for peaceful purposes.[683] Similarly, lawful military activities in self-defense (e.g., mis-

679. Department of Defense, Office of the General Counsel, An Assessment of International Legal Issues in Information Operations (2d ed. Nov. 1999), *reprinted in* 76 INTERNATIONAL LAW STUDIES 459, 494 (2002).

680. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S), Judgment, 1986 I.C.J. 14, ¶ 25 (June 27).

681. ILC, Draft Articles on the Effects of Armed Conflicts on Treaties, *in* Report on the Work of Its Sixty-Third Session, U.N. Doc. A/66/10 (2011), *reprinted in* [2011] 2(2) YEARBOOK OF THE ILC 101, at 111 (art. 3).

682. *Treaty on Outer Space: Hearings Before the Senate Committee on Foreign Relations*, 90th Cong. 59 (1967) (Sen. Albert Gore, Sr.); DOD LAW OF WAR MANUAL, § 14.10.4.

683. Albert Gore, Sr., U.S. Representative to the United Nations, U.N. GAOR, 17th Sess., 1289th mtg. at 13, U.N. Doc. A/C.1/PV.1289 (Dec. 3, 1962); Report by the Committee on Satellite Reconnaissance Policy, attached to memorandum from Secretary Rusk to

sile early warning and the use of weapon systems) would be consistent with the use of space for peaceful purposes, but aggressive activities that violate the UN Charter would not be permissible.[684]

2.11.2.1 General Principles of the Law of Outer Space

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

1. Access to outer space is free and open to all States.

2. Outer space is free from claims of sovereignty and not otherwise subject to national appropriation.

3. Outer space should be used for peaceful purposes.

4. Each user of outer space must show due regard for the rights of others.

5. No nuclear or other weapons of mass destruction (WMD) may be stationed in outer space. This does not prohibit weapons that are not WMDs (e.g., antisatellite laser weapons or other conventional weapons).

6. Nuclear explosions in outer space are prohibited.

7. States are to avoid harmful contamination of outer space and adverse changes in the environment of the Earth resulting from the introduction of extraterrestrial matter.

8. Astronauts must render all possible assistance to other astronauts in distress.

President Kennedy (July 2, 1962), *excerpted in* 25 FOREIGN RELATIONS OF THE UNITED STATES (1961–1963), at 951–59 (2001).

684. CARL Q. CHRISTOL, THE INTERNATIONAL LAW OF OUTER SPACE 114 (1966).

9. Objects in outer space must be registered to a State.

10. States may be liable for damage inflicted by space objects where they are the State of registry or otherwise a launching State.

Commentary

The Outer Space Treaty entered into force on October 10, 1967. The agreement provides in Article I that outer space, the Moon, and other celestial bodies are the province of all mankind. Like the high seas, space is not subject to national appropriation or claims of sovereignty by means of use or occupation, or by any other means.[685] The exploration and use of outer space, including the moon and other celestial bodies, shall be carried out "in the interest of maintaining international peace and security" and promoting cooperation and understanding.[686] The Moon, other celestial bodies, and outer space are also "free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law, and there shall be free access to all areas of celestial bodies."[687]

Under Article IV, States parties "undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner." Article IV further requires that "the Moon and other celestial bodies shall be used . . . exclusively for peaceful purposes" and it prohibits the "establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military maneuvers on celestial bodies."

The Limited Test Ban Treaty, a bilateral agreement between the United States and the Soviet Union, bans explosive nuclear testing or other nuclear explosions in the atmosphere, outer space, and underwater.[688]

685. Outer Space Treaty, art. II.
686. *Id.* art. III.
687. *Id.* art. I.
688. Nuclear Test Ban Treaty, art. I.

The meaning of the term "peaceful purposes" is subject to contending interpretations. As discussed above (§ 2.11.2), the United States and other space powers interpret the term to allow for all military activities in space that are not specifically prohibited by treaty (e.g., stationing WMD in outer space) or that are not inconsistent with Article 2(4) (the prohibition on the aggressive use of force) or Article 51 (the right of individual and collective self-defense) of the UN Charter.[689]

In 2006, the Bush administration committed itself to explore and use space for peaceful purposes but clarified that "peaceful purposes" permit defense and intelligence-related activities.[690] Similarly, the Obama administration stated that "peaceful purposes" and international law allow outer space to be used for national security missions.[691] The 2020 U.S. Defense Space Strategy reinforces this interpretation.[692]

To accept that all military activities in space are, by their nature, prohibited by the "peaceful purposes" provision of Article IV would be inconsistent with long-standing State practice. The first military reconnaissance satellite was launched by the United States in 1959.[693] By 2020, twenty nations were operating more than three hundred military satellites in Earth's orbit.[694] Satellites are used for a variety of

689. Gore, *supra* note 682, at 13; Report by the Committee on Satellite Reconnaissance Policy, *supra* note 683. *See also* Bing Cheng, *Properly Speaking, Only Celestial Bodies Have Been Reserved for Use Exclusively for Peaceful (Non-Military) Purposes, but Not Outer Void Space*, 75 INTERNATIONAL LAW STUDIES 81, 96 (2000).

690. DEPARTMENT OF HOMELAND SECURITY, U.S. NATIONAL SPACE POLICY (Aug. 31, 2006).

691. OFFICE OF THE PRESIDENT, NATIONAL SPACE POLICY OF THE UNITED STATES OF AMERICA 3–7 (June 28, 2010).

692. DEPARTMENT OF DEFENSE, DEFENSE SPACE STRATEGY 8 (June 2020).

693. Albert D. Wheelon, *Corona: The First Reconnaissance Satellites*, PHYSICS TODAY, Feb. 1997, at 24, 29.

694. Joyce Chepkemoi, *Countries by Number of Military Satellites*, WORLD ATLAS (Mar. 16, 2018), https://www.worldatlas.com/articles/countries-by-number-of-military-satellites.html; *Here Are All the Satellites Orbiting the Earth in 2019*, ALL IN ALL SPACE (Mar. 25, 2019), https://www.allinallspace.com/here-are-all-the-satellites-orbiting-the-earth-in-2019/; *Iran Launches Military Satellite Amid Tensions with US*, THE MALAYSIAN INSIGHTS (Apr. 22. 2020), https://www.themalaysianinsight.com/s/239607; Amir Vahdat & Jon Gambrell, *Iran Guard*

> military purposes, including military communications; early warning systems; space-based navigation systems; intelligence, surveillance, and reconnaissance; and positioning, navigation, and timing operations.
>
> The Moon Agreement elaborates on numerous provisions in the Outer Space Treaty as applied to the Moon and other celestial bodies. The Agreement entered into force in June 1984 but has only eighteen States parties. None of the five permanent members of the UN Security Council is a party to the Agreement. The Agreement states that all activities on the Moon shall be carried out in accordance with the UN Charter and with due regard for the interests of all other States.[695] Moreover, the Moon and its natural resources shall be considered "the common heritage of mankind," and no State may purport to claim sovereignty over the Moon.[696] Article 11 further provides that, when exploitation of the natural resources of the Moon becomes feasible, the States parties to the Agreement undertake to establish an international regime to govern the exploitation of such resources. The Agreement requires that the Moon be used "exclusively for peaceful purposes" and "[a]ny threat or use of force or any other hostile act or threat of hostile act on the moon is prohibited."[697] Article 3 prohibits the use of the Moon to commit any such act or engage in any such threat "in relation to the earth, the moon, spacecraft, the personnel of spacecraft or man-made space objects" and States parties agree not to place in orbit around the Moon objects carrying nuclear weapons or any other WMD "or place or use such weapons on or in the moon." The Agreement further prohibits the "establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of

Reveals Secret Space Program in Satellite Launch, AP (Apr. 22, 2020), https://apnews.com/article/donald-trump-israel-persian-gulf-tensions-tehran-international-news-0b45baa8a846f55e058e98905e290ce5.

695. Moon Agreement, art. 2.

696. *Id.* art. XI.

697. *Id.* art. 3.

military manoeuvres on the moon."[698] States may, however, "establish manned and unmanned stations on the moon" to conduct activities consistent with the Agreement.[699]

In 2020, eight nations—Australia, Canada, Italy, Japan, Luxemburg, the United Arab Emirates, the United Kingdom, and the United States—signed the Artemis Accords, which represent a political commitment to establish a set of principles, guidelines, and best practices to enhance the civil exploration and use of outer space.[700] As of September 2022, twenty-one States had signed the Accords.[701] All cooperative activities under the Accords "should be exclusively for peaceful purposes and in accordance with relevant international law," including the Outer Space Treaty, the Rescue Agreement, the Liability Convention, and the Registration Convention.[702] Scientific information resulting from space activities under the Accords will be shared with the public and the international scientific community.[703] Any extraction and utilization of space resources, including any recovery from the surface or subsurface of the Moon, Mars, comets, or asteroids, should comply with the Outer Space Treaty and support safe and sustaining space activities.[704] Additionally, the exploration and use of outer space will be conducted with due regard for the rights of others and the signatories will "refrain from any intentional actions that may create harmful interference with each other's use of outer space."[705]

The Accords allow for the declaration of temporary safety zones to avoid harmful interference. Within these zones, the signatories commit to provide notification of their activities and coordinate with any

698. *Id.* art. 3.

699. *Id.* art. 9.

700. *Artemis Accords: Principles for Cooperation in the Civil Exploration and Use of the Moon, Mars, Comets, and Asteroids for Peaceful Purposes*, U.S. DEPARTMENT OF STATE (Oct. 13, 2020), https://www.state.gov/artemis-accords [hereinafter Artemis Accords].

701. *First Meeting of the Artemis Accords Signatories: Media Note*, U.S. DEPARTMENT OF STATE (Sept. 19, 2022), https://www.state.gov/first-meeting-of-artemis-accords-signatories/.

702. Artemis Accords, *supra* note 700, § 3.

703. *Id.* §§ 4, 8.

704. *Id.* § 10.

705. *Id.* § 11.

relevant actor to avoid harmful interference. Within a safety zone, the following principles will apply:

(a) the size and scope of the safety zone to include the nature of the operations being conducted and the environment in which such operations are conducted;
(b) the size and scope of the safety zone should be determined in a reasonable manner leveraging commonly accepted scientific and engineering principles;
(c) if the nature of an operation changes, the corresponding safety zone should be altered in size and scope as appropriate; and
(d) the signatories should promptly notify each other and the UN Secretary-General of the establishment, alteration, or end of any safety zone.[706]

Finally, as part of their mission planning process, the signatories commit to plan for the mitigation of orbital debris and "commit to limit, to the extent practicable, the generation of new, long-lived harmful debris released through normal operations, break-up in operational or post-mission phases, and accidents and conjunctions."[707]

2.11.2.2 The Moon and Other Celestial Bodies

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

Commentary

The prohibition on the placement of WMDs in orbit, as well as installing or stationing such weapons on celestial bodies or in outer

706. *Id.* § 11.
707. *Id.* § 12.

space, does not prohibit using space as a medium for delivering a nuclear weapon.[708] The Outer Space Treaty does not ban WMD that go into a fractional orbit or engage in suborbital flight. Intercontinental ballistic missiles are permissible since they travel through space during only a portion of their trajectory and are there temporarily. States are also prohibited from establishing military bases, installations, and fortifications on celestial bodies, as well as testing any type of weapons or conducting military maneuvers on such bodies.[709] These activities are prohibited only on the Moon and other celestial bodies, however, and not in the vast spaces between such bodies. Article IV also recognizes that military personnel, as well as equipment and facilities, may be used freely for peaceful purposes in outer space missions.

States are responsible in international law for their activities in outer space, "including the Moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities."[710] If a State launches an object into outer space, including the Moon and other celestial bodies, it is internationally liable for damage to another State or its natural or juridical persons.[711] This provision would, however, be trumped by the *lex specialis* of the law of armed conflict between belligerents. However, it is not clear whether it also applies as against third-party States whose satellites are also harmed. States bear responsibility during armed conflict for violations of the law of war, which generate an obligation to compensate other States.[712]

States are additionally required to conduct all their activities in outer space, including the Moon and other celestial bodies, with "due regard" to the corresponding interests of all other States.[713] To monitor

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708. Outer Space Treaty, art. IV.

709. *Id.*

710. Outer Space Treaty, art. IV; Report of the ILC to the General Assembly, 53 U.N. GAOR Supp. No. 10, U.N. Doc. A/56/10 (2001), *reprinted in* [2001] 2 YEARBOOK OF THE ILC 32, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

711. Outer Space Treaty, art. VII. *See also* Kieran Tinkler, *Rogue Satellites Launched into Outer Space: Legal and Policy Implications*, JUST SECURITY (June 17, 2018), https://www.justsecurity.org/57496/rogue-satellites-launched-outer-space-legal-policy-implications/.

712. DOD LAW OF WAR MANUAL, § 18.9.1.

713. Outer Space Treaty, art. IX.

compliance, all stations, installations, equipment, and space vehicles on the Moon and other celestial bodies shall be open to the representatives of other States on the basis of reciprocity if advance notice of the projected visit is provided.[714]

See §§ 2.11.2 and 2.11.2.1 for the U.S. interpretation of "peaceful purposes."

The Liability Convention elaborates on Article VII of the Outer Space Treaty. Article II imposes absolute liability on the launching State "to pay compensation for damage caused by its space object on the surface of the earth or to aircraft flight." For damages not on the Earth's surface, the launching State is "liable only if the damage is due to its fault or the fault of persons for whom it is responsible."[715] A launching State may be exonerated from absolute liability if it can establish that the damage resulted "from gross negligence or from an act or omission done with intent to cause damage" by the "claimant State or of natural or juridical persons it represents," unless the damage results from activities conducted by the launching State that are inconsistent with international law, in particular the UN Charter and the Outer Space Treaty.[716] A claim for compensation for damages "shall be presented to the launching state through diplomatic channels" or through the UN Secretary-General.[717] If the parties cannot settle the claim through diplomatic negotiations within one year, the dispute will be decided by a Claims Commission.[718]

2.11.3 Rescue and Return of Astronauts

Both the Outer Space Treaty and the 1968 Rescue and Return of Astronauts Agreement establish specific requirements for coming to the aid of civilian and military astronauts. These include a requirement by States to extend search and rescue assistance if such persons have made an emergency or unintended landing in a State's territorial waters, the high seas, or other place

714. *Id.* art. XII.
715. Liability Convention, art. III.
716. *Id.* art. VI.
717. *Id.* arts. VIII–IX.
718. *Id.* arts. XIV, XVIII, XIX.

not under the jurisdiction of any State. Rescued personnel are to be safely and promptly returned.

Commentary

Astronauts are considered envoys of mankind. Accordingly, Article V of the Outer Space Treaty provides that all States shall render all possible assistance to such personnel of a spacecraft "in the event of accident, distress, or emergency landing on the territory of another State Party or on the high seas." Article V further provides that personnel of a spacecraft "shall be safely and promptly returned to the State of registry of their space vehicle" and that astronauts shall render all possible assistance to other astronauts when conducting activities in outer space and on celestial bodies. The State of registration maintains ownership over its space objects, wherever located, and all States shall, upon request, provide assistance to the launching State in recovering its space objects that return to Earth.[719]

The Registration Convention requires States to register their space objects launched into Earth orbit or beyond in an appropriate registry maintained by the launching State.[720] Article III requires the UN Secretary-General to maintain a Register of the various State registries. All States shall provide the Secretary-General information concerning each space object recorded in its registry, to include:

(a) name of launching State or States;
(b) an appropriate designator of the space object or its registration number;
(c) date and territory or location of launch;
(d) basic orbital parameters, including:
    (i) nodal period;
    (ii) inclination;
    (iii) apogee;
    (iv) perigee;
(e) general function of the space object.[721]

719. Outer Space Treaty, art. VIII.
720. Registration Convention, art. II.
721. *Id.* art. IV.

Article IV further requires States to inform the Secretary-General when a previously reported space object is no longer in Earth orbit.

2.11.4 Return of Outer Space Objects

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

Commentary

Article 5 of the Rescue Agreement provides:

> 1. Each Contracting Party which receives information or discovers that a space object or its component parts has returned to Earth in territory under its jurisdiction or on the high seas or in any other place not under the jurisdiction of any State, shall notify the launching authority and the Secretary-General of the United Nations.
>
> 2. Each Contracting Party having jurisdiction over the territory on which a space object or its component parts has been discovered shall, upon the request of the launching authority and with assistance from that authority if requested, take such steps as it finds practicable to recover the object or component parts.
>
> 3. Upon request of the launching authority, objects launched into outer space or their component parts found beyond the territorial limits of the launching authority shall be returned to or held at the disposal of representatives of the launching authority, which shall, upon request, furnish identifying data prior to their return.

> 4. Notwithstanding paragraphs 2 and 3 of this Article, a Contracting Party which has reason to believe that a space object or its component parts discovered in territory under its jurisdiction, or recovered by it elsewhere, is of a hazardous or deleterious nature may so notify the launching authority, which shall immediately take effective steps, under the direction and control of the said Contracting Party, to eliminate possible danger of harm.
>
> 5. Expenses incurred in fulfilling obligations to recover and return a space object or its component parts under paragraphs 2 and 3 of this Article shall be borne by the launching authority.

2.11.5 Law of Armed Conflict in Outer Space

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

Commentary

> There is no international consensus on whether all, or even some, of the law of armed conflict applies in outer space.[722] Nevertheless, the use of force in outer space during an international armed conflict is constrained by existing treaty and customary international law, including the UN Charter and law of armed conflict rules regulating

722. Frans G. von der Dunk, *Armed Conflicts in Outer Space: Which Law Applies?*, 97 INTERNATIONAL LAW STUDIES 188, 191–92 (2021); Michael N. Schmitt, *International Law and Military Operations in Space*, MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 89 (2006); Michael Schmitt & Kieran Tinkler, *War in Space: How International Humanitarian Law Might Apply*, JUST SECURITY (Mar. 9, 2020), https://www.justsecurity.org/68906/war-in-space-how-international-humanitarian-law-might-apply/.

the means and methods of warfare.[723] Thus, belligerents must respect law of armed conflict rules governing the conduct of hostilities, to include the "principle of distinction, the prohibition against indiscriminate and disproportionate attacks, and the obligation to take precautions in attack against the effects of attack."[724]

There is no question that man-made space satellites are lawful military objectives if they carry weapons, are part of the enemy's kill chain (such as GPS), or are used for intelligence, surveillance, and reconnaissance; military communications; or command and control.[725] GPS satellites, however, are dual-use space objects. An attack on a GPS satellite could destroy or degrade safety-critical civilian activities, such as air traffic control, but it may also present a military advantage because the satellite could aid the adversary.[726] Therefore, targeting a GPS satellite requires a proportionality analysis to ensure that the anticipated military advantage outweighs expected incidental harm to civilians. Furthermore, attacks against military satellites and space vehicles may generate significant space debris that could affect civilian satellites, requiring an analysis of whether the attack is proportional in relation to the expected harmful effects and anticipated military advantage.[727] Such attacks also implicate the rights of neutral States that may own or operate satellites that are affected by debris.[728]

During an international armed conflict, enemy military satellites and other space objects are always lawful targets. Civilian and dual-use satellite objects in outer space may also be military objectives and subject to attack if they are used by the enemy to conduct or sustain

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723. ICRC, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICT 32 (Nov. 22, 2019) [hereinafter ICRC REPORT ON CONTEMPORARY ARMED CONFLICT]; DOD LAW OF WAR MANUAL, § 14.10.2.2.

724. ICRC REPORT ON CONTEMPORARY ARMED CONFLICT, *supra* note 723, at 34.

725. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 144 (4th ed. 2022).

726. ICRC REPORT ON CONTEMPORARY ARMED CONFLICT, *supra* note 723, at 32–35.

727. DINSTEIN, *supra* note 725, at 139–40.

728. Michel Bourbonnière & Ricky J. Lee, *Jus ad Bellum and Jus in Bello Considerations on the Targeting of Satellites: The Targeting of Post-Modern Military Space Assets*, 44 ISRAELI YEARBOOK OF HUMAN RIGHTS 167, 200 (2014); *cf.* Wolff Heintschel von Heinegg, *Neutrality and Outer Space*, 93 INTERNATIONAL LAW STUDIES 526, 530 (2017).

operations—such as for precision navigation and timing or for intelligence, surveillance, and reconnaissance—and for other war fighting or war sustaining activities.[729]

Proportionality and precautions in attack also apply. A civilian satellite or space object that is not making an effective contribution to military action may not be attacked.[730] Moreover, in the event of a dual-use satellite or space object, belligerents must take into consideration the "expected incidental harm to civilians and civilian objects . . . while assessing the legality of the attack under the principles of proportionality and precautions."[731] Even temporarily disabling a commercial satellite may, in certain circumstances, impose severe consequences on the civilian population, such as the loss of essential civilian services, like an electrical power grid.[732]

Belligerents must also consider the amount of space debris that will be created by the operation when conducting a kinetic attack on a space object. Space debris resulting from an attack on a lawful military target in space could potentially harm both protected civilian and third-party neutral military satellites. If disabling, rather than destroying, an enemy satellite will achieve a similar military advantage, the means selected to engage it should be the one that is least likely to cause danger to civilians and civilian objects.[733]

The Woomera Manual on the International Law of Military Space Activities and Operations seeks to identify, clarify, and succinctly articulate the extant rules of international law that apply to military space activities and operations, to explain the basis for those rules, and to delineate the areas of legal uncertainty that remain.[734]

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729. AP I, art. 52(2); DOD LAW OF WAR MANUAL, § 5.17.2.3.

730. AP I, art. 52.

731. AP I, art. 57; ICRC REPORT ON CONTEMPORARY ARMED CONFLICT, *supra* note 723, at 34.

732. ICRC REPORT ON CONTEMPORARY ARMED CONFLICT, *supra* note 723, at 35.

733. AP I, art. 57; Schmitt & Tinkler, *supra* note 722.

734. *See The Woomera Manual*, THE UNIVERSITY OF ADELAIDE, https://law.adelaide.edu.au/woomera/.

CHAPTER 3

PROTECTION OF PERSONS AND PROPERTY AT SEA AND MARITIME LAW ENFORCEMENT

3.1 INTRODUCTION

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

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

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

3.2 RESCUE, SAFE HARBOR, AND QUARANTINE

The obligation of mariners to render assistance to persons in distress at sea has long been recognized in custom and tradition. A right of emergency entry into territorial waters of a coastal State to take refuge from extreme perils of sea (*force majeure*) has customarily been recognized under international law. The right of emergency entry is not absolute. Coastal States may impose reasonable restrictions upon the entry of vessels into its territorial seas and the

movement and anchorage of vessels which enter due to emergencies. Coastal States may promulgate necessary and appropriate quarantine regulations and restrictions. See 3.2.2 for a more detailed discussion of *force majeure*.

Commentary

See § 3.2.2. for a detailed discussion of *force majeure*.
See § 3.2.3 for a detailed discussion of quarantine.

3.2.1 Assistance to Persons, Ships, and Aircraft in Distress

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

Commentary

The Standing Rules of Engagement for US Forces provide:

> Right of Assistance Entry
>
> (1) Ships and, under certain circumstances, aircraft have the right to enter a foreign territorial sea or archipelagic waters and corresponding airspace without the permission of the coastal state when rendering emergency assistance to those in danger or distress from perils of the sea.

> (2) Right of Assistance Entry extends only to rescues where the location of those in danger is reasonably well known. It does not extend to entering the territorial sea, archipelagic waters or territorial airspace to conduct a search.
>
> (3) For ships and aircraft rendering assistance on scene, the right and obligation of unit commanders to exercise unit self-defense extends to and includes persons, vessels or aircraft being assisted. The extension of self-defense in such circumstances does not include interference with legitimate law enforcement actions of a coastal nation. Once received on board the assisting ship or aircraft, however, persons assisted will not be surrendered to foreign authority unless directed by the SecDef.[1]

See Article 12 of the High Seas Convention and Article 98 of UNCLOS, which give expression to the general tradition and practice of all seafarers and of maritime law regarding the rendering of assistance to persons or ships in distress at sea, and the elementary considerations of humanity. Every State is legally obligated to require the master of every ship flying its flag to render assistance to persons or ships in distress if assistance can be provided without serious danger to the master's ship, passenger, and crew. The first obligation of a master of a ship is for the safety of his or her ship, its crew, and passengers, and the master has discretion in rendering assistance if there is a threat to these interests. States are also required to establish effective maritime search and rescue (SAR) services and to cooperate regionally as necessary.[2] The duty to rescue persons at sea includes asylum-seekers who are in distress.

The duty to render assistance is also addressed in Article 18 (Meaning of passage) of UNCLOS. Under Article 18(2), a ship exercising the right of innocent passage through the territorial sea may stop and anchor if it is necessary "for the purpose of rendering assistance to persons, ships or aircraft in danger or distress." Article 98 sets out the general obligation to render assistance to persons in distress "at

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1. CJCSI 3121.01B, Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces, encl. A at A-4 (June 13, 2005).

2. 3 VIRGINIA COMMENTARY at 170–71.

> sea" (i.e., anywhere in the oceans). Article 98 is applicable in the EEZ in accordance with Article 58(2). Therefore, in combination with Article 18, the duty to render assistance exists throughout the entire ocean, whether in the territorial sea, in straits used for international navigation, in archipelagic waters, in the EEZ, or on the high seas.[3]
>
> Besides UNCLOS, the duty to render assistance is reflected in four long-standing treaties: the Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea;[4] the Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels;[5] and the International Convention on Maritime Search and Rescue (SAR Convention).[6] These rules reflect internationally accepted standards and customary international law.[7]
>
> The SAR Convention provides an internationally standardized foundation and framework for coastal States to work together in implementing a global maritime SAR system. The ICAO's 1944 Convention on International Civil Aviation (Chicago Convention), in Annex 12 (Search and Rescue), provides a comparable framework for the establishment and coordination of the global aeronautical SAR system. The SAR Convention and the Chicago Convention (Annex 12) utilize comparable language in the establishment and operation of their respective global aeronautical and maritime SAR systems. However, SAR services are predominantly provided by maritime SAR services, even for an aircraft in distress at sea. To meet the requirements of both the SAR Convention and the Chicago Convention, nations establish national or regional SAR systems for the provision of aer-

3. *Id.* at 176–77.

4. 1910 Salvage Convention, art. XI.

5. Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels, art. 8, Sept. 23, 1910, 212 Consol. T.S. 178, *reprinted in* 4 AMERICAN JOURNAL OF INTERNATIONAL LAW Supp. 121 (1910); SOLAS, annex.

6. SAR Convention, annex ¶ 2.1.10.

7. ILC, Report on Its Eighth Session, U.N. Doc. A/3159 (1956), *reprinted in* [1956] 2 YEARBOOK OF THE ILC 253 at 281 (art. 36 commentary); FELICITY G. ATTARD, THE DUTY OF THE SHIPMASTER TO RENDER ASSISTANCE AT SEA UNDER INTERNATIONAL LAW 92–109 (2020); Irini Papanicolopulu, *The Historical Origins of the Duty to Save Life at Sea in International Law*, 24 JOURNAL OF THE HISTORY OF INTERNATIONAL LAW 149 (2022).

onautical and maritime SAR services to meet national and international humanitarian and legal obligations.[8] Each national SAR system is a component of the global maritime and aeronautical SAR systems.

The International Convention for the Safety of Life at Sea (SOLAS) provides the obligation for the master of a ship to render assistance to any person in distress at sea, and for contracting governments to coordinate and cooperate to minimize the impact to the master.[9]

The disposition of persons rescued at sea can be complicated by humanitarian and human rights concerns. Under the 1951 Refugee Convention and other human rights conventions, it is impermissible to return a person to a country where "his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[10] Under U.S. interpretation of human rights conventions, a person on a ship at sea may not validly claim asylum and is not entitled to the U.S. immigration process, as they are not within U.S. territory and jurisdiction. However, by policy, persons rescued at sea and manifesting a fear of return to a country where disposition is contemplated are still screened for protection concerns.[11]

Search and Rescue Regions (SRRs): The world is divided into maritime and aeronautical SRRs, in which each nation assumes responsibility for the coordination of SAR services.[12] A maritime SRR is not an extension of a coastal State's maritime boundary, but a geographic area in which the coastal State accepts responsibility to coordinate SAR operations.[13] Maritime SRRs are considered provisional until States with adjacent SRRs enter into cooperative agreements to formally establish the respective SRR.[14] In some regions of the world, there are no provisional maritime SRRs identified.

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8. SAR Convention, annex ¶¶ 3.1.1, 3.1.8.

9. SOLAS, ch. V, reg. 33.

10. Refugee Convention, art. 33.

11. Exec. Order No. 12807, 57 Fed. Reg. 23133 (June 1, 1992); Exec. Order No. 13276, 67 Fed. Reg. 223 (Nov. 15, 2002); Presidential Decision Directive 9, Alien Smuggling (June 18, 1993).

12. SAR Convention, annex ¶ 1.3.4; Chicago Convention, annex 12 at ch. 1.

13. SAR Convention, annex ¶ 2.1.7; Chicago Convention, annex 12 § 2.2.1 note 2.

14. SAR Convention, annex ¶¶ 2.1.3, 2.1.4.

> The IMO and the ICAO attempt to maintain updated information on SRRs through SAR plans (ICAO regional offices) and the Global SAR Plan (the IMO). However, these sources are dependent on information provided by States and, as a result, many regions of the world do not have clearly identified SRRs. In these instances, several coastal States may assume responsibility and respond independently to notifications of distress. The Admiralty List of Radio Signals (Volume V) provides the best visual representation of maritime SRRs, with disputed areas annotated as unresolved.
>
> Rescue Coordination Centers (RCCs): Each SRR has an associated RCC that coordinates SAR within the SRR and with other RCCs.[15] An RCC may be an Aeronautical RCC (ARCC), a Maritime RCC (MRCC), or a Joint RCC (JRCC) that coordinates both aeronautical and maritime SAR (e.g., U.S. Coast Guard RCCs are JRCCs).
>
> Ships and aircraft rendering assistance to persons, ships, or aircraft in distress at sea should coordinate their assistance with the RCC in whose SRR the incident occurred.[16] It is generally accepted in the international SAR community that a coastal State's RCC would not deny the participation of a ship or aircraft that is able to support a SAR operation and that can provide timely and effective assistance. While this is rare, if the RCC coordinating the response believes that the assistance of a ship or aircraft is not required, but the resource believes that its participation is still warranted, then this position should be communicated to the RCC.
>
> In addition, IMO Circular MSC.1/Circ.896/Rev.2 provides:
>
> > When evidence exists that a ship is engaged in unsafe practices associated with the trafficking, smuggling or transport of migrants by sea, States . . . should:
> > .1 ensure the safety and the humanitarian handling of the persons on board…; and

15. SAR Convention, annex ¶¶ 1.3.5, 2.3.1, 2.3.2, 2.3.3, 4.5.4; Chicago Convention, annex 12 at ch. 1 §§ 2.3.1, 2.3.3.

16. SAR Convention, annex ¶ 4.5.4.

> .2 take appropriate action in accordance with relevant domestic and international law."[17]

For the purposes of the circular,

> "unsafe practices" means any practice which involves operating a ship that is:
> .1 obviously in conditions which violate fundamental principles of safety at sea, in particular those of the International Convention for the Safety of Life at Sea, 1974 . . . ; or
> .2 not properly manned, equipped or licensed for carrying passengers on international voyages, and thereby constitute a serious danger for the lives or the health of the persons on board, including the conditions for embarkation and disembarkation.[18]

3.2.1.1 Duty of Masters

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

Commentary

Article 98 of UNCLOS provides: "Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost . . . ."[19] The failure of masters or persons in charge of vessels to render assistance so far as they are able to do so (absent serious danger to their own

17. IMO, Interim Measures for Combatting Unsafe Practices Associated with the Trafficking, Smuggling or Transport of Migrants by Sea, ¶ 16, IMO Doc. MSC.1/Circ.896/Rev.2 (26 May 2016).

18. *Id.* ¶ 1.3.

19. *See also* SOLAS, regs. 33, 34, ch. V.

vessels) to every person found at sea in danger of being lost is a crime under U.S. law punishable by a fine not exceeding $1,000 and/or imprisonment for up to two years.[20] This section does not apply to public vessels.[21]

The master of a ship has the duty to render assistance to persons in distress "regardless of the nationality or status of such a person or the circumstances in which that person is found."[22] (The obligation of a coastal State to coordinate a SAR operation in its SRR does not prevent another State from assisting in the response, or separately coordinating and conducting its own response on the high seas.) In addition, the SAR Convention states that SAR survivors are to be transported to a place of safety.[23] A "place of safety" is defined in the IMO's Guidelines on the Treatment of Persons Rescued at Sea as

> a location where rescue operations are considered to terminate. It is also a place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met. Further, it is a place from which transportation arrangements can be made for the survivors' next or final destination.[24]

The Guidelines further state: "The need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea."[25] Under U.S. interpretation of human rights conventions, a person on a ship at sea may not validly claim asylum and is not entitled to the U.S. immigration process, as the person is not within U.S. territory and

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20. 46 U.S.C. § 2304 (Duty to provide assistance at sea).

21. 46 U.S.C. § 2109.

22. SAR Convention, annex ¶ 2.1.10; SOLAS, reg. V/33 1; UNCLOS, art. 98; Chicago Convention, annex 12 § 2.1.2.

23. SAR Convention, annex ¶ 3.1.9; SOLAS, reg. V/33 1-1; Chicago Convention, annex 12 at ch. 1 § 5.5.1.

24. IMO Res. MSC.167(78), Guidelines on the Treatment of Persons Rescued at Sea, ¶ 6.1.2 (May 20, 2004).

25. *Id.* ¶ 6.1.7.

jurisdiction. However, by policy, persons rescued at sea and manifesting a fear of return to a country where disposition is contemplated are still screened for protection concerns.[26]

Contemporary policy concerning places of refuge was developed at the IMO in response to three significant events involving tank ship structural failures at sea: the motor tanker (M/T) *Erika* (December 1999), the M/T *Castor* (December 2000), and the M/T *Prestige* (November 2002). In the case of the *Erika* and the *Prestige*, both tank ships broke apart and sank, resulting in catastrophic environmental damage to coastal States due to spilled oil.[27] The policy balances the needs of the vessel and the needs of the coastal State to make sound decisions to enhance maritime safety and the protection of the marine environment.

The U.S. Coast Guard policy is designed to select the lowest risk place of refuge option for a stricken vessel. In any such situation, Operational Commanders will also be conducting other, simultaneous operations, including but not limited to developing transit plans; staging pollution, fire, and/or hazmat response equipment; and addressing any security concerns.[28] IMO Resolution A.950(23) recommends that all coastal States establish a maritime assistance service (MAS). In the United States, Rescue Coordination Centers (RCCs) meet the intent of this resolution.[29]

3.2.1.2 Duty of Naval Commanders

U.S. Navy Regulations, 1990, Article 0925, requires as they can do so without serious danger to themselves or crew, the commanding officer or senior officer present, as appropriate, shall proceed with all possible speed to the rescue of persons in distress if informed:

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26. Exec. Order No. 12807, 57 Fed. Reg. 23133 (June 1, 1992); Exec. Order No. 13276, 67 Fed. Reg. 223 (Nov. 15, 2002); Presidential Decision Directive 9, Alien Smuggling (June 18, 1993).

27. IMO Res. A.949(23), Guidelines on Places of Refuge for Ships in Need of Assistance (Dec. 5, 2003).

28. COMDTINST 16451.9, U.S. Coast Guard Places of Refuge Policy (July 17, 2007).

29. IMO Res. A.950(23), Maritime Assistance Services (MAS) (Dec. 5, 2003).

1. Their need for assistance

2. Render assistance to any person found at sea in danger of being lost

3. After a collision, render assistance to the other ship, its crew and passengers, and, where possible, inform the other ship of the officer's identity.

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

Commentary

In addition to these obligations explicitly required by the law of the sea conventions, Article 0925 of the U.S. Navy Regulations also requires that ships and aircraft in distress be afforded all reasonable assistance. Actions taken pursuant to Article 0925 beyond the territorial sea of any State are to be reported promptly to the Chief of Naval Operations. Assistance rendered by ships or aircraft inside foreign territorial seas will be reported immediately to the cognizant unified Commander, the Joint Chiefs of Staff, the cognizant American embassy, the U.S. Defense Attaché Office, and other appropriate commanders.[30]

On June 9, 1988, the USS *Dubuque* (LPD 8) and the USNS *Kilauea* (AE-26) operating in the South China Sea encountered between fifty and seventy Vietnamese refugees adrift in a boat (and some in the water near the boat) some 280 nautical miles from the nearest land. The seafarers, who included some children, appeared emaciated, poorly clothed, dehydrated, and in need of medical attention. Through an interpreter, the Vietnamese reported that they had been at sea for ten to fourteen days and had gone seven days without fresh water and twenty of their number had perished. The *Dubuque* transferred food and water to the boat, as well as a navigation chart and rudimentary sailing directions, "go in the direction of the sun," written in Vietnamese. Eighteen days later, the ship was discovered by Philippine fishers, who brought the Vietnamese seafarers into Subic

30. U.S. Navy Regulations, art. 0925(3) (1990).

> Bay. Just fifty-two refugees were alive, from an estimated eighty-three who had been alive when the *Dubuque* departed. The commanding officer of the *Dubuque*, Alexander G. Balian, later was found guilty of dereliction of duty for failing to provide adequate assistance.[31]
>
> The peacetime obligation persists during armed conflict at sea. GC II establishes a legal framework for the humane treatment and protection of victims of armed conflict at sea. In this regard, Article 12 requires parties to the conflict to respect and protect, in all circumstances, members of the armed forces and other individuals falling within the scope of the Convention "who are at sea and who are wounded, sick or shipwrecked . . . without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria."[32]

3.2.2 Place of Refuge/Innocent Passage

Historically, coastal States would not deny entry to a distressed vessel making a valid claim of *force majeure* (a force or condition of such severity that it threatens loss of the vessel, cargo, or crew unless immediate corrective action is taken) and requesting a place of refuge (a place where a ship can take action to stabilize its condition and reduce the hazards to navigation, and protect human life and the environment) to avoid loss of life or serious hazard to the vessel. The right of a vessel in distress to make an emergency entry into foreign territorial seas or internal waters to find a place of refuge is no longer absolute. The right of emergency entry under *force majeure* is a humanitarian concept—developed at a time when ships in distress posed little harm to the coastal State and when rescuing a distressed vessel's crew on the high seas was problematic. With the advent of supertankers, carriage of hazardous cargo by sea, and the development of sophisticated search and rescue capabilities, modern State practice has evolved with respect to the treatment of

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31. *See Navy Checking Report Ship Left Boat People to Die*, NEW YORK TIMES, Aug. 11, 1988, at A7; *Skipper Convicted Over Boat People*, NEW YORK TIMES, Feb. 24, 1989, at A3; Richard Pyle, *Accused Captain Was War Hero in Vietnam with AM Boat People Cannibalism*, AP NEWS, Aug. 11, 1988; John H. Cushman, *Skipper Rejected Help with Refugees, Navy Says*, NEW YORK TIMES, Aug. 26, 1988, at A3.

32. Raul Pedrozo, *Duty to Render Assistance to Mariners in Distress During Armed Conflict at Sea: U.S. Perspective*, 94 INTERNATIONAL LAW STUDIES 102 (2018).

distressed vessels requesting a place of refuge within territorial seas and internal waters. Some coastal States have denied valid *force majeure* claims of entry to stricken vessels posing a threat to their marine ecosystems. International Maritime Organization guidelines state that granting a vessel access to a place of refuge within a State's territorial waters is primarily a political decision based upon a case-by-case balancing between the humanitarian needs of the stricken vessel and the risk to the environment posed by the ship's proximity to the coast. In some circumstances, coastal States could actually increase their risk if they deny a vessel the opportunity to enter a place of refuge and make repairs or delay a decision until no options remain. A vessel should only be denied entry when the coastal State can identify a practical and lower-risk alternative to granting a place of refuge. Alternatives might include continuing the voyage (independently or with assistance), directing the vessel to a specific place of refuge in another locale, or scuttling the vessel in a location where the expected consequences will be relatively low.

Commentary

Transit rights do not exist in internal waters except as authorized by the coastal State or, in some limited circumstances, as rendered necessary by *force majeure* or distress. Unless a ship or aircraft is in distress, however, it may not enter internal waters without the permission of the coastal State. In recent decades, coastal States have begun to narrow the rule on *force majeure* in an effort to keep damaged vessels out of their ports and harbors for fear that they might produce damaging environmental spills. Thus, the extent of the classic right of *force majeure*, particularly when it is rejected explicitly by the coastal State, is not well settled. For example, the IMO Guidelines on Places of Refuge for Ships in Need of Assistance[33] recognize that the best way to prevent damage or pollution is to lighten a damaged ship's cargo and bunkers, and repair the damage, and that such operations are best carried out in a place of refuge.[34] However, the Guidelines specifically provide that "[w]hen permission to access a place of refuge is requested, there is no obligation for the coastal State to grant it." The coastal State need only weigh all the factors and risks in a balanced manner and "give shelter whenever reasonably possible."[35]

33. IMO Res. A.949(23), *supra* note 27.
34. *Id.* ¶ 1.3.
35. *Id.* ¶ 3.12.

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

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

3.2.3 Quarantine

U.S. Navy Regulations, 1990, Article 0859, requires the commanding officer or aircraft commander of a ship or aircraft comply with quarantine regulations and restrictions. While commanding officers and aircraft commanders shall not permit inspection of their vessels or aircraft, they shall afford every other assistance to health officials, U.S. or foreign, and shall give all information required, as permitted by the requirements of military necessity and security, and not violate or infringe on sovereign immunity. This includes taking steps to comply with foreign quarantine regulations and provide assurances to foreign officials of such compliance. To avoid restrictions imposed by quarantine regulations, the commanding officer should request free pratique (clearance granted a ship to proceed into a port after compliance with health or quarantine regulations) in accordance with the sailing directions for that port. Commanding officers may refer to CNO NAVADMIN 165/21 (041827Z AUG 21) for additional information on U.S. Navy sovereign immunity policy. See COMDT COGARD ALCOAST 370/21 (061626Z OCT 21) for additional information on U.S. Coast Guard sovereign immunity policy. See USCG COMDTINST 3128.1H. Information may be disseminated to commercial vessels by the USCG via Marine Safety Information Bulletins (.dco.uscg.mil/Featured-Content/Mariners/Marine-Safety-Information-Bulletins-MSIB/). Marine Safety Information Bulletins have discussed, among other issues, reporting requirements for the master of a commercial vessel inbound to a U.S. port for illness or death, and port

and facility operations. See U.S. Maritime Advisories and Alerts at https://www.maritime.dot.gov/msci-alerts.

Commentary

Article 0859 (Quarantine) of the U.S. Navy Regulations provides:

> 1. The commanding officer or aircraft commander of a ship or aircraft shall comply with all quarantine regulations and restrictions, United States or foreign, for the port or area within which the ship or aircraft is located.
>
> 2. The commanding officer shall give all information required by authorized foreign officials, insofar as permitted by military security, and will meet the quarantine requirements promulgated by proper authority for United States or foreign ports. However, nothing in this article shall be interpreted as authorizing commanding officers to permit onboard inspections by foreign officials, or to modify in any manner the provisions of Article 0828 of these regulations.
>
> 3. The commanding officer shall allow no intercourse with a port or area or with other ships or aircraft until after consultation with local health authorities when:
>
> a. doubt exists as to the sanitary regulations or health conditions of the port or area;
> b. a quarantine condition exists aboard the ship or aircraft; or
> c. coming from a suspected port or area, or one actually under quarantine.
>
> 4. No concealment shall be made or any circumstance that may subject a ship or aircraft of the Navy to quarantine.
>
> 5. Should there appear at any time on board a ship or aircraft conditions which present a hazard of introduction of a communicable disease outside the ship or aircraft, the commanding officer or aircraft commander shall at once report the fact

> to the senior officer present, to other appropriate higher authorities and, if in port, to the health authorities having quarantine jurisdiction. The commanding officer or aircraft commander shall prevent all contacts likely to spread disease until pratique is received. The commanding officer of a ship in port shall hoist the appropriate signal.

With regard to warships, of NAVADMIN 165/21, Sovereign Immunity Policy, states:

> (1) Under references (f) and (h), commanding officers and officers-in-charge shall comply with all domestic or foreign State quarantine regulations for the port within which the warship is located that do not contravene this sovereign immunity policy. Per references (f) and (h), in response to a request by foreign authorities for health information required by foreign State quarantine regulations, commanding officers and officers-in-charge may deliver a U.S. Navy Declaration of Health (NAVMED 6210/3) completed IAW reference (h). As detailed in this form, as an exhibit, if requested, commanding officers and officers-in-charge may provide additional information to the host nation regarding precautionary measures taken onboard due to a U.S. declared ongoing pandemic or other similar concern regarding the spread of diseases, without providing any specific individual medical data, after coordination with the GNCC [Geographic Naval Component Commander]. This might include sharing mask restrictions, sanitation protocols, and regular testing regimes. However, delivery of NAVMED 6210/3 and its exhibit, is the only authorized form for meeting the requirements by authorized foreign officials as set forth in reference (f). Commanding officers and officers-in-charge are not authorized to provide any other supplementary or locally demanded health forms, even if the supplementary or locally demanded forms appear to disclose similar information, nor are they authorized to grant foreign authorities access to individual health records. Per reference (h), in response to a request by foreign authorities for access to sanitation conditions onboard, commanding officers and officers-in-charge may

> deliver a U.S. Navy Ship Sanitation Control Certificate (NAVMED 6210/1) and/or a U.S. Navy Ship Sanitation Control Certificate 30-Day Extension (NAVMED 6210/2).
>
> (2) The above measures satisfy, per reference (h), commanding officers and officers-in-charge, or their representatives, ability, but not requirement, to certify to foreign authorities actions consistent with foreign State quarantine regulations (i.e., provide a general description of measures taken to comply insofar as permitted by military security restrictions). However, commanding officers and officers-in-charge shall not permit a warship under their command to be searched on any pretense whatsoever by foreign authorities and organizations.[36]

With regard to Coast Guard vessels, COMDT COGARD ALCOAST 370/21, Sovereign Immunity Policy, states:

> (1) . . . commanding officers, officers-in-charge, and aircraft commanders must comply with all domestic or foreign State quarantine regulations for the port within which the vessel is located that do not contravene this sovereign immunity policy.
>
> (2) IAW REFs (C) and (D), while commanding officers, officers-in-charge, and aircraft commanders must not permit inspection of their vessel or aircraft, they must afford every other assistance to health officials, U.S. or foreign, and must give all information required, insofar as permitted by military necessity and security requirements. To avoid restrictions imposed by quarantine regulations, the commanding officer should request free pratique (clearance granted a ship to proceed into a port after compliance with health or quarantine regulations) IAW that port's sailing directions.[37]

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36. NAVADMIN 165/21 (CNO WASHINGTON DC 041827Z AUG 21), Sovereign Immunity Policy, ¶ 5.d (Quarantine and Health Information Requirements) (Aug. 4, 2021).

37. COMDT COGARD ALCOAST 370/21 (061626Z OCT 21), Sovereign Immunity Policy, ¶ 5(d) (Quarantine and Health Information Requirements) (Oct. 6, 2021).

With regard to naval auxiliary vessels, NAVADMIN 165/21 states:

> (a) Under references (f) and (h), masters shall comply with all domestic or foreign State quarantine regulations for the port within which the warship is located that do not contravene this sovereign immunity policy. Per references (f) and (h), in response to a request by foreign authorities for health information required by foreign State quarantine regulations, masters may deliver a U.S. Navy Declaration of Health (NAVMED 6210/3) completed IAW reference (h). As detailed in this form, as an exhibit, if requested, masters may provide additional information to the host nation regarding precautionary measures taken onboard due to a U.S. declared ongoing pandemic or other similar concern regarding the spread of diseases, without providing any specific individual medical data, after coordination with the GNCC. This might include sharing mask restrictions, sanitation protocols, and regular testing regimes. However, delivery of NAVMED 6210/3 and its exhibit, is the only authorized form for meeting the requirements by authorized foreign officials as set forth in reference (f). Masters are not authorized to provide any other supplementary or locally demanded health forms, even if the supplementary or locally demanded forms appear to disclose similar information, nor are they authorized to grant foreign authorities access to individual health records. Per reference (h), in response to a request by foreign authorities for access to sanitation conditions onboard, Masters may deliver a U.S. Navy Ship Sanitation Control Certificate (NAVMED 6210/1) and/or a U.S. Navy Ship Sanitation Control Certificate 30-Day Extension (NAVMED 6210/2).
>
> (b) The above measures satisfy, per reference (h), masters, or their representatives, ability, but not requirement, to certify to foreign authorities actions consistent with foreign State quarantine regulations (i.e., provide a general description of measures taken to comply insofar as permitted by military security requirements). However, masters shall not permit a

> ship under their authority to be searched on any pretense whatsoever by foreign authorities and organizations.[38]

The International Health Regulations provide an overarching legal framework that defines the rights and obligations of countries in handling public health events and emergencies that have the potential to cross borders.[39] The Regulations are a legally binding agreement of 196 countries that requires all parties to have the ability to detect, assess, report, and respond to potential public health events. A "public health risk" means a "likelihood of an event that may affect adversely the health of human populations, with an emphasis on one which may spread internationally or may present a serious and direct danger."[40] States have "the sovereign right to legislate and to implement legislation in pursuance of their health policies."[41] Each State party shall develop and maintain "the capacity to respond promptly and effectively to public health risks and public health emergencies of international concern."[42] Furthermore,

> officers in command of ships or pilots in command of aircraft . . . shall make known to the port or airport control [i.e., the competent authority for the port or airport or the relevant port or airport authority] as early as possible before arrival at the port or airport of destination any cases of illness indicative of a disease of an infectious nature or evidence of a public health risk on board as soon as such illnesses or public health risks are made known to the officer or pilot.[43]

38. NAVADMIN 165/21, *supra* note 36, ¶ 7.a(4) (Quarantine and Health Information Requirements).

39. WORLD HEALTH ORGANIZATION, INTERNATIONAL HEALTH REGULATIONS (3d ed. 2005).

40. *Id.* art. 1(1).

41. *Id.* art. 3(4).

42. *Id.* art. 13(1).

43. *Id.* art. 28(4).

3.3 ASYLUM AND TEMPORARY REFUGE

3.3.1 Asylum

International law recognizes the right of a State to grant asylum to foreign nationals already present within or seeking admission to its territory. SECNAVINST 5710.22C, Asylum and Temporary Refuge, defines asylum as:

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

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

Commentary

SECNAVINST 5710.22C, Asylum and Temporary Refuge, states:

> 3. Definitions
>
> a. Asylum. Protection granted by the United States (U.S.) Government within the U.S. to a foreign national who, due to persecution or well-founded fear of persecution on account of his or her race, religion, nationality, membership in a particular social group, or political opinion, is unable or unwilling to avail himself or herself of the protection of his or her country of nationality (or, if stateless, of last habitual residence).
>
> b. Temporary Refuge. Protection afforded for humanitarian reasons to a foreign national in a Department of Defense (DoD) shore installation, facility, or military vessel within the territorial jurisdiction of a foreign nation or in international waters, under conditions of urgency, in order to secure the

> life or safety of that person against imminent danger, such as a pursuit by a mob.[44]

The Standard Organization and Regulations of the U.S. Navy (SORM) provide:

> (4) IN CASES OF REQUESTS FOR ASYLUM AND TEMPORARY REFUGE, the following procedures apply:
>
> (a) In international waters or in territories under exclusive U.S. jurisdiction, at their request, an applicant for asylum or temporary refuge will be received on board. Under no circumstances shall the applicant be surrendered to foreign jurisdiction or control, unless at the direction of the Secretary of the Navy or higher authority.
>
> (b) In territories under foreign jurisdiction, temporary refuge shall be granted for humanitarian reasons and only in extreme or exceptional circumstances wherein life or safety of the applicant is put in imminent danger. A request by foreign authorities for return of custody of the applicant under protection of the temporary refuge will be reported to the CNO or the Commandant of the Marine Corps. The requesting foreign authorities will be informed that the case has been referred to higher authorities for instructions. When temporary refuge has been granted, it will be terminated only when directed by the Secretary of the Navy or higher authority. While temporary refuge can be granted in these circumstances, permanent asylum will not be granted.
>
> (c) Foreign nationals who request assistance in forwarding requests for political asylum in the United States shall not be received on board, but will be advised to apply in person at the nearest American Embassy or Consulate. If a foreign national is already onboard, however, such person will not be surrendered to foreign jurisdiction or control unless at the personal direction of the Secretary of the Navy or higher authority.[45]

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44. SECNAVINST 5710.22C, Asylum and Temporary Refuge, 1 (May 1, 2019).

45. OPNAVINST 3120.32D, Standard Organization and Regulations of the U.S. Navy (SORM), encl. 1 at 6-87 to 6-88 (Ch. 1, May 15, 2017).

Appendix C (Protection and Disposition of Foreign Nationals in the Control of US Forces) of Enclosure B (Maritime Operations) of CJCSI 3121.01B states:

> a. Humanitarian Assistance and Control
>
> > (1) Asylum. DOD Directive 2000. 11, "Procedures for Handling Requests for Political Asylum and Temporary Refuge," provides authority and further guidance to US forces to take necessary measures to provide support and protection to asylum seekers pending instructions from higher authorities. Persons seeking refuge who are not in immediate danger will normally be directed to the nearest embassy or consular facility of the country of their choice. Authority to grant asylum is solely vested with the President or Secretary of State.
> >
> > (2) Temporary Refuge. Immediate temporary refuge may be granted in extreme or exceptional circumstances where the life or safety of a person is in danger.
>
> b. Shipwrecked and Rescued Foreign Nationals and Persons in Distress at Sea. Commanders will rescue and provide humanitarian assistance and reasonable care and protection. Subject to operational considerations. Such persons will normally be disembarked at the next port of call, consistent with US Navy Regulations.[46]

Asylum is a specific legal status granted by authorities to persons requesting protection from persecution or torture who meet the definition of a refugee under U.S. law. Persons may apply for asylum only if they are physically present in the U.S., or at a port of entry. Sometimes referred to as "political asylum," the right of asylum recognized by the U.S. government is territorial asylum.[47] The 1948 Universal Declaration of Human Rights declares that "[e]veryone has

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46. CJCSI 3121.01B, *supra* note 1, encl. B app. C at B-C-1.

47. Warren Christopher, *Political Asylum*, 80 DEPARTMENT OF STATE BULLETIN, no. 2034, at 35 (Jan. 1980).

> the right to seek and to enjoy in other countries asylum from persecution."[48]
>
> DoD Directive (DoDD) 2000.11 (Procedures for Handling Requests for Political Asylum and Temporary Refuge) provides authority and further guidance to U.S. forces in taking necessary measures to provide support and protection to asylum seekers pending instructions from higher authorities. Persons seeking refuge who are not in immediate danger will normally be directed to the nearest embassy or consular facility of the country of their choice. Authority to grant asylum is solely vested with the President or Secretary of State.[49]
>
> Temporary refuge is the physical protection and reasonable care of a claimant by U.S. personnel, either onboard a warship or elsewhere. "Immediate temporary refuge may be granted in extreme or exceptional circumstances where the life or safety of a person is in danger."[50]
>
> The decision to grant asylum remains within the discretion of the requested nation. The Refugee Act of 1980[51] created, for the first time, substantial protections for aliens fleeing persecution who are physically present in U.S. territory.[52]
>
> This definition of "refugee" is derived from Article 1 of the Refugee Convention (in respect of refugees resulting from pre-1951 events),

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48. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948), *quoted in* G.A. Res. 2312 (XXII), Declaration on Territorial Asylum (Dec. 14, 1967).

49. CJCSI 3121.01B, *supra* note 1, app. C, encl. B.

50. *Id.*

51. Pub. L No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C).

52. The Act is carefully examined in Deborah E. Anker, *Discretionary Asylum: A Protection Remedy for Refugees Under the Refugee Act of 1980*, 28 VIRGINIA JOURNAL OF INTERNATIONAL LAW 1 (1987). With regard to illegal Haitian migrants, see Agreement Relating to Establishment of a Cooperative Program of Interdiction and Selective Return of Persons Coming from Haiti, Sept. 23, 1981, U.S.-Haiti, 33 U.S.T. 3559, *reprinted in* 20 INTERNATIONAL LEGAL MATERIALS 1198 (1981) [hereinafter U.S.-Haiti Agreement]. *See also* Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 83 AMERICAN JOURNAL OF INTERNATIONAL LAW 905, 906 (1989).

Articles 2-34 of which are incorporated into the 1967 Protocol Relating to the Status of Refugees,[53] which makes its provisions applicable without time reference. The United States is party to the latter instrument. Refugees are defined in 8 U.S.C. § 1101(42)(A) (1982) in substantially similar terms.

Asylum responsibility rests with the government of the country in which the seeker of asylum finds himself or herself. The U.S. government does not recognize the practice of granting "diplomatic asylum" or long-term refuge in diplomatic missions or other government facilities abroad or at sea and considers it contrary to international law. However, exceptions to this policy have been made. For example, the United States received Cardinal Mindszenty in the U.S. Embassy in Budapest in 1956 and accorded him a protected status for some six years.[54] Several Pentecostals spent five years in the U.S. Embassy in Moscow between 1978 and 1983.[55] In 1989, two Chinese dissidents were received in the U.S. Embassy in Beijing.[56]

Guidance for military personnel in handling requests for political asylum and temporary refuge (see § 3.3.2) is found in DoDD 2000.11, SECNAVINST 5710.22, Article 0939 of the U.S. Navy Regulations, and applicable operations orders. These directives were promulgated after the Simas Kudirka incident.[57]

Special procedures, held locally, apply to Antarctica and Guantanamo Bay, as set out in 8 U.S.C. § 1158 (Asylum):

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53. Protocol Relating to the Status of Refugees, Oct. 4, 1967, 606 U.N.T.S. 267; AFP 110-20, Selected International Agreements (Navy Supp.) at 37-2 (Apr. 27, 1981).

54. 6 WHITEMAN DIGEST 463–64.

55. AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 466 reporters' note 3 (1987).

56. WASHINGTON POST, June 13, 1989, at A25; WALL STREET JOURNAL, June 13, 1989, at A20.

57. *See* Clyde R. Mann, *Asylum Denied: The Vigilant Incident*, 62 INTERNATIONAL LAW STUDIES 598 (1980); Lewis F.E. Goldie, *Legal Aspects of the Refusal of Asylum by U.S. Coast Guard on 23 November 1970*, 62 INTERNATIONAL LAW STUDIES 626 (1980); Richard L. Fruchterman, *Asylum: Theory and Practice*, 26 JAG JOURNAL 169 (1972).

(a) Authority to apply for asylum

(1) In general

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

(2) Exceptions

(A) Safe third country

Paragraph (1) shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.

(B) Time limit

Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application

has been filed within 1 year after the date of the alien's arrival in the United States.

(C) Previous asylum applications

Subject to subparagraph (D), paragraph (1) shall not apply to an alien if the alien has previously applied for asylum and had such application denied.

(D) Changed circumstances

An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B).

(E) Applicability

Subparagraphs (A) and (B) shall not apply to an unaccompanied alien child (as defined in section 279(g) of title 6).

(3) Limitation on judicial review

No court shall have jurisdiction to review any determination of the Attorney General under paragraph (2).

(b) Conditions for granting asylum

(1) In general

(A) Eligibility

> The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.
>
> **(B) Burden of proof**
>
> **(i) In general**
>
> The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 1101(a)(42)(A) of this title. To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.
>
> **(ii) Sustaining burden**
>
> The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony,

such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.

(iii) Credibility determination

Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

(2) Exceptions

(A) In general

Paragraph (1) shall not apply to an alien if the Attorney General determines that—

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality,

membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States;

(iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States;

(v) the alien is described in subclause (I), (II), (III), (IV), or (VI) of section 1182(a)(3)(B)(i) of this title or section 1227(a)(4)(B) of this title (relating to terrorist activity), unless, in the case only of an alien described in subclause (IV) of section 1182(a)(3)(B)(i) of this title, the Attorney General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States; or

(vi) the alien was firmly resettled in another country prior to arriving in the United States.

(B) Special rules

(i) Conviction of aggravated felony

For purposes of clause (ii) of subparagraph (A), an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.

(ii) Offenses

The Attorney General may designate by regulation offenses that will be considered to be a crime described in clause (ii) or (iii) of subparagraph (A).

(C) Additional limitations

The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1).

(D) No judicial review

There shall be no judicial review of a determination of the Attorney General under subparagraph (A)(v).

(3) Treatment of spouse and children

(A) In general

A spouse or child (as defined in section 1101(b)(1)(A), (B), (C), (D), or (E) of this title) of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien.

(B) Continued classification of certain aliens as children

An unmarried alien who seeks to accompany, or follow to join, a parent granted asylum under this subsection, and who was under 21 years of age on the date on which such parent applied for asylum under this section, shall continue to be classified as a child for purposes of this paragraph and section 1159(b)(3)

> of this title, if the alien attained 21 years of age after such application was filed but while it was pending.
>
> **(C) Initial jurisdiction**
>
> An asylum officer (as defined in section 1225(b)(1)(E) of this title) shall have initial jurisdiction over any asylum application filed by an unaccompanied alien child (as defined in section 279(g) of title 6), regardless of whether filed in accordance with this section or section 1225(b) of this title.

3.3.1.1 Asylum Requests Made in Territories Under the Exclusive Jurisdiction of the United States and International Waters

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

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

See SECNAVINST 5710.22C and COMDTINST M16247.1H, U.S. Coast Guard Maritime Law Enforcement Manual (MLEM), for specific guidance.

Commentary

SECNAVINST 5710.22C states:

> 5. Policy. It is the SECNAV's policy to handle requests from foreign nationals for asylum or temporary refuge as follows:
>
> a. On international waters or in territories under exclusive U.S. jurisdiction (including territorial seas, the Commonwealth of Puerto Rico, territories under U.S. administration and possessions):
>
> (1) At his or her request, an applicant for asylum will be received on board any naval aircraft or waterborne craft, Navy or Maine Corps activity or station.
>
> (2) Under no circumstances shall the person seeking asylum be surrendered to foreign jurisdiction or control, unless directed by the SECNAV, or higher authority, in coordination with relevant U.S. entities, including Head of the Department of State (DoS), the Department of Homeland Security (DHS) (U.S. Citizenship and Immigration Services (USCIS)), and the Department of Justice (DOJ), as appropriate, per reference (a) [DoD Instruction 2000.11 of 13 May 2010]. Persons seeking asylum should be afforded every reasonable care and protection permitted by the circumstances.
>
> (3) Per reference (a), requests for asylum by foreign nationals physically present in the U.S. will be handled by the DHS USCIS), or if the applicant is in removal proceedings, by an Immigration Judge of the Executive Office for Immigration Review, DOJ.
>
> b. In territories under foreign jurisdiction (including foreign territorial seas, territories and possessions);

(1) Temporary refuge shall be granted for humanitarian reasons on board any naval aircraft or waterborne craft or Navy or Marine Corps activity or station only in extreme or exceptional circumstances where life or safety of a person is put in imminent danger. When temporary refuge is granted, such protection will be terminated only when directed by the SECNAV or higher authority, in coordination with relevant U.S. entities, including Heads of the DOS, DHS USCIS, and the DOJ, as appropriate, in accordance reference (a).

(2) A request by foreign authorities for return of custody of a person under the protection of temporary refuge will be reported to the CNO or the CMC. The requesting foreign authorities will be informed that the case has been referred to higher authorities for instructions. The Office of the CNO and Headquarters, U.S. Marine Corps will notify the Under Secretary of the Navy.

(3) Persons whose temporary refuge is terminated will be released to the protection of the authorities designated in the message authorizing release.

(4) While temporary refuge can be granted in the circumstances set forth above, permanent asylum will not be granted.

(5) Foreign nationals who request assistance in forwarding requests for asylum will not be received on board, but will be advised to ask for assistance at the nearest U.S. Embassy or Consulate for referral, as applicable, to the local representative of the United Nations High Commissioner for Refugees or host country officials, per reference (a). If a foreign national is already on board, however, such person will not be surrendered to foreign jurisdiction or control unless directed to by the SECNAV, or higher authority, in

> coordination with relevant U.S. entities, including Heads of the DOS, DHS (USCIS), and the DOJ, as appropriate, per reference (a).
>
> c. The CNO or CMC, as appropriate, will be informed by the most expeditious means of all action taken pursuant to subparagraphs 5a and 5b above, as well as the attendant circumstances. Telephone or voice communications will be used where possible but must be confirmed as soon as possible with an immediate precedence message providing information to the Secretary of State.
>
> (1) For actions taken pursuant to subparagraphs 5b(1) and 5b(5), make the appropriate U.S. Embassy or Consulate an information addressee.
>
> (2) Personnel of the DON shall neither directly nor indirectly invite persons to seek asylum or temporary refuge.[58]

3.3.1.2 Asylum Requests Made in Territories Under Foreign Jurisdiction

Commanders of U.S. warships, military aircraft, and military installations in territories under foreign jurisdiction—including foreign territorial seas, archipelagic waters, internal waters, ports, territories, and possessions—are not authorized to receive on board foreign nationals seeking asylum. Such persons should be referred to the U.S. embassy or nearest U.S. consulate in the country, foreign territory, or foreign possession involved, if any, for assistance in coordinating a request for asylum with the host government. If a foreign national is already on board a Navy vessel, such person will not be surrendered to foreign jurisdiction or control unless directed to by the SECNAV or higher authority. If a foreign national is already on board a USCG vessel, they will not be surrendered to foreign jurisdiction without commandant approval, unless the commanding officer/officer-in-charge determines the risk to the unit or USCG personnel has become unacceptable or the individual voluntarily departs the unit. See COMDTINST M16247.1H. If

58. SECNAVINST 5710.22C, *supra* note 44, at 2–3.

exceptional circumstances exist involving imminent danger to the life or safety of the person, temporary refuge may be granted. See 3.3.2. The final decision as to a person's status is reserved to the Secretary of State.

Commentary

See §§ 3.3.1 and 3.3.1.1. above.

3.3.1.3 Expulsion or Surrender

Article 33 of the 1951 Convention Relating to the Status of Refugees provides that a refugee may not be expelled or returned in any manner whatsoever to the frontier or territories of a State where their life or freedom would be threatened on account of their race, religion, nationality, political opinion, or membership in a particular social group, unless they may reasonably be regarded as a danger to the security of the country of asylum or have been convicted of a serious crime and are a danger to the community of that State. This obligation applies only to persons who have entered territories under the exclusive jurisdiction of the United States. It does not apply to temporary refuge granted abroad.

Commentary

This obligation, known as non-refoulement, is implemented by 8 U.S.C. § 1231(b)(3) (1997): "[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion."[59]

Since the Migrant Interdiction Program (MIP) was created in 1981, the U.S. Coast Guard conducts interdictions of refugee boats beyond U.S. territorial waters and returns them to their country of origin.[60]

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59. *See also* AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 711 reporters' note 7 (1987).

60. Exec. Order No. 12324, Interdiction of Illegal Aliens, 3 C.F.R. 180 (1981 Comp.) (Sept. 29, 1981) (prohibiting the return of a refugee without his or her consent and requiring observance of our international obligations).

> The MIP is a "necessary and proper means" of enforcing U.S. immigration laws. The program applies to Haitian migrants intercepted at sea under an executive agreement between the United States and Haiti.[61] Haiti authorizes U.S. Coast Guard personnel to board any Haitian flag vessel on the high seas or in Haitian territorial waters which the Coast Guard has reason to believe may be involved in the irregular carriage of passengers outbound from Haiti, to make inquiries concerning the status of those on board, to detain the vessel if it appears that an offense against U.S. immigration laws or appropriate Haitian laws has been or is being committed, and to return the vessel and the persons on board to Haiti.
>
> Under this agreement, the United States "does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status."[62]

3.3.2 Temporary Refuge/Termination or Surrender

International law and practice have long recognized the humanitarian practice of providing temporary refuge to anyone, regardless of nationality, who may be in imminent physical danger for the duration of that danger. See U.S. Navy Regulations, 1990, Article 0939; SECNAVINST 5710.22C; and COMDTINST M16247.1H.

SECNAVINST 5710.22C defines temporary refuge as:

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

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61. U.S.-Haiti Agreement, *supra* note 52.

62. *See* Proclamation No. 4865, High Seas Interdiction of Illegal Aliens (Sept. 29, 1981), 3 C.F.R. 50 (1981 Comp.) (suspending the entry of undocumented aliens from the high seas); Exec. Order No. 12324, 5 Op. O.L.C. 242, 248 (1981) (discussing U.S. obligations under the Protocol); Haitian Refugee Center, Inc. v. Baker, 953 F.2d 1498 (11th Cir. 1991) (art. 33 not self-executing; interdiction at sea not judicially reviewable), *cert. denied*, 112 S. Ct. 1245 (1992). *See also* Sale v. Haitian Centers Council, 113 S. Ct. 2549 (1993).

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

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

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

Commentary

See §§ 3.3.1 and 3.3.1.1. above for a discussion of temporary refuge.

3.3.3 Inviting Requests for Asylum or Refuge

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

3.3.4 Protection of U.S. Citizens

The limitations on asylum and temporary refuge are not applicable to U.S. citizens. See 3.10 and CJCSI 3121.01B, Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces for applicable guidance.

Commentary

Appendix A (Defense of US Nationals and Their Property at Sea) of Enclosure B (Maritime Operations) of CJCSI 3121.01B provides:

> 2. Policy. . . .
>
> a. General. US policy is to protect US nationals and their property and US commercial assets against the illegal use of force at sea. Foreign forces are allowed to use reasonable force without US interference while exercising jurisdiction or control over US nationals and their property. In conformity with international law. Illegal use of force includes injury or threat of injury to US nationals or damage to or loss of their property in violation of principles of US or international law.
>
> b. Conformity With US and International Law. Defense of US nationals and their property will conform to US and international law and is limited to that force that is necessary and proportional to the threat.
>
> . . . .
>
> 4. Procedures

> a. When unit commanders observe threats to US nationals or their property at sea, unit commanders will:
>
> (1) Determine if hostile intent exists.
>
> (2) Determine the precise location of the incident and the nature of the authority, if any, that foreign states may lawfully exercise over US nationals or their property at that location.
>
> (3) Attempt to communicate, when appropriate, with the foreign forces to ascertain the basis for their action against US nationals or their property.
>
> [Redacted][63]

3.4 RIGHT OF APPROACH AND VISIT

As a general principle, vessels in international waters are immune from the jurisdiction of any State other than the flag State. Under international law, a warship, military aircraft, or other duly authorized ship or aircraft may approach any vessel in international waters to verify its nationality and to query it for information regarding *inter alia* its destination, cargo, manning, and intent. Unless the vessel encountered is itself a warship or a sovereign-immune government vessel of another State, it may be stopped, boarded, and the ship's documents examined, provided there is a reasonable ground for suspecting that it is:

1. Engaged in piracy (see 3.5)

2. Engaged in the slave trade (see 3.6)

3. Engaged in unauthorized broadcasting, and the flag State of the warship has jurisdiction under UNCLOS, Article 109(3) (see 3.7)

4. Without nationality (see 3.11.2.3 and 3.11.2.4)

63. CJCSI 3121.01B, *supra* note 1, encl. B app. A at B-A-1, B-A-3 to B-A-4.

5. Though flying a foreign flag, or refusing to show its flag, is, in reality, of the same nationality as the warship.

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

Commentary

Vessels engaged in universal crimes—such as piracy, the transport of slaves, and unauthorized broadcasting—may be subject to the jurisdiction of any nation. This customary international law concept is codified in Article 22 of the High Seas Convention and Article 110 of UNCLOS.

Article 22 of the High Seas Convention provides:

> 1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting:
>
> (a) That the ship is engaged in piracy; or
>
> (b) That the ship is engaged in the slave trade; or
>
> (c) That though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.
>
> 2. In the cases provided for in subparagraphs (a), (b) and (c) above, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

Article 110 of UNCLOS provides:

> Right of visit
>
> 1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:
>
> (a) the ship is engaged in piracy;
>
> (b) the ship is engaged in the slave trade;
>
> (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;
>
> (d) the ship is without nationality; or
>
> (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.
>
> 2. In the cases provided for in paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.
>
> . . . .
>
> 4. These provisions apply *mutatis mutandis* to military aircraft.
>
> 5. These provisions also apply to any other duly authorized ships or aircraft clearly marked and identifiable as being on government service.[64]

64. *See also* Mariana Flora, 24 U.S. 1, 43–44 (1826); 4 WHITEMAN DIGEST 667–77; C. JOHN COLOMBOS, INTERNATIONAL LAW OF THE SEA 310–13 (6th ed. 1967); Ana van Zwanenberg, *Interference with Ships on the High Seas*, 10 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 785 (1961); MYRES S. MCDOUGAL & WILLIAM T. BURKE, THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA 887–92

The SORM provide:

> 6.3.21 VISIT AND SEARCH, BOARDING AND SALVAGE, AND PRIZE CREW BILL
>
> a. PURPOSE. To set forth an organization to which personnel shall be assigned for visiting and searching, boarding and salvaging, and placing a prize crew on board ship on the high seas; and to prescribe appropriate responsibilities and procedures.
>
> b. RESPONSIBILITY FOR THE BILL. The operations officer is responsible for this bill and shall advise the executive officer of required changes or other matters affecting the bill.
>
> c. GENERAL. Under certain circumstances, U.S. Navy ships are authorized to approach and visit ships encountered inside the territorial waters of the U.S. or in international waters. In addition, there are limited circumstances in which U.S. Navy ships may become involved in salvage operations or the taking of a prize. This bill describes generally the circumstances under which these situations may occur and prescribes responsibilities of officers and crew assigned to carry out such operations.
>
> d. INFORMATION.
>
> (1) APPROACH AND VISIT. As a general rule, vessels in international waters are immune from the jurisdiction of any nation other than the flag nation. However, under international law, a warship may approach any vessel in international waters to verify its nationality. In addition, unless the vessel encountered is itself a warship or non-

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(1962); DOUGLAS GUILFOYLE, SHIPPING INTERDICTION AND THE LAW OF THE SEA 4–5 (2009); JAMES KRASKA & RAUL PEDROZO, INTERNATIONAL MARITIME SECURITY LAW 700, 888 (2013); James Kraska, *Broken Taillight at Sea: The Law of Peacetime Visit, Board, Search and Seizure*, 16 OCEAN AND COASTAL LAW JOURNAL 1, 3 (2011); Craig H. Allen, *The Peacetime Right of Approach and Visit and Effective Security Council Sanctions Enforcement at Sea*, 95 INTERNATIONAL LAW STUDIES 400 (2019).

commercial 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:

(a) Engaged in piracy.

(b) Engaged in the slave trade.

(c) Engaged in unauthorized broadcasting.

(d) Without nationality.

(e) Through flying a foreign flag, or refusing to show its flag, in reality, of the same nationality as the warship.

(2) VISIT AND SEARCH. Under the law of armed conflict, belligerent warships or aircraft may visit and search a merchant vessel for the purpose of determining its true character, i.e., enemy or neutral, nature of cargo, manner of employment and other facts bearing on its relation to the conflict. Such visits occur outside neutral territorial seas. This right does not extend to visiting or searching warships or vessels engaged in government non-commercial service. In addition, neutral merchant vessels in convoy of neutral warships are exempt from visit and search, although the convoy commander may be required to certify the neutral character of merchant vessels' cargo.

(3) SUPPORT FOR LAW ENFORCEMENT. U.S. naval units provide support to the United States Coast Guard (USCG) and other U.S. law enforcement agencies, primarily in the area of drug interdiction. When a naval unit is operating under USCG tactical control with a Law Enforcement Detachment (LEDET) embarked, the support may include providing a platform for approach, visit, and arrest/seizure of suspect vessels pursuant to

the law enforcement authority of the USCG. Detailed guidance is found in applicable OPORDs governing the affected naval units.

(4) Additional information pertaining to the above is found in NWP 1-14M, chapters 3 and 7.

e. RESPONSIBILITIES AND PROCEDURES.

(1) THE EXECUTIVE OFFICER shall:

(a) Designate, subject to the approval of the commanding officer, an examining officer to train and direct the visit and search party in accordance with the rules and procedures prescribed in NWP 1-14M and appropriate provisions of applicable OPORDs.

(b) Designate, subject to the approval of the commanding officer, a boarding officer to train and direct the boarding and salvage party.

(c) Designate, subject to the approval of the commanding officer, a Prize Master to organize, train, and direct the prize crew.

(d) Coordinate all departments in organizing, training, and equipping personnel necessary for the various parties and crews required by this bill.

(2) DEPARTMENT HEADS shall require division officers to assign and equip qualified personnel for the parties and crews prescribed by this bill.

(3) DIVISION OFFICERS shall:

(a) Assign qualified personnel.

(b) Post all assignments required by this bill on division watch, quarter, and station bills.

(c) Ensure that designated division personnel are properly trained and equipped with basic equipment.

f. APPROACH AND VISIT.

(1) DUTIES OF THE EXAMINING OFFICER. Personnel in the boat sent by U.S. naval vessels may carry arms. The examining officer shall inquire of the master and, if necessary, the crew regarding the nature of the vessel and its activity, relative to the circumstances which gave rise to the approach and visit; i.e., piracy, slave trade, etc. The examining officer shall recommend to the commanding officer one of these actions:

(a) That the ship be released (if ownership of the ship has been recently transferred).

(b) That the ship be detained or seized and sent in for adjudication (if papers, questioning of personnel, search, and inspections do not result in satisfactory proof of ship's innocence).

(2) PAPERS TO BE EXAMINED. The ship's papers to be examined are:

(a) A certificate of registry or bill of sale (if the ship has been transferred recently from enemy to neutral ownership).

(b) The crew list.

(c) The passenger list.

(d) The ship's log (to determine whether the ship has deviated from her direct course).

(e) The bill of health.

(f) The ship's clearance papers.

(g) The certificate of charter.

(h) The invoices or manifests of cargo.

(i) The bills of lading.

(j) A consular declaration certifying the innocence of the cargo may be included but is not considered conclusive evidence of innocence.

(3) REPORTS. The examining officer's report to the commanding officer of the visiting warship shall include the following information:

(a) Name and nationality of visited ship.

(b) Registry Number.

(c) Gross tonnage.

(d) Port and date of departure and destination.

(e) Number of passengers.

(f) General character of cargo.

(g) Any additional remarks and recommendations.

(4) RECORD OF ACTION TAKEN. After the commanding officer of the visiting ship is advised of the findings, appropriate entries shall be written in the visited ship's log.[65]

3.5 REPRESSION OF PIRACY

International law has long recognized a general duty of all States to cooperate in the repression of piracy. This traditional obligation is included in the 1958

65. OPNAVINST 3120.32D, *supra* note 45, encl. 1 at 6-109 to 6-112.

Geneva Convention on the High Seas and UNCLOS. Both provide all States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.

Commentary

Article 14 of the High Seas Convention and Article 100 of UNCLOS provide: "All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State."[66]

3.5.1 U.S. Law

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

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

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

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

33 U.S.C. § 381 authorizes the President to employ public armed vessels in protecting U.S. merchant ships from piracy. 33 U.S.C. § 382 authorizes the President to instruct the commanders of such vessels to seize any pirate ship that has attempted or committed an act of piracy against any U.S.- or foreign-flagged vessel in international waters.

66. *See also* MODERN PIRACY: LEGAL CHALLENGES AND RESPONSES (Douglas Guilfoyle ed., 2013); JAMES KRASKA, CONTEMPORARY MARITIME PIRACY: INTERNATIONAL LAW, STRATEGY, AND DIPLOMACY AT SEA (2010); Alfred P. Rubin, *The Law of Piracy*, 63 INTERNATIONAL LAW STUDIES 1 (2018); AMERICAN LAW INSTITUTE, RESTATEMENT (FOURTH) FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 reporters' note 10 at 161 (2017).

Commentary

The congressional exercise of the power to "define and punish piracies" is set forth in 18 U.S.C. §§ 1651–61 (piracy), 33 U.S.C. §§ 381–84 (regulations for suppression of piracy), and 18 U.S.C. § 1654 (privateering).

While U.S. law makes criminal those acts proscribed by international law as piracy, other provisions of U.S. municipal law proscribe, as criminal, related conduct. For example, U.S. law makes criminal arming or serving on privateers (18 U.S.C § 1654), assault by a seaman on a captain so as to prevent him from defending his ship or cargo (18 U.S.C § 1655), running away with a vessel within the admiralty jurisdiction (18 U.S.C. § 1656), corruption of seamen to run away with a ship (18 U.S.C § 1657), receipt of pirate property (18 U.S.C § 1660), and robbery ashore in the course of a piratical cruise (18 U.S.C § 1661).

18 U.S.C. § 1651 (Piracy under law of nations) provides: "Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life."

In *United States v. Dire*, the Fourth Circuit Court of Appeals stated:

> In its present form, the language of 18 U.S.C. § 1651 can be traced to an 1819 act of Congress, which similarly provided, in pertinent part:
>
> > That if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders, shall afterwards be brought into or found in the United States, every such offender or offenders shall, upon conviction thereof, . . . be punished. . . .
>
> *See* Act of Mar. 3, 1819, ch. 77, § 5, 3 Stat. 510, 513–14 (the "Act of 1819"). Whereas today's mandatory penalty for pi-

> racy is life imprisonment, however, the Act of 1819 commanded punishment "with death." *Id.* at 514. Examining the Act of 1819 in its *United States v. Smith* decision of 1820, the Supreme Court recognized:
>
> > There is scarcely a writer on the law of nations, who does not allude to piracy, as a crime of a settled and determinate nature; and whatever may be the diversity of definitions, in other respects, all writers concur, in holding, that robbery, or forcible depredations upon the sea, *animo furandi*, is piracy.
>
> 18 U.S. (5 Wheat.) 153, 161, 5 L.Ed. 57 (1820). Accordingly, the Smith Court, through Justice Story, articulated "no hesitation in declaring, that piracy, by the law of nations, is robbery upon the sea." *Id.* at 162.[67]

The High Seas Convention, to which the United States is a party, and UNCLOS both address piracy by stating that "[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."[68] The definition of piracy in these treaties reflects customary international law for the United States.[69] In addition, UN Security Council Resolution 2020 reaffirms "that international law, as reflected in [UNCLOS], sets out the legal framework applicable to combating piracy and armed robbery at sea."[70]

18 U.S.C. § 1652 (Citizens as pirates) provides:

> Whoever, being a citizen of the United States, commits any murder or robbery, or any act of hostility against the United States, or against any citizen thereof, on the high seas, under color of any commission from any foreign prince, or state,

67. United States v. Dire, 680 F.3d 446, 452 (4th Cir. 2012).
68. High Seas Convention, art. 14; UNCLOS, art. 100.
69. United States v. Dire, 680 F.3d 446, 469 (4th Cir. 2012).
70. S.C. Res. 2020 (Nov. 22, 2011); S.C. Res. 1851 (Dec. 16, 2008); S.C. Res. 2634 (May 31, 2022).

> or on pretense of authority from any person, is a pirate, and shall be imprisoned for life.

18 U.S.C. § 1653 (Aliens as pirates) provides:

> Whoever, being a citizen or subject of any foreign state, is found and taken on the sea making war upon the United States, or cruising against the vessels and property thereof, or of the citizens of the same, contrary to the provisions of any treaty existing between the United States and the state of which the offender is a citizen or subject, when by such treaty such acts are declared to be piracy, is a pirate, and shall be imprisoned for life.

18 U.S.C. § 1654 (Arming or serving on privateers) provides:

> Whoever, being a citizen of the United States, without the limits thereof, fits out and arms, or attempts to fit out and arm or is concerned in furnishing, fitting out, or arming any private vessel of war or privateer, with intent that such vessel shall be employed to cruise or commit hostilities upon the citizens of the United States or their property; or
>
> Whoever takes the command of or enters on board of any such vessel with such intent; or
>
> Whoever purchases any interest in any such vessel with a view to share in the profits thereof—
>
> Shall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. § 1655 (Assault on commander as piracy) provides:

> Whoever, being a seaman, lays violent hands upon his commander, to hinder and prevent his fighting in defense of his vessel or the goods intrusted to him, is a pirate, and shall be imprisoned for life.

18 U.S.C. § 1656 (Conversion or surrender of vessel) provides:

> Whoever, being a captain or other officer or mariner of a vessel upon the high seas or on any other waters within the admiralty and maritime jurisdiction of the United States, piratically or feloniously runs away with such vessel, or with any goods or merchandise thereof, to the value of $50 or over; or
>
> Whoever yields up such vessel voluntarily to any pirate—
>
> Shall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. § 1657 (Corruption of seamen and confederating with pirates) provides:

> Whoever attempts to corrupt any commander, master, officer, or mariner to yield up or to run away with any vessel, or any goods, wares, or merchandise, or to turn pirate or to go over to or confederate with pirates, or in any wise to trade with any pirate, knowing him to be such; or
>
> Whoever furnishes such pirate with any ammunition, stores, or provisions of any kind; or
>
> Whoever fits out any vessel knowingly and, with a design to trade with, supply, or correspond with any pirate or robber upon the seas; or
>
> Whoever consults, combines, confederates, or corresponds with any pirate or robber upon the seas, knowing him to be guilty of any piracy or robbery; or
>
> Whoever, being a seaman, confines the master of any vessel—
>
> Shall be fined under this title or imprisoned not more than three years, or both.

18 U.S.C. § 1658 (Plunder of distressed vessel) provides:

> (a) Whoever plunders, steals, or destroys any money, goods, merchandise, or other effects from or belonging to any vessel in distress, or wrecked, lost, stranded, or cast away, upon the sea, or upon any reef, shoal, bank, or rocks of the sea, or in any other place within the admiralty and maritime jurisdiction of the United States, shall be fined under this title or imprisoned not more than ten years, or both.
>
> (b) Whoever willfully obstructs the escape of any person endeavoring to save his life from such vessel, or the wreck thereof; or
>
> Whoever holds out or shows any false light, or extinguishes any true light, with intent to bring any vessel sailing upon the sea into danger or distress or shipwreck—
>
> Shall be imprisoned not less than ten years and may be imprisoned for life.

18 U.S.C. § 1659 (Attack to plunder vessel) provides:

> Whoever, upon the high seas or other waters within the admiralty and maritime jurisdiction of the United States, by surprise or open force, maliciously attacks or sets upon any vessel belonging to another, with an intent unlawfully to plunder the same, or to despoil any owner thereof of any moneys, goods, or merchandise laden on board thereof, shall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. § 1660 (Receipt of pirate property) provides:

> Whoever, without lawful authority, receives or takes into custody any vessel, goods, or other property, feloniously taken by any robber or pirate against the laws of the United States, knowing the same to have been feloniously taken, shall be imprisoned not more than ten years.

18 U.S.C. § 1661 (Robbery ashore) provides:

> Whoever, being engaged in any piratical cruise or enterprise, or being of the crew of any piratical vessel, lands from such vessel and commits robbery on shore, is a pirate, and shall be imprisoned for life.

33 U.S.C. §§ 381–382 also authorize the issuance of instructions to naval commanders to send into any U.S. port any vessel which is armed or the crew of which is armed, and which shall have "attempted or committed any piratical aggression, search, restraint, depredation, or seizure, upon any vessel," U.S. or foreign flag, or upon U.S. citizens; and to retake any U.S. flag vessel or U.S. citizens unlawfully captured in international waters.

33 U.S.C. § 381 (Use of public vessels to suppress piracy) provides:

> The President is authorized to employ so many of the public armed vessels as in his judgment the service may require, with suitable instructions to the commanders thereof, in protecting the merchant vessels of the United States and their crews from piratical aggressions and depredations.

33 U.S.C. § 382 (Seizure of piratical vessels generally) provides:

> The President is authorized to instruct the commanders of the public armed vessels of the United States to subdue, seize, take, and send into any port of the United States, any armed vessel or boat, or any vessel or boat, the crew whereof shall be armed, and which shall have attempted or committed any piratical aggression, search, restraint, depredation, or seizure, upon any vessel of the United States, or of the citizens thereof, or upon any other vessel; and also to retake any vessel of the United States, or its citizens, which may have been unlawfully captured upon the high seas.

33 U.S.C. § 383 (Resistance of pirates by merchant vessels) provides:

> The commander and crew of any merchant vessel of the United States, owned wholly, or in part, by a citizen thereof, may oppose and defend against any aggression, search, restraint, depredation, or seizure, which shall be attempted upon such vessel, or upon any other vessel so owned, by the commander or crew of any armed vessel whatsoever, not being a public armed vessel of some nation in amity with the United States, and may subdue and capture the same; and may also retake any vessel so owned which may have been captured by the commander or crew of any such armed vessel, and send the same into any port of the United States.

33 U.S.C. § 384 (Condemnation of piratical vessels) provides:

> Whenever any vessel, which shall have been built, purchased, fitted out in whole or in part, or held for the purpose of being employed in the commission of any piratical aggression, search, restraint, depredation, or seizure, or in the commission of any other act of piracy as defined by the law of nations, or from which any piratical aggression, search, restraint, depredation, or seizure shall have been first attempted or made, is captured and brought into or captured in any port of the United States, the same shall be adjudged and condemned to their use, and that of the captors after due process and trial in any court having admiralty jurisdiction, and which shall be holden for the district into which such captured vessel shall be brought; and the same court shall thereupon order a sale and distribution thereof accordingly, and at its discretion.

33 U.S.C. § 385 (Seizure and condemnation of vessels fitted out for piracy) provides:

> Any vessel built, purchased, fitted out in whole or in part, or held for the purpose of being employed in the commission of any piratical aggression, search, restraint, depredation, or seizure, or in the commission of any other act of piracy, as defined by the law of nations, shall be liable to be captured and brought into any port of the United States if found upon

> the high seas, or to be seized if found in any port or place within the United States, whether the same shall have actually sailed upon any piratical expedition or not, and whether any act of piracy shall have been committed or attempted upon or from such vessel or not; and any such vessel may be adjudged and condemned, if captured by a vessel authorized as mentioned in section 386 of this title to the use of the United States, and to that of the captors, and if seized by a collector, surveyor, or marshal, then to the use of the United States.

33 U.S.C. § 386 (Commissioning private vessels for seizure of piratical vessels) provides:

> The President is authorized to instruct the commanders of the public-armed vessels of the United States, and to authorize the commanders of any other armed vessels sailing under the authority of any letters of marque and reprisal granted by Congress, or the commanders of any other suitable vessels, to subdue, seize, take, and, if on the high seas, to send into any port of the United States, any vessel or boat built, purchased, fitted out, or held as mentioned in section 385 of this title.

3.5.2 Piracy Defined

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

Commentary

"A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal

> concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism . . . ."[71]
>
> The Report of the Subcommittee of the League of Nations Committee of Experts for the Progressive Codification of International Law defined piracy in customary international as consisting of:
>
> > sailing the seas for private ends without authorization from the Government of any State with the object of committing depredations upon property or acts of violence against persons. The pirate attacks merchant ships of any and every nation without making any distinction except in so far as will enable him to escape punishment for his misdeeds. He is a sea-robber, pillaging by force of arms, stealing or destroying the property of others and committing outrages of all kinds upon individuals.[72]
>
> Article 101 of UNCLOS defines piracy under the law of nations as follows:
>
> > Piracy consists of any of the following acts:
> >
> > > (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
> > >
> > > > (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
> > > > (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

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71. AMERICAN LAW INSTITUTE, RESTATEMENT (FOURTH) FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402, 403, 407, 413 reporters' notes 10, 4, 2, 1 at 161, 168, 191, 212 (2017).

72. Committee of Experts for the Progressive Codification of International Law, Questionnaire No. 6: Piracy, Feb. 9, 1926, *reprinted in* Piracy, 20 AMERICAN JOURNAL OF INTERNATIONAL LAW 222, 223–24 (1926) [hereinafter Questionnaire No. 6].

> (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
>
> (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

Article 15 of the High Seas Convention defines piracy in essentially identical terms.[73]

In *Sea Shepherd Conservation Society v. Institute for Cetacean Research*, the Ninth Circuit considered whether Sea Shepherd's "direct action" protests at sea against Japanese whaling vessels constitute piracy. The Ninth Circuit overturned the district court's ruling that Sea Shepherd activists had not committed "violence" because they targeted ships and equipment rather than people.

> This [lower court holding] runs afoul of the UNCLOS itself, which prohibits "violence . . . against another ship" and "violence . . . against persons or property." UNCLOS art. 101. Reading "violence" as extending to malicious acts against inanimate objects also comports with the commonsense understanding of the term, *see* Webster's New Int'l Dictionary 2846, as when a man violently pounds a table with his fist. Ramming ships, fouling propellers and hurling fiery and acid-filled projectiles easily qualify as violent activities, even if they could somehow be directed only at inanimate objects.
>
> Regardless, Sea Shepherd's acts fit even the district court's constricted definition. The projectiles directly endanger Cetacean's crew, as the district court itself recognized. And damaging Cetacean's ships could cause them to sink or become stranded in glacier-filled, Antarctic waters, jeopardizing the safety of the crew.[74]

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73. *See* United States v. Dire, 680 F.3d 446, 469 (4th Cir. 2012).

74. Institute of Cetacean Research v. Sea Shepherd Conservation Society, 708 F.3d 1099, 1102 (9th Cir. 2013), amended by 2013 U.S. App. LEXIS 10717 (9th Cir. May 24, 2013); *Ninth Circuit Rules Antiwhaling Group Engaged in Piracy*, 107 AMERICAN JOURNAL OF INTERNATIONAL LAW 666 (2013). *See* Declaration of Legal Adviser Harold Hongju Koh,

3.5.2.1 Location

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

3.5.2.2 Private Ship or Aircraft

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

3.5.2.3 Mutiny or Passenger Hijacking

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

3.5.2.4 Private Ends

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

United States v. Hasan, E.D. Va., Criminal No. 2:10cr56 (Sept 3. 2010); KRASKA, *supra* note 66, at 108–17; Alfred P. Rubin, *The United States of America and the Law of Piracy*, 63 INTERNATIONAL LAW STUDIES 122, 123–200 (1988).

Commentary

The "private ends" element of the crime of piracy is often mistakenly interpreted as including only those acts that fulfill a personal pecuniary interest in financial gain, exempting politically motivated crimes. In fact, the political motivations or lack of personal financial gain of the act of piracy are irrelevant to the analysis of whether this element of the offense is fulfilled. The incorrect position may be expressed as:

> 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.[75]

This view is ahistorical. The distinction between "private ends" and "public purposes" is not one of economic or political motivations; rather, it arose from and reflects the ban on privateers after the Declaration of Paris in 1856. The Declaration sought to ban privateering and the proponents of the agreement sought to characterize privateering as "legalized piracy."[76] The *Economist* wrote at the time:

> Privateering having become piracy in the code of the civilized nations of Europe, those nations cannot acknowledge or countenance American privateers even in the most indirect manner. They cannot admit them into their ports for the purpose of disposing of their prizes, or for refitting, or for victualling, or for shelter. They become *hostes humani generis* everywhere except within the ports of the Union. It will most probably, therefore, be found practically that the retention of

75. ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 3.5.2.3, (1997), *reprinted in* 73 INTERNATIONAL LAW STUDIES 1, 224 (1999).

76. Paris Declaration, art. 1; JAN MARTIN LEMNITZER, POWER, LAW AND THE END OF PRIVATEERING 39–43 (2014).

> a practice discountenanced and abandoned by all the civilized States of the East cannot permanently be continued by the one nation of the West which clings to this congenial relic of a barbarous age.[77]

Because privateering was committed on behalf of or under the license of the State, it was not considered piracy historically. The League of Nations subcommittee that studied piracy in 1926 was somewhat sympathetic with a progressive view that politically motivated acts are not piracy, although not doctrinaire:

> Certain authors take the view that desire for gain is necessarily one of the characteristics of piracy. But the motive of the acts of violence might be not the prospect of gain but hatred or a desire for vengeance. In my opinion it is preferable not to adopt the criterion of desire for gain, since it is both too restrictive and contained in the larger qualification "for private ends." It is better, in laying down a general principle, to be content with the external character of the facts without entering too far into the often delicate question of motives. Nevertheless, when the acts in question are committed from purely political motives, it is hardly possible to regard them as acts of piracy involving all the important consequences which follow upon the commission of that crime. Such a rule does not assure any absolute impunity for the political acts in question, since they remain subject to the ordinary rules of international law.[78]

Even those interpretations that tended to consider political motivations as not fulfilling the "private ends" element of the crime of piracy only exempted the political purposes of insurgents and rebels, not those of mere criminals. For example, the 1876 U.S. Navy Regulations stated that the officers and crew of any vessel acting as a warship or privateer without a proper commission should be considered as pirates and treated accordingly, but this rule did not include

77. ECONOMIST, Aug. 30, 1856, at 952.
78. Questionnaire No. 6, *supra* note 72, at 223–24.

"vessels acting in the interests of insurgents and directing their hostilities solely against the state whose authority they have disputed."[79]

In 2013, a U.S. circuit court dispelled any doubt about the contemporary U.S. position on this matter. The Ninth Circuit held that Sea Shepherd Conservation Society, a private direct action environmental group, was motivated by "private ends" in its attacks against Japanese whaling activities. The Court dismissed the district court's analysis on an erroneous interpretation of "private ends" and "violence":

> The district court construed "private ends" as limited to those pursued for "financial enrichment." But the common understanding of "private" is far broader. The term is normally used as an antonym to "public" (e.g., private attorney general) and often refers to matters of a personal nature that are not necessarily connected to finance (e.g., private property, private entrance, private understanding and invasion of privacy). See *Webster's New Int'l Dictionary* 1969 (2d. ed.1939) (defining "private" to mean "[b]elonging to, or concerning, an individual person, company, or interest").[80]

Writing for the Court, Chief Judge Kozinski held:

> You don't need a peg leg or an eye patch. When you ram ships; hurl glass containers of acid; drag metal-reinforced ropes in the water to damage propellers and rudders; launch smoke bombs and flares with hooks; and point high-powered lasers at other ships, you are, without a doubt, a pirate, no matter how high-minded you believe your purpose to be.[81]

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79. Leslie C. Green, *The Santa Maria: Rebels or Pirates*, 37 BRITISH YEARBOOK OF INTERNATIONAL LAW 496, 502 (1961).

80. Institute of Cetacean Research v. Sea Shepherd Conservation Society, 708 F.3d 1099, 1101 (9th Cir. 2013), amended by 2013 U.S. App. LEXIS 10717 (9th Cir. May 24, 2013).

81. *Id.*; *Ninth Circuit Rules Antiwhaling Group Engaged in Piracy*, 107 AMERICAN JOURNAL OF INTERNATIONAL LAW 666 (2013).

> In short, piratical acts are those that are done without the sanction or approval, and not on behalf of, the State, and therefore constitute private ends, regardless of the personal or financial benefit of the actor.

3.5.3 Use of Naval Forces to Repress Piracy

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

Commentary

> Article 21 of the High Seas Convention provides: "A seizure on account of piracy may only be carried out by warships or military aircraft, or other ships or aircraft on government service authorized to that effect."
>
> Article 107 of UNCLOS provides: "A seizure on account of piracy may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect."
>
> The IMO Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery Against Ships provides IMO member States with an aide-mémoire to facilitate the investigation of the crimes of piracy and armed robbery against ships. It recommends that States adopt and implement legislation to counter piracy and armed robbery against ships:
>
> > States are recommended to take such measures as may be necessary to establish their jurisdiction over the offences of piracy and armed robbery against ships, including adjustment of their legislation, if necessary, to enable those States to apprehend and prosecute persons committing such offences. States are furthermore encouraged to take the necessary national legislative, judicial and law enforcement actions as to

> be able to receive, prosecute or extradite any pirates or suspected pirates and armed robbers arrested by warships or military aircraft or other ships or aircraft clearly marked and identifiable as being on government service. States should take into consideration appropriate penalties when drafting legislation on piracy.[82]

The U.S. Standing Rules of Engagement/Standing Rules for the Use of Force state:

> Piracy. US warships and aircraft have an obligation to repress piracy on or over international waters directed against any vessel or aircraft, whether US or foreign flagged. For ship and aircraft commanders repressing an act of piracy, the right and obligation of unit self-defense extend to the persons, vessels or aircraft assisted. Every effort should be made to obtain the consent of the coastal state prior to continuation of the pursuit if a fleeing pirate vessel or aircraft proceeds into the territorial sea, archipelagic waters or airspace of that country.[83]

Joint Publication (JP) 3-32, Joint Maritime Operations, states:

> b. **Counterpiracy.** International law has long recognized a general duty of all nations to cooperate in the repression of piracy. 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 beyond the territorial sea of another nation against another ship or aircraft or persons and property on board (depredation is the act of plundering, robbing, or pillaging). In international law, piracy is a crime that can be committed only on or over the high seas, EEZs, contiguous zones, and in other places beyond the territorial jurisdiction of any na-

82. IMO Res. A.1025(26), Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery Against Ships, ¶ 3.1 (Dec. 2, 2009).

83. CJCSI 3121.01B, *supra* note 1, encl. A at A-5 to A-6. *See also* § 3.11.2.2.4 (Hot Pursuit) below.

tion. The same acts (e.g., armed robbery, hostage taking, kidnapping, extortion) 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 coastal nation.

c. Only warships, military aircraft, or other ships or aircraft clearly marked and identifiable as being in governmental service may seize a pirate ship or aircraft. A pirate vessel or aircraft, and all persons on board, seized and detained by a US vessel or aircraft should be taken, sent, or directed to the nearest port or airfield and delivered to appropriate law enforcement authorities for disposition, as directed by higher authority.

d. If a pirate vessel or aircraft fleeing from pursuit by a warship or military aircraft proceeds from the contiguous zone, EEZ, high seas, or international airspace, into the territorial sea, archipelagic waters, or national 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 airspace to continue pursuit. 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, in extraordinary circumstances where life and limb are imperiled and contact cannot be established in a timely manner with the coastal nation, or the coastal nation is unable or unwilling to act, pursuit may continue into the territorial sea, archipelagic waters, or national airspace. US commanders should consult applicable standing ROE and OPORDs for specific guidance. 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.

> e. 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.[84]

3.5.3.1 Seizure of Pirate Vessels and Aircraft

A pirate vessel or aircraft encountered in or over U.S. or international waters may be seized and detained by any U.S. vessels or aircraft described in 3.5.3. The pirate vessel or aircraft, and all persons on board, may be taken, sent, or directed to the nearest U.S. port or airfield and delivered to U.S. law enforcement authorities for disposition according to U.S. law. Higher authority may arrange with another State to accept and prosecute the pirates and dispose of the pirate vessel or aircraft, since every State has jurisdiction under international law over any act of piracy. To facilitate subsequent prosecution of the pirates in a court of law, commanders may be directed to safeguard physical evidence associated with the piratical act.

Commentary

Article 19 of the High Seas Convention provides:

> On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

Article 105 of UNCLOS similarly provides:

84. JP 3-32, Joint Maritime Operations, IV-22 to 23 (Ch. 1, Sept. 20, 2021).

> On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.[85]

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

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

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

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85. *See also* AMERICAN LAW INSTITUTE, RESTATEMENT (FOURTH) FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402, 403, 407, 413 reporters' notes 10, 4, 2, 1 at 161, 168, 191, 212 (2017).

Commentary

> In 2008, the UN Security Council authorized naval forces of States cooperating with the Transitional Federal Government of Somalia to enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea. States were also authorized to use "all necessary means" to repress acts of piracy and armed robbery in the territorial sea of Somalia in a manner consistent with action permitted on the high seas.[86]

3.5.3.3 Treatment of Detained Persons Suspected of Piracy

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

Commentary

> Detention of a person is the temporary limitation of that person's freedom of movement. To be lawful, a detention must be reasonable in duration, method, and location, and must be undertaken by a person with authority to detain. Whether the duration is reasonable depends upon the circumstances.
>
> The 2011 report of the UN special adviser on legal issues related to piracy off the coast of Somalia calls for
>
> > respect for international human rights law, which requires, at the judicial level, a judgement rendered by an independent and impartial court within a reasonable time and with due protection of defendants' rights and, at the correctional level, conditions of detention that meet international standards,

86. S.C. Res. 1816, ¶ 7 (June 2, 2008). This authorization expired on March 3, 2022: *see* S.C. Res. 2608 (Dec. 3, 2021).

> provisions for social reintegration and criminal punishment that excludes the death penalty.[87]

The report notes:

> The detention of suspected pirates at sea involves a number of operational difficulties. Warships do not always have a secure location in which to keep such persons, so naval forces must be able to transfer them swiftly. However, where the relevant agreements are not applied automatically, a series of procedures must be initiated in each potential host State, and there is often no positive outcome for several days. In addition, there are often constitutional constraints limiting the deprivation of liberty to one day or 48 hours from capture to appearance before a judge (examples are Germany, Kenya, the Russian Federation and Spain).
>
> Moreover, most States do not have a legal framework for detention at sea.[88]

Several courts facing the dilemma of detentions at sea by the U.S. Coast Guard have also recognized the dual role of the Coast Guard as both a law enforcement body and a guardian of national security, and that the Coast Guard vessel may attend to its duties as long as the delay produced is still reasonable. For example, in *United States v. Purvis*, the Court found that there had been no unreasonable delay even when "the Coast Guard cutter did not proceed directly to Key West, Florida, the nearest United States port, but rather continued its normal law enforcement patrolling activities. In addition, the vessel stopped for approximately eight hours to attempt to sink an abandoned vessel."[89] In *United States v. Taborda-Reales*, the Court found that a ten-day delay between the Coast Guard's apprehension of defendants near the Dominican Republic was not unreasonable when considered in light of the facts and circumstances in that case after a pursuit took the Coast Guard vessel "several hundred miles south of

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87. Jack Lang, *Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia*, ¶ 10, U.N. Doc. S/2011/30 (Jan. 24, 2011).

88. *Id.* ¶¶ 53–54.

89. United States v. Purvis, 768 U.S. 1237, 1239 (11th Cir. 1985).

the Dominican Republic," but cautioned that "ten days may not always be reasonable."[90] And, in *United States v. Quijije-Franco*, the Court found that "Coast Guard Cutters cannot be used as taxis to ferry detainees immediately to the nearest United States port. . . . The government is not required to take the fastest possible route to the courthouse, just a reasonable one."[91]

3.6 PROHIBITION OF THE TRANSPORT OF SLAVES

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

Commentary

Certain activities (e.g., genocide, piracy, and the slave trade) are so heinous that any nation may apprehend, prosecute, and punish an offender on behalf of the world, regardless of the nationality of the victim or the offender. Human trafficking is a form of modern-day slavery involving force, fraud, or coercion to lure victims into labor or sexual exploitation for commercial gain. The peremptory norm against slavery and slave trafficking is reflected in international agreements and customary international law.[92] This obligation is implemented in 18 U.S.C. §§ 1581–1588 (1988).[93]

Article 99 of UNCLOS reflects an obligation among all States to "take effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag and to prevent the unlawful

90. United States v. Taborda-Reales, 2021 WL 156553, at 2 (D.P.R. Apr. 20, 2021)

91. United States v. Quijije-Franco, 2017 WL 11536137, at 4 (S.D. Fla. Dec. 27, 2017).

92. Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253; Protocol Amending the Slavery Convention, Dec. 7, 1953, 7 U.S.T. 479, 182 U.N.T.S. 51; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 5, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 3.

93. *See* AMERICAN LAW INSTITUTE, RESTATEMENT (FOURTH) FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402, 403, 407, 413 reporters' notes 10, 4, 2, 1 at 161, 168, 191, 212 (2017).

use of its flag for that purpose." Furthermore "any slave taking refuge on board any ship, whatever its flag, shall *ipso facto* be free."[94]

Slavery is defined in Article 1 of the Convention to Suppress the Slave Trade and Slavery (Slavery Convention) as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised" and a "slave" is a person in such condition or status. Persons in debt bondage and illegal immigrants fall outside the scope of the definition of slaves. If a ship is transporting slaves, it is deemed to be engaged in the slave trade. The Slavery Convention, the Amending Protocol, and the Supplementary Convention do not authorize nonconsensual high seas boarding by foreign flag vessels. Nonconsensual boarding pursuant to a reasonable belief of slave trafficking, however, is authorized in Article 22(1) of the High Seas Convention and Article 110(1)(b) of UNCLOS.

18 U.S.C. § 1585 (Seizure, detention, transportation or sale of slaves) provides:

> Whoever, being a citizen or resident of the United States and a member of the crew or ship's company of any foreign vessel engaged in the slave trade, or whoever, being of the crew or ship's company of any vessel owned in whole or in part, or navigated for, or in behalf of, any citizen of the United States, lands from such vessel, and on any foreign shore seizes any person with intent to make that person a slave, or decoys, or forcibly brings, carries, receives, confines, detains or transports any person as a slave on board such vessel, or, on board such vessel, offers or attempts to sell any such person as a slave, or on the high seas or anywhere on tide water, transfers or delivers to any other vessel any such person with intent to make such person a slave, or lands or delivers on shore from such vessel any person with intent to sell, or having previously sold, such person as a slave, shall be fined under this title or imprisoned not more than seven years, or both.

94. *See also* High Seas Convention, art. 13.

3.7 SUPPRESSION OF UNAUTHORIZED BROADCASTING

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

The right of visit (see 3.4) can be exercised for suspected unauthorized broadcasting only if the flag State of the warship has jurisdiction over the offense of unauthorized broadcasting. Jurisdiction is conferred on:

1. The flag State of the broadcasting ship.

2. The State of registry of the offshore installation.

3. The State of which the person is a national.

4. Any State where the transmissions can be received.

5. Any State where authorized radio communication is suffering interference.

Commanders should request guidance from higher authority if confronted with this situation.

Commentary

The provisions to suppress unauthorized broadcasting reflect customary international law and are set forth in Article 109 of UNCLOS:

Unauthorized broadcasting from the high seas

1. All States shall cooperate in the suppression of unauthorized broadcasting from the high seas.

> 2. For the purposes of this Convention, "unauthorized broadcasting" means the transmission of sound radio or television broadcasts from a ship or installation on the high seas intended for reception by the general public contrary to international regulations, but excluding the transmission of distress calls.
>
> 3. Any person engaged in unauthorized broadcasting may be prosecuted before the court of:
>
> (a) the flag State of the ship;
>
> (b) the State of registry of the installation;
>
> (c) the State of which the person is a national;
>
> (d) any State where the transmissions can be received; or
>
> (e) any State where authorized radio communication is suffering interference.
>
> 4. On the high seas, a State having jurisdiction in accordance with paragraph 3 may, in conformity with article 110, arrest any person or ship engaged in unauthorized broadcasting and seize the broadcasting apparatus.

Paragraph 1 imposes on all States the duty to cooperate in the suppression of unauthorized broadcasting from the high seas (and, by virtue of Article 58(2), in the EEZ as well). Paragraph 2 defines "unauthorized broadcasting." Paragraph 3 identifies the courts that may serve as a venue for prosecution. Paragraph 4 requires that actions to suppress unauthorized broadcasting under Article 109 be "in conformity with" Article 110 (Right of visit). Persons engaged in unauthorized broadcasting may be arrested and their associated broadcasting equipment seized. The provisions in Article 109 emerged during the second session of UNCLOS III, when a group of nine

European States proposed text to address unlawful propaganda or commercial broadcasting from the sea.[95]

The provisions are reflected in U.S. law at 47 U.S.C. § 301 (License for radio communication or transmission of energy):

> No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any State, Territory, or possession of the United States or in the District of Columbia to another place in the same State, Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States (except as provided in section 303(t) of this title); or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

The enforcement provisions are contained in 47 U.S.C. § 401.

95. U.N. Doc. A/CONF.62/C.2/L.54 (1974), 3 Official Records, Third United Nations Conference on the Law of the Sea 229, 230 (1983) (Belgium, Denmark, France, Federal Republic of Germany, Ireland, Italy, Luxembourg, Netherlands, and United Kingdom).

3.8 SUPPRESSION OF INTERNATIONAL NARCOTICS TRAFFIC

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

Commentary

Article 108 of UNCLOS provides:

> Illicit traffic in narcotic drugs or psychotropic substances
>
> 1. All States shall cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions.
>
> 2. Any State which has reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic in narcotic drugs or psychotropic substances may request the cooperation of other States to suppress such traffic.

Article 108 applies on the high seas and within the EEZ in accordance with Article 58(2). In the territorial sea, Article 27 recognizes that the coastal State has criminal jurisdiction against drug trafficking on board a foreign ship.

Article 17 of the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances states:

Illicit Traffic by Sea

1. The Parties shall co-operate to the fullest extent possible to suppress illicit traffic by sea, in conformity with the international law of the sea.

2. A Party which has reasonable grounds to suspect that a vessel flying its flag or not displaying a flag or marks of registry is engaged in illicit traffic may request the assistance of other Parties in suppressing its use for that purpose. The Parties so requested shall render such assistance within the means available to them.

3. A Party which has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law, and flying the flag or displaying marks of registry of another Party is engaged in illicit traffic may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures in regard to that vessel.

4. In accordance with paragraph 3 or in accordance with treaties in force between them or in accordance with any agreement or arrangement otherwise reached between those Parties, the flag State may authorize the requesting State to, *inter aria*:

a) Board the vessel;

b) Search the vessel;

c) If evidence of involvement in illicit traffic is found, take appropriate action with respect to the vessel, persons and cargo on board.

5. Where action is taken pursuant to this article, the Parties concerned shall take due account of the need not to endanger the safety of life at sea, the security of the vessel and the cargo

or to prejudice the commercial and legal interests of the flag State or any other interested State.

6. The flag State may, consistent with its obligations in paragraph 1 of this article, subject its authorization to conditions to be mutually agreed between it and the requesting Party, including conditions relating to responsibility.

7. For the purposes of paragraphs 3 and 4 of this article, a Party shall respond expeditiously to a request from another Party to determine whether a vessel that is flying its flag is entitled to do so, and to requests for authorization made pursuant to paragraph 3. At the time of becoming a Party to this Convention, each Party shall designate an authority or, when necessary, authorities to receive and respond to such requests. Such designation shall be notified through the Secretary-General to all other Parties within one month of the designation.

8. A Party which has taken any action in accordance with this article shall promptly inform the flag State concerned of the results of that action.

9. The Parties shall consider entering into bilateral or regional agreements or arrangements to carry out, or to enhance the effectiveness of, the provisions of this article.

10. Action pursuant to paragraph 4 of this article shall be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

11. Any action taken in accordance with this article shall take due account of the need not to interfere with or affect the rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea.

The principal high seas drug trafficking statute in the United States, the Maritime Drug Law Enforcement Act of 1986 (MDLEA), prohibits the manufacture, distribution, or possession with intent to manufacture or distribute, a controlled substance, "[w]hile on board a covered vessel."[96] The MDLEA's prohibitions extend to both attempts and conspiracies.[97] Under the MDLEA, a "covered vessel" includes a "vessel subject to the jurisdiction of the United States," a "vessel without nationality," and "a vessel assimilated to a vessel without nationality."[98] In effect, these definitions permit extraterritorial enforcement of U.S. drug laws against U.S. vessels, select foreign vessels (with the consent of the flag State), and stateless vessels. The elements of the offense are as follows:

(1) the defendant was on board [the eligible vessel] and at the time possessed [an eligible controlled substance], either actually or constructively;
(2) the defendant had the specific intent to distribute that controlled substance; and
(3) the defendant did so knowingly and voluntarily.

Punishments for violating the MDLEA are provided under Title 21's importation statute, 21 U.S.C. § 960, and, in certain circumstances, 21 U.S.C. § 962.[99]

Drug traffickers have also employed submersible or semi-submersible craft to carry illegal drugs. Operation of these craft is unlawful and they are deemed to be stateless vessels under U.S. law. Under the Drug Trafficking Vessel Interdiction Act of 2008 (DTVIA),[100] the operation of submersible vessel or semi-submersible vessel without nationality has four elements:

(1) a fully or semi-submersible (SPSS) craft (defined as a watercraft constructed or adapted to be capable of operating with

96. 46 U.S.C. § 70503(a)(1).
97. 46 U.S.C. § 70506(b).
98. 46 U.S.C. §§ 70502(c)(1)(A)-(B), 70502(d)(1).
99. 46 U.S.C. § 70506(a).
100. 18 U.S.C. § 2285.

most of its hull and bulk under the surface of the water, including both manned and unmanned watercraft);
(2) Stateless;
(3) operated with intent to evade detection; and
(4) navigating into, through, or from international waters.[101]

3.9 RECOVERY OF GOVERNMENT PROPERTY LOST AT SEA

The property of a State lost at sea remains vested in that State until title is formally relinquished or abandoned. Aircraft wreckage, sunken vessels, practice torpedoes, test missiles, and target drones are among the types of U.S. Government property which may be the subject of recovery operations. Should such U.S. property be recovered at sea by foreign entities, it is U.S. policy to demand its immediate return. Specific guidance for the on-scene commander in such circumstances is contained in the standing rules for engagement (SROE)/standing rules for the use of force (SRUF) and applicable operation orders. See 2.1.2 for a similar discussion regarding the status of sunken warships and military aircraft.

Commentary

Under the Standing Rules of Engagement (SROE) contained in CJCSI 3121.01B, impeding U.S. forces recovering U.S. government property may be considered a hostile act or demonstrate hostile intent, triggering the right of self-defense. The SROE define a hostile act and hostile intent as follows:

> e. Hostile Act. An attack or other use of force against the United States, US forces or other designated persons or property. It also includes force used directly to preclude or

101. *See also* Brian Wilson, *Submersibles and Transnational Criminal Organizations*, 17 OCEAN AND COASTAL LAW JOURNAL 1 (2011) (DTVIA effectively outlawed the conveyance, under conditions, regardless of its contents and this statute has supported more than fifty prosecutions in U.S. federal courts); KRASKA & PEDROZO, *supra* note 64, at 519–86 (2013); Robert McLaughlin & Natalie Klein, *Maritime Autonomous Vehicles and Drug Trafficking by Sea: Some Legal Issues*, 36 INTERNATIONAL JOURNAL OF MARINE & COASTAL LAW 389 (2021); AMERICAN LAW INSTITUTE, RESTATEMENT (FOURTH) FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 reporters' note 6 at 155 (2017).

> impede the mission and/or duties of US forces, including the recovery of US personnel or vital US government property.
>
> f. Hostile Intent. The threat of imminent use of force against the United States, US forces or other designated persons or property. It also includes the threat of force to preclude or impede the mission and/or duties of US forces, including the recovery of US personnel or vital USG property.[102]

U.S. policy concerning the seizure of U.S. government property at sea is also set forth in the SROE:

> International law provides that state-owned property at sea is not abandoned unless the state of ownership abandons the property by explicit pronouncement. Accordingly, the United States has a superior right to recover US Government-owned property at sea regardless of whether or not US or foreign vessels or aircraft are first to arrive on scene. The same rule of law applies when a foreign nation has specifically requested the United States to act as its agent with respect to government-owned property of that nation at sea. Any use of force by foreign forces to disrupt US recovery-of assets vital to national security or other specified US government property at sea constitutes a hostile act and will be countered using proportionate measures necessary to prevent disruption of US recovery or seizure by the foreign force.[103]

Where the forces of the United States and another State are searching for the same U.S. government property at sea, the U.S. on-scene commander will:

> (1) Request immediate issuance of a NOTMAR, Notice to Airmen or special warning (as appropriate) stating that US recovery operations have commenced or are about to commence.

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102. CJCSI 3121.01B, *supra* note 1, encl. A at A-4.
103. *Id.* encl. B app. B at B-B-1.

> (2) Advise foreign forces, via bridge-to-bridge radio telephone (channel 16 VHF-FM) or other means of communications that the property belongs to the United States, that operations are underway to recover the property, and to request the foreign force maintain a safe distance from US operations.
>
> (3) If the foreign force is Russian, ensure US units hoist appropriate special incidents at sea (INCSEA) signal for conducting salvage operations.
>
> (4) If the foreign units involved refuse to comply with the request to stand clear and they continue to search, immediately notify higher authority . . . and update as appropriate.[104]

The Rules on the Use of Force by DoD Personnel Providing Support to Law Enforcement Agencies Conducting Counterdrug Operations in the United States (Enclosure A in CJCSI 3121.02) provide:

> (1) Use of force
>
> > (a) Normally, deadly force is not authorized to defend property. However, DOD personnel may use force up to and including deadly force to prevent the actual theft or sabotage of property that has been designated by the NCA [National Command Authorities] as vital to national security, or property that is inherently dangerous. Property is inherently dangerous to others if, in the hands of an unauthorized individual, it presents an imminent danger of death or serious bodily harm to others, such as high risk, portable, and lethal: missiles; rockets; arms; ammunition; explosives; chemical agents; and special nuclear materials.
> >
> > (b) The use of force to defend property should not be confused with the use of force by DOD personnel in

104. *Id.* encl. B app. B at B-B-2.

self-defense, or in defense of others within the immediate vicinity of DOD personnel, in accordance with paragraph 3. For example: Force up to and including deadly force may be used to defend a DOD helicopter that is being fired upon in flight, regardless of whether it has been designated as property vital to national security. By contrast, if a DOD helicopter with no weapons systems or weapons on board is unoccupied and parked on a tarmac and has not been designated as property vital to national security, DOD personnel would not be authorized to use deadly force to prevent it from being stolen or damaged.

(2) Following persons and recovery of property.

(a) When participating in CD [counterdrug] military support operations in the United States, DOD personnel will immediately contact LEA [law enforcement agencies] personnel if property vital to national security or inherently dangerous property is stolen. If no LEA personnel are available to do so, DOD personnel are authorized to follow, at a safe interval, and for a reasonable distance, persons fleeing with the stolen property, as long as such persons remain in sight or within contact until LEA personnel arrive.

(b) DOD personnel authorized to follow as provided above may attempt recovery if LEA personnel remain unavailable and the following circumstances exist:

1. The stolen property is vital to national security; or

2. The stolen property is inherently dangerous and DOD personnel believe it will pose an imminent danger of death or serious physical injury to DOD personnel or others within their immediate vicinity.

(c) Unless previously authorized by the NCA or agreed to in advance by the foreign nation involved, authority to

follow persons does not include entry into the land territory of a foreign nation, its territorial sea, or its national airspace.[105]

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

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

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

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

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105. CJCSI 3121.02, Rules on the Use of Force by DoD Personnel Providing Support to Law Enforcement Agencies Conducting Counterdrug Operations in the United States, encl. A at A-5 to A-6 (May 31, 2000).

Commentary

Further information can be found in a range of sources.[106]

3.10.1.1 Foreign Internal Waters, Archipelagic Waters, and Territorial Seas

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

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

The primary responsibility of coastal States for the protection of foreign shipping and aircraft off their shores ends at the seaward edge of the territorial sea. Beyond that point, each State bears the primary responsibility for the

106. *See U.S. Military Forces to Protect "Re-Flagged" Kuwaiti Oil Tankers: Hearings Before the Senate Committee on Armed Services*, 100th Cong. (1987); Defense Policy Panel and Investigations Subcommittee of the Committee on Armed Services, *National Security Policy Implications of United States Operations in the Persian Gulf* 7–10, 100th Cong., 1st Sess. (1987); George K. Walker, *The Tanker War, 1980–1988: Law and Policy*, 74 INTERNATIONAL LAW STUDIES 1, 59–66 (2000); David D. Caron, *Choice and Duty in Foreign Affairs: The Reflagging of the Kuwaiti Tankers*, *in* THE PERSIAN GULF WAR: LESSONS FOR STRATEGY, LAW, AND DIPLOMACY 153 (Christopher C. Joyner ed., 1990).

protection of its own flag vessels and aircraft and its own citizens and their property. The coastal State may properly exercise jurisdiction over foreign vessels, aircraft, and persons—subject to principles of sovereign immunity—in and over its contiguous zone to prevent infringement of its customs, fiscal, immigration, and sanitary laws; in its EEZ to enforce its natural resource-related rules and regulations; and on its continental shelf to enforce its relevant seabed resources-related rules and regulations. When the coastal State is acting lawfully in the valid exercise of such jurisdiction or is in hot pursuit (see 3.11.2.2.4) of a foreign vessel or aircraft for violations that have occurred in or over those waters or in its sovereign territory, the flag State should not interfere. U.S. commanders should consult the SROE for specific guidance as to the exercise of this authority.

3.10.2 Protection of Foreign-flagged Vessels and Aircraft and Persons

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

3.10.3 Noncombatant Evacuation Operations

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

Commentary

Enclosure G (Noncombatant Evacuation Operations) of CJCSI 3121.01B provides:

> a. The SROE reflect the limited objective of NEO operations. The use of military force is restricted to that necessary to provide successfully for the self-defense of the evacuees and complete the mission.
>
> b. The Department of State is charged with the overall responsibility to protect US citizens abroad, and the Ambassador or Chief of Mission at a particular embassy or consulate is responsible for evacuation of US citizens. During the execution of a NEO, however, DOD is specifically responsible for the protection of US nationals and designated third-country nationals within the embassy grounds until the evacuation is complete. The Ambassador or Chief of Mission orders the evacuation of US Government personnel and dependents, including other than "wartime essential" DOD personnel at a particular US Government overseas mission. DOD acts in a supporting role and is responsible to advise and assist DOS in such evacuations. Coordination between the Chief of Mission and the combatant commander in developing the ROE is necessary: however, ultimate approval for the DOD ROE will remain with the military chain of command.[107]

3.11 MARITIME LAW ENFORCEMENT

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

107. CJCSI 3121.01B, *supra* note 1, encl. G at G-1.

Because of the complexity of these elements, commanders should seek guidance from higher authority whenever time permits.

A wide range of U.S. Laws and treaty obligations pertaining to fisheries, wildlife, customs, immigration, environmental protection, and marine safety are enforced at sea by U.S. agencies. Even though DOD personnel do not have authority to enforce such laws, they are often called upon to assist law enforcement agencies (e.g., the USCG) in carrying out these missions. It is essential that commanders and their legal advisors have a basic understanding of MLE.

3.11.1 Authority and Jurisdiction

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

3.11.2 Jurisdiction to Enforce

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

1. Substantive Law. In a MLE context, this consideration involves the domestic legislation—the criminal law—that proscribes the illicit activity. Key focus areas include the specific elements of the crime (e.g., piracy, drug trafficking, illegal fishing) and whether it applies where the activity occurs.

2. Vessel Status/Flag. The general principle of exclusive flag State jurisdiction provides a vessel sails under the flag of a single country and is subject to the exclusive jurisdiction of that country (UNCLOS, Article 92). Only the flag State may take enforcement action on the high seas against a vessel under its registry. Several exceptions to this principle exist, including crimes of universal jurisdiction and actions taken under the authority of a United Nations Security Council resolution, among others. Ships that are without nationality—stateless—may be boarded on the high seas and are subject to the jurisdiction of any State.

3. Vessel Activity. This consideration involves identifying what illicit action the vessel may be taking. The reasonable grounds for suspecting, for example, piracy, drug trafficking, or illegal fishing influence the response and whether an exception to the general principle of flag State jurisdiction exists.

4. Location. This consideration involves identifying the maritime zone where the illicit activity has taken place. The location—territorial sea, contiguous zone, exclusive economic zone, high seas—when combined with the suspected activity is pivotal to the ability to exercise jurisdiction (or whether consent from a flag State is required).

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

Commentary

Article 91 of UNCLOS provides:

> 1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.
>
> 2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

Under Article 92(1), "[s]hips shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas." Article 94(1) provides that "[e]very State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag." Further, under Article 94(2)(b), every State shall "assume jurisdiction under its internal law over each ship flying its flag and its master, officers and

crew in respect of administrative, technical and social matters concerning the ship."[108]

3.11.2.1 Enforcement Jurisdiction over U.S.-flagged Vessels

U.S. law applies at all times aboard U.S.-flagged vessels and is enforceable by the USCG worldwide. As a matter of comity and respect for foreign sovereignty, except aboard ships where the United States claims all the privileges of sovereign immunity, enforcement action is generally not undertaken within the territorial seas, archipelagic waters, or internal waters of another State without notification to or consent of that State.

For law enforcement purposes, U.S. vessels:

1. Are documented or numbered under U.S. law

2. Are owned in whole or in part by a U.S. citizen or national (including corporate entities) and not registered in another country

3. Were once documented under U.S. law and, without approval of the U.S. Maritime Administration, have been either sold to a non-U.S. citizen or placed under foreign registry or flag.

3.11.2.2 Enforcement Jurisdiction over Foreign Flagged Vessels

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

Commentary

See §§ 1.6.1 and 3.11.2.2.2 for a discussion of coastal State authority in the contiguous zone.

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108. *See* AMERICAN LAW INSTITUTE, RESTATEMENT (FOURTH) FOREIGN RELATIONS LAW OF THE UNITED STATES § 431 reporters' note 5 (2017).

See §§ 1.6.2 and 3.11.2.2.2 for a discussion of coastal State authority in the EEZ.

3.11.2.2.1 Enforcement Jurisdiction on the High Seas

A flagged vessel on the high seas is generally subject to the exclusive law enforcement jurisdiction of the State whose flag it is entitled to fly. One exception to this principle is the right of approach and visit (see 3.4). States may provide authorization to foreign law enforcement vessels to board their flagged vessels in certain circumstances. The flag State may grant consent—ad hoc, written arrangement, or in accordance with an international agreement—to another State to board and exercise jurisdiction over its vessels. Special arrangements are discussed in 3.11.2.2.7.

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

Commentary

Pursuant to 14 U.S.C. § 522, the Coast Guard may utilize the authority of 19 U.S.C. § 1581 (Boarding vessels):

> (a) Customs officers
>
> Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs enforcement area established under the Anti-Smuggling Act [19 U.S.C.A. 1701 et seq.], or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and

> every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.
>
> (b) Officers of Department of the Treasury
>
> Officers of the Department of the Treasury and other persons authorized by such department may go on board of any vessel at any place in the United States or within the customs waters and hail, stop, and board such vessel in the enforcement of the navigation laws and arrest or, in case of escape or attempted escape, pursue and arrest any person engaged in the breach or violation of the navigation laws.

3.11.2.2.2 Enforcement Jurisdiction in the Exclusive Economic Zone, Continental Shelf, and Contiguous Zone

Within the EEZ, the coastal State has sovereign rights over the exploration, exploitation, management, and conservation of the living and nonliving natural resources in the water column and on the seabed and its subsoil. These rights permit the coastal State to exercise jurisdiction over nonsovereign-immune foreign vessels violating its resource-related laws without consulting with or contacting the flag State. The coastal State has exclusive sovereign rights over the exploration and exploitation of natural resources on the continental shelf and may exercise jurisdiction over nonsovereign-immune vessels violating those resource rights.

A coastal State has limited police powers within its contiguous zone and may take law enforcement action to exercise the control necessary to prevent infringement of its fiscal, immigration, sanitary, or customs laws and regulations within its territory or territorial sea without consulting with or contacting the flag State.

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

Coastal States have the right to regulate their territorial sea, archipelagic waters, and internal waters. The coastal State has absolute power to enforce its domestic law in these waters, subject only to recognized restrictions

grounded in international law principles related to FON. These principles include innocent passage, assistance entry, transit passage, and *force majeure* (see 2.5.2.1, 2.5.2.6, 2.5.3.2, and 3.2.2). A coastal State may enforce reasonable, nondiscriminatory conditions on a vessel's entry into its ports. Warships and government vessels in noncommercial service retain their sovereign-immune status in the territorial sea and archipelagic and internal waters. When a coastal State imposes conditions for port entry on sovereign-immune vessels which compromise the vessel's status, (e.g., a requirement to provide crew lists or submit to safety inspections), the commander may decide not to enter the coastal State's port. See 2.1.

3.11.2.2.4 Hot Pursuit

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

Commentary

Although distinct from the concept of "hot pursuit," self-defense includes the authority to pursue and engage forces that have committed a hostile act or demonstrated hostile intent, if those forces continue to commit hostile acts or demonstrate hostile intent.[109]

The SROE permit hot pursuit to recover stolen assets vital to national security or inherently dangerous to others:

109. CJCSI 3121.01B, *supra* note 1, encl. A.

> Pursuit of Stolen Property. If assets vital to national security or assets considered inherently dangerous to others are stolen, and civilian law enforcement personnel or security forces are not reasonably available to recover them, the combatant commander may authorize DOD forces to pursue and recover the assets provided the pursuit is immediate, continuous and uninterrupted. The combatant commander may delegate this authority, as required. DOD forces will contact civilian law enforcement authorities as soon as practicable to inform them of the theft and their pursuit.[110]

3.11.2.2.4.1 Commencement of Hot Pursuit

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

Commentary

> The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Pursuit must commence when the foreign ship or one of its boats is within the internal waters, archipelagic waters, territorial sea, contiguous zone, or EEZ (or above the continental shelf) of the pursuing State. It is not necessary that, at the time when the foreign ship within the archipelagic waters, territorial sea, contiguous zone, or EEZ (or above the continental shelf) receives the order to stop, the ship giving the order should likewise be within the archipelagic waters, territorial sea, contiguous zone, or EEZ (or above the continental shelf).

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110. *Id.* encl. N.

> If the foreign ship is within a contiguous zone or EEZ, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zones were established.[111]
>
> Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be 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 archipelagic waters, territorial sea, contiguous zone, or EEZ (or above the continental shelf). The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance that enables it to be seen or heard by the foreign ship.[112]

3.11.2.2.4.2 Requirement for Continuous Pursuit

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

Commentary

> Hot pursuit may only be continued outside the territorial sea, contiguous zone, or EEZ if the pursuit has not been interrupted.[113]

3.11.2.2.4.3 Termination of Hot Pursuit

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

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111. Territorial Sea Convention, art. 23(1); UNCLOS, art. 111(1).
112. High Seas Convention, art. 23(3); UNCLOS, art. 111(4).
113. High Seas Convention, art. 23(1); UNCLOS, art. 111(1).

Commentary

Article 23(2) of the High Seas Convention provides: "The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own country or of a third State."[114]

3.11.2.2.5 Constructive Presence

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

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

2. A contact boat in a maritime area over which that State may exercise jurisdiction (e.g., internal waters, territorial sea, archipelagic waters, contiguous zone, EEZ, or waters over the continental shelf) and commit an act subjecting it to such jurisdiction

3. Good reason to believe two vessels are working as a team to violate the laws of that State.

Commentary

In international law, the doctrine of constructive presence permits a coastal State to assert jurisdiction over a foreign flag vessel (mothership) that lies beyond the geographic jurisdiction of the coastal State jurisdiction but uses its boat or another ship (contact boat) to commit offenses in violation of coastal State law within a maritime area over which the coastal State exercises sovereignty, sovereign rights, or jurisdiction. In order to exercise jurisdiction over a mothership located seaward of coastal State waters, the contact vessel must be physically present in coastal State territorial waters or be subject to

114. *See also* UNCLOS, art. 111(3).

coastal State jurisdiction beyond the territorial sea, such as while fishing in the EEZ or under hot pursuit.[115]

3.11.2.2.6 Right of Approach and Visit

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

Commentary

The SORM provide:

> g. SUPPORT FOR LAW ENFORCEMENT.
>
> (1) GENERAL. The USCG is the primary U.S. maritime agency charged with the enforcement of all federal laws on the high seas and in waters subject to the jurisdiction of the United States. When USCG LEDETs are embarked on U.S. Navy platforms, the U.S. Navy supports the USCG in its law enforcement responsibilities (primarily drug interdiction) on a not-to-interfere basis with fleet operations and readiness. Similar support is also provided to other U.S. law enforcement agencies when authorized by DOD. When operating from U.S. Navy ships, the OIC of the LEDET is responsible for directing and executing searches, arrests or seizures of suspect vessels. Such actions are based on USCG directives and policy. The commanding officer, however, remains responsible for their ship and retains the authority to allow, disallow, suspend, or terminate any law enforcement activity involving his command when circumstances require.

115. *See* Reece Lewis, *The Doctrine of Constructive Presence and the Arctic Sunrise Award (2015): The Emergence of the "Scheme Theory,"* 51 OCEAN DEVELOPMENT & INTERNATIONAL LAW 19 (2020).

(2) BOARDING SUSPECT VESSELS. Consistent with applicable USCG directives, LEDETs may board vessels of United States Registry when directed by the senior embarked USCG boarding officer. LEDETs may board foreign flag vessels in international waters only after appropriate interagency coordination required by Presidential Directive (PD)/NSC-27. Transport to vessels being boarded is provided by U.S. Navy small boats operated by Navy personnel. The U.S. naval unit also provides backup support to the LEDET, including the use of deadly force, if necessary for self-defense or the protection of the boarding party. U.S. naval personnel may board seized and detained vessels for non-law enforcement purposes (such as damage control, rigging of the tow, etc.) when directed by their commanding officer.

(3) TACTICAL CONTROL OF U.S. NAVAL UNITS IN SUPPORT OF LAW ENFORCEMENT OPERATIONS. U.S. Naval Units must shift tactical control to the appropriate Coast Guard authority prior to USCG LEDETs boarding suspect vessels, and establish communications on the designated law enforcement command and control net. Tactical control remains with the USCG during boardings and any subsequent towing or escort operations. The U.S. Naval Unit will fly the USCG ensign from the yard during all such operations.

(4) USE-OF-FORCE IN SUPPORT OF USCG LEDET OPERATIONS. USCG use-of-force policy governs boarding operations. However, consistent with CJCSI 3121.01 (series), this does not limit the authority or responsibility of the commanding officer to use such force as is necessary for the protection of his ship and personnel.

(5) CUSTODY OF SEIZED VESSEL/PROPERTY/PRISONERS. Custody of and responsibility for seized vessels, other property and prisoners is retained by the USCG. The commanding officer may provide

> U.S. naval personnel to augment the LEDET to guard and control prisoners if required for security of the naval unit.[116]

3.11.2.2.7 Special Arrangements and International Agreements

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

The United States has entered into numerous bilateral agreements and arrangements addressing counterdrug, migrant interdiction, fisheries enforcement, counter-proliferation, and other law enforcement operations with States around the world. Many of the agreements provide USCG law enforcement officers with authority to stop, board, and search the vessels of the other State in international waters. These agreements may allow the USCG to embark its personnel on vessels of that State, to enforce certain laws of that State, to pursue fleeing vessels or aircraft into the waters or airspace of that State, and to fly into that State's airspace in support of counterdrug operations. Maritime Stability Operations complement bilateral

116. OPNAVINST 3120.32D, *supra* note 45, encl. 1 at 6-114 to 6-115.

agreements by providing Navy and Coast Guard forces an ability to advance shared priorities. See NWP 3-07, Maritime Stability Operations.

Commentary

The Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation[117] (2005 SUA Protocol) and the Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf[118] (Fixed Platforms Protocol) were adopted by the IMO member States on October 14, 2005 and signed on behalf of the United States on February 17, 2006. The Protocols prevent and punish maritime terrorism and the proliferation of weapons of mass destruction. They provide a legal basis for international cooperation in the investigation, prosecution, and extradition of those who commit or aid terrorist acts or trafficking in weapons of mass destruction aboard ships at sea or on fixed platforms.

For States parties, the 2005 SUA Protocol and the Fixed Platforms Protocol displace the 1988 Protocol:

> The Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation ("2005 SUA Protocol") and the Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf ("2005 Fixed Platforms Protocol") (together "the Protocols") are an important component in the international campaign to prevent and punish maritime terrorism and the proliferation of weapons of mass destruction. The Protocols amend two International Maritime Organization (IMO) counterterrorism agreements to which the United States is party: the Convention for the Suppression of Unlawful Acts against the Safety

117. Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Oct. 14, 2005, IMO Doc. LEG/CONF.15/21 [hereinafter 2005 SUA Protocol].

118. Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Oct. 14, 2005, IMO Doc. LEG/CONF.15/22.

of Maritime Navigation ("the Convention"), and its accompanying protocol, the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf ("the 1988 Protocol"), both done at Rome, March 10, 1988, S. Treaty Doc. 101-1. The Convention and 1988 Protocol seek to ensure that all individuals who commit acts of terrorism that endanger the safe navigation of a ship or the safety of a fixed platform will be prosecuted in the State in which they are found, or extradited to another State for prosecution. The Convention and 1988 Protocol require States Parties to criminalize certain terrorist acts involving the safety of maritime navigation and fixed platforms, and they create a series of obligations relating to those offenses with the object of bringing the perpetrators to justice.

Following the terrorist attacks of September 11, 2001, the international community recognized the urgent need for a more effective international regime to combat maritime terrorism and to conduct maritime interdictions of weapons of mass destruction. To this end, the United States led the effort to negotiate the Protocols for over three years in the IMO. The resulting Protocols fill several gaps in the existing treaty framework for combating global terrorism. The Protocols require States Parties to criminalize under their domestic laws certain acts, including using a ship or a fixed platform in terrorist activity, transporting weapons of mass destruction ("WMD"), their means of delivery or related materials, and transporting terrorist fugitives. The Protocols also incorporate many of the provisions in recent counterterrorism conventions to which the United States is already a party, such as the 1999 International Convention for the Suppression of the Financing of Terrorism ("Terrorism Financing Convention"), S. Treaty Doc. 106-49, and the 1997 International Convention for the Suppression of Terrorist Bombings ("Terrorist Bombings Convention"), S. Treaty Doc. 106-6. Like prior conventions, the Protocols require Parties to extradite or submit for prosecution persons accused of

> committing, attempting to commit, or aiding in the commission of such offenses. The 2005 SUA Protocol also creates a shipboarding regime based on flag state consent similar to agreements that the United States has concluded bilaterally as part of the Proliferation Security Initiative ("PSI") . . . . This shipboarding regime will provide an international legal framework to facilitate interdiction on waters seaward of the territorial sea of any State of WMD, their means of delivery and related materials, and terrorist fugitives.[119]

The United States has negotiated bilateral and multilateral treaties, agreements, and memoranda of understanding with States to facilitate cooperation on a variety of maritime security missions, including with regard to the proliferation security initiative (PSI) (see § 4.4.5), counterdrug operations, maritime piracy, maritime migration, and the conservation of living marine resources. Some of the agreements, such as those concerning the PSI, are quite specific in focus, whereas others are broader in scope and might be classified as either "counterdrug" agreements or "maritime surveillance" cooperation, which can be used to conduct fisheries enforcement and for other purposes. Hence, the categorization of agreements below is somewhat subjective.

The United States has numerous bilateral and regional agreements to facilitate maritime security cooperation, including the following.

Piracy agreements:

1. **Kenya**. Memorandum of Understanding between the United States of America and the Republic of Kenya Concerning the Conditions of Transfer of Suspected Pirates and Armed Robbers and Seized Property in the Western Indian Ocean, the Gulf of Aden, and the Red Sea, January 16, 2009.

2. **Seychelles**. Memorandum of Understanding between the United States of America and the Republic of the Seychelles Concerning the Conditions of Transfer of Suspected Pirates and Armed

119. S. TREATY DOC. NO. 110-8, at VI–VII (2007).

Robbers and Seized Property in the Western Indian Ocean, the Gulf of Aden, and the Red Sea, July 14, 2010.

Counterdrug and maritime security agreements:

1. **Antigua and Barbuda**. Agreement between the Government of the United States of America and the Government of Antigua and Barbuda Concerning Maritime Counter-Drug Operations, April 19, 1995; amended by exchange of notes, June 3, 1996; further amended by Protocol, September 30, 2003.[120]

2. **Antilles and Aruba**. Agreement of Cooperation between the Government of the United States of America and the Kingdom of the Netherlands Concerning Access to and Use of Facilities in the Netherlands Antilles and Aruba for Aerial Counter-Narcotics Activities, March 2, 2000.[121]

3. **Bahamas**. Understanding between the Governor of the Bahamas and the United States Coast Guard effected by exchange of letters dated December 4 and 11, 1964; provisions pertaining to maritime law enforcement terminated June 29, 2004. Agreement on the Continuance of United States Military Rights and Maritime Practices in the Bahamas effected by exchange of notes, July 10 and 20, 1973;[122] provisions pertaining to maritime law enforcement terminated June 29, 2004. Understanding Concerning Military Operating Rights and Maritime Practices effected by exchange of notes, April 5, 1984;[123] provisions pertaining to maritime law enforcement terminated June 29, 2004. Understanding Concerning Drug Interdiction and Other Operations effected by exchange of notes, May 22 and 28, 1992; terminated June 29, 2004. Agreement between the Government of the United States of America and the Government of Bahamas Concerning a Cooperative Shiprider and Overflight Drug Interdiction Program, effected by exchange of notes, May 1 and 6, 1996; terminated June 29, 2004.

120. 2003 U.S.T. LEXIS 84.
121. 2000 U.S.T. LEXIS 157.
122. T.I.A.S. 7688, 24 U.S.T. 1783.
123. T.I.A.S. 11058, 2034 U.N.T.S. 189.

4. **Barbados**. Agreement between the Government of the United States of America and the Government of Barbados Concerning Co-operation in Suppressing Illicit Maritime Drug Trafficking, June 25, 1997.[124]

5. **Belgium**. Memorandum of Understanding between the Government of the United States of America and the Government of the Kingdom of Belgium Concerning the Deployment of United States Coast Guard Law Enforcement Detachments on Belgian Navy Vessels in the Waters of the Caribbean Sea, March 1, 2001.

6. **Belize**. Agreement between the Government of the United States of America and the Government of Belize Concerning Maritime Counter-Drug Operations, December 23, 1992;[125] amended by Protocol, April 25, 2000.

7. **Cabo Verde**. Agreement Between the Government of the Republic of Cabo Verde and the Government of the United States of America Concerning Cooperation to Combat Illicit Transnational Maritime Activity, March 24, 2014.

8. **Canada**. Memorandum of Understanding between the Canadian Forces and the United States Coast Guard Concerning the Embarkation of United States Coast Guard Law Enforcement Detachments and Observers on Canadian Forces Vessels and Aircraft to Suppress Illicit Traffic in the Joint Interagency Task Force South Joint Operating Area, October 8, 2010.

9. **Caribbean Area**. Agreement Concerning Co-operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area, April 10, 2003. The United States signed the Agreement definitively, with a declaration, on April 10, 2003. Belize, Costa Rica, Dominican Republic, France, Guatemala, Netherlands, Nicaragua, and the United States of America.

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124. 1997 U.S.T. LEXIS 5.
125. T.I.A.S. 11914, 2231 U.N.T.S. 511.

10. **Cook Islands**. Agreement between the Government of the United States of America and the Government of the Republic of the Cook Islands Concerning Cooperation to Suppress Illicit Traffic in Narcotic Substances and Psychotropic Substances by Sea, November 8, 2007.

11. **Colombia**. Agreement between the Government of the United States of America and the Government of Colombia to Suppress Illicit Traffic by Sea, February 20, 1997.

12. **Costa Rica**. Agreement between the Government of the United States of America and the Government of the Republic of Costa Rica Concerning Cooperation to Suppress Illicit Traffic, December 1, 1998; amended by Protocol, July 2, 1999.[126]

13. **Ecuador**. Agreement of Cooperation between the Government of the United States of America and the Government of the Republic of Ecuador Concerning United States Access to and Use of Installations at the Ecuadorian Air Force Base in Manta for Aerial Counter-Narcotics Activities, November 12, 1999.

14. **El Salvador**. Agreement of Cooperation between the Government of the United States of America and the Government of the Republic of El Salvador Concerning United States Access to and Use of Facilities at the International Airport of El Salvador for Aerial Counter-Narcotics Activities, March 31, 2000.[127]

15. **Dominica**. Agreement between the Government of the United States of America and the Government of Dominica Concerning Maritime Counter-Drug Operations, April 19, 1995.[128]

16. **Dominican Republic**. Agreement between the Government of the United States of America and the Government of the Dominican

126. T.I.A.S. 13005.
127. 2000 U.S.T. LEXIS 134.
128. T.I.A.S. 12630, 2458 U.N.T.S. 115.

Republic Concerning Maritime Counter-Drug Operations, March 23, 1995;[129] amended by Protocol, May 20, 2003.[130]

17. **Gambia**. Agreement between the Government of the United States of America and the Government of the Republic of Gambia Concerning Cooperation to Suppress Illicit Transnational Maritime Activity, October 10, 2011.

18. **Grenada**. Agreement between the Government of the United States of America and the Government of Grenada Concerning Maritime Counter-Drug Operations, May 16, 1995; amended by exchange of notes, November 26, 1996.[131]

19. **Guatemala**. Agreement between the Government of the United States of America and the Government of the Republic of Guatemala Concerning Cooperation to Suppress Illicit Traffic in Narcotic Drugs and Psychotropic Substances by Sea and Air, June 19, 2003.

20. **Guyana**. Agreement between the Government of the United States of America and the Government of the Co-operative Republic of Guyana Concerning Cooperation to Suppress Illicit Traffic by Sea and Air, April 10, 2001.

21. **Haiti**. Agreement between the United States of America and the Republic of Haiti Concerning Cooperation to Suppress Illicit Maritime Drug Traffic, October 17, 1997.[132]

22. **Honduras**. Agreement between the United States of America and the Republic of Honduras Concerning Cooperation for the Suppression of Illicit Maritime Traffic in Narcotic Drugs and Psychotropic Substances, March 29, 2000. Implementing Agreement between the United States of America and the Republic of Honduras Concerning Cooperation for the Suppression of Illicit Maritime

129. T.I.A.S. 12620, 2458 U.N.T.S. 221.
130. 2003 U.S.T. LEXIS 31.
131. T.I.A.S. 12648.
132. 1997 U.S.T. LEXIS 128.

Traffic in Narcotic Drugs and Psychotropic Substances, March 29, 2000.[133]

23. **Jamaica**. Agreement between the Government of the United States of America and the Government of Jamaica Concerning Cooperation in Suppressing Illicit Maritime Drug Trafficking, May 6, 1997;[134] amended by Protocol, February 6, 2004.[135]

24. **Malta**. Agreement between the Government of the United States of America and the Government of the Republic of Malta Concerning Cooperation to Suppress Illicit Traffic in Narcotic Substances and Psychotropic Substances by Sea, June 16, 2004.

25. **Nauru**. Agreement between the Government of the United States of America and the Government of the Republic of Nauru Concerning Operational Cooperation to Suppress Illicit Transnational Maritime Activity, September 8, 2011.

26. **Netherlands**. Memorandum of Understanding between the Government of the United States of America and the Government of the Kingdom of the Netherlands Concerning the Deployment of United States Coast Guard Law Enforcement and Helicopter Interdiction Tactical Squadron Aviation Detachments on Royal Netherlands Navy Vessels and Aircraft in the Waters of the Caribbean Area, June 20, 2011.

27. **Nicaragua**. Agreement between the Government of the United States of America and the Government of Nicaragua Concerning Cooperation to Suppress Illicit Traffic by Sea and Air, June 1, 2001.[136]

28. **OPBAT Tripart Agreement**. Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland including the Government of the Turks & Caicos Islands, the Government of the Bahamas and the Government

133. 2000 U.S.T. LEXIS 159.
134. 1997 U.S.T. LEXIS 21.
135. 2004 U.S.T. LEXIS 1.
136. 2001 U.S.T. LEXIS 63.

of the United States of America, July 12, 1990 (Operation Bahamas Turks & Caicos (OPBAT) Tripart Agreement).

29. **Palau**. Agreement between the Government of the United States of America and the Government of the Republic of Palau Concerning Operational Cooperation to Suppress Illicit Transnational Maritime Activity, August 15, 2013.

30. **Panama**. Arrangement between the Government of the United States and the Government of Panama for Support and Assistance from the U.S. Coast Guard for the National Maritime Service of the Ministry of Government and Justice, March 18, 1991.[137] Supplementary Arrangement between the Government of the United States of America and the Government of Panama to the Arrangement between the Government of the United States and the Government of Panama for Support and Assistance from the U.S. Coast Guard for the National Maritime Service of the Ministry of Government and Justice, February 5, 2002.[138]

31. **Samoa**. Agreement between the Government of the United States of America and the Government of Samoa Concerning Operational Cooperation to Suppress Illicit Transnational Maritime Activity, June 2, 2012.

32. **Senegal**. Agreement between the Government of the United States of America and the Government of the Republic of Senegal Concerning Operational Cooperation to Suppress Illicit Transnational Maritime Activity, April 29, 2011.

33. **Sierra Leone**. Agreement between the Government of the United States of America and the Government of the Republic of Sierra Leone Concerning Cooperation to Suppress Illicit Transnational Maritime Activity, June 26, 2009.[139]

34. **St. Kitts and Nevis**. Agreement between the Government of the United States of America and the Government of St. Kitts and

137. T.I.A.S. 11833.
138. 2002 U.S.T. LEXIS 51.
139. 2009 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 471.

Nevis Concerning Maritime Counter-Drug Operations, April 13, 1995; amended by exchange of notes, June 27, 1996.[140]

35. **St. Lucia**. Agreement between the Government of the United States of America and the Government of St. Lucia Concerning Maritime Counter-Drug Operations, April 20, 1995; amended by exchange of notes, June 5, 1996.[141]

36. **St. Vincent and the Grenadines**. Agreement between the Government of the United States of America and the Government of St. Vincent and the Grenadines Concerning Maritime Counter-Drug Operations, June 29 and July 4, 1995.[142]

37. **Suriname**. Agreement between the Government of the United States of America and the Government of Suriname Concerning Cooperation in Maritime Law Enforcement, December 1, 1998.[143]

38. **Tonga**. Agreement between the Government of the United States of America and the Government of the Kingdom of Tonga Concerning Cooperation in Joint Maritime Surveillance Operations, August 24, 2009.[144]

39. **Trinidad and Tobago**. Agreement between the Government of the United States of America and the Government of Trinidad and Tobago Concerning Maritime Counter-Drug Operations, March 4, 1996.[145]

40. **Tuvalu**. Agreement between the Government of the United States of America and the Government of Tuvalu Concerning Operational Cooperation to Suppress Illicit Transnational Maritime Activity, September 9, 2011.

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140. T.I.A.S. 12775.
141. T.I.A.S. 12764.
142. T.I.A.S. 12676, 2452 U.N.T.S. 89.
143. 1998 U.S.T. LEXIS 166.
144. 2009 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 472.
145. T.I.A.S. 12732, 1996 U.S.T. LEXIS 59.

41. **United Kingdom**. Agreement between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland to Facilitate the Interdiction by the United States of Vessels of the United Kingdom Which Are Suspected of Being Engaged in Trafficking in Drugs, November 13, 1981.[146]

42. **United Kingdom**. Agreement between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning Maritime and Aerial Operations to Suppress Illicit Trafficking by Sea in Waters of the Caribbean and Bermuda, July 13, 1998.[147]

43. **United Kingdom**. Memorandum of Understanding between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning the Deployment of United States Coast Guard Law Enforcement and Helicopter Interdiction Tactical Squadron Aviation Detachments on Royal Navy and Royal Fleet Auxiliary Ships and Aircraft to Suppress Illicit Traffic in the Joint Interagency Task Force South Joint Operating Area, July 29, 2005.

44. **United Kingdom**. Memorandum of Understanding between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning the Deployment of United States Coast Guard Law Enforcement Detachments on Royal Navy and Royal Fleet Auxiliary Ships in the Waters of the Caribbean and Bermuda, June 23, 1999; amended by exchange of notes, October 29, 2004; modified by exchange of notes, May 9, 2008.[148]

45. **Venezuela**. Agreement between the Government of the United States of America and the Government of Venezuela to Suppress

146. T.I.A.S. 10296; 33 UST 4224; 1285 U.N.T.S. 197.
147. 2169 U.N.T.S. 251; 70 BRITISH YEARBOOK OF INTERNATIONAL LAW 519 (2000).
148. 2008 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 650.

Illicit Traffic in Narcotic Drugs and Psychotropic Substances by Sea, November 9, 1991;[149] amended by Protocol, July 23, 1997.[150]

Border security agreements:

1. **Canada**. Framework Agreement on Integrated Cross-Border Maritime Law Enforcement Operations between the Government of the United States of America and the Government of Canada, May 26, 2009.[151]

Maritime migration agreements:

1. **Bahamas**. Agreement between the Government of the United States of America and the Government of the Commonwealth of the Bahamas Concerning Cooperation in Maritime Law Enforcement, June 29, 2004.

2. **Cuba**. Migrant Accords of 1994 and 1995, entered into force September 9, 1994, and May 2, 1995. Operational Procedures Agreed to between the United States Coast Guard and the Cuban Guardas Fronteras Regarding Cuban Repatriation, effective May 8, 1995.

3. **Dominican Republic**. Agreement between the Government of the United States of America and the Government of the Dominican Republic Concerning Maritime Migration Law Enforcement, May 20, 2003.[152]

Maritime security operational procedures:

1. **Colombia**. U.S. Coast Guard and Colombian Navy Combined Boardings Standard Operating Procedures Implementing the Agreement between the Government of the United States of America and the Government of Colombia to Suppress Illicit Traffic by Sea, 1997, April 20, 2006.

149. T.I.A.S. 11827, 2211 U.N.T.S. 387.
150. T.I.A.S. 12876.
151. 2009 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 469.
152. 2003 U.S.T. LEXIS 32.

2. **Ecuador**. U.S. Operational Procedures for Boarding and Inspecting Vessels Suspected of Illicit Traffic in Narcotic Drugs and Psychotropic Substances and of Smuggling Migrants by Sea, August 30, 2006.[153]

3. **Mexico**. Letter of Intent to Strengthen the Exchange of Information and Cooperation among the Mexican Navy, U.S. Coast Guard, and U.S. Northern Command in Matters of Safety and Maritime Security in Order to Improve Mutual Capacity for Operational Coordination, April 15, May 12, and May 16, 2008.[154]

4. **Peru**. Operational Procedures for Boarding and Inspecting Vessels Suspected of Illicit Traffic in Narcotic Drugs and Psychotropic Substances between the Peruvian National Maritime Authority and the United States Coast Guard, March 24, 2010.

Living marine resources agreements:

1. **Canada**. Agreement between the Government of the United States of America and the Government of Canada on Fisheries Enforcement, September 26, 1990.

2. **Cook Islands**. Agreement between the Government of the United States of America and the Government of the Cook Islands Concerning Cooperation in Joint Maritime Surveillance Operations, July 25, 2008.

3. **China**. Memorandum of Understanding between the Government of the United States of America and the Government of the People's Republic of China on Effective Cooperation and Implementation of United Nations General Assembly Resolution 46/215 of December 20, 1991, Entitled "Large-Scale Pelagic Driftnet Fishing and Its Impact of the Living Marine Resources of the World's Oceans and Sea," December 3, 1993.

153. 2006 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 838–40.
154. 2008 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 651.

4. **Federated States of Micronesia**. Agreement between the Government of the United States of America and the Government of the Federated States of Micronesia Concerning Operational Cooperation to Suppress Illicit Transnational Maritime Activity, March 3, 2014.

5. **Kiribati**. Agreement between the Government of the United States of America and the Government of the Republic of Kiribati Concerning Cooperation in Joint Maritime Surveillance Operations, November 24, 2008.

6. **Marshall Islands**. Agreement between the Government of the United States of America and the Government of the Republic of the Marshall Islands Concerning Cooperation in Maritime Surveillance and Interdiction Activities, August 5, 2008.[155]

7. **Taiwan**. Memorandum of Agreement between the American Institute in Taiwan, the United States Department of Commerce, the United States Coast Guard, and the Bureau of Oceans and International Environmental and Scientific Affairs of the United States Department of State to Assume Responsibilities of Designated Representatives of the American Institute of Taiwan Pursuant to the Memorandum of Understanding between the American Institute in Taiwan and the Taipei Economic and Cultural Representative Office in the United States Concerning Cooperation in Fisheries and Aquaculture, July 30, 2002.

8. **USSR**. Agreement between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on Mutual Fisheries Relations, May 31, 1998.

3.11.2.3 Enforcement Jurisdiction over Vessels without Nationality

Vessels that are not legitimately registered in any one State are without nationality. They are often referred to as stateless vessels. They are not entitled to fly the flag of any State and, because they are not entitled to the protection

155. 2008 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 649.

of any State, they are subject to the jurisdiction of all States. U.S. law expressly provides for jurisdiction over vessels without nationality or a vessel assimilated to be a vessel without nationality. (See 46 U.S.C. § 70502). Stateless vessels may be boarded upon being encountered in international waters by a warship or other government vessel and subjected to all appropriate law enforcement actions. Other conduct that could lead a vessel to be treated as one without nationality includes:

1. The vessel displays no name, flag, or other identifying characteristics.

2. The master or person-in-charge, upon request, makes no claim of nationality or registry for that vessel.

3. The claim of registry or the vessel's display of registry is either denied or not affirmatively and unequivocally confirmed by the State whose registry is claimed.

Commentary

Consistent with Article 110 of UNCLOS and with customary international law, a vessel may be boarded where reasonable grounds exist to suspect that it may be without nationality. However, there is no positive language in UNCLOS or in customary international law regarding unregistered or undocumented vessels being subject to the jurisdiction of any and all States. While Article 92 of UNCLOS affirmatively states that ships must have nationality, and can sail only under one flag, it lacks prescriptive language as to which countries—if any—may subject such vessels to their jurisdiction. Only in Article 105 (piracy) and Article 109 (unauthorized broadcasting) do we find a grant of enforcement authority to all States. That said, U.S. appellate rulings and criminal statutes, treaty provisions, foreign judicial opinions, and legal commentators recognize the ability to assert criminal jurisdiction over illicit activities aboard stateless vessels.

MDLEA prohibits drug trafficking "[w]hile on board a covered vessel."[156] The act defines a "covered vessel" to include a "vessel subject

156. 46 U.S.C. § 70503(a)(1).

to the jurisdiction of the United States,"[157] such as a "vessel without nationality" and a "vessel assimilated to a vessel without nationality."[158] A "vessel without nationality," in turn, includes "a vessel aboard which the master or individual in charge makes a claim of registry and for which the claimed nation of registry does not affirmatively and unequivocally assert that the vessel is of its nationality."[159] A "claim of nationality or registry" can be accomplished by possession of documents aboard the vessel evidencing nationality, flying the flag or ensign of the claimed nation, or verbally.[160]

U.S. judicial rulings have consistently affirmed prosecutions and convictions under MDLEA and DTVIA for vessels without nationality, unflagged vessels, and the subcategory of stateless vessels. In *United States v. Marino-Garcia*, the Eleventh Circuit Court of Appeals held that "international law permits any nation to subject stateless vessels on the high seas to its jurisdiction."[161] The Ninth Circuit, in *United States v. Caicedo*, held that "[b]ecause stateless vessels do not fall within the veil of another sovereign's territorial protection, all nations can treat them as their own territory and subject them to their laws."[162] The Court reasoned that "there is nothing arbitrary or fundamentally unfair" about "[t]he radically different treatment afforded to stateless vessels as a matter of international law."[163] Another U.S. appellate ruling found that to hold otherwise would allow such vessels to become "floating sanctuaries from authority."[164]

The U.S. position is consistent with rulings that include the Judicial Committee of the United Kingdom's Privy Council, which concluded that

> the freedom of the open sea . . . is a freedom of ships which fly and are entitled to fly the flag of a State which is within

157. 46 U.S.C. § 70503(e).
158. 46 U.S.C. § 70502(c)(1)(A).
159. 46 U.S.C. § 70502(d)(1)(C).
160. 46 U.S.C. § 70502(e).
161. United States v. Marino-Garcia, 670 F.2d 1373, 1383 (11th Cir. 1982).
162. United States v. Caicedo, 47 F.3d 370, 373 (9th Cir. 1995).
163. *Id.* at 372.
164. U.S. v. Juda, 46 F.3d 961, 967 (9th Cir. 1995).

> the comity of nations. The [vessel in question] did not satisfy these elementary conditions. No question of comity nor of any breach of international law can arise, if there is no State under whose flag the vessel sails.[165]

Legal commentators McDougal and Burke concluded that "[s]o great a premium is placed upon the certain identification of vessels for purposes of maintaining minimum order upon the high seas . . . that extraordinary deprivational measures are permitted with respect to stateless ships."[166]

The Treaty of San José, to which the United States is a party, is also instructive on the ability of States to subject stateless vessels to their jurisdiction. Article 23 provides:

> Each Party shall take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with Article 3, paragraph 1, of the 1988 [Vienna Drug] Convention, when . . . the offence is committed on board a vessel without nationality or assimilated to a ship without nationality under international law, which is located seaward of the territorial sea of any State . . . .[167]

3.11.2.4 Enforcement Jurisdiction over Vessels Assimilated to Vessels without Nationality

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

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165. Molvan v. Attorney-General, Palestine [1948] AC 351, *citing* 1 LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 546 (Hersch Lauterpacht ed., 6th ed. 1940).

166. MCDOUGAL & BURKE, *supra* note 64, at 1084.

167. Agreement Concerning Co-operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area, Apr. 10, 2003.

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

3.11.2.5 Law Enforcement Actions Short of Exercising Jurisdiction

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

3.11.2.5.1 Right of Approach

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

3.11.2.5.2 Consensual Boarding

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

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

Where the boarding occurs with the consent of the flag State, approval may be pursuant to an existing agreement, or it may be on an ad hoc basis. Where

there are reasonable grounds to suspect that the vessel is engaged in the illicit activity that is the subject of the agreement, the boarding shall be conducted under the terms of that agreement vice seeking the master's consent. See 3.11.2.2.7.

Commentary

The master has plenary authority over the ship. Regulation 8 of Chapter XI-2 of the International Ship and Port Security Code (ISPS Code) addresses the master's authority with respect to access to the ship. It provides:

> 1. The master shall not be constrained by the Company, the charterer or any other person from taking or executing any decision which, in the professional judgement of the master, is necessary to maintain the safety and security of the ship. This includes denial of access to persons (except those identified as duly authorized by a Contracting Government) or their effects and refusal to load cargo, including containers or other closed cargo transport units.
>
> 2. If, in the professional judgement of the master, a conflict between any safety and security requirements applicable to the ship arises during its operations, the master shall give effect to those requirements necessary to maintain the safety of the ship. In such cases, the master may implement temporary security measures and shall forthwith inform the Administration and, if appropriate, the Contracting Government in whose port the ship is operating or intends to enter. Any such temporary security measures under this regulation shall, to the highest possible degree, be commensurate with the prevailing security level. When such cases are identified, the Administration shall ensure that such conflicts are resolved and that the possibility of recurrence is minimised.

> Master's consent is recognized as a lawful basis of boarding a ship in numerous U.S. bilateral ship boarding agreements.[168]

3.11.3 Limitations on the Exercise of Maritime Law Enforcement Jurisdiction

Even where international and domestic U.S. law would recognize conduct as a criminal violation, there are legal and policy restrictions on U.S. law enforcement action that must be considered. Within the United States, the doctrine of *posse comitatus* (see 3.11.3.1) limits DOD law enforcement activities. This restriction does not apply to the USCG, which exercises its statutory law enforcement authority when carrying out a law enforcement boarding (see 14 U.S.C. § 522). Outside of the United States, a commander's greatest concerns will be limitations on DOD assistance to civilian law enforcement agencies, the requirement for coastal State authorization to conduct law enforcement in that State's national waters, and the necessity for interagency coordination.

Commentary

14 U.S.C. § 522 (Law enforcement) provides:

> (a) The Coast Guard may make inquiries, examinations, 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 laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, 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 from such inquiries, examination, inspection, or search it appears that a breach of the laws

168. *See, e.g.*, Agreement Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, U.S.-Ant. & Barb., ¶ 7, Apr. 26, 2010. *See also* Stuart Kaye, *Maritime Jurisdiction and the Right to Board*, 26 JAMES COOK UNIVERSITY LAW REVIEW 17, 24–27 (2020); CRAIG H. ALLEN, MARITIME COUNTER-PROLIFERATION OPERATIONS AND THE RULE OF LAW 129 (2007).

> of the United States rendering an individual liable to arrest is being, or has been committed, by any individual, such individual shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so as to render such vessel liable to a fine or penalty and if necessary to secure such fine or penalty, such vessel or such merchandise, or both, shall be seized.
>
> (b) The officers of the Coast Guard insofar as they are engaged, pursuant to the authority contained in this section, in enforcing any law of the United States shall:
>
> (1) be deemed to be acting as agents of the particular executive department or independent establishment charged with the administration of the particular law; and
>
> (2) be subject to all the rules and regulations promulgated by such department or independent establishment with respect to the enforcement of that law.
>
> (c) The provisions of this section are in addition to any powers conferred by law upon such officers, and not in limitation of any powers conferred by law upon such officers, or any other officers of the United States.

According to the Historical and Revision Notes, "[t]he words 'or such merchandise' are inserted in the last clause of subsection (a) in order to provide for situations where it may be desirable to seize merchandise without seizing the vessel."[169]

169. *See* AMERICAN LAW INSTITUTE, RESTATEMENT (FOURTH) FOREIGN RELATIONS LAW OF THE UNITED STATES § 432 reporters' note 4 (2017).

3.11.3.1 Posse Comitatus

Except when expressly authorized by the Constitution or act of Congress, the use of United States Army or United States Air Force personnel or resources as a *posse comitatus*—a force to aid civilian law enforcement authorities in keeping the peace and arresting felons—or otherwise to execute domestic law, is prohibited by 18 U.S.C. § 1385, the Posse Comitatus Act. 10 U.S.C. § 275, Restriction on Direct Participation by Military Personnel, requires DOD prescribe regulations to ensure that all DOD Services—including the Navy and Marine Corps—do not directly participate in civilian law enforcement activities, except where authorized by law. See DODI 3025.21, Defense Support of Civilian Law Enforcement Agencies, and SECNAVINST 5820.7C, Cooperation with Civilian Law Enforcement Officials.

Commentary

18 U.S.C. § 1385 (Use of Army, Navy, Marine Corps, Air Force, and Space Force as posse comitatus) provides:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army, the Navy, the Marine Corps, the Air Force, or the Space Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

3.11.3.2 Department of Defense Assistance

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

Commentary

Enclosure 3 (Participation of DoD Personnel in Civilian Law Enforcement Activities) of DoDI 3025.21, Defense Support of Civilian Law Enforcement Agencies, provides:

> 1. GUIDING STATUTORY REQUIREMENTS AND SUPPORTING POLICIES
>
> a. Statutory Restrictions
>
> (1) The primary restriction on DoD participation in civilian law enforcement activities is the Posse Comitatus Act. It provides that whoever willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute U.S. laws, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, shall be fined under Reference (n), or imprisoned not more than 2 years, or both.
>
> (2) Section 275 of Reference (d) provides that the Secretary of Defense shall prescribe such regulations as may be necessary to ensure that any activity (including the provision of any equipment or facility or the assignment or detail of any personnel) . . . does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law.
>
> b. Permissible Direct Assistance. Categories of active participation in direct law enforcement-type activities (e.g., search, seizure, and arrest) that are not restricted by law or DoD policy are:
>
> (1) Actions taken for the primary purpose of furthering a DoD or foreign affairs function of the United States, regardless of incidental benefits to civil authorities. This does not include actions taken for the primary purpose

of aiding civilian law enforcement officials or otherwise serving as a subterfuge to avoid the restrictions of the Posse Comitatus Act. Actions under this provision may include (depending on the nature of the DoD interest and the authority governing the specific action in question):

(a) Investigations and other actions related to enforcement of chapter 47 of Reference (d) (also known as "the Uniform Code of Military Justice").

(b) Investigations and other actions that are likely to result in administrative proceedings by the DoD, regardless of whether there is a related civil or criminal proceeding. (See DoDI 5525.07 (Reference (u)) and Memorandum of Agreement Between the AG and the Secretary of Defense (Reference (v)) with respect to matters in which the DoD and the Department of Justice both have an interest.)

(c) Investigations and other actions related to a commander's inherent authority to maintain law and order on a DoD installation or facility.

(d) Protection of classified defense information or equipment or controlled unclassified information (e.g., trade secrets and other proprietary information), the unauthorized disclosure of which is prohibited by law.

(e) Protection of DoD personnel, equipment, and official guests.

(f) Such other actions that are undertaken primarily for a military or foreign affairs purpose.

(2) Audits and investigations conducted by, under the direction of, or at the request of the IG, DoD, pursuant to the Inspector General Act of 1978, as amended.

(3) When permitted under emergency authority in accordance with Reference (c), Federal military commanders have the authority, in extraordinary emergency circumstances where prior authorization by the President is impossible and duly constituted local authorities are unable to control the situation, to engage temporarily in activities that are necessary to quell large-scale, unexpected civil disturbances because:

(a) Such activities are necessary to prevent significant loss of life or wanton destruction of property and are necessary to restore governmental function and public order; or,

(b) When duly constituted Federal, State, or local authorities are unable or decline to provide adequate protection for Federal property or Federal governmental functions. Federal action, including the use of Federal military forces, is authorized when necessary to protect Federal property or functions.

(4) DoD actions taken pursuant to sections 251-254 of Reference (d) relating to the use of Federal military forces in specified circumstances with respect to insurrection, domestic violence, or conspiracy that hinders the execution of State or Federal law.

(5) Actions taken under express statutory authority to assist officials in executing the laws, subject to applicable limitations. The laws that permit direct DoD participation in civilian law enforcement include:

(a) Protection of national parks and certain other Federal lands consistent with sections 23, 78, and 593 of title 16, U.S.C. (Reference (w)).

(b) Enforcement of the Fishery Conservation and Management Act of 1976, as amended, pursuant to section 1861(a) of Reference I.

(c) Assistance in the case of crimes against foreign officials, official guests of the United States, and other internationally protected persons pursuant to sections 112 and 1116 of Reference (n).

(d) Assistance in the case of crimes against Members of Congress, Members-of-Congress-elect, Justices of the Supreme Court and nominees, and certain senior Executive Branch officials and nominees in accordance with section 351 of Reference (n).

(e) Assistance in the case of crimes involving nuclear materials in accordance with section 831 of Reference (n).

(f) Protection of the President, Vice President, and other designated dignitaries in accordance with section 1751 of Reference (n) and Public Law 94-524 (Reference (x)).

(g) Actions taken in support of the neutrality laws in accordance with sections 408 and 461-462 of title 22, U.S.C. (Reference (y)).

(h) Removal of persons unlawfully present on Indian lands in accordance with section 180 of title 25, U.S.C. (Reference (z)).

(i) Execution of quarantine and certain health laws in accordance with section 97 of title 42, U.S.C. (Reference (aa)) and DoDI 6200.03 (Reference (ab)).

(j) Removal of unlawful enclosures from public lands in accordance with section 1065 of title 43, U.S.C. (Reference (ac)).

(k) Protection of the rights of a discoverer of an island covered by section 1418 of title 48, U.S.C. (Reference (ad)).

(l) Support of territorial governors if a civil disorder occurs, in accordance with sections 1422 and 1591 of Reference (ad).

(m) Actions in support of certain customs laws in accordance with section 220 of title 50, U.S.C. (Reference (ae)).

(n) Actions by Defense Criminal Investigative Organizations in support of internet crimes against children having a DoD nexus in accordance with Reference (p).

(6) Actions taken to provide search and rescue support domestically under the authorities provided in the National Search and Rescue Plan (Reference (af)) and DoDI 3003.01 (Reference (ag)).

c. Restrictions on Direct Assistance

(1) Except as authorized in this Instruction (e.g., in Enclosures 3 and 4), DoD personnel are prohibited from providing the following forms of direct civilian law enforcement assistance:

(a) Interdiction of a vehicle, vessel, aircraft, or other similar activity.

(b) A search or seizure.

(c) An arrest; apprehension; stop and frisk; engaging in interviews, interrogations, canvassing, or questioning of potential witnesses or suspects; or similar activity.

(d) Using force or physical violence, brandishing a weapon, discharging or using a weapon, or threatening to discharge or use a weapon except in self-de-

fense, in defense of other DoD persons in the vicinity, or in defense of non-DoD persons, including civilian law enforcement personnel, in the vicinity when directly related to an assigned activity or mission.

(e) Evidence collection; security functions; crowd and traffic control; and operating, manning, or staffing checkpoints.

(f) Surveillance or pursuit of individuals, vehicles, items, transactions, or physical locations, or acting as undercover agents, informants, investigators, or interrogators.

(g) Forensic investigations or other testing of evidence obtained from a suspect for use in a civilian law enforcement investigation in the United States unless there is a DoD nexus (e.g., the victim is a member of the Military Services or the crime occurred on an installation under exclusive DoD jurisdiction) or the responsible civilian law enforcement official requesting such testing declares in writing that the evidence to be examined was obtained by consent. Requests for exceptions to this restriction must be made through channels to the ASD(HD&GS), who will evaluate, in coordination with the General Counsel of the Department of Defense, whether to seek Secretary of Defense authorization for an exception to policy.

(2) The use of deputized State or local law enforcement powers by DoD uniformed law enforcement personnel shall be in accordance with DoDI 5525.13 (Reference (ah)).

(3) Except as otherwise directed by the Secretary of Defense, the rules for the use of force and authority for the

> carrying of firearms by DoD personnel providing authorized support under this Instruction shall be in accordance with DoDD 5210.56 (Reference (ai)) and any additional Secretary of Defense-approved rules for the use of force contained in CJCS Instruction 3121.01B (Reference (aj)).
>
> (4) Exceptions to these restrictions for assistance may be granted when the assistance is to be provided outside the United States. Only the Secretary of Defense or Deputy Secretary of Defense may grant such exceptions, based on compelling and extraordinary circumstances.[170]

See also 10 U.S.C. Chapter 15 (Military Support for Civilian Law Enforcement Agencies).

3.11.3.2.1 Use of Department of Defense Personnel

Although Congress has enacted legislation expanding the permissible role of the DOD in assisting law enforcement agencies, DOD personnel may not directly participate in a search, seizure, arrest, or similar activity unless otherwise authorized by law. Department of Defense personnel may provide specified limited support to law enforcement operations, such as assisting with security on board a suspect vessel. Other permissible activities presently include training and advising federal, state, and local law enforcement officials in the operation and maintenance of loaned equipment. Department of Defense personnel made available by appropriate authority may maintain and operate equipment in support of civil law enforcement agencies for the following purposes:

1. Detection, monitoring, and communication of the movement of air and sea traffic

2. Aerial reconnaissance

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170. DoDI 3025.21, Defense Support of Civilian Law Enforcement Agencies, encl. 3, 16–19 (Ch. 1, Feb. 8, 2019).

3. Interception of vessels or aircraft detected outside the land area of the United States for the purposes of communicating with and directing them to a location designated by law enforcement officials

4. Operation of equipment to facilitate communications in connection with law enforcement programs

5. Transportation of civilian law enforcement personnel

6. Operation of a base of operations for civilian law enforcement personnel

7. Transportation of suspected terrorists to the United States for delivery to federal law enforcement personnel.

3.11.3.2.2 Providing Information to Law Enforcement Agencies

The DOD may provide federal, state, or local law enforcement officials with information acquired during the normal course of military training or operations that may be relevant to a violation of any law within the jurisdiction of those officials. Present law provides the needs of civilian law enforcement officials for information should, to the maximum extent practicable, be taken into account in planning and executing military training or operations. Intelligence information held by DOD and relevant to counterdrug or other civilian law enforcement matters may be provided to civilian law enforcement officials to the extent consistent with national security and in accordance with SECNAVINST 5820.7C and DODI 3025.21. See COMDTINST M3800.6, Coast Guard Intelligence Manual, for the USCG policy guidance for the dissemination and use of intelligence information, including law enforcement intelligence, and for the use of classified investigative technologies.

Commentary

SECNAVINST 5820.7C, Cooperation with Civilian Law Enforcement Officials, states:

> 4. Policy. It is DON policy to cooperate with civilian law enforcement officials (employees with the responsibility for enforcement of the laws within the jurisdiction of U.S. Federal, State, or local governmental agency) to the extent practical. The implementation of this policy shall be consistent with the needs of national security and military preparedness, the historic tradition of limiting direct military involvement in civilian law enforcement activities, and applicable law. Assistance provided under this instruction shall be at the lowest cost practicable. Assistance may not be provided under this instruction if such assistance could adversely affect national security or military preparedness.[171]

> 10 U.S.C. § 271(a) authorizes the Secretary of Defense (in accordance with other applicable law) to "provide to Federal, State, or local civilian law enforcement officials any information collected during the normal course of military training or operations that may be relevant to a violation of any Federal or State law within the jurisdiction of such officials." The Secretary shall also ensure that (to the extent consistent with national security) intelligence information held by the DoD "and relevant to drug interdiction or other civilian law enforcement matters is provided promptly to appropriate civilian law enforcement officials."[172] When planning and executing military training or operations, "the needs of civilian law enforcement officials for information shall, to the maximum extent practicable, be taken into account."[173]

3.11.3.2.3 Use of Department of Defense Equipment and Facilities

The DOD may make available equipment (including associated supplies or spare parts) and base or research facilities to federal, state, or local law enforcement authorities for law enforcement purposes. Designated platforms—surface and air—are routinely made available for patrolling drug trafficking areas with USCG law enforcement detachments embarked. The

171. SECNAVINST 5820.7C, Cooperation with Civilian Law Enforcement Officials, 1–2 (Jan. 26, 2006).
172. 10 U.S.C. § 271(c).
173. 10 U.S.C. § 271(b).

USCG law enforcement detachment personnel on board any U.S. Navy vessel have the authority to search, seize property, and arrest persons suspected of violating U.S. law.

Commentary

The Secretary of Defense may, in accordance with other applicable law, make available any equipment (including associated supplies or spare parts), base facility, or research facility of the DoD to any federal, state, or local civilian law enforcement official for law enforcement purposes.[174]

The Secretary of Defense may, in accordance with other applicable law, make DoD personnel available (1) to train federal, state, and local civilian law enforcement officials in the operation and maintenance of equipment, including equipment made available under § 272; and (2) to provide such law enforcement officials with expert advice relevant to the purposes of Chapter 15.[175]

The Secretary of Defense and the Secretary of Homeland Security are responsible for assigning "on board every appropriate surface naval vessel at sea in a drug-interdiction area members of the Coast Guard who are trained in law enforcement and have powers of the Coast Guard under title 14, including the power to make arrests and to carry out searches and seizures."[176] Coast Guard personnel "assigned to duty on board naval vessels . . . shall perform such law enforcement functions (including drug-interdiction functions) . . . (1) as may be agreed upon by the Secretary of Defense and the Secretary of Homeland Security; and (2) as are otherwise within the jurisdiction of the Coast Guard."[177] No fewer than 500 active duty Coast Guard personnel "shall be assigned each fiscal year to duty under this section."[178]

174. 10 U.S.C. § 272.
175. 10 U.S.C. § 273.
176. 10 U.S.C. § 279(a).
177. 10 U.S.C. § 279(b).
178. 10 U.S.C. § 279(c).

3.11.3.3 Law Enforcement in Foreign National Waters

Except aboard U.S. ships entitled to sovereign immunity, law enforcement in foreign internal waters, territorial seas, and archipelagic waters may be undertaken only to the extent authorized by the coastal State. Such authorization may be obtained on an ad hoc basis or be the subject of a written agreement. See 3.5.3.2 for a discussion of pursuit of pirates into the territorial seas, archipelagic waters, or national airspace of another State.

3.11.3.4 Interagency Coordination

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

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

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

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

Commentary

The Maritime Operational Threat Response (MOTR) Plan is the presidentially approved plan to achieve a coordinated U.S. government response to threats against the United States and its interests in the maritime domain. The MOTR Plan contains operational coordination requirements to ensure quick and decisive action to counter maritime threats. In its first five years, from 2006 to 2011, the MOTR Plan was utilized in more than 1,000 maritime events ranging from migrant interdictions and drug seizures to terrorism and piracy.

The Global Maritime Coordination Center (GMCC) was established in February 2010 to provide full-time support to interagency partners and to serve as a national interagency MOTR coordinator and the Plan's executive secretariat. The GMCC provides MOTR training, process guidance, expertise, and educational resources to agencies to support federal responses to maritime threats.

The GMCC is focused towards addressing key mission areas while meeting the functional objectives outlined in its founding Presidential Plan. It primarily works with the following agencies: Department of State; DoD; Department of Justice; Department of Commerce; Department of Transportation; and Department of Homeland Security (DHS). The GMCC is a DHS entity within the U.S. Coast Guard. It is led by a Senior Executive Service (SES) Director. The GMCC Director is supported by a Deputy Director (an Admiralty Attorney)

and a staff of three trained coordinators. During MOTR coordination activities, the GMCC is accountable to the National Security Staff.[179]

JP 3-32 provides:

> 20. Maritime Operational Threat Response.
>
> a. The *National Strategy for Maritime* Security and the MOTR Plan are directed in the National Security Presidential Directive-41/Homeland Security Presidential Directive-13, *Maritime Security Policy*. The MOTR Plan establishes the protocols to achieve coordinated, unified, timely, and effective planning and execution by various departments and agencies of the USG. The MOTR Plan addresses the full range of maritime security threats to the homeland, including nation-state military threats; piracy; state/non-state criminal, unlawful, or hostile acts such as smuggling; threat vessels with cargo; or personnel requiring investigation and disposition.
>
> b. The MOTR Plan predesignates USG departments and agencies with lead responsibilities, clarifies interagency roles and responsibilities, and establishes protocols and procedures for a coordinated response to achieve the USG's desired outcome for a particular threat.
>
> c. The MOTR protocols and procedures allow rapid response to short-notice threats and require interagency partners to begin coordination activities (i.e., MOTR conference calls) at the earliest possible opportunity when one of the following triggers are met:
>
> (1) Any specific terrorist or state threat exists, and US response action is or could be imminent.
>
> (2) More than one USG department or agency has become substantially involved in responding to the threat.

179. Source: Department of Homeland Security.

(3) The agency or department either lacks the capability, capacity, or jurisdiction to address the threat.

(4) Upon resolving the threat, the initial responding USG department or agency cannot execute the disposition of cargo, people, or vessels acting under its own authority.

(5) The threat poses a potential adverse effect on the foreign affairs of the United States.

d. The MOTR coordination process is conducted through a virtual network of interagency national and operational command centers. This coordination process determines which agency is the right choice to lead the USG response and what other departments and agencies are needed to support the response effort. The MOTR protocols include a process to transition the lead from one agency to another and dispute resolution (i.e., if the USG desired outcome cannot be resolved at the lower levels of government, the characterization of a particular threat could ultimately be elevated for resolution by higher authority). At the tactical level, it is important to realize that the MOTR process exists to achieve a USG desired outcome and coordinate and assist in bringing additional capabilities to bear on a threat.

e. MOTR presents guiding principles that apply to all agencies at all times and sets the basic standards for interagency actions to overcome maritime threats to the US.

f. Successful MOTR execution is fundamentally reliant on the operational intelligence linkage. This linkage is optimized through ongoing efforts to achieve MDA.[180]

180. JP 3-32, Joint Maritime Operations, IV-31 to IV-32 (Ch. 1, Sept. 20, 2021).

3.11.4 Counterdrug Operations

3.11.4.1 U.S. Law

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

1. U.S. vessels anywhere (see 3.11.2.1)

2. Vessels without nationality (see 3.11.2.3)

3. Vessels assimilated to a statelessness (see 3.11.2.4)

4. Foreign vessels where the flag State authorizes enforcement of U.S. law by the United States (see 3.11.2.2.7)

5. Foreign vessels located within the territorial sea or contiguous zone of the United States

6. Foreign vessels located in the territorial seas or archipelagic waters of another State, where that State authorizes enforcement of U.S. law by the United States.

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

Commentary

Drug traffickers have employed submersible or semi-submersible craft to carry illegal drugs. Operation of these craft is unlawful and they are deemed to be stateless vessels in U.S. law. Under 18 U.S.C.

§ 2285 (Operation of submersible vessel or semi-submersible vessel without nationality), the offense is:

> Whoever knowingly operates, or attempts or conspires to operate, by any means, or embarks in any submersible vessel or semi-submersible vessel that is without nationality and that is navigating or has navigated into, through, or from waters beyond the outer limit of the territorial sea of a single country or a lateral limit of that country's territorial sea with an adjacent country, with the intent to evade detection, shall be fined under this title, imprisoned not more than 15 years, or both.

The crime has four constitutive elements:

(1) a fully or semi-submersible (SPSS) craft (defined as a watercraft constructed or adapted to be capable of operating with most of its hull and bulk under the surface of the water, including both manned and unmanned watercraft);
(2) Stateless;
(3) operated with intent to evade detection; and
(4) navigating into, through, or from international waters.

The presence of any of the following indicia may be considered, in the totality of the circumstances, to be prima facie evidence of intent to evade detection:

- the configuration of the vessel to ride low in the water or present a low hull profile to avoid being detected visually or by radar;
- the presence of materials used to reduce or alter the heat or radar signature of the vessel and avoid detection;
- the presence of a camouflaging paint scheme, or of materials used to camouflage the vessel, to avoid detection;
- the display of false vessel registration numbers, false indicia of vessel nationality, false vessel name, or false vessel homeport;
- the operation of the vessel without lights during times that lights are required to be displayed under applicable law or

regulation and in a manner of navigation consistent with smuggling tactics used to avoid detection by law enforcement authorities;

- the failure of the vessel to stop or respond or heave to when hailed by government authority, especially where the vessel conducts evasive maneuvering when hailed; and
- the declaration to government authority of apparently false information about the vessel, crew, or voyage or the failure to identify the vessel by name or country of registration when requested to do so by government authority.[181]

3.11.4.2 Department of Defense Mission in Counterdrug Operations

The DOD has been designated by statute as the lead agency of the Federal Government for the detection and monitoring of aerial and maritime transit of illegal drugs into the United States, including its possessions, territories, and commonwealths. The DOD is further tasked with integrating the command, control, communications, and technical intelligence assets of the United States that are dedicated to the interdiction of illegal drugs into an effective communications network. Enclosure H, CJCSI 3121.01B (13 June 205).

Commentary

Enclosure H (Counterdrug Support Operations Outside US Territory) of CJCSI 3121.01B states:

1. Purpose and Scope

a. This enclosure governs actions taken by US forces conducting counterdrug (CD) support operations under DOD control outside US territory. CD Operations conducted within US territory (including US territorial seas) are governed by SRUF.

181. 18 U.S.C. § 2285(b). *See also* KRASKA & PEDROZO, *supra* note 64, at 519–86; McLaughlin & Klein, *supra* note 100.

b. DOD units under US Coast Guard (USCG) control, conducting operations both outside and within the territorial limits of the US, will follow the Use of Force Policy for warning shots and disabling fire issued by the Commandant, USCG, per 14 USC 637 . . . . Unit commanders of US Naval units or personnel, operating under USCG control and outside the territorial limits of the US, retain the inherent right and obligation to exercise unit self-defense IAW these SROE.

2. Policy. IAW Enclosure A.

3. Definitions and Authorities

a. Accompany. To be or go with physically. DOD personnel "accompany" US or host nation (HN) law enforcement agents (LEA) or HN military forces on CD-related deployments when they travel with such personnel on foot or in the same vehicle, aircraft, ship or boat, including any groupings of the same.

b. Actual CD Field Operations. Activities during which the intent, or the reasonable expectation, is that the US or HN LEAs or HN military forces on CD-related deployments will conduct CD law enforcement functions.

c. Law Enforcement Functions. These activates include, but are not limited to, search, seizure, arrest or other similar activities.

d. Imminent. All available facts indicate that a CD activity or CD-related hostile action is about to occur.

4. Procedures

a. DOD personnel will not accompany US LEAs, HN LEAs, or HN military forces on actual CD field opera-

tions, or participate in any CD activities where CD-related hostilities are imminent, unless specifically authorized by the SecDef.

b. DOD personnel will not accompany US LEAs or HN personnel to or provide CD support from a location outside a secured base or area (ground operations).

(1) This limitation is not intended to prevent DOD personnel from accompanying LEAs on authorized transportation, aerial reconnaissance and/or detection and monitoring support missions, or on other authorized support missions from one secure area to another if the latter is no closer than small-arms range from the site of the anticipated LEA activity.

(2) DOD personnel may proceed to a forward operating or support base or area only after the commander or other official designated by the responsible combatant commander makes a defemination that such a base or area is secure and adequately protected.

[Redacted]

d. The limitations described above are not meant to prevent US military forces from conducting non-CD related authorized exercises or training in designated drug interdiction areas. Ln this event, appropriate measures will be taken to ensure that US military forces will not be in a location where involvement in related hostilities is likely to occur.

e. DOD personnel will make every attempt to avoid confrontation with non-mission personnel or civilians.

[Redacted]

> h. USG space assets may be used for detection, monitoring and communication of suspected narcotrafficker activities in support of CD operations, consistent with applicable policy and law.
>
> i. Force will only be used in self-defense unless otherwise directed by the SecDef.[182]

3.11.4.3 U.S. Coast Guard Responsibilities in Counterdrug Operations

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

The principal U.S. statute for counterdrug enforcement in the maritime domain is 46 U.S.C. §§ 70501–70508, Maritime Drug Law Enforcement Act. Under the Act, it is unlawful for any person on board a vessel of the United States, on board a vessel subject to the jurisdiction of the United States, or who is a citizen of the United States or a resident alien of the United States on board any vessel to knowingly or intentionally manufacture or distribute a controlled substance.

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

182. CJCSI 3121.01B, *supra* note 1, encl. H at H-1 to H-2.

rules and regulations as other customs officers (e.g., the Bureau of Customs and Border Protection), which include all rules, regulations, and policies that limit customs enforcement authority. Close coordination with customs enforcement supervisors is necessary to ensure complete compliance with all applicable regulations and policy.

Commentary

The Department of Homeland Security's 2020 Report to Congress on Counterdrug Operations states:

> The Coast Guard is the lead and only federal maritime law enforcement agency with both the authority and capability to enforce national and international law, including drug interdiction, on the high seas. The Coast Guard shares the lead for interdiction and enforcement responsibilities with U.S. Customs and Border Protection (CBP) in U.S. territorial waters. Illicit maritime drug shipments are carried both by noncommercial means such as small "go-fast" vessels with multiple outboard engines, semisubmersible vessels, fishing vessels, and sailing vessels, as well as by commercial vessels such as container ships. The majority of known maritime drug flow is conveyed via noncommercial means through the Western Hemisphere Transit Zone (WHTZ)—the waters off the coasts of Central and South America and the Caribbean Sea.
>
> The Maritime Drug Law Enforcement Act, 46 U.S. Code (U.S.C.) §§ 70501–70507, is the primary criminal statute that the Coast Guard enforces in the counter-drug mission. The law applies extraterritorially so that persons who are interdicted aboard suspected drug smuggling vessels in international waters may be prosecuted in the United States when the elements of the offense are met.
>
> To combat the growing threat posed by the drug trafficking organizations' expanded use of semisubmersible and submersible vessels, the Drug Trafficking Vessel Interdiction

> Act (P.L. 110-407) was enacted in 2008. Because of the danger that the drug trafficking organizations pose to our national security, Congress enacted this law making it unlawful (when certain elements are met) for any person knowingly to operate, by any means, or to embark in any submersible or semisubmersible vessel. The law applies extraterritorially so that persons who are interdicted in a semisubmersible or submersible vessel in international waters may be prosecuted in the United States when the elements of the offense are met.
>
> The Coast Guard uses cutters, boats, and aircraft in a layered approach to combat cartels as they transport illicit drugs from the source zone, through the WHTZ and into the United States. This approach confronts the threat beyond our land borders on the high seas where traffickers are most exposed and drugs are most vulnerable to interdiction by law enforcement assets.
>
> In the WHTZ, the Coast Guard is the major maritime interdiction asset provider to U.S. Southern Command through the Joint Interagency Task Force-South (JIATF-South), which executes the Department of Defense (DOD) statutory responsibility for detecting and monitoring illicit drug trafficking in the air and maritime domains bound for the United States. Fixed-wing maritime patrol aircraft, provided by the Coast Guard, CBP, DOD, and allies, coupled with sophisticated intelligence cueing capabilities provided through JIATF-South and other agencies, enable U.S. government and partner nation interdiction efforts. The Coast Guard's most capable interdiction platforms include flight deck-equipped major cutters with embarked airborne use of force rotary wing capability, deployable pursuit-capable boats, and Coast Guard law enforcement detachments embarked on U.S. Navy (USN) and allied ships.[183]

183. DEPARTMENT OF HOMELAND SECURITY, COUNTERDRUG OPERATIONS: FISCAL YEAR 2020 REPORT TO CONGRESS 2 (Aug. 14, 2020).

3.11.5 Use of Force in Maritime Law Enforcement

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

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

Commentary

Under Enclosure B (Maritime Operations) of the SROE, U.S. Coast Guard units operating under DoD Tactical Control (TACON) outside U.S. territorial seas, and not conducting Coast Guard law enforcement missions, will operate under the SROE. USCG units conducting U.S. Coast Guard law enforcement missions, even when operating as a Service in the Department of the Navy, follow the Coast Guard Use of Force Policy, as set forth in the Coast Guard Maritime Law Enforcement Manual.[184]

International agreements that authorize the use of force to arrest ships at sea reaffirm the basic principle that the force used must be reasonable and necessary under the circumstances. For example, Article 22 of the UN Fish Stocks Agreement advises boarding parties to "avoid the use of force except when and to the degree necessary to ensure the safety of the inspectors and where the inspectors are obstructed in the execution of their duties," specifying that "the degree of force used shall not exceed that reasonably required in the

184. COMDTINST M16247.1G, U.S. Coast Guard Maritime Law Enforcement Manual (2017).

circumstances."[185] Similarly, Article 8*bis* of the 2005 SUA Protocol requires that the use of force by a boarding party "be avoided except when necessary to ensure the safety of its officials and persons on board, or where the officials are obstructed in the execution of the authorized actions" and, if force is used, it "shall not exceed the minimum degree of force . . . necessary and reasonable in the circumstances."[186]

The limitations on the use of force reflected in these and other international agreements have their origin in judicial and arbitral decisions that prohibit the indiscriminate and excessive use of force by maritime law enforcement officials. Four of the seminal cases that have addressed use-of-force issues during maritime law enforcement operations are the 1929 *I'm Alone*, the 1961 *Red Crusader*, the 1997 *M/V Saiga (No. 2)*, and the 2014 *M/V Virginia G*.

The *I'm Alone* was observed in the Gulf of Mexico, by U.S. Revenue Cutter (USRC) *Dexter*, attempting to smuggle rum into the United States during Prohibition.[187] A bilateral agreement with the United Kingdom authorized U.S. law enforcement officials to board, search, and detain British-flagged vessels beyond the U.S. territorial sea if there were reasonable grounds to suspect that a vessel was attempting to smuggle alcoholic beverages into the United States.[188] When the *I'm Alone* attempted to flee the area, the *Dexter* and the USRC *Wolcott* engaged in hot pursuit of the vessel. After chasing the rum-runner for two days, the *Dexter* intentionally sank the *I'm Alone* after it refused multiple orders and signals, including the use of warning shots and disabling fire, to heave to for boarding. A subsequent arbitration commission found that the USRCs had authority to use necessary and reasonable force under the terms of the 1924 bilateral agreement, but that the intentional sinking of the *I'm Alone* was not

185. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of December 10, 1982, relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, art. 22(1)(f), Aug. 4, 1995, T.I.A.S. 01-1211, 2167 U.N.T.S. 3.

186. 2005 SUA Protocol, *supra* note 117.

187. S.S. I'm Alone (Can. v. U.S.), 3 R.I.A.A. 1609 (1935).

188. Convention Between the United States of America and Great Britain to Aid in the Prevention of the Smuggling of Intoxicating Liquor into the United States art. II, Jan. 23, 1924, 43 Stat. 1761, 27 L.N.T.S. 182.

justified by the agreement or any other principle of international law under the circumstances.

A boarding party from the Danish frigate *Niels Ebbesen* boarded and arrested the *Red Crusader* for allegedly fishing illegally near the Faroe Islands.[189] When the master of the British trawler subsequently failed to comply with an order to proceed to the port of Tórshavn with two members of the boarding party still on board, the Danish frigate ordered the *Red Crusader* to heave to, fired four warning shots, and signaled the British trawler to stop. When the trawler refused to heave to, the *Niels Ebbesen* fired, without warning, more than thirty solid, non-explosive gunshot at the *Red Crusader*'s scanner, mast, masthead light, hull, and stern. Although no-one was injured and the trawler did not sink, a Commission of Inquiry found that (1) firing solid gunshot without warning and (2) creating a danger to human life on board the trawler without necessity exceeded the legitimate use of force, even though two Danish sailors were still on board.

The M/V *Saiga* was providing bunkering services to fishing boats off the West African coast, to include fishing boats operating in Guinea's contiguous zone.[190] Without any signal or warning, Guinean patrol boats approached and opened fire on the tanker with live ammunition, using solid shot from large-caliber automatic weapons. Guinean officials then boarded and arrested the *Saiga* on the high seas for violating Guinean customs laws. Although the crew did not resist the boarding, Guinean officials fired indiscriminately while on the deck, as well as at the ship's engine to stop the *Saiga*, wounding two crew members and causing considerable damage to vital equipment in the engine and radio rooms. The International Tribunal for the Law of the Sea (ITLOS) found that the use of force by the Guinean patrol boats to stop and board the tanker, both before and after the boarding, without any signal or warning as required by international law and practice, was excessive and unreasonable and endangered human life. The Tribunal further concluded that law enforcement officers must avoid the use of force if possible and, if force is unavoidable, it

189. Red Crusader (U.K. v. Den.), 29 R.I.A.A. 521 (1962).

190. M/V Saiga (No. 2) (St. Vincent v. Guinea), Case No. 2, Judgment of July 1, 1999, ITLOS Rep. 1999.

must not go beyond what is reasonable and necessary in the circumstances. The Tribunal explained that the "normal practice used to stop a vessel at sea is to first give an auditory or visual signal to stop, using internationally recognized signals."[191] If the suspect vessel ignores the signal, the law enforcement officials may take a variety of actions, to include firing warning shots across the bow of the ship, to get the vessel to heave to. Only after these actions fail to stop the suspect vessel may law enforcement officials use force as a last resort. Even then, the suspect ship must be appropriately warned "and all efforts should be made to ensure that life is not endangered.[192]

ITLOS reached a different conclusion in the case concerning the M/V *Virginia G*.[193] On August 20, 2009, the *Virginia G* provided gas oil to fishing vessels operating in the EEZ of Guinea-Bissau. The following day, the Panamanian-flagged tanker was approached by speedboats clearly marked as government vessels and boarded by uniformed personnel from the Guinea-Bissau Navy and the National Fisheries Inspection and Control Service (FISCAP) about 60 miles off the coast. The FISCAP officials took control of the vessel and ordered the captain to sail to the port of Bissau. Panama alleged that FISCAP officials used excessive force because the boarding party (1) did not identify themselves; (2) was inconsiderate and intimidating and brandished their weapons during the boarding; (3) confined the crew at gunpoint, even though the crew did not resist the boarding; and (4) prevented the captain from communicating with the vessel's owner.[194] After considering the use of force standard articulated in the *Saiga (No. 2)* case, ITLOS determined that excessive force was not used against the vessel or its crew. The FISCAP patrol boats used to stop the tanker were clearly marked. Members of the boarding party were dressed in FISCAP and Navy uniforms that were clearly identifiable. After the initial stage of the boarding, the captain was permitted to communicate with the owner. Thus, the use of force did not go beyond what was reasonable and necessary in the circumstances (e.g., although weapons may have been drawn, they were not

191. *Id.* ¶ 156.

192. *Id.*

193. M/V Virginia G Case (Pan./Guinea-Bissau), Case No. 19, Judgment of April 14, 2014, ITLOS Rep. 2014, at 4.

194. *Id.* ¶¶ 350–58.

discharged; there were no physical injuries; and there was no endangerment of human life).[195]

The United Nations has developed several non-binding guidelines on the use of force to assist law enforcement personnel in the performance of their duties.[196]

The Coast Guard Use of Force Policy is set forth in the U.S. Coast Guard Maritime Law Enforcement Manual, COMDTINST M16247.1B.[197]

3.11.5.1 Warning Shots and Disabling Fire

A warning shot is a signal—usually to warn an offending vessel to stop or maneuver in a particular manner or risk the employment of disabling fire or more severe measures. Under international law, warning shots do not constitute a use of force. Disabling fire is firing under controlled conditions into a noncompliant vessel's rudder or propulsion equipment for the sole purpose of stopping it after oral warnings (if practicable) or warning shots (if practicable) have gone unheeded. Department of Defense forces under USCG control, conducting operations outside and within the territorial limits of the United States, will follow the Use of Force Policy for warning shots and disabling fire as issued by the Commandant, USCG. It is USCG policy that commanders use warning shots as a predicate to disabling fire, unless warning shots unreasonably endanger persons or property in the vicinity of the noncompliant vessel.

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195. *Id.* ¶¶ 359–62.

196. *See, e.g.*, G.A. Res. 34/169, Code of Conduct for Law Enforcement Officials (Dec. 17, 1979); Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, *in* U.N. Secretariat, *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, 112, U.N. Doc. A/CONF.144/28/Rev.1 (1991); United Nations Office on Drugs and Crime, *Maritime Crime: A Manual for Criminal Justice Practitioners* (2017).

197. *See also* Memorandum from Claire M. Grady, Acting Deputy Secretary of Homeland Security and Under Secretary for Management, Department of Homeland Security, Policy Statement 044-05, Department Policy on the Use of Force (Sept. 7, 2018) [hereinafter DHS Policy Statement 044-05].

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

Commentary

Enclosure M (Maritime Operations Within US Territory) of CJCSI 3121.01B states:

> c. Warning Shots from US Navy and Naval Service Vessels and Piers. Warning shots to protect US Navy and Naval Service vessels within the territorial seas and internal waters of the United States are authorized when, in the appropriate exercise of force protection of US Navy and Naval Service vessels, they are fired:
>
> (1) Over water to warn an approaching vessel.
>
> (2) When a clear line of fire exists.
>
> (3) From a crew served weapon or rifle.
>
> (4) By personnel certified under a training program approved by the Service Chief.
>
> (5) Under tactical direction of competent authority, as determined by the Service Chief.
>
> (6) When there are no other means reasonably available to determine the intent of the approaching craft without increasing the threat to US Navy and Naval Service vessels and personnel.[198]

U.S. Coast Guard personnel may use warning shots when conducting maritime law enforcement operations but only as a signal to the

198. CJCSI 3121.01B, *supra* note 1, encl. M at M-2.

suspect vessel to stop and only after all other available means of signaling have failed. Coast Guard personnel may also discharge firearms to disable moving vessels or other maritime conveyances.[199] Before firing at or into a vessel, Coast Guard personnel will first fire a gun as a warning signal unless they determine that firing a warning signal will unreasonably endanger persons or property in the vicinity of the vessel to be stopped.[200] Additionally, if the use of warning shots and disabling fire is warranted, each shot must have a defined target.[201] Warning shots and disabling fire are not intended to cause bodily injury but are still considered to be inherently dangerous. They should, therefore, only be used with due care and with safety as the primary consideration.[202]

3.11.6 Other Maritime Law Enforcement Assistance

The naval commander may become involved in other activities supporting law enforcement actions, such as acting in support to U.S. Customs and Border Protection. Activities of this nature usually involve extensive advance planning and coordination. Department of Defense forces detailed to other federal agencies will operate under common mission-specific rules for the use of force approved by the Secretary of Defense (SECDEF) and the lead federal agency. See CJCSI 3121.01B, Enclosure L.

Commentary

Enclosure L (Standing Rules for the Use of Force for US Forces) of CJCSI 3121.01B provides:

1. Purpose and Scope

a. Standing Rules for the Use of Force (SRUF) provide operational guidance and establish fundamental policies and procedures governing the actions taken by DOD forces performing civil support missions (e.g., military

199. DHS Policy Statement 044-05, *supra* note 197.
200. 14 U.S.C. § 526.
201. DHS Policy Statement 044-05, *supra* note 197.
202. *Id.*

assistance to civil authorities and military support for civilian law enforcement agencies) and routine Service functions (including AT/FP duties) within US territory (including US territorial waters). The SRUF also apply to land homeland defense missions occurring within US territory and to DOD forces, civilians and contractors performing law enforcement and security duties at all DOD installations (and off-installation, while conducting official DOD security functions), within or outside US Territory, unless otherwise directed by the SecDef. Host nation laws and international agreements may limit US forces means of accomplishing their law enforcement or security duties. Additional examples of these missions, within the US, include protection of critical US infrastructure both on and off DOD installations, military assistance and support to civil authorities, DOD support during civil disturbance and DOD cooperation with Federal, State and local law enforcement authorities, including counterdrug support.

b. SRUF cancels CJCSI 3121.02, "RUF for DOD Personnel Providing Support to Law Enforcement Agencies Conducting CD Operations in the United States," and RUF contained in DOD Civil Disturbance Plan (Garden Plot). Existing standing Military Department and combatant commander RUF directives shall be reviewed and updated to comply with these SRUF. Existing SecDef-approved mission-specific RUF remain in effect, unless otherwise noted. Use of force guidance contained in this instruction supersedes that contained in DOD Directive 5210.56, Enclosure 2.

c. Unit commanders at all levels must teach and train their personnel how and when to use both non-deadly and deadly force in self-defense.

d. DOD forces detailed to other USG lead Federal Agencies (LFA) (e.g., support to US Border Patrol) will operate under common mission-specific RUF approved by

the SecDef and the LFA. DOD forces always retain the light of self-defense, IAW these RUF.

e. DOD forces under USCG control, conducting operations both outside and within the territorial limits of the US, will follow the Use of Force Policy for warning shots and disabling fire as issued by the Commandant, USCG, per 14 USC 637 . . . . DOD forces, under USCG control and inside the territorial limits of the US, retain the right of self-defense IAW these SRUF.

f. DOD forces, under DOD control (and using DOD SRUF and mission-specific RUF), but operating in coordination with other LFA security forces will coordinate with on-scene LFA personnel to ensure common understanding of DOD RUF. Combatant commanders shall notify the SecDef. Through the CJCS, of any use of force issues that cannot be resolved.

2. Policy. Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Unit self-defense includes the defense of other DOD forces in the vicinity.

3. Combatant Commander Mission-Specific RUF

a. Combatant commanders may augment these SRUF as necessary by submitting a request for mission-specific RUF to the CJCS for SecDef approval. The message format for requesting approval of mission-specific RUF is contained in Enclosure P.

b. Unit commanders may further restrict mission-specific RUF approved by the SecDef. US commanders shall notify the SecDef, through the CJCS, as soon as practicable, of restrictions (at all levels) placed on Secretary of Defense-approved RUF. In time critical situations, make SecDef notification concurrently to the

CJCS. When concurrent notification is not possible, notify the CJCS as soon as practicable after SecDef notification.

c. Combatant commanders will distribute these RUF to subordinate commanders and units for implementation.

4. Definitions and Authorities

a. Inherent Right of Self-Defense. Unit commanders always retain the inherent right and obligation to exercise unit sell-defense in response to a hostile act or demonstrated hostile intent. Unless otherwise directed by a unit commander as detailed below, service members may exercise individual self-defense in response to a hostile act or demonstrated hostile intent. When individuals are assigned and acting as part of a unit, individual self-defense should be considered a subset of unit self-defense. As such, unit commanders may limit individual self-defense by members of their unit.

b. Imminent Threat. The determination of whether the danger of death or serious bodily harm is imminent will be based on an assessment of all facts and circumstances known to DOD forces at the time and may be made at any level. Imminent does not necessarily mean immediate or instantaneous. Individuals with the capability to inflict death or serious bodily harm and who demonstrate intent to do so may be considered an imminent threat.

c. Hostile Act. An attack or other use of force against the United States, US forces or other designated persons or property. It also includes force used directly to preclude or impede the mission and/ or duties of US forces, including the recovery of US personnel or vital USG property.

d. Hostile Intent. The imminent threat of the use of force against the United States, US forces or other designated

persons or property. It also includes the threat of force to preclude or impede the mission and/or duties of US forces, including the recovery of US personnel or vital USG property.

e. Assets Vital to National Security. For the Purposes of DOD operations, defined as President-designated non-DOD and/or DOD property, the actual theft or sabotage of which the President determines would seriously jeopardize the fulfillment of a national defense mission and would create an imminent threat of death or serious bodily harm. Examples may include, but are not limited to, nuclear weapons; nuclear command and control facilities; and designated restricted areas containing strategic operational assets, sensitive codes or special access programs.

f. Inherently Dangerous Property. Property is considered inherently dangerous if, in the hands of an unauthorized individual, it would create an imminent threat of death or serious bodily harm. Examples may include, but are not limited to: portable missiles, rockets, arms, ammunition, explosives, chemical agents and special nuclear materials. On-scene DOD commanders are authorized to classify property as inherently dangerous.

g. National Critical Infrastructure. For the purposes of DOD operations, defined as President-designated public utilities, or similar critical infrastructure, vital to public health or safety, the damage to which the President determines would create an imminent threat of death or serious bodily harm.

5. Procedures

a. De-Escalation. When time and circumstances permit, the threatening force should be warned and given the opportunity to withdraw or cease threatening actions.

b. Use of Non-Deadly Force

(1) Normally, force is to be used only as a last resort, and the force used should be the minimum necessary. The use of force must be reasonable in intensity, duration and magnitude based on the totality of circumstances to counter the threat. If force is required, non-deadly force is authorized and may be used to control a situation and accomplish the mission, or to provide self-defense of DOD forces, defense of non-DoD persons in the vicinity if directly related to the assigned mission, or in defense of the protected property, when doing so is reasonable under the circumstances.

(2) The use of Service-approved, unit issued non-lethal weapons and riot control agents, including oleoresin capsicum (OC) pepper spray, and CS gas, is authorized in operations other than war. Detailed guidance for use of riot control agents by DOD personnel is governed by CJCSI 3110.07 Series, (references b and t listed in Enclosure K).

(3) When operating under SRUF, warning shots are not authorized within US territory (including US territorial waters), except when in the appropriate exercise of force protection of US Navy and Naval Service vessels within the limits set forth in Enclosure M.

c. Use of Deadly Force. Deadly force is to be used only when all lesser means have failed or cannot reasonably be employed. Deadly force is authorized under the following circumstances:

(1) Inherent Right of Self-Defense. Deadly force is authorized when DOD unit commanders reasonably believe that a person poses an imminent threat of death or serious bodily harm to DOD forces. Unit

self-defense includes the defense of other DOD forces in the vicinity.

(2) Defense of Others. Deadly force is authorized in defense of non-DOD persons in the vicinity, when directly related to the assigned mission.

(3) Assets Vital to National Security. Deadly force is authorized when deadly force reasonably appears to be necessary to prevent the actual theft or sabotage of assets vital to national security.

(4) Inherently Dangerous Property. Deadly force is authorized when deadly force reasonably appears to be necessary to prevent the actual theft or sabotage of inherently dangerous property.

(5) National Critical Infrastructure. Deadly force is authorized when deadly force reasonably appears to be necessary to prevent the sabotage of national critical infrastructure.

d. Additionally, when directly related to the assigned mission, deadly force is authorized under the following circumstances:

(1) Serious Offenses Against Persons. Deadly force is authorized when deadly force reasonably appears to be necessary to prevent the commission of a serious offense that involves imminent threat of death or serious bodily harm (for example, setting fire to an inhabited dwelling or sniping), including the defense of other persons, where deadly force is directed against the person threatening to commit the offense. Examples include murder, armed robbery and aggravated assault.

(2) Escape. Deadly force is authorized when deadly force reasonably appears to be necessary to prevent

> the escape of a prisoner, provided there is probable cause to believe that such person(s) have committed or attempted to commit a serious offense, that is, one that involves imminent threat of death or serious bodily harm, and would pose an imminent threat of death or serious bodily harm to DOD forces or others in the vicinity.
>
> (3) Arrest or Apprehension. Deadly force is authorized when deadly force reasonably appears necessary to arrest or apprehend a person who, there is probable cause to believe, has committed a serious offense (as indicated in subparagraph c above).[203]

203. CJCSI 3121.01B, *supra* note 1, encl. L at L-1 to L-6.

CHAPTER 4

SAFEGUARDING U.S. NATIONAL INTERESTS IN THE MARITIME ENVIRONMENT

4.1 INTRODUCTION

This chapter examines the broad principles of international law that govern the conduct of States in protecting their interests in the maritime environment during peacetime.

Historically, international law governing the use of force by States has been divided into rules applicable in peacetime and rules applicable in time of war. In the latter half of the twentieth century and continuing today, the concepts of peace and war have become blurred to the extent it is not always possible to draw distinctions between the two. This chapter will focus specifically on safeguarding national interests in the maritime environment during times when the State whose interest is at stake is not involved in armed conflict with the entity threatening its interest.

4.2 1945 CHARTER OF THE UNITED NATIONS

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

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

Article 2, Paragraph 4, provides:

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

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

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

Article 41 provides:

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

Article 42 further provides:

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

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

> Nothing in the . . . Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a

> Member . . . until the Security Council has taken measures necessary to maintain international peace and security.

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

Commentary

Article 2 of the UN Charter provides:

> The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.
>
> 1. The Organization is based on the principle of the sovereign equality of all its Members.
>
> 2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.
>
> 3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
>
> 4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

The Charter further provides:

> **Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression**

Article 39

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

Article 40

In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

Article 41

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 of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 42

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 of the United Nations.

. . . .

Article 51

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Chapter VIII: Regional Arrangements

Article 52

1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

2. The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.

4.3 NONMILITARY MEASURES

4.3.1 Diplomatic

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

4.3.2 Judicial

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

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

4.3.3 Economic

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

4.4 MILITARY MEASURES

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

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

4.4.1 The Right of Self-defense

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

1. Necessity means the use of force is required under the circumstances—there is no other effective means to counter the hostile act or demonstrated hostile intent. A hostile act is an attack or other use of force against the United States, U.S. forces, or other designated persons or property. It includes force used directly to preclude or impede the mission and/or duties of U.S. forces. Hostile intent is the imminent threat of the use of force against the United States, U.S. forces, or other designated persons or property.

2. Proportionality requires the nature, intensity, scope, and duration of force used in self-defense not exceed what is required to respond decisively to hostile acts or demonstrations of hostile intent. Proportionality does not require the force used in response be of the same kind as used in the attack. For example, the response to a cyberspace attack is not limited to cyberspace means.

Included within the inherent right of self-defense is the right of a State to protect itself from an imminent attack. International law recognizes it would be contrary to the purposes of the Charter of the UN if a threatened State were required to absorb an aggressor's initial, and potentially crippling first strike, before taking those military measures necessary to thwart an imminent attack. The right of a State to self-defense includes the use of armed force where attack is imminent and no reasonable alternative means is available. Allies and partners engaged in combined operations may have a separate and distinct legal position on the use of force in self-defense.

Commentary

The UN Charter imposes a near absolute prohibition on the use of force. Article 2(4) provides: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations." It is a violation to render the threat to use force as much as it is to actually use force. The prohibition of the use of force extends to the territorial integrity or political independence of a State, or "in any other manner inconsistent with the Purposes of the United Nations."

Among those purposes is the maintenance of "international peace and security."[1]

Although the obligation to refrain from using force applies only to members, it extends to acts of force against any State, even a non-party. This prohibition has become customary international law.[2] In *Nicaragua v. United States*, the ICJ cited the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, which states:

> Every State has the duty to refrain in its 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. Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues.[3]

The *Nicaragua* decision also cited the ILC's 1966 Commentary to the Final Draft Articles on the Law of Treaties, which states that "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*." States may not derogate from such peremptory norms, even by treaty.

There are two exceptions for the use of force in the UN Charter: (1) force authorized by the Security Council pursuant to Chapter VII; and (2) self-defense. In the case of the first exception, Article 39 of the Charter requires the Security Council to "determine the existence of any threat to the peace, breach of the peace, or act of aggression."

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1. U.N. Charter, art. 1(1).

2. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 188 (June 27).

3. G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, annex, U.N. Doc. A/8082 (Oct. 24, 1970).

> Once that has occurred, the Council may either make recommendations to those involved or "decide what measures shall be taken . . . to maintain or restore international peace and security." Under Article 41, the Security Council may employ "measures not involving the use of armed force," such as "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."
>
> Under Article 42, if nonforcible measures are ineffective or would be fruitless, the Security Council may "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."
>
> In the second exception to the prohibition on the use of force, States may use force in the exercise of self-defense. Article 51 of the UN Charter provides:
>
> > Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.
>
> Self-defense must comply with three basic criteria: necessity, proportionality, and imminency.[4] These criteria emerged from the *Caroline* case, a product of the Canadian rebellion of 1837. Americans living along the border were actively sympathetic towards the Canadian rebels, although the government of the United States took steps to restrain their support. The main force of rebels was defeated, and many

4. *See* Michael N. Schmitt, *Preemptive Strategies in International Law*, 24 MICHIGAN JOURNAL OF INTERNATIONAL LAW 513, 521–30 (2003).

rebels fled south to the United States. In Buffalo, New York, rebel leaders McKenzie and Rolfe conducted large public meetings to solicit a force to assist them against the British Crown authority in Canada.[5]

Under the leadership of an American named Van Rausselear, the armed force, composed mostly of Americans, invaded and took possession of Canada's Navy Island from December 13 to 29. The small island belonged to Britain but was to be used as a staging area for insurrection on the Canadian side of the river. On December 29, the *Caroline* went down the Niagara River from Buffalo, past Grand Island, owned by the United States, and landed at Navy Island. It was evident to British observers at Chippewa that the ship ferried armaments to the rebels. The ship made several trips to Fort Schlosser and Navy Island, transporting a six-pound cannon and other "warlike stores." The Lieutenant Governor apprised the Governor of the State of New York but received no answer to his communication.

Fearing that the *Caroline* would be used to ferry additional supplies to Navy Island, and also prove a means for the rebels to attack Canada, Colonel McNab, commanding British forces, assembled across the river at Chippewa, set out to destroy the American ship. The operation was conducted under the leadership of Captain Drew on the night of December 29. Seventy to eighty armed men stormed the ship during the middle of the night, as the vessel lay moored at Fort Schlosser. The ship was abandoned without resistance and the Canadians set it on fire and cut it adrift. The burning vessel went over the falls at Niagara. The British defended their action based upon three arguments: (1) the ship had a "piratical character"; (2) the area of Fort Schlosser was lawless and public authority "overborne"; and (3) self-defense. The United States and Britain ultimately focused their diplomatic exchanges principally on the third issue of self-defense, in which the ship was treated by Britain as a "belligerent vessel" and the United States was alleged to have abandoned its duties as a "neutral." Britain dispatched Lord Ashburton to Washington, D.C. to consider the U.S. complaint over the *Caroline* in conjunction

5. R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AMERICAN JOURNAL OF INTERNATIONAL LAW 82, 82–92 (1938).

with further negotiations concerning the settlement of a north-eastern boundary dispute. In the meantime, William Henry Harrison was sworn into office as president on March 4, 1841; he died thirty-two days later and was replaced by John Tyler, who was sworn into office as president on April 4, 1841. Tyler sought a quick resolution to the dispute.

On July 27, 1842, Secretary of State Daniel Webster sent a note to Lord Ashburton, enclosing a copy of a letter dated April 24, 1841, which had been addressed to British ambassador Henry Stephen Fox. Webster called upon the British to bear the burden of proof to demonstrate that the attack was lawful because there was

> a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it. It must be shown that admonition or remonstrance to the persons on board the *Caroline* was impracticable, or would have been unavailing; it must be shown that day-light could not be waited for; that there could be no attempt at discrimination between the innocent and the guilty; that it would not have been enough to seize and detain the vessel; but that there was a necessity, present and inevitable, for attacking her in the darkness of night, while moored to the shore, and while unarmed men were asleep on board, killing some and wounding others, and then drawing here into the current, above the cataract, setting her on fire, and, careless to know whether there might not be in her the innocent with the guilty, or the living with the dead, committing her to a fate which fills the imagination with horror. A necessity for all this, the Government of the United States cannot believe to have existed.[6]

6. Letter from Mr. Webster to Lord Ashburton (July 27, 1842), encl. Letter from Mr. Webster to Mr. Fox (Apr. 24, 1841), *reprinted in* 29 BRITISH AND FOREIGN STATE PAPERS 1129, 1138 (1840–41).

The Webster letter also used the terms "self-defence" and "self-preservation" synonymously, with the declaration that "a just right of self-defence attaches to nations as well as to individuals and is equally necessary for the preservation of both."[7] The ingenious reply by Lord Ashburton fits the narrative into the model for lawful self-defense erected by Webster, along with an apology. While not ever admitting that the action was justified, Webster accepted the apology in a letter of August 6, 1842. The restrictive formula offered by Webster and adopted by Ashburton vitiated the Naturalist notion of "an absolute primordial right of self-preservation" with the limiting condition of necessity. The *Caroline* standard requires a "necessity of self-defence [that is] instant, overwhelming, leaving no choice of means, and no moment for deliberation" and acts in self-defense cannot be "unreasonable or excessive." The standard has been accepted nearly universally, referenced by the Nuremburg Tribunal, the *Nicaragua* decision, and the *Nuclear Weapons* Advisory Case.[8]

See also DoD Law of War Manual, §§ 1.11.3–1.11.5.

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

Rules of engagement serve three purposes:

1. Provide guidance from the President and SECDEF, as well as subordinate commanders, to deployed units on the use of force

2. Act as a control mechanism for the transition from peacetime to combat operations

3. Provide a mechanism to facilitate planning. Rules of engagement provide a framework that encompasses national policy goals, mission requirements, and the law.

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7. *Id.* at 1133.

8. *See International Military Tribunal (Nuremberg), Judgment and Sentences* (Oct. 1, 1946), *reprinted in* 41 AMERICAN JOURNAL OF INTERNATIONAL LAW 172, 205 (1947); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 176 (June 27); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 225, ¶ 41 (July 8).

The United States has incorporated and operationalized the governing international principles on the lawful use of force—necessity and proportionality—in CJCSI 3121.01B and DODD 5210.56, Arming and the Use of Force. U.S. SROE implements the right and obligation of self-defense and sets out delegation of authority to use force for mission accomplishment during military operations, contingencies, and routine military department functions, including AT/FP. Under United States use of force doctrine, unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Rules of engagement, including mission-specific ROE, reflect operational and national policy considerations that may restrict operations and tactics that would otherwise be permitted by international law.

Commentary

DoDD 5210.56, Arming and the Use of Force:

- establishes policy and standards and assigns responsibilities for arming, the carrying of firearms, and the use of force by DoD personnel performing security and protection, law and order, investigative, or counterintelligence duties, and for personal protection when related to the performance of official duties;
- establishes policy and standards and assigns responsibilities for contractor personnel required to carry a firearm in accordance with applicable DoD contracts;
- implements 10 U.S.C. § 1585, which authorizes civilian officers and employees of the DoD to carry firearms or other appropriate weapons while assigned investigative duties or such other duties as prescribed by the Secretary of Defense;
- provides requirements, authorizations, and restrictions on carrying firearms and the use of force to protect DoD installations, property, and personnel, and to enforce law and order in accordance with DoDI 5200.08 and DoD 5200.08-R;
- implements 10 U.S.C. § 2672, 18 U.S.C. § 926A, and § 526 of Public Law 114-92, and authorizes DoD Components to arm DoD personnel qualified under 18 U.S.C. §§ 926B

and 926C when related to the performance of official duties; and

- provides guidance for permitting the carrying of privately owned firearms on DoD property by DoD personnel for personal protection purposes that are not associated with the performance of official duties.[9]

4.4.1.2 CJCSI 3121.01B, Standing Rules of Engagement or Standing Rules for Use of Force—Determining which Doctrine Applies

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

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

9. DoDD 5210.56, Arming and the Use of Force (Ch. 1, Nov. 6, 2020).

4.4.1.3 Self-defense Principles in CJCSI 3121.01

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

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

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

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

4.4.1.4 Self-defense Pursuant to CJCSI 3121.01, Standing Rules of Engagement

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

hostile intent to give them an opportunity to withdraw or cease threatening actions.

Commentary

In the Standing Rules of Engagement (SROE), self-defense has the following meaning:

> Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Unless otherwise directed by a unit commander as detailed below, military members may exercise individual self-defense in response to a hostile act or demonstrated hostile intent. When individuals are assigned and acting as part of a unit, individual self-defense should be considered a subset of unit self-defense. As such, unit commanders may limit individual self-defense by members of their unit. Both unit and individual self-defense includes defense of other US military forces in the vicinity.[10]

The SROE and the accompanying enclosures

> establish fundamental policies and procedures governing the actions to be taken by US commanders and their forces during all military operations and contingencies and routine Military Department functions occurring outside US territory (which includes the 50 states, the Commonwealths of Puerto Rico and Northern Marianas, US possessions, protectorates and territories) and outside US territorial seas. Routine Military Department functions include AT /FP duties, but exclude law enforcement and security duties on DOD installations, and off-installation while conducting official DOD security functions, outside US territory and territorial seas. SROE also apply to air and maritime homeland defense missions conducted within US territory or territorial seas, unless otherwise directed by the Secretary of Defense (SecDef).[11]

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10. CJCSI 3121.01B, Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces, encl. A at A-3 (June 13, 2005).

11. *Id.* at 1.

Enclosure A (Standing Rules of Engagement for US Forces) contains policy, definitions and authorities, and procedures governing the application of self-defense:

2. Policy

a. Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent.

b. Once a force is declared hostile by appropriate authority, US forces need not observe a hostile act or demonstrated hostile intent before engaging the declared hostile force. . . .

. . . .

3. Definitions and Authorities

a. Inherent Right of Self-Defense. Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Unless otherwise directed by a unit commander as detailed below, military members may exercise individual self-defense in response to a hostile act or demonstrated hostile intent. When individuals are assigned and acting as part of a unit, individual self-defense should be considered a subset of unit self-defense. As such, unit commanders may limit individual self-defense by members of their unit. Both unit and individual self-defense includes defense of other US military forces in the vicinity.

b. National Self-Defense. Defense of the United States, US forces, and, in certain circumstances, US persons and their property, and/ or US commercial assets from a hostile act or demonstration of hostile intent. . . .

c. Collective Self-Defense. Defense of designated non-US military forces and/or designated foreign nationals and their property from a hostile act or demonstrated hostile intent. Only the President or SecDef may authorize collective self-defense.

. . . .

4. Procedures

a. Principles of Self-Defense. All necessary means available and all appropriate actions may be used in self-defense. The following guidelines apply.

(1) De-escalation. When time and circumstances permit, the forces committing hostile acts or demonstrating hostile intent should be warned and given the opportunity to withdraw or cease threatening actions.

(2) Necessity. Exists when a hostile act occurs or when a force demonstrates hostile intent. When such conditions exist, use of force in self-defense is authorized while the force continues to commit hostile acts or exhibit hostile intent.

(3) Proportionality. The use of force in self-defense should be sufficient to respond decisively to hostile acts or demonstrations of hostile intent. Such use of force may exceed the means and intensity of the hostile act or hostile intent, but the nature, duration and scope of force used should not exceed what is required. The concept of proportionality in self-defense should not be confused with attempts to minimize collateral damage during offensive operations.

b. Pursuit. Self-defense includes the authority to pursue and engage forces that have committed a hostile act or

> demonstrated hostile intent, if those forces continue to commit hostile acts or demonstrate hostile intent.
>
> c. Defense of US Persons and Their Property, and Designated Foreign Persons
>
> (1) Within a Foreign Nation's US-Recognized Territory, Airspace or Seas. The foreign nation has the principal responsibility for defending US persons and property within its territory, airspace or seas. . . .
>
> (2) Outside territorial seas. Nation of registry has the principal responsibility for protecting civilian vessels outside territorial seas. . . .
>
> (3) In International Airspace. Nation of registry has the principal responsibility for protecting civil aircraft in international airspace. . . .[12]

4.4.1.5 Self-defense Pursuant to CJCSI 3121.01, Standing Rules for the Use of Force

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

When operating under the SRUF, warning shots are not authorized within U.S. territory—including U.S. territorial seas—except when in the appropriate exercise of force protection of U.S. Navy and naval-service vessels within the limits set forth in Enclosure M of the SROE (CJCSI 3121.01B) and NTTP 3-07.2.1, Antiterrorism. Warning shots pursuant to the SRUF must

12. *Id.* encl. A at A-2, A-3 to A-5.

be distinguished from the use of warning shots during the conduct of MLE actions under the tactical control of the USCG and its Use of Force Policy. See 3.11.5.1.

Commentary

In the Standing Rules for the Use of Force (SRUF), self-defense has the following meaning:

> Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Unless otherwise directed by a unit commander as detailed below, military members may exercise individual self-defense in response to a hostile act or demonstrated hostile intent. When individuals are assigned and acting as part of a unit, individual self-defense should be considered a subset of unit self-defense. As such, unit commanders may limit individual self-defense by members of their unit. Both unit and individual self-defense includes defense of other US Military forces in the vicinity.[13]

The SRUF

> establish fundamental policies and procedures governing the actions to be taken by US commanders and their forces during all DOD civil support (e.g., military assistance to civil authorities) and routine Military Department functions (including AT/FP duties) occurring within US territory or US territorial seas. SRUF also apply to land and homeland defense missions occurring within US territory and to DOD forces, civilians and contractors performing law enforcement and security duties at all DOD installations (and off-installation while conducting official DOD security functions), within or outside US territory, unless otherwise directed by the SecDef. Host nation laws and international agreements may

13. *Id.* at 3.

> limit US forces' means of accomplishing their law enforcement or security duties.[14]

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

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

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

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

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14. *Id.* at 1–2.

Commentary

DoDD 5210.56, Arming and the Use of Force, states:

> **3.4. USE OF FORCE IN THE PERFORMANCE OF OFFICIAL DUTIES.**
>
> **a. General.** DoD personnel, armed in accordance with this Directive, are authorized to use force in the performance of their official duties, as described in Paragraph 3.1.c. When force is necessary to perform official duties, DoD personnel will use a reasonable amount of force and will not use excessive force. The reasonableness of any use of force is determined by assessing the totality of the circumstances that led to the need to use force.
>
> **b. Warning Shots.** Warning shots are prohibited in the United States. Warning shots are also prohibited outside the United States unless otherwise authorized by applicable host-nation law and status of forces agreements and in accordance with Standing Rules on the Use of Force in non-United States locations. Warning shots to protect U.S. Navy and Naval Service vessels and piers in the territorial seas and internal waters of the United States are authorized if all of the following factors are present:
>
> (1) The warning shots are fired over water to warn an approaching vessel;
>
> (2) A clear line of fire exists;
>
> (3) The shots are fired from a crew-served weapon or rifle;
>
> (4) The shots are fired by personnel who are certified under a training program approved by the Secretary of the Military Department concerned and who are under the tactical direction of competent authority, as determined

by the Secretary of the Military Department concerned; and

(5) There are no other means reasonably available to determine the intent of the approaching craft without increasing the threat to U.S. Navy and Naval Service vessels and personnel.

c. Vehicles. Firearms will not be fired solely to disable a non-threatening moving vehicle. DoD personnel who have reason to believe that a driver or occupant of a vehicle poses an imminent danger of death or serious physical injury to themselves or others may fire at the driver or an occupant only when such shots are reasonable to avoid death or serious physical injury to the officer or another, and only if the public safety benefits of using such force reasonably appear to outweigh other risks to DoD personnel or the public, such as from a crash, ricocheting bullets, or return fire from the subject or another person in the vehicle.

d. Less Than Deadly Force (Use of Force). Force may be used when there is probable cause to believe it is reasonable to accomplish the lawful performance of assigned duties. The amount of force used must be reasonable when assessed under the totality of the circumstances leading to the need for force.

(1) DoD Directive 3000.03E establishes policy for the development and employment of NLWs. For the purpose of this issuance, and in the context of the use of force, the term "less than deadly force" is used as there is no guarantee that NLWs will not cause severe injury or death.

(2) Any use of force can have unforeseeable and unintended consequences, and in rare circumstances less than deadly force can cause or contribute to severe injury or death. DoD personnel using less than deadly force, including NLWs, will provide or coordinate for prompt

and appropriate medical attention to the party on which the force is used should a medical need arise (e.g., asthmatic reaction to pepper spray).

(3) Less than deadly force may be used when reasonable:

(a) To defend oneself from actual or imminent threat of physical injury or death.

(b) To defend other persons from actual or imminent threat of physical injury or death.

(c) To overcome the active or passive resistance offered to a lawful detention, arrest, or apprehension or to accomplish the lawful performance of assigned duties.

(d) To prevent the escape of a prisoner.

(e) To prevent the destruction of DoD property.

(f) To control or restrain animals presenting an ongoing or imminent threat of bodily harm against oneself or others.

e. Deadly Force.

(1) The DoD Component heads may impose further restrictions on the use of deadly force if deemed necessary in their judgment and if such restrictions would not unduly compromise U.S. national security interests or unduly put DoD personnel at risk.

(2) Deadly force is justified only when there is a reasonable belief that the subject of such force poses an imminent threat of death or serious bodily harm to a person or under the circumstances described in Paragraph 3.4.e.(4).

> (a) A subject may pose an imminent danger even if he or she is not at that very moment pointing a weapon at a person if, for example, he or she has a weapon within reach or is running for cover carrying a weapon or running to a place where the DoD armed person has reason to believe a weapon is available.
>
> (b) DoD recognizes and respects the paramount value of all human life. If less than deadly force could reasonably be expected to accomplish the same result without unreasonably increasing the danger to armed DoD personnel or to others, then it should be used.

(3) An oral warning must be given prior to the use of deadly force if the situation permits and if doing so does not unreasonably increase the danger to DoD personnel or others.

(4) Deadly force may only be used when reasonable, including, but not limited to, under the following circumstances:

> (a) Self-defense and defense of other DoD personnel. Authorized DoD personnel may use deadly force in order to defend themselves or other DoD personnel in their vicinity when there is probable cause to believe the target of that force poses an actual or imminent threat of death or serious bodily harm.
>
> (b) Defense of others. Authorized DoD personnel may use deadly force to defend non-DoD personnel in their vicinity when there is probable cause to believe the target of that force poses an actual or imminent threat of death or serious bodily harm and when defense of those non-DoD personnel is reasonably related to the performance of their assigned mission

or to their duty status, or is within the scope of federal employment.

(c) Protecting assets vital to national security. Authorized DoD personnel may use deadly force to prevent the actual theft or sabotage of assets vital to national security.

(d) Protecting inherently dangerous property. Authorized DoD personnel may use deadly force to prevent the actual theft or sabotage of inherently dangerous property.

(e) Protecting national critical infrastructure. Authorized DoD personnel may use deadly force to prevent the sabotage or destruction of national critical infrastructure.

(f) Performing an arrest or apprehension, or preventing escape. Authorized DoD personnel may use deadly force to arrest, apprehend, or prevent the unlawful escape of a fleeing subject if there is probable cause to believe:

1. The subject has committed an offense involving the infliction or threatened infliction of serious physical injury or death; and

2. The escape of the subject would pose an actual or imminent threat of death or serious bodily harm to DoD personnel or others in the vicinity.

(g) Defending against animals. Deadly force may be directed against vicious animals when necessary in self-defense or in defense of others.[15]

15. DoDD 5210.56, *supra* note 9, at 15–18.

4.4.2 Naval Presence

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

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

Commentary

The core capabilities of the Naval service include presence, deterrence, sea control, power projection, maritime security, and sealift:

> The job of gaining and maintaining maritime superiority or supremacy—of engaging in and winning battles in the maritime domain and preventing conflict through presence offshore—falls almost exclusively to the Naval Service. Naval doctrine is based on current force structure and capabilities.

> It incorporates time-tested principles and builds upon approved joint doctrine in standardizing terminology and processes among naval forces.[16]

"Countering malign behaviors short of armed conflict requires sufficient naval capacity and integration to maintain forward presence, as well as targeted capabilities that expand our response options. To sustain deterrence and prevent competition from escalating into conflict, we must maintain our critical military advantages."[17]

With a secure position in the Western Hemisphere, the United States is blessed with geographic advantage. Forward presence is essential to conduct sea control and sea denial and power projection.[18] The missions reliant on forward presence include surface warfare, undersea warfare, air warfare, power projection and strike, missile defense, sustainment, and strategic sealift.[19] Navy doctrine incorporates forward presence as an essential element in theater operations, strategic missions, and homeland defense:

> ***Forward Presence***
>
> The forward operating posture serves several key functions: it enables familiarity with the operational environment, as well as contributing to an understanding of the capabilities, culture, and behavior patterns of regional actors, and it enables influence. This understanding and influence facilitate more effective responses in the event of crisis. Should peacetime operations transition to war, commanders and commanding officers will have developed their naval forces' environmental and operational understanding and experience to successfully engage in combat operations. Forward presence also allows us to combat terrorism as far from US shores as possible. Where and when applicable, forward-deployed naval forces isolate, capture, or destroy terrorists and

16. NDP 1, Naval Warfare, iii (Mar. 1, 2010).

17. U.S. MARINE CORPS, U.S. NAVY, & U.S. COAST GUARD, ADVANTAGE AT SEA: PREVAILING WITH INTEGRATED ALL-DOMAIN NAVAL POWER 6 (2020).

18. *Id.* at 22.

19. *Id.* at 22–23.

> their infrastructure, resources, and sanctuaries, preferably in conjunction with coalition partners.
>
> Naval forward presence is a key enabler of regional stability, providing credible combat power where US vital interests are most concentrated. These naval forces are able to act on indications and warnings and provide a timely response to crisis. With an ever-constant presence forward, they mitigate the political and diplomatic ramifications of introducing forces into the theater when crises arise. They also provide the United States with a broad range of options, unfettered by the requirement to obtain host-nation permissions and access.
>
> Forward-deployed naval forces demonstrate commitment to our partners without imposing a lasting footprint ashore; they provide persistent presence without permanence. Naval forces are ideally suited to conduct an expanding array of activities that prevent, deter, or resolve conflict. While forward, acting as the lead element of our defense in-depth, naval forces are positioned for increased roles in shaping our operational environment and providing immediate response for HA/DR to relieve suffering. They also act in cooperation with an expanding set of international partners.[20]

Forward deployed naval forces (FDNFs) are forces homeported overseas, thereby increasing operations tempo, surge capacity, and on-station operations. The FDNF ships, aircraft, sailors, and marines provide about 25 percent of overseas naval presence, and this is likely to grow to one-third by 2024. In the U.S. Indo-Pacific Command (INDOPACOM) area of responsibility (AOR), homeported ships and aircraft operate from Japan, Guam, and Singapore. In U.S. European Command AOR, the Sixth Fleet includes four FDNF guided missile destroyers (DDGs) based in Rota, Spain. In the Central Command (CENTCOM), ten patrol coastal (PC) and four mine countermeasures (MCM) ships are homeported in Bahrain.[21]

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20. NDP 1, Naval Warfare, 26 (Mar. 1, 2010).
21. BRYAN CLARK & JESSE SLOMAN, DEPLOYING BEYOND THEIR MEANS 12 (2018).

JP 3-32, Joint Maritime Operations, states:

> Naval forces provide the means of maintaining a global military presence while limiting the undesired economic, social, political, or diplomatic repercussions that often accompany US footprints ashore. Culturally aware, forward-deployed naval forces can provide a stabilizing influence on regional actors and can prevent or limit conflict. Forward-deployed naval forces provide US policy makers a range of options for influencing events while minimizing the risk of being drawn into a crisis or protracted entanglement.[22]

4.4.3 Interception of Intruding Aircraft

All States have complete and exclusive sovereignty over their national airspace (see 1.9). With the exception of overflight by aircraft in transit passage of international straits and in archipelagic sea lanes passage (see 2.5.3 and 2.5.4.2), distress (see 3.2.1), and assistance entry to assist those in danger of being lost at sea (see 2.5.2.6), all aircraft must obtain authorization to enter another State's national airspace (see 2.5). Authorization may be flight-specific (in the case of diplomatic clearance for the visit of a military aircraft) or general (in the case of commercial air navigation pursuant to the Chicago Convention).

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

In regard to military aircraft, State practice suggests an aircraft with military markings will be presumed to be conducting a military mission, unless evidence is produced to the contrary by its State of registry. This is the case both for tactical military aircraft capable of directly attacking the overflown State and unarmed military aircraft capable of being used for intelligence-gathering purposes. Though aviation treaties that deal with the issue of unauthorized airspace intrusions (particularly the Chicago Convention) do not

22. JP 3-32, Joint Maritime Operations, IV-24 (Ch. 1, Sept. 20, 2021).

apply to military aircraft, the United States takes the position that customary international law standards of reasonableness, necessity, and proportionality should be applied by the State before it resorts to military defensive measures in response to the intrusion.

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

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

Commentary

The Chicago Convention provides that every State has complete and exclusive sovereignty over the airspace above its territory (land areas and territorial sea).[23] Subject to the rights and obligations of States set forth in the UN Charter, "every State must refrain from resorting to the use of weapons against civil aircraft in flight" and, "in case of interception, the lives of persons on board and the safety of aircraft must not be endangered."[24] The Chicago Convention further provides:

> [E]very State, in the exercise of its sovereignty, is entitled to require the landing at some designated airport of a civil aircraft flying above its territory without authority or if there are reasonable grounds to conclude that it is being used for

23. Chicago Convention, arts. 1–2.
24. *Id.* art. 3*bis*(a).

> any purpose inconsistent with the aims of this Convention; it may also give such aircraft any other instructions to put an end to such violations.[25]

For this purpose, "States may resort to any appropriate means consistent with relevant rules of international law, including the relevant provisions of this Convention" and shall publish their "regulations in force regarding the interception of civil aircraft."[26] Civil aircraft shall comply with an order given in conformity with this article.[27] States shall take appropriate measures to prohibit the deliberate use of civil aircraft registered in their State or operated by an operator who has his principal place of business or permanent residence in their State "for any purpose inconsistent with the aims of this Convention."[28]

4.4.4 Maritime Interception and Interdiction

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

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25. *Id.* art. 3*bis*(b).
26. *Id.*
27. *Id.* art. 3*bis*(c).
28. *Id.* art. 3*bis*(d).

Commentary

Maritime interception operations (MIOs) are efforts to monitor, query, and board merchant vessels in international waters to enforce sanctions against other nations, such as those in support of UN Security Council Resolutions and/or to prevent the transport of restricted goods.[29] Naval Doctrine Publication (NDP) 1, Naval Warfare, states:

- Maritime Interception Operations. Maritime interception operations (MIO) are defined as "efforts to monitor, query, and board merchant vessels in international waters to enforce sanctions against other nations such as those in support of United Nations Security Council Resolutions and/or prevent the transport of restricted goods." (JP 1-02. Source: JP 3-0) Boarding teams of Sailors, Marines, Coastguardsmen, and other law enforcement personnel are trained in the techniques of visit, board, search, and seizure (VBSS) to conduct MIO worldwide. These boardings are used for specific missions based on authorities, laws, and jurisdiction.

- Law Enforcement Operations. Law enforcement operations (LEO) are a form of interception operations. LEO, however, is different from MIO. Coast Guard cutters routinely conduct independent LEO. DOD personnel are generally prohibited from direct involvement in law enforcement activities. Navy vessels or foreign naval vessels may, however, embark Coast Guard law enforcement detachments with the power to make arrests in US and international waters. LEO may be conducted to counter activities such as illegal immigration or drug trafficking.

- Expanded Maritime Interception Operations. Expanded MIO (EMIO) are authorized by the President and directed by the SecDef to intercept vessels identified to be

29. JP 1-02, Department of Defense Dictionary of Military and Associated Terms, 146 (Nov. 8, 2010, as amended Feb. 15, 2016).

> transporting terrorists and/or terrorist-related material that pose an imminent threat to the United States and its allies. (For further discussion of EMIO, see JP 3-03, *Joint Interdiction*.)[30]

Enclosure B (Maritime Operations) of the SROE states:

> Within DOD, only the Secretary of Defense may approve conduct of maritime interception operations (MIO). As MIO potentially infringe upon freedom of navigation, it is incumbent upon US forces engaged in these operations to conduct them in a way that limits interference with other nations' exercise of freedom of the seas. A Notice to Mariners (NOTMAR) or special warning (as appropriate) should be published prior to MIO execution, if appropriate. NOTMARs should identify interception areas, prohibited cargo and cargo access inspection requirements.[31]

4.4.4.1 Legal Bases for Conducting Maritime Interception and Interdiction

There are several legal bases under which maritime interception and interdiction may be conducted—none of which are mutually exclusive. Depending on the circumstances, one or a combination of these bases can be used to justify permissive and nonpermissive interference with suspect vessels. The bases for conducting lawful boardings of suspect vessels at sea were greatly enhanced by the 2005 Protocols to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation. See 3.11.2.2.7 for a discussion of SUA and the 2005 Protocols. Subject to these limitations, international law does permit the interception or interdiction of foreign-flagged vessels, as described in the following.

Commentary

> The 2005 SUA Protocol adds a new Article 8*bis*, which contains an enhanced boarding regime. If a flag State has reasonable grounds to

30. NDP 1, Naval Warfare, 37–38 (Mar. 2010).
31. CJCSI 3121.01B, *supra* note 10, encl. B at B-3.

> suspect that an offence under the Convention has been, is being, or is about to be committed involving a ship flying its flag, it may request the assistance of other States in preventing or suppressing that offence. A requested State shall use its best endeavors to render such assistance within the means available to it.[32] If a State encounters a foreign-flagged vessel seaward of any State's territorial sea, and that State has reasonable grounds to suspect that the ship or a person on board the ship has been, is, or is about to be involved in the commission of an offence under the Convention, and desires to board, it shall request that the flag State confirm the claim of nationality, and if nationality is confirmed, shall ask the flag State for authorization to board and to take appropriate measures with regard to that vessel, to include stopping, boarding, and searching the ship, its cargo, and persons on board, and questioning the persons on board in order to determine if an offence under the Convention has been, is being, or is about to be committed.[33] If requested, the flag State shall (1) authorize the requesting State to board and to take appropriate measures, subject to any conditions the flag State may impose; or (2) conduct the boarding and search with its own law enforcement or other officials; or (3) conduct the boarding and search together with the requesting party, subject to any conditions the flag State may impose; or (4) decline to authorize a boarding and search.[34] In addition, at any time, a flag State can notify the Secretary-General that, with respect to ships flying its flag or displaying its mark of registry, it is granting advance authorization to a requesting State to board and search the ship, its cargo, and persons on board, and to question the persons on board in order to locate and examine documentation of its nationality and determine if an offence under the Convention has been, is being, or is about to be committed, if there is no response from the flag State within four hours of acknowledgement of receipt of a request to confirm nationality.[35] When evidence of illegal conduct is found as the result of any boarding conducted pursuant to Article 8*bis*, the flag State may authorize the requesting party to detain

32. Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, art. 8*bis*(4), Oct. 14, 2005, IMO Doc. LEG/CONF.15/21.

33. *Id.* art. 8*bis*(5)(a)–(b).

34. *Id.* art. 8*bis*(5)(c).

35. *Id.* art. 8*bis*(5)(d)–(e).

the ship, cargo, and persons on board pending receipt of disposition instructions from the flag State.[36] The requesting party shall promptly inform the flag State of the results of a boarding, search, and detention conducted pursuant to Article 8*bis*, and of the discovery of evidence of illegal conduct that is not subject to the Convention.[37] For all boardings pursuant to Article 8*bis*, the flag State has the right to exercise jurisdiction over a detained ship, cargo, or other items and persons on board, including seizure, forfeiture, arrest, and prosecution, or it may, subject to its constitution and laws, consent to the exercise of jurisdiction by another State having jurisdiction.[38]

See § 3.11.2.2.7 for a more detailed discussion of the SUA Convention and the 2005 Protocol.

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

Under Article 41 of the Charter of the UN, the Security Council may authorize the complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication . . . pursuant to that specific authority. In a more general authority of Chapter VII, the UN Security Council may authorize member States to use naval forces to intercept vessels and possibly board, inspect, search, and seize them or their cargoes as necessary to maintain or restore international peace and security. Article 41 measures do not involve the use of military force. In determining exactly what measures the Security Council has authorized, the specific chapter and article of the Charter of the UN cited by the Security Council and the operative language in the resolution must be analyzed.

36. *Id.* art. 8*bis*(6).
37. *Id.* art. 8*bis*(6).
38. *Id.* art. 8*bis*(8).

Commentary

In cases in which measures adopted under Article 41 of the UN Charter would be inadequate or have failed to achieve their desired outcome, the Security Council may utilize Article 42, which authorizes the Security Council to adopt measures that may be enforced through coercion or military action. This activity is also called "enforcement action."[39]

Article 42 provides:

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

The Security Council has authorized maritime enforcement action under Article 42 in five situations: Rhodesia (1965), Iraq (1990), the Federal Republic of Yugoslavia (1991–93), Haiti (1993), and Libya (2011). These five missions used ships and aircraft from the armed forces of member States to interdict shipping traffic, which was judged by the Security Council to be a threat to international peace and security.

Rhodesia (1965). In Resolution 217 of November 20, 1965, the Security Council stated:

> [T]he situation resulting from the proclamation of independence by the illegal authorities in Southern Rhodesia is extremely grave, . . . the Government of the United Kingdom . . . should put an end to it and . . . its continuance in time constitutes a threat to international peace and security;

39. JAMES KRASKA & RAUL PEDROZO, INTERNATIONAL MARITIME SECURITY LAW 904 (2013).

> . . . .
>
> [The Security Council] [c]alls upon all States to refrain from any action which would assist and encourage the illegal régime and, in particular, to desist from providing it with arms, equipment and military material, and to do their utmost in order to break all economic relations with Southern Rhodesia, including an embargo on oil and petroleum products . . . .[40]

The Security Council adopted two more Resolutions: Resolution 221 of April 9, 1966, and Resolution 232 of December 16, 1966. Resolution 221 expressly authorized the use of force by the United Kingdom to prevent "the arrival at Beira of vessels reasonably believed to be carrying oil destined for Southern Rhodesia, and empower[ed] the United Kingdom to arrest and detain the tanker known as the *Joanna V* upon her departure from Beira in the event her oil cargo is discharged there."[41] The *Joanna V* got underway from Beira without first discharging her oil, so the condition precedent was not triggered. Another ship, however, the tanker *Manuela*, was intercepted by HMS *Berwick* on the high seas and redirected from making port at Beira. The vessel was boarded and the master of the ship diverted to Lourenço Marques, Mozambique.[42]

Iraq (1990). On August 2, 1990, Iraqi military forces invaded Kuwait, quickly subduing its smaller neighbor. The Security Council immediately adopted Resolution 660, which required withdrawal of all Iraqi military forces from Kuwait.[43]

On August 6, 1990, the Security Council adopted Resolution 661, which states:

> The Security Council,

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40. S.C. Res. 217 (Nov. 20, 1965).

41. S.C. Res. 221 (Apr. 9, 1965).

42. Letter dated Apr. 11, 1966 from the Permanent Representative of the United Kingdom addressed to the Secretary General, U.N. Doc. S/7249 (Mar 11, 1966).

43. S.C. Res. 660 (Aug. 2, 1990).

> . . . .
>
> Acting under Chapter VII of the Charter,
>
> . . . .
>
> 3. Decides that all States shall prevent:
>
> (a) The import into their territories of all commodities and products originating in Iraq or Kuwait exported therefrom after the date of the present resolution;
>
> (b) Any activities by their nationals or in their territories, which would promote or are calculated to promote the export or trans-shipment of any commodities or products from Iraq or Kuwait . . . ;
>
> (c) The sale or supply by their nationals or from their territories or using their flag vessels of any commodities or products, including weapons or any other military equipment . . . not including supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs, to any person or body in Iraq or Kuwait . . . .[44]

Iraq's noncompliance with Resolutions 660 and 661 led to the adoption of Security Council Resolution 665 on August 25, 1990. Resolution 665 imposed a traditional maritime blockade, a belligerent act in the law of naval warfare:

> The Security Council
>
> . . . .
>
> 1. Calls upon those Member States co-operating with the Government of Kuwait which are deploying maritime forces to the area to use such measures commensurate to the specific circumstances as may be necessary under the authority

44. S.C. Res. 661 (Aug. 6, 1990).

> of the Security Council to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions related to such shipping laid down in Resolution 661 (1990) . . . .[45]

Yugoslavia (1991–93). On September 25, 1991, acting under the authority of Chapter VII of the UN Charter, the Security Council adopted Resolution 713, which decided

> that all States shall, for the purposes of establishing peace and stability in Yugoslavia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia until the Security Council decides otherwise following consultation between the Secretary-General and the Government of Yugoslavia . . . .[46]

On April 17, 1993, the Security Council adopted Resolution 820, which states:

> The Security Council,
>
> . . . .
>
> Acting under Chapter VII of the Charter of the United Nations,
>
> . . . .
>
> 28. Decides to prohibit all commercial maritime traffic from entering the territorial sea of the Federal Republic of Yugoslavia (Serbia and Montenegro) except when authorized on a case-by-case basis by the Committee established by resolution 724 (1991) or in case of *force majeure*;

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45. S.C. Res. 665 (Aug. 25, 1990). *See* Special Warning No. 80 (Aug. 17, 1990), *reprinted in* U.S. NAVAL WAR COLLEGE, MARITIME OPERATIONAL ZONES app. C at C-34 (2013).

46. S.C. Res. 713 (Sept. 25, 1991).

> 29. Reaffirms the authority of States . . . to enforce the present resolution and its other relevant resolutions, including in the territorial sea of the Federal Republic of Yugoslavia (Serbia and Montenegro) . . . .[47]

Haiti (1993). After a December 1990 coup in Haiti that ousted Jean-Bertrand Aristide from power, and resolutions by the Organization of American States and the UN General Assembly, the Security Council adopted a resolution imposing an embargo on the island country.

Acting under Chapter VII of the UN Charter, the Security Council imposed an embargo starting at 00.01 EST on June 23, 1993. In Resolution 841, adopted on June 16, 1993, the Security Council decided

> that all States shall prevent the sale, or supply, by their nationals or from their territories or using their flag vessels, or aircraft, of petroleum or petroleum products or arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, [and] police equipment . . . to any person or body in Haiti or to any person or body for the purpose of any business carried on in or operated from Haiti . . . .
>
> [and] to prohibit any and all traffic from entering the territory or territorial sea of Haiti carrying petroleum or petroleum products, or arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, police equipment and spare parts . . . .[48]

On October 16, 1993, after further political turmoil, the Security Council adopted Resolution 875, which cited the authority of Chapters VII and VIII of the UN Charter. The resolution called on member States to strictly implement the oil and arms embargo against Haiti, to include stopping and inspecting all ships travelling towards Haiti "in order to inspect and verify their cargoes and destinations."[49]

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47. S.C. Res. 820 (Apr. 17, 1993).
48. S.C. Res. 841 (June 16, 1993).
49. S.C. Res. 875 (Oct. 16, 1993).

On October 15, 1994, President Aristide returned to Haiti and reassumed office. The Security Council lifted the remaining sanctions against Haiti on that day.[50] The U.S. government lifted sanctions and financial restrictions on the same day.[51]

Libya (2011). In February 2011, peaceful demonstrations in Benghazi by groups opposed to the continued rule of Colonel Muammar Qadhafi were violently repressed by government security forces. On February 26, 2011, the Security Council adopted Resolution 1970, which acted under Article 41 to impose an arms embargo on the Qadhafi regime.

Operative paragraph 9 of the Resolution states:

> Member States shall immediately take the necessary measures to prevent the direct or indirect supply, sale or transfer to the Libyan Arab Jamahiriya, from or through their territories or by their nationals, or using their flag vessels or aircraft, of arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned, and technical assistance, training, financial or other assistance, related to military activities or the provision, maintenance or use of any arms and related materiel, including the provision of armed mercenary personnel . . . .[52]

On September 16, 2011, with the regime weakened and collapsed, the Security Council ultimately adopted Resolution 2009, which lifted the arms embargo against Libya. Over the course of the operation, over 3,100 vessels were hailed. Of these ships encountered by coalition forces, approximately 300 were boarded and 11 were "denied transit to or from Libya because the vessel or its cargo presented a risk to the civilian population."[53]

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50. S.C. Res. 948 (Oct. 15, 1994).

51. *See* Exec. Order No. 12,932, 59 Fed. Reg. 52403 (Oct. 18, 1994).

52. S.C. Res. 1970, ¶ 9 (Feb. 26, 2011).

53. North Atlantic Treaty Organization, Fact Sheet: Operation Unified Protector Final Mission Statistics (Nov. 2, 2011). *See also* ROB MCLAUGHLIN, UNITED NATIONS NAVAL

4.4.4.1.2 Flag-State Consent

Ships are subject to the exclusive jurisdiction of their flag State (see 3.11.2). The flag State has the right to authorize officials of another State to board vessels flying its flag. Similar to agreements in the law enforcement realm (see 3.11.2.2.7), States may negotiate bilateral or multilateral agreements which provide advance consent to board another State's vessels for other than law enforcement purposes. Commanders, via the chain of command, may seek consent to board a vessel from a particular State. Care should be taken to identify and comply with the limits of the flag-State's consent. Consent to board a vessel does not automatically extend to consent to inspect or search the vessel or to seize persons or cargo. The master may not alter the scope of the consent granted by the flag State. Commanders need to be aware of the exact nature and extent of flag-State consent prior to conducting interceptions at sea.

4.4.4.1.3 Master's Consent

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

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

PEACE OPERATIONS IN THE TERRITORIAL SEA (2009); KRASKA & PEDROZO, *supra* note 39, ch. 24 (Security Council Maritime Enforcement) at 903–22 (2013).

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

4.4.4.1.4 Right of Approach and Visit

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

1. Engaged in piracy (see 3.5)

2. Engaged in the slave trade (see 3.6)

3. Engaged in unauthorized broadcasting, and the flag State of the warship has jurisdiction (see 3.7 and UNCLOS, Article 109(3))

4. Without nationality (see 3.11.2.3 and 3.11.2.4)

5. Though flying a foreign flag, or refusing to show its flag, is, in reality, of the same nationality as the warship.

There are other legal bases distinct from customary international law (reflected in UNCLOS) that provide authority to board a foreign-flagged vessel (e.g., self-defense, bilateral international agreement, UN Security Council Resolution, etc.). See 3.4 for additional information on the right to query any ship. See OPNAVINST 3120.32D, Change 1, and COMDTINST M16247.1H for further guidance. For the belligerent right of visit and search, see 7.6.1.

Commentary

See the commentary accompanying § 3.4 (Right of Approach and Visit) and see the provisions relating to the Visit and Search, Boarding and Salvage, and Prize Crew Bill in the SORM.[54]

4.4.4.1.5 Vessels without Nationality

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

Commentary

Consistent with Article 110 of UNCLOS and with customary international law, a vessel may be boarded where reasonable grounds exist to suspect that it may be without nationality. However, there is no positive language in UNCLOS or in customary international law regarding unregistered or undocumented vessels being subject to the jurisdiction of any and all States. While Article 92 of UNCLOS affirmatively states that ships must have nationality, and can sail under only one flag, it lacks prescriptive language as to which countries—if any—may subject such vessels to their jurisdiction. Only in Article 105 (piracy) and Article 109 (unauthorized broadcasting) do we find a grant of enforcement authority to all States. That said, U.S. appellate rulings and criminal statutes, treaty provisions, foreign judicial opinions, and legal commentators recognize the ability to assert criminal jurisdiction over illicit activities aboard stateless vessels.

54. OPNAVINST 3120.32D, Standard Organization and Regulations of the U.S. Navy (SORM), encl. 1 ¶ 6.4.21 (Ch. 1, May 15, 2017).

The Maritime Drug Law Enforcement Act (MDLEA) prohibits drug trafficking "[w]hile on board a covered vessel."[55] The act defines a "covered vessel" to include a "vessel subject to the jurisdiction of the United States,"[56] such as a "vessel without nationality" and a "vessel assimilated to a vessel without nationality."[57] A "vessel without nationality," in turn, includes "a vessel aboard which the master or individual in charge makes a claim of registry and for which the claimed nation of registry does not affirmatively and unequivocally assert that the vessel is of its nationality."[58] Further, a "vessel without nationality" includes "a vessel aboard which the master or individual in charge fails, on request of an officer of the United States authorized to enforce applicable provisions of United States law, to make a claim of nationality or registry for that vessel."[59] A "claim of nationality or registry" can be accomplished by possession of documents aboard the vessel evidencing nationality, flying the flag or ensign of the claimed nation, or verbally.[60] A vessel assimilated to a vessel without nationality pursuant to Article 6(2) of the High Seas Convention treats a vessel that sails under the flags of two or more countries as a ship without nationality.

On December 23, 2022, the National Defense Authorization Act amended the "vessel without nationality" provision in 46 U.S.C. § 70502(d)(1) to include, in addition to the provisions in items (A)–(C) discussed above, the following:

> (D) a vessel aboard which no individual, on request of an officer of the United States authorized to enforce applicable provisions of United States law, claims to be the master or is identified as the individual in charge, and that has no other claim of nationality or registry under paragraph (1) or (2) of subsection (e).[61]

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55. 46 U.S.C. § 70503(a)(1).
56. 46 U.S.C. § 70503(e).
57. 46 U.S.C. § 70502(c)(1)(A), (B).
58. 46 U.S.C. § 70502(d)(1)(C).
59. 46 U.S.C. § 70502(d)(1)(B).
60. 46 U.S.C. § 70502(e).
61. James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. 117-263, 136 Stat. 2395.

This amendment importantly clarified that where a master/person-in-charge declines to make a claim upon request, has no documents evidencing nationality, and fails to fly a flag, the vessel is, as a matter of statute, a "vessel without nationality." The vast majority of MDLEA cases prosecuted in U.S. district courts involve a defendant's vessel subject to U.S. jurisdiction because it is "without nationality" under § 70502(d)(1).

U.S. judicial rulings have consistently affirmed prosecutions and convictions under MDLEA and the Drug Trafficking Vessel Interdiction Act (DTVIA) for vessels without nationality, unflagged vessels, and the subcategory of stateless vessels. In *United States v. Marino-Garcia*, the Eleventh Circuit Court of Appeals held that "international law permits any nation to subject stateless vessels on the high seas to its jurisdiction."[62] The Ninth Circuit, in *United States v. Caicedo*, held that "[b]ecause stateless vessels do not fall within the veil of another sovereign's territorial protection, all nations can treat them as their own territory and subject them to their laws."[63] The Court reasoned that "there is nothing arbitrary or fundamentally unfair" about "[t]he radically different treatment afforded to stateless vessels as a matter of international law."[64] Another U.S. appellate ruling found that to hold otherwise would allow such vessels to become "floating sanctuaries from authority."[65]

The U.S. position is consistent with rulings that include the Judicial Committee of the United Kingdom's Privy Council, which concluded that

> the freedom of the open sea . . . is a freedom of ships which fly and are entitled to fly the flag of a State which is within the comity of nations. The [vessel in question] did not satisfy these elementary conditions. No question of comity nor of

62. United States v. Marino-Garcia, 679 F.2d 1373, 1383 (11th Cir. 1982).
63. United States v. Caicedo, 47 F.3d 370, 373 (9th Cir. 1995).
64. *Id.* at 372.
65. United States v. Juda, 46 F.3d 961, 967 (1995).

> any breach of international law can arise, if there is no State under whose flag the vessel sails.[66]

McDougal and Burke concluded that "[s]o great a premium is placed upon the certain identification of vessels for purposes of maintaining minimum order upon the high seas . . . that extraordinary deprivational measures are permitted with respect to stateless ships."[67]

The 2003 Treaty of San José, to which the United States is a party, is instructive on the ability to subject stateless vessels to their jurisdiction. Article 23 provides:

> Each Party shall take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with Article 3, paragraph 1, of the 1988 [Vienna Drug] Convention, when:
>
> . . . .
>
> c. the offence is committed on board a vessel without nationality or assimilated to a ship without nationality under international law, which is located seaward of the territorial sea of any State . . . .[68]

4.4.4.1.6 Condition of Port Entry

Under international law, a coastal State may impose any condition on ships entering its ports or internal waters, including a requirement that all ships (other than sovereign-immune vessels) entering port will be subject to boarding and inspection. A vessel intending to enter a State's port or internal waters can be boarded and searched without flag State consent, provided the port State has imposed such a measure as a condition of port entry on a

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66. Molvan v. Attorney-General, Palestine [1948] AC 351, *citing* 1 LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 546 (Hersch Lauterpacht ed., 6th ed. 1940).

67. MYRES S. MCDOUGAL & WILLIAM T. BURKE, THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA 1084 (1962).

68. Agreement Concerning Co-operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area, Apr. 10, 2003.

nondiscriminatory basis. Such boardings and inspections need not wait until a ship enters port—they can occur at any location, preferably when a ship enters the territorial sea.

Commentary

See, for example, 33 C.F.R. Part 160, Subpart C (Notification of Arrival, Hazardous Conditions, and Certain Dangerous Cargoes).

4.4.4.1.7 Belligerent Rights under the Law of Armed Conflict

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

4.4.4.1.8 Inherent Right of Self-defense

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

4.4.5 Proliferation Security Initiative

The Proliferation Security Initiative (PSI) is a global effort to stop shipments of WMD, their delivery systems, and related materials to or from States and non-State actors of proliferation concern. The PSI is not a treaty or international organization. It is an undertaking supported by participating States committed to a set of principles to halt proliferation of WMD. These principles have been memorialized as a Statement of Interdiction Principles. The Statement of Interdiction Principles urges States to bolster their domestic nonproliferation laws, encourages participants to execute bilateral nonproliferation boarding agreements, and stresses the importance of routine, joint, and multinational nonproliferation training. As of September 2021, the United States has 11 bilateral PSI ship boarding agreements.

Since PSI is not a formal organization or legally binding treaty, it is best understood as ad hoc partnerships that establish the basis for cooperation on specific activities when the need arises. It does not create formal obligations

for participating States, but does represent a political commitment to establish best practices to stop proliferation-related shipments. The PSI seeks to use existing national and international legal authorities for such interdictions. Such legal authority will be found in a bilateral agreement. In the event that no bilateral agreement exists, the PSI Statement of Interdiction Principles urges PSI participants to seriously consider providing consent to the boarding and searching of its flag vessels by other States and to the seizure of such WMD-related cargoes as may be identified.

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

Proliferation Security Initiative activities include:

1. Undertaking a review and providing information on current national legal authorities to conduct interdictions at sea, in the air, or on land, and indicating a willingness to strengthen authorities, where appropriate

2. Identifying specific national assets that might contribute to PSI efforts (e.g., information sharing, military, and/or law enforcement resources)

3. Providing points of contact for PSI assistance requests and other operational activities, and establishing appropriate internal government processes to coordinate PSI response efforts

4. Willing to actively participate in PSI interdiction training exercises and operations as opportunities arise

5. Willing to conclude relevant agreements (e.g., boarding arrangements) or otherwise to establish a concrete basis for cooperation with PSI efforts.

Commentary

The Proliferation Security Initiative (PSI) is a voluntary community of States to cooperate and share information to more effectively interdict WMD through existing treaties and collaborative frameworks and regimes, and to strengthen practical partnerships to counter the proliferation of WMD. PSI is not a treaty organization and participating States are not members. The PSI promotes cooperation by the States that are best positioned to act based on their national capacities, using a wide array of military, diplomatic, and law enforcement tools. The PSI builds the capacity of States, including through exercises and workshops and by sharing tools and resources to build interdiction capabilities. States also work to strengthen interdiction authorities on a national or international basis. For example, eleven States have signed bilateral PSI ship boarding agreements with the United States that facilitate securing their consent to inspect vessels suspected of carrying WMD-related cargoes. Participating in the PSI is a way for States to comply with their obligations under UN Security Council Resolutions 1718, 1737, 1747, 1803, and 1540.[69]

The eleven States that launched the PSI are Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, the United Kingdom, and the United States.[70]

The PSI interdiction principles are intended "to establish a more coordinated and effective basis through which to impede and stop shipments of WMD, delivery systems, and related materials flowing to and from States and non-State actors of proliferation concern, consistent with national legal authorities and relevant international law and frameworks, including the United Nations Security Council."[71] PSI participants "call on all States concerned with this threat to international peace and security" to similarly commit to the following principles:

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69. U.S. Department of State, Fact Sheet: Proliferation Security Initiative Frequently Asked Questions (FAQ) (May 22, 2008).

70. White House, Office of the Press Secretary, Statement of Interdiction Principles (Sept. 4, 2003).

71. *Id.*

1. Undertake effective measures, either alone or in concert with other states, for interdicting the transfer or transport of WMD, their delivery systems, and related materials to and from states and non-state actors of proliferation concern. "States or non-state actors of proliferation concern" generally refers to those countries or entities that the PSI participants involved establish should be subject to interdiction activities because they are engaged in proliferation through: (1) efforts to develop or acquire chemical, biological, or nuclear weapons and associated delivery systems; or (2) transfers (either selling, receiving, or facilitating) of WMD, their delivery systems, or related materials.

2. Adopt streamlined procedures for rapid exchange of relevant information concerning suspected proliferation activity, protecting the confidential character of classified information provided by other states as part of this initiative, dedicate appropriate resources and efforts to interdiction operations and capabilities, and maximize coordination among participants in interdiction efforts.

3. Review and work to strengthen their relevant national legal authorities where necessary to accomplish these objectives, and work to strengthen when necessary relevant international law and frameworks in appropriate ways to support these commitments.

4. Take specific actions in support of interdiction efforts regarding cargoes of WMD, their delivery systems, or related materials, to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks, to include:

a. Not to transport or assist in the transport of any such cargoes to or from states or non-state actors of proliferation concern, and not to allow any persons subject to their jurisdiction to do so.

b. At their own initiative, or at the request and good cause shown by another state, to take action to board and search any vessel flying their flag in their internal waters or territorial seas, or areas beyond the territorial seas of any other state, that is reasonably suspected of transporting such cargoes to or from states or non-state actors of proliferation concern, and to seize such cargoes that are identified.

c. To seriously consider providing consent under the appropriate circumstances to the boarding and searching of its own flag vessels by other states, and to the seizure of such WMD-related cargoes in such vessels that may be identified by such states.

d. To take appropriate actions to (1) stop and/or search in their internal waters, territorial seas, or contiguous zones (when declared) vessels that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and to seize such cargoes that are identified; and (2) to enforce conditions on vessels entering or leaving their ports, internal waters or territorial seas that are reasonably suspected of carrying such cargoes, such as requiring that such vessels be subject to boarding, search, and seizure of such cargoes prior to entry.

e. At their own initiative or upon the request and good cause shown by another state, to (a) require aircraft that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and that are transiting their airspace to land for inspection and seize any such cargoes that are identified; and/or (b) deny aircraft reasonably suspected of carrying such cargoes transit rights through their airspace in advance of such flights.

f. If their ports, airfields, or other facilities are used as transshipment points for shipment of such cargoes to or

> from states or non-state actors of proliferation concern, to inspect vessels, aircraft, or other modes of transport reasonably suspected of carrying such cargoes, and to seize such cargoes that are identified.[72]

Ship boarding agreements are tangible examples of nonproliferation cooperation, providing authority on a bilateral basis to board sea vessels suspected of carrying illicit shipments of weapons of mass destruction, their delivery systems, or related materials. These agreements will facilitate bilateral cooperation to prevent such shipments by establishing procedures to board and search such vessels in international waters. Under the agreements, if a vessel registered in the United States or the partner country is suspected of carrying proliferation-related cargo, either one of the parties to this agreement can request of the other to confirm the nationality of the ship in question and, if needed, to authorize the boarding, search, and possible detention of the vessel and its cargo. These agreements are important steps in further operationalizing the PSI and strengthening the mechanisms that we have at our disposal to interdict suspect weapons-of-mass-destruction-related cargoes. They are modeled after similar arrangements that exist in the counter-narcotics arena.

Eleven States have signed PSI ship boarding agreements with the United States: in 2004, Panama, the Marshall Islands, and Liberia; in 2005, Croatia, Cyprus, and Belize; in 2007, Malta and Mongolia; in 2008, the Bahamas; and, in 2010, Antigua and Barbuda and Saint Vincent and the Grenadines. Such agreements typically allow two hours to deny U.S. personnel the right to board a ship.

The PSI ship boarding agreements are as follows:

1. **Antigua and Barbuda**. Agreement between the Government of the United States of America and the Government of the Antigua and Barbuda Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, April 26, 2010.

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72. *Id.*

2. **Bahamas**. Agreement between the Government of the United States of America and the Government of the Commonwealth of the Bahamas Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, August 11, 2008.[73]

3. **Belize**. Agreement between the Government of the United States of America and the Government of Belize Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, and note, August 4, 2005.

4. **Croatia**. Agreement between the Government of the United States of America and the Government of Croatia Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, June 1, 2005.

5. **Cyprus**. Agreement between the Government of the United States of America and the Government of Cyprus Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, July 25, 2005.

6. **Liberia**. Agreement between the Government of the United States of America and the Government of the Republic of Liberia Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, February 11, 2004.[74]

7. **Malta**. Agreement between the Government of the United States of America and the Government of the Republic of the Malta Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, March 15, 2007.[75]

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73. 2008 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1003.
74. 2004 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1078.
75. 2007 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1071.

8. **Marshall Islands**. Agreement between the Government of the United States of America and the Government of the Republic of the Marshall Islands Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, August 13, 2004.

9. **Mongolia**. Agreement between the Government of the United States of America and the Government of Mongolia Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, October 23, 2007.[76]

10. **Panama**. Amendment to the Supplementary Arrangement between the Government of the United States of America and the Government of the Republic of Panama to the Arrangement between the Government of the United States of America and the Government of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice, May 12, 2004.

11. **Saint Vincent and the Grenadines**. Agreement between the Government of the United States of America and the Government of Saint Vincent and the Grenadines Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, May 11, 2010.

4.4.6 Antiterrorism/Force Protection

When naval forces operate in the maritime environment during peacetime, a constant underlying mission is force protection, both in port and at sea. Commanders possess an inherent right and obligation to defend their units and other U.S. units in the vicinity from a hostile act or demonstrated hostile intent. U.S. naval doctrine provides tactics, techniques, and procedures to deter, detect, defend against, and mitigate terrorist attacks

76. *Id.*

(see NTTP 3-07.2.1). Antiterrorism/force protection actions are preventive measures designed to mitigate hostile actions against U.S. forces by terrorists or another State's military forces. Force protection does not include offensive operations or protection against accidents, weather, or disease.

4.4.7 Maritime Warning Zones

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

Commentary

The use of defensive warning zones in peacetime is intended to provide commanders at all levels sufficient time and separation from potential threats in order to assess hostile intent. Thus, warning

zones are established as a self-defense measure to advise the international community of the increased defensive posture being taken by U.S. forces while providing commanders time and distance in their determination of prospective threats. These warnings, focused on close-in threats to U.S. forces, notify the international community that U.S. forces are operating at a heightened defensive posture in a specified designated area. Vessels and aircraft are requested to identify themselves and their intentions prior to approaching within a certain distance of U.S. forces and are notified that failure to do so places them at risk of being misidentified as a threat and subject to defensive measures.

For example, HYDROLANT 2420/83 states:

HYDROLANT 2420/83 (54, 56)
December 27, 1983

P 271845Z DEC 83
FM DMAHTC WASHINGTON DC//NVS//
TO AIG FOUR FIVE ZERO ONE
AIG FIVE SEVEN SEVEN FOUR
SIG FOUR FIVE FIVE SEVEN
RUHJWUA/COMSCSEA SUBIC BAY RP
ZEN/COORDINATOR NAVAREA III INSTITUTO
HYDROGRAFICA DE LA MARINA CADIZ SPAIN
TELEX 76147 MEDCO
INFO RHDLCNE/CINCUSNAVEUR LONDON UK
RUDHAAD/DMA WASHINGTON DC

BT

UNCLAS

HYDROLANT 2420/83 (54, 56). MEDITERRANEAN SEA, HAZARDOUS OPERATIONS.

1. HAZARDOUS OPERATIONS WILL BE CONDUCTED BY U.S. NAVAL FORCES IN THE EASTERN MEDITERRANEAN 30 DEC 83 TO 31 JAN 84 IN

AREA BOUND BY 34- 32N 035-56E, 34-30N 034-30E, 33-20N 033-00E, 33-20N 035-15E.

2. ALL SURFACE AND SUBSURFACE CRAFT SHOULD ATTEMPT TO AVOID APPROACHING CLOSER THAN 5 NAUTICAL MILES TO U.S. NAVAL FORCES WITHIN THE BOUNDED AREA DUE TO POTENTIALLY HAZARDOUS OPERATIONS BEING CONDUCTED AND HEIGHTENED SECURITY AWARENESS RESULTING FROM TERRORIST THREATS. ON THEIR PART, U.S. NAVAL FORCES WILL ALSO ATTEMPT TO AVOID APPROACHING OTHER SURFACE AND SUBSURFACE CRAFT. IT IS REQUESTED THAT RADIO CONTACT WITH U.S. NAVAL FORCES BE MAINTAINED ON VHF CHANNEL 16, INTERNATIONAL SAFETY AND CALLING CHANNEL, WHEN WITHIN 5 NAUTICAL MILES OF U.S. NAVAL VESSELS.

3. THIS NOTICE IS PUBLISHED SOLELY TO ADVISE THAT HAZARDOUS OPERATIONS ARE BEING CONDUCTED ON AN UNSCHEDULED BASIS; IT DOES NOT AFFECT THE FREEDOM OF NAVIGATION OF ANY INDIVIDUAL OR STATE. BT

The 1984 NOTAM for the Persian Gulf, the Strait of Hormuz, the Gulf of Oman, and the North Arabian Sea states:

NOTAM for Persian Gulf, Strait of Hormuz, Gulf of Oman, and North Arabian Sea
January 20, 1984

P202222Z JAN 84
FM USCINCCENT MACDILL AFB FL//CCJ3/
TO AFCNF CARSWELL AFB TX//
INFO JCS WASH DC//
CNO WASH DC//
CSAF WASH DC//

CMC WASH DC//
USCINCPAC HONOLULU HI//
USCINCLANT NORFOLK VA//
USCINCEUR VAHINGEN GE//
USCINCSO QUARRY HEIGHTS PN//
CINCPACFLT PEARL HARBOR HI//
COMUSNAVCENT PEARL HARBOR HI//
COMIDEASTFOR//
COMSEVENTH FLT//
CTF SEVEN ZERO//
CMDT COGARD WASH DC//

UNCLAS

SUBJ: NOTAM FOR PERSIAN GULF, STRAIT OF HORMUZ, GULF OF OMAN, AND NORTH ARABIAN SEA.

1. IN RESPONSE TO JCS TASKING, REQUEST THE FOLLOWING NOTAM BE PUBLISHED WORLDWIDE IN THE ICAO ALERTING SYSTEM:

QUOTE A. US NAVAL FORCES OPERATING IN INTERNATIONAL WATERS WITHIN THE PERSIAN GULF, STRAIT OF HORMUZ AND THE GULF OF OMAN ARE TAKING ADDITIONAL DEFENSIVE PRECAUTIONS AGAINST TERRORIST THREATS. AIRCRAFT AT ALTITUDES LESS THAN 2000 FT AGL WHICH ARE NOT CLEARED FOR APPROACH/DEPARTURE TO OR FROM A REGIONAL AIRPORT ARE REQUESTED TO AVOID APPROACHING CLOSER THAN FIVE NM TO US NAVAL FORCES. IT IS ALSO REQUESTED THAT AIRCRAFT APPROACHING WITHIN FIVE NM ESTABLISH AND MAINTAIN RADIO CONTACT WITH US NAVAL FORCES ON 121.5 MZ VHF OR 243.0 MZ UHF. AIRCRAFT WHICH APPROACH WITHIN FIVE NM AT ALTITUDES LESS THAN 2000 FT AGL

WHOSE INTENTIONS ARE UNCLEAR TO US NAVAL FORCES MAY BE HELD AT RISK BY US DEFENSIVE MEASURES.

B. THIS NOTICE IS PUBLISHED SOLELY TO ADVISE THAT HAZARDOUS OPERATIONS ARE BEING CONDUCTED ON AN UNSCHEDULED BASIS; IT DOES NOT AFFECT THE FREEDOM OF NAVIGATION OF ANY INDIVIDUAL OR STATE.

UNQUOTE

2. THIS IS A JOINT USCINCPAC AND USCINCCENT NOTAM AFFECTING OPERATIONS WITHIN THEIR RESPECTIVE AREA OF RESPONSIBILITY.

These warning zones specifically do not purport to suspend navigational rights and freedoms within the designated area, but rather are published solely to advise that measures in self-defense will be exercised by U.S. forces and will be implemented in a manner that does not impede the freedom of navigation of any vessel or State. See, for example, HYDROPAC 78/84:

HYDROPAC 78/84 (62)
January 21, 1984

P210100Z JAN 84
FM DMAHTC WASHINGTON DC//NVS//
TO AIG FOUR FIVE FIVE SEVEN
INFO CNO WASHINGTON DC
SECSTATE WASHINGTON DC
SECDEF WASHINGTON DC
JCS WASHINGTON DC
CSA WASHINGTON DC
CSAF WASHINGTON DC
CMC WASHINGTON DC
USCINCPAC HONOLULU HI
USCINCCENT
CINCPACFLT

MACDILL AFB FL
PEARL HARBOR HI
COMUSNAVCENT
COMIDEASTFOR
PEARL HARBOR HI

UNCLAS

HYDROPAC 78/84 (62) PERSIAN GULF, STRAIT OF HORMUZ AND GULF OF OMAN.

A. US NAVAL FORCES OPERATING IN INTERNATIONAL WATERS WITHIN THE PERSIAN GULF, STRAIT OF HORMUZ AND THE GULF OF OMAN AND THE ARABIAN SEA NORTH OF TWENTY DEGREES NORTH ARE TAKING ADDITIONAL DEFENSIVE PRECAUTIONS AGAINST TERRORIST THREATS. ALL SURFACE AND SUBSURFACE SHIPS AND CRAFT ARE REQUESTED TO AVOID CLOSING US FORCES CLOSER THAN FIVE NAUTICAL MILES WITHOUT PREVIOUSLY IDENTIFYING THEMSELVES. US FORCES ESPECIALLY WHEN OPERATING IN CONFINED WATERS, SHALL REMAIN MINDFUL OF NAVIGATIONAL CONSIDERATIONS OF SHIPS AND CRAFT IN THEIR IMMEDIATE VICINITY. IT IS REQUESTED THAT RADIO CONTACT WITH US NAVAL FORCES BE MAINTAINED ON CHANNEL 16, 121.5MZ VHF, OR 243.0 MZ UHF WHEN APPROACHING WITHIN FIVE NAUTICAL MILES OF US NAVAL FORCES. SURFACE AND SUBSURFACE SHIPS AND CRAFT THAT CLOSE US NAVAL FORCES WITHIN FIVE NAUTICAL MILES WITHOUT MAKING PRIOR CONTACT AND/OR WHOSE INTENTIONS ARE UNCLEAR TO SUCH FORCES MAY BE HELD AT RISK BY US DEFENSE MEASURES.

B. THESE MEASURES WILL ALSO APPLY WHEN US FORCES ARE ENGAGED IN TRANSIT PASSAGE

THROUGH THE STRAIT OF HORMUZ OR WHEN IN INNOCENT PASSAGE THROUGH FOREIGN TERRITORIAL WATERS AND WHEN OPERATING IN SUCH WATERS WITH THE APPROVAL OF THE COASTAL STATE.

C. *THIS NOTICE IS PUBLISHED SOLELY TO ADVISE THAT MEASURES IN SELF DEFENSE WILL BE EXERCISED BY US NAVAL FORCES. THE MEASURES WILL BE IMPLEMENTED IN A MANNER THAT DOES NOT IMPEDE THE FREEDOM OF NAVIGATION OF ANY VESSEL OR STATE.* BT

(Emphasis added)

Following the attack by an Iraqi F-1 Mirage on the USS *Stark* (FFG 31) on May 17, 1987, the United States issued revised warnings to vessels and aircraft approaching U.S. forces. The revised warnings eliminated fixed distances and concentrated on establishing a warning zone commensurate with potential threat capabilities. Vessels and aircraft were requested to identify themselves and their intentions as soon as they were detected, stating that failure to do so or to respond to warnings could result in defensive measures. Additionally, the warnings specifically noted that illuminating a U.S. vessel with fire control radar could result in an immediate defensive reaction.

For example, HYDROPAC 870/87 states:

HYDROPAC 870/87 (62)
August 3, 1987

P032215Z AUG 87 PSN 455045G18
FM DMAHTC WASHINGTON DC/MONM//
TO AIG FOUR FIVE FIVE SEVEN
INFO DEPT OF STATE WASHINGTON DC//EB/TRA/MA//

UNCLASS

HYDROPAC 870/87 (62). PERSIAN GULF-STRAIT OF HORMUZ-GULF OF OMAN-NORTH ARABIAN SEA.

1. IN RESPONSE TO THE RECENT ATTACK ON THE USS STARK, AND THE CONTINUING TERRORIST THREAT IN THE REGION, U.S. NAVY VESSELS OPERATING WITHIN THE PERSIAN GULF, STRAIT OF HORMUZ, GULF OF OMAN AND THE ARABIAN SEA, NORTH OF 20 DEGREES NORTH, ARE TAKING ADDITIONAL DEFENSIVE PRECAUTIONS. IT IS REQUESTED THAT RADIO CONTACT BE ESTABLISHED ON VHF CHANNEL 16 (156.8 MHZ, 121:5 MHZ, OR UHF 243.0 MHZ WHEN APPROACHING U.S. NAVAL FORCES. UNIDENTIFIED SURFACE OR SUBSURFACE SHIPS OR CRAFT WHOSE INTENTIONS ARE UNCLEAR OR WHO ARE APPROACHING U.S. NAVAL VESSELS MAY BE REQUESTED TO IDENTIFY THEMSELVES AND STATE THEIR INTENTIONS AS SOON AS THEY ARE DETECTED. IN ORDER TO AVOID INADVERTENT CONFRONTATION, SHIPS OR CRAFT, INCLUDING MILITARY VESSELS, MAY BE REQUESTED TO CHANGE COURSE TO REMAIN WELL CLEAR OF U.S. NAVY VESSELS. FAILURE TO RESPOND TO REQUESTS FOR IDENTIFICATION AND INTENTIONS, OR TO WARNINGS, OR A REQUEST TO REMAIN CLEAR, AND OPERATING IN A THREATENING MANNER COULD PLACE THE SHIP OR CRAFT AT RISK BY U.S. DEFENSIVE MEASURES. ILLUMINATION OF A U.S. NAVAL VESSEL WITH A WEAPONS FIRE CONTROL RADAR WILL BE VIEWED WITH SUSPICION AND COULD RESULT IN IMMEDIATE U.S. OFFENSIVE REACTION. U.S. FORCES, ESPECIALLY WHEN OPERATING IN CONFINED WATERS, WILL REMAIN MINDFUL OF NAVIGATION CONSIDERATIONS OF SHIPS AND CRAFT IN THEIR IMMEDIATE VICINITY.

> 2. THIS NOTICE IS PUBLISHED SOLELY TO ADVISE THAT MEASURES IN SELF DEFENSE ARE BEING EXERCISED BY U.S. NAVAL FORCES IN THIS REGION. THE MEASURES WILL BE IMPLEMENTED IN A MANNER THAT DOES NOT UNDULY INTERFERE WITH FREEDOM OF NAVIGATION AND OVERFLIGHT.
>
> 3. CANCEL HYDROPAC 1/87. BT

Post-*Stark* warning zones were repeatedly established over the years wherever U.S. maritime forces were operating in a heightened defensive posture or within certain areas of international waters. After the terrorist attacks on September 11, 2001, the United States issued a special broadcast warning, notifying the international community that U.S. forces worldwide were operating at a heightened state of readiness in response to attacks on the United States and during Operation Enduring Freedom in the Middle East.

The U.S. Special Broadcast Warning to Mariners 162045Z NOV 2001 states:

> **United States Special Broadcast Warning to Mariners**
> **November 16, 2001**
>
> 16 November 2001
> Special Warning No. 120
> Worldwide
>
> 1. DUE TO RECENT EVENTS IN THE MIDDLE EAST AND THE AMERICAN HOMELAND, U.S. FORCES WORLDWIDE ARE OPERATING AT A HEIGHTENED STATE OF READINESS AND TAKING ADDITIONAL DEFENSIVE PRECAUTIONS AGAINST TERRORIST AND OTHER POTENTIAL THREATS. CONSEQUENTLY, ALL AIRCRAFT, SURFACE VESSELS, AND SUBSURFACE VESSELS APPROACHING U.S. FORCES ARE REQUESTED TO MAINTAIN RADIO CONTACT WITH U.S. FORCES

ON BRIDGE-TO-BRIDGE CHANNEL 16, INTERNATIONAL AIR DISTRESS (121.5 MHZ VHF) OR MILAIR DISTRESS (243.0 MHZ UHF).

2. U.S. FORCES WILL EXERCISE APPROPRIATE MEASURES IN SELFDEFENSE IF WARRANTED BY THE CIRCUMSTANCES. AIRCRAFT, SURFACE VESSELS, AND SUBSURFACE VESSELS APPROACHING U.S. FORCES WILL, BY MAKING PRIOR CONTACT AS DESCRIBED ABOVE, HELP MAKE THEIR INTENTIONS CLEAR AND AVOID UNNECESSARY INITIATION OF SUCH DEFENSIVE MEASURES.

3. U.S. FORCES, ESPECIALLY WHEN OPERATING IN CONFINED WATERS, SHALL REMAIN MINDFUL OF NAVIGATIONAL CONSIDERATIONS OF AIRCRAFT, SURFACE VESSELS, AND SUBSURFACE VESSELS IN THEIR IMMEDIATE VICINITY.

4. NOTHING IN THE SPECIAL WARNING IS INTENDED TO IMPEDE OR OTHERWISE INTERFERE WITH THE FREEDOM OF NAVIGATION OR OVERFLIGHT OF ANY VESSEL OR AIRCRAFT, OR TO LIMIT OR EXPAND THE INHERENT SELF-DEFENSE RIGHTS OF U.S. FORCES. THIS SPECIAL WARNING IS PUBLISHED SOLELY TO ADVISE OF THE HEIGHTENED STATE OF READINESS OF U.S. FORCES AND TO REQUEST THAT RADIO CONTACT BE MAINTAINED AS DESCRIBED ABOVE.

(Issued 162045Z NOV 2001)

Similarly, warning zones were issued by U.S. and coalition forces in the Mediterranean Sea prior to the initiation of hostilities in Operation Iraqi Freedom.

HYDROLANT 271/03 (U.S. forces warn of heightened state of readiness defensive measures against terrorist threats) states:

HYDROLANT 271/03
February 5, 2003

HYDROLANT 271/03(GEN). MEDITERRANEAN SEA.
(051340Z FEB 2003)

1. U.S. FORCES IN THE MEDITERRANEAN SEA ARE OPERATING AT A HEIGHTENED STATE OF READINESS AND TAKING ADDITIONAL DEFENSIVE PRECAUTIONS AGAINST TERRORIST AND OTHER POTENTIAL THREATS. ALL AIRCRAFT OR SURFACE VESSELS APPROACHING U.S. FORCES ARE REQUESTED TO MAINTAIN RADIO CONTACT WITH U.S. FORCES ON BRIDGE-TO-BRIDGE CHANNEL 16, INTERNATIONAL AIR DISTRESS (121.5 MHZ VHF) OR MILAIR DISTRESS (243.0 MHZ UHF).

2. U.S. FORCES WILL EXERCISE APPROPRIATE MEASURES IN SELF-DEFENSE IF WARRANTED BY THE CIRCUMSTANCES. AIRCRAFT AND SURFACE VESSELS APPROACHING U.S. FORCES WILL HELP MAKE THEIR INTENTIONS CLEAR AND AVOID UNNECESSARY INITIATION OF SUCH DEFENSIVE MEASURES BY MAKING PRIOR CONTACT AS DESCRIBED ABOVE.

3. NOTHING IN THIS WARNING IS INTENDED TO IMPEDE OR OTHERWISE INTERFERE WITH THE FREEDOM OF NAVIGATION OR OVERFLIGHT OF ANY VESSEL OR AIRCRAFT, OR TO LIMIT OR EXPAND THE INHERENT SELF-DEFENSE RIGHTS OF U.S. FORCES. THIS WARNING IS PUBLISHED SOLELY TO ADVISE OF THE HEIGHTENED STATE OF READINESS OF U.S. FORCES AND TO REQUEST THAT RADIO CONTACT BE MAINTAINED AS DESCRIBED ABOVE.

4. SPECIAL WARNING NUMBER 120 REFERS.

HYDROLANT 509/03 (U.S. forces warn of combat training exercises in international waters off the northern and eastern coasts of Cyprus) states:

HYDROLANT 509/03
March 6, 2003

UNCLAS
061620Z MAR 03

FM NIMA NAVSAFETY BETHESDA MD//
MSGID/GENADMIN/NIMA NAVSAFETY
BETHESDA MD//

RMKS/

HYDROLANT 509/03(54,56). EASTERN MEDITERRANEAN SEA.

1. U.S. FORCES ARE CONDUCTING COMBAT TRAINING EXERCISES IN INTERNATIONAL WATERS OFF THE NORTHERN AND EASTERN COAST OF CYPRUS UNTIL FURTHER NOTICE. COMBAT EXERCISE ACTIVITIES MAY POSE A HAZARD TO NAVIGATION. ALL VESSELS ARE ADVISED TO NAVIGATE WITH EXTREME CAUTION.

2. REQUEST SURFACE VESSELS WITH DESTINATIONS AT PORTS IN SOUTHWESTERN TURKEY, NORTH AND EASTERN CYPRUS OR SYRIA REMAIN CLEAR OF THE FOLLOWING DESIGNATED OPERATING AREAS:

A. OPAREA ONE: 36-30N 034-40E, 36-12N 035-30E, 35-50N 035-30E, 35-50N 034-54E, 36-00N 034-36E, 35-45N 034-00E, 35-55N 034-00E.

B. OPAREA TWO: 35-25N 034-40E, 35-25N 035-30E, 34-40N 035-35E, 34-10N 035-10E, 34-10N 033-55E, 34-25N 033-55E, 34-55N 034-25E, 35-15N 034-25E.

3. DURING THESE COMBAT TRAINING EXERCISES U.S. FORCES WILL BE OPERATING AT A HEIGHTENED STATE OF READINESS AND TAKING ADDITIONAL DEFENSIVE PRECAUTIONS AGAINST TERRORIST AND OTHER POTENTIAL THREATS. SURFACE VESSELS APPROACHING U.S. FORCES ARE REQUESTED TO MAINTAIN RADIO CONTACT WITH U.S. FORCES ON BRIDGE-TO-BRIDGE CHANNEL 16.

4. U.S. FORCES WILL EXERCISE APPROPRIATE MEASURES IN SELF-DEFENSE IF WARRANTED BY THE CIRCUMSTANCES. SURFACE VESSELS APPROACHING U.S. FORCES SHOULD MAKE THEIR INTENTIONS CLEAR AND AVOID UNNECESSARY INITIATION OF SUCH DEFENSIVE MEASURES BY INITIATING RADIO CONTACT AS DESCRIBED ABOVE.

5. NOTHING IN THIS WARNING IS INTENDED TO IMPEDE OR OTHERWISE INTERFERE WITH THE FREEDOM OF NAVIGATION OF ANY VESSEL, OR TO LIMIT OR EXPAND THE INHERENT SELF-DEFENSE RIGHTS OF U.S. FORCES. THIS WARNING IS PUBLISHED SOLELY TO ADVISE OF THE HEIGHTENED STATE OF READINESS OF U.S. FORCES AND TO REQUEST THAT RADIO CONTACT BE MAINTAINED AS DESCRIBED ABOVE.

6. CANCEL HYDROLANT 499/03.//

Upon the commencement of hostilities in Operation Iraqi Freedom, coalition forces established areas of sea control and notified the international community of the coalition's exercise of its belligerent rights to stop, board, and search vessels during operations against

Iraq. Maritime Liaison Office (MARLO) Bahrain Advisory Bulletin 06-03 states:

> **MARLO Advisory Bulletin 06-03**
> **March 20, 2003**
>
> Maritime Liaison Office (MARLO) Bahrain
> MARLO Advisory Bulletin 06-03
> 20 March 2003
>
> With the intention of providing widest distribution, MARLO is forwarding the following NOTICE TO MARINERS in an attempt to ensure the maritime safety of crews and vessels operating in the Arabian Gulf. We request you pass this information throughout your own commercial circles.
> ---
> COALITION NAVAL FORCES MAY CONDUCT MILITARY OPERATIONS IN THE EASTERN MEDITERRANEAN SEA, RED SEA, GULF OF ADEN, ARABIAN SEA, GULF OF OMAN, AND ARABIAN GULF. THE TIMELY AND ACCURATE IDENTIFICATION OF ALL VESSELS AND AIRCRAFT IN THESE AREAS IS CRITICAL TO AVOID THE INADVERTENT USE OF FORCE.
>
> ALL VESSELS ARE ADVISED THAT COALITION NAVAL FORCES ARE PREPARED TO EXERCISE APPROPRIATE MEASURES IN SELFDEFENSE TO ENSURE THEIR SAFETY IN THE EVENT THEY ARE APPROACHED BY VESSELS OR AIRCRAFT. COALITION FORCES ARE PREPARED TO RESPOND DECISIVELY TO ANY HOSTILE ACTS OR INDICATIONS OF HOSTILE INTENT. ALL MARITIME VESSELS OR ACTIVITIES THAT ARE DETERMINED TO BE THREATS TO COALITION NAVAL FORCES WILL BE SUBJECT TO DEFENSIVE MEASURES, INCLUDING BOARDING, SEIZURE,

> DISABLING OR DESTRUCTION, WITHOUT REGARD TO REGISTRY OR LOCATION. CONSEQUENTLY, SURFACE VESSELS, SUBSURFACE VESSELS, AND ALL AIRCRAFT APPROACHING COALITION NAVAL FORCES ARE ADVISED TO MAINTAIN RADIO CONTACT ON BRIDGE-TO-BRIDGE CHANNEL 16, INTERNATIONAL AIR DISTRESS (121.5 MHZ VHF) OR MILITARY AIR DISTRESS (243.0 MHZ UHF).
>
> VESSELS OPERATING IN THE MIDDLE EAST, EASTERN MEDITERRANEAN SEA, RED SEA, GULF OF OMAN, ARABIAN SEA, AND ARABIAN GULF ARE SUBJECT TO QUERY, BEING STOPPED, BOARDED AND SEARCHED BY US/COALITION WARSHIPS OPERATING IN SUPPORT OF OPERATIONS AGAINST IRAQ. VESSELS FOUND TO BE CARRYING CONTRABAND BOUND FOR IRAQ OR CARRYING AND/OR LAYING NAVAL MINES ARE SUBJECT TO DETENTION, SEIZURE AND DESTRUCTION. THIS NOTICE IS EFFECTIVE IMMEDIATELY AND WILL REMAIN IN EFFECT UNTIL FURTHER NOTICE.

4.4.8 Maritime Quarantine

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

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

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

2. The goal of quarantine is de-escalation and return to the status quo ante or other stabilizing arrangement. The goal of a blockade is denial and degradation of an enemy's capability with the ultimate end-state being defeat of the enemy.

3. Quarantine is selective in proportional response to the perceived threat. Blockade requires impartial application to all States—discrimination by a blockading belligerent renders the blockade legally invalid.

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

Commentary

During the Berlin Crisis and the Cuban Missile Crisis, political maneuvers and oblique military confrontation raised the level of tension between the two superpowers nearly to the breaking point. During this period, the United States was faced with Soviet activity in Cuba—a policy that was regarded in Washington, D.C. as the first real challenge to the 1823 Monroe Doctrine. In response, the United States used naval power in a traditional way to intercept naval shipping.

The 1962 Presidential Proclamation Regarding Interdiction of Offensive Weapons Delivery to Cuba states:

A PROCLAMATION

WHEREAS the peace of the world and the security of the United States and of all American States are endangered by reason of the establishment by the Sino-Soviet powers of an offensive military capability in Cuba, including bases for ballistic missiles with a potential range covering most of North and South America;

WHEREAS by a Joint Resolution passed by the Congress of the United States and approved on October 3, 1962, it was declared that the United States is determined to prevent by whatever means may be necessary, including the use of arms, the Marxist-Leninist regime in Cuba from extending, by force or the threat of force, its aggressive or subversive activities to any part of this hemisphere, and to prevent in Cuba the creation or use of an externally supported military capability endangering the security of the United States; and

WHEREAS the Organ of Consultation of the American Republics meeting in Washington on October 23, 1962, recommended that the Member States, in accordance with Articles 6 and 8 of the Inter-American Treaty of Reciprocal Assistance, take all measures, individually and collectively, including the use of armed force, which they may deem necessary to ensure that the Government of Cuba cannot continue to receive from the Sino-Soviet powers military material and related supplies which may threaten the peace and security of the Continent and to prevent the missiles in Cuba with offensive capability from ever becoming an active threat to the peace and security of the Continent:

Now, THEREFORE, I, JOHN F. KENNEDY, President of the United States of America, acting under and by virtue of the authority conferred upon me by the Constitution and statutes of the United States, in accordance with the aforementioned resolutions of the United States Congress and of the Organ of Consultation of the American Republics, and to defend the security of the United States, do hereby proclaim that the forces under my command are ordered, beginning at 2:00 p.m. Greenwich time October 24, 1962, to interdict, subject to the instructions herein contained, the delivery of offensive weapons and associated materiel to Cuba.

For the purposes of this Proclamation, the following are declared to be prohibited materiel:

Surface-to-surface missiles; bomber aircraft; bombs, air-to-surface rockets and guided missiles; warheads for any of the above weapons; mechanical or electronic equipment to support or operate the above items; and any other classes of materiel hereafter designated by the Secretary of Defense for the purpose of effectuating this Proclamation.

To enforce this order, the Secretary of Defense shall take appropriate measures to prevent the delivery of prohibited materiel to Cuba, employing the land, sea and air forces of the United States in cooperation with any forces that may be made available by other American States.

The Secretary of Defense may make such regulations and issue such directives as he deems necessary to ensure the effectiveness of this order, including the designation, within a reasonable distance of Cuba, of prohibited or restricted zones and of prescribed routes.

Any vessel or craft which may be proceeding toward Cuba may be intercepted and may be directed to identify itself, its cargo, equipment and stores and its ports of call, to stop, to lie to, to submit to visit and search, or to proceed as directed. Any vessel or craft which fails or refuses to respond to or comply with directions shall be subject to being taken into custody. Any vessel or craft which it is believed is en route to Cuba and may be carrying prohibited materiel or may itself constitute such materiel shall, wherever possible, be directed to proceed to another destination of its own choice and shall be taken into custody if it fails or refuses to obey such directions. All vessels or craft taken into custody shall be sent into a port of the United States for appropriate disposition.

In carrying out this order, force shall not be used except in case of failure or refusal to comply with directions, or with regulations or directives of the Secretary of Defense issued hereunder, after reasonable efforts have been made to com-

> municate them to the vessel or craft, or in case of self-defense. In any case, force shall be used only to the extent necessary.
>
> IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States of America to be affixed.
>
> DONE in the City of Washington this twenty-third day of October in the year of our Lord, nineteen hundred and sixty-two, and of the Independence of the United States of America the one hundred and eighty-seventh.
>
> [SEAL]
>
> JOHN F. KENNEDY
>
> By the President: DEAN RUSK, Secretary of State[77]

4.4.9 Information Operations

Information operations provide additional capabilities to protect U.S. forces and advance mission objectives in the maritime environment, during peacetime and armed conflict. Information operations are the integrated employment, during military operations, of information-related capabilities (IRCs) in concert with other lines of operation to influence, disrupt, corrupt, or usurp the decision-making of adversaries and potential adversaries while protecting our own. These IRCs support tactical operations, intelligence collection, military deception, electromagnetic spectrum operations, cyber operations, space operations, and military information support operations. The offensive employment of IO is part of what is termed information warfare by the Navy and operations in the information environment by the U.S. Marine Corps. Information warfare is the integrated employment of U.S. Navy's information-based capabilities (communications, networks, intelligence, oceanography, meteorology, cryptology, electronic warfare, cyberspace op-

77. 27 Fed. Reg. 10401 (Oct. 23, 1962). *See also* KRASKA & PEDROZO, *supra* note 39, at 870–80.

erations, and space) to degrade, deny, deceive, or destroy an enemy's information environment or to enhance the effectiveness of friendly operations. See NDP 1, Naval Warfare and JP 3-13, Information Operations.

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

Commentary

JP 3-13, Information Operations, states:

4. Legal Considerations

a. **Introduction.** US military activities in the information environment, as with all military operations, are conducted as a matter of law and policy. Joint IO will always involve legal and policy questions, requiring not just local review, but often national-level coordination and approval. The US Constitution, laws, regulations, and policy, and international law set boundaries for all military activity, to include IO. Whether physically operating from locations outside the US or virtually from any location in the information environment, US forces are required by law and policy to act in accordance with US law and the law of war.

b. **Legal Considerations.** IO planners deal with legal considerations of an extremely diverse and complex nature. Legal interpretations can occasionally differ, given the complexity of technologies involved, the significance of legal interests potentially affected, and the challenges inherent for law and policy to keep pace with the technological changes and implementation of [information

related capabilities (IRCs)]. Additionally, policies are regularly added, amended, and rescinded in an effort to provide clarity. As a result, IO remains a dynamic arena, which can be further complicated by multinational operations, as each nation has its own laws, policies, and processes for approving plans. The brief discussion in this publication is not a substitute for sound legal advice regarding specific IRC- and IO-related activities. For this reason, joint IO planners should consult their staff judge advocate or legal advisor for expert advice.

c. **Implications Beyond the JFC.** Bilateral agreements to which the US is a signatory may have provisions concerning the conduct of IO as well as IRCs when they are used in support of IO. IO planners at all levels should consider the following broad areas within each planning iteration in consultation with the appropriate legal advisor:

(1) Could the execution of a particular IRC be considered a hostile act by an adversary or potential adversary?

(2) Do any non-US laws concerning national security, privacy, or information exchange, criminal and/or civil issues apply?

(3) What are the international treaties, agreements, or customary laws recognized by an adversary or potential adversary that apply to IRCs?

(4) How is the joint force interacting with or being supported by US intelligence organizations and other interagency entities?[78]

78. JP 3-13, Information Operations, III-3 (Ch. 1, Nov. 20, 2014).

4.4.9.1 Military Information Support Operations

Military Information Support Operations (MISO) are planned operations to convey selected information and indicators to foreign audiences to influence their emotions, motives, objective reasoning, and ultimately the behavior of foreign governments, organizations, groups, and individuals in a manner favorable to the originator's objectives. They occur during both armed conflict and peacetime. U.S. MISO will not target U.S. citizens under any circumstances. See JP 3-13.2, Military Information Support Operations.

Commentary

JP 3-13.2, Military Information Support Operations, states:

b. Law

(1) The legal authorities for MISO are established in a number of documents and are in place to enable the proper integration of MISO. The legal framework for MISO applies to:

(a) Establishing the capability.

(b) Authorizing execution.

(c) Approving messages and actions.

(d) Establishing authorities for use of MIS forces in civil support operations (domestic operations) and for use of MISO in sovereign territory, air, seas, and airways.

(2) Although the following list is not all-inclusive, consideration should be given to the following specific legal issues when conducting MISO:

(a) The requirement that US MISO will not target US citizens at any time, in any location globally, or under any circumstances.

> (b) *Geneva and Hague Conventions*. These international conventions preclude the injury of an enemy through "treachery" or "perfidy." It is also a violation of Geneva Convention III to publish photographic images of enemy prisoners of war.
>
> (c) International agreements with host countries may limit the activities of MIS units (e.g., status-of-forces agreements).
>
> (d) Domestic laws including copyright law and broadcasting law.[79]

4.4.9.2 Military Deception

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

Commentary

> JP 3-13, Information Operations, states:
>
> > (10) **Military Deception**
> >
> > > (a) One of the oldest [information-related capabilities (IRCs)] used to influence an adversary's perceptions is MILDEC. MILDEC can be characterized as actions executed to deliberately mislead adversary decision makers, creating conditions that will contribute to the accomplishment of the friendly mission. While MILDEC requires a thorough knowledge of an adversary or potential

79. JP 3-13.2, Military Information Support Operations, I-3 (Ch. 1, Dec. 20, 2011).

> adversary's decision-making processes, it is important to remember that it is focused on desired behavior. It is not enough to simply mislead the adversary or potential adversary; MILDEC is designed to cause them to behave in a manner advantageous to the friendly mission, such as misallocation of resources, attacking at a time and place advantageous to friendly forces, or avoid taking action at all.
>
> (b) When integrated with other IRCs, MILDEC can be a particularly powerful way to affect the decision-making processes of an adversary or potential adversary. The IO cell provides a coordinating mechanism for enabling or integrating MILDEC with other IRCs.
>
> (c) MILDEC differs from other IRCs in several ways. Due to the sensitive nature of MILDEC plans, goals, and objectives, a strict need-to-know should be enforced.[80]

Enclosure F (Information Operations) of CJCSI 3121.01B provides:

> c. SecDef authorization is required for tactical military deception operations that involve intrusions on information systems (including communications and computer nets).[81]
>
> . . . .
>
> b. Tactical Military Deception. Combatant commanders and their delegated subordinate commanders are authorized to conduct tactical military deception. Tactical military deception plans, including training, will be submitted for CJCS review if they meet one or more of the criteria:
>
> (1) Have strategic-level implications, including potential impact on politically or militarily sensitive areas.

---

80. JP 3-13, Information Operations, II-2 to II-12 (Ch. 1, Nov. 20, 2014). *See also* JP 3-13.4, Military Deception (Jan. 26, 2012).

81. CJCSI 3121.01B, *supra* note 10, encl. F at F-1.

(2) Misrepresent the intentions of US Government foreign policy or threaten the conduct of effective US foreign policy.

(3) Requite major US military resources (or national assets) to execute the plan.

(4) Could reveal or result in the inadvertent exposure of sensitive US military capabilities.

(5) Could be interpreted as demonstrating hostile intent.

(6) Could have a significant collateral effect on a non-targeted country or organization.

(7) Uses methods or means that require SecDef approval.[82]

4.4.9.3 Intelligence

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

Commentary

See JP 2-0, Joint Intelligence.[83]

4.4.9.4 Key Leader Engagement

Key leader engagements are deliberate, planned engagements between U.S. military leaders and the leaders of foreign audiences that have defined objectives, such as a change in policy or supporting the Joint Force Commander's objectives. These engagements can be used to shape and influence foreign leaders at the strategic, operational, and tactical levels and may be directed

82. *Id.* encl. F at F-3 to F-4.
83. JP 2-0, Joint Intelligence (May 26, 2022).

toward specific groups, such as religious leaders, academic leaders, and tribal leaders (e.g., to solidify trust and confidence in U.S. forces). See JP 3-13, Information Operations.

Commentary

JP 3-13, Information Operations, states that key leader engagement (KLE) is one of the potential ways to achieve a commander's IO objectives through persuasive communications or coercive force. "Regardless of the means and ways employed by the players within the information environment, the reality is that the strategic advantage rests with whoever applies their means and ways most efficiently."[84]

KLEs are described as follows:

> (14) **Key Leader Engagement (KLE)**
>
> (a) KLEs are deliberate, planned engagements between US military leaders and the leaders of foreign audiences that have defined objectives, such as a change in policy or supporting the JFC's objectives. These engagements can be used to shape and influence foreign leaders at the strategic, operational, and tactical levels, and may also be directed toward specific groups such as religious leaders, academic leaders, and tribal leaders; e.g., to solidify trust and confidence in US forces.
>
> (b) KLEs may be applicable to a wide range of operations such as stability operations, counterinsurgency operations, noncombatant evacuation operations, security cooperation activities, and humanitarian operations. When fully integrated with other IRCs into operations, KLEs can effectively shape and influence the leaders of foreign audiences.[85]

84. JP 3-13, Information Operations, II-4 (Ch. 1, Nov. 20, 2014).
85. *Id.* at II-13.

4.4.9.5 Joint Electromagnetic Spectrum Operations

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

Commentary

JP 3-85, Joint Electromagnetic Spectrum Operations, states:

> (1) **JEMSO.** JEMSO are military actions undertaken by a joint force to exploit, attack, protect, and manage the EMOE. These actions include/impact all joint force transmissions and receptions of electromagnetic (EM) energy. JEMSO are offensively and defensively employed to achieve unity of effort and the commander's objectives. JEMSO integrate and synchronize electromagnetic warfare (EW), EMS management, and intelligence, as well as other mission areas, to achieve EMS superiority.[86]
>
> . . . .
>
> (2) **Policy and ROE.** JEMSO activities frequently involve a unique set of complex issues. There are legal and policy requirements, including DOD directives and instructions, national laws, international law (i.e., international treaties, the law of war), and ROE, which may affect JEMSO activities. Staff legal advisors can help JFCs navigate these issues when they are included throughout planning and execution process. Laws, policies, and guidelines become especially critical

86. JP 3-85, Joint Electromagnetic Spectrum Operations, I-1 (May 22, 2020).

> during peacetime operations when international and domestic laws, treaty provisions, and agreements (e.g., status-of-forces agreements [SOFAs], International Telecommunication Union Radio Regulations, International Civil Aviation Organization regulations) are more likely to affect JEMSO planning and execution. JFCs seek a legal review during all phases of JEMSO planning and execution, to include development of ROE. While ROE will be considered during the planning process, it should not inhibit developing a plan that employs available capabilities to their maximum potential. If, during the planning process, an ROE-induced restriction is identified, planners should consult with staff legal advisors to clarify the ROE or develop and obtain approval of supplemental ROE applicable to JEMSO. This ROE guides the destructive means.[87]

Appendix B (Electromagnetic Warfare Activities) to JP 3-85 states:

> **2. Electromagnetic Warfare Activities**
>
> a. **EA Activities.** To conduct operational planning, targeting, execution, and assessment, the joint force requires a clear understanding of the effects that can be created by EW. EA can be conducted for both offensive and defensive purposes. Since an EA system transmits EM energy just like any other transmitter, it can also be used to transmit EM energy for purposes other than for EA. This is most commonly done for MISO or to create effects in cyberspace. In such cases, it is important that those effects are created using the proper legal authorities and also that their use complies with the law of war and applicable ROE. The effects that can be created by EA systems include destruction, degradation, disruption, and deception. The first three effects are denial effects that can be placed on a continuum of temporary to permanent and partial to complete. Thus, an effect on a capability could be described as disrupted for a short time

87. *Id.* at III-7.

period, destroyed, or degraded at varying levels for varying time periods.

(1) **Destroy.** Destruction makes the condition of a target so damaged that it can neither function nor be restored to a usable condition in a time frame relevant to the current operation. When used in the EW context, destruction is the use of EA to eliminate targeted enemy personnel, facilities, or equipment. Sensors and C2 nodes are lucrative targets because their destruction strongly influences the enemy's perceptions and ability to coordinate actions. Space assets in orbit, as well as computer services in cyberspace, are potentially lucrative targets as well. EW, through ES, supports destruction by providing actionable target locations and/or information. While destruction of enemy equipment is an effective means to permanently eliminate aspects of an enemy's capability, the duration of the effect on operations will depend on the enemy's ability to reconstitute.

(2) **Degrade.** Degradation reduces the effectiveness or efficiency of an enemy EMS-dependent system. The impact of degradation may last a few seconds or remain throughout the entire operation. For example, degradation may confuse or delay the actions of an enemy, but a proficient operator may be able to work around the effects to reduce or eliminate its impact. Degradation is accomplished with EM jamming, EM deception, and EM intrusion. Degradation may be the best choice to stimulate the enemy to determine the adversary's response or for EA conditioning. Degradation may be adequate to achieve overall mission success.

(3) **Disrupt.** Disruption temporarily interrupts the operation of an enemy EMS-dependent system. Disruption interferes with the enemy's use of the EMS

> to limit its combat capabilities. A trained enemy operator may be able to thwart disruption through effective EP actions (e.g., changing frequency, EM shielding). The objective of disruption is to confuse or delay enemy action. Advanced EA techniques offer the opportunity to nondestructively disrupt enemy infrastructure.
>
> (4) **Deceive.** Deception measures are designed to mislead the enemy by manipulation, distortion, or falsification of evidence to induce them to react in a manner prejudicial to their interests. Deception in an EW context presents enemy operators and higher-level processing functions with erroneous inputs, either directly through the sensors themselves or through EMS-based networks such as voice communications or data links. Through use of the EMS, EW manipulates the enemy's decision loop, making it difficult to establish an accurate perception of objective reality. Deception is often used for defensive purposes to avoid being targeted by an enemy in a tactical engagement or by injection of false signals into a sensor such as a radar. This is not to be confused with MISO or MILDEC, which are often used to present false messages to decision makers, usually at a higher level. The distinction is important because the required legal authorities governing EA differ from those governing MISO or MILDEC.[88]

4.4.9.6 Cyberspace Operations

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

1. Use cyber capabilities (e.g., computers, software tools, or networks)

88. *Id.* at B-1 to B-2.

2. Have the primary purpose of achieving objectives or creating effects in or through cyberspace.

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

Commentary

"Cyberspace operations (CO)" is defined as "the employment of cyberspace capabilities where the primary purpose is to achieve objectives in or through cyberspace."[89]

JP 3-12, Cyberspace Operations, states:

4. Legal Considerations

a. DOD conducts CO consistent with US domestic law, applicable international law, and relevant USG and DOD policies. The laws that restrict military actions in US territory also apply to cyberspace. Therefore, DOD cyberspace forces that operate outside the DODIN, when properly authorized, are generally limited to operating in gray and red cyberspace only, unless they are issued different ROE or conducting DSCA under appropriate authority. Since each CO mission has unique legal considerations, the applicable legal framework depends on the nature of the activities to be conducted, such as OCO or DCO, DSCA, ISP actions, LE and CI activities, intelligence activities, and defense of the homeland. Before conducting CO, commanders, planners, and operators require clear understanding of the relevant legal framework to comply with laws and policies, the application of which may be challenging given the global na-

89. JP 3-12, Cyberspace Operations, I-1 (June 8, 2018).

> ture of cyberspace and the geographic orientation of domestic and international law. It is essential commanders, planners, and operators consult with legal counsel during planning and execution of CO.
>
> b. **Application of the Law of War.** Members of DOD comply with the law of war during all armed conflicts and in all other military operations. The law of war encompasses all international law for the conduct of armed hostilities binding on the US or its individual citizens, including treaties and international agreements to which the US is a party and applicable customary international law. The law of war rests on fundamental principles of military necessity, proportionality, distinction (discrimination), and avoidance of unnecessary suffering, all of which may apply to certain CO.[90]

4.4.9.6.1 Cyberspace Operations and Use of Force

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

1. Severity
2. Immediacy
3. Directness
4. Invasiveness

---

90. *Id.* at III-11.

5. Measurability of effects

6. Military character

7. State involvement

8. Presumptive legality of the operations.

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

Commentary

See Tallinn Manual 2.0, r. 13.

4.4.9.7 Operations Security

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

Commentary

JP 3-13.3, Operations Security, states that the OPSEC process consists of five steps or elements:

> **Identify Critical Information.** Critical information answers key questions likely to be asked by adversaries about specific friendly intentions, capabilities, and activities.

> **Threat Analysis.** Threat analysis involves the research and analysis of intelligence, counterintelligence, and open-source information to identify the likely adversaries to the planned operation.
>
> **Vulnerability Analysis.** The purpose of this action is to identify an operation's or activity's vulnerabilities. A vulnerability exists when the adversary is capable of collecting critical information, correctly analyzing it, and then taking timely action to exploit the vulnerability to obtain an advantage.
>
> **Risk Assessment.** Risk assessment has three components: analyze the vulnerabilities and identify possible OPSEC countermeasures; estimate the impact to operations; and select specific OPSEC countermeasures for execution[.]
>
> **Apply Countermeasures.** The command implements the OPSEC countermeasures selected in the risk assessment process or, in the case of planned future operations and activities, includes the countermeasures in specific operations plans.[91]

4.5 U.S. MARITIME ZONES AND OTHER CONTROL MECHANISMS

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

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91. JP 3-13.3, Operations Security, ix (Jan. 6, 2016).

When deployed, commanders should be aware of similar sounding maritime zones and control mechanisms declared by other States. While some of these are consistent with international law and UNCLOS, some are inconsistent with international law and UNCLOS and unlawfully impede FON.

4.5.1 Safety Zones

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

Commentary

Generally, a safety zone is an area of water and/or land designated for a certain time for safety or environmental purposes.[92] To protect human safety or the environment, a safety zone will limit public access to the area. Except for those situations where a safety zone is needed around an Outer Continental Shelf (OCS) facility, safety zones may not extend beyond the 12-mile territorial sea. Regulations governing the establishment of safety zones on the OCS are located in 33 C.F.R. Part 147.

Article 60(4)–(7) of UNCLOS provide:

> 4. The coastal State may, where necessary, establish reasonable safety zones around such artificial islands, installations and structures in which it may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures.

92. 33 C.F.R. pt. 165 subpt. C (Safety Zones).

> 5. The breadth of the safety zones shall be determined by the coastal State, taking into account applicable international standards. Such zones shall be designed to ensure that they are reasonably related to the nature and function of the artificial islands, installations or structures, and shall not exceed a distance of 500 metres around them, measured from each point of their outer edge, except as authorized by generally accepted international standards or as recommended by the competent international organization. Due notice shall be given of the extent of safety zones.
>
> 6. All ships must respect these safety zones and shall comply with generally accepted international standards regarding navigation in the vicinity of artificial islands, installations, structures and safety zones.
>
> 7. Artificial islands, installations and structures and the safety zones around them may not be established where interference may be caused to the use of recognized sea lanes essential to international navigation.

The right of hot pursuit under Article 111(2) of UNCLOS applies, *mutatis mutandis*, to violations of safety zones:

> The right of hot pursuit shall apply *mutatis mutandis* 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 State applicable in accordance with this Convention to the exclusive economic zone or the continental shelf, including such safety zones.

States may establish safety zones around installations supporting deep seabed mining in the international seabed area (the Area), subject to Article 147(2) of UNCLOS:

> Installations used for carrying out activities in the Area shall be subject to the following conditions:

> (a) such installations shall be erected, emplaced and removed solely in accordance with this Part and subject to the rules, regulations and procedures of the [International Seabed] Authority. Due notice must be given of the erection, emplacement and removal of such installations, and permanent means for giving warning of their presence must be maintained;
>
> (b) such installations may not be established where interference may be caused to the use of recognized sea lanes essential to international navigation or in areas of intense fishing activity;
>
> (c) safety zones shall be established around such installations with appropriate markings to ensure the safety of both navigation and the installations. The configuration and location of such safety zones shall not be such as to form a belt impeding the lawful access of shipping to particular maritime zones or navigation along international sea lanes . . . .

At its eighty-eighth session (November 24 to December 3, 2010), the IMO Maritime Safety Committee adopted the Guidelines for Safety Zones and Safety of Navigation Around Offshore Installations and Structures, which provide:

> 1 Some offshore artificial islands, installations or structures are complex systems that present particular challenges for safe navigation. These artificial islands, installations or structures are such that navigation around them creates concern about the safety of personnel and the risk of serious damage to offshore installations or structures, vessels and the environment in the event of a collision.
>
> 2 Any features of a sufficiently permanent nature of offshore artificial islands, installations or structures should be shown on all appropriate navigational charts.
>
> 3 Related documents:

— Resolution A.671(16) provides guidance on safety zones and safety of navigation around offshore installations and structures.

— Resolution A.572(14), as amended, establishes the General Provisions on Ships' Routeing.

— Resolution A.857(20) establishes guidelines for vessel traffic services.

— Resolution A.893(21) establishes guidelines for voyage planning when approaching artificial islands, installations and structures.

4 In order to enhance both the safety of navigation and of these artificial islands, installations or structures as well as the safety of personnel:

.1 Governments are requested to:

.1 implement the recommendations in resolution A.671(16);

.2 take appropriate measures to ensure navigation charts clearly reflect the location and projected swing or movement, if any, with the wind and seas of Floating Production Storage Offloading units (FPSOs), including their connected associated and necessary structures, installations, vessels, shuttle tankers and/or tugs in its operations, and other similarly situated installations or structures, that rotate around a fixed mooring;

.3 adopt as standard representation on navigation charts the legends, symbols and notes recommended by the International Hydrographic Organization for the designation of safety zones around offshore artificial islands, structures or installations including their connected associated

and necessary operational arrangements mentioned in paragraph 4.1.2 above, as guidance for the representation of details of safety zones established in accordance with international law;

.4 consider as standard representation on navigation charts, the use of appropriate area legends, symbols and notes, such as "development areas" and "anchors and cables", recommended by the International Hydrographic Organization, as a warning to mariners navigating in the vicinity of offshore resource and exploitation areas;

.5 include a cautionary or explanatory note on navigation charts depicting the location of safety zones established in accordance with international law;

.6 consider and propose to the Organization those routeing measures that, in combination with duly established safety zones around offshore artificial islands, structures or installations, will enhance the safety both of navigation and of the artificial island, structure or installation, particularly those that are complex systems; and

.7 if circumstances permit, consider holding consultation with all stakeholders with respect to safety of navigation.

.2 Flag States are requested to:

.1 take all necessary steps to ensure that, unless specifically authorized, ships flying their flag observe any coastal State's conditions for entry into and/or navigation within duly established safety zones; and

> .2 draw the attention of seafarers to the need to navigate with extreme caution, including taking all necessary measures in regard to voyage planning required by SOLAS regulation V/34 and make timely radio contact with the offshore artificial islands, installations or structures, associated vessel traffic services and other vessels in the area, if an infringement of the safety zone cannot be avoided.[93]

The Guidelines refer to IMO Resolution A.671(16), which circulates the Annex titled Recommendation on Safety Zones and Safety of Navigation Around Offshore Installations and Structures.

The Recommendation provides:

> 1 General
>
> Every coastal State which authorizes and regulates the operation and use of offshore installations and structures under its jurisdiction should:
>
> .1 issue early Notices to Mariners by appropriate means to advise vessels of the location or intended location of offshore installations or structures, the breadth of any safety zones established and the rules which apply therein, and any fairways available;
>
> .2 require operators of MODUs to provide advance notice of any change of their location to the appropriate authority of the coastal State so as to allow timely issue of relevant Notices to Mariners;
>
> .3 require operators of offshore installations or structures, including MODUs which are on station, either moored or resting on the sea-bed, and not actively

93. IMO, Guidelines for Safety Zones and Safety of Navigation Around Offshore Installations and Structures, annex, IMO Doc. SN.1/Circ.295 (Dec. 7, 2010).

engaged in drilling operations either prior to commencing such operations or during temporary stoppages for whatever reasons, to take adequate measures to prevent infringement of safety zones around such offshore installations or structures. Such measures may include effective lights and sound signals, racons, permanent visual look-out and radar watch, listening for and warning vessels on VHF channel 16 or other appropriate radio frequencies and the establishment of vessel traffic services; and

.4 request operators of offshore installations or structures to report actions by vessels which jeopardize safety including infringement of safety zones.

2 Vessels navigating in the vicinity of offshore installations or structures

Vessels which are navigating in the vicinity of offshore installations or structures should:

.1 navigate with caution, giving due consideration to safe speed and safe passing distances taking into account the prevailing weather conditions and the presence of other vessels or dangers;

.2 where appropriate, take early and substantial avoiding action when approaching such installation or structure to facilitate the installation's or structure's awareness of the vessel's closest point of approach and provide information on any possible safety concerns, particularly where the offshore installation or structure may be used as an aid to navigation;

.3 use any routeing systems established in the area; and

.4 maintain a continuous listening watch on the navigating bridge on VHF channel 16 or other appropriate radio frequencies when navigating in the vicinity of offshore installations or structures to allow radio contact to be established between such installations or structures, vessel traffic services and other vessels so that any uncertainty as to a vessel maintaining an adequate passing distance from the installations or structures can be alleviated.

3 Infringements of safety zones

3.1 Every coastal State which is aware of an infringement of the regulations relating to safety zones around offshore installations or structures under its jurisdiction should take action in accordance with international law and, where it considers necessary, notify the flag State of the infringement allegedly committed by a vessel flying its flag and provide available factual evidence to substantiate the allegation as follows:

.1 name, flag and call sign of the vessel;

.2 course and speed of the vessel;

.3 identification of the offshore installation or structure and its operators;

.4 description of the operational status of the offshore installation or structure (i.e. its latitude and longitude, nature and duration of activity on station, breadth of the safety zone, text and date of notice to mariners giving warning of the offshore activity and rules applicable to the safety zone);

.5 weather conditions at time of the alleged infringement;

> .6 details of attempts by installation or structure personnel or personnel on service vessels to contact the approaching vessel including radio frequencies used and the interval between attempts;
>
> .7 description of any communications with the vessel;
>
> .8 statement as to whether the installation or structure exhibited the proper lights and sounded appropriate signals;
>
> .9 photographic evidence or a complete and detailed radar plot, or both, and indication of whether a radar beacon or warning device was in operation;
>
> .10 details of any apparent contravention of any other regulation by the intruding vessel such as the International Regulations for Preventing Collisions at Sea, 1972 as amended, or the 1974 SOLAS Convention; and
>
> .11 name of the Government official to contact regarding the complaint.[94]

4.5.2 Security Zones

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

1. Preventing the destruction, loss, or injury to vessels, harbors, ports, or waterfront facilities resulting from sabotage or other subversive acts, accidents, or similar causes

94. IMO Res. A.671(16), Safety Zones and Safety of Navigation Around Offshore Installations and Structures, annex (Nov. 30, 1989).

2. Securing the observance of the rights and obligations of the United States

3. Preventing or responding to an act of terrorism against an individual, vessel, or structure that is subject to the jurisdiction of the United States

4. Responding to a national emergency, as declared by the President, by reason of actual or threatened war, insurrection or invasion, or disturbance or threatened disturbance of the international relations of the United States.

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

Commentary

Generally, a security zone is an area of water and/or land designated for a certain time to protect vessels, harbors, ports, and waterfront facilities from sabotage, damage, or injury due to subversive acts, accidents, or other causes of a similar nature.[95] To provide protection to a vessel or waterfront facility, a security zone will often surround a vessel or a waterfront facility, preventing other vessels from approaching.

33 C.F.R. § 165.30 (Security zones) provides:

> (a) A security zone is an area of land, water, or land and water which is so designated by the Captain of the Port or District Commander for such time as is necessary to prevent damage or injury to any vessel or waterfront facility, to safeguard ports, harbors, territories, or waters of the United

95. 33 C.F.R. pt. 165 subpt. D.

> States or to secure the observance of the rights and obligations of the United States.
>
> (b) The purpose of a security zone is to safeguard from destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of a similar nature:
>
> (1) Vessels,
>
> (2) Harbors,
>
> (3) Ports, and
>
> (4) Waterfront facilities:
>
> in the United States and all territory and water, continental or insular, that is subject to the jurisdiction of the United States.

33 C.F. R. § 165.33 (General regulations) provides:

> Unless otherwise provided in the special regulations in Subpart F of this part:
>
> (a) No person or vessel may enter or remain in a security zone without the permission of the Captain of the Port;
>
> (b) Each person and vessel in a security zone shall obey any direction or order of the Captain of the Port;
>
> (c) The Captain of the Port may take possession and control of any vessel in the security zone;
>
> (d) The Captain of the Port may remove any person, vessel, article, or thing from a security zone;
>
> (e) No person may board, or take or place any article or thing on board, any vessel in a security zone without the permission of the Captain of the Port; and

> (f) No person may take or place any article or thing upon any waterfront facility in a security zone without the permission of the Captain of the Port.[96]

4.5.3 Naval Vessel Protection Zones

The USCG establishes naval vessel protection zones (NVPZs) under authority contained in 14 U.S.C. § 527 to provide for the regulation of traffic in the vicinity of U.S. naval vessels in the navigable waters of the United States. A U.S. naval vessel is any vessel owned, operated, chartered, or leased by the U.S. Navy and any vessel under the command and control of the U.S. Navy or a unified commander. The establishment and enforcement of NVPZs is a vital tool in protecting naval units and personnel and ensuring the safe and smooth conduct of military operations.

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

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

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

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96. *See* KRASKA & PEDROZO, *supra* note 39, at 75–112.

Commentary

Following the terrorist attacks on the World Trade Center and the Pentagon on September 11, 2001, the Navy became concerned that its warships operating in U.S. waters were particularly vulnerable to a terrorist attack. One year earlier, the devastating attack on the USS *Cole* (DDG 67) in Aden, Yemen, by Al Qaeda terrorists was a stark wake-up call that perhaps the greatest danger to high-value U.S. warships and submarines is a very low-technology threat. The staff of the Chief of Naval Operations and the Office of the Judge Advocate General of the Navy, working in conjunction with U.S. Coast Guard Headquarters, developed Naval Vessel Protection Zones (NVPZs) that authorize Coast Guard captains of the port (COTPs) to control vessel traffic in the vicinity of U.S. warships. NVPZs have been established in both the Atlantic Area[97] and the Pacific Area.[98]

NVPZs are a key counter-terrorism tool to protect high value, national assets and crews on submarines and warships. The NVPZ legislation states that the Secretary of Homeland Security "may control the anchorage and movement of any vessel in the navigable waters of the United States to ensure the safety or security of any United States naval vessel in those waters."[99]

The NVPZ is a 500-yard protective regulatory "bubble" surrounding large U.S. naval vessels, which are defined as naval vessels greater than 100 feet in length.[100] The zone exists whether the naval vessel is "underway, anchored, moored, or within a floating dry dock, except when the . . . naval vessel is moored or anchored within a restricted area or within a naval defensive sea area."[101] The term "U.S. naval vessel" includes "any vessel owned, operated, chartered, or leased by the U.S. Navy; any pre-commissioned vessel under construction for the U.S. Navy, once launched into the water; and any

97. 33 C.F.R. § 165.2025.
98. 33 C.F.R. § 165.2030.
99. 14 U.S.C. § 91.
100. 33 C.F.R. § 165.2015.
101. 33 C.F.R. § 165.2030.

vessel under the operational control of the U.S. Navy or a Combatant Command."[102] Violations of NVPZ orders, such as refusal to make way for a warship, are contained in 33 U.S.C. § 1232.

Traffic regulations in the zones supplement, but do not replace, other rules pertaining to the safety and security of U.S. naval vessels. For example, the International Regulations for Preventing Collisions at Sea (COLREGs) always apply within an NVPZ.[103]

Any Coast Guard commissioned, warrant, or petty officer may enforce the rules and regulations pertaining to NVPZs.[104] In some cases, even U.S. naval officers may exercise authority under the statute. Where immediate action is required and Coast Guard representatives are not present or are not present in sufficient force to exercise effective control of an NVPZ, "the senior naval officer present in command may control the anchorage or movement of any vessel in the navigable waters of the United States to ensure the safety and security of any United States naval vessel under the officer's command."[105]

This grant of authority also includes assisting any Coast Guard enforcement personnel who are present.[106] Unless otherwise designated by competent authority, the "senior naval officer present in command" is "the senior line officer of the U.S. Navy on active duty, eligible for command at sea, who is present and in command of any part of the Department of Navy in the area."[107] The provision is interesting because it carves out a limited area in which an officer of the military forces may exercise control over civilians, or even civil authorities, inside the internal waters or territorial sea of the United States. Normally, American civil-military culture and the statutory

102. 14 U.S.C. § 633. *See also* 33 C.F.R. § 165.2015.
103. 33 C.F.R. § 165.2025(c); 33 C.F.R § 165.2030(c).
104. 33 C.F.R. § 165.2020(a).
105. 14 U.S.C. § 91(b); 33 C.F.R. § 165.2020(b).
106. 33 C.F.R. § 2020(b).
107. 33 C.F.R. § 165.2015.

prohibitions of the Posse Comitatus Act[108] and 10 U.S.C. § 375 prohibit the military from exercising law enforcement functions inside the United States.

All vessels within 500 yards of a U.S. naval vessel must operate at the minimum speed necessary to maintain a safe course, unless required to maintain speed by the COLREGS, and "shall proceed as directed by the Coast Guard, the senior naval officer present in command, or the official patrol."[109] "Official patrols" include all "personnel designated and supervised by a senior naval officer present in command and tasked to monitor a naval vessel protection zone, permit entry into the zone, give legally enforceable orders to persons or vessels within the zone, and take other actions authorized by the U.S. Navy."[110]

In no case are other vessels allowed within 100 yards of a U.S. naval vessel, unless authorized by the Coast Guard, the senior officer present in command, or the official patrol.[111] Vessels requesting to pass within 100 yards of a U.S. naval vessel must contact the Coast Guard, the senior naval officer present in command, or the official patrol on VHF-FM channel 16 in order to obtain permission. Under appropriate circumstances, the Coast Guard, the senior naval officer present in command, or the official patrol may:

- "[p]ermit vessels constrained by their navigational draft or restricted in their ability to maneuver to pass within 100 yards of a large U.S. naval vessel in order to ensure a safe passage in accordance with the Navigation Rules";
- "[p]ermit commercial vessels anchored in a designated anchorage area to remain at anchor when within 100 yards of passing large U.S. naval vessels"; and
- "[p]ermit vessels that must transit via a navigable channel or waterway to pass within 100 yards of a moored or anchored

108. Posse Comitatus Act of 1878, 18 U.S.C. § 1385.
109. 33 C.F.R. § 165.2025(d); 33 C.F.R. § 165.2030(d).
110. 33 C.F.R. § 165.2015.
111. 33 C.F.R. § 165.2025(d); 33 C.F.R. § 165.2030(d).

> large U.S. naval vessel with minimal delay consistent with security."[112]

Although restrictive in nature, the effects of NVPZs on freedom of navigation for civil and commercial craft are minimal because the zones are limited in size, and the enforcement authorities may allow access to the zone. Furthermore, the NVPZs apply only in the "navigable waters of the United States," which include only internal waters and territorial sea, and, since the zones follow or adhere to naval warships, they move with the ship and therefore are not permanent.

The protection of naval vessels is addressed in 33 C.F.R. Part 165, Subpart G (Protection of Naval Vessels).

33 C.F.R. § 165.2010 (Purpose) provides:

> This subpart establishes the geographic parameters of naval vessel protection zones surrounding U.S. naval vessels in the navigable waters of the United States. This subpart also establishes when the U.S. Navy will take enforcement action in accordance with the statutory guidelines of 14 U.S.C. 91. Nothing in the rules and regulations contained in this subpart shall relieve any vessel, including U.S. naval vessels, from the observance of the Navigation Rules. The rules and regulations contained in this subpart supplement, but do not replace or supercede, any other regulation pertaining to the safety or security of U.S. naval vessels.

33 C.F.R. § 165.2015 (Definitions) provides:

> The following definitions apply to this subpart:
>
> *Atlantic Area* means that area described in 33 CFR 3.04-1 Atlantic Area.
>
> *Large U.S. naval vessel* means any U.S. naval vessel greater than 100 feet in length overall.

112. 33 C.F.R. § 165.2025(e); 33 C.F.R. § 165.2030(f).

Naval defensive sea area means those areas described in 32 CFR part 761.

Naval vessel protection zone is a 500-yard regulated area of water surrounding large U.S. naval vessels that is necessary to provide for the safety or security of these U.S. naval vessels.

Navigable waters of the United States means those waters defined as such in 33 CFR part 2.

Navigation rules means the Navigation Rules, International-Inland.

Official patrol means those personnel designated and supervised by a senior naval officer present in command and tasked to monitor a naval vessel protection zone, permit entry into the zone, give legally enforceable orders to persons or vessels within the zone, and take other actions authorized by the U.S. Navy.

Pacific Area means that area described in 33 CFR 3.04-3 Pacific Area.

Restricted area means those areas established by the Army Corps of Engineers and set out in 33 CFR part 334.

Senior naval officer present in command is, unless otherwise designated by competent authority, the senior line officer of the U.S. Navy on active duty, eligible for command at sea, who is present and in command of any part of the Department of Navy in the area.

U.S. naval vessel means any vessel owned, operated, chartered, or leased by the U.S. Navy; any pre-commissioned vessel under construction for the U.S. Navy, once launched into the water; and any vessel under the operational control of the U.S. Navy or a Combatant Command.

> *Vessel* means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water, except U.S. Coast Guard or U.S. naval vessels.

33 C.F.R. § 165.2020 (Enforcement authority) provides:

> (a) *Coast Guard.* Any Coast Guard commissioned, warrant or petty officer may enforce the rules and regulations contained in this subpart.
>
> (b) *Senior naval officer present in command.* In the navigable waters of the United States, when immediate action is required and representatives of the Coast Guard are not present or not present in sufficient force to exercise effective control in the vicinity of large U.S. naval vessels, the senior naval officer present in command is responsible for the enforcement of the rules and regulations contained in this subpart to ensure the safety and security of all large naval vessels present. In meeting this responsibility, the senior naval officer present in command may directly assist any Coast Guard enforcement personnel who are present.

33 C.F.R. § 165.2025 (Atlantic Area) provides:

> (a) This section applies to any vessel or person in the navigable waters of the United States within the boundaries of the U.S. Coast Guard Atlantic Area, which includes the First, Fifth, Seventh, Eighth and Ninth U.S. Coast Guard Districts. [Note: The boundaries of the U.S. Coast Guard Areas and Districts are set out in 33 CFR part 3.]
>
> (b) A naval vessel protection zone exists around U.S. naval vessels greater than 100 feet in length overall at all times in the navigable waters of the United States, whether the large U.S. naval vessel is underway, anchored, moored, or within a floating drydock, except when the large naval vessel is moored or anchored within a restricted area or within a naval defensive sea area.

(c) The Navigation Rules shall apply at all times within a naval vessel protection zone.

(d) When within a naval vessel protection zone, all vessels shall operate at the minimum speed necessary to maintain a safe course, unless required to maintain speed by the Navigation Rules, and shall proceed as directed by the Coast Guard, the senior naval officer present in command, or the official patrol. When within a naval vessel protection zone, no vessel or person is allowed within 100 yards of a large U.S. naval vessel unless authorized by the Coast Guard, the senior naval officer present in command, or official patrol.

(e) To request authorization to operate within 100 yards of a large U.S. naval vessel, contact the Coast Guard, the senior naval officer present in command, or the official patrol on VHF-FM channel 16.

(f) When conditions permit, the Coast Guard, senior naval officer present in command, or the official patrol should:

(1) Give advance notice on VHF-FM channel 16 of all large U.S. naval vessel movements; and

(2) Permit vessels constrained by their navigational draft or restricted in their ability to maneuver to pass within 100 yards of a large U.S. naval vessel in order to ensure a safe passage in accordance with the Navigation Rules; and

(3) Permit commercial vessels anchored in a designated anchorage area to remain at anchor when within 100 yards of passing large U.S. naval vessels; and

(4) Permit vessels that must transit via a navigable channel or waterway to pass within 100 yards of a moored or anchored large U.S. naval vessel with minimal delay consistent with security.

A note to § 165.2025 paragraph (f) states: "The listed actions are discretionary and do not create any additional right to appeal or otherwise dispute a decision of the Coast Guard, the senior naval officer present in command, or the official patrol."

33 C.F.R. § 165.2030 (Pacific Area) provides:

> (a) This section applies to any vessel or person in the navigable waters of the United States within the boundaries of the U.S. Coast Guard Pacific Area, which includes the Eleventh, Thirteenth, Fourteenth, and Seventeenth U.S. Coast Guard Districts.
>
> (b) A naval vessel protection zone exists around U.S. naval vessels greater than 100 feet in length overall at all times in the navigable waters of the United States, whether the large U.S. naval vessel is underway, anchored, moored, or within a floating dry dock, except when the large naval vessel is moored or anchored within a restricted area or within a naval defensive sea area.
>
> (c) The Navigation Rules shall apply at all times within a naval vessel protection zone.
>
> (d) When within a naval vessel protection zone, all vessels shall operate at the minimum speed necessary to maintain a safe course, unless required to maintain speed by the Navigation Rules, and shall proceed as directed by the Coast Guard, the senior naval officer present in command, or the official patrol. When within a naval vessel protection zone, no vessel or person is allowed within 100 yards of a large U.S. naval vessel unless authorized by the Coast Guard, the senior naval officer present in command, or official patrol.
>
> (e) To request authorization to operate within 100 yards of a large U.S. naval vessel, contact the Coast Guard, the senior naval officer present in command, or the official patrol on VHF-FM channel 16.

> (f) When conditions permit, the Coast Guard, senior naval officer present in command, or the official patrol should:
>
> (1) Give advance notice on VHF-FM channel 16 of all large U.S. naval vessel movements;
>
> (2) Permit vessels constrained by their navigational draft or restricted in their ability to maneuver to pass within 100 yards of a large U.S. naval vessel in order to ensure a safe passage in accordance with the Navigation Rules; and
>
> (3) Permit commercial vessels anchored in a designated anchorage area to remain at anchor when within 100 yards of passing large U.S. naval vessels; and
>
> (4) Permit vessels that must transit via a navigable channel or waterway to pass within 100 yards of a moored or anchored large U.S. naval vessel with minimal delay consistent with security.
>
> A note to paragraph (f) states: "The listed actions are discretionary and do not create any additional right to appeal or otherwise dispute a decision of the Coast Guard, the senior naval officer present in command, or the official patrol."

4.5.4 Outer Continental Shelf Facilities

Safety zones may be established on the continental shelf around offshore platforms pursuant to 43 U.S.C. § 1331–1356b, Outer Continental Shelf Lands Act. Outer continental shelf (OCS) safety zones may be established around OCS facilities being constructed, maintained, or operated on the OCS to promote the safety of life and property on the facilities, their appurtenances and attending vessels, and on the adjacent waters within the safety zones. An OCS safety zone may extend to a maximum distance of 500 meters around the OCS facility measured from each point on its outer edge or from its construction site. It may not interfere with the use of recognized sea lanes essential to navigation. The following vessels are authorized to enter and remain in an OCS safety zone:

1. Vessels owned or operated by the OCS facility

2. Vessels less than 100 feet in overall length not engaged in towing

3. Vessels authorized by the cognizant USCG commander.

Commentary

The term "outer Continental Shelf" means:

> (1) all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control or within the exclusive economic zone of the United States and adjacent to any territory of the United States; and
>
> (2) does not include any area conveyed by Congress to a territorial government for administration . . . .[113]

4.5.5 Other Areas

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

Commentary

The U.S. government may enforce regulated navigation areas, restricted waterfront areas, restricted areas, danger zones, and naval defensive sea areas, and may implement other control and enforcement mechanisms. The use of force may be employed to enforce these areas.[114] U.S. constitutional law governs the use of force.[115]

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113. 43 U.S.C. § 1331. *See* Commentary to Safety Zones, *supra*, § 4.5.1.

114. *See* COMDTINST M16247.1H, U.S. Coast Guard Maritime Law Enforcement Manual, app. O (DHS Policy on the Use of Deadly Force).

115. *See* Graham v. Connor, 490 U.S. 386 (1989); Tennessee v. Garner, 471 U.S. 1 (1985).

The Department of Homeland Security's 2018 Policy Statement on the Use of Force states:

> **II. Use of Force Standard**
>
> A. Introduction.
>
> In determining the appropriateness of a particular use of force, the Department is guided by constitutional law, as interpreted by the U.S. Supreme Court [See, e.g., Graham v. Connor, 490 U.S. 386 (1989), and Tennessee v. Garner, 471 U.S. 1 (1985)]. The Fourth Amendment supplies a constitutional baseline for permissible use of force by LEOs in the course of their official duties; law enforcement agencies may adopt policies that further constrain the use of force. This policy describes the governing legal framework and articulates additional principles to which the Department will adhere.
>
> B. General Statement.
>
> Unless further restricted by DHS Component policy, DHS LEOs are permitted to use force to control subjects in the course of their official duties as authorized by law, and in defense of themselves and others. In doing so, a LEO shall use only the force that is **objectively reasonable** in light of the facts and circumstances confronting him or her at the time force is applied.
>
> C. Discussion: The Fourth Amendment "Reasonableness" Standard
>
> 1. The Supreme Court has ruled that "all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." [*Graham*, 490 U.S. at 396]. The Court has further determined that a

Fourth Amendment "seizure" of a person occurs when an officer, "by means of physical force or show of authority, terminates or restrains his freedom of movement *through means intentionally applied* (emphasis in original)." Brendlin v. California, 551 U.S. 249, 254 (2007) (citations omitted).] This standard is an objective one that, in the context of use of force policy and practice, is often referred to as "objective reasonableness."

2. Because this standard is "not capable of precise definition or mechanical application," its "proper application requires careful attention to the facts and circumstances of each particular case."

[*Graham* (citing *Garner*, 471 U.S at 8–9: "[T]he question is 'whether the totality of the circumstances justifie[s] a particular sort of . . . seizure'"). The "totality of the circumstances" refers to all factors surrounding a particular use of force. In *Graham*, the Court lists three factors, often referred to as the "Graham factors," that may be considered in assessing reasonableness: the severity of the crime/offense at issue, whether the subject poses an immediate threat to the safety of the LEO or others, and whether the subject is actively resisting arrest or attempting to evade arrest by flight. Other factors include, but are not limited to: the presence and number of other LEOs, subjects, and bystanders; the size, strength, physical condition, and level of training of the LEO(s); the apparent size, strength, physical condition, and level of training of the subject(s); whether an individual is forcibly assaulting, resisting, opposing, impeding, intimidating, or interfering with a LEO while the LEO is engaged in, or on account of the performance of, official duties; proximity and type of weapon(s) present; criminal or mental health history of the subject(s) known to the LEO at the time of the use of

force; and the perceived mental/emotional state of the subject.]

The reasonableness of a LEO's use of force must be judged "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." [*Graham* at 8–9.] In determining whether the force a LEO used to effect a seizure was reasonable, courts allow for the fact that LEOs are often forced to make split-second judgments, in circumstances that are tense, uncertain, and rapidly evolving.

3. Consequently, there may be a range of responses that are reasonable and appropriate under a particular set of circumstances.

4. Once used, physical force [Other than the force reasonably required to properly restrain a subject and safely move him or her from point to point. That is, once the subject is secured with restraints, a LEO may maintain physical control of the subject via the use of "come-along or other control techniques" to safely and securely conclude the incident.] must be discontinued when resistance ceases or when the incident is under control.

III. General Principles

A. Respect for Human Life.

All DHS personnel have been entrusted with a critical mission: safeguarding the American people, our homeland, and our values. In keeping with this mission, respect for human life and the communities we serve shall continue to guide DHS LEOs in the performance of their duties.

B. De-escalation.

To ensure that DHS LEOs are proficient in a variety of techniques that could aid them in appropriately resolving an encounter, DHS Components shall provide use of force training that includes de-escalation tactics and techniques.

C. Use of Safe Tactics.

DHS LEOs should seek to employ tactics and techniques that effectively bring an incident under control while promoting the safety of LEOs and the public, and that minimize the risk of unintended injury or serious property damage. DHS LEOs should also avoid intentionally and unreasonably placing themselves in positions in which they have no alternative to using deadly force.

D. Additional Considerations.

1. DHS LEOs are permitted to use force that is reasonable in light of the totality of the circumstances. This standard does not require LEOs to meet force with equal or lesser force.

2. DHS LEOs do not have a duty to retreat to avoid the reasonable use of force, nor are they required to wait for an attack before using reasonable force to stop a threat.

E. Warnings

1. When feasible, prior to the application of force, a DHS LEO must attempt to identify him- or herself and issue a verbal warning to comply with the LEO's instructions. In determining whether a warning is feasible under the circumstances, a LEO may be guided by a variety of considerations including, but not limited to, whether the resulting delay is likely to:

a. Increase the danger to the LEO or others, including any victims and/or bystanders;

b. Result in the destruction of evidence;

c. Allow for a subject's escape; or

d. Result in the commission of a crime.

2. In the event that a LEO issues such a warning, where feasible, the LEO should afford the subject a reasonable opportunity to voluntarily comply before applying force.

F. Exigent Circumstances

In an exigent situation, for self-defense or the defense of another, DHS LEOs are authorized to use any available object or technique in a manner that is reasonable in light of the circumstances.

G. Medical Care

As soon as practicable following a use of force and the end of any perceived public safety threat, DHS LEOs shall obtain appropriate medical assistance for any subject who has visible or apparent injuries, complains of being injured, or requests medical attention. This may include rendering first aid if properly trained and equipped to do so, requesting emergency medical services, and/or arranging transportation to an appropriate medical facility.[116]

116. Memorandum from Claire M. Grady, Acting Deputy Secretary of Homeland Security and Under Secretary for Management, Department of Homeland Security, Policy Statement 044-05, Department Policy on the Use of Force (Sept. 7, 2018) (footnotes inserted).

4.6 DETAINEES AT SEA DURING PEACETIME

On occasion, circumstances may arise where naval commanders detain individuals at sea who are neither involved in an armed conflict (see Chapter 11) nor violating domestic U.S. law (see 3.11). If this should occur, all persons detained by naval forces during peacetime must be treated humanely.

Commentary

Appendix A to JP 3-32 states:

> **APPENDIX A**
>
> **DETAINEE OPERATIONS AT SEA**
>
> 1. It may be necessary to detain individuals on naval vessels in situations in which they are initially captured at sea (e.g., counterterrorism, counter-piracy operations, directed maritime interdiction operations, or recovery of shipwrecked enemy personnel). Such individuals may be held on board as operational needs dictate, pending a reasonable opportunity to transfer them to a shore facility or to another vessel for eventual transfer to a shore facility. Additionally, individuals not initially detained at sea may be temporarily held on board naval vessels while being transported between land facilities or in other cases dictated by operational necessity. In all cases of detention at sea, detained individuals should be moved from the vessel to a shore detention facility at the earliest opportunity consistent with operational imperatives.
>
> 2. As with any detained personnel, US forces conducting at-sea detention are obligated to comply with applicable legal and policy standards for the treatment of detainees. These include the requirement to treat detained individuals humanely and in accordance with Article 3 of the 1949 Geneva Conventions during non-international armed conflict, the Detainee Treatment Act, the principles set forth in Article 75 of Additional Protocol I to the Geneva Conventions during international armed conflict, and applicable provisions of the

1949 Geneva Convention Relative to the Treatment of Prisoners of War.

3. Holding captured individuals on board naval vessels is permissible only under strictly limited circumstances and is a temporary measure permitted until the detained individuals can be transferred to a shore-based facility. It is limited to the minimum period necessary to transfer detainees from a zone of hostilities or as a result of operational necessity.

4. Individuals detained in connection with international armed conflict and classified as prisoners of war (including retained personnel) are subject to special rules that can limit the discretion of US forces to detain such persons at sea. Article 22 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War states, "Prisoners of war may be interned only in premises located on land and affording every guarantee of hygiene and healthfulness." This rule is intended to ensure that prisoners of war are interned in a relatively safe and healthy environment. Detention aboard ship for prisoners of war captured at sea, or pending the establishment of suitable facilities on land, is nonetheless consistent with Article 22 if detention on a ship provides the most appropriate living conditions. Ships may also be used to transport prisoners of war or for screening. The use of immobilized vessels for even temporary holding of prisoners of war or retained personnel is prohibited without Secretary of Defense approval.[117]

117. JP 3-32, *supra* note 22, at IV-24, app. A (Detainee Operations at Sea) at A-1 (Ch. 1, Sept. 20, 2021).

CHAPTER 5

PRINCIPLES AND SOURCES OF THE LAW OF ARMED CONFLICT

5.1 WAR AND THE LAW

Historically, the application of law to war has been divided into two parts. The first—referred to as *jus ad bellum*—is that part of international law that regulates the circumstances in which States may resort to the use of force in international relations. The second—referred to as *jus in bello*—is the part of international law relating to the conduct of hostilities and the protection of combatants, noncombatants, and civilians. Although it is important for commanders to understand both these areas, the legality of a State's decision to resort to war is primarily the responsibility of its national leadership. The legality of how the war is conducted is the responsibility of national leadership, military commanders, and individual service members. Concepts on application of the law of war to conflict on land are set out in greater detail in the DOD Law of War Manual. There are law of armed conflict rules unique to naval operations that have developed separately from the law of land warfare, which are addressed in the following.

Commentary

The law of war includes the *jus ad bellum*—the law concerning the resort to force—and the *jus in bello*—the law concerning conduct during war.

The *jus ad bellum* sets forth the international law rules governing when a State may resort to force as an instrument of its national policy. It often involves national policy decisions that, in U.S. practice, are usually decided by the President.[1] A State must comply with the *jus ad bellum* regardless of whether it is complying with *jus in bello*. For example, the Preamble to AP I provides that "nothing in this Protocol or in the Geneva Conventions of 12 August 1949 can be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations." Thus,

1. DOD LAW OF WAR MANUAL, §§ 1.11, 3.5.2.

even though a State complies with *jus in bello* rules, it may still violate the prohibition on the use of force under the *jus ad bellum*.[2]

Jus ad bellum criteria are drawn from principles developed as part of the just war tradition. These principles include:

- a competent authority to order the war for a public purpose;
- a just cause (such as self-defense);
- the means must be proportionate to the just cause;
- all peaceful alternatives must have been exhausted; and
- a right intention on the part of the just belligerent.[3]

Resort to military force under the *jus ad bellum* is a prerogative only of States. It may only be ordered by a competent authority for a public purpose. Armed groups that belong to a State may engage in hostilities on behalf of the State that has the right to use force under the *jus ad* bellum, but other non-State actors may not look to the *jus ad bellum* for authority to use force.[4]

The *jus in bello*—which is also called the law of armed conflict, the law of war, or international humanitarian law—governs how force may be used during an armed conflict. It also sets forth various protections for specified individuals, objects, and activities. By the principle of equal application, parties to a conflict must adhere to law of armed conflict rules regardless of whether their resort to force was in accordance with the *jus ad bellum*. For example, Common Article 1 of the 1949 Geneva Conventions provides: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." Moreover, the undertaking to respect and ensure respect of the law of armed conflict "in all circumstances" reaffirms that the "application of the Conventions does not depend on the legal justification for the conflict under the *jus ad bellum*. . . . Whether an armed conflict is 'just' or 'unjust', whether it is a war of aggression or of resistance to aggression, the Conventions'

2. *Id.* § 3.5.2.2.
3. *Id.* § 1.11.1.
4. *Id.* § 1.11.1.1.

guarantees are in no way affected."[5] Similarly, once an occupation exists in fact, the law of occupation applies, regardless of whether the invasion was lawful under *jus ad bellum*.[6]

5.1.1 Law Governing when States can Legally Use Force

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

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

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

Commentary

Under the UN Charter, the Security Council has primary responsibility for the maintenance of international peace and security.[7] The Security Council may determine the existence of any threat to the peace, any breach of the peace, or any act of aggression, and may decide what measures (including the use of military force) shall be taken under the Charter to maintain or restore international peace and security.[8] For example, in 1990, Security Council Resolution 661 affirmed "the inherent right of individual or collective self-defence, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter"[9] and, following the terrorist attacks

5. GC II COMMENTARY, ¶ 208. *See also* DOD LAW OF WAR MANUAL, § 3.4.
6. DOD LAW OF WAR MANUAL, § 3.5.2.1.
7. U.N. Charter, art. 24(1).
8. *Id.* arts. 39, 42.
9. S.C. Res. 661 (Aug. 6, 1990).

that took place on September 11, 2001, Resolution 1368 recognized "the inherent right of individual or collective self-defence in accordance with the Charter."[10]

UN member States agree to give the United Nations every assistance in any action it takes in accordance with the Charter and to refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action.[11] Member States also agree to accept and carry out the decisions of the UN Security Council in accordance with the Charter.[12] Moreover, members must afford mutual assistance in carrying out the measures decided upon by the Security Council.[13] In the event of a conflict between the obligations of the member States under the Charter and their obligations under any other international agreement, their obligations under the Charter prevail.[14]

In addition to Article 2(4) of the UN Charter, the prohibition on the threat or use of force is contained in other international treaties. For example, Article 1 of the Inter-American Treaty of Reciprocal Assistance states: "The High Contracting Parties formally condemn war and undertake in their international relations not to resort to the threat or the use of force in any manner inconsistent with the provisions of the Charter of the United Nations or of this Treaty."[15] Similarly, Article 1 of the General Treaty for Renunciation of War as an Instrument of National Policy (the Kellogg-Briand Pact) states: "The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another."[16]

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10. S.C. Res. 1368 (Sept. 12, 2001); DOD LAW OF WAR MANUAL, § 1.11.2.
11. U.N. Charter, art. 2(5).
12. *Id.* art. 25.
13. *Id.* art. 49.
14. *Id.* art. 103. *See also* DOD LAW OF WAR MANUAL, § 1.11.2.1.
15. Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, 62 Stat. 1681, 21 U.N.T.S. 77.
16. General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343. *See also* DOD LAW OF WAR MANUAL, § 1.11.3.

Aggression is the most serious form of the unlawful use of force, but not every unlawful use of force constitutes an act of aggression.[17] The U.S. representative to the UN Special Committee on the Question of Defining Aggression noted that the definition, "while recognizing the dangers which would flow from an illegal use of force amounting to aggression, correctly stated the view that not every act of force in violation of the Charter constituted aggression."[18] The United States believes that the definition of the act of aggression in the Kampala amendments to the Rome Statute does not reflect customary international law.[19]

The Charter of the International Military Tribunal convened at Nuremberg in 1945 empowered the Tribunal to try and punish persons, whether individuals or members of organizations, for international crimes, including the planning, preparation, initiation, or waging of a war of aggression. Article 6 of the Charter of the International Military Tribunal provides the Tribunal with "the power to try and punish persons who . . . , whether as individuals or as members of organizations, committed any of the following crimes . . . [including] *Crimes against peace*: namely, planning, preparation, initiation or waging of a war of aggression."

Military and civilian personnel may not, however, be lawfully punished simply for fighting in or supporting an armed conflict, even if their side has been labeled the aggressor by the United Nations. Regarding the crime of planning and waging aggressive war, both post-Second World War International Military Tribunals punished only those high-ranking civilian and military officials who were engaged in the formulation of war-making policy. The tribunals rejected efforts to punish lesser officials for this crime merely because they participated in the war. For example, in the *I.G. Farben Case*, the Tribunal asked:

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17. G.A. Res. 3314 (XXIX), annex, Definition of Aggression, pmbl. ¶ 5 (Dec. 14, 1974).

18. Joseph Sanders, Rapporteur, Special Committee on the Question of Defining Aggression, *Report of the Special Committee on the Question of Defining Aggression*, annex 1, U.N. GAOR, 29th Sess., Supp. No. 19, at 22–23, U.N. Doc. A/9619 (1974).

19. DOD LAW OF WAR MANUAL, § 1.11.3.1.

> Is it an offense under international law for a citizen of a state that has launched an aggressive attack on another country to support and aid such war efforts of his government, or is liability to be limited to those who are responsible for the formulation and execution of the policies that result in the carrying on of such war?
>
> . . . individuals who plan and lead a nation into and in an aggressive war should be held guilty of crimes against peace, but not those who merely follow the leaders and whose participations . . . 'were in aid of the war effort in the same way that other productive enterprises aid in the waging of war.' (IMT Judgement, Volume 1, page 330).[20]

It would be unjust to punish individual military members based on *jus ad bellum* considerations when they have no influence on whether their State has resorted to force lawfully under applicable international law. For example, in *United States v. Altstoetter*, the Tribunal stated:

> If we should adopt the view that by reason of the fact that the war was a criminal war of aggression every act which would have been legal in a defensive war was illegal in this one, we would be forced to the conclusion that every soldier who marched under orders into occupied territory or who fought in the homeland was a criminal and a murderer. The rules of land warfare upon which the prosecution has relied would not be the measure of conduct and the pronouncement of guilt in any case would become a mere formality.[21]

In 1974, in Resolution 3314, the UN General Assembly adopted by consensus a definition of aggression: "Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner incon-

20. United States v. Krauch (The I.G. Farben Case), 8 TWC 1124, 1126–27 (1952).
21. United States v. Josef Altstoetter (The Justice Case), 3 TWC 1027 (1951).

sistent with the Charter of the United Nations, as set out in this definition."[22] Article 3 of the resolution contains a non-exhaustive list of acts that qualify as acts of aggression:

> (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
> (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
> (c) The blockade of the ports or coasts of a State by the armed forces of another State;
> (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
> (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
> (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
> (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

The legality of a use of force must be assessed in light of the particular facts and circumstances at issue: "In the end, each use of force must find legitimacy in the facts and circumstances that the state believes have made it necessary. Each should be judged not on abstract

22. G.A. Res. 3314 (XXIX), art. 1 (Dec. 14, 1974); 72 DEPARTMENT OF STATE BULLETIN 158–60 (Feb. 1975).

> concepts, but on the particular events that gave rise to it."[23] In 1841, U.S. Secretary of State Daniel Webster wrote: "It is admitted that a just right of self-defense attaches always to nations as well as to individuals, and is equally necessary for the preservation of both. But the extent of this right is a question to be judged of by the circumstances of each particular case . . . ."[24]
>
> Legal justifications for the resort to force include the use of force in self-defense;[25] the use of force authorized by the UN Security Council under Chapter VII of the Charter;[26] and the use of force with the consent of the territorial State. For example, in 1984, "[i]n the case of the action taken in Grenada, the legal position of the United States was based upon the application of a combination of three well established principles of international law," including that "the lawful governmental authorities of a State may invite the assistance in its territory of military forces of other states or collective organizations in dealing with internal disorder as well as external threats."[27] And, in 1964, the U.S. Permanent Representative to the UN Security Council wrote:
>
> > The United States Government has just received confirmation that a short time ago—early morning of 24 November in the Congo—a unit of Belgian paratroopers, carried by United States military transport planes, landed at Stanleyville in the Congo. This landing has been made (1) with the authorization of the Government of the Congo . . . .[28]

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23. William H. Taft IV, Legal Adviser, Department of State, & Todd F. Buchwald, Assistant Legal Adviser for Political-Military Affairs, Department of State, *Preemption, Iraq, and International Law*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 557, 557 (2003).

24. Daniel Webster, Letter to Mr. Fox (Apr. 24, 1841), *reprinted in* DANIEL WEBSTER, THE DIPLOMATIC AND OFFICIAL PAPERS OF DANIEL WEBSTER, WHILE SECRETARY OF STATE 105 (1848). *See also* DOD LAW OF WAR MANUAL, § 1.11.3.

25. U.N. Charter, art. 51.

26. *Id.* art. 42.

27. Davis R. Robinson, Legal Adviser, Department of State, Letter to Professor Edward Gordon, Chairman of the Committee on Grenada Section on International Law and Practice American Bar Association on the Legal Position of the United States on the Action Taken in Grenada (Feb. 10, 1984), *reprinted in* 18 INTERNATIONAL LAWYERS 381, 381–82 (1984).

28. Statement by the United States Government, *reprinted in* Letter dated Nov. 24, 1964 from the representative of the United States of America to the President of the Security

> The use of force in self-defense must be necessary and proportionate.[29] The condition of necessity requires that no reasonable non-forcible means of redress are available.[30] Thus, prior to using force in self-defense, diplomatic initiatives, economic measures, or other non-forcible means must be exhausted or provide no reasonable prospect of stopping an armed attack. For example, in 1993, the U.S. Permanent Representative to the United Nations wrote:
>
> > Based on the pattern of the Government of Iraq's behavior, including the disregard for international law and Security Council resolutions, the United States has concluded that there is no reasonable prospect that new diplomatic initiatives or economic measures can influence the current Government of Iraq to cease planning future attacks against the United States.[31]
>
> And, in 1989, the U.S. Permanent Representative wrote: "The United States has exhausted every available diplomatic means to resolve peacefully disputes with Mr. Noriega, who has rejected all such efforts."[32] Necessity in the context of *jus ad bellum* is different from the *jus in bello* concept of military necessity.[33]
>
> Necessity also has a temporal element. If defensive actions occur in anticipation of an armed attack, they must be "imminent." The traditional reference to this requirement is the *Caroline* incident, in response to which the U.S. Secretary of State observed that the need

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Council, annex II, U.N. Doc. S/6062 (Nov. 24, 1964). *See also* DOD LAW OF WAR MANUAL, § 1.11.4.

29. *See, e.g.*, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 41 (July 8); Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161, ¶ 76 (Nov. 6).

30. William H. Taft IV, Legal Adviser, Department of State, *Self-Defense and the Oil Platforms Decision*, 29 YALE JOURNAL OF INTERNATIONAL LAW 295, 304 (2004).

31. Madeleine Albright, Letter dated June 26, 1993 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/26003 (June 26, 1993).

32. Thomas R. Pickering, Letter dated 20 December 1989 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/21035 (Dec. 20, 1989).

33. DOD LAW OF WAR MANUAL, § 1.11.1.3.

for a defensive use of force must be "instant, overwhelming, and leaving no choice of means, and no moment for deliberation."[34] In light of the fact that modern armed attacks may come without warning and have catastrophic consequences, a growing body of opinion supports the "last window of opportunity" approach, by which an armed attack is imminent when the attacker has the capability to conduct an armed attack and the intent to launch one, and must act promptly lest the opportunity to effectively use defensive force be lost.[35] Additionally, self-defense may not take place too long after an armed attack has been launched, the requirement of "immediacy." However, if a reasonable State would conclude that the attack is but one in a series (a campaign), the right to use force in self-defense continues for as long as that campaign is underway. This is so despite the occurrence of operational pauses.

While necessity is about whether forcible actions are needed to stop an armed attack that is ongoing or imminent, the requirement of proportionality deals with the degree of force that may be used defensively. There is no requirement that a State exercising the right of self-defense use the same degree or type of force used by the attacking State. Rather, proportionality is judged according to the nature of the threat being addressed. Thus, for instance, it is appropriate to look "not only at the immediately preceding armed attack, but also at whether it was part of an ongoing series of attacks, what steps were already taken to deter future attacks, and what force could reasonably be judged to be needed to successfully deter future attacks."[36] Restated, force may be used in self-defense, but only to the extent that it is required to repel the armed attack and to restore the security of the party attacked.[37] For example, in 1986, the U.S. objective in Libya was to "destroy facilities used to carry out Libya's

34. Webster, *supra* note 24, at 124.

35. *See, e.g.*, Department of Justice, Lawfulness of a Lethal Operation Directed Against a U.S. Citizen who is a Senior Operational Leader of Al'Qaida or an Associated Force (Nov. 8, 2011); Eric Holder, Attorney General, Remarks at Northwestern University School of Law (Mar. 5, 2012).

36. William H. Taft IV, Legal Adviser, Department of State, *Self-Defense and the Oil Platforms Decision*, 29 YALE JOURNAL OF INTERNATIONAL LAW 295, 305–6 (2004).

37. Counter-Memorial and Counter-Claim Submitted by the United States of America, Oil Platforms (Iran v. U.S.), 141 (¶ 4.31) (June 23, 1997).

hostile policy of international terrorism and to discourage Libyan terrorist attacks in the future."[38] Similarly, in 1993, the United States decided "as a last resort . . . that it is necessary to respond to the attempted attack and the threat of further attacks by striking at an Iraqi military and intelligence target that is involved in such attacks."[39] Proportionality in the context of *jus ad bellum* should not be confused with the *jus in bello* principle of proportionality in conducting attacks.[40]

Importantly, the collective use of force is lawful so long as it is in response to a request from the State facing the armed attack and is compliant with any limitations set forth therein.[41]

The other bases for the use of force lawfully are more straightforward. Consent by the State concerned is a circumstance precluding wrongfulness under the law of State responsibility. This is recognized in Article 20 of the ILC's Articles on State Responsibility, which reflects customary international law. As an example, a State may request assistance on its territory from another State in the form of actions qualifying as a use of force against an insurgent group. Because consent precludes the wrongfulness of that use of force, the assistance is lawful.

Additionally, Chapter VI of the UN Charter allows the Security Council to authorize or mandate the use of force (Article 42), if non-forceful measures (Article 41) have failed to resolve a situation involving a threat to the peace, a breach of the peace, or an act of aggression (Article 39). This is typically done by means of a Security Council resolution allowing for resort to "all necessary means" to accomplish the purpose (mandate) set forth in the resolution.

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38. Herbert S. Okun, Letter dated Apr. 14, 1986 from the Acting Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/17990 (Apr. 14, 1986).

39. Madeleine Albright, Letter dated June 26, 1993 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/26003 (June 26, 1993).

40. DOD LAW OF WAR MANUAL, § 1.11.1.2.

41. U.N. Charter, art. 51; Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S), Judgment, 1986 I.C.J. 14, ¶ 199 (June 27).

Some States, like the United Kingdom, argue that humanitarian intervention may be a legal basis for the resort to the use of force. For example, the United Kingdom has stated the following position:

> The legal basis for the use of force is humanitarian intervention, which requires three conditions to be met:
> (i) there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief;
> (ii) it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and
> (iii) the proposed use of force must be necessary and proportionate to the aim of relief of humanitarian suffering and must be strictly limited in time and in scope to this aim (i.e. the minimum necessary to achieve that end and for no other purpose).[42]

The United States has not adopted that position:

> Of particular note, the idea that humanitarian catastrophes must be avoided has been asserted as a reason for rethinking what actions international law permits in a number of situations. . . .
>
> Significantly, the doctrine was invoked in the absence of authorization by the UN Security Council. The United States did not, however, adopt this theory as a basis for the NATO intervention in Kosovo, and instead pointed to a range of other factors to justify its participation in the Kosovo campaign.[43]

The Security Council may, however, authorize the use of military action for humanitarian reasons. Resolution 1973 of March 17, 2011, for example, authorizes member States, "acting nationally or through

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42. U.K. Prime Minister's Office, *Policy Paper, Syria Action—UK Government Legal Position* (Apr. 14, 2018), https://www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position.

43. 2004 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 971.

regional organizations or arrangements, . . . to take all necessary measures, . . . to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya."[44]

See § 4.4.1 for a detailed discussion of the use of force in self-defense.

5.1.2 Law Governing how Armed Conflict is Conducted

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

Commentary

The law of armed conflict establishes (1) rules governing the resort to force (*jus ad bellum*); (2) rules for the conduct of hostilities and the protection of war victims in international and non-international armed conflict; (3) rules between belligerents and neutrals; (4) rules for military occupation; and (5) duties during peacetime that help implement the above rules. The law of war can also be applied by analogy to other contexts.[45]

The law of armed conflict distinguishes between (1) international armed conflicts; and (2) other armed conflicts, typically called non-international armed conflicts.[46] A conflict involving two or more States on opposite sides is known as an "international armed conflict" (IAC).[47] A conflict not involving opposing States—for example, two non-State organized armed groups fighting against one another or States fighting against non-State organized armed groups—is characterized as a conflict "not of an international character" or a "non-international armed conflict" (NIAC). The geographical reach of a NIAC is a matter of some contention,[48] but the U.S. position is that it continues to exist even if operations are conducted beyond

44. S.C. Res. 1973, ¶ 4 (Mar. 17, 2011). *See also* DOD LAW OF WAR MANUAL, § 1.11.4.4.
45. DOD LAW OF WAR MANUAL, § 3.2.
46. *Id.* § 3.3.
47. 1949 Geneva Conventions, comm. art. 2; AP I, art. 1.
48. *See, e.g.*, NEWPORT MANUAL, § 12.2.

the borders of the State concerned. Thus, for instance, strikes against a terrorist organized armed group in another State far from the battlefield are nevertheless governed by the law of armed conflict applicable to NIACs.[49] There are important differences between the law applicable to an IAC and the law applicable to a NIAC.[50]

It is possible to characterize some parts of a conflict as international in character, while other parts may be characterized as non-international in character. In such cases, the rules of IAC apply between States (and any armed groups "belonging" to a State), while the rules of NIAC apply as between the States and non-State organized armed groups or in fighting between such groups. For example, in *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, the International Court of Justice (ICJ) stated:

> The conflict between the *contras*' forces and those of the Government of Nicaragua is an armed conflict which is "not of an international character." The acts of the *contras* towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts. Because the minimum rules applicable to international and to non-international conflicts are identical, there is no need to address the question whether those actions must be looked at in the context of the rules which operate for the one or for the other category of conflict.[51]

In *Prosecutor v. Lubanga*, the International Criminal Court (ICC) stated:

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49. 1949 Geneva Conventions, comm. art. 3; AP II, art. 1; The Prize Cases, 67 U.S. 635, 666 (1863); Hamdan v. Rumsfeld, 548 U.S. 557, 630 (2006); Hamdan v. Rumsfeld, 415 F.3d 33, 44 (D.C. Cir. 2005) (Williams, J., concurring).

50. DOD LAW OF WAR MANUAL, § 3.3.1; NEWPORT MANUAL, §§ 2.2.2, 2.2.4.

51. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 219 (June 27).

> Similarly, although there is evidence of direct intervention on the part of Uganda, this intervention would only have internationalised the conflict between the two states concerned (viz. the DRC and Uganda). Since the conflict to which the UPC/FPLC [Lubanga's militia] was a party was not "a difference arising between two states" but rather protracted violence carried out by multiple non-state armed groups, it remained a non-international conflict notwithstanding any concurrent international armed conflict between Uganda and the DRC.[52]

5.1.2.1 International Armed Conflict

An international armed conflict (IAC) refers to any declared war between States or any other armed conflict between States, even if the state of war is not recognized by one of them. See Common Article 2 of the Geneva Conventions of 1949. This same standard has been understood to result in the application of the customary law of war. The Geneva Conventions apply to all cases of IAC and all cases of partial or total occupation of a territory, even if the occupation meets no armed resistance. The United States has interpreted armed conflict in Common Article 2 to include any situation in which there is hostile action between the armed forces of two parties, regardless of the duration, intensity, or scope of fighting.

The law governing IAC is known as the law of armed conflict or the law of war. These terms are used synonymously in U.S. military publications. The law of armed conflict is part of international law that regulates the conduct of armed hostilities and the protection of war victims in both international and noninternational armed conflict; belligerent occupation; and the relationship between belligerent, neutral, and nonbelligerent States. It encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law. See 7.1 for discussion on belligerent, nonbelligerent, and neutral States.

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52. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment, 258 (¶ 563) (Mar. 14, 2012). *See also* DOD LAW OF WAR MANUAL, § 3.3.1.2.

Although the law of war is part of international law, it is important to understand different States may have different law of war obligations. Understanding where these differences may arise is often important in dealing with an enemy. It becomes critical when working with allies and other foreign partners. The United States has signed but not ratified Additional Protocol I and is therefore not bound by it. Although the United States is not a party, its coalition partners often will be. Some provisions of Additional Protocol I reflect customary international law that is binding on the United States. Partner States may have different interpretations of law of war obligations even where the same treaty provision is at issue. Consequently, those partners often adopt conditions or caveats during multinational operations that express those States' interpretations or their differences on issues of national policy.

Commentary

Jus in bello treaties apply in cases of "declared war or of any other armed conflict," even if a state of war is not recognized by them, as provided in Common Article 2 of the Geneva Conventions.[53] For example, the Conventional Weapons Convention "shall apply in the situations referred to in Article 2 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims."[54] Compliance with *jus in bello* rules arises in two ways: (1) when a party intends to conduct hostilities; or (2) when parties are actually conducting hostilities.[55] If a State elects to go to war, it is bound by *jus in bello* rules for the conduct of those hostilities.[56] Thus, if a State responds to an attack with military force, those military operations must comply with *jus in bello* rules. For example, in 2001, the U.S. position was that "[t]he current operations in Afghanistan and continuing preparations for a sustained campaign easily establish that the situation here involves an armed conflict for purposes of international law."[57]

53. *See also* Hague Cultural Property Convention, art. 18.

54. Conventional Weapons Convention, art. 1.

55. DOD LAW OF WAR MANUAL, § 3.4.

56. LASSA OPPENHEIM, 2 INTERNATIONAL LAW 66 (2d ed. 1912); DOD LAW OF WAR MANUAL, § 3.4.1.

57. Patrick F. Philbin, Deputy Assistant Attorney General, Legality of the Use of Military Commissions to Try Terrorists, 25 Op. O.L.C 238, 276 (Nov. 6, 2001). *See also* DOD LAW OF WAR MANUAL, § 3.4.1.

States generally no longer file formal declarations of war with one another. Nonetheless, a state of hostilities can exist between States if one State provides objective evidence of its decision to resort to force through formal declarations that hostilities exist between them. Article 1 of the 1907 Hague III provides: "The Contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war."[58]

Government officials may also make public statements that are like declarations of war in that they provide notice of a state of hostilities. For example, after Egypt nationalized the Suez Canal in 1956, Israel invaded Egypt in October of that year. Britain and France demanded that Egypt and Israel stop all warlike action and withdraw their forces 10 miles from the Canal. Egypt rejected the demands, resulting in a series of air raids by French-British forces. Egypt severed diplomatic relations with the United Kingdom and France. President Gamal Abdel Nasser made the following public statement on November 1, 1956:

> And now fellow countrymen, while we face this situation: shall we fight or shall we surrender? . . . Egypt has always declared that it shall fight in defense of its sovereignty and honour. Fellow countrymen, we shall fight the forces of tyranny which are aiming at the violation of our liberty. . . .
>
> Fellow Egyptians: We are fighting a bitter fight. We shall not yield in the defense of Egypt's liberty, honour and dignity. . . . Orders have been issued to deliver arms, and we have a big quantity of them. We shall fight in a bitter battle from village to village. Let each one of you, my fellow countrymen, be a soldier in the armed forces, so that we may defend our liberty. Let our motto be: we shall fight and never surrender.[59]

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58. *See also* DOD LAW OF WAR MANUAL, § 3.4.1.1.

59. Quoted in Navios Corp. v. The Ulysses II, 161 F. Supp. 932, 935–36 (D. Md. 1958), *aff'd*, 260 F.2d 959 (4th Cir. 1958).

Two days later, on November 3, the Egyptian Information Department of the Ministry of National Guidance issued a formal statement that was distributed to the press, indicating, in part:

> We are at war with Britain and France whose Armed Forces are attacking Egyptian civilians in towns and villages, destroying houses, hospitals, and places of worship, killing women and children without discrimination or mercy, and in a manner most repulsive to the civilized mind. War is raging between us and the Anglo-French, and between us and Israel. World public opinion is fully aware of the true facts of this situation.[60]

In a case filed in the U.S. District Court for the District of Maryland to recover damages for an alleged breach of a time charter that contained a "war clause," the Court held that "the speech of November 1, confirmed by the statement of November 3, constituted a declaration of war even under the technical requirements of international law."[61] In 2001, in signing the Joint Resolution of Congress authorizing the use of all necessary and appropriate force in responding to the September 11 terrorist attacks, President George W. Bush stated:

> On September 11, 2001, terrorists committed treacherous and horrific acts of violence against innocent Americans and individuals from other countries. . . . Those who plan, authorize, commit, or aid terrorist attacks against the United States and its interests—including those who harbor terrorists—threaten the national security of the United States. It is, therefore, necessary and appropriate that the United States exercise its rights to defend itself and protect United States citizens both at home and abroad.[62]

When a State reports measures taken in the exercise of its inherent right of self-defense to the UN Security Council under Article 51 of the Charter, it may make statements that indicate its views that it is

60. Quoted in *id.* at 937.

61. *Id.* at 943.

62. Statement on Signing the Authorization for Use of Military Force, 37 WEEKLY COMP. PRES. DOC. 1333 (Sept. 24, 2001).

engaged in an armed conflict. For instance, on October 7, 2001, the United States reported to the Security Council that it was exercising its inherent right of individual and collective self-defense in Afghanistan:

> In accordance with Article 51 . . . , I wish . . . to report that the United States of America, together with other States, has initiated actions in the exercise of its inherent right of individual and collective self-defence following the armed attacks that were carried out against the United States on 11 September 2001.
>
> . . . .
>
> The attacks on 11 September 2001 and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation. Despite every effort by the United States and the international community, the Taliban regime has refused to change its policy. From the territory of Afghanistan, the Al-Qaeda organization continues to train and support agents of terror who attack innocent people throughout the world and target United States nationals and interests in the United States and abroad.
>
> In response to these attacks, and in accordance with the inherent right of individual and collective self-defence, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States. These actions include measures against Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan. In carrying out these actions, the United States is committed to minimizing civilian casualties and damage to civilian property.[63]

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63. Letter dated Oct. 7, 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2001/946 (2001). *See also* DOD LAW OF WAR MANUAL, § 3.4.1.1.

A congressional authorization to use military force can trigger the application of certain parts of the law of armed conflict. In *Talbot v. Seeman*, the U.S. Supreme Court stated: "It is not denied . . . that Congress may authorize general hostilities, in which case the general laws of war apply to our situation, or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed."[64] Thus, a Joint Resolution of Congress authorized the President to use all necessary and appropriate force in responding to the terrorist attacks of September 11, 2001:

> **SEC. 2 AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.**
>
> (a) IN GENERAL.—That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[65]

A statement by a State indicating that it has suffered a wrongful attack may also indicate that it views *jus in bello* rules as applying to all military operations, both its own and those of its adversary. Statements made by the United States after the September 11 terrorist attacks reflected that U.S. forces would conduct their operations against al-Qaida consistent with international law and the law of armed conflict. For example:

> In an indisputable act of aggression, al-Qa'ida attacked our nation and killed nearly 3,000 innocent people. . . . Our ongoing armed conflict with al-Qa'ida stems from our right—recognized under international law—to self defense.

64. Talbot v. Seeman, 5 U.S. 1, 28 (1801).
65. Pub. L. No. 107-40, 115 Stat. 225. *See also* DOD LAW OF WAR MANUAL, § 3.4.1.1.

> . . . The United States does not view our authority to use military force against al-Qa'ida as being restricted solely to "hot" battlefields like Afghanistan. Because we are engaged in an armed conflict with al-Qa'ida, the United States takes the legal position that—in accordance with international law—we have the authority to take action against al-Qa'ida and its associated forces without doing a separate self-defense analysis each time. . . . [W]e reserve the right to take unilateral action if or when other governments are unwilling or unable to take the necessary actions themselves.
>
> That does not mean we can use military force whenever we want, wherever we want. International legal principles, including respect for a state's sovereignty and the laws of war, impose important constraints on our ability to act unilaterally—and on the way in which we can use force—in foreign territories.[66]

Statements by States that justify the legality of their actions or assert authority under *jus in bello* rules may also provide evidence that States have the intention of conducting hostilities and that *jus in bello* restrictions apply to the activities that will effectuate those intentions. Section 1021 of the National Defense Authorization Act for Fiscal Year 2012 provided: "Congress affirms that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force (Public Law 107-40; 50 U.S.C. 1541 note) includes the authority for the Armed Forces of the United States to detain covered persons . . . pending disposition under the law of war."[67]

The de facto existence of an armed conflict is sufficient to trigger obligations for the conduct of hostilities. "There is no need for a formal declaration of war, or for the recognition of the existence of a state of war, as preliminaries to the application of the Convention.

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66. John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Remarks at Harvard Law School: Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011); DOD LAW OF WAR MANUAL, § 3.4.1.1.

67. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 10 U.S.C. § 801 note (2011), 125 Stat. 1562; DOD LAW OF WAR MANUAL, § 3.4.1.1.

The occurrence of de facto hostilities is sufficient."[68] GC III applies "on the outbreak of *de facto* hostilities, even if war has not been previously declared, and irrespective of the nature of the armed conflict."[69] For example, in 1966, the United States maintained that American military personnel held by North Vietnam were entitled to treatment as POWs:

> Although there have been no declarations of war, the present conflict in Vietnam is indisputably an "armed conflict" between parties to the Geneva Conventions of 1949. In one aspect of the war, American aircraft are operating against military targets in North Vietnam, and North Vietnamese forces have engaged these aircraft. Under these circumstances, the Convention applies in its entirety to this conflict. . . . In this case, the state of war (under international law) is not disputed; it is merely undeclared.[70]

The United States interprets "armed conflict" in Common Article 2 of the 1949 Geneva Conventions as follows:

> The Third Geneva Convention accords "prisoner-of-war" status to members of the armed forces who are captured during "armed conflict" between two or more parties to the Convention. "Armed conflict" includes any situation in which there is hostile action between the armed forces of two parties, regardless of the duration, intensity or scope of the fighting and irrespective of whether a state of war exists between the two parties.[71]

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68. GC III COMMENTARY, at 22–23.

69. Howard S. Levie, *Prisoners of War in International Armed Conflict*, 59 INTERNATIONAL LAW STUDIES 1, 15 (1977) (quoting Jean S. Pictet, *The New Geneva Conventions for the Protection of War Victims*, 45 AMERICAN JOURNAL OF INTERNATIONAL LAW 462, 468 (1951)).

70. George Aldrich, Assistant Legal Adviser for Far Eastern Affairs, Department of State, Entitlement of American Military Personnel Held by North Viet-Nam to Treatment as Prisoners of War Under the Geneva Convention of 1949 Relative to the Treatment of Prisoners of War, July 13, 1966, 10 WHITEMAN DIGEST, § 7 at 231–32. *See also* DOD LAW OF WAR MANUAL, § 3.4.2.

71. U.S. Department of State, Telegram 348126 to American Embassy at Damascus (Dec. 8, 1983), 3 1981–88 CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 3456, 3457; DOD LAW OF WAR MANUAL, § 3.4.2.

In evaluating whether de facto hostilities exist for the purpose of applying *jus in bello* restrictions, situations of internal disturbances and tensions—such as riots, isolated and sporadic acts of violence, and other acts of a similar nature—do not amount to armed conflict. See § 5.1.2.2 below.

5.1.2.2 Noninternational Armed Conflict

Noninternational armed conflict (NIAC) is defined by Common Article 3 (CA3) of the Geneva Conventions of 1949 as an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties. A NIAC is an armed conflict not between States, but rather a conflict between a State and a non-State armed group, as in a civil war or domestic rebellion occurring within the territory of a State or a conflict between two non-State armed groups. In assessing whether a NIAC exists, triggering the applicable law of armed conflict rules, situations of internal disturbances and tensions—such as riots, isolated and sporadic acts of violence, and other acts of a similar nature—do not amount to armed conflict. The intensity of the conflict and organization of the parties are criteria that have to be assessed to distinguish between a NIAC and internal disturbances and tensions. Non-international armed conflicts are classified as such simply based on the status of the parties to the armed conflict and sometimes occur in more than one State. The mere fact that an armed conflict occurs in more than one State and may be characterized as international in scope, does not render it international in character. For example, two non-State armed groups warring against one another or States warring against non-State armed groups may be described as NIAC, even if international borders are crossed in the fighting. Small wars or limited military expeditions may constitute NIACs or IACs, depending on the parties to the conflict.

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

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

Commentary

NIACs are regulated by Common Article 3 of the 1949 Geneva Conventions, as supplemented by AP II (see Article 1(1)), and customary international law. AP II applies to armed conflicts not covered by Article 1 of AP I (IACs) that take place in the territory of one State "between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."

The following acts are prohibited at any time and in any place:

Common Article 3(1)	**AP II, Article 4.2**
Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment, and torture	Violence to the life, health, and physical or mental well-being of persons, in particular murder, as well as cruel treatment such as torture, mutilation, or any form of corporal punishment
Taking of hostages	Taking of hostages
Outrages upon personal dignity, in particular humiliating and degrading treatment	Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution, and any form of indecent assault
The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples	Collective punishment
	Acts of terrorism
	Pillage
	Threats to commit any of the foregoing acts

In assessing whether de facto hostilities exist for the purpose of applying the law of armed conflict applicable in a NIAC, situations of internal disturbances and tensions—such as riots, isolated and sporadic acts of violence, and other acts of a similar nature—do not

amount to armed conflict.[72] For example, in ratifying the International Convention for the Suppression of the Financing of Terrorism, the United States noted that it "understands that the term 'armed conflict' in Article 2(1)(b) of the Convention does not include internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature."[73] The Rome Statute of the ICC similarly provides that each of Article 8(2)(d) and (f) "applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature."[74]

While it may be easy to distinguish IACs from "internal disturbances and tensions," it is more difficult to distinguish NIACs from "internal disturbances and tensions."[75] "Common Article 3 is generally understood to apply to low intensity and open armed confrontations between relatively organized armed forces or groups that take place within the territory of a particular State."[76] The criteria used to distinguish a NIAC from an internal disturbance or tension include the intensity of the conflict and the organization of the parties. For example, in *Prosecutor v. Tadić*, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) stated: "In an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law."[77] And, in *Prosecutor v. Akayesu*, the Trial Chamber noted: "It suffices to recall that an armed conflict is distinguished from internal disturbances by the level of intensity of the

72. AP II, art. 1(2); Conventional Weapons Convention, art. 1(2); Amended Mines Protocol, art. 1(2).

73. United States, Statement on Ratification of the International Convention for the Suppression of the Financing of Terrorism, June 26, 2002, 2185 U.N.T.S. 611, 612.

74. Rome Statute, art. 8(2)(d), (f). *See also* DOD LAW OF WAR MANUAL, § 3.4.2.2.

75. DOD LAW OF WAR MANUAL, § 3.4.2.2.

76. Abella v. Argentina, Inter-American Commission on Human Rights, Case No. 11.137, OEA/Ser.L/V/II.98, ¶ 152 (Nov. 18, 1997).

77. Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 562 (May 7, 1997).

conflict and the degree of organization of the parties to the conflict."[78] The factors considered in assessing the intensity of a conflict include:

- the seriousness of attacks and whether there has been an increase in armed clashes;
- the spread of clashes over territory and over a period of time;
- any increase in the number of government forces and mobilization;
- the distribution of weapons among both parties to the conflict;
- whether the conflict has attracted the attention of the Security Council;
- whether any resolutions on the matter have been passed by the Security Council;
- the number of civilians forced to flee from the combat zones;
- the type of weapons used, in particular the use of heavy weapons, and other military equipment, such as tanks and other heavy vehicles;
- the blocking or besieging of towns and the heavy shelling of those towns;
- the extent of destruction and the number of casualties caused by shelling or fighting;
- the quantity of troops and units deployed;
- the existence and change of front lines between the parties;
- the occupation of territory, and towns and villages;
- the deployment of government forces to the crisis area;
- the closure of roads; and
- ceasefire orders and agreements and attempts by representatives from international organizations to broker and enforce cease fire agreements.[79]

Factors considered in assessing the organization of an armed group fall into five broad groups.

78. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 625 (Sept. 2, 1998).
79. Prosecutor v. Boškoski, Case No. IT-04-82-T, Judgment, ¶ 177 (July 10, 2008).

- factors signaling the presence of a command structure;
- factors indicating that an armed group could carry out operations in an organized manner;
- factors indicating that a level of logistics has been taken into account;
- factors relevant to determining whether an armed group possessed a level of discipline and the ability to implement the basic obligations of Common Article 3; and
- factors indicating that the armed group was able to speak with one voice.[80]

Generally, where parties are, in fact, engaged in activities that the law of armed conflict contemplates, those activities are subject to the law of war. In *Abella v. Argentina*, the Inter-American Commission on Human Rights stated:

> What differentiates the events at the La Tablada base from these situations [of internal disturbances] are the concerted nature of the hostile acts undertaken by the attackers, the direct involvement of governmental armed forces, and the nature and level of the violence attending the events in question. More particularly, the attackers involved carefully planned, coordinated and executed an armed attack, i.e., a military operation, against a quintessential military objective—a military base.[81]

The Commentary to GC III states that it "suffices for the armed forces of one Power to have captured adversaries falling within the scope of Article 4. Even if there has been no fighting, the fact that persons covered by the Convention are detained is sufficient for its application."[82]

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80. Prosecutor v. Dordević, Case No. IT-05-87/I-T, Judgment, ¶ 1526 (Feb. 23, 2011).

81. Abella v. Argentina, Inter-American Commission on Human Rights, Case No. 11.137, OEA/Ser.L/V/II.98, ¶ 155 (Nov. 18, 1997).

82. GC III COMMENTARY, at 23; DOD LAW OF WAR MANUAL, § 3.4.2.2.

5.1.2.3 Other Situations to which the Law of War is Applicable

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

Commentary

As provided in Common Article 2, the 1949 Geneva Conventions apply "to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."[83] Common Article 2 is considered to reflect customary law. Thus, the scope it sets forth for the applicability of the law of war would apply even if the States involved in the IAC in question were not party to the Geneva Conventions.

The 1954 Hague Cultural Property Convention also applies "to cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."[84] Article 5 of the Convention requires a Party occupying all or part of the territory of another Party to "as far as possible support the competent national authorities of the occupied country in safeguarding and preserving its cultural property."[85] Should it becomes necessary "to take measures to preserve cultural property situated in occupied territory and damaged by military operations" because the competent national authorities are unable to take such measures, "the Occupying Power shall, as far as possible, and in close co-operation with such authorities, take the most necessary measures of preservation."[86]

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83. *See in particular* GC IV, arts. 27–34, 47–78; DOD LAW OF WAR MANUAL, § 11.1.2.3.
84. Hague Cultural Property Convention, art. 18(2).
85. *Id.* art. 5(1).
86. *Id.* art. 5(2); DOD LAW OF WAR MANUAL, § 11.1.2.3.

> A discussion of the law of neutrality is contained in Chapter 7.
>
> It is DoD policy that DoD Components must implement effective programs to prevent violations of the law of war, including:
>
> > (1) Law of war dissemination and periodic training.
> >
> > (2) Qualified legal advisers advising on the law of war.
> >
> > (3) Instructions, regulations, and procedures to implement law of war standards and establish processes for ensuring compliance.
> >
> > . . . .
> >
> > (6) Appropriate actions to ensure accountability and to improve efforts to prevent violations of the law of war in U.S. military operations. Such actions may include:
> >
> > > (a) Providing additional training.
> > >
> > > . . . .
> > >
> > > (d) Revising or issuing policies, regulations, instructions, procedures, training documents, or other guidance to incorporate lessons learned.[87]

The DoD General Counsel coordinates and monitors DoD Components' respective plans and policies for training and education in the law of war.[88] DoD Component heads are responsible for implementing "effective programs to prevent violations of the law of war by members of their component, including programs for law of war dissemination and periodic training commensurate with each individual's duties and responsibilities."[89] The Secretaries of the Military Departments shall:

87. DoDD 2311.01, DoD Law of War Program, ¶ 1.2.c (July 2, 2020).
88. *Id.* ¶ 2.1.e.
89. *Id.* ¶ 2.6.b.

> Provide directives, publications, instructions, and periodic training so the principles and rules of the law of war will be known to members of their respective Military Department. Such training will ensure that:
>
> (1) All military members . . . know the fundamental precepts of the law of war and that all members have knowledge of the law commensurate with each individual's duties and responsibilities. This includes relevant standards applicable in international armed conflict and belligerent occupation.[90]

The Secretaries shall also ensure that "[i]nformation about the law of war in such directives, publications, instructions, and training is consistent with information in the DoD Law of War Manual."[91] The Combatant Commanders shall similarly "[e]nsure that law of war dissemination and periodic training programs of subordinate commands and components are consistent with this issuance and the law of war."[92]

Several DoD issuances provide requirements that support DoD compliance with the law of war.[93]

All the military services have implementing directives regarding the law of war.[94]

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90. *Id.* ¶ 2.7.b.

91. *Id.* ¶ 2.7.b.

92. *Id.* ¶ 2.9.

93. *See, e.g.*, DoDD 5000.01, DoDD 3000.03E, DoDD 3000.09 (review of the legality of weapons); DoDD 2310.01E, DoDD 3115.09 (detention and interrogation policies); DOD LAW OF WAR MANUAL; DoDI 1000.01 (identification cards required by the Geneva Conventions). *See* DoDD 2311.01, DoD Law of War Program, ¶ 1.4 (July 2, 2020).

94. *See* SECNAVINST 3300.1D, Department of the Navy Law of War Program, ¶ 4 (May 19, 2022) (see in particular encl. 1 (Law of War Training Program)); FM 6-27/MCTP 11-10C, ¶ 1-120; AR 350-1, Army Training and Leader Development (Dec. 10, 2017, rev. Aug. 13, 2019) (see in particular Table F-2 (Other requirements for selected personnel (unites and institutions)); AFI 51-401, The Law of War, pt. 1 (Aug. 3, 2018).

5.2 THE LAW OF ARMED CONFLICT AND ITS APPLICATION

DODD 2311.01, Department of Defense Law of War Program, defines the law of war/law of armed conflict as the treaties and customary international law binding on the United States that regulate: the resort to armed force; the conduct of hostilities and the protection of war victims in international and noninternational armed conflict; belligerent occupation; and the relationships between belligerent, neutral, and nonbelligerent States.

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

It is DOD policy to comply with the law of armed conflict during all armed conflicts, however such conflicts are characterized, and in all other military operations. See DODD 2311.01.

Commentary

The DoD Law of War Manual defines the law of war as "that part of international law that regulates the resort to armed force; the conduct of hostilities and the protection of war victims in both international and non-international armed conflict; belligerent occupation; and the relationships between belligerent, neutral, and non-belligerent States" and as comprising "treaties and customary international law applicable to the United States."[95]

5.3 GENERAL PRINCIPLES OF THE LAW OF ARMED CONFLICT

The law of armed conflict seeks to minimize unnecessary suffering and destruction by controlling and mitigating the harmful effects of hostilities through standards of protection to be accorded to combatants, noncombatants, civilians, and civilian property. To achieve this goal, the law of armed

95. DOD LAW OF WAR MANUAL, § 1.3. *See also* DoDD 2311.01, DoD Law of War Program (July 2, 2020); DoDD 2310.01E, DoD Detainee Program (Mar. 15, 2022).

conflict is based on the three general principles of military necessity, humanity, and honor. These principles provide the foundation for other law of armed conflict principles, such as proportionality and distinction, and most of the treaty and customary rules of the law of armed conflict. These principles must be considered collectively. No one principle of the law of war can be considered in isolation.

Commentary

The law of armed conflict provides common ground of rationality between enemies. This body of law corresponds to their mutual interests during conflict and constitutes a bridge for a new understanding after the end of the conflict. The law of armed conflict is intended to preclude purposeless, unnecessary destruction of life and property and to ensure that violence is used only to defeat the enemy's military forces. If followed by all participants, the law of armed conflict will inhibit warfare from needlessly affecting persons or things of little military value. By preventing needless cruelty, the bitterness and hatred arising from armed conflict are lessened, and thus it is easier to restore an enduring peace. The legal and military experts who attempted to codify the laws of war more than a hundred years ago reflected this reality when they declared that the final object of an armed conflict is the "re-establishment of good relations, and a more solid and lasting peace between the belligerent States."[96]

General principles of law common to the major legal systems of the world, including law of war principles, are a recognized part of international law. For example, "the general principles of law recognized by civilized nations" are a source of applicable law for the ICJ,[97] and the U.S. Supreme Court has stated that international law includes "resort to the great principles of reason and justice."[98] Baron Descamps, President of the Advisory Committee of Jurists that drafted that Statute of the Permanent Court of International Justice, said:

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96. Final Protocol of the Brussels Conference of 27 August 1874, *reprinted in* THE LAWS OF ARMED CONFLICT 22 (Dietrich Schindler & Jiří Toman eds., 4th ed. 2004).

97. ICJ Statute, art. 38(1)(c).

98. Thirty Hogsheads of Sugar v. Boyle, 13 U.S. 191, 198 (1815) (Marshall, C.J.).

> The only question is,—how to make unerring rules for the judge's guidance. . . .
>
> . . . listen to this solemn declaration of the Powers, placed at the beginning of the Convention dealing with laws and customs of war on land:
>
> > Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience.
>
> . . . .
>
> I am convinced that the assembly of all the States does not and cannot intend, in dealing with the state of peace, to abjure principles which are clearly intended to be applied in war.[99]

Law of war principles (1) help practitioners interpret and apply specific treaty or customary rules; (2) provide a general guide for conduct during war when no specific rule applies; and (3) work as interdependent and reinforcing parts of a coherent system. The Martens Clause, introduced in the 1899 Hague Convention No. II, provides:

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, popula-

99. Speech by Baron Descamps on the Rules of Law to be applied, annex no. 1 to 14th Meeting (Private) on July 2, 1920, PERMANENT COURT OF INTERNATIONAL JUSTICE, ADVISORY COMMITTEE OF JURISTS, PROCÈS-VERBAUX OF THE PROCEEDINGS OF THE COMMITTEE: JUNE 16TH–JULY 24TH 1920 WITH ANNEXES 322, 323–24 (1920); DOD LAW OF WAR MANUAL, § 2.1.1.

> tions and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.[100]

> Law of war principles operate as interdependent and reinforcing parts of a coherent system. Military necessity justifies certain actions necessary to defeat the enemy as quickly and efficiently as possible. Yet, humanity forbids actions unnecessary to achieve that object. Similarly, proportionality requires that even when actions may be justified by military necessity, such actions must be balanced by humanity and therefore may not be unreasonable or excessive. Distinction reinforces the parties' responsibility to comport their behavior with military necessity, humanity, and proportionality by requiring parties to a conflict to apply certain rules based on certain legal categories, principally by distinguishing between the armed forces and the civilian population. Finally, honor supports, and gives parties confidence in, the entire system.[101]

5.3.1 Principle of Military Necessity

Military necessity is the principle that justifies the use of all measures not prohibited by the law of armed conflict needed to defeat the enemy quickly and efficiently. The law of armed conflict is not intended to impede the waging of hostilities. Its purpose is to ensure that the violence of hostilities is directed toward the enemy's war efforts and not used to cause unnecessary human misery and physical destruction. The principle of military necessity recognizes that force resulting in death and destruction will have to be applied to achieve military objectives, but its goal is to limit suffering and destruction to which is necessary to achieve a valid military objective. It prohibits the use of any kind or degree of force not required for the partial or complete submission of the enemy with a minimum expenditure of time,

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100. Convention No. II with Respect to the Laws and Customs of War on Land preamble, July 29, 1899, 32 Stat. 1803, T.S. No. 403; DOD LAW OF WAR MANUAL, § 2.1.2. *See also* Hague IV; GC I, art. 63; GC II, art. 62; GC III, art. 142; GC IV, art. 158; Conventional Weapons Convention, pmbl.; AP I, art. 1(2); AP II, pmbl.

101. DOD LAW OF WAR MANUAL, § 2.1.2.3.

life, and physical resources. The principle of military necessity does not authorize acts that are otherwise prohibited by the law of armed conflict. Military necessity is not a criminal defense for acts expressly prohibited by the law of armed conflict.

Commentary

Military necessity justifies the use of measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of war.[102] In the *Hostage Case*, the Military Tribunal stated that "[m]ilitary necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money."[103] Military necessity has been described as "the right to apply that amount and kind of force which is necessary to compel the submission of the enemy with the least possible expenditure of time, life, and money."[104] Further, "[m]ilitary necessity, as understood by the United States, justifies a resort to all measures which are indispensable to bring about the complete submission of the enemy by means of regulated violence and which are not forbidden by the modern laws and customs of war."[105]

In addition to operations that involve attacks on combatants and military objectives, military necessity justifies alternative means of subduing the enemy, including capture and non-forcible measures such as propaganda and intelligence. Article 15 of the Lieber Code provides:

> Military necessity admits of all destruction of life or limb of armed enemies, . . . it allows of the capturing of every armed

102. *See, e.g.*, Lieber Code; 1914 Rules of Land Warfare, ¶¶ 9–11; 1940 Rules of Land Warfare, ¶ 4a; FM 27-10, ¶ 3; NWIP 10-2, ¶ 220a; 1958 UK MANUAL, ¶ 3; 2004 UK MANUAL, ¶ 2.2; NEWPORT MANUAL, § 5.3; NATO, Glossary of Terms and Definitions, AAP-6, at 2-M-6 (2009).

103. United States v. List (The Hostage Case), 11 TWC 1230, 1253 (1950).

104. MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 313–14 (1959).

105. CHARLES HENRY HYDE, 2 INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 299–300 (1922). *See also* DOD LAW OF WAR MANUAL, § 2.2.

> enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist.

In the *Hostage Case*, the Tribunal stated:

> In general, [military necessity] sanctions measures by an occupant necessary to protect the safety of his forces and to facilitate the success of his operations. It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war; it allows the capturing of armed enemies and others of peculiar danger . . . . It is lawful to destroy railways, lines of communication or any other property that might be utilised by the enemy. Private homes and churches even may be destroyed if necessary for military operations.[106]

The Tribunal noted that military necessity does not, however,

> permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of International Law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces. . . . It does not admit of wanton devastation of a district or the wilful infliction of suffering upon its inhabitants for the sake of suffering alone.[107]

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106. United States v. List (The Hostage Case), 11 TWC 1230, 1253–54 (1950). *See also* DOD LAW OF WAR MANUAL, § 2.2.1.

107. United States v. List (The Hostage Case), 11 TWC 1230, 1253–54 (1950).

Military necessity has been "generally rejected as a defense for acts forbidden by the customary and conventional laws of war."[108] For example, in the *Hostage* Case, the Tribunal stated:

> It is apparent from the evidence of these defendants that they considered military necessity, a matter to be determined by them, a complete justification of their acts. We do not concur in the view that the rules of warfare are anything less than they purport to be. Military necessity or expediency do not justify a violation of positive rules.[109]

In *United States v. Krupp*, the Tribunal rejected defense counsel's argument that Hague IV and the Hague Regulations did not apply in cases of "total war."[110] In *Trial of Gunther Thiele and Georg Steinert*, the U.S. Military Commission rejected military necessity as a defense to the murder of a POW.[111] And, in *United States v. Milch*, the Tribunal rejected defense counsel's argument that "total warfare" allowed the suspension or abrogation of law of war rules.[112]

Although military necessity cannot justify actions that are prohibited by the law of war, some law of war rules allow for departure from what would otherwise be the rule if absolutely or imperatively necessary. Examples of rules incorporating the concept of absolute or imperative necessity include the following:

- The activities of the representatives or delegates of the protecting powers shall only be restricted as an exceptional and temporary measure when this is rendered necessary by imperative military necessities.
- The internment or placing in assigned residence of protected persons may be ordered only if the security of the detaining power makes it absolutely necessary.

108. FM 27-10, ¶ 3a.
109. United States v. List (The Hostage Case), 11 TWC 1230, 1255–56 (1950).
110. United States v. Krupp, 9 TWC 1340 (1950).
111. Trial of Gunther Thiele and Georg Steinert, 3 LRTWC 56, 58–59 (1948).
112. United States v. Milch, 2 TWC 773, 849–50 (1949) (Musmanno, J., concurring).

> - If the occupying power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.
> - The seizure or destruction of enemy property must be imperatively demanded by the necessities of war.[113]
>
> Similarly, certain law of war rules require compliance with an obligation, but only to the extent feasible or consistent with military necessity. Examples of rules incorporating the concept of feasibility or necessity include the following:
>
> - Certain affirmative duties require taking feasible precautions to reduce the risk of harm to the civilian population and other protected persons and objects.
> - Military medical and religious personnel, if their retention is not indispensable, are to be returned to the party to the conflict to which they belong as soon as a road is open for their return and military requirements permit.
> - Whenever military considerations permit, POW camps shall be indicated in the daytime by the letters PW or PG, placed so as to be clearly visible from the air.
> - Should military necessity require the quantity of relief shipments to civilian internees to be limited, due notice thereof shall be given to the protecting power and to the ICRC, or to any other organization giving assistance to the internees and responsible for the forwarding of such shipments.[114]

In applying the principle of military necessity, a commander should ask whether the object of attack is a valid military objective and, if so, whether the total or partial destruction, capture, or neutralization of the object of attack will constitute a definite military advantage under the circumstances ruling at the time of the attack. An object is a valid military objective if its nature (e.g., combat ships and military aircraft), location (e.g., bridge on an enemy supply route), purpose (e.g., a civilian airport that is built with a longer

113. DOD LAW OF WAR MANUAL, § 2.2.2.2.
114. *Id.*

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

Commentary

Military necessity may consider the broader imperatives of winning the war and not only the demands of the immediate situation. Thus, when assessing the military advantage of attacking an object, one may consider the entire war strategy rather than only the potential tactical gains from attacking the object.[115]

Some commentators have argued that military necessity should be interpreted to require commanders, if possible, to seek to capture or wound enemy combatants rather than make them the object of attack. For example, Melzer states: "In conjunction, the principles of military necessity and of humanity reduce the sum total of permissible military action from that which [international humanitarian law] does not expressly prohibit to that which is actually necessary for the accomplishment of a legitimate military purpose in the prevailing circumstances."[116] Pictet writes: "If we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him."[117] This view, however, does not reflect customary international law or applicable treaty law: "There is no obligation to attempt capture rather than attack of an enemy."[118]

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115. *Id.* § 2.2.3.1.

116. ICRC INTERPRETIVE GUIDANCE, at 79.

117. JEAN PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 75–76 (1985).

118. W. Hays Parks, Chief, International Law Branch, Office of the Judge Advocate General, Department of the Army, Executive Order No. 12333 and Assassination (Nov. 2, 1989), 3 1981–88 CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 3411, 3419; DOD LAW OF WAR MANUAL, § 2.2.3.1.

> There is no requirement in the law to warn enemy combatants before they are made the object of attack. Similarly, there is no requirement in the law to give enemy combatants an opportunity to surrender before they are made the object of attack.[119]

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

Commentary

> Military necessity justifies those measures necessary to achieve the object of war, and the object of war is not simply to prevail but to prevail as quickly and efficiently as possible.[120]

> The principle of the objective provides that every military undertaking must have an objective—that is, it must be directed towards a clearly defined goal and all activity must contribute to the attainment of that goal. Military objectives necessarily support national objectives, in peace as well as in war, and support the national war aims during a conflict. The law of armed conflict supports this principle by assisting in defining what is politically and legally obtainable.

The law of armed conflict seeks to ameliorate difficulties in applying military necessity in three ways. First, in evaluating military necessity, one may consider the broader imperatives of winning the war as quickly and efficiently as possible and is not restricted to considering only the demands of the specific situation. Second, the law of armed conflict recognizes certain types of actions are militarily necessary per se. For example, an attack on enemy forces is generally lawful. Third, commonly called the Rendulic Rule, the law of

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119. DOD LAW OF WAR MANUAL, § 2.2.3.1.
120. *Id.* § 2.2.3.1.

armed conflict recognizes that commanders must assess the military necessity of an action based on the information available to them at the relevant time. They cannot be judged based on information that subsequently comes to light.

Commentary

The law of war seeks to ameliorate the difficulties in applying military necessity by (1) permitting consideration of the broader imperatives of winning the war as quickly and efficiently as possible; (2) recognizing that certain types of actions are, as a general matter, inherently militarily necessary (e.g., attacking enemy combatants, the internment of enemy POWs); and (3) recognizing that persons must assess the military necessity of an action in good faith based on the information available to them at the relevant time and their decisions are not to be assessed based on information that subsequently comes to light (Rendulic Rule).[121]

5.3.2 Principle of Humanity

Humanity may be defined as the principle that forbids the infliction of suffering, injury, or destruction unnecessary to accomplish a legitimate military purpose. Humanity underlies certain law of armed conflict rules, such as:

1. Provide fundamental safeguards for persons who fall into the hands of the enemy

2. Protect the civilian population and civilian objects

3. Protect military medical personnel, units, and transports

4. Protect enemy wounded, sick, and shipwrecked, as well as respect for the dead

5. Prohibit or restrict weapons that are calculated to cause unnecessary suffering to combatants

121. *Id.* §§ 2.2.3, 2.2.3.2, 2.2.3.3.

6. Prohibit weapons that are inherently indiscriminate, or restrict weapons that are indiscriminate in their effects on civilians and civilian objects without special precautions.

Commentary

The principle of humanity prohibits the employment of any kind or degree of force not necessary for the purpose of the war—that is, for the partial or complete submission of the enemy with the least possible expenditure of time, life, and physical resources.[122] Humanity forbids the infliction of suffering, injury, or destruction unnecessary to accomplish a legitimate military purpose.[123] It "postulates that all such kinds and degrees of violence as are not necessary for the overpowering of the opponent should not be permitted to a belligerent."[124] Further, humanity "forbids the employment of all such kinds and degrees of violence as are not necessary for the purpose of the war."[125]

The principle of humanity may help in the interpretation of law of armed conflict rules. For example, the requirement that POWs be interned only in premises located on land does not prohibit POW detention aboard ships pending the establishment of suitable facilities on land, if detention aboard ships provides the most appropriate living conditions for POWs.[126] The U.S. made the following reservation to Protocol III[127] to the Conventional Weapons Convention:

> The United States of America . . . reserves the right to use incendiary weapons against military objectives located in concentrations of civilians where it is judged that such use would cause fewer casualties and/or less collateral damage than alternative weapons, but in so doing will take all feasible

122. NWIP 10-2, ¶ 220b.

123. *See, e.g.*, CANADIAN MANUAL, ¶ 202(6); 2004 UK MANUAL, ¶ 2.4; 1958 UK MANUAL, ¶ 3; 1914 Rules of Land Warfare, ¶ 9; 1940 Rules of Land Warfare, *supra* note102, ¶ 4b; NEWPORT MANUAL, § 5.2.

124. LAUTERPACHT, 2 OPPENHEIM'S INTERNATIONAL LAW 227 (§ 67).

125. GREENSPAN, *supra* note 104 at 315. *See also* DOD LAW OF WAR MANUAL, § 2.3.

126. DOD LAW OF WAR MANUAL, § 2.3.2.

127. Incendiary Weapons Protocol.

> precautions with a view to limiting the incendiary effects to the military objective and to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.[128]

Although military necessity justifies certain actions necessary to defeat the enemy as quickly and efficiently as possible, it does not justify actions that are not necessary to achieve this purpose, such as cruelty or wanton violence. In the *Hostage Case*, the Tribunal stated that military necessity "does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill. . . . It does not admit the wanton devastation of a district or the willful infliction of suffering upon its inhabitants for the sake of suffering alone."[129] Article 16 of the Lieber Code provides: "Military necessity does not admit to cruelty—that is, the infliction of suffering for the sake of suffering or for revenge . . . ."[130]

Once a military purpose is achieved, inflicting more suffering is unnecessary and should be avoided. For example, the principle of humanity prohibits attacking enemy combatants who have been placed *hors de combat* (e.g., incapacitated by being captured or severely wounded) because no military purpose is served by continuing to attack them. The principle of humanity also confirms the immunity of civilian populations and civilian objects from attack because they make no contribution to military action and no military purpose is served by attacking them.[131]

Humanity and military necessity complement one another. If certain necessary actions are justified, then certain unnecessary actions are prohibited. The principle of necessity therefore functions as both a limitation and a justification. Because the principle of humanity forbids those actions that are unnecessary, it is not in tension with military effectiveness but rather reinforces it.[132]

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128. United States, Statement on Consent to Be Bound by Protocol III, 2562 U.N.T.S. 36 (Jan. 21, 2009).

129. United States v. List (The Hostage Case), 11 TWC 1230, 1253–54 (1950).

130. *See also* DOD LAW OF WAR MANUAL, § 2.3.1.

131. *See, e.g.*, 2004 UK MANUAL, ¶ 2.4.1; DOD LAW OF WAR MANUAL, § 2.3.1.

132. DOD LAW OF WAR MANUAL, § 2.3.1.1.

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

Commentary

DoD policy requires that "the intended acquisition, procurement, or modification of weapons or weapons systems is reviewed for consistency with the law of war."[133] Specifically, "[t]he acquisition and procurement of DoD weapons and information systems must be consistent with all applicable domestic law, and the resulting systems must comply with applicable treaties and international agreements . . . [including arms control agreements], customary international law, and the law of armed conflict." Legal reviews of an intended acquisition of weapons or weapons systems shall be conducted by "[a]n attorney authorized to conduct such legal reviews in the DoD."[134]

The DoD has had a separate, but complementary, policy and practice requiring review of its activities (e.g., the research, development, and testing of weapons) to ensure that they are consistent with the arms control agreements to which the United States is a party.[135]

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133. DoDD 2311.01, DoD Law of War Program, ¶¶ 1.2.d, 2.6.e (July 2, 2020).

134. DoDD 5000.01, The Defense Acquisition System, ¶ 1.2.v (Ch. 1, July 28, 2022). *See also* DOD LAW OF WAR MANUAL, § 6.2.

135. DoDD 2060.1, Implementation of, and Compliance with, Arms Control Agreements, ¶ 2.8 (June 23, 2020); DOD LAW OF WAR MANUAL, § 6.2.4.

Legal reviews are also required for non-lethal weapons (NLWs), which are defined as "[w]eapons, devices, and munitions that are explicitly designed and primarily employed to incapacitate targeted personnel or materiel immediately, while minimizing fatalities, permanent injury to personnel, and undesired damage to property in the target area or environment. NLW are intended to have reversible effects on personnel and materiel."[136] The Commandant of the Marine Corps (CMC) is the DoD executive agent for NLWs.[137] In that capacity, the CMC will ensure that legal reviews of the acquisition of all NLWs are conducted in accordance with DoDD 2311.01 and that an arms control compliance review is completed in accordance with DoDD 2060.1.[138] The Secretaries of the Military Departments and the Commander, U.S. Special Operations Command (USSOCOM), through the Chairman of the Joint Chiefs of Staff (CJCS), shall require that "a legal review of the acquisition of all NLW is conducted . . . and an arms control compliance review is completed" and that "a human-effects characterization is completed in the development of NLW during the acquisition process . . . to support legal and policy reviews, and the operational commander's determination of the suitability for NLW use."[139] Guidance on, and coordination of, issues associated with the legal review of NLWs shall be provided by the DoD General Counsel.[140]

Additional legal reviews are required for autonomous and semi-autonomous weapons systems.[141] Before a decision is made to enter into formal development of such systems, the Under Secretary of Defense for Policy (USD(P)), the Under Secretary of Defense for Research and Engineering (USD(R&E)), and the CJCS shall ensure that a preliminary legal review of the weapons system has been completed, in coordination with DoD General Counsel.[142] A second legal

136. DoDD 3000.03E, DoD Executive Agent for Non-Lethal Weapons (NLW), and NLW Policy, glossary (Ch. 2, Aug. 31, 2018).
137. *Id.* encl. 2 ¶ 1.
138. *Id.* encl. 2 ¶ 13(l).
139. *Id.* encl. 2 ¶ 11c–d.
140. *Id.* encl. 2 ¶ 4.
141. DoDD 3000.09, Autonomy in Weapons Systems (Jan. 25, 2017).
142. *Id.* ¶ 4.1.c(7).

review is required before fielding an autonomous or semi-autonomous weapons system.[143] The Secretaries of the Military Departments, the Commander, USSOCOM, and the Heads of the Defense Agencies and DoD Field Activities shall also "[e]nsure that legal reviews of the intended acquisition, procurement, or modification of autonomous and semi-autonomous weapon systems . . . address consistency with all applicable domestic and international law and, in particular, the law of war."[144] Once a weapons system is fielded, persons authorized to use, direct the use of, or operate autonomous and semiautonomous weapons systems must do so with appropriate care and in accordance with the law of war, applicable treaties, weapons system safety rules, and applicable rules of engagement (ROE).[145]

Department of the Navy legal reviews are conducted in accordance with SECNAVINST 5000.2G.[146] All potential weapons and weapons systems developed, acquired, or procured by the Department of the Navy will be reviewed by the Judge Advocate General (JAG) of the Navy "to ensure that the intended use of such weapons or weapon systems is consistent with domestic and international law." Modifications of weapons and weapons systems must receive a new legal review.[147]

No weapon or weapons system may be developed, acquired, procured, fielded, or employed by the Department of the Navy without a legal consultation and subsequent formal review. The following law of armed conflict issues must be addressed when any weapon or weapons system is being reviewed:

> (a) Whether the system is calculated to cause superfluous injury (i.e., it invariably causes unnecessary suffering or harm disproportionate to the military advantage reasonably expected to be gained from its use).

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143. *Id.* ¶ 4.1.d(7).
144. *Id.* ¶ 2.9.c.
145. *Id.* ¶ 2.9.b(7).
146. SECNAVINST 5000.2G, Department of the Navy Implementation of the Defense Acquisition System and the Adaptive Acquisition Framework, encl. 18 (Apr. 8, 2022).
147. *Id.* encl. 18, ¶ 2a.

> (b) Whether the system may be controlled in such a manner that it is capable of being directed against a lawful target (i.e., it is not inherently indiscriminate).
> (c) Whether there is a rule of law or treaty specifically prohibiting the use of the system.[148]

Legal reviews will also "consider and specify any legal restrictions on the weapon or weapon system's use." If any specific restrictions apply, the intended concept of employment (CONEMP) of the "weapon or weapon system will be reviewed for consistency with those restrictions." Where appropriate, the legal review will advise on "measures that would assist in ensuring compliance with [law of armed conflict] obligations during employment of the weapon or weapon system."[149] In addition, the Director, Strategic Systems Programs (DIRSSP), in coordination with the Naval Treaty Implementation Program Office, with the advice of the Office of General Counsel, shall review all systems developed or acquired by the Department of the Navy "to certify compliance with arms control agreements."[150] Additionally, Program Managers "will ensure that . . . all DON acquisition program activities which may be affected by arms control agreements are reviewed for arms control compliance before such activities are undertaken."[151]

Legal review guidance for the Army and Air Force is contained in Department of the Army Regulation (AR) 27-53[152] and Department of the Air Force Instruction (AFI) 51-401,[153] respectively.

Article 36 of AP I also requires States parties to conduct weapons reviews: "In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a . . . Party is under an obligation to determine whether its employment would, in some or

148. *Id.* encl. 18, ¶ 2.g.1. *See also* DOD LAW OF WAR MANUAL, § 6.2.2.
149. SECNAVINST 5000.2G, *supra* note 146, encl. 18, ¶ 2.g.2. *See also* DOD LAW OF WAR MANUAL, § 6.2.2.
150. SECNAVINST 5000.2G, *supra* note 146, encl. 18, ¶ 3.a.
151. *Id.* encl. 18, ¶ 3.b.
152. AR 27-53, Legal Review of Weapons and Weapon Systems (Sept. 23, 2019).
153. AFI 51-401, The Law of War (especially pt. 2 ¶¶ 5–7) (Aug. 3, 2018).

all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the . . . Party."

5.3.3 Principle of Proportionality

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

Commentary

Although the term "proportionality" is not specifically mentioned, the principle of proportionality is reflected in AP I. Article 51(5)(b) provides that the following type of attack, inter alia, is to be considered as indiscriminate: "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." Similarly, Article 57(2)(a)(iii) provides that those who plan or decide upon an attack shall "refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." Thus, even where a State is justified in acting, it must not act in a way that is unreasonable or excessive.

> These provisions are seen as reflecting customary international law and therefore bind even non-party States, such as the United States.[154]
>
> In *jus in bello*, military necessity justifies attacking military objectives, such as enemy combatants. An attack on enemy combatants that incidentally damages civilian property, however, would raise proportionality considerations. Where there is no justification for acting (e.g., an unlawful attack directed against the civilian population), a proportionality analysis is not required to conclude that the attack is unlawful.[155]
>
> The principle of proportionality does not require that no incidental damage results from an attack. Incidental damage to the civilian population and civilian objects is inevitable in war. Rather, the principle of proportionality
>
> > creates obligations to refrain from attacks in which the expected harm incidental to such attacks would be excessive in relation to the concrete and direct military advantage anticipated to be gained and to take feasible precautions in planning and conducting attacks to reduce the risk of harm to civilians and other persons and objects protected from being made the object of attack.
>
> Thus, proportionality considers the justification for acting in light of the expected harms when determining whether the harms are disproportionate.[156]

5.3.4 Principle of Distinction

The principle of distinction (sometimes referred to as discrimination) is concerned with distinguishing combatants from civilians and military objectives from civilian objects to minimize harm to civilians and damage to civilian objects. Commanders have two duties under the principle of distinction. First, they must distinguish their own forces from the civilian population

154. DOD LAW OF WAR MANUAL, § 2.4. *See also* NEWPORT MANUAL, § 8.8.
155. DOD LAW OF WAR MANUAL, § 2.4.1.1.
156. *Id.* § 2.4.1.2.

(this is why combatants wear uniforms or other distinctive signs). Second, they must distinguish valid military objectives from civilians or civilian objects. During naval conflict, commanders identify military objectives by assessing the status or use of vessels overall, rather than individualized assessment of embarked individuals. Distinction at sea is primarily between those vessels associated with a belligerent State and those associated with a neutral State. Unless innocently employed, vessels associated with or in the service of a belligerent State will be military objects by their nature, purpose, use, war-sustaining, or war-supporting roles.

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

1. Attacks that are not directed at a specific military objective (e.g., Iraqi SCUD-missile attacks on Israeli and Saudi cities during the Persian Gulf War)

2. Attacks that employ a method or means of combat that cannot be directed at a specific military objective (e.g., declaring an entire city a single military objective and attacking it by bombardment when there are several distinct military objectives throughout the city that could be targeted separately)

3. Attacks that employ a method or means of combat, the effects of which cannot be limited as required by the law of armed conflict (e.g., use of chemical or biological weapons).

Commentary

The principle of distinction obliges parties to a conflict to distinguish principally between the armed forces and the civilian population, and between unprotected and protected objects. The U.S. Supreme Court has noted that "[b]y universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations."[157] The UN General Assembly

157. *Ex parte* Quirin, 317 U.S. 1, 30 (1942).

has affirmed that "distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible."[158]

In 1972, the General Counsel for the Department of Defense wrote:

> A summary of the laws of armed conflict, in the broadest terms, reveals certain general principles including the following:
>
> . . . .
>
> (c) That a distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the civilians be spared as much as possible.
>
> These general principles were recognized in a resolution unanimously adopted by the United Nations General Assembly in its Resolution dated 13 January 1969 (Resolution 2444 (XXIII)). We regard them as declaratory of existing customary international law.").[159]

Article 48 of AP I requires that "[i]n order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives." The 2004 UK Manual similarly states: "Since military operations are to be conducted only against the enemy's armed forces and military objectives, there must be a clear distinction between the armed forces and civilians, or between combatants and

158. G.A. Res. 23/2444, Respect for Human Rights in Armed Conflicts, ¶ 1(c) (Dec. 19, 1968).

159. J. Fred Buzhardt, General Counsel, Department of Defense, Letter to Senator Edward Kennedy (Sept. 22, 1972), *reprinted in* 67 AMERICAN JOURNAL OF INTERNATIONAL LAW 122 (1973).

non-combatants, and between objects that might legitimately be attacked and those that are protected from attack."[160]

On the one hand, consistent with military necessity, parties may make enemy combatants and other military objectives the object of attack. On the other hand, consistent with humanity, parties may not make the civilian population and other protected persons and objects the object of attack. When using force, parties must discriminate between legitimate and illegitimate objects of attack in good faith based on the information available to them at the time.[161]

The principle of distinction

> enjoins the party controlling the population to use its best efforts to distinguish or separate its military forces and war-making activities from members of the civilian population to the maximum extent feasible so that civilian casualties and damage to civilian objects incidental to attacks on military objectives will be minimized as much as possible.[162]

Thus, parties to a conflict must

> (1) take certain measures to help ensure that military forces and civilians can be visually distinguished from one another; (2) physically separate, as feasible, their military objectives from the civilian population and other protected persons and objects; and (3) refrain from the misuse of protected persons and objects to shield military objectives.[163]

To help ensure that military forces and civilians can be visually distinguished from one another, parties to the conflict must take certain measures, in both offense and defense. For instance:

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160. 2004 UK MANUAL, ¶ 2.5. *See also* DOD LAW OF WAR MANUAL, § 2.5; NEWPORT MANUAL, § 5.4.

161. DOD LAW OF WAR MANUAL, § 2.5.2.

162. Buzhardt, *supra* note 159.

163. DOD LAW OF WAR MANUAL, § 2.5.3.

> (1) Parties to a conflict must not disguise their armed forces as civilians or as other protected categories of persons in order to kill or wound opposing forces.
> (2) Protected persons and objects must be marked to help ensure that they receive the protections of that status.
> (3) Parties to a conflict should identify certain persons and objects as unprotected (e.g., during an IAC, members of organized resistance movements must, inter alia, wear fixed distinctive signs visible at a distance and carry arms openly to distinguish themselves from the civilian population in order for members of their group to receive POW status).
>
> See DoD Law of War Manual, § 2.5.3.1.
>
> The principle of distinction also obligates parties to a conflict to take feasible measures to separate physically their own military objectives from the civilian population and other protected persons and objects (e.g., evacuating civilians from danger areas). If feasible, military commanders should also avoid placing military objectives in densely populated areas. In addition, it may be appropriate to establish zones where civilians and other protected persons may seek refuge.[164] Deliberately misusing protected persons and objects to shield military objectives to deter enemy military operations is prohibited.[165]

5.3.5 Principle of Honor

Honor is a core U.S. Navy, U.S. Marine Corps, and U.S. Coast Guard value. Honor, also called chivalry, demands a certain amount of fairness in offense and defense, and a certain mutual respect between opposing forces. In requiring a certain amount of fairness in offense and defense, honor reflects the principle that parties to a conflict must accept certain limits exist on their ability to conduct hostilities. Honor prohibits perfidy, the misuse of certain signs, fighting in the enemy's uniform, feigning nonhostile relations in order to seek a military advantage, and compelling nationals of a hostile party to take part in the operations of war directed against their own country. Honor does not forbid combatants to use ruses and other lawful deceptions against

164. *Id.* § 2.5.3.2.
165. *Id.* § 2.5.3.3.

the enemy. Honor requires a party to a conflict to refrain from taking advantage of its opponent's adherence to the law by falsely claiming the law's protections. This type of conduct is forbidden, because it undermines the protections afforded by the law of armed conflict, impairs nonhostile relations between opposing belligerents, and damages the basis for the restoration of peace short of complete annihilation of one belligerent by another.

Commentary

The principle of chivalry (honor) forbids the resort to dishonorable (treacherous) means, expedients, or conduct.[166] While stratagems or ruses of war are legally permitted, acts of treachery used to kill, wound, or otherwise obtain an advantage over an enemy are legally forbidden.[167] Chivalry "denounces and forbids resort to dishonorable means, expedients, or conduct."[168] The concept of chivalry "is reflected in specific prohibitions such as those against dishonourable or treacherous conduct and against misuse of enemy flags or flags of truce."[169]

The principle of honor demands a certain amount of fairness in offense and defense and a certain mutual respect between opposing forces.[170]

Honor requires a party to a conflict to refrain from taking advantage of its opponent's adherence to the law by falsely claiming the law's protections because it:

- undermines the protections afforded by the law of war;
- impairs non-hostile relations between opposing belligerents; and

166. NWIP 10-2, ¶ 220c. *See also* NEWPORT MANUAL, § 5.5.3.
167. *Id.* ¶ 640a–b; DOD LAW OF WAR MANUAL, § 2.6.2.2.
168. 1940 Rules of Land Warfare, *supra* note 102, ¶ 4(c).
169. CANADIAN MANUAL, ¶ 202(7); DOD LAW OF WAR MANUAL, § 2.6.2.
170. *See, e.g.*, LAUTERPACHT, 2 OPPENHEIM'S INTERNATIONAL LAW 227 (§ 67); 1958 UK MANUAL, ¶ 3; 1914 Rules of Land Warfare, ¶ 9; 1914 UK MANUAL at 234 (¶ 3); DOD LAW OF WAR MANUAL, § 2.6.

- damages the basis for the restoration of peace short of complete annihilation of one belligerent by another.[171]

Opposing forces must deal with one another in good faith. Even in the conduct of hostilities, good faith prohibits:

(1) killing or wounding enemy persons by resort to perfidy;
(2) misusing certain signs;
(3) fighting in the enemy's uniform;
(4) feigning non-hostile relations in order to seek a military advantage; and
(5) compelling nationals of a hostile party to take part in the operations of war directed against their own country.[172]

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

Commentary

The principle of honor reflects the premise that military forces are a common class of professionals who have undertaken to comport themselves honorably. Honor animates the rules that determine who qualifies for the privileges of combatant status. For instance, it is reflected in rules that require POWs and their captors to treat one another with respect. POWs, with the exception of officers, must also salute and show to all officers of the detaining power the external marks of respect provided for by the regulations applying in their own forces.[173]

Reflecting this principle of honor between armed forces, an armed group must, inter alia, be organized under a responsible command and conduct its operations in accordance with the law of war in order for its members to be entitled to POW status during international armed conflict; private persons are generally denied the privileges of

171. DOD LAW OF WAR MANUAL, § 2.6.2.2.
172. *Id.*
173. GC III, art. 39; DOD LAW OF WAR MANUAL, § 2.6.3.1.

combatant status because they do not belong to this class of combatants.

The principle that combatants share a common class has also been a foundation for the trial of enemy combatants by military tribunals. Article 84 of GC III expresses a preference for POWs to be tried by military courts rather than civilian courts. In 1946, General Douglas MacArthur said of General Tomoyuki Yamashita:

> It is not easy for me to pass penal judgment upon a defeated adversary in a major military campaign. I have reviewed the proceedings in vain search for some mitigating circumstance on his behalf. I can find none. Rarely has so cruel and wanton a record been spread to public gaze.
>
> Revolting as this may be in itself, it pales before the sinister and far reaching implication thereby attached to the profession of arms. The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason for his being. When he violates this sacred trust he not only profanes his entire cult but threatens the very fabric of international society. The traditions of fighting men are long and honorable. They are based upon the noblest of human traits, - sacrifice. This officer, of proven field merit, entrusted with high command involving authority adequate to responsibility, has failed this irrevocable standard; has failed his duty to his troops, to his country, to his enemy, to mankind; has failed utterly his soldier faith. The transgressions resulting therefrom as revealed by the trial are a blot upon the military profession, a stain upon civilization and constitute a memory of shame and dishonor that can never be forgotten.[174]

174. General Douglas MacArthur, Action of the Confirming Authority (Feb. 7, 1946), *reprinted in Documents on Prisoners of War*, 60 INTERNATIONAL LAW STUDIES 298 (1979); DOD LAW OF WAR MANUAL, § 2.6.3.2.

5.4 PERSONS IN THE OPERATIONAL ENVIRONMENT

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

5.4.1 Combatants

Combatants are persons engaged in hostilities during an armed conflict. Combatants may be lawful or unlawful. Unlawful combatants are more appropriately called unprivileged belligerents and are persons who engage in hostilities without being legally entitled to engage in hostilities. Lawful combatants are privileged to engage in hostilities during an armed conflict and are immune from prosecution by the capturing State for their precapture lawful war-like acts (i.e., combatant immunity). For purposes of combatant immunity, lawful combatants include:

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

2. Militia, volunteer corps, and organized resistance movements belonging to a State party to the conflict, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the laws of war

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

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

Commentary

Three classes of persons qualify as "lawful" or "privileged" combatants: (1) members of the armed forces of a State that is a party to a

conflict, aside from certain categories of medical and religious personnel; (2) under certain conditions, members of militia or volunteer corps that are not part of the armed forces of a State, but belong to a State; and (3) inhabitants of an area who participate in a kind of popular uprising to defend against foreign invaders, known as a *levée en masse*.[175]

Combatants enjoy a special legal status, which imposes certain rights, duties, and liabilities. They may engage in hostilities and may be made the object of attack by enemy combatants. Combatants placed *hors de combat*, however, must not be made the object of attack. Combatants are required to conduct their operations in accordance with the law of war.[176]

Combatants are afforded legal immunity from the domestic law of the enemy State for their actions if done in accordance with the law of war. Thus, a combatant's killing, wounding, or other warlike acts done under military authority and in accordance with the law of war do not create criminal or civil liability.[177] In *Johnson v. Eisentrager*, the U.S. Supreme Court stated that "legitimate 'acts of warfare,' however murderous, do not justify criminal conviction."[178] In *Arce v. State*, the Texas Court of Criminal Appeals reversed the homicide conviction of Mexican soldiers prosecuted in connection with hostilities between the United States and Mexico.[179] The Tribunal in the *Hostage Case* stated that "acts done in time of war under the military authority of an enemy cannot involve criminal liability on the part of officers or soldiers if the acts are not prohibited by the conventional or customary rules of war."[180] In 1841, Secretary of State Daniel Webster wrote: "That an individual forming part of a public force, and acting under the authority of his Government, is not to be held answerable,

175. GC I, art. 13; GC II, art. 13; GC III, art. 4; AP I, art. 43; Hague Regulations, arts. 1–3; DOD LAW OF WAR MANUAL, § 4.3.3.

176. DOD LAW OF WAR MANUAL, §§ 4.4, 4.4.1.

177. Lieber Code, art. 57; AP I, art. 43(2).

178. Johnson v. Eisentrager, 339 U.S. 763, 793 (1950) (Black, J., dissenting).

179. Arce v. State, 202 S.W. 951 (Tex. Crim. App. 1918).

180. United States v. List (The Hostage Case), 11 TWC 1230, 1236 (1950).

as a private trespasser or malefactor, is a principle of public law sanctioned by the usages of all civilized nations."[181] During the Civil War, "each party was entitled to the benefit of belligerent rights, as in the case of public war," and "for an act done in accordance with the usages of civilized warfare, under and by military authority of either party, no civil liability attached to the officers or soldiers who acted under such authority." In *Dow v. Johnson*, the Supreme Court stated: "There would be something singularly absurd in permitting an officer or soldier of an invading army to be tried by his enemy, whose country it had invaded. The same reasons for his exemption from criminal prosecution apply to civil proceedings."[182] Nonetheless, combatants lack combatant immunity from an enemy State's domestic law for acts that are prohibited by the law of war: "He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law."[183]

Combatants are liable to capture and detention by enemy combatants during an IAC. Like all detained individuals, POWs must be treated humanely[184] and are afforded a number of privileges in detention in accordance with GC III.[185] Combatants retain their right to POW status and treatment, even if they have committed crimes before capture.[186] POWs are entitled to a variety of rights in relation to judicial proceedings against them.[187] In addition, POWs serving disciplinary punishment shall continue to receive the benefits of GC III, except insofar as these benefits are necessarily rendered inapplicable by the mere fact that the POW is confined.[188] Additionally, in-

181. Daniel Webster, Letter to John G. Crittenden, Attorney General (Mar. 15, 1841), *reprinted in* THE DIPLOMATIC AND OFFICIAL PAPERS OF DANIEL WEBSTER, WHILE SECRETARY OF STATE 134–35 (1848).

182. Dow v. Johnson, 100 U.S. 158, 165 (1879).

183. United States v. Göring, Judgment, 1 TWC 223 (1947). *See also* DOD LAW OF WAR MANUAL, §§ 4.4, 4.4.3.

184. GC III, art. 13.

185. *See, e.g.*, GC III, arts. 18, 28, 38, 40, 54, 60.

186. GC III, art. 85.

187. *See, e.g.*, GC III, arts. 86, 88, 90, 99, 100, 102–5.

188. GC III, art. 108. *See also* DOD LAW OF WAR MANUAL, §§ 4.4, 4.4.2.

dividuals who enjoy POW status are generally immune from prosecution for legitimate acts of war in an IAC.[189] Article 56 of the Lieber Code provides: "A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity." In *United States v. Lindh*, the Court noted that Articles 87 and 99 of GC III "make clear that a belligerent in a war cannot prosecute the soldiers of its foes for the soldiers' lawful acts of war."[190] The Court in *United States v. Noriega* stated that "the essential purpose of the Geneva Convention Relative to the Treatment of Prisoners of War is to protect prisoners of war from prosecution for conduct which is customary in armed conflict."[191]

Combatants captured while engaged in spying or sabotage forfeit their entitlement to POW status, as provided in Article 46(1) of AP I, which is considered to reflect customary law. A person is considered a spy when, "acting clandestinely or on false pretenses, he obtains or endeavors to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party."[192] In *Ex parte Quirin*, the US. Supreme Court stated:

> By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts

189. Memorandum submitted in United States v. Shakur, 690 F. Supp. 1291 (S.D.N.Y. 1988); 3 1981–88 CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 3436, 3451.

190. United States v. Lindh, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002) (memorandum opinion); United States v. Khadr, 717 F. Supp. 2d. 1215, 1222 n.7 (C.M.C.R. 2007); United States v. Pineda, 2006 U.S. Dist. LEXIS 17509, 6–8 (D.D.C. Mar. 23, 2006).

191. United States v. Noriega, 746 F. Supp. 1506, 1529 (S.D. Fla. 1990); DOD LAW OF WAR MANUAL, § 4.4.3.1.

192. Hague Regulations, art. 29.

> which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.[193]

In other words, a spy is not entitled to combatant immunity. Nevertheless, a member of the armed forces who, in territory controlled by an adverse party, "gathers or attempts to gather information shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces."[194]

POWs also have duties in detention, such as identifying themselves to their captors.[195] They are subject to the laws, regulations, and orders of the detaining power.[196] After cessation of active hostilities, POWs shall be released and repatriated without delay.[197] Seriously wounded, injured, or sick POWs should be returned before the end of hostilities.[198] Nonetheless, certain POWs may be held in connection with criminal proceedings even after hostilities have ended.[199]

In cases of doubt as to whether a detainee is entitled to POW status, that person should be afforded the protections of POW status until their status has been determined by a competent tribunal.[200]

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193. *Ex parte* Quirin, 317 U.S. 1, 30–31 (1942).
194. AP I, art. 46(2). *See also* Hague Regulations, art. 29; DOD LAW OF WAR MANUAL, §§ 4.4, 4.4.2.
195. GC III, art. 17.
196. GC III, art. 82.
197. GC III, art. 118.
198. GC III, arts. 109–10.
199. GC III, art. 115. *See also* DOD LAW OF WAR MANUAL, §§ 4.4, 4.4.2.
200. AP I, art. 45. DOD LAW OF WAR MANUAL, §§ 4.4, 4.4.2.

5.4.1.1 Unprivileged Belligerents

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

Commentary

Unprivileged belligerents are generally classified into two categories: (1) persons who initially qualify as combatants, but who act so as to forfeit the privileges of combatant status by engaging in spying or sabotage; and (2) persons who never meet the qualifications to be entitled to the privileges of combatant status, but who have, by engaging in hostilities, incurred the corresponding liabilities of combatant status (i.e., forfeited one or more of the protections of civilian status). The two categories are distinguished from one another by the presence or absence of State authorization. Although the two categories generally receive the same treatment, the distinction that the first category has State authorization, while the second category does not, may create different legal results. For example, a combatant who spies regains the entitlement to the privileges of combatant status upon returning to friendly lines. However, a private person who spies cannot regain a status to which the person was never entitled.[201]

See also § 8.2.2 below for a further discussion of unprivileged belligerents.

5.4.2 Noncombatants

Noncombatants are those members of the armed forces who are medical personnel and chaplains. It can include those combatants who become *hors de combat* (out of combat) by reason of wounds, illness, or capture. If noncombatants take a direct part in hostilities, they lose their protected status and may be attacked. See 8.2.1.

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201. DOD LAW OF WAR MANUAL, §§ 4.2.3.3, 4.3.1, 4.3.4.

Commentary

The term "noncombatant" is generally used to mean military medical and religious personnel, but also can include those combatants placed *hors de combat*.[202]

Military medical and religious personnel include (1) medical personnel exclusively engaged in the search for, or the collection, transport, or treatment of, the wounded or sick, or in the prevention of disease; (2) staff exclusively engaged in the administration of medical units and establishments; and (3) chaplains attached to the armed forces.[203] Under certain circumstances, (1) the authorized staff of voluntary aid societies and (2) the staff of a recognized aid society of a neutral country are treated like military medical and religious personnel.[204]

Medical personnel exclusively engaged in the search for, or the collection, transport, or treatment of, the wounded or sick, or in the prevention of disease, include military physicians, dentists, nurses, orderlies, stretcher-bearers, and other persons belonging to the armed forces who give direct care to the wounded and sick.[205] Additionally, persons who are exclusively engaged in the prevention of disease (e.g., veterinary personnel exclusively engaged in providing health services for military personnel who perform food safety inspections and ensure that animal illnesses do not spread to humans) also qualify as military medical personnel.[206]

Medical personnel status extends to staff exclusively engaged in the administration of medical units and establishments provided they are exclusively assigned to the medical service (e.g., Medical Service Corps personnel, and individuals with a non-medical Military Occupation Specialty permanently assigned to a medical unit or facility, such as cooks, clerks, supply personnel, cleaners, ambulance drivers, or crews operating permanent medical aircraft).[207]

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202. DOD LAW OF WAR MANUAL, § 4.1.1.1.
203. GC I, art. 24; AP I, art. 8.
204. DOD LAW OF WAR MANUAL, §§ 4.9, 4.9.1.
205. GC I COMMENTARY, at 218.
206. *See* GC I COMMENTARY, at 205; DOD LAW OF WAR MANUAL, § 4.9.1.1.
207. AP I, art. 8; GC I COMMENTARY, at 219; DOD LAW OF WAR MANUAL, § 4.9.1.2.

Chaplains attached to the armed forces include any cleric, regardless of faith, who is attached to the armed forces of a belligerent and assigned duties exclusively of a religious or spiritual nature.[208]

To acquire and retain military medical and religious status, members of the armed forces must (1) belong to a force whose members qualify for POW status; (2) be designated as exclusive medical or religious personnel by their armed forces; and (3) serve exclusively in a medical or religious capacity.[209] Thus, medical personnel belonging to non-State armed groups would not be entitled to retained personnel status under GC I, GC II, or GC III because their members do not qualify for POW status.[210] Members of the armed forces do not acquire military medical and religious status merely by performing medical or religious functions or by having medical or religious training (e.g., a special forces medical specialist who performs both combatant and medical duties). To acquire military medical and religious status, they must be designated as such by their armed forces, usually by being part of the official medical or religious service.[211] Finally, in order to establish and maintain their status as military medical or religious personnel, they must serve exclusively in a humanitarian capacity.[212] The requirement that military medical and religious personnel serve exclusively in a humanitarian capacity not only requires that they refrain from acts harmful to the enemy, but also imposes an affirmative obligation to serve in a humanitarian capacity. Thus, persons engaged in combat search and rescue and captured military medical personnel who refuse to perform their medical duties to care for fellow POWs are not entitled to retain personnel status.[213]

Military medical and religious personnel are afforded special privileges so that they may fulfill their humanitarian duties. They must be

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208. GC I, art. 24; AP I, art. 8; DOD LAW OF WAR MANUAL, § 4.9.1.3.

209. DOD LAW OF WAR MANUAL, § 4.9.2.

210. *Id.* § 4.9.2.1.

211. GC III, art. 32; GC I COMMENTARY, at 218, 220; DOD LAW OF WAR MANUAL, § 4.9.2.2.

212. GC I COMMENTARY, at 219.

213. DOD LAW OF WAR MANUAL, § 4.9.2.3. *See also* W. Hays Parks, Memorandum of Law: Status of Certain Medical Corps and Medical Service Corps Officers under the Geneva Conventions, *reprinted in* THE ARMY LAWYER, No. 5, ¶ 8 (Apr. 1989); Levie, *supra* note 69, at 74.

respected and protected in all circumstances and generally may not commit acts harmful to the enemy (e.g., resisting lawful capture by the enemy military forces). They may, however, employ arms in self-defense or in defense of their patients against unlawful attack. If they fall into the power of the enemy during an IAC, they may be retained to care for, or minister to, POWs.[214] Although military medical and religious personnel may not be made the object of attack, they do accept the risks of incidental harm from military operations. Additionally, military medical and religious personnel who take actions outside their role as military medical and religious personnel forfeit the corresponding protections of their special status and may be treated as combatants or auxiliary medical personnel, as appropriate.[215]

Military medical and religious personnel who fall into the power of the enemy during an IAC are not considered POWs, but instead are held as "retained personnel."[216] Although they are not held as POWs, they shall receive, at a minimum, the protections of POW status and shall be granted all facilities necessary to provide for the medical care of, and religious ministration to, POWs. For example, retained personnel:

- may not be compelled to carry out any work other than that concerned with their medical or religious duties;
- shall be authorized to visit periodically POWs situated in working detachments or in hospitals outside the camp; and
- have the right (through the senior officer in each camp) to deal with the competent authorities of the camp on all questions relating to their duties.[217]

If military requirements permit, military medical and religious personnel who are not needed to care for, or minister to, POWs should be returned to the forces to which they belong so that they may continue to care for, or minister to, members of their armed forces. The

214. DOD LAW OF WAR MANUAL, § 4.10.
215. *Id.* § 4.10.1.
216. GC I, arts. 33, 35.
217. GC I, art. 33; DOD LAW OF WAR MANUAL, § 4.10.2.

parties to the conflict would establish special agreements to establish the procedures for repatriation.[218]

States may choose to employ the staff of their duly recognized and authorized National Red Cross Societies and that of other Voluntary Aid Societies, such as military medical and religious personnel. If States subject such staff to military laws and regulations, then such personnel are to be treated like military medical and religious personnel. States must notify other parties to the 1949 Geneva Conventions, either in time of peace or at the commencement of hostilities, before actually employing such personnel.[219] In the United States, the American National Red Cross is a voluntary aid society authorized to support the U.S. armed forces in time of war.[220] American National Red Cross personnel who support the U.S. armed forces in military operations are subject to the Uniform Code of Military Justice.[221]

The 1949 Geneva Conventions recognize that neutral States may lend their recognized aid societies to a party to the conflict, with the consent of their own government and the authorization of the party to the conflict concerned, by placing those personnel and units under the control of that party to the conflict.[222] The neutral government shall notify this consent to the adversary of the State that accepts such assistance, and the party to a conflict that accepts such assistance must notify enemy States before using it.[223] This assistance is not considered as interference in the conflict by the neutral State.[224] The staff of a recognized aid society of a neutral country who have been lent to a party to the conflict must be furnished with an identity card similar to that provided to retained personnel before leaving their neutral State.[225] Such personnel, while in the power of a party to the conflict, should be treated on the same basis as corresponding

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218. GC I, art. 30; DOD LAW OF WAR MANUAL, § 4.10.2.
219. GC I, art. 26; DOD LAW OF WAR MANUAL, § 4.11.
220. 36 U.S.C. § 300102.
221. DOD LAW OF WAR MANUAL, § 4.11.1.
222. GC I, art. 27.
223. *Id.*
224. *Id.*
225. *Id.* arts. 27, 40.

personnel of the armed forces of that party to the conflict. Food, in particular, must be sufficient as regards quantity, quality, and variety to keep them in a normal state of health.[226]

If personnel of a recognized aid society of a neutral country fall into the hands of the adverse party, they may not be detained.[227] Unless otherwise agreed, such personnel shall have permission to return to their country or, if this is not possible, to the territory of the party to the conflict in whose service they were, as soon as a route for their return is open and military considerations permit.[228] Pending their release, such personnel shall continue their work under the direction of the adverse party and shall preferably be engaged in the care of the wounded and sick of the party to the conflict in whose service they were.[229] On their departure, they shall take with them their effects, personal articles and valuables, and the instruments, the arms, and, if possible, the means of transport belonging to them.[230]

Auxiliary medical personnel are members of the armed forces specially trained for employment, should the need arise, as hospital orderlies, nurses, or auxiliary stretcher-bearers, in the search for, or the collection, transport, or treatment of, the wounded and sick in international armed conflict.[231] These auxiliary medical personnel are generally treated like combatants. However, while carrying out medical duties, they must distinguish themselves by wearing a white armlet bearing the distinctive sign (e.g., the red cross) and they may not be made the object of attack if they are carrying out their medical duties when they come into contact with the enemy.[232]

Members of the armed forces do not acquire auxiliary medical status simply by performing medical duties. To be accorded immunity, aux-

226. *Id.* art. 32. *See also* DOD LAW OF WAR MANUAL, § 4.12.
227. GC I, art. 32
228. *Id.*
229. *Id.*
230. *Id. See also* DOD LAW OF WAR MANUAL, § 4.12.
231. GC I, art. 25.
232. DOD LAW OF WAR MANUAL, §§ 4.13, 4.13.3.

iliary personnel must have received special medical training beforehand and must be designated as such by their armed forces.[233] These personnel shall be provided proper identification, including an armband and a special identity document.[234] Auxiliary medical personnel must abstain from acts harmful to the enemy while carrying out their medical duties. When these conditions are not present, auxiliary medical personnel may be made the object of attack on the same basis as other combatants.[235]

Auxiliary medical personnel are POWs when detained by the enemy during an IAC, but may be required to perform their medical duties, as needed.[236] They are not, however, subject to the repatriation provisions that apply specifically to retained personnel.[237]

Persons, including combatants, placed *hors de combat* may not be made the object of attack because they are out of the fighting. Persons placed *hors de combat* include the following categories of persons, provided they abstain from any hostile act and do not attempt to escape:

- persons in the power of an adverse party;
- persons not yet in custody, who have surrendered;
- persons who have been rendered unconscious or otherwise incapacitated by wounds, sickness, or shipwreck; and
- persons parachuting from aircraft in distress.[238]

Persons in the power of an adverse party include all persons detained by an adverse party, such as POWs, unprivileged belligerents, retained personnel, and civilian internees. Detainees must refrain from hostile acts or attempts to escape in order to be considered *hors de combat*.[239]

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233. GC I COMMENTARY, at 222.
234. *Id.* at 223–24; DOD LAW OF WAR MANUAL, § 4.13.2.
235. DOD LAW OF WAR MANUAL, § 4.13.3.
236. GC I, art. 29.
237. DOD LAW OF WAR MANUAL, § 4.13.4.
238. 1949 Geneva Conventions, comm. art. 3; AP I, art. 41; GC II COMMENTARY, at 87; DOD LAW OF WAR MANUAL, §§ 5.9, 5.9.1, 5.9.4.
239. AP I, art. 41(2); DOD LAW OF WAR MANUAL, § 5.9.2.

Persons who are not in custody but who have surrendered are *hors de combat* and may not be made the object of attack.[240] In order to make a person *hors de combat*, the surrender must be (1) genuine; (2) clear and unconditional; and (3) under circumstances where it is feasible for the opposing party to accept the surrender.[241] U.S. practice provides:

> The laws of armed conflict require acceptance of a genuine offer of surrender that is clearly communicated by the surrendering party and received by the opposing force, under circumstances where it is feasible for the opposing force to accept that offer of surrender. But where that is not the case, those laws authorize use of lethal force against an enemy belligerent, under the circumstances presented here.[242]

The offer to surrender must be clear and unconditional. Any arms being carried should be laid down. All hostile acts or resistance, or manifestations of hostile intent, including efforts to escape or to destroy items, documents, or equipment to prevent their capture by the enemy, must cease immediately. Raising one's hands above one's head to show that one is not preparing to fire a weapon or engage in combat is often a sign of surrender. However, waving a white flag is not technically a sign of surrender, but signals a desire to negotiate. The surrender must be unconditional—a person who offers to surrender only if certain demands are met would not be *hors de combat* until that offer has been accepted.[243]

For an offer of surrender to render a person *hors de combat*, it must be feasible (practical and safe) for the opposing party to accept the offer:

> Surrender involves an offer by the surrendering party (a unit or an individual soldier) and an ability to accept on the part

240. Hague Regulations, art. 23(c); AP I, art. 41(2).

241. DOD LAW OF WAR MANUAL, §§ 5.9.3, 5.9.3.1.

242. Harold Hongju Koh, Legal Adviser, Department of State, *The Lawfulness of the U.S. Operation Against Osama bin Laden*, OPINIOJURIS (May 19, 2011), https://opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden/.

243. Hague Regulations, art. 23(c); DOD LAW OF WAR MANUAL, § 5.9.3.2.

> of his 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 at surrender in the midst of a hard-fought battle is neither easily communicated nor received. The issue is one of reasonableness.[244]

However, a genuine offer to surrender may not be refused simply because it would be militarily inconvenient or impractical to guard or care for detainees.[245]

Persons who have been rendered unconscious or otherwise incapacitated by wounds, sickness, or shipwreck, such that they are no longer capable of fighting, are *hors de combat*.[246] Shipwrecked combatants include those who have been shipwrecked from any cause, including forced landings at sea by or from aircraft. In order to receive protection as *hors de combat*, the person must be wholly disabled from fighting.[247] Combatants who are wounded or sick but continue to fight are not protected.[248] In many cases, the circumstances of combat may make it difficult to distinguish between persons who have been incapacitated by wounds, sickness, or shipwreck and those who continue to fight. If possible, those seeking protection as wounded, sick, or shipwrecked should make their condition clear.[249]

In general, persons, such as aircrew or embarked passengers, parachuting from an aircraft in distress are treated as though they are *hors de combat* and must not be made the object of attack provided they do not engage in hostile acts or attempt to evade capture.[250] "When an aircraft has been disabled, the occupants, when endeavoring to escape by means of a parachute, must not be attacked in the course of their descent."[251]

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244. PERSIAN GULF WAR: FINAL REPORT, at 629.
245. DOD LAW OF WAR MANUAL, § 5.9.3.4.
246. AP I, art. 41(2).
247. Lieber Code, art. 71.
248. GC I COMMENTARY, at 136 n.1.
249. GC II COMMENTARY, at 90; DOD LAW OF WAR MANUAL, § 5.9.4.
250. AP I, art. 42(1); DOD LAW OF WAR MANUAL, §§ 5.9.5, 5.9.5.1; FM 27-10, ¶ 30; ICRC AP COMMENTARY, ¶¶ 1637, 1644.
251. Hague Rules of Air Warfare, art. 20.

Persons deploying into combat by parachute are not protected and may be attacked throughout their descent, and upon landing. They may be attacked even if deploying from an aircraft in distress.[252]

5.4.3 Civilians

A civilian is a person who is not a combatant or noncombatant. Civilians may not be made the object of attack and feasible precautions must be taken to reduce the risk of harm to them. If detained, they are entitled to humane treatment and a variety of other protections, depending upon the context of the conflict. Civilians who take a direct part in hostilities lose their protection against direct attack. Civilians taking a direct part in hostilities are not entitled to combatant immunity and may be subject to criminal prosecution under the domestic law of the detaining State. Note, that there are special cases, such as persons authorized to accompany the armed forces, members of the merchant marine, and others.

Commentary

Members of the civilian population also enjoy certain rights, duties, and liabilities under the law of armed conflict. Civilians may not be made the object of attack.[253] If detained, they must be treated humanely.[254] Civilians do not, however, enjoy combatant's privilege and may be punished, after a fair trial, by an enemy State for engaging in hostilities against it.[255]

To ensure respect for and protection of the civilian population and civilian objects, "the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."[256] Additionally, civilians must not be used as shields[257] or as hostages.[258] Similarly,

252. AP I, art. 42(3); DOD LAW OF WAR MANUAL, § 5.9.5.2.
253. AP I, art. 51.
254. *Id.* art. 75.
255. *Id.* art. 75(4); DOD LAW OF WAR MANUAL, §§ 4.8, 4.8.4.
256. AP I, art. 48; DOD LAW OF WAR MANUAL, § 5.2.2.
257. AP I, art. 51(7).
258. *Id.* arts. 4(2)(c), 75(2)(c); DOD LAW OF WAR MANUAL, § 5.2.2.

measures of intimidation or terrorism against the civilian population are prohibited, including acts or threats of violence, the primary purpose of which is to spread terror among the civilian population.[259]

Anyone who is not a combatant, as provided for in Article 4(A)(1)-(3) and (6) of GC III and Article 43 of AP I, is considered a civilian.[260] Article 50(1) of AP I provides: "In case of doubt whether a person is a civilian, that person shall be considered to be a civilian."[261] The United States has objected to the definition of a combatant in AP I.[262] The DoD Law of War Manual uses the term "civilian" to mean "a member of the civilian population, i.e., a person who is neither part of nor associated with an armed force or group, nor otherwise engaging in hostilities."[263]

Civilians may not be made the object of attack unless they take direct part in hostilities, as provided in Article 51(3) of AP I, which reflects customary law. See § 8.2.2 below for a discussion of direct participation in hostilities.

Civilians may be killed incidentally in military operations. However, the expected incidental harm to civilians may not be excessive in relation to the anticipated military advantage from an attack, and feasible precautions must be taken to reduce the risk of harm to civilians during military operations.[264] Article 5 of Hague IX provides:

> In bombardments by naval forces all the necessary measures must be taken by the commander to spare as far as possible sacred edifices, buildings used for artistic, scientific, or charitable purposes, historic monuments, hospitals, and places where the sick or wounded are collected, on the understanding that they are not used at the same time for military purposes.

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259. AP I, arts. 4(2)(d), 51(2); DOD LAW OF WAR MANUAL, § 5.2.2.
260. AP I, art. 50(1).
261. *Id.*
262. DOD LAW OF WAR MANUAL, § 4.8.1.4.
263. *Id.* § 4.8.1.5.
264. AP I, arts. 57, 58.

FM 27-10, The Law of Land Warfare, states:

> Those who plan or decide upon an attack, therefore, must take all reasonable steps to ensure not only that the objectives are identified as military objectives or defended places . . . but also that these objectives may be attacked without probable losses in lives and damage to property disproportionate to the military advantage anticipated.[265]

The State Department has recognized that such precautionary measures are binding on the United States:

> We support the principle that all practicable precautions, taking into account military and humanitarian considerations, be taken in the conduct of military operations to minimize incidental death, injury, and damage to civilians and civilian objects, and that effective advance warning be given of attacks which may affect the civilian population, unless circumstances do not permit.[266]

"In the conduct of military operations, every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to civilian populations."[267] Nonetheless, civilians who engage in hostilities forfeit their protected status and may be liable to treatment as unprivileged belligerents (see § 5.4.1.1 above). "'Feasible precautions' are reasonable precautions, consistent with mission accomplishment and allowable risk to attacking forces."[268]

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265. FM 27-10, ¶ 41.

266. Michael J. Matheson, Deputy Legal Adviser, Department of State, Remarks on the United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions at the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law (Jan. 22, 1987), *reprinted in* 2 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 419, 426–27 (1987).

267. G.A. Res. 2675, Basic Principles for the Protection of Civilian Populations in Armed Conflicts (Dec. 9, 1970).

268. U.S. Comments on the International Committee of the Red Cross's Memorandum on the Applicability of International Humanitarian Law in the Gulf Region (Jan. 11, 1991),

See Chapter 8 below for further discussion of proportionality and feasible precautions.

Civilians may be subject to non-violent measures that are justified by military necessity, such as searches, or temporary detention.[269] Such measures may include:

- stopping and searching civilians for weapons and to verify that they are civilians;
- temporarily detaining civilians for reasons of mission accomplishment or self-defense, or for their own safety;
- collecting intelligence from civilians, including interrogating civilians;
- restricting the movement of civilians or directing their movement away from military operations for their own protection; or
- seeking to influence enemy civilians with propaganda.

"You may stop civilians and check their identities, search for weapons and seize any found."[270] Civilians may be detained "if they interfere with mission accomplishment or if required for self-defense."[271]

Belligerents or occupying powers may take necessary security measures in relation to civilians, including internment or assigned residence for imperative reasons of security.[272] Enemy civilians who are interned during international armed conflict or occupation generally are classified as "protected persons" under GC IV and receive a variety of protections.[273] In all circumstances, detained civilians

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2 1991–99 CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 2057, 2063; DOD LAW OF WAR MANUAL, §§ 4.8.2, 5.2.3.1.

269. DOD LAW OF WAR MANUAL, §§ 4.8.3, 5.2.2.1.

270. 101st Airborne ROE Card, Iraq (2003), *reprinted in* CENTER FOR LAW AND MILITARY OPERATIONS, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: MAJOR COMBAT OPERATIONS 315 (2004).

271. Coalition Forces Land Component Command ROE Card, Iraq (2003), *reprinted in* CENTER FOR LAW AND MILITARY OPERATIONS, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: MAJOR COMBAT OPERATIONS 314 (2004).

272. GC IV, art. 27; DOD LAW OF WAR MANUAL, §§ 4.8.3, 10.6.

273. GC IV, arts. 42–43.

must be treated humanely.[274] Special categories of civilians, such as children and women, may require additional consideration during detention.[275]

5.4.3.1 Civilians Accompanying the Force

Persons authorized to accompany the armed forces are referred to as civilians, but such civilians are treated differently from civilians who make up the civilian population. For instance, civilians authorized to accompany the force are entitled to POW status if captured. Civilians accompanying the force play critical roles across the full spectrum of military operations, to include training and maintenance roles and intelligence, planning, logistics, and communications support functions. The 1907 Hague Regulations and Geneva Convention III recognize that civilians will support and accompany the armed forces. Civilians accompanying the force may not take a direct part in hostilities. Civilians accompanying the force may be prosecuted under the domestic law of the capturing State if they directly participate in hostilities. They retain their status as POWs.

Commentary

Persons who are not members of the armed forces, but are authorized to accompany them, are referred to as "civilians" because they are not military personnel. However, these persons differ from the civilian population because they are authorized to accompany military forces into a theater of operations to support the force. For example, in *Damson (United States v. Germany)*, the Commission concluded that a nonmilitary employee of the U.S. government whose activities were "directly in furtherance of a military operation" was not a "civilian" for the purposes of the Treaty of Berlin and thus was not entitled to assert a claim under the provisions of the Treaty of Berlin that provided for Germany to compensate for damages to the civilian population that it caused during the First World War.[276] In *Hungerford (United States v. Germany)*, the Commission stated:

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274. *Id.* art. 27.

275. DOD LAW OF WAR MANUAL, §§ 4.8.3, 4.20, 10.5.1.2. *See also* GC IV, arts. 14, 17, 23–24, 38(5), 50, 82, 89, 94, 132 (children); GC IV, arts. 14, 16–17, 23, 38(5), 50, 76, 89, 132 (women/mothers); AP I, arts. 77–78 (children); AP I, art. 76 (women/mothers).

276. Damson Claim (U.S. v. Ger.), 7 R.I.A.A. 184, 198 (1925).

> [T]he members of the Y.M.C.A. who served on the western front were, in the language of the Commander-in-Chief of the A.E.F., "militarized and . . . under the control and supervision of the American military authorities." . . . They had voluntarily segregated themselves from "the civilian population" as that term is used in the Treaty of Berlin. . . . The provisions of the Treaty of Berlin obligating Germany to make compensation for damages to "civilians" or to "civilian victims" or to the "civilian population" were manifestly intended to apply to the passive victims of warfare, not to those who entered the war zone, subjected themselves to risks to which members of the civilian population generally were immune, and participated in military activities, whether as combatants or noncombatants."[277]

Article 32 of the American Articles of War of 1775 provides: "All suttlers and retailers to a camp, and all persons whatsoever, serving with the continental army in the field, though not in-listed soldiers, are to be subject to the articles, rules, and regulations of the continental army."[278]

Persons authorized to accompany the armed forces may not be made the object of attack unless they take direct part in hostilities (e.g., resisting capture).[279] Nevertheless, they retain the right of self-defense against unlawful attack.[280] They may be detained by enemy military forces and they are entitled to POW status if they fall into the power of the enemy during international armed conflict.[281] They have legal immunity from the enemy's domestic law for providing

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277. Hungerford (U.S. v. Ger.), 7 R.I.A.A. 368, 371 (1926). *See also* DoDI 3020.41, Operational Contract Support (OCS) (Ch. 2, Aug. 31, 2018); DoDI 1100.22, Policies and Procedures for Determining Workforce Mix (Ch. 1, Mar. 3, 2017); DOD LAW OF WAR MANUAL, § 4.15; Articles of War, art. 2(d), June 4, 1920, 41 Stat. 759, 787.

278. American Articles of War of 1775, art. 32, June 30, 1775, *reprinted in* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 953 (2d ed. 1920).

279. DOD LAW OF WAR MANUAL, §§ 4.15.2.1, 4.15.2.4.

280. *Id.* § 4.15.2.

281. GC I, art. 13(4); GC II, art. 13(4); GC III, art. 4A(4); AP I, art. 79; Convention Relative to the Treatment of Prisoners of War art. 81, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343; Hague Regulations, art. 13; Lieber Code, art. 50; DOD LAW OF WAR MANUAL, § 4.15.3.

> authorized support services to the armed forces.[282] Additionally, persons authorized to accompany the armed forces may be permitted to carry defensive weapons as necessary for personal security and self-defense purposes. "It is not a violation of the law of war for DoD civilians and Defense contractor employees who are authorized to accompany the armed forces in the field during hostilities to be issued a weapon on the authority of the Combatant Commander for individual self-defense . . . ."[283]
>
> Persons authorized to accompany the armed forces who provide security against criminal elements generally are not considered to be taking a direct part in hostilities and do not forfeit their protection from being made the object of attack. Nonetheless, providing such services to defend against enemy armed forces of a State is regarded as taking a direct part in hostilities. See DoDI 3020.50 for policy guidance on the use of nonmilitary personnel to provide security services for DoD components.[284]
>
> Although persons authorized to accompany the armed forces are permitted to wear the uniform of the armed forces that they accompany, U.S. practice requires them to wear clothing that distinguishes them from members of the armed forces in order to prevent confusion about their status:
>
> > Generally, commanders shall not issue military clothing to contractor personnel or allow the wearing of military or military look-alike uniforms. However, a [Combatant Commander] or subordinate [Joint Force Commander] deployed forward may authorize contractor personnel to wear standard uniform items for operational reasons. . . . When commanders issue any type of standard uniform item to contractor personnel, care must be taken to ensure, consistent with

282. DOD LAW OF WAR MANUAL, § 4.15.

283. DoDI 1100.22, *supra* note 277, encl. 5 ¶ 2.d(5)(a). *See also* DoDI 3020.41, *supra* note 277, encl. 2 ¶ 4.e for policy procedures for issuing weapons to contractor personnel; DOD LAW OF WAR MANUAL, § 4.15.2.4.

284. DoDI 3020.50, Private Security Contractors Operating in Contingency Operations, Humanitarian or Peace Operations, or Other Military Operations or Exercises (Oct. 13, 2022); DOD LAW OF WAR MANUAL, § 4.15.2.6.

> force protection measures, that contractor personnel are distinguishable from military personnel through the use of distinctive patches, arm bands, nametags, or headgear.[285]

If persons authorized to accompany the armed forces provide support that constitutes taking direct part in hostilities, they retain their entitlement to POW status under Article 4A(4) of GC III. Nonetheless, commanders may not employ such persons to perform duties and functions traditionally performed by military personnel if done for the purpose of shielding a military objective from attack.[286]

Persons authorized to accompany the armed forces under Article 4A(4) include DoD employees, other government agency employees sent to support the armed forces, and other authorized persons working on government contracts to support the armed forces. For example, during the Persian Gulf War:

> In Operations Desert Shield and Desert Storm, the United States employed civilians both as career civil service employees and indirectly as contractor employees. Civilians performed as part of the transportation system, at the forward depot level repair and intermediate level maintenance activities and as weapon systems technical representatives. Civilians worked aboard Navy ships, at Air Force (USAF) bases, and with virtually every Army unit. Only the Marine Corps (USMC) did not employ significant numbers of civilians in theater. This civilian expertise was invaluable and contributed directly to the success achieved.[287]

The list given in Article 4A(4) of GC III "is only by way of indication . . . and the text could therefore cover other categories of persons or services who might be called upon, in similar conditions, to follow the armed forces during any future conflict."[288]

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285. DoDI 3020.41, *supra* note 277, encl. 2 ¶ 3.j; DOD LAW OF WAR MANUAL, § 4.15.2.5.

286. DOD LAW OF WAR MANUAL, § 4.15.2.2.

287. PERSIAN GULF WAR: FINAL REPORT, at 599.

288. GC III COMMENTARY, at 64; DOD LAW OF WAR MANUAL, § 4.15.1.

5.4.3.2 Civilian Mariners

Civilian mariners—government civil-service and contractor employees—including those serving on MSC auxiliary vessels or USS warships, are entitled to POW status if captured. Merchant mariners serving aboard merchant vessels and belligerent vessels may lawfully resist attack by enemy forces, including efforts by enemy warships to capture their vessel. They are permitted to carry out defensive measures through to eventual seizure of the attacking vessel or aircraft, if possible. Civilian mariners serving as crew members on MSC auxiliary vessels or assigned as crew members on USS vessels (performing deck, engineering, purser, or steward functions) are not directly participating in hostilities by virtue of performing their normal assigned duties or by using force in self-defense, to include operating shipboard weapons in defense against the attack of an enemy vessel or aircraft.

Commentary

Members of the crews of merchant marine vessels or civil aircraft of a belligerent are not members of the armed forces but are authorized to support the armed forces in fighting.[289] Additionally, under certain circumstances, crews of merchant marine vessels or civil aircraft of a neutral that engage in hostilities may be treated like the crews of belligerent vessels or aircraft.[290]

Belligerent merchant vessels or civil aircraft may be used to support military operations, such as by conveying goods and military personnel to theaters of active military operations. Enemy merchant vessels or civil aircraft may be captured. Although belligerent merchant vessels or civil aircraft should not commit hostile acts in offensive combat operations, such vessels and aircraft may resist attacks by enemy forces, including by eventually seizing the attacking vessels or aircraft.[291]

Members of the crews of merchant marine vessels or civil aircraft of a belligerent who fall into the power of the enemy during an IAC,

289. DOD LAW OF WAR MANUAL, § 4.2.3.2.
290. *Id.* § 4.16.
291. LAUTERPACHT, 2 OPPENHEIM'S INTERNATIONAL LAW 266 (§ 85); DOD LAW OF WAR MANUAL, § 4.16.1.

and do not benefit from more favorable DoD treatment under any other provisions of international law, are entitled to POW status.[292] However, under Articles 6 and 8 of Hague XI, crews of enemy merchant ships that do not take part in hostilities are not held as POWs provided "that they make a formal promise in writing, not to undertake, while hostilities last, any service connected with the operations of the war."[293] These provisions proved ineffective during the First and Second World Wars and were not applied, given that not all the belligerent States were parties to the Convention.[294]

5.5 SOURCES OF THE LAW OF ARMED CONFLICT

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

Commentary

The principal sources of the laws of war are custom and treaties.[295] For example, Article 38(1) of the ICJ Statute provides:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;

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292. GC III, art. 4A(5); DOD LAW OF WAR MANUAL, § 4.16.2; NEWPORT MANUAL, § 1.2.

293. DOD LAW OF WAR MANUAL, § 4.16.

294. *Documents on Prisoners of War*, 60 INTERNATIONAL LAW STUDIES 63 (1979); 2-A FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 238–39, 418–19 (1949). *See* also DOD LAW OF WAR MANUAL, § 4.16.2.

295. NWIP 10-2, ¶ 210.

> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

In this regard, it is important to note that judicial decisions constitute persuasive authority, but not binding precedential authority, for States that are not party to the case in question. It is also significant that in international law, the work of eminent scholars is likewise persuasive authority when finding and interpreting law of armed conflict rules.

5.5.1 Treaties

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

Commentary

Treaties, or conventions, are international agreements between two or more states. Certain conventions represent a codification of the rules of war already established by custom, while other conventions create new laws of war.[296] Article 2(1)(b) of the VCLT defines "treaty" to mean "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."[297]

296. DOD LAW OF WAR MANUAL, § 1.7; NWIP 10-2, ¶ 212; NEWPORT MANUAL, § 1.2.1.

297. VCLT, art. 2. *See also* AMERICAN LAW INSTITUTE, RESTATEMENT (FOURTH) FOREIGN RELATIONS LAW, § 301 comment a, at 10 (2017).

> A treaty is binding only upon States that are parties to it.[298] The Treaties in Force website[299] lists treaties and other international agreements of the United States on record with the Department of State. Certain types of agreements, such as classified agreements and certain agency-level agreements, are not listed.
> Under the U.S. Constitution, a treaty must receive the advice and consent of the Senate before U.S. ratification or accession.[300] Certain international agreements, such as Executive agreements, are not classified as treaties for the purposes of this requirement, although they may be characterized as "treaties" for the purposes of international law and impose obligations upon the United States. "The word 'treaty' has more than one meaning. Under principles of international law, the word ordinarily refers to an international agreement concluded between sovereigns, regardless of the manner in which the agreement is brought into force."[301]

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

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298. DOD LAW OF WAR MANUAL, § 1.7.

299. *Treaties in Force*, U.S. DEPARTMENT OF STATE, https://www.state.gov/treaties-in-force/.

300. U.S. CONST., art. II, § 2, cl. 2.

301. Weinberger v. Rossi, 456 U.S. 25, 29–30 (1982). *See also* DOD LAW OF WAR MANUAL, § 1.7.1.1; AMERICAN LAW INSTITUTE, RESTATEMENT (FOURTH) FOREIGN RELATIONS LAW OF THE UNITED STATES § 301 comment a, at 10 (2017).

Commentary

> States may enact domestic legislation to implement treaty provisions. Although such implementing legislation is not international law, it may reflect a State's interpretation of those provisions and thus *opinion juris*. A State's domestic implementing legislation, or lack of such legislation, does not, however, justify that State's noncompliance with an international obligation as a matter of international law.[302]

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

1. Hague Regulations of 1907

2. Geneva Gas Protocol of 1925

3. Geneva Conventions of 1949 for the Protection of War Victims

4. 1954 Hague Cultural Property Convention

5. Biological Weapons Convention of 1972

6. 1980 Convention on Conventional Weapons (and its five Protocols)

7. Chemical Weapons Convention of 1993.

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

There are international agreements the United States has signed and ratified, signed but not ratified, or neither signed nor ratified. If the United States has signed and ratified an agreement, it is binding as law. If the United States has signed but not ratified an agreement, it is not law, but the United States has

302. DOD LAW OF WAR MANUAL, § 1.7.5.

a duty not to defeat the object and purpose of the agreement until it has made its intention clear not to become a party to the treaty. If the agreement is not signed or ratified, the agreement creates no obligations on the part of the United States.

Commentary

> A State is obliged to refrain from acts that would defeat the object and purpose of a treaty when (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance, or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.[303]

The United States is a party to the following agreements:

1. 1907 Hague Convention Respecting the Laws and Customs of War on Land (Hague IV) and the Annex entitled Regulations Respecting the Laws and Customs of War on Land

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

3. 1907 Hague Convention Relative to the Laying of Automatic Submarine Contact Mines (Hague VIII)

4. 1907 Hague Convention Concerning Bombardment by Naval Forces in Time of War (Hague IX)

5. 1907 Hague Convention Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War (Hague XI)

6. 1907 Hague Convention Concerning the Rights and Duties of Neutral Powers in Naval War (Hague XIII)

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303. VCLT, art. 18; AMERICAN LAW INSTITUTE, RESTATEMENT (FOURTH) FOREIGN RELATIONS LAW OF THE UNITED STATES § 304 reporters' note 8 at 43 (2017).

7. 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare

8. 1936 London Protocol in Regard to the Operations of Submarines or Other War Vessels with Respect to Merchant Vessels (Part IV of the 1930 London Naval Treaty)

9. 1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GWS)*

10. 1949 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea*
11. 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War (GPW)

12. 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (GC)*

13. 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*

14. 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction

15. 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects (with Amendment to Article 1)

16. 1980 Protocol I to the Convention on Certain Conventional Weapons (Non-Detectable Fragments)

17. 1980 Protocol II to the Convention on Certain Conventional Weapons (Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices)

18. 1988 Protocol III to the Convention on Certain Conventional Weapons (Prohibitions or Restrictions on the Use of Incendiary Weapons)*

19. 1993 Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1993 Chemical Weapons Convention or CWC)

20. 1995 Protocol IV to the Convention on Certain Conventional Weapons (Blinding Laser Weapons)*

21. 1996 Protocol II Amended to the Convention on Certain Conventional Weapons (Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended on 3 May 1996)*
22. 2003 Protocol V to the Convention on Certain Conventional Weapons (Explosive Remnants of War)*

23. 2005 Protocol III Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem.

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

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

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

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

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

1. 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction

2. 1998 Rome Statute of the International Criminal Court (ICC)

Note

The United States effectively withdrew its signature on May 6, 2002.

Commentary

With regard to the "unsigning" of the Rome Statute, the United States advised the UN Secretary-General as follows:

> Dear Mr. Secretary-General:
>
> This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty.
>
> Sincerely,
>
> S/John R. Bolton.[304]

3. 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict

4. 2008 Oslo/Dublin Convention on Cluster Munitions.

304. Press Statement, Richard Boucher, Spokesman, U.S. Department of State, International Criminal Court: Letter to U.N. Secretary General Kofi Annan (May 6, 2002).

5.5.2 Customary International Law

The customary international law of armed conflict derives from the general and consistent practice of States during hostilities that is done out of a sense of legal obligation (*opinion juris*). Customary law develops over time. Only when State practice attains a degree of regularity and is believed to be legally required, can the practice become a rule of customary law. Customary international law is binding upon all States, but States that have been persistent objectors to a customary international law rule during its development are not bound by that rule. It is frequently difficult to determine the precise point in time at which a usage or practice of warfare evolves into a customary rule of law. In a period marked by rapid developments in technology, coupled with the broadening of the spectrum of conflict to encompass insurgencies and State-sponsored terrorism, it is not surprising that States often disagree to the precise content of an accepted practice of armed conflict and its status as a rule of law. This lack of precision in the definition and interpretation of rules of customary international law has been a principal motivation behind efforts to codify the law of armed conflict through written agreements (treaties and conventions). The inherent flexibility of law built on custom and fact it reflects the actual—albeit constantly evolving—practice of States, underscores the continuing importance of customary international law in the development of the law of armed conflict. Commanders should recognize their actions can influence the development of customary international law and operate in a manner consistent with U.S. positions. Unlike a treaty provision—which is readily accessible in an identifiable document that sets forth an agreed-upon, codified rule—it can be difficult to identify and assess evidence of State practice and *opinion juris* when seeking to determine whether State actions in a particular area have resulted in a rule of customary international law. As with issues of treaty applicability and interpretation, questions on customary international law should be referred to judge advocates, who should refer specific questions through their operational chain of command for resolution to ensure there are common understandings of the customary international law requirements during military operations.

Commentary

Customary laws of war develop out of the usage or practice of States when such usage or practice attains a degree of regularity and is accompanied by the general conviction that behavior in conformity

with this usage or practice is both obligatory and right (*opinion juris*).[305] Article 38 of the VCLT provides that "[n]othing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such."

Customary international law is generally binding on all States, but States that have been persistent objectors to a customary international law rule during its development are not bound by that rule.[306]

One part of determining whether a purported rule is customary international law is to analyze whether there is a general and consistent practice of States that supports the purported rule. An analysis of State practice to determine whether a purported rule reflects the customary international law of war should include consideration of, inter alia, (1) whether the State practice is extensive and virtually uniform; (2) actual operational practice; (3) the practice of specially affected States; and (4) contrary practice.[307]

To meet the "extensive and virtually uniform" standard generally required for the existence of a customary rule, state practice should be sufficiently dense and consistent. In the *North Sea Continental Shelf Cases*, the ICJ stated:

> Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way

305. DOD LAW OF WAR MANUAL, § 1.8; NWIP 10-2, ¶ 211; AMERICAN LAW INSTITUTE, RESTATEMENT (FOURTH) FOREIGN RELATIONS LAW OF THE UNITED STATES § 451 comment c, at 326 (2017); NEWPORT MANUAL, § 1.2.4.

306. DOD LAW OF WAR MANUAL, § 1.8.

307. *Id.* § 1.8.2.

> as to show a general recognition that a rule of law or legal obligation is involved.[308]

The U.S. State Department provided the following advice in 2011:

> Determining that a principle has become customary international law requires a rigorous legal analysis to determine whether such principle is supported by a general and consistent practice of states followed by them from a sense of legal obligation. Although there is no precise formula to indicate how widespread a practice must be, one frequently used standard is that state practice must be extensive and virtually uniform, including among States particularly involved in the relevant activity (i.e., specially affected States).[309]

An analysis of State practice should include an analysis of actual operational practice by States during armed conflict. Although manuals or other official statements may provide important indications of State behavior, they cannot replace a meaningful assessment of operational State practice. In 2006, the United States noted its initial reactions to the ICRC Study on Customary International Law:

> Second, we are troubled by the type of practice on which the Study has, in too many places, relied. Our initial review of the State practice volumes suggests that the Study places too much emphasis on written materials, such as military manuals and other guidelines published by States, as opposed to actual operational practice by States during armed conflict. Although manuals may provide important indications of State behavior and *opinio juris*, they cannot be a replacement for a meaningful assessment of operational State practice in connection with actual military operations. We also are troubled by the extent to which the Study relies on non-binding

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308. North Sea Continental Shelf Cases (F.R.G. v. Den.; F.R.G. v. Neth.), Judgment, 1969 I.C.J. 3, ¶ 74 (Feb. 20).

309. *Libya and War Powers: Hearing Before the Senate Committee on Foreign Relations*, 112th Cong. 53, 57 (2011) (Harold Koh, Legal Adviser, Department of State, responses to questions submitted by Senator Richard G. Lugar). *See also* DOD LAW OF WAR MANUAL, § 1.8.2.1.

> resolutions of the General Assembly, given that States may lend their support to a particular resolution, or determine not to break consensus in regard to such a resolution, for reasons having nothing to do with a belief that the propositions in it reflect customary international law.[310]

The practice of "States whose interests are specially affected" (such as those with a distinctive history of participation in the relevant matter) must support the purported rule. However, "[n]ot every State that has participated in an armed conflict is 'specially affected'; . . . it is those States that have a distinctive history of participation that merit being regarded as 'specially affected.'"[311]

Further:

> Evidence of a customary norm requires indication of 'extensive and virtually uniform' State practice, including States whose interests are 'specially affected.' . . .
>
> With respect to the use of nuclear weapons, customary law could not be created over the objection of the nuclear-weapon States, which are the States whose interests are most specially affected."[312]

States that have had a wealth of experience, or that have otherwise had significant opportunities to develop a carefully considered military doctrine, may be expected to have contributed a greater quantity and quality of State practice relevant to the law of war than States that have not. For example, the United Kingdom has been viewed as a specially affected State with respect to the law of the sea. In *The Paquete Habana*, the U.S. Supreme Court noted that "[i]t is difficult to

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310. John B. Bellinger III & William J. Haynes II, U.S. Response to International Committee of the Red Cross Study on Customary International Humanitarian Law, 2006 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1069, 1071. *See also* DOD LAW OF WAR MANUAL, § 1.8.2.2; NEWPORT MANUAL, § 1.2.4.1.

311. Bellinger & Haynes, *supra* note 310, at 1072 n.3.

312. Written Statement of the Government of the United States of America, International Court of Justice, Request by the United Nations General Assembly for an Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons 8–9 (June 20, 1995). *See also* DOD LAW OF WAR MANUAL, § 1.8.2.3.

conceive of a law of the sea of universal obligation to which Great Britain has not acceded."[313]

State practice that does not support the purported rule must be considered in assessing whether it is customary international law.[314]

When analyzing State practice, it must be determined whether the practice results from a sense of legal obligation (*opinio juris*) or merely reflects a State's policy or practical interests. *Opinio juris* cannot simply be inferred from consistent State practice: "Although the same action may serve as evidence both of State practice and *opinio juris*, we do not agree that *opinio juris* simply can be inferred from practice. Both elements instead must be assessed separately in order to determine the presence of a norm of customary international law."[315] For example, the fact that nuclear weapons have not been used to conduct attacks during armed conflict since 1945 does not reflect a prohibition in customary international law against their use because that absence of use is not the product of a sense of legal obligation:

> 65. States which hold the view that the use of nuclear weapons is illegal have endeavoured to demonstrate the existence of a customary rule prohibiting this use. They refer to a consistent practice of non-utilization of nuclear weapons by States since 1945 and they would see in that practice the expression of an *opinio juris* on the part of those who possess such weapons.
>
> 66. Some other States, which assert the legality of the threat and use of nuclear weapons in certain circumstances, invoked the doctrine and practice of deterrence in support of their argument. They recall that they have always, in concert with certain other States, reserved the right to use those weapons in the exercise of the right to self-defence against an armed attack threatening their vital security interests. In

313. The Paquete Habana, 175 U.S. 677, 719 (1900) (Fuller, J., dissenting); DOD LAW OF WAR MANUAL, § 1.8.2.3.

314. DOD LAW OF WAR MANUAL, § 1.8.2.4.

315. Bellinger & Haynes, *supra* note 310, at 1073.

> their view, if nuclear weapons have not been used since 1945, it is not on account of an existing or nascent custom but merely because circumstances that might justify their use have fortunately not arisen.
>
> 67. The Court does not intend to pronounce here upon the practice known as the "policy of deterrence." It notes that it is a fact that a number of States adhered to that practice during the greater part of the Cold War and continue to adhere to it. Furthermore, the members of the international community are profoundly divided on the matter of whether non-recourse to nuclear weapons over the past fifty years constitutes the expression of an *opinio juris*. Under these circumstances the Court does not consider itself able to find that there is such an *opinio juris*.[316]

Similarly, compliance with treaty provisions does not necessarily reflect *opinio juris*: "One . . . must be cautious in drawing conclusions as to *opinio juris* from the practice of States that are parties to conventions, since their actions often are taken pursuant to their treaty obligations . . . and not in contemplation of independently binding customary international law norms."[317] Likewise, State military manuals often recite requirements applicable to States under treaties to which they are a party, or provide guidance to their military forces as a matter of national policy, rather than indicating a position expressed out of a sense of a customary legal obligation. For example, the U.S. response to the ICRC Study on Customary International Law states:

> We are troubled by the Study's heavy reliance on military manuals. We do not agree that *opinio juris* has been established when the evidence of a State's sense of legal obligation consists predominately of military manuals. Rather than indicating a position expressed out of a sense of a customary legal obligation, in the sense pertinent to customary international law, a State's military manual often (properly) will recite requirements applicable to that State under treaties to which it

316. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶¶ 65–67 (July 8); DOD LAW OF WAR MANUAL, § 1.8.3.

317. Bellinger & Haynes, *supra* note 310, at 1073–74.

> is a party. Reliance on provisions of military manuals designed to implement treaty rules provides only weak evidence that those treaty rules apply as a matter of customary international law in non-treaty contexts.[318]

Even if a rule otherwise reflects customary international law, the rule is not binding upon a State that has persistently objected to it during its development. In the *Fisheries Case (United Kingdom v. Norway)*, the ICJ stated:

> [A]lthough the ten-mile rule has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law. In any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast.[319]

In the *Asylum Case (Colombia v. Peru)*, the ICJ noted that

> even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which . . . has . . . repudiated it by refraining from ratifying the Montevideo Conventions of 1933 and 1939, which were the first to include a rule concerning the qualification of the offence in matters of diplomatic asylum.[320]

In *Legality of the Threat or Use of Nuclear Weapons*, Vice-President Schwebel stated:

> State practice demonstrates that nuclear weapons have been manufactured and deployed by States for some 50 years; that in that deployment inheres a threat of possible use; and that

318. *Id.* at 1074; DOD LAW OF WAR MANUAL, § 1.8.3.1.
319. Fisheries Case (U.K. v. Nor.), Judgment, 1951 I.C.J. 116, 131 (Dec. 18).
320. Asylum Case (Colom. v. Peru), 1950 I.C.J. 266, 277–78 (Nov. 20).

> the international community, by treaty and through action of the United Nations Security Council, has, far from proscribing the threat or use of nuclear weapons in all circumstances, recognized in effect or in terms that in certain circumstances nuclear weapons may be used or their use threatened.[321]

Furthermore, it its response to the ICRC Study on Customary International Law, the United States noted "that the Study raises doubts about the continued validity of the 'persistent objector' doctrine . . . . The U.S. Government believes that the doctrine remains valid."[322] In the view of the United States, "[t]hat a rule of customary law is not binding on any state indicating its dissent during the development of the rule (Comment d) is an accepted application of the traditional principle that international law essentially depends on the consent of states."[323]

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

The law of armed conflict is often called the law of war. Both terms can be found in DODDs and training materials. Some States consider international humanitarian law as an alternative term for the law of armed conflict that may be understood to have the same substantive meaning as the law of armed conflict. In other cases, international humanitarian law is understood more narrowly than the law of armed conflict (e.g., by understanding international humanitarian law not to include the law of neutrality). The term international humanitarian law does not cover all aspects of the law of armed conflict and is often confused with human rights law. The more traditional term law of armed conflict eliminates this confusion and is the term employed by the United States. Law of war is often used interchangeably with law of armed conflict. While there are some areas of overlap, the law of armed conflict and human rights law are separate and distinct bodies of law.

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321. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 311, 312 (July 8) (dissenting opinion of Vice-President Schwebel).

322. Bellinger & Haynes, *supra* note 310 at 1081 n.38.

323. AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 reporters' note 2 at 32 (1987); DOD LAW OF WAR MANUAL, § 1.8.4.

Compliance with the law of armed conflict and U.S. domestic law will ensure compliance with human rights law.

Commentary

In addition to the *jus in bello,* the law of war is often referred to as the "law of armed conflict" or "international humanitarian law."[324] For example, "[t]he United States of America understands that the term 'international humanitarian law' in Paragraph 5 of the Amendment (Article 2 of the Convention on the Physical Protection of Nuclear Material, as amended) has the same substantive meaning as the law of war."[325] The terminology has been described as follows:

> The law of war is often referred to as "international humanitarian law applicable in armed conflict" or, shorter, "law of armed conflict" or "humanitarian law." While the inclusion of "humanitarian" accentuates the element of protection of victims and its omission that of warfare, the various phrases all refer to the same body of law.[326]

As noted in § 5.6, the term "international humanitarian law" sometimes is considered to be narrower than the term "the law of war."[327] The former term, which does not appear in the 1949 Geneva Conventions, "includes most of what used to be known as the laws of war, although strictly speaking some parts of those laws, such as the law of neutrality, are not included since their primary purpose is not humanitarian."[328]

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324. DoDD 2311.01, DoD Law of War Program, 15 (July 2, 2020).

325. Overview of the Amendment to the Convention on the Physical Protection of Nuclear Material, 6, encl. to Condoleezza Rice, Letter of Submittal (June 11, 2007), Message from the President Transmitting Amendment to the Convention on the Physical Protection of Nuclear Material, S. TREATY DOC. NO. 110-6, at 6 (2007).

326. FRITS KALSHOVEN & LIESBETH ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW ¶ 1.1 (4th ed. 2011).

327. DOD LAW OF WAR MANUAL, § 1.3.1.2.

328. Christopher Greenwood, *Historical Development and Legal Basis*, *in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 9 (¶ 102) (Dieter Fleck ed., 1999).

CHAPTER 6

ADHERENCE AND ENFORCEMENT

6.1 ADHERENCE TO THE LAW OF ARMED CONFLICT

States adhere to the law of armed conflict not only because they are legally obliged to do so, but for the very practical reason that it is in their best interest to be governed by consistent and mutually acceptable rules of conduct. Commanders must exercise leadership to ensure the forces under their command comply with the law of armed conflict. In addition to being legally required, compliance with the law of armed conflict reinforces military effectiveness, helps maintain public support and political legitimacy, and can encourage reciprocal adherence by the adversary or adherence by adversaries in future conflicts. The law of armed conflict has long recognized knowledge of the requirements of the law is a prerequisite to compliance with the law and to prevention of violations of its rules, and has therefore required training of the armed forces. All U.S. service members, commensurate with their duties and responsibilities, must receive training and education in the law of armed conflict through publications, instructions, training programs, and exercises. Heads of DOD components are required to make legal advisors available to advise U.S. military commanders at the appropriate level on the application of the law of armed conflict.

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

Commentary

There are many practical reasons for supporting the implementation and enforcement of the law of armed conflict. These include reinforcing military effectiveness, encouraging reciprocal adherence by the adversary, and maintaining public support and political legitimacy.[1] Beyond the fact that compliance and enforcement yield prac-

1. DOD LAW OF WAR MANUAL, § 18.2.

tical benefits, under Common Article 1 of the 1949 Geneva Conventions, each nation has an affirmative legal duty at all times to respect the requirements of the Conventions and to ensure respect for them, including by its own armed forces. The obligation to respect and ensure respect also appears in other instruments to which the United States is party.[2]

It is sometimes argued that such obligations include a legal duty to ensure the implementation of the conventions by other States or parties to a conflict. The United States does not agree, but, as a matter of policy, often seeks to promote adherence to the law of armed conflict by others:

> Some have argued that the obligation in Common Article 1 of the Geneva Conventions to "ensure respect" for the Conventions legally requires us to undertake such steps and more vis-à-vis not only our partners, but all States and non-State actors engaged in armed conflict. Although we do not share this expansive interpretation of Common Article 1, as a matter of policy, we always seek to promote adherence to the law of armed conflict generally and encourage other States to do the same. As a matter of international law, we would look to the law of State responsibility and our partners' compliance with the law of armed conflict in assessing the lawfulness of our assistance to, and joint operations with, those military partners.[3]

Further, under the 1949 GC II (Articles 50–53), GC III (Articles 129–132), and GC IV (Articles 146–149), every party to the respective Convention has an obligation to seek out violators and cause them to be prosecuted. This is so irrespective of their nationality. Additionally, the United States supports the principle, detailed in AP

2. AP III, art. 1(1); Amended Mines Protocol, art. 14; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, art. 6(1), May 25, 2000, 2201 U.N.T.S. 311.

3. Brian Egan, Legal Adviser, Department of State, Remarks to the American Society of International Law: International Law, Legal Diplomacy, and the Counter-ISIL Campaign (Apr. 1, 2016).

I (Articles 85–89), that the appropriate authorities must take all reasonable measures to prevent acts contrary to the applicable rules of humanitarian law.[4]

6.1.1 Adherence by the United States

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

Commentary

The Supreme Court set forth the premise that customary law can be an element of U.S. domestic law in such cases as *The Paquete Habana*[5] and *Reid v. Covert*.[6]

As discussed in § 6.1.3.2 and its accompanying commentary, members of the U.S. armed forces have a duty to (1) comply in good faith with the law of armed conflict; and (2) refuse to comply with clearly illegal orders to commit violations of the law of armed conflict.

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4. Michael J. Matheson, Deputy Legal Adviser, Department of State, Remarks on the United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions at the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law (Jan. 22, 1987), *reprinted in* 2 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 419, 428 (1987).

5. The Paquete Habana, 175 U.S. 677 (1900).

6. Reid v. Covert, 354 U.S. 1, 18 (1957). *See also* AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 111 reporters' notes 2, 3, introductory note (1987).

6.1.2 Policies

6.1.2.1 Department of Defense

DODD 2311.01 defines the law of war for U.S. personnel and directs all members of DOD components and U.S. civilians and contractors assigned to or accompanying the armed forces comply with the law of war during all armed conflicts, however characterized. In all other military operations, members of the DOD components will continue to act consistent with the law of war's fundamental principles and rules, which include those in CA3 of the 1949 Geneva Conventions and the principles of military necessity, humanity, distinction, proportionality, and honor (the term law of war is synonymous with the law of armed conflict). Combatant commanders are responsible for the overall execution of the DOD Law of War Program within their respective commands.

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

If the unit or superior commander determines U.S. persons are not involved in a reportable incident, a U.S. investigation or review will be continued at the direction of the appropriate combatant commander only. Such incidents must be reported in accordance with DOD regulations. Incidents that involve allegations of partner forces violating the law of armed conflict will be reported with a view to ensuring compliance with the requirements of Title 10 U.S.C. § 362 and associated DOD policies. Contracts shall require U.S. contractor employees to report reportable incidents to the commander of the unit they are accompanying, to the installation to which they are assigned, or to the combatant commander.

Commentary

DoD policy requires that "[m]embers of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations."[7] The Heads of the DoD Components shall "[e]nsure that the members of their Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations."[8] The armed forces of the United States shall "comply with the law of war in the conduct of military operations and related activities in armed conflict, however such conflicts are characterized."[9]

Additionally, U.S. law of armed conflict obligations must be "observed and enforced by the DoD Components and DoD contractors assigned to, or accompanying, deployed armed forces."[10] Indeed, DoD Components must implement an "effective program to prevent violations of the law of war."[11]

These policies are long-standing:

> In consequence, treaties relating to the law of war have a force equal to that of laws enacted by the Congress. Their provisions must be observed by both military and civilian personnel with the same strict regard for both the letter and spirit of the law which is required with respect to the Constitution and statutes enacted in pursuance thereof.
>
> . . . The unwritten or customary law of war is binding upon all nations. It will be strictly observed by United States forces, subject only to such exceptions as shall have been directed

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7. DoDD 2311.01E, DoD Law of War Program, ¶ 4.1 (May 9, 2006); DOD LAW OF WAR MANUAL, § 18.1.1.

8. DoDD 5100.77, DoD Law of War Program, ¶ 5.3.1 (Dec. 9, 1998).

9. *Id.* ¶ E(1)(a). *See also* DoDD 5100.77, DoD Program for the Implementation of the Law of War, ¶ V(A) (Nov. 5, 1974).

10. DOD LAW OF WAR MANUAL, § 18.1.1; DoDD 2311.01E, DoD Law of War Program, ¶ 4.2 (May 9, 2006).

11. DOD LAW OF WAR MANUAL, § 18.1.1; DoDD 2311.01E, DoD Law of War Program, ¶ 4.3 (May 9, 2006).

> by competent authority by way of legitimate reprisals for illegal conduct of the enemy . . . .[12]

Article 0505 (Observance of International Law) of the U.S. Navy Regulations (1948) provides:

> 1. In the event of war between nations with which the United States is at peace, a commander shall observe, and require his command to observe, the principles of international law. He shall make every effort consistent with those principles to preserve and protect the lives and property of citizens of the United States wherever situated.
>
> 2. When the United States is at war, he shall observe, and require his command to observe, the principles of international law and the rules of humane warfare. He shall respect the rights of neutrals as prescribed by international law and by pertinent provisions of treaties, and shall exact a like observance from neutrals.[13]

See also NWIP 10-2, ¶ 120.

6.1.2.2 Department of the Navy

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

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

12. FM 27-10, ¶ 7.
13. U.S. Navy Regulations, art. 0505 (1948).

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

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

Commentary

SECNAVINST 3300.1C, Department of the Navy Law of War Program, outlines the law of armed conflict program for both the Navy and the Marine Corps, including Department of the Navy civilians and contractors receiving Department of the Navy funding.[14] The instruction is "punitive" in the sense that it constitutes a lawful order that opens the door to punishment or adverse administrative procedures without further implementation.[15]

In addition to requiring compliance with the law of armed conflict, it sets the following requirements for training:

(1) Be conducted by qualified instructors;

(2) Be standardized in content, to the extent possible;

(3) Emphasize the general principles, the specific rules of law, and their practical application;

(4) Incorporate realistic scenarios that are tailored to the particular services' audiences;

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14. SECNAVINST 3300.1C, Department of the Navy Law of War Program, ¶ 3a (May 28, 2009).

15. *Id.* ¶ 3b.

> (5) Leverage information technology for the widest possible dissemination and access;
>
> (6) Be periodically reviewed for accuracy;
>
> (7) Be periodically updated to incorporate lessons learned from recent operations; and
>
> (8) Be documented for individual DON personnel and contractors.[16]

The training must emphasize:

> (1) The rights and obligations regarding detainees (to include lawful enemy combatants; unlawful enemy combatants; sick, wounded or shipwrecked; noncombatants; and civilians);
>
> (2) The handling of detainee property;
>
> (3) Grave breaches of the Geneva Conventions and serious violations of the law of war;
>
> (4) Unlawful orders and superior responsibility;
>
> (5) Rules governing the conduct of hostilities, including the law of targeting and the principles of proportionality, necessity, unnecessary suffering and distinction; and
>
> (6) Procedures for reporting reportable incidents (as defined in this instruction).[17]

It requires that judge advocates who advise operational commanders "have sufficient understanding of the law of war to advise and assist those commanders independently and expeditiously."[18]

16. *Id.* ¶ 4d.
17. *Id.* ¶ 6b.
18. *Id.* ¶ 6c(3).

> The law of armed conflict has long recognized that knowledge of the requirements of the law is a prerequisite to compliance with the law and to the prevention of violations of its rules. It has therefore required training of the armed forces.[19] The United States supports the principle in Article 83 of AP I that study of the principles of the law of armed conflict be included in programs of military instruction.[20] The United States also supports the principle of Article 82 that legal advisers be made available, when necessary, to advise military commanders at the appropriate level on the application of these principles.[21] The manner of achieving these results is left to nations to implement.
>
> When the United States is at war, a commander "shall observe, and require his command to observe, the principles of international law and the rules of humane warfare. He shall respect the rights of neutrals as prescribed by international law and by pertinent provisions of treaties, and shall exact a like observance from neutrals."[22]

6.1.2.3 U.S. Coast Guard

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

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19. On dissemination of the law of armed conflict, see Hague IV, art. 1; Hague X, art. 20; Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, art. 29, July 27, 1929, 47 Stat. 2074, 118 L.N.T.S. 303; GC I, art. 47; GC II, art. 48; GC III, art. 127; GC IV, art. 144; Hague Cultural Property Convention, arts. 7, 25; AP I, arts. 83, 87(2); AP II, art. 19; and Conventional Weapons Convention, art. 6.

20. Matheson, *supra* note 4, at 428.

21. *Id.*

22. NWIP 10-2, ¶ 120.2; U.S. Navy Regulations, art. 0705 (1990). *See also* JP 1-04, Legal Support to Military Operations (Aug. 2, 2016).

Commentary

10 U.S.C. § 101(a)(4) explains that, for the purposes of U.S. domestic law, "the term 'armed forces' means the Army, Navy, Air Force, Marine Corps, Space Force, and Coast Guard." 14 U.S.C. § 101 provides that "[t]he Coast Guard as established January 28, 1915, shall be a military service and a branch of the armed forces of the United States at all times. The Coast Guard shall be a service in the Department of Homeland Security, except when operating as a service in the Navy." 14 U.S.C. § 103(b) states:

> Upon the declaration of war if Congress so directs in the declaration or when the President directs, the Coast Guard shall operate as a service in the Navy, and shall so continue until the President, by Executive order, transfers the Coast Guard back to the Department of Homeland Security. While operating as a service in the Navy, the Coast Guard shall be subject to the orders of the Secretary of the Navy, who may order changes in Coast Guard operations to render them uniform, to the extent such Secretary deems advisable, with Navy operations.[23]

6.1.3 Who may be Held Accountable

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

23. *See also* U.S. Navy Regulations, ch. 6 (1990).

Commentary

Individuals may be held liable for violations of the law of armed conflict whether they have committed them directly or are complicit in their commission. The theories of liability that apply to a law of armed conflict violation can vary depending on the particular forum (e.g., U.S. federal court, U.S. military commission, international criminal tribunal). Modes of liability for law of armed conflict offenses may include ordering, instigating or directly inciting, command responsibility, aiding and abetting, conspiracy, and joint criminal enterprise. In some cases, these theories are ways to attribute an offense by one person to another person. In others, they are distinct offenses.[24]

A person who orders another to commit an offense is generally punishable as though that person had committed the offense.[25] For example, 10 U.S.C. § 877 provides:

> Any person punishable under this chapter who—
>
> (1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission; or
>
> (2) causes an act to be done which if directly performed by him would be punishable by this chapter;
>
> is a principal.

Instigating or directly inciting an offense is also punishable, as reflected in the statutes of international tribunals.[26] For example, Article 7(1) of the ICTY Statute provides: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime."

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24. DOD LAW OF WAR MANUAL, § 18.23.
25. *Id.* § 18.23.1.
26. *Id.* § 18.23.2.

Commanders have duties to take necessary and reasonable measures to ensure that their subordinates do not commit violations of the law of armed conflict. Failure to do so can result in criminal responsibility.[27] On the one hand, they may be punished directly for their failure to take necessary and reasonable measures to ensure that their subordinates do not commit violations of the law of armed conflict—for instance, as a dereliction of duty. Such failures may be punished under the Uniform Code of Military Justice as dereliction of duty or violation of orders.[28] On the other hand, a failure of a commander to take necessary and reasonable steps to ensure that the commander's subordinates do not commit law of armed conflict violations can result in the violation being imputed to the commander, such that the commander is responsible for it. For example, 10 U.S.C. § 950q provides:

> Any person is punishable under this chapter who—
>
> . . . .
>
> (3) is a superior commander who, with regard to acts punishable under this chapter, knew, had reason to know, or should have known, that a subordinate was about to commit such acts or had done so and who failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof,
>
> is a principal.

Article 28 of the Rome Statute provides:

> In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:
>
> > (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by

27. *Id.* § 18.23.3.
28. 10 U.S.C. § 892.

> forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
>
> > (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
> >
> > (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Individuals may also be held criminally responsible for aiding and abetting a violation of the law of armed conflict that amounts to a war crime.[29] Such liability consists of three elements: (1) knowledge of the illegal activity that is being aided and abetted; (2) a desire to help the activity succeed; and (3) some act of helping.[30] Article 25(3) of the Rome Statute provides:

> In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
>
> . . . .
>
> (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission . . . .

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29. DOD LAW OF WAR MANUAL, § 18.23.4.

30. Walter Dellinger, Assistant Attorney General, United States Assistance to Countries That Shoot Down Civil Aircraft Involved in Drug Trafficking, 18 Op. O.L.C. 148, 156 (July 14, 1994). *See* 18 U.S.C. § 2; 18 U.S.C. § 877.

The United States has taken the position that conspiracy to violate the law of armed conflict is punishable:

> In view of the statements of the authorities on military law set forth above, and the precedents established in the proceedings referred to above, it may be said to be well established that a conspiracy to commit an offense against the laws of war is itself an offense cognizable by a commission administering military judgment.[31]

For example, the United States has used military tribunals to punish unprivileged belligerents for the offense of conspiracy to violate the law of armed conflict:

> The Civil War experience provides further support for the President's conclusion that conspiracy to violate the laws of war is an offense cognizable before law-of-war military commissions. Indeed, in the highest profile case to be tried before a military commission relating to that war, namely, the trial of the men involved in the assassination of President Lincoln, the charge provided that those men had "combin[ed], confederat[ed], and conspir[ed] . . . to kill and murder" President Lincoln.[32]

The essence of conspiracy is the combination of minds in an unlawful purpose.[33] Conspiracy is an offense under the Uniform Code of Military Justice.[34] It is also an offense under Title 18 of the U.S. Code.[35]

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31. DOD LAW OF WAR MANUAL, § 18.23.5; Memorandum of Law from Tom C. Clark, Assistant Attorney General, to Major General Myron C. Kramer, Judge Advocate General, 6 (Mar. 12, 1945).

32. Hamdan v. Rumsfeld, 548 U.S. 1, 23 (2006) (Thomas, J., dissenting).

33. Smith v. United States, 133 S. Ct. 714, 719 (2013).

34. 10 U.S.C. § 881.

35. 18 U.S.C. § 371.

6.1.3.1 Command Responsibility

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

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

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

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

subordinates properly constitutes criminal negligence on the commander's part. The commander may be criminally liable where there is personal neglect amounting to a wanton, immoral disregard of the action of the commander's subordinates that amounts to acquiescence in the crimes.

Commentary

On command responsibility as a theory of individual criminal liability, see the commentary accompanying § 6.1.3.2.

The law of armed conflict is premised in part on the avoidance of violations through the control of operations by commanders who are to some extent responsible for their subordinates.[36] One of the requirements for armed forces to receive the privileges of combatant status is that they operate under a responsible command.[37] Additionally, law of armed conflict treaties require commanders to take appropriate measures to ensure that the provisions of those treaties are observed. For example, Article 46 of GC I and Article 46 of GC II each provide: "Each Party to the conflict, acting through its Commanders-in-Chief, shall ensure the detailed execution of the preceding Articles and provide for unforeseen cases, in conformity with the general principles of the present Convention."

Commanders may use disciplinary or penal measures to carry out their duties to implement and enforce the law of armed conflict. They enjoy discretion under international law as to how to do so.[38] Additionally, commanders are obligated to investigate reports of law of armed conflict violations by persons under their command when those reports are credible.[39] A "reportable incident" has been defined as a "possible, suspected, or alleged violation of the law of war, for which there is credible information, or conduct during military operations other than war that would constitute a violation of the law of war if it occurred during an armed conflict."[40]

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36. *See* NEWPORT MANUAL, § 1.4.1.
37. GC III, art. 4A(1)–(2); AP I, art. 43.
38. DOD LAW OF WAR MANUAL, § 18.4.2.
39. *See id.* § 18.13.
40. DoDD 2311.01E, DoD Law of War Program, ¶ 3.2 (May 9, 2006). *See also* DoDD 5100.77, DoD Law of War Program, ¶ 3.2 (Dec. 9, 1998).

See also NWIP 10-2, ¶ 330b2.

6.1.3.2 Individual Responsibility

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

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

Commentary

On theories of individual criminal liability, see the commentary accompanying § 6.1.3.1.

Each member of the armed forces has a duty to comply with the law of armed conflict in good faith.[41] In practice, the obligation is met when individual service members (1) perform their duties as they have been trained and directed; and (2) apply the training on the law of armed conflict that they have received.[42]

Members of the armed forces must refuse to comply with clearly illegal orders to commit law of armed conflict violations and orders should not be construed to authorize implicitly violations of the law of armed conflict.[43] However, this duty does not apply when the subordinate is not competent to evaluate whether the rule has been violated. Subordinates are not required to screen the orders of superiors for questionable points of legality and may, absent specific knowledge to the contrary, presume that orders have been lawfully issued. In *United States v. von Leeb (The High Command Case)*, the Tribunal stated:

> Orders are the basis upon which any army operates. It is basic to the discipline of an army that orders are issued to be carried out. Its discipline is built upon this principle. Without it, no army can be effective and it is certainly not incumbent upon a soldier in a subordinate position to screen the orders of superiors for questionable points of legality. Within certain limitations, he has the right to assume that the orders of his superiors and the state which he serves and which are issued to him are in conformity with international law.
>
> . . . He has the right to presume, in the absence of specific knowledge to the contrary, that the legality of such orders has been properly determined before their issuance. He cannot be held criminally responsible for a mere error in judgment as to disputable legal questions.[44]

To illustrate, take the case of a commander issuing an order to attack a town. In most cases, it is reasonable to act on the basis that the

41. *See* NEWPORT MANUAL, § 1.4.2.
42. DOD LAW OF WAR MANUAL, § 18.3.1.
43. *Id.* § 18.3.2.
44. United States v. von Leeb (The High Command Case), 11 TWC 510–11 (1950).

order directs attacks on military objectives located in that area.[45] Similarly, speeches by commanders before combat operations to rally members of their command should not be understood to authorize implicitly law of armed conflict violations against the enemy.

See also NWIP 10-2, ¶ 330b1.

6.2 ENFORCEMENT OF THE LAW OF ARMED CONFLICT

Various means are available to belligerents under international law for inducing compliance with the law of armed conflict. To establish the facts, belligerents may agree to an ad hoc inquiry. The following is a nonexhaustive list of actions which the aggrieved nation could pursue:

1. Publicize the facts with a view toward influencing world public opinion against the offending nation. For example, during Iraq's unlawful occupation of Kuwait in 1990, the Security Council invited all States to collate substantiated information in their possession or submitted to them on the grave breaches by Iraq . . . and make this information available to the Council. The United States submitted such a report as an effort to publicize the grave breaches committed by Iraq.

2. Protest to the offending nation and demand those responsible be punished and/or compensation be paid.

3. Seek the intervention of a neutral party, particularly with respect to the protection of POWs and other of its nationals that have fallen under the control of the offending nation.

4. Execute a belligerent reprisal action (see 6.2.4).

5. Punish individual offenders either during the conflict or upon cessation of hostilities (see 6.2.6).

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45. *See, e.g.*, Prosecutor v. Gotovina and Markač, Case No. IT-06-09-A, Appeals Judgment, ¶ 77 (ICTY, Nov. 16, 2012).

Commentary

Issuing a formal or informal complaint to the offending party can be an initial step in addressing law of armed conflict violations by the enemy. Given the typical lack of diplomatic relations between States involved in an armed conflict, complaints cannot normally be made through the usual diplomatic channels. Traditionally, complaints were passed by a *parlementaire* directly to the commander of the offending forces, a procedure that remains viable in some circumstances. Today, the message is more likely to be transmitted by electronic means.[46] Complaints also may be made through the protecting power, an impartial humanitarian organization performing the duties of a protecting power, or a neutral State. On protecting powers, see § 6.2.1 and accompanying commentary.

International mechanisms, such as commissions of inquiry, sometimes may be used to investigate law of armed conflict violations.[47] Commissions of inquiry, for instance, might be established by treaty or by the UN Security Council. For example, Article 34 of the UN Charter provides: "The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security."

The Geneva Conventions authorize and encourage belligerents to agree to objective inquiries into alleged violations of the Convention.[48] If agreement is not reached concerning the procedure for the inquiry, the parties should agree on the choice of an "umpire" who will decide upon the procedure to be followed. Once the violation has been established, the parties to the conflict "shall put an end to it and shall repress it with the least possible delay."

Article 90 of AP I provides for the establishment of an International Fact-Finding Commission that is competent (1) to inquire into any facts alleged to be a grave breach as defined in the 1949 Geneva

46. DOD LAW OF WAR MANUAL, § 18.11; 2004 UK MANUAL, ¶ 16.6.
47. *Id.* § 18.14.
48. GC I, art. 52; GC II, art. 53; GC III, art. 132; GC IV, art. 149.

Conventions and AP I or other serious violation of the 1949 Geneva Conventions or of AP I; and (2) to facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and AP I. The Commission operates on the basis of mutual consent. Any party to a conflict may ask the Commission to conduct an inquiry. However, unless the States involved have previously declared that they recognize ipso facto and without special agreement, in relation to any other party to AP I accepting the same obligation, the competence of the Commission, the Commission will only investigate with the consent of the States involved. Although constituted in 1991, the Commission has not been used. Since the United States has not ratified AP I, it does not recognize the competence of the Commission in matters involving the United States.

6.2.1 The Protecting Power

Under the Geneva Conventions of 1949, the treatment of POWs, interned civilians, and the inhabitants of occupied territory is to be monitored by a neutral State, known as the Protecting Power. Due to the difficulty of finding a State the opposing belligerents will regard as truly neutral, the Conventions contemplate that international humanitarian organizations, such as the International Committee of the Red Cross (ICRC), subject to the consent of the parties to the conflict, provide humanitarian aid and seek to ensure the protection of war victims in armed conflict.

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

States may control access to their territory, and belligerents may control access to their military operations. The entry of the ICRC or other nongovernmental organizations into a State's sovereign territory, or into a theater of

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

Commentary

Protecting powers are entities intended to ensure the implementation of the 1949 Geneva Conventions and the 1954 Hague Cultural Property Convention.[49] Under the 1949 Geneva Conventions, belligerents may designate neutral States as "Protecting Powers." Their duty is to safeguard the interests of the parties to the conflict: "The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict."[50]

Detaining powers are obligated to seek a protecting power if the wounded and sick, shipwrecked, medical personnel and chaplains, POWs, or protected persons in its custody do not benefit from one.[51] If such protection cannot be arranged, the Conventions contemplate that States will use the ICRC or another impartial humanitarian organization to serve in that capacity.[52] The ICRC has often performed this role. For example, during the 1991 Persian Gulf War, the ICRC was provided "access to Coalition [POW] facilities and reviewed their findings with Coalition representatives in periodic meetings in

49. DOD LAW OF WAR MANUAL, § 18.15.
50. GC I, art. 8. *See also* GC II, art. 8; GC III, art. 8; GC IV, art. 9.
51. GC I, art. 10; GC II, art. 10; GC III, art. 10; GC IV, art. 11.
52. GC I, art. 10; GC II, art. 10; GC III, art. 10; GC IV, art. 11.

Riyadh, Saudi Arabia."[53] Iraq, however, refused ICRC access to Coalition POWs held in Iraq.[54] In Korea and in Southeast Asia, the ICRC acted in its traditional humanitarian role for North Korean, Chinese, Viet Cong, and North Vietnamese prisoners in the hands of the United States and its allies, notwithstanding refusal by North Korea and North Vietnam to provide ICRC access to prisoners in their hands.[55]

Similarly, the Hague Cultural Property Convention provides that it and the Regulations for its execution are to be applied with the cooperation of the protecting powers: "The present Convention and the Regulations for its execution shall be applied with the co-operation of the Protecting Powers responsible for safeguarding the interests of the Parties to the conflict."[56]

Within a State, the appointment of a protecting power is a decision made by authorities at the national level. Appointment requires the consent of the States whose relations are to be transacted through the protecting power. For example, during an international armed conflict, the U.S. designation of a neutral State as its protecting power would require agreement of the enemy State, but the consent of States allied with the United States would not be required.[57]

The activities of a protecting power require the consent of the State on whose territory it serves and the State whose facilities it visits. For example, the delegates of the protecting power are subject to the approval of the power with which they are to carry out their duties. In addition, a protecting power must ensure that its delegation does not exceed its humanitarian responsibilities and takes into account the imperative necessities of security of the State wherein they carry out their duties.

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53. PERSIAN GULF WAR: FINAL REPORT, at 617.

54. ICRC BULLETIN, Mar. 1991, at 2.

55. Howard Levie, *Maltreatment of Prisoners of War in Vietnam*, 48 BOSTON UNIVERSITY LAW REVIEW 323 (1968).

56. Hague Cultural Property Convention, art. 21.

57. DOD LAW OF WAR MANUAL, § 18.15.2.

6.2.2 The International Committee of the Red Cross

The ICRC is a private, nongovernmental, humanitarian organization based in Geneva, Switzerland. The ICRC is distinct from, and should not be confused with, the various national Red Cross societies, such as the American Red Cross.

The ICRC's principal purpose is to provide protection and assistance to the victims of armed conflict. It bases its activities on the principles of neutrality and humanity. The Geneva Conventions recognize the special status of the ICRC and have assigned specific tasks for it to perform, to include visiting and interviewing, without witnesses present, POWs and detained or interned protected persons (civilians), providing relief to the civilian population of occupied territories, searching for information concerning missing persons, and offering its good offices to facilitate the establishment of hospital and safety zones. The President has recognized the role of the ICRC in visiting individuals detained in armed conflict. See Executive Order (EO) 13491, Ensuring Lawful Interrogations.

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

Commentary

As noted in Article 1 of its Statutes:

> 1. The ICRC is an organization formally recognized in the Geneva Conventions, their Additional Protocols, and the Statutes of the International Red Cross and Red Crescent Movement (hereafter "the Movement"), and by the International Conferences of the Red Cross and Red Crescent (hereafter "the International Conferences").

> 2. It is one of the components of the Movement, which also comprises the National Red Cross and Red Crescent Societies ("the National Societies") and the International Federation of Red Cross and Red Crescent Societies ("the Federation").

The ICRC was established in 1863 and directs and coordinates the international activities of the Movement during armed conflict and other situations of violence.

Article 4 of the Statutes sets out the roles of the organization, which include:

> (c) to undertake the tasks incumbent upon it under the Geneva Conventions, to work for the faithful application of international humanitarian law applicable in armed conflicts and to take cognizance of any complaints based on alleged breaches of that law;
>
> (d) to endeavour at all times—as a neutral institution whose humanitarian work is carried out particularly in time of international and other armed conflicts or internal strife—to ensure the protection of and assistance to military and civilian victims of such events and of their direct results;
>
> (e) to ensure the operation of the Central Tracing Agency as provided in the Geneva Conventions;
>
> (f) to contribute, in anticipation of armed conflicts, to the training of medical personnel and the preparation of medical equipment, in cooperation with the National Societies, the military and civilian medical services and other competent authorities;
>
> (g) to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof.

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

The Deputy Secretary of Defense (DepSecDef), in a memorandum of 5 October 2007, with the subject line Amended Policy Guidance on International Committee of the Red Cross (ICRC) Communications, requires DOD personnel to report contacts with the ICRC.

> 1. All ICRC reports, written or oral, received by a military or civilian official of the DOD at any level shall, within 48 hours, be transmitted via email through the operational chain of command to designated representatives within the cognizant combatant command. The combatant command shall then transmit such reports within 1 day of receipt to the Under SECDEF for Policy with information copies to the Director, Joint Staff; DOD General Counsel; and DOD Executive Secretary. The ICRC reports received within a combatant command area of operation shall be transmitted simultaneously to the commander of the combatant command.
>
> 2. Oral ICRC reports shall be summarized in writing and shall contain the following information:
>
> a. Dates and location of the ICRC communication
>
> b. Subject matter of the communication
>
> c. Name of the ICRC and DOD representatives
>
> d. Actions taken or planned by the command in response to the ICRC communication.
>
> 3. The senior commander or DOD official to which an ICRC communication is addressed shall provide a timely written response to the ICRC acknowledging the communication and, to the extent practicable, provide a written response to the ICRC addressing substantive matters raised by the ICRC, to include answering requests for information and explaining actions taken to resolve alleged deficiencies identified by the ICRC communication. This written response

will be forwarded to DOD in the same manner as the original ICRC communication.

4. All ICRC communications shall be marked with the statement:

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

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

Commentary

The 2007 memorandum that is the basis for this section was canceled by DoDD 2310.01E, effective March 15, 2022. The Directive provides that the Undersecretary of Defense for Policy is the principal DoD coordinator with the ICRC or protecting powers for detainee issues.[58] Combatant commanders:

> Accept the services of the ICRC or [protecting power (PP)] to perform humanitarian functions related to detainees during, and in relation to, any armed conflict, however characterized, to which the United States is a party. The ICRC or PP will be given access to all DoD detention facilities and the detainees housed therein, subject to reasons of imperative military necessity and within the requirements of the law of war.
>
> > (1) Conduct prompt evaluation and, as appropriate, transmission to senior DoD leaders of ICRC or PP communication (e.g., substantive written or oral reports, excluding administrative matters such as scheduling visits

58. DoDD 2310.01E, DoD Detainee Program, ¶ 2.1.d (Mar. 15, 2022).

> or logistical support) to ensure appropriate and timely action.
>
> (2) To the extent practicable, provide a written response to ICRC or PP addressing substantive matters raised by ICRC or PP, including requests for information, explaining actions taken to resolve alleged deficiencies identified in the ICRC or PP communication.
>
> (3) Mark all ICRC or PP communications with the following: "ICRC or PP communications are provided to DoD as confidential, restricted-use documents. As such, they will be safeguarded the same as SECRET//NOFORN information using classified information channels. Dissemination of ICRC or PP communications outside of DoD is not authorized without the approval of the Secretary of Defense or the Deputy Secretary of Defense.[59]

The Directive further requires that the ICRC or protecting power "be promptly notified of all internment serial number assignments and afforded the opportunity to meet with detainees, subject to reasons of imperative military necessity."[60]

6.2.4 Reprisal

Reprisals are acts that are otherwise not permitted by the law of armed conflict in order to persuade a party to the conflict to cease violating the law of armed conflict. They are taken in response to a prior act in violation of the law of armed conflict that was committed by or is attributable to that party. This could include the use of weapons forbidden by the 1907 Hague Regulations to counter the use of the same weapons by an enemy on combatants who have not yet fallen into the hands of the enemy. Reprisals are extreme measures that are only adopted as a last resort to induce the party to desist from violations of the law of armed conflict. Under customary international law, members of the enemy civilian population, other than protected persons

59. *Id.* ¶ 2.9(f).
60. *Id.* ¶ 3.5(c).

covered under the Fourth Geneva Convention, may be legitimate objects of reprisal. Additional Protocol I to the Geneva Conventions prohibits reprisals against civilians and civilian objects. The United States is not a party to Additional Protocol I and has taken the position that its reprisal provisions are counterproductive and remove a significant deterrent that protects civilians and other war victims on all sides of a conflict.

Commentary

Reprisals are actions taken during an armed conflict that would otherwise violate the law of armed conflict but are permissible in order to compel an enemy to desist in its own law of armed conflict violations. For instance, a reprisal could include the use of weapons forbidden by the Hague Regulations to counter the use of the same weapons by an enemy on combatants who have not yet fallen into the hands of the enemy. As will be explained, reprisals are extreme measures that are adopted only as a last resort.

The sole purpose of a reprisal is to force the enemy back into compliance with the law. Mere retribution or retaliation by means of a law of armed conflict violation is strictly forbidden. Moreover, reprisals are subject to strict conditions set forth in the following sections of the Handbook. They are to be distinguished from countermeasures, which similarly preclude the wrongfulness of unlawful action when designed to force another state to abide by international law.[61] Countermeasures, which are available during peacetime, may never involve violations of the law of armed conflict.[62] Reprisals must also be distinguished from acts of retorsion, which are unfriendly but lawful actions by one State against another. For instance, depriving POWs of benefits that they have no legal entitlement to receive in response to enemy actions would amount to retorsion, not reprisal.

Famously, Abraham Lincoln ordered reprisals against Confederate POWs in response to the treatment of African American soldiers:

61. *See* DOD LAW OF WAR MANUAL, § 18.18.
62. Articles on State Responsibility, arts. 22, 50(1)(c).

> It is the duty of every Government to give protection to its citizens, of whatever class, color, or condition, and especially to those who are duly organized as soldiers in the public service. The law of nations, and the usages and customs of war, as carried on by civilized powers, permit no distinction as to color in the treatment of prisoners of war as public enemies. To sell or enslave any captured person, on account of his color, and for no offence against the laws of war, is a relapse into barbarism, and a crime against the civilization of the age.
>
> The Government of the United States will give the same protection to all its soldiers; and if the enemy shall sell or enslave any one because of his color, the offence shall be punished by retaliation upon the enemy's prisoners in our possession.
>
> It is therefore ordered, that for every soldier of the United States killed in violation of the laws of war, a rebel soldier shall be executed; and for every one enslaved by the enemy or sold into slavery, a rebel soldier shall be placed at hard labor on the public works, and continued at such labor until the other shall be released and receive the treatment due to a prisoner of war.[63]

In the modern law of armed conflict, reprisals against POWs are forbidden.[64]

The DoD Law of War Manual notes that there are important practical considerations with regard to the use of reprisals apart from the strict legal requirements. Some may counsel against taking them. These include:

- Taking reprisals may divert valuable and scarce military resources from the military struggle and may not be as effective militarily as steady adherence to the law.

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63. Abraham Lincoln, General Order No. 252, July 31, 1863, *reprinted in* THOMAS M. O'BRIEN & OLIVER DIEFENDORF, 2 GENERAL ORDERS OF THE WAR DEPARTMENT, EMBRACING THE YEARS 1861, 1862 & 1863, at 323 (1864).

64. GC III, art. 13.

- Reprisals will usually have an adverse impact on the attitudes of governments not participating in the conflict.
- Reprisals may only strengthen enemy morale and will to resist.
- Reprisals frequently lead only to further unwanted escalation of the conflict by an adversary or a vicious cycle of counter-reprisals.
- Reprisals may render resources of an adversary less able to contribute to the rehabilitation of an area after the cessation of hostilities.[65]

6.2.4.1 Conditions for Reprisal

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

Commentary

The United States is of the view that the conditions on reprisal set forth in the following sections are customary in nature and therefore binding on all States.[66] They are drawn from U.S. practice. The most significant condition is that reprisals are only permissible to compel the enemy to desist in its own violations of the law of armed conflict.

6.2.4.1.1 Careful Inquiry that Reprisals are Justified

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

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65. DOD LAW OF WAR MANUAL, § 18.18.4. *See also* NWIP 10-2, ¶ 310.
66. DOD LAW OF WAR MANUAL, § 18.18.2.

Commentary

This text is drawn from the DoD Law of War Manual, § 18.18.2.1. It emphasizes that the decision to engage in a reprisal should only be taken after careful consideration of the facts and with sensitivity to the possibility of misperception.

The DoD Law of War Manual section offers the cautionary example of an attack that results in the death of civilians. Although the attack may appear unlawful, the deaths may be the result of good faith or reasonable mistake, or they may have been justified by the importance of destroying the military objective against which the bombardment was directed (proportionality). This demonstrates the need to carefully assess the situation before considering reprisal operations. Article 28 of the Lieber Code provides:

> Retaliation will, therefore, never be resorted to as a measure of mere revenge, but only as a means of protective retribution, and moreover, cautiously and unavoidably; that is to say, retaliation shall only be resorted to after careful inquiry into the real occurrence, and the character of the misdeeds that may demand retribution.
>
> Unjust or inconsiderate retaliation removes the belligerents farther and farther from the mitigating rules of regular war, and by rapid steps leads them nearer to the internecine wars of savages.

6.2.4.1.2 Proportionality in Reprisal

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

Commentary

This text is drawn from the DoD Law of War Manual, § 18.18.2.4. The concept of proportionality appears in numerous forms in international law and often denotes differing considerations. For instance, the standard of assessment differs in the law of targeting, the taking of countermeasures, and actions taken pursuant to the right of self-defense. As used in the law of reprisal, proportionality denotes rough equivalence in the harm caused. Importantly, the harm caused by the reprisal, or the rule violated, need not be of the same nature as the unlawful enemy action to which it responds.

On the issue of proportionality in the context of law of armed conflict reprisals, the United States takes the following position:

> Customary international law allows reprisals, which are breaches of a treaty's terms or other unfriendly conduct in response to a breach by another party. . . .
> . . . . .
> . . . . To be legal, reprisals must respond in a proportionate manner to a preceding illegal act by the party against whom they are taken. . . . Identical reprisals are the easiest to justify as proportionate, because subjective comparisons are not involved. Thus, in the current crisis, the taking of Iranian diplomats as "hostages" (or a lesser restriction on their freedom of movement that approaches imprisonment) would clearly be a proportionate response; reducing the immunity of Iranian diplomats from criminal prosecution would be more difficult to justify.[67]

In the 1928 *Naulilaa Incident Arbitration*, the Tribunal stated:

> The necessity of a proportion between the reprisals and the offense would appear to be recognized in the German answer. Even if one admitted that international law does not require that the reprisal be approximately measured by the

67. Larry A. Hammond, Deputy Assistant Attorney General, Possible Participation by the United States in Islamic Republic of Iran v. Pahlavi, 4A Op. O.L.C. 160, 163 (1980).

> offense, one should certainly consider as excessive, and thus illegal, reprisals out of all proportion with the act which motivated them. Now in this case . . . there has been evident disproportion between the incident of Naulilaa and the six acts of reprisals which followed it.
>
> The arbiters conclude that the German aggressions of October, November and December, 1914, on the Angola frontier, cannot be considered as lawful reprisals for the Naulilaa incident . . . , in view of the lack of sufficient occasion, of previous demand and of admissible proportion between the alleged offense and the reprisals taken.[68]

6.2.4.1.3 Exhaustion of Other Means of Securing Compliance

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

Commentary

> This text is drawn from the DoD Law of War Manual, § 18.18.2.2. The requirement to consider other means of resolution derives from the fact that a reprisal is an act that would otherwise be unlawful, but for the fact that the State that was the victim of the enemy's violation of the law of armed conflict is trying to compel the enemy to desist in that unlawfulness. Since a reprisal involves what would otherwise be unlawful conduct, international law allows the action only when other means of compelling the enemy to act lawfully have failed or would be likely to fail. Such measures include, for instance, protests

68. Naulilaa Incident Arbitration, Portuguese-German Arbitral Tribunal, 1928, *reprinted and translated in* WILLIAM W. BISHOP, INTERNATIONAL LAW: CASES AND MATERIALS 904 (3d ed. 1971).

and demands, retorsion, or reasonable notice of the threat to use reprisals before resorting to reprisals.

The exhaustion-of-other-means requirement resembles the "necessity" condition in the law of self-defense, which allows for the use of force in self-defense only if reasonable non-forcible measures have been exhausted.

6.2.4.1.4 Who may Authorize

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

Commentary

In that reprisals require a variety of conditions and implicate the rights and duties of a State under international law, the authority to conduct them is generally held at a high level of national authority. The 2004 UK Manual, for example, states:

> This means that reprisals taken in accordance with the statement [made on the ratification of AP I] are permissible by and against the United Kingdom. However, commanders and commanders-in-chief are not to take reprisal action on their own initiative. Requests for authority to take reprisal action must be submitted to the Ministry of Defence and require clearance at Cabinet level.[69]

High-level authorization is especially important, for an act of reprisal involves a violation of the law of armed conflict that may place protected persons or property at risk. The decision to take them is an act of the State under the law of State responsibility. As such, the authority to violate the law of armed conflict is a State act that should

69. 2004 UK MANUAL, ¶ 16.19.2.

be authorized only by senior officials. For example, in the *Trial of Hans Albin Rauter*, the Court stated:

> In the proper sense one can speak of reprisals only when a State resorts, by means of its organs, to measures at variance with International Law, on account of the fact that its *opponent*—in this case the State with which it is at war—had begun, by means of one or more of its organs, to commit acts contrary to International Law, quite irrespective of the question as to what organ this may have been, Government or legislator, Commander of the Fleet, Commander of Land Forces, or of the Air Force, diplomat or colonial governor.
>
> The measures which the appellant describes . . . as "reprisals" bear an entirely different character, they are indeed retaliatory measures taken in time of war by the occupant of enemy territory as a retaliation not of unlawful acts *of the State* with which he is at war, but of hostile acts *of the population* of the territory in question or *of individual members* thereof, which, in accordance with the rights of occupation, he is not bound to suffer.
>
> Both types of "reprisals" have this in common, that the right to take genuine reprisals as well as the alleged competence to take so called "reprisals" may in principle belong only to the *State* which applies them . . . .[70]

Commanders who believe that a reprisal is warranted should report the enemy's violation promptly through command channels in accordance with DoDD 2311.01E, along with any proposal for reprisal action.

6.2.4.1.5 Public Announcement of Reprisals

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

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70. Trial of Hans Albin Rauter, 14 LRTWC 89, 132 (1949).

Commentary

Reprisals are communicative in nature. They are designed to send the message to the enemy that it must desist in its own course of conduct and that, if it does, the party taking the reprisal will, in turn, return to full compliance with the law of armed conflict. Therefore, it is essential that the enemy understand that the unlawful conduct is meant as a reprisal and not mere retaliation or a decision to no longer abide by certain rules of the law of armed conflict. For example, in the *Trial of Richard Wilhem Hermann Bruns*, the Supreme Court of Norway stated: "Reprisals were generally understood to aim at changing the adversary's conduct and forcing him to keep to the generally accepted rules of lawful warfare. If this aim were to be achieved, the reprisals must be made public and announced as such."[71]

6.2.4.2 Treaty Limitations on Reprisal

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

1. Combatant personnel who are wounded, sick, or shipwrecked (GWS, Article 46 and GWS Sea, Article 47)

2. Medical and religious personnel, medical units and facilities, and hospital ships (GWS, Article 46 and GWS Sea, Article 47)

3. POWs (GPW, Article 13)

4. Persons protected by the GC and their property (GC, Article 33)

5. Cultural property (1954 Hague Convention, Article 4(4)).

Commentary

Although reprisals per se are not prohibited, treaty law forbids taking reprisals against certain persons and objects. Those set forth in this

71. Trial of Richard Wilhem Hermann Bruns, 3 LRTWC 15, 19 (1948).

section that are drawn from the 1949 Geneva Conventions are considered customary in nature and therefore binding, even on States that are not party to those instruments.

Generally, the prohibition on attacking cultural property as a reprisal is likewise considered customary. Article 1 of the Hague Cultural Property Convention defines cultural property:

> For the purposes of the present Convention, the term "cultural property" shall cover, irrespective of origin or ownership:
>
> (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;
>
> (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);
>
> (c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as "centres containing monuments."

Although not reflected in this section, it is prohibited in all circumstances to direct mines, booby-traps, and other devices, either in offense, defense, or by way of reprisals, against the civilian population as such or against individual civilians or civilian objects.[72]

72. Amended Mines Protocol, art. 3(7).

> For State parties, AP I prohibits attacks targeting the following by way of reprisal: the civilian population or civilians;[73] civilian objects;[74] objects indispensable to the survival of the civilian population, such as foodstuffs, crops, livestock, drinking water installations and supplies, and irrigation works;[75] the natural environment;[76] and works and installations containing dangerous forces, namely dams, dykes, and nuclear electrical generating systems.[77]
>
> The United States has expressed the view that AP I's provisions on reprisal are counterproductive and that they remove a significant deterrent that protects civilians and war victims on all sides of a conflict:
>
> > To take another example, article 51 of Protocol I prohibits any reprisal attacks against the civilian population, that is, attacks that would otherwise be forbidden but that are in response to the enemy's own violations of the law and are intended to deter future violations. Historically, reciprocity has been the major sanction underlying the laws of war. If article 51 were to come into force for the United States, an enemy could deliberately carry out attacks against friendly civilian populations, and the United States would be legally forbidden to reply in kind. As a practical matter, the United States might, for political or humanitarian reasons, decide in a particular case not to carry out retaliatory or reprisal attacks involving unfriendly civilian populations. To formally renounce even the option of such attacks, however, removes a significant deterrent that presently protects civilians and other war victims on all sides of a conflict.[78]

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73. AP I, art. 51(6).
74. *Id.* art. 52.
75. *Id.* art. 54.
76. *Id.* art. 55(2).
77. *Id.* art. 56(1).
78. *The Position of the United States on Current Law of War Agreements: Remarks of Judge Abraham D. Sofaer, Legal Adviser, United States Department of State, January 22, 1987*, 2 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 460, 469 (1987).

The United Kingdom has taken a reservation to AP I's prohibitions on certain attacks by way of reprisal:

> The obligations of Articles 51 and 55 are accepted on the basis that any adverse party against which the United Kingdom might be engaged will itself scrupulously observe those obligations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government. Any measures thus taken by the United Kingdom will not be disproportionate to the violations giving rise thereto and will not involve any action prohibited by the Geneva Conventions of 1949, nor will such measures be continued after the violations have ceased. The United Kingdom will notify the Protecting Powers of any such formal warning given to an adverse party, and if that warning has been disregarded, of any measures taken as a result.[79]

France has declared that it will apply the provisions of Article 51(8) "insofar as their interpretation does not constitute an obstacle to the use, according to international law, of the means which it considers indispensable for the protection of its civilian population against grave, clear, and deliberate violations of the Geneva Conventions and of [AP I] by the enemy."[80]

See also NWIP 10-2, ¶ 310e.

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79. United Kingdom, Statement on Ratification of AP I, Jan. 28, 1998, 2020 U.N.T.S. 75, 77–78.

80. France, Statement on Ratification of AP I, *translated in* THE LAWS OF ARMED CONFLICTS 800, 801 (Dietrich Schindler & Jirí Toman eds., 4th ed. 2004).

6.2.5 Reciprocity

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

Commentary

The notion of reciprocity is dealt with extensively in DoD Law of War Manual, § 3.6. In the law of armed conflict, reciprocity may play a role in: (1) whether a rule applies; (2) enforcing a rule; or (3) how a rule operates.

Treaties may include a provision involving reciprocity with respect to their scope of application. For instance, some law of armed conflict treaties have a general participation clause, which provides that the treaty only applies if all the parties to the armed conflict are also parties to the treaty. For example, Article 2 of Hague IV states: "The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention." Key neutrality treaties on the law of neutrality also contain such a clause. For example, Article 20 of Hague V states: "The provisions of the present Convention do not apply except between Contracting Powers and then only if all the belligerents are Parties to the Convention."[81]

Other treaties specify that if both parties and non-parties to a treaty are in an armed conflict, then parties to the treaty remain bound by the treaty in their mutual relations, but not in relation to States that are not parties to the treaty. For example, Common Article 2 of the

81. *See also* Hague IX, art. 8.

Geneva Conventions provides: "Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations." Article 7(1) of the Conventional Weapons Convention similarly provides: "When one of the parties to a conflict is not bound by an annexed Protocol, the parties bound by this Convention and that annexed Protocol shall remain bound by them in their mutual relations."

Treaties can also provide that if a State is not a party to the treaty, but it accepts and applies the treaty's provisions in an armed conflict, then the parties to the treaty are bound by the treaty in relation to that State. Article 7(2) of the Conventional Weapons Convention provides:

> Any High Contracting Party shall be bound by this Convention and any Protocol annexed thereto which is in force for it, in any situation contemplated by Article 1, in relation to any State which is not a party to this Convention or bound by the relevant annexed Protocol, if the latter accepts and applies this Convention or the relevant Protocol, and so notifies the Depositary.

Common Article 2 of the Geneva Conventions similarly provides: "Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto . . . shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof."

It must be cautioned that these treaty provisions sometimes reflect a separate customary law norm. Such provisions are binding on all States. For example, although not all parties to the Second World War were parties to Hague IV, the humanitarian protections of Hague IV were deemed applicable as a matter of customary international law. For example, in *United States v. Göring*, the Tribunal concluded that "by 1939 these rules laid down in [Hague IV] were rec-

ognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war."[82] In *United States v. Krupp*, the Tribunal concurred "that the Hague Convention No. IV of 1907 to which Germany was a party had, by 1939, become customary law and was, therefore, binding on Germany not only as treaty law but also as customary law."[83] In the *High Command Case*, the Tribunal concluded that provisions of the Hague Regulations and the 1929 Geneva Convention Relative to the Treatment of Prisoners of War[84] reflected customary international law relating to the treatment of POWs.[85] And, in *United States v. Araki*, the Tribunal explained that although certain treaties, such as Hague IV and Hague V, might not be applicable by their terms, "the Convention remains as good evidence of the customary law of nations, to be considered by the Tribunal along with all other available evidence in determining the customary law to be applied in any given situation."[86]

Reciprocity may be reflected in the enforcement of the law of armed conflict. Reprisal is one example (see § 3.2.4 above). It is also reflected in the principle of *tu quoque*, which may be understood as an argument that a State may not deem unlawful and punish certain conduct by its adversary when that State has chosen to allow its forces to engage in that same conduct. "The lack of strong international legal sanctions for peacetime espionage may also constitute an implicit application of the international law doctrine called '*tu quoque*' (roughly, a nation has no standing to complain about a practice in which it itself engages)."[87]

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82. United States v. Göring, Judgment, 1 TWC 253–54 (1947).

83. United States v. Krupp, 9 TWC 1340 (1950).

84. Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343.

85. United States v. von Leeb (The High Command Case), 11 TWC 535–38 (1950).

86. United States v. Araki, Majority Judgment, 48,491 (Military Tribunal for the Far East, Nov. 12, 1948), *reprinted in* DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIBUNAL 102 (Neil Boister & Robert Cryer eds., 2008).

87. Department of Defense, Office of the General Counsel, An Assessment of International Legal Issues in Information Operations 46 (May 1999). On *tu quoque*, see DOD LAW OF WAR MANUAL, § 18.21.2.

> Reciprocity may appear in particular law of armed conflict rules. In other words, a rule may operate differently depending upon an opponent's behavior. For example, the treatment of POWs has been based on the principle that POWs should be treated as the detaining power would want its forces held by the enemy to be treated.[88]
>
> Sometimes, the law of armed conflict requires that those seeking to obtain certain benefits under the law of armed conflict also accept certain burdens as a condition for receiving those benefits. For example, in *Al Warafi v. Obama*, the Court stated:
>
> > The Geneva Conventions and their commentary provide a roadmap for the establishment of protected status. As the district court found, Al Warafi was serving as part of the Taliban. The Taliban has not followed the roadmap set forth in the Conventions, and it has not carried Al Warafi to the destination. . . . Without compliance with the requirements of the Geneva Conventions, the Taliban's personnel are not entitled to the protection of the Convention.[89]
>
> The United States recognizes that the "fundamental principle" of the Geneva Conventions is that "warring entities must accept the Conventions' burdens in order to claim their benefits."[90] In addition, hospital ships and coastal rescue craft must not be used for military purposes in order to receive their protection from capture and being attacked, while cultural property must not be used for military purposes in order to receive special protection.[91]

6.2.6 War Crimes in International Armed Conflict

All naval personnel must promptly report alleged war crimes and other violations of the law of armed conflict. In line with our international legal obligations, U.S. law provides a basis for prosecution of violations of the law of

88. DOD LAW OF WAR MANUAL, § 9.2.5.

89. Al Warafi v. Obama, 716 F.3d 627, 631–32 (D.C. Cir. 2013).

90. Jack L. Goldsmith III, Assistant Attorney General, "Protected Person" Status in Occupied Iraq Under the Fourth Geneva Convention, 28 Op. O.L.C. 35, 53–57 (Mar. 18, 2004).

91. DOD LAW OF WAR MANUAL, §§ 5.18.8.2, 7.12.2.2.

armed conflict. Commanders are responsible for taking all measures necessary to suppress violations of the law of armed conflict through focused training, reporting, and investigation of inappropriate and illegal actions (e.g., GC, Article 146).

Commentary

In most cases, individuals are disciplined in national jurisdictions for violations of the law of armed conflict. Corrective action may take the form of adverse or corrective administrative actions. Punishment may take the form of non-judicial punishment or judicial actions in military or civilian courts, depending on the circumstances. In some cases, prosecutions in national courts are carried out by charging violations of domestic law, but in other cases, prosecutions are carried out by charging violations of international law.

In the United States, the War Crimes Act of 1996 authorizes prosecution for certain war crimes if the victim or the perpetrator is either a U.S. national or a member of the U.S. armed forces, whether inside or outside the United States.[92] Certain persons may be tried for violations of the Uniform Code of Military Justice, including members of a regular component of the U.S. armed forces; POWs in the custody of the U.S. armed forces; in time of declared war or contingency operations, persons serving with or accompanying an armed force in the field; and individuals belonging to one of the eight categories enumerated in Article 4 of GC III who violate the law of armed conflict.[93] Offenses under the Uniform Code of Military Justice that would encompass law of armed conflict violations include cruelty and maltreatment, murder, rape and sexual assault, failure to obey an order or regulation, and conduct prejudicial to good order and discipline.[94]

See also NWIP 10-2, ¶ 320.

92. 18 U.S.C. § 2441.
93. 10 U.S.C. § 802.
94. DOD LAW OF WAR MANUAL, § 18.19.3.1.

6.2.6.1 Grave Breaches of the Geneva Conventions

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

1. Willful killing of protected persons

2. Torturing or inhumane treatment (e.g., biological experiments)

3. Willfully causing great suffering or serious injury to body or health

4. Extensively destroying or appropriating of property not justified by military necessity and carrying out unlawfully and wantonly

5. Compelling a protected person to serve in the forces of a hostile power

6. Willfully depriving a protected person of the rights of a fair and regular trial

7. Unlawfully deporting, transferring, or confining a protected person

8. Taking of hostages.

Commentary

Parties to the 1949 Geneva Conventions have certain obligations relating to "grave breaches" of those instruments; the obligations also reflect customary international law. Parties to the Conventions undertake to enact legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the 1949 Geneva Conventions.[95] Parties are also obligated to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and to bring such persons, regardless of their nationality, before the party's own courts. They may instead hand such persons over for trial to another

95. GC I, art. 49; GC II, art. 50; GC III, art. 129; GC IV, art. 146.

high contracting party concerned, provided that party has made out a prima facie case.[96]

With respect to these offenses, see DoD Law of War Manual, § 18.9.3.1.

6.2.6.2 Other Violations

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

1. Using poisonous weapons or weapons calculated to cause unnecessary suffering

2. Attacking or bombarding of undefended cities, towns, or villages

3. Pillaging of public or private property

4. Maltreating dead bodies

5. Poisoning of wells or streams

6. Resorting to perfidy (e.g., using a white flag to conduct an attack treacherously)

7. Abusing or intentionally firing on a flag of truce

8. Intentionally targeting protected places, objects, or persons.

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

Commentary

The term "war crime" is sometimes used to refer to any violation of the law of armed conflict. However, contemporary usage generally

96. GC I, art. 49; GC II, art. 50; GC III, art. 129; GC IV, art. 146.

limits its use to violations that are serious. For instance, 18 U.S.C. § 2441 provides:

> (c) Definition.—As used in this section the term "war crime" means any conduct—
>
> (1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;
>
> (2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;
>
> (3) which constitutes a grave breach of common Article 3 (as defined in subsection (d)) when committed in the context of and in association with an armed conflict not of an international character; or
>
> (4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.

Note that the provisions of Hague IV and its accompanying Regulations are considered to reflect customary law binding on all States, regardless of whether the State concerned is a party to the instrument. For example, in *United States v. Göring*, the Tribunal concluded that "by 1939 these rules laid down in [Hague IV] were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war."[97] In *United States v. Krupp*, the Tribunal concurred that "the Hague Convention No. IV of 1907 to which Germany was a party had, by 1939, become customary law and was,

97. United States v. Göring, Judgment, 1 TWC 253–54 (1947).

> therefore, binding on Germany not only as treaty law but also as customary law."[98] And, in the *High Command Case*, the Tribunal concluded that provisions of the Hague Regulations and the 1929 Geneva Convention Relative to the Treatment of Prisoners of War reflected customary international law relating to the treatment of POWs.[99]

6.2.7 War Crimes in Noninternational Armed Conflict

Common Article 3 of the 1949 Geneva Conventions provides minimum standards that States party to a conflict are bound to apply in the case of armed conflict not of an international character occurring in the territory of one of the States parties (i.e., NIAC.) These standards are widely considered to apply to all armed conflicts. It explicitly prohibits violence to life and person for those taking no active part in hostilities and protects them from:

1. Murder

2. Mutilation

3. Cruel treatment

4. Torture

5. Being taken hostage

6. Outrages upon personal dignity, in particular, humiliating and degrading treatment

7. Sentences passed and executions carried out without a judgment pronounced by a regularly constituted court affording all the judicial guarantees recognized as indispensable by civilized peoples.

Although CA3 does not address individual criminal liability for violation of these minimum standards, the U.S. Congress enacted the War Crimes Act of 1996 and Public Law 109–366, Military Commissions Act of 2006, which

98. United States v. Krupp, 9 TWC 1340 (1950).

99. United States v. von Leeb (The High Command Case), 11 TWC 535–38. *See also* United States v. Araki, *supra* note 86, at 48,491.

criminalize specific violations of CA3, as defined in the War Crimes Act, in U.S. Federal court (e.g., 18 U.S.C. § 2441(c)(3) (as amended by the Military Commissions Act of 2006)).

Commentary

With respect to these offenses, see DoD Law of War Manual, § 18.9.3.2.

The United States is of the view that the obligations created by the grave breaches provisions of the 1949 Geneva Conventions also apply to violations of Common Article 3:

> For example, Article 130 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War defines "grave breaches" as any of a series of specified acts "if committed against persons or property protected by the Convention." . . . Insofar as Common Article 3 prohibits certain acts with respect to "[p]ersons taking no active part in hostilities" in cases of armed conflict not of an international character, it is consistent with the ordinary meaning of the Geneva Conventions to treat such persons as persons protected by the Conventions.[100]

However, an Appeals Chamber of the ICTY rejected this view, concluding instead that the 1949 Geneva Conventions only created obligations applicable in international armed conflicts.[101]

With respect to the characterization of a Common Article 3 violation in U.S. law,[102] see the commentary accompanying § 6.2.6.2.

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100. D. Stephen Mathias, Legal Counselor, Embassy of the United States, the Hague, the Netherlands, Submission of the Government of the United States of America Concerning Certain Arguments Made by Counsel for the Accused in the Case of the Prosecutor of the Tribunal v. Dusan Tadic, 35–36 (July 17, 1995).

101. Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 71 (ICTY, Oct. 2, 1995).

102. 18 U.S.C. § 2441.

6.2.8 Other Violations of the Law of Armed Conflict

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

Commentary

The obligation to take all measures necessary to prevent acts contrary to the Geneva Conventions is derived from Common Article 1 of the 1949 Geneva Conventions: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." "Respect" refers to the obligation of the armed forces and other organs of the State to abide by law of armed conflict rules. "Ensure respect" extends the obligation to those under control of the State, such as those on its territory or territory that it otherwise controls. Criminal prosecution and administrative action may be employed as a mechanism to comply with these requirements.

The fact that a violation of the law of armed conflict does not rise to the level of a war crime under international law does not prevent a State from criminalizing the conduct or issuing other guidance that forbids it.

Any violation of the law of armed conflict by military personnel or other agents or organs of a State constitutes an "internationally wrongful act" by that State pursuant to the rule of State responsibility that is reflected in Article 4 of the Articles on State Responsibility. Non-State actor violation of any rule of the law of armed conflict results in the responsibility of the State if the individual or group was

> acting pursuant to the instructions, direction, or control of the State.[103]

6.2.9 Prosecution of War Crimes

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

On a number of occasions, since the beginning of the 20th century, war crimes, crimes against humanity, genocide, and crimes against peace were prosecuted by special international tribunals. These tribunals were established to address crimes committed during specific periods or in connection with specific conflicts. These tribunals have applied international law, including the Geneva Conventions, their Additional Protocols, as well as the Hague (IV) Regulations. The statute governing each tribunal stipulates the specific types of crimes addressed by the tribunal and the standards for culpability. The decisions of these tribunals do not bind the United States and its courts. Their decisions provide useful examples of the application of international law. Created in 1945 by Great Britain, France, the United States, and the USSR, the International Military Tribunal is an example of a special international tribunal. This tribunal conducted the landmark Trial of Major War Criminals, with 21 Axis defendants, in Nuremberg, Germany, from November 1945 to October 1946. Another post-war tribunal was established in Tokyo to try war criminals in the Pacific Theater of World War II. The jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY), established by the UN Security Council in 1993, provides numerous examples of war crimes prosecutions.

In 1998, 120 nations at a Diplomatic Conference in Rome voted to approve the final text of the Rome Statute, adopting a treaty that established an International Criminal Court (ICC). The Rome Statute entered into force on July 1, 2002. The United States is not party to the Rome Statute. The Rome

103. Articles on State Responsibility, art. 8.

Statute provides that the ICC has jurisdiction with respect to the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.

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

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

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

Commentary

On prosecution in international and hybrid courts, see DoD Law of War Manual, § 18.20.

6.2.9.1 U.S. Domestic Jurisdiction over Offenses and Individuals

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

Commentary

On discipline and prosecution in national courts, see DoD Law of War Manual, § 18.19.

Jurisdiction over war crimes has traditionally been exercised by belligerents with respect to offenses committed by or against their nationals. In *United States v. Josef Altstoetter*, the Tribunal stated:

> [D]uring hostilities and before their formal termination belligerents have concurrent jurisdiction over war crimes committed by the captured enemy persons in their territory or against their nationals in time of war. . . . After armistice or peace agreement the matter of punishment of war crimes is determined by the terms thereof.[104]

In *United States v. Ohlendorf (The Einsatzgruppen Case)*, the Tribunal rejected the defense counsel's argument that Russia could not participate in the Tribunal. It explained that "Russia's participation in the formulation of Control Council Law No. 10 is in accordance with every recognized principle of international law" because "[t]here is no authority which denies any belligerent nation jurisdiction over individuals in its actual custody charged with violation of international law" and "no one would be so bold as to suggest that what occurred between Germany and Russia from June 1941 to May 1945 was anything but war, and, being war, that Russia would not have the right to try the alleged violators of the rules of war on her territory and against her people."[105]

Universal jurisdiction is the right to define and prescribe punishment based simply on the character of the offense as a war crime.[106] States did not attempt to exercise jurisdiction on this basis until the 1990s. In the United States, Congress has not authorized prosecution on this basis for war crimes:

> [T]he expansion of [the War Crimes Act of 1996] to include universal jurisdiction would be an unwise [sic] at present. Domestic prosecution based on universal jurisdiction could draw the United States into conflicts in which this country has no place and where our national interests are slight. In addition, problems involving witnesses and evidence would likely be daunting.[107]

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104. United States v. Josef Altstoetter (The Justice Case), 3 LRTWC 1189–90 (1948) (separate opinion of Blair, J.).

105. United States v. Otto Ohlendorf (The Einsatzgruppen Case), 4 TWC 460 (1951).

106. AMERICAN LAW INSTITUTE, RESTATEMENT (FOURTH) FOREIGN RELATIONS LAW § 413 (2018).

107. H.R. REP. NO. 104-698, at 8 (1996).

Prosecutions on this basis by other States have been controversial and generally unsuccessful unless the State concerned has consented:

> International criminal law . . . recognizes in many situations the possibility, or indeed the obligation, for a State other than that on whose territory the offence was committed to confer jurisdiction on its courts to prosecute the authors of certain crimes where they are present on its territory. International criminal courts have been created. But at no time has it been envisaged that jurisdiction should be conferred upon the courts of every State in the world to prosecute such crimes, whoever their authors and victims and irrespective of the place where the offender is to be found. To do this would, moreover, risk creating total judicial chaos. It would also be to encourage the arbitrary, for the benefit of the powerful, purportedly acting as agent for an ill-defined "international community." Contrary to what is advocated by certain publicists, such a development would represent not an advance in the law but a step backward.[108]

Prosecutions in national courts for law of armed conflict violations can be conducted by charging violations of ordinary domestic law (including military law) or of international law. The United States is under no international law obligation to prosecute an offense as a "war crime," as distinct from an ordinary criminal offense. Typically, the United States punishes members of the U.S. armed forces for violations of the law of armed conflict through the Uniform Code of Military Justice. Possible offenses that might be charged include:

- Article 81 (10 U.S.C. § 881), Conspiracy;
- Article 93 (10 U.S.C. § 893), Cruelty and maltreatment;
- Article 108 (10 U.S.C. § 908), Military Property of United States—loss, damage, destruction, or wrongful disposition;
- Article108a (10 U.S.C. § 908a), Captured or abandoned property;

108. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 35, 43 (¶ 15) (separate opinion of President Guillaume).

- Article 109 (10 U.S.C. § 909), Property other than military property of United States—waste, spoilage, or destruction;
- Article 118 (10 U.S.C. § 918), Murder;
- Article 119 (10 U.S.C. § 919), Manslaughter;
- Article 119a (10 U.S.C. § 919a), Death or injury of an unborn child;
- Article 120 (10 U.S.C. § 920), Rape and sexual assault generally (including Forcible Sodomy);
- Article 120b (10 U.S.C. § 920b), Rape and sexual assault of a child;
- Article 120c (10 U.S.C. § 920c), Other sexual misconduct;
- Article 125 (10 U.S.C. § 925), Kidnapping;
- Article 126 (10 U.S.C. § 926), Arson;
- Article 128 (10 U.S.C. § 928), Assault;
- Article 128a (10 U.S.C. § 928a), Maiming;
- Article 130 (10 U.S.C.§ 920), Stalking;
- Article 92 (10 U.S.C. § 892), Disobedience of lawful orders or general regulations (UCMJ); and
- Article 134 (10 U.S.C. § 934), Conduct prejudicial to good order and discipline in the armed forces.

6.2.9.2 War Crimes Act

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

1. Defined as a grave breach of any of the 1949 Geneva Conventions or any Protocol to one of those conventions the United States is a party (currently only Additional Protocol III)

2. Which violates certain listed articles in the Hague (IV) Regulation

3. Which constitutes a grave breach of CA3 of the 1949 Geneva Conventions (more specifically defined in the War Crimes Act)

4. In relation to an armed conflict and contrary to the provisions of the Amended Protocol II to the Conventional Weapons Treaty, when a person willfully kills or causes serious injury to civilians.

Commentary

18 U.S.C. § 2441 (War crimes) provides:

> (a) Offense.—Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.
>
> (b) Circumstances.—The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).

On the crimes encompassed in the statute, see the commentary accompanying § 6.2.6.2.

6.2.9.3 Military Extraterritorial Jurisdiction Act and Other Laws

The Military Extraterritorial Jurisdiction Act (MEJA) of 2000 provides federal criminal jurisdiction over persons who are employed by or accompanying the armed forces outside the United States who engage in conduct that would constitute an offense punishable by more than one year imprisonment had the conduct occurred within the special maritime and territorial jurisdiction of the United States. These persons include DOD civilian employees, contractors, DOD dependents, members of the armed forces who commit an offense with someone not subject to the UCMJ, or former members of the armed forces no longer subject to the UCMJ. Members of the armed

forces otherwise subject to the UCMJ, as well as persons who are ordinarily resident in the country where the conduct occurred, are excluded under MEJA. This Act was amended in 2004 to expand jurisdiction to include civilians and contractors from other federal agencies or any provisional authority, to the extent that their employment relates to supporting the mission of the DOD overseas. In 2005, the DOD issued DODI 5525.11, Criminal Jurisdiction Over Civilians Employed by or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members, which implemented the policies and procedures and assigned responsibilities under MEJA. All MEJA referrals are to be transmitted to the Department of Justice's Human Rights and Special Prosecutions section.

Congress enacted a provision in Public Law 107–56, § 804, USA Patriot Act of 2001, which amended 18 U.S.C. § 7, expanding the U.S. Special Maritime and Territorial Jurisdiction Act to give federal courts jurisdiction over criminal offenses committed by U.S. citizens in U.S.-operated facilities overseas. This provides the Department of Justice an additional source of authority to bring charges against an individual if the act committed constitutes a crime within the statute, namely maiming, assault, kidnapping, murder, and manslaughter, and the offense was committed in a U.S. facility overseas.

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

1. Genocide (18 U.S.C. § 1091)

2. Murder or manslaughter of foreign officials, official guests, or internationally protected persons (18 U.S.C. § 1116)

3. Piracy (18 U.S.C. §§ 1651–1661, Piracy Under the Law of Nations)

4. Terrorism and material support to terrorists (18 U.S.C. §§ 2331–2339D)

5. Various acts involving biological weapons, chemical weapons, WMD, or nuclear weapons (18 U.S.C. §§ 175, 229, 832 and 2332a).

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

Commentary

On extraterritorial jurisdiction in U.S. law, see DoD Law of War Manual, § 18.19.

Note the following provisions:

- Whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States—

  (1) while employed by or accompanying the Armed Forces outside the United States; or

  (2) while a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice),

  shall be punished as provided for that offense.[109]

- No prosecution may be commenced against a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice) under this section unless—

  (1) such member ceases to be subject to such chapter; or

  (2) an indictment or information charges that the member committed the offense with one or more other

109. 18 U.S.C. § 3261(a).

defendants, at least one of whom is not subject to such chapter.[110]

- This Instruction:

1.1. Implements policies and procedures, and assigns responsibilities, under the "Military Extraterritorial Jurisdiction Act of 2000," as amended by Section 1088 of the "Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005" (reference (a)) (hereinafter the "Act") for exercising extraterritorial criminal jurisdiction over certain current and former members of the U.S. Armed Forces, and over civilians employed by or accompanying the U.S. Armed Forces outside the United States.

1.2. Implements Section 3266 of the Act.[111]

- (b) Within the special maritime and territorial jurisdiction of the United States,

Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life;

Whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life.[112]

- The term "special maritime and territorial jurisdiction of the United States," as used in this title, includes:

. . . .

110. 18 U.S.C. § 3261(d).

111. DoDI 5525.11, Criminal Jurisdiction Over Civilians Employed by or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members, ¶ 2.5 (Mar. 3, 2005).

112. 18 U.S.C. § 1111.

> (9) With respect to offenses committed by or against a national of the United States as that term is used in section 101 of the Immigration and Nationality Act—
>
> (A) the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership . . . .[113]

6.2.10 Military Commissions

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

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

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

113. 18 U.S.C. § 7.

1. Has engaged in hostilities against the United States or its coalition partners

2. Has purposefully and materially supported hostilities against the United States or its coalition partners

3. Was part of al Qaeda at the time of the alleged offense under the MCA (10 U.S.C. § 948a(7)).

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

1. Defense counsel

2. Notice of charges alleged

3. The exclusion of evidence obtained by torture or cruel, inhumane, or degrading treatment

4. Protection against self-incrimination and the inappropriate admission of hearsay evidence

5. The right to be present at proceedings, offer evidence, and confront witnesses

6. Protection against former jeopardy.

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

Commentary

On military commissions, see DoD Law of War Manual, § 18.19.3.7.

Military commissions have been considered as more efficient in the execution of the war powers vested in Congress and the power vested in the President as Commander-in-Chief in war:

> But, in general, it is those provisions of the Constitution which empower Congress to "declare war" and "raise armies," and which, in authorizing the initiation of war, authorize the employment of all necessary and proper agencies for its due prosecution, from which this tribunal derives its original sanction. Its authority is thus the same as the authority for the making and waging of war and for the exercise of military government and martial law. The commission is simply an instrumentality for the more efficient execution of the war powers vested in Congress and the power vested in the President as Commander-in-chief in war.[114]

Military Commissions have been used instead of courts-martial because U.S. courts-martial are designed to effectively discipline members of the U.S. armed forces, not for certain other offenses that are also committed during armed conflict:

> The occasion for the military commission arises principally from the fact that the jurisdiction of the court-martial proper, in our law, is restricted by statute almost exclusively to members of the military force and to certain specific offences defined in a written code. It does not extend to many criminal acts, especially of civilians, peculiar to time of war; and for the trial of these a different tribunal is required. A commander indeed, where authorized to constitute a purely war-court, may designate it by any convenient name; he may style it a "court-martial," and, though not a court-martial proper, it will still be a legal body under the laws of war. But to employ the same name for the two kinds of court could scarcely but result in confusion and in questions as to jurisdiction and power of punishment.[115]

The use of military commissions is deemed appropriate in modern times: "Any alien unprivileged enemy belligerent is subject to trial by military commission as set forth in this chapter."[116] Further:

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114. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 831 (2d ed. 1920).
115. *Id.*
116. 10 U.S.C. § 948c.

> Military commissions are also appropriate in proper circumstances, and we can use them as well to convict terrorists and disrupt their plots. . . .
>
> It's important to note that the reformed commissions draw from the same fundamental protections of a fair trial that underlie our civilian courts. They provide a presumption of innocence and require proof of guilt beyond a reasonable doubt. They afford the accused the right to counsel—as well as the right to present evidence and cross-examine witnesses. They prohibit the use of statements obtained through torture or cruel, inhuman, or degrading treatment. And they secure the right to appeal to Article III judges—all the way to the United States Supreme Court. In addition, like our federal civilian courts, reformed commissions allow for the protection of sensitive sources and methods of intelligence gathering, and for the safety and security of participants.
>
> A key difference is that, in military commissions, evidentiary rules reflect the realities of the battlefield and of conducting investigations in a war zone. For example, statements may be admissible even in the absence of Miranda warnings, because we cannot expect military personnel to administer warnings to an enemy captured in battle. But instead, a military judge must make other findings—for instance, that the statement is reliable and that it was made voluntarily.[117]

6.2.11 Fair Trial Standards

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

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117. Eric Holder, Attorney General, Remarks at Northwestern University School of Law (Mar. 5, 2012), 2012 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 577, 579–80.

Commentary

Persons charged with war crimes have a right to a fair trial, as provided in Principle V of the Nuremberg Principles: "Any person charged with a crime under international law has the right to a fair trial on the facts and law."

Those accused of grave breaches of the 1949 Geneva Conventions have a right to the safeguards of proper trial and defense. The safeguards are not to be less favorable than those set forth in the 1949 Geneva Conventions. Article 49 of GC I provides: "In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949."[118] Article 105 deals with the trial of POWs. The rights of defense and the requisite trial procedure during such trials are addressed in the DoD Law of War Manual, § 9.28.4. Additionally, other fundamental trial guarantees should be afforded.[119]

6.2.12 Defenses

Individuals charged with war crimes may raise a number of defenses which fall into two groups. One group of defenses negates criminal responsibility under general principles of domestic criminal law, such as lack of mental responsibility, self-defense, mistake of fact, mistake of law, and duress. The other group of defenses are those peculiar to war crimes trials, such as superior orders, military necessity, and acts done in accordance with national law. Recent practice in international law has been to enumerate and define defenses in the statutes establishing the ad hoc, hybrid international-domestic, or permanent court/tribunals (e.g., Statute of the International Criminal Tribunal for the Former Yugoslavia). The availability of legal defenses to charges of war crimes may depend on the specific jurisdiction and forum in which charges are brought. The following general information regarding af-

118. *See also* GC II, art. 50 (same); GC IV, art. 146 (same).
119. DOD LAW OF WAR MANUAL, § 8.16.

firmative defenses that negate criminal responsibility under general principles of criminal law may be helpful, but commanders should request legal advice if they have specific questions.

Commentary

Individuals being tried by a U.S. court-martial for war crimes (either as violations of the Uniform Code of Military Justice, as violations of other federal law, or as violations of the law of armed conflict) may assert legal defenses available under the Uniform Code. These include justification, as in the case of killing enemy combatants; self-defense based on an apprehension, on reasonable grounds, that death or bodily harm was about to be wrongfully inflicted and that the force used by the accused was necessary for protection against such death or bodily harm; and accident that results in death, injury, or damage as the unintentional and unexpected result of doing a lawful act in a lawful manner (e.g., the conduct of military operations in accordance with the law of armed conflict).[120]

Ignorance or mistake of law may be a defense in certain circumstances, such as when the mistake relates to a separate non-penal law or potentially when the mistake results from reliance on the decision or pronouncement of an authorized public official or agency.[121] For example, ignorance of international law may serve as a defense when the accused acts pursuant to superior orders and cannot, under the conditions of military discipline and operations, be expected to weigh scrupulously the legal merits of the order received.[122] Ignorance of international law may also be a mitigating factor in considering punishment.[123]

In addition to the bases set forth below that do not amount to a defense, it must be noted that the fact that the accused acted as Head of State or responsible government official does not relieve him or

120. Rules for Courts-Martial, r. 916(c), (e), and (f), respectively.
121. *Id.* r. 916(l)(1) discussion.
122. Trial of Karl Buck, 5 LRTWC 39, 44 (1948).
123. *See, e.g.*, United States v. Shigeru Sawada, 5 LRTWC 7–8 (1948).

> her of responsibility under international law.[124] Article 7 of the Charter of the International Military Tribunal states: "The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment." Article 27(1) of the Rome Statute provides:
>
> > This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

6.2.12.1 Superior Orders

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

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124. ILC, Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with Commentaries, *in* Report on Its Second Session, U.N. Doc. A/CN.4/34 (1950), *reprinted in* [1950] 2 YEARBOOK OF THE ILC 374.

Commentary

"Superior orders" is not a defense so long as the accused had a moral choice in the situation, provided it was possible in fact for that person to make a moral choice.[125] This point typically appears in the statutes of international criminal tribunals. For example, Article 8 of the Charter of the International Military Tribunal provides: "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires." Article 7(4) of the ICTY Statute similarly provides: "The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility." Article 33 of the Rome Statute further provides:

> The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
>
> (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
>
> (b) The person did not know that the order was unlawful; and
>
> (c) The order was not manifestly unlawful.

On superior orders, see DoD Law of War Manual, § 18.22.4; NWIP 10-2, ¶ 330b1.

6.2.12.2 Military Necessity

The principle of military necessity justifies the use of all measures required to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of armed conflict. Following World War II, war crime tribunals specifically rejected defense arguments that military necessity

125. *Id.*

(*Kriegsraison*) could be used to justify law of armed conflict violations (see DOD Law of War Manual, § 2.2.2.1, which cites the *Krupp* case and others). One may not justify law of armed conflict violations by invoking the need to win the war.

Commentary

From the late nineteenth century through the Second World War, Germany asserted that *military necessity* could override specific law of armed conflict rules (*Kriegsraeson geht vor Kriegsmanier*, or necessity in war overrules the manner of warfare). The view was strongly criticized.[126] After the Second World War, it was rejected by war crimes tribunals. For example, in the *Hostage Case*, the Tribunal stated:

> It is apparent from the evidence of these defendants that they considered military necessity, a matter to be determined by them, a complete justification of their acts. We do not concur in the view that the rules of warfare are anything less than they purport to be. Military necessity or expediency do not justify a violation of positive rules.[127]

Logically, military necessity cannot justify departures from the law of armed conflict because States have crafted the law with war's exigencies in mind. In devising law of armed conflict rules, States considered military requirements. Thus, prohibitions on conduct in the law of armed conflict may be understood to reflect the determinations of States that such conduct is militarily unnecessary per se. Hague IV provides that "these provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants."[128] In *United States v. Krupp*, the Tribunal stated: "In short these rules and customs of warfare are designed

126. *See, e.g.*, Elihu Root, *Opening Address*, 15 PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 1, 2 (1921).

127. United States v. List (The Hostage Case), 11 TWC 1255–56 (1950). *See also* United States v. Krupp, 9 TWC 1340 (1950); Trial of Gunther Thiele and Georg Steinert, 3 LRTWC 58–59 (1948); United States v. Milch, 2 TWC 849–50 (1949) (Musmanno, J., concurring).

128. Hague IV, pmbl. ¶ 5.

specifically for all phases of war. They comprise the law for such emergency."[129]

Although military necessity cannot justify actions that have been prohibited by the law of armed conflict, some law of armed conflict rules expressly incorporate military necessity. For a list of such rules, see DoD Law of War Manual, § 2.2.2.2.

6.2.12.3 Acts Legal or Obligatory under National Law

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

Commentary

See Principle II of the Nuremberg Principles and see DoD Law of War Manual, § 18.22.3.

6.2.13 Penalties

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

129. United States v. Krupp, 9 TWC 1347 (1950).

Commentary

Certain penalties are prohibited. In particular, POWs may not be sentenced by the military authorities and courts of the detaining power to any penalties except those provided for in respect of members of the armed forces of the detaining power who have committed the same acts.[130] The following punishments are expressly prohibited: collective punishments for individual acts; corporal punishment; imprisonment in premises without daylight; any form of torture or cruelty; and deprivation of rank or of the right to wear badges.[131]

6.3 REPORTABLE VIOLATIONS

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

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

All military and U.S. civilian employees, contractor personnel, and subcontractors assigned to or accompanying a DOD component must report through their chain of command all reportable incidents, including those involving allegations of non-DOD personnel having violated the law of war.

130. GC III, art. 87.
131. DOD LAW OF WAR MANUAL, § 9.26.6.

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

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

The following are examples of incidents that must be reported:

1. Offenses against the Wounded, the Sick, Survivors of Sunken Ships, POWs, and Civilian Inhabitants of Occupied or Allied Territories including Interned and Detained Civilians. Attacking without due cause; willful killing; torture or inhuman treatment, including biological, medical, or scientific experiments; physical mutilation; removal of tissue or organs for transplantation; any medical procedure not indicated by the health of the person and is not consistent with generally accepted medical standards; willfully causing great suffering or serious injury to body or health or seriously endangering physical or mental health; and taking hostages.

2. Other Offenses against a Detainee or POW. Compelling a POW to serve in the armed forces of the enemy; causing the performance of unhealthy, dangerous, or otherwise prohibited labor; infringement of religious rights; and deprivation of the right to a fair and regular trial.

3. Other Offenses against Survivors of Sunken Ships, the Wounded, or the Sick. When military interests permit, failure to search out, collect, make provision for the safety of, or to care for survivors of sunken ships; care for members of armed forces in the field who are disabled by sickness or wounds; or who have laid down their arms and surrendered.

4. Other Offenses against Civilian Inhabitants, including Interned and Detained Civilians of, and Refugees and Stateless Persons Within, Occupied or Allied Territories. Unlawful deportation or transfer, unlawful confinement, compelling forced labor, compelling the civilian inhabitants to serve in the armed forces of the enemy or to participate in military operations, denial of religious rights, denaturalization, infringement of property rights, and denial of a fair and regular trial.

5. Attacks on individual civilians or the civilian population, or indiscriminate attacks affecting the civilian population or civilian property, knowing the attacks will cause loss of life, injury to civilians or damage to civilian property that would be excessive in relation to the concrete and direct military advantage anticipated, and cause death or serious injury to body or health

6. Deliberate attacks upon medical transports including hospital ships, coastal rescue craft, and their lifeboats or small craft; medical vehicles; medical aircraft; medical establishments including hospitals; medical units; medical personnel or crews (including shipwrecked survivors); and persons parachuting from aircraft in distress during their descent

7. To kill or otherwise impose punishment, without a fair trial, upon spies and other persons suspected of hostile acts while such persons are in custody

8. Maltreatment or mutilation of dead bodies

9. Willful or wanton destruction of cities, towns, or villages, or devastation not justified by military necessity; aerial or naval bombardment whose sole purpose is to attack and terrorize the civilian population, or to destroy protected areas, buildings or objects (e.g., buildings used for religious, charitable or medical purposes, historic monuments, or works of art); attacking undefended localities, open to occupation, and without military significance; attacking demilitarized zones contrary to the terms establishing such zones

10. Improper use of privileged buildings or localities for military purposes

11. Attacks on facilities—such as dams and dikes, which, if destroyed, would release forces dangerous to the civilian population—when not justified by military necessity

12. Pillage or plunder of public or private property

13. Willful misuse of the distinctive emblem (red on a white background) of the Red Cross, Red Crescent or other protective emblems, signs, or signals recognized under international law

14. Feign incapacitation by wounds/sickness that results in the killing or wounding of the enemy; feign surrender or the intent to negotiate under a flag of truce that results in the killing or wounding of the enemy; and use of a flag of truce to gain time for retreats or reinforcement

15. Fire upon a flag of truce

16. Denial of quarter, unless bad faith is reasonably suspected

17. Violations of surrender or armistice terms

18. Use of poisoned or otherwise forbidden arms or ammunition

19. Poison wells, streams, or other water sources

20. Other analogous acts violating the accepted rules regulating the conduct of warfare.

Source: SECNAVINST 3300.19, Enclosure 1.

CHAPTER 7

THE LAW OF NEUTRALITY

7.1 INTRODUCTION

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

Commentary

Many of the rules concerning the rights and duties of neutral States and belligerent States in naval warfare are set out in Hague XIII. *See* also the Convention on Maritime Neutrality (Havana Convention). Other rules are found in customary international law.

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

Commentary

Neutrality may be defined as the nonparticipation of a State in a war between other States. Such nonparticipation must in turn be recognized by the belligerents. In the absence of any treaty limiting the available scope of neutrality (e.g., the UN Charter), whether or not a State chooses to refrain from participating in war is a policy decision. Similarly, recognition of such nonparticipation is also a policy decision.[1]

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1. NWIP 10-2, ¶ 230a.

> For example, the United States consistently proclaimed its neutrality in the Iran-Iraq War (1980–88): "The United States is neutral in the Iran-Iraq war. We do not ship weapons to Iran or Iraq, nor do we intend to do so. This policy is firm."[2]
>
> The law of neutrality regulates relations between (1) belligerent States, vessels, aircraft, and persons; and (2) neutral States, vessels, aircraft, and persons. Under the law of neutrality, these categories of belligerents and neutrals have corresponding rights, duties, and liabilities.[3] "Belligerent State" refers to a State that is engaged in an international armed conflict.[4] "Neutral State" refers to a State that is not taking part in the armed conflict.[5]

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

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

7.2 NEUTRAL STATUS

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

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2. Written Responses to Questions, 23 WEEKLY COMP. PRES. DOC. 556 (May 19, 1987). *See also* Remarks, 16 WEEKLY COMP. PRES. DOC. 1922 (Sept. 24, 1980); U.S. Department of State, U.S. Policy in the Persian Gulf, Special Report No. 166, at 8–11 (July 1987).
3. DOD LAW OF WAR MANUAL, § 15.1.1.
4. *Id.* § 15.1.2.1.
5. *Id.* § 15.1.2.2.

Commentary

> For example, the French Manual provides that States that are not parties to an international armed conflict are bound by the law of neutrality either by a formal declaration of neutrality or by their actual conduct.[6]
>
> Although nonparticipating States may issue proclamations of neutrality on the outbreak of war, a special declaration by nonparticipating States of their intention to adopt a neutral status is not required. The status of neutrality is terminated only when a neutral State resorts to war against a belligerent or when a belligerent resorts to war against a neutral State.[7] The practice of issuing formal proclamations of neutrality has declined. Alternatively, States may also communicate their neutral status through diplomatic channels or use other means they deem appropriate.[8]
>
> Note that Article 2 of Hague III provides:
>
> > The existence of a state of war must be notified to the neutral Powers without delay, and shall not take effect in regard to them until after the receipt of a notification, which may, however, be given by telegraph. Neutral Powers, nevertheless, cannot rely on the absence of notification if it is clearly established that they were in fact aware of the existence of a state of war.

The law of armed conflict reciprocally imposes duties and confers rights upon neutral States and belligerents. The principal right of the neutral State is the inviolability of its territory. Its principal duties are those of abstention and impartiality. Impartiality obligates neutral States to fulfill their duties and to exercise their rights in an equal (i.e., impartial or nondiscriminatory) manner toward all belligerents without regard to its differing effect on individual belligerents. Abstention is the neutral's duty to abstain from furnishing belligerents with war-related goods or services, including money and loans. Neutral duties include prevention and acquiescence. The neutral has a duty

6. FRENCH MANUAL, at 66.
7. NWIP 10-2, ¶ 231.
8. DOD LAW OF WAR MANUAL, § 15.2.1.4.

to prevent violations of neutrality within its jurisdiction (e.g., to prevent belligerent acts of hostility in neutral waters or the use of neutral ports and waters as a base of operations). If a neutral State is unable or unwilling to enforce its inviolability, the agreed belligerent may take necessary measures in neutral territory to counter the acts of the enemy force, including the use of force. The neutral has a duty to acquiesce in the exercise of lawful measures the belligerent may take against neutral merchant vessels engaged in the carriage of contraband, breach or attempted breach of blockade, or in the performance of unneutral service. Failure to acquiesce may subject a neutral merchant vessel to capture (see 7.10). It is the duty of a belligerent to respect the inviolability of a neutral and the neutral's right to insist upon its duties of abstention and impartiality.

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

Commentary

Impartiality obligates neutral States to fulfill their duties and exercise their rights in an impartial or nondiscriminatory manner towards all belligerents, without regard to its differing effect on the belligerents. For example, Hague XIII requires a neutral State to "apply impartially to the . . . belligerents the conditions, restrictions, or prohibitions made by it in regard to the admission into its ports, roadsteads, or territorial waters, of belligerent war-ships or of their prizes."[9]

A neutral State has a duty to abstain from furnishing the belligerents with certain goods or services. For example, neutral States are prohibited from supplying the belligerents, "in any manner, directly or indirectly . . . war-ships, ammunition, or war material of any kind whatever."[10]

9. Hague XIII, art. 9.
10. *Id.* art. 6.

Neutral States also have a duty to prevent the commission of certain acts by anyone within their jurisdiction, such as preventing belligerent acts of hostility in neutral waters, or the use of neutral ports and waters as a base of operations. In this regard, a neutral State is required "to exercise such surveillance as the means at its disposal allow to prevent any violation of the provisions of the above Articles [prohibited belligerent activities] occurring in its ports or roadsteads or in its waters."[11] Lawful actions taken by a neutral State when exercising its rights and duties under international law cannot be considered as an unfriendly act by the belligerents. In other words, the lawful use of force by a neutral State to resist attempts to violate its neutrality does not constitute participation in the hostilities.[12]

However, if a neutral State is unable or unwilling to enforce its neutrality, the aggrieved belligerent may take necessary measures in neutral territory, waters, and airspace to counter the acts of the opposing belligerent, including the use of force. An example of the right of self-help is the *Altmark* incident that occurred during the Second World War. In February 1940, the German tanker *Altmark* was transiting through Norwegian waters enroute to Germany with 299 British POWs. Although Norwegian authorities boarded the tanker on three occasions, no evidence of the POWs was found. While under escort by three Norwegian warships in Norwegian waters, the *Altmark* was intercepted by the British warship HMS *Cossack*. After the Norwegian warships blocked initial attempts to board the tanker, the *Cossack* received the following instructions from the Admiralty:

> Unless Norwegian torpedo-boat undertakes to convoy *Altmark* to Bergen with a joint Anglo-Norwegian guard on board, and a joint escort, you should board *Altmark*, liberate the prisoners, and take possession of the ship pending further instructions. If Norwegian torpedo-boat interferes, you should warn her to stand off. If she fires upon you, you should not reply unless attack is serious, in which case you should defend yourself, using no more force than is necessary, and ceasing fire when she desists. Suggest to Norwegian

11. *Id.* art. 25.
12. *Id.* art. 26; DOD LAW OF WAR MANUAL, § 15.4.3.

> destroyer that honour is served by submitting to superior force.

After the Norwegian forces refused to take part in a joint escort or joint boarding, British forces boarded the *Altmark* and liberated the POWs.[13]

Thus, belligerent forces may (for example) act in self-defense when attacked, or threatened with attack, by enemy forces unlawfully present in neutral territory, including by taking appropriate action to counter the use of neutral territory as a base of enemy operations when the neutral State is unwilling or unable to prevent such violations.[14]

Neutral States also have a duty to acquiesce in the exercise by belligerents of those repressive measures international law permits them to take against neutral merchant ships engaged in the carriage of contraband, in breach or attempted breach of blockade, or in the performance of unneutral service. These concepts are further discussed throughout this chapter.

The law of neutrality seeks to preserve friendly relations between belligerent and neutral States by permitting States to avoid taking sides in an armed conflict. It also seeks to prevent additional States from being drawn into an armed conflict by establishing a clear distinction between belligerent and neutral States. Additionally, the law of neutrality seeks to minimize the effects of armed conflict on States that are not party to the conflict, including by lessening the effect of war on neutral commerce.[15]

A nation may be neutral, insofar as it does not participate in hostilities, even though it may not be impartial in its attitude towards the belligerents. Whether or not a position of nonparticipation can be

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13. WINSTON CHURCHILL, THE SECOND WORLD WAR: THE GATHERING STORM 532 (1948).

14. DOD LAW OF WAR MANUAL, §§ 15.3.1.2, 15.4.2; 2006 Australian Manual, ¶¶ 11.8, 11.17; CANADIAN MANUAL, ¶ 1304(3); GERMAN COMMANDER'S HANDBOOK, ¶ 232; JMSDF TEXTBOOK, at 121–22.

15. DOD LAW OF WAR MANUAL, § 15.1.3.

maintained, in the absence of complete impartiality, depends upon the reaction of the aggrieved belligerent.[16] In other words, a neutral State that violates its neutrality is not automatically brought into the conflict as a co-belligerent.[17] For example, conducting an armed attack against one of the belligerents would clearly bring the neutral State into the armed conflict as a party. Similarly, a neutral State that provides actionable intelligence to a belligerent that allows that belligerent to successfully attack the opposing belligerent would become a party to the conflict. However, simply providing weapons and other war-related material to a belligerent does not, in and of itself, mean that a neutral State engaged in such conduct has become a party to the armed conflict.

7.2.1 Qualified Neutrality

The law of neutrality has traditionally required neutral States to observe a strict impartiality between parties to a conflict, regardless of which State was viewed as the aggressor. After treaties outlawed war as a matter of national policy, the United States and other States took the position that neutral States could discriminate in favor of States that were victims of wars of aggression, referred to as qualified neutrality. Not all States agree with this position.

Commentary

As stated above, the law of neutrality historically required neutral States to observe strict impartiality between the parties to the conflict and to abstain from providing war-related goods or other military assistance to the belligerents. However, after war was renounced as an instrument of national policy,[18] some States took the position that neutrals can discriminate in favor of a State that is the victim of a war of aggression and they are not bound by their neutral obligations of strict impartiality and abstention. Proponents of qualified neutrality argue that neutral States supplying weapons and other war material to the victim of aggression are not acting contrary to the law of neutrality. The Russia-Ukraine Conflict is the most recent example, as more than forty States have provided military and other aid to

16. NWIP 10-2, ¶ 230b.
17. DOD LAW OF WAR MANUAL, § 15.4.1.
18. Kellogg-Briand Pact.

Ukraine since the war began in February 2022.[19] The concept of qualified or benevolent neutrality, as an exception to the traditional law of neutrality, is not universally recognized.[20] For example:

> At Havana on March 27, 1941, Attorney General Jackson delivered an address designed to prove that as a matter of *law* the United States was now obliged to render to England (and presumably others) all aid "short of war," while "at the same time it is the declared determination of the government to avoid entry into the war as a belligerent." Apparently convinced that United States military aid to one belligerent alone cannot be justified by the traditional international law, the Attorney General feels obliged first to explode as obsolete the international law conceptions of war and neutrality of the past two centuries, culminating in the Hague Conventions, and to maintain that a new international law has now been revealed in the Covenant of the League of Nations, the Kellogg Pact, the Budapest "Articles of Interpretation" of 1934, and the Argentine Anti-War Treaty of 1933, all of which are alleged to make discrimination the new way of life for neutrals. The legislation of Congress requiring impartiality is not accorded even honorable mention. The "new international law" is thus found in the vague and illusory monuments to the myth called "collective security," which crumbled under the impact of the first European crisis. It should be no surprise to the Attorney General that many international lawyers

19. *See Ukraine Support Tracker*, KIEL INSTITUTE FOR THE WORLD ECONOMY, https://www.ifw-kiel.de/topics/war-against-ukraine/ukraine-support-tracker/; *The Countries Pledging the Most Military Aid to Ukraine*, STATISTICA, https://www.statista.com/chart/27278/military-aid-to-ukraine-by-country/.

20. For a discussion of the various arguments on the legality of qualified neutrality, see Michael Schmitt, *Ukraine Symposium—Are We at War?*, LIEBER INSTITUTE: ARTICLES OF WAR (May 9, 2022), https://lieber.westpoint.edu/are-we-at-war/; Wolff Heintschel von Heinegg, *Neutrality in the War Against Ukraine*, LIEBER INSTITUTE: ARTICLES OF WAR (Mar. 1, 2022), https://lieber.westpoint.edu/neutrality-in-the-war-against-ukraine/; Raul Pedrozo, *Ukraine Symposium—Is the Law of Neutrality Dead?*, LIEBER INSTITUTE: ARTICLES OF WAR (May 31, 2022), https://lieber.westpoint.edu/is-law-of-neutrality-dead/.

> do not share his views on international law or how international law is created, or follow his unique construction of documents.[21]

The United States has taken the position that certain duties of neutral States may be inapplicable under the doctrine of qualified neutrality.[22] Thus, before entering the Second World War, the United States adopted a position of "qualified neutrality" in which neutral States had the right to support belligerent States that had been the victim of flagrant and illegal wars of aggression. Lauterpacht explains:

> Similarly, it is open to neutral States as a matter of legal right to give effect to their moral obligation to discriminate against the aggressor and to deny him, in their discretion, the right to exact from neutrals a full measure of impartiality. In some cases neutral States may, having regard to their own safety and the desire not to be involved in the war, continue to accord impartial treatment to the aggressor. But they need not do so wherever they feel in the position actively to assert the principle, as did the United States and other States before entering the Second World War, that the historic foundation of neutrality as an attitude of absolute impartiality has disappeared with the renunciation and the abolition of war as an instrument of national policy.[23]

Further, in 1941, the U.S. Attorney General stated:

> Present aggressive wars are civil wars against the international community. Accordingly, as responsible members of that community, we can treat victims of aggression in the same way we treat legitimate governments when there is civil strife and a state of insurgency—that is to say, we are permitted to give to defending governments all the aid we choose. In the light of the flagrancy of current aggressions, which are apparent on their face, and which all right thinking people

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21. *See also* Edwin Borchard, *War, Neutrality and Non-Belligerency*, 35 AMERICAN JOURNAL OF INTERNATIONAL LAW 618 (1941).

22. DOD LAW OF WAR MANUAL, § 15.2.2; NEWPORT MANUAL, § 11.2.2.

23. LAUTERPACHT, 2 OPPENHEIM'S INTERNATIONAL LAW 221 (§ 61).

> recognize for what they are, the United States and other states are entitled to assert a right of discriminatory action by reason of the fact that, since 1928 so far as it is concerned, the place of war and with it the place of neutrality in the international legal system have no longer been the same as they were prior to that date.[24]

7.2.2 Neutrality Under the 1945 Charter of the United Nations

The customary law of neutrality has, to some extent, been modified by the Charter of the UN. The Charter of the UN, Article 2(4) provides all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. In the event of a threat to or breach of the peace or act of aggression, the UN Security Council is empowered to take enforcement action on behalf of all member States under Articles 39, 41, and 42, including the use of force, in order to maintain or restore international peace and security. Traditional concepts of neutral rights and duties may be modified when the UN authorizes collective action against an aggressor. The Charter of the UN, Article 2(5) provides all members shall give the UN every assistance in any action it takes in accordance with the present Charter and shall refrain from giving assistance to any state against which the UN is taking preventive or enforcement action. Obligations pursuant to the Charter of the UN override other international obligations.

Commentary

> Article 2(3) of the UN Charter provides: "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." Article 2(4) provides: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

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24. Address of Robert H. Jackson, Attorney General of the United States, Inter-American Bar Association, Havana, Cuba, March 27, 1941, 35 AMERICAN JOURNAL OF INTERNATIONAL LAW 348, 353–54 (1941).

Article 39 provides: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

Article 41 provides:

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

Article 42 provides:

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

Article 43(1) provides:

> All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

Article 45 provides:

> In order to enable the United Nations to take urgent military measures, Members shall hold immediately available national air-force contingents for combined international enforcement action. The strength and degree of readiness of these contingents and plans for their combined action shall be determined, within the limits laid down in the special agreement or agreements referred to in Article 43, by the Security Council with the assistance of the Military Staff Committee.

Finally, Article 2(5) provides: "All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action."

In situations where the UN Security Council has decided what measures shall be taken in accordance with Articles 41 and 42 of the UN Charter to maintain or restore international peace and security, member States are required to give the United Nations "every assistance" in any action, especially enforcement action.[25] This obligation, which would be incompatible with the status of neutrality and the principle of impartiality, takes precedence over a State's other international obligations, including the traditional law of neutrality.[26] For example, during the Persian Gulf War, the United States took the position that,

> regardless of assertions of neutrality, all nations were obligated to avoid hindrance of Coalition operations undertaken pursuant to, or in conjunction with, UNSC decisions, and to provide whatever assistance possible. By virtue of UNSC Resolution 678 (29 November), members were requested "to provide appropriate support for the actions undertaken" by nations pursuant to its authorization of use of all necessary means to uphold and implement prior resolutions.[27]

25. U.N. Charter, art. 2(5).
26. DOD LAW OF WAR MANUAL, § 15.2.3.2; NWIP 10-2, ¶ 232.
27. PERSIAN GULF WAR: FINAL REPORT, at 626.

Thus, decisions of the Security Council may, in certain circumstances, qualify rights and obligations under the law of neutrality. During the Persian Gulf War, for example, Iran did not participate in the conflict. If Iran received in its territory military forces operating pursuant to Security Council Resolution 678,[28] it might be required to return them, rather than intern these forces under the law of neutrality.[29] In this regard, the United States "advised Iran that, in light of UNSC Resolution 678, Iran would be obligated to return downed Coalition aircraft and aircrew, rather than intern them."[30] Similarly, a Security Council resolution might obligate States to take measures that would not be required by neutrality law.[31]

If the Security Council is unable to fulfill its assigned functions, the members may, in case of a war, remain neutral and observe an attitude of strict impartiality.[32]

Moreover, Security Council resolutions may obligate States to take measures that would not be required by neutrality law. For example, the Security Council may require States to impose restrictions on private conduct within their jurisdiction, such as to prevent private individuals from selling weapons to certain States or non-State armed groups. For example, in Resolution 1970 of February 26, 2011, the Security Council decided

> that all Member States shall immediately take the necessary measures to prevent the direct or indirect supply, sale or transfer to the Libyan Arab Jamahiriya, from or through their territories or by their nationals, or using their flag vessels or aircraft, of arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned, and technical assistance, training, financial or other assistance, related to military activities or the provision,

28. S.C. Res. 678 (Nov. 29, 1990).
29. Hague V, art. 11.
30. PERSIAN GULF WAR: FINAL REPORT, at 628.
31. S.C. Res. 1907 (Feb. 26, 2011).
32. NWIP 10-2, ¶ 232.

> maintenance or use of any arms and related materiel, including the provision of armed mercenary personnel whether or not originating in their territories.[33]

In Resolution 713 of September 25, 1991, the Security Council decided,

> under Chapter VII of the Charter of the United Nations, that all States shall, for the purposes of establishing peace and stability in Yugoslavia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia until the Council decides otherwise following consultation between the Secretary-General and the Government of Yugoslavia.[34]

The Charter of the UN, Article 25, requires member States to accept and carry out the decisions of the UN Security Council in accordance with the present Charter. All member States must comply with the terms of decisions taken by the UN Security Council under Chapter VII of the Charter of the UN. Member States may be obliged to support a UN action at the expense of their pure neutrality. The Charter of the UN, Article 50 does recognize a State that finds itself confronted with special economic problems arising from carrying out preventive or enforcement measures authorized by the UN Security Council, has a right to consult the Council with regard to a solution of those problems. Absent a binding decision of the UN Security Council, each State is free to determine whether to support the victim of an armed attack (invoking collective self-defense) or to remain neutral. Although members may discriminate against an aggressor in the absence of any action on the part of the UN Security Council, they do not have to do so. In these circumstances, neutrality remains a distinct possibility.

Commentary

Article 25 of the UN Charter provides that member States "agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." Under Article 48(1), "[t]he action

33. S.C. Res. 1970, ¶ 9 (Feb. 26, 2011).
34. S.C. Res. 713, ¶ 6 (Sept. 25, 1991).

required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine." Article 49 provides that members "shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council."

In Article 50, the Charter provides:

> If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems.

If the Security Council is unable to fulfill its assigned functions, the members may, in case of a war, remain neutral and observe an attitude of strict impartiality.[35] Nonetheless, in the absence of a Security Council decision, nations may discriminate, and even resort to armed conflict, against a nation that is guilty of an illegal armed attack (e.g., collective self-defense under Article 51 of the UN Charter).

Article 51 of the UN Charter provides:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

35. NWIP 10-2, ¶ 232.

Under the "Uniting for Peace" Resolution,[36] the UN General Assembly may, in the event of a breach of the peace, make "appropriate recommendations to Members for collective measures, including . . . the use of armed force when necessary." The recommendations of the General Assembly, however, do not constitute legal obligations for member nations.

7.2.3 Neutrality Under Regional and Collective Self-defense Arrangements

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

Commentary

The right of individual and collective self-defense established by the UN Charter may be implemented by regional and collective self-defense arrangements. Under these arrangements, the possibility of maintaining a status of neutrality and of observing an attitude of impartiality depends upon the extent to which the contracting parties are obliged to give assistance to the regional action, or, in the case of collective self-defense, to the victim of an armed attack.[37]

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36. G.A. Res. 377 (V) (Nov. 3, 1950).
37. DOD LAW OF WAR MANUAL, § 15.2.4; NWIP 10-2, ¶ 233.

Article 52(1) of the Charter provides:

> Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

7.3 NEUTRAL TERRITORY

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

Commentary

Waters subject to the sovereignty of a neutral State are considered neutral. They include (1) the territorial sea; (2) archipelagic waters; and (3) ports, roadsteads, and internal waters. For the purpose of applying the law of neutrality, all ocean areas not subject to the territorial sovereignty of any State are not considered neutral waters. They include (1) a neutral State's contiguous zone; (2) a neutral State's EEZ; and (3) the high seas.[38]

38. DOD LAW OF WAR MANUAL, § 15.7.1.

A neutral State is required "to exercise such surveillance as the means at its disposal allow" to effectively detect and prevent any violation of its neutrality in archipelagic waters.[39] Measures taken by a neutral State to prevent violations of its neutrality, including the use of force, cannot be "considered as an unfriendly act" by any of the belligerents.[40] For example, Article 10 of Hague V provides: "The fact of a neutral Power resisting, even by force, attempts to violate its neutrality cannot be regarded as a hostile act."

Nonetheless, a belligerent "is not forbidden to resort to acts of hostility in neutral jurisdiction against enemy troops, vessels, or aircraft making illegal use of neutral territory, waters, or air space, if a neutral State will not or cannot effectively enforce its rights against such offending belligerent forces."[41] Belligerent forces may use force in self-defense or as part of self-help enforcement actions against enemy forces that have committed violations of neutrality when the neutral State is unwilling or unable to address such violations.[42]

The 2004 UK Manual provides:

> Neutral states must refrain from allowing their territory to be used by belligerent states for the purposes of military operations. If a neutral state is unable or unwilling to prevent the use of its territory for the purposes of such military operations, a belligerent state may become entitled to use force in self-defense against enemy forces operating from the territory of that neutral state. Whether or not they are so entitled will depend on the ordinary rules of the jus ad bellum.[43]

The 2006 Australian Manual provides:

> As a general rule of international law, all acts of hostility in neutral territory, including neutral land, neutral waters and neutral airspace are prohibited. A neutral state has a duty to

39. Hague XIII, art. 25.
40. *Id.* art. 26; DOD LAW OF WAR MANUAL, § 15.4.3.
41. NWIP 10-2, ¶ 441; DOD LAW OF WAR MANUAL, § 15.4.2.
42. DOD LAW OF WAR MANUAL, § 15.3.1.2.
43. 2004 UK MANUAL, ¶ 1.43a.

> prevent the use of its territory as a sanctuary or a base of operations by the belligerent forces of any side. If the neutral state is unable or unwilling to enforce effectively its right of inviolability, an aggrieved belligerent may resort to acts of hostility in neutral territory against enemy forces, including warships and military aircraft, making unlawful use of that territory. Belligerents are also authorised to act in self-defence when attacked or threatened with attack while in neutral territory or when attacked or threatened from neutral territory.[44]

The 2001 Canadian Manual provides:

> A neutral state is permitted to resist any attempted violation of its borders by force and such resistance does not make the neutral a party to the conflict. If enemy forces enter neutral such territory and the neutral state is unwilling or unable to intern or expel them, the opposing party is entitled to attack them there, or to demand compensation from the neutral for this breach of neutrality.[45]

Finally, the 2002 German Commander's Handbook provides:

> On the other hand, a neutral state is obliged to prevent the parties to the conflict from misusing these areas as sanctuary or base of operations. If it is unwilling or unable to do so, the other party to the conflict is entitled to take all measures necessary to terminate the misuse of neutral territory or neutral waters.[46]

7.3.1 Neutral Lands

Belligerents are forbidden to move troops or war materials and supplies across neutral-land territory. Neutral States may be required to mobilize sufficient armed forces to ensure fulfillment of their responsibility to prevent

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44. 2006 Australian Manual, ¶ 11.8.
45. CANADIAN MANUAL, ¶ 1304(3).
46. GERMAN COMMANDER'S HANDBOOK, ¶ 232.

belligerent forces from crossing neutral borders. Neutral States have discretion whether to allow belligerent forces seeking refuge to enter their territory. Belligerent troops that do enter neutral territory must be disarmed and interned until the end of the armed conflict.

Commentary

Belligerents are prohibited from moving "troops or convoys of either munitions of war or supplies across the territory of a neutral Power."[47] This prohibition applies only to the official acts of a belligerent State and does not apply to the shipment of such supplies by private persons.[48]

A neutral State has discretion in whether to permit belligerent forces seeking refuge to enter its territory.[49] If, however, a neutral State "receives on its territory troops belonging to the belligerent armies," it "shall intern them, as far as possible, at a distance from the theatre of war."[50] Belligerent forces received in neutral territory shall be disarmed, and appropriate measures must be taken to prevent their leaving the neutral State.[51]

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

47. Hague V, art. 2.
48. DOD LAW OF WAR MANUAL, § 15.5.4.
49. *Id.* § 15.16.1.
50. Hague V, art. 11; DOD LAW OF WAR MANUAL, § 15.16.1.2.
51. DOD LAW OF WAR MANUAL, § 15.16.1.2.

Commentary

A neutral State "may authorize the passage over its territory of the sick and wounded belonging to the belligerent armies," on condition that the vehicles transporting them shall not carry combatants or war material.[52] If combatants accompany the passage of the wounded and sick, they should be interned. Similarly, any military supplies must be seized and placed in safe custody until the end of the conflict.[53] Sick or wounded personnel brought into neutral territory under these circumstances "by one of the belligerents, and belonging to the hostile party," must be guarded by the neutral State to ensure that they do not take part again in military operations. The neutral State has the same duty "with regard to wounded or sick of the other army who may be committed to its care."[54]

The neutral State is not obligated to permit such passage, but, if provided, passage should be provided on an impartial basis to all belligerent States. There is no requirement to obtain the consent of the other belligerent States before permitting the passage of sick and wounded personnel.[55]

A neutral State may deny or receive the admission of escaped POWs.[56] A neutral State that "receives escaped prisoners of war shall leave them at liberty." If the neutral State "allows them to remain in its territory it may assign them a place of residence." The same rule "applies to prisoners of war brought by troops taking refuge in the territory of a neutral Power."[57] POWs who have escaped to neutral territory are deemed to have successfully escaped from the detaining power.[58]

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52. Hague V, art. 14; DOD LAW OF WAR MANUAL, § 15.18.1.
53. DOD LAW OF WAR MANUAL, § 15.18.1.2.
54. Hague V, art. 14; DOD LAW OF WAR MANUAL, § 15.18.1.
55. DOD LAW OF WAR MANUAL, § 15.18.1.1.
56. *Id.* § 15.17.1.
57. Hague V, art. 13; DOD LAW OF WAR MANUAL, §§ 15.17.1, 15.17.2.
58. DOD LAW OF WAR MANUAL, § 15.17.1.

7.3.2 Neutral Ports and Roadsteads

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

Commentary

A neutral State may adopt laws or regulations governing the presence of belligerent warships and their prizes in its waters.[59] A neutral State must apply impartially to opposing belligerents the conditions, restrictions, or prohibitions made by it in regard to the admission into its ports, roadsteads, or territorial waters of belligerent warships or of their prizes. Nevertheless, a neutral State "may forbid a belligerent vessel which has failed to conform to the orders and regulations made by it, or which has violated neutrality, to enter its ports or roadsteads."[60]

If a neutral State "which has been informed of the outbreak of hostilities learns that a belligerent war-ship is in one of its ports or roadsteads, or in its territorial waters, it must notify the said ship to depart within twenty-four hours or within the time prescribed by local regulations."[61]

Belligerent vessels, including warships, have a right of entry in distress whether caused by force majeure or damage resulting from enemy action. The right of entry in distress does not prejudice the measures that a neutral State may take after entry has been granted,

59. *Id.* § 15.7.2.
60. Hague XIII, art. 9; DOD LAW OF WAR MANUAL, § 15.7.2.
61. Hague XIII, art. 13; DOD LAW OF WAR MANUAL, § 15.7.3.1.

such as measures to intern the ship if it remains when it is not entitled to remain.[62]

7.3.2.1 Limitations on Stay and Departure

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

Commentary

Generally, in the absence of special provisions to the contrary in the legislation of a neutral State, "belligerent warships are not permitted to remain in the ports, roadsteads, or territorial waters" of the neutral State for more than twenty-four hours.[63] For example, Article 5 of the Havana Convention provides:

> Belligerent warships are forbidden to remain in the ports or waters of a neutral state more than twenty-four hours. This provision will be communicated to the ship as soon as it arrives in port or in the territorial waters, and if already there at the time of the declaration of war, as soon as the neutral state becomes aware of this declaration.

62. DOD LAW OF WAR MANUAL, § 15.7.4.1.
63. Hague XIII, art. 12; DOD LAW OF WAR MANUAL, § 15.7.3.

The twenty-four-hour rule does not apply to vessels used exclusively for scientific, religious, or philanthropic purposes.[64] This exemption does not apply to warships engaged in the collection of scientific data of potential military application.[65]

A ship may extend its stay in port more than twenty-four hours in case of damage or bad conditions at sea but must depart as soon as the cause of the delay has ceased.[66] Additionally, "when, according to the domestic law of the neutral state, the ship may not receive fuel until twenty-four hours after its arrival in port the period of its stay may be extended an equal length of time."[67]

Further:

> In the absence of special provisions to the contrary in the laws or regulations of a neutral State, belligerent warships are forbidden to remain in the territorial sea, ports, or roadsteads of a neutral for more than twenty-four hours. This restriction does not apply to belligerent vessels devoted exclusively to humanitarian, religious, or scientific purposes. In addition, belligerent warships may be permitted by a neutral to extend their stay in neutral ports on account of stress of weather or damage . . . . It is the duty of a neutral State to intern a belligerent warship, together with officers and crew, that will not or cannot leave a neutral port where she is not entitled to remain.[68]

If, notwithstanding neutral State notification, a belligerent warship does not leave a port where it is not entitled to remain, the neutral State is entitled to take such measures as it considers necessary to render the ship incapable of taking to sea during the war, and the commanding officer of the ship must facilitate the execution of such measures. When a belligerent ship is detained by a neutral State, the

64. Hague XIII, art. 14; Havana Convention, art. 5; DOD LAW OF WAR MANUAL, § 15.7.3.
65. DOD LAW OF WAR MANUAL, § 15.7.3.
66. Hague XIII, art. 14; DOD LAW OF WAR MANUAL, § 15.7.3.
67. Havana Convention, art. 5; DOD LAW OF WAR MANUAL, § 15.7.3.
68. NWIP 10-2, ¶ 443b1.

> officers and crew are likewise detained. The detained officers and crew may be left on board the ship or kept either on another vessel or on land and may be subjected to the measures of restriction that the neutral State may appear necessary to impose upon them. A sufficient number of men for looking after the vessel must, however, be left on board. The officers may be left at liberty on giving their word not to quit the neutral territory without permission.[69] A ship is considered to be interned "from the moment it receives notice to that effect from the local neutral authority" and it remains under custody "from the moment it receives the order."[70]

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

Commentary

> In the absence of special provisions to the contrary in the legislation of a neutral State, the maximum number of warships belonging to a belligerent that may be in a neutral port or roadstead at the same time shall be three.[71]
>
> When warships belonging to both belligerents are present simultaneously in a neutral port or roadstead, a period of not less than twenty-four hours must elapse between the departure of the ship belonging

69. Hague XIII, art. 24; Havana Convention, art. 6; DOD LAW OF WAR MANUAL, § 15.9.2.

70. Havana Convention, art. 6.

71. Hague XIII, art. 15; Havana Convention, art. 7; DOD LAW OF WAR MANUAL, § 15.9.1; JAPANESE LAW OF WAR MANUAL, 248.

> to one belligerent and the departure of the ship belonging to the other. The order of departure is determined by the order of arrival, unless the ship that arrived first is granted an extension of the period of stay.[72] Additionally, a belligerent warship may not leave a neutral port or roadstead until twenty-four hours after the departure of a merchant ship flying the flag of its adversary.[73]

Further:

> In the absence of special provisions to the contrary in the laws or regulations of a neutral State, no more than three warships of a belligerent are allowed to be in the same port or roadstead of a neutral at any one time. When warships of opposing belligerents are present in a neutral port at the same time, at least twenty-four hours must elapse between the departure of the respective enemy vessels. The order of departure is determined by the order of arrival, unless the vessel which arrived first is granted an extension of the period of stay. A belligerent warship cannot leave a neutral port or roadstead less than twenty-four hours after the departure of an enemy merchant ship.[74]

7.3.2.2 War Materials, Supplies, Communications, and Repairs

Belligerent warships may not make use of neutral ports or roadsteads to replenish or increase their supplies of war materials or their armaments, or to erect or employ any apparatus for communicating with belligerent forces. Although they may take on food and fuel, the law is unsettled as to the quantities that may be allowed. In practice, it has been left to the neutral State to determine the conditions for the replenishment and refueling of belligerent warships, subject to the principle of nondiscrimination among belligerents and the prohibition against the use of neutral territory as a base of operations. Hague Convention XIII, Article 19 limits resupply of food on warships to the peace standard. Article 19 establishes two different standards for refueling. Warships may take on sufficient fuel to enable them to reach the

72. Hague XIII, art. 16; Havana Convention, art. 8; DOD LAW OF WAR MANUAL, § 15.9.3; JAPANESE LAW OF WAR MANUAL, 248–49.

73. Hague XIII, art. 16; DOD LAW OF WAR MANUAL, § 15.9.3.

74. NWIP 10-2, ¶ 443b2.

nearest port in their own country, or they may take on the fuel to fill up their bunkers built to carry fuel when in neutral countries which have adopted this method of determining the amount of fuel to be supplied. Article 20 forbids warships to renew their supply of fuel in the ports of the same neutral State until a minimum period of 3 months has elapsed.

Commentary

Belligerents are prohibited from using "neutral ports and waters as a base of naval operations against their adversaries" and, in particular, from erecting "wireless telegraphy stations or any apparatus for the purpose of communicating with the belligerent forces on land or sea."[75] Belligerent warships are also prohibited from using "neutral ports, roadsteads, or territorial waters for replenishing or increasing their supplies of war material or their armament, or for completing their crews."[76]

Article 4 of the Havana Convention provides that a belligerent State is forbidden:

> (a) To make use of neutral waters as a base of naval operations against the enemy, or to renew or augment military supplies or the armament of its ships, or to complete the equipment of the latter;
>
> (b) To install in neutral waters radio-telegraph stations or any other apparatus which may serve as a means of communication with its military forces, or to make use of installations of this kind it may have established before the war and which may not have been opened to the public.

Further, "[b]elligerent warships may not make use of neutral ports, roadsteads, or territorial waters to replenish or to increase their supplies of war materials or their armaments or to erect any apparatus for the purpose of communicating with belligerent forces on land or at sea."[77]

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75. Hague XIII, art. 5.
76. *Id.* art. 18.
77. NWIP 10-2, ¶ 443c.

> Belligerent warships may take on food "in neutral ports or roadsteads to bring up their supplies to the peace standard."[78] Additionally, warships may take on "sufficient fuel to enable them to reach the nearest port in their own country."[79] Alternatively, belligerent warships may "fill up their bunkers built to carry fuel, when in neutral countries which have adopted this method of determining the amount of fuel to be supplied."[80] If, in accordance with the law of the neutral State, warships are not supplied with fuel within twenty-four hours of their arrival, "the permissible duration of their stay is extended by twenty-four hours."[81]
>
> In addition, "[b]elligerent warships may supply themselves with fuel and stores in neutral ports, under the conditions especially established by the local authority and in case there are no special provisions to that effect, they may supply themselves in the manner prescribed for provisioning in time of peace."[82] Further:
>
> > Belligerent warships in neutral ports or roadsteads are not forbidden to supply themselves with food and fuel, although there is no unanimity on the amount of food and fuel that may be taken on. In practice, it has been left to a neutral State to determine the conditions for the replenishment and refueling of belligerent warships. A neutral State may extend the lawful period of stay to vessels being supplied with fuel by twenty-four hours.[83]
>
> Once a belligerent warship has taken on fuel in a neutral port, it may not within the next three months replenish its fuel supply in a port of the same neutral State.[84]

Belligerent warships may only carry out repairs in neutral ports and roadsteads as are absolutely necessary to render them seaworthy. If the 1928 Pan

78. Hague XIII, art. 19; DOD LAW OF WAR MANUAL, § 15.9.4.1.
79. Hague XIII, art. 19; DOD LAW OF WAR MANUAL, § 15.9.4.1.
80. Hague XIII, art. 19; DOD LAW OF WAR MANUAL, § 15.9.4.1.
81. Hague XIII, art. 19.
82. Havana Convention, art. 10.
83. NWIP 10-2, ¶ 443d.
84. Hague XIII, art. 20; Havana Convention, art. 11.

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

Commentary

Belligerent warships in neutral ports or roadsteads "may only carry out such repairs as are absolutely necessary to render them seaworthy and may not add in any manner whatsoever to their fighting force" (e.g., they may not add to or repair weapon systems, or enhance any other aspect of their war fighting capability).[85] Local authorities shall decide what repairs are necessary and will ensure that such repairs are "carried out with the least possible delay."[86] Further:

> In neutral ports and roadsteads, belligerent warships may carry out only such repairs as are absolutely necessary to render them seaworthy, and may not add in any manner whatsoever to their fighting force. It is the duty of a neutral State to decide what repairs are necessary and to insist that these be carried out with the least possible delay.[87]

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85. Hague XIII, art. 17; Havana Convention, art. 9; DOD LAW OF WAR MANUAL, § 15.9.4.2.

86. Hague XIII, art. 17; Havana Convention, art. 9; DOD LAW OF WAR MANUAL, § 15.9.4.2.

87. NWIP 10-2, ¶ 443e.

> Note that Article 9 of the Havana Convention specifically prohibits the repair of battle damage in neutral ports for those States that are parties to the convention: "Damages which are found to have been produced by the enemy's fire shall in no case be repaired."
>
> For an example of the application of these rules, see the case of the German battleship *Admiral Graf Spee*:
>
> > On December 13, 1939, the *Graf Spee* entered the Uruguayan port of Montevideo, following an engagement with British naval forces. A request was made to the Uruguayan authorities to permit the *Graf Spee* to remain fifteen days in port in order to repair damages suffered in battle and to restore the vessel's navigability. The Uruguayan authorities granted a seventy-two hour period of stay. Shortly before the expiration of this period the *Graf Spee* left Montevideo and was destroyed by its own crew in the Rio de la Plata. The British Government, while not insisting that Article 17 of Hague XIII clearly prohibited the repair of battle damage, did point to the widespread practice of states when neutral in forbidding the repair of battle damage in their ports. In accordance with this practice it was suggested that the *Graf Spee's* period of stay be limited to twenty-four hours. Uruguay maintained, however, that the scope of the neutral's duty required it only to prevent those repairs that would serve to augment the fighting force of a vessel but not repairs necessary for safety of navigation.—The incident is noteworthy as an example of the extent to which belligerents seemingly can make use of neutral ports without violating the prohibition against using neutral territory as a base of naval operations.[88]

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

88. Robert W. Tucker, *The Law of War and Neutrality at Sea*, 50 INTERNATIONAL LAW STUDIES 1, 245 n.2 (1955).

circumstances are overcome or cease to prevail. It is the duty of the neutral State to release a prize, together with its officers and crew, and intern the offending belligerent's prize master and prize crew whenever a prize is unlawfully brought into a neutral port or roadstead or, having entered lawfully, fails to depart when ordered as soon as the circumstances that justified its entry no longer pertain.

Commentary

Prizes may not be brought into a neutral port except on "account of unseaworthiness, stress of weather, or want of fuel or provisions."[89] As soon as the circumstances that justified its entry are at an end, the prize must leave immediately and, if it does not leave, the neutral State "must order it to leave at once."[90] If the prize fails to obey the order to leave, the neutral State must "release it with its officers and crew and . . . intern the prize crew."[91]

If a prize is brought into a neutral port under circumstances other than on account of unseaworthiness, stress of weather, or want of fuel or provision, the neutral State must release the prize (i.e., restore the vessel to its former crew) and intern the prize crew.[92]

Further:

> A prize may be brought into a neutral port only because of unseaworthiness, stress of weather, or want of fuel or provisions. It must leave as soon as the circumstances which justified its entry are at an end. It is the duty of a neutral State to release a prize, together with its officers and crew, and to intern the prize crew in the event that a prize is unlawfully brought into the neutral's port or, having entered lawfully,

89. Hague XIII, art. 21; Havana Convention, art. 17; DOD LAW OF WAR MANUAL, § 15.9.5.

90. Hague XIII, art. 21; Havana Convention, art. 21; DOD LAW OF WAR MANUAL, § 15.9.5.

91. Hague XIII, art. 21; Havana Convention, art. 17; DOD LAW OF WAR MANUAL, § 15.9.5.

92. Hague XIII, art. 22; Havana Convention, art. 18; DOD LAW OF WAR MANUAL, § 15.9.5.

> fails to depart as soon as the circumstances which justified its entry are at an end.[93]

A neutral State "may allow prizes to enter its ports and roadsteads . . . when they are brought there to be sequestrated pending the decision of a Prize Court."[94] Note that the United States ratified Hague XIII subject to a reservation to Article 23:

> And whereas the Senate of the United States of America by its resolution of April 17, 1908 . . . did advise and consent to the adherence by the United States to the said Convention with the reservation and exclusion of its Article 23 and with the understanding that the last clause of Article 3 of the said Convention implies the duty of a neutral power to make the demand therein mentioned for the return of a ship captured within the neutral jurisdiction and no longer within that jurisdiction;
>
> And whereas the President of the United States of America, in pursuance of and in conformity with the aforesaid advice and consent of the Senate, did, on the 23rd day of February, 1909, declare the adherence of the United States to the said Convention . . .[95]

The United Kingdom and Japan also do not adhere to Article 23.

The S.S. *Appam* provides an example of the application of these rules. On January 15, 1916, the British steamship *Appam* was captured on the high seas by the German cruiser *Moewe*. At the time of the capture, the *Appam* was returning from the West Coast of Africa to Liverpool and was approximately 1,590 miles from Emden (the nearest German port), 130 miles from Punchello in the Madeiras (the nearest available port), 1,450 miles from Liverpool, and 3,051 miles from Hampton Roads. After the capture, the *Appam* sailed west and arrived in Hampton Roads on January 31. The *Appam* was seaworthy

93. NWIP 10-2, ¶ 443f.

94. Hague XIII, art. 23; DOD LAW OF WAR MANUAL, § 15.9.5.1.

95. William H. Taft, Proclamation Regarding the Hague XIII, 36 Stat. 2415, 2438 (Feb. 28, 1910).

and had plenty of provisions, both when captured and at the time of her arrival in Hampton Roads. On February 2, the German Ambassador informed the State Department of the intention, under the Treaty of 1799 between the United States and Prussia, to stay in an American port until further notice and requested that the crew of the *Appam* be detained in the United States for the remainder of the war. On February 16, the owner of the *Appam* filed a libel case seeking to recover the *Appam*, claiming that holding and detaining the vessel in American waters was in violation of the law of nations, the laws of the United States, and the neutrality of the United States. The German government alleged that the *Appam* was brought in as a prize by a prize master, in reliance upon the Treaty of 1799; that, by the general principles of international law, the prize master was entitled to bring his ship into the neutral port under these circumstances; that the length of stay was not a matter for judicial determination; and that proceedings had been instituted in a proper prize court of competent jurisdiction in Germany for the condemnation of the *Appam* as a prize of war. The German government averred that the American court had no jurisdiction.

The U.S. Supreme Court restored the vessel to her owners and released the crew on the basis that the United States would not permit its ports to be used as harbors of safety in which prizes could be kept:

> It is familiar international law that the usual course after the capture of the *Appam* would have been to take her into a German port, where a prize court of that nation might have adjudicated her status, and, if it so determined, condemned the vessel as a prize of war. Instead of that, the vessel was neither taken to a German port nor to the nearest port accessible of a neutral power, but was ordered to, and did, proceed over a distance of more than 3,000 miles, with a view to laying up the captured ship in an American port.
>
> It was not the purpose to bring the vessel here within the privileges universally recognized in international law—*i.e.*, for necessary fuel or provisions, or because of stress of

> weather or necessity of repairs, and to leave as soon as the cause of such entry was satisfied or removed. . . .
>
> . . . .
>
> The principles of international law recognized by this government, leaving the treaty aside, will not permit the ports of the United States to be thus used by belligerents. If such use were permitted, it would constitute of the ports of a neutral country harbors of safety into which prizes, captured by one of the belligerents, might be safely brought and indefinitely kept.[96]

The 1939 incident involving the *City of Flint* provides another example of the application of the rules:

> On October 9th, 1939, the American merchant steamer *City of Flint* was visited and searched by a German cruiser at an estimated distance of 1,250 miles from New York. The *Flint*, carrying a mixed cargo destined for British ports, was seized by the German cruiser on grounds of contraband, and a German prize crew was placed on board. Between the 9th of October and the 4th of November 1939 the American ship was taken first to the Norwegian port of Tromsoe, then to the Russian city of Murmansk, and then after two days in the last-named port, back along the Norwegian coast as far as Haugesund where the Norwegian authorities on November 4th released the *Flint* on the grounds of the international law rules contained in articles XXI and XXII of Hague Convention XIII of 1907. Prizes may be taken to a neutral harbor only because of an "inability to navigate, bad conditions at sea, or lack of anchors or supplies." The entry of the *Flint* into Haugesund on November 3 was not justified by the existence of any one of these conditions. The original visit and search and seizure of the *Flint* by the German warship, the placing of the prize crew on board, and the conduct of that crew were apparently all in accord with law. The stay in the

96. Steamship Appam, 243 U.S. 124, 148–49 (1917).

> harbor of Murmansk, however, was of doubtful legality. No genuine distress or valid reason for refuge in a so-called neutral harbor is evident from the examination of the facts. Perhaps the Germans and the Russians hoped to invoke the provisions of Article XXIII of Hague Convention XIII which authorizes a neutral power to permit "prizes to enter its ports and roadsteads . . . when they are brought there to be sequestrated pending the decision of a prize court." This article has never been accepted generally as a part of international law and was specifically rejected by the United States in ratifying the convention. The situation was complicated by the equivocal position of Soviet Russia, which was not a neutral in the traditional sense, in the European war. Under strict rules of international law the U.S.S.R. was derelict in regard to its neutral duties and should not have permitted the *Flint* either to enter Murmansk or to find any sort of a haven there.[97]

The U.S. State Department noted the following in response to the incident:

> A prize crew may take a captured ship into a neutral port without internment only in case of stress of weather, want of fuel and provisions, or necessity of repairs. In all other cases, the neutral is obligated to intern the prize crew and restore the vessel to her former crew.[98]

7.3.3 Neutral Internal Waters

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

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97. *Situation I: Neutral Duties and State Control of Enterprise*, 39 INTERNATIONAL LAW SITUATIONS WITH SOLUTIONS AND NOTES 1, 24–25 (1939).

98. Press Release, U.S. Department of State, German Capture of the American Steamer "City of Flint" (Oct. 28, 1939), *reprinted in* 1 DEPARTMENT OF STATE BULLETIN 429, 432 (July 1, 1939).

7.3.4 Neutral Territorial Seas

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

Commentary

"As a general rule, all acts of hostility in neutral jurisdiction are forbidden."[99] Belligerents must "respect the sovereign rights of neutral Powers" and "abstain, in neutral territory or neutral waters, from any act which would . . . constitute a violation of neutrality."[100]

Belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries and, in particular, to erect wireless telegraphy stations or any apparatus for the purpose of communicating with the belligerent forces on land or sea.[101] Article 4 of the Havana Convention provides:

> Under the terms of the preceding article a belligerent state is forbidden:
>
> > (a) To make use of neutral waters as a base of naval operations against the enemy, or to renew or augment military supplies or the armament of its ships, or to complete the equipment of the latter;
> >
> > (b) To install in neutral waters radio-telegraph stations or any other apparatus which may serve as a means of communication with its military forces, or to make use of installations of this kind it may have established before the war and which may not have been opened to the public.

99. NWIP 10-2, ¶ 441.
100. Hague XIII, art. 1.
101. *Id.* art. 5; DOD LAW OF WAR MANUAL, § 15.7.

NWIP 10-2 states: "Belligerents are forbidden to use neutral territory, territorial sea, or air space as a base for hostile operations."[102]

The prohibition against the use of neutral territorial waters as a sanctuary was at issue in the *Altmark* case:

> On February 14, 1940, the German naval auxiliary vessel *Altmark* entered Norwegian territorial waters on a return trip from the South Atlantic to Germany. The vessel carried almost three hundred captured British seamen on board . . . . The German auxiliary was granted permission by the Norwegian authorities to navigate through the latter's territorial waters. At the same time the Norwegian authorities refused the request made by the commander of British naval forces in the area that the *Altmark* be searched in order to determine whether she carried British prisoners. On February 16, 1940, after the *Altmark* had passed through approximately four hundred miles of Norwegian waters, a British destroyer entered these waters and forcibly released the prisoners held on board the German vessel. No attempt was made by the British destroyer carrying out the action either to capture or to sink the *Altmark*.
>
> In justification of the British action in the *Altmark* case it has been urged that Norway failed to comply with the obligations of neutrality by not conducting a proper investigation into the nature and object of the *Altmark*'s voyage and of the use to which she was putting Norwegian territorial waters. Still further, it has been argued that, in taking an extremely circuitous route which involved making prolonged use of Norwegian waters for the evident purpose of avoiding capture by British forces, the *Altmark*'s passage went far beyond the "mere passage" a neutral state may grant belligerent warships under Article 10 of Hague XIII. Given these circumstances, the passage of the German auxiliary vessel amounted to the use of Norwegian waters as a "base of operations," within the meaning of Article 5 of the same convention. Hence,

102. NWIP 10-2, ¶ 442.

> Norway had the duty either to intern the vessel and to release the prisoners, or, at the very least, to order the *Altmark* out of Norwegian waters.
>
> . . . the *Altmark*'s use of neutral waters did not constitute "mere passage," but rather the use of neutral waters as a base of operations, was not without substantial foundation. In retrospect, the *Altmark* case serves to emphasize once again that a belligerent will not readily accede to his enemy's use of neutral waters for purposes other than those strictly incidental to the normal requirements of navigation. And although the matter cannot be regarded as conclusively settled it is probable that the present scope of the neutral's duty is such that it must prevent passage through its waters by belligerent warships when such passage has as its purpose the use of these waters as a refuge from enemy forces.[103]

> The neutral State has an affirmative duty to police its waters to prevent violations of neutrality in those waters.[104] If a neutral State is unable or unwilling to detect and expel belligerent forces unlawfully present in its waters, the opposing belligerent State may undertake such self-help enforcement actions as may be necessary to terminate the violation of neutrality.[105] Thus, a belligerent may "resort to acts of hostility in neutral jurisdiction against enemy troops, vessels, or aircraft making illegal use of neutral territory, waters, or air space, if a neutral State will not or cannot effectively enforce its rights against such offending belligerent forces."[106]

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

103. Tucker, *supra* note 88, at 236–39 (footnotes omitted).
104. Hague XIII, art. 25; DOD LAW OF WAR MANUAL, § 15.7.
105. DOD LAW OF WAR MANUAL, § 15.7.
106. NWIP 10-2, ¶ 441.

seas, a belligerent warship must refrain from adding to or repairing its armaments or replenishing its war materials. Although the general practice has been to close neutral territorial seas to belligerent submarines, a neutral State may elect to allow passage of submarines. Neutral States customarily authorize passage through their territorial sea of ships carrying the wounded, sick, and shipwrecked, whether or not those waters are otherwise closed to belligerent vessels.

Commentary

A neutral State may allow the mere passage of warships, or prizes, of belligerents through its territorial sea without affecting its neutrality.[107] Belligerents are prohibited from using neutral waters as a base of operations or as a sanctuary.[108] Moreover, while in neutral ports, roadsteads, or territorial sea, belligerent warships may not replenish or increase their supplies of war materials or armaments or complete their crews.[109] Thus, "mere passage" must be continuous and incidental to the normal requirements of navigation. The prolonged presence by a belligerent warship in neutral waters, either for avoiding combat with the enemy or for evading capture, may be considered as using neutral waters as a base of operations. See the *Altmark* case above.

A neutral State may, on a nondiscriminatory basis, suspend passage of belligerent warships and prizes through its waters (with the exception of international straits and archipelagic sea lanes).[110] "Although a neutral State may suspend the passage of belligerent warships through its waters, a neutral State may not suspend, hamper, or otherwise impede the access of belligerent vessels and aircraft through international straits overlapped by neutral waters or archipelagic sea lanes of a neutral State."[111]

Although the general practice has been to close neutral territorial seas to belligerent submarines, a neutral State may elect to allow passage

107. Hague XIII, art. 10; NWIP 10-2, ¶ 443a; DOD LAW OF WAR MANUAL, § 15.7.4.
108. Hague XIII, art. 5.
109. *Id.* art. 18.
110. NWIP 10-2, ¶ 412b; DOD LAW OF WAR MANUAL, § 15.7.4.
111. DOD LAW OF WAR MANUAL, § 15.8.

> of submarines through its territorial sea provided they do not engage in hostile acts while in the territorial sea.[112] Neutral States customarily allow passage through their territorial sea of ships carrying the wounded, sick, and shipwrecked, whether or not those waters are otherwise closed to belligerent ships.[113]
>
> Any conditions, restrictions, or prohibitions made by a neutral State in regard to the admission into its ports, roadsteads, or territorial waters of belligerent warships, or of their prizes, must be applied impartially to all of the belligerents.[114] "[T]he rules restricting the use by belligerents of neutral waters, ports, and air space . . . establish correlative rights and obligations of neutrals and belligerents and presuppose a neutral's duty to exercise its rights and to fulfill its obligations in an impartial manner toward all belligerents."[115]
>
> Neutral States may also rely on Article 25(3) of UNCLOS to suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships, without discrimination in form or in fact among foreign ships, "if such suspension is essential for the protection of its security, including weapons exercises."[116] However, there shall be "no suspension of the innocent passage of foreign ships, whether merchant vessels or warships, through straits used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State."[117]

7.3.5 The 12 Nautical-mile Territorial Sea

When the law of neutrality was codified in the Hague Conventions of 1907, the 3 nautical-mile territorial sea was the accepted norm, aviation was in its infancy, and the submarine had not yet proven itself a significant weapons platform. The rules of neutrality applicable to the territorial sea were designed primarily to regulate the conduct of surface warships in a narrow band

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112. *Id.* § 15.7.4.
113. *Id.*
114. Hague XIII, art. 9.
115. NWIP 10-2, ¶ 440.
116. *Id.* ¶ 412b.
117. *Id.*

of water off neutral coasts. The UN Convention on the Law of the Sea provides coastal States may lawfully extend the breadth of claimed territorial seas to 12 nautical miles. The United States claims a 12 nautical-mile territorial sea and recognizes the right of all coastal States to do likewise. The law of neutrality remains applicable in the 12 nautical-mile territorial sea and airspace. Belligerents continue to be obliged to refrain from acts of hostility in neutral waters and are forbidden to use the territorial sea of a neutral State as a place of sanctuary from their enemies or as a base of operations. Should belligerent forces violate the neutrality of those waters and the neutral State demonstrates an inability or unwillingness to detect and expel the offender, the other belligerent retains the right to undertake such self-help enforcement actions as are necessary to assure compliance by their adversary and the neutral State with the law of neutrality.

Commentary

"Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with [UNCLOS]."[118] The United States claimed a 12-nautical mile territorial sea in 1988.[119] Waters subject to the sovereignty of a neutral State, including the territorial sea, are considered neutral.[120]

See § 7.3.4 for a discussion of the belligerent right of self-help.

7.3.6 International Straits Overlapped by Neutral Waters

Customary international law, as reflected in UNCLOS, provides belligerent and neutral surface ships, submarines, and aircraft have a right of transit passage through, over, and under all straits used for international navigation. Neutral States cannot suspend, hamper, or otherwise impede this right of transit passage through international straits. Belligerent forces transiting through international straits overlapped by neutral waters must proceed without delay, must refrain from the threat or use of force against the neutral State, and must otherwise refrain from acts of hostility and other activities

118. UNCLOS, art. 3; DOD LAW OF WAR MANUAL, § 13.2.2.2.

119. Proclamation No. 5928, Territorial Sea of the United States of America, 54 Fed. Reg. 777 (Dec. 27, 1988); DOD LAW OF WAR MANUAL, § 13.2.2.2.

120. DOD LAW OF WAR MANUAL, § 15.7.1.

not incident to their transit. Belligerent forces in transit may take defensive measures consistent with their security, to include the launching and recovery of aircraft and military devices, screen formation steaming, and acoustic and electronic surveillance, and may respond in self-defense to a hostile act or demonstrated hostile intent. Belligerent forces may not use neutral straits as a place of sanctuary or as a base of operations, and belligerent warships may not exercise the belligerent right of visit and search in those waters.

Commentary

See § 2.5.3 for a discussion of navigation and overflight of international straits.[121]

In straits that are used for international navigation between one part of the high seas or an EEZ and another part of the high seas or an EEZ, all ships and aircraft (including those belonging to belligerent and neutral States) enjoy the right of transit passage, which shall not be impeded.[122] States bordering straits may adopt laws and regulations relating to transit passage through straits provided that such laws and regulations do not "discriminate in form or in fact among foreign ships or in their application have the practical effect of denying, hampering or impairing the right of transit passage."[123] Additionally, "[t]here shall be no suspension of transit passage."[124]

Transit passage through straits overlapped by neutral waters, by ships carrying contraband of war or by belligerent warships, does not compromise the neutrality of a bordering neutral State.[125] Belligerent forces engaged in transit passage must proceed without delay, refrain from the threat or use of force against the neutral State, and otherwise refrain from acts of hostility and other activities not incident to

121. *See also* UNCLOS, arts. 34–45.
122. *Id.* arts. 37, 38.
123. *Id.* art. 42; DOD LAW OF WAR MANUAL, § 15.8.1.
124. UNCLOS, art. 44.
125. DOD LAW OF WAR MANUAL, § 15.8.1.

their transit.[126] For example, belligerent forces must refrain from exercising the right of visit and search while transiting through international straits that are overlapped by neutral waters.[127]

Belligerent forces engaged in transit passage may take defensive measures consistent with their security, including the launching and recovery of military devices, screen formation steaming, and acoustic and electronic surveillance, and may respond in self-defense to a hostile act or a demonstration of hostile intent.[128] In the *Corfu Channel* case, the Albanian government contended that Albania's sovereignty was violated because the passage of the British warships was not an innocent passage. In support of this contention, Albania contended that the passage was not ordinary because, inter alia, "the vessels passed with crews at action stations."[129] In view of the fact that Albanian shore batteries had fired on the British warships during a previous passage of the channel, the Court determined that it was not unreasonable for the warships to pass

> with crews at action stations, ready to retaliate quickly if fired upon. They passed . . . close to the Albanian Coast, at a time of political tension in this region. The intention must have been, not only to test Albania's attitude, but at the same time to demonstrate such force that [Albania] would abstain from firing again on passing ships. Having regard . . . to all the circumstances of the case . . . , the Court is unable to characterize these measures taken by the United Kingdom authorities as a violation of Albania's sovereignty.[130]

This case did not arise from the application of the law of neutrality. Nonetheless, the Court's determination that the transit of the strait by British warships with their crews at action stations was consistent with the right of transit and did not violate Albanian sovereignty sup-

126. UNCLOS, art. 39(1); DOD LAW OF WAR MANUAL, § 15.8.1.
127. DOD LAW OF WAR MANUAL, §§ 15.13.3, 15.8.1.
128. *Id.* § 15.8.1.
129. Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 30 (Apr. 9).
130. *Id.* at 31.

ports the conclusion that belligerent forces in transit may take defensive measures consistent with their security and may respond in self-defense to a hostile act or a demonstration of hostile intent.

7.3.7 Neutral Archipelagic Waters

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

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

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

Commentary

See § 1.5.4 (archipelagic waters and sea lanes), § 2.5.4 (navigation in archipelagic waters), and § 2.7.1.2 (archipelagic sea lanes).[131]

As a general rule, all acts of hostility in neutral jurisdiction, including neutral archipelagic waters, are forbidden, unless enemy troops, vessels, or aircraft make illegal use of neutral territory, waters, or air space, and the neutral State will not or cannot effectively enforce its rights against such offending belligerent forces.[132]

Article 1 of Hague XIII provides: "Belligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from any act which would . . . constitute a violation of neutrality." Under Article 2: "Any act of hostility, including capture and the exercise of the right of search, committed by belligerent war-ships in the territorial waters of a neutral Power, constitutes a violation of neutrality and is strictly forbidden." Article 5 provides: "Belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries . . . ." Article 1 of Hague V provides: "The territory of neutral Powers is inviolable."

A neutral State is required "to exercise such surveillance as the means at its disposal allow" to effectively detect and prevent any violation of its neutrality in archipelagic waters.[133]

Belligerent ships and aircraft have a right of unimpeded archipelagic sea lanes passage (ASLP) through, under, and over neutral archipelagic sea lanes.[134] Neutral archipelagic States shall not suspend or hamper the right of ASLP through all sea lanes and air routes used for international navigation through the archipelago.[135] Belligerent State forces exercising the right of ASLP must refrain from acts of

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131. *See also* DOD LAW OF WAR MANUAL, §§ 13.2.2.3, 13.2.2.4, 15.7.1, 15.8.2; UNCLOS, arts. 46–54.

132. NWIP 10-2, ¶ 441.

133. Hague XIII, art. 25.

134. DOD LAW OF WAR MANUAL, § 15.8.2; UNCLOS, art. 53(2).

135. DOD LAW OF WAR MANUAL, § 15.8.2; UNCLOS, arts. 44, 54.

> hostility and other activities not incident to their transit.[136] For example, belligerent State forces must refrain from exercising the right of visit and search while exercising the right of ASLP.[137] Belligerent State forces exercising the right of ASLP may, however, engage in those activities that are incident to their normal mode of continuous and expeditious passage, and that are consistent with their security, including formation steaming, acoustic and electronic surveillance, and the launching and recovery of military devices.[138]

7.3.8 Exclusive Economic Zone

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

Commentary

> See §§ 1.3.4, 1.6.2, and 2.6.2 for further discussion of the EEZ.
>
> The EEZ is a zone of limited, resource-related rights and jurisdiction adjacent to the territorial sea that may extend out to 200 nautical miles from the baseline. Coastal State sovereign rights in the EEZ must be exercised with "due regard" for the rights and duties of other States, such as the high seas freedoms of other States.[139] Article 56 of UNCLOS provides:
>
> > 1. In the exclusive economic zone, the coastal State has:
> >
> > > (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation

136. DOD LAW OF WAR MANUAL, § 15.8.2; UNCLOS, arts. 39, 54.
137. DOD LAW OF WAR MANUAL, §§ 15.13.3, 15.8.2.
138. *Id.* § 15.8.2; UNCLOS, art. 53(3).
139. DOD LAW OF WAR MANUAL, § 13.2.3.3.

> and exploration of the zone, such as the production of energy from the water, currents and winds;
>
> (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
>
> (i) the establishment and use of artificial islands, installations and structures;
>
> (ii) marine scientific research;
>
> (iii) the protection and preservation of the marine environment;
>
> (c) other rights and duties provided for in this Convention.
>
> 2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.
>
> 3. The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI.

Within the EEZ, all States enjoy high seas freedoms of navigation and overflight and other internationally lawful uses of the sea related to these freedoms, subject to a similar "due regard" obligation (in peacetime). Article 58 of UNCLOS provides:

> 1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables

> and pipelines, and compatible with the other provisions of this Convention.
>
> 2. Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.
>
> 3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.

To the extent that a similar "due regard" obligation applies during armed conflict, what regard would be due depends on military necessity and other principles and rules of the law of war, which are specially adapted to the circumstances of armed conflict.[140]

7.3.9 Neutral Airspace and Duties

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

1. The airspace above neutral international straits and archipelagic sea lanes (whether designated or not) remains open at all times to belligerent aircraft, including armed military aircraft, engaged in transit or archipelagic sea lanes passage. Such passage must be continuous and expeditious and must be undertaken in the normal mode of flight of the aircraft involved. Belligerent aircraft must refrain from acts of hostility while in transit, but may engage in activities consistent with their security and the security of accompanying surface and subsurface forces.

2. Medical aircraft may, with prior notice, overfly neutral territory, land therein in case of necessity, and use neutral airfield facilities as ports of

140. *Id.* § 3.1.1.

call, subject to such restrictions and regulations as the neutral State may see fit to apply equally to all belligerents.

3. Belligerent aircraft in evident distress may be permitted to enter neutral airspace and land in neutral territory under such safeguards as the neutral State may wish to impose. The neutral State must require such aircraft to land and must intern both aircraft and crew.

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

Commentary

The airspace over a neutral State's land territory, internal waters, territorial sea, and archipelagic waters is subject to the sovereignty of the neutral State and is considered neutral. The airspace over a neutral State's contiguous zone and EEZ, as well as the high seas, is not considered neutral airspace.[141]

Under the Hague Rules of Air Warfare, belligerent military aircraft are forbidden to penetrate into the jurisdiction of a neutral State.[142] Although these rules were never adopted in legally binding form, they are of importance "as an authoritative attempt to clarify and formulate rules of law governing the use of aircraft in war."[143] Belligerent military aircraft "may not enter neutral airspace except to address violations of neutrality by enemy forces when the neutral State is unwilling or unable to address such violations"[144] and "are forbidden to enter neutral airspace, subject to certain exceptions."[145]

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141. *Id.* § 15.10.1.
142. Hague Rules of Air Warfare, art. 40. *See also* NWIP 10-2, ¶ 444a.
143. LAUTERPACHT, 2 OPPENHEIM'S INTERNATIONAL LAW 519.
144. DOD LAW OF WAR MANUAL, § 15.10.
145. *Id.* § 15.10.2.

Exceptions to this prohibition include:

(1) The **medical aircraft of belligerents** may fly over neutral territory; may land thereon in case of necessity; or may use such neutral territory as a port of call, subject to such regulations as the neutral may see fit to apply equally to all belligerents.[146] "Belligerent States' medical aircraft may enter neutral airspace subject to certain conditions."[147]
(2) A neutral State may permit **unarmed belligerent military aircraft** to enter its space under such conditions as it may wish to impose. Where such aircraft enter without permission, the neutral State may intern the aircraft, together with their crews.[148]
(3) Belligerent military aircraft have the right to pass through international straits overlapped by neutral waters and archipelagic sea lanes of a neutral State.[149]
(4) Belligerent aircraft in evident distress may be permitted to enter neutral airspace and to land in neutral territory under such safeguards as the neutral State may wish to impose. The neutral State must require such aircraft to land and must intern both aircraft and crew.[150] "Neutral States should, however, permit aircraft in evident distress to enter their air space and land under such safeguards as they may wish to impose."[151]

Medical aircraft of parties to a conflict

> may fly over the territory of neutral Powers, land thereon in case of necessity, or use it as a port of call. They shall give neutral Powers prior notice of their passage over the said territory, and obey every summons to alight, on land or water. They will be immune from attack only when flying on routes,

146. NWIP 10-2, ¶ 444a1.
147. DoD Law of War Manual, § 15.10.2.
148. NWIP 10-2, ¶ 444a2.
149. DoD Law of War Manual, § 15.10.2.
150. *Id.*
151. NWIP 10-2, ¶ 444b.

> at heights and at times specifically agreed upon between the Parties to the conflict and the neutral Power concerned.[152]

Neutral States may "place conditions or restrictions on the passage or landing of medical aircraft on their territory," which "shall be applied equally to all Parties to the conflict."[153] Unless otherwise agreed between the neutral States and the parties to the conflict, "the wounded, sick or shipwrecked who are disembarked with the consent of the local authorities on neutral territory by medical aircraft shall be detained by the neutral Power, where so required by international law, in such a manner that they cannot again take part in operations of war."[154]

Neutral States have an affirmative duty to prevent violations of their airspace by belligerent military aircraft. If a belligerent military aircraft enters neutral airspace, the neutral State must "use the means at its disposal to require the belligerent military aircraft to land within its territory" and "intern the aircraft and its crew for the duration of the armed conflict."[155] With regard to "belligerent military aircraft which are forbidden to enter the air space of a neutral State, the neutral State should use the means at its disposal to prevent their entry; should compel such aircraft to land once they have entered; and should usually intern such aircraft, together with their crews."[156] A neutral State is "bound to use the means at its disposal to prevent belligerent military aircraft from entering its jurisdiction and to compel them to land or to alight on water if they have penetrated therein" and is "bound to employ the means at its disposal to intern every belligerent military aircraft which is found within its jurisdiction after landing or watering for whatever cause, as well as its crew and its passengers, if any."[157] A neutral State "which receives on its territory troops belonging to the belligerent armies shall intern them."[158]

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152. GC II, art. 40.
153. *Id.*
154. *Id.*
155. DOD LAW OF WAR MANUAL, § 15.10.3.
156. NWIP 10-2, ¶ 444b.
157. Hague Rules of Air Warfare, art. 42.
158. Hague V, art. 11.

If a neutral State is unable or unwilling to prevent the unlawful entry or use of its airspace by a belligerent State, the opposing belligerent State's forces may undertake such self-help enforcement measures as the circumstances may require.[159] See § 7.3.4 for a discussion of the belligerent right of self-help.

7.4 NEUTRAL COMMERCE

A principal purpose of the law of neutrality is the regulation of belligerent activities with respect to neutral commerce. For purposes of this publication, neutral commerce comprises all commerce between one neutral State and another not involving materials of war or armaments ultimately destined for a belligerent State, and all commerce between a neutral State and a belligerent that does not involve the carriage of contraband or otherwise contribute to the belligerent's warfighting/war-sustaining capability. Commanders participating in coalition operations should be aware that some of our allies and partners do not believe contraband includes war-sustaining materials. Although war-sustaining commerce is not subject to precise definition, commerce that indirectly, but effectively supports and sustains the belligerents' warfighting capability, properly falls within the scope of the term. Examples of war-sustaining commerce include imports of raw materials used for the production of armaments and exports of products the proceeds of which are used by the belligerent to purchase arms and armaments. Neutral merchant vessels and civil aircraft engaged in legitimate neutral commerce are subject to visit and search, but may not be captured or destroyed by belligerent forces. The law of neutrality does not prohibit neutral States from engaging in commerce with belligerent States. A neutral government cannot itself supply materials of war or armaments to a belligerent without violating its neutral duties of abstention and impartiality and risking loss of its neutral status. Although a neutral government may forbid its citizens from carrying on nonneutral commerce with belligerent States, it is not obligated to do so. If it does so, it must treat all belligerents impartially. The law establishes a balance-of-interests test to protect neutral commerce from unreasonable interference on one hand and the right of belligerents to interdict the flow of war materials to the enemy on the other.

159. DOD LAW OF WAR MANUAL, § 15.10.3.

Commentary

Neutral States must not provide war-related goods (i.e., warships, ammunition, or war material of any kind) and services to belligerents.[160] However, citizens of neutral States are not prohibited from such activity by the law of neutrality.[161] The rules on neutral commerce and the carriage of contraband seek to balance the right of neutral persons to conduct commerce free from unreasonable interference against the right of belligerent States to interdict the passage of war materials to the enemy. Neutral merchant vessels and civil aircraft engaged in legitimate neutral commerce are subject to visit and search (see § 7.6 below), but generally may not be captured or destroyed by belligerent forces. Neutral merchant vessels and civil aircraft, however, are subject to capture and other penalties if they engage in certain conduct (see § 7.10 below). Contraband goods are liable to capture at any place beyond neutral territory, if their destination is the territory belonging to, or occupied by, an opposing belligerent State (see §§ 7.4.1–7.4.1.2 below).[162]

7.4.1 Contraband

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

160. Hague XIII, art. 6; DOD LAW OF WAR MANUAL, § 15.12.
161. Hague XIII, art. 7; Hague V, art. 7; DOD LAW OF WAR MANUAL, § 15.12.
162. DOD LAW OF WAR MANUAL, § 15.12.

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

Commentary

Contraband consists of goods that are destined for an enemy of a belligerent and that may be susceptible to use in armed conflict.[163] Items susceptible to use in armed conflict include "war-sustaining commerce, i.e., commerce that indirectly but effectively supports and sustains the belligerent State's war fighting capability (e.g., imports of raw materials used for the production of armaments and exports of products whose proceeds are used by the belligerent State to purchase arms and armaments)."[164] Whether an item is susceptible to use in armed conflict may depend on the character of the item.[165]

Traditionally, contraband had been divided into two categories, absolute and conditional. Absolute contraband consisted of goods whose character was such that they were obviously destined for use in armed conflict, such as munitions, weapons, uniforms, and the like. Conditional contraband consisted of goods equally susceptible to either peaceful or warlike purposes, such as foodstuffs, construction materials, and fuel.[166]

163. *Id.* § 15.12.1; NWIP 10-2, ¶ 631a.
164. DOD LAW OF WAR MANUAL, § 15.12.1.
165. *Id.* § 15.12.1.1.
166. *Id.*; NWIP 10-2, ¶ 631a.

> During the Second World War, belligerent States largely did not distinguish between absolute and conditional contraband because virtually the entire population was involved in support of the war effort and because the belligerent States exercised governmental control over all imports.[167]
>
> Upon the initiation of armed conflict, belligerents may declare contraband lists that set forth the classification of articles regarded as contraband, as well as the distinction to be made between goods considered as absolute contraband and goods considered as conditional contraband. The precise nature of a belligerent's contraband list may vary according to the particular circumstances of the armed conflict.[168] For example, in December 1971, Pakistan and India each declared contraband lists containing items traditionally considered to be absolute contraband.[169]
>
> State practice indicates that, to the extent that international law may continue to require publication of contraband lists, the requirement may be satisfied by a listing of exempt goods.[170]

7.4.1.1 Exemptions to Contraband—Free Goods

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

1. Articles intended exclusively for the treatment of wounded and sick members of the armed forces and for prevention of disease. The particulars concerning the carriage of such articles must be transmitted to the belligerent State and approved by it.

2. Medical and hospital stores, religious objects, clothing, bedding, essential foodstuffs, and means of shelter for the civilian population in general—and women and children in particular—provided there is not

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167. DOD LAW OF WAR MANUAL, § 15.12.1.1.

168. *Id.* § 15.12.1.3; NWIP 10-2, ¶ 631b.

169. *See* Steven C. Nelson, Office of the Legal Adviser, Department of State, *Contemporary Practice of the United States Relating to International Law*, 66 AMERICAN JOURNAL OF INTERNATIONAL LAW 378, 386–87 (1972).

170. DOD LAW OF WAR MANUAL, § 15.12.1.3.

serious reason to believe that such goods will be diverted to other purpose, or that a definite military advantage would accrue to the enemy by their substitution for enemy goods would thereby become available for military purposes

3. Items destined for POWs, including individual parcels and collective relief shipments containing food; clothing; medical supplies; religious objects; and educational, cultural, and athletic articles

4. Goods otherwise specifically exempted from capture by international convention or by special arrangement between belligerents.

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

Commentary

Goods qualifying as "free goods" (goods not susceptible to use in war) are exempt from capture by belligerent States as contraband even though they are destined for enemy territory.[171] Free goods include:

- equipment exclusively intended for the treatment of wounded and sick members of armed forces or for the prevention of disease, provided that the particulars regarding the voyage of such equipment have been notified to and approved by the opposing belligerent State;[172]
- consignments of certain types of relief goods (e.g., medical supplies and religious materials for civilians; clothing and medicine for children under fifteen, expectant mothers, and maternity cases), under certain conditions;[173]
- certain types of relief consignments intended for the benefit of the population of occupied territory;

171. *Id.* § 15.12.1.2; NWIP 10-2, ¶ 631e1.
172. *See, e.g.*, GC II, art. 38.
173. *See* GC IV, arts. 23, 59; AP I, art. 70.

- items destined for POWs, including individual parcels and collective relief shipments containing food, clothing, medical supplies, religious objects, and educational, cultural, and athletic articles;[174] and
- other goods that are specifically exempted from capture by an applicable treaty or by a special arrangement between belligerent States.[175]

As an example of the last category, "[t]he postal correspondence of neutrals or belligerents, whatever its official or private character may be, found on the high seas on board a neutral or enemy ship, is inviolable. If the ship is detained, the correspondence is forwarded by the captor with the least possible delay."[176]

In practice, neutral States have provided belligerent States of both sides with information regarding the nature, timing, and route of shipments of goods constituting exceptions to contraband and have obtained approval for their safe conduct and entry into belligerent owned or occupied territory.[177]

7.4.1.2 Enemy Destination

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

1. The neutral vessel is to call at an enemy port before arriving at a neutral port for which the goods are documented.

2. The goods are documented to a neutral port serving as a port of transit to an enemy, even though they are consigned to a neutral.

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174. *See* GC III, arts. 72–75, annex III.
175. DOD LAW OF WAR MANUAL, § 15.12.1.2; NWIP 10-2, ¶ 631e2–3.
176. Hague XI, art. 1.
177. DOD LAW OF WAR MANUAL, § 15.12.1.2.

3. The goods are consigned to order or to an unnamed consignee, but are destined for a neutral State in the vicinity of enemy territory.

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

Commentary

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.[178] Vessels and aircraft carrying goods liable to capture as absolute or conditional contraband may be captured.[179] However, liability to capture for carriage of contraband ceases once a vessel or aircraft has deposited the contraband goods.[180]

It is immaterial whether the carriage of contraband is direct, involves transshipment, or requires overland transport. Under the doctrine of continuous voyage, the ultimate destination is determinative, and contraband goods may be captured, even if there are neutral ports that are intended to be visited between the point of capture and the ultimate destination.[181] For example, in *The Pedro*, the U.S. Supreme Court stated:

> In *The Circassian*, 2 Wall. 514, it was ruled that the intent to violate a blockade, found as a fact, was not disproved by evidence of a purpose to call at a neutral port, not reached at time of capture, with ulterior destination to the blockaded port. In *The Bermuda*, 3 Wall. 514, the actual destination to a belligerent port, whether ulterior or direct, was held to determine the character of the transaction as a whole; that transhipment could not change the effect of the pursuit of a common object by a common plan; and that if the cargo was

178. *Id.* § 15.12.2; NWIP 10-2, ¶ 631c1–2.
179. DOD LAW OF WAR MANUAL, § 15.15.1; NWIP 10-2, ¶¶ 503d1, 631d.
180. NWIP 10-2, ¶ 631d.
181. DOD LAW OF WAR MANUAL, § 15.12.2.1; NWIP 10-2, ¶ 631c1–2.

> contraband its condemnation was justified, whether the voyage was to ports blockaded or to ports not blockaded; and so as to the vessel in the former case. And in *The Springbok*, 5 Wall. 1, it was held that an intention to tranship cargo at a neutral port did not save it when destined for a blockaded port; that as to cargo, both in law and intent, the voyage from London to the blockaded port was one voyage, and that the liability attached from the time of sailing if captured during any part of that voyage.[182]

When contraband is involved, a destination of enemy-owned or enemy-occupied territory may be presumed when:

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

These presumptions of enemy destination constitute sufficient cause for naval commanders to order a capture.[183]

7.4.2 Certificate of Noncontraband Carriage

A certificate of noncontraband carriage is a document issued by a belligerent consular or other designated official to a neutral vessel (navicert) or neutral aircraft (aircert) certifying the cargo being carried has been examined, usually at the initial place of departure, and has been found to be free of contraband. The purpose of such a navicert or aircert is to facilitate belligerent control of contraband goods with minimal interference and delay of neutral commerce. The certificate is not a guarantee the vessel or aircraft will not be subject to visit and search or cargo will not be seized. (Changed circumstances, such as a change in status of the neutral vessel, between the time of issuance of the

182. The Pedro, 175 U.S. 354, 365–66 (1899).
183. DOD LAW OF WAR MANUAL, § 15.12.2.2; NWIP 10-2, ¶ 631c1.

certificate and the time of interception at sea may cause it to be invalidated.) The absence of a navicert or aircert is not, in itself, a valid ground for seizure of cargo. Navicerts and aircerts issued by one belligerent have no effect on the visit and search rights of a belligerent of the opposing side. The acceptance of a navicert or aircert by a neutral ship or aircraft does not constitute unneutral service.

Commentary

A belligerent consular or other designated official may issue a certificate of noncontraband carriage 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 certificates 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. For example, 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 the certificate to be invalidated. Conversely, the absence of a certificate is not, in itself, a valid ground for seizure of cargo. Certificates issued by one belligerent do not limit the visit and search rights of an opposing belligerent. When a neutral ship or aircraft accepts a certificate from one belligerent, this may affect how the other belligerent views the neutrality of that aircraft or vessel.[184]

Although not an armed conflict, the United States used a similar procedure—issuing clearance certificates (clearcerts)—during the Cuban Missile Crisis:[185]

> The Department of State announced on October 27 the institution of a system of clearances to assist vessels which transit waters in the vicinity of Cuba and vessels destined for Cuban ports with cargoes containing no offensive weapons or associated materiel.

184. DOD LAW OF WAR MANUAL, § 15.12.3.
185. *Id.*

> The system, developed by the State, Defense, and Treasury Departments, is designed to avoid unnecessary delays and other difficulties arising out of the stoppage, inspection, or possible diversion of ships.
>
> The system is for the convenience of shipping, and clearances are obtainable upon application by ships' owners, agents, or officers.
>
> A vessel departing a United States port may obtain a special clearance from customs authorities at the port of departure. A vessel departing a foreign port may obtain the clearance from an American consulate.[186]

7.5 ACQUIRING ENEMY CHARACTER

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

Commentary

See DoD Law of War Manual, § 15.14; NWIP 10-2, ¶ 501.

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186. Press Release, U.S. Department of State, U.S. Acts to Avoid Delays for Ships Transiting Waters in Vicinity of Cuba (Oct. 27, 1962), *reprinted in* 47 DEPARTMENT OF STATE BULLETIN 747 (Nov. 12, 1962).

> Vessels or aircraft may acquire enemy character from (1) the ownership or control of the vessel or aircraft, or (2) their conduct.[187] A neutral flag or neutral markings cannot serve as a device to protect vessels or aircraft from seizure whose actual status indicates either continued ownership or control by individuals who themselves possess enemy character. Such vessels may be subject to treatment as enemy merchant vessels or civil aircraft, including being subject to capture.[188]

7.5.1 Acquiring the Character of an Enemy Warship or Military Aircraft

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

1. Taking a direct part in the hostilities on the side of the enemy

2. Acting in any capacity as a naval or military auxiliary to the enemy's armed forces. Actions that may be taken against enemy warships and military aircraft are described in 8.6.1.

Commentary

See DoD Law of War Manual, § 15.14.2.1; NWIP 10-2, ¶ 501a.

It is not the mere fact of assisting a belligerent that permits treating a neutral merchant vessel or civil aircraft as an enemy warship or military aircraft:

> Nor is it simply the consideration that the belligerent exercises a close control and direction over the neutral merchant vessel. The decisive consideration is rather that the services rendered are in direct support of the belligerent's military operations. It is this support, leading as it does to the identification of the neutral merchant vessel (or aircraft) with the

187. DoD Law of War Manual, § 15.14; NWIP 10-2, ¶ 501.
188. DoD Law of War Manual, § 15.14.1

belligerent's naval or military forces, that permits a treatment similar to that meted out to these forces.[189]

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

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

1. Operating directly under enemy control, orders, charter, employment, or direction

2. Resisting an attempt to establish identity, including resisting visit and search. Actions that may be taken against enemy merchant vessels and civil aircraft are described in 8.6.2.

Commentary

See DoD Law of War Manual, § 15.14.2.2; NWIP 10-2, ¶ 501b.

7.6 VISIT AND SEARCH

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

Warships and naval auxiliaries are not subject to visit and search. Other neutral vessels engaged in government noncommercial service may not be subjected to visit and search. Clarification on this point should be issued by the operational chain of command. Neutral merchant vessels under convoy of neutral warships of the same nationality are exempt from visit and search, although the convoy commander may be required to provide in writing to the commanding officer of an intercepting belligerent warship information as to the character of the vessels and their cargoes, which could otherwise

189. Tucker, *supra* note 88, at 321.

be obtained by visit and search. Should it be determined by the convoy commander that a vessel under their charge possesses enemy character or carries contraband cargo, they are obliged to withdraw their protection of the offending vessel, making it liable to visit and search, and possible capture, by the belligerent warship. The prohibition against visit and search in neutral territory extends to international straits overlapped by neutral territorial seas and to archipelagic waters, including archipelagic sea lanes (whether designated or not).

Commentary

The belligerent right of visit and search is a necessary part of the belligerent's right to capture enemy merchant vessels and civil aircraft, and to capture neutral merchant vessels and civil aircraft that have engaged in violations of neutrality.[190] Visit and search can be conducted with the object of:

(1) ascertaining the character of the vessel or aircraft and its nationality (including assessing whether a vessel or aircraft that is flagged to a neutral State has acquired enemy character by engaging in service to the enemy);
(2) verifying whether the vessel conveys contraband cargo;
(3) verifying whether the vessel has committed a breach of blockade; or
(4) verifying whether the vessel or aircraft has committed another violation of neutrality making it liable to capture.[191]

Warships of belligerents "have the right to stop and visit on the high seas and in territorial waters that are not neutral any merchant ship with the object of ascertaining its character and nationality and of verifying whether it conveys cargo prohibited by international law or has committed any violation of blockade."[192] The belligerent right of visit and search "may be exercised anywhere outside of neutral jurisdiction upon all merchant vessels and aircraft in order to determine

190. *See, e.g.*, NEWPORT MANUAL, § 9.9.
191. DOD LAW OF WAR MANUAL, § 15.13.1.
192. Havana Convention, art. 1.

their character (enemy or neutral), the nature of their cargo, the manner of their employment, or other facts which bear on their relation to the war."[193] Further, under the law of armed conflict,

> belligerent warships or aircraft may visit and search a merchant vessel for the purpose of determining its true character, i.e., enemy or neutral, nature of cargo, manner of employment and other facts bearing on its relation to the conflict. Such visits occur outside neutral territorial seas. This right does not extend to visiting or searching warships or vessels engaged in government non-commercial service. In addition, neutral merchant vessels in convoy of neutral warships are exempt from visit and search, although the convoy commander may be required to certify the neutral character of merchant vessels' cargo.[194]

In *The Nereide*, the U.S. Supreme Court stated:

> Belligerents have a full and perfect right to capture enemy goods and articles going to their enemy which are contraband of war. To the exercise of that right the right of search is essential. It is a mean justified by the end. It has been truely denominated a right growing out of, and ancillary to the greater right of capture. Where this greater right may be legally exercised without search, the right of search can never arise or come into question.[195]

Vessels and aircraft exempt from the belligerent right of visit and search include:

(1) neutral warships;
(2) neutral State aircraft (including military aircraft);
(3) ships of neutral States used only on government non-commercial service; and

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193. NWIP 10-2, ¶ 502a.

194. OPNAVINST 3120.32D, Standard Organization and Regulations of the U.S. Navy (SORM), encl. 1 at 6-109 to 6-114 (Ch. 1, May 15, 2017).

195. The Nereide, 13 U.S. 388, 427–28 (1815).

> (4) neutral merchant vessels under convoy of neutral warships of the same nationality, and neutral aircraft accompanied by neutral military aircraft of the same nationality.[196]

Neutral warships have complete immunity from the jurisdiction of any State other than the flag State,[197] as provided in Article 95 of UNCLOS: "Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State." Similarly, neutral State aircraft (including military aircraft) are immune from visit and search by foreign States.[198] Ships owned or operated by a neutral State and used only on government non-commercial service also enjoy complete immunity from the jurisdiction of any State other than the flag State,[199] as provided in Article 96 of UNCLOS: "Ships owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State."

During the Iraq-Iran War, the United States relied on the doctrine of "right of convoy" when it registered eleven Kuwaiti-owned tankers under the U.S. flag.[200] Neutral merchant vessels under convoy of neutral warships of the same nationality are exempt from visit and search because the neutral State has provided an assurance that the neutral vessel is not engaged in violations of neutrality: "Neutral vessels under national convoy are exempt from search. The commander of a convoy gives, in writing, at the request of the commander of a belligerent warship, all information as to the character of the vessels and their cargoes, which could be obtained by search."[201] Thus, "[v]essels convoyed by a neutral war-ship are not subject to visit except in so far as permitted by the rules relating to convoys."[202] If the commander of the belligerent warship has reason to suspect that the

196. DOD LAW OF WAR MANUAL, § 15.13.2.
197. *Id.* § 15.13.2.1.
198. *Id.* § 15.13.2.2.
199. *Id.* § 15.13.2.3.
200. John H. McNeill, *Neutral Rights and Maritime Sanctions: The Effects of Two Gulf Wars*, 31 VIRGINIA JOURNAL OF INTERNATIONAL LAW 631, 635 (1991).
201. London Declaration of 1909, art. 61.
202. Oxford Manual, art. 32.

confidence of the convoy commander has been abused, the commander of the belligerent warship shall communicate his suspicions to the convoy commander. In such a case, the convoy commander shall investigate the matter, record the results of the investigation in a report, and provide a copy to the commander of the belligerent warship. If, in the opinion of the convoy commander, the facts "justify the capture of one or more vessels, the protection of the convoy must be withdrawn from such vessels."[203]

Neutral civil aircraft accompanied by neutral military aircraft of the same flag may also be exempt from visit and search if (1) the flag State of a neutral military aircraft warrants that the neutral civil aircraft is not carrying contraband cargo; and (2) the commander of the neutral military aircraft provides to the intercepting belligerent military aircraft upon request all information as to the character and cargo of the neutral civil aircraft that would otherwise be obtained by a visit and search.[204]

The belligerent right of visit and search is considered an act of hostility and may not be conducted within neutral territory, waters, or airspace. This prohibition on the exercise of the belligerent right of visit and search extends to international straits overlapped by neutral territorial seas and to neutral archipelagic sea lanes.[205] Article 2 of Hague XIII provides that "[a]ny act of hostility, including capture and the exercise of the right of search, committed by belligerent warships in the territorial waters of a neutral Power, constitutes a violation of neutrality and is strictly forbidden." Article 1(1) of the Havana Convention provides:

> Warships of the belligerents have the right to stop and visit on the high seas and in territorial waters that are not neutral any merchant ship with the object of ascertaining its character and nationality and of verifying whether it conveys cargo prohibited by international law or has committed any violation of blockade.

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203. London Declaration of 1909, art. 62.
204. DOD LAW OF WAR MANUAL, § 15.13.2.4.
205. *Id.* § 15.13.3.

NWIP 10-2 states: "As a general rule, all acts of hostility in neutral jurisdiction are forbidden. This includes both visit and search and capture or destruction."[206]

7.6.1 Procedure for Visit and Search of Merchant Vessels

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

1. Visit and search should be exercised with all possible tact and consideration.

2. Before summoning a vessel to lie to, the warship should hoist its national flag. The summons is made by firing a blank charge, by international flag signal (SN or SQ), or by other recognized means. The summoned vessel, if a neutral merchant ship, is bound to stop, lie to, display her colors, and not resist. If the summoned vessel is an enemy ship, it is not bound and may legally resist, even by force, but thereby assumes all risk of resulting damage or destruction.

3. Merchant vessels or civil aircraft that comply with instructions given to them may not be made the object of attack. Merchant ships or civil aircraft that refuse to comply may be stopped by force. Merchant ships or civil aircraft that resist visit and search assume the risk of resulting damage. Such vessels or aircraft may be deemed to acquire the character of enemy merchant ships or civil aircraft.

4. When a summoned vessel has been brought to, the warship should send a boat with an officer to conduct the visit and search. If practicable, a second officer should accompany the officer charged with the examination. The officer(s) and boat crew may be armed at the discretion of the commanding officer.

206. NWIP 10-2, ¶ 441.

5. If visit and search at sea is deemed hazardous or impracticable, the neutral vessel may be escorted by the summoning, or another, U.S. warship or by a U.S. military aircraft to the nearest place (outside neutral territory) where the visit and search may be conveniently and safely conducted. The neutral vessel is not obliged to lower her flag (she has not been captured) but must proceed according to the orders of the escorting warship or aircraft.

6. The boarding officer should first examine the ship's papers to ascertain her character, ports of departure and destination, nature of cargo, manner of employment, and other facts deemed pertinent. Papers to be examined will include a certificate of national registry, crew list, passenger list, logbook, bill of health clearances, charter party (if chartered), invoices or manifests of cargo, bills of lading, and on occasion, a consular declaration or other certificate of noncontraband carriage certifying the innocence of the cargo.

7. Regularity of papers and evidence of innocence of cargo, employment, or destination furnished by them are not necessarily conclusive, and, should doubt exist, the ship's company may be questioned and the ship and cargo searched.

8. Unless military security prohibits, the boarding officer will record the facts concerning the visit and search in the logbook of the visited ship, to include the date and position of the interception. The entry should be authenticated by the signature and rank of the boarding officer, but neither the name of the visiting warship nor the identity of her commanding officer should be disclosed.

Commentary

Customary international law prescribes "detailed rules governing the mode of conducting visit and search and belligerents have always enjoyed a certain discretion in this regard."[207] Generally, the belligerent warship will initially show its true color and provide a clear signal to the merchant vessel that it is expected to submit to visit and search. The notification of intention to visit may be accomplished

207. Tucker, *supra* note 88, at 336; DOD LAW OF WAR MANUAL, § 15.13.4.

"by firing a blank charge, by international flag signal, or even by radio."[208]

If a merchant vessel "does not heed the signal to stop, it may be pursued by the warship and stopped by force; outside of such a case the ship cannot be attacked unless, after being hailed, it fails to observe the instructions given it."[209]

Methods of visit and search of merchant vessels are also contained in NWIP 10-2, ¶ 502b (parentheticals omitted):

> In the absence of special instructions issued during a period of armed conflict, the following procedure should be carried out:
>
> 1. In general, the belligerent right of visit and search should be exercised with all possible tact and consideration.
>
> 2. Before summoning a vessel to lie to, a warship must hoist her own national flag. The summons should be made by firing a blank charge, by international flag signal, or by other recognized means. The summoned vessel, if a neutral, is bound to stop, lie to, and display her colors: if an enemy vessel, she is not so bound and legally may even resist by force, but she thereby assumes all risks of resulting damage. On the other hand, a neutral merchant vessel is obligated not to resist the belligerent right of visit and search.
>
> 3. If a summoned vessel takes to 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 arming

208. Tucker, *supra* note 88, at 336; DOD LAW OF WAR MANUAL, § 15.13.4; Oxford Manual, art. 32.

209. Havana Convention, art. 1(1); DOD LAW OF WAR MANUAL, § 15.13.4.1.

of the officers and of the boat's crew is left to the discretion of the commanding officer of the visiting vessel.

5. If visit and search at sea of a neutral merchant vessel is deemed hazardous or impracticable, the neutral vessel may be escorted by the summoning vessel or by another vessel or by aircraft to the nearest place where search may be made conveniently. In this case, the neutral vessel should not be required to lower her flag, since she has not been captured, but she must proceed according to orders of the escorting vessel or aircraft. A neutral vessel disobeying a belligerent's orders may be captured and sent in for adjudication.

6. A boarding officer should first examine a ship's papers in order to determine her character, ports of departure and destination, nature of cargo and employment, and other facts deemed essential. The papers which are generally found on board a merchant vessel are:

(a) Certificate of registry of nationality
(b) Crew list
(c) Passenger list
(d) Log book
(e) Bill of health
(f) Clearance
(g) Charter party, if chartered
(h) Invoices or manifests of cargo
(i) Bills of lading
(j) A consular declaration certifying the innocence of the cargo may be included.

7. The evidence furnished by papers against a vessel may be taken as conclusive. However, regularity of papers and evidence of innocence of cargo or destination furnished by them are not necessarily conclusive, and if any doubt exists the personnel of the vessel should be questioned and a search made, if practicable, of the ship or cargo. There are many circumstances which may raise legitimate doubt or suspicion. For example, if a vessel has deviated far from her direct

> course, this, if not satisfactorily explained, is a suspicious circumstance warranting search, however favorable the character of the papers. If search, under suspicious circumstances, does not satisfy a boarding officer of the innocence of a vessel, the vessel should be captured and sent in for adjudication. Even though a prize court may later order the release of the vessel, the commander sending the vessel in for adjudication acted properly if the result of visit and search appeared to furnish probable cause for capture.
>
> 8. When sending in a captured vessel as prize, the detailed prize procedures contained in *Instructions for Prize Masters and Special Prize Commissioners* (NAVEXOS P-825) are to be followed.
>
> 9. Unless military security prohibits, the boarding officer must record the facts concerning the visit and search in the log book of the vessel visited, including the date when and the position where the visit occurred. The entry in the log book should be authenticated by the signature and rank of the boarding officer. Neither the name of the visiting vessel nor the name and rank of her commanding officer should be disclosed.[210]

Similarly, the Standard Organization and Regulations Manual (SORM)[211] outlines procedures for U.S. Navy prize crews:

> The prize crew is organized and trained to navigate, operate and administer a seized, captured, or abandoned ship with or without the cooperation of the crew; to bring it safely into port; and to deliver it to the appropriate authorities for examination or adjudication:
>
> (a) The Prize Master shall, when ordered by the commanding officer, command the prize or abandoned ship and prize crew in all operations, subject to the

210. NWIP 10-2, ¶ 502b (parenthetical cross-references omitted).
211. OPNAVINST 3120.32D, *supra* note 194.

orders of the commanding officer of this ship or other higher authority. They shall discharge the responsibilities prescribed in NAVREGS for a commanding officer.

(b) The Prize Crew executive officer shall organize and train prize crew personnel. They shall act as Prize Crew Master when the prize crew is mustered or drilled. When on board a prize or abandoned ship, they shall discharge the responsibilities prescribed for an executive officer.

(c) The Prize Crew 1LT shall organize, train, and command the deck force, Marine detachment and supply personnel of the prize crew during drills on board a prize or abandoned ship. They shall have the responsibilities and authority prescribed for a head of detachment.

(d) The prize crew operations officer shall organize, train and command the communications and navigation personnel of the prize crew during drills on board a prize or abandoned ship. They shall have the responsibilities and authority prescribed for the operations officer and navigator.

(e) The prize crew engineer officer shall organize, train and command the engineering and damage control personnel of the prize crew during drills on board a prize or abandoned ship. They shall have the responsibilities and authority prescribed for the engineer officer.

(f) The prize crew medical officer shall organize, train, and command the medical personnel of the prize crew during drills on board a prize or abandoned ship. They shall have responsibilities and authority prescribed for the medical officer. In the event that a hospital corpsman must be assigned to direct the medical personnel of the prize crew, the ship's medical officer shall be responsible for functions of organization and training, and the assigned hospital corpsman shall be responsible, under the prize crew

executive officer, for providing medical treatment for personnel of the seized ship and the prize crew.[212]

7.6.2 Visit and Search of Merchant Vessels by Military Aircraft

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

Commentary

See DoD Law of War Manual, § 15.13.4.2.

7.6.3 Visit and Search of Civilian Aircraft by Military Aircraft

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

Commentary

See DoD Law of War Manual, § 15.13.4.3.

212. *Id.* encl. 1 at 6-109 to 6-114.

7.7 BLOCKADE

7.7.1 General

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

Commentary

The purpose of a blockade is to deprive the adversary of supplies needed to conduct hostilities. A blockade enables the blockading State to control traffic in the blockaded area. A blockade also enables the blockading State to take measures on the high seas (e.g., right of visit and search on the high seas to enforce the blockade) to deny supplies to a blockaded area.[213]

"A blockade is a belligerent operation intended to prevent vessels of all States from entering or leaving specified coastal areas which are under the sovereignty, under the occupation, or under the control of an enemy. Such areas may include ports and harbors, the entire coastline, or parts of it."[214] A blockade by sea can be extended to include the air space above those portions of the high seas in which the blockading forces are operating.[215]

7.7.2 Criteria for Blockades

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

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213. DOD LAW OF WAR MANUAL, §§ 13.10, 13.10.1. *See also* NEWPORT MANUAL, § 7.4.
214. NWIP 10-2, ¶ 632a.
215. *Id.*

Commentary

A concise statement of the criteria and the rationale for their development appears in the ICRC Commentary to AP I:

> Nevertheless, the fact remains that the possibility of a blockade exists provided that some conditions are fulfilled. Thus, it must be preceded by a declaration indicating its duration and the area covered; it must be effective and applied impartially to ships of all countries; neutral States must be informed of blockades which have been implemented against a Party to the conflict.[216]

7.7.2.1 Establishment

A blockade must be established by the government of the belligerent State. This is accomplished by a declaration of the belligerent government or by the commander of the blockading force acting on behalf of the belligerent government. The declaration should include, at a minimum, the date the blockade is to begin, its geographic limits, and the grace period granted neutral vessels and aircraft to leave the area to be blockaded. Only the President or the SECDEF can direct establishment of a blockade by U.S. forces. Although it is the customary practice of States when declaring a blockade to specify a period during which neutral vessels and aircraft may leave the blockaded area, there is no uniformity with respect to the length of the grace period. A belligerent declaring a blockade is free to fix as long a grace period as it considers reasonable under the circumstances.

Commentary

To be binding, a blockade must be established by the belligerent government concerned. A blockade may be declared either by the government of the blockading State or by the commander of the blockading force acting on behalf of the government. The declaration should specify (1) the date the blockade begins; (2) the geographical limits of the blockade; and (3) the period granted neutral vessels and

216. ICRC AP COMMENTARY, ¶ 2094.

aircraft to leave the blockaded area.[217] The United States has taken the following position:

> The traditional law of blockade requires a formal declaration of the establishment of the blockade and notification of it to all states. A blockade must be "effective" in preventing all ingress or egress—including commercial trade and activities—from or to the enemy's coast. The blockading state would have the right to stop vessels of any nation anywhere on the high seas, to inspect and search such vessels, to seize them if they are bound to or from the blockaded ports, and eventually to condemn them and their cargos in a prize court. Ships attempting to violate the blockade could be taken under fire should they fail to stop on order.[218]

A blockade may also be established by the UN Security Council:

> 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 of the United Nations.[219]

7.7.2.2 Notification

It is customary for the belligerent State establishing the blockade to notify all affected States of its imposition. Because knowledge of the existence of a blockade is an essential element of the offenses of breach and attempted breach of blockade (see 7.7.4), neutral vessels and aircraft are always entitled to notification. The commander of the blockading forces will notify local

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217. NWIP 10-2, ¶ 632b; London Declaration of 1909, art. 9; DOD LAW OF WAR MANUAL, § 13.10.2.1.

218. Letter dated June 6, 1972 from John Reese Stevenson, Legal Adviser, Department of State, *reprinted in* Steven C. Nelson, *Contemporary Practice of the United States Relating to International Law*, 66 AMERICAN JOURNAL OF INTERNATIONAL LAW 836, 837 (1972).

219. U.N. Charter, art. 42.

authorities in the blockaded area. The form of the notification is not material, so long as it is effective.

Commentary

A declaration of blockade is notified, by the blockading State, directly to the governments of neutral powers or their accredited representative. The declaration of blockade shall also be notified, by the commanding officer of the blockading force, to the local authorities. The local authorities will, in turn, inform the foreign consular officers at the port or on the coastline under blockade as soon as possible.[220] "It is customary for the blockade to be notified in a suitable manner to the governments of all States. The commander of the blockading force usually makes notification to local authorities in the blockaded area."[221]

Article 16 of the London Declaration of 1909 provides:

> If a vessel approaching a blockaded port has no knowledge, actual or presumptive, of the blockade, the notification must be made to the vessel itself by an officer of one of the ships of the blockading force. This notification should be entered in the vessel's logbook, and must state the day and hour, and the geographical position of the vessel at the time.[222]

At a minimum, the notification should include "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."[223] The notification establishes a presumption of knowledge of the blockade that is required in the offense of breach or attempted breach of a blockade.[224]

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220. London Declaration of 1909, art. 11; DOD LAW OF WAR MANUAL, § 13.10.2.2.

221. NWIP 10-2, ¶ 632c.

222. London Declaration of 1909, art. 16.

223. DOD LAW OF WAR MANUAL, § 13.10.2.2; NWIP 10-2, ¶ 632b; London Declaration of 1909, art. 9.

224. DOD LAW OF WAR MANUAL, § 13.10.2.2.

An example of a declaration of blockade is the U.S. announcement of the naval mining of North Vietnam. On May 8, 1972, President Richard Nixon made a public address on nationwide television to announce the commencement of Operation Pocket Money, the naval mining of North Vietnam's coast and harbors:

> In full coordination with the Republic of Vietnam, I have ordered the following measures which are being implemented as I am speaking to you. All entrances to North Vietnamese ports will be mined to prevent access to these ports and North Vietnamese naval operations from these ports. United States forces have been directed to take appropriate measures within the internal and claimed territorial waters of North Vietnam to interdict the delivery of any supplies. Rail and all other communications will be cut off to the maximum extent possible. Air and naval strikes against military targets in North Vietnam will continue.
>
> These actions are not directed against any other nation. Countries with ships presently in North Vietnamese ports have already been notified that their ships will have three daylight periods to leave in safety. After that time, the mines will become active and any ships attempting to leave or enter these ports will do so at their own risk.
>
> These actions I have ordered will cease when the following conditions are met:
>
> First, all American prisoners of war must be returned.
>
> Second, there must be an internationally supervised cease-fire throughout Indochina.[225]

On May 9, A-6 Intruders and A-7 Corsairs, launched from the USS *Coral Sea* (CV 43),

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225. Address to the Nation in the Situation in Southeast Asia, PUB. PAPERS 583–87 (May 8, 1972).

> dropped magnetic-acoustic sea mines in the river approaches to Haiphong, North Vietnam's chief port. Shortly thereafter, the other major ports were mined as well. Over 85 percent of the country's military imports passed through these ports. Washington gave foreign ships three days to depart the country, after which the mines armed themselves. Despite this advance notice, 32 foreign, mostly Communist ships elected to remain trapped in North Vietnamese waters.[226]

7.7.2.3 Effectiveness

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

Commentary

> In order to be binding, a blockade must be effective—"that is to say, it must be maintained by a force sufficient really to prevent access to the enemy coastline."[227] Similarly: "A blockade, in order to be binding, must be effective. This means that a blockade must be maintained by a force sufficient to render ingress and egress to or from the blockaded area dangerous."[228] In *The Olinde Rodrigues*, the U.S. Supreme Court stated:

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226. *By Air, Sea, and Land, Chapter 4: Winding Down the War, 1968–1973*, NAVAL HISTORY AND HERITAGE COMMAND, https://www.history.navy.mil/research/library/online-reading-room/title-list-alphabetically/b/by-sea-air-land-marolda/chapter-4-winding-down-the-war-1968-1973.html.

227. London Declaration of 1909, art. 2. *See also* Paris Declaration of 1856.

228. NWIP 10-2, ¶ 632d.

> Such is the settled doctrine of the English and American courts and publicists, and it is embodied in the second of the instructions issued by the Secretary of the Navy, June 20, 1898, General Order No. 492: "A blockade, to be effective and binding, must be maintained by a force sufficient to render ingress to or egress from the port dangerous."[229]

A "paper" blockade is therefore invalid. In *The Peterhoff*, the Court held:

> [N]o paper or constructive blockade is allowed by international law. When such blockades have been attempted by other nations, the United States have ever protested against them and denied their validity. Their illegality . . . was solemnly proclaimed in the Declaration of Paris of 1856, to which most of the civilized nations of the world have since adhered; and this principle is nowhere more fully recognized than in our own country, though not a party to that declaration.[230]

In *The Olinde Rodrigues*, the Court stated:

> The fourth maxim of the Declaration of Paris (April 16, 1856) was:
>
> "Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy."
>
> . . . .
>
> The object [of this definition] was to correct the abuse, in the early part of the century, of paper blockades, where extensive coasts were put under blockade by proclamation, without the

229. The Olinde Rodrigues, 174 U.S. 510, 515 (1899).
230. The Peterhoff, 72 U.S. 28, 50 (1867).

> presence of any force, or an inadequate force; and the question of what might be sufficient force was necessarily left to be determined according to the particular circumstances.[231]

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).[232] "A blockade is not regarded as raised if the blockading force is temporarily withdrawn on account of stress of weather."[233]

The forces that are necessary to make a blockade effective depend on the specific military circumstances.[234] In *The Olinde Rodrigues*, the Court stated:

> [T]he question of effectiveness is not controlled by the number of the blockading force. . . .
>
> . . . . The question of effectiveness must necessarily depend on the circumstances. We agree that the fact of a single capture is not decisive of the effectiveness of a blockade, but . . . if a single modern cruiser blockading a port renders it in fact dangerous for other craft to enter the port, that is sufficient, since thereby the blockade is made practically effective.[235]

Additionally, the blockade may be maintained by forces that are some distance from the shore.[236] The 2013 German Manual states that "[l]ong distance blockades are also permissible, i.e. the blockade and control of an enemy coast by armed forces at a greater distance from the blockaded coast as a result of military requirements."[237] The

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231. The Olinde Rodrigues, 174 U.S. 510, 513–14 (1899). *See also* DOD LAW OF WAR MANUAL, § 13.10.2.3.
232. DOD LAW OF WAR MANUAL, § 13.10.2.3.
233. London Declaration of 1909, art. 4.
234. DOD LAW OF WAR MANUAL, § 13.10.2.3.
235. The Olinde Rodrigues, 174 U.S. 510, 516–18 (1899).
236. DOD LAW OF WAR MANUAL, § 13.10.2.3.
237. GERMAN MANUAL, ¶ 1062.

2004 UK Manual states that "[t]he force maintaining the blockade may be stationed at a distance determined by military requirements."[238]

7.7.2.4 Impartiality

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

Commentary

"A blockade must be applied equally (impartially) to the vessels and aircraft of all states."[239]

7.7.2.5 Limitations

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

Commentary

"The blockading forces must not bar access to neutral ports or coasts."[240] The blockade must not prevent trade and communication to or from neutral ports or coasts, provided that such trade and communication are neither destined to nor originate from the blockaded area.

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238. 2004 UK MANUAL, ¶ 13.68.

239. NWIP 10-2, ¶ 632f. *See* DOD LAW OF WAR MANUAL, § 13.10.2.4; London Declaration of 1909, art. 5.

240. London Declaration of 1909, art. 18. *See* DOD LAW OF WAR MANUAL, § 13.10.2.5; NWIP 10-2, ¶ 632e.

> A blockade may not be used for the sole purpose of starving the civilian population. Starvation specifically directed against the enemy civilian population is prohibited.[241] Further, "an attack by any means against crops intended solely for consumption by noncombatants not contributing to the enemy's war effort would be unlawful for such would not be an attack upon a legitimate military objective."[242] The United States has stated the following position:
>
> > We support the principle that starvation of civilians not be used as a method of warfare, and subject to the requirements of imperative military necessity, that impartial relief actions necessary for the survival of the civilian population be permitted and encouraged. These principles can be found, though in a somewhat different form, in articles 54 and 70.[243]

7.7.3 Special Entry and Exit Authorization

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

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241. DOD LAW OF WAR MANUAL, §§ 5.20.1, 5.20.4. *See also* AP I, art. 54(1).

242. J. Fred Buzhardt, General Counsel, Department of Defense, Letter to Chairman Fulbright, Senate Committee on Foreign Relations (Apr. 5, 1971), *reprinted in* 10 INTERNATIONAL LEGAL MATERIALS 1300, 1302 (1971).

243. Michael J. Matheson, Deputy Legal Adviser, Department of State, Remarks on the United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions at the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law (Jan. 22, 1987), *reprinted in* 2 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 419, 426 (1987).

Commentary

The commander of a blockading force may give permission to a warship to enter, and subsequently to leave, a blockaded port.[244] Further:

> Neutral warships and neutral military aircraft have no positive right of entry to a blockaded area. However, they may be allowed to enter or leave a blockaded area as a matter of courtesy. Permission to visit a blockaded area is subject to any conditions, such as the length of stay, that the senior officer of the blockading force may deem necessary and expedient.[245]

Article 7 of the London Declaration of 1909 provides: "In circumstances of distress, acknowledged by an officer of the blockading force, a neutral vessel may enter a place under blockade and subsequently leave it, provided that she has neither discharged nor shipped any cargo there." Similarly, NWIP 10-2 states that "[n]eutral vessels and aircraft in urgent distress may be permitted to enter a blockaded area, and subsequently to leave it, under conditions prescribed by the commander of the blockading force."[246]

See also DoD Law of War Manual, § 13.10.3.3.

Commanders should make arrangements to permit the free passage of (1) all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians; and (2) all consignments of essential foodstuffs, clothing, and tonics (i.e., medicine) intended for children under fifteen, expectant mothers, and maternity cases.[247]

Nonetheless, allowing passage of these items is not required unless the party controlling the area is satisfied that there are no serious reasons for fearing that (1) the consignments may be diverted from their destination; (2) the control may not be effective; or (3) a definite

244. London Declaration of 1909, art. 6.
245. NWIP 10-2, ¶ 632h1. *See also* DOD LAW OF WAR MANUAL, §§ 13.10.3; 13.10.3.1.
246. NWIP 10-2, ¶ 632h2. *See also* DOD LAW OF WAR MANUAL, § 13.10.3.2.
247. DOD LAW OF WAR MANUAL, § 5.19.3. *See also* GC IV, art. 23.

> advantage may accrue to the military efforts or economy of the enemy.[248] Such advantage may arise "through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods."[249]
>
> Commanders may require, as a condition for allowing the passage of consignments listed above, that the consignments be distributed under the local supervision of the protecting powers.[250] Article 23 of GC IV provides: "The Power which allows the passage of the consignments indicated in the first paragraph of this Article may make permission conditional on the distribution to the persons benefited thereby being made under the local supervision of the Protecting Powers." Additionally, Commanders may prescribe other rules and regulations for how consignments are to be distributed, although consignments should be forwarded as rapidly as possible.[251] Article 23 further provides: "Such consignments shall be forwarded as rapidly as possible, and the Power which permits their free passage shall have the right to prescribe the technical arrangements under which such passage is allowed."

7.7.4 Breach and Attempted Breach of Blockade

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

248. DOD LAW OF WAR MANUAL, § 5.19.3. *See also* GC IV, art. 23.
249. GC IV, art. 23.
250. DOD LAW OF WAR MANUAL, § 5.19.3.1.
251. *Id.*

is the blockaded area. There is a presumption of attempted breach of blockade where vessels or aircraft are bound for a neutral port or airfield serving as a point of transit to the blockaded area. A temporary anchorage in waters occupied by the blockading vessels does not justify capture, in the absence of other grounds.

Commentary

See DoD Law of War Manual, § 13.10.4.1.

"*Breach of blockade* is the passage of a vessel or aircraft through the blockade."[252]

"*Attempted breach of blockade* occurs from the time a vessel or aircraft leaves a port or air take-off point with the intent of evading the blockade."[253] It is immaterial that the vessel or aircraft is at the time of visit bound to a neutral port or airfield, if its ultimate destination is the blockaded area, or if the goods found in its cargo are to be transshipped through the blockaded area.[254] The practice of nations has rendered obsolete the contrary provisions in Articles 17 and 19 of the London Declaration of 1909.

Breach or attempted breach of a blockade subjects a neutral vessel or aircraft to capture.[255] If a vessel or aircraft has succeeded in escaping from a blockaded area, liability to capture continues until the completion of the voyage or flight.[256]

The liability of a neutral vessel to capture for breach of blockade is contingent on its knowledge, actual or presumptive, of the blockade.[257] "Knowledge of the existence of a blockade is essential to the offenses of breach of blockade and attempted breach of blockade;

252. NWIP 10-2, ¶ 632g.
253. *Id.*
254. *Id.* ¶ 632g1; 2 D.P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 1157 (I.A. Shearer ed., 1988).
255. DOD LAW OF WAR MANUAL, § 13.10.4.
256. NWIP 10-2, ¶ 632g2.
257. London Declaration of 1909, art. 14.

presumed knowledge is sufficient."[258] Further, "[t]he liability of a blockade runner to capture begins and terminates with her voyage or flight."[259]

Knowledge may be presumed once a blockade has been declared and appropriate notification has been provided to affected governments.[260] Failing proof to the contrary, knowledge of the blockade is presumed if the vessel left a neutral port subsequently to the notification of the blockade to the power to which such port belongs, provided that such notification was made in sufficient time.[261] In *The Prize Cases*, the U.S. Supreme Court held: "A vessel being in a blockaded port is presumed to have notice of the blockade as soon as it commences. This is a settled rule in the law of nations."[262] There is a presumption of attempted breach of blockade where vessels and aircraft are bound to a neutral port or airfield serving as a point of transit to the blockaded area.[263] In *The Peterhoff*, the Court stated: "It is an undoubted general principle, recognized by this Court in the case of *The Bermuda*, and in several other cases, that an ulterior destination to a blockaded port will infect the primary voyage to a neutral port with liability for intended violation of blockade."[264]

A vessel sailing ignorantly—with neither presumptive nor actual knowledge—to a blockaded port is not liable to capture, although it may be turned away from the blockaded area. In *Yeaton v. Fry*, the Court stated:

> The risk of a blockaded port, as a blockaded port, is the risk incurred by breaking the blockade. This is defined by public law. Sailing from Tobago for Curraçoa, knowing Curraçoa to be blockaded, would have incurred this risk, but sailing for that port, without such knowledge, did not incur it.[265]

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258. NWIP 10-2, ¶ 632g.
259. *Id.* ¶ 632g2. *See also* DOD LAW OF WAR MANUAL, § 13.10.4.2.
260. DOD LAW OF WAR MANUAL, § 13.10.4.2. *See* London Declaration of 1909, arts. 14, 15; NWIP 10-2, ¶ 632g n.35; Tucker, *supra* note 88, at 292–93.
261. London Declaration of 1909, art. 15.
262. The Prize Cases, 67 U.S. 635, 677 (1863).
263. DOD LAW OF WAR MANUAL, § 13.10.4.1; NWIP 10-2, ¶ 632g(1).
264. The Peterhoff, 72 U.S. 28, 55 (1867).
265. Yeaton v. Fry, 9 U.S. 335, 342–43 (1809) (Marshall, C.J.).

A temporary anchorage in waters occupied by the blockading vessels does not justify capture, in the absence of other grounds.[266] In *The Teresita*, the Court stated: "We are of opinion that, under such circumstances, temporary anchorage in waters occupied by the blockading vessels, does not justify capture, in the absence of other grounds."[267]

See § 7.4.1.2 above regarding presumption of ultimate enemy destination.

7.7.5 Contemporary Practice

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

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

266. DOD LAW OF WAR MANUAL, § 13.10.4.1.
267. The Teresita, 72 U.S. 180, 182 (1867).

to maintain during anything other than a local or limited armed conflict. The characteristics of modern weapon systems will be a factor in analyzing the effectiveness of contemporary blockades.

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

Commentary

On May 8, 1972, President Richard Nixon made a public address on nationwide television to announce the commencement of Operation Pocket Money, the naval mining of North Vietnam's coast and harbors:

> In full coordination with the Republic of Vietnam, I have ordered the following measures which are being implemented as I am speaking to you.
>
> All entrances to North Vietnamese ports will be mined to prevent access to these ports and North Vietnamese naval operations from these ports. United States forces have been directed to take appropriate measures within the internal and claimed territorial waters of North Vietnam to interdict the delivery of any supplies. Rail and all other communications will be cut off to the maximum extent possible. Air and naval strikes against military targets in North Vietnam will continue.
>
> These actions are not directed against any other nation. Countries with ships presently in North Vietnamese ports have already been notified that their ships will have three daylight periods to leave in safety. After that time, the mines

> will become active and any ships attempting to leave or enter these ports will do so at their own risk.
>
> These actions I have ordered will cease when the following conditions are met:
>
> First, all American prisoners of war must be returned.
>
> Second, there must be an internationally supervised cease-fire throughout Indochina.[268]

On May 9, A-6 Intruders and A-7 Corsairs, launched from the USS *Coral Sea* (CV 43),

> dropped magnetic-acoustic sea mines in the river approaches to Haiphong, North Vietnam's chief port. Shortly thereafter, the other major ports were mined as well. Over 85 percent of the country's military imports passed through these ports. Washington gave foreign ships three days to depart the country, after which the mines armed themselves. Despite this advance notice, 32 foreign, mostly Communist ships elected to remain trapped in North Vietnamese waters.[269]

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

Within the immediate area of naval operations (e.g., in the vicinity of naval units to ensure proper battlespace management and self–defense objectives), a belligerent may establish special restrictions upon the activities of neutral vessels and aircraft and may prohibit such vessels and aircraft from entering the area. The immediate area of naval operations is that area within which hostilities are taking place or belligerent forces are operating. Belligerent control over neutral vessels and aircraft within an immediate area of naval operations is based on a belligerent's right to attack and destroy its enemy, its right to defend itself without suffering from neutral interference, and its right

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268. Address to the Nation in the Situation in Southeast Asia, PUB. PAPERS 583–87 (May 8, 1972).

269. *By Air, Sea, and Land, Chapter 4*, *supra* note 226.

to ensure the security of its forces. A belligerent may not purport to deny access to neutral States or close an international strait to neutral shipping, pursuant this authority, unless another route of similar convenience remains open to neutral traffic. The commanding officer of a belligerent warship may exercise control over the communication of any neutral merchant vessel or civil aircraft whose presence in the immediate area of naval operations might otherwise endanger or jeopardize those operations. A neutral merchant ship or civil aircraft within that area that fails to conform to a belligerent's directions concerning communications may thereby assume enemy character and risk being fired upon or captured. Legitimate distress communications should be permitted to the extent the success of the operation is not prejudiced thereby. Any transmission to an opposing belligerent of information concerning military operations or military forces is inconsistent with the neutral duties of abstention and impartiality and renders the neutral vessel or aircraft liable to capture or destruction.

Commentary

Within the immediate area or vicinity of naval operations, to ensure proper battle space management and self-defense objectives, a belligerent may establish special restrictions upon the activities of neutral vessels and aircraft and may prohibit altogether such vessels and aircraft from entering the area.[270] Neutral vessels and aircraft that fail to comply with a belligerent's orders expose themselves to capture or attack.[271]

The immediate area or vicinity of naval operations is that area within which hostilities are taking place, or belligerent State forces are actually operating. However, a belligerent State may not purport to deny access to neutral States, or to close an international strait or archipelagic sea lane to neutral shipping, pursuant to this authority unless another route of similar convenience remains open to neutral traffic.

For example, within the immediate vicinity of his forces, a belligerent commander may exercise control over the communications of any neutral merchant vessel or aircraft whose presence might otherwise

270. NWIP 10-2, ¶ 430b; DOD LAW OF WAR MANUAL, §§ 13.8.1, 14.6. *See also* 2006 Australian Manual, ¶ 6.16; 2004 UK MANUAL, ¶ 13.80.

271. NWIP 10-2, ¶ 430b; DOD LAW OF WAR MANUAL, § 13.8.2.

> endanger the success of the operation. An exception applies for legitimate distress communications by neutral vessels and aircraft if such communications do not prejudice the success of the operation.[272] A neutral vessel or aircraft that does not conform to a belligerent's control assumes enemy character and can be captured or attacked.[273]
>
> Any transmission to an opposing belligerent State of information concerning military operations or military forces is inconsistent with the neutral State's duties of abstention and impartiality and renders the neutral State's vessel or aircraft making such a communication liable to capture or destruction:[274]
>
> > 1. The transmission by radio by a vessel or an aircraft, whether enemy or neutral, when on or over the high seas of military intelligence for the immediate use of a belligerent is to be deemed a hostile act and will render the vessel or aircraft liable to be fired upon.
> >
> > 2. A neutral vessel or neutral aircraft which transmits when on or over the high seas information destined for a belligerent concerning military operations or military forces shall be liable to capture. The prize court may condemn the vessel or aircraft if it considers that the circumstances justify condemnation.[275]

7.9 EXCLUSION ZONES AND WAR ZONES

Belligerent control of an immediate area of naval operations is to be clearly distinguished from the belligerent practice during World Wars I and II, the Falkland/Malvinas Conflict, and the Iran-Iraq War of establishing broad ocean areas as exclusion zones or war zones where neutral shipping was either barred or put at special risk. The most extensive use of such zones occurred during World Wars I and II. These zones were initially established by

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272. NWIP 10-2, ¶ 520a; DOD LAW OF WAR MANUAL, § 13.8.2. *See also* 2006 Australian Manual, ¶ 6.17.

273. NWIP 10-2, ¶ 520a; DOD LAW OF WAR MANUAL, § 13.8.2.

274. DOD LAW OF WAR MANUAL, § 13.8.2.

275. Hague Rules on the Control Radio, art. 6.

belligerents based on the right of belligerent reprisals against alleged illegal behavior of the enemy and were used to justify the exercise of control over, or capture and destruction of, neutral vessels not otherwise permitted by the rules of naval warfare.

Commentary

Exclusion zones have been established by belligerents since the turn of the twentieth century. During the Russo-Japanese War (1904–5), Japan designated defensive sea areas beyond its territorial sea in strategic waters around its main islands, as well as the Pescadores Islands (Note: After the First Sino-Japanese War, Taiwan was ceded to Japan by the 1895 Treaty of Shimonoseki). Imperial Ordinance No. 11 provided, in part:

> ARTICLE 1. In case of war or emergency, the minister of the navy may, limiting an area, designate a defense sea area under this ordinance. The designation . . . of such defense sea area shall be advertised by the minister of the navy.
>
> ART. 2. [Designation of defense areas by the commander in chief or commandant of a naval station in cases of urgent necessity.]
>
> ART. 3. In the defense sea area, the ingress and egress and passage of any vessels other than those belonging to the army or navy are prohibited from sunset to sunrise.
>
> ART. 4. Within the limits of naval . . . ports included in a defense sea area the ingress and egress and passage of all vessels other than those belonging to the army or navy are prohibited.
>
> ART. 5. All vessels which enter, leave, pass through, or anchor in a defense sea area shall obey the direction of the commander in chief of the naval station, or the commandant of the secondary naval station, concerned.

> ART. 6. The commander in chief . . . or the commandant of a . . . naval station, may, when he thinks necessary, forbid or limit within a defense sea area . . . any . . . act considered to interfere with military operations.
>
> ART. 7. [Exemptions from all or part of the limitations may be made by the commander in chief or commandant of a naval station.]
>
> ART. 8. Any vessel which has transgressed this ordinance, or orders issued under this ordinance, may be ordered to leave the defense sea area by a route which shall be designated.
>
> Regarding vessels which do not obey the order mentioned in the preceding paragraph, armed force may be used when necessary.[276]

Detailed rules regulating the movement of vessels within the restricted areas were issued by the Commander in Chief or Commandant of the relevant naval station.[277] The fact that the defensive sea areas extended beyond the territorial sea was not protested by other States:

> The practice, nature of regulations, and drift of opinion seem to show that in time of war a belligerent is entitled to take measures for his protection which are not unreasonable. Certainly he is entitled to regulate the use of his territorial waters in such fashion as shall be necessary for his well-being. Similarly a belligerent may be obliged to assume in time of war for his own protection a measure of control over the waters which in time of peace would be outside of his jurisdiction.[278]

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276. Imperial Ordinance No. 11 (Jan. 23, 1904), *reprinted in* 12 INTERNATIONAL LAW SITUATIONS WITH SOLUTIONS AND NOTES 122 (1912). *See also* Sandesh Sivakumaran, *Exclusion Zones in the Law of Armed Conflict at Sea: Evolution in Law and Practice*, 92 INTERNATIONAL LAW STUDIES 153, 156 (2016); L.F.E. Goldie, *Maritime War Zones & Exclusion Zones*, 64 INTERNATIONAL LAW STUDIES 156, 158–59 (1991).

277. *See, e.g.*, Imperial Ordinance No. 11, *supra* note 276, at 123–26.

278. *Id.* at 128.

At the outset of the First World War, on November 3, 1914, Great Britain issued an admiralty notice declaring that, owing to German mining of the North Sea,

> the whole of that sea must be considered a military area. All merchant and fishing vessels of every description are hereby warned of the dangers they encounter by entering this area except in strict accordance with Admiralty directions. . . . Ships of all countries wishing to trade to and from Norway, the Baltic, Denmark, and Holland . . . will be given sailing directions which will pass them safely. . . . By strict adherence to these routes the commerce of all countries will be able to reach its destination in safety . . . , but any straying . . . from the course thus indicated may be followed by serious consequences.[279]

On February 4, 1915, Germany reciprocated, declaring its own war zone:

> [Germany] therefore finds itself under the necessity, to its regret, of taking military measures against England in retaliation for the practice followed by England. Just as England declared the whole North Sea between Scotland and Norway to be comprised within the seat of war, so does Germany now declare the waters surrounding Great Britain and Ireland, including the whole English Channel, to be comprised within the seat of war, and will prevent by all the military means at its disposal all navigation by the enemy in those waters. To this end it will endeavor to destroy, after February 18 next, any merchant vessels of the enemy which present themselves at the seat of war above indicated, although it

279. British Admiralty Notice No. 1706 (Nov. 3, 1914), *reprinted in* 1 JAMES GARNER, INTERNATIONAL LAW AND THE WORLD WAR 333 (1920); Telegrams from Ambassador W.H. Page to the Secretary of State (Jan. 25 & Feb. 15, 1917), *reprinted in* 4 DEPARTMENT OF STATE, DIPLOMATIC CORRESPONDENCE WITH BELLIGERENT GOVERNMENTS RELATING TO NEUTRAL RIGHTS AND DUTIES 47–48 (1918); British Foreign Office to British Ambassador in Washington, presented to the Secretary of State (Nov. 3, 1914), *reprinted in* 43 INTERNATIONAL LAW DOCUMENTS 52 (1943) [hereinafter INTERNATIONAL LAW DOCUMENTS 1943]; Sivakumaran, *supra* note 276, at 159.

> may not always be possible to avert the dangers which may menace persons and merchandise. Neutral powers are accordingly forewarned not to continue to entrust their crews, passengers, or merchandise to such vessels. Their attention is furthermore called to the fact that it is of urgency to recommend to their own vessels to steer clear of these waters. It is true that the German navy has received instructions to abstain from all violence against neutral vessels recognizable as such; but in view of the hazards of war, and of the misuse of the neutral flag ordered by the British government, it will not always be possible to prevent a neutral vessel from becoming the victim of an attack intended to be directed against a vessel of the enemy.[280]

In 1917, Germany extended the zone and warned that all ships entering the zone would be sunk:

> Germany has, so far, not made unrestricted use of the weapon which she possesses in her submarines. Since the Entente powers, however, have made it impossible to come to an understanding based upon equality of rights of all nations, as proposed by the Central powers, and have instead declared only such a peace to be possible which shall be dictated by the Entente allies and shall result in the destruction and humiliation of the Central powers, Germany is unable further to forego the full use of her submarines. Under these circumstances Germany will meet the illegal measures of her enemies by forcibly preventing after February 1, 1917, in a zone around Great Britain, France, Italy, and in the eastern Mediterranean all navigation, that of neutrals included, from and to England and from and to France, etc., etc. All ships met within that zone will be sunk.[281]

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280. Imperial Councellor's proclamation, as given by the German Ambassador to the Secretary of State (Feb. 4, 1915), *reprinted in* INTERNATIONAL LAW DOCUMENTS 1943, *supra* note 279, at 53; Sivakumaran, *supra* note 276, at 159–60.

281. Memorandum, enclosed in message from the German Ambassador to the Secretary of State (Jan. 31, 1917), *reprinted in* INTERNATIONAL LAW DOCUMENTS 1943, *supra* note 279, at 55; Sivakumaran, *supra* note 276, at 159–60.

> Both zones were, in effect, illegal "free fire" zones in that the belligerents did not distinguish between military objectives and innocently employed protected vessels. For example, the United States protested the German proclamation as an act unprecedented in naval warfare:
>
> > It is of course not necessary to remind the German Government that the sole right of a belligerent in dealing with neutral vessels on the high seas is limited to visit and search, unless a blockade is proclaimed and effectively maintained, which this Government does not understand to be proposed in this case. To declare or exercise a right to attack and destroy any vessel entering a prescribed area of the high seas without first certainly determining its belligerent nationality and the contraband character of its cargo would be an act so unprecedented in naval warfare that this Government is reluctant to believe that the Imperial Government of Germany in this case contemplates it as possible.[282]
>
> Illegal "free fire" zones were also established by both the Allies and the Axis powers during the Second World War, allowing for the targeting of vessels solely because of their presence within the prescribed war zones. On November 24, 1939, Germany warned neutral States that "in view of the fact that the actions are carried on with all the technical means of modern warfare, and . . . that these actions are increasing in the waters around the British Isles and near the French coast, these waters can no longer be considered safe for neutral shipping." Starting in January 1940, within the defined operational areas around the British coast, "attack without warning against all ships sailing there was admissible." On January 1, 1940, Hitler ordered the German U-boat command "to attack all Greek merchant ships in the zone surrounding the British Isles" and, on January 6, U-boats were instructed "to make immediate unrestricted use of weapons against all ships" in a defined area of the North Sea. Finally, on January 18, authorization was given to sink, without warning, all ships "in those waters near the enemy coast in which the use of

282. Secretary of State to Ambassador in Germany (Feb. 10, 1905), *reprinted in* INTERNATIONAL LAW DOCUMENTS 1943 *supra* note 279, at 53–54; Sivakumaran, *supra* note 276, at 160.

> mines can be pretended."[283] A total blockade of Great Britain was declared on August 17, 1940: "The Reich Government wishes to emphasize the following fact: The naval war in the waters around the British Isles is in full progress. The whole area has been mined. German planes attack every vessel. Any neutral ship which in the future enters these waters is liable to be destroyed."[284]
>
> In response, on May 8, 1940, Great Britain declared an exclusion zone in the Skagerrak, which provided, in part, that "all German ships [whether warships, auxiliaries, or merchant vessels] by day and all ships [including neutral vessels] by night were to be sunk as opportunity served."[285] Similarly, shortly after the Japanese surprise attack on Pearl Harbor on December 7, 1941, Admiral Stark, Chief of Naval Operations, ordered U.S. naval forces to "execute unrestricted air and submarine warfare against Japan."[286]

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

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283. 18 TWC 328 (1948); 22 TWC 558 (1948); Sivakumaran, *supra* note 276, at 167–68.

284. German Declaration Announcing a "Total Blockade" of Britain (Aug. 17, 1940), *reprinted in* 40 INTERNATIONAL LAW DOCUMENTS 50 (1940).

285. HC Deb (May 8, 1940) (360) col. 1351; Sivakumaran, *supra* note 276, at 169.

286. 22 TWC 556–61 (1948); 40 TWC 108–9, 111 (1949); Sivakumaran, *supra* note 276, at 170, 176.

Commentary

It is lawful for belligerent States to establish maritime and airspace zones during an international armed conflict. The legality of each zone will depend on its location, the function of the zone, and the measures used to enforce the zone against vessels and aircraft entering the zone.[287] For example, the establishment of a zone in a State's territorial sea or national airspace may rely on the State's sovereignty over those waters or airspace. Outside its territory, a belligerent may also establish a zone on the belligerent State's right (1) to interdict contraband; (2) to control the immediate area of operations; or (3) of blockade. Exclusion zones may also be established in accordance with a resolution adopted by the UN Security Council.[288]

Neutral or non-belligerent States have also established such zones during armed conflicts. For example, during the Spanish Civil War, zones were established by neutral States in response to indiscriminate attacks by submarines on neutral merchant ships operating in the Mediterranean.[289]

The 1937 Nyon Arrangement provides:

> I. The participating Powers will instruct their naval forces to take the action indicated in paragraphs II and III below with a view to the protection of all merchant ships not belonging to either of the conflicting Spanish parties.
>
> II. Any submarine which attacks such a ship in a manner contrary to the rules of international law referred to in the International Treaty for the Limitation and Reduction of Naval Armaments signed in London on 22 April 1930, and confirmed in the Protocol signed in London on 6 November 1936, shall be counter-attacked and, if possible, destroyed.
>
> III. The instruction mentioned in the preceding paragraph shall extend to any submarine encountered in the vicinity of

287. DOD LAW OF WAR MANUAL, §§ 13.9, 13.9.1.
288. *Id.* § 13.9.1.
289. *See* Nyon Arrangement, Sept. 14, 1937, 181 L.N.T.S. 135.

a position where a ship not belonging to either of the conflicting Spanish parties has recently been attacked in violation of the rules referred to in the preceding paragraph in circumstances which give valid grounds for the belief that the submarine was guilty of the attack.

IV. In order to facilitate the putting into force of the above arrangements in a practical manner, the participating Powers have agreed upon the following arrangements:

1. In the western Mediterranean and in the Malta Channel, with the exception of the Tyrrhenean Sea, which may form the subject of special arrangements, the British and French fleets will operate both on the high seas and in the territorial waters of the participating Powers, in accordance with the division of the area agreed upon between the two Governments.

2. In the eastern Mediterranean,

(a) Each of the participating Powers will operate in its own territorial waters;

(b) On the high seas, with the exception of the Adriatic Sea, the British and French fleets will operate up to the entrance to the Dardanelles, in those areas where there is reason to apprehend danger to shipping in accordance with the division of the area agreed upon between the two Governments. The other participating Governments possessing a sea border on the Mediterranean undertake, within the limit of their resources, to furnish these fleets any assistance that may be asked for; in particular, they will permit them to take action in their territorial waters and to use such of their ports as they shall indicate.

3. It is further understood that the limits of the zones referred to in sub-paragraphs 1 and 2 above, and their allocation shall be subject at any time to revision by the

> participating Powers in order to take account of any charge in the situation.

Zones may be used to advise vessels or aircraft to remain clear of an area of naval operations. Such zones normally provide procedures to reduce the risk of neutral vessels being mistakenly attacked. For example, HYDROLANT 597/03 (54,56) states:

> 2. ALL VESSELS SHOULD MAINTAIN A SAFE DISTANCE FROM U.S. FORCES SO THAT INTENTIONS ARE CLEAR AND UNDERSTOOD BY U.S. FORCES. VESSELS THAT ENTER THE MARITIME SAFETY ZONE WHICH ARE APPROACHING U.S. FORCES, OR VESSELS WHOSE INTENTIONS ARE UNCLEAR ARE SUBJECT TO BOARDING AND VISIT BY U.S. FORCES. ALL VESSELS APPROACHING U.S. FORCES ARE REQUESTED TO MAINTAIN RADIO CONTACT WITH U.S. FORCES ON BRIDGE-TO-BRIDGE CHANNEL 16.
>
> 3. U.S. FORCES WILL EXERCISE APPROPRIATE MEASURES IN SELFDEFENSE IF WARRANTED BY THE CIRCUMSTANCES. VESSELS APPROACHING U.S. FORCES WILL HELP MAKE THEIR INTENTIONS CLEAR AND AVOID UNNECESSARY INITIATION OF SUCH DEFENSIVE MEASURES BY MAKING PRIOR CONTACT AS DESCRIBED ABOVE.[290]

Such zones have also been used (1) to identify a particularly dangerous operational area; (2) to assist in the defense of a particular area; or (3) to assist in the defense of particular naval forces (i.e., a defensive bubble). For example, HYDROLANT 597/03 (54,56) states:

> 1. U.S. FORCES IN THE EASTERN MEDITERRANEAN HAVE ESTABLISHED A MARITIME SAFETY

290. HYDROLANT 597/03 (54,56), Eastern Mediterranean Sea (Mar. 20, 2003), *reprinted in* UNITED STATES NAVAL WAR COLLEGE, MARITIME OPERATIONAL ZONES app. C at C-57 (2013); DOD LAW OF WAR MANUAL, § 13.9.2.

> ZONE AND ARE CONDUCTING COMBAT OPERATIONS IN INTERNATIONAL WATERS THAT POSE A HAZARD TO NAVIGATION. ALL VESSELS ARE ADVISED TO EXERCISE EXTREME CAUTION AND TO REMAIN CLEAR OF THE FOLLOWING DESIGNATED OPERATION AREA BOUND BY 32-28.0N 033-22.0E, 31-40.0N 033-22.0E, 31-55.0N 032-20.0E, 32-46.8N 032-20.0E.[291]

For example, in 1917, President Woodrow Wilson issued an Executive Order establishing defensive sea areas:

> I, Woodrow Wilson, President of the United States of America, do order that defensive sea areas are hereby established, to be maintained until further notification, at the places and within the limits prescribed as follows, that is to say:
>
> . . . .
>
> The responsibility of the United States of America for any damage inflicted by force of arms with the object of detaining any person or vessel proceeding in contravention to Regulations duly promulgated in accordance with this Executive order shall cease from this date.[292]

And, in 1982, the United Kingdom's Permanent Representative to the United Nations advised:

> Further to Mr. Whyte's letter dated 9 April 1982 (S/14963), I have the honour, on instructions from my Government, to inform you that the following communication was conveyed to the Government of Argentina on 23 April 1982:
>
> > "In announcing the establishment of a maritime exclusion zone around the Falkland Islands, Her Majesty's Government made it clear that this measure

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291. HYDROLANT 597/03 (54,56), *supra* note 290, app. C at C-57.

292. Exec. Order No. 2584 (1917), *reprinted in* 12 AMERICAN JOURNAL OF INTERNATIONAL LAW SUPPLEMENT 13, 16 (1918).

> was without prejudice to the right of the United Kingdom to take whatever additional measures may be needed in the exercise of its right of self-defence under Article 51 of the United Nations Charter. In this connection, Her Majesty's Government now wishes to make clear that any approach on the part of Argentine warships, including submarines, naval auxiliaries, or military aircraft which could amount to a threat to interfere with the mission of the British forces in the South Atlantic, will encounter the appropriate response. All Argentine aircraft including civil aircraft engaging in surveillance of these British forces will be regarded as hostile and are liable to be dealt with accordingly."[293]

However, a merchant ship or civil aircraft, neutral or enemy, does not become a lawful target simply because it has entered a declared zone. Before attacking ships or aircraft in the zone, belligerents must still ensure that they are legitimate military objectives. For example, during the Iran-Iraq War, Iran declared that all of its coastal waters constituted a war zone:

> Iraq replied to these Iranian declarations by proclaiming a series of escalating exclusion zones, beginning with a "prohibited war zone;" Iraq declared that it would "attack all vessels" appearing within these zones, and stated that "all tankers, regardless of nationality, docking at Kharg Island are targets for the Iraqi Air Force." As noted earlier, Iraq launched the Tanker War in 1984 in an apparent bid to internationalize the war. During the first months of this new offensive, some seventy ships were hit, many of which were neutral-flag tankers bound to or from the massive Iranian oil terminal at Kharg Island. But international law has never legitimized attacks upon neutral merchant vessels simply because they ventured into a specified area of the high seas.[294]

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293. Letter dated Apr. 24, 1982 from the representative of the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council, U.N. Doc. S/14997 (Apr. 24, 1982). *See also* DOD LAW OF WAR MANUAL, § 13.9.2.

294. McNeill, *supra* note 200, at 635–36.

Nonetheless, the fact that an unidentified vessel or aircraft enters a zone without authorization may be probative in assessing whether it is entitled to protection (e.g., whether it is an enemy military vessel or aircraft, or whether it has acquired the character of enemy military vessels or aircraft).[295]

Zones may be used to counter the adversary's logistics chain, such as to facilitate the interdiction of contraband. Thus, a zone may be established to warn neutral vessels and aircraft that they will be subject to visit and search if they attempt to enter the zone without authorization. For example, Special Warning No. 121 Persian Gulf states:

> 1. COALITION NAVAL FORCES MAY CONDUCT MILITARY OPERATIONS IN THE EASTERN MEDITERRANEAN SEA, RED SEA, GULF OF ADEN, ARABIAN SEA, GULF OF OMAN, AND ARABIAN GULF. THE TIMELY AND ACCURATE IDENTIFICATION OF ALL VESSELS AND AIRCRAFT IN THESE AREAS ARE CRITICAL TO AVOID THE INADVERTENT USE OF FORCE.
>
> . . . .
>
> 3. VESSELS OPERATING IN THE MIDDLE EAST, EASTERN MEDITERRANEAN SEA, RED SEA, GULF OF OMAN, ARABIAN SEA, AND ARABIAN GULF ARE SUBJECT TO QUERY, BEING STOPPED, BOARDED AND SEARCHED BY US/COALITION WARSHIPS OPERATING IN SUPPORT OF OPERATIONS AGAINST IRAQ. VESSELS FOUND TO BE CARRYING CONTRABAND BOUND FOR IRAQ OR CARRYING AND/OR LAYING NAVAL MINES ARE SUBJECT TO DETENTION, SEIZURE AND DE-

295. DOD LAW OF WAR MANUAL, § 13.9.2.

> STRUCTION. THIS NOTICE IS EFFECTIVE IMMEDIATELY AND WILL REMAIN IN EFFECT UNTIL FURTHER NOTICE.[296]

Exclusion zones may be established that prohibit the entry of vessels or aircraft without authorization from the proclaiming belligerent. Such zones may suspend the right of innocent passage through non-neutral waters. For example, HYDROPAC 795/2004 (62) states:

> 8. ADDITIONALLY, EFFECTIVE IMMEDIATELY, EXCLUSION ZONES ARE ESTABLISHED AND THE RIGHT OF INNOCENT PASSAGE IS TEMPORARILY SUSPENDED IN ACCORDANCE WITH INTERNATIONAL LAW AROUND THE KAAOT AND ABOT OIL TERMINALS WITHIN IRAQI TERRITORIAL WATERS. THE EXCLUSION ZONES EXTEND 2000 METERS FROM THE OUTER EDGES OF THE TERMINAL STRUCTURES IN ALL DIRECTIONS.
>
> 9. ONLY TANKERS AND SUPPORT VESSELS AUTHORIZED BY TERMINAL OPERATORS OR COALITION MARITIME SECURITY FORCES ARE ALLOWED TO ENTER THE EXCLUSION ZONES. VESSELS ATTEMPTING TO ENTER THE ZONES WITHOUT AUTHORIZATION MAY BE SUBJECT TO DEFENSIVE MEASURES, INCLUDING, WHEN NECESSARY, THE USE OF DEADLY FORCE. ALL REASONABLE EFFORTS WILL BE TAKEN TO WARN VESSELS AWAY BEFORE EMPLOYING DEADLY FORCE. HOWEVER, DEADLY FORCE WILL BE EMPLOYED WHEN NECESSARY TO PROTECT COALITION MARITIME SECURITY FORCES,

296. Special Warning No. 121, Persian Gulf (Mar. 20, 2003), *reprinted in* UNITED STATES NAVAL WAR COLLEGE, MARITIME OPERATIONAL ZONES app. C at C-56 (2013). *See also* DOD LAW OF WAR MANUAL, § 13.9.3.

> LEGITIMATE SHIPPING PRESENT IN THE EXCLUSION ZONES AND THE OIL TERMINALS.[297]
>
> The extent, location, and duration of the exclusion zone and the measures imposed should not exceed what is required by military necessity. For example:
>
> > On 28 April 1982, Great Britain proclaimed a "Total Exclusion Zone" (TEZ) in the South Atlantic. Beside deterring the Argentine naval forces from leaving their ports, its main purpose was to facilitate the early identification of military objectives and to prevent vessels flying neutral flags from conveying information to Argentina. . . . On one hand, the British TEZ covered an area of 200 nautical miles measured from the centre of the main island. On the other hand, the TEZ was situated far from any main shipping lanes. Moreover, its duration was comparatively short. It did not serve economic warfare purposes but was aimed at facilitating military operations, including identification. Vessels and aircraft flying flags of states not parties to the conflict suffered no damage whatsoever. For these reasons, only the former USSR officially protested against the British TEZ.[298]
>
> When establishing zones, belligerents must provide "safe passage through the zone for neutral vessels and aircraft where the geographical extent of the zone significantly impedes free and safe access to the ports and coasts of a neutral State and, unless military requirements do not permit, in other cases where normal navigation routes are affected."[299]

Because exclusion zones and war zones are not simply 'free-fire zones' for the warships of the belligerents, the establishment of such a zone carries with

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297. HYDROPAC 795/2004 (62), Persian Gulf (May 3, 2004), *reprinted in* UNITED STATES NAVAL WAR COLLEGE, MARITIME OPERATIONAL ZONES app. C at C-69 (2013). *See also* DOD LAW OF WAR MANUAL, § 13.9.4.

298. Wolff Heintschel von Heinegg, *The Law of Armed Conflict at Sea*, *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 467, 577–78 (Dieter Fleck ed., 4th ed. 2021); *see also* DOD LAW OF WAR MANUAL, § 13.9.4.

299. DOD LAW OF WAR MANUAL, § 13.9.4.

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

Commentary

Questionable exclusion zones were declared by both the United Kingdom and Argentina during the Falklands/Malvinas War. Following the invasion of the Falkland Islands/Islas Malvinas, the United Kingdom established a Maritime Exclusion Zone (MEZ) on April 7, 1982, effective April 12:

> [A] maritime exclusion zone will be established around the Falkland Islands. The outer limits of this zone is a circle of 200 nautical mile radius from . . . approximately the centre of the Falkland Islands. From the time indicated, any Argentine warships and Argentine naval auxiliaries found within this zone will be treated as hostile and are liable to be attacked by British forces.[300]

The MEZ was clearly legal, indicating that only Argentine warships and naval auxiliaries would be targeted within the zone. Two weeks later:

> [A] Total Exclusion Zone (TEZ) will be established around the Falkland Islands. The outer limits of this zone will be the same as for the MEZ established on April 12 . . . .

300. THE TIMES (London), Apr. 8, 1982, at 6, *reprinted in* UNITED STATES NAVAL WAR COLLEGE, MARITIME OPERATIONAL ZONES app. C at C-12 (2013); Sivakumaran, *supra* note 276, at 177.

> From the time indicated the Exclusion Zone will apply not only to Argentine warships and Argentine naval auxiliaries but also to any other ship, whether naval or merchant vessel, which is operating in support of the illegal occupation of the Falkland Islands by Argentine forces.
>
> The zone will also apply to any aircraft, whether military or civil, which is operating in support of the illegal occupation. Any ship and any aircraft, whether military or civil, which is found within this zone without due authority from the Ministry of Defence in London will be regarded as operating in support of the illegal occupation and will therefore be regarded as hostile and will be liable to be attacked by British Forces.
>
> Also from the time indicated, Port Stanley airport will be closed; and any aircraft on the ground in the Falkland Islands will be regarded as present in support of the illegal occupation and accordingly is liable to attack.[301]

The TEZ was problematic in that mere presence in the zone purportedly rendered a vessel or aircraft targetable. With the exception of the Soviet Union, the British exclusion zones were not condemned by other States:

> The British Government continues expanding the zone of combat operations in the Atlantic Ocean, arbitrarily proclaiming vast expanses of high seas closed to ships and aircraft of other countries. These actions clearly contradict the 1958 Convention on the High Seas and, consequently, are regarded by the Soviet side as unlawful.[302]

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301. Letter dated Apr. 28, 1982 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, U.N. Doc. S/15006 (Apr. 28, 1982); THE TIMES (London), Apr. 29, 1982, at 1, *reprinted in* UNITED STATES NAVAL WAR COLLEGE, MARITIME OPERATIONAL ZONES app. C at C-15 (2013); Sivakumaran, *supra* note 276, at 179.

302. *See* Sivakumaran, *supra* note 276, at 180–81.

> Despite its apparent overreach, the TEZ was located away from the main shipping lanes in the South Atlantic and was of relatively short duration. Arguably, the TEZ was designed to facilitate the identification of legitimate military targets rather than attack all ships or aircraft within the zone. The British declaration indicated that ships or aircraft within the zone were warned of possible attacks and there is no evidence that foreign-flag vessels within the TEZ were actually engaged by British forces.[303]
>
> Argentina responded by establishing its own exclusion zones. On April 8, 1982, Argentina declared its own 200-mile MEZ "around the disputed islands and Argentine coast as a theater of operations in which military action could be taken, declaring it will act in self-defense at any time in the zone if national security was in danger."[304]
>
> Three weeks later, on April 30, Argentina warned that
>
> > all British ships, including merchant and fishing vessels, operating within the 200-mile zone of the Argentine sea, of the Malvinas Islands, the South Georgias and the South Sandwich Islands, are considered hostile; . . . any British aircraft, whether military or civil, which flies through Argentine airspace will be considered hostile and treated accordingly.[305]
>
> Subsequently, on May 11, Argentina declared that "any vessel flying the United Kingdom flag which is navigating in the [South Atlantic] towards the area of operations and/or which may be presumed to constitute a threat to national security shall be considered hostile, and action will be taken accordingly."[306] Unlike the United Kingdom,

303. Raul (Pete) Pedrozo, *Maritime Exclusion Zones in Armed Conflicts*, 99 INTERNATIONAL LAW STUDIES 526, 529 (2022).

304. WASHINGTON POST, Apr. 8, 1982, at A-1, col. 6, *reprinted in* UNITED STATES NAVAL WAR COLLEGE, MARITIME OPERATIONAL ZONES app. C at C-13 (2013); Sivakumaran, *supra* note 276, at 181.

305. Letter dated Apr. 30, 1982 from the Permanent Representative of Argentina to the President of the Security Council, U.N. Doc. S/15018 (Apr. 30, 1982); Sivakumaran, *supra* note 276, at 181.

306. Letter dated May 11, 1982 from the representative of Argentina to the President of the Security Council, U.N. Doc. S/15069 (May 11, 1982); Sivakumaran, *supra* note 276, at 181–82.

Argentina attacked an innocently employed Liberian-flagged merchant vessel that was operating well outside the declared war zones. On June 8, the crude oil tanker *Hercules* was navigating on the high seas about 600 nautical miles from Argentina and 500 nautical miles from the Falkland Islands/Islas Malvinas. After making a routine report by radio to Argentine officials, providing the ship's name, international call sign, registry, position, course, speed, and voyage description, the *Hercules* was attacked, without provocation, by Argentine military aircraft. Although severely damaged, the *Hercules* was able to reverse course and sail to Rio de Janeiro, the nearest safe port.[307]

Zones declared by Iran and Iraq during the Tanker War were also implemented as "free fire zones" where neither belligerent discriminated between military objectives and protected civilian vessels when engaging targets in the war zones. The zones were "not generally recognised by the foreign navies."[308]

On September 22, 1980, Iraq attacked Iran, prompting Tehran to issue a notice to mariners that read:

> From: Commander-in-Chief of Naval Army of Islamic Republic of Iran.
>
> Regarding to the Iraqi aggression we declare Iranian maritime border nearby coast war area. The Iranian Government does not give any authorization to the vessels intending to proceed to Iraqi ports. For the safety of shipping in Persian Gulf the following route shall be strictly observed. Vessels after having passed Hormuz Strait will change the route to pass 12 miles south of Abu Musa Island, 12 miles south of Sirri Island, south of Cable Bank Light and 12 miles south-

307. *See* Argentine Republic v. Amerada Hess, 488 U.S. 428, 431–32 (1989).

308. FOREIGN AFFAIRS COMMITTEE, SECOND REPORT, CURRENT UK POLICY TOWARDS THE IRAN/IRAQ CONFLICT, 1987–88, HC 279-I-II, *reprinted in* THE IRAN-IRAQ WAR (1980–1988) AND THE LAW OF NAVAL WARFARE 302 (Andrea de Guttry & Natalino Ronzitti eds., 1993).

> west of Farsi Island. Iranian Government will not take responsibility for those vessels which do not pay consideration to this notice. Thanks.[309]

Special Warning No. 53 of May 27, 1981 advised:

> 1. The Iranian government has recently revised the guidelines which it issued last fall for the navigational safety of merchant shipping in the Persian Gulf.
> 2. Relevant portions of the revised Iranian guidelines are as follows:
> – After transiting the Strait of Hormuz, merchant ships sailing to non-Iranian ports should pass 12 miles south of Abu Musa Island; 12 miles south of Sirri Island; south of Cable Bank Island; 12 miles south of Farsi Island; thence west of a line connecting the points 27-55N 49-53E and 29-10N 49-12E; thereafter south of the line 29-10N as far as 48-40E.
> – All Iranian coastal waters are war zones.
> – All transportation of cargo to Iraqi ports is prohibited.
> – The Iranian government will bear no responsibility for merchant ships which fail to comply with the above instructions.
> 3. Iraqi government has stated that the area north of 29-30N is a prohibited war zone.
> 4. Deep-draft shipping should be aware of shoal waters near Farsi Island.[310]

Iraq responded on October 7, 1980, indicating that the area of the Persian Gulf north of 29° 30' N was a "prohibited war zone."[311] The

309. Notice to Mariners No. 17/59 (Sept. 22, 1980), *reprinted in* UNITED STATES NAVAL WAR COLLEGE, MARITIME OPERATIONAL ZONES app. C at C-10 (2013); Sivakumaran, *supra* note 276, at 182–83.

310. Special Warning No. 53 (May 27, 1981), *reprinted in* UNITED STATES NAVAL WAR COLLEGE, MARITIME OPERATIONAL ZONES app. C at C-11 (2013).

311. Special Warning No. 50 (Oct. 7, 1980), *reprinted in* S.P. Menefee, *Commentary*, *in* THE IRAN-IRAQ WAR (1980–1988) AND THE LAW OF NAVAL WARFARE 147 (Andrea de Guttry & Natalino Ronzitti eds., 1993).

> zone was expanded on August 12, 1982. Special Warning No. 62 of August 16, 1982 advised:
>
> > 1. Special Warning No. 53 regarding the Persian Gulf remains in effect except that the Iraqi government has expanded the restricted military zone described below.
> >
> > 2. The Iraqi government has warned that it will attack all vessels appearing within a zone believed to be north and east of a line connecting the following points: (1) 29-30N 48-30E; (2) 29-25N 49-09E; (3) 29-00N 49-30E; (4) 2830N 49-30E; (5) 28-30N 51-00E. The Iraqi government has further warned that all tankers docking at Kharg Island, regardless of nationality, are targets for the Iraqi Air Force.[312]
>
> Both sides considered the establishment and enforcement of their respective war zones to be consistent with the law of armed conflict.[313] Nonetheless, attacks by both sides on neutral commercial shipping going to and from neutral ports were universally condemned by individual States and the UN Security Council.[314]

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:

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312. Special Warning No. 62 (Aug. 16, 1982), *reprinted in* UNITED STATES NAVAL WAR COLLEGE, MARITIME OPERATIONAL ZONES app. C at C-18 (2013); Sivakumaran, *supra* note 276, at 184.

313. For Iraq, see Permanent Representative of Iraq to the UN, Letter dated May 5, 1983 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General, U.N. Doc. A/38/187, S/15752 (May 9, 1983); Letter dated Feb. 20, 1985 from the representative of Iraq to the Secretary-General, U.N. Doc. S/16972 (Feb. 20, 1985); U.N. Secretary-General, *Report of the Secretary-General*, annex 6, U.N. Doc. S/18480 (Nov. 26, 1986); Sivakumaran, *supra* note 276, at 184–85. For Iran, see Letter dated May 25, 1984 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General, U.N. Doc. S/16585 (May 25, 1984).

314. *See, e.g.*, S.C. Res. 552 (June 1, 1984); S.C. Res. 582 (Feb. 24, 1986); U.N. SCOR, 39th Sess., 2546th mtg., ¶¶ 23, 33, 78, 92, U.N. Doc. S/PV.2546 (June 1, 1984); Sivakumaran, *supra* note 276, at 185.

1. Avoiding an attempt to establish identity

2. Resisting visit and search

3. Carrying contraband

4. Breaching or attempting to breach blockade

5. Presenting irregular or fraudulent papers; lacking necessary papers; or destroying, defacing, or concealing papers

6. Violating regulations established by a belligerent within the immediate area of naval operations

7. Carrying personnel in the military or public service of the enemy

8. Communicating information in the interest of the enemy.

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

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

Commentary

Neutral merchant vessels or neutral civil aircraft that have acquired enemy character are liable to capture. Additionally, neutral merchant

vessels and civil aircraft are, in general, liable to capture by a belligerent State's warships and military aircraft if performing any of the following acts: (1) carrying contraband; (2) carrying personnel in the military or public service of the enemy; (3) communicating information in the interest of the enemy; (4) breaching or attempting to breach a blockade; (5) violating regulations established by a belligerent within the immediate area of naval operations; (6) avoiding an attempt to establish identity, including visit and search; or (7) presenting irregular or fraudulent papers, lacking necessary papers, or destroying, defacing, or concealing papers.[315]

Neutral merchant vessels and aircraft are, in general, liable to capture if performing any of the following acts:

1. Carrying contraband (see paragraph 631d).
2. Breaking or attempting to break, blockade (see paragraph 632g).
3. Carrying personnel in the military or public service of an enemy.
4. Transmitting information in the interest of an enemy.
5. Avoiding an attempt to establish identity, including visit and search.
6. Presenting irregular or fraudulent papers; lacking necessary papers; destroying, defacing, or concealing papers.
7. Violating regulations established by a belligerent within the immediate area of naval operations (see paragraph 430b).[316]

Article 12 of the Havana Convention provides:

> The neutral vessel shall be seized and in general subjected to the same treatment as enemy merchantmen:
>
> (a) When taking a direct part in the hostilities;
>
> (b) When at the orders or under direction of an agent placed on board by an enemy government;
>
> (c) When entirely freight-loaded by an enemy government;

315. DOD LAW OF WAR MANUAL, § 15.15.1. *See also* NEWPORT MANUAL, §§ 8.6.5, 8.6.6, 9.6.

316. NWIP 10-2, ¶ 503d.

> (d) When actually and exclusively destined for transporting enemy troops or for the transmission of information on behalf of the enemy.

> Article 45 of the London Declaration of 1909 provides for the capture of neutral merchant vessels if they are "on a voyage especially undertaken with a view to the transport of individual passengers who are embodied in the armed forces of the enemy, or with a view to the transmission of intelligence in the interest of the enemy" or "if, to the knowledge of either the owner, the charterer, or the master, she is transporting a military detachment of the enemy, or one or more persons who, in the course of the voyage, directly assist the operations of the enemy." A neutral vessel may not be captured for these reasons if "the vessel is encountered at sea while unaware of the outbreak of hostilities, or if the master, after becoming aware of the outbreak of hostilities, has had no opportunity of disembarking the passengers." A vessel is "deemed to be aware of the existence of a state of war if she left an enemy port subsequently to the outbreak of hostilities, or a neutral port subsequently to the notification of the outbreak of hostilities to the Power to which such port belongs, provided that such notification was made in sufficient time."

Captured merchant vessels and civil aircraft are sent to a port or airfield under belligerent jurisdiction as a prize for adjudication by a prize court. A belligerent warship will place a prize master and prize crew on board a captured vessel for this purpose. Should that be impracticable, the prize may be escorted into port by a belligerent warship or military aircraft. In the latter circumstance, the prize must obey the instructions of its escort or risk forcible measures. OPNAVINST 3120.32D, Change 1, Article 6.3.21, Visit and Search, Boarding and Salvage, and Prize Crew Bill, sets forth the duties and responsibilities of commanding officers and prize masters concerning captured vessels. Neutral vessels or aircraft attempting to resist proper capture lay themselves open to forcible measures by belligerent warships and military aircraft and assume all risk of resulting damage.

Commentary

See DoD Law of War Manual, § 15.15.2. Note that a "Prize Court cannot be set up by a belligerent on neutral territory or on a vessel in neutral waters."[317]

Belligerent States have discretion in formulating their procedures for conducting the capture and condemnation of neutral merchant vessels and aircraft. For example, Article 2 of the Havana Convention provides:

> Both the detention of the vessel and its crew for violation of neutrality shall be made in accordance with the procedure which best suits the state effecting it and at the expense of the transgressing ship. Said state, except in the case of grave fault on its Part, is not responsible for damages which the vessel may suffer.[318]

Prior exercise of the right of visit and search is not required for the capture of neutral vessels or neutral aircraft that have acquired enemy status, if positive determination of status can be obtained by other means:

> Historically, visit and search was considered the only legally acceptable method for determining whether or not a merchant vessel was subject to capture. It is now recognized that changes in warfare have rendered this method either hazardous or impracticable in many situations. In the case of enemy merchant vessels and aircraft and neutral merchant vessels and aircraft acquiring enemy character as described in the preceding article, the belligerent right of capture (and, exceptionally, destruction as described in paragraph 503b) need not be preceded by visit and search, provided that a positive determination of status can be obtained by other methods.[319]

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317. Hague XIII, art. 4.
318. *See also* DOD LAW OF WAR MANUAL, § 15.15.2.
319. NWIP 10-2, ¶ 502a. *See also* DOD LAW OF WAR MANUAL, § 15.15.2.

Forcible measures by a belligerent warship or military aircraft can be used to compel compliance of a neutral vessel or aircraft that attempts to resist proper capture, and the neutral vessel or aircraft assumes the risk of any resulting damage. The same rule applies to resistance during visit and search.[320]

7.10.1 Destruction of Neutral Prizes

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

Commentary

Every reasonable effort should be made to avoid destruction of captured neutral vessels and aircraft.[321] A capturing officer should not order such destruction without being entirely satisfied that the prize can neither be sent to a belligerent State port or airfield nor, in his or her opinion, be properly released.[322] Thus, although the destruction of a neutral prize is not forbidden, it involves a much more serious responsibility than the destruction of an enemy prize.[323]

Should it become necessary that the prize be destroyed, the capturing officer must provide for the safety of the passengers and crew. Additionally, all documents and papers relating to the prize should be preserved and, if practicable, the personal effects of passengers should also be safeguarded:

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320. DOD LAW OF WAR MANUAL, § 15.15.2.1.
321. 2006 Australian Manual, ¶ 6.59; DOD LAW OF WAR MANUAL, § 15.15.3.
322. NWIP 10-2, ¶ 509e; DOD LAW OF WAR MANUAL, § 15.15.3.
323. NWIP 10-2, ¶ 509e; DOD LAW OF WAR MANUAL, § 15.15.3; NEWPORT MANUAL, § 9.13.

> Should the necessity for the destruction of a neutral prize arise, it is the duty of the capturing officer to provide for the safety of the passengers and crew. All documents and papers relating to a neutral prize should be saved. If practicable, the personal effects of passengers should be saved. Every case of destruction of a neutral prize should be reported promptly to a higher command.[324]

Article 1(4) of the Havana Convention provides: "The ship shall not be rendered incapable of navigation before the crew and passengers have been placed in safety." Article 22(2) of the Treaty for the Limitation and Reduction of Naval Armaments (London Treaty) further provides:

> 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.[325]

7.10.2 Personnel of Captured Neutral Vessels and Aircraft

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

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324. NWIP 10-2, ¶ 509e.
325. *See also* London Protocol of 1936.

of enemy warships or military aircraft and, upon capture, their officers and crew may be held as POWs.

Commentary

The officers and crews of captured neutral merchant vessels and aircraft who are nationals of a neutral State should not be made POWs, even if the vessel or aircraft has acquired the character of an enemy merchant vessel or aircraft.[326] However, if the vessel or aircraft has acquired the character of an enemy warship or military aircraft, the officers and crew may be held as POWs.[327]

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

Commentary

Enemy nationals may be made POWs:

> Enemy nationals found on board neutral merchant vessels and aircraft as passengers who are actually embodied in the military forces of an enemy, or who are en route to serve in an enemy's military forces, or who are employed in the public service of an enemy, or who may be engaged in or suspected of service in the interests of an enemy may be made prisoners of war.[328]

Belligerents have a right to remove certain enemy persons from neutral vessels or aircraft, even if there are no grounds for the capture

326. NWIP 10-2, ¶ 513a; DOD LAW OF WAR MANUAL, § 15.15.4.1.
327. DOD LAW OF WAR MANUAL, § 15.15.4.1.
328. NWIP 10-2, ¶ 513b.

of the vessel or aircraft as prize. Enemy nationals found onboard a neutral State's merchant vessels or civil aircraft as passengers who are (1) a current member of an enemy military force; (2) en route to join, or be incorporated into, an enemy's armed forces; (3) employed in the public service of the enemy State; or (4) engaged in, or suspected of engagement in, service in the interests of the enemy State also may be interned until a determination of their status has been made. Article 47 of the London Declaration of 1909 provides: "Any individual embodied in the armed forces of the enemy who is found on board a neutral merchant vessel, may be made a prisoner of war, even though there be no ground for the capture of the vessel."[329]

7.11 BELLIGERENT PERSONNEL INTERNED BY A NEUTRAL GOVERNMENT

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

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

Commentary

Article 11 of Hague V provides that "[a] neutral Power which receives on its territory troops belonging to the belligerent armies shall intern them."

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

329. *See also* DOD LAW OF WAR MANUAL, § 15.15.4.2.

Commentary

NWIP 10-2 states:

> As to belligerent military aircraft which are forbidden to enter the air space of a neutral State, the neutral State should use the means at its disposal to prevent their entry; should compel such aircraft to land once they have entered; and should usually intern such aircraft, together with their crews.[330]

Article 43 of the Hague Rules of Air Warfare provides: "The personnel of a disabled belligerent military aircraft who have been rescued outside the neutral territorial waters and brought into the jurisdiction of a neutral State by a neutral military aircraft and who have been landed there, shall be interned."

330. NWIP 10-2, ¶ 444b. *See also* Hague V, art. 11.

CHAPTER 8

THE LAW OF TARGETING

8.1 PRINCIPLES OF LAWFUL TARGETING

The legal principles underlying the law of armed conflict—military necessity, distinction, proportionality, unnecessary suffering, and honor (discussed in Chapter 5)—are the basis for the rules governing targeting decisions. The law requires only military objectives be attacked, but permits the use of sufficient force to destroy those objectives. Excessive collateral damage must be avoided to the extent possible and, consistent with mission accomplishment and the security of the force, unnecessary harm to civilians and civilian objects must be minimized. The law of targeting requires all feasible precautions must be taken to ensure that only military objectives are targeted so noncombatants, civilians, and civilian objects are spared as much as possible from the ravages of war. Warfare in the information environment, which includes targeting with nonlethal force, such as military information support operations and cyberspace operations, are addressed in 4.4.9 and 8.11.

Commentary

The right of States engaged in armed conflict to adopt means and methods of warfare is not unlimited. For example, the Hague Regulations provide: "The right of belligerents to adopt means of injuring the enemy is not unlimited."[1] The Preamble to the Conventional Weapons Convention similarly provides that "the principle of international law that the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited." And Article 35(1) of AP I provides: "In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited." The ICJ has opined:

> The legal principle by which parties to an armed conflict do not have an unlimited choice of weapons or of methods of warfare . . . [is intended] to ensure that weapons, both in the

1. Hague Regulations, art. 22. *See also* Convention No. II with Respect to the Laws and Customs of War on Land art. 22, July 29, 1899, 32 Stat. 1803, T.S. No. 403; NEWPORT MANUAL, § 8.2.

> context of their use, and in the methods of warfare, must comply with the other substantive rules.[2]

Therefore, the law of armed conflict contains various prohibitions and limitations on targeting and sets forth certain requirements during targeting. The law of armed conflict rules governing targeting have been implemented during military operations through rules of engagement and other military orders.[3]

The conduct of operations involving targeting is routinely subject to more restrictions and applies standards that are more protective of civilians than required by the law of war:

> The protection of civilians is fundamentally consistent with the effective, efficient, and decisive use of force in pursuit of U.S. national interests. Minimizing civilian casualties can further mission objectives; help maintain the support of partner governments and vulnerable populations, especially in the conduct of counterterrorism and counterinsurgency operations; and enhance the legitimacy and sustainability of U.S. operations critical to our national security. As a matter of policy, the United States therefore routinely imposes certain heightened policy standards that are more protective than the requirements of the law of armed conflict that relate to the protection of civilians.[4]

Indeed, military commanders often seek to reduce the risk of civilian casualties by taking additional precautions even when such measures are not required by the law of war:

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2. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 583, ¶ 11 (July 8) (dissenting opinion of Higgins, J.).

3. *See* DOD LAW OF WAR MANUAL, § 1.6.5 (Rules of Engagement), § 18.7 (Instructions, Regulations, and Procedures to Implement and Enforce the Law of War). *See also* NEWPORT MANUAL, § 8.1.

4. Exec. Order No. 13732, United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force, 81 Fed. Reg. 44485, § 1 (July 1, 2016).

> As a matter of international law, the United States is bound to adhere to the law of armed conflict. In many cases, the United States imposes standards on its direct-action operations that go beyond the requirements of the law of armed conflict. For example, the U.S. military may impose an upper limit as a matter of policy on the anticipated number of noncombatant casualties that is much lower than that which would be lawful under the rule that prohibits attacks that are expected to cause excessive incidental harm.[5]

Moreover, it is often the case that military or policy reasons preclude attack even though the attack would be legally permissible. For example, during the Persian Gulf War:

> Similar actions were taken by the Government of Iraq to use cultural property to protect legitimate targets from attack; a classic example was the positioning of two fighter aircraft adjacent to the ancient temple of Ur (as depicted in the photograph in Volume II, Chapter VI, "Off Limits Targets" section) on the theory that Coalition respect for the protection of cultural property would preclude the attack of those aircraft. While the law of war permits the attack of the two fighter aircraft, with Iraq bearing responsibility for any damage to the temple, Commander-in-Chief, Central Command (CINCCENT) elected not to attack the aircraft on the basis of respect for cultural property and the belief that positioning of the aircraft adjacent to Ur (without servicing equipment or a runway nearby) effectively had placed each out of action, thereby limiting the value of their destruction by Coalition air forces when weighed against the risk of damage to the temple. Other cultural property similarly remained on the Coalition no-attack list, despite Iraqi placement of valuable military equipment in or near those sites.[6]

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5. Brian Egan, Legal Adviser, Department of State, Remarks to the American Society of International Law: International Law, Legal Diplomacy, and the Counter-ISIL Campaign (Apr. 1, 2016).

6. PERSIAN GULF WAR: FINAL REPORT, at 615.

8.2 MILITARY OBJECTIVES

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

Commentary

The term "military objective" is used in various treaties as a term of art referring to a person or object that may lawfully be made the object of attack. It has been used to refer to "combatants or other military objectives"[7] or "any important military objective constituting a vulnerable point."[8] Article 18 of GC IV provides: "In view of the dangers to which hospitals may be exposed by being close to military objectives, it is recommended that such [civilian] hospitals be situated as far as possible from such objectives." Although enemy combatants may be made the object of attack, some sources limit the term "military objective" to objects.

Treaties have defined the term "military objective" in the context of objects, rather than persons: "Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which . . . ."[9] This Handbook uses the term "military objective" to include persons who may be made the object of attack.[10]

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7. Incendiary Weapons Protocol, art. 2(4).

8. Hague Cultural Property Convention, art. 8(1).

9. AP I, art. 52(2). *See also* Incendiary Weapons Protocol, art. 1(3); Amended Mines Protocol, art. 2(6).

10. *See also* DOD LAW OF WAR MANUAL, § 5.6.2.

Classes of persons who are military objectives and therefore may be attacked include combatants, such as military ground, air, and naval units, or unprivileged belligerents and civilians taking a direct part in hostilities. However, the following classes of persons are not military objectives and may not be attacked: military medical and religious personnel, unless they commit acts harmful to the enemy; military medical units, unless they have forfeited their protected status; combatants placed *hors de combat*; and *parlementaires*.[11]

Objects meeting the definition set forth in § 8.2 are military objectives subject to attack. With respect to objects, military objectives include "any object which by its nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[12] 10 U.S.C. § 950p(a)(1) provides:

> The term "military objective" means combatants and those objects during hostilities which, by their nature, location, purpose, or use, effectively contribute to the war-fighting or war-sustaining capability of an opposing force 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 an attack."

Article 52(2) of AP I similarly provides:

> In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

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11. DOD LAW OF WAR MANUAL, § 5.6.2.

12. Amended Mines Protocol, art. 2(6). *See also* Incendiary Weapons Protocol, art. 1(3). For a discussion of nature, location, use, and purpose, see NEWPORT MANUAL, §§ 8.5.1, 8.5.2.

As explained below, there are circumstances when objects that normally are civilian in character become military objectives. See § 8.2.5 and accompanying commentary. The term "dual-use" is used sometimes to describe objects that are used by both the armed forces and the civilian population, such as power stations or communications facilities. From the legal perspective, such objects are either military objectives or they are not; there is no intermediate legal category. If an object is a military objective, it is not a civilian object and may be made the object of attack. For example, Article 2(7) of the Amended Mines Protocol provides: "'Civilian objects' are all objects which are not military objectives as defined in paragraph 6 of this Article." However, harm to civilians and civilian objects is considered during the targeting of such military objectives when the rule of proportionality and the requirement to take feasible precautions in attack are applied. See § 8.3.1.

Two types of objects are categorically recognized as military objectives. First, military equipment and bases are so recognized.[13] Second, objects that contain military objectives are military objectives. Examples include storage and production sites for military equipment (such as missile production and storage facilities) and nuclear, biological, and chemical weapons research and production facilities. Facilities sheltering or billeting combatants also qualify on this basis.[14]

There are two parts to the definition of military objective with respect to objects: (1) the object somehow makes an effective contribution to military action; and (2) attacking, capturing, or neutralizing the object, in the circumstances, offers a definite military advantage.[15] Usually, satisfying the first element also satisfies the second because attacking the object in the circumstances will offer a definite military advantage by precluding it from effectively contributing to the enemy's military action. Additionally, the concept of definite military advantage is broader than merely denying the adversary

13. DOD LAW OF WAR MANUAL, § 5.6.4.1.
14. *Id.*
15. ICRC AP COMMENTARY, ¶ 2018.

the benefit of an object's effective contribution to its military operations.[16]

The four factors in the first part of the test are to be distinguished.[17] "Nature" refers to the type of object and may be understood to refer to objects that are per se military objectives. For example, military equipment and facilities, by their nature, make an effective contribution to military action.[18] An object can also satisfy the first part of the test if it provides an effective contribution to military action. For example, during military operations in urban areas, a house or other structure that would ordinarily be a civilian object may be located such that it provides cover to enemy forces or would provide a vantage point from which attacks could be launched or directed. Further, an area of land can be militarily important and therefore amount to a military objective.[19]

An object's present function is its "use." For example, using an otherwise civilian building to billet combatant forces makes the building a military objective. Similarly, using equipment and facilities for military purposes, such as a command-and-control center or communications facility, would satisfy the first test by making an effective contribution to the enemy's military action. "Purpose" refers to the intended or likely use in the future. For example, runways at a civilian airport could qualify as military objectives because they may be subject to immediate military use in the event that runways at military air bases have been rendered unserviceable or inoperable. Similarly, the likelihood that bridges or tunnels would be used in the adversary's military operations in the future because of attacks on other bridges could lead to them satisfying the purpose factor.

To make an effective contribution to military action, the contribution need not be "direct" or "proximate":

> Military objectives must make an "effective contribution to military action." This does not require a direct connection

16. *See* DOD LAW OF WAR MANUAL, § 5.6.7.3 (Definite Military Advantage).
17. DOD LAW OF WAR MANUAL, § 5.6.6.1.
18. ICRC AP COMMENTARY, ¶ 2020.
19. DOD LAW OF WAR MANUAL, § 5.6.8.4.

> with combat operation . . . . [A] civilian object may become a military objective and thereby lose its immunity from deliberate attack through use which is only indirectly related to combat action, but which nevertheless provides an effective contribution to the military phase of a Party's overall war effort.[20]

For example, an object might be geographically distant from most of the fighting and nonetheless satisfy this element.

The United States takes the position that "military action" has a broad meaning and is understood to mean the general prosecution of the war. It is not necessary that the object provide immediate tactical or operational gains or that the object make an effective contribution to a specific military operation. Rather, the object's effective contribution to the war-fighting or war-sustaining capability of an opposing force is sufficient. Although terms such as "war-fighting," "war-supporting," and "war-sustaining" are not explicitly reflected in the treaty definitions of "military objective," the United States has interpreted the military objective definition to include these concepts:

> In particular, I'd like to spend a few minutes walking through some of the targeting rules that the United States regards as customary international law applicable to all parties in a NIAC: . . . Insofar as objects are concerned, military objectives are those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. The United States has interpreted this definition to include objects that make an effective contribution to the enemy's war-fighting or war-sustaining capabilities.[21]

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20. MICHAEL BOTHE, KARL JOSEF PARTSCH, & WALDEMAR A. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS 324 (1982) (AP I, art. 52, ¶ 2.4.3).

21. Egan, *supra* note 5.

It must be cautioned that the "war-sustaining" criterion is controversial and the armed forces of other nations may take a narrower view of military action.[22]

In addition to making an effective contribution to the adversary's military action, attacking the object must also, in the circumstances, offer a definite military advantage in order to qualify as a military objective. Importantly, the second part of the test extends beyond damage or destruction to encompass capture or neutralization. Capture refers to the possibility of seizure (rather than destruction), which would confer a military advantage. For example, the seizure of a city may be a military objective because of its strategic location. Neutralization refers to a military action that denies an object to the enemy without capturing or destroying it. For example, a specific area of land may be neutralized by planting landmines on or around it, and thus denying it to the enemy.

The military advantage offered must be "definite," a term denoting a concrete and perceptible military advantage, rather than a merely hypothetical or speculative one, although it need not be immediate.[23] For example, the military advantage in the attack of an individual bridge may not be seen immediately but can be established by reference to the overall effort to isolate enemy military forces through the destruction of lines of communication.

"Military advantage" refers to the advantage anticipated from an attack when considered as a whole, and not only from its isolated or particular parts.[24] It is not restricted to immediate tactical gains but may be assessed in the full context of the war strategy. For example, with regard to the Persian Gulf War, it was noted that " '[m]ilitary advantage' is not restricted to tactical gains, but is linked to the full

22. *See* NEWPORT MANUAL, §§ 8.5.1.1, 8.5.1.2.

23. DOD LAW OF WAR MANUAL, § 5.6.7.3. *See* J. Fred Buzhardt, General Counsel, Department of Defense, Letter to Senator Edward Kennedy (Sept. 22, 1972), *reprinted in* 67 AMERICAN JOURNAL OF INTERNATIONAL LAW 122, 124 (1973).

24. *See, e.g.*, France, Statement on Ratification of AP I, *translated in* THE LAWS OF ARMED CONFLICTS 800, 800 (Dietrich Schindler & Jirí Toman eds., 4th ed. 2004).

context of a war strategy, in this instance, the execution of the Coalition war plan for liberation of Kuwait."[25] And, with regard to the conflict between Eritrea and Ethiopia, the Claims Commission stated:

> The Commission is of the view that the term "military advantage" can only properly be understood in the context of the military operations between the Parties taken as a whole, not simply in the context of a specific attack. Thus, with respect to the present claim, whether the attack on the power station offered a definite military advantage must be considered in the context of its relation to the armed conflict as a whole at the time of the attack.[26]

In a diversionary attack, for instance, military advantage would result from diverting the resources and attention of enemy forces. Military advantage includes enhancing the security of one's own forces or affecting the morale of enemy forces. However, diminishing the morale of civilians and their support for the war effort does not provide a definite military advantage:

> It is also probable that till the end of the War the aerial bombardment by the Allies did not assume the complexion of bombing for the exclusive purpose of spreading terror and shattering the morale of the population at large—though this was the inevitable concomitant of strategic target-bombing. Thus, what remained of the protection afforded by International Law to the civilian population in the matter of aerial bombardment was the principle—generally acknowledged by the Allies, though not always capable of being adhered to in practice—that the bombing of towns or purely residential parts of towns which were not in any way related to the war efforts of the enemy was unlawful.[27]

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25. PERSIAN GULF WAR: FINAL REPORT, at 613.

26. Eritrea Ethiopia Claims Commission, Partial Award: Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25 & 26, ¶ 113 (Dec. 19, 2005).

27. LAUTERPACHT, 2 OPPENHEIM'S INTERNATIONAL LAW 528–29 (§ 214eb); DOD LAW OF WAR MANUAL, § 5.6.7.3.

8.2.1 Combatants

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

Commentary

On combatant status, see also the commentary accompanying § 5.4.1.

In addition to distinguishing between the armed forces and the civilian population, the law of armed conflict also distinguishes between "privileged" and "unprivileged," or "lawful" and "unlawful," combatants. As the U.S. Supreme Court has explained: "Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful."[28] The Court has also noted that "[t]he capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'"[29] On "unprivileged belligerents," including members of organized armed groups and individual civilians who are directly participating in the hostilities, see § 8.2.2 below.

Membership in the armed forces makes a person liable to being made the object of attack, regardless of whether he or she is taking a direct part in hostilities: "Those who belong to armed forces or armed groups may be attacked at any time."[30] This is because the hostile intent of the armed forces may be imputed to an individual through

28. *Ex parte* Quirin, 317 U.S. 1, 31 (1942).

29. Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (plurality, quoting *Ex parte* Quirin at 28, 30).

30. ICRC AP COMMENTARY, ¶ 4789.

> his or her association with the armed forces. Moreover, the individual can be assigned a combat role at any time, even if that individual normally performs other functions for the group. Thus, combatants may be made the object of attack at all times, regardless of the activities in which they are engaged at the time of attack. For example, combatants who are standing in a mess line, engaging in recreational activities, or sleeping remain the lawful object of attack, provided they are not placed *hors de combat*.
>
> The categories of persons who may be made the object of attack because they are sufficiently associated with armed forces or armed groups include members of the armed forces of a State, members of militia and volunteer corps, participants in a *levée en masse*, persons belonging to non-State armed groups, and leaders whose responsibilities include the operational command and control of the armed forces.[31]

8.2.2 Unprivileged Belligerents

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

The law of armed conflict does not expressly prohibit civilians from directly participating in hostilities, but those who do so may be targeted so long as

31. *See* DOD LAW OF WAR MANUAL, § 5.7.2.

they take a direct part. There is no definition of direct part in hostilities in international law. At a minimum, it encompasses actions that are hostile per se, that is, by their very nature and purpose can be expected to cause actual harm to the enemy. Examples include taking up arms or otherwise trying to kill, injure, capture enemy personnel, or destroy enemy property. It would include certain actions that constitute an integral part of combat operations or effectively and substantially contribute to an adversary's ability to conduct, support, or sustain combat operations. Examples include serving as a lookout, guarding a military objective, or gathering intelligence for enemy military forces. It does not include actions which provide general support to a State's war effort, such as transmitting propaganda.

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

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

Commentary

"Unlawful combatants" or "unprivileged belligerents" are persons who, by engaging in hostilities, have incurred one or more of the corresponding liabilities of combatant status (e.g., being made the object of attack and subject to detention), but who are not entitled to any of the distinct privileges of combatant status (e.g., combatant immunity and POW status). On unprivileged belligerent status, see the commentary accompanying § 5.4.1.1.

There are two types of unprivileged belligerents: members of an organized armed group and direct participants in hostilities. As to the former, individuals who are formally or functionally part of a non-State armed group that is engaged in hostilities may be made the object of attack because they likewise share in their group's hostile intent. In *Al-Adahi v. Obama*, the Court of Appeals stated:

> The district court seemed to think it important to determine Al-Adahi's motive for attending the al-Qaida training camp. We do not understand why. Whatever his motive, the significant points are that al-Qaida was intent on attacking the United States and its allies, that bin Laden had issued a *fatwa* announcing that every Muslim had a duty to kill Americans, and that Al-Adahi voluntarily affiliated himself with al-Qaida.[32]

Formal membership in an armed group might be indicated by formal or direct information or by other types of information. Examples include using a rank, title, or style of communication; taking an oath of loyalty to the group or the group's leader; wearing a uniform or other clothing, adornments, or body markings that identify members of the group; or documents issued or belonging to the group that identify the person as a member, such as membership lists, identity cards, or membership applications.[33]

In many cases, such formal indicia may be unavailable. Yet, other indicators might point to formal membership. These include acting at the direction of the group or within its command structure; performing a function for the group that is analogous to a function normally performed by a member of a State's armed forces; taking a direct part in hostilities, including consideration of the frequency, intensity, and duration of such participation; accessing facilities, such as safehouses, training camps, or bases used by the group that outsiders would not be permitted to access; traveling along specific clandestine routes used by those groups; or traveling with members of

32. Al-Adahi v. Obama, 613 F.3d 1102, 1108 (D.C. Cir. 2010); DOD LAW OF WAR MANUAL, § 5.7.3.1.

33. Alsabri v. Obama, 684 F.3d 1298, 1304–5 (D.C. Cir. 2012); Alsabri v. Obama, 684 F.3d 1298, 1304–5 (D.C. Cir. 2012).

the group in remote locations or while the group conducts operations.[34]

Some groups lack a formal distinction between members and non-members who nonetheless participate in the hostile activities of the group.[35] The latter may functionally be deemed part of the group and therefore subject to attack on that basis. Indicia of this status include following directions issued by the group or its leaders; taking a direct part in hostilities on behalf of the group on a sufficiently frequent or intensive basis; or performing tasks on behalf of the group similar to those provided in a combat, combat support, or combat service support role in the armed forces of a State. If the association with the group unambiguously ceases, the individual is not targetable on this basis:

> Relevant factors in determining that an individual has ceased to be a member of an organized armed group include the amount of time that has passed since that individual has taken relevant action on behalf of the group in question, and whether he or she affirmatively has disassociated himself or herself from the organized armed group.[36]

However, the onus is on the person having belonged to the armed group to demonstrate clearly and affirmatively to the opposing forces that he or she will no longer participate in the activities of the group.

It was suggested in the ICRC's 2009 Interpretive Guidance that only members of an organized armed group who have a "continuous combat function" are targetable at all times (subject to other law of armed conflict targeting rules) and that those without such a function

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34. DOD LAW OF WAR MANUAL, § 5.7.3.1. *See* Alsabri v. Obama, 684 F.3d 1298, 1306 (D.C. Cir. 2012); Suleiman v. Obama, 670 F.3d 1311, 1314 (D.C. Cir. 2012); and Hussain v. Obama, 718 F.3d 964, 968–69 (D.C. Cir. 2013).

35. DOD LAW OF WAR MANUAL, § 5.7.3.2.

36. Stephen Pomper, Assistant Legal Adviser for Political-Military Affairs, Department of State, *Toward a Limited Consensus on the Loss of Civilian Immunity in Non-International Armed Conflict: Making Progress Through Practice*, 88 INTERNATIONAL LAW STUDIES 181, 189 (2012).

may only be targeted on the same basis as individual direct participants in hostilities.[37] The United States rejects this assertion on the basis that membership in the group renders the individual subject to attack during the duration of membership, irrespective of the person's role in the group.[38]

The second category of unprivileged belligerents encompasses civilians who directly participate in the hostilities. They lose their protection from attack for such time as they directly participate. This is a rule of customary law and is reflected in Article 51(3) of AP I and Article 13(3) of AP II for parties to those instruments, which apply in international and non-international armed conflicts respectively. The ICRC has published the Interpretive Guidance to elucidate the rule. Although parts of the document accurately reflect customary law, the United States disagrees with various conclusions asserted in it: "From the operational perspective, the feedback [on the Interpretive Guidance] was that the report was too rigid and complex, and did not give an accurate picture of State practice or (in some respects) of a practice to which States could realistically aspire."[39] In *Al-Bihani v. Obama*, the U.S. Supreme Court noted:

> The work itself explicitly disclaims that it should be read to have the force of law. . . . Even to the extent that Al Bihani's reading of the Guidance is correct, then, the best he can do is suggest that we should follow it on the basis of its persuasive force. As against the binding language of the [Authorization for Use of Military Force] and its necessary implications, however, that force is insubstantial.[40]

Direct participation includes actions that are, by their nature and purpose, intended to cause actual harm to the enemy: "Thus 'direct' participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces."[41] It extends beyond engaging in combat and

37. ICRC INTERPRETIVE GUIDANCE, at 33–34.
38. DOD LAW OF WAR MANUAL, § 5.8.2.1.
39. Pomper, *supra* note 36, at 186.
40. Al-Bihani v. Obama, 590 F.3d 866, 885 (D.C. Cir. 2010) (Williams, J., concurring).
41. ICRC AP COMMENTARY, ¶ 1944; DOD LAW OF WAR MANUAL, § 5.8.3.

includes certain acts that are an integral part of combat operations or that effectively and substantially contribute to an adversary's ability to conduct or sustain combat operations. However, taking a direct part in hostilities does not encompass the general support that members of the civilian population provide to their State's war effort. The determination is highly contextual. Factors include the degree to which the act causes harm to the opposing party's persons or objects; the degree to which it is connected to the hostilities; the specific purpose underlying the act; the military significance of the activity to the party's war effort; and the degree to which the activity is viewed inherently or traditionally as a military one.[42]

Examples of conduct not rising to the level of direct participation include mere sympathy or moral support for a party's cause; general contributions made by citizens to their State's war effort (e.g., paying taxes); police services; independent journalism or public advocacy; working in a munitions factory or other factory that is not in geographic or temporal proximity to military operations but that is supplying weapons, materiel, and other goods useful to the armed forces of a State; and providing medical care or impartial humanitarian assistance.

Note that civilians directly participating in hostilities not only lose their protection from attack for such time as they are engaged in the activity but also do not factor into proportionality and precautions in attack considerations. On these, see § 8.3.1.

The loss of protection from attack applies only "for such time" as the civilian is directly participating in hostilities. A variety of views exist as to the duration of this period:

> At one end of the spectrum were experts who preferred narrowly defining temporal scope and favoured strictly limiting loss of protection to the period where [direct participation in hostilities (DPH)] is actually being carried out. At the other end were experts who said that, once a person had under-

42. DOD LAW OF WAR MANUAL, § 5.8.3.

> taken an act constituting DPH, that person must clearly express a will to definitively disengage and offer assurances that he or she will not resume hostilities in order to regain protection against direct attack. However, opinions varied greatly and could not easily be divided into two groups supporting distinct positions.[43]

The United States has taken the position that once a direct participant has permanently ceased his or her participation, that individual regains his or her protections as a civilian because there would be no military necessity for attacking him or her. The assessment of whether a person has permanently ceased participation in hostilities must be based on a good faith assessment of the available information.[44] Persons who take a direct part in hostilities, however, do not benefit from a "revolving door" of protection. In other words, persons who repeatedly engage in hostilities do not regain protection between engagements and other acts of participation. A "revolving door" of protection would place these civilians who take a direct part in hostilities on a better footing than lawful combatants, who may be made the object of attack even when not taking a direct part in hostilities.

There may be difficult cases, and in such situations a case-by-case analysis of the specific facts would be needed. The Israeli High Court of Justice has noted:

> These examples point out the dilemma which the "for such time" requirement presents before us. On the one hand, a civilian who took a direct part in hostilities once, or sporadically, but detached himself from them (entirely, or for a long period) is not to be harmed. On the other hand, the "revolving door" phenomenon, by which each terrorist has "horns of the alter" (1 Kings 1:50) to grasp or a "city of refuge" (Numbers 35:11) to flee to, to which he turns in order to rest and prepare while they grant him immunity from attack, is to be avoided (*see* Schmitt, at p. 536; Watkin, at p. 12; Kretzmer,

43. Nils Melzer, *Background Paper: Direct Participation on Hostilities under International Humanitarian Law—Expert Meeting of 25–26 October, 2004*, 34 (2004).

44. DOD LAW OF WAR MANUAL, § 5.8.4.

at p. 193; DINSTEIN, at p. 29; *and* Parks, at p. 118). In the wide area between those two possibilities, one finds the "gray" cases, about which customary international law has not yet crystallized. There is thus no escaping examination of each and every case.[45]

8.2.3 Hors de Combat

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

Commentary

On *hors de combat* status, see the commentary accompanying § 5.4.2. The term *hors de combat* appears in Common Article 3 of the 1949 Geneva Conventions and Article 41 of AP I. These provisions reflect customary law. Those who are *hors de combat* may not be attacked. Provided they abstain from any hostile act and do not attempt to escape, persons are *hors de combat* if they are in the power of an adverse party; are not yet in custody but have surrendered; have been rendered unconscious or otherwise incapacitated by wounds, sickness, or shipwreck; or are parachuting from aircraft in distress.[46]

Persons in the power of an adverse party include all persons detained by an adverse party, such as POWs, unprivileged belligerents, retained personnel, and civilian internees. Persons who are not in custody but who have surrendered are also *hors de combat* so long as the surrender is (1) genuine; (2) clear and unconditional; and (3) under circumstances where it is feasible for the opposing party to accept the surrender. See § 8.2.3.2. Under Article 23(c) of the Hague Regulations, it is especially forbidden to "kill or wound an enemy who, having laid down his arms, or having no longer means of defence,

45. HCJ 769/02, Public Committee against Torture in Israel v. Government of Israel, ¶ 40 (Dec. 11, 2005).

46. DOD LAW OF WAR MANUAL, § 5.9.

has surrendered at discretion." Article 41(2) of AP I provides that a person is *hors de combat* if "he clearly expresses an intention to surrender," provided that "he abstains from any hostile act and does not attempt to escape." The United States has taken the following position:

> Finally, consistent with the laws of armed conflict and U.S. military doctrine, the U.S. forces were prepared to capture bin Laden if he had surrendered in a way that they could safely accept. The laws of armed conflict require acceptance of a genuine offer of surrender that is clearly communicated by the surrendering party and received by the opposing force, under circumstances where it is feasible for the opposing force to accept that offer of surrender. But where that is not the case, those laws authorize use of lethal force against an enemy belligerent, under the circumstances presented here.[47]

The feasibility of accepting surrender refers to whether it is practical and safe to take custody of the surrendering persons in the circumstances. Consider the situation of enemy soldiers who man an antiaircraft gun and shoot at an enemy aircraft, and who then raise their hands as if to surrender seconds before a second aircraft attacks their position. In the circumstances, it would not be feasible for the crew of the attacking aircraft to land and accept their surrender. Similarly, a soldier 50 meters from an enemy defensive position in the midst of an infantry assault by his unit could not throw down his weapon and raise his arms (as if to indicate his desire to surrender) and reasonably expect that the defending unit will be able to accept and accomplish his surrender while resisting the ongoing assault by his unit. It must be cautioned, however, that the feasibility of accepting surrender does not include consideration of whether it is feasible to care for detainees after taking custody. Offers to surrender may not be refused because it would be militarily inconvenient or impractical to guard or care for detainees.

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47. Harold Koh, Legal Adviser, Department of State, *The Lawfulness of the U.S. Operation Against Osama bin Laden*, OPINIO JURIS (May 19, 2011), https://opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden/.

Sometimes, combatants suffer from wounds and sickness, but nonetheless continue to fight. They are not *hors de combat*. To qualify as *hors de combat*, the person must be unable to fight.

Shipwrecked combatants are those shipwrecked from any cause, including forced landings at sea by or from aircraft. See § 8.2.3.1. Circumstances of combat may make it difficult to distinguish between persons who have been incapacitated by wounds, sickness, or shipwreck and those who continue to fight. If possible, those seeking protection as wounded, sick, or shipwrecked should make their condition clear.

Aircrew or embarked passengers parachuting from an aircraft in distress are *hors de combat*. As with the circumstances discussed above, they forfeit their protection if they engage in hostile acts or attempt to evade capture. Those parachuting into combat may be attacked throughout their descent and upon landing. This includes those who are parachuting into combat from a disabled aircraft. See § 8.2.3.3.

8.2.3.1 Shipwrecked Persons

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

Commentary

See the commentary accompanying § 8.2.3. See also DoD Law of War Manual, § 5.9.4.

8.2.3.2 Surrender

Combatants and unprivileged belligerents cease to be subject to attack when they cease fighting and clearly indicate their wish to surrender. The law of armed conflict does not precisely define when surrender takes effect or how it may be accomplished in practical terms. Surrender involves an offer by the surrendering party (a unit or individual combatant) and an ability to accept on the part of the opponent. The latter may not refuse an offer of surrender

when communicated, but communication must be made at a time when it can be received and properly acted upon. An attempt to surrender in the midst of an ongoing battle is neither easily communicated nor received. The issue is one of reasonableness. The mere fact that a combatant or enemy force is retreating or fleeing the battlefield, without some other positive indication of intent to surrender, does not constitute an attempt to surrender, even if such combatant or force has abandoned their arms or equipment.

Commentary

See the commentary accompanying §§ 5.4.2. and 8.2.3. See also DoD Law of War Manual, § 5.9.3.

8.2.3.3 Airborne Forces versus Parachutists in Distress

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

Commentary

See the commentary accompanying §§ 5.4.2 and 8.2.3. See also DoD Law of War Manual, § 5.9.5.

8.2.4 Noncombatants

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

Commentary

On noncombatant status, see the commentary accompanying § 5.4.2.

8.2.4.1 Medical Personnel

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

Commentary

On medical personnel status, see the commentary accompanying § 5.4.2.

8.2.4.2 Religious Personnel

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

Commentary

On religious personnel status, see the commentary accompanying § 5.4.2.

8.2.5 Objects

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

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

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

12. Ammunition stores.

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

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

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

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

Military action is used in the ordinary sense of the words and is not intended to encompass a limited or specific military operation. Military action has a broad meaning and is understood to mean the general prosecution of the war. To be a military objective does not require the attack of the object provides immediate tactical or operational gains or the object makes an effective

contribution to a specific military operation. Rather, the object's effective contribution to the warfighting or war-sustaining capability of an opposing force is sufficient. Although terms such as warfighting, war-supporting, and war-sustaining are not explicitly reflected in the Additional Protocol I definition of 'military objective,' the United States has interpreted the military objective definition to include these concepts. Commanders participating in coalition operations should be aware that some allies and partners do not believe objects that provide war-sustaining objects are military objectives.

Commentary

See the commentary accompanying § 8.2. See also DoD Law of War Manual, § 5.6.3.

8.3 CIVILIANS AND CIVILIAN OBJECTS

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

Commentary

Civilians and civilian objects are persons and objects who do not qualify as military objectives. On qualification as a military objective, see § 8.2 and accompanying commentary. On combatant status, see § 8.2.1 and accompanying commentary. Objects and persons not satisfying the criteria set forth in these sections are civilian objects and civilians respectively and may not be attacked. On the requirement to distinguish between civilians and civilian objects on the one hand, and combatants and military objectives on the other, see § 5.3.4 and accompanying commentary.

Civilians may not be made the object of attack. This is explicitly stated in Article 51 of AP I, which is considered to reflect customary international law. Civilians are individuals who are not members of the armed forces of a party, which "consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party."[48]

It must be cautioned that civilians not otherwise qualifying as members of the armed forces lose their protections from attack while directly participating in hostilities. See § 8.2.2 and accompanying commentary.

The wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect.[49] Civilians may be killed incidentally in military operations; however, the expected incidental harm to civilians may not be excessive in relation to the anticipated military advantage from an attack, and feasible precautions must be taken to reduce the risk of harm to civilians during military operations. See § 8.3.1. and accompanying commentary.

Article 52 of AP I reflects this rule for objects:

> 1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.
>
> 2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

48. AP I, art. 43(1).
49. GC IV, art. 16.

Article 54(2) of AP I provides:

> It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.

This rule does not apply to attacks that are carried out for specific purposes other than to deny sustenance to the civilian population. For example, the rule would not prohibit destroying a field of crops to prevent it from being used as concealment by the enemy, or destroying a supply route that is used to move military supplies but is also used to supply the civilian population with food."[50]

Similarly, the AP I prohibition does not apply to objects that it would otherwise cover if those objects are used by an adverse party "as sustenance solely for the members of its armed forces" or "if not as sustenance, then in direct support of military action."[51] Actions against this latter category of objects, however, may not be taken if they "may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement." A State may engage in a "scorched earth" defense of its own territory.[52]

This AP I prohibition was novel when adopted and it would be difficult to conclude that all of its particulars reflect customary interna-

50. *See, e.g.*, Memorandum from the Joint Chiefs of Staff for the Secretary of Defense, Review of the 1977 First Additional Protocol to the Geneva Conventions of 1949, JCSM-152–85 app. at 56 (May 3, 1985); United Kingdom, Statement on Ratification of AP I, Jan. 28, 1998, 2020 U.N.T.S. 75, 77.

51. AP I, art 54(3).

52. AP I, art. 54(5).

> tional law. Nonetheless, the United States has supported the underlying principle that starvation of civilians may not be used as a method of warfare:
>
> > We support the principle that starvation of civilians not be used as a method of warfare, and subject to the requirements of imperative military necessity, that impartial relief actions necessary for the survival of the civilian population be permitted and encouraged. These principles can be found, though in a somewhat different form, in articles 54 and 70.[53]

8.3.1 Collateral Damage and Precautions in Attack

It is not unlawful to cause incidental injury to civilians or collateral damage to civilian objects during an attack upon a legitimate military objective. The principle of proportionality requires the anticipated incidental injury or collateral damage must not be excessive in light of the military advantage expected to be gained. Naval commanders must take all reasonable precautions, taking into account military and humanitarian considerations, to keep civilian casualties and damage to the minimum consistent with mission accomplishment and the security of the force. In each instance, the commander must determine whether the anticipated incidental injuries and collateral damage would be excessive, on the basis of an honest and reasonable estimate of the facts available to the commander at the time. The commander must decide, in light of all the facts known or reasonably available to them, including the need to conserve resources and complete the mission successfully, whether to adopt an alternative method (i.e., tactics) or means (i.e., weapons) of attack, if reasonably available, to reduce civilian casualties and damage.

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53. Michael J. Matheson, Deputy Legal Adviser, Department of State, Remarks on the United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions at the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law (Jan. 22, 1987), *reprinted in* 2 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 419, 426 (1987).

Commentary

This section sets forth the rule of proportionality and the requirement of an attacking force to take precautions to minimize civilian harm. On proportionality, see § 5.3.3. and accompanying commentary and DoD Law of War Manual, § 5.12.

By the rule of proportionality, attacks are prohibited where the expected loss of civilian life, injury to civilians, and damage to civilian objects incidental to the attack would be excessive in relation to the concrete and direct military advantage expected to be gained. This is a customary rule reflected in Articles 51(5)(b) and 57(2)(a)(iii) of AP I. The rule does not require consideration of harm to military personnel and military objectives, although feasible precautions must be taken to reduce the risk of harm to those who are protected from being made the object of attack, such as military personnel placed *hors de combat*.

Certain persons and objects merit particular consideration in performing proportionality calculations.[54] For instance, the expected loss of civilian life and injury to civilians should be given greater consideration than the expected damage to civilian objects. "While collateral damage to civilian objects should be minimized, consistent with the above, collateral damage to civilian objects should not be given the same level of concern as incidental injury to civilians."[55] Similarly, the expected damage to civilian objects (such as schools, hospitals, and religious facilities) should be given greater consideration when such damage is expected to involve the risk of harming civilians present inside such objects, and damage to cultural property should be afforded greater consideration than expected damage to ordinary property.

The rule of proportionality only requires consideration of expected loss of civilian life, injury to civilians, and damage to civilian objects.

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54. DOD LAW OF WAR MANUAL, § 5.12.1.1.

55. U.S. Comments on the International Committee of the Red Cross's Memorandum on the Applicability of International Humanitarian Law in the Gulf Region, Jan. 11, 1991, 2 1991–99 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 2057, 2063–64 [hereinafter U.S. Comments on the ICRC Memorandum].

Mere inconveniences or temporary disruptions to civilian life need not be considered in applying this rule. For example, although the actual damage to a civilian marketplace from an attack on a nearby military objective would be considered, the temporary disruption to commerce from the closure of the marketplace due to the nearby attack would not need to be considered.[56]

Remote harms that could result from the attack do not need to be considered. Proportionality calculations involve only immediate or direct harms foreseeably resulting from the attack.[57] For instance, in determining the expected loss of civilian life, injury to civilians, and damage to civilian objects, an attacker would not be required to consider the possibility that a munition might not detonate as intended and might injure civilians much later after the attack. Additionally, harm caused by enemy action, or beyond the control of either party, need not be considered, as would be the case with civilians injured or killed by counter-attacks from enemy air defense measures, such as spent surface-to-air missiles or antiaircraft projectiles.

The military advantage factored into a proportionality calculation must be "concrete and direct." The military advantage may not be merely hypothetical or speculative, although there is no requirement that it be "immediate." For example, the understanding of both Australia and New Zealand is that "the term 'concrete and direct military advantage anticipated', used in Articles 51 and 57, means a bona fide expectation that the attack will make a relevant and proportional contribution to the objective of the military attack involved."[58] The Canadian Manual states that a "concrete and direct military advantage exists if the commander has an honest and reasonable expectation that the attack will make a relevant contribution to the success of the overall operation."[59]

The military advantage expected from an attack is intended to refer to the advantage gained from the attack considered as a whole, rather

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56. DOD LAW OF WAR MANUAL, § 5.12.1.2.

57. *Id.* § 5.12.1.3.

58. Australia, Statement on Ratification of AP I, June 21, 1991, 1642 U.N.T.S. 474; New Zealand, Statement on Ratification of AP I, Feb. 8, 1988, 1499 U.N.T.S. 358.

59. CANADIAN MANUAL, ¶ 415(2).

than from only isolated or particular parts of an attack. Similarly, "military advantage" is not restricted to immediate tactical gains but may be assessed in the full context of the war strategy.[60] The military importance of a target often turns on its relationship to other targets within an operational system, and the effect that disabling the target will have on the functions that comprise the adversary's ability to wage war.[61]

Determining whether the expected incidental harm is excessive does not necessarily lend itself to quantitative analysis because the comparison is often between unlike quantities and values. The ICTY has stated:

> The main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied. It is relatively simple to state that there must be an acceptable relation between the legitimate destructive effect and undesirable collateral effects. . . . Unfortunately, most applications of the principle of proportionality are not quite so clear cut. It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values. One cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective.[62]

In less clear-cut cases, the legal question of whether the expected incidental harm is excessive may be a "highly open-ended" inquiry, and the answer may be "subjective and imprecise."[63] Therefore, States have chosen to apply a "clearly excessive" standard for determining whether a criminal violation has occurred.[64] The United

60. United Kingdom, Statement on Ratification of AP I, Jan. 28, 1998, 2020 U.N.T.S. 75, 77.

61. ICTY, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, ¶ 78 (June 13, 2000).

62. *Id.* ¶ 48.

63. Statement of Interest of the United States of America, Matar v. Dichter, 2006 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 465, 471–72.

64. *See, e.g.*, Rome Statute, art. 8(2)(b)(iv).

States has proposed the following definition of "proportionality": "The principle of proportionality prohibits attacks which are expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be clearly excessive in relation to the overall advantage anticipated."[65]

The obligation to take precautions in attack requires that an attacker "take feasible precautions in planning and conducting attacks to reduce the risk of harm to civilians and other persons and objects protected from being made the object of attack."[66] U.S. policy is that, "consistent with mission objectives and applicable law, including the law of armed conflict," relevant agencies shall

> take feasible precautions in conducting attacks to reduce the likelihood of civilian casualties, such as providing warnings to the civilian population (unless the circumstances do not permit), adjusting the timing of attacks, taking steps to ensure military objectives and civilians are clearly distinguished, and taking other measures appropriate to the circumstances . . . .[67]

Article 27 of the Hague Regulations provides: "In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes." Article 5 of Hague IX provides:

> In bombardments by naval forces all the necessary measures must be taken by the commander to spare as far as possible sacred edifices, buildings used for artistic, scientific, or charitable purposes, historic monuments, hospitals, and places

65. United States of America: Proposal regarding an annex on definitional elements for part 2 crimes, A/CONF.183/C.1/L.10, *reprinted in* 3 OFFICIAL RECORDS OF THE UNITED NATIONS DIPLOMATIC CONFERENCE OF PLENIPOTENTIARIES ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT 229, 232 (2002).

66. DOD LAW OF WAR MANUAL, § 5.11.

67. Exec. Order 13732, *supra* note 4, at 44485–86 (§ 2).

> where the sick or wounded are collected, on the understanding that they are not used at the same time for military purposes.

The United States has taken the following position:

> In particular, the U.S. reservation [to AP III] is consistent with article 57(2)(ii) and article 57(4) of the 1977 Additional Protocol I to the Geneva Conventions. Article 57(4) provides that governments shall "take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects." Although the United States is not a party to Additional Protocol I, we believe these provisions are an accurate statement of the fundamental law of war principle of discrimination.[68]

For parties to the instrument, Article 57(2) of AP I provides:

> With respect to attacks, the following precautions shall be taken:
>
> (a) those who plan or decide upon an attack shall:
>
> . . . .
>
> (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects; . . . .

Article 57(4) of AP I provides:

> In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in

68. Harold Koh, Legal Adviser, Department of State, Letter to Paul Seger, Legal Adviser of Switzerland, regarding Switzerland's Position on the U.S. Reservation to Protocol III of the Convention on Certain Conventional Weapons (Dec. 30, 2009).

> armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.

Feasible precautions in planning and conducting attacks may include, but are not limited to, the following: assessing the risks to civilians; identifying zones in which military objectives are more likely to be present or civilians are more likely to be absent; providing effective advance warning before an attack that may affect the civilian population; adjusting the timing of an attack; cancelling or suspending attacks based on new information raising concerns of expected civilian casualties; weaponeering (e.g., selecting appropriate weapons, aim points); and selecting military objectives.

Unless circumstances do not permit, effective advance warning must be given of an attack that may affect the civilian population. Article 26 of the Hague Regulations provides that "[t]he officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities." Article 6 of Hague IX requires that "[i]f the military situation permits, the commander of the attacking naval force, before commencing the bombardment, must do his utmost to warn the authorities." Article 19 of the Lieber Code provides:

> Commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the noncombatants, and especially the women and children, may be removed before the bombardment commences. But it is no infraction of the common law of war to omit thus to inform the enemy. Surprise may be a necessity.

Article 57(2)(c) of AP I requires that "[e]ffective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit."

Warnings are intended to allow civilians and the authorities in control of the civilian population to take measures to reduce the risk that civilians will be harmed by military operations. Although there is no set form for warnings, they should be designed to accomplish this

purpose. Warnings may be communicated to the authorities in control of the civilian population or directly to the civilian population through military information support operations and may be general in nature. Giving the specific time and place of an attack is not required.

If the civilian population will not be affected by an attack, no warning is required. Circumstances may also preclude the obligation to warn. Circumstances not permitting the giving of advance warning include where giving a warning would be incompatible with legitimate military requirements, such as exploiting the element of surprise in order to provide for mission accomplishment and preserving the security of the attacking force. "The 'unless circumstances do not permit' recognizes the importance of the element of surprise. Where surprise is important to mission accomplishment and allowable risk to friendly forces, a warning is not required."[69]

Article 57(3) of AP I provides that "[w]hen a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects." The United States has expressed the view that this language is not a part of customary international law:

> Paragraph 4B(4) contains the language of Article 57(3) of Protocol I, and is not a part of customary law. The provision applies "when a choice is possible . . . ;" it is not mandatory. An attacker may comply with it if it is possible to do so, subject to mission accomplishment and allowable risk, or he may determine that it is impossible to make such a determination.[70]

The U.S. view as to the customary law requirement is explained in the DoD Law of War Manual, § 5.11.7.[71] The United States interprets the precautions-in-attack obligation as not preventing the commander from attacking multiple military objectives or pursuing every

69. U.S. Comments on the ICRC Memorandum, *supra* note 55, at 2064.
70. *Id.*
71. *See also* NEWPORT MANUAL, § 8.9.

> military advantage that he or she believes warrants pursuit. And when the choice of military objectives involves different risks and benefits potentially yielding different military advantages, the rule does not require that the object that may be expected to cause the least danger to civilian lives and to civilian objects be chosen for attack. For example, a commander could decide to attack a military objective involving higher risks of civilian casualties because the attack on that objective affords a greater likelihood of achieving the military advantage.

8.3.2 Civilians In or On Military Objectives

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

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

The presence of civilian workers (e.g., technical representatives aboard a warship or employees in a munitions factory) in or on a military objective, does not alter the status of the military objective. Provided such civilian workers are not taking a direct part in hostilities, they must be considered in a commander's proportionality analysis and feasible precautions must be taken to reduce the risk of harm to them. Because the primary military objectives at sea are vessels, and the principle of proportionality is applied using a vessel-based construct, absent particular information, naval commanders are not

generally required to conduct an individualized proportionality assessment of embarked personnel on the vessel once it has been deemed a lawful military objective. See 5.3.3.

Commentary

Parties to a conflict may not use the presence or movement of protected persons or objects (1) to attempt to make certain points or areas immune from seizure or attack; (2) to shield military objectives from attack; or (3) otherwise to shield or favor one's own military operations or to impede the adversary's military operations.[72] In particular, the civilian population, protected persons under GC IV, POWs, fixed medical establishments and medical units, *parlementaires* and other persons protected by a flag of truce, and cultural property are protected persons and objects that may not be used in order to shield.

The prohibition does not prohibit using what would otherwise be a civilian object for military purposes and thereby converting it to a military objective that is not protected by the law of armed conflict. For example, a building that previously was a civilian object could be used for military purposes (including as cover) and would not implicate this rule because it would no longer be a protected object. Similarly, this rule does not prohibit persons who would otherwise be civilians from participating in hostilities or otherwise assuming the risks inherent in supporting military operations. Rather, the essence of the rule is to refrain from deliberately endangering protected persons or objects for the purpose of deterring enemy military operations.

Violations of the prohibition do not relieve those conducting attacks from their obligation to seek to discriminate between lawful and unlawful objects of attack.[73] However, such violations by the adversary may impair the attacking force's ability to discriminate and increase the risk of harm to protected persons and objects.

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72. DOD LAW OF WAR MANUAL, § 5.16. *See also* AP I, art. 51(7); 10 U.S.C. § 950t(9) (using protected persons as a shield); § 950t(10) (using protected property as a shield).

73. DOD LAW OF WAR MANUAL, § 5.16.4; AP I, art. 51(8).

The United States is of the view that enemy use of voluntary human shields may be considered as a factor in assessing the legality of an attack. In other words, their act of voluntary shielding may be taken into consideration when doing the proportionality calculation. However, the attacker remains responsible for taking feasible precautions in attack to reduce the risk of harming them. The more challenging legal question is the effect of involuntary shielding. The U.S. position is that the party that employs human shields in an attempt to shield military objectives from attack assumes responsibility for their injury, although the attacker may share this responsibility if it fails to take feasible precautions:[74]

> In no case may a combatant force utilize individual civilians or the civilian population to shield a military objective from attack. A nation that utilizes civilians to shield a target from attack assumes responsibility for their injury, so long as an attacker exercises reasonable precaution in executing its operations. Likewise, civilians working within or in the immediate vicinity of a legitimate military objective assume a certain risk of injury.[75]

This approach is controversial.

Although reasonable steps must be taken to separate the civilian population from military objectives, such as by removing members of the civilian population from the vicinity of military objectives and combat operations, civilian personnel sometimes work in or on military objectives in order to support military operations. For example, civilian workers may serve as members of military aircrews, as technical advisers on warships, and as workers in munitions factories. Provided they are not taking a direct part in hostilities, those performing a proportionality assessment to determine whether a planned attack would be excessive must consider such workers, and feasible precautions must be taken to reduce the risk of harm to them.[76]

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74. DOD LAW OF WAR MANUAL, § 5.16.5.
75. U.S. Comments on the ICRC Memorandum, *supra* note 55, at 2063.
76. DOD LAW OF WAR MANUAL, § 5.12.3.3.

8.4 ENVIRONMENTAL CONSIDERATIONS

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

Commentary

The United States is a party to the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD Convention). It is prohibited to use environmental modification techniques having widespread, long-lasting, or severe effects as a means of destruction, damage, or injury to another party to the Convention.[77] In addition, it is prohibited to assist, encourage, or induce others to use such environmental modification techniques against a party to the Convention.[78]

"Environmental modification techniques" refers to any technique for changing, through the deliberate manipulation of natural processes, the dynamics, composition, or structure of the Earth, including its biota, lithosphere, hydrosphere, and atmosphere, or of outer space.[79] "Widespread" denotes an area on the scale of several hundred square kilometers. "Long-lasting" is a period of at least months, or approximately a season. "Severe" effects are those involving seri-

77. ENMOD Convention, art. 1(1). *See, e.g.* NEWPORT MANUAL, §§ 6.3.1, 8.7.5.2.
78. *Id.* art. 1(2); DOD LAW OF WAR MANUAL, § 6.10.
79. ENMOD Convention, art. 2.

ous or significant disruption or harm to human life, natural and economic resources, or other assets.[80] For example, earthquakes, tsunamis, and cyclones are environmental effects likely to be widespread, long-lasting, or severe that could be caused by the use of environmental modification techniques. By contrast, dispelling fog to facilitate military or combat operations may involve the use of environmental modification techniques, but the effects would not be widespread, long-lasting, or severe.

In order to fall within the ENMOD Convention's prohibitions, the environmental modification techniques must be used as a means of destruction, damage, or injury to another party to the Convention. The ENMOD Convention does not prohibit damage to the environment but reflects the idea that the environment itself should not be used as an instrument of war:

> The Environmental Modification Convention is not an Environmental Protection Treaty; it is not a treaty to prohibit damage to the environment resulting from armed conflict. Rather, the Environmental Modification Convention fills a special, but important niche reflecting the international community's consensus that the environment itself should not be used as an instrument of war.[81]

For parties to AP I, Article 35(3) states that "[i]t is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment." Additionally, Article 55 provides:

> 1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected

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80. Cyrus Vance, Letter of Submittal (Aug. 31, 1978), Message from the President Transmitting the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, Executive K, at 4 (1978).

81. Michael Moodie, United States Arms Control and Disarmament Agency, Statement before the Second Review Conference of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (Sept. 15, 1992).

> to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.
>
> 2. Attacks against the natural environment by way of reprisals are prohibited.

The United States believes that these provisions do not reflect customary international law:[82]

> The United States considers that the fourth paragraph of the preamble to the Convention, which refers to the substance of provisions of article 35(3) and article 55(1) of Additional Protocol I to the Geneva Conventions for the Protection of War Victims of August 12, 1949, applies only to States which have accepted those provisions.[83]

The United States is of the view that harm to the environment would only be prohibited if disproportionate under the rule of proportionality:

> An example illustrates why States—particularly those not party to AP I—are unlikely to have supported rule 45. Suppose that country A has hidden its chemical and biological weapons arsenal in a large rainforest, and plans imminently to launch the arsenal at country B. Under such a rule, country B could not launch a strike against that arsenal if it expects that such a strike may cause widespread, long-term, and severe damage to the rainforest, even if it has evidence of country A's imminent launch, and knows that such a launch itself would cause environmental devastation.[84]

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82. DOD LAW OF WAR MANUAL, § 6.10.3.1.

83. United States, Statement on Ratification of the Conventional Weapons Convention, Accepting Protocols I & II, Mar. 24, 1995, 1861 U.N.T.S. 482, 483.

84. John B. Bellinger III & William J. Haynes II, U.S. Response to International Committee of the Red Cross Study on Customary International Humanitarian Law, 2006 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1069, 1079 n.30.

8.5 DISTINCTION BETWEEN MILITARY OBJECTIVES AND PROTECTED PERSONS AND OBJECTS

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

8.5.1 Protective Signs and Symbols

Commentary

GC I and GC II contemplate that the distinctive emblem, usually a red cross on a white background, will be used to facilitate the identification of the persons and objects protected by those conventions.[85] It helps to identify protected persons and objects (e.g., medical and religious personnel, medical transports, and medical facilities), but does not itself confer on them, or by its absence deprive them of, legal protection. The use of the distinctive emblem to facilitate protection is to take place under the direction of the competent military authority. The misuse of the distinctive emblem is prohibited. Additional signs and symbols of protected status are also provided for in the law of armed conflict.[86]

8.5.1.1 The Red Cross, Red Crescent, and Red Crystal

A Red Cross on a white field (Figure 8-1) is an internationally accepted symbol of protected medical and religious persons and activities. Some countries utilize a Red Crescent on a white field for the same purpose (Figure 8-2). The third Protocol to the Geneva Conventions authorizes an additional distinctive emblem, a Red Crystal (Figure 8-3). The conditions for use of and respect for the Additional Protocol III emblem are identical to those for the Red Cross and Red Crescent. A Red Lion and Sun on a white field (Figure 8-4) was originally created for use by Iran. In 1980, Iran declared it would no longer use the Red Lion and Sun, but use the Red Crescent. In 2000, Iran communicated its desire to maintain its right to use the Red Lion and Sun emblem once again. Israel employs a six-pointed Red Star, which it reserved

85. GC I, art. 38; GC II, art. 41.
86. DOD LAW OF WAR MANUAL, § 7.15.

the right to use when it ratified the 1949 Geneva Conventions (Figure 8-5). The United States has not agreed the Israeli six-pointed Red Star is a protected symbol. All medical and religious persons or objects recognized as being such are to be treated with care and protection.

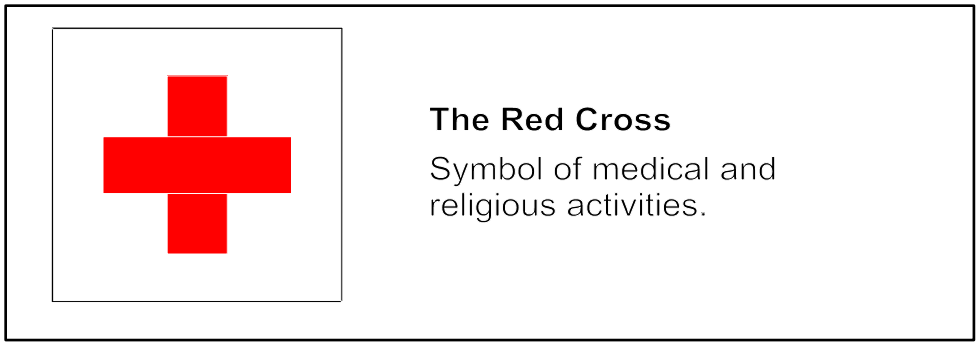

Figure 8-1. The Red Cross

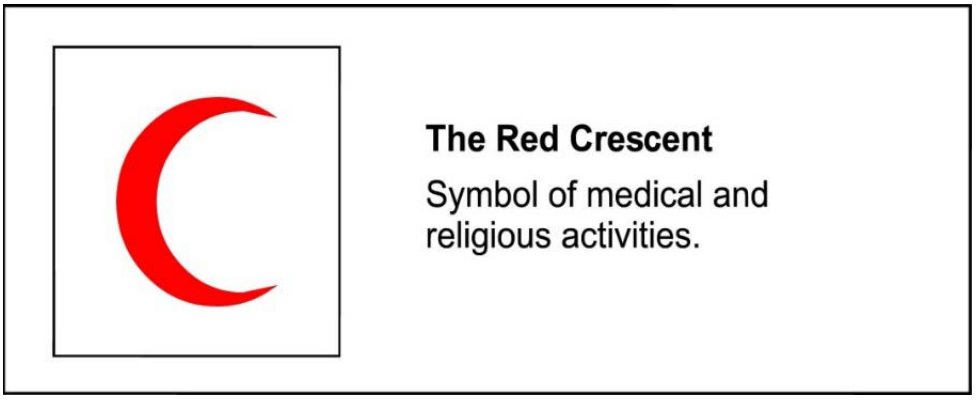

Figure 8-2. The Red Crescent

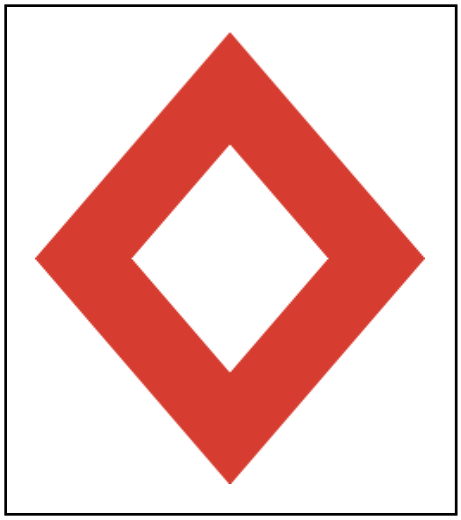

Figure 8-3. Red Crystal, Symbol of Medical and Religious Activities

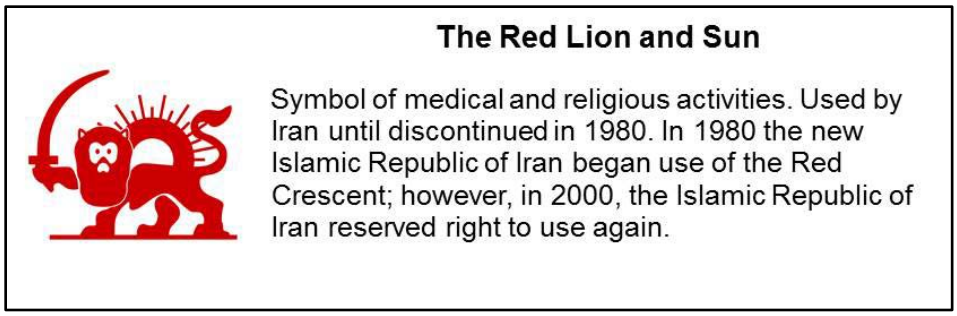

Figure 8-4. The Red Lion and Sun

Figure 8-5. The Red Star of David

Commentary

"As a compliment to Switzerland," the heraldic emblem of the red cross on a white ground formed by reversing the federal colors is retained as the emblem and distinctive sign of the Medical Services of armed forces.[87] The explanation that the red cross is used as a compliment to Switzerland was added to emphasize that it is not intended to have religious significance.[88] The red cross has long been used to identify medical personnel during armed conflict.[89] At the time the 1949 Geneva Conventions were adopted, some countries already used, in place of the red cross, the emblem of the red crescent or the emblem of the red lion and sun on a white ground. Thus, those emblems are also recognized by the terms of GC I and GC II.[90]

AP III to the 1949 Geneva Conventions recognizes an additional distinctive emblem that serves the same purposes. For parties to AP III, the red crystal enjoys equal status to the other emblems.[91]

Some States, such as Iran, have adopted the red crescent, without objection by other States parties, even though their use of the red crescent did not predate the adoption of GC I.[92] Israel ratified the 1949 Geneva Conventions with the reservation that it will use a Red Shield of David as its distinctive sign.[93]

8.5.1.2 Other Protective Symbols

Other protective symbols specially recognized by international law include an oblique red band on a white background to designate hospital zones and

87. GC I, art. 38.

88. GC I COMMENTARY, at 303.

89. *See, e.g.*, Convention for the Amelioration of the Wounded in Armies in the Field, art. 7, Aug. 22, 1864, 22 Stat. 940, 944.

90. GC I, art. 38; GC II, art. 41.

91. AP III, art. 2(1).

92. *See, e.g.*, H. Beer, Secretary General, League of Red Cross Societies, & J. Moreillon, Department of Principles and Law, ICRC, *Adoption of the Red Crescent by the Islamic Republic of Iran*, Circular No. 72 (Nov. 5, 1980), *reprinted in* 20 INTERNATIONAL REVIEW OF THE RED CROSS 316–17 (1980).

93. Israel, Reservation to GC I, Aug. 12, 1949, 75 U.N.T.S. 436.

safe havens for civilians and the wounded and sick (Figure 8-6). Prisoner of war camps are marked by the letters PW (prisoners of war) or PG (*prisonniers de guerre*) (Figure 8-7). Civilian internment camps with the letters IC (internment camp) (Figure 8-8). A royal-blue diamond and royal-blue triangle on a white shield is used to designate cultural buildings, museums, historic monuments, and other cultural objects that are exempt from attack (Figure 8-9). In the western hemisphere, a red circle with triple red spheres in the circle, on a white background (the Roerich Pact symbol) is used for the same purpose as the royal-blue diamond and royal-blue triangle on a white shield (Figure 8-10).

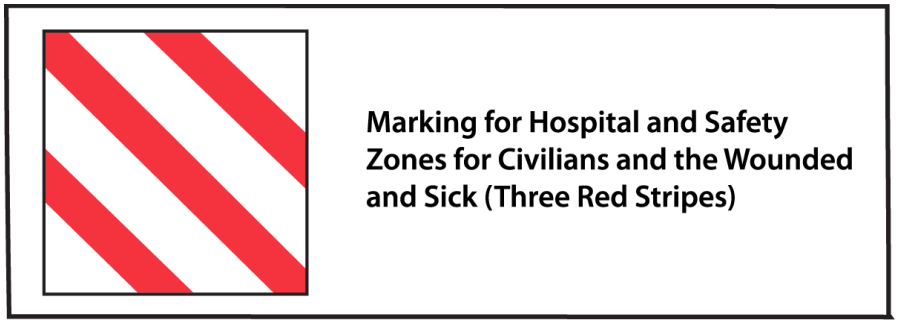

Figure 8-6. Three Red Stripes

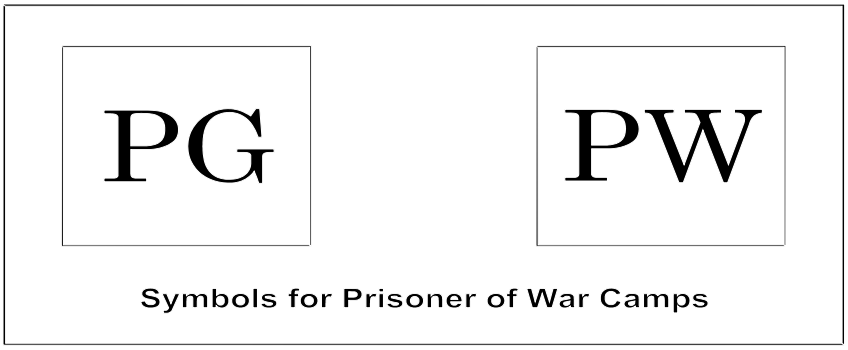

Figure 8-7. Symbols for Prisoner of War Camps

Figure 8-8. Civilian Internment Camps

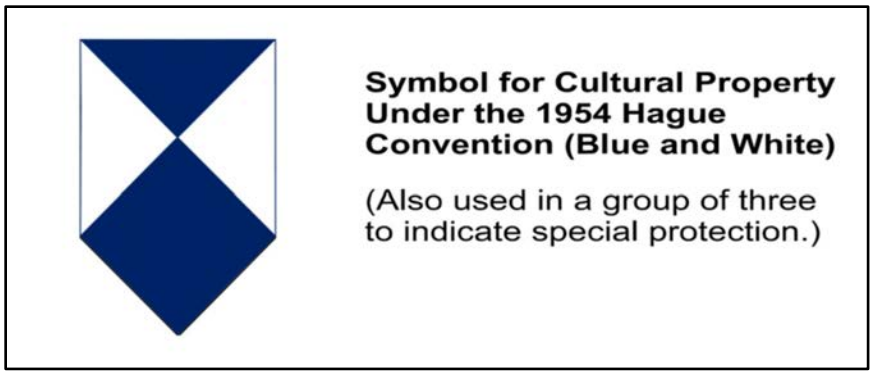

Figure 8-9. Cultural Property Under the 1954 Hague Convention

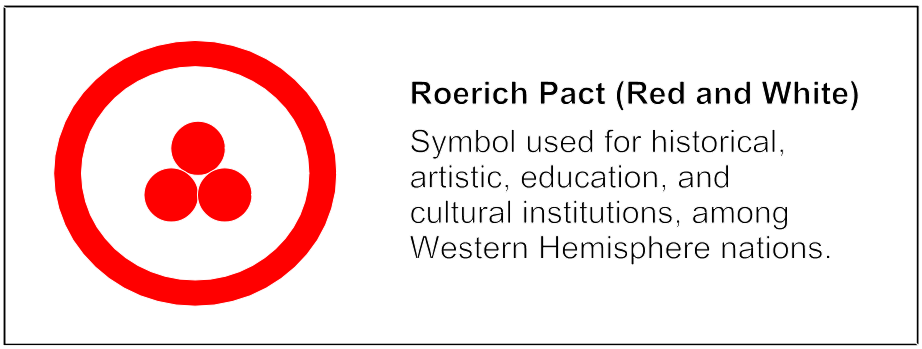

Figure 8-10. The Roerich Pact

The 1977 Additional Protocol I to the Geneva Conventions of 1949, prescribes protective symbols to mark works and installations containing dangerous forces and civil defense facilities. Although the United States is not a

party to Additional Protocol I, these symbols are useful in identifying facilities that may need to be factored into a commander's proportionality analysis. Works and installations containing forces potentially dangerous to the civilian population (e.g., dams, dikes, and nuclear power plants) may be marked by three bright orange circles of equal size on the same axis (Figure 8-11). Civil defense facilities and personnel may be identified by an equilateral blue triangle on an orange background (Figure 8-12).

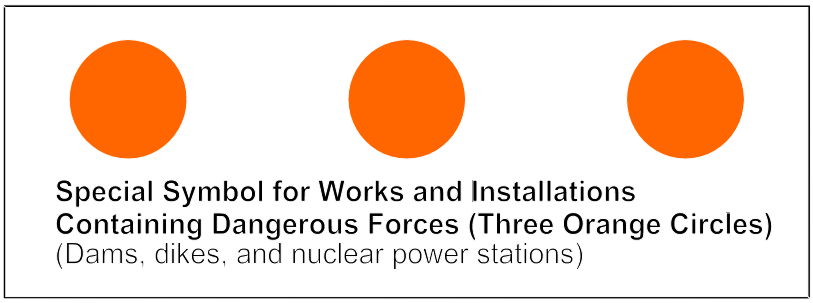

Figure 8-11. Works and Installations Containing Dangerous Forces

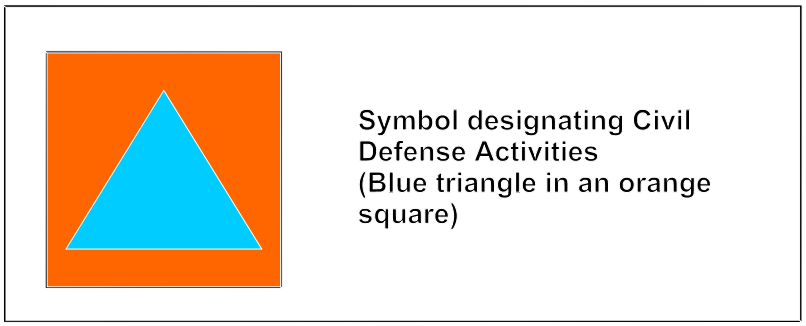

Figure 8-12. Civil Defense Activities

Commentary

On hospital zones, see Article 15 of GC IV and Article 6 of Annex I. Hospital zones for wounded and sick combatants are to be marked with red crosses.[94]

94. GC I, art. 23, annex I art. 6.

On POW camps, see Article 23(4) of GC III. POW camps are to be marked with the letters PW or PG (*prisonniers de guerre*) placed so as to be clearly visible from the air in daytime. If the exact locations of POW camps are provided as required by Article 23(3) of GC III, the need for this marking may be reduced. The parties may agree on some other marking scheme. Areas other than POW camps must not bear these markings.[95]

On civilian internment camps, see Article 83(3) of GC IV. The letters IC are used only if military considerations permit and are to be placed so as to be clearly visible from the air in daytime. If the exact locations of internment camps are provided as required by Article 83(2) of GC IV, the need for this marking may be reduced. The parties may agree on some other marking scheme. Areas other than internment camps must not bear these markings.[96]

On the sign for cultural property, see Article 16 of the Hague Cultural Property Convention.

On the sign for artistic and scientific institutions and historical monuments, see Article 3 of the Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact).[97] As of 2023, the parties to the Roerich Pact are Brazil, Chile, Colombia, Cuba, the Dominican Republic, El Salvador, Guatemala, Mexico, the United States, and Venezuela.

On the sign for works and installations containing dangerous forces, see Article 56(7) of AP I.

On the sign for civil defense installations, see Article 66(4) of AP I.

8.5.1.3 The 1907 Hague Convention Symbol

A protective symbol of special interest to naval officers is the sign established by Hague IX. The 1907 Hague Convention symbol is used to mark sacred

95. GC III, art. 23(4).
96. GC IV, art. 83(3).
97. Roerich Pact, art. 3.

edifices, hospitals, historic monuments, cultural buildings, and other structures protected from naval bombardment. The symbol consists of a rectangular panel divided diagonally into two triangles, the upper black and lower white (Figure 8-13).

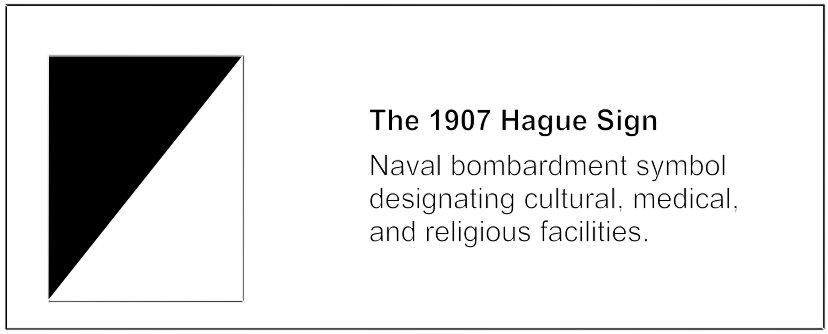

Figure 8-13. The 1907 Hague Sign

Commentary

On the 1907 Hague sign, see Article 5 of Hague IX.

8.5.1.4 The 1954 Hague Convention Symbol

A more recent protective symbol for cultural property was established by the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict. Cultural sites that are of artistic, historical, or of archaeological interest—whether religious or secular—may be marked with the symbol to facilitate recognition. The symbol may be used alone or repeated three times in a triangular formation. It takes the form of a shield, pointed below, consisting of a royal-blue square, one of the angles of which forms the point of the shield, and of a royal-blue triangle above the square, the space on either side being taken up by a white triangle (Figure 8-9).

Commentary

On the sign for cultural property, see Article 16 of the Hague Cultural Property Convention.

8.5.1.5 The White Flag

Customary international law recognizes the white flag as a symbol to request a cease-fire, negotiate, or surrender. Enemy forces displaying a white flag should be permitted an opportunity to surrender or communicate a request for cease-fire or negotiation. The burden is upon the soldiers or unit displaying a white flag to communicate their intentions clearly and unequivocally.

Commentary

On the white flag, see Articles 111–114 of the Lieber Code, Articles 23(f) and 32 of the Hague Regulations, and Article 38(1) of AP I.

As a legal matter, the white flag, when used by military forces, indicates a desire to communicate with the enemy. The hoisting of a white flag has no other legal meaning in the law of war. The hoisting of a white flag may indicate that the party hoisting it desires to open communication with a view to an armistice (e.g., to enable forces to collect the wounded) or a surrender. If hoisted during a military action by an individual combatant or a small party of combatants, it may signify merely that those persons or forces wish to surrender. Although the white flag has been used with this intent, the display of the white flag does not necessarily mean that the person or forces displaying it are prepared to surrender. Moreover, enemy forces in the immediate area might not have the same intent as the individual or forces displaying the white flag, especially where the display of the white flag was not authorized by the commander of the individual or forces.[98]

8.5.1.6 Permitted Use

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

98. DOD LAW OF WAR MANUAL, § 12.4.

Commentary

The purpose of signs and symbols is to facilitate the identification of protected status. Their absence may increase the risk that enemy forces will not recognize the protected status of military medical and religious personnel and other protected persons and objects and attack them in error. They do not in and of themselves establish the right to protection. Rather, the right to protection is established by the fact that the units, facilities, or personnel involved have met the applicable requirements for protected status. Thus, if the protective signs and symbols are displayed by forces not entitled to protection, their display does not confer protection and those forces may be made the object of attack. On the other hand, if personnel who are entitled to protection are recognized as such, they remain entitled to respect and protection even if the distinctive signs and symbols are not displayed.

With the exception of certain cases mentioned in Article 44 of GC I, the emblem of the Red Cross may not be employed, either in time of peace or in time of war, except to indicate or to protect the medical units and establishments, the personnel, and material protected by GC I and other conventions dealing with similar matters (e.g., GC II).[99] The same applies to the emblems mentioned in the second paragraph of Article 38 of GC I (i.e., the emblem of the red crescent and the emblem of the red lion and sun), in respect of the countries that use them.

The distinguishing signs referred to in Article 43 of GC II (i.e., certain red crosses on white backgrounds) may only be used, whether in time of peace or war, for indicating or protecting the ships mentioned in Article 43, except as may be provided in any other international convention (e.g., GC I) or by agreement between all the parties to the conflict concerned.[100]

In particular, it is prohibited to use the distinctive emblem (1) while engaging in attacks; (2) in order to shield, favor, or protect one's own

99. GC I, art. 44.
100. GC II, art. 44.

> military operations; or (3) to impede enemy military operations.[101] For example, using an ambulance marked with the red cross to mount a surprise attack against enemy forces would be prohibited. In the 1946 *Trial of Heinz Hagendorf*, the accused, a German soldier, was charged with having "wrongfully used the Red Cross emblem in a combat zone by firing a weapon at American soldiers from an enemy ambulance displaying such emblem."[102]
>
> Certain nonmilitary uses of the distinctive emblem are authorized under GC I and GC II: (1) use by National Red Cross Societies and other Authorized Voluntary Aid Societies; (2) use by international Red Cross organizations and their duly authorized personnel; and (3) use by ambulances and free aid stations.[103]

8.5.1.7 Failure to Display

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

Commentary

> See the commentary accompanying § 8.5.1.6. On this issue, the 1960 Commentary to GC II notes:
>
> > Obviously, respect for camouflaged units will be purely theoretical. The enemy can respect a medical unit only if he knows of its presence. If the unit is exposed to long-range enemy fire, it will thus lose a large part of its security. If however, the enemy approaches, for instance, and recognizes the the [sic] medical unit as such, he must obviously respect it.[104]

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101. DOD LAW OF WAR MANUAL, § 5.24.
102. Trial of Heinz Hagendorf, 13 LAW REPORTS OF THE TRIALS OF WAR CRIMINALS 146, 146 (1949).
103. DOD LAW OF WAR MANUAL, § 7.15.4.1.
104. GC II COMMENTARY, at 229.

8.5.2 Protective Signals

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

Commentary

See Article 18(5)-(6) of AP I and Article 5 of Annex I.

8.5.2.1 Radio Signals

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

Commentary

Further information is available in various sources.[105]

8.5.2.2 Visual Signals

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

Commentary

Experiments conducted during the Falklands/Malvinas war by the British found that the visibility of a flashing blue light was 7 nautical

105. *See* Radio Regulations (Mob 1983), 24 INTERNATIONAL REVIEW OF THE RED CROSS 54–56 (1984); International Code of Signals, H.O. Pub. 102, at 137 (rev. 1981); AP I, annex I art. 7; ICRC AP COMMENTARY at 1216–45.

miles, while normal visibility at sea was 1 mile.[106] The use of the flashing blue light ashore poses difficulties caused by its extensive use by many European and Asian police, fire, and emergency vehicles.[107]

8.5.2.3 Electronic Identification

The identification and location of medical ships and craft may be effected by means of appropriate standard maritime radar transponders as established by special agreement to the parties to the conflict. The identification and location of medical aircraft may be effected by use of the secondary surveillance radar specified in Annex 10 to the Chicago Convention. The secondary surveillance radar mode and code is to be reserved for the exclusive use of the medical aircraft.

Commentary

Further information is available in various sources.[108] The secondary surveillance radar (SSR) is also known as identification friend or foe (IFF).

8.5.3 Identification of Neutral Platforms

Ships and aircraft of States not party to an armed conflict may adopt special signals for self-identification, location, and establishing communications. Use of these signals does not confer or imply recognition of any special rights or duties of neutrals or belligerents, except as may otherwise be agreed between them.

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106. SYLVIE-STOYANKA JUNOD, PROTECTION OF THE VICTIMS OF ARMED CONFLICT FALKLAND-MALVINAS ISLANDS 25 (1982). Similar results are reported in Gerald C. Cauderay, *Visibility of the Distinctive Emblem on Medical Establishments, Units, and Transports*, 30 INTERNATIONAL REVIEW OF THE RED CROSS 295 (1990).

107. *See* Radio Regulations (Mob 1983), art. 40; International Code of Signals, H.O. Pub. 102, ch. 136A, Notice to Mariners 52/85, at 11-2.5 (rev. 1981); AP I, annex I art. 6; ICRC AP COMMENTARY at 1206–11.

108. *See* Radio Regulations (Mob 1983), *supra* note 105, arts. 3219A, B; International Code of Signals, H.O. Pub. 102, change 136A, Notice to Mariners 52/85, at 11-2.5 (rev. 1981); AP I, annex I art. 8; ICRC AP COMMENTARY at 1248–55

Commentary

See Resolution No. 18 (Mob 1983) of the World Administrative Radio Conference for Mobile Services.[109]

8.6 SURFACE WARFARE

As a general rule, surface warships may attack enemy surface, subsurface, and air targets wherever located beyond neutral territory. Special circumstances in which enemy warships and military aircraft may be attacked in neutral territory are discussed in Chapter 7. The law of armed conflict pertaining to surface warfare is concerned primarily with the protection of noncombatants and civilians through rules establishing lawful targets of attack. All enemy vessels and aircraft fall into one of three general classes:

1. Warships and military aircraft (including military auxiliaries)

2. Merchant vessels and civilian aircraft

3. Exempt vessels and aircraft.

Commentary

In general, the rules for conducting attacks, such as bombardments, by naval forces are the same as those for land or air forces. As a general rule, naval forces may attack military objectives wherever located outside neutral territory.[110] In certain cases (e.g., involving belligerent use of neutral territory as a base of operations), hostilities may be conducted in neutral territory to redress violations of neutrality.[111]

Warships and naval and military auxiliaries are generally liable to attack and capture.[112] Merchant vessels are generally liable to capture

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109. Resolution No. 18 (Mob 1983), World Administrative Radio Conference for Mobile Services (1983), *reprinted in* 24 INTERNATIONAL REVIEW OF THE RED CROSS 58 (1984). *See also* ICRC AP COMMENTARY at 1244–45.

110. DOD LAW OF WAR MANUAL, § 15.3.1.2.

111. *Id.* § 15.4.2.

112. *Id.* § 13.4.

but may be attacked if they forfeit their protection.[113] Exempt vessels are not liable to capture or attack, unless they forfeit their protection.[114] On these three categories, see §§ 8.6.1, 8.6.2, and 8.6.3.

During international armed conflict at sea, warships are the only vessels that are entitled to conduct attacks: "At sea, only warships and military aircraft may exercise belligerent rights."[115] Other vessels may, however, defend themselves, including against attacks by enemy forces:

> Apart from the conditions laid down in Articles 3 [regarding the conversion of public and private vessels into warships] and following, neither public nor private vessels, nor their personnel, may commit acts of hostility against the enemy. Both may, however, use force to defend themselves against the attack of an enemy vessel.[116]

During non-international armed conflict, State vessels other than warships may be used to conduct attacks against non-State armed groups. For example, international law does not prohibit auxiliaries from conducting attacks in a non-international armed conflict. Similarly, a State may use its law enforcement authorities to address insurgent groups, and there would be no objection to using a law enforcement vessel as part of operations against insurgents:

> Under the law of international armed conflict, only warships are entitled to exercise belligerent rights. This rule goes back to the prohibition of privateering under the 1856 Paris Declaration. Warships are those vessels that meet the criteria set forth in Articles 2–5 of the 1907 Hague Convention VII, Article 8(2) of the 1958 High Seas Convention and Article 29 of [UNCLOS]. Limitations on the exercise of belligerent rights are most important with regard to interference with

113. *Id.* § 13.5.
114. *Id.* § 13.6.
115. NWIP 10-2, ¶ 500e. *See also* DOD LAW OF WAR MANUAL, § 13.3.3.
116. *See* Oxford Manual, art. 12.

> neutral navigation and aviation; thus, neutral vessels and aircraft must accede to such interference only if the measures are taken by warships.
>
> No such limitation applies to non-international armed conflicts vis-à-vis the parties. It follows from the object and purpose of the rule limiting the exercise of belligerent rights under the law of naval warfare—i.e., the transparent entitlement of the warship—that the non-State actor will obviously not have ships that meet the criteria for classification as a warship since one of the criteria is that it be a State vessel. The government forces may make use of any vessel or aircraft, including, for example, those used for law enforcement and customs enforcement, in the conduct of hostilities.[117]

8.6.1 Enemy Warships, Naval Auxiliaries, and Military Aircraft

Enemy warships and military aircraft, including naval and military auxiliaries, are subject to attack, destruction, or capture anywhere beyond neutral territory. It is forbidden to target an enemy warship or military aircraft that in good faith unambiguously and effectively conveys a timely offer of surrender. Once an enemy warship has clearly indicated a readiness to surrender (e.g., by hauling down her flag, by hoisting a white flag, by surfacing (in the case of submarines), by stopping engines and responding to the attacker's signals, or by taking to lifeboats) the attack must be discontinued. Disabled or damaged enemy aircraft in air combat are frequently pursued to destruction because of the impossibility of verifying their true status and inability to enforce surrender. Although disabled or damaged, the aircraft may or may not have lost its means of combat. It may still represent a valuable military asset. Surrender in air combat is not generally offered. If surrender is offered in good faith so that circumstances do not preclude enforcement, it must be respected. Officers and crews of captured or destroyed enemy warships and military aircraft should be detained. As far as military exigencies permit, after each engagement all possible measures should be taken without delay to search for and collect the shipwrecked, wounded, and sick and recover the dead.

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117. Wolff Heintschel von Heinegg, *Methods and Means of Naval Warfare in Non-International Armed Conflicts*, 88 INTERNATIONAL LAW STUDIES 211, 219 (2012) (citations omitted).

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

Commentary

Enemy warships and naval and military auxiliaries are subject to attack, destruction, or capture anywhere beyond neutral territory.[118] A warship is generally understood to be a ship belonging to the armed forces of a State bearing the external markings distinguishing the character and nationality of such ships, under the command of an officer duly commissioned by the government of that State and whose name appears in the appropriate service list of officers, and manned by a crew that is under regular armed forces discipline.[119]

In general, enemy warships are military objectives. However, warships that have surrendered or that are exempt vessels may not be made the object of attack. The general rules on the protection of persons *hors de combat*, including the rule prohibiting the attack of persons who have surrendered, also apply to enemy vessels. See § 8.2.3 above on *hors de combat* status. In particular, it is forbidden to make an enemy vessel the object of attack if it has genuinely, clearly, and unconditionally surrendered, in circumstances in which it is feasible to accept such surrender. This is a long-standing rule of naval warfare:

> It is forbidden to refuse quarter to any enemy who has surrendered in good faith. In particular, it is forbidden either to continue to attack enemy warships and military aircraft which have clearly indicated a readiness to surrender or to fire upon the survivors of such vessels and aircraft who no longer have the means to defend themselves.[120]

In the *Trial of Helmuth von Ruchteschell*, the British Military Court noted: "The captain of the *Davisian* stopped his engines, hoisted an answering pennant and acknowledged the signal. In spite of this, the raider's firing continued for 15 minutes, wounding 8 or 10 of the

118. NWIP 10-2, ¶ 503a.
119. High Seas Convention, art. 8; UNCLOS, art. 29.
120. NWIP 10-2, ¶ 511c.

crew of the *Davisian*, whilst they were trying to abandon ship [by taking to lifeboats]."[121] On surrender at sea, see DoD Law of War Manual, § 13.3.5.

It has long been the case that prize procedures are not used for captured enemy warships: "Enemy warships and military aircraft may be captured outside neutral jurisdiction. Prize procedure is not used for such captured vessels and aircraft because their ownership immediately vests in the captor's government by the fact of capture."[122] As public movable property, warships are seizable as war booty.[123] Similarly, prize procedures are not used for captured enemy military aircraft.[124]

8.6.2 Enemy Merchant Vessels and Civil Aircraft

8.6.2.1 Capture

Enemy merchant vessels and civil aircraft may be captured wherever located beyond neutral territory. Prior exercise of visit and search is not required provided positive determination of enemy status can be made by other means. When military circumstances preclude sending or taking in such vessel or aircraft for adjudication as an enemy prize, it may be destroyed after all possible measures are taken to provide for the safety of passengers and crew. Claims may be made by neutrals, either with respect to the captured vessel or aircraft, or with respect to the cargo (noncontraband neutral cargo on board a captured enemy vessel is not liable to confiscation). It is always preferable that captured enemy prizes be sent into port for adjudication rather than destroyed, if practicable. Every case of destruction of a captured enemy prize should be reported promptly to higher command.

Documents and papers relating to the prize should be safeguarded and, if practicable, the personal effects of passengers should be saved. In accordance with U.S. law, the commanding officer of a vessel making a capture shall:

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121. Trial of Helmuth von Ruchteschell, Outline of the Proceedings, 9 LAW REPORTS OF TRIALS OF WAR CRIMINALS 82, 82 (1949).

122. NWIP 10-2, ¶ 503a2.

123. DOD LAW OF WAR MANUAL, § 5.17.3.

124. *Id.* § 14.5.3.

1. Secure the documents of the captured vessel, including the log, and cargo documents, together with all other documents and papers, including letters, found on board

2. Inventory and seal all the documents and papers

3. Send the inventory and documents and papers to the court in which proceedings are to be had, with a written statement that:

a. The documents and papers sent are all the papers found, or explaining the reasons why any are missing

b. The documents and papers sent are in the same condition as found, or explaining the reasons why any are in different condition.

4. Send as witnesses to the prize court the master, one or more of the other officers, the supercargo, purser, or agent of the prize, and any other person found on board whom they believe to be interested in or to know the title, national character, or destination of the prize, and if any of the usual witnesses cannot be sent, send the reasons therefor to the court

5. Place a competent prize master and a prize crew on board the prize and send the prize, witnesses, and all documents and papers, under charge of the prize master, into port for adjudication

a. In the absence of instructions from higher authority as to the port to which the prize shall be sent for adjudication, the commanding officer of the capturing vessel shall select the port they consider most convenient.

b. If the captured vessel, or any part of the captured property, is not in condition to be sent in for adjudication, the commanding officer of the capturing vessel shall have a survey and appraisal made by competent and impartial persons.

Officers and crews of captured enemy merchant ships and civilian aircraft may be detained. See § 8.2.3.3 and Chapter 11 for further discussion of surrender and treatment of detainees, respectively. Other enemy nationals on board such captured ships and aircraft as private passengers are subject to

the discipline of the captor. If necessary, enemy nationals, particularly those in the public service of the enemy, found on board captured enemy merchant vessels may be treated as POWs. Nationals of a neutral State on board captured enemy merchant vessels and civilian aircraft should not be detained, unless they participated in acts of hostility or resistance against the captor or are otherwise in the service of the enemy.

Commentary

The conclusion that enemy merchant vessels and civil aircraft may be captured wherever located beyond neutral territory is long-standing.[125] It reflects the rejection by the United States of Hague VI relating, inter alia, to the exemption from capture of enemy merchant vessels located in ports of their adversary at the outbreak of hostilities.[126] Although originally parties to Hague VI, France, Japan, the United Kingdom, and the former USSR subsequently denounced it. The U.S. position is that Hague VI does not articulate customary international norms.

On the capture of enemy merchant vessels, see DoD Law of War Manual, § 13.5.1. Such vessels may be captured beyond neutral territory without prior exercise of visit and search, provided positive determination of enemy status can be made by other means.

Captured neutral or enemy merchant vessels are called prizes.[127] Prize procedures are usually used to complete the transfer of title of captured property, such as enemy merchant ships: "It has already been stated above that the capture of a private enemy vessel has to be confirmed by a Prize Court, and that it is only through its adjudication that the vessel becomes finally appropriated."[128] The U.S. Supreme Court has stated:

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125. *See, e.g.*, NWIP 10-2, ¶ 503b1; Tentative Instructions for the Navy of the United States Governing Maritime and Aerial Warfare ¶ 67, May 1941; Instructions for the Navy of the United States Governing Maritime Warfare ¶ 62, June 1917; NEWPORT MANUAL, §§ 8.6.3, 8.6.4.

126. Hague VI, art. 1.

127. *See, e.g.*, NEWPORT MANUAL, § 9.1.

128. *See*, *e.g.*, NEWPORT MANUAL, § 9.14; LAUTERPACHT, 2 OPPENHEIM'S INTERNATIONAL LAW 482 (§ 192).

> By the law of nations, recognized and administered in this country, when movable property in the hands of the enemy, used, or intended to be used, for hostile purposes, is captured by land forces, the title passes to the captors as soon as they have reduced the property to firm possession; but when such property is captured by naval forces, a judicial decree of condemnation is usually necessary to complete the title of the captors.[129]

As against an enemy, title to captured enemy merchant vessels or aircraft vests in the captor's government by virtue of the fact of capture. However, claims may be made by neutrals, either with respect to the captured vessel or aircraft, or with respect to the cargo (normally, noncontraband neutral cargo on board a captured enemy vessel is not liable to confiscation). For these reasons, it is always preferable that captured enemy prizes be sent in for adjudication, whenever possible.

The prize proceedings set forth in this section are long-standing.[130] Prize procedures are not used for captured enemy warships because their ownership vests immediately in the captor's government by the fact of capture. As public movable property, warships are seizable as war booty.[131] Similarly, prize procedures are not used for captured enemy military aircraft.[132]

The detention of officers and crews of captured enemy merchant ships and civilian aircraft is permissible in accordance with Article 4(A)(5) of GC III:

> Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
>
> . . .

129. Oakes v. United States, 174 U.S. 778, 786–87 (1899).
130. *See, e.g.*, NWIP 10-2, ¶ 503.
131. DOD LAW OF WAR MANUAL, § 5.17.3.
132. *Id.* § 14.5.3.

> (5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

As to other enemy nationals being subject to the discipline of their captor, see Articles 4 and 41 of GC IV. As to neutrals, see Articles 5 and 8 of Hague XI. If there is doubt as to the entitlement of such detained neutral nationals to treatment as POWs, they are to be given the benefit of that doubt until the contrary is determined by a "competent tribunal."[133] Nationals of a neutral nation who have not so participated in acts of hostility or resistance are to be released.

8.6.2.2 Destruction

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

1. Persistently refusing to stop upon being duly summoned to do so

2. Actively resisting visit and search or capture

3. Sailing under convoy of enemy warships or enemy military aircraft

4. Armed with systems or weapons beyond that required for self-defense against terrorist, piracy, or like threats.

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

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133. GC III, art. 5(2); AP I, art. 45(1).

Commentary

Prior to the Second World War, 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.[134]

Specifically, the London Protocol of 1936, to which almost all of the belligerents of the Second World War expressly acceded, provides in part:

> 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 the Second World War, 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. The rationale for these apparent departures from the agreed rules of the 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.

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134. Treaty Relating to the Use of Submarines and Noxious Gases in Warfare pmbl., art. I, Feb. 6, 1922, 25 L.N.T.S. 202; London Treaty, art. 22; London Protocol of 1936.

Although the rules of the 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 antiship missile systems, as well as the customary practice of belligerents that evolved during and following the Second World War. Accordingly, enemy merchant vessels may be attacked and destroyed by surface warships, either with or without prior warning, for any of the circumstances set forth in this section.

Additionally, they may be attacked if incorporated into an enemy's armed forces or assisting in any way the intelligence system of the enemy's armed forces; if acting in any capacity as a naval or military auxiliary to an enemy's armed forces; or if integrated into the enemy's war-fighting/war-sustaining effort and compliance with the rules of the London Protocol would, under the circumstances of the specific encounter, subject the surface warship to imminent danger or would otherwise preclude mission accomplishment.

On the destruction of enemy merchant vessels, see DoD Law of War Manual, § 13.5.2.

8.6.3 Enemy Vessels and Aircraft Exempt from Destruction or Capture

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

Commentary

Exempt vessels may not be used for purposes outside their innocent role while taking advantage of their harmless appearance. Warships may not be disguised as exempt vessels.[135] Exempt vessels and boats

135. DOD LAW OF WAR MANUAL, § 13.13.

> are subject to the regulations of a belligerent naval commander operating in the area.[136] They must not hamper the movement of combatants, they must submit to identification and inspection procedures, and they may be ordered out of harm's way. Refusal to provide immediate identification upon demand is ordinarily sufficient legal justification for capture or destruction.[137]

8.6.3.1 Hospital Ships, Medical Transports, and Medical Aircraft

Properly designated and marked hospital ships, medical transports, and medical aircraft, as well as coastal rescue craft are exempt from destruction or capture. A hospital ship's medical personnel and crew must not be attacked or captured, even if there are no sick or wounded on board. Names and descriptions of hospital ships must be provided to the parties to the conflict no later than 10 days before they are first employed. Thereafter, hospital ships must be used exclusively to assist, treat, and transport the wounded, sick, and shipwrecked. All exterior surfaces of hospital ships are painted white and the distinctive emblem of the Red Cross or Red Crescent is displayed on the hull and on horizontal surfaces.

In the actual employment of hospital ships, the application of some previously well-established principles has been adapted to reflect the realities of modern circumstances. Traditionally, hospital ships could not be armed, although crew members could carry light, individual weapons for the maintenance of order and their own defense and of the wounded, sick, and shipwrecked. Due to the current threat environment in which the Red Cross symbol is not recognized by various hostile groups and actors as indicating protected status, the United States views the manning of hospital ships with defensive weapons systems (e.g., antimissile defense systems or crew-served weapons to defend against small boat threats as prudent AT/FP measures) analogous to arming crew members with small arms and consistent with the humanitarian purpose of hospital ships and duty to safeguard the wounded and sick. Weapons and ammunition taken from the wounded, sick, and shipwrecked, may be retained on board for eventual turn-over to the proper authority.

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136. *Id.* § 13.8.
137. *See also* NWIP 10-2, ¶ 503c.

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, Article 34, provides hospital ships may not use or possess secret codes as means of communication so that belligerents could verify hospital ships' communications systems were being used only in support of their humanitarian function and not as a means of communicating information that would be harmful to the enemy. Subsequent technological advances in encryption and satellite navigation, while recognized as legally problematic, have not been specifically addressed by treaty. As a practical matter, modern navigational technology requires the traditional rule prohibiting secret codes be understood to not include modern communications encryption systems. Such systems must not be used for military purposes in any way harmful to a potential adversary.

Medical aircraft—civilian or military—whether permanently or temporarily so employed, must be used exclusively for the removal and transportation of the wounded, sick, and shipwrecked, or for the transportation of medical personnel or medical equipment. They shall not be armed or configured for reconnaissance. Medical aircraft shall contain no armament other than small arms and ammunition belonging to the wounded and sick or necessary for the defense of the wounded and sick and the medical personnel. Medical aircraft must not be used to collect or transmit intelligence data, since they must not be used to commit, outside their humanitarian duties, acts harmful to the enemy. This prohibition does not preclude the presence or use on board medical aircraft of communications equipment and encryption materials solely to facilitate navigation, identification, or communication in support of medical operations. Medical aircraft should be clearly marked with the emblem of the Red Cross, Red Crescent, or Red Crystal. Failure to mark them risks having them not recognized as protected platforms.

Hospital ships, medical transports, and medical aircraft utilized solely for medical purposes and recognized as such, whether or not marked with the appropriate emblem, are not to be deliberately attacked. Before making flights bringing medical aircraft within range of the enemy's surface-to-air weapons systems, the enemy should be notified with a view to ensure such aircraft will not be attacked. Aeromedical evacuation may, of course, be conducted by combat-equipped helicopters and airplanes. They are not exempt from attack and fly at their own risk of being attacked.

Hospital ships can leave port even if the port falls into enemy hands. Hospital ships are not classified as warships with regard to the length of their stay in neutral ports.

Hospital ships must not be used for any other purpose during the conflict, particularly in an attempt to shield military objectives from attack. To ensure this, an opposing force may visit and search hospital ships, put on board a commissioner temporarily, put on neutral observers, detain the ship for no more than 7 days (if required by the gravity of the circumstances), and control the ship's means of communications. The opposing force may order hospital ships to depart, make them take a certain course, or refuse assistance to them.

A warship may demand the surrender of enemy military wounded, sick, and shipwrecked personnel found in hospital ships and other craft provided they are in a fit state to be moved and the warship can provide adequate facilities for necessary medical treatment.

Sick bays and their medical personnel aboard other naval vessels must also be respected by boarding parties and spared as much as possible. They remain subject to the laws of warfare, but cannot be diverted from their medical purposes if required for the care of the wounded or sick. If a naval commander can ensure the proper care of the sick and wounded, and if there is urgent military necessity, sick bays may be used for other purposes.

Medical aircraft must comply with a request to land for inspection. These requests are to be given in accordance with ICAO standard procedures for interception of civil aircraft. Medical aircraft complying with such a request to land must be allowed to continue their flight, with all personnel on board belonging to their forces, to neutral countries or to countries not a party to the conflict, so long as inspection does not reveal the aircraft was engaging in acts harmful to the inspecting force or otherwise violating the Geneva Conventions of 1949. Persons of the nationality of the inspecting force found on board may be taken off and retained.

Commentary

See DoD Law of War Manual, § 7.11 (ground transports of the wounded and sick), § 7.12 (hospital ships), § 7.14 (military medical

aircraft), § 7.18 (land and sea civilian hospital convoys), and § 7.19 (civilian medical aircraft).[138]

The protection for ground transports of the wounded and sick, or of medical equipment, may cease only after due warning has been given, naming, in all appropriate cases, a reasonable time limit, and after such warning has remained unheeded. Should ground medical transports or vehicles fall into the hands of the adverse party, they shall be subject to the laws of armed conflict, on condition that the party to the conflict who captures them shall in all cases ensure the care of the wounded and sick they contain.[139] Thus, the adverse party may seize and dispose of the property as enemy property.[140] The adverse party may use or dispose of such transports (including by removing the distinctive emblem and using the vehicle for a hostile purpose), provided that the capturing party ensures the care of the wounded and sick being carried in such transports.[141]

On military hospital ships, Article 22 of GC II provides:

> Military hospital ships, that is to say, ships built or equipped by the Powers specially and solely with a view to assisting the wounded, sick and shipwrecked, to treating them and to transporting them, may in no circumstances be attacked or captured, but shall at all times be respected and protected, on condition that their names and descriptions have been notified to the Parties to the conflict ten days before those ships are employed.
>
> The characteristics which must appear in the notification shall include registered gross tonnage, the length from stem to stern and the number of masts and funnels.

Many States have employed ships that are equipped or converted into hospital ships, rather than building them specifically as hospital

138. *See also, e.g.*, NEWPORT MANUAL, § 10.4.1 (hospital ships), § 10.5 (medical aircraft).
139. GC I, art. 35.
140. DOD LAW OF WAR MANUAL, § 5.17.
141. GC I COMMENTARY, at 282.

> ships. For example, in 1991 the United States advised: "The two hospital ships are 'USNS Mercy' (T-AH 19) and 'USNS Comfort' (T-AH 20). These two converted San Clemente class tankers, ex-SS Worth ex-SS Rose City, have identical characteristics: . . . . Both ships are equipped specially and solely to assist, treat, and transport wounded, sick, and shipwrecked."[142]
>
> Hospital ships used by the National Red Cross Societies, by officially recognized relief societies, or by private persons enjoy the same protection as military hospital ships and are exempt from capture if the party to the conflict on which they depend has given them an official commission and insofar as they have complied with the provisions of Article 22 of GC II concerning notification. The ships must be provided with certificates from the responsible authorities, stating that the vessels have been under their control while fitting out and on departure.[143] Under the same conditions as those provided for in Articles 22 and 24 of GC II, small craft employed by the State, or by the officially recognized lifeboat institutions for coastal rescue operations, shall also be respected and protected, so far as operational requirements permit.[144]
>
> Parties to GC II undertake not to use these vessels for any military purpose.[145] The vessels must not participate in any way in the armed conflict or the war effort. For example, the vessels may not be used to relay military orders, transport able-bodied combatants or military equipment, or engage in reconnaissance. In the *Orel* case, the Japanese Prize Court stated:
>
> > A hospital ship is only exempt from capture if she fulfils certain conditions and is engaged solely in the humane work of aiding the sick and wounded. That she is liable to capture, should she be used by the enemy for military purposes, is

142. U.S. Department of State, Diplomatic Note given to the Iraqi Chargé d'affairs in Washington, D.C. (Jan. 19, 1991), *reprinted in* Letter dated Jan. 21, 1991 from the Permanent Representative of the United States of America to the United Nations addressed to President of the Security Council, annex II, U.N. Doc. S/22122 (Jan. 21, 1991).

143. GC II, art. 24.

144. GC II, art. 27.

145. GC II, art. 30.

> admitted by International Law, and is clearly laid down by the stipulations of the Hague Convention No. 3 of July 29th, 1899, for the adaptation to maritime warfare of the principles of the Geneva Convention of August 22nd, 1864. Although the "Orel" had been lawfully equipped and due notification concerning her had been given by the Russian Government to the Japanese Government, yet her action in communicating the orders of the Commander-in-Chief of the Russian Pacific Second Squadron to other vessels during her eastward voyage with the squadron, and her attempt to carry persons in good health, i.e. the master and three others of British steamship captured by the Russian fleet, to Vladivostock, which is a naval port in enemy territory, were evidently acts in aid of the military operations of the enemy. Further, when the facts that she was instructed by the Russian squadron to purchase munitions of war, and that she occupied the position usually assigned to a ship engaged in reconnaissance, are taken in consideration, it is reasonable to assume that she was constantly employed for military purposes on behalf of the Russian squadron. She is, therefore, not entitled to the exemptions laid down in The Hague Convention for the adaptation to maritime warfare of the principles of the Geneva Convention, and may be condemned according to International Law.[146]

During and after an engagement, these vessels act at their own risk.[147] Although the presence of hospital ships or coastal rescue craft does not serve to exempt nearby military objectives from attack due to the risk that the hospital ships or coastal rescue craft would be incidentally damaged, feasible precautions must be taken to reduce the risk of harm to hospital ships or coastal rescue craft.

The obligation to refrain from the use of force against a medical vessel acting in violation of its mission and protected status without due warning does not prohibit the exercise of the right of self-defense. There may be cases in which, in the exercise of the right of self-

146. The "Orel," *reported in* 2 RUSSIAN AND JAPANESE PRIZE CASES 354, 356–57 (J.B. Hurst & F.E. Bray eds., 1910).

147. GC II, art. 30.

> defense, a warning is not "due" or a reasonable time limit is not appropriate. For example, forces receiving heavy fire may exercise their right of self-defense and return fire. Such use of force in self-defense must also be proportionate.
>
> On the definition of medical aircraft, see Article 36 of GC I. Medical aircraft may not be attacked while flying at heights and times, and on routes, specifically agreed upon by the belligerents concerned.[148] However, known medical aircraft, when performing their humanitarian functions, must be respected and protected. The U.S. has taken the following position:
>
> > We support the principle that known medical aircraft be respected and protected when performing their humanitarian functions. That is a rather general statement of what is reflected in many, but not all, aspects of the detailed rules in articles 24 through 31, which include some of the more useful innovations in the Protocol.[149]
>
> A medical aircraft that is not flying pursuant to a special agreement that seeks to claim protection as medical aircraft shall make every effort to identify itself and to inform the enemy State of its status and its operations, such as its flight times and routes. For example, an unknown aircraft within a theater of military operations would often be reasonably presumed to be a military objective, and the aircraft must take affirmative steps to rebut this presumption. In order to maintain its entitlement to protection, such aircraft must obey the directions of the enemy State, such as directions to land and to submit to search.

8.6.3.2 Other Vessels and Aircraft Exempt from Destruction or Capture

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

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148. GC II COMMENTARY, at 216–17.
149. Matheson, *supra* note 53, at 423–24.

1. Vessels and aircraft designated for and engaged in the exchange of POWs (cartel vessels or aircraft)

2. Vessels charged with religious, nonmilitary scientific, or philanthropic missions (vessels engaged in the collection of scientific data of potential military application are not exempt)

3. Vessels and aircraft guaranteed safe conduct by prior arrangement between the belligerents

4. Small coastal (not deep-sea) fishing vessels and small boats engaged in local coastal trade. Such vessels and boats are subject to the regulations of a belligerent naval commander operating in the area

5. Civilian passenger vessels at sea and civil airliners in flight are subject to capture but are exempt from destruction. Although enemy lines of communication are generally legitimate military targets in modern warfare, civilian passenger vessels at sea, and civil airliners in flight, are exempt from destruction, unless at the time of the encounter, they are being utilized by the enemy for a military purpose (e.g., transporting troops or military cargo) or refuse to respond to the directions of the intercepting warship or military aircraft. Such passenger vessels in port and airliners on the ground are not protected from destruction.

If an enemy vessel or aircraft assists the enemy's military effort in any manner, it may be captured or destroyed. Refusal to provide immediate identification upon demand is ordinarily sufficient legal justification for capture or destruction. All States have a legal obligation not to take advantage of the harmless character of exempt vessels and aircraft in order to use them for military purposes while preserving their innocent appearance.

Commentary

Vessels and aircraft designated for, and engaged in, the exchange of POWs are cartel vessels. They may not be attacked or captured. In *The Brig "Betsey"*, the Court of Claims stated:

> What is a cartel in warfare of the nations? An agreement between belligerents for the exchange of prisoners. What is a

> cartel ship except a vessel of belligerents duly commissioned for the carriage by sea of exchanged prisoners from enemy country to their own country or for the carriage of official communications to and from enemies?[150]

In *The Adula*, the U.S. Supreme Court noted:

> While the mission of the Adula was not an unfriendly one to this Government, she was not a cartel ship, privileged from capture as such, but one employed in a commercial enterprise for the personal profit of the charterer, and only secondarily, if at all, for the purpose of humanity.[151]

Vessels charged with religious, nonmilitary scientific, or philanthropic missions are exempt from capture.[152] Vessels engaged in the collection of scientific data of potential military application, however, would not be included within this exemption.

Vessels granted safe conduct may not be attacked.[153] Certain safe-conduct protection may be granted by special agreements contemplated in the 1949 Geneva Conventions. These include agreements for the removal and passage of certain personnel, such as vulnerable civilians, from besieged areas; agreements for the passage of consignments; agreements for the removal or transport of the wounded and sick; agreements for the passage of medical aircraft for the transport of the military or civilian wounded and sick; agreements for the safe passage of chartered medical transport ships; and agreements for the special transport of relief shipments for POWs or civilian internees.[154]

Small coastal (not deep-sea) fishing vessels and small boats engaged in local coastal trade are exempt from attack and capture. Article 3 of Hague XI provides:

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150. The Brig "Betsey", 49 Ct. Cl. 125, 132 (Ct. Cl. 1913).
151. The Adula, 176 U.S. 361, 379–80 (1900). *See also* Crawford v. The William Penn., 6 F. Cas. 778, 780–81 (C.C.D.N.J. 1815).
152. Hague XI, art. 4. *See, e.g.* NEWPORT MANUAL, § 9.5.
153. *See, e.g.* NEWPORT MANUAL, § 9.5.
154. *See* DOD LAW OF WAR MANUAL, § 12.6.3.3.

> Vessels used exclusively for fishing along the coast or small boats employed in local trade are exempt from capture, as well as their appliances, rigging, tackle, and cargo. They cease to be exempt as soon as they take any part whatever in hostilities.
>
> The Contracting Powers agree not to take advantage of the harmless character of the said vessels in order to use them for military purposes while preserving their peaceful appearance.

In *The Paquete Habana*, the Supreme Court stated:

> This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that, at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent states, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war.
>
> The exemption, of course, does not apply to coast fishermen or their vessels if employed for a warlike purpose, or in such a way as to give aid or information to the enemy; nor when military or naval operations create a necessity to which all private interests must give way.
>
> Nor has the exemption been extended to ships or vessels employed on the high sea in taking whales or seals or cod or other fish which are not brought fresh to market, but are salted or otherwise cured and made a regular article of commerce.[155]

155. The Paquete Habana, 175 U.S. 677, 708 (1900).

If a civilian passenger vessel constitutes a military objective and thus is liable to attack, any attack must comply with other applicable rules related to attacks. In particular, attacks against civilian passenger vessels engaged in passenger service must comply with the requirement that the expected loss of life or injury to civilians, and damage to civilian objects incidental to the attack, must not be excessive in relation to the concrete and direct military advantage expected to be gained. On the rule of proportionality, see the commentary accompanying § 8.3.1.

8.7 SUBMARINE WARFARE

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

Commentary

Submarine warships must comply with the same law of war rules that apply to surface warships. For example, in their action with regard to merchant ships, submarines must conform to the law of war rules to which surface vessels are subject.[156] In general, submarines must provide for the safety of passengers, crew, and ship's papers before destruction of an enemy merchant vessel. However, the same exceptions to this rule that permit surface ships to attack enemy merchant

156. Treaty for the Limitation and Reduction of Naval Armament, art. 22, Apr. 22, 1930, 112 L.N.T.S. 65. *See also* London Protocol of 1936.

vessels that are military objectives also permit submarines to conduct such attacks.

8.7.1 Interdiction of Enemy Merchant Shipping by Submarines

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

1. The enemy merchant vessel persistently refuses to stop when duly summoned to do so.

2. It actively resists visit and search or capture.

3. It is sailing under convoy of enemy warships or enemy military aircraft.

4. It is armed with systems or weapons beyond required for self-defense against terrorism, piracy, or like threats.

If not resisting visit and search, enemy merchant vessels targetable because of integration into the enemy's war-sustaining effort may be destroyed without warning and without providing a place of safety for the passengers, crew, and ship's papers only where, under the circumstances of the specific encounter, doing so subjects the submarine to imminent danger or would otherwise preclude mission accomplishment. For this purpose, the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board.

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

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

apply to enemy merchant vessels and civilian aircraft that may become subject to attack and destruction.

Commentary

Although submarines must comply with the same law of war rules as surface ships, a law of war rule may apply differently in the context of submarine warfare because of the different circumstances of submarine warfare as compared to surface warfare. For example, like surface warships, submarine warships also have an obligation to search for and collect the shipwrecked, wounded, and sick after an engagement. This obligation, however, is subject to certain practical limitations, and the practical limitations faced by submarines may be different from those faced by surface vessels. To cite an example, although a surface warship might be able to take on board survivors after an engagement, a submarine may have limited passenger-carrying capabilities. Thus, it may be necessary to rely on other measures (such as passing the location of possible survivors to a surface ship, aircraft, or shore facility capable of rendering assistance) to comply with the law of war obligation. U.S. Admiral Chester Nimitz testified in writing to the International Military Tribunal:

> Q: "Were, by order or on general principles, the U.S. submarines prohibited from carrying out rescue measures toward passengers and crews of ships sunk without warning in those cases whereby doing so the safety of their own boat was endangered?"
>
> A: "On general principles, the U.S. submarines did not rescue enemy survivors if undue additional hazard to the submarine resulted or the submarine would thereby be prevented from accomplishing its further mission. U.S. submarines were limited in rescue measures by small passenger-carrying facilities combined with the known desperate and suicidal character of the enemy. Therefore, it was unsafe to pick up many survivors. Frequently survivors were given rubber boats and/or provisions. Almost invariably survivors did not

> come aboard the submarine voluntarily, and it was necessary to take them prisoner by force."[157]

8.7.2 Enemy Vessels and Aircraft Exempt from Submarine Interdiction

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

8.8 AIR WARFARE AT SEA

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

1. When persistently refusing to comply with directions from the intercepting aircraft

2. When sailing under convoy of enemy warships or military aircraft

3. When armed with systems or weapons beyond required for self-defense against terrorism, piracy, or like threats

4. When incorporated into or assisting in any way the enemy's military intelligence system

5. When acting in any capacity as a naval or military auxiliary to an enemy's armed forces

6. When otherwise integrated into the enemy's warfighting, war-supporting, or war-sustaining effort.

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157. Affidavit subscribed by Chester W. Nimitz, Fleet Admiral, Chief of Naval Operations, U.S. Navy, from Joseph L. Broderick, Lieutenant Commander, U.S. Naval Reserve, of the International Law Section, Office of the Judge Advocate General, Navy Department (May 11, 1946), *in* 17 TWC 379–80 (1948).

To the extent that military exigencies permit, military aircraft are required to search for the shipwrecked, wounded, and sick following an engagement at sea. Medical aircraft flying pursuant to an agreement between the parties in the contact zone or over areas controlled by the enemy may not search for the wounded, sick, and shipwrecked, except by prior agreement with the enemy. The location of possible survivors should be communicated at the first opportunity to a surface vessel, aircraft, or shore facility capable of rendering assistance.

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

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

Commentary

On air warfare at sea, see the commentary and rules accompanying § 8.6 (surface warfare). These apply *mutatis mutandis* to air operations at sea. The listing in this section is identical to that for surface warships and for submarines except for the omission of reference to a merchant vessel resisting visit and search or capture. Should visit and search or capture of a merchant vessel by an aircraft be feasible, as perhaps by a helicopter, that provision would apply as it does for surface warships and submarines.

With regard to searching for the shipwrecked, wounded, and sick following an engagement, see Article 15 of GC I, Article 18 of GC II, and Article 16 of GC IV. Under AP I, medical aircraft flying pursuant to agreement between the parties in the contact zone or over areas controlled by the enemy may not search for the wounded, sick, and shipwrecked except by prior agreement with the enemy.[158]

158. AP I, art. 28(4).

As to whether aircraft can enforce the surrender of a vessel, the aircraft must be able to communicate in some fashion with the surrendering ship and take enforcement measures should the vessel attempt to escape or indicate that its surrender was a subterfuge.

8.9 BOMBARDMENT

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

8.9.1 General Rules

The United States is a party to Hague IX. That convention established the general rules of naval bombardment of land targets. These rules have been further developed by customary practice in World Wars I and II, Vietnam, the Falkland/Malvinas Conflict, Operations DESERT SHIELD/DESERT STORM, and Operations ENDURING FREEDOM and IRAQI FREEDOM. Underlying these rules are the broad principles of the law of armed conflict that belligerents are forbidden to make noncombatants and civilians the target of direct attack, that superfluous injury to, and unnecessary suffering of, combatants are to be avoided, and wanton destruction of property is prohibited. To give effect to these concepts, the following general rules governing bombardment shall be observed.

Commentary

On the prohibition of attacking noncombatants and civilians, see § 8.3 and accompanying commentary.[159]

On superfluous suffering and unnecessary suffering, see § 9.1.1 and accompanying commentary.[160]

159. *See also* DOD LAW OF WAR MANUAL, § 5.5.
160. *See also id.* § 2.3.

On the wanton destruction of property, see §§ 6.2.6.1 and 6.3 and accompanying commentary.[161]

8.9.1.1 Destruction of Civilian Habitation

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

An attack by bombardment by any methods or means which treats a number of clearly separated and distinct military objectives located in an area as a single military objective containing a concentration of civilians and civilian objects is prohibited.

Commentary

On the wanton destruction of civilian habitation, see Article 50 of GC I, Article 51 of GC II, Article 14 of GC IV, and Article 85(2) of AP I. To be subject to attack, civilian habitation must qualify as a military objection and the attacker must comply with the proportionality rule and the requirement to take precautions in attack. See §§ 8.2 and 8.3.1 and accompanying commentary.[162]

The prohibition on treating clearly separate and distinct objects as a single military objective reflects Article 51(5)(a) of AP I:

> Among others, the following types of attacks are to be considered as indiscriminate:

161. *See also* GC I, art. 50; GC II, art. 51; GC IV, art. 147; AP I, art. 85(2); Charter of the International Military Tribunal, art. 6(b). *See also* DOD LAW OF WAR MANUAL, § 5.17.2.

162. *See also* Hague Regulations, art. 23(g); Hague Rules of Air Warfare, art. 24(4); AP I, art. 51(5)(b); Incendiary Weapons Protocol, art. 3.

> (a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; . . . .

The United States is not a party to the instrument, but application of the rules regarding discrimination and precautions in attack would lead to the same result. It must be cautioned that the prohibition only applies in situations where it is feasible for the attack to separately target the military objectives. To engage in area bombing may be possible even if civilians and civilian objects are placed at risk so long as the proportionality rule and the requirement to take precautions in attack are respected.

8.9.1.2 Terrorization

Bombardment for the sole purpose of terrorizing the civilian population is prohibited. Otherwise legal acts which cause incidental terror to civilians are not prohibited. As a practical matter, some fear and terror will be experienced by civilians whenever military objectives in their vicinity are attacked.

Commentary

This section applies only to situations in which the belligerent conducts an attack for the primary purpose of terrorizing the civilian population.[163] Although the United States is not a party to the Additional Protocols, it recognizes Article 51(2) of AP I as reflecting customary international law.[164]

8.9.1.3 Undefended Cities or Agreed Demilitarized Zones

Belligerents are forbidden to bombard a city or town that is undefended and is open to immediate physical entry by their own or allied ground forces. A city or town behind enemy lines is, by definition, neither undefended nor

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163. *See* Hague Rules of Air Warfare, art. 22; AP I, art. 51(2); AP II, art. 13(2); Matheson, *supra* note 53, at 426.

164. Matheson, *supra* note 53, at 426.

open, and military objectives therein may be attacked. An agreed demilitarized zone is exempt from bombardment.

Commentary

On undefended cities and demilitarized zones, Article 25 of the Hague Regulations provides: "The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited." Article 1 of Hague IX similarly provides: "The bombardment by naval forces of undefended ports, towns, villages, dwellings, or buildings is forbidden."[165]

The term "undefended city" (or "town" or "village", or any other populated area) is a term of art in the law of war and should not be confused with a place that simply lacks defensive capabilities. Historically, open or undefended status for a town, village, or city would be sought as opposing military forces approached and the military forces previously controlling the city abandoned it. Undefended or open status would essentially surrender the city to the opposing force; this would minimize injury to the inhabitants and damage to civilian objects within the city because the city could be occupied without resistance or bypassed.

An undefended city may be established through negotiations with opposing forces, or unilaterally by the party to the conflict in control of it. If the latter, the intent and actions of that party should be communicated to opposing military forces through a declaration. A town, village, or city may be declared "undefended" when it is near, or in, a zone where opposing armed forces are in contact with one another and it is open for immediate physical occupation by an adverse party without resistance. Because the area in question must be open for immediate physical occupation by opposing military ground forces, a city in rear areas behind enemy lines cannot be "undefended."

165. *See also* AP I, art. 59(1); DOD LAW OF WAR MANUAL, § 5.15; NEWPORT MANUAL, § 8.7.1.

Belligerents may refuse to recognize a declaration that a city is undefended if they assess that it does not satisfy all of the necessary conditions, although they should notify the opposing belligerent of that decision. Absent or until recognition, military objectives in a city unilaterally designated as undefended remain subject to attack. Once validly declared undefended, the city must also satisfy certain conditions: combatants and mobile military equipment must have been evacuated; no hostile use can be made of fixed military installations or establishments within the city; hostile acts may not be committed by the local civilian authorities or the civilian population against the occupying military force; and activities in support of military operations may not be undertaken.

Parties may agree to recognition of a demilitarized zone, which is addressed in Article 60 of AP I. The United States recognizes that provision as an accurate reflection of customary law.[166] The agreement may be concluded verbally or in writing, either directly or through a protecting power or any impartial humanitarian organization. It may be concluded prior to or during the armed conflict and is subject to the same conditions as undefended locations (evacuation of military personnel and assets, etc.).

8.9.1.4 Medical Facilities

Medical establishments and units (mobile and fixed), medical vehicles, and medical equipment and stores may not be deliberately bombarded. Belligerents are required to ensure such medical facilities are, as far as possible, situated in such a manner that attacks against military targets in the vicinity do not imperil their safety. If medical facilities are used for military purposes inconsistent with their humanitarian mission, they must be warned about the inconsistent use, if feasible. If appropriate warnings are unheeded, the facilities become subject to attack. The distinctive medical emblem, a Red Cross, Red Crescent, or Red Crystal is to be clearly displayed on medical establishments and units in order to identify them as entitled to protected status. Any object recognized as being a medical facility may not be attacked, whether or not marked with a protective symbol.

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166. Matheson, *supra* note 53, at 427.

Commentary

On medical facilities and units, see DoD Law of War Manual, § 7.10.[167]

Article 19 of GC I provides: "Fixed establishments and mobile medical units of the Medical Service may in no circumstances be attacked, but shall at all times be respected and protected by the Parties to the conflict." The respect and protection accorded by GC I to military medical units and facilities mean that that they must not knowingly be attacked, fired upon, or unnecessarily prevented from discharging their proper functions. Article 23 of GC II similarly provides: "Establishments ashore entitled to protection of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, shall be protected from bombardment or attack from the sea." However, incidental harm to military medical units or facilities is not prohibited unless disproportionate or resulting from a failure to take appropriate precautions in attack.

Article 21 of GC I provides:

> The protection to which fixed establishments and mobile medical units of the Medical Service are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after a due warning has been given, naming, in all appropriate cases, a reasonable time limit and after such warning has remained unheeded.

Acts harmful to the enemy may be direct or indirect. For example, a hospital may not be used as a shelter for able-bodied combatants or fugitives, as an arms or ammunition depot, or as a military observation post. A medical unit must not be deliberately situated so as to hamper or impede an enemy attack. The following conditions do not deprive a medical unit or establishment of the protection guaranteed by Article 19 of GC I:

167. *See also* NEWPORT MANUAL, § 8.7.2.

- that the personnel of the unit or establishment are armed, and that they use the arms in their own defense, or in that of the wounded and sick in their charge;
- that, in the absence of armed orderlies, the unit or establishment is protected by a picket, by sentries, or by an escort;
- that small arms and ammunition taken from the wounded and sick and not yet handed to the proper service are found in the unit or establishment;
- that personnel and material of the veterinary service are found in the unit or establishment, without forming an integral part thereof; and
- that the humanitarian activities of medical units and establishments or of their personnel extend to the care of civilian wounded or sick.

Combatants or other military objectives may be temporarily present within a medical unit or facility. For example, a military vehicle that is not protected as medical aircraft or transport may deliver the wounded or sick to a medical facility. The temporary presence of combatants or other military objectives does not automatically constitute an act harmful to the enemy. Additional facts would be necessary to establish that it is being used to commit acts harmful to the enemy.

The distinctive emblem (see § 8.5.1.1) is to be used to facilitate the identification of medical units and facilities as such. The distinctive flag of GC I may only be hoisted over medical units and establishments that are entitled to be respected under the Convention, and only with the consent of the military authorities. In mobile units, as in fixed establishments, it may be accompanied by the national flag of the party to the conflict to which the unit or establishment belongs. Failure to display the emblem does not deprive it of protection, but it does heighten the risk that the facility will be unintentionally or incidentally harmed.

8.9.1.5 Special Hospital Zones and Neutralized Zones

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

Commentary

Article 23 of GC I provides:

> In time of peace, the High Contracting Parties and, after the outbreak of hostilities, the Parties to the conflict, may establish in their own territory and, if the need arises, in occupied areas, hospital zones and localities so organized as to protect the wounded and sick from the effects of war, as well as the personnel entrusted with the organization and administration of these zones and localities and with the care of the persons therein assembled.

It may be appropriate to conclude agreements with opposing forces to establish neutralized zones in regions where fighting is taking place. Neutralized zones differ from civilian hospital and safety zones in that they are intended to protect a broader group of persons and in that they are generally established on a temporary basis in regions where fighting is taking place.[168] These neutralized zones are to shelter (a) wounded and sick combatants or noncombatants; and (b) civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character.[169] The agreements should be made in writing, should be signed by representatives of the parties to the conflict, and should establish (a) the location of the zone; (b) the administration of the zone; (c) the food supply of the zone; (d) the supervision of the zone; and (e) the beginning and duration of the neutralization of the zone.[170]

168. GC IV COMMENTARY, at 129.
169. GC IV, art. 15.
170. *Id.* art. 15.

8.9.1.6 Religious, Cultural, and Charitable Buildings and Monuments

Buildings devoted to religion, the arts, or charitable purposes; historic monuments; and other religious, cultural, or charitable facilities should not be bombarded, provided they are not used for military purposes. It is the responsibility of the local inhabitants to ensure such buildings and monuments are clearly marked with the distinctive emblem of such sites—a rectangle divided diagonally into two triangular halves, the upper portion black and the lower white (see Figure 8-12), or the cultural property sign contained in 1954 Hague Convention for the protection of cultural property in time of war (see Figure 8-8). The latter has superseded the former. Such buildings—even if displaying a protective emblem—lose their protection from attack if they are used for military purposes.

Commentary

During a bombardment, the law of armed conflict rules governing the conduct of hostilities apply to religious, cultural, and charitable buildings and monuments as civilian property, including the rule of proportionality and the requirement to take precautions in attack. They may be attacked subject to these rules if they qualify as military objectives. See §§ 8.2 and 8.3.1. During occupation, the property of municipalities, that of institutions dedicated to religion, charity, and education, and the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction of, or willful damage done to institutions of this character, historic monuments, works of art, and science is forbidden and should be made the subject of legal proceedings.[171]

On the protections to which cultural property is entitled, see DoD Law of War Manual, § 5.18. Certain treaty obligations with respect to cultural property may apply only on the territory of parties to the Hague Cultural Property Convention. For example, Article 4(1) of the Convention provides: "The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties." However,

171. Hague Regulations, art. 56.

the United States has previously identified some of these obligations as customary international law.

For the purpose of this Handbook, the definition of cultural property is set forth in Article 1 of the Hague Cultural Property Convention:

> For the purposes of the present Convention, the term "cultural property" shall cover, irrespective of origin or ownership:
>
> (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;
>
> (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);
>
> (c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as "centres containing monuments."

It must be cautioned that this definition may be more limited than cultural property described and protected by other instruments.[172] The protections afforded cultural property by the Hague Cultural Property Convention are supplementary to those afforded by earlier

172. *See, e.g.*, Hague Regulations, art. 27; Hague IX, art. 5; Roerich Pact, art. 1; AP I, art. 53.

treaties, although the distinctive scope of objects being protected by each instrument is not the same (there may be overlap).

Property must be "of great importance to the cultural heritage of every people" to qualify as cultural property. Ordinary property (such as churches or works of art) that are not of great importance to the cultural heritage of every people would not qualify as cultural property, although such property may benefit from other protections, such as those afforded civilian objects or enemy property.

In general, acts of hostility may not be directed against cultural property, its immediate surroundings, or appliances in use for its protection.[173] Acts of hostility may, however, be directed against cultural property, its immediate surroundings, or appliances in use for its protection when military necessity imperatively requires such acts. For example, if cultural property is being used by an opposing force for military purposes, then military necessity generally may imperatively require its seizure or destruction. Similarly, if an opposing force uses cultural property and its immediate surroundings to protect military objectives, then the attack of those military objectives may be imperatively required by military necessity. Even where the waiver of the protection afforded cultural property, its immediate surroundings, or appliances in use for its protection may be warranted for reasons of imperative military necessity, the risk of harm to the cultural property must be considered in a proportionality analysis and feasible precautions should be taken to reduce the risk of harm to the cultural property.

8.9.1.7 Dams and Dikes

Dams, dikes, levees, and other installations, which if breached or destroyed would release flood waters or other forces dangerous to the civilian population, should not be bombarded if the anticipated harm to civilians would be excessive in relation to the anticipated military advantage to be gained by bombardment.

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173. Hague Cultural Property Convention, art. 4(1). *See also* NEWPORT MANUAL, §§ 8.7.3, 8.7.4.1.

Commentary

Facilities containing dangerous forces—such as dams, dikes, nuclear power plants, or facilities producing weapons of mass destruction—may constitute military objectives.[174] There may be a number of reasons for their attack, such as denial of electric power to military sources. Attacks against such facilities are permissible so long as they are conducted in accordance with the law of armed conflict, especially the requirement to qualify as a military objective, the rule of proportionality, and the requirement to take feasible precautions in attack. For example, weaponeering or timing the attack such that weather conditions would minimize the dispersion of dangerous materials may be appropriate to reduce the risk that the release of these dangerous forces may pose to the civilian population.

Article 56 of AP I provides special rules of protection for works and installations containing dangerous forces. For example, "[w]orks or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population." In addition, Article 56 provides immunity from attack to combatants and military equipment stationed or placed around works and installations containing dangerous forces "for the sole purpose of defending the protected works."

The United States has objected to Article 56:

> Article 56 of Protocol I is designed to protect dams, dikes, and nuclear power plants against attacks that could result in "severe" civilian losses. As its negotiating history indicates, this article would protect objects that would be considered legitimate military objectives under customary international law. Attacks on such military objectives would be prohibited if "severe" civilian casualties might result from flooding or release of radiation. The negotiating history throws little light

174. *See, e.g.*, NEWPORT MANUAL, § 8.7.4.2.

> on what level of civilian losses would be "severe." It is clear, however, that under this article, civilian losses are not to be balanced against the military value of the target. If severe losses would result, then the attack is forbidden, no matter how important the target. It also appears that article 56 forbids any attack that raises the possibility of severe civilian losses, even though considerable care is taken to avoid them.[175]

Insofar as Article 56 of AP I deviates from the regular application of the principles of distinction and proportionality, the U.S. view has been that it does not reflect customary international law. In ratifying AP I, other States have also taken reservations from this article.

8.9.2 Warning Before Bombardment

Where the military situation permits, commanders should make every reasonable effort to warn the civilian population located in close proximity to a military objective targeted for bombardment. Warnings may be general rather than specific, lest the bombarding force or the success of its mission be placed in jeopardy. Warnings are for the protection of the civilian population and need not be given when civilians are unlikely to be affected by the attack.

Commentary

Unless circumstances do not permit, effective advance warning must be given of an attack that may affect the civilian population.[176] Additional warning requirements exist before certain medical units, vessels, or facilities forfeit their protection from being made the object of attack: military medical units and facilities; ground medical transports; hospital ships and sick-bays in warships; civilian hospitals; and civilian hospital convoys.[177]

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175. *The Position of the United States on Current Law of War Agreements: Remarks of Judge Abraham D. Sofaer, Legal Adviser, United States Department of State, January 22, 1987*, 2 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 460, 468 (1987).

176. Hague Regulations, art. 26; AP I, art. 57(2)(c).

177. DOD LAW OF WAR MANUAL, § 5.11.5.1.

> Warnings may be communicated to the authorities in control of the civilian population, such as the national leadership of the enemy State. Warnings may also be delivered directly to the civilian population through military information support operations (e.g., broadcasts and leaflets) advising civilians of the risk of harm if they are near military objectives. Low passes of aircraft or warning shots may also be appropriate in certain circumstances.
>
> Since the purpose of a warning is to facilitate the protection of the civilian population, if civilians will not be affected by an attack, then there is no obligation to provide a warning to facilitate their protection. Circumstances not permitting the giving of advance warning include where giving a warning would be incompatible with legitimate military requirements, such as exploiting the element of surprise in order to provide for mission accomplishment and preserving the security of the attacking force.

8.10 LAND WARFARE

The guidance in this section provides an overview of the basic principles of law governing conflict on land. For a comprehensive treatment of the law of armed conflict applicable to land warfare, see the DOD Law of War Manual and FM 6-27/MCTP 11-10C, The Commander's Handbook on the Law of Land Warfare.

8.10.1 Targeting in Land Warfare

Targeting principles in land warfare are the same as in naval warfare. See 8.1. The characteristics of land warfare, often involving intermingled military objectives, combatants, civilians, and civilian objects, can make the application of targeting decisions more difficult.

8.10.2 Special Protection

Under the law of land warfare, certain persons, places, and objects enjoy special protection against attack. Protection is, of necessity, dependent upon recognition of protected status. Special signs and symbols are employed for that purpose (see 8.5.1). Failure to display protective signs and symbols does not render an otherwise protected person, place, or object a legitimate target

if that status is otherwise apparent (see 8.5.1.7). Protected persons directly participating in hostilities lose their protected status and may be attacked while so employed. Misuse of protected places and objects for military purposes renders them subject to legitimate attack during the period of misuse.

8.10.2.1 Protected Status

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

8.10.2.2 Protected Places and Objects

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

8.10.2.3 The Environment

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

8.11 WARFARE IN THE INFORMATION ENVIRONMENT

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

8.11.1 General Targeting Considerations

Legal analysis of intended wartime targets requires traditional law of armed conflict analysis. Warfare in the IE can target human decision processes (human factors), the information and information systems used to support decision-making (links), and the information and information systems used to

process information and implement decisions (nodes). Human factors include national command authorities, commanders, forces, populace as a whole and/or groups within the populace (e.g., target audience and relevant actors). Planned warfare in the IE targeting efforts should examine all three target areas to maximize the opportunity for success. In all cases, the selection of targets must be consistent with U.S. objectives, applicable international conventions, the law of armed conflict, and ROE. Department of Defense warfare in the IE activities will not be directed at or intended to manipulate audiences, public actions, or opinions in the United States and will be conducted in accordance with all applicable U.S. laws.

8.11.2 Cyberspace Attacks

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

Commentary

For a full discussion of cyber operations, see Chapter XVI of the DoD Law of War Manual. It should be cautioned that the applicability of certain rules of general international law is controversial, especially the application of the principle of sovereignty and the exist-

ence, or lack thereof, of a rule requiring States to exercise due diligence to put an end to hostile cyber operations mounted from their territory into other States.[178]

It is unquestionable that the law of armed conflict applies to cyber operations mounted during an armed conflict that have a nexus to that conflict. Two key issues remain unsettled among States. The first surrounds the qualification of a cyber operation as an "attack," such that it is subject to rules involving, inter alia, discrimination, proportionality, and precautions in attack. For instance, if a cyber operation against civilian cyber infrastructure is not an attack as a matter of law, it does not violate the rule prohibiting attacks on civilian objects. While there is agreement that cyber operations causing physical damage or injury amount to attacks, there is no consensus over cyber operations not having those consequences, such as an operation that causes the targeted cyber infrastructure to cease functioning altogether.

The second issue involves the qualification of data as an object. States are divided on this issue. If data is not an object, a cyber operation against civilian data would not violate the prohibition on attacking civilian objects. This would expose all civilian databases, governmental and private, to hostile cyber operations unless the consequence of those operations was a prohibited effect upon civilian objects. By contrast, if data is an object, military operations altering civilian data would be prohibited. For instance, a psychological operation targeting the civilian population that involved data manipulation would constitute a violation of the law of armed conflict and a war crime.

178. *See* TALLINN MANUAL 2.0 chs. 1–4, 6–7. *See also* NEWPORT MANUAL, § 8.1.4.

CHAPTER 9

CONVENTIONAL WEAPONS AND WEAPONS SYSTEMS

9.1 INTRODUCTION

This chapter addresses the legal considerations pertaining to the use of conventional weapons and weapons systems. It is a fundamental tenet of the law of armed conflict that the right of States engaged in armed conflict to choose methods or means of warfare is not unlimited. Weapons which by their nature are incapable of being directed specifically against military objectives, and therefore put civilians and noncombatants at equivalent risk, are forbidden due to their indiscriminate effect. The employment of weapons, materiel, and methods of warfare designed to cause superfluous injury or unnecessary suffering is prohibited. Some weapons (e.g., poisoned projectiles) are unlawful per se. Others may be rendered unlawful by alteration (e.g., coating ammunition with a poison). Any lawful weapon is capable of being used for an unlawful purpose when it is directed against noncombatants, civilians, and other protected persons and property.

The United States has a formal weapon legal review program. For the purposes of this program, weapons and weapons systems are defined as all arms, munitions, materiel, instruments, mechanisms, devices, and those components required for their operation, that are intended to have an effect of injuring, damaging, destroying, or disabling personnel or property, to include nonlethal weapons. See SECNAVINST 5000.2F, Defense Acquisition System and Joint Capabilities Integration and Development System Implementation. For the purposes of this program, weapons do not include launch or delivery platforms, such as ships or aircraft. The program addresses the acquisition of weapons and mandates that all weapons newly developed or purchased by the U.S. armed forces be reviewed for consistency with the law of armed conflict prior to the engineering development and initial contract for production stages of the acquisition process. These reviews are conducted by the judge advocate general of the relevant service. For the Department of the Navy, legal reviews are conducted by the Office of the Judge Advocate General's National Security Law Division (OJAG Code 10) in the Pentagon.

This chapter does not attempt to individually address each type of weapon and weapon system in the U.S. inventory. It focuses on the rules pertaining to those weapons and weapons systems of particular interest to naval officers (e.g., naval mines, landmines, torpedoes, cluster and fragmentation weapons, delayed-action devices, incendiary weapons, directed-energy devices, and over-the-horizon (OTH) weapons systems). Each of these weapons or systems will be assessed in terms of its potential for causing unnecessary suffering and superfluous injury or indiscriminate effect.

Commentary

Enclosure 3 of SECNAVINST 5000.2F, Defense Acquisition System and Joint Capabilities Integration and Development System Implementation, states in part:

> 10. Mandatory Legal Review of Potential Weapons & Weapon Systems
>
> a. Requirement. All potential weapons and weapon systems developed, acquired, or procured by the DON will be reviewed by the Judge Advocate General (JAG) of the Navy to ensure that the intended use of such weapons or weapon systems is consistent with domestic and international law. Modifications of weapons and weapon systems must receive a new legal review. Paragraph 10e below contains definitions specific to this section and should be read carefully.
>
> b. Scope. Legal consultation and review as described below are required whether the potential weapon or weapon system is developed, acquired, or procured through the formal acquisition process or in any other way, including by purchase of a commercial-off-the-shelf system, by a rapid or accelerated acquisition process, or by modification of an existing system within the Department.
>
> c. Other Service Systems. Where a weapon or weapon system was not developed, acquired, or procured by the

DON but will otherwise be fielded or employed by the DON, those who field such weapons or weapon systems will ensure a review has been completed by the appropriate authority in accordance with reference (a). The Office of the JAG, Code 10 (National Security Law) can be contacted to help determine the appropriate review authority.

d. Responsibility and Timing. Program Managers, or others who develop, acquire, or procure weapons or weapon systems, will ensure that all potential weapons or weapon systems are reviewed in accordance with this section. Legal review is required regardless of whether the intended effect of the weapon or weapon system would be caused to the target or to collateral persons or objects.

(1) Legal Consultation. Program Managers, or others who develop, acquire, or procure weapons or weapon systems, will notify and consult with the Office of the JAG, Code 10 (National Security Law) concerning prospective weapons or weapon systems prior to the award of the Engineering and Manufacturing Development (EMD) contract, or any other contract for the development, acquisition, procurement, or purchase of a system.

(2) Formal Legal Review. For weapons or weapon systems acquired under DON acquisition programs, the formal legal review will take place before award of the initial production contract. In all other cases, the formal legal review will occur before fielding or employment.

e. Definitions

(1) Weapon or Weapon System. As referred to in this section, weapons or weapon systems are defined as all arms, munitions, materiel, instruments, mechanisms, devices, and those components required for

> their operation, that are intended to have an effect of injuring, damaging, destroying, or disabling personnel or property, to include non-lethal weapons.
>
> (2) Modifications. As referred to in this section, modifications are defined as any change, addition, enhancement, or improvement to a weapon or weapon system which adds, changes, or enhances effects of injuring, damaging, destroying, or disabling personnel or property. This includes effects to either the target or to collateral persons or objects.
>
> (3) Platforms. As referred to in this section, weapons do not include launch or delivery platforms, including, but not limited to, ships or aircraft, but rather the weapons or weapon systems contained on those platforms.

f. Request. To provide the information required to conduct the legal consultation or review, the command requesting the initiation of the legal review will prepare and forward to the Office of the JAG, Code 10 (National Security Law) a memorandum containing the following in plain, commonly understood language (a template will be provided by Code 10):

> (1) A complete description of the weapon or weapon system, to include: a list of all parts, how the weapon or weapon system functions, what the weapon or weapon system does, the manning level required for use, and whether the weapon or weapon system is self-propelled, mounted or attached to a platform, or individually portable.
>
> (2) The concept of employment planned for use of the weapon or weapon system. This should include detailed information from the final approved con-

cept of operation or method of employment that describes exactly how the system will be used and in what contexts, where appropriate.

(3) Information regarding the ability of the weapon or weapon system to be directed at a specific target, including a comparison of the accuracy of the new weapon or weapon system to similar weapons or weapon systems that have already been acquired or developed and have received a legal review.

(4) Information regarding the impact of the weapon or weapon system on the human body and on material objects, including both the intended target and any collateral persons or objects.

(5) Any additional information or testing data and pertinent conclusions arising from these tests.

g. Legal Consultation and Review Requirements. No weapon or weapon system may be developed, acquired, procured, fielded, or employed by the DON without a legal consultation and subsequent formal review under this section.

(1) The following Law of Armed Conflict (LOAC) issues must be addressed when any weapon or weapon system is being reviewed:

(a) Whether the system is calculated to cause superfluous injury (i.e., it invariably causes unnecessary suffering or harm disproportionate to the military advantage reasonably expected to be gained from its use);

(b) Whether the system may be controlled in such a manner that it is capable of being directed against a lawful target (i.e., it is not inherently indiscriminate); and

> (c) Whether there is a rule of law or treaty specifically prohibiting the use of the system.
>
> (2) The review will also consider and specify any legal restrictions on the weapon or weapon system's use. If any specific restrictions apply, the intended concept of employment of the weapon or weapon system will be reviewed for consistency with those restrictions. Where appropriate, the review will advise on other measures that would assist in ensuring compliance with LOAC obligations during employment of the weapon or weapon system.
>
> h. Record Keeping. The JAG will maintain a permanent file of all opinions issued under this instruction, other than reviews of weapons or weapon systems which are within Special Access Programs or Compartmented Access Programs. These reviews will be held by the office responsible . . . .
>
> 11. Review for Compliance with Arms Control Agreements
>
> a. All systems developed or acquired by DON will be reviewed by the Director, Strategic Systems Programs (DIRSSP) via the Naval Treaty Implementation Program Office (NT00), with the advice of DON Office of General Counsel (OGC), to certify compliance with arms control agreements in accordance with reference (q).
>
> b. Program Managers will ensure that as reference (q) requires, all DON acquisition program activities which may be affected by arms control agreements must be reviewed for arms control compliance before such activities are undertaken.[1]

1. SECNAVINST 5000.2F, Defense Acquisition System and Joint Capabilities Integration and Development System Implementation (Mar. 26, 2019). *See also* DoDD 5000.01, The Defense Acquisition System, ¶ 1.2.v (Ch. 1, July 28, 2022); DoDD 2060.1, Implementation of, and Compliance with, Arms Control Agreements, ¶ 2.8 (June 23, 2020); DOD LAW OF WAR MANUAL, §§ 6.1, 6.2.

9.1.1 Unnecessary Suffering

The law of war prohibits the design, use, or modification of weapons calculated to cause unnecessary suffering or superfluous injury. The terms unnecessary suffering and superfluous injury are regarded as synonymous and are used interchangeably. In determining whether a means or method of warfare causes unnecessary suffering or superfluous injury, the suffering or injury incurred by the combatant must not be manifestly disproportionate to the military advantage to be gained by the weapon's use. Serious injury, or even death, is not necessarily prohibited. Under the law of war, combatants can legally kill or wound enemy combatants. Such acts are legitimate if accomplished with lawful means or methods. For example, the prohibition of unnecessary suffering does not restrict the use of overwhelming firepower on an opposing military force in order to subdue or destroy it. The test is whether the suffering or injury is manifestly disproportionate to the military advantage. Certain means of warfare have been prohibited from use on the battlefield, either because they are regarded as causing unnecessary suffering or superfluous injury or for policy reasons. These include poison, chemical weapons, biological (or bacteriological) weapons, munitions containing fragments not detectable by x-ray, and blinding laser weapons.

Commentary

One of the purposes of the law of war is to protect combatants, noncombatants, and civilians from unnecessary suffering.[2] This concept is related to humanity.[3] "The principle of military necessity does not prohibit the application of overwhelming force against enemy combatants, units, and materiel consistent with the principles of distinction and proportionality."[4] For example, the DoD in coordination with the Department of State reconfirmed that the prohibition in the 1899 Declaration on Expanding Bullets[5] did not reflect customary

2. DOD LAW OF WAR MANUAL, § 1.3.4. *See also* NEWPORT MANUAL, § 6.2.1.
3. *Id.* § 2.3.
4. NWP 1-14M, § 5.3.1.
5. Declaration (IV, 3) Concerning Expanding Bullets, July 29, 1899, 187 Consol. T.S. 459, 26 MARTENS NOUVEAU RECUEIL.

international law, but that the United States instead regards expanding bullets as prohibited only to the extent that such bullets are calculated to cause unnecessary suffering.[6]

The DoD Law of War Manual states:

> The prohibition against weapons calculated to cause superfluous injury or of a nature to cause unnecessary suffering has been formulated in a variety of ways both in treaties to which the United States is a Party and in other treaties. The United States is not a Party to a treaty that provides a definition of "superfluous injury."
>
> Article 23(e) of the 1899 Hague II Regulations prohibits weapons "of a nature to cause superfluous injury." Article 23(e) of the 1907 Hague IV Regulations prohibits weapons "calculated to cause unnecessary suffering." The official texts of both the 1899 and 1907 treaties are French, and the French text of that paragraph is exactly the same in both treaties, even though English translations of the treaties are different. The title of the CCW refers to "Weapons Which May be Deemed to Be Excessively Injurious," and the CCW Preamble also recognizes "the principle that prohibits the employment in armed conflicts of weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering."
>
> Treaties that the United States has not ratified have also included this prohibition. The Preamble to the 1868 Declaration of St. Petersburg noted that "the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable" would be "be contrary to the laws of humanity." AP I Article 35(2) prohibits the use of "weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering."

6. DOD LAW OF WAR MANUAL, § 6.5.4.4.

> Although the various formulations may be regarded as describing the same underlying prohibition, the phrase "calculated to cause superfluous injury" may be regarded as the more accurate translation of the French rule stated in the 1907 Hague IV Regulations and as more precisely conveying the intent of the rule.[7]

> It is the U.S. view that the "necessity" of the suffering "must be judged in relation to the military utility of the weapons. The test is whether the suffering is needless, superfluous, or proportionate to the military advantage reasonably expected from the use of the weapon."[8]

9.1.2 Indiscriminate Effect

The principle of distinction requires means and methods of warfare amounting to attacks only be directed at combatants and objectives. Civilians and civilian objects may not be attacked, unless they lose their protected status. Weapons that are incapable of being directed at a military objective are forbidden as being indiscriminate in their effect. Examples of weapons incapable of discrimination include drifting armed contact mines, long-range unguided missiles (e.g., the German V-1 and V-2 rockets and Japanese uncontrolled balloon-borne bombs used during World War II). A weapon is not indiscriminate simply because it may cause incidental or collateral civilian casualties when directed at a legal military objective. An artillery round that is capable of being directed with a reasonable degree of accuracy at a military target is not an indiscriminate weapon simply because it may miss its mark or inflict collateral damage, provided such collateral damage is not foreseeably excessive in light of the anticipated military advantage to be gained. There is no obligation to employ the most precise weapon available, so long as the weapon employed is capable of discrimination.

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7. *Id.* § 6.6.1.

8. Ronald J. Bettauer, Deputy Assistant Legal Adviser, Department of State, Statement at the Conference of Government Experts on Weapons Which May Cause Unnecessary Suffering or Have Indiscriminate Effects, Lucerne (Sept. 25, 1974), 1974 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 707.

Commentary

The DoD Law of War Manual states:

> 6.7 Inherently Indiscriminate Weapons
>
> Inherently indiscriminate weapons, *i.e.*, weapons that are incapable of being used in accordance with the principles of distinction and proportionality, are prohibited. Such weapons include weapons that are specifically designed to conduct attacks against the civilian population as well as weapons that, when used, would necessarily cause incidental harm that is excessive compared to the military advantage expected to be gained from their use.
>
> . . . .
>
> 6.7.2 Inherently Indiscriminate Weapons—Circumstances to Be Assessed and Design Intent. The test for whether a weapon is inherently indiscriminate is whether its use necessarily violates the principles of distinction and proportionality, *i.e.*, whether its use is expected to be illegal in all circumstances.
>
> Special consideration should be given to the planned or intended uses of the weapon, *i.e.*, those that are reasonably foreseeable. For example, a practitioner conducting a legal review of the proposed acquisition or procurement of a weapon should consider the uses of the weapon that are planned and reflected in the design documents. Practitioners should advise if the planned uses of the weapon are not consistent with the principles of distinction and proportionality, with a view towards ensuring that either the weapon or the planned uses are modified accordingly.
>
> The wide range of circumstances in which weapons can lawfully be used should also be considered before concluding that a weapon is prohibited as inherently indiscriminate. For example, in some circumstances, an area of land can be a

> military objective. Thus, even if it would not be possible for the weapon to be directed against enemy combatants, if the weapon could be directed at specific areas, it would be unlikely that the weapon would be considered inherently indiscriminate. As another example, in some circumstances, feasible precautions can mitigate the incidental harm expected to be caused so that it is not excessive. Whether such precautions could be taken to mitigate the expected incidental harm caused by the weapon under review should be considered before concluding that a weapon is prohibited as inherently indiscriminate.

9.1.3 Proportionality

The principle of proportionality requires the anticipated loss of civilian life and damage to civilian property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained. When targeting a legitimate military objective, effects on civilians and civilian objects is considered collateral, or incidental, damage. A weapon violates the principle of proportionality only if the anticipated collateral effects on civilians and/or civilian objects is excessive to the military advantage to be gained by the targeting of the military objective.

Commentary

The DoD Law of War Manual states:

> 5.10 Proportionality in Conducting Attacks
>
> In accordance with the principle of proportionality, combatants must not exercise the right to engage in attacks against military objectives in an unreasonable or excessive way. Therefore, when prosecuting attacks against military objectives (*i.e.*, the persons and objects that may be made the object of attack), combatants must exercise due regard to reduce the risk of incidental harm to the civilian population and other persons and objects that may not be made the object of attack. In particular, the following rules apply:

- Combatants must take feasible precautions in planning and conducting attacks to reduce the risk of harm to civilians and other persons and objects protected from being made the object of attack; and

- Combatants must refrain from attacks in which the expected loss of civilian life, injury to civilians, and damage to civilian objects incidental to the attack would be excessive in relation to the concrete and direct military advantage expected to be gained.

5.10.1 Scope of Application of the Principle of Proportionality in Conducting Attacks. The principle of proportionality in conducting attacks imposes duties that apply to the protection of persons and objects that may not be made the object of attack. This principle does not impose obligations intended to reduce the risk of harm to military objectives (*i.e.*, persons and objects that may be made the object of attack).

Although the prohibition on attacks expected to cause excessive harm to civilians and civilian objects generally does not require consideration of military personnel and objects, feasible precautions must be taken to reduce the risk of harm to military personnel and objects that are protected from being made the object of attack, such as military personnel placed *hors de combat*.

5.10.1.1 *Proportionality in Conducting Attacks and Military Objectives*. The principle of proportionality in conducting attacks does not impose obligations intended to reduce the risk of harm to military objectives (*i.e.*, persons and objects that may be made the object of attack). For example, an attack against an enemy combatant might also injure other enemy combatants who were not the specific targets of the attack. The principle of proportionality in conducting attacks would not require that efforts be made to reduce the likelihood of harm to other enemy combatants or damage to other military objectives, even if this harm were an unintended result of the attack.

5.10.1.2 *Proportionality in Conducting Attacks and Protected Military Personnel and Facilities*. The prohibition on attacks expected to cause excessive incidental harm requires consideration of civilians and civilian objects, but this prohibition generally does not require consideration of military personnel and objects, even if they may not be made the object of attack, such as military medical personnel, the military wounded and sick, and military medical facilities. For example, treaty provisions articulating a prohibition on attacks expected to cause excessive incidental harm do not reflect protections for military personnel who are protected from being made the object of attack. Those planning or conducting attacks may consider such military personnel as a matter of practice or policy in applying the prohibition on attacks expected to cause excessive incidental harm.

The exclusion of protected military personnel and military medical facilities from this prohibition reflects such factors as, among others, the general impracticality of prohibiting attacks on this basis during combat operations. For example, the expected incidental harm to a sick-bay on a warship would not serve to exempt that warship from being made the object of attack.

Nonetheless, feasible precautions must be taken to reduce the risk of harm to military personnel and objects that are protected from being made the object of attack. For example, in the context of a deliberate, planned bombardment of a military objective near an identifiable military hospital, it may be feasible to take precautions to reduce the risk of harming the military hospital, and such precautions must be taken.

The law of war obligation of proportionality applies to persons rather than the weapons themselves. The law of war does require that a weapon determine whether its target is a military objective. Similarly, the law of war does not require that a weapon make other legal determinations, such as whether an attack may be expected to result in incidental harm that is excessive in relation to the concrete and

direct military advantage expected to be gained. Rather, it is persons who must comply with the law of war.[9]

9.2 NAVAL MINES

Naval mines have been effectively employed for area denial, coastal and harbor defense, antisurface and antisubmarine warfare, and blockade. Naval mines are lawful weapons, but their potential for indiscriminate effects has led to specific regulation of their deployment and employment by the law of armed conflict. The extensive and uncontrolled use of naval mines by both sides in the Russo-Japanese War of 1904–1905 inflicted great damage on innocent shipping during and long after that conflict, and led to Hague VIII. The purpose of the Hague VIII rules is to ensure, to the extent practicable, the safety of innocent shipping. These rules require naval mines be so constructed as to become harmless should they break loose from their moorings or otherwise cease to be under the affirmative control of the belligerents that laid them. The Hague rules require ship owners be warned of the presence of mines as soon as military exigencies permit.

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

Commentary

The use of naval mines can be both a means and a method of naval warfare. Naval mines can be used for area denial, coastal and harbor defense, anti-surface and anti-submarine warfare, and blockade.[10] When used exclusively for defensive purposes (e.g., moored mines used in area denial or harbor defense), the laying of naval mines is considered a method of naval warfare and does not constitute an attack. When directed against a military objective (e.g., free-floating mines designed to hit a specific target), the use of naval mines is a

9. DOD LAW OF WAR MANUAL, § 6.5.9.3.
10. *Id.* § 13.11.1. *See also* NEWPORT MANUAL, § 8.1.2.

means of naval warfare that qualifies as an attack and is subject to the rules and principles of targeting law. For example, the principle of distinction requires that means and methods of warfare that constitute an attack only be directed at military objectives. Unless they do something to lose their protected status, civilians and civilian objects may not be attacked. Therefore, weapons, such as drifting armed contact mines, which are incapable of being directed specifically at a military objective, are forbidden by the law of naval warfare due to their indiscriminate effect.[11]

9.2.1 Current Technology

Modern naval mines are versatile and variable weapons. They range from relatively unsophisticated and indiscriminate contact mines to highly technical, target-selective devices with state-of-the-art homing guidance capability. Today's mines may be armed and/or detonated by physical contact, acoustic or magnetic signature, or sensitivity to changes in water pressure generated by passing vessels. They may be emplaced by air, surface, or subsurface platforms. For purposes of this publication, naval mines are classified as armed or controllable mines. Armed mines are either emplaced with all safety devices withdrawn or armed following emplacement, so as to detonate when preset parameters (if any) are satisfied. Controllable mines have no destructive capability until affirmatively activated by some form of arming order (whereupon they become armed mines).

Commentary

Generally, there are six categories of naval mines:

(1) moored;
(2) drifting/floating;
(3) bottom;
(4) remotely controlled;

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11. *See* NWIP 10-2, ¶ 611; NEWPORT MANUAL, § 6.5; Steven Haines, *1907 Hague Convention VIII Relative to the Laying of Automatic Submarine Contact Mines*, 90 INTERNATIONAL LAW STUDIES 412 (2014); David Letts, *Beyond Hague VIII: Other Legal Limits on Naval Mine Warfare*, 90 INTERNATIONAL LAW STUDIES 446 (2014); Chatham House, *International Law Applicable to Naval Mines*, 90 INTERNATIONAL LAW STUDIES (2014); Raul (Pete) Pedrozo, *Russia-Ukraine Conflict: The War at Sea*, 100 INTERNATIONAL LAW STUDIES 1, 32–39 (2023).

(5) submarine launched mobile; and
(6) rising/rocket mines.[12]

9.2.2 Peacetime Mining

Consistent with the safety of its own citizenry, a State may emplace armed and controllable mines in its own internal waters at any time with or without notification. A State may mine its own archipelagic waters and territorial sea during peacetime when deemed necessary for national security purposes. If armed mines are emplaced in archipelagic waters or the territorial sea, appropriate international notification of the existence and location of such mines is required. Because the right of innocent passage may be suspended only temporarily, armed mines must be removed or rendered harmless as soon as the security threat that prompted their emplacement has terminated. Armed mines may not be emplaced in international straits or archipelagic sea lanes during peacetime. Emplacement of controllable mines in a nation's own archipelagic waters or territorial sea is not subject to such notification or removal requirements.

Naval mines may not be emplaced in the internal waters, territorial seas, or archipelagic waters of another nation in peacetime without that nation's consent. Controllable mines may be emplaced in international waters (i.e., beyond the territorial sea) if they do not unreasonably interfere with other lawful uses of the oceans. The determination of what constitutes an unreasonable interference involves a balancing of a number of factors, including the rationale for their emplacement (i.e., self-defense requirements of the emplacing nation), the extent of the area to be mined, the hazard (if any) to other lawful ocean uses, and the duration of their emplacement. Because controllable mines do not constitute a hazard to navigation, international notice of their emplacement is not required.

Armed mines may not be emplaced in international waters prior to the outbreak of armed conflict, except under the most demanding requirements of individual or collective self-defense. Should armed mines be emplaced in international waters under such circumstances, prior notification of their location must be provided. A nation emplacing armed mines in international wa-

12. *See* HOWARD S. LEVIE, MINE WARFARE AT SEA (1992).

ters during peacetime must maintain an on-scene presence in the area sufficient to ensure appropriate warning is provided to ships approaching the danger area. All armed mines must be expeditiously removed or rendered harmless when the imminent danger that prompted their emplacement has passed.

Commentary

JP 3-32, Joint Maritime Operations, states:

5. Mine Warfare

a. Maritime [mine warfare (MIW)] is divided into two basic subdivisions: the laying of mines to degrade the enemy's capabilities to wage warfare and the countering of enemy-laid mines to permit friendly maneuver.

b. Maritime MIW is one aspect of a coordinated naval, and most likely, joint campaign. MIW identifies engagement opportunities that should be considered by joint planners to employ friendly mining capability, preclude adversaries from effectively employing maritime mining, and defeat the minefield. Actions taken by other elements of the joint force may have significant impact on the planning and execution of MIW. Mine countermeasures (MCM) operations, for example, are likely to include the use of helicopters and unmanned aircraft, requiring coordination with the JFACC. If conducted in a hostile or uncertain OE, MCM ships and aircraft will require FP, and enemy assets capable of impeding the MCM effort will need to be addressed as part of the joint targeting process. MIW operations must be carefully coordinated with the other component commanders.

c. Maritime mining is used to support the broad tasks to establish and maintain control of essential sea areas. Mines may be employed either offensively or defensively to restrict the movement of surface ships and submarines. They can be used alone to deny free access to ports,

harbors, and rivers, as well as movement through SLOCs. Sea mines can also be used as a force multiplier to augment other military assets and reduce the surface and submarine threat. Mining is generally conducted by US Air Force bomber or USN strike aircraft. Submarines and surface ships can also be configured to emplace mines.

d. MCM include all actions undertaken to prevent enemy mines from altering friendly forces' maritime plans, operations, or maneuver. MCM reduce the threat and effects of enemy-laid sea mines on friendly naval force and seaborne logistic force access to and transit of selected waterways. MCM operations are divided into two broad areas: offensive and defensive MCM.

(1) **Offensive MCM.** The most effective means for countering a mine threat is to prevent the laying of mines, a problem that may require cross-component coordination across the joint force. Offensive MCM destroy enemy mine manufacturing and storage facilities or mine laying platforms before the mines are laid. Although an adjunct of MIW, these operations are not normally conducted by MIW forces. Therefore, staff MCM planners nominate enemy mine layer, mine storage and, ultimately, mine production facilities and assets up through the JFMCC targeting group for inclusion on joint target lists.

(2) **Defensive MCM.** Defensive countermeasures are designed to counter mines once they have been laid. Some measures are undertaken following the termination of conflict solely to eliminate or reduce the threat to shipping posed by residual sea mines. However, most defensive MCM operations are undertaken during conflict to support (enable) other maritime operations. Defensive MCM includes passive and active MCM.

(a) Passive MCM reduce the threat from emplaced mines without physically attacking the mine itself through reduction of ship susceptibility to mine actuation. Three primary passive measures are practiced: localization of the threat, detection and avoidance of the minefield, and risk reduction.

1. Threat localization engenders establishment of a transit-route system, referred to as Q-routes, which all ships will use to minimize exposure in potentially mined waters. Establishing transit routes should be one of the first steps taken by MCM planners, if the routes have not been previously designated, to minimize exposure of shipping and permit concentration of active MCM efforts. Minehunting and minesweeping are time-consuming operations performed by forces (ships and helicopters) that require localized air and maritime superiority in which to operate. The JFC may need to allocate significant maritime and air forces to protect the MCM force and prevent the enemy from re-seeding areas already cleared of mines.

2. Detection and avoidance of minefields can be accomplished by exploiting intelligence information or organic MCM forces. When the location has been established, shipping may be routed around the area.

3. Risk reduction is primarily practiced by individual ships rather than planned and executed by MCM forces. Risk may be reduced by controlling the degree of potential interaction with a mine sensor. Against contact mines, a reduction in draft and posting additional lookouts can reduce the number of

> mines with which the ship's hull might strike. Influence mines can be denied the required activation signals by controlling the ship's emissions. Use of on-board magnetic field reduction equipment or external degaussing, silencing a ship to minimize radiated noise, or using minimum speeds to reduce pressure signature are examples of operational risk reduction. Other types of risk reduction involve the enhancement of ship survivability in the event of mine detonation.
>
> (b) Active MCM are applied when passive measures alone cannot protect traffic. This entails physical interference with the explosive functioning of the mine or actually destroying it. Minehunting and minesweeping are the primary techniques employed in active MCM. Both require detailed intelligence and extensive planning by the mine countermeasures commander (MCMC) to counter the threat effectively.

e. Planning and execution of MIW operations, both MCM and mining, require detailed subject matter expertise. For most operations requiring dedicated MCM assets, Commander, Naval Surface and Mine Warfighting Development Center, one of the three MCM squadron commanders, or one of the forward-based mine division commanding officers, will act as the MCMC. For small-scale operations or those operations employing a single type of MCM asset, the commanding officer or officer in charge from an airborne MCM squadron, explosive ordnance disposal (EOD) mobile unit, or expeditionary MCM company may be assigned as the MCMC. When assigned as the MIWC, the MCMC also plans and executes mining operations. When no MIWC is assigned under the JFMCC, responsibility for planning and executing naval mining operations usually rests with the CWC.

> f. The command organization and relationships involving MIW forces will vary for each operation or exercise. In most cases, MIW operations are conducted under the framework of a TF architecture with the MIWC or MCMC reporting directly to the JFMCC. MIW can also be executed under the supported-supporting concept (e.g., the MCMC, operating as CTF MCM can be assigned as a supporting commander to the amphibious CTF in support of an amphibious assault).[13]

JP 3-15, Barriers, Obstacles, and Mine Warfare for Joint Operations, states:

> **3. Maritime Mining Capabilities**
>
> a. **The Minefield**
>
> (1) **The Minefield Compared with Other Weapons**
>
> (a) In naval warfare, a minefield is an area of water containing mines emplaced with or without a defined pattern. If the field is not declared or the mine emplacement operation goes unobserved, it may not create its desired effect until sometime after the mining agents have departed. Although able to discriminate between target types, mines are unable to determine the nationality of a target. Unless sterilizers or self-destruct features are incorporated, the mine continues to be effective until swept or otherwise neutralized. Note: A mine sterilizer is a countermeasure device designed to make a mine harmless after a preset number of days.

13. JP 3-32, Joint Maritime Operations, IV-14 to IV-16 (Ch. 1, Sept. 20, 2021).

(b) When used, mines have inflicted disproportionate casualties compared with the mine emplacement effort. The collateral effects of mining operations, such as the diversion of shipping, the exposure of ships to other weapon systems, and the cost of MCM efforts, can have a major impact on objectives.

(c) The design of a naval minefield, and the type and number of mines to be used, depends on the field's purpose, expected adversary traffic, geographical location, amount of countermeasures to which it will be subjected, and the mining platforms to be used. Optimum minefield design enables mining forces to achieve their objectives without excessive mining effort. Although neutralizing a single mine can prove easy, an entire minefield is challenging.

(2) **Types of Minefields.** Naval minefields can be characterized by their purpose and where they are laid, as follows:

(a) Offensive minefield: a minefield laid in enemy territorial water or waters under enemy control.

(b) Defensive minefield: a minefield laid in international waters or international straits with the declared intention of controlling shipping in defense of sea communications.

(c) Protective minefield: a minefield laid in friendly territorial waters to protect ports, harbors, anchorages, coasts, and coastal routes.

(3) **Mine Classification.** Naval mines are typically classified in one of three ways:

(a) Final position in the water. Discussed in follow-on paragraphs.

(b) Method of actuation. This includes contact, magnetic, acoustic, seismic, and pressure.

(c) Method of delivery. This includes air, surface, and submarine.

(4) **Final Position in the Water.** When classified according to the position they assume in the water after placement, mines fall into three primary categories:

(a) Bottom mines.

(b) Moored mines.

(c) Moving mines.

(5) **Bottom Mines**

(a) Bottom mines are non-buoyant weapons. When planted, the mine case is in contact with the seabed and is held in place by its own weight. In areas with a soft bottom they may be completely or partially embedded. Such mines are referred to as buried mines. A mine that is resting on the bottom (unburied or partially buried) may also be referred to as a proud mine.

(b) There are two special categories of bottom mines that react differently from other bottom mines when they are initially emplaced, but they become similar once they have reached their final plant position:

1. A moving bottom mine is a collective description for those designed to move along

the bottom after being planted, but before becoming armed.

2. A self-propelled mine is fitted with propulsion equipment, such as a torpedo, that is used to propel it to an intended final position. For example, a submarine could fire a self-propelled mine from a standoff point that is outside of the intended minefield location, and the mine would then propel itself to the desired location.

(6) **Moored Mines**

(a) Moored mines have a buoyant case set at a certain depth beneath the surface. The mine is held in place above the seabed by means of a cable or chain that is attached to an anchor. The mines are frequently fitted with a self-destruct device that will cause them to flood and sink if separated from the anchor. Mines that separate from their anchors and rise to the surface are known as floaters. These may continue to float until they are struck and detonated, or they may deteriorate from their exposure to the seawater. Using moored mines can avoid problems that bottom mines may encounter in deep water. The length and weight of the mooring cable and the mine case crush-depth will limit the maximum water depth in which they may be emplaced.

(b) A major disadvantage of moored mines is that the mooring cable can be cut with mechanical sweep apparatus. When this occurs, the case floats to the surface and must be avoided or destroyed. Another disadvantage is that they can be affected by current and tidal variations that cause the case to dip below its intended depth and

change the angle for intended operation, thereby reducing its effectiveness against a surface target.

(c) There are two special types of moored mines that contain propulsion systems that enable them to quickly reach the intended target:

1. Homing or guided mines are self-propelled moored mines that use guidance equipment to home onto a target once the target has been detected.

2. A rising mine is a self-propelled or buoyant moored mine that releases from its mooring and rises to detonate on contact with (or proximity to) a target. It does not incorporate a homing device to guide it to the target, but contains logic circuitry that enables it to calculate an estimated target location.

(7) **Moving Mines.** Moving mines are classified as either drifting or oscillating mines.

(a) **Drifting Mines**

1. This is a mine that is buoyant or neutrally buoyant, but does not have an anchor or any other device to maintain it in a fixed position. It is free to move under the influence of wind, tide, or current. It may float at the water's surface or may be kept at a set depth beneath the surface by a depth-controlling hydrostatic device. It may be attached to a small piece of flotsam or other innocent-looking object, or even to another drifting mine. Two or more may be tethered together to increase the probability of striking a ship.

2. Drifting sea mines which do not self-destruct or self-deactivate within one hour are banned from international waters by the Hague Convention VIII of 1907 relative to the Laying of Automatic Submarine Contact Mines. A drifting mine is classified differently from a moored mine that has become a floater, as a floater was designed to be anchored, while a drifter was designed to float freely with the tides and currents. It is also forbidden to lay anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings.

3. The principal advantage of drifting mines is that their use is independent of bottom depth. The major drawback is that they scatter and may imperil friendly shipping. Consequently, drifters are usually fitted with devices designed to sink them after a short life span. As such, the most useful application has been in tactical situations in which they are placed in the path of an adversary to cause a delay or diversion.

(b) **Oscillating Mines**

1. This is a drifting mine that regulates its depth by means of a hydrostatic control mechanism.

2. The hydrostatic control mechanism causes it to oscillate at or near a preset water depth, which permits the mining of waters that are too deep for bottom or moored mines.

b. **US and Allied Mine Emplacement Assets**

(1) Mines reach their maximum effectiveness only when they are accurately positioned in time to be armed and ready for the transit of the first target ship. This requirement places the burden on operational forces to employ delivery vehicles with acceptable capabilities. As previously stated, mines may be delivered by aircraft, submarine, or surface craft. Selection depends on the various environmental and operational factors associated with each situation. The factors to be considered include:

(a) Type of minefield (defensive, offensive, or protective).

(b) Number and type of mines to be delivered.

(c) Number of sorties required.

(d) Defensive capabilities in area, attrition rate expected for delivery vehicles, and the need for standoff delivery systems.

(e) Environmental characteristics, such as water depth and bottom composition.

(f) Required accuracy in delivery.

(g) Logistics for coordinating stockpiled mines and delivery systems.

(2) **US Mine Inventory.** The US mine inventory consists of a variety of air- and submarine-delivered, influence-actuated mines. Sizes vary and include 500 to 2,000 pounds. The US mining program is designed to support offensive, defensive, and protective mining operations. Detailed discussion of these systems can be found in NTTP 3-15.1, *Maritime Mining*.

(3) **Air Delivery.** Aircraft are the most suitable delivery vehicles for most offensive mining operations. In general, any aircraft capable of carrying bombs can carry a similar load of sea mines of the same weight class. There are some constraints and limitations imposed by matching suspension lugs on some mines to certain bomb racks, the shape and dimensional changes of some mines brought about by the addition of flight gear or fins, and the high drag and buffeting characteristics of mines carried on external stations. Several incompatibilities can be corrected with existing adapters and modification kits, but the performance limitations imposed on high-speed aircraft are also factors. Range, weather conditions, auxiliary equipment, and armament must be considered, as each can affect the maximum permissible load aboard the aircraft. The tactical manual of the individual aircraft is the final authority on mine carriage.

(a) **Advantages of Air Delivery.** There are a number of advantages associated with aerial delivery:

1. Aircraft can penetrate areas inaccessible to ships and submarines and can replenish existing fields without danger from previously emplaced sea mines.

2. Aircraft have a faster reaction time than surface ships or submarines.

3. Aircraft are generally more readily available and can typically complete their mining mission quickly.

4. Aircraft can carry a wide variety of naval mines.

(b) **Disadvantages of Air Delivery.** There are a number of disadvantages associated with air delivery, but for offensive scenarios, many of these can be overcome through proper planning.

1. The payload-per-sortie is relatively small except for large, bomber aircraft. However, this disadvantage can be overcome by the ability to rapidly execute multiple sorties.

2. Mine emplacement accuracy of aircraft is lower than for a surface ship but is adequate for offensive mining.

3. Many aircraft types can be restricted by weather conditions.

4. The range of aircraft without aerial refueling support is more restricted than that of surface ships or submarines.

5. In general, aircraft deploy mines in a less clandestine manner than submarines (but more so than surface ships).

6. Aircraft are vulnerable to enemy defenses, especially if the area to be mined is within the envelope of an enemy integrated air defense system.

(c) **Helicopter Delivery.** It is possible to deliver sea mines by helicopter, but such use is inefficient due to limited range and carrying capacity.

(4) **Submarine Delivery.** Submarines are most effective in areas that are too well protected for surface or aircraft delivery. Normally, they will be used in offensive fields, but may be used to emplace defensive

fields as well. This can take place day or night, surfaced or submerged. The availability of the Submarine-Launched Mobile Mine enhances the submarine capability.

(a) **Advantages of Submarine Delivery.** The advantages of submarine-delivered mines are:

1. The clandestine nature of submarine delivery.

2. Mission radius.

3. Unrestricted by weather conditions.

(b) **Disadvantages of Submarine Delivery.** The disadvantages of submarine-delivered mines are:

1. Limited payloads and weapons mix.

2. Slow reaction time (i.e., if not loaded with mines for a contingency, submarine must return to a port for loading of naval mines).

3. Slow transit speed when compared with aircraft delivery.

4. Submarine availability with respect to competing mission requirements.

5. Delay incurred in reconfiguring mines to fit a torpedo tube.

6. Cannot replenish existing fields without danger from previously laid sea mines.

(5) **Surface Delivery.** This is the preferred method for protective and defensive minefields where transit

distances are limited and the area to be mined is benign. Any surface ship can be configured to emplace sea mines by hoisting or rolling them over the side or by using temporarily installed mine rails or tracks. There are no active US mine emplacing surface ships in service today. However, should an operational requirement develop, it is possible to configure ships to emplace mines. Suitable conversion of cargo ships is also an option. Some allies do have a surface mine emplacement capability.

(a) **Advantages of Surface Delivery**

1. Able to carry a larger payload than aircraft or submarine mine emplacers.

2. Surface assets have the ability to position mines more accurately than the other delivery assets.

(b) **Disadvantages of Surface Delivery**

1. Surface ships have a slow reaction time and are not suitable when time is critical.

2. Surface mine emplacement is not clandestine.

3. They are vulnerable to attack, so they are not effective offensively.

4. Surface ships are unable to replenish existing minefields.

Additional information on naval MIW capabilities can be found in the NWP 3-15, Naval Mine Warfare, series of publications or by contacting Commander, SMWDC.

4. Naval Mine Warfare and Mine Countermeasures Organization and Capabilities

a. **Naval MIW Force Organization.** The Commander, USFF, and COMUSPACFLT are the administrative and operational commanders for the naval MIW forces. When other fleet commanders require naval MIW support, forces are provided through the numbered fleet commanders, with SMWDC coordination. Commander, USFF, and COMUSPACFLT normally exercise operational control over Navy Munitions Command (NMC) units—deployable mine assembly teams which are administratively consolidated with larger NMC detachments. These NMC units are directed by Commander, Mobile Mine Assembly Group, in response to mine-build orders generated by the SMWDC MIW staff or the designated MIWC. The respective type commanders are responsible for naval MIW force readiness, and SMWDC, as the USN principal naval MIW command, is responsible for the integrated training, tactics, and interoperability of the naval MIW forces. These forces are required to be prepared to deploy on short notice to meet the CCDR's operational requirements. SMWDC maintains a deployable, scalable naval MIW staff to support fleet or combatant command staffs and provides technical advice to the North Atlantic Treaty Organization and allied countries. Additionally, the USN maintains deployable tactical MCMRONs that report to SMWDC or other designated commander. These MCMRONs are operational staffs that exist to exercise tactical C2 of specified MCM forces (air, surface, and underwater).

b. **Command Relationships and Mission-Related Terminology.** The following command relationships are defined by joint doctrine, but are presented here for clarification as they relate to naval MIW-MCM (mining forces are considered strike warfare assets and are not discussed here). Assigned MCM units are placed within a command organization on a relatively permanent basis.

An Avenger Class ship that deploys as part of an MCM task unit (TU) is an example of assigned MCM units.

(1) **Attached.** MCM units are temporarily placed within a command organization for short duration and specific operation. An Avenger Class ship operating within a strike group to protect maneuver space is an example of an attached MCM unit.

(2) **Supporting.** MCM units that operate in general, mutual, direct, or close augmentation of a supported force, but remain assigned or attached to the supporting force commander.

c. **MCM Force Response Categories.** MCM forces fall into three categories based on response capability:

(1) **Immediate Response Force.** Immediate response forces are MCM forces in theater and in close proximity available for countering imminent threats and protecting maneuver space. Immediate response forces are structured to provide MCM coverage rates that permit freedom of maneuver with minimal delay.

(2) **Rapid Response Force.** Rapid response forces are MCM contingency forces that can quickly arrive in theater. They consist of continental United States (CONUS)-based, rapidly deployable forces and in-theater, forward-deployed naval forces, available to commence operations within 96 hours. The rapid response forces can augment immediate response forces for direct support to a strike group operation or provide theater mission support in advance of approaching forces.

(3) **Follow-On Force.** Follow-on forces are MCM forces that are time-phased to arrive in theater after

combat operations commence. Follow-on forces execute large-scale MCM operations to expand the operational area initially cleared by rapid response forces and conduct post-hostility mine clearance. These forces include CONUS-based AMCM and EOD forces not employed in the rapid response force and CONUS-based SMCM ships, which can self-deploy or be heavy-lifted into theater.

d. **US MCM Assets.** This section describes resources of the current USN MCM triad of forces, consisting of AMCM, SMCM, and UMCM systems and platforms. In most MCM operations, the US approach is to employ the triad working in concert. Each functional component of the triad offers complementary capabilities in MCM. The following paragraphs briefly describe US systems and platforms in service.

(1) **AMCM.** This section describes the general capabilities of AMCM helicopters and their systems. Additional information on AMCM functions and capabilities are contained in NTTP 3-15.22, *Airborne Mine Countermeasures Operations*. The AMCM force consists of two squadrons of MH-53E helicopters, HM-14 and HM-15, and the AMCM Weapon Systems Training School. The operational squadrons are organized and trained for rapid deployment and can be largely self-sustaining when operating in detachments from a large deck amphibious warfare ship or a shore site. Principal capabilities of the aircraft include sonar minehunting/bottom mapping, with laser bottom mine identification; mechanical minesweeping; influence minesweeping; precision navigation; and environmental reconnaissance. Typically, AMCM helicopters can carry and employ one MCM system at a time. The decision on which system to employ must be made well before the mission in order to configure the aircraft before flight.

(a) **MH-53E Helicopter.** The AMCM helicopter is the MH-53E Sea Dragon, a three-engine heavy-lift helicopter. Discussion of maximum and operational lift limitations can be found in Naval Air Training and Operating Procedures Standardization Flight Manual A1-H53ME-NFM-000, *Navy Model MH-53E Helicopters*. The aircraft can fly for approximately four hours, assuming that environmental conditions do not restrict full-capacity fueling. More specific discussion of endurance and other limitations can also be found in Naval Air Training and Operating Procedures Standardization flight manuals.

(b) **AMCM Systems.** The major equipment used by the current AMCM systems includes mechanical and influence (acoustic, magnetic, and combination) minesweeping equipment and minehunting sonar. The systems are modular to permit installation and removal.

(2) **SMCM.** The surface element of the MCM triad is the Avenger Class, which has the capability to hunt and sweep moored and bottom mines. Avenger Class vessels have minehunting and neutralization capabilities, and can conduct mechanical, influence, and combination minesweeping. Their hulls are constructed of wood with a laminated glass reinforced plastic outer shell to reduce magnetic signature. Propulsion is primarily diesel engines driving twin shafts, with backup electric light load propulsion motors powered by a marine minesweeping gas turbine generator for reduced acoustic signature. The gas turbine generator can also power a bow thruster, for station-keeping and low-speed maneuvering, or the magnetic influence sweeping equipment. These vessels participate in coordinated operations with amphibious and other supported forces, conduct independent operations, and participate in integrated MCM operations.

While these vessels can operate for extended periods of time, their transit speed is slow, and therefore they are unable to deploy rapidly in support of contingency operations. They are often deployed by heavy-lift shipping, and availability of such assets must be considered. Some Avenger Class ships are permanently forward deployed to alleviate this circumstance. MCM equipment used aboard the Avenger Class includes mechanical and influence (acoustic, magnetic, and combination) minesweeping gear, a hull-mounted variable depth high-frequency sonar, and a tethered pilotable minehunting unmanned underwater vessel (UUV) capable of identifying and neutralizing naval mines. Additional information on SMCM functions and capabilities is contained in NTTP 3-15.21, *Surface Mine Countermeasures (SMCM) Operations*. Principal SMCM operational capabilities are:

(a) Minehunting sonar.

(b) Remotely operated vehicle mine neutralization.

(c) Mechanical moored minesweeping.

(d) Influence minesweeping.

(e) Combination sweeping (mechanical-acoustic and magnetic-acoustic).

(f) Support of EOD operations to neutralize, destroy, and exploit mines.

(g) Magnetic silencing.

(h) Precision navigation.

(i) Environmental measuring.

(j) Buoying equipment.

(k) Nonferrous design throughout to reduce magnetic signature.

(l) Propulsion designed to reduce acoustic signature.

(3) **UMCM.** This section describes the general capabilities of UMCM assets and their systems. Additional information on UMCM functions and capabilities is contained in NTTP 3-15.23, *Underwater Mine Countermeasures (UMCM).*

(a) **EOD MCM PLTs.** EOD MCM PLTs operate in conjunction with SMCM and AMCM units to reacquire, identify, neutralize, recover, and dispose of sea mines in the SW and VSW regions. They may deploy as part of an amphibious force and are vital in supporting amphibious operations. EOD MCM PLTs are designed to be deployable on short notice and can sustain operations without major resupply for approximately 30 days. They have diving and hand-held sonar equipment employable to a working depth of 200 feet and a maximum depth of 300 feet, but generally do not operate in the VSW region up to the SZ; that mission is assigned to the VSW TU as discussed in paragraph 4d(3)(c), "VSW TU." The primary mission of these detachments is to provide the MCMC with the capability to relocate, neutralize, counter, and exploit mines. Additionally, they can neutralize and countermine drifting and floating mines and are capable of prosecuting minelike contacts (MILCOs). They use specialized underwater breathing apparatus, recompression equipment, and technology to extend their working times, but are limited to operating in currents of one knot or less in sea state 3 or

less, and their operating times may be further reduced by temperature extremes. EOD MCM PLTs are compatible with and complement the other members of the MCM triad, SMCM and AMCM. Specifically:

1. **AMCM and EOD.** EOD assets can be used in conjunction with AMCM to reacquire and prosecute contacts that have been located by helicopter using the Global Positioning System and selected segments of sonar imagery that are analyzed relative to the MILCO, or to dispose of mines released from their moorings by mechanical sweeping.

2. **SMCM and EOD.** EOD forces should be embarked aboard SMCM ships whenever minehunting is ongoing. This enables the prosecution of contacts using divers only or divers and unmanned neutralization vehicles. They can also deploy from a platform of opportunity, such as an amphibious warfare ship, to allow the SMCM units to continue operations while EOD assets prosecute MILCOs.

3. **Marine Mammal System (MMS) and EOD.** When used in concert with a MMS, EOD forces can identify marked contacts, neutralize previously marked contacts, conduct verification dives, or exploit a previously neutralized contact.

4. **UUVs and EOD.** EOD assets can be used to reacquire, identify, and neutralize UUV contacts using the Global Positioning System and selected segments of sonar imagery.

(b) **EOD Mobile PLTs.** EOD mobile PLTs are trained and equipped to perform the same missions as an MCM PLT, with the exception of mine recovery and field exploitation. Though possessing a smaller capacity for MCM operations, and operationally focused on other EOD missions, these units are referred to as possessing a "limited" MCM capability and are a valuable force multiplier for operational commanders. For example, EOD mobile PLTs embarked in carrier strike groups provide the battle group's primary drifting mine neutralization capability.

(c) **VSW TU.** The VSW TU mission is to execute MCM in the VSW/SW region to the seaward edge of the SZ (normally the 10-foot depth contour). VSW TU assets conduct low-visible exploratory and reconnaissance operations to locate and prepare sea mines and obstacles for neutralization in support of amphibious operations and are also capable of providing the MCMC with an accurate and timely hydrographic reconnaissance report. Such missions are carried out in support of the amphibious task force commander to help prepare the operational area, but the unit's capabilities are also vital to the amphibious task force and LF commanders in executing the landing plan. The unit is capable of detecting, classifying, identifying, and neutralizing mines while assisting in opening assault lanes for landing craft and amphibious vehicles. Stages of VSW TU operations in support of amphibious operations include reconnaissance of possible landing sites, establishing a navigational grid, and swimming predetermined search patterns to detect, locate, classify, and map obstacles and mines. The team may also conduct clearance operations. Specific VSW TU capabilities include:

1. Locating, marking, and mapping mines in the VSW and SW region.

2. Assisting in lane selection.

3. Clearing mines within VSW and SW seaward approaches to amphibious landing beaches.

4. Precise navigation, obstacle location, doctrinal bottom type classification, and bottom mapping.

(d) The VSW TU is comprised of EOD divers, Marine Corps reconnaissance specialists, fleet technicians and divers organized into four operational PLTs: unmanned systems PLT, dive PLT, MMS PLT, and combatant craft PLT.

1. **Unmanned Systems PLT.** The UUV team uses the Mk 18 Mod 1 UUV to search for and map underwater objects in the VSW and SW regions with its onboard side-scan sonar. The Mk 18 Mod 1 can perform reconnaissance via hydrographic and side-scan sonar surveys from the seaward edge of the SZ to the deep-water region. The vehicle is small, capable of deployment by two people, simple to program, and can be launched and recovered from a small vessel or boat without a crane or special handling equipment. Mk 18 Mod 1 can operate for over 20 hours on battery power before recharging and is capable of speeds over 2.5m per second. It is programmed using a laptop computer and can employ sound-emitting transponders as navigational reference beacons, or its onboard computer can autonomously select another more appropriate navigation method

to use. Mk 18 Mod 1 missions are preprogrammed, and the vehicle runs a predetermined track. Acoustic signaling equipment can be used to recall UUVs. UUV operators perform classification of sonar images during post mission analysis. Mk 18 Mod 1 was used successfully during Operation IRAQI FREEDOM as it was sent out to perform wide area surveys. MMS were then used to inspect potential targets located by Mk 18 Mod 1, and EOD PLTs followed up with demolition tasks. The unmanned aerial vehicle team uses the radio-controlled, man-portable *Silver Fox* and *Manta* unmanned aerial vehicles to provide real-time, low-observable intelligence surveillance and reconnaissance as well as adversary and friendly laydown situational awareness via electro-optical and infrared video during all phases of the VSW/SW missions. They can be launched from a forward operating base or various small insertion craft and recovered via in-water landing. The aircraft are capable of fully autonomous flight and are able to carry various payloads to enhance mission effectiveness and adaptability.

2. **VSW Dive PLTs.** The dive PLT is comprised of three elements, each with 14 combat divers and an officer in charge. Divers operate in pairs with a *Viper* underwater breathing apparatus and an integrated navigation sonar system. Diver missions may last as long as three hours, and divers are capable of conducting exploratory, reconnaissance, and clearance operations. Although divers are a slow asset for clandestine reconnaissance and exploration, they provide the best mine identification and verification available

and are well-suited for reacquisition, identification, and clearance. As with all divers, environmental limitations associated with extreme cold or hot water should be taken into account during planning.

3. **MMS PLTs.** Dolphins possess natural sonar ability, and, with proper training and care, can readily discriminate between MILCOs and non-MILCOs and can be reliably used to detect, mark, or neutralize mines or MILCOs. All three MMSs can carry out day or night operations and can be airlifted to a forward operating base or deployed on a naval vessel with a well-deck capability. In support of amphibious operations the dolphins can hunt mines from over the horizon into the operational area to clear boat lanes, and locate and mark mines for neutralization. The three MMSs assigned for use by the VSW TU are dolphins that are identified by system numbers.

a. Mk 4. Dolphins trained to detect, mark, and/or neutralize moored mines. An animal handler on the surface controls the dolphin from a small boat.

b. Mk 7. Dolphins trained to detect, mark, and/or neutralize bottom mines. The Mk 7 Mod 0 version MMS detects bottom mines proud of the bottom, and the Mk 7 Mod 1 version MMS detects bottom mines both proud of the bottom and buried. An animal handler on the surface controls the dolphin from a small boat.

> c. Mk 8. Dolphins trained to detect and mark bottom mines. The animal handler on the surface operates out of a low-visible craft that offers a greater degree of concealment than other small boats.
>
> 4. **Combatant Craft PLT.** The combatant craft PLT employs the 11-meter Zodiac to insert and extract VSW TU PLTs. A typical deployment will include four 11-meter rigid hull inflatable boats, trailers, and two maintenance integrated services units.[14]

NDP 1, Naval Warfare, states:

> **Undersea Warfare.** Undersea warfare encompasses actions to establish and maintain control of the undersea portion of the maritime domain using submarines, mines and other undersea systems. Undersea warfare includes the subsets of antisubmarine warfare; mine warfare, both offensive and defensive; subsea and seabed warfare, and counter-subsea and counter-seabed warfare. Subsea warfare and seabed warfare include the delivery of effects with or from systems located in the water column or on/in the seabed, including systems other than submarines or mines—such as unmanned vehicles, remotely operated vehicles, submersibles and seabed systems. Evolving technology has expanded our capabilities in this realm, but undersea warfare remains the most intricate and complex tactical problem.[15]

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14. JP 3-15, Barriers, Obstacles, and Mine Warfare for Joint Operations, at B-13 to B-25 (Mar. 5, 2018).

15. NDP 1, Naval Warfare, at 35 (Apr. 2020). *See also* Wolff Heintschel von Heinegg, *Minelaying and the Impediment of Passage Rights*, 90 INTERNATIONAL LAW STUDIES 544 (2014); Haines, *supra* note 11; Letts, *supra* note 11; Wolff Heintschel von Heinegg, *The Current State of the Law of Naval Warfare: A Fresh Look at the San Remo Manual*, 82 INTERNATIONAL LAW STUDIES 269 (2006); Thomas A. Clingan, Jr., *Submarine Mines in International Law*, 64 INTERNATIONAL LAW STUDIES 351 (1991); LEVIE, *supra* note 12; Pedrozo, *supra* note 11, at 32–39.

9.2.3 Mining during Armed Conflict

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

1. International notification of the location of emplaced mines must be made as soon as military exigencies permit.

2. Mines may not be emplaced by belligerents in neutral waters.

3. Anchored mines must become harmless as soon as they have broken their moorings.

4. Unanchored mines not otherwise affixed or imbedded in the bottom (seabed) must become harmless within 1 hour after loss of control over them.

5. The location of minefields must be carefully recorded to ensure accurate notification and facilitate subsequent removal and/or deactivation.

6. Naval mines may be employed to channelize neutral shipping, but not in a manner to deny transit passage of international straits or archipelagic sea lanes passage of archipelagic waters by such shipping.

7. Naval mines may not be emplaced off the coasts and ports of the enemy with the sole objective of intercepting commercial shipping. They may otherwise be employed in the strategic blockade of enemy ports, coasts, and waterways.

8. It is prohibited to mine areas of indefinite extent in international waters. Reasonably limited barred areas may be established by naval mines provided neutral shipping retains an alternate route around or through such an area with reasonable assurance of safety.

Commentary

The rules on naval mines are addressed in the DoD Law of War Manual, § 13.11.

To be a lawful means of naval warfare, naval mines must be able to adhere to the law of armed conflict. The rules applicable to the use of automatic contact mines are contained in Hague VIII. Nevertheless, for example, even though neither Russia nor Ukraine is a party to Hague VIII, they are bound by these rules because they reflect customary international law[16] and are designed to regulate the employment of mines in order to mitigate the severity of war and ensure the security of peaceful neutral navigation. Article 1 prohibits the laying of (1) unanchored automatic contact mines unless they "become harmless one hour . . . after the person who laid them ceases to control them;" and (2) anchored automatic contact mines that "do not become harmless as soon as they have broken loose from their moorings."

Belligerents are also prohibited from laying "automatic contact mines off the coast and ports of the enemy, with the sole object of intercepting commercial shipping."[17] Nonetheless, mining for some other purpose—strategic blockade of enemy ports, coasts, and waterways—is permissible even if commercial shipping is incidentally affected.[18] For example, in May 1972, the United States lawfully mined all entrances to North Vietnamese ports to prevent access to, and North Vietnamese naval operations from, those ports. The purpose was to prevent the use of the ports to all shipping—both commercial and military. The United States provided proper notification to all concerned parties, as well as the United Nations, and neutral shipping was given three days to leave North Vietnamese ports before the mines became active.

The general rule that belligerents must take feasible precautions for the protection of civilians applies when using naval mines.[19] When employing automatic contact mines, Article 3 of Hague VIII requires that belligerents must take "every possible precaution" for the safety of peaceful (neutral) shipping. In this regard, "belligerents undertake to do their utmost to render these mines harmless within a limited time, and, should they cease to be under surveillance, to notify the

16. *See* NWP 1-14M, § 7.2.2.1.
17. Hague VIII, art. 2.
18. DOD LAW OF WAR MANUAL, § 3.6.
19. *See* NWP 1-14M, § 7.2.2.1; DOD LAW OF WAR MANUAL, § 13.11.3.1.

danger zones as soon as military exigencies permit, by a notice addressed to ship owners" and to governments through diplomatic channels.[20] Ship owners are normally notified of danger zones by a notice to mariners (NOTMAR) or other navigational warning issued pursuant to the IMO/IHO World-Wide Navigational Warning Service (WWNWS).

Feasible precautions may include surveillance and monitoring of minefields by the belligerents to reduce the risk of harm to peaceful neutral shipping.[21] If a peaceful neutral vessel inadvertently sails near the minefield, a belligerent may issue an appropriate warning to the vessel to stand clear of the area. Similarly, belligerents must accurately record the location of minefields to facilitate proper notification and subsequent removal or deactivation of the mines at the conclusion of the conflict.[22]

Neutral states may also lay automatic contact mines during an international armed conflict. If they do so, neutrals must comply with the same rules and take the same precautions applicable to the belligerents.[23] Ship owners must be notified in advance of the location of the mines by either a NOTMAR or NAVAREA warning.[24] Neutrals must also notify governments through diplomatic channels.[25]

At the conclusion of the conflict, States that have laid mines are required "to do their utmost to remove the mines which they have laid, each Power removing its own mines."[26] If a belligerent has laid anchored automatic contact mines off the coast of the other belligerent, the position of these mines must be notified to the other belligerent and each state must proceed without delay "to remove the mines in its own waters."[27] Since 1997, a multinational naval mine clearance and ordnance disposal operation has been conducted in the Baltic

20. Hague VIII, art. 3; DOD LAW OF WAR MANUAL, § 13.11.3.2.
21. DOD LAW OF WAR MANUAL, § 13.11.3.3.
22. *Id.* § 13.11.3.3.
23. Hague VIII, art. 4.
24. *Id.*
25. *Id.*
26. *Id.* art. 5.
27. *Id.*

Sea to clear and destroy naval mines and other explosive remnants from the First and Second World Wars, as well as the Cold War. Of the more than 160,000 naval mines laid in the Baltic Sea during these wars, only 20 percent have been removed or destroyed.

Removal or deactivation of mines can also be the subject of a bilateral agreement between states. For example, Article 1 of the Protocol to the Agreement on Ending the War and Restoring Peace in Vietnam Concerning the Removal, Permanent Deactivation, or Destruction of Mines in the Territorial Waters, Ports, Harbors, and Waterways of the Democratic Republic of Vietnam requires the United States to "clear all mines it has placed in the territorial waters, ports, harbors, and waterways of the Democratic Republic of Vietnam." Article 1 further requires that the "mine-clearing operation . . . be accomplished by rendering the mines harmless through removal, permanent deactivation or destruction."

The emplacement of mines by belligerents may also be regulated by the law of neutrality and the law of the sea. In this case, both Russia and Ukraine are parties to Hague XIII and UNCLOS, thereby expressly agreeing to be bound by the provisions in the agreements. The law of naval warfare imposes duties and confers rights on neutral and belligerent states. The principal right of a neutral State is the inviolability of its territory. This inviolability extends to neutral waters, which include internal waters, the territorial sea, and archipelagic waters of the neutral state.[28] Belligerents have a corresponding duty to respect the inviolability of neutral States, which are those States that are not taking part in the armed conflict.[29] Thus, during an international armed conflict, belligerents have a duty to respect the sovereignty of neutral States.[30] Belligerents must also abstain from any act that constitutes a violation of neutrality, such as an act of hostility committed by a belligerent warship in neutral waters.[31] The belligerents may therefore not emplace mines in neutral waters.[32]

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28. DOD LAW OF WAR MANUAL, §§ 15.7, 15.7.1.
29. *See* NWP 1-14M, § 7.2; DOD LAW OF WAR MANUAL, § 15.3.1.
30. Hague XIII, art. 1.
31. Hague XIII, arts. 1, 2.
32. DOD LAW OF WAR MANUAL, § 13.11.3.5.

The contiguous zone and the EEZ do not constitute neutral waters under the law of naval warfare.[33] Rather, these areas are subject to high seas freedoms and belligerents may conduct attacks from and within them. While coastal States enjoy limited law enforcement jurisdiction in the contiguous zone[34] and sovereign rights over resources in the EEZ,[35] UNCLOS does not affect the rights of belligerents under the law of naval warfare. Accordingly, belligerents may lawfully employ mines (that can comply with Hague VII rules) beyond the territorial sea of a neutral State.[36]

Belligerents retain the right of transit passage through international straits overlapped by neutral waters[37] and archipelagic sea lanes passage through neutral archipelagic waters.[38] However, when transiting through the strait or an archipelagic sea lane, belligerent warships and military aircraft must refrain from the threat or use of force against the neutral State, as well as acts of hostility (such as laying mines) and other activities not incident to their transit.[39]

Additionally, while belligerents may employ mines to channelize neutral shipping, they may not do so in a manner that denies these ships the right of transit passage or archipelagic sea lanes passage.[40] Thus, closing off a strait or archipelagic sea lane may be lawful if an alternative convenient route is available for use by neutral shipping.

Naval mines may also be employed to establish limited barred areas in the EEZ or on the high seas, provided there is an alternative route around or through the minefield available for use by neutral shipping with reasonable assurance of safety. Mining of areas of indefinite extent, however, is prohibited.[41]

The Newport Manual states:

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33. *See* NWP 1-14M, §§ 7.3, 7.3.8; DOD LAW OF WAR MANUAL, § 15.7.1.
34. UNCLOS, art. 33.
35. *Id.* art. 56.
36. *See* NWP 1-14M, § 7.3; DOD LAW OF WAR MANUAL, § 13.11.3.5.
37. UNCLOS, art. 38.
38. *Id.* art. 53.
39. *See* NWP 1-14M, §§ 7.3.6, 7.3.7; DOD LAW OF WAR MANUAL, §§ 15.8.1, 15.8.2.
40. DOD LAW OF WAR MANUAL, § 13.11.3.5.
41. *Id.*

Naval or sea mines are a permissible means of war if lawfully employed. These weapons are used for area denial, coastal and harbor defense, anti-surface and anti-submarine warfare, and blockade. To be a lawful means of naval warfare, naval mines must be capable of use in accordance with the LOAC, including the principle of distinction (see Sections 7.2.3 and 8.1.2).

There are numerous types of naval mines employed or in development, including moored, tethered, seabed, and controlled mines, with each typically containing an explosive charge. Historically, mines were either tethered to the seabed or suspended in the water column. These weapons may be categorized as follows: contact or influence, by location (moored, bottom, and floating), and by mobility (self-propelled and fixed). Contact mines detonate on contact with a target. Influence mines may be detonated through pressure, acoustics (broad and narrow band), magnetic signatures, electrical fields, ship count (remaining inactive until a certain number of contacts have passed or until a particular target signature is detected), or seismic activity. In each case, ships or submarines passing in proximity to the mine activate the weapon, which creates explosive force, and, at depth, pressure waves that can disable or sink the target. Modern mines integrate advanced sensors and technologies, including networked systems and autonomous features, and may be lawfully employed if they can be directed at a military objective.

Ships of all States enjoy freedom of the seas and the rules governing employment of sea mines are designed to "mitigate the severity of war." The rules governing automatic submarine contact mines that are contained in Hague VIII, which reflect customary international law, stipulate that it is forbidden to:

— "[L]ay unanchored automatic contact mines, except when they are so constructed as to become harmless one hour at most after the person who laid them ceases to control them"; and

— "[L]ay anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings."

The Seabed Arms Control Treaty prohibits emplacement of nuclear mines and other nuclear weapons or any other types of weapons of mass destruction on the seabed beyond territorial seas.[42]

9.3 LANDMINES

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

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

On 31 January 2020, the DOD issued a new policy on landmines, replacing the landmine policy issued on 23 September 2014. The DOD policy requires

42. NEWPORT MANUAL, ¶ 6.5 (2023) (footnotes omitted).

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

The DOD maintains or establishes the following restrictions regarding landmines:

1. The DOD will not employ persistent landmines (i.e., landmines that do not incorporate self-destruction mechanisms and self-deactivation features). The DOD will only employ, develop, produce, or otherwise acquire landmines that are nonpersistent (they must possess self-destruction mechanisms and self-deactivating features).

2. The DOD will adhere to certain restrictions that are more protective of civilians and noncombatants than the Amended Mines Protocol II—such as self-destruct timelines no longer than 30 days, but in some cases as short as 2 hours or 48 hours—for all activated landmines, whether remotely delivered or not.

3. The policy removes express geographical limits on employment of nonpersistent landmines. Appropriate geographical limitations will be formulated based on specific operational contexts and will be reflected in relevant ROE, consistent with existing DOD policy and practice.
4. The DOD may pursue on/off area denial systems that can be remotely activated when an imminent threat emerges and deactivated once the threat subsides. The DOD should explore acquiring landmines and landmine alternatives that could further reduce the risk of unintended harm to civilians and noncombatants.

5. Combatant commanders are the approval authority to employ nonpersistent landmines.

6. Military departments and CCMDs will maintain a robust surveillance program to ensure the operational quality and reliability of landmines, particularly the reliability of the self-destruct mechanisms and self-deactivating features.

7. The DOD will not seek to transfer landmines, except as provided for under U.S. law.

8. Military departments will continue to demilitarize any persistent landmines in existing inactive stockpiles. Notwithstanding this policy, the DOD may acquire, retain, and transfer a limited number of persistent landmines for the purposes of training personnel engaged in demining and countermining operations and improving countermine operations. The stocks of such persistent landmines will not exceed the minimum number absolutely necessary for such purposes.

The 1997 Ottawa Convention imposes a ban on the use, stockpiling, production, and transfer of APLs. This prohibition does not apply to command detonated weapons (such as claymores in a nontripwire mode) or to AVLs (referred to as mines other than antipersonnel mines). The United States is not a party to the Ottawa Convention. Many of its allies and coalition partners are, and this may, depending on the circumstances at the time, impact operational planning regarding shipment, resupply, and placement of landmines.

Commentary

The DoD Law of War Manual states:

> 6.12 Landmines, Booby-Traps, and Other Devices
>
> As a class of weapons, landmines, booby-traps, and other devices are not specifically prohibited under the law of war. However, certain landmines, booby-traps, and other devices are prohibited. In addition, the use of landmines, booby-traps, and other devices is subject to certain restrictions that the United States has accepted in the CCW Amended Mines Protocol.

6.12.1 Definition of Mine. The CCW Amended Mines Protocol defines a "mine" as "a munition placed under, on, or near the ground or other surface area and designed to be exploded by the presence, proximity or contact of a person or vehicle." The term "mine" thus includes both anti-personnel and anti-vehicle mines, including anti-tank mines.

The mines to which the CCW Amended Mines Protocol relate are those used on land, including those laid to interdict beaches, waterway crossings, or river crossings, but do not include the use of anti-ship mines at sea or in inland waterways. The rules on naval mines are addressed in § 13.11 (Naval Mines).

The term "mine" does not include hand grenades. A trip-wired hand grenade is not considered a mine but is considered a booby-trap under the CCW Amended Mines Protocol.

. . . .

6.12.1.2 *Designed to Be Exploded by the Presence, Proximity, or Contact of a Person or Vehicle*. An important characteristic of a mine is its designed function of being exploded by the presence, proximity, or contact of a person or vehicle. Command-detonated munitions (*i.e.*, munitions whose explosion is triggered by a decision of an operator) are not "mines" under the CCW Amended Mines Protocol but may be regulated under the CCW Amended Mines Protocol as "other devices."

Some munitions, such as the Claymore, may be configured for detonation by command, or by trip-wire. When used in trip-wire mode, they are mines and subject to corresponding restrictions. When used in command-detonated mode, they are subject to the restrictions applicable to "other devices."

The design function of being activated by the target also distinguishes a mine from unexploded ordnance that results

from the malfunction of a munition. Other rules address unexploded ordnance.

6.12.1.3 *Anti-Personnel Mines*. Under the CCW Amended Mines Protocol, an "anti-personnel mine" is a mine primarily designed to be exploded by the presence, proximity, or contact of a person and that will incapacitate, injure, or kill one or more persons.

"Primarily" was added to ensure that anti-vehicle mines equipped with anti-handling devices (which often cause the mine to detonate by contact of a person) are not treated as anti-personnel mines under the CCW Amended Mines Protocol.

Another element in the definition of "anti-personnel mine" is its effect of incapacitating, injuring, or killing one or more persons. This description was understood to be broad enough to cover the range of hazards posed by anti-personnel mines, but the term "incapacitating" means permanent incapacity. Thus, the definition of "mine" for the purposes of the CCW Amended Mines Protocol does not include nonlethal weapon technology that is designed temporarily to disable, stun, or signal the presence of a person, but not to cause permanent incapacity.

6.12.1.4 *Mines Other Than Anti-Personnel Mines*. The CCW Amended Mines Protocol uses the term "mines other than anti-personnel mines" to refer to anti-vehicle mines. "Anti-vehicle mines" or "mines other than anti-personnel mines" are also sometimes referred to as anti-tank mines.

The CCW Amended Mines Protocol defines "mine" in terms of a munition that is designed to be exploded by a person or vehicle. Thus, "mines other than anti-personnel mines" are anti-vehicle mines.

6.12.1.5 *Remotely Delivered Mines*. "Remotely delivered mine" means a mine that is not directly emplaced, but is instead delivered by artillery, missile, rocket, mortar, or similar means, or dropped from an aircraft.

Mines delivered from a land-based system from less than 500 meters, however, are not considered to be remotely delivered, provided that they are used in accordance with Article 5 and other relevant articles of the CCW Amended Mines Protocol. These mines were excluded from the definition of remotely delivered mines because, when delivered in the prescribed manner, they can be accurately marked and precautions to protect civilians can be reliably maintained.

6.12.1.6 *Mines With Compliant Self-Destruction and Self-Deactivation (SD/SDA) Mechanisms*. Certain types of mines may be equipped with self-destruction or self-neutralization mechanisms or be self-deactivating.

"Self-destruction [SD] mechanism" means an incorporated or externally attached automatically functioning mechanism that secures the destruction of the munition into which it is incorporated or to which it is attached.

"Self-neutralization mechanism" means an incorporated automatically functioning mechanism that renders inoperable the munition into which it is incorporated. The term is used in Article 6 of the CCW Amended Mines Protocol in relation to remotely delivered mines other than anti-personnel mines. There are no technical specifications for self-neutralization mechanisms in the Technical Annex to the CCW Amended Mines Protocol.

"Self-deactivating" (SDA) means automatically rendering a munition inoperable by means of the irreversible exhaustion of a component; for example, a battery that is essential to the operation of the munition could be exhausted as part of a self-deactivating mine.

. . . .

6.12.13 U.S. Policy on Landmines. Landmines have been addressed by U.S. national policy. The United States has announced a policy: (1) not to use anti-personnel landmines outside the Korean Peninsula; (2) not to assist, encourage, or induce anyone outside the Korean Peninsula to engage in activity prohibited by the Ottawa Convention; (3) to undertake to destroy anti-personnel landmine stockpiles not required for the defense of the Republic of Korea; and (4) not to produce or otherwise acquire any anti-personnel munitions that are not compliant with the Ottawa Convention. The United States has also previously committed not to emplace new persistent anti-personnel or anti-vehicle landmines (*i.e.*, landmines without self-destruction mechanisms and self-deactivation features). U.S. landmines will continue to meet or exceed international standards for self-destruction and self-deactivation. In addition, the United States no longer has any non-detectable mine of any type in its arsenal.

The United States has a long practice of contributing significantly to humanitarian demining efforts and other conventional weapons destruction programs.

6.12.14 Ottawa Convention on Anti-Personnel Landmines. The United States is not a Party to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction. This Convention is commonly called the Ottawa Convention.

The United States has announced policy changes that align U.S. anti-personnel landmine policy outside the Korean Peninsula with the key requirements of the Ottawa Convention. Among other reasons, because the practice of the United States and other States remains inconsistent with the prohibitions of the Ottawa Convention, its prohibitions do not reflect customary international law.

> Many U.S. allies and coalition partners, including Australia, Canada, and the United Kingdom, are parties to the Ottawa Convention. Article 1 of the Ottawa Convention prohibits States Parties from using, developing, producing, otherwise acquiring, stockpiling, retaining, or transferring to anyone, directly or indirectly, anti-personnel landmines, or to assist, encourage, or induce, in any way, anyone to engage in any activity prohibited to a State Party under the Convention. Australia, Canada, and the United Kingdom have taken the position that its armed forces would not violate the Ottawa Convention merely by reason of taking part in joint operations with forces of an ally that is not bound by the Ottawa Convention and that uses anti-personnel mines.

9.4 TORPEDOES

Torpedoes must be designed to sink or otherwise become harmless when they have missed their intended target. This rule is based upon the premise that a torpedo that misses its target becomes a hazard to innocent shipping in the same manner as a free-floating mine.

Commentary

The DoD Law of War Manual states:

> 13.12 Torpedoes
>
> It is forbidden to use torpedoes that do not become harmless when they miss their mark. Such torpedoes may become a hazard to innocent shipping, and therefore torpedoes must be designed to become harmless when they have missed their mark.
>
> For example, torpedoes have been designed to become harmless upon completion of their propulsion run, such as by sinking to the bottom.
>
> 13.12.1 Torpedoes – Notes on Terminology. In the 19th century, the term "torpedo" was used to refer to any explosive

> munition that operated by contact against the hull of a ship, including relatively stationary munitions that, in modern parlance, would be called mines. However, by the time of the 1907 Hague VIII Convention, the term "torpedo" was used in the modern sense to refer to munitions that propelled through the water.

9.5 CLUSTER AND FRAGMENTATION WEAPONS

Fragmentation weapons are projectiles, bombs, missiles, submunitions, and grenades that are designed to fragment upon detonation, thereby expanding the radius of their lethality and destructiveness. Cluster munitions are weapons designed to disperse or release explosive submunitions and includes those explosive submunitions. These weapons are lawful when used against combatants and military objectives. When used in proximity to civilians or civilian objects, their employment should be carefully monitored to ensure that collateral damage and incidental injury is not excessive in relation to the legitimate military advantage sought.

9.5.1 Convention on Cluster Munitions

The Convention on Cluster Munitions (CCM) prohibits the use, development, production, acquisition, stockpiling, retention, or transfer of cluster munitions. The United States is not a party to the CCM, and the CCM does not prohibit State parties from engaging in military cooperation and operations with States that are not parties.

Commentary

The DoD Law of War Manual states:

> 6.13.4 Convention on Cluster Munitions. The United States is not a Party to the Convention on Cluster Munitions. The United States has determined that its national security interests cannot be fully ensured consistent with the terms of the Convention on Cluster Munitions. The United States has expressed the view that the Convention on Cluster Munitions does not represent an emerging norm or reflect customary

international law that would prohibit the use of cluster munitions in armed conflict.

The Convention on Cluster Munitions establishes for its States Parties a number of prohibitions and restrictions on certain types of cluster munitions. These rules include prohibitions on assisting, encouraging, or inducing anyone to engage in any activity prohibited to a State Party. Despite these restrictions, States Parties and their military personnel and nationals may engage in military cooperation and operations with States that are not Parties to the Convention on Cluster Munitions that might engage in activities prohibited to a State Party. Yet, even during such military operations, the Convention on Cluster Munitions does not authorize a State Party:

(a) To develop, produce or otherwise acquire cluster munitions;

(b) To itself stockpile or transfer cluster munitions;

(c) To itself use cluster munitions; or

(d) To expressly request the use of cluster munitions in cases where the choice of munitions used is within its exclusive control.

9.5.2 U.S. Policy on Cluster Munitions

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

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

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

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

Commentary

Cluster munitions are defined as "munitions composed of a non-reusable canister or delivery body containing multiple, conventional explosive submunitions." This definition does not include "nuclear weapons, as well as obscurants, pyrotechnics, non-lethal systems (e.g., leaflets), and weapons that produce non-explosive kinetic effects (e.g., flechettes or rods) or electronic effects." Landmine submunitions are also excluded, "since they are covered by existing policy and international agreements."[43]

The DoD Policy on Cluster Munitions applies to submunitions or submunition warheads dispersed from the cluster munition. Any submunition or submunition warhead that fails to detonate after

43. Memorandum from the Deputy Secretary of Defense, DoD Policy on Cluster Munitions, attach. ¶ 1 (Nov. 30, 2017).

properly dispensed is considered unexploded ordnance, even if it is unarmed.

The DoD has stated the following position:

> [T]he Department will retain cluster munitions currently in active inventories until the capabilities they provide are replaced with enhanced and more reliable munitions. It is DoD policy that:
>
> - Continuing or beginning with their respective FY 2019 budgets, the military departments will program for capabilities to replace cluster munitions currently in active inventories that do not meet the standards prescribed by this policy for procuring new cluster munitions. . . .
>
> - The Department's operational planners should plan for the availability of cluster munitions in their planning efforts. The approval authority to employ cluster munitions that do not meet the standards prescribed by this policy for procuring new cluster munitions, however, rests with the Combatant Commanders. . . .
>
> . . . .
>
> - The Military Departments and the Combatant Commands, in keeping with the U.S. legal obligations under Protocol V on Explosive Remnants of War annexed to the Convention on Conventional Weapons and consistent with past practices, will continue to record and retain information on the use of cluster munitions and provide relevant information to facilitate the removal or destruction of unexploded submunitions.
>
> . . . .

> - The Department will not transfer cluster munitions except as provided for under U.S. law. The operational use of cluster munitions that include Anti-Personnel Landmines (APL) sub-munitions shall comply with Presidential policy.[44]

9.6 BOOBY TRAPS AND OTHER DELAYED-ACTION DEVICES

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

Commentary

The DoD Law of War Manual states:

> 6.12.4 Prohibited Classes of Mines, Booby-Traps, and Other Devices. Certain types of mines, booby-traps, and other devices are prohibited. These types include:
>
> - mines, booby-traps, and other devices calculated to cause superfluous injury;
> - mines, booby-traps, and other devices specifically designed to detonate during detection operations;
> - self-deactivating mines with anti-handling devices designed to function after the mine's operation;
> - non-detectable anti-personnel mines;

44. *Id.* at 2.

- remotely delivered anti-personnel mines without compliant self-destruction and self-deactivation mechanisms;

- remotely delivered mines other than anti-personnel mines without a feasible SD/SDA mechanism;

- mines produced after December 3, 1998, without identifying information;

- booby-traps and other devices in the form of apparently harmless portable objects specifically designed to explode; and

- certain types of prohibited booby-traps and other devices.

. . . .

6.12.5 General Rules for Using Mines, Booby-Traps, and Other Devices. The use of mines, booby traps, and other devices is subject to the same rules and principles that govern the use of other weapons to conduct attacks. However, because mines, booby-traps, and other devices explode only after their emplacement, there have been different views as to when the use of a mine constitutes an "attack." Thus, the CCW Amended Mines Protocol seeks to clarify how these principles apply to the use of mines, booby-traps, and other devices. These rules include:

- a prohibition against directing mines, booby-traps, and other devices against the civilian population;

- a prohibition against the indiscriminate use of mines, booby-traps, and other devices;

- an obligation to take feasible precautions to protect civilians from the effects of mines, booby-traps, and other devices;

- an obligation to give effective advance warning of the emplacement of mines, booby-traps, and other devices, unless circumstances do not permit; and

- obligations with respect to the recording of the placement of mines, booby-traps, and other devices.

9.7 EXPLOSIVE REMNANTS OF WAR

Protocol V to the Convention on Certain Conventional Weapons defines explosive remnants of war (ERW) as unexploded explosive ordnance and abandoned explosive ordnance. Unexploded explosive ordnance is explosive ordnance (i.e., conventional munitions containing explosives, with the exception of mines, booby traps, and other devices as defined in Amended Protocol II of the convention) that has been primed, fused, armed, or otherwise prepared for use and used in an armed conflict. It includes ordnance that has been fired, dropped, launched, or projected, and failed to explode. Abandoned explosive ordnance means explosive ordnance that has not been used during an armed conflict, has been left behind or dumped by a party to an armed conflict, and is no longer under control of the party that left it behind or dumped it. Abandoned explosive ordnance may or may not have been primed, fused, armed, or otherwise prepared for use.

States ratifying the protocol, to include the United States, agree to maintain records regarding the use of ERW, and to mark, clear, remove, or destroy ERW in territories under their control as soon as feasible after the cessation of active hostilities. In territory that they do not control, States that used explosive ordnance agree to assist with clearing, removing, or destroying ERW. The Protocol applies to land territory and internal waters. It does not apply to ERW existing prior to ratification.

Commentary

The DoD Law of War Manual states:

6.20 Explosive Remnants of War

There are certain obligations with respect to explosive remnants of war on territory under U.S. control. Most of these obligations are trigged upon the cessation of active hostilities.

6.20.1 Definition of Explosive Remnants of War. Under the CCW Protocol V on Explosive Remnants of War, "explosive remnants of war" means: (1) unexploded ordnance (UXO); and (2) abandoned explosive ordnance (AXO).

"Unexploded ordnance" is defined in § 6.19.1.2 (Definition of Unexploded Ordnance (UXO)). "Abandoned explosive ordnance" is defined in § 6.19.1.3 (Definition of Abandoned Explosive Ordnance (AXO).

6.20.2 Scope of the Obligations Created by the CCW Protocol V on Explosive Remnants of War. The CCW Protocol V on Explosive Remnants of War applies to explosive remnants of war on the land territory, including internal waters, of States that are Parties to the Protocol.

The CCW Protocol V on Explosive Remnants of War applies to situations resulting from armed conflict and occupation.

Certain obligations in the CCW Protocol V on Explosive Remnants of War only apply to explosive remnants of war that were created after the entry into force of the Protocol for the High Contracting Party on whose territory the explosive remnants of war exist. These obligations include obligations discussed in:

- § 6.20.3 (Taking Feasible Precautions to Protect Civilians From Explosive Remnants of War);
- § 6.20.6 (Making Available Information on Used or Abandoned Explosive Ordnance That May Have Become Explosive Remnants of War);

- § 6.20.7 (Clearance, Removal, or Destruction of Explosive Remnants of War From Territory Under a Party's Control); and
- § 6.20.8 (Providing Assistance to Facilitate the Removal of Explosive Remnants of War From a Party's Military Operations in Areas Outside Its Control).

9.8 INCENDIARY WEAPONS

An incendiary weapon is any weapon or munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat, or combination thereof, produced by a chemical reaction of a substance delivered on the target. Incendiary weapons can take the form of flame throwers, flame fougasses, shells, rockets, grenades, mines, bombs, other containers of incendiary substances, etc.

Incendiary weapons do not include munitions which have incidental incendiary effects, such as illuminants, tracers, signaling flares, etc. It does not include munitions designed to combine an incendiary effect with penetration, blast, or fragmenting effects—such as armor-piercing rounds, etc.—which are designed for use against tanks, aircraft, etc., and are not intended to cause burn injuries to personnel. Incendiary devices are lawful weapons which may be employed against combatants and military objects. Where incendiary devices are the weapons of choice, they should be employed in a manner that does not cause incidental injury or collateral damage excessive in light of the military advantage anticipated by the attack.

The Protocol III to the Convention on Certain Conventional Weapons places restrictions on attacks on military objectives located within a concentration of civilians. It completely prohibits attacks against military objectives located within concentrations of civilians by air-delivered incendiary weapons. It further prohibits attacks against military objectives located within a concentration of civilians by means other than air-delivery, except when such military objective is clearly separated from the concentration of civilians and all feasible precautions are taken with a view to limit the incendiary effects to the military objective and to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians, and damage to civilian objects. It specifically prohibits incendiary attacks on forests or other plant cover,

except when those conceal, cover or camouflage combatants or other military objectives, or are themselves military objectives. The United States ratified Protocol III, but reserved its right to use incendiary weapons against military objectives located in concentrations of civilians where it is judged such use would cause fewer casualties and/or less collateral damage than alternative weapons. This reservation could include situations where incendiary weapons are the only means which can effectively destroy biological or chemical weapons facilities (since resort to high explosives against such targets could risk widespread release of dangerous substances).

Commentary

The DoD Law of War Manual states:

> 6.14 Incendiary Weapons
>
> The use of incendiary weapons is permissible, but subject to certain restrictions in order to reduce the risk of incidental harm to civilians.
>
> 6.14.1 Definition of an Incendiary Weapon. An "incendiary weapon" is any weapon or munition that is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat, or combination thereof, produced by a chemical reaction of a substance on the target. Only "pure" incendiaries, such as napalm or the type of incendiary bombs used in World War II and Korea, are regulated as incendiary weapons.
>
> 6.14.1.1 *Fire or Burn Injury Produced by Chemical Reaction of a Substance on the Target*. Incendiary weapons use a chemical reaction of a substance on the target to create flame or heat that destroys or injures.
>
> On the other hand, laser weapons, even if their primary effect is to set fire to objects or cause burn injuries, do not constitute "incendiary weapons" under CCW Protocol III on Incendiary Weapons because the fire or burn injuries are not

produced by a chemical reaction of a substance that is delivered to the target. Similarly, chemical weapons cause death or other harm through the toxic properties of chemicals themselves, rather than the chemicals causing a fire or burn injury.

6.14.1.2 *Examples of Incendiary Weapons*. Examples of incendiary weapons include:

- flame throwers;
- fougasse; and
- shells, rockets, grenades, mines, bombs, and other containers of incendiary substances, such as napalm and thermite.

6.14.1.3 *Excluded From the Definition of Incendiary Weapons – Weapons With Incidental Incendiary Effects*. Incendiary weapons do not include munitions that may have incidental incendiary effects, such as illuminants, tracers, or smoke or signaling systems.

For example, white phosphorous is a munition that contains fragments of white phosphorous. It is intended primarily for marking or illuminating a target or masking friendly force movement by creating smoke.

Similarly, tracer rounds are not incendiary weapons as they are designed to enable a gunner to direct his or her rounds onto a target rather than to set fire to objects.

6.14.1.4 *Excluded From the Definition of Incendiary Weapons – Certain Combined-Effects Munitions*. Certain combined-effects munitions are excluded from the definition of incendiary weapons. These munitions are designed to combine penetration, blast, or fragmentation effects with an additional incendiary effect, in which the incendiary effect is not specifically designed to cause burn injury to persons, but to be used against

> objects that are military objectives, such as armored vehicles, aircraft, and installations or facilities. Such weapons may include armor-piercing projectiles, fragmentation shells, explosive bombs, and similar combined-effects munitions.
>
> 6.14.2 Use of Incendiary Weapons Is Permissible. Although subject to certain specific restrictions described in § 6.14.3 (Restrictions on the Use of Incendiary Weapons), the use of incendiary weapons, including anti-personnel use, is not prohibited.
>
> . . . .
>
> 6.14.3 Restrictions on the Use of Incendiary Weapons. As with other weapons, it is prohibited to make the civilian population as such, individual civilians, or civilian objects the object of attack by incendiary weapons. In addition, it is specifically prohibited to make forests or other kinds of plant cover the object of attack by incendiary weapons, except when such natural elements are used to cover, conceal, or camouflage combatants or other military objectives, or are themselves military objectives.
>
> Similarly, the risks that the use of an incendiary weapon may pose to the civilian population should be considered in a proportionality analysis.
>
> As with the use of other weapons, commanders must take feasible precautions to reduce the risk of incidental harm to civilians when using incendiary weapons.

9.9 DIRECTED-ENERGY DEVICES

Directed-energy devices—such as laser, high-powered microwave, particle-beam devices, and active-denial systems using millimeter electromagnetic waves—are not proscribed by the law of armed conflict. Lasers can have nondestructive or destructive effects. Lasers may be employed despite the possibility of incidental injury to enemy personnel. Laser dazzlers designed to temporarily disorient may be employed.

The Protocol IV to the Convention on Certain Conventional Weapons prohibits the use or transfer of laser weapons specifically designed to cause blindness to unenhanced vision (e.g., to the naked eye or the eye with corrective lenses). While blinding as an incidental effect of the legitimate military employment of lasers is not prohibited by Protocol IV, parties thereto are obligated to take all feasible precautions to avoid such injuries. Laser weapons utilized to counter adversary optical equipment which causes incidental permanent blindness are not prohibited. The United States has ratified Protocol IV.

Commentary

Directed energy (DE) is used by the DoD to describe a wide range of non-kinetic capabilities that produce "a beam of concentrated electromagnetic energy or atomic or subatomic particles" to "damage or destroy enemy equipment, facilities, and personnel" in the air, sea, space, and land domains. DE devices are defined as systems "using directed energy primarily for a purpose other than as a weapon" that may include laser rangefinders and designators used against sensors that are sensitive to light. Finally, DE warfare includes "actions taken to protect friendly equipment, facilities, and personnel and retain friendly use of the electromagnetic spectrum."[45]

DE is an umbrella term covering technologies that relate to the production of a beam of concentrated electromagnetic energy or atomic or subatomic particles.[46] DE weapons are one element of electromagnetic attack (EA) and may include lasers, millimeter wave, and microwave capabilities that transmit energy to disrupt or degrade an enemy's ability to receive signals, deliver data payloads supporting cyberspace operations (CO), or disable and destroy targets (e.g., electronics of vehicles, vessels, and unmanned aircraft systems' control modules) susceptible to high-energy EM radiation.[47]

DE weapons "are not authoritatively defined under international law, nor are they currently on the agenda of any existing multilateral

45. *See* JP 1-02, Department of Defense Dictionary of Military and Associated Terms, 99-100 (Nov. 8, 2010, as amended Feb. 15, 2016).

46. JP 3-85, Joint Electromagnetic Spectrum Operations, GL-6 (May 22, 2020).

47. *Id.* at I-4.

mechanism."[48] However, some applications of DE weapons are prohibited. Article 1 of the Protocol on Blinding Laser Weapons prohibits the employment of "laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision."[49] (The protocol does not cover the development, procurement, or possession of such weapons, nor does it prohibit the employment of laser weapons that may cause blindness "as an incidental or collateral effect."[50])

The Congressional Research Service has stated:

> According to OUSD(R&E), DOD's current DE roadmap outlines DOD's plan to increase power levels of DE weapons from around 150 kilowatts (kW—a unit of power), as is currently feasible, to 300 kW by FY2023, "with goal milestones to achieve 500 kW class with reduced size and weight by FY2025 and to further reduce size and weight and increase power to MW [megawatt] levels by FY2026." For reference, although there is no consensus regarding the precise power level that would be needed to neutralize different target sets, some analysts believe that lasers of around 100 kW could engage unmanned aircraft systems, small boats, rockets, artillery, and mortars, whereas lasers of around 300 kW could additionally engage cruise missiles flying in certain profiles (i.e., flying across—rather than at—the laser). Lasers of 1 MW could potentially neutralize ballistic missiles and hypersonic weapons.[51]

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48. Anna de Courcy Wheeler, *Directed Energy Weapons*, ARTICLE 36, 4 (Nov. 2017).

49. Protocol on Blinding Laser Weapons, Oct. 13, 1995, 1380 U.N.T.S. 370.

50. *Id.* art. 3.

51. Congressional Research Service, *Defense Primer: Directed-Energy Weapons*, IF 11882 (Nov. 14, 2022). *See also* Congressional Research Service, *Department of Defense Directed Energy Weapons: Background and Issues for Congress,* R46925 (Sept. 13, 2022); Ronald O'Rourke, Congressional Research Service, *Navy Shipboard Lasers for Surface, Air, and Missile Defense: Background and Issues for Congress*, app. I, R41526 (Dec. 21, 2022); Mark Gunzinger & Chris Dougherty, *Changing the Game: The Promise of Directed-Energy Weapons*, CENTER FOR STRATEGIC AND BUDGETARY ASSESSMENTS (2012).

9.10 OVER-THE-HORIZON WEAPONS SYSTEMS

Missiles and projectiles with OTH or beyond visual-range capabilities are lawful provided they are equipped with sensors or are employed in conjunction with external sources of targeting data that are sufficient to ensure effective target discrimination. See 9.1.2.

Commentary

For an average human at sea level, the distance to the horizon is about 4.8 kilometers. For aircraft, however, the horizon extends farther as altitude increases, out to 100 kilometers or even beyond. More accurate data is required to conduct precision attacks at a distance, and aircraft and missiles require propulsion, communications for mid-course adjustments or parameter modifications, and navigation and terminal guidance.[52]

9.11 NONLETHAL WEAPONS

Nonlethal weapons (NLWs) are weapons, devices, or munitions that are explicitly designed and primarily employed to incapacitate personnel or materiel immediately, while minimizing fatalities, permanent injury to personnel, and undesired damage to property in the target area or environment. Unlike conventional (lethal) weapons, which utilize blast, penetration, and fragmentation to destroy their targets, NLWs employ means other than gross physical destruction to incapacitate the target. Nonlethal weapons are generally intended to have reversible effects on personnel or material.

Nonlethal weapons are not required to have a zero probability of producing fatalities or permanent injuries. When properly employed, NLWs should significantly reduce injurious effects as compared with physically destroying the same target. The mere fact NLWs are in a unit's inventory does not mean the law requires that such weapons be employed prior to using conventional (lethal) weapons. The availability of NLWs will not limit the commander's inherent right or obligation to exercise unit self-defense in response to a hos-

52. *See* Tamir Eshel, *Over the Horizon Sensing, Targeting, and Attack*, EUROPEAN SECURITY & DEFENCE (Oct. 11, 2022), https://euro-sd.com/2022/10/articles/27542/over-the-horizon-sensing-targeting-and-attack/.

tile act or demonstration of hostile intent, or to use lethal force when authorized by competent authority pursuant to the SROE or SRUF. Nonlethal weapons are merely another option for commanders to use, as appropriate, in exercising the right and obligation of self-defense and in carrying out assigned missions. Their availability does not create a higher standard for the use of force, under the applicable law, ROE, or other rules for the use of force.

Commentary

DoDD 3000.03E states:

> 3. POLICY. It is DoD policy that:
>
> > a. NLW doctrine and concepts of operation will be developed to reinforce deterrence and expand the range of options available to commanders.
> >
> > b. NLW have the potential to enhance the commander's ability to:
> >
> > > (1) Deter, discourage, delay, or prevent hostile and threatening actions.
> > >
> > > (2) Deny access to and move, disable, and suppress individuals.
> > >
> > > (3) Stop, disable, divert, and deny access to vehicles and vessels.
> > >
> > > (4) Adapt and tailor escalation of force options to the operational environment.
> > >
> > > (5) Employ capabilities that temporarily incapacitate personnel and materiel while minimizing the likelihood of casualties and damage to critical infrastructure.
> > >
> > > (6) De-escalate situations to preclude lethal force.

(7) Precisely engage targets.

(8) Enhance the effectiveness and efficiency of lethal weapons.

(9) Capture or incapacitate high value targets.

(10) Protect the force.

c. Unlike conventional lethal weapons that destroy their targets principally through blast, penetration, and fragmentation, NLW employ means other than gross physical destruction to prevent the target from functioning. NLW are intended to have relatively reversible effects on personnel or materiel.

d. NLW are capable of delivering a level of force that achieves immediate target response and can provide predictable and intended reversible effects, allowing the affected target to return to pre-engagement functionality.

e. NLW are developed and used with the intent to minimize the probability of producing fatalities, significant or permanent injuries, or undesired damage to materiel, but do not, and are not intended to, eliminate risk of those actions entirely.

f. Developers of NLW will conduct a thorough human effects characterization in accordance with DoD Instruction (DoDI) 3200.19 (Reference (e)) to help understand the full range of effects and limitations prior to operational employment of the NLW.

g. The availability of NLW will not limit the commander's inherent right or obligation to exercise unit self-defense in response to a hostile act of demonstrated hostile intent, or to use lethal force when authorized by competent authority pursuant to the standing rules of engagement or standing rules for the use of force.

> h. The presence of NLW will not constitute an obligation for their use, or create a higher standard for the use of force, under the applicable law, rules of engagement, or other rules for the use of force.
>
> i. NLW may be used in conjunction with lethal weapon systems to enhance effectiveness and efficiency in military operations, where such use is consistent with domestic and international law, including the law of war.
>
> j. Military planners should consider the inclusion of NLW within plans and supporting strategic communications annexes that support minimizing cultural misperceptions, denying misinformation, and gaining trust of the populace.
>
> k. Where appropriate, NLW should be considered for integration into applicable joint and doctrinal publications, joint and Service concept and operational plans, and rules of engagement and rules for the use of force.[53]

9.12 AUTONOMOUS WEAPON SYSTEMS

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

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

Semiautonomous weapon systems only engage individual targets or specific target groups that have been selected by a human operator. Semiautonomous

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53. DoDD 3000.03E, DoD Executive Agent for Non-Lethal Weapons (NLW), and NLW Policy, ¶ 3 (Ch. 2, Aug. 31, 2018).

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

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

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

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

Commentary

The United States has taken the following position on autonomous weapons systems:

> Autonomy has already been used sensibly in targeting-related functions such as identifying, selecting, and determining whether and when to engage targets. . . . [T]here is no requirement that the machine itself be programmed to make law of war assessments, such as whether the target is a military objective. Rather, there are a variety of ways to ensure

> that even relatively simple forms of automation can be used appropriately in military operations.[54]

DoDD 3000.09, Autonomy in Weapon Systems, states:

> The Secretaries of the Military Departments; the Commander, USSOCOM; and, under the authority, direction, and control of their respective OSD Component head, the Directors of Defense Agencies and DoD Field Activities:
>
> . . . .
>
> c. Ensure that legal reviews of the intended acquisition, procurement, or modification of autonomous and semi-autonomous weapon systems are conducted in accordance with DoDD 5000.01, DoDD 2311.01, and, where applicable, DoDD 3000.03E. Legal reviews must address consistency with all applicable domestic and international law and, in particular, the law of war.[55]

The DoD requires that autonomous and semi-autonomous weapons systems shall be designed to allow commanders and operators to exercise "appropriate levels of human judgment over the use of force."[56] The United States has offered this standard during discussions by the Group of Governmental Experts (GGE) at the Conference on Certain Conventional Weapons, noting that there is no single metric for determining the correct level of human control or judgment to be exercised over the use of force in autonomous weapons systems:

> "Appropriate" is a flexible term that reflects the fact that there is not a fixed, one-size-fits-all level of human judgment that should be applied to every context. What is "appropriate" can differ across weapon systems, domains of warfare,

54. United States, Human-Machine Interaction in the Development, Deployment and Use of Emerging Technologies in the Area of Lethal Autonomous Weapons Systems, ¶ 13, U.N. Doc. CCW/GGE.2/2018/WP.4 (Aug. 28, 2018).

55. DoDD 3000.09, Autonomy in Weapon Systems, ¶ 2.9.c (Jan. 25, 2023).

56. *Id.* ¶ 4(a).

> types of warfare, operational contexts, and even across different functions in a weapon system. Some functions might be better performed by a computer than a human being, while other functions should be performed by humans.[57]

Human judgment over the use of force is different from human control over the use of force. For example, if the operator is reflexively pressing a button to approve strikes recommended by the weapons system, it could be argued that there is control, but little judgment is being exercised.[58] "Appropriate levels of human judgment" is viewed as a holistic standard that accounts for the totality of the circumstances in the employment of a weapon. There is no single metric for what constitutes "appropriate levels" of judgment, just as there is no single metric for what type of control would be "meaningful." Factors that are considered in determining the appropriate level of human judgment include the characteristics and features of the weapons system, how it will be employed in a specific physical operating environment, and the tactical context of applicable operational concepts and rules of engagement.[59]

See also DOD Law of War Manual, § 6.5.9.

57. United States, Human-Machine Interaction in the Development, Deployment and Use of Emerging Technologies in the Area of Lethal Autonomous Weapons Systems, ¶ 9, U.N. Doc. CCW/GGE.2/2018/WP.4 (Aug. 28, 2018).

58. *Id.* ¶ 11.

59. James Kraska, *Command Accountability for AI Weapon Systems in the Law of Armed Conflict*, 97 INTERNATIONAL LAW STUDIES 407, 430 (2021).

CHAPTER 10

CHEMICAL, BIOLOGICAL, RADIOLOGICAL, AND NUCLEAR WEAPONS

10.1 INTRODUCTION

Chemical, biological, radiological, and nuclear weapons—often referred to as WMD—and their delivery systems present special law of armed conflict problems due to their potential for indiscriminate effect. This chapter addresses legal considerations pertaining to the development, possession, deployment, and employment of these weapons.

10.2 NUCLEAR WEAPONS

10.2.1 General

There are no rules of customary or conventional international law prohibiting States from employing nuclear weapons in armed conflict. In the absence of an express prohibition, the use of nuclear weapons against enemy combatants and other military objectives is not unlawful. Employment of nuclear weapons is subject to the following principles:

1. The right of the parties to the conflict to adopt means of injuring the enemy is not unlimited.

2. It is prohibited to launch attacks against the civilian population as such.

3. Distinction must be made at all times between combatants and civilians to the effect the latter be spared as much as possible.

Given their destructive potential, the decision to authorize employment of nuclear weapons should emanate from the highest level of government. For the United States, authority resides solely with the President.

Commentary

The DOD Law of War Manual states:

6.18 Nuclear Weapons

There is no general prohibition in treaty or customary international law on the use of nuclear weapons. The United States has not accepted a treaty rule that prohibits the use of nuclear weapons *per se*, and thus nuclear weapons are lawful weapons for the United States.

The law of war governs the use of nuclear weapons, just as it governs the use of conventional weapons. For example, nuclear weapons must be directed against military objectives. In addition, attacks using nuclear weapons must not be conducted when the expected incidental harm to civilians is excessive compared to the military advantage expected to be gained.

6.18.1 U.S. Policy on the Use of Nuclear Weapons. The United States has developed national policy on the use of nuclear weapons. For example, the United States has stated that it would only consider the use of nuclear weapons in extreme circumstances to defend the vital interests of the United States or its allies and partners. In addition, the United States has stated that it will not use or threaten to use nuclear weapons against non-nuclear weapons States that are party to the Nuclear Non-Proliferation Treaty and in compliance with their nuclear non-proliferation obligations.

6.18.2 Nuclear Weapons and Arms Control Obligations. Nuclear weapons are regulated by a number of arms control agreements restricting their development, testing, production, proliferation, deployment, use, and, with respect to specific types, possession. Some of these agreements may not apply in times of war. Guidance on nuclear arms control agreements is beyond the scope of this manual.

6.18.3 AP I Provisions and Nuclear Weapons. Parties to AP I have expressed the understanding that the rules relating the use of weapons introduced by AP I were intended to apply exclusively to conventional weapons. Thus, Parties to AP I

> have understood AP I provisions not to regulate or prohibit the use of nuclear weapons. Although the United States is not a Party to AP I, the United States participated in the diplomatic conference that negotiated AP I based upon this understanding.
>
> 6.18.4 Authority to Launch Nuclear Weapons. The authority to launch nuclear weapons generally is restricted to the highest levels of government. The domestic law and procedures concerning nuclear weapons employment are beyond the scope of this manual.

Furthermore, the United States has stated: "There is no general prohibition in treaty or customary international law on the use of nuclear weapons per se, and thus nuclear weapons are lawful weapons for the United States."[1]

The law of war governs the use of nuclear weapons, just as it governs the use of conventional weapons:

> The new guidance makes clear that all plans must also be consistent with the fundamental principles of the Law of Armed Conflict. Accordingly, plans will, for example, apply the principles of distinction and proportionality and seek to minimize collateral damage to civilian populations and civilian objects. The United States will not intentionally target civilian populations or civilian objects.[2]

Further:

> The United States has long taken the position that various principles of the international law of armed conflict would apply to the use of nuclear weapons as well as to other means and methods of warfare. This in no way means, however,

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1. Written Statement of the Government of the United States of America, June 20, 1995 at 21, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8). [hereinafter Written Statement].

2. Secretary of Defense, Report on Nuclear Employment Strategy of the United States Specified in Section 491 of 10 U.S.C. at 4–5 (June 2013).

> that the use of nuclear weapons is precluded by the law of war.[3]

> As far back as 1965, the United States supported a UN resolution stating that "all governments and other authorities responsible for action in armed conflicts should conform at least to the following principle . . . that the general principles of the Law of War apply to nuclear and similar weapons."[4]

> For example, nuclear weapons must be directed against military objectives. In addition, attacks using nuclear weapons must not be conducted when the expected incidental harm to civilians is excessive compared to the military advantage expected to be gained.

10.2.2 Treaty Obligations

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

10.2.2.1 1971 Seabed Arms Control Treaty

The 1971 Seabed Arms Control Treaty is a multilateral convention that prohibits emplacement of nuclear weapons and mines on the seabed and the ocean floor or in the subsoil thereof beyond 12 nautical miles from the baseline from which the territorial sea is measured. The prohibition extends to structures, launching installations, and other facilities specifically designed for storing, testing, or using nuclear weapons. It does not prohibit the use of nuclear weapons in the water column, provided they are not affixed to the seabed (e.g., nuclear-armed depth charges and torpedoes).

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3. Written Statement, *supra* note 1, at 21.

4. Edward R. Cummings, Acting Assistant Legal Advisor for Politico-Military Affairs, *Remarks at Symposium at Brooklyn Law School*, Sept. 25, 1982, 3 CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1981–88, 3421, 3422.

Commentary

The Seabed Arms Control Treaty emerged from the Committee on Disarmament, negotiated by the United States and the Soviet Union, with input from other nations.[5] UN General Assembly Resolution 2660 (XXV) adopted the final draft on December 7, 1970 by a vote of 104 to 2 (El Salvador and Peru), with two abstentions (Ecuador and France). The Seabed Arms Control Treaty was opened for signature on February 11, 1971 and entered into force on May 18, 1972.

Article I of the Seabed Arms Control Treaty states:

> 1. The States Parties to this Treaty undertake not to emplant or emplace on the sea-bed and the ocean floor and in the subsoil thereof beyond the outer limit of a sea-bed zone, as defined in article II [coterminous with a 12-mile outer limit], any nuclear weapons or any other types of weapons of mass destruction as well as structures, launching installations or any other facilities specifically designed for storing, testing or using such weapons.
>
> 2. The undertakings of paragraph 1 of this article shall also apply to the sea-bed zone referred to in the same paragraph, except that within such sea-bed zone, they shall not apply either to the coastal State or to the sea-bed beneath its territorial waters.
>
> 3. The States Parties to this Treaty undertake not to assist, encourage or induce any State to carry out activities referred to in paragraph 1 of this article and not to participate in any other way in such actions.

Article III of the Treaty permits verification through observation by the States parties of the activities of other States parties, so long as observation does not interfere with such activities. If, after observa-

5. Conference on the Committee on Disarmament, Report, U.N. GAOR, 25th Sess., 1749th mtg., U.N. Doc. A/8059 (1970).

tion, there exist reasonable doubts, further procedures for verification may be reached, including inspections. An appropriate report shall be circulated to other parties upon completion of other procedures for verification by the party that initiated the action. Review Conferences are to be held every five years[6] and were conducted in 1977, 1983, and 1989. In 1989, it was agreed that the next review conference would be held no earlier than 1996, but in 1992 the Conference on Disarmament determined that there was no need for a fourth review conference.[7]

10.2.2.2 Outer Space Treaty of 1967

The Outer Space Treaty of 1967 is a multilateral convention that prohibits the placement in Earth orbit, installation on the moon and other celestial bodies, and stationing in outer space in any other manner, of nuclear and other WMD. Suborbital missile systems are not included in this prohibition.

Commentary

Article IV of the Outer Space Treaty provides: "The moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military maneuvers on celestial bodies shall be forbidden."

The DoD Law of War Manual states:

> 14.10.2 Application of International Law to Activities in Space.

6. Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, art. VII, Feb. 11, 1971, 23 U.S.T. 701; T.I.A.S. 7337; 955 U.N.T.S. 115

7. *See* Treaty on Prohibiting the Emplacement of Nuclear Weapons on the Seabed and Ocean Floor, 10 INTERNATIONAL LEGAL MATERIALS 145 (1971); Louis Henkin, *The Sea-Bed Arms Treaty—One Small Step More*, 10 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 107 (1990).

14.10.2.1 *Treaties Specifically Addressing Space Activities*. The United States is a Party to certain treaties that address space activities. The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Outer Space Treaty), imposes restrictions on certain military operations in outer space (*i.e.*, it does not exempt military spacecraft or military space activities from its purview). The Outer Space Treaty provides for State responsibility for the activities of non-governmental entities in outer space, including the moon and other celestial bodies.

Other treaties that specifically address space activities include:

- Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space;
- Convention on International Liability for Damage Caused by Space Objects; and
- Convention on Registration of Objects Launched into Outer Space.

Certain provisions of these treaties may not be applicable as between belligerents during international armed conflict.

14.10.2.2 *Application of General International Law to Activities and Use of Outer Space*. The Outer Space Treaty reaffirms the duty of States Parties to comply with existing international law in carrying out activities in outer space. Article III of the Outer Space Treaty provides that "States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the moon and other celestial bodies, in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international cooperation and understanding."

Although existing international law, such as the Charter of the United Nations, generally applies to States Parties' activities in outer space, international law that prescribes certain conditions for national claims of sovereignty does not apply to outer space because outer space is not subject to national appropriation.

Certain treaties apply only in certain geographical locations (such as a State's own territory), and thus might not create obligations applicable to a State's activities in outer space. However, law of war treaties and the customary law of war are understood to regulate the conduct of hostilities, regardless of where they are conducted, which would include the conduct of hostilities in outer space. In this way, the application of the law of war to activities in outer space is the same as its application to activities in other environments, such as the land, sea, air, or cyber domains.

14.10.3 Outer Space Treaty Restrictions on Military Activities. The Outer Space Treaty imposes restrictions on certain military operations in outer space.

Other treaties may also impose restrictions on military activities in outer space. For example, the Treaty Banning Nuclear Testing in the Atmosphere, Oceans, and Outer Space (Limited Test Ban Treaty) prohibits nuclear weapon test explosions in outer space.

14.10.3.1 *Restriction on Nuclear Weapons and Other Kinds of Weapons of Mass Destruction in Outer Space*. Article IV of the Outer Space Treaty provides that "States Parties to the Treaty undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner."

The prohibition on placing weapons of mass destruction "in orbit around the earth" refers only to their placement in full orbit around the Earth; thus, the Outer Space Treaty does

not ban the use of nuclear or other weapons of mass destruction that go into a fractional orbit or engage in suborbital flight. For example, intercontinental ballistic missiles (ICBMs) will travel a portion of their trajectory in outer space; but because ICBMs would enter outer space only temporarily, their entry into outer space with nuclear warheads would not violate this prohibition. By contrast, some arms control treaties have prohibited the production, testing, or deployment of systems, including missiles, that place nuclear weapons or other weapons of mass destruction into either full earth orbit or a *fraction* of an earth orbit.

In addition, this rule in Article IV of the Outer Space Treaty does not establish any prohibitions with respect to weapons that are not weapons of mass destruction (e.g., anti-satellite laser weapons or other conventional weapons).

14.10.3.2 *Restrictions on Military Activities on the Moon and Other Celestial Bodies*. Article IV of the Outer Space Treaty places certain prohibitions on military activities on the moon and other celestial bodies: (1) the establishment of military bases, installations, and fortifications; and (2) the testing of any type of weapons; and (3) the conduct of military maneuvers.

These activities are prohibited only on the moon and other celestial bodies, not in outer space itself.

Article IV also recognizes the unimpeded right to: (1) the use of military personnel for scientific research or other peaceful purposes on outer space missions; and (2) the use of any equipment or facility necessary for the peaceful exploration of the moon and other celestial bodies.

14.10.4 General Use of Outer Space for Peaceful Purposes. The United States has expressed the view that outer space should be used only for peaceful purposes. This view is consistent with the Preamble to the Outer Space Treaty.

The United States has interpreted use of outer space for "peaceful purposes" to mean "non-aggressive and beneficial" purposes consistent with the Charter of the United Nations and other international law. This interpretation of "peaceful purposes" is similar to the interpretation given to the reservation of the high seas for "peaceful purposes" in the LOS Convention.

For example, observation or information-gathering from satellites in space is not an act of aggression under the Charter of the United Nations and, thus, would be a use of space for peaceful purposes. Similarly, lawful military activities in self-defense (e.g., missile early warning, use of weapon systems) would be consistent with the use of space for peaceful purposes, but aggressive activities that violate the Charter of the United Nations would not be permissible.

Article IV of the Outer Space Treaty provides that "[t]he moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes." Article IV specifies restrictions on military operations on the moon and other celestial bodies.

14.10.5 Outer Space Treaty Provisions on Cooperation, Mutual Assistance, and Potentially Harmful Interference. Article IX of the Outer Space Treaty provides that in the exploration and use of outer space, States Parties shall be guided by the principle of cooperation and mutual assistance and shall conduct all their activities in outer space with due regard to the corresponding interests of all other States Parties. For example, States should conduct their activities in space with due regard for the rights of other States to have their space systems pass through, and conduct operations in, space without interference.

Article IX of the Outer Space Treaty also requires States Parties to undertake "appropriate international consultations" before proceeding with any activity or experiment planned

> by it or its nationals in outer space if that State Party has reason to believe that its activity or experiment would cause potentially harmful interference with the activities of other States Parties in the peaceful exploration and use of outer space. Conversely, a State Party that has reason to believe that an activity or experiment planned by another State Party in outer space would cause potentially harmful interference with its activities in the peaceful exploration and use of outer space may request consultation concerning the activity or experiment.

In addition, Article I of the Nuclear Test Ban Treaty provides:

> Each of the Parties to this Treaty undertakes to prohibit, to prevent, and not to carry out any nuclear weapon test explosion, or any other nuclear explosion, at any place under its jurisdiction or control:
>
> (a) in the atmosphere; beyond its limits, including outer space; or under water, including territorial waters or high seas . . . .

See the narrative on the Outer Space Treaty prepared by the United States Arms Control and Disarmament Agency.[8]

10.2.2.3 1959 Antarctic Treaty

The 1959 Antarctic Treaty is a multilateral convention designed to ensure that Antarctica, defined to include the area south of 60 degrees south latitude, is used for peaceful purposes only. The treaty prohibits, in Antarctica, any measures of a military nature (e.g., the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons). Nuclear explosions are specifically prohibited. Ships and aircraft at points of discharging or embarking personnel or cargoes

8. UNITED STATES ARMS CONTROL AND DISARMAMENT AGENCY, ARMS CONTROL AND DISARMAMENT AGREEMENTS: TEXTS AND HISTORIES OF THE NEGOTIATIONS 52 (1990).

in Antarctica are subject to international inspection. This treaty does not affect in any way the high seas freedoms of navigation and overflight in the Antarctic region.

Commentary

On May 2, 1958, the United States extended to the eleven other countries that participated in the Antarctic program of the international geophysical year an invitation to participate in a conference to consider the conclusion of a treaty on Antarctica. All eleven countries accepted the invitation, including Argentina, Australia, Belgium, Chile, the French Republic, Japan, New Zealand, Norway, the Union of South Africa, the Union of Soviet Socialist Republics, and the United Kingdom of Great Britain and Northern Ireland. The representatives of the twelve countries drafted the Antarctic Treaty and signed it. President Dwight D. Eisenhower called it a "significant advance toward the goal of a peaceful world with justice." The Treaty incorporates the basic purposes of the U.S. proposal and provides practical means for their fulfillment. The instrument is designed to further the purposes and principles embodied in the UN Charter. Article one dedicates Antarctica to peaceful purposes only.

The Treaty prohibits measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of maneuvers, and the testing of weapons. It specifies that military personnel or equipment may be used in Antarctica for scientific research or any other peaceful purpose. The United States and a few other countries have used military logistic support to conduct their Antarctic programs. Article 2 of the Treaty provides that freedom of scientific investigation in Antarctica and cooperation towards that end shall continue. Article 3 promotes international scientific cooperation, including the exchange of scientists between expeditions and stations in Antarctica. The parties shall make each other informed of their plans for scientific programs into Antarctica and shall make freely available scientific observations.

Article 4 of the Treaty specifies that the States parties do not renunciate any claim to sovereignty in the region. Likewise, no acts or activities constitute a basis for asserting, supporting, or denying a claim or create any rights of sovereignty in Antarctica.

See the narrative on the Antarctic Treaty prepared by the United States Arms Control and Disarmament Agency.[9]

10.2.2.4 Treaty of Tlatelolco

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

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

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

9. *Id.* at 20.

Commentary

See the narrative on the Treaty of Tlatelolco prepared by the United States Arms Control and Disarmament Agency.[10]

10.2.2.5 Additional Nuclear Weapon-free Zones

Although not currently ratified by the United States, several additional treaties seek to create nuclear weapon-free zones. Those treaties are:

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

10.2.2.6 1963 Limited Test Ban Treaty

The 1963 Limited Test Ban Treaty is a multilateral treaty that prohibits the testing of nuclear weapons in the atmosphere, in outer space, and underwater. Over 100 States are party to the treaty, including Russian Federation, the United Kingdom, and the United States (France and China are not parties). Underground testing of nuclear weapons is not included within the ban.

Commentary

Article 1 of the Nuclear Test Ban Treaty (or Limited Test Ban Treaty) provides:

> Each of the Parties to this Treaty undertakes to prohibit, to prevent, and not to carry out any nuclear weapon test explosion, or any other nuclear explosion, at any place under its jurisdiction or control:

10. *Id.* at 64.

> (a) in the atmosphere; beyond its limits, including outer space; or under water, including territorial waters or high seas . . . .

See the narrative on the Nuclear Test Ban Treaty prepared by the United States Arms Control and Disarmament Agency.[11]

10.2.2.7 1968 Treaty on the Nonproliferation of Nuclear Weapons

The 1968 Treat on the Nonproliferation of Nuclear Weapons is a multilateral treaty obligates nuclear-weapons States to refrain from transferring nuclear weapons or nuclear-weapons technology to nonnuclear-weapons States It obligates nonnuclear-weapons States to refrain from accepting such weapons from nuclear-weapons States or from manufacturing nuclear weapons themselves. The treaty does not apply in time of war, and parties may withdraw from the treaty if the supreme interests of a nation are at stake.

Commentary

Article I of the Nuclear Non-Proliferation Treaty provides:

> Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices.

Article II provides:

> Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire

11. *Id.* at 52.

> nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.

See the narrative on the Nuclear Non-Proliferation Treaty prepared by the United States Arms Control and Disarmament Agency.[12]

10.2.2.8 Bilateral Nuclear Arms Control Agreements

The United States and Russian Federation (as the successor State to the USSR) are parties to a number of bilateral agreements designed to either restrain the growth or reduce the number of nuclear warheads and launchers and reduce the risk of miscalculation that could trigger a nuclear exchange. Among these agreements are:

1. Hotline Agreements of 1963 and 1971

2. Accidents Measures Agreement of 1971

3. 1973 Agreement on Prevention of Nuclear War

4. Threshold Test Ban Treaty of 1974

5. 1976 Treaty on Peaceful Nuclear Explosions

6. Strategic Arms Limitation Talks (SALT) Agreements of 1972 and 1977 (SALT I—Interim Agreement has expired and SALT II was never ratified)

7. Intermediate Range Nuclear Forces Treaty of 1988

8. Strategic Arms Reduction Treaties (START) of 1991 (START I) and 1993 (START II). The START initiated the process of physical destruction of strategic nuclear warheads and launchers by the United States, Russian Federation, Ukraine, Belarus, and Kazakhstan (the latter four being recognized as successor States to the USSR for this purpose).

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12. *Id.* at 52.

On 14 June 2002, the Russian Federation announced its withdrawal from START II. On 24 May 2002, the United States and Russian Federation concluded the Strategic Offensive Reductions Treaty, whereby they had agreed to reduce and limit their respective strategic nuclear warheads to an aggregate number not to exceed 1,700–2,000 for each party by 31 December 2012. In April 2010, the United States and Russian Federation signed the New START, which entered into force on 5 February 2011 and has a 10-year duration. The United States and the Russian Federation agreed to extend the treaty until 3 February 2026. Like the START before it, New START continues efforts to reduce and limit nuclear warheads and launchers. In 2019, the United States withdrew from the Intermediate Range Nuclear Forces Treaty.

Commentary

On April 8, 2010, the United States and Russia signed the New Strategic Arms Reduction Treaty (New START), which limited each side's nuclear strike capabilities to:

- 700 deployed intercontinental ballistic missiles (ICBMs), deployed submarine-launched ballistic missiles (SLBMs), and deployed heavy bombers equipped for nuclear armaments;
- 1,550 nuclear warheads on deployed ICBMs, deployed SLBMs, and deployed heavy bombers equipped for nuclear armaments (each such heavy bomber is counted as one warhead towards this limit); and
- 800 deployed and non-deployed ICBM launchers, SLBM launchers, and heavy bombers equipped for nuclear armaments.

The Treaty does not limit conventional weapons or non-deployed ICBMs and SLBMs. It includes measures to conduct on-site inspections and exhibitions, exchange data, and provide notifications related to strategic offensive weapons and facilities covered by the Treaty. The agreement also has terms to facilitate employment of national technical means for monitoring and verification and exchange of missile telemetry flight data on up to five tests per side, per year.

New START entered into force on February 5, 2011. Both parties met the Treaty's central limits by the implementation deadline on February 5, 2018. On February 3, 2021, the United States and Russia agreed to extend New START through February 4, 2026, as permitted by the Treaty.

On February 3, 2021, Secretary of State Anthony J. Blinken issued the following media statement:

> Extending the New START Treaty ensures we have verifiable limits on Russian ICBMs, SLBMs, and heavy bombers until February 5, 2026. The New START Treaty's verification regime enables us to monitor Russian compliance with the Treaty and provides us with greater insight into Russia's nuclear posture, including through data exchanges and onsite inspections that allow U.S. inspectors to have eyes on Russian nuclear forces and facilities. The United States has assessed the Russian Federation to be in compliance with its New START Treaty obligations every year since the Treaty entered into force in 2011.

See the narratives of the bilateral nuclear arms control agreements prepared by the United States Arms Control and Disarmament Agency.[13]

10.3 CHEMICAL WEAPONS

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

Commentary

The Chemical Weapons Convention (or CWC) prohibits active chemical weapons agents and substances, which are categorized in three schedules. Schedule 1 includes materials that have previously been used as weapons. Schedule 2 includes dual use substances that

13. *See id.* at 31, 122 ("Hot Line" Agreements), 118 ("Accidents Measures" Agreement), 177 (Threshold Test Ban Treaty), 184 (Threshold Test Ban Treaty 1974), 191 (1976 Treaty on Peaceful Nuclear Explosions), 345 (Intermediate Range Nuclear Forces Treaty of 1988).

pose risks as weapons, but also have civilian applications. Schedule 3 covers substances and materials with less but not trivial risk, such as precursors. The chemicals in each schedule are subject to separate provisions regarding declarations of materials in inventory, destruction of weapons, and regulation of international and verification mechanisms.

The DoD Law of War Manual states:

> 6.8.3 Chemical Weapons. Chemical weapons are subject to a number of prohibitions.
>
> 6.8.3.1 *Definition of Chemical Weapons*. Under the Chemical Weapons Convention, chemical weapons mean the following, together or separately:
>
> > (a) Toxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes;
> >
> > (b) Munitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in subparagraph (a), which would be released as a result of the employment of such munitions and devices;
> >
> > (c) Any equipment specifically designed for use directly in connection with the employment of munitions and devices specified in subparagraph (b).
>
> *Toxic chemicals* refer to any chemical that through its chemical action on life processes can cause death, temporary incapacitation, or permanent harm to humans or animals. This includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions, or elsewhere. Chemicals that only cause harm to plants, such as herbicides, are not covered. In addition, toxic chemicals intended for purposes

not prohibited by the Chemical Weapons Convention are also excluded, so long as they are of a type and quantity consistent with these purposes that are not prohibited.

Precursor means any chemical reactant (including any key component of a binary or multicomponent chemical system) that takes part at any stage in the production by whatever method of a toxic chemical. *Key component of a binary or multicomponent chemical system* means the precursor that plays the most important role in determining the toxic properties of the final product and reacts rapidly with other chemicals in the binary or multicomponent system.

Equipment specifically designed for use directly in connection with the employment of such munitions and devices only applies to equipment designed solely for use with chemical weapons and does not, for example, include equipment that is designed also for purposes that are not prohibited.

6.8.3.2 *Prohibitions With Respect to Chemical Weapons*. Chemical weapons are subject to a number of prohibitions. It is prohibited:

- to use chemical weapons;
- to develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone;
- to engage in any military preparations to use chemical weapons; and
- to assist, encourage, or induce, in any way, anyone to engage in any activity prohibited to a Party to the Chemical Weapons Convention.

These prohibitions apply in any circumstances. For example, chemical weapons may not be used in international armed conflict and non-international armed conflicts. Similarly,

chemical weapons may not be used in retaliation after a State has suffered from a chemical weapons attack, even if that attack has been conducted by a State that is not a Party to the Chemical Weapons Convention.

6.8.3.3 *Obligation to Destroy Certain Chemical Weapons and Chemical Weapons Production Facilities*. In addition, a Party to the Chemical Weapons Convention has an obligation to destroy chemical weapons or chemical weapon production facilities it owns or possesses or that are located in a place under its jurisdiction or control. If U.S. armed forces encounter chemical weapons or chemical weapon production facilities during armed conflict, U.S. national authorities should be notified as soon as practicable. In addition, with due regard for safety and security considerations, reasonable efforts should be made to secure and retain information regarding the chemical weapons.

6.8.3.4 *Certain Uses of Toxic Chemicals Not Prohibited*. The Chemical Weapons Convention does not prohibit the use of toxic chemicals and their precursors for certain purposes. Toxic chemicals and their precursors that are used for these purposes are not considered chemical weapons, so long as they are of a type and quantity consistent with these permitted purposes. These purposes include:

- industrial, agricultural, research, medical, pharmaceutical, or other peaceful purposes;
- protective purposes, namely those purposes directly related to protection against toxic chemicals and to protection against chemical weapons;
- military purposes not connected with the use of chemical weapons and not dependent on the use of the toxic properties of chemicals as a method of warfare; and

- law enforcement, including domestic riot control purposes.

Seeking to develop and use means of protection against chemical weapons is permissible, provided such protection is not intended to facilitate the use of chemical weapons or for other purposes prohibited by the Chemical Weapons Convention.

10.3.1 Treaty Obligations

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

Commentary

The United States is party to the Chemical Weapons Convention, which prohibits the development, production, acquisition, stockpiling, retention, transfer, and use of chemical weapons. The Convention also requires the destruction of all chemical weapons and chemical weapons production facilities. In addition, the Convention prohibits the use of riot control agents (RCAs) as a "method of warfare." The United States ratified the Chemical Weapons Convention on April 25, 1997 and the Convention entered into force for the United States on April 29, 1997. The Convention has a verification regime that relies on data declarations, inspections of declared facilities (initial, routine, and closeout), continuous and non-continuous chemical

> weapons destruction monitoring, investigation of alleged chemical weapons use, and challenge inspections (CIs). The Organization for the Prohibition of Chemical Weapons receives and reviews declaration updates, and its Technical Secretariat Inspection Teams conduct inspections. The United States has submitted a national declaration, which is updated as required. Schedule 1 chemical weapons storage and destruction facilities in the United States and its territories are subject to routine inspections and continuous monitoring. U.S.-controlled facilities—including facilities outside the United States (OUT-U.S.), public vessels and state aircraft, and geographically separated units (e.g., ground force units participating in peacekeeping operations)—could be subject to a CI on relatively short notice. All DoD components must be prepared to host a Chemical Weapons Convention challenge inspection.[14]

Commanders may be required to submit to challenge inspections on board U.S. warships:

> One potential operational effect on the United States, as a State Party to the CWC, is the potential for access to public vessels or state aircraft, or geographically separated units (either as direct objects of a CI or entities within the CI perimeter), by inspectors for the very narrow purpose of conducting a CWC CI. Additionally, military facilities located outside the United States are subject to inspection. Since the CWC applies to any area under the jurisdiction or control of a State Party, there may be circumstances in which commanders are required to submit to an inspection both inside and outside the United States. As a State Party to the CWC, the USG has an obligation to demonstrate compliance with the provisions of the Convention. This demonstration may require that the United States provide access to a military facility, public vessel or state aircraft, or geographically separated unit subjected to a CI. Commanders, however, have the obligation to man-

14. *See* CJCSI 2030.01E, Chemical Weapons Convention Implementation and Compliancy Policy Guidance (Apr. 12, 2023).

> age access to protect sensitive systems and prevent unauthorized disclosure of classified, sensitive, and proprietary information.[15]

"Under no circumstances are commanders to permit an inspection without notifying their chain of command."[16] Further, "[f]or inspections of DoD facilities, public vessels or state aircraft, or a geographically separated unit, the unit commander retains ultimate responsibility for the safety and security of their command."[17] The right of "managed access" is to be employed "when providing access to military facilities or public vessels, state aircraft, and geographically separated units."[18] Public vessels and state aircraft may be subject to CIs "even though they may be in international waters or airspace at the time the CI is announced. Unless otherwise directed by their operational controlling authority, "commanders are not to permit a CI of their ship or aircraft while under way or airborne."[19]

SECNAVINST 5710.27A, Department of the Navy Readiness for Challenge Inspections under the Chemical Weapons Convention, states:

> a. Department of the Navy (DON) policy is to comply with the obligations of the CWC. This does not diminish or modify established requirements to comply with Navy and Marine Corps safety and security regulations and directives. During a challenge inspection, the DON's objective is to demonstrate compliance, when and if required, and to protect sensitive, proprietary and classified information.
>
> . . . .
>
> c. CWC challenge inspections do not alter existing DON command relationships or the operational chain of command. Commanders, Commanding Officers, and Officers in

15. *Id.* at Enclosure A ¶ 2.a.(2).
16. *Id.* at Enclosure A ¶ 2.b.(1).
17. *Id.* at Enclosure A ¶ 2.b.(2).
18. *Id.* at Enclosure A ¶ 2.b.(7).
19. *Id.* at Enclosure A ¶ 2.b.(8).

> Charge and Masters of USNS/MPS vessels, (hereinafter referred to as "Commanding Officers") of Navy and Marine Corps installations facilities, ships, submarines, aircraft, USNS vessels, and MPS designated for a challenge inspection shall coordinate such inspections and procedures with their chain of command. Once notified of a potential challenge inspection, Commanding Officers of ships and aircraft squadron commanders shall coordinate any departure or other movement of ships, aircraft, and naval forces with their operational chain of command. Ships and aircraft normally will not be required to remain in a U.S. or foreign port or airfield longer than their scheduled departure time solely to accommodate a challenge inspection.
>
> > (1) Commanding Officers are responsible under Navy Regulations for the routine conduct of operations, control of access, safety of visitors, protection of national security information, and compliance with U.S. Government obligations under international agreements. Only the Commanding Officer will exercise command authority at inspected DON or DON-controlled installations, bases, and facilities, or DON ships, submarines, aircraft, USNS vessels, and MPS.[20]

10.3.2 Riot Control Agents

The CWC defines RCAs as any chemical, not listed in a Schedule of the CWC, that can produce rapidly in human's sensory irritation or disabling physical effects that disappear within a short time following termination of exposure. States agree not to use RCAs as a method of warfare. The CWC does not define the term. The United States ratified the CWC subject to the understanding that nothing in the CWC prohibited the use of RCAs in accordance with EO 11850, Reunification of Certain Uses in War of Chemical Herbicides and Riot Control Agents.

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20. SECNAVINST 5710.27A, Department of the Navy Readiness for Challenge Inspections under the Chemical Weapons Convention, ¶ 5 (Dec. 3, 2018).

Commentary

See the U.S. Senate Hearing on Riot Control Agents, held on September 27, 2006.[21]

10.3.2.1 Riot Control Agents in Armed Conflict

Under EO 11850 and RCAs, the United States renounced the first use of RCAs in armed conflict, except in defensive military modes to save lives, in situations such as:

1. Riot control situations in areas under effective U.S. military control, to include control of rioting POWs

2. Situations in which civilians are used to mask or screen attacks and civilian casualties can be reduced or avoided

3. Rescue missions in remotely isolated areas involving downed aircrews and passengers or escaping POWs

4. Protection of convoys in rear-echelon areas from civil disturbances, terrorist activities, or paramilitary operations.

Such employment of RCAs by U.S. forces in armed conflict requires presidential approval.

The United States considers the prohibition on the use of RCAs as a method of warfare applies in international and non-international armed conflict, but it does not apply in normal peacekeeping operations, law enforcement operations, humanitarian and disaster relief operations, counterterrorist and hostage rescue operations, noncombatant rescue operations, and any other operations not considered international or internal armed conflict. CJCSI 3110.07D, Guidance Concerning Employment of Riot Control Agents and Herbicides, provides further guidance.

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21. *U.S. Policy and Practice with Respect to the Use of Riot Control Agents by the U.S. Armed Forces: Hearing Before the Subcommittee on Readiness and Management Support of the Senate Committee on Armed Services*, 109th Cong. 784 (2006).

Commentary

The DoD Law of War Manual states:

> 6.16 Riot Control Agents
>
> The use of riot control agents is subject to certain prohibitions and restrictions. Riot control agents are widely used by governments for law enforcement purposes (such as crowd control), but are prohibited as a method of warfare.
>
> 6.16.1 Definition of Riot Control Agents. *Riot control agents* mean any chemical not listed in a Schedule Annexed to the Chemical Weapons Convention, which can produce rapidly in humans sensory irritation or disabling physical effects that disappear within a short time following termination of exposure. Riot control agents include, for example, tear gas and pepper spray, but generally are understood to exclude the broader class of non-lethal weapons that may sometimes be used for riot control or other similar purposes, such as foams, water cannons, bean bags, or rubber bullets.
>
> The United States does not consider riot control agents to be "chemical weapons," or otherwise to fall under the prohibition against asphyxiating, poisonous, or other gases, and all analogous liquids, materials, or devices.
>
> 6.16.2 Prohibition on Use of Riot Control Agents as a Method of Warfare. It is prohibited to use riot control agents as a method of warfare. The United States has understood this prohibition not to prohibit the use of riot control agents in war in defensive military modes to save lives, such as use of riot control agents:
>
> - in riot control situations in areas under direct and distinct U.S. military control, including controlling rioting POWs;

- in situations in which civilians are used to mask or screen attacks and civilian casualties can be reduced or avoided;

- in rescue missions in remotely isolated areas, of downed aircrews and passengers, and escaping prisoners; and

- in rear echelon areas outside the zone of immediate combat to protect convoys from civil disturbances, terrorists, and paramilitary organizations.

These uses are as articulated in Executive Order 11850. Even though Executive Order 11850 predated the Chemical Weapons Convention (which could have created legal obligations that were inconsistent with Executive Order 11850), interpreting the Chemical Weapons Convention consistent with Executive Order 11850 was a condition of the Senate giving its advice and consent to ratification of the Chemical Weapons Convention. Thus, Executive Order 11850 has remained an important part of U.S. policy on the use of riot control agents.

In addition to being permitted in war in defensive military modes to save lives, it is not prohibited to use riot control agents in military operations outside of war or armed conflict. Specifically, the United States has taken the position that riot control agents may be used in the conduct of:

- peacetime military operations within an area of ongoing armed conflict when the United States is not a party to the conflict;

- consensual peacekeeping operations when the use of force is authorized by the receiving state, including operations pursuant to Chapter VI of the United Nations Charter; and

- peacekeeping operations when force is authorized by the Security Council under Chapter VII of the United Nations Charter.

10.3.2.2 Riot Control Agents in Time of Peace

Employment of RCAs in peacetime is not proscribed by either the 1925 Gas Protocol or the 1993 Chemical Weapons Convention and may be authorized by the SECDEF or, in limited circumstances, by the commanders of the CCMDs. Circumstances in which RCAs may be authorized for employment in peacetime include:

1. Civil disturbances in the United States, its territories, and possessions.

2. Protection and security on U.S. bases, posts, embassy grounds, and installations overseas, including riot control purposes.

3. Law enforcement:

   a. On-base and off-base in the United States, its territories, and possessions

   b. On-base overseas

   c. Off-base overseas when specifically authorized by the host government.

4. Noncombatant evacuation operations.

5. Security operations regarding the protection or recovery of nuclear weapons.

10.3.3 Herbicidal Agents

Herbicidal agents are gases, liquids, and analogous substances that are designed to defoliate trees, bushes, or shrubs, or kill long grasses and other vegetation that could shield the movement of enemy forces. The United States considers use of herbicidal agents in wartime is not prohibited by either the 1925 Gas Protocol or the 1993 Chemical Weapons Convention,

but formally renounced, in EO 11850, the first use of herbicides in time of armed conflict, except for control of vegetation within U.S. bases and installations or around their immediate defensive perimeters. Use of herbicidal agents during armed conflict requires presidential approval. Use of herbicidal agents in peacetime may be authorized by the SECDEF or, in limited circumstances, by commanders of the CCMDs. See CJCSI 3110.07D for further guidance.

Commentary

Executive Order No. 11850 (Renunciation of certain uses in war of chemical herbicides and riot control agents) provides:

> The United States renounces, as a matter of national policy, first use of herbicides in war except use, under regulations applicable to their domestic use, for control of vegetation within U.S. bases and installations or around their immediate defensive perimeters, and first use of riot control agents in war except in defensive military modes to save lives such as:
>
> (a) Use of riot control agents in riot control situations in areas under direct and distinct U.S. military control, to include controlling rioting prisoners of war.
>
> (b) Use of riot control agents in situations in which civilians are used to mask or screen attacks and civilian casualties can be reduced or avoided.
>
> (c) Use of riot control agents in rescue missions in remotely isolated areas, of downed aircrews and passengers, and escaping prisoners.
>
> (d) Use of riot control agents in rear echelon areas outside the zone of immediate combat to protect convoys from civil disturbances, terrorists and paramilitary organizations.[22]

22. 40 Fed. Reg. 16187, 3 C.F.R. (1971–75 Comp. 980) (Apr. 10, 1975).

The DoD Law of War Manual states:

6.17 Herbicides

The United States has renounced, as a matter of national policy, first use of herbicides in war except use, under regulations applicable to their domestic use, for control of vegetation within U.S. bases and installations or around their immediate defensive perimeters.

6.17.1 Definition of Herbicide. An herbicide is a chemical compound that will kill or damage plants. Herbicides that are harmless to human beings are not prohibited under the rule against the use of poison or poisoned weapons.

6.17.2 Chemical Weapons Convention and Herbicides. The Chemical Weapons Convention does not add any new constraints on the use of herbicides. The Chemical Weapons Convention addresses toxic chemicals that cause death, temporary incapacitation, or permanent harm to humans or animals, rather than plants. Moreover, even if an herbicide were such a toxic chemical, its use would likely be for a purpose not prohibited by the Chemical Weapons Convention.

6.17.3 ENMOD Convention and Herbicides. Under certain circumstances, the use of herbicides could be prohibited by the ENMOD Convention. However, the use of herbicides to control vegetation within U.S. bases and installations or around their immediate defensive perimeters has been understood by the United States to be permitted under international law.

6.17.4 Authority Under Domestic Law to Employ Herbicides in War. Use of herbicides in war by the U.S. armed forces requires advance Presidential approval. Additional regulations govern the use of herbicides.

10.4 BIOLOGICAL WEAPONS

International law prohibits all biological weapons or methods of warfare, whether directed against persons, animals, or plant life. United States domestic law prohibits the use of biological weapons for any purpose, including antimateriel purposes. See 18 U.S.C. § 175 *et seq*. Biological weapons include microbial or other biological agents or toxins—whatever their origin (i.e., natural or artificial)—or methods of production.

Commentary

The DoD Law of War Manual states:

> 6.9 Biological Weapons
>
> Biological weapons, including bacteriological and toxin weapons, are subject to a number of prohibitions and restrictions.
>
> 6.9.1 Biological Weapons—Prohibition on Use as a Method of Warfare. It is prohibited to use bacteriological methods of warfare. This prohibition includes all biological methods of warfare and the use in warfare of toxin weapons. For example, it is prohibited to use plague as a weapon.
>
> A prohibition against the use of biological weapons may be understood to result from U.S. obligations in the Biological Weapons Convention to refrain from developing, acquiring, or retaining biological weapons.
>
> Bacteriological or biological warfare is prohibited, at least in part, because it can have massive, unpredictable, and potentially uncontrollable consequences.
>
> 6.9.1.1 *Toxin Weapons*. The term *toxin* refers to poisonous chemical substances that are naturally produced by living organisms, and that, if present in the body, produce effects sim-

ilar to disease in the human body. Toxins are not living organisms and thus are not capable of reproducing themselves and transmissible from one person to another.

Toxin weapons have been regulated in connection with biological weapons because they have been produced in facilities similar to those used for the production of biological agents. However, even toxins that are produced synthetically, and not through biological processes, fall within these prohibitions. Substances that are classified as "toxins" for the purpose of applying the requirements of the Biological Weapons Convention may also be classified as "chemical weapons" that are subject to the requirements of the Chemical Weapons Convention.

6.9.2 Biological Weapons—Prohibition on Development, Acquisition, or Retention. It is also prohibited to develop, produce, stockpile, or otherwise acquire or retain:

- microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective, or other peaceful purposes; or

- weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.

6.9.3 Biological Weapons—Prohibition on Transfer or Assisting, Encouraging, or Inducing the Manufacture or Acquisition. It is also prohibited to transfer or to assist, encourage, or induce others to acquire biological weapons.

The exchange of equipment, materials, and scientific and technological information for the use of bacteriological and biological agents and toxins for peaceful purposes, such as the prevention of disease, however, is not restricted.

See also the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction.[23]

10.4.1 Treaty Obligations

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

Commentary

See the narratives prepared by the United States Arms Control and Disarmament Agency.[24]

10.4.2 U.S. Policy Regarding Biological Weapons

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

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23. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163.

24. UNITED STATES ARMS CONTROL AND DISARMAMENT AGENCY, *supra* note 8, at 129.

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

10.5 RADIOLOGICAL WEAPONS

Radiological weapons include radiological dispersal devices and radiological exposure devices. A radiological dispersal device is an improvised assembly or process—other than a nuclear explosive device—designed to disseminate radioactive material to cause destruction, damage, or injury. A radiological exposure device is a radioactive source placed to cause injury or death. Radiological weapons are not considered to be militarily useful for a State-sponsored military, but may be desirable for non-State actors and terrorist organizations wishing to inflict psychological and economic damage.

Commentary

Appendix A of JP 3-41, Chemical, Biological, Radiological, and Nuclear Response, states:

KEY LEGAL, STRATEGY, AND POLICY DOCUMENTS AND INTERNATIONAL PROTOCOLS

1. Legal, National Strategy, and National Policy Guidance

a. **Key Executive and Legislative Guidance.** The following documents are key references when addressing the DSCA mission area, to include CBRN response.

(1) **The White House Notice,** *Continuation of Emergency with Respect to Weapons of Mass Destruction*. Reissued every year since 1994, the notice concerns EO 12938, Proliferation of Weapons of Mass Destruction, and as amended, that a national emergency exists because of the worldwide threat posed by the proliferation and potential use of WMD.

(2) **PPD-1,** *Organization of the National Security Council System*, establishes the process and structure for the national security council system.

(3) **HSPD-1,** *Organization and Operation of the Homeland Security Council*, established the Homeland Security Council to ensure coordination of all HS-related activities among the executive departments and agencies and promote the effective development and implementation of all HS policies.

(4) **HSPD-3,** *The Homeland Security Advisory System*, provides the guidelines for a comprehensive and effective means to disseminate information regarding the risk of terrorist acts to federal, state, local, tribal, and territorial authorities and the American people. In 2011, DHS replaced the color-coded alerts of the HS Advisory System with the National Terrorism Advisory System, designed to more effectively communicate information about terrorist threats by providing timely, detailed information to the American public. This document establishes the five threat conditions and their respective protective measures.

(5) **DOD Strategy for CWMD** states that DOD seeks to ensure that the US and its allies and partners are neither attacked nor coerced by actors with WMD. It outlines three end states: no-new WMD possession, no-WMD use, and minimization of WMD effects. The strategy also establishes countering WMD priority objectives for the DOD, defines an approach for achieving them, and identifies essential activities and tasks.

(6) **HSPD-5,** *Management of Domestic Incidents*, assigns the Secretary of the DHS as the PFO for domestic incident management to coordinate the USG's resources utilized in response to, or recovery from terrorist attacks, major disasters, or other emergencies.

Additionally, HSPD-5 established the NIMS to provide a consistent nationwide approach for federal, state, and local governments to work effectively and efficiently together to prepare for, respond to, and recover from domestic incidents.

(7) **PPD-8,** *National Preparedness*, is aimed at strengthening the security and resilience of the US through systematic preparation for the threats that pose the greatest risk to the security of the nation, including acts of terrorism, cyberspace attacks, pandemics, and catastrophic natural disasters.

(8) **Federal Strategic Guidance Statement for Chemical Attacks in the United States.** The strategic guidance statement, issued pursuant to HSPD-8, Annex 1 (National Preparedness), guides USG efforts in addressing chemical attacks based on the applicable National Planning Scenarios along with threats of attacks using other possible chemical weapons.

(9) **HSPD-9,** *Defense of United States Agriculture and Food*, establishes a national policy to defend the agriculture and food system against terrorist attacks, major disasters, and other emergencies.

(10) **HSPD-10,** *Biodefense for the 21st Century*, outlines the essential pillars of our biodefense program and provides specific directives to further strengthen the significant gains put in place during the past three years. These pillars include threat awareness, prevention and protection, surveillance and detection, and response and recovery, which include response planning, mass casualty care, risk communication, medical countermeasures, and decontamination.

(11) **HSPD-14,** *Domestic Nuclear Detection*, seeks to protect against the unauthorized importation, possession, storage, transportation, development, or use of a nuclear explosive device, fissile material, or radiological material in the US, and to protect against attack using such devices or materials against the people, territory, or interests of the US.

(12) **HSPD-15,** *US Strategy and Policy on the War on Terror[ism] (U)*, discusses the coordination of all instruments of national power to meet six US goals for the war on terrorism: deny terrorists resources, enable partner nations to counter terrorism, combat WMD, defeat terrorists and their organizations, counter support for terrorism in coordination with partner nations, and establish conditions that counter ideological support for terrorism.

(13) **HSPD-18,** *Medical Countermeasures Against Weapons of Mass Destruction*, describes the principles from which national guidance is derived for addressing the challenges presented by the diverse CBRN threat spectrum, optimizing the investments necessary for medical countermeasures development, and ensuring that USG activities significantly enhance domestic and international response and recovery capabilities. Mitigating illness and preventing death from CBRN threats are the principal goals of the USG medical countermeasure efforts.

(14) **PPD-17,** *Countering Improvised Explosive Devices*, establishes and implements measures to prevent, protect against, respond to, recover from, and mitigate attacks using IEDs and their consequences at home and abroad.

(15) **HSPD-20,** *National Continuity Policy*, establishes a comprehensive national policy on the continuity of USG structures and operations and a single national

continuity coordinator responsible for coordinating the development and implementation of federal continuity policies. The policy establishes "national essential functions," prescribes continuity requirements for all executive departments and agencies, and provides guidance for state, local, territorial, and tribal governments and private sector organizations in order to ensure a comprehensive and integrated national continuity program that will enhance the credibility of the USG national security posture and enable a more rapid and effective response to and recovery from a national emergency.

(16) **HSPD-21,** *Public Health and Medical Preparedness*, establishes a national strategy for public health and a medical preparedness strategy which builds upon principles set forth in HSPD-10, *Biodefense for the 21st Century*. The directive sets forth policy enabling the provision of public health and medical needs of the American people in the case of a catastrophic health incident through continual and timely flow of information and rapid public health and medical response that marshals all available nation capabilities and capacities in a rapid and coordinated manner.

(17) **HSPD-22,** *Domestic Chemical Defense (U)*, establishes a national policy and directs actions to strengthen the ability of the US to prevent, protect from, and respond to, and recover from terrorist attacks employing toxic chemicals and other chemical incidents.

(18) **The NSS and the National Military Strategy (NMS).** The NSS establishes broad strategic guidance for advancing US interests in the global environment through the instruments of national power. The NMS describes how the USG will employ military forces to protect and advance US interests.

(19) **The National Strategy for HS.** Prepared for the President by the Office of Homeland Security, this document lays out the strategic objectives, organization, and critical areas for HS. The strategy identifies critical areas that focus on preventing terrorist attacks, reducing the nation's vulnerabilities, minimizing the damage and recovering from said attacks.

(20) **National Strategy for Countering Biological Threats.** Issued by the National Security Council, this strategy guides efforts to prevent acts of bioterrorism or other significant outbreaks of infectious disease by reducing the risk of misuse of the life sciences or derivative materials, techniques, or expertise that will result in the use or intent to use biological agents to cause harm. It also complements existing policies, plans, and preparations to advance the USG's ability to respond to public health crises of natural, accidental, or deliberate origin.

(21) **National Strategy for Combating Terrorism.** Expands on the National Strategy for HS and the NSS by expounding on the need to destroy terrorist organizations, win the war of ideas, and strengthen America's security at home and abroad. While the national strategy focuses on preventing terrorist attacks within the US, this strategy is more proactive and focuses on identifying and defusing threats before they reach our borders. The direct and continuous action against terrorist groups can disrupt, degrade, and destroy their capability to attack the US.

(22) **National Strategy for Pandemic Influenza.** Issued by the Homeland Security Council, this strategy presents the USG approach to address the threat of PI. It outlines how the nation prepares, detects, and responds to a pandemic by documenting the responsibilities of federal, state, and local governments;

private industry; international partners; and American citizens.

(23) **Strategy for HD and DSCA.** This strategy establishes strategic guidance for securing the US from direct attack by using an active, layered defense construct. Expands on the DSG by establishing a lead, support, and enable construct in organizing DOD objectives. Provides specific objectives to support managing the consequences of CBRN and bulk HE use resulting in mass casualties.

(24) **FAA of 1961.** Establishes DOS as the LFA for USG assistance to a foreign country during a disaster and describes the procedures for conducting that relief as well as the congressionally authorized funding.

(25) **Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act** (USA PATRIOT Act of 2001 [as amended]). This act enhances domestic security against terrorism. It eases some of the restrictions on foreign intelligence gathering within the US and affords the US intelligence community greater access to information discovered during a criminal investigation.

(26) **The Robert T. Stafford Disaster Relief and Emergency Assistance Act, (Title 42, USC, Sections 5121–5207).** The Stafford Act provides for assistance by the USG to the states in the event of natural and other disasters and emergencies. It is the primary legal authority for federal participation in domestic DR. Under the Stafford Act, the President may direct federal agencies, including DOD, to support DR. DOD may be directed to provide assistance in one of three different scenarios: a Presidential declaration of a major disaster, a Presidential order to perform emergency work for the preservation of life

and property, or a Presidential declaration of emergency.

(27) **The Economy Act of 1932 (Title 31, USC, Section 1535).** The Economy Act authorizes federal agencies to provide goods or services on a reimbursable basis to other federal agencies, when more specific statutory authority to do so does not exist.

(28) **PCA (Title 18, USC, Section 1385).** This statute limits the use of federal military personnel to perform civilian law enforcement activities. The PCA generally prohibits the use of US Army and US Air Force active duty (Title 10, USC) personnel for civilian law enforcement activities, except as authorized by the US Constitution or by statute. Additionally, DOD policy extends the prohibitions of the PCA to US Navy and US Marine Corps active duty (Title 10, USC) personnel. DODI 3025.21, *Defense Support of Civilian Law Enforcement Agencies*, details express statutory exceptions to the PCA, such as the Insurrection Act and emergency assistance involving WMD, which, upon appropriate notifications and approval, allow for the otherwise prohibited use of federal military personnel to support civilian law enforcement activities during civilian led-CBRN response operations.

(29) **Title 10, USC (Armed Forces).** Title 10, USC, provides guidance on the Armed Forces. Guidance is divided into five subtitles. One covers general military law and one each for the US Army, US Navy, US Marine Corps, the US Air Force, and the RC. Chapter 18 (Sections 371–382) of Title 10, USC, is entitled and governs Military Support for Civilian Law Enforcement Agencies. Title 10, USC, Section 375, directs SecDef to promulgate regulations that prohibit "direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search,

seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law."

(30) **Title 14, USC (Coast Guard).** Sections 1, 2, 19, 88, 89, 99, 141, and 143, define the statutory authority of the USCG during HS missions.

(31) **Title 32, USC (National Guard).** Specifically, Title 32, USC, authorizes the use of US federal funds to train NG members, while they remain under the C2 of their respective state governors. In certain limited instances, specific statutory or Presidential authority allows for NG forces to perform DOD operational missions funded by the USG under Title 32, USC, authority, while they remain under the C2 of the governor. Examples of those exceptions include the employment of WMD-CSTs, HD activities, and the President of the United States-directed airport security mission.

(32) **Memorandum of Understanding Between the Intelligence Community, Federal Law Enforcement Agencies, and the DHS Concerning Information Sharing, 4 March 2003.** This agreement provides a framework and guidance to govern information sharing, use, and handling among the following individuals and their agencies: Secretary of Homeland Security, Director of National Intelligence, the Attorney General, and any other organization having federal law enforcement responsibilities (other than those that are part of the DHS). The agreement mandates minimum requirements for information sharing, use, and handling and for coordination and deconfliction of analytic judgments.

(33) **Memorandum of Agreement Between the Department of Defense and Department of Homeland Security on the Use of US Coast**

Guard Capabilities and Resources in Support of the National Military Strategy, 23 May 2008. This agreement provides for the identification of certain national defense capabilities of the USCG and improves the process by which the USCG serves as a force provider for DOD missions.

(34) **NRF.** The NRF focuses on response and short-term recovery, and articulates doctrine, principles, and architectures by which the US prepares for and responds to all- hazard disasters across all levels of government. The NRF and supporting annexes are available at www.fema.gov/nrf.

(35) **Inter-Departmental Memorandum of Understanding for Foreign Consequence Management Preparedness and Response.** The purpose of this MOU is to synchronize and integrate USG foreign consequence management (now ICBRN-R) efforts. The MOU details the USG's goals and objectives relating to foreign consequence management (now ICBRN-R) and provides policy relating to roles and responsibilities of departments and agencies to prepare for and respond to a CBRN incident on foreign soil.

(36) **National Strategy for Biosurveillance.** This strategy articulates an overarching goal supported by core functions. Through a deliberate emphasis on the identified core functions and enabling focus areas, the aim is to enhance the Nation's ability to detect, track, investigate, and navigate incidents affecting human, animal, and plant health, thereby better protecting the safety, well-being, and security of the American people.

b. **Key DOD Guidance.** The following discussion identifies a number of key documents to make commanders

and planners more aware of material that may assist in the planning and execution of the CBRN mission areas.

(1) **UCP.** The UCP provides basic guidance to all unified CCDRs, establishes their missions and responsibilities, delineates the general geographical AORs for GCCs, and specifies functional responsibilities for functional CCDRs.

(2) **DSG.** DSG establishes and directs how to accomplish broad strategic objectives. Provides HD implementation guidelines.

(3) **DOD Strategy for CWMD.** The pursuit of WMD and potential use by actors of concern pose a threat to US national security and peace and stability around the world. The 2014 DOD Strategy for Countering Weapons of Mass Destruction represents the DOD's response to this global WMD threat. It specifies desired end states, prescribes priority objectives, delineates a strategic approach for achieving those objectives, and outlines the CWMD activities and tasks necessary for success.

(4) **National Military Strategic Plan for the War on Terrorism.** This plan constitutes the comprehensive military plan to prosecute the global war on terrorism for the Armed Forces of the United States. It is the plan that guides the contributions of the CCMDs the Military Departments, combat support agencies, and field support activities of the US to protect and defend the homeland, attack terrorists and their capacity to operate effectively at home and abroad, and support mainstream efforts to reject violent extremism.

(5) **DODI 2000.12,** *DOD Antiterrorism (AT) Program.* This instruction updates policies and assigns responsibilities for implementing the procedures for the

DOD AT program. It establishes CJCS as the principal advisor and focal point responsible to SecDef for DOD AT issues. It also defines the AT responsibilities of the Military Departments, commanders of CCMDs, DOD agencies, and DOD field activities. Its guidelines are applicable for the physical security of all DOD activities both overseas and in the homeland.

(6) **DODI 3025.20,** *Defense Support of Special Events*. This instruction provides definitions for a special event and support and outlines policy guidelines and responsibilities for DOD support of special events. It allows for the DOD component to designate a special events coordinator who is charged with providing timely information and technical support to the ASD (HD&GS).

(7) **DODD 2060.02,** *Department of Defense (DOD) Combating Weapons of Mass Destruction (WMD) Policy*. This directive recognizes the need for the Services to be prepared to support CWMD operations and directs Services to organize, train, and equip their forces to support them.

(8) **DODD 3025.18,** *Defense Support of Civil Authorities (DSCA)*. This directive provides guidance for the execution and oversight of DSCA when requested by civil authorities approved by the appropriate DOD official or as directed by the President. It authorizes immediate response authority for providing DSCA when requested and authorizes emergency authority for the use of military force under dire situations.

(9) **DODI 3025.21,** *Defense Support of Civilian Law Enforcement Agencies*. This instruction provides guidance on DSCA activities for civil disturbances and civil disturbance operations, including response to terrorist incidents, and covers the policy and procedures

whereby the President is authorized by the Constitution and laws of the US to employ the Armed Forces to suppress insurrections, rebellions, and domestic violence under various conditions and circumstances. Planning and preparedness by the USG and the DOD for civil disturbances are important due to the potential severity of the consequences of such incidents for the nation and the population.

(10) **DODD 3150.08,** *DOD Response to Nuclear and Radiological Incidents*. This directive promulgates policy and assigns responsibilities for DOD CBRN response to US nuclear weapon incidents and other nuclear or radiological incidents involving materials in DOD custody IAW the guidance in NSPD-28, *US Nuclear Weapons Command and Control, Safety, and Security*; the NRF; and the NIMS.

(11) **DODD 5100.46,** *Foreign Disaster Relief (FDR)*, details DOD policy for conducting DR operations which covers the scenarios of foreign consequence management (now ICBRN-R) and DOD-led CBRN response on foreign soil.

(12) **DODD 5200.27,** *Acquisition of Information Concerning Persons and Organizations not Affiliated with the Department of Defense*. This directive establishes the Defense Investigative Program general policy, limitations, procedures, and operational guidance pertaining to the collecting, processing, storing, and disseminating of information concerning persons and organizations not affiliated with DOD.

(13) **DODD 5240.01,** *DOD Intelligence Activities*. This directive is the primary authority used as guidance by DOD intelligence personnel and those performing an intelligence or counterintelligence function to collect, process, retain, or disseminate information concerning US persons.

(14) **DOD 5240.1-R,** *Procedures Governing the Activities of DOD Intelligence Components That Affect United States Persons*. This regulation sets forth procedures governing the activities of DOD intelligence components that affect US persons, to include the collection, retention, processing, and dissemination of US persons' information.

(15) **Department of Defense Manual (DODM) 3150.08-M,** *Nuclear Weapon Accident Response Procedures (NARP)*. This manual is issued under the authority of DODD 3150.08, *DOD Response to Nuclear and Radiological Incidents*. It provides a concept of operations as well as functional information necessary to execute a comprehensive and unified response to a nuclear weapon accident. It provides information for planners and response elements to understand the overall response concept and roles of DOD and the Department of Energy/National Nuclear Security Administration.

(16) **DODI 3020.52,** *DOD Installation Chemical, Biological, Radiological, Nuclear, and High-Yield Explosive (CBRNE) Preparedness Standards*. This instruction implements policy, assigns responsibilities, and prescribes procedures to establish and implement a program for a worldwide DOD installation hazard response to manage the consequences of a CBRN and bulk HE incident. It provides guidance for the establishment of a CBRN and bulk HE preparedness program for emergency responders at all DOD installations. It also prescribes that DOD installation emergency responders must be prepared to respond to the effects of a CBRN or bulk HE incident to preserve life, prevent human suffering, minimize the effects of incident hazards, and protect critical assets and infrastructure.

(17) **DODI 2000.21,** *DOD Support to International Chemical, Biological, Radiological, and Nuclear (CBRN) Incidents*. This instruction establishes policy and assigns responsibilities for DOD support to the United States Government response to international CBRN incidents.

(18) **DODI 3001.02,** *Personnel Accountability in Conjunction with Natural or Manmade Disasters*. This instruction establishes policy and assigns responsibilities for accounting and reporting of specified DOD-affiliated personnel, within CONUS and outside CONUS, following a natural or man-made disaster.

(19) **DODI 6055.17,** *DOD Installation Emergency Management (IEM) Program*. This instruction is a reference for response of a DOD installation to a CBRN incident.

(a) Establishes policy, assigns responsibilities, and prescribes procedures for developing, implementing, and sustaining installation emergency management (IEM) programs at DOD installations worldwide for "all hazards" as defined in the glossary. Establishes the goals of the DOD IEM Program as follows:

1. Prepare DOD installations for emergencies.

2. Respond appropriately to protect personnel and save lives.

3. Recover and restore operations after an emergency.

(b) Aligns DOD emergency management activities with NIMS, the National Preparedness Guidelines, and the NRF.

(c) Establishes the DOD Emergency Management Steering Group.

(20) **DODI 6200.03,** *Public Health Emergency Management within the Department of Defense*. Establishes DOD guidance IAW applicable law and ensures mission assurance and readiness by protecting installations, facilities, personnel, and other assets in managing the impact of public health emergencies caused by all-hazards incidents.

(21) **CJCSI 3121.01,** *Standing Rules of Engagement/Rules for the Use of Force for US Forces (Classified)*. This instruction provides the SRUF to be employed by US forces in a Title 10, USC, status performing DSCA missions.

(22) **CJCSI 3125.01,** *Defense Response to Chemical, Biological, Radiological, and Nuclear (CBRN) Incidents in the Homeland*. This instruction provides operational and policy guidance and instructions for US military forces responding to domestic CBRN and bulk HE incidents. This instruction applies only to domestic operations. This instruction is of specific importance to the geographic CCMDs with domestic CBRN and bulk HE responsibilities. It identifies that domestic support encompasses both deliberate and inadvertent CBRN and bulk HE situations including terrorism, acts of aggression, industrial accidents, and acts of nature. It recognizes that these operations may be conducted by US military forces under immediate response authority and in support of the designated LFA.

(23) **CJCSI 3214.01,** *Defense Support for Chemical, Biological, Radiological, and Nuclear Incidents on Foreign Territory*. This instruction provides guidance for US military forces supporting USG-led foreign consequence management (now ICBRN-R) operations and DOD-

led CBRN response operations in response to a CBRN incident.

(24) **Guidance for Employment of the Force (GEF).** The GEF and the Joint Strategic Capabilities Plan (JSCP) inform DOD how to employ, and in part manage, the force in the near term. The GEF provides strategic planning guidance and identifies security cooperation focus areas for campaign planning—both foreign language for US forces and English skills for allies.

(25) **JSCP.** The JSCP provides guidance to the CCDRs and the Joint Chiefs of Staff to accomplish tasks and missions based on current military capabilities. It apportions limited forces and resources to CCDRs, based on military capabilities resulting from completed program and budget actions and intelligence assessments. The JSCP provides a coherent framework for capabilities-based military advice provided to the President and SecDef.

2. Key International Legal Documents

a. Canada-United States (CANUS) Agreements

(1) **Integrated Line of Communications (ILOC) Agreements.** The CANUS ILOC agreements facilitate cooperation in training and operations and provides for reciprocal logistical support, supplies, and/or services in non-routine situations.

(2) **Canada-US Agreement for Enhanced Military Cooperation.** Under this agreement, both countries work together on contingency plans for defending against and responding to possible threats in Canada and the US including natural disasters and potential terrorist attacks.

(3) **Temporary Cross-Border Movement of Land Forces Between the United States and Canada Agreement.** This agreement provides principles and procedures for temporary cross-border movement of land forces between the two nations.

(4) **Canadian–United States Regional Emergency Management Agreements.** Emergency management officials in Canada and the US have regional mutual assistance agreements to manage emergencies or disasters when the affected jurisdiction(s) requests assistance in response to natural disasters, technological hazards, man-made disasters, and civil emergencies. These agreements are compliant with the *Agreement between the Government of the United States and the Government of Canada on Cooperation in Comprehensive Emergency Planning and Management*. These agreements promote unity of effort with civil authorities in planning and executing military support to civilian authorities. Three regional agreements implement regional emergency management mutual assistance covering specific states and provinces:

(a) Pacific Northwest Emergency Management Agreement.

(b) Prairie Region EMAC.

(c) International Emergency Management Assistance Memorandum of Understanding.

(5) **Joint Radiological Emergency Response Plan (JRERP).** The CANUS JRERP establishes the basis for cooperative measures to deal effectively with a potential or actual peacetime radiological incident involving Canada, the US, or both countries. The JRERP will apply whenever a potential or actual ra-

diological incident occurs that can affect both countries or, although affecting one country, is of a magnitude that the affected country may need to request assistance from the other. The JRERP is designed to:

(a) Alert the appropriate federal authorities within each country of the existence of a threat from a potential or actual radiological incident.

(b) Establish a framework of cooperative measures to reduce, to the extent possible, the threat posed to public health and safety, property, and the environment.

(c) Facilitate coordination between organizations of the federal government of each country in providing support to states and provinces affected by a potential or actual radiological incident.

(6) **Inland Pollution Contingency Plan,** June 1998. The US EPA and Environment Canada recognize that there is a high probability that there will be a spill or other release of oil or hazmat along the common border between Canada and the US. The CANUS Joint Inland Pollution Contingency Plan provides for cooperative measures for dealing with accidental and unauthorized releases of pollutants that cause or may cause damage to the environment along the shared inland boundary and that may constitute a threat to the public health, property, or welfare. The Inland Plan is made up of five regional annexes or regional plans.

b. **Military Agreements**

(1) **CANUS Civil Assistance Plan.** The CANUS Civil Assistance Plan provides a framework for the

military of one nation to provide support to the military of the other nation in the performance of DSCA operations.

(2) **Quadripartite Standardization Agreements (QSTAGs).** The military forces of the US, United Kingdom, Canada, Australia, and New Zealand have agreed to adopt certain standard operational concepts in various QSTAGs. The military forces further agreed to consult and wherever possible, reach mutual agreement, before introducing changes to these agreements.

(3) **North Atlantic Treaty Organization (NATO) Standardization Agreements (STANAGs).** STANAGs are promulgated by the Director, NATO Standardization Agency. No departure may be made from these agreements without informing the tasking authority in the form of a reservation at the time of ratification. Ratifying nations have agreed that national orders, manuals, and instructions implementing these STANAGs will be developed. The aim of these agreements is to provide guidelines to commanders about operational issues. Participating nations agree that NATO armed forces will adopt the standards outlined in each agreement.

c. **SPP.** The SPP agreement, designed to reduce barriers to trade and facilitate economic growth while improving the security of the continent, was signed on 23 March 2005 by the President of the United States, the Prime Minister of Canada, and the President of Mexico. DHS and the HS Council are the lead agencies for the agreement's security components, with DOD as a supporting agency. The SPP Action Plan addresses goals and objectives associated with HS to include "protection, prevention, and response." This includes a dual-binational (US/Canada and US/Mexico) objective on emergency management cooperation to develop and implement

joint plans for cooperation in incident response, as well as conduct joint training and exercises in hazard response. This includes the development of a plan to build and strengthen mechanisms, protocols, and agreements for communicating and coordinating hazard response for mutual assistance and cooperation in the event of natural and technological/industrial disasters or malicious acts involving CBRN and bulk HE devices and hazards.

. . . .

e. **International Agreements that Affect US CBRN Activities with Mexico**

(1) **Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.** The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal is the most comprehensive global environmental agreement on hazardous and other wastes. While the US is not a party to the agreement, it is a signatory and conducts activities with many of the convention's 178 parties to help protect human health and the environment against the adverse effects resulting from the generation, management, transboundary movements, and disposal of hazardous and other wastes.

(2) **Convention on the Transboundary Effect of Industrial Accidents.** This convention applies to the prevention of, preparedness for, and response to industrial accidents capable of causing transboundary effects, including the effects of such accidents caused by natural disasters, and to international cooperation concerning mutual assistance, research and development, exchange of information, and exchange of technology in the area of prevention of, preparedness for, and response to industrial accidents.

(3) **International Convention on Oil Pollution Preparedness** provides emergency response planning for oil pollution incidents.

(4) **The Organization for Economic Co-Operation and Development Guiding Principles for Chemical Accident Prevention, Preparedness, and Response.** A comprehensive document to help public authorities, industry, and communities worldwide prevent and prepare for accidents involving hazardous substances resulting from technological and natural disasters, as well as sabotage.

(5) **Mexico-US Joint Contingency Plan Preparedness for and Response to Emergencies and Contingencies Associated with Chemical Hazardous Substances in the Inland Border.** Also referred to as the Inland Border Plan, its purpose is to protect the health, human safety and the environment, providing joint and coordinated responses to significant chemical hazardous substances contingencies or emergencies that affect the inland border area between Mexico and the US. It provides a mechanism for cooperation between Mexico and the US to provide response to a chemical hazardous substances contingency or emergency that may resent a significant threat for both participants or that affects one of them in such a way that justifies the notification of the other participant or RFA.[25]

25. JP 3-41, Chemical, Biological, Radiological, and Nuclear Response, at A-1 to A-13 (Sept. 9, 2016).

CHAPTER 11

TREATMENT OF DETAINED PERSONS

11.1 INTRODUCTION

The law of armed conflict requires humane treatment for all persons who are detained. Treatment detained persons receive above and beyond this minimum standard is dependent on their status at the time they are detained. This chapter examines standards of treatment required for combatants, unprivileged belligerents, noncombatants, and civilians (see 5.4 for definitions).

Commentary

The Hague Conventions of 1907 were an early effort to codify the treatment of captured persons. The 1929 Geneva Convention relative to the Treatment of Prisoners of War further developed POW protection. The issue was comprehensively addressed in the 1949 GC III and in AP I. Since the United States is a party to GC III, it is binding treaty law. The United States is not a party to AP I.

11.2 HUMANE TREATMENT

Pursuant to international law and U.S. policy, all persons under the control of DOD personnel (military, civilian, or contractor employee) during any military operation must be treated humanely and protected against any cruel, inhuman, or degrading treatment until their final release, transfer, or repatriation. At a minimum, humane treatment includes compliance with Common Article 3 of the Geneva Conventions of 1949 in both international and non-international armed conflict. During international armed conflict, Additional Protocol I, Article 75 to the Geneva Conventions, provides additional fundamental guarantees. Although not a party to Additional Protocol I, the United States applies the fundamental guarantees reflected in Article 75 in all international armed conflicts.

Humane treatment is, at a minimum, protection from unlawful threats or acts of violence and deprivation of basic human necessities. It will be afforded to all detained persons without adverse distinction based on race, color, religion or faith, sex, birth or wealth, national or social origin, political

opinion, or any other similar criteria. The following acts are prohibited with respect to all detainees in DOD custody and control:

1. Violence, torture, and cruel treatment

2. Humiliating or degrading treatment

3. Public curiosity and insults

4. Rape, enforced prostitution, and other indecent assault

5. Biological or medical experiments

6. Threats to commit any of the acts above.

Any violation of these rules is strictly prohibited and is not justified by the stress of combat or provocation.

All detainees shall:

1. Receive appropriate medical attention and treatment

2. Receive sufficient food, drinking water, shelter, and clothing

3. Be allowed the free exercise of religion, consistent with the requirements for safety and security

4. Be removed as soon as practicable from the point of capture and transported to detainee collection points, holding facilities, or other internment facilities operated by DOD components

5. Have their person registered, their property accounted for, and records maintained according to applicable law, policy, and regulation, including notice of their detention to the ICRC, and timely access for an ICRC representative to visit them

6. Be respected as human beings.

Detainees may have appropriate contact with the outside world subject to security measures, practical considerations, and other military necessities, including through correspondence, videos, and family contact.

Beyond the baseline humane treatment standard set forth in this section, some persons detained may qualify for POW status under the GPW. If doubt exists as to how to treat a particular detainee, U.S. military personnel should seek guidance through their chain of command. Until this doubt has been resolved, detainees must receive the protections of a POW under the GPW.

The commander should have and be familiar with the following references in making any determinations or seeking guidance relative to detainees. These are in addition to any mission-specific or theater-specific operational orders.

1. DODD 2310.1E

2. DODD 3115.09, Department of Defense Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning

3. JP 3-63, Detainee Operations

4. AR 190-8/OPNAVINST 3461.6/AFJI 31-304/MCO 3461.1, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees

5. FM 3-63, Detainee Operations

6. FM 2-22.3, Human Intelligence Collector Operations.

Commentary

Common Article 3 to the 1949 Geneva Conventions provides, in relevant part:

> Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and

> those placed "hors de combat" by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

This provision applies in both international and non-international armed conflicts. DoD policy has explicitly incorporated the standards in Common Article 3 as minimum standards. For example, DoDD 2310.01E, DoD Detainee Program, provides: "Until a detainee's release, repatriation, or transfer from DoD custody or control, all persons subject to this issuance will, without regard to a detainee's legal status, at a minimum apply . . . [t]he standards established in Common Article 3 to the Geneva Conventions of 1949."[1] DoDD 2310.01E also requires that all detainees "be treated humanely."[2]

Moreover, the United States is of the view that Article 75 of AP I sets forth minimum standards of treatment that accurately reflect the customary law binding upon the United States.[3]

Detainees shall be treated humanely without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, national or social origin, political or other opinion, or any other similar criteria.[4]

All detainees must be treated humanely and protected against cruel, inhuman, or degrading treatment. This requirement has been reflected in international law, domestic law,[5] national policy,[6] and DoD policies (see the sources cited in the text). Failure to treat detainees humanely may violate international and domestic criminal law.

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1. DoDD 2310.01E, DoD Detainee Program, ¶ 3.3 (Mar. 15, 2022).
2. *Id.* ¶ 1.2.b.
3. *See* Press Release, White House, Fact Sheet: New Actions on Guantánamo and Detainee Policy (Mar. 7, 2011); DOD LAW OF WAR MANUAL, § 8.1.4.2.
4. GC I, art. 3; GC II, art. 3; GC III, art. 3; GC IV, art. 3; DOD LAW OF WAR MANUAL, § 8.2.6. *See also* AP I, art. 75(1); AP II, art. 2(1).
5. 42 U.S.C. § 2000dd.
6. *See, e.g.*, Exec. Order No. 13491, Ensuring Lawful Interrogations, 74 Fed. Reg. 4893, 4894 (Jan. 22, 2009).

Detainees must be protected against violence to life and person, particularly murder of all kinds, mutilation, cruel treatment, torture, and any form of corporal punishment.[7] They must also be protected against outrages upon personal dignity, particularly humiliating and degrading treatment.[8] This includes protection against rape, forced prostitution, and other indecent assault. Indecent assault is generally referred to today as sexual assault. Detainees are also protected against insults and public curiosity. For example, displaying detainees publicly to expose them to ridicule and humiliation is prohibited: "All detainees will be respected as human beings . . . . They will be protected against . . . public curiosity . . . ."[9] Furthermore, "humane treatment implies that detainees will be protected from insults and public curiosity."[10] To protect detainees against public curiosity, amongst other reasons, DoD policy has generally prohibited the taking of photographs of detainees except for authorized purposes.[11] Medical and biological experiments involving detainees are likewise forbidden. The principle requiring humane treatment of detainees "also incorporates the prohibition against torture and other forms of cruel, inhuman or degrading treatment or punishment, the prohibition against corporal and collective punishment and medical experiments; and includes threats to commit the foregoing acts."[12]

Threats to commit the unlawful acts described above (i.e., violence against detainees, humiliating or degrading treatment, or biological or medical experiments) are also prohibited.[13] This prohibition may be understood to arise separately (i.e., as a distinct prohibition against certain threats), or it may be understood to result when such threats

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7. GC I, art. 3; GC II, art. 3; GC III, art. 3; GC IV, art. 3.

8. DOD LAW OF WAR MANUAL, § 8.2.2.

9. DoDD 2310.01E, DoD Detainee Program, ¶ 3.4.b (Mar. 15, 2022). *See also* DoDD 2310.01E, The Department of Defense Detainee Program, ¶ E4.1.1.3 (Sept. 5, 2006).

10. Copenhagen Process on the Handling of Detainees in International Military Operations, The Copenhagen Process: Principles and Guidelines annex (Chairman's Commentary) ¶ 2.3 (Oct. 19, 2012).

11. *See, e.g.*, Army Regulation 190-8/Office of the Chief of Naval Operations Instruction 3461.6/Air Force Joint Instruction 31-304/Marine Corps Order 3461.1, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, § 1-5.d (Oct. 1, 1997).

12. Copenhagen Process, *supra* note 10, annex ¶ 2.1.

13. DOD LAW OF WAR MANUAL, § 8.2.4.

> constitute torture or other abuse. For example, 18 U.S.C. § 2340 defines "torture" to include "severe mental pain or suffering" caused by or resulting from:
>
> > (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
> >
> > (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
> >
> > (C) the threat of imminent death; or
> >
> > (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality . . . .
>
> Wounded and sick detainees shall be cared for.[14] They should receive the medical care and attention required by their condition.[15] Medical care should, wherever possible, be undertaken with the consent of the wounded or sick detainee.[16] However, medical actions to preserve the detainee's health may be justified even if the detainee refuses to consent. For example, it is not prohibited to administer vaccinations to detainees to maintain their health and prevent epidemics. Similarly, it is not prohibited to order detainees to be fed if they undertake a hunger strike.[17]
>
> Detainees shall be provided with adequate food, drinking water, and clothing.[18] Daily food rations for detainees shall be sufficient in quantity, quality, and variety to keep detainees in good health or, in

14. *Id.* § 8.8.
15. *See, e.g.*, Copenhagen Process, *supra* note 10, annex ¶ 9.
16. DODI 2310.08E, Medical Program Support for Detainee Operations, ¶ 4.7 (June 6, 2006).
17. *Id.* ¶ 4.7.1.
18. DOD LAW OF WAR MANUAL, § 8.5.

> any event, no worse than that afforded the local civilian population. DoD practice has been to account for the internees' customary diet. For example, the detainee's cultural and religious requirements have been considered in determining and ensuring the appropriate diet. Sufficient drinking water shall be supplied to detainees. As needed, detainees shall receive adequate clothing, underwear, and footwear suitable for the climate.
>
> Detainees shall be granted free exercise of religion, consistent with the requirements of detention.[19] Their religious practices shall be respected; they shall be allowed to practice their religion, and, if requested and appropriate, they may receive spiritual assistance from persons, such as chaplains, performing religious functions. DoD practice has been for detainees to be provided religious materials of their faith (e.g., copies of religious texts), as well as time and other accommodations for religious exercise.[20]
>
> A proper accounting of detainees is an important part of a State's implementation of the requirements of humane treatment.[21] The detaining authority should register detainees within a reasonable time, taking into account other essential tasks and resource limitations that may affect the detaining authority's ability to register detainees.[22] DoDD 2310.01E provides:
>
> > 3.6 Detainees will be registered, and property in their possession will be inventoried. Records of their detention and such property will be maintained according to applicable law, regulation, policy, and other issuances.
> >
> > . . . .
> >
> > b. DoD Components will maintain full accountability for all detainees under DoD control. Detainees will be assigned an internment serial number within 14 days after

19. *Id.* § 8.11; DoDD 2310.01E, DoD Detainee Program, ¶ 3.4.a (Mar. 15, 2022).

20. *See, e.g.*, Admiral Patrick Walsh et al., Department of Defense, *Review of Department Compliance with President's Executive Order on Detainee Conditions of Confinement* 25 (2009).

21. DOD LAW OF WAR MANUAL, § 8.5.

22. *See* Copenhagen Process, *supra* note 10.

> their capture by, or transfer to, the custody or control of DoD personnel, barring exceptional circumstances.[23]

Registration of detainees assists in ensuring that all detainees can be accounted for and that allegations of illegal detention can be addressed. DoD practice has been to register detainees with the National Detainee Reporting Center, which is also used to account for the detention of POWs under GC III and protected persons under GC IV. The practice also has been for property in the possession of detainees to be inventoried and for records of such property to be maintained to ensure accountability of it (e.g., to prevent theft) and to ensure its lawful disposition.

Subject to security measures, practical considerations, and other military necessities, detainees should be afforded appropriate contact with the outside world, including (1) receipt of individual or collective relief; (2) correspondence; (3) communication with family; and (4) ICRC access.[24] They shall be allowed to receive individual or collective relief and send and receive letters and cards, the number of which may be limited by a competent authority if it deems this necessary. DoD practice has been, where practicable, to grant detainees the means to communicate with family members (e.g., exchange of letters, phone calls, and video teleconferences with family, family visits).[25]

An impartial humanitarian body, such as the ICRC, may offer its services to the parties to the conflict.[26] All departments and agencies of the federal government shall provide the ICRC with notification of, and timely access to, any individual detained in any armed conflict in the custody or under the effective control of an officer, employee, or other agent of the U.S. government or detained within a facility

23. DoDD 2310.01E, DoD Detainee Program, ¶ 3.6 (Mar. 15, 2022). *See also* DoDD 2310.01E, The Department of Defense Detainee Program, ¶ 4.4.1 (Sept. 5, 2006).

24. DOD LAW OF WAR MANUAL, § 8.10.

25. DoDD 2310.01E, DoD Detainee Program, ¶ 3.4.a(2) (Mar. 15, 2022).

26. GC I, art. 3; GC II, art. 3; GC III, art. 3; GC IV, art. 3; DOD LAW OF WAR MANUAL, § 8.10.4.

owned, operated, or controlled by a department or agency of the U.S. government, consistent with DoD regulations and policies.[27]

Some detained individuals may qualify for POW status. Should any doubt arise regarding status, they shall enjoy the protection of GC III until a competent tribunal has determined their status. See § 11.3 below.

11.3 COMBATANTS

Generally, combatants are members of the armed forces of a State, with the exception of medical personnel and clergy. Militias and irregular forces can qualify as combatants by meeting certain requirements. See 5.4 for more information.

Commentary

See generally Chapter 9 of the DoD Law of War Manual and Chapter 3 of FM 6-27/MCTP 11-10C.

Pursuant to Article 4A of GC III, persons entitled to POW status include members of the armed forces of a State that is a party to the conflict, including deserters; military medical and religious personnel not entitled to retained personnel status (e.g., those not exclusively engaged in medical duties at the time of their capture); members of certain militia and volunteer corps; members of regular armed forces who profess allegiance to a government or authority not recognized by the detaining power; persons authorized to accompany the armed forces; members of crews of merchant marine vessels or civil aircraft; and participants in a *levée en masse*.[28]

Certain categories of persons are not entitled to POW status. They include spies, saboteurs, and other persons engaging in similar acts behind enemy lines, as well as nationals of the detaining power or its co-belligerents, such as a defector who subsequently is captured by the force from which he or she defected.

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27. Exec. Order No. 13491, Ensuring Lawful Interrogations, § 4(b), 74 Fed. Reg. 4893, 4894 (Jan. 22, 2009).

28. *See also* DOD LAW OF WAR MANUAL, § 9.3.2.

> The persons who are not necessarily excluded from POW status simply because they belong to one of these categories include mercenaries; persons who are alleged to have committed war crimes; nationals of neutral or non-belligerent States serving in the armed forces of an enemy State; and persons whose capture has not been acknowledged by the power to which they belong.
>
> Although not entitled to POW status, some detainees are treated as POWs under GC III. They include persons belonging, or having belonged, to the armed forces of an occupied State if it is deemed necessary to intern them, and persons belonging to one of the categories enumerated in Article 4 of GC III who have been received by neutral or non-belligerent powers on their territory and whom those powers are required to intern under international law.

11.3.1 Standard of Treatment

Combatants (see 5.4.1) who are captured or detained during an international armed conflict are entitled to POW status. Which detainees are entitled to POW status is determined by the capturing State applying the rules provided in the GPW. Because the GPW only applies during international armed conflict, there is no legal entitlement to POW status in a noninternational armed conflict. Persons in those conflicts who meet the definition of combatants (e.g., members of the armed forces) receive some of the same protections.

If there is any doubt as to whether a person is entitled to POW status, that individual must be accorded the protections afforded POWs until a competent tribunal convened by the detaining power determines the status to which that individual is entitled. This is known as an Article 5 tribunal based on GPW, Article 5. As a matter of policy, a State can grant POW protections to individuals who do not qualify as a matter of law. Detainees who do not qualify for POW status must still be afforded the protections of CA3 of the 1949 Geneva Conventions.

Prisoner of war status carries with it extensive rights and privileges. The GPW details the rights and obligations of both prisoners and detaining powers and should be consulted if a commander is charged with the care of POWs. When POWs are given medical treatment, differences in treatment

among detainees may only be based on medical grounds. When treated together with members of U.S. armed forces, differences in treatment may be based only on medical grounds. Prisoners of war may be questioned upon capture but are required to disclose only their name, rank, date of birth, and military serial number. Humane treatment must be afforded at all times and torture, threats, or other coercive acts are prohibited.

Commentary

There is no POW status during a non-international armed conflict. However, during an international armed conflict, GC III applies to persons referred to in Article 4 from the time they fall into the enemy's power until their final release and repatriation.[29] Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of GC III until a competent tribunal has determined their status.[30]

As noted in the commentary to § 11.2 above, detainees who do not qualify for POW status are entitled to at least the treatment set forth in Common Article 3 to the 1949 Geneva Conventions and Article 75 of AP I.

POWs must at all times be humanely treated.[31] They are entitled to respect for their persons and their honor[32] and must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.[33] Any unlawful act or omission by the detaining power causing death or seriously endangering the health of a POW in its custody is prohibited; such conduct is a serious breach of GC III.[34]

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29. GC III, art. 5.

30. *Id. See also* DOD LAW OF WAR MANUAL, § 4.27.2 (POW Protections for Certain Persons Until Status Has Been Determined), § 4.27.3 (Competent Tribunal to Assess Entitlement to POW Status or Treatment).

31. GC III, art. 13.

32. *Id.* art. 14.

33. *Id.* art. 13.

34. *Id.*

> For example, the murder of POWs is forbidden.[35] A commander may not put enemy prisoners to death even if their presence slows the force's movements or diminishes the force's combat capability by necessitating a large guard, by consuming supplies, or because it appears certain that they will regain their liberty through the impending success of enemy forces. It is likewise unlawful for a commander to kill enemy prisoners in the force's custody on the grounds of self-preservation, even in the case of airborne or commando operations. However, the circumstances of the operation may make necessary rigorous supervision of and restraint upon the movement of POWs. Older sources that permitted commanders in dire circumstances to deny quarter, such as Article 60 of the Lieber Code, do not reflect the current law.[36]
>
> POWs must be protected against violence by the civilian population.[37] They should be protected not only against unlawful acts by the agents of the detaining power, but also against violence from other POWs.[38]
>
> In addition to the prohibition against violence, POWs are entitled to respect for their persons and their honor in all circumstances. This is a further basis for the unlawfulness of rape or other indecent assault of POWs.[39]
>
> POWs must also be protected against insults and public curiosity.[40] For example, organizing a parade of POWs through the civilian population, thereby exposing them to assault, ridicule, and insults, would be prohibited.[41] And, for the same reason, displaying POWs in a hu-

35. Trial of Nisuke Masuda (The Jaluit Atoll Case), 1 LRTWC 71, 72 (1947).
36. DOD LAW OF WAR MANUAL, § 9.5.2.1.
37. *See, e.g.*, Trial of Erich Heyer (The Essen Lynch Case), 1 LRTWC 88, 89 (1947).
38. GC III COMMENTARY, at 143.
39. *Id.* art 14; DOD LAW OF WAR MANUAL, §§ 8.2.2.1, 10.5.1.2.
40. GC III, art. 13.
41. *See, e.g.*, Trial of Lieutenant General Kurt Maelzer, 11 LRTWC 53 (1949); United States v. Araki, Majority Judgment, 49,708 (Military Tribunal for the Far East, Nov. 12, 1948), *reprinted in* DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIBUNAL 574 (Neil Boister & Robert Cryer eds., 2008).

miliating fashion on television or the internet would also be prohibited. For this reason and others, DoD policy has prohibited taking photographs of detainees except for authorized purposes.[42]

Physical mutilation or medical or scientific experiments not justified by the medical, dental, or hospital treatment of the POW concerned and carried out in their interest is forbidden.[43] This prohibition was established in the 1949 Geneva Conventions to prohibit expressly criminal practices that occurred during the Second World War and to prevent the wounded, sick, or shipwrecked in captivity from being used as "guinea pigs" for medical experiments.[44]

However, the prohibition on subjecting the wounded, sick, or shipwrecked to biological experiments does not prevent doctors from trying new treatments that are justified on medical grounds and that are employed solely for therapeutic purposes. Additionally, POWs may voluntarily consent to give blood for transfusion or skin for grafting for therapeutic purposes; such procedures should take place under conditions consistent with generally accepted medical standards and controls designed for the benefit of both the donor and the recipient.[45]

Taking into consideration the provisions of GC III relating to rank and sex, and subject to any privileged treatment that may be accorded to them because of their state of health, age, or professional qualifications, all POWs shall be treated alike by the detaining power, without any adverse distinction based on race, nationality, religious belief, or political opinions, or any other distinction founded on similar criteria.[46]

The provision of accountability information is crucial because it allows the detaining power to fulfill its obligations under GC III. For example, the detaining power requires this information to establish

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42. DOD LAW OF WAR MANUAL, § 8.2.2.3.

43. GC III, art. 13.

44. GC II COMMENTARY, at 139. *See, e.g.*, United States v. Karl Brandt (The Medical Case), 2 TWC 171, 175–78 (1949).

45. DOD LAW OF WAR MANUAL, § 9.5.2.4.

46. GC III, art. 16.

lists of POWs for evacuation. In addition, the detaining power must gather further information on POWs to facilitate notification of their families. POWs who, owing to their physical or mental condition, cannot state their identity shall be handed over to the medical service. The identity of such POWs shall be established by all possible means, subject to the prohibition of physical or mental torture, coercion, threats, insults, or exposure to unpleasant or disadvantageous treatment.[47]

11.3.2 Trial and Punishment

Unlike unprivileged belligerents, combatants who are captured must not be punished for hostile acts directed against opposing forces prior to capture, unless those acts constituted violations of the law of armed conflict. Prisoners of war prosecuted for war crimes committed prior to capture, or for serious offenses committed after capture, are entitled to be tried by the courts that try the captor's own forces and are to be accorded the same procedural rights. These rights must include the assistance of a fellow prisoner, lawyer counsel, witnesses, and as required, an interpreter.

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

Commentary

No POW may be tried or sentenced for an act that is not forbidden by the law of the detaining power or by international law in force at the time that act was committed.[48] A POW can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the detaining power, and if the provisions of Chapter III of GC III have been observed.[49] For example, evidence laws used in the trial of a POW will be the same as those applicable in the trial of a member of the detaining power's military forces.

47. *Id.* art. 17.
48. *Id.* art. 99. *See also* DOD LAW OF WAR MANUAL, § 9.28.
49. GC III, art. 102.

The duration of any single punishment shall in no case exceed thirty days. The maximum of thirty days may not be exceeded, even if the POW is answerable for several acts when punishment is awarded, regardless of whether such acts are related.[50]

Measures of reprisal against POWs are prohibited.[51] In the *Dostler* case, the U.S. Military Commission noted that "under the law as codified by the 1929 Convention there can be no legitimate reprisals against prisoners of war. No soldier, and still less a Commanding General, can be heard to say that he considered the summary shooting of prisoners of war legitimate even as a reprisal."[52]

Collective punishment of POWs is forbidden.[53] This prohibition includes penalties inflicted upon persons or groups of persons for acts that these persons have not committed, including administrative penalties.

11.3.3 Labor

Enlisted POWs may be required to engage in labor having no military character or purpose. Noncommissioned officers may be required to perform only supervisory work. Officers may not be required to work. Any prisoner made to work must have the benefit of working considerations and safeguards similar to the local population.

Commentary

The detaining power may use the labor of POWs who are physically fit, considering their age, sex, rank, and physical aptitude, and with a view, in particular, to maintaining them in a good state of physical and mental health.[54] In determining whether labor should be compelled, as well as the appropriate labor assignment for a POW, the POW's age, gender, rank, and physical aptitude should be considered. "It may be assumed that these criteria are to be considered not

50. *Id.* art. 90.
51. *Id.* art. 13. *See also* DOD LAW OF WAR MANUAL, § 18.18.3.2.
52. Trial of General Anton Dostler, 1 LRTWC 22, 31 (1947).
53. DOD LAW OF WAR MANUAL, §§ 9.26.6, 8.16.2.1.
54. GC III, art. 49.

only in determining whether a prisoner of war should be compelled to work, but also in determining the type of work to which the particular prisoner of war should be assigned."[55]

Noncommissioned officers shall only be required to do supervisory work. Noncommissioned officers not required to do supervisory work may ask for other suitable work, which shall, so far as possible, be found for them. If officers or persons of equivalent status ask for suitable work, it shall be found for them, so far as possible, but they may not be compelled to work.[56] Retained personnel and persons treated like retained personnel (e.g., POWs trained as medical personnel who are directed to provide medical care for fellow POWs), however, may not be compelled to carry out any work other than that concerned with their medical or religious duties.[57]

POWs may not be employed on labor that is of an unhealthy or dangerous nature unless they volunteer. For example, removing landmines or similar devices is considered dangerous labor.

Nor may POWs be assigned to labor that would be considered humiliating for a member of the detaining power's forces.[58] Like other enemy nationals, POWs may not be compelled to participate in operations directed against their own country.[59]

POWs may be compelled to do work in the following classes: POW camp administration, installation, and maintenance; agriculture; industries connected with the production or the extraction of raw materials, and manufacturing industries, except metallurgical, machinery, and chemical industries; public works and building operations having no military character or purpose; the transport and handling

55. Howard Levie, *Prisoners of War in International Armed Conflict*, 59 INTERNATIONAL LAW STUDIES 1, 218–19 (1978). *See also* DOD LAW OF WAR MANUAL, § 9.19.

56. GC III, art. 49.

57. DOD LAW OF WAR MANUAL, § 9.19.1.

58. GC III, art. 52.

59. Hague Regulations, art. 23.

of stores not of a military character or purpose; commercial businesses, including arts and crafts; domestic services; and public utilities having no military character or purpose.[60]

11.3.4 Escape

Prisoners of war must not be judicially punished for acts committed in attempting to escape, unless they injure or kill someone in the process. Disciplinary punishment within the limits described in 11.3.2 may be imposed upon them for the escape attempt. Prisoners of war who make good their escape by rejoining friendly forces or leaving enemy-controlled territory must not be subjected to disciplinary punishment if recaptured. They remain subject to punishment for causing death or injury in the course of their escape.

Commentary

On escapes, see DoD Law of War Manual, § 9.25.

POWs who have made good their escape in the sense of Article 91 of GC III, and who are recaptured, shall not be liable to any punishment for their previous escape. In this way, POWs who have escaped successfully are treated similarly to persons who have engaged in espionage and returned safely to friendly lines. But POWs must not kill or wound the enemy by resorting to perfidy.

Under Article 91 of GC III, the escape of a POW shall be deemed to have succeeded when the POW has joined the armed forces of the power on which he or she depends or those of an allied power; left the territory under the control of the detaining power, or of an ally of the detaining power; or joined a ship flying the flag of the power on which they depend, or of an allied power, in the territorial waters of the detaining power, this ship not being under the control of the detaining power.[61] The general principle is that the POW must have gone beyond the reach of the detaining power. Thus, for example, a POW who escapes from the territory of the detaining power

60. GC III, art. 50.
61. *Id.* art. 91.

to the territory of one of the detaining power's allies will not be deemed to have escaped successfully. On the other hand, if the POW reaches neutral territory or the high seas, he or she will have escaped successfully. The situation of POWs who have successfully escaped into neutral territory is addressed under the law of neutrality. See § 7.11 and accompanying commentary.[62]

POWs who do not escape successfully retain their entitlement to POW status upon recapture. In particular, wearing civilian clothes does not deny escaping POWs their status as POWs:

> Additional difficulties have sometimes arisen from the wearing of civilian clothing; during the Second World War, some Detaining Powers stated their intention of considering prisoners of war in civilian clothing as spies and no longer as prisoners of war. This matter is settled by the present provision: a prisoner of war retains that legal status until such time as he has made good his escape.[63]

Several rules limit the punishment of POWs who do not escape successfully. By limiting the punishment for the act of escape, GC III recognizes that POWs may legitimately try to escape from their captors:

> A prisoner of war can legitimately try to escape from his captors. It is even considered by some that prisoners of war have a moral obligation to try to escape, and in most cases such attempts are of course motivated by patriotism. Conversely, in its own interest, the Detaining Power will endeavour to prevent escape whenever possible.[64]

In some cases, POWs may even be under an obligation to escape. For example, U.S. military personnel have a duty to make every effort to escape captivity.[65]

62. *See also* DOD LAW OF WAR MANUAL, § 15.17.1.
63. GC III COMMENTARY, at 454.
64. *Id.* at 445.
65. *See* DOD LAW OF WAR MANUAL, § 9.39.1.3 (Code of Conduct—Article III).

A POW who attempts to escape and is recaptured before having made good his or her escape in the sense of Article 91 of GC III shall be liable only to disciplinary punishment, even if it is a repeated offense.[66] In conformity with the principle stated in Article 83 of GC III (i.e., leniency in favor of disciplinary rather than judicial proceedings), offenses committed by POWs with the sole intention of facilitating their escape and that do not entail any violence against life or limb, such as offenses against public property, theft without intention of self-enrichment, the drawing up or use of false papers, or the wearing of civilian clothing, shall occasion disciplinary punishment only.[67] For example, if a POW steals food, money, or means of transport; wears civilian clothing; or fabricates false documents to facilitate escape and is caught before escaping successfully, such acts may only incur disciplinary punishment.

Escape or attempt to escape, even if it is a repeated offense, shall not be deemed an aggravating circumstance if the POW is subjected to trial by judicial proceedings regarding an offense committed during their escape or attempt to escape.[68] For example, an escaping POW who kills or injures a detaining power guard while escaping could be liable to judicial punishment for that offense. However, the circumstance of escape shall not be deemed to aggravate the sentence of the POW, even if the POW frequently attempts to escape.

POWs who aid or abet an escape or an attempt to escape are liable on this count to disciplinary punishment only.[69] Collective punishment of POWs for an escape attempt by other POWs is also prohibited.

11.3.5 Temporary Detention of Prisoners of War, Civilian Internees, and Other Detained Persons Aboard Naval Vessels

International treaty law expressly prohibits internment of POWs other than on land, but does not address temporary detention on board vessels. U.S.

66. GC III, art. 92.
67. *Id.* art. 93.
68. *Id.*
69. *Id.*

policy permits temporary detention of POWs, civilian internees, and detained persons on naval vessels for operational or humanitarian needs as follows:

> 1. When picked up at sea, they may be temporarily held on board as operational needs dictate, pending a reasonable opportunity to transfer them to a shore facility or to another vessel for evacuation to a shore facility.
>
> 2. They may be temporarily held on board naval vessels while being transported between land facilities.
>
> 3. They may be temporarily held on board naval vessels if such detention would appreciably improve their safety or health prospects.

Detention on board vessels must be temporary, limited to the minimum period necessary to evacuate such persons from the combat zone or to avoid significant harm such persons would face if detained on land. Commanders should seek guidance from the chain of command regarding any temporary detention aboard a naval vessel. Use of immobilized vessels for temporary detention of POWs, civilian internees, or detained persons is not authorized without SECDEF approval.

Commentary

POWs may be interned only in premises located on land.[70] This rule is intended to ensure that POWs are interned in a relatively safe and healthy environment. For example, in prior conflicts, POWs interned on ships were not held in hygienic and humane conditions. Similarly, POWs held on ships faced increased risk from the dangers of war.[71]

Because the purpose of the rule is to provide for the detention of POWs in a relatively safe and healthy environment, confinement aboard ship for POWs captured at sea or pending the establishment of suitable facilities on land is nonetheless consistent with GC III if

70. *Id.* art. 22. *See, e.g.*, NEWPORT MANUAL, § 10.6.3.1.
71. *See* DOD LAW OF WAR MANUAL, § 9.11.3.1.

detention on a ship provides the most appropriate living conditions for POWs. For example, during Operation Iraqi Freedom,

> a U.S. naval vessel in the Persian Gulf served as a temporary detention facility for EPWs. EPW internment camps in Iraq were not yet ready for prisoners. Additionally, Kuwait refused to allow Coalition forces to build EPW camps in Kuwait and they would not allow Coalition forces to bring EPWs into Kuwait. The cavernous hold of USS DUBUQUE (LPD-8), an amphibious assault ship, was converted into a detention facility where prisoners were held and interrogated as EPWs until camps were operational on shore.[72]

U.S. policy provides that POWs "may be temporarily held on board naval vessels if such detention would appreciably improve the safety or health prospects" of such persons, but this "must be truly temporary, limited to the minimum period necessary to evacuate the [POW] from the combat zone or to avoid the significant harm the [POW] would face if detained on land."[73]

The 2004 UK Manual notes that in 1982, during the Falklands conflict, temporary internment on board ship for the purpose of evacuation from the combat zone was done "with the concurrence of the ICRC, because there was nowhere suitable to hold PW on the Falklands Islands and the intention was to repatriate them as quickly as possible."[74]

Thus, POWs may be detained temporarily on board a ship if operational or humanitarian needs dictate, pending a reasonable opportunity to transfer them to a shore facility or to another vessel for evacuation to a shore facility.[75] For example, they may be temporarily detained on board naval vessels (a) while being transported between

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72. Gregory P. Noone et al., *Prisoners of War in the 21st Century: Issues in Modern Warfare*, 50 NAVAL LAW REVIEW 1, 16 (2004).

73. Joint Chiefs of Staff, Memorandum: Policy Concerning Temporary Detention of Prisoners of War, Civilian Internees, and Other Detained Persons Aboard Naval Vessels, ¶¶ 2a(3)–2b (Aug. 24, 1984).

74. 2004 UK MANUAL, ¶ 8.37.1 n.123.

75. DOD LAW OF WAR MANUAL, § 9.10.4.

> land facilities; or (b) if such action would appreciably improve their safety or health prospects, such as avoidance of exposure to severe environmental or combat conditions, or improved access to medical care for those requiring it. Such limited detention does not violate the requirement for the internment of POWs on land.
>
> Ships may also be used to transport POWs or for screening. For example, during the Second World War:
>
> > The total number of enemy prisoners of war interned within the United States was 435,788. Included were 378,898 Germans, 51,455 Italians, and 5,435 Japanese. The number of prisoners of war in the United States was somewhat negligible prior to January 1943. It increased rapidly beginning with May of that year, largely as a result of the success of the African campaign. The increase continued irregularly but speedily until it reached its peak shortly after the surrender of Germany, when the influx of prisoners of war from Europe ceased.[76]

11.4 UNPRIVILEGED BELLIGERENTS

Unprivileged belligerents (see 5.4.1.2) do not have a right to engage in hostilities and do not receive combatant immunity for their hostile acts. They are not entitled to POW status if detained. Any person detained by the United States is entitled to humane treatment as a matter of law and U.S. policy. See 11.2.

Because unprivileged belligerents do not have combatant immunity, they may be prosecuted for their hostile actions. Prosecution is not required, and unprivileged belligerents may be detained until the cessation of hostilities without being prosecuted for their acts. If prosecuted and convicted, unprivileged belligerents may be detained for the duration of their sentence, even if it extends beyond the cessation of hostilities. Even if their criminal sentence has been served, but hostilities have not ceased, they may be held until the cessation of hostilities. Regardless of the fact that hostilities have not ceased or the full sentence has not been served, a detaining State may release

76. Martin Tollefson, *Enemy Prisoners of War*, 32 IOWA LAW REVIEW 51, 59 (1946).

an unprivileged belligerent at any time. For example, a detaining State may decide to end detention before the cessation of hostilities if it determines the detained unprivileged belligerent no longer poses a threat.

Commentary

According to the DoD Law of War Manual, the category of unprivileged belligerent may be understood as an implicit consequence of creating the classes of lawful combatants and peaceful civilians.[77] The concept of unprivileged belligerency—that is, the set of legal liabilities associated with unprivileged belligerents—may be understood in opposition to the rights, duties, and liabilities of lawful combatants and peaceful civilians. Unprivileged belligerents include lawful combatants who have forfeited the privileges of combatant status by engaging in spying or sabotage and private persons who have forfeited one or more of the protections of civilian status by engaging in hostilities.

Unprivileged belligerents have certain rights, duties, and liabilities. In general, unprivileged belligerents lack the distinct privileges afforded to combatants and civilians and are subject to the liabilities of both classes. Unprivileged belligerents generally may be made the object of attack by enemy combatants. They must, however, be afforded fundamental guarantees of humane treatment if *hors de combat*.

Although unprivileged belligerents have not been recognized and protected in treaty law to the same extent as peaceful civilians and lawful combatants, basic guarantees of humane treatment in customary international law (i.e., elementary considerations of humanity) protect unprivileged belligerents. See the commentary accompanying § 11.2 above. Moreover, some treaty protections apply to certain unprivileged belligerents.[78] In some cases, U.S. practice has, as a matter of domestic law or policy, afforded unprivileged belligerents more favorable treatment than they would be entitled to receive under international law. For example, in *Boumediene v. Bush*, the U.S. Supreme Court afforded the constitutional privilege of habeas corpus to aliens

77. DOD LAW OF WAR MANUAL, § 431; 10 U.S.C. § 948a.
78. GC III, art. 3; GC IV, art. 5.

detained as unprivileged belligerents at Guantanamo.[79] Nonetheless, U.S. practice has also recognized that unprivileged belligerents should not be afforded the distinct privileges to which lawful combatants and peaceful civilians are entitled under the law of war.

Unprivileged belligerents are liable to capture and detention, like lawful combatants. Although they are not entitled to the privileges of POW status, unprivileged belligerents, like all other detained persons, must be treated humanely. In particular, they, like all other detainees, must receive, at a minimum, the fundamental guarantees of humane treatment described in Common Article 3 of the 1949 Geneva Conventions. In addition, the United States has explicitly supported, out of a sense of legal obligation, the fundamental guarantees reflected in Article 75 of AP I as minimum standards for the humane treatment of all persons detained during international armed conflict. See the commentary accompanying § 11.1 above.

Unprivileged belligerents who are detained to prevent their further participation in hostilities generally must be released when hostilities have ended unless there is another legal basis for their detention. DoD practice has been to periodically review the detention of all persons not afforded POW status or treatment.[80]

Although international law affords lawful combatants a privilege or immunity from prosecution, unprivileged belligerents lack such protection.[81] Enemy States may punish unprivileged belligerents for engaging in hostilities if they are convicted after a fair trial. For example, Article 30 of the Hague Regulations provides that "[a] spy taken in the act shall not be punished without previous trial."

11.5 NONCOMBATANTS

Noncombatants are medical personnel or chaplains in the armed forces who do not take a direct part in hostilities. Because they do not take a direct part in hostilities, noncombatants receive special protections under the law of armed conflict. Medical personnel and chaplains falling into enemy hands do

79. Boumediene v. Bush, 553 U.S. 723 (2008).
80. DOD LAW OF WAR MANUAL, § 4.19.3.
81. *Id.* § 4.17.5.

not become POWs. They are given a special status as retained persons, and unless their retention by the enemy is required to provide for the medical or religious needs of POWs, medical personnel and chaplains must be repatriated at the earliest opportunity.

Commentary

See DoD Law of War Manual, §§ 4.9 and 7.9.

If military medical and religious personnel fall into the enemy's power during international armed conflict, they are held not as POWs but as retained personnel.[82] They may be retained only insofar as the health, spiritual needs, and number of POWs require.[83] The classes of personnel that may be retained include military medical and religious personnel, such as medical personnel exclusively engaged in medical duties; administrative staff exclusively engaged in support to medical units; chaplains attached to the armed forces; and authorized staff of voluntary aid societies.[84] They should present their identity cards to demonstrate their status as retained personnel.

Although they are not held as POWs, military medical and religious personnel receive, at a minimum, the protections of POW status. In addition, retained personnel shall be granted all facilities necessary to provide for the medical care of, and religious ministration to, POWs. For example, retained personnel may not be compelled to do work other than their medical or religious duties. Retained personnel, through their senior officer in each camp, have the right to deal with the competent authorities of the camp on all questions relating to their duties.[85]

From the outbreak of hostilities, parties to the conflict may determine by special agreement the percentage of personnel to be retained, in proportion to the number of POWs and the distribution of these medical and religious personnel in the camps.[86] If they are

82. *Id.* § 4.10.2.
83. GC I, art. 28.
84. DOD LAW OF WAR MANUAL, § 7.9.1.3.
85. GC I, art. 28; GC III, art. 33.
86. GC I, art. 31.

> not needed to care for, or minister to, POWs, and if military requirements permit, retained personnel should be returned to the forces to which they belong so that they may continue to care for, or minister to, members of their armed forces. The parties to the conflict would establish special agreements to develop the procedures for repatriation.[87]

11.6 CIVILIANS

In international armed conflict and any occupation that follows, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 governs the treatment of civilians. Enemy civilians falling under the control of the armed forces may be interned if security considerations make it absolutely necessary to do so. Civilians sentenced for offenses committed in occupied territory may be ordered into internment in lieu of punishment. Civilians of an enemy State must not be interned as hostages. Interned persons must not be removed from the occupied territory in which they reside, except as their own security or imperative military considerations may require. All interned persons must be treated humanely (see 11.2) and must not be subjected to reprisal action or collective punishment.

War correspondents, supply contractors, members of organizations responsible for the welfare of service members, and other persons who accompany the armed forces, although civilians, may be accredited by the armed forces that they accompany. While such persons are not combatants and may not be individually targeted, their close proximity to combatants means they may be incidentally killed or injured during a lawful attack on a military objective. They are entitled to POW status upon capture provided they have been properly accredited by the armed forces they accompany. Possession of a Geneva Conventions identification card by a civilian accompanying an armed force provides evidence of accreditation by the armed forces of the State issuing the card. Service as a civilian mariner in the crew of an auxiliary vessel or warship is evidence of accreditation by the armed forces of that State, even if the civilian mariner is not in possession of a Geneva Conventions identification card.

87. *Id.* art. 28; GC III, art. 33.

Commentary

Like combatants, members of the civilian population also have certain rights, duties, and liabilities under the law of war. Civilians may not be made the object of attack. If detained, civilians are entitled to humane treatment and various additional protections. Civilians lack the combatant's privilege and may be punished by an enemy State after a fair trial for engaging in hostilities against it.[88]

In general, civilians may be subject to non-violent measures justified by military necessity, such as searches, or temporary detention. Belligerents or occupying powers may take necessary security measures concerning civilians, including internment or assigned residence for imperative security reasons. Enemy civilians who are interned during international armed conflict or occupation generally are classified as "protected persons" under GC IV and receive a variety of protections.

Unlike combatants, civilians lack the combatant's privilege excepting them from the domestic law of the enemy State. After a fair trial, civilians who engage in hostilities may be punished by an opposing State. A State that is an occupying power has additional authorities over enemy civilians that extend beyond the ability to punish their unauthorized participation in hostilities.[89]

The parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.[90] For example, in a belligerent's home territory, measures of control are usually taken with respect to, at the very least, persons known to be active or reserve members of a hostile army, persons who would be liable to service in the enemy forces, and persons who it is expected would furnish information or other aid to a hostile State. These measures may include, for example, requiring protected persons (1) to register with and report periodically to the police authorities; (2) to carry identity cards or special papers; (3) to refrain from carrying weapons; (4) to refrain from changing their place of

88. DOD LAW OF WAR MANUAL, § 4.8.
89. *Id.* § 4.8.4.
90. GC IV, art. 27.

residence without permission; (5) to refrain from accessing certain areas; (6) to have an assigned residence; and (7) to be interned.[91]

The parties to the conflict shall not intern protected persons except in accordance with the provisions of Articles 41, 42, 43, 68, and 78 of GC IV.[92] In some respects, the principles underlying the internment of protected persons are similar to those underlying the internment of POWs. For example, the internment of protected persons is non-punitive, the detaining power is responsible for the treatment of internees in its custody, and humane treatment is required. However, GC IV recognizes that the internment of protected persons differs in character from that of POWs by requiring the separation of internees from POWs.[93] Protected persons interned for security reasons have not, in theory, participated in hostilities. Thus, their internment shall cease when the reasons that have necessitated it have ceased, which may occur before the end of the conflict. In practice, however, internment for security reasons may involve persons who have participated in hostilities, and the continued detention of such persons for the duration of the conflict may be justified to prevent their further participation in the conflict. On the other hand, internees are not members of the armed forces and, thus, in certain respects, have not earned the special privileges that POWs have earned. For example, although internees receive allowances, they do not receive specified pay advances like POWs. Similarly, internees who have successfully escaped do not benefit from the immunity from punishment applicable to POWs who have successfully escaped.[94]

GC III affords POW status to persons accompanying the force if they fall into the hands of the enemy during international armed conflict. Persons authorized to accompany the armed forces under Article 4(A)(4) include employees of the DoD, employees of other government agencies sent to support the armed forces, and other authorized persons working on government contracts to support the

91. GC IV COMMENTARY, at 207.
92. GC IV, art. 79.
93. *Id.* art. 84.
94. DOD LAW OF WAR MANUAL, § 10.9.1.

armed forces. DoD practice has been to permit a broad range of civilians to be authorized to accompany U.S. forces.[95]

For the purposes of detention, persons authorized to accompany the armed forces are treated like combatants. These persons may be detained by the enemy and are entitled to POW status during international armed conflict. Article 4(A)(4) of GC III defines "[p]risoners of war, in the sense of the present Convention," to include persons who have fallen into the power of the enemy and "who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany." Article 81 of the 1929 Convention Relative to the Treatment of Prisoners of War provides:

> Persons who follow the armed forces without directly belonging thereto, such as correspondents, newspaper reporters, sutlers, or contractors, who fall into the hands of the enemy, and whom the latter think fit to detain, shall be entitled to be treated as prisoners of war, provided they are in possession of an authorization from the military authorities of the armed forces which they were following.[96]

Article 13 of the Hague Regulations provides:

> Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers and contractors, who fall into the enemy's hands and whom the latter thinks expedient to detain, are entitled to be treated as prisoners of war, provided they are in possession of a certificate from the military authorities of the army which they were accompanying.

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95. *Id.* § 4.15.2.

96. Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343.

11.7 PERSONNEL HORS DE COMBAT

Combatants who have been rendered incapable of combat (*hors de combat*) by wounds, sickness, shipwreck, surrender, or capture are entitled to special protections including assistance and medical attention, if necessary. Parties to the conflict must, after each engagement and without delay, take all possible measures to search for and collect the wounded and sick on the field of battle, protect them from harm, and ensure their care. When circumstances permit, a cease-fire should be arranged to enable the wounded and sick to be located and removed to safety and medical care. Wounded and sick personnel falling into enemy hands must be treated humanely and cared for without adverse distinction along with the enemy's own casualties. Priority in order of treatment may only be determined according to medical considerations. The physical and mental well-being of enemy wounded and sick personnel may not be unjustifiably endangered, nor may the wounded and sick be subjected to any medical procedure not called for by their condition or inconsistent with accepted medical standards. See 5.4.2.

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

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

Commentary

At all times, and particularly after an engagement, parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded and sick on land, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the

dead and prevent their being despoiled.[97] GC IV provides for the obligation to search for, collect, protect, and care for civilians who are wounded, sick, shipwrecked, and dead.[98]

After each engagement, parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded, sick, and shipwrecked at sea, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled.[99] The obligation in GC II to search for and collect certain persons is written differently from the comparable obligation in GC I. Instead of a general obligation in Article 15 of GC I to take measures "at all times," the obligation in Article 18 of GC II to search for and collect the wounded, sick, and shipwrecked applies only "after each engagement."

If practicable, affirmative measures (including, in some cases, the use of force) must be taken to protect the wounded, sick, and shipwrecked from pillage or ill-treatment by any person, whether military or civilian, seeking to harm them.[100]

Various measures may be taken to fulfill the obligation to search for, collect, and protect the wounded, sick, and shipwrecked. Military forces may directly engage in these activities. In addition to searching for, collecting, and protecting the wounded, sick, and shipwrecked directly, commanders may take other measures to fulfill this obligation. For example, commanders may request the help of civilian volunteers. As another example, if a warship cannot collect the shipwrecked after an engagement, it might be able to alert a hospital ship in the vicinity or provide the shipwrecked with a lifeboat.[101]

Whenever circumstances permit, an armistice or a suspension of fire shall be arranged, or local arrangements made, to allow the removal, exchange, and transport of the wounded left on the battlefield.[102]

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97. DOD LAW OF WAR MANUAL, § 7.4.
98. GC IV, art. 16.
99. GC II, art. 18.
100. GC I COMMENTARY, at 152.
101. GC II COMMENTARY, at 131.
102. GC I, art. 15.

> Such arrangements may take the form of or include a protected or neutral zone. Likewise, local arrangements may be concluded between parties to the conflict for the removal or exchange of wounded and sick by land or sea from a besieged or encircled area, or for the passage of medical and religious personnel and equipment on their way to that area. For example, parties to a conflict may agree to a temporary cease-fire to permit evacuation of the wounded from the fighting area.
>
> The obligations to search for, collect, and take affirmative steps to protect the wounded, sick, and shipwrecked are subject to practical limitations.[103] Military commanders are to judge what is possible and to what extent they can commit their personnel to these duties.[104] In some cases, commanders might designate specific units or personnel to engage in such missions. For example, personnel performing rescue and recovery missions need not place their lives at undue risk to search for, collect, or protect the wounded, sick, shipwrecked, or dead (e.g., recovery of a body from a minefield, or entry into a disabled enemy armored vehicle that might contain unexploded ordnance or other hazards). Similarly, a commander of a naval ship need not increase the risk to their vessel from threats (e.g., by slowing their transit or by placing their ship dead in the water) to recover shipwrecked enemy military personnel from a sunken vessel or crashed aircraft.
>
> Similarly, the requirements of ongoing military operations may render rescue efforts impractical. For example, during a fast-tempo operation (offensive or defensive), it might not be possible to devote resources to the search and collection of the wounded, sick, and shipwrecked. In other cases, the rescue of enemy personnel may exceed the abilities of the force and its medical personnel. For example, a small patrol operating behind enemy lines or a submarine may not be capable of receiving and caring for large numbers of injured personnel. Thus:

103. DOD LAW OF WAR MANUAL, § 7.4.4.
104. GC I COMMENTARY, at 151.

> Of course, one cannot always require certain fighting ships, such as fast torpedo-boats and submarines, to collect in all circumstances the crews of ships which they have sunk, for they will often have inadequate equipment and insufficient accommodation. Submarines stay at sea for a long time and sometimes they neither wish nor are able to put in at a port where they could land the persons whom they have collected. Generally speaking, one cannot lay down an absolute rule that the commander of a warship must engage in rescue operations if, by doing so, he would expose his vessel to attack.[105]

The wounded, sick, and shipwrecked who are protected by GC I and GC II shall be treated humanely and cared for by the party to the conflict in whose power they may be, without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria.[106] They shall not willfully be left without medical assistance. The obligation to care for enemy combatants who are wounded and sick is a longstanding law of war obligation. The obligation to provide medical care incorporates practical considerations; whether resources may be committed to medical care may depend on military necessity, such as the requirements of the mission or the immediate tactical situation. For example, Article 79 of the Lieber Code provides: "Every captured wounded enemy shall be medically treated, according to the ability of the medical staff." Article 6 of the Convention for the Amelioration of the Wounded in Armies in the Field provides: "Wounded or sick soldiers shall be entertained and taken care of, to whatever nation they may belong."[107]

Only urgent medical reasons will authorize priority in the order of treatment.[108] For example, in addressing an influx of wounded that includes friends and enemies, doctors should attend to those patients for whom delay might be fatal or, at any rate, prejudicial, proceeding

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105. GC II COMMENTARY, at 131.

106. GC I, art. 12; GC II, art. 12. *See also* DOD LAW OF WAR MANUAL, § 7.5.

107. Convention for the Amelioration of the Wounded in Armies in the Field, Aug. 22, 1864, 22 Stat. 940, 944.

108. GC I, art. 12; GC II, art. 12.

afterwards to those whose condition is not such as to necessitate immediate attention.[109] The wounded, sick, and shipwrecked, and other POWs, may be ordered to receive medical treatment or care that is warranted by their medical condition. Because POWs are subject to the laws, regulations, and orders in force in the armed forces of the detaining power, POWs may be ordered to receive medical treatment just as detaining power military personnel may be ordered to do so. However, the wounded, sick, and shipwrecked, and other POWs, may not be subjected to medical or biological experiments, even if detaining power military personnel could be ordered to be subjected to such procedures. See the commentary accompanying § 11.3.1 above.

11.8 QUESTIONING AND INTERROGATION OF DETAINED PERSONS

Commanders may order the tactical questioning of detained persons. Tactical questioning is defined in DODD 3115.09 as the field-expedient, initial, direct questioning for information of immediate tactical value of a captured or detained person at or near the point of capture and before the individual is placed in a detention facility. Tactical questioning is not an interrogation, but a timely and expedient method of questioning by a noninterrogator seeking information of immediate value. It may be conducted by any DOD personnel trained in accordance with DODD 3115.09, Subparagraph 4.1. Anyone conducting tactical questioning must ensure all detained persons receive humane treatment. If the detained person is entitled to POW status additional restrictions on questioning apply. See 11.9.

If questioning beyond tactical questioning is necessary, it is considered interrogation and must only be conducted by DOD-certified personnel who have received specific training in interrogation techniques. Masters-at-arms or other security personnel must not actively participate in interrogations, as their function is limited to security, custody, and control of the detainees. Interrogators may conduct debriefs of the masters-at-arms or other security personnel regarding the detainees for whom they are responsible. If interrogation is necessary, in addition to securing the services of certified interrogators, reference should be made to the following:

109. GC I COMMENTARY, at 140.

1. Geneva Convention Relative to the Treatment of Prisoners of War, of 12 August 1949

2. DODD 3115.09

3. JP 2-01.2, Counterintelligence and Human Intelligence in Joint Operations

4. FM 2-22.3.

Commentary

On the interrogation of POWs, see § 11.9 below.

The law of war does not prohibit the interrogation of detainees, but interrogation must be conducted in accordance with the requirements for humane treatment.[110] Interrogation must be carried out in a manner consistent with the requirements for humane treatment, including the prohibitions against torture, cruelty, degrading treatment, and acts or threats of violence. No physical or moral coercion shall be exercised against protected persons to obtain information from them or third parties. In addition to the legal prohibitions on torture or other illegal methods of interrogation, practical considerations have also strongly counseled against such methods:

> Experience indicates that the use of prohibited techniques is not necessary to gain the cooperation of interrogation sources. Use of torture and other illegal methods is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the interrogator wants to hear.
>
> Revelation of use of torture by US personnel will bring discredit upon the US and its armed forces while undermining domestic and international support for the war effort. It also

110. DOD LAW OF WAR MANUAL, § 8.4.

> may place US and allied personnel in enemy hands at a greater risk of abuse by their captors.[111]

11.9 QUESTIONING OF PRISONERS OF WAR

Detainees entitled to protections set forth in the GPW may not be denied rights or have rights withheld in order to obtain information. Interrogators may offer incentives exceeding basic amenities in exchange for cooperation. Prisoners of war are only required to provide name, rank, serial number (if applicable), and date of birth. Failure to provide these items does not result in any loss of protections from inhumane or degrading treatment. A POW who refuses to provide such information shall be regarded as having the lowest rank of that force, and shall be treated accordingly. Prisoners of war who refuse to answer questions may not be threatened, insulted, or exposed to unpleasant or disparate treatment.

Commentary

> See DoD Law of War Manual, § 9.8.[112]
>
> Every POW, when questioned, is bound to give only their surname, first names and rank, date of birth, and army, regimental, personal, or serial number, or, failing this, equivalent information.[113] If POWs willfully infringe this rule, they may render themselves liable to a restriction of the privileges accorded to their rank or status. However, POWs who refuse to provide this information may not be coerced or exposed to any unpleasant or disadvantageous treatment for failing to respond.
>
> Interrogation must be carried out in a manner consistent with the requirements for humane treatment, including the prohibition against acts of violence or intimidation and insults. No physical or mental torture, or any other form of coercion, may be inflicted on POWs to secure information of any kind. POWs who refuse to answer may not be threatened, insulted, or exposed to unpleasant or

111. FM 34-52, Intelligence Interrogation, 1–8 (Sept. 28, 1992).
112. *See also* DoDD 3115.09, DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning (Oct. 11, 2012).
113. GC III, art. 17.

disadvantageous treatment.[114] Prohibited means include imposing inhumane conditions, denying medical treatment, or using mind-altering chemicals.[115] The U.S. position is that "the suggested use of a chemical 'truth serum' during the questioning of prisoners of war would be in violation of the obligations of the United States under the Geneva Convention Relative to the Treatment of Prisoners of War."[116]

U.S. law and policy impose additional requirements on the interrogation of POWs. No person in the custody or under the effective control of the DoD or under detention in a DoD facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.[117]

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114. *Id.*

115. *See* Trial of Erich Killinger (The Dulag Luft Case), 3 LRTWC 67 (1948).

116. U.S. Army, Office of the Judge Advocate General, JAGW 1961/1157, Memorandum: Use of "Truth Serum" in Questioning Prisoners of War (June 21, 1961), *reprinted in Documents on Prisoners of War*, 60 INTERNATIONAL LAW STUDIES 708, 709 (1979).

117. Pub. L. No. 109-163, § 1402(a), 10 U.S.C. § 801 note (2006); FM 2-22.3, Human Intelligence Collector Operations (Sept. 6, 2006).

CHAPTER 12

DECEPTION DURING ARMED CONFLICT

12.1 GENERAL

The law of armed conflict permits deceiving the enemy through ruses of war intended to mislead the enemy, deter the enemy from taking action, or induce the enemy to act recklessly, provided the ruses do not constitute perfidy or otherwise violate the rules of international law applicable to armed conflict.

Commentary

While deception in war is a just and necessary means of hostility, clandestine or treacherous attempts to injure the enemy are prohibited by the law of war. It is "prohibited to kill, injure, or capture an adversary by resort to perfidy."[1] By contrast, ruses of war—"acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under the law"—are not prohibited.[2] Note that the United States does not interpret customary international law to prohibit U.S. forces from seeking to capture by resort to perfidy.[3]

12.1.1 Permitted Deceptions

Ruses of war are methods, resources, and techniques that can be used to convey false information or deny information to opposing forces. They can include:

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1. Lieber Code, art. 101.

2. AP I, art. 37. *See also* DOD LAW OF WAR MANUAL, § 5.21; NWIP 10-2, ¶ 640a; FM 27-10, ¶ 49; 1958 UK MANUAL, ¶ 310.

3. DOD LAW OF WAR MANUAL, § 5.22.2.1; *cf.* AP I, art. 37(1) ("kill, injure, or capture"). On perfidy and deception generally, see FM 6-27/MCTP 11-10C, ¶¶ 2-145 to 2-165; NEWPORT MANUAL, § 7.5.2.

1. Physical, technical, or administrative means, such as electronic warfare measures

2. Flares, smoke, and chaff

3. Camouflage

4. Deceptive lighting

5. Dummy ships and other armament.

6. Decoys

7. Simulated forces

8. Feigned attacks and withdrawals

9. Ambushes

10. False intelligence information

11. Utilization of enemy codes, passwords, and countersigns

12. Transmission of a false position through an automatic identification system or other electronic identification systems.

Commentary

Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are permitted.[4] Examples of permitted ruses are the use of camouflage, decoys, mock operations, and misinformation. These acts are not perfidious because they do not invite the confidence of the enemy with respect to protection under the law.[5] Other permissible deceptions include traps; mock operations; feigned retreats or flights; surprise attacks; simulation of quiet and inactivity; use of small units to simulate large

4. Hague Regulations, art. 24; NWIP 10-2, ¶ 640a.
5. AP I, art. 37(2).

units; use of dummy aircraft, vehicles, airfields, weapons, and mines to create a fictitious force; moving landmarks and route markers; pretending to communicate with forces or reinforcements that do not exist; deceptive supply movements; and allowing false messages to fall into enemy hands. It is also permissible to attempt to frustrate target intelligence activity—for example, by the employment of ruses to conceal, deceive, and confuse reconnaissance means. Additionally, deceptive measures can be used to thwart precision guided weapons.[6]

AFP 110-31, International Law—The Conduct of Armed Conflict and Air Operations, states:

> a. Among the permissible ruses are surprises, ambushes, feigning attacks, retreats, or flights; simulation of quiet and inactivity; use of small forces to simulate large units; transmission of false or misleading radio or telephone messages (not involving protection under international law such as internationally recognized signals of distress); deception by bogus orders purported to have been issued by the enemy commander; use of the enemy's signals and passwords; feigned communication with troops or reinforcements which have no existence; and resort to deceptive supply movements. Also included are the deliberate planting of false information, moving of landmarks, putting up of dummy guns and vehicles, laying of dummy mines, erection of dummy installations and airfields, removal of unit identifications from uniforms, and use of signal deceptive measures.
>
> b. The following examples provide guidelines for lawful ruses:
>
> (1) The use of aircraft decoys. . . .
>
> (2) Staging air combats. . . .

6. *See* MICHAEL BOTHE, KARL JOSEF PARTSCH, & WALDEMAR A. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS 207, 214 (1982).

> (3) Imitation of enemy signals. . . . However, misuse of distress signals or distinctive signals internationally recognized as reserved for the exclusive use of medical aircraft would be perfidious.
>
> (4) Use of flares and fires. . . . However, it is an unlawful ruse to fire false target flare indicators over residential areas of a city or town which are not otherwise valid military objectives.
>
> (5) Camouflage use. . . . . The camouflage of a flying aircraft must not conceal national markings of the aircraft, and . . . must not take the form of the national markings of the enemy or that of objects protected under international law.
>
> (6) Operational ruses. . . .[7]

12.1.2 Prohibited Deceptions

It is unlawful to injure or kill persons by means of perfidy. Acts of perfidy are acts that invite the confidence of the enemy to lead them to believe that they are entitled to, or are obliged to accord, protected status under the law of armed conflict, with the intent to betray that confidence. Perfidy is prohibited, because it may undermine the protections afforded by the law of war to certain classes of persons and objects; diminish legitimate activities that depend upon trust between hostile forces; and damage the basis for the restoration of peace short of the complete annihilation of one belligerent by another. Feigning surrender and then attacking, feigning an intent to negotiate under a flag of truce and then attacking, and feigning death or incapacitation by wounds or sickness and then attacking are examples of acts of perfidy.

7. AFP 110-31, International Law—The Conduct of Armed Conflict and Air Operations, ¶ 8-4a-b (1976). *See also* JP 3-10, Joint Security Operations in Theater (July 25, 2019); JP 3-13.2, Military Information Support Operations (Ch. 1, Dec. 20, 2011); JP 3-13.3, Operations Security (Jan. 6, 2016); JP 3-13.4, Military Deception (Jan. 26, 2012).

Commentary

Acts of treachery/perfidy, whether used to kill or to wound, are prohibited during an international armed conflict.[8] Article 23(b) of the Hague Regulations provides that it is especially forbidden to "kill or wound treacherously individuals belonging to the hostile nation or army." Article 101 of the Lieber Code notes that "the common law of war allows even capital punishment for clandestine or treacherous attempts to injure an enemy." Article 8(2)(b)(xi) of the Rome Statute provides that war crimes in international armed conflict include "[k]illing or wounding treacherously individuals belonging to the hostile nation or army." The word "treacherously" in Article 23(b) of the Hague Regulations is synonymous with "perfidy" in Article 37.[9]

Perfidy includes acts "inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence."[10] The key element in the definition of perfidy is the false claim to protections under the law of war in order to secure a military advantage over the opponent.[11]

In addition to killing or wounding, Article 37 of AP I prohibits "capture" by resort to perfidy. The DoD does not interpret customary international law to prohibit U.S. forces from seeking to capture by resort to perfidy.[12] Additionally, "[i]t may not be prohibited to invite the confidence of the adversary that he or she is obligated to accord protection under the law of war, for certain purposes (*e.g.*, to facilitate spying, sabotage, capturing enemy personnel, or evading enemy forces)."[13] Deception may not, however, rely on certain signs and

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8. DOD LAW OF WAR MANUAL, § 5.22; NWIP 10-2, ¶ 640b; FM 27-10, ¶ 50; AP I, art. 37(1).

9. 15 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS 99 at ¶ 78 (1978).

10. AP I, art. 37(1); DOD LAW OF WAR MANUAL, § 5.22.1.

11. ICRC AP COMMENTARY, ¶ 1500; DOD LAW OF WAR MANUAL, § 5.22.1.

12. DOD LAW OF WAR MANUAL, § 5.22.2.1.

13. *Id.* § 5.22.2.

symbols, and "persons who use perfidy to engage in spying and sabotage may forfeit POW status or be liable to certain penalties under the domestic law of enemy States."[14]

Examples of killing or wounding by resort to perfidy include (a) the feigning of an intent to negotiate under a flag of truce or of a surrender ("which takes advantage of the rule that flags of truce may not be used to shield military operations"); (b) the feigning of an incapacitation by wounds or sickness and then attacking ("which takes advantage of the respect afforded the dead or the protection afforded those who are *hors de combat*"); (c) the feigning of civilian or non-combatant status and then attacking; (d) feigning surrender and then attacking ("which takes advantage of the rule that the enemy may not attack those who have surrendered"); (e) calling out "do not fire; we are friends" and then attacking; and (f) the feigning of protected status by the use of signs, emblems, or uniforms of the United Nations or of neutral or other States not parties to the conflict.[15] For example, during the Persian Gulf War, "an Iraqi officer approached Coalition forces with his hands in the air, indicating his intention to surrender. When near his would-be captors, he drew a concealed pistol from his boot, fired, and was killed during the combat that followed."[16] The 1958 UK Manual states that "it would be treachery for a soldier to sham wounded or dead and then to attack enemy soldiers who approached him without hostile intent, or to pretend he had surrendered and afterwards to open fire upon or attack an enemy who was treating him as hors de combat or a prisoner."[17] Examples of treachery include "calling out 'Do not fire, we are friends' and then firing at enemy troops who had lowered their guard, especially if coupled with the wearing of enemy uniforms or civilian clothing."[18]

The rationale for this rule is that if protected status or protective signs, signals, symbols, and emblems are abused, they will lose their

14. *Id.*
15. *Id.* § 5.22.3; AP I, art. 37(1).
16. PERSIAN GULF WAR: FINAL REPORT, at 621.
17. 1958 UK MANUAL, ¶ 115 n.2.
18. 2004 UK MANUAL, ¶ 5.9 n.35. *See also* 1958 UK MANUAL, ¶ 311 n.1; 1914 Rules of Land Warfare, ¶ 178 n.1.

effectiveness and put protected persons and places at additional risk. Thus, perfidious conduct may "(1) undermine the protections afforded by the law of war to classes of persons and objects" (e.g., civilians, persons who are *hors de combat*, or certain other classes of persons); "(2) impair non-hostile relations between opposing belligerents" (e.g., activities that depend upon a degree of mutual respect and trust between hostile forces, such as effecting surrender or collection of the dead, wounded, or sick (enemy or friendly force) on the battlefield); and "(3) damage the basis for the restoration of peace short of complete annihilation of one belligerent by another" (e.g., a degree of mutual respect and trust is essential for the negotiation of cease-fires, truces, surrenders, and other agreements necessary to bring an end to hostilities).[19] Perfidious conduct may also "make it more difficult for military commanders to ensure that their forces comply with the law of war where treacherous acts by the enemy have resulted in casualties among their own forces."[20]

12.2 IMPROPER USE OF PROTECTIVE SIGNS, SIGNALS, AND SYMBOLS

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

1. While engaging in attacks

2. In order to shield, favor, or protect one's own military operations

3. To impede enemy military operations.

Their use may be improper even when that use does not involve killing or wounding. They may not be used to facilitate espionage (except for signs, emblems, or uniforms of a neutral or nonbelligerent State). The prohibited acts are unlawful because they undermine the effectiveness of protective signs, signals, and symbols and thereby jeopardize the safety of noncombat-

19. DOD LAW OF WAR MANUAL, § 5.21.1.
20. *Id.* § 5.21.1.

ants and civilians, as well as the immunity of protected structures and activities. For example, using an ambulance or medical aircraft marked with the Red Cross or Red Crescent to carry armed combatants, weapons, or ammunition with which to attack or elude enemy forces is prohibited. Use of the white flag to gain a military advantage over the enemy is unlawful.

Commentary

See DoD Law of War Manual, § 5.24.[21]

See § 8.5 for a discussion of protective signs and symbols.

The DoD Law of War Manual states: "The distinctive emblems of the red cross, red crescent, and red crystal are symbols that identify military medical and religious personnel, medical units, and medical transports, or certain other categories of persons engaged in humanitarian work as personnel and objects entitled to special protection." These emblems may only be used to identify these protected persons and objects.[22]

The white flag symbolizes a request to cease fire, negotiate, or surrender. The improper use of a flag of truce is strictly prohibited.[23]

Only POW camps under GC III should be marked using internationally agreed symbols, such as the PW or PG designation.[24] Only civilian internee camps under GC IV should be marked with an IC designation.[25]

Markings that distinguish hospital or safety zones or neutralized zones established under GC I and GC IV may not be used for other

21. *See also* Hague Regulations, art. 23(f); AFP 110-31, *supra* note 7, ¶¶ 8-3c, 8-6a(1), 8-6b; NEWPORT MANUAL, § 7.5.2.2.

22. DOD LAW OF WAR MANUAL, § 5.24.2.

23. Hague Regulations, art. 23(f); DOD LAW OF WAR MANUAL, § 5.24.7; AFP 110-31, *supra* note 7, ¶ 8-6a(2).

24. *See* GC III, art. 23.

25. *See* GC IV, art. 83; DOD LAW OF WAR MANUAL, § 5.24.3.

purposes.[26] Similarly, distinctive and visible signs used to identify objects that are protected as civilian objects under the law of war must not be used for other purposes.[27] Likewise, the distinctive emblem for cultural property may not be used for other purposes.[28]

12.3 NEUTRAL FLAGS, INSIGNIA, AND UNIFORMS

12.3.1 At Sea

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

Commentary

A belligerent warship may use false colors and disguise its outward appearance in other ways in order to deceive an enemy, provided that prior to going into action the warship shows its true colors.[29] Although Article 37(1)(d) of AP I prohibits (inter alia) "the feigning of protected status by the use of signs, emblems or uniforms of . . . neutral or other States not Parties to the conflict," Article 39 clarifies that nothing in Article 37(1)(d) affects "the existing generally recognized rules of international law applicable . . . to the use of flags in the conduct of armed conflict at sea."[30]

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.

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26. DOD LAW OF WAR MANUAL, § 5.24.4.
27. *Id.* § 5.24.5.
28. *Id.* § 5.24.6.
29. NWIP 10-2, ¶ 640a.
30. *See also* DOD LAW OF WAR MANUAL, § 5.24.1.

Commentary

Military aircraft are required to be marked with appropriate signs of their nationality and military character.[31] Such markings "distinguish friend from foe and serve to preclude misidentification as neutral or civilian aircraft."[32] Military aircraft, therefore, may not bear markings of neutral aircraft while engaging in combat. "Combatant markings should be prominently affixed to the exterior aircraft surfaces and be recognizable at a reasonable distance from any direction."[33]

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.

Commentary

Perfidy includes "the feigning of protected status by the use of signs, emblems or uniforms . . . of neutral or other States not Parties to the conflict."[34] Thus, "it is prohibited to make use in an armed conflict of the flags or military emblems, insignia or uniforms of neutral or other States not Parties to the conflict."[35]

12.4 THE UNITED NATIONS FLAG AND EMBLEM

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

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31. AFP 110-31, *supra* note 7, ¶ 7-4; NWIP 10-2, ¶ 500d.
32. AFP 110-31, *supra* note 7, ¶ 7-4.
33. *Id.*
34. AP I, art. 37(1)(d).
35. *Id.* art. 39(1); DOD LAW OF WAR MANUAL, § 5.24.1.

Commentary

Article 37(1)(d) of AP I prohibits on land "the feigning of protected status by the use of signs, emblems or uniforms of the United Nations." Article 38(2) of AP I additionally prohibits the "use of the distinctive emblem of the United Nations, except as authorized by the Organization."

12.5 ENEMY FLAGS, INSIGNIA, AND UNIFORMS

12.5.1 At Sea

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

Commentary

As discussed in § 12.3.1 above, a belligerent warship may use false colors and disguise its outward appearance in other ways in order to deceive an enemy, provided that prior to going into action the warship shows its true colors.[36]

12.5.2 In the Air

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

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36. NWIP 10-2, ¶ 640a; AP I, art. 39. *See also* DOD LAW OF WAR MANUAL, § 5.24.1; NEWPORT MANUAL, § 7.5.3.

Commentary

Improper use of the military insignia or uniform of the enemy is forbidden. Airmen should, therefore, not wear the uniform or national insignia of the enemy while engaging in combat operations.

As discussed in § 12.3.2 above, military aircraft are required to be marked with appropriate signs of their nationality and military character.[37] Accordingly, military aircraft may not bear markings of the enemy while engaging in combat. Once airborne, an aircraft will not be able to change its markings prior to an attack. Thus, "combatant markings should be prominently affixed to the exterior aircraft surfaces and be recognizable at a reasonable distance from any direction."[38]

12.5.3 On Land

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

Commentary

In general, the use of enemy flags, insignia, and military uniforms is permissible outside of combat.[39] Article 23(f) of the Hague Regulations prohibits the "improper" use of enemy flags, insignia, and uniforms.[40] Hague IV forbids the employment of enemy flags, insignia, and uniforms "during combat, but their use at other times is not forbidden."[41] The use of enemy flags, insignia, and uniforms as a ruse is therefore permissible.

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37. AFP 110-31, *supra* note 7, ¶ 7-4; NWIP 10-2, ¶ 500d.
38. AFP 110-31, *supra* note 7, ¶ 7-4.
39. DOD LAW OF WAR MANUAL, §§ 5.23.1, 5.23.1.3.
40. *Id.* § 5.23. *See also* Trial of Otto Skorzeny, 9 LRTWC 90 (1949).
41. FM 27-10, ¶ 54.

> Once an armed engagement begins, Article 23(f) of the Hague Regulations prohibits the use of "the national flag or . . . military insignia and uniform of the enemy" to deceive the enemy. Similarly, Article 39(2) of AP I prohibits the "use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favour, protect or impede military operations." AFP 110-31 states: "Article 23(f) of the Hague Regulations forbids 'improper use . . . of the national flag, or of the military insignia and uniform of the enemy.' Improper use of an enemy's flags, military insignia, national markings and uniforms involves use in actual attacks."[42]
>
> The prohibition on the misuse of enemy flags, insignia, and uniforms "refers only to concrete visual objects, rather than enemy codes, passwords, and countersigns." Thus, "enemy codes, passwords, and countersigns may be used as a ruse to aid military operations."[43]
>
> In addition to prohibiting the use of enemy flags, military emblems, insignia, or uniforms while engaging in attacks, Article 39(2) of AP I also prohibits such use "in order to shield, favour, protect or impede military operations." The United States does not consider this provision of AP I to be part of customary international law and U.S. military personnel are therefore not subject to this more restrictive rule.[44] Similarly, Canada "does not intend to be bound by the prohibitions contained in paragraph 2 of Article 39 to make use of military emblems, insignia or uniforms of adverse parties in order to shield, favour, protect or impede military operations."[45]

Combatants caught behind enemy lines wearing the uniform of their adversaries run the risk of being denied POW status or protection and, historically, have been subjected to severe punishment. It is permissible for downed aircrews and escaping POWs to use enemy uniforms to evade capture, so long

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42. AFP 110-31, *supra* note 7, ¶ 8-6c.

43. DOD LAW OF WAR MANUAL, § 5.23.1.5. *See also* BOTHE, PARTSCH, & SOLF, *supra* note 6, at 214 (AP I, art. 29, ¶ 2.3.3; AP I, art. 37, ¶ 2.5).

44. DOD LAW OF WAR MANUAL, § 5.23.3.

45. Canada, Statement on Ratification of AP I, Nov. 20, 1990, 1591 U.N.T.S. 462, 463; BOTHE, PARTSCH, & SOLF, *supra* note 6, at 214 (AP I art. 39, ¶ 2.3).

as they do not attack enemy forces, collect military intelligence, or engage in similar military operations while so attired.

Commentary

Military personnel may use enemy uniforms to evade capture. Similarly, POWs may use enemy military uniforms to facilitate their escape from a POW camp to return to friendly lines. However, personnel "using enemy uniforms to evade capture or escape must not engage in combat while in the enemy's uniform, and, if they are not escaping POWs, they may be liable to treatment as spies and saboteurs if caught behind enemy lines."[46]

Article 93 of GC III recognizes that offences committed by POWs "with the sole intention of facilitating their escape and which do not entail any violence against life or limb, such as . . . the wearing of civilian clothing, shall occasion disciplinary punishment only." The wearing of civilian clothing by a POW to escape is therefore permissible.

Thus, although the use of enemy uniforms outside of combat is not prohibited by the customary law of war, nor by law of war treaties to which the United States is a party, "combatants captured by an opposing party behind the opposing party's lines while wearing the uniform of the opposing party may be liable to treatment as spies and saboteurs."[47]

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

Commentary

Using enemy uniforms and equipment without an intent to deceive the enemy is not prohibited. Similarly, using captured enemy weapons or equipment during combat is permissible. Nonetheless, when

46. DOD LAW OF WAR MANUAL, § 5.23.1.4.
47. *Id.* § 5.23.2.

circumstances permit, enemy insignia should generally be removed, or alternative measures taken to distinguish U.S. forces from the enemy.[48] For example, Article 64 of the Lieber Code provides: "If American troops capture a train containing uniforms of the enemy, and the commander considers it advisable to distribute them for use among his men, some striking mark or sign must be adopted to distinguish the American soldier from the enemy." The use of foreign military uniforms or equipment in training to promote realism and recognition is not prohibited by international law.

12.6 FEIGNING DISTRESS

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

Commentary

Certain deceptions may not meet the definition of "ruses" because they may invite the confidence of an adversary with respect to protection under the law of war. Nevertheless, these deceptions are not technically prohibited by the law of war—for example, "an aircraft crew that feigns loss of control and the appearance that the aircraft was about to crash in order to dissuade further enemy attack and to break contact with enemy forces."[49]

In air combat, disabled enemy aircraft are normally pursued to destruction "because of the impossibility in verifying its true status and inability to enforce surrender." Although the aircraft may be disabled, "it may or may not have lost its means of combat." Additionally, "it still may represent a valuable military asset." Nonetheless, "if

48. *Id.* § 5.23.1.2.
49. *Id.* § 5.25.3.

an aircraft in distress is clearly *hors de combat* (out of conflict), from the information known to the attacking force at the time, then its destruction offers no military advantage, and the attack should be broken off to permit possible evacuation by crew or passengers."[50]

12.7 FALSE CLAIMS OF NONCOMBATANT OR CIVILIAN STATUS

It is a violation of the law of armed conflict to attack the enemy by false indication of intent to surrender or by feigning shipwreck, sickness, wounds, noncombatant, or civilian status (see 12.3.1). An attack by a person feigning shipwreck, sickness, or wounds undermines the protected status of those rendered incapable of combat. Attacking enemy forces while posing as a civilian puts all civilians at hazard. Such acts of perfidy are punishable as war crimes.

Commentary

The following acts constitute perfidy: (1) the feigning of an intent to negotiate under a flag of truce or of a surrender; and (2) the feigning of civilian, non-combatant status.[51] These rules recognize that the enemy will be tempted to attack civilians and the sick and wounded, and refuse offers to surrender or negotiate, if it appears dangerous to respect these persons or offers.[52]

12.8 SPIES

A spy is someone who, while in territory under enemy control or the zone of operations of a belligerent force, seeks to obtain information while operating under a false claim of civilian or friendly forces status with the intention of passing that information to an opposing belligerent. Members of the armed forces who penetrate enemy-held territory in civilian attire or enemy uniform to collect intelligence are spies. Personnel conducting reconnaissance missions behind enemy lines while properly uniformed are not spies.

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50. AFP 110-31, *supra* note 7, ¶ 4-2d. *See also* NEWPORT MANUAL, § 7.5.2.3.
51. AP I, art. 37(1)(a), (c).
52. DOD LAW OF WAR MANUAL, § 5.22.3.

Crew members of warships, naval auxiliaries (even if crew members do not wear uniforms), and military aircraft engaged in intelligence collection missions in enemy waters or airspace are not spies, unless the ship or aircraft displays false civilian, neutral, or enemy markings.

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

Commentary

A person (military or civilian) is considered to be a spy when, acting clandestinely or on false pretenses, he or she obtains, or endeavors to obtain, information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.[53] Acting "clandestinely or under false pretenses" means deliberately concealing or misrepresenting one's identity and conduct (e.g., a member of the armed forces wearing civilian clothes or an enemy uniform so that the enemy will fail to identify the person as a member of the opposing armed force).[54]

Military personnel not wearing a disguise who penetrate "the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies." Similarly, military personnel and civilians who carry out their mission openly, who are "entrusted with the delivery of despatches intended either for their own army or for the enemy's army," are not spies.[55] Article 46(2) of AP I extends these protections beyond the "zone of operations" of the hostile force to any territory "controlled" by the enemy. Thus, members of the armed forces (properly uniformed) who openly seek to gather

53. Hague Regulations, art. 29; DOD LAW OF WAR MANUAL, §§ 4.17, 4.17.2. *See also* Lieber Code, art. 88(1); FM 27-10, ¶ 75; AFP 110-31, *supra* note 7, ¶ 9-2a; NEWPORT MANUAL, § 7.5.5.

54. DOD LAW OF WAR MANUAL, § 4.17.2.1.

55. Hague Regulations, art. 29; DOD LAW OF WAR MANUAL, § 4.17.2.1.

and transmit intelligence information in the enemy's zone of the interior, including crews of reconnaissance aircraft, are not considered "spies" and are not subject to national espionage legislation:

> A member of the armed forces of a Party to the conflict who, on behalf of that Party and in territory controlled by an adverse Party, gathers or attempts to gather information shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces.[56]

Further, "soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies," and, similarly, "[s]oldiers and civilians, carrying out their mission openly, intrusted with the delivery of despatches intended either for their own army or for the enemy's army," are also not considered spies.[57] In *Wessels v. McDonald*, the U.S. District Court noted: "In this great World War through which we have just passed, the field of operations which existed after the United States entered the war, and, especially in regard to naval operations, brought the port of New York within the field of active operations."[58] And, in *Ex parte Quirin*, the U.S. Supreme Court stated: "The law of war cannot rightly treat those agents of enemy armies who enter our territory, armed with explosives intended for the destruction of war industries and supplies, as any the less belligerent enemies than are agents similarly entering for the purpose of destroying fortified places or our Armed Forces."[59]

Acts of espionage are not prohibited by international law.[60] However, "any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy."[61] Persons who commit acts of spying may be punished, in some cases by death, regardless of the success or failure of

56. AP I, art. 46(2). *See also* FM 27-10, ¶ 75.
57. AFP 110-31, *supra* note 7, ¶ 9-2a.
58. Wessels v. McDonald, 265 F. 754, 763–64 (E.D.N.Y. 1920).
59. *Ex parte* Quirin, 317 U.S. 1, 37 (1942).
60. DOD LAW OF WAR MANUAL, § 4.17.4.
61. AP I, art. 46(1); DOD LAW OF WAR MANUAL, § 4.17.5.

their mission.[62] Nonetheless, spies shall not be punished without previous trial.[63] Persons lawfully convicted of spying may be executed in areas under occupation.[64]

In the United States, Article 103 of the Uniform Code of Military Justice provides:

> Any person who in time of war is found lurking as a spy or acting as a spy in or about any place, vessel, or aircraft, within the control or jurisdiction of any of the armed forces, or in or about any shipyard, any manufacturing or industrial plant, or any other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere, shall be tried by a general court-martial or by a military commission and on conviction shall be punished by death or such other punishment as a court-martial or a military commission may direct.

Persons may also be charged with and prosecuted for espionage-related offenses committed in the United States under 18 U.S.C. §§ 792–99.

If a spy who rejoins the army to which he or she belongs is subsequently captured by the enemy, he or she shall be treated as a POW and incurs no responsibility for his or her previous acts of espionage.[65] Article 46(4) of AP I provides:

> A member of the armed forces of a Party to the conflict who is not a resident of territory occupied by an adverse Party and who has engaged in espionage in that territory shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured before he has rejoined the armed forces to which he belongs.

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62. DOD LAW OF WAR MANUAL, § 4.17.2.3; Lieber Code, art. 88(1); FM 27-10, ¶ 78b; AFP 110-31, *supra* note 7, ¶ 9-2b.

63. Hague Regulations, art. 30; FM 27-10, ¶ 78a.

64. GC IV, art. 68.

65. Hague Regulations, art. 31; DOD LAW OF WAR MANUAL, § 4.17.5.1; FM 27-10, ¶ 78c; AFP 110-31, *supra* note 7, ¶ 9-2a.

> Article 104 of the Lieber Code similarly provides that "[a] successful spy or war-traitor, safely returned to his own army, and afterwards captured as an enemy, is not subject to punishment for his acts as a spy or war-traitor."

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14 U.S.C., § 527, Naval Vessel Protection Zones

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18 U.S.C., § 2441, War Crimes Act of 1996

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United States Oceans Policy Statement, 10 March 1983; updated in part by United States Marine Scientific Research Policy, 15 September 2020

UNITED STATES-RUSSIAN FEDERATION NUCLEAR ARMS CONTROL TREATIES

1973 Agreement on Prevention of Nuclear War

1976 Treaty on Peaceful Nuclear Explosions

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Strategic Arms Limitation Talks (SALT) Agreement of 1972

Strategic Arms Limitation Talks (SALT) Agreement of 1977

Strategic Arms Reduction Treaties of 1991 (START I)

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Strategic Arms Reduction Treaties of 2010 (New START)

Threshold Test Ban Treaty of 1974

MULTILATERAL ARMS CONTROL AGREEMENTS

1959 Antarctic Treaty

1963 Limited Test Ban Treaty

1967 Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco)

1968 Treaty on the Nonproliferation of Nuclear Weapons

1968 Rescue and Return of Astronauts Agreement

1971 Seabed Arms Control Treaty

1985 Treaty of Rarotonga (South Pacific)

1992 Open Skies Treaty

1995 Treaty of Bangkok (Southeast Asia)

1996 Treaty of Pelindaba (Africa)

2006 Treaty of Semipalatinsk (Central Asia)

INTERNATIONAL LAW CONCERNING THE LAW OF THE SEA

1928 Pan American Maritime Neutrality Convention

1944 Convention on International Civil Aviation (Chicago Convention)

1951 Convention Relating to the Status of Refugees

1958 Geneva Convention on the High Seas

1959 Antarctic Treaty

1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Outer Space Treaty of 1967)

1972 International Regulations for Preventing Collisions at Sea (1972 COLREGS)

1972 United States-Union of the Soviet Socialist Republic Agreement on the Prevention of Incidents On and Over the High Seas

1974 International Convention for the Safety of Life at Sea

1982 United Nations Convention on the Law of the Sea (UNCLOS)

1988 Convention for the Suppression of Unlawful Acts against the Safety of Navigation (SUA Convention)

1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

1990 United States-Union of the Soviet Socialist Republic Agreement on the Prevention of Dangerous Military Activities

1991 Protocol on Environmental Protection to the Antarctic Treaty

1998 United States-China Military Maritime Consultative Agreement (MMCA)

2005 Protocols to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation

2014 Code for Unplanned Encounters at Sea

2014 United States-China Memorandum of Understanding Regarding the Rules of Behavior for Safety of Air and Maritime Encounters

Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), 25 May 1993

INTERNATIONAL LAW CONCERNING THE LAW OF WAR

1907 Hague Convention Concerning Bombardment by Naval Forces in Time of War (Hague IX)

1907 Hague Convention Concerning the Rights and Duties of Neutral Powers in Naval War (Hague XIII)

1907 Hague Convention Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War (Hague XI)

1907 Hague Convention Relative to the Laying of Automatic Submarine Contact Mines (Hague VIII)

1907 Hague Convention Respecting the Laws and Customs of War on Land (Hague IV)

1907 Hague Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague V)

1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare

1936 London Protocol in Regard to the Operations of Submarines or Other War Vessels with Respect to Merchant Vessels

1936 Montreux Convention

1945 Charter of the United Nations

1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GWS)

1949 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (GWS Sea)

1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War (GPW)

1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (GC)

1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict

1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction

1977 Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts

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

1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects (with Amendment to Article 1)

1980 Protocol I to the Convention on Certain Conventional Weapons (Non-Detectable Fragments)

1980 Protocol II to the Convention on Certain Conventional Weapons (Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices)

1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

1988 Protocol III to the Convention on Certain Conventional Weapons (Prohibitions or Restrictions on the Use of Incendiary Weapons)

1993 Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1993 Chemical Weapons Convention or CWC)

1995 Protocol IV to the Convention on Certain Conventional Weapons (Blinding Laser Weapons)

1996 Protocol II Amended to the Convention on Certain Conventional Weapons (Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended on 3 May 1996)

1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction

1998 Rome Statute of the International Criminal Court

1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict

2003 Protocol V to the Convention on Certain Conventional Weapons (Explosive Remnants of War)

2005 Protocol III Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem

2008 Oslo/Dublin Convention on Cluster Munitions

INTERNATIONAL STRAITS TREATIES

1857 Convention on Discontinuance of Sound Dues (United States and Denmark)

1857 Treaty of Redemption of the Sound Dues

1881 Boundary Treaty between Argentina and Chile

1984 Treaty of Peace and Friendship between Argentina and Chile

GLOSSARY

air defense identification zone (ADIZ). Airspace of defined dimensions within which the ready identification, location, and control of airborne vehicles are required. (DOD Dictionary)

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

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

exclusive economic zone. A maritime zone adjacent to the territorial sea that may not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. Also called **EEZ**. (DOD Dictionary)

information operations. The integrated employment, during military operations, of information-related capabilities in concert with other lines of operation to influence, disrupt, corrupt, or usurp the decision-making of adversaries and potential adversaries while protecting our own. Also called **IO**. See also **electromagnetic warfare; military deception; military information support operations; operations security**. (DOD Dictionary)

military information support operations. Planned operations to convey selected information and indicators to foreign audiences to influence their emotions, motives, objective reasoning, and ultimately the behavior of foreign governments, organizations, groups, and individuals in a manner favorable to the originator's objectives. Also called **MISO**. (DOD Dictionary)

Military Sealift Command. A major command of the United States Navy reporting to Commander, Fleet Forces Command, and the United States Transportation Command's component command responsible for designated common-user sealift transportation services to deploy, employ, sustain, and redeploy United States forces on a global basis. Also called **MSC**. See also **transportation component command**. (DOD Dictionary)

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

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

noncombatant evacuation operation. An operation whereby noncombatant evacuees are evacuated from a threatened area abroad, which includes areas facing actual or potential danger from natural or manmade disaster, civil unrest, imminent or actual terrorist activities, hostilities, and similar circumstances, that is carried out with the assistance of the Department of Defense. Also called **NEO**. See also **evacuation; noncombatant evacuees; operation; safe haven**. (DOD Dictionary)

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

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

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

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

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

riot control agent. Any chemical, not listed in a schedule of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction that can produce rapidly in humans sensory irritation or disabling physical effects that disappear within a short time following termination of exposure. Also called **RCA**. See also **chemical warfare**. (DOD Dictionary)

rules of engagement. Directives issued by competent military authority that delineate the circumstances and limitations under which United

States forces will initiate and/or continue combat engagement with other forces encountered. Also called **ROE**. See also **law of war**. (DOD Dictionary)

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

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

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

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

LIST OF ACRONYMS AND ABBREVIATIONS

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

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

OCS	outer continental shelf
OPCON	operational control
OTH	over the horizon
POW	prisoner of war
PRC	People's Republic of China
PSI	Proliferation Security Initiative
RCA	riot control agent
RCM	rules for court martial
ROE	rules of engagement
SALT	Strategic Arms Limitation Talks
SECDEF	Secretary of Defense
SECNAVINST	Secretary of the Navy instruction
SOFA	status of forces agreement
SROE	standing rules of engagement
SRUF	standing rules for the use of force
START	Strategic Arms Reduction Treaty
TACON	tactical control
U.S.C.	United States Code
UA	unmanned aircraft
UCMJ	Uniform Code of Military Justice
UMS	unmanned system
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
USCG	United States Coast Guard
USCGC	United States Coast Guard cutter
USNS	United States Naval Ship
USS	United States Ship
USSR	Union of the Soviet Socialist Republics
WMD	weapons of mass destruction