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# INTERNATIONAL LAW STUDIES

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## The Newport Manual on the Law of Naval Warfare

*James Kraska*

*David Letts*

*Raul "Pete" Pedrozo*

*Wolff Heintschel von  
Heinegg*

*Rob McLaughlin*

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*Yurika Ishii*

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## **International Law Studies**

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The first civilian professor to teach at the College was James R. Soley, who served as a lecturer in international law. In 1894, Commander Charles H. Stockton was appointed to replace Professor Freeman Snow of Harvard University as lecturer in law. Stockton would go on to become Rear Admiral before being named the fifth President of the College in 1898. In 1901, Stockton published the first U.S. Naval Code of Law. Its contemporary successor, *The Commander's Handbook on the Law of Naval Operations*, is the world's foremost manual on international law and naval operations.

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PREFACE

The Newport Manual on the Law of Naval Warfare reflects the law as it exists (*lex lata*); that is, the prevailing rules governing international armed conflict at sea as States have recognized and employed them in the past and present. Where the law is not clear, or States have taken differing positions, these uncertainties are stated and discussed. However, the Manual's authors have avoided stating any *lex ferenda* positions; that is, law as they wish it to be. Accordingly, this Manual does not set out any "black letter rules" as some scholarly-produced manuals have sought to do, but rather the authors explain what they believe the law is and the basis for this view. While areas of uncertainty are explored, there are no statements in this Manual that develop the law in any direction or influence changes in the law. Instead, we produced a restatement of the law of naval warfare, as currently reflected in treaties, customary international law, and other sources of international law. Since many areas of the law of naval warfare lack binding treaty law as a source of legal obligation, we have relied extensively on customary international law, as reflected in State practice and States' *opinio juris*.

The Manual is the first effort to restate the law of naval warfare as a purely *lex lata* exercise since 1955 and it is designed to provide a practical guide for commanders and seafarers, lawyers and officials, and educators and students. In doing so, the Manual also factors in the developments in warfighting technologies in recent decades, which have significantly influenced the nature of war at sea.

The views presented in the Newport Manual reflect the personal views of the authors. It does not reflect the official policy or position of any government, ministry of defense, university, or institution. The Newport Manual is a work of scholarship produced by the authors in their personal capacity, albeit benefiting from their operational law experience in service in the armed forces.

The Manual also benefited from peer review from scholars and experts, who provided their comments in a personal capacity. The work also benefited from the generous support of research grants from the Australian National University and the Korea Institute of Ocean Science & Technology, grant # PO01429.

The Newport Manual was edited by James Kraska, David Letts, Raul “Pete” Pedrozo, and Wolff Heintschel von Heinegg. Michelle Nichols copyedited the Manual. The editors of *International Law Studies*, James R. Crisfield Jr., Captain, U.S. Navy (Retired), Editor-in-Chief, and Greg Smith, Captain, U.S. Navy (Retired), Associate Editor, completed final editing and publication.



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LIST OF ACRONYMS

A2/AD	Anti-Access/Area Denial
ADIZ	Air Defense Identification Zone
AIS	Automatic Identification System
AP	Additional Protocol
ASBM	Anti-Ship Ballistic Missile
ASCM	Anti-Ship Cruise Missile
ASL	Archipelagic Sea Lane
ASLP	Archipelagic Sea Lanes Passage
ASuW	Anti-Surface Warfare
ASW	Anti-Submarine Warfare
CCG	China Coast Guard
CIWS	Close-In Weapon System
CN3	Communication/Navigation Network Nodes
DEW	Directed Energy Weapons
DoD	Department of Defense
DPH	Direct Participation in Hostilities
EEZ	Exclusive Economic Zone
EW	Electronic Warfare
GC	Geneva Convention
HELIOS	High Energy Laser with Integrated Optical-dazzler and Surveillance
HIMARS	High Mobility Artillery Rocket System
IAC	International Armed Conflict
ICAO	International Civil Aviation Organization
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
ID	Inspection/Identification
IDF	Israel Defense Force
IMO	International Maritime Organization
IO	Information Operations
ISR	Intelligence, Surveillance, and Reconnaissance
JMSDF	Japan Maritime Self-Defense Force
LCAC	Landing Craft Air Cushion
LNW	Law of Naval Warfare
LOAC	Law of Armed Conflict

LTTE	Liberation Tigers of Tamil Eelam
MASS	Maritime Autonomous Surface Ships
MCM	Mine Countermeasure
MEZ	Maritime Exclusion Zone
MOFA	Ministry of Foreign Affairs (Japan)
NIAC	Non-International Armed Conflict
NPT	Nuclear Non-Proliferation Treaty
NUC	Not-Under-Command
OAG	Organized Armed Group
ODIN	Optical Dazzling Interdictor, Navy
OPSEC	Operational Security
PAF	People's Armed Forces
PAFMM	People's Armed Forces Maritime Militia
PAP	People's Armed Police
PLA	People's Liberation Army
PLAN	People's Liberation Army-Navy
POW	Prisoner of War
RHIB	Rigid Hull Inflatable Boat
SAM	Surface-to-Air Missile
SAR	Search and Rescue
SSM	Surface-to-Surface Missile
TCS	Time Critical Strike
TTP	Tactics, Techniques, and Procedures
UAS	Unmanned Aerial System
UAV	Unmanned Aerial Vehicles
UMS	Unmanned Maritime System
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
USV	Unmanned Surface Vessel
UUV	Unmanned Underwater Vessel
VBSS	Visit, Board, Search, and Seizure
WBLC	Waterborne Logistics Craft

ABBREVIATIONS FOR TREATIES AND OTHER INSTRUMENTS

API	Protocol Additional to the Geneva Conventions of 12 August 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 12 August 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
Chicago Convention	Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295
ENMOD Convention	Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques, Dec. 10, 1976, 1108 U.N.T.S. 151
GC I	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 II	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 III	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 IV	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
Hague IV	Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2227, T.S. No. 539
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 War-ships, 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 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 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, <i>reprinted in</i> 32 AMERICAN JOURNAL OF INTERNATIONAL LAW SUPPLEMENT 12 (1938)
High Seas Convention	Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5639, 450 U.N.T.S. 82
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



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, <i>reprinted in</i> 31 AMERICAN JOURNAL OF INTERNATIONAL LAW SUPPLEMENT 137 (1939)
Montreux Convention	Convention regarding the Régime of the Straits, Jul. 20, 1936, 173 L.N.T.S. 213
Pan American Convention	Convention on Maritime Neutrality, Feb. 20, 1928, 135 L.N.T.S. 187
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, 15 MARTENS NOUVEAU RECUEIL (ser. 1) 791, <i>reprinted in</i> 1 AMERICAN JOURNAL OF INTERNATIONAL LAW SUPPLEMENT 89 (1907)
Rome Statute	Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90
SAR Convention	International Convention on Maritime Search and Rescue, Apr. 27, 1979, T.I.A.S No. 11,093, 1405 U.N.T.S. 119
SOLAS	International Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47, 1184 U.N.T.S. 2 (as amended)
St. Petersburg Declaration	Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Nov. 29/Dec. 11, 1868, 138 Consol. T.S. 297
VCLT	Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331
UNCLOS	United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397

ABBREVIATIONS FOR MILITARY MANUALS,  
TREATISES, AND OTHER SOURCES

ADDP 06.4	Australian Defence Headquarters, ADDP 06.4, Law of Armed Conflict (2006)
Air and Missile Warfare Manual	Program on Humanitarian Policy and Conflict Research at Harvard University, Manual on International Law Applicable to Air and Missile Warfare (2009)
Canadian Manual	Chief of the General Staff (Canada), B-GJ-005-104/FP-021, Law of Armed Conflict at the Operational and Tactical Levels (2001)
Danish Manual	Danish Ministry of Defence, Defence Command Denmark, Military Manual on International Law Relevant to Danish Armed Forces in International Operations (2016)
DoD Law of War Manual	Office of the General Counsel, U.S. Department of Defense, Law of War Manual (rev. ed., Dec. 2016)
FM 6-27	Department of the Army, U.S. Marine Corps, FM 6-27/MCTP 11-10C, The Commander's Handbook on the Law of Land Warfare (2019)
French Manual	Republique Française, Ministère de la Défense, Manuel de Droit des Conflits Armés (2012)
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)
ICRC Interpretive Guidance on the Notion of DPH	Nils Melzer, International Committee of the Red Cross, Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law (2009)

- Indian Handbook Indian Navy, Handbook on the Law Maritime Operations, INBR 1652 (2013)
- Japan, JMSDF Regulations for Officers and Crews of Warships Jieikan Jouin Hukumukisoku, Kaibakujin Dai 10346 Gou (25.12.2) Bessatsu (自衛艦乗員服務規則、海幕人第 10346 号) (25.12.2) 別冊 [JMSDF Regulations for Officers and Crews of Warships, Dec. 2, 2013, Supplement]
- Japan, Revised Rules of Naval War (1942) Kaigunsho (海軍省), Daitoa Sensorioite Tekikokunotorusochinikangami Taisho Sannen Gunrei Kai Dai Hachigo Kaisen Hokino Ichibutokotonarukiteiwo Tekiyosurunoken, Showa Jushichinen Sangatsu Hatsuka (大東亜戦争ニ於テ敵国ノ執ル措置ニ鑑ミ大正三年軍令海第八号海戦法規ノ一部ト異ル規定ヲ適用スルノ件、官報第四五五七号、昭和十七年三月二十日) [Ministry of Navy, In view of the measures taken by the enemy in the Greater East Asia War, the provisions of Military Ordinance No. 8 of 1914, which differ from some of the Rules of Naval War, shall apply (1942)], Mar. 20, 1942, Kanpō No. 4557, at 592, available at <https://dl.ndl.go.jp/info:ndljp/pid/2961059>
- Japan, Rules of Naval War (1914) Japan, Kaisen Hoki (海戦法規), Gunrei Dai Hachigo, Taisho 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)]
- Japan, Ship Law (1899) Senpaku Ho (船舶法), Meiji Sanjuninen Horitsu Dai Yonjurokugo (明治 32 年法律第 46 号), Dai Nijunijo (第 22 条) [Japan, Ship Law, Act No. 46, 1899, 2018 Revision]
- 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 Directive of Ships Classification and Names	Kaijo Jieitaino Shiyosurusenpakunokubunto oyobi-meishotowohuyosuru Hyoujunwosadameru Kunrei (海上自衛隊の使用する船舶の区分等及び名称等を付与する標準を定める訓令), Kaijo Jieitai Kunrei Daisanjugo, Showa Sanjugonen Kugatsu Nijuyokka (海上自衛隊訓令第30号、昭和35年9月24日) [Japan Minister of Defense Directive Establishing the Standard for Designating the Classification and Names, etc. of Ships Used by the Maritime Self-Defense Force, Sept. 24, 1960]
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]
Netherlands Manual	Koninklijke Landmacht, Militair Juridische Dienst, Humanitair Oorlogsrecht: Handleiding, Voorschrift No. 27-412 (2005)
Norwegian Manual	Norwegian Ministry of Defence, Manual of the Law of Armed Conflict (2013, English ed. 2018)
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), <i>reprinted in</i> 50 International Law Studies 359 (1955)
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)
NZ Manual	New Zealand Defence Force, Manual of Armed Forces Law, Volume 4: Law of Armed Conflict, DM 69 (2d ed. 2019)
Oxford Manual	Institute of International Law, The Laws of War on Land (1880), <i>reprinted in</i> The Laws of Armed Conflicts 29 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004)

Oxford Manual of Naval Warfare	Institute of International Law, <i>The Law of Naval Warfare Governing the Relations between Belligerents</i> (1913), <i>reprinted in The Laws of Armed Conflicts</i> 1123 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004)
San Remo Manual	San Remo Manual on International Law Applicable to Armed Conflicts at Sea (Louise Doswald Beck ed., 1995)
Tachi, International Law in Wartime	Tachi, Sakutarō (立作太郎), <i>Senji Kokusaiho Ron</i> (戦時国際法論) [S. Tachi, <i>International Law in Wartime</i> (Tokyo, 1944)]
Tallinn Manual	Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations (Michael N. Schmitt gen. ed., 2017)
UK Manual	United Kingdom Ministry of Defence, <i>The Manual of the Law of Armed Conflict</i> (2004)

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**CHAPTER 1****CONCEPTS AND SOURCES OF THE LAW OF NAVAL WARFARE**

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**1.1 The Distinct Nature of the Law of Naval Warfare**

The law of naval warfare—like the law of air warfare—rests on three pillars:

- Rules and principles governing the conduct of hostilities, including the legality of methods and means of naval warfare, and the protection of victims and civilians and civilian objects at sea;
- Prize law; and
- The law of maritime neutrality.<sup>1</sup>

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1. The law of air warfare does not benefit from specific treaties dealing with the topic. Rather, it is drawn from a wide variety of sources, including two key publications: the 1923 Hague Rules of Aerial Warfare and the 2009 Harvard Manual on International Law Applicable to Air and Missile Warfare (AIR AND MISSILE WARFARE MANUAL).

The conduct of hostilities at sea takes place in, under, and above sea areas that continue to be used by international shipping and air traffic. Hostilities at sea can also take place in areas beyond national jurisdiction (e.g., the high seas). By contrast, land warfare is limited to the land territory (and superjacent airspace) under the sovereign control of the belligerents. The law of land warfare focuses on the regulation of the conduct of hostilities and on the protection of victims, civilians, and civilian objects.<sup>2</sup> By contrast, the law of naval warfare is more concerned with the status of objects and platforms, such as ships and aircraft, and the regulation of the exercise of belligerent rights by or against those platforms. Moreover, the principles and rules on targeting at sea will predominantly apply to attacks against objects, that is, platforms such as ships and aircraft, not the individuals who are operating or otherwise on board the platforms.

The law of naval warfare (like air warfare, but unlike land warfare) is characterized by an element of economic warfare. Under prize law, belligerents at sea are permitted to capture enemy merchant vessels and civil aircraft, and enemy goods therein, outside neutral waters and airspace, and to subject neutral merchant vessels and civil aircraft outside neutral waters and airspace to visit, search, diversion, and, if they carry contraband or if certain other legal considerations apply, capture. To avoid confusing the exercise of belligerent measures with acts of piracy or privateering, only warships and military aircraft can exercise belligerent rights.<sup>3</sup>

Furthermore, if neutral merchant vessels and civil aircraft make an effective contribution to the enemy's military action or war-fighting (or, in some States' interpretation, war-sustaining) effort, they are liable to be attacked as military objectives.<sup>4</sup>

Belligerent naval units may also pass through neutral sea areas and call at neutral ports for replenishment or repair (see Chapter 11). The use of neutral

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2. The law of neutrality also applies in land warfare. Like the law of maritime neutrality, it protects the territorial sovereignty of neutral States, and it subjects such States to various obligations. Its object and purpose are to prevent an escalation of an international armed conflict (IAC). The respective rules are laid down in 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.

3. *See infra* Section 3.1; UNCLOS, art. 29.

4. 10 U.S.C. § 950p(a)(1); DOD LAW OF WAR MANUAL §§ 5.6.6.2, 5.6.8. 5.17.2.3, 14.8.3.2; NWP 1-14M §§ 5.3.1, 5.3.4, 7.4, 8.2.

sea areas and ports is regulated by the law of maritime neutrality, which aims at preventing an escalation of an international armed conflict (IAC) at sea through the involvement of neutral States.

Treaties addressing the law of naval warfare predominantly apply to situations of IAC. However, the law of naval warfare contains many rules, such as the law of prize and blockade, that developed through custom and may apply in non-international armed conflicts (NIACs).<sup>5</sup>

The law of naval warfare is *lex specialis* and prevails over the peacetime international law of the sea. To the extent that peacetime international maritime law as reflected in the United Nations Convention on the Law of the Sea (UNCLOS) may be inconsistent with the law of naval warfare, the latter prevails during periods of hostilities.

## 1.2 Sources of the Law of Naval Warfare

The principal sources of the law of naval warfare are international treaties, some of which date back to the nineteenth century. However, the law of naval warfare also has been extensively developed by State practice and accompanying *opinio juris*. Accordingly, customary international law is another important source of the international law applicable to armed conflicts at sea.<sup>6</sup> While States are bound only by the treaties they have ratified, all States are bound by customary international law.

### 1.2.1 Law of Naval Warfare Treaties

The treaties on the law of naval warfare reflect its distinct nature. States have adopted specific treaties on the law of naval warfare since 1856.

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5. Eran Shamir-Borer, *The Revival of Prize Law—An Introduction to the Summary of Recent Cases of the Prize Court in Israel*, 50 ISRAEL YEARBOOK ON HUMAN RIGHTS 349, 362 (2020).

6. Some States, such as Denmark, that are bound by the European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS 5) apply international human rights law extraterritorially in the course of armed hostilities at sea, in particular with regard to persons not belonging to any of the categories of protected persons under GC II and III. See DANISH MANUAL ch. 3 § 4.2.

The following treaties regulate specific aspects of the law of naval warfare:<sup>7</sup>

- Conduct of hostilities at sea (see Section 1.2.1.1);
- Protection of victims of armed conflict (see Section 1.2.1.2);
- Prize law (see Section 1.2.1.3); and
- Maritime neutrality (see Section 1.2.1.4).

### 1.2.1.1 Conduct of Hostilities at Sea

Conduct of hostilities at sea, including methods and means of naval warfare (see Chapters 3, 4–8):

- Declaration Respecting Maritime Law, Paris, April 16, 1856;<sup>8</sup>
- Convention (VII) Relating to the Conversion of Merchant Ships into War-ships, The Hague, October 18, 1907;<sup>9</sup>
- Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines, The Hague, October 18, 1907;<sup>10</sup>
- Convention (IX) Concerning Bombardment by Naval Forces in Time of War, The Hague, October 18, 1907;<sup>11</sup>
- Procès-verbal: Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of April 2, 1930, London, November 6, 1936;<sup>12</sup>
- Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, May 14, 1954;<sup>13</sup>
- Regulations for the Execution of the Convention for the Protection of Cultural Property in Event of Armed Conflict, The Hague, May 14, 1954;<sup>14</sup>
- Protocol for the Protection of Cultural Property in the Event of Armed Conflict (Protocol I), The Hague, May 14, 1954;<sup>15</sup> and

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7. Some of those treaties deal with both the conduct of hostilities and prize law. Accordingly, they are listed more than once.

8. 115 Consol. T.S. 1, 15 MARTENS NOUVEAU RECUEIL (ser. 1) 791, *reprinted in* 1 AMERICAN JOURNAL OF INTERNATIONAL LAW SUPPLEMENT 89 (1907).

9. 205 Consol. T.S. 319.

10. 36 Stat. 2332, T.S. No. 541.

11. 36 Stat. 2351, T.S. No. 542.

12. 173 L.N.T.S. 353.

13. 249 U.N.T.S. 240.

14. *Id.*

15. 249 U.N.T.S. 358.

- Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, March 26, 1999.<sup>16</sup>

### 1.2.1.2 Protected Persons

Protection of victims of armed conflict (see Chapter 10):

- Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, August 12, 1949;<sup>17</sup>
- Convention (III) Relative to the Treatment of Prisoners of War, Geneva, August 12, 1949;<sup>18</sup> and
- Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, August 12, 1949.<sup>19</sup>

### 1.2.1.3 Prize Law

Prize law (see Chapter 9):

- Declaration Respecting Maritime Law, Paris, April 16, 1856;<sup>20</sup>
- Convention (VI) Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, The Hague, October 18, 1907;<sup>21</sup>
- Convention (XI) Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War, The Hague, October 18, 1907;<sup>22</sup> and

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16. 2253 U.N.T.S. 172.

17. 75 U.N.T.S. 85. *See also* ICRC, COMMENTARY ON THE SECOND GENEVA CONVENTION: CONVENTION (II) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA (2017), <https://ihl-databases.icrc.org/en/ihl-treaties/gcii-1949?activeTab=undefined>.

18. 75 U.N.T.S. 135.

19. 75 U.N.T.S. 287.

20. The Paris Declaration addresses prize law (i.e., the protection against capture of enemy goods on board neutral merchant vessels and of neutral goods on board enemy merchant vessels, unless those goods qualify as contraband of war), naval blockades, and the prohibition of privateering.

21. 205 Consol. T.S. 305.

22. 36 Stat. 2396, T.S. No. 544.



- Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, May 14, 1954, and its annex and Protocols.<sup>23</sup>

#### 1.2.1.4 Maritime Neutrality

Maritime neutrality (see Chapter 11):

- Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, The Hague, October 18, 1907.<sup>24</sup>

#### 1.2.2 The 1977 Additional Protocol I and Naval Warfare

According to Article 49(3), the States party to the 1977 Additional Protocol I (AP I) on the protection of victims of IACs<sup>25</sup> are obliged to apply the Protocol's provisions in their entirety to the conduct of hostilities at sea that "may affect the civilian population, individual civilians or civilian objects on land," and to "attacks from the sea or from the air against objectives on land."<sup>26</sup> This rule means that the Protocol's provisions on the general protection of the civilian population apply to naval bombardment of land targets and to naval operations in the close proximity to the coastline that may inflict harm to protected persons and objects on land.

Also, according to Article 49(3) of AP I, the application of the provisions of Articles 48–67 "do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air." Accordingly, the States party to AP I are not obliged to apply Articles 48–67 of AP I to the following operations if they are not anticipated to affect protected persons and objects on land: sea-to-sea, air-to-sea, sea-to-air, and air-to-air. Such operations continue to be governed by the applicable traditional treaty and customary rules of the law of naval and air warfare, including the principle of distinction and the rule of proportionality.

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23. *Supra* notes 13–16.

24. 36 Stat. 2415, T.S. No. 545.

25. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3.

26. For States that are not parties to AP I, the 1907 Hague IX applies qua customary international law.

### 1.2.3 Other Treaties

Other *jus in bello* treaties that may have a bearing on naval operations in times of armed conflict include:

- Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, St. Petersburg, November 29/December 11, 1868;<sup>27</sup>
- Declaration (IV, 3) concerning Expanding Bullets, The Hague, July 29, 1899;<sup>28</sup>
- Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, June 17, 1925;<sup>29</sup>
- Convention on Maritime Neutrality, Havana, February 20, 1928;<sup>30</sup>
- Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Geneva, April 10, 1972;<sup>31</sup>
- Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques, Geneva, December 10, 1976;<sup>32</sup>

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27. “The contracting parties engage, mutually, to renounce, in case of war among themselves, the employment, by their military or naval forces, of any projectile of less weight than four hundred grammes, which is explosive, or is charged with fulminating or inflammable substances.” 138 Consol. T.S. 297. As a result of State practice, the Declaration has fallen into desuetude. *See, e.g.*, DOD LAW OF WAR MANUAL § 19.6. (The prohibition in the Declaration against “any projectile of less weight than four hundred grammes, which is explosive, or is charged with fulminating or inflammable substances” does not reflect customary international law. For example, for many decades without legal controversy, States have used, and continue to use, tracer ammunition, grenades, explosive bullets, or other projectiles of less weight than four hundred grams with a burning or explosive capability.)

28. 187 Consol. T.S. 459.

29. 26 U.S.T. 571, 94 L.N.T.S. 65, *reprinted in* 14 INTERNATIONAL LEGAL MATERIALS 49 (1975).

30. Convention on Maritime Neutrality, Feb. 20, 1928, 135 L.N.T.S. 187.

31. 1015 U.N.T.S. 163.

32. 1108 U.N.T.S. 151.

- 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, Geneva, October 10, 1980<sup>33</sup> and its Protocols;<sup>34</sup> and
- Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Paris, January 13, 1993.<sup>35</sup>

Details on the way these treaties impact naval operations during armed conflict appear later in this Manual.

#### 1.2.4 Customary International Law

Along with the abovementioned treaties, customary international law is an important source of international law applicable to armed conflicts at sea due to the extensive development of naval warfare law by State practice and accompanying *opinio juris*.

Most of the treaties listed above are quite dated and do not fully reflect the development of naval technologies and methods of naval warfare since their coming into force, particularly so since the end of World War II.<sup>36</sup> Na-

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33. 1342 U.N.T.S. 137.

34. Protocol on Non-Detectable Fragments, Oct. 10, 1980, 1342 U.N.T.S. 168 (Protocol I); Protocol on Blinding Laser Weapons, Oct. 13, 1995, 1380 U.N.T.S. 370 (Protocol IV); and Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, Oct. 10, 1980, 1342 U.N.T.S. 168 and 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 (Protocol II) apply only to beach-interdiction mines. Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons, Oct. 10, 1980, 1342 U.N.T.S. 171 (Protocol III) and Protocol on Explosive Remnants of War to the 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, Nov. 28, 2003, 2399 U.N.T.S. 100 (Protocol V) have no bearing on naval warfare.

35. 1974 U.N.T.S. 45.

36. The International Court of Justice has addressed the criteria for recognition that a certain practice constitutes customary international law in several cases. For example, in *North Sea Continental Shelf* (F.R.G. v. Den., F.R.G. v. Neth.), Judgment, 1969 I.C.J. 3, ¶ 74 (Feb. 20), the court stated that “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 . . .

val commanders and legal advisers have a duty to apply customary international law in addition to applicable treaty obligations. The question of how different rules apply to newly developed technologies and methods may present challenges, especially where there is limited State practice and accompanying *opinio juris*.

#### 1.2.4.1 National Military Manuals

Rules of international law have been accepted as such by the international community of States in the form of customary law, treaty law, and general principles common to the major legal systems of the world. The codified and customary law of naval warfare is very often reflected in national military manuals, which provide authoritative guidance for operational forces.<sup>37</sup> While not an exhaustive list, the following national military manuals are reflective of and attest to State practice in the law of naval warfare:

- Law of War Manual (1937) (Japan);<sup>38</sup>
- The Law of Naval Warfare, Naval Warfare Information Publication 10-2 (1955/1974) (United States);<sup>39</sup>
- Commander’s Handbook: Legal Bases for the Operations of Naval Forces (2002) (Germany);<sup>40</sup>
- Joint Service Manual of the Law of Armed Conflict, JSP 383, Ministry of Defence (2004) (United Kingdom);<sup>41</sup>

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;—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.”

37. Numerous military manuals relevant to the law of naval warfare are collected at the Stockton e-portal, <https://usnwc.libguides.com/LOAC-IHL>. Some States, like the United States, take the position that an analysis of State practice should include an analysis of actual operational practice by States during armed conflict. Although military manuals or other official statements may provide important indications of State behavior, they cannot replace a meaningful assessment of operational State practice. See DOD LAW OF WAR MANUAL § 1.8.2.2; John B. Bellinger III & William J. Haynes II, *A US Government Response to the International Committee of the Red Cross Study on Customary International Humanitarian Law*, 89 INTERNATIONAL REVIEW OF THE RED CROSS 443, 445 (June 2007).

38. JAPANESE LAW OF WAR MANUAL. In confirming customary international law, military manuals before the end of World War II in Japan reflect State practice in *jus in bello*. See also Japan, Rules of Naval War (1914); Japan, Revised Rules of Naval War (1942); JMSDF TEXTBOOK, which is an unpublished monograph used within the JMSDF.

39. NWIP 10-2.

40. GERMAN COMMANDER’S HANDBOOK.

41. UK MANUAL.

- Australian Defence Doctrine Publication 06.4: Law of Armed Conflict (2006) (Australia);<sup>42</sup>
- Australian Defence Doctrine Publication 3.14—Targeting (2009) (Australia);<sup>43</sup>
- Manuel de Droit des Conflits Armés, Ministère de la Défense (2012) (France);<sup>44</sup>
- Manual of the Law of Armed Conflict, Chief of Defence, Norwegian Ministry of Defence (2013) (Norway);<sup>45</sup>
- Legal Bases for the Operations of Naval Forces (Kommandanten-Handbuch—Rechtsgrundlagen für den Einsatz von Seestreitkräften) (May 2013) (Germany);<sup>46</sup>
- Department of Defense Law of War Manual (Dec. 2016) (United States);<sup>47</sup>
- Commander’s Handbook on the Law of Land Warfare (Aug. 2019) (United States);<sup>48</sup>
- Manual of Armed Forces Law, Volume 4 Law of Armed Conflict—DM 69, New Zealand Defence Force (2d ed. 2019) (New Zealand);<sup>49</sup>
- Military Manual on International Law Relevant to Danish Armed Forces in International Operations, Danish Ministry of Defence (2020) (Denmark);<sup>50</sup>
- The Commander’s Handbook on the Law of Naval Operations (Mar. 2022) (United States);<sup>51</sup>
- Handbook on the Law of Maritime Operations, Indian Navy Book of Reference (INBR) 1652, Volume 2 (Laws of Armed Conflicts) (Feb. 2013) (India);<sup>52</sup> and

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42. ADDP 06.4.

43. Australian Defence Headquarters, ADDP 3.14, Targeting (2009).

44. FRENCH MANUAL 42ff.

45. NORWEGIAN MANUAL ch. 10.

46. GERMAN MANUAL.

47. DoD LAW OF WAR MANUAL.

48. FM 6-27.

49. NZ MANUAL ch. 10.

50. DANISH MANUAL ch. 14.

51. NWP 1-14M.

52. Indian Handbook, Vol. 2: Laws of Armed Conflicts.

- Comando General de las Fuerzas Militares, Manual de Derecho Operacional, Manual FF.MM 3-41 Público (2009) (Colombia).<sup>53</sup>

#### 1.2.4.2 Legally Non-Binding Documents

In addition to military manuals, the following legally non-binding documents may be consulted because they are, at least in part, reflective of customary international law:

- Declaration Concerning the Laws of Naval War, London, Feb. 26, 1909,<sup>54</sup>
- Manual of the Laws of Naval War, Oxford, Aug. 9, 1913;<sup>55</sup> and
- Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare (Dec. 1922–Feb. 1923).<sup>56</sup>

#### 1.2.4.3 Writings of Publicists

Works of scholarship constitute the writings of publicists and may influence international law. The following works apply to the law of naval warfare and neutrality at sea:

- International Law in Wartime [立作太郎 『戦時國際法論』 (S. Tachi, Tokyo, 1944),<sup>57</sup>
- The Present Law of War and Neutrality (E. Castrén, Helsinki, 1954),<sup>58</sup>
- The Law of War and Neutrality at Sea (Robert W. Tucker, Newport, 1955);<sup>59</sup>
- International Law, Vol. II (Oppenheim, 7th ed. 1963);<sup>60</sup>

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53. Comando General de las Fuerzas Militares, Manual de Derecho Operacional, Manual FF.MM 3-41 Público (2009).

54. The London Declaration of 1909 is a draft treaty that did not enter into force because the British House of Lords was unwilling to ratify it.

55. Oxford Manual of Naval Warfare.

56. 32 AMERICAN JOURNAL OF INTERNATIONAL LAW SUPPLEMENT 23 (1938). Drafted by a Commission of Jurists at the Hague.

57. TACHI, INTERNATIONAL LAW IN WARTIME.

58. ERIK CASTRÉN, THE PRESENT LAW OF WAR AND NEUTRALITY, 241ff., 492ff. (1954).

59. Robert W. Tucker, *The Law of War and Neutrality at Sea*, 50 INTERNATIONAL LAW STUDIES 1, app. § 430(b) (1955).

60. LASSA OPPENHEIM, 2 INTERNATIONAL LAW: A TREATISE 457ff., 768ff. (H. Lauterpacht ed., 7th ed. 1952).

- The International Law of the Sea (C. John Colombos, 6th ed. 1967);<sup>61</sup>
- San Remo Manual on International Law Applicable to Armed Conflicts at Sea (Louise Doswald-Beck ed., 1994);<sup>62</sup>
- Manual of International Law Applicable to Air and Missile Warfare, Bern (Program on Humanitarian Policy and Conflict Research at Harvard University (HPCR), 2009);<sup>63</sup>
- Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations (Michael N. Schmitt gen. ed., 2016);<sup>64</sup> and
- Oslo Manual on Select Topics of the Law of Armed Conflict (Yoram Dinstein & Arne Willy Dahl, 2020).<sup>65</sup>

This Manual provides guidance to legal advisers and naval operators as to the current state of the law of naval warfare and its impact on naval operations in times of armed conflict. It is not meant to provide a lengthy academic discussion of the various issues at stake.

### 1.3 War Crimes at Sea

#### 1.3.1 Concept

Detailed comment regarding war crimes at sea is beyond the scope of this Manual, as the legal framework for dealing with such criminal offenses lies within the boundaries of international criminal law. Nevertheless, individual criminal responsibility might flow from certain grave or serious breaches of the law of naval warfare. While the law of naval warfare binds States, individual commanders and seafarers may be held accountable for some violations.

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61. C. JOHN COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* 477ff. (6th ed. 1967).

62. For the text of the *San Remo Manual* and the Explanations, see *SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA* (Louise Doswald-Beck ed., 1995).

63. *AIR AND MISSILE WARFARE MANUAL*. The Manual and the Commentary thereon were published by Cambridge University Press in 2013.

64. *TALLINN MANUAL*.

65. YORAM DINSTEIN & ARNE WILLY DAHL, *OSLO MANUAL ON SELECT TOPICS OF THE LAW OF ARMED CONFLICT: RULES AND COMMENTARY* (2020).

Some war crimes are more likely to occur on land than at sea, but the history of naval warfare suggests that war crimes also may arise in warfare at sea. Incidents that could be considered war crimes that have occurred during armed conflict at sea include protected vessels being attacked, as well as sailors being attacked after becoming wounded, sick, or shipwrecked. Comment on the protections available under the law of naval warfare for vessels and persons is provided later in the Manual (see Chapter 10).

War crimes have been defined differently throughout history by various international fora. The Military Tribunals established after World War II define such crimes as “violations of the laws or customs of war.”<sup>66</sup> The Geneva Conventions of 1949 use the term “grave breaches” to describe acts, committed during IAC, that are of the most concern to the international community.<sup>67</sup> Subsequently, other definitions have emerged, including “grave breaches” (as used in AP I),<sup>68</sup> as well as the more complete definitions provided in the Rome Statute of the International Criminal Court (ICC) concerning “grave breaches” and “other serious violations.”<sup>69</sup>

A war crime can be defined as an act or omission that occurs during, and in the context of, an armed conflict that results in criminal liability under international law. For example, the usage of prohibited means and methods of warfare directed against protected persons or property under the provisions of the Geneva Conventions might amount to war crimes, such as means and methods directed against:

- Protected persons (e.g., civilians, the shipwrecked, or prisoners);
- Persons providing humanitarian assistance;
- Persons on peacekeeping operations; or
- Certain civilian property.

### **1.3.2 Historical Precedents**

A brief reference to the practice of submarine operations during World War II provides an illustration of the way the law of naval warfare applies to

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66. Charter of the International Military Tribunal art. 6(b), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279; Charter of the International Military Tribunal for the Far East art. 5(b), Jan. 19, 1946, T.I.A.S. No. 1589.

67. For example, GC II, arts. 50–52.

68. AP I, art. 85(5).

69. Rome Statute, art. 8.



submarine warfare. At the outbreak of the war, the German Navy ordered its U-boat commanders to observe the requirements of the London Protocol of 1936,<sup>70</sup> especially in relation to rescuing passengers and crews before merchant vessels were sunk. However, this practice ceased after the “*Laconia* Incident” in 1942, when several German and Italian U-boats that were rescuing survivors from the British liner RMS *Laconia* were attacked by American aircraft, despite information being broadcast that a rescue operation was underway. In the aftermath of this incident, Admiral Dönitz issued an order to German U-boats halting all rescue operations after submarine attacks.

At the Nuremberg International Military Tribunal at the end of World War II, arguments were raised in Dönitz’s defense regarding allied naval practice during the war. Although he was convicted of some of the charges against him, some actions were excluded from consideration by the Tribunal, which noted that belligerents on both sides of the conflict, Dönitz included, did not always act in accordance with the law regulating naval warfare in general, and submarine warfare in particular.<sup>71</sup> The United States, for example, ordered unrestricted submarine warfare against Japan on December 7, 1941.<sup>72</sup>

### 1.3.3 Distinction Between War Crimes on Land and at Sea

Certain conduct during IAC that would constitute a war crime in land warfare is not a war crime under the law of naval warfare. For those States party to AP I, the key difference between land warfare and naval warfare is highlighted in the use of false flags belonging to the enemy or neutral powers, which is prohibited under the law of land warfare. The customary right for a naval vessel to use an enemy or neutral flag to deceive the enemy into believing the vessel is not a threat is preserved by Article 39(3) of AP I, which reads (in part):

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70. *Supra* note 12.

71. United States v. Dönitz, 22 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1948). For the charges against Dönitz and the Tribunal’s findings, see *id.* at 508ff.

72. Execute Against Japan Unrestricted Air and Submarine Warfare. CNO 072252 DEC 1941 MSG to CINCPAC, COM PANAMA, CINCAF, PACIFIC NORTHERN, PACIFIC SOUTHERN, HAWAIIAN NAVAL COASTAL FRONTIERS, *reprinted in* U.S. DEPARTMENT OF DEFENSE, THE “MAGIC” BACKGROUND OF PEARL HARBOR: VOLUME 4 (OCTOBER 17, 1941 – DECEMBER 7, 1941), at A-135 (1977).

Nothing in this Article . . . shall affect the existing generally recognized rules of international law applicable . . . to the use of flags in the conduct of armed conflict at sea.<sup>73</sup>

The differences between war crimes arising in land warfare and in naval warfare are also reflected to some extent in Article 8(2)(b) of the ICC Statute. The “other serious violations of the laws and customs applicable in international armed conflicts” falling within the jurisdiction of the ICC are subject to the “established framework of international law.” The Elements of War Crimes under Article 8 instructs that these elements “shall be interpreted within the established framework of the international law of armed conflict,” including, as appropriate, the international law of armed conflict applicable to armed conflict at sea.<sup>74</sup> Accordingly, the war crimes enumerated in Article 8, including Article 8(2)(b)(i)–(xxvi), must be interpreted and applied considering the rules of the law of naval warfare. For instance, according to Article 8(2)(b)(xiii) of the ICC Statute, the destruction and seizure of enemy property is a war crime if such destruction or seizure is not “imperatively demanded by the necessities of war.” However, if, during an armed conflict at sea, the destruction or seizure of enemy property, such as enemy merchant vessels and/or enemy cargo, complies with prize law, such destruction or seizure will not qualify as a war crime, even if not “imperatively demanded by the necessities of war.”

## 1.4 Responsibility

### 1.4.1 Naval Commanders

The notion that commanders are responsible for their actions, and generally for those of their subordinates, is a fundamental aspect of military service and is invariably a key part of naval training across all ranks. The law of naval warfare, as part of the broader law of armed conflict (LOAC), builds on this concept and does not exclude the doctrine of command responsibility.<sup>75</sup>

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73. AP I, art. 39(3).

74. ICC, Elements of Crimes, art. 8 (2013).

75. *See, e.g.*, Article 87 (Duty of commanders) of AP I. Even for those States that are not party to AP I, the duty to ensure adherence to the LOAC is undoubtedly part of customary international law.

From a naval perspective, officers in command are vested with a responsibility, not only for the overall conduct of combat operations in accordance with the law, but also, in general, for the lawful performance of their subordinates. While commanders may delegate some or all their authority, their responsibility for the lawful conduct of the force they command cannot be delegated. The fact that commanders do not order, authorize, or knowingly acquiesce in a violation of the law by a subordinate does not necessarily relieve them of criminal responsibility for its occurrence in certain circumstances.

For example, according to the *Čelebići* case in the International Criminal Tribunal for the former Yugoslavia, commanders might be criminally responsible if it is established that they failed to prevent violations, as long as they knew or had reason to know that such violation was about to be or had been committed, and the superior failed to take necessary and reasonable measures to prevent the violation or punish the perpetrator.<sup>76</sup> Therefore, naval commanders should be aware of the actions of all whom they have authority over during armed conflict and must put in place appropriate measures to ensure that reports of behavior that constitute a breach of the LOAC reach higher levels of authority. Additionally, commanders need to ensure that their own actions and orders do not result in any breaches of the law.

One way in which commanders can facilitate their responsibilities during an armed conflict is to ensure that timely and accurate legal advice is readily available and incorporated into the decision-making cycle, especially when targeting decisions are being made. These themes will appear regularly throughout this Manual.

#### 1.4.2 Individual Responsibility

All military officers and subordinates have a duty to comply with the law to the utmost of their ability and authority. They must obey readily and strictly all lawful orders issued by a superior. However, an order to a subordinate to commit a manifestly unlawful act, such as killing a non-combatant

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76. Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, ¶¶ 21, 346 (Int'l Crim. Trib. for the former Yugoslavia Nov. 16, 1998). *See also* Trial of General Tomoyuki Yamashita, 4 LAW REPORTS OF THE TRIALS OF WAR CRIMINALS 35, 87 (1948); *In re Yamashita*, 327 U.S. 1, 14–16 (1946).

or torturing a prisoner, will not necessarily relieve the subordinate of criminal responsibility for violation of the law if he or she complies with such an unlawful order. For example, according to Article 33 of the ICC Statute, only if the subordinate is unaware of the unlawfulness of the order, and if the order was not manifestly unlawful, will the defense of “obedience of an order” provide a defense in the event of a prosecution for the corresponding war crime.<sup>77</sup> During World War II, the German submarine U-852 machine-gunned the survivors of the Greek freighter SS *Peleus*. During the war crimes trial that was held after the war ended, the U-boat commanding officer (Kapitänleutnant Heinz Eck) and all surviving members of the submarine’s wardroom (including the medical officer) were found guilty of the crime. Hence, while the commanding officer bears the primary responsibility for the ship’s conduct, the commanding officer is not the only one who is expected to know and apply the law. All personnel onboard bear this responsibility.

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77. Note that not all States’ domestic war crimes laws explicitly provide for a defense of “obedience to an order.” See, e.g., the International Criminal Court Act 2001 (UK).

## CHAPTER 2

### SCOPE OF APPLICATION OF THE LAW OF NAVAL WARFARE

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### 2.1 International Armed Conflict (IAC)

All three pillars of the law of naval warfare—that is, conduct of hostilities, prize law, and maritime neutrality—depend on the existence of an international armed conflict (IAC) or, insofar as the rules on the conduct of hostilities and victim protection are concerned, on the existence of a non-international armed conflict (NIAC).<sup>78</sup> Historically, the law of naval warfare

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<sup>78</sup> 1949 Geneva Conventions, common arts. 2, 3; ADDP 06.4 ¶¶ 1.51–1.52; UK MANUAL ¶ 3.3; DOD LAW OF WAR MANUAL § 3.4; JMSDF TEXTBOOK 100, 115–16.

was primarily designed to apply in IACs and many of the treaties regulating armed conflicts at sea were adopted before 1949 (see Chapter 1), in times when the concept of NIAC was not recognized as a matter of international law. Nevertheless, today the law of naval warfare applies to NIACs that extend to the sea insofar as its provisions on the conduct of hostilities (see Chapter 8) and the protection of civilians, civilian objects, and victims at sea (see Chapter 12).

### 2.1.1 “War”

Traditionally, the applicability of the law of naval warfare was limited to situations of *de jure* war.<sup>79</sup> Today, there is general agreement that the law of naval warfare also applies to a situation of IAC as distinguished from a declared war.<sup>80</sup> However, the concept of “war” has not become entirely obsolete. First, Common Article 2 of the 1949 Geneva Conventions provides that the four Conventions “shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.” Second, while accepting that they are bound by the law of armed conflict (LOAC) and the law of naval warfare in situations of IAC, some States take the position that they are bound by the law of (maritime) neutrality in situations of (declared) war only.<sup>81</sup> The applicability of the law of naval warfare does not depend upon a state of war, however defined.

### 2.1.2 IAC: Concept

There is no definition of an IAC in the 1949 Geneva Conventions or in any other LOAC treaty. Common Article 2 merely provides that an IAC must “arise between two or more of the High Contracting Parties”—that is, between two or more States. In theory, a NIAC may change its nature and qualify as an IAC in case of a recognition of belligerency of the non-State party to that conflict. Such recognition may be given by the State party to the conflict, but this has not occurred in the recent past. If the NIAC meets certain conditions, in particular, protracted armed violence between the State and a non-State organized armed group, and if “other States have recognized the rebel faction as a belligerent with the effect of treating the rebels as

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79. See, *inter alia*, the 1907 Hague Conventions, which apply to situations of “war.”

80. UK MANUAL ¶ 3.1.

81. FRENCH MANUAL 66.

though they were a State with belligerent rights under the law of neutrality,”<sup>82</sup> this does not preclude the classification of the armed conflict as a NIAC.

According to Article 1(4) of Additional Protocol I (AP I), the concept of IAC includes “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination.” However, this provision is not reflective of customary international law<sup>83</sup> and, therefore, is binding only on the States party to AP I.<sup>84</sup>

### 2.1.2.1 Armed Force

The law of naval warfare applies in IACs. Under customary international law, an IAC comes into existence “whenever there is a resort to armed force between States”<sup>85</sup> or by “the hostile resort to armed force involving two or more States.”<sup>86</sup> The existence of an IAC does not depend upon the views of the parties to the conflict.<sup>87</sup> Whether a situation can be classified as an IAC solely depends on the facts ruling at the time.

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82. DoD LAW OF WAR MANUAL § 3.3.3.1. *See also* ADDP 06.4 ¶ 1.35.

83. *See, e.g.*, Ronald Reagan, *Message to the Senate Transmitting a Protocol to the 1949 Geneva Conventions*, RONALD REAGAN PRESIDENTIAL LIBRARY & MUSEUM (Jan. 29, 1987), <https://www.reaganlibrary.gov/archives/speech/message-senate-transmitting-protocol-1949-geneva-conventions>.

84. *See, e.g.*, UK MANUAL ¶¶ 3.4–3.4.3.

85. *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the former Yugoslavia Oct. 2, 1995). *See also* ICC Office of the Prosecutor, *Situation in the Republic of Korea: Article 5 Report* ¶¶ 45ff. (June 2014).

86. ICRC, COMMENTARY ON THE SECOND GENEVA CONVENTION: CONVENTION (II) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA ¶ 241 (2017), <https://ihl-databases.icrc.org/en/ihl-treaties/gcii-1949/article-2/commentary/2017?activeTab=default> [hereinafter 2017 GC II COMMENTARY] (“All the foregoing shows that the notion of armed conflict under Article 2(1) requires the hostile resort to armed force involving two or more States.”). *But see* OSCAR M. UHLER ET AL., COMMENTARY TO GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 12ff. (1958): “Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2.”

87. Common Article 2 of the 1949 Geneva Conventions: “even if the state of war is not recognized by one of them.”

Armed force is not limited to the employment of arms that are designed to cause, or in fact cause, death, injury, physical damage, or destruction. The use of any means (such as guns, torpedoes, missiles, and naval mines) or methods (such as a naval blockade) of warfare by a State that is directed against another State that causes death, injury, physical damage, or destruction triggers an IAC. The use of such means or methods of warfare need not materialize in damage or harm, nor be met with armed resistance by the other State. Accordingly, an invasion of armed forces into the territory of another State qualifies as an IAC even if no shots are fired by either side.<sup>88</sup> The same holds true for a situation of military occupation.<sup>89</sup> Also, a malicious cyber operation that is designed to cause and in fact results in physical damage or destruction may qualify as a use of force triggering an IAC.<sup>90</sup> Any military intervention by a State into a NIAC on the side of the non-State organized armed group (as discussed in Section 2.2.1.2) qualifies as a use of force by the intervening State against the affected State and would therefore change the characterization of that conflict to an IAC between the territorial State and the intervening State. Between the territorial State and the organized armed group, the conflict continues to be a NIAC, unless the intervening State has effective or overall control over the non-State organized armed group. A conflict would remain a NIAC if there is an intervention by a State on the side of the territorial State.

Accordingly, a “single shot” or any other conduct qualifying as a use of force seems sufficient to bring an IAC into existence that would be subject to the LOAC (and the law of naval warfare).<sup>91</sup> Thus, the use of force against a foreign warship, whether manned or unmanned, may bring an IAC into

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88. Note that a military occupation as defined in Article 43 of the 1907 Hague Regulations qualifies as a use of force.

89. See GC I–IV, art. 2(1): “The Convention shall also 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.”

90. For cyber operations qualifying as uses of force under *jus ad bellum*, see DOD LAW OF WAR MANUAL § 16.3.1. See also TALLINN MANUAL r. 82: “An international armed conflict exists whenever there are hostilities, which *may include or be limited to cyber operations, between two or more States*” (emphasis added).

91. See 2017 GC II COMMENTARY, *supra* note 86, ¶ 259: “Even minor skirmishes between the armed forces, be they land, air or naval forces, would spark an international armed conflict and lead to the applicability of humanitarian law.” See also G.A. Res. 3314, Definition of Aggression, art. 3(d) (Dec. 14, 1974) (“An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State”).



existence.<sup>92</sup> However, some States take the position that the use of force must be sufficiently intense and of some duration to trigger an IAC.<sup>93</sup> Generally, State practice seems to justify the conclusion that mere isolated incidents at sea or in the air might not trigger an IAC even if they result in damage or casualties.<sup>94</sup> In such situations, the existence of an IAC will most likely depend on the military reactions by the States involved. The International Committee of the Red Cross (ICRC) has tried to solve the problem posed by such “grey zones” by excluding uses of force “that are the result of a mistake or of individual *ultra vires* acts.”<sup>95</sup> However, the determination whether a use of force is the result of a mistake or of individual *ultra vires* acts will generally be feasible *ex post facto* only. Therefore, the exclusion of uses of force by mistake or *ultra vires* does not provide an adequate solution to the legal problem or a guide to naval operations.

### 2.1.2.2 Attribution

The use of force triggering an IAC must be attributable to a State. Attribution for conflict classification purposes is distinguished from attribution under the law of State responsibility. This is certainly the case if such use qualifies as the conduct of the regular armed forces of a State or of militias and volunteer corps belonging to a State. Accordingly, a use of force by the following vessels may trigger an IAC and the applicability of the law of naval warfare:

- Warships (see Sections 3.2 and 3.3);
- Naval auxiliaries (see Section 3.4); or
- Vessels used by maritime militias (see Section 3.6).

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92. For example, the sinking of the South Korean warship *Cheonan* by a torpedo launched from a North Korean submarine was considered to create an IAC (albeit of short duration) under customary international law. ICC Office of the Prosecutor, *supra* note 85, at 12.

93. See the references in 2017 GC II COMMENTARY, *supra* note 86, ¶ 260.

94. See CONGRESSIONAL RESEARCH SERVICE, CHINA-U.S. AIRCRAFT COLLISION INCIDENT OF APRIL 2001: ASSESSMENTS AND POLICY IMPLICATIONS, RL30946 (Oct. 10, 2001); Press Release, White House, Office of the Press Secretary, Letter from Ambassador Prueher to Chinese Minister of Foreign Affairs Tang (Apr. 11, 2001), available at <https://georgewbush-whitehouse.archives.gov/news/releases/2001/04/text/20010411-1.html>.

95. 2017 GC II COMMENTARY, *supra* note 86, ¶ 263. To the same effect, see NORWEGIAN MANUAL § 1.33; UK MANUAL ¶ 3.3.1.

However, the use of force triggering an IAC is not limited to the conduct of a State's (regular or irregular) armed forces. According to customary international law, the conduct of every State organ is attributable to that State.<sup>96</sup> For instance, a use of force by a State's intelligence service may bring an IAC into existence. Moreover, the conduct of a non-State organized armed group that is engaged in hostilities against government forces can be attributed to a foreign State that exercises "overall control" over the non-State armed group.<sup>97</sup> For the purpose of conflict classification, the "overall control" test, as distinguished from the "effective control" test, has general approval.<sup>98</sup>

### 2.1.2.3 "Against Another State"

The use of force attributable to a State must be directed against another State. This is undoubtedly the case if the force is directed against the objects or persons on the land territory, in the territorial sea, or in the archipelagic waters of an archipelagic State, including the national airspace, of another State, or against such sea areas. The same also generally holds true if force is

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96. Int'l Law Comm'n, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, vol. II, pt. 2, arts. 4, 8.

97. Prosecutor v. Tadić, Case No. IT-94-1-A, Appeal Judgement, ¶ 137 (Int'l Crim. Trib. for the former Yugoslavia July 15, 1999) ("control by a State over subordinate *armed forces or militias or paramilitary units* may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) *has a role in organising, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group.").

98. For example, the International Court of Justice in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 404 (Feb. 26) stated: "Insofar as the 'overall control' test is employed to determine whether or not an armed conflict is international . . . , it may well be that the test is applicable and suitable." 2017 GC II COMMENTARY, *supra* note 86, ¶¶ 287ff., also supports this view.

used against sovereign immune platforms, that is, warships,<sup>99</sup> auxiliaries, military aircraft, or other government ships or aircraft present in sea areas beyond the outer limit of the State's territorial sea/archipelagic waters or in international airspace.<sup>100</sup>

It is unsettled whether a use of force against foreign merchant vessels and civil aircraft, or against artificial islands, installations, or structures over which the coastal State exercises exclusive jurisdiction, qualifies as a use of force against the respective flag State, State of registry, or coastal State. Subject to the right of innocent passage, coastal States have legal competence to exercise maritime law enforcement authority in the territorial sea. Generally, coastal States may enforce their sovereignty in the territorial sea and specified sovereign rights and jurisdiction in the contiguous zone and exclusive economic zone (EEZ). In doing so, coastal States may employ peacetime use of force that is reasonable and necessary in the circumstances against foreign merchant vessels (and civil aircraft) that are infringing on their sovereignty or sovereign rights and jurisdiction in those maritime zones. Accordingly, such uses of force typically do not bring an IAC into existence, even if they are unlawful, employ excessive force, or are unreasonable or unnecessary. This rationale also applies to a use of force pursuant to law enforcement authority against another State's artificial islands, installations, or structures on the seabed.

### 2.1.3 Termination of an International Armed Conflict

If an IAC has come into existence by a mere declaration of war, it may be terminated by a withdrawal of the declaration.

The conclusion of a peace treaty, which is to be distinguished from a truce, cease-fire, or armistice,<sup>101</sup> also terminates an IAC. This conclusion also

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99. For the torpedo attack against the South Korean warship *Cheonan*, see ICC Office of the Prosecutor, *supra* note 85, ¶¶ 9, 14, 43.

100. While warships and other vessels have traditionally been the focus of the law of naval warfare, as technological capabilities advance, the inclusion of satellites in outer space and other platforms and devices in various maritime and air zones may be appropriate.

101. Hague Regulations, arts. 36–41; ADDP 06.4 ¶ 3.11; DOD LAW OF WAR MANUAL § 12.11. According to the ICC Office of the Prosecutor, there is a technical state of war if, as in the case of the 1953 Armistice Agreement between the Republic of Korea and the

holds true for the termination of a military occupation, that is, the termination of the exercise of military authority over foreign territory without the consent of the territorial State.

It is an unsettled question whether, absent a peace treaty, an IAC can be terminated by the “cessation of active hostilities” or by “the general close of military operations.”<sup>102</sup> These issues are discussed in the following paragraphs.

According to Article 118(1) of Geneva Convention III, States are obligated to release and repatriate prisoners of war (POWs) “after the cessation of active hostilities.” Such a cessation could terminate an IAC because the repatriation of POWs is made after it can be ruled out that upon return to their home State they will re-organize and resume armed hostilities.

According to Article 3(b) of AP I, “the application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general close of military operations.” The two concepts are not synonymous. A “general close of military operations” goes beyond a “cessation of active hostilities.” Whereas “active hostilities” may be understood as applying to the use of methods and means of warfare, the concept of “military operations” applies not only to such use but to the exercise of all belligerent rights. In the context of naval warfare, belligerent rights include the exercise of prize measures against enemy and neutral merchant vessels and civil aircraft (see Chapter 9). Therefore, an IAC is terminated if the parties to the conflict refrain from the exercise of all belligerent rights and they do not intend to resume hostilities against each other within the foreseeable future. Determining when a general close of military operations has been reached and the conflicting parties have no intention of resuming hostilities can be challenging. This conclusion can only be made *ex post facto*.

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Democratic People’s Republic of Korea, an armistice agreement “is merely a ceasefire agreement.” Armistice Agreement for the Restoration of the South Korean State, July 27, 1953. See ICC Office of the Prosecutor, *supra* note 85, ¶¶ 11, 43.

102. The *UK Manual* adopts the “general close of military operations” threshold. UK MANUAL ¶ 3.10.

### 2.1.4 Geographical Scope

Parties to a conflict are entitled to exercise belligerent rights in their respective territories, including the territorial sea, archipelagic waters, and national airspace, and in the sea areas and airspace beyond neutral waters and neutral national airspace pursuant to the law of naval warfare. The law of maritime neutrality is an integral component of the law of naval warfare (see Chapters 1 and 11), which is designed to protect the sovereignty of neutral States and which applies to neutral territories, neutral waters, and neutral national airspace.

### 2.1.5 Application of Other Branches of International Law

After an IAC is initiated, it is regulated primarily by the LOAC, including the law of naval warfare. The use of force between the belligerents needs no special justification. Other branches of international law that conflict with *jus in bello* will be supplanted during an IAC. However, specific rules of international law, such as certain rules contained in the UN Charter, may continue to apply even during an IAC.

## 2.2 Non-International Armed Conflict (NIAC)

Common Article 3 of the 1949 Geneva Conventions refers to an “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.” While the conflict is not one between two or more States, the Conventions lack a definition of the concept of NIAC. A similar approach underlies Article 1(1) of Additional Protocol II (AP II), which goes beyond Common Article 3 by declaring that the Protocol applies to armed conflicts that take place between a State’s “armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of [the] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”

Article 1(2) of AP II excludes from the scope of applicability “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.” The scope of Common Article 3 is broader than the scope of AP II insofar as, under Common Article

3 the armed conflict may also occur between two or more non-State organized armed groups and in an armed conflict between a State's regular armed forces and a non-State organized armed group, the latter need not exercise control over a part of the territory (see Chapter 12).

### 2.2.1 NIAC: Concept

Whereas an IAC comes into existence whenever there is a resort to armed force by one State against another State, the threshold for a NIAC is higher because it only applies to situations of "protracted armed violence," which naturally requires that the non-State party has sufficient minimum organization and is capable of committing a level of violence that is greater than sporadic or incidental and above a minimum threshold of intensity.<sup>103</sup>

#### 2.2.1.1 Intensity

It is generally agreed that Article 1(2) of AP II is reflective of customary international law insofar as a NIAC only comes into existence if there is "protracted armed violence."<sup>104</sup> This term means that the hostilities are characterized by a sufficient degree of intensity. According to the International Criminal Tribunal for the former Yugoslavia (ICTY), the following indicative factors may be used for the purpose of assessing the intensity of the violence:

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 mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and whether any resolutions on the matter have been passed. Trial Chambers have also taken into account in this respect 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

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103. Prosecutor v. Tadić, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the former Yugoslavia Oct. 2, 1995). See also 2017 GC II COMMENTARY, *supra* note 86, ¶¶ 444ff.

104. ADDP 06.4 ¶ 3.4; FRENCH MANUAL 34; GERMAN MANUAL ¶ 1301; NORWEGIAN MANUAL § 1.37; UK MANUAL ¶¶ 15.2.1, 15.3; DOD LAW OF WAR MANUAL § 3.4.2.2; JMSDF TEXTBOOK 115.

heavy shelling of these towns; the extent of destruction and the number of casualties caused by shelling or fighting; the quantity of troops and units deployed; 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; cease fire orders and agreements, and the attempt of representatives from international organizations to broker and enforce cease fire agreements.<sup>105</sup>

### 2.2.1.2 Non-State Organized Armed Groups

There is a general presumption that State armed forces involved in a NIAC are sufficiently organized to be capable of engaging in “protracted armed violence.” However, for a situation to qualify as a NIAC, the non-State party or non-State parties must have a minimum organizational structure that enables them to engage in “protracted armed violence.”<sup>106</sup> Again, the ICITY has identified the following “indicative factors” that may assist in establishing whether the organizational requirement has been met:

the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords.<sup>107</sup>

### 2.2.2 Geographical Scope of Non-International Armed Conflict

The LOAC applies to the entire territory of the State in which a situation of protracted armed violence exists between the State’s armed forces and a non-State organized armed group or between non-State organized armed groups.<sup>108</sup> The territory of the State includes the territorial sea and, where

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105. Prosecutor v. Boškoski, Case No. IT-04-82-T, Trial Judgement, ¶ 177 (Int’l Crim. Trib. for the former Yugoslavia July 10, 2008) (footnotes omitted).

106. FRENCH MANUAL 34; GERMAN MANUAL ¶ 1301.

107. Prosecutor v. Haradinaj, Case No. IT-04-84-T, Trial Judgement, ¶ 60 (Int’l Crim. Trib. for the former Yugoslavia Apr. 3, 2008).

108. 2017 GC II COMMENTARY, *supra* note 86, ¶ 481; Prosecutor v. Tadić, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l

applicable, archipelagic waters. The applicability of the LOAC is not limited to the combat zone.

Armed hostilities may extend beyond the outer limit of the territorial sea, as occurred during the Sri Lankan Civil War (1983–2009). In such situations, the law of naval warfare will not apply in its entirety. In relations between the parties to the conflict, only the rules and principles on protection of persons (see Chapter 10)<sup>109</sup> and governing NIAC (see Chapter 12) will apply. (For measures taken by the parties to the conflict against foreign vessels beyond the territorial sea, see Section 2.2.4.)

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Crim. Trib. for the former Yugoslavia Oct. 2, 1995): “international humanitarian law continues to apply in . . . the whole territory under the control of a party, whether or not actual combat takes place there.”

109. GC II, art. 3.

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) 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.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;  
 (b) taking of hostages;  
 (c) outrages upon personal dignity, in particular humiliating and degrading treatment;  
 (d) 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.

(2) The wounded and sick and shipwrecked shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

*Id.*



If the armed hostilities against a specific non-State organized armed group extend into the territory of another State (such as in the armed conflict between Iraq and the so-called Islamic State), the conflict remains the one (and the same) NIAC, as long as two or more States are not on opposing sides.<sup>110</sup> The fact that hostilities are conducted in another State does not bring into existence an IAC unless the hostilities are also directed against that second State (especially its armed forces). Nonetheless, the factual situation in each affected State must be considered individually in determining whether the violence in that State amounts to an armed conflict.

### 2.2.3 Termination of Non-International Armed Conflict

Arguably, a NIAC is terminated if the acts of violence no longer meet the required intensity. However, according to the ICTY, the LOAC “applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until . . . a peaceful settlement is achieved.”<sup>111</sup> This approach has been adopted in State practice and is reflective of customary international law.<sup>112</sup> Another way of terminating a NIAC is the complete defeat of one party to the conflict, such as in the Sri Lankan armed conflict.

### 2.2.4 Limited Applicability of the Law of Naval Warfare in Non-International Armed Conflict

As stated in Section 2.2.2 above, the law of naval warfare will apply to situations of NIACs extending to the sea only insofar as the rules and principles governing the conduct of hostilities and the protection of civilians, civilian objects, and victims at sea are concerned. Those rules and principles are limited to the relations between the parties to the conflict. Generally, neither prize law nor the law of maritime neutrality applies to most NIACs, unless there is a recognition of belligerency or the conflict “has all the trappings of an international armed conflict.”<sup>113</sup> Accordingly, attacks against for-

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110. 2017 GC II COMMENTARY, *supra* note 86, ¶¶ 488ff.

111. Prosecutor v. Tadić, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the former Yugoslavia Oct. 2, 1995).

112. See, e.g., Corte Constitucional [C.C.] [Constitutional Court], No. C-291-07, Judgment, ¶ 1.2.1 (2007) (Colom.); UK MANUAL ¶ 15.3.1.

113. U.N. Panel of Inquiry on the 31 May 2010 Flotilla Incident, *Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident* ¶ 73 (Sept. 2011).

eign merchant vessels or civil aircraft or the capture of such vessels and aircraft by a non-State organized armed group typically find no legal basis in the law of naval warfare and in such case would be assessed under other applicable international legal regimes, such as the crime of piracy in the law of the sea.<sup>114</sup>

### 2.3 Law of Naval Warfare and Maritime Law Enforcement

The law of the sea contemplates the use of force in maritime law enforcement in which actions are permitted by customary international law as reflected in the United Nations Convention on the Law of the Sea (UNCLOS) or under the terms of another agreement.<sup>115</sup> However, these actions qualify as law enforcement measures conducted by warships and authorized State vessels against private vessels, including foreign-flagged vessels. Such law enforcement measures, even in situations where weapons are used against a vessel, do not normally equate to the use of force by one State against another State in a manner that would constitute an IAC.<sup>116</sup> Furthermore, even during an IAC, States may conduct maritime law enforcement operations to suppress crime, such as maritime piracy.

### 2.4 Law of Naval Warfare and the UN Charter

The UN Charter outlines the circumstances where a State can lawfully resort to the use of force against another State. Importantly, Article 2(4) of the Charter 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.” The UN Charter also contains two important exceptions to the prohibition on the use of force between States, which are measures authorized by the UN Security Council using its powers

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114. UNCLOS, art. 101. *But see* Eran Shamir-Borer, *The Revival of Prize Law—An Introduction to the Summary of Recent Cases of the Prize Court in Israel*, 50 ISRAEL YEARBOOK ON HUMAN RIGHTS 349 (2020).

115. UNCLOS, arts. 25, 27, 33, 56, 73, 110, 111; VCLT, art. 31(1).

116. For example, although shots were fired by a Danish fisheries enforcement vessel while attempting to apprehend the British trawler *Red Crusader* in 1961 (The Red Crusader (Denmark v. United Kingdom), 29 R.I.A.A. 521 (Mar. 23, 1962)) and during the MV *Saiga* incident in 1997 (M/V Saiga (No. 2) (Saint Vincent v. Guinea), Judgment of July 1, 1999, ITLOS Case No. 2), neither incident resulted in an armed conflict between the respective flag States.

under Chapter VII of the Charter, or acts undertaken by a State when exercising its inherent right of self-defense.

#### 2.4.1 Self-Defense

A State has a right to defend itself against any unlawful use of force by employing appropriate forceful measures in response. The right to respond against an armed attack exists under customary international law and is reflected in the UN Charter, which states:

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.<sup>117</sup>

Measures in self-defense shall be necessary and proportional to the threat. Self-defense includes an element of imminency, which suggests that non-forceful measures must be considered prior to the use of force.<sup>118</sup>

##### 2.4.1.1 Decisions for National Self-Defense

National self-defense refers to actions authorized by the State's highest level of political and/or military leadership in response to an armed attack against that State. In characterizing national self-defense in this way, it becomes apparent that such a measure cannot be invoked by a lower-level commander as it necessarily involves high-level political decisions.

##### 2.4.1.2 Anticipatory Self-Defense

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117. U.N. Charter art. 51.

118. These principles are derived from the "*Caroline* case," in which a series of letters was exchanged by U.S. and Great Britain authorities between 1838 and 1842, following the seizure and destruction (in 1837) of a vessel (the *Caroline*) in American territory that was being used to provide supplies to Canadian forces fighting against Great Britain. Letter from Mr. Webster to Mr. Fox (Apr. 24, 1841), 29 BRITISH AND FOREIGN STATE PAPERS 1840–1841, at 1129 (1857); *The Caroline Case*, TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA: VOLUME 4, DOCUMENTS 80–121: 1836–46, at 449 (Hunter Miller ed., 1934) ("It will be for that Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation."). See also R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AMERICAN JOURNAL OF INTERNATIONAL LAW 82 (1938).

The right of self-defense may be invoked in anticipation of an imminent armed attack, before an actual armed attack occurs, when a State reasonably believes that an armed attack will take place in the near future. The regular conditions of necessity and proportionality continue to apply.<sup>119</sup>

#### 2.4.1.3 Decisions for Individual and Unit Self-Defense

National self-defense is distinguished from individual and unit self-defense.

In peacetime, individual and unit self-defense refer to the right of an individual member of the armed forces or an individual unit of the armed forces to defend themselves from an armed attack, subject to national-level guidance.<sup>120</sup> This Manual is not concerned with individual self-defense, as naval warfare is typically fought at a platform level where the threats posed to any individual are subordinated to the overall threat that is posed to the naval platform.

The concept of unit self-defense refers to action taken by the commander of a military unit (e.g., an individual ship, aircraft, or military installation) to defend that unit from an imminent threat. This right, authorized and implemented by an individual commander, is a separate and distinct issue from the right of a State to act in national self-defense and might typically be characterized by an immediate response to a threat or use of force that is countered or extinguished by the unit's response. An example would be a warship during normal peacetime operations that responds to a missile attack with an effective anti-air warfare system and shoots down the incoming threat.<sup>121</sup> Whether a use of force in individual or unit self-defense is sufficient to trigger an IAC will depend on the military reactions by the States involved (see Section 2.1.2.1).

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119. The United States takes the position that included within the inherent right of self-defense is the right of a State to protect itself from an imminent attack. *See* DOD LAW OF WAR MANUAL § 1.11.5.1; NWP 1-14M § 4.4.1. *See also* W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AMERICAN JOURNAL OF INTERNATIONAL LAW 525, 538–44 (2006).

120. *See, e.g.*, Standing Rules of Engagement for U.S. Forces, CJCSI 3121.01B, ¶ 6(b) (June 13, 2005).

121. If an on-scene commander exercises the right of unit self-defense, the commander's government is not precluded from subsequently claiming that the action is an exercise of the right of national self-defense.

### 2.4.2 Actions Authorized by the UN Security Council

If the UN Security Council determines that there is a threat to the peace, a breach of the peace, or an act of aggression, it may decide on enforcement measures to maintain or restore international peace and security, including demonstrations, blockade, and other operations by air, sea, or land forces of member States of the United Nations.<sup>122</sup> The Security Council could, for example, adopt a binding resolution under Chapter VII that calls on member States to enforce a sanctions regime against a particular State. In some situations, member States may use the belligerent rights of blockade and visit and search to implement and enforce such a UN Security Council resolution. Chapter VII resolutions adopted under Article 41 (measures not involving the use of armed force) may be enforced through the peacetime law of the sea, such as prevention of non-innocent passage or port State control measures. Resolutions adopted under Article 42 (measures to restore international peace and security) may be enforced through compulsory boarding, which is tantamount to the right of visit and search during armed conflict, as occurred against Iraq after the adoption of UN Security Council Resolution 678 in 1990.<sup>123</sup>

Measures authorized by the UN Security Council under Chapter VII are not governed by the law of neutrality.<sup>124</sup>

### 2.4.3 Equal Application of the *Jus in Bello*

The purported legitimacy of action giving rise to an armed conflict, commonly referred to as the *jus ad bellum*, does not impact the legality of the actions taken in the armed conflict and the application of *jus in bello*. This point is made clear in the Preamble to AP I, where it is stated that

the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on

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122. U.N. Charter art. 42. Article 42 enforcement measures must be distinguished from Article 41 measures not involving the use of force.

123. S.C. Res. 678, ¶ 2 (Nov. 29, 1990): “all necessary means.”

124. U.N. Charter arts. 2(5), 25, 48, 49, 103.

the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.

This means that the alleged aggressor, and the alleged victim of such aggression, are bound by the same laws of armed conflict once the hostilities commence. In *jus in bello*, there is legal equality of rights and duties between the belligerents.

Furthermore, while the UN Charter opened a new era in *jus ad bellum*, the law of naval warfare prior to World War II still informs contemporary *jus in bello*. However, in the past, some States have taken the position that the exercise of belligerent rights under the law of naval warfare is subject to considerations that deal with the *jus ad bellum*.<sup>125</sup> For example, prize measures during the 1980–88 Iran–Iraq War were considered illegal by the United Kingdom because, in the view of the UK government, they were not necessary for the self-defense of either Iraq or Iran. Additionally, in the 1982 Falklands/Malvinas conflict and the 1980–88 Iran–Iraq War, the use of zones, including the “Total Exclusion Zone” promulgated by the United Kingdom in the Falklands/Malvinas conflict, was justified by reference to *jus ad bellum* concepts of self-defense.

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125. UK MANUAL ¶¶ 2.8–2.8.2.

**CHAPTER 3**

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### 3.1 Belligerent Rights

Unlike land warfare, which focuses on the status of personnel to determine who is entitled to combatant privileges under the law of armed conflict (LOAC),<sup>126</sup> the law of naval warfare focuses on the status of the platform to determine whether ships and aircraft can take a direct part in hostilities. At sea, only warships and military aircraft may exercise belligerent rights during an international armed conflict (IAC).<sup>127</sup> These rights include the right to conduct hostilities; the right to visit, search, and diversion of enemy and neutral vessels; the right of capture; the right to inspect specially protected enemy vessels (e.g., hospital ships); the right to control neutral vessels and aircraft in the immediate vicinity of naval operations; the right to establish and enforce a blockade; the right to establish and enforce exclusion zones; the right to demand the surrender of enemy military personnel; and the right to undertake convoy operations. Belligerent parties may also employ warships in exercising the right of reprisal.<sup>128</sup>

Other vessels, such as naval auxiliaries and merchant vessels, even when carrying out support services for naval forces, are not entitled to engage in belligerent acts during an IAC, but they may defend themselves (including resisting attacks by enemy forces).<sup>129</sup>

None of these limitations apply to non-international armed conflicts (NIACs). Any State vessel may be used to conduct offensive attacks against

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126. GC III; AP I.

127. Paris Declaration of 1856; Hague VII; Oxford Manual of Naval Warfare; GERMAN MANUAL ¶ 1019; Japan, Rules of Naval War (1914), art. 1; JAPANESE LAW OF WAR MANUAL 262; DOD LAW OF WAR MANUAL § 13.3.2; NWIP 10-2 § 500(e); NWP 1-14M § 2.2.1.

128. According to § 18.18 of the *DoD Law of War Manual*, “[r]eprisals are extreme measures of coercion used to help enforce the law of war by seeking to persuade an adversary to cease violations.” Section 18.18.1 provides that “[r]eprisals are acts taken against a party [to the conflict]: (1) that would otherwise be unlawful; (2) in order to persuade that party to cease violating the law.” See also ADDP 06.4 ¶ 13.17; GERMAN MANUAL ¶ 1528; UK MANUAL ¶ 16.16. Reprisals are explicitly prohibited if they affect persons protected under the 1949 Geneva Conventions: GC I, art. 46 (“Reprisals against the wounded, sick, personnel, buildings or equipment protected by the Convention are prohibited.”); GC II, art. 47 (“Reprisals against the wounded, sick and shipwrecked persons, the personnel, the vessels or the equipment protected by the Convention are prohibited.”); GC III, art. 13(3) (“Reprisals against protected persons and their property are prohibited.”).

129. Oxford Manual of Naval Warfare, art. 12; NWP 1-14M § 2.2.1; GERMAN MANUAL ¶ 1020; JAPANESE LAW OF WAR MANUAL 76–77; DOD LAW OF WAR MANUAL § 13.3.3.3.



vessels operated by a non-State armed group or to visit, board, search, detain, and/or seize such vessels during a NIAC.<sup>130</sup> In some cases, acts of hostility by vessel-borne non-State armed groups directed against a vessel on the high seas may be regarded as piracy.<sup>131</sup>

### 3.2 Warships and Other Government Ships

#### 3.2.1 “Warship” Defined

A “warship” is defined 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 that is under regular armed forces discipline.<sup>132</sup>

Warships include both manned and unmanned surface ships, submarines, and other submersibles that have been designated as a warship by the flag State and are included in the respective State’s list/register of warships.<sup>133</sup> There is no requirement that the commanding officer or crew be physically on board the warship. Warships may therefore be autonomous or remotely commanded, crewed, and operated by personnel ashore or on board a manned platform (see Section 3.3).<sup>134</sup> Warships shall bear external

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130. UNCLOS, art. 110; DOD LAW OF WAR MANUAL § 13.3.3.1.

131. UNCLOS, art. 101; DOD LAW OF WAR MANUAL §§ 4.3.4, 13.3.3.1.

132. Hague VII, arts. 1–4; High Seas Convention, art. 8; UNCLOS, art. 29; ADDP 06.4 ¶ 6.12; GERMAN MANUAL ¶ 1002; JMSDF TEXTBOOK 41; JAPANESE LAW OF WAR MANUAL 76–77, UK MANUAL ¶ 13.5.n; DOD LAW OF WAR MANUAL § 13.4.1; NWP 1-14M § 2.2.1; NWIP 10-2 § 500(c); A. PEARCE HIGGINS, THE HAGUE PEACE CONFERENCES AND OTHER INTERNATIONAL CONFERENCES CONCERNING THE LAWS AND USAGES OF WAR: TEXTS OF CONVENTIONS WITH COMMENTARIES 316–20 (1909).

133. Hague VII, art. 6.

134. In the United States, all Navy ships designated “USS” and Coast Guard vessels designated “USCGC” are considered “warships” under international law whether manned or unmanned. NWP 1-14M § 2.2.1; U.S. Department of the Navy, U.S. Navy Regulations, art. 0406 (1990); U.S. Department of the Navy, Office of the Secretary, SECNAV Instruction 5030.8C, General Guidance for the Classification of Naval Vessels and Battle Force Ship Counting Procedures (2016) [hereinafter SECNAVINST 5030.8C]. The U.S. Coast Guard is considered an armed force of the United States (10 U.S.C. § 101; 14 U.S.C. §§ 1, 2). India’s position is similar regarding the Indian Coast Guard and its vessels designated “CGS” being considered warships.

marks distinguishing such ships of their nationality<sup>135</sup> and shall be under the direct authority, immediate control, and responsibility of the flag State.<sup>136</sup> Warships are entitled to sovereign immunity.<sup>137</sup> They maintain their legal status, even if civilians form part of the crew, and need not be armed if they have been properly designated as a warship by the flag State.

### 3.2.2 Conversion of Merchant Vessels

The conversion of merchant ships into warships is governed by Hague VII.<sup>138</sup> The Convention requires that the converted merchant ship: (1) be placed under the direct authority, immediate control, and responsibility of the State whose flag it flies; (2) bear the external marks that distinguish the warship of its nationality; (3) be under the command of a duly commissioned officer in the service of the State whose name is on the list of the officers of the fighting fleet; and (4) be manned by a crew subject to military discipline.<sup>139</sup>

Merchant ships converted into warships must comply with the laws and customs of war.<sup>140</sup> In addition, a belligerent that converts a merchant ship into a warship must, as soon as possible, announce such conversion in the list of warships.<sup>141</sup> The same procedures apply to naval auxiliaries and other government noncommercial vessels that are converted into warships.<sup>142</sup> In some countries, these converted vessels are referred to as “auxiliary warships.”<sup>143</sup>

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135. Hague VII, art. 2.

136. Hague VII, art. 1.

137. NWP 1-14M § 2.1.1. The U.S. sovereign immunity policy is set out in CNO WASHINGTON DC 041827Z AUG 21, NAVADMIN 165/21, Subject: Sovereign Immunity Policy and COMDT COGARD WASHINGTON DC 061626Z OCT 21, AL-COAST 370/21, Subject: Sovereign Immunity Policy; JMSDF TEXTBOOK 41–42.

138. Hague VII; GERMAN MANUAL ¶ 1003; NORWEGIAN MANUAL § 10.19. Article 15 of the Japanese Rules of Naval War (1914) states: “With regard to the Conversion of Merchant ships into Warships, the No.7 of the 45th year of Meiji (Hague Convention 1907, Annex No.7) shall be complied with.”

139. Hague VII, arts. 1–4.

140. Hague VII, art. 5.

141. Hague VII, art. 6.

142. Oxford Manual of Naval Warfare, arts. 3–8; NORWEGIAN MANUAL § 10.19.

143. GERMAN MANUAL ¶ 1003.

Whether a merchant ship can be converted into a warship only in a port of the converting State or also at sea is unsettled. During the negotiations of Hague VII, the Contracting Powers were unable to come to an agreement on the question of where such conversion must take place.<sup>144</sup> The delegates were also unable to arrive at a consensus on the permissibility of a re-conversion during the war.<sup>145</sup> It may be difficult or impracticable for a State to convert a merchant ship into a warship at sea, but to the extent that a State can meet all the requirements relating to the conversion of merchant ships into warships set out in Articles 1–6 of Hague VII, this Manual takes the position that such conversion is legally permissible.

### 3.2.3 Small Craft Status

Military small watercraft are deployed from larger surface ships and submarine host platforms or launched from land. Examples of small craft include rigid hull inflatable boats (RHIBs), landing craft air cushion (LCAC), motor whaleboats, small/medium unmanned surface vessels (USVs) and unmanned underwater vessels (UUVs), and other small boats, craft, and vehicles deployed from larger vessels.<sup>146</sup> Small craft enjoy sovereign immunity and may exercise any internationally lawful uses of the seas, including navigational rights and freedoms. Their sovereign immune status is not dependent on the status of the launching platform. If deployed from a warship (surface ship or submarine), the small craft also may be considered an extension of the launch platform (an integral part of the warship) and enjoy sovereign immunity on that basis.<sup>147</sup> Small craft that meet the requirements of a “warship” and have been designated a “warship” by the State have that status. For example, LCACs assigned to the Japan Maritime Self-Defense Force (JMSDF) retain the status of a warship.<sup>148</sup>

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144. General Report to the Conference upon the work of the Fourth Commission, *reprinted in* THE REPORTS TO THE HAGUE CONFERENCES OF 1899 AND 1907, at 592, 595–97 (James Brown Scott ed., 1917).

145. *Id.* at 597.

146. NWP 1-14M § 2.3.3.

147. *Id.*

148. JMSDF Directive of Ships Classification and Names (1960). Some States consider that an unmanned aerial system (UAS) deployed from a warship has the status of military aircraft but also retains the status of the warship as an integral part of the platform. UK Royal Navy unmanned vessels (of which there are 23 at the time of writing) are currently listed as auxiliaries in the experimentation section of the UK Defence Shipping Register,

Whether they are deployed and controlled from a warship or other platform or from shore, military small craft can be employed in belligerent operations, such as attacks, mine clearance, and visit and search.

### 3.3 Unmanned and Autonomous Maritime Systems

Unmanned maritime systems (UMSs) may be autonomous, semi-autonomous, or remotely controlled and operate on the surface or underwater. UMSs may be launched from the surface, subsurface, air, or land and operate independently as a ship. Some UMSs, such as the *Sea Hunter* and *Orca*, if designated as a warship by the flag State, may exercise belligerent rights and navigational rights and freedoms and other internationally lawful uses of the sea. UMSs are distinct from expendable weapons, such as mines and torpedoes. Other marine instruments or devices, such as gliders and sensors, may also be employed in the battlespace. When owned or operated by the State, expendable weapons and marine devices always remain the sovereign property of the State and beyond the jurisdiction of a foreign State.

UMSs may conduct a variety of high-priority missions to augment manned platforms, to include intelligence, surveillance, and reconnaissance (ISR); offensive mining and mine countermeasures (MCM); antisubmarine warfare (ASW); anti-surface warfare (ASuW); inspection/identification (ID); oceanography; communication/navigation network nodes (CN3); payload delivery; information operations (IO); time critical strike (TCS); barrier patrol and operations, including homeland defense; antiterrorism/force protection; sea base support; electronic warfare (EW); laying undersea sensor grids; sustainment of at sea operating areas; bottom mapping and survey; and special operations support.<sup>149</sup>

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but with the aspiration that they be classified as warships where appropriate once the capabilities under experimentation are proven. For example, the Maritime Autonomous Demonstrator for Operational Exploitation (MADFOX) has carried out a test missile firing. See oral evidence of Commander Caroline Tuckett to the UK House of Lords International Relations and Defence Committee given on November 10, 2021, available at <https://committees.parliament.uk/oralevidence/3000/pdf/>.

149. DEPARTMENT OF THE NAVY, UNMANNED CAMPAIGN FRAMEWORK 2 (Mar. 16, 2021); U.S. DEPARTMENT OF DEFENSE, PUBLICATION NO. 14-S-0553, UNMANNED SYSTEMS INTEGRATED ROADMAP: FY2013–2038 (2014); 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

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. Although “ship” and “vessel” are not defined in the United Nations Convention on the Law of the Sea (UNCLOS), the treaty recognizes that UMSs operate at sea.<sup>150</sup> Flag States shall effectively exercise jurisdiction and control over “master[s], officers and crew,”<sup>151</sup> but international law does not require that these persons be physically present on the ship. Like unmanned aerial vehicles (UAVs), UMSs may be remotely operated by a crew and under the charge of a master 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.<sup>152</sup> The only requirement that UNCLOS imposes is that the flag State has a duty to 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.<sup>153</sup>

“Ship” and “vessel” are defined differently in several conventions adopted by the International Maritime Organization (IMO).<sup>154</sup> One thing

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PLAN (Nov. 9, 2004); JAPAN, DEFENSE BUILDUP PROGRAM (National Security Council Decision and Cabinet Decision, Dec. 16, 2022).

150. UNCLOS, art. 19 (prevents ships engaged in innocent passage from launching, landing, or taking on board any “military device,” which includes unmanned systems); art. 20 (recognizes the right of innocent passage for “underwater vehicles” (including UMS) that navigate on the surface and show their flag when transiting the territorial sea).

151. UNCLOS, art. 94; *see infra* note 154 for a list of some of the applicable international regulations adopted by the IMO.

152. Note that Article 94 of UNCLOS uses the term “in the charge” of a master.

153. Comité Maritime International, *International Working Group Position Paper on Unmanned Ships and the International Regulatory Framework 6* [hereinafter CMI Position Paper] (the requirements of Article 94 of UNCLOS can “arguably be met in case of remotely operated ships”).

154. IMO Res. MSC.99(73), Adoption of Amendments to the International Convention for the Safety of Life at Sea, 1974, as amended (Dec. 5, 2000); SOLAS, reg. V/2; International Convention for the Prevention of Pollution from Ships, art. 2, Nov. 2, 1973, 12 I.L.M. 1319; Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, Feb. 17, 1978, 1340 U.N.T.S. 61; Convention on the International Regulations for Preventing Collisions at Sea, r. 3, Oct. 20, 1972, 28 U.S.T. 3459, T.I.A.S. 8587, 1050 U.N.T.S. 16; Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter art. 1, Dec. 29, 1972, 26 U.S.T. 2403, 1046 U.N.T.S. 120; IMO, Adoption of the Final Act and Any Instruments, Recommendations and Resolutions Re-

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.<sup>155</sup> Since 2017, the member States of the IMO have examined the issue of maritime autonomous surface ships (MASS)<sup>156</sup> and adopted interim guidelines for MASS trials.<sup>157</sup> 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 development of a new instrument altogether.<sup>158</sup>

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sulting from the Work of the Conference, Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, IMO Doc. LEG/CONF. 15/2 (Nov. 1, 2005).

155. See CMI Position Paper, *supra* note 153 (“existing international conventions that define the term ‘ship’ do not include references to crewing and at national level . . . the definition of a ship is usually disconnected from the question of whether or not the ship is manned. It would . . . seem unjustified that two ships, one manned and the other unmanned, doing similar tasks involving similar dangers would not be subject to the same rules that have been designed to address those dangers.”).

156. MASS is defined as “a ship which, to a varying degree, can operate independently of human interaction.” The varying degrees of autonomy that will be considered by the Committee during the exercise include:

Degree One: *Ship with automated processes and decision support*: Seafarers are on board to operate and control shipboard systems and functions. Some operations may be automated.

Degree Two: *Remotely controlled ship with seafarers on board*: The ship is controlled and operated from another location, but seafarers are on board to take control if necessary.

Degree Three: *Remotely controlled ship without seafarers on board*: The ship is controlled and operated from another location. There are no seafarers on board.

Degree Four: *Fully autonomous ship*: The operating system of the ship can make decisions and determine actions by itself.

IMO, *Report of the Maritime Safety Committee on Its One Hundredth Session* annex 2, ¶ 4, IMO Doc. MSC 100/20/Add.1 (Dec. 7, 2018); IMO, *Maritime Autonomous Surface Ships Proposal for a Regulatory Scoping Exercise*, IMO Doc. MSC 98/20/2 (Feb. 27, 2017).

157. IMO, *Interim Guidelines for MASS Trials*, IMO Doc. MSC.1/Circ.1604 (June 14, 2019).

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

Every sovereign State decides “to whom he will accord the right to fly his flag and to prescribe the rules governing such grants.”<sup>159</sup> Thus, domestic, not international, law governs ship registration,<sup>160</sup> and many States agree that a UMS can be designated a “ship” under their national laws.<sup>161</sup>

If owned or operated for the time being by the armed forces of the flag State for government, noncommercial purposes, UMSs enjoy immunity from foreign jurisdiction. When flagged as a ship, such UMSs enjoy sovereign immunity.<sup>162</sup> 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.<sup>163</sup> All UMSs may exercise the navigational rights and freedoms and other internationally lawful uses of the seas related to those freedoms.

The classic definition of a “warship” is evolving in light of contemporary 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, neither of whom are physically present on the platform.<sup>164</sup>

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159. The *Muscat Dhows Case* (Fr. v. Gr. Brit.), Hague Ct Rep. (Scott) 93, 96 (Perm. Ct. Arb. 1916); UNCLOS, art. 91 (“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,” and provide documents to that effect.).

160. UNCLOS, art. 91.

161. 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) (For the purposes of registration, the term “vessel” “includes every description of watercraft or other contrivance capable of being used as a means of transportation on water but does not include aircraft.”); 46 C.F.R. § 67.5 (2020) (“Any vessel of a least five net tons wholly owned by a citizen or citizens of the United States is eligible for documentation” in the United States.).

162. NWP 1-14M § 2.3.5.

163. *Id.*

164. *See supra* note 134. In the United States, the Chief of Naval Operations (CNO) has authority to register, classify, and designate naval water-borne craft as warships. U.S. Department of the Navy, U.S. Navy Regulations, art. 0406 (1990); 10 U.S.C. § 6011 (2018); Warship classification applies to any ship built or armed for naval combat that the Service maintains on the Naval Vessel Register and the CNO is responsible for entering vessels into the battle force ship inventory and the Naval Vessel Register. SECNAVINST 5030.8C, *supra* note 134. Neither U.S. Navy Regulations nor the Secretary of the Navy Instruction distinguish between manned and unmanned vessels. Consequently, there is nothing that prohibits

### 3.4 Naval Auxiliaries (Auxiliary Vessels)

Naval auxiliaries (auxiliary vessels) are vessels, other than warships, that are owned or operated by the armed forces and used, for the time being, only on government noncommercial service. Such vessels are under the command of a civilian master and not a commissioned officer. Naval auxiliaries are entitled to sovereign immunity.<sup>165</sup> Naval auxiliaries, such as ocean surveillance ships, troop transports, and replenishment ships, are lawful targets during armed conflict and may be captured as booty of war or made the object of attack, even 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:

- Disembark military forces and materiel in a port or to another installation as part of an ongoing operation (as during the 2003 Iraq War);
- Disembark forces and materiel to shore in amphibious operations;

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the CNO from designating an UMS as a warship. The United Kingdom takes the same position. *See supra* note 148.

165. NWP 1-14M § 2.3.2; GERMAN MANUAL ¶ 1004; UK MANUAL ¶ 13.5.d. In the United States, the following Military Sealift Command (MSC) vessels are considered to be naval auxiliaries: USNS, to include U.S. government-owned vessels or those under bareboat charter to the government, and assigned to MSC; privately owned U.S. flag vessels under charter to MSC, including ships chartered for a period of time (time-chartered ships) and vessels chartered for a specific voyage or voyages (voyage-chartered ships); and the U.S. Maritime Administration's National Defense Reserve Fleet and its Ready Reserve Force, when activated and assigned to MSC. In the United Kingdom, Royal Fleet Auxiliary (RFA) vessels and the British STUFT (ships taken up from trade) that supported the British Task Force during the Falklands War were considered naval auxiliaries. JMSDF Directive of Ships Classification and Names (1960). In Japan, ocean-going vessels used to transport troops and military cargo are classified as warships; tugboats and water supply vessels used in harbors are considered auxiliary vessels. ADDP 06.4 ¶ 6.6 defines an "auxiliary vessel" as "a vessel, other than a warship, that is owned by or under the exclusive control of the armed forces of a state and used for the time being on government non-commercial service." *See* CNO WASHINGTON DC 041827ZAUG21, NAVADMIN 165/21, Subject: Sovereign Immunity Policy (issuing a new U.S. sovereign immunity policy on August 4, 2021).



- Refuel and re-arm (including as a “lily pad”) helicopters and attack craft being directly employed in maritime attack operations, visit and search operations, and amphibious operations;<sup>166</sup>
- Serve as a base/support vessel for MCM operations;<sup>167</sup> and
- Serve as one node or element in a network “kill chain.”

Naval auxiliaries may also defend themselves, including resisting attacks by enemy forces.<sup>168</sup> Active resistance and other defensive measures taken by an auxiliary are not a violation of the LOAC.<sup>169</sup>

In some States, ocean surveillance ships, troop transports, and replenishing ships may be designated as warships. For example, fleet replenishment oilers of Australia, Germany, India, Japan, and the Netherlands retain the status of a warship since they fulfill the qualifying criteria of “warships,” as stated at Section 3.2.1. Nevertheless, some uncertainty remains as to the precise boundary between a warship and the exercise of belligerent rights on the one hand and naval auxiliaries and permissible support roles on the other. For example, the United States has re-designated some naval auxiliaries (USNS) to warships (USS) to ensure the distinction.<sup>170</sup> While some States

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166. The Expeditionary Transfer Dock (ESD) and Expeditionary Sea Base (ESB) ship classes are highly flexible platforms that may be used across a broad range of military operations supporting multiple operational phases. Acting as a mobile sea base, they are part of the critical access infrastructure that supports the deployment of forces and supplies to provide prepositioned equipment and sustenance with flexible distribution. *Expeditionary Transfer Dock (ESD) and Expeditionary Sea Base (ESB)*, NAVAL SEA SYSTEMS COMMAND, <https://www.navsea.navy.mil/Home/Team-Ships/PEO-Ships/Exp-Transfer-Dock-ESD-Exp-Sea-Base-ESB/>.

167. As has been exercised by, inter alia, the Royal Navy and the U.S. Navy. Megan Eckstein, *Navy Brings Mine Countermeasures Triad Together for Experiment Aboard British Ship*, USNI NEWS (Apr. 1, 2019), <https://news.usni.org/2019/04/01/video-navy-brings-mine-countermeasures-triad-together-experiment-aboard-british-ship>.

168. Oxford Manual of Naval Warfare, art. 12; GERMAN MANUAL ¶ 1020; DOD LAW OF WAR MANUAL § 13.3.3.

169. JAPANESE LAW OF WAR MANUAL (1937), 76; Italy, Rule of Naval Warfare, 1924, art. 14; J.A. HALL, THE LAW OF NAVAL WARFARE 24 (1914); Tucker, *supra* note 59, at 56–57; OPPENHEIM, *supra* note 60, at 466–67.

170. The USS *Lewis B. Puller* (ESB 3), along with the *Hershel “Woody” Williams* (ESB 4) and the *Miguel Keith* (ESB 5), are being used to support a variety of maritime based missions including Special Operations Force and Airborne Mine Counter Measures. The ESBs include a four-spot flight deck, mission deck, and hangar and are designed around four core capabilities: aviation facilities, berthing, equipment staging support, and command and control assets. *Montford Point* (T-ESD 1), *John Glenn* (T-ESD 2), and *Hershel “Woody” Williams* (T-

have also employed ships other than warships, such as auxiliaries or merchant ships, to lay naval mines during armed conflict at sea (such as Iran's use of the *Iran Ajr* to lay mines during the 1980–88 Iran–Iraq War or Iraq's use of three mine-laying tugs, which were captured by Coalition forces during the 2003 Iraq War), it is doubtful that this is permissible, since mine laying is a belligerent right retained only by warships.

### 3.5 “Other Government Ships” Defined

“Other government ships” are ships owned or operated by a State and used exclusively on government noncommercial service.<sup>171</sup> These vessels include naval auxiliaries, coast guard vessels (if not designated “warships” by the flag State), and other maritime law enforcement vessels that are clearly marked and identifiable as being on government noncommercial service and authorized to that effect.<sup>172</sup> Privately owned vessels flying the flag of the respective State also qualify as other government ships if they operate under charter to the State (bareboat-chartered, time-chartered, and voyage-chartered ships).<sup>173</sup> Other government ships are entitled to sovereign immunity but are not entitled to exercise belligerent rights.<sup>174</sup>

### 3.6 Privateers

The Paris Declaration of 1856 abolished privateering as a method of warfare, confirming that only warships are entitled to engage in belligerent

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ESB 4) have all been delivered to the U.S. Navy and are operated by Military Sealift Command. In August 2017, upon arrival in the U.S. 5th Fleet Area of Responsibility, ESB 3 was re-designated from USNS and commissioned as a USS. As a commissioned Navy ship, USS *Lewis B. Puller* (ESB 3) is commanded by a Navy O-6 with a permanently embarked military crew. This re-designation provides combatant commanders greater operational flexibility as to how the platform is employed in accordance with the laws of armed conflict. NAVAL SEA SYSTEMS COMMAND, *Expeditionary Transfer Dock (ESD) and Expeditionary Sea Base (ESB)*, *supra* note 166.

171. Government ships used for commercial purposes are not entitled to sovereign immunity. UNCLOS, art. 32.

172. NWP 1-14M § 2.3.1; GERMAN MANUAL ¶¶ 1005, 1006.

173. A charter can be for a short period of time (e.g., specific voyage charter), for an extended period (e.g., one-year time charter), or for an indefinite period (e.g., bareboat charter).

174. NWP 1-14M § 2.3.1; JMSDF TEXTBOOK 51.

rights.<sup>175</sup> The Declaration reflects customary international law. Neither private vessels nor their personnel may commit offensive acts of hostilities against the enemy.<sup>176</sup> Therefore, even if they are acting under State authority, vessels other than warships may not exercise belligerent rights. For example, private vessels operated by a State-sponsored maritime militia that have not been converted into warships are not entitled to engage in offensive belligerent acts or to exercise prize measures.

Although most States acceded to the Declaration, the United States withheld its formal adherence after its proposal to exempt all private property from capture at sea was rejected. The U.S. Constitution empowers Congress to grant letters of Marque and Reprisal,<sup>177</sup> and the United States made extensive use of privateers during the War of 1812. Nonetheless, on April 26, 1898, President McKinley issued a proclamation that it was the policy of the United States not to resort to privateering in its war with Spain, but rather to adhere to the rules of the Paris Declaration.<sup>178</sup> Current U.S. law criminalizes the fitting out or arming of any private “vessel of war” or privateer or serving on privateers.<sup>179</sup> Additionally, U.S. military manuals reflect the commonly accepted rule that only warships can engage in belligerent acts at sea during an IAC.<sup>180</sup>

### 3.7 “Maritime Militia”

The term “maritime militia” is not a legal term of art. According to the ordinary meaning, a militia is “a military force that is raised from the civil

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175. Paris Declaration, art. I.

176. Oxford Manual of Naval Warfare, art. 12; GERMAN MANUAL ¶¶ 127, 128; JAPANESE LAW OF WAR MANUAL 76–77.

177. U.S. CONST. art. I, § 8.

178. *War with Spain*, Presidential Proclamation (Apr. 26, 1898), reprinted in U.S. DEPARTMENT OF STATE, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, WITH THE ANNUAL MESSAGE OF THE PRESIDENT TRANSMITTED TO CONGRESS DECEMBER 5, 1898, at 639 (1901).

179. 18 U.S.C. § 1654.

180. DOD LAW OF WAR MANUAL § 13.3.2; NWP 1-14M § 2.2.1.1. The DoD Law of War Manual, however, makes a distinction between acts of unprivileged belligerency by private persons on the high seas, which may constitute piracy, and similar acts by private persons acting under State authority, which would not constitute piracy. This distinction potentially leaves the door open for State-sanctioned privateers operating pursuant to letters of marque granted by Congress. DOD LAW OF WAR MANUAL § 4.3.4.

population to supplement a regular army.”<sup>181</sup> Accordingly, a “maritime militia” is composed of civilians operating from civilian craft and who augment the naval forces of a State.

The 1949 Geneva Conventions do not provide a definition of “militia,” but merely distinguish between (regular) armed forces on the one hand and militias (and volunteer) corps on the other.<sup>182</sup> Such militias (and volunteer corps) may form part of the (regular) armed forces by being integrated into the latter’s hierarchy in accordance with the domestic law of the respective State.<sup>183</sup> The Geneva Conventions also recognize “other militia and volunteer corps” that are not so incorporated into the (regular) armed forces if (a) they are commanded by a responsible person; (b) their members have a fixed distinctive sign recognizable at a distance; (c) they carry arms openly; and (d) they conduct their operations in accordance with the laws and customs of war.<sup>184</sup> Members of militias or volunteer corps, whether integrated into the regular armed forces or not, enjoy prisoner of war (POW) status if they have fallen into the hands of the enemy.<sup>185</sup> Maritime militia members who do not meet one of these conditions will need to be considered as enemy merchant vessel crew (who are also entitled to POW status, or to the more favorable treatment available under Articles 5–8 of the 1907 Hague XI).<sup>186</sup>

Several States have established maritime militias that are designed to augment State maritime law enforcement authorities in peacetime and can be mobilized in times of war to provide direct support to naval forces. These hybrid civilian–naval forces, comprised of modified fishing vessels (some with reinforced hulls), have a military organizational structure and, in some States, are under the direct command of the Navy. Militia units receive military training on ship identification and the use of small arms and are equipped with advanced communications suites and radars to enhance interoperability with naval forces during a conflict. Militia boats can also be equipped with satellite navigation systems that can be used to track and relay enemy ship positions to facilitate target acquisition or serve as an element of

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181. CONCISE OXFORD ENGLISH DICTIONARY 907 (12th ed. 2011).

182. GC I, art. 13(1), (2); GC II, art. 13(1), (2); GC III, art. 4(A)(1), (2).

183. Article 43 of AP I provides: “Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.”

184. GC I, art. 13(2); GC II, art. 13(2); GC III, art. 4(A)(2).

185. GC III, art. 4(A).

186. GC III, art. 4(A)(5). *See infra* Section 10.6.3.2.

the kill chain, as well as gather and report maritime intelligence on enemy naval movements. In addition, the militia can be used to provide logistic support, participate in military deception, conduct electronic warfare, lay mines, provide combat search and rescue services, and conduct visit and search.

### 3.7.1 National Maritime Militia

States operate different categories of maritime militia, each with potentially distinct legal implications. For example, during World Wars I and II, the United Kingdom operated the Royal Naval Patrol Service.<sup>187</sup> During the Vietnam War, North Vietnam employed waterborne logistics craft (WBLC) to move supplies into battle. Today, Vietnam operates a maritime militia at the level of coastal communes, island communes, and agencies and organizations to perform tasks in Vietnamese waters.<sup>188</sup>

China's maritime militia—the People's Armed Forces Maritime Militia (PAFMM)—is the world's largest and most sophisticated maritime militia. It is comprised of thousands of fishing boats and civilian mariners who work primarily as fishermen but are trained and equipped to provide paramilitary support to the China Coast Guard (CCG), other Chinese maritime law enforcement agencies, and the People's Liberation Army-Navy (PLAN) in

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187. The Royal Naval Patrol Service (RNPS) employed launches, fuel carriers, fishing trawlers, drifters, seaplane tenders, corvettes, and specially constructed craft to augment the Royal Navy. At its height, the RNPS constituted a force of some 6,000 vessels. Most of the crew were Royal Navy reservists serving in a “navy within a navy” that served in all theaters of the war and were present in every significant naval engagement. These vessels swept mines and hunted and destroyed U-boats and E-boats. Drifters could lay two miles of herring nets, which could trap German submarines or force them to dive. Pairs of trawlers would tow a sweeping wire between them to catch sea mines and bring them to the surface, where they would be destroyed with rifle fire. *See* ARTHUR CECIL HAMPSHIRE, *LILLIPUT FLEET: THE STORY OF THE ROYAL NAVAL PATROL SERVICE* (1957).

188. Socialist Republic of Vietnam Law No. 43/2009/QH12 (Nov. 23, 2009), arts. 5, 44, 48. These forces coordinate with the Vietnam People's Army and People's Police and other Vietnamese forces, performing a broad range of missions, including national defense and security, and “protection of sovereignty and sovereign rights in the seas and islands. The commander of the Navy is authorized to mobilize the maritime militia and self-defense forces after agreeing with the commander of the Military Region, the chairman of the provincial-level People's Committee, and the head of the agency or organization where the maritime militia and self-defense forces are mobilized.” *See also* Nguyen Hong Thao & Ton Nu Thanh Binh, *Maritime Militias in the South China Sea* (Maritime Awareness Project, June 13, 2019).

times of peace and war.<sup>189</sup> Along with the People's Liberation Army (PLA) and the People's Armed Police (PAP), the PAFMM is part of the People's Armed Forces (PAF) and is under the direct command and control of local PLA military commanders.<sup>190</sup> In times of war, the militia will be integrated into the PLA to support forward deployed forces, resist aggression, and defend China.<sup>191</sup>

PAFMM units are divided into three distinct categories. First, small coastal fishing boats, manned by civilian mariners, are used primarily to perform mundane tasks in littoral waters on an ad hoc basis, such as port security. Second, deep-sea fishing boats manned by civilian mariners that operate far from the Chinese mainland are used on an ad hoc basis to carry out peacetime missions to advance China's maritime and territorial claims ("rights protection"), to include fisheries protection, surveillance and reconnaissance, and monitoring, approaching, and harassing foreign government and civilian vessels. These units can also be called upon to provide direct support to the PLAN in times of war. Third, a select number of larger, State-owned vessels are professionally manned by PLAN veterans and equipped with collision-absorbing rails, reinforced hulls, and small arms and ammunition for use in direct action missions in support of the CCG and PLAN.<sup>192</sup> These specialized units are a professional paramilitary force first, with fishing as a secondary occupation. This militia enjoys a close relationship with the PLAN and is trained to provide support for combat operations. Other fishing vessels may be directed to support naval operations on an ad hoc basis.

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189. OFFICE OF THE SECRETARY OF DEFENSE, MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA 2021: ANNUAL REPORT TO CONGRESS 76 (2021); OFFICE OF THE SECRETARY OF DEFENSE, MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA 2020: ANNUAL REPORT TO CONGRESS 69–72 (2020). For example, the PAFMM directly participated in the seizure of the Western Paracel Islands from South Vietnam in 1974 in direct support of the PLAN amphibious assault. See Ho van Ky-Thoai, *Naval Battle of the Paracels*, in VOICES FROM THE SECOND REPUBLIC OF SOUTH VIETNAM (1967–1975) 153 (K.W. Taylor ed., 2014); Toshi Yoshihara, *The 1974 Paracels Sea Battle*, 69 NAVAL WAR COLLEGE REVIEW 1, 6–8 (2016).

190. Law of the People's Republic of China on National Defence (1997), art. 22; Law of the People's Republic of China on Military Service (Amendment) (1998), art. 4; People's Republic of China Militia Work Regulations (1990), arts. 2, 5.

191. People's Republic of China Militia Work Regulations (1990), art. 3(3).

192. Conor Kennedy & Andrew Erickson, *China's Third Sea Force, The People's Armed Forces Maritime Militia: Tethered to the PLA* 2–3, 10–11 (China Maritime Studies Institute Maritime Report No. 1, Mar. 2017).

When these vessels are so engaged, they become targetable in the same way as “full-time” PAFMM vessels.

PAFMM vessels are equipped with special communications equipment—satellite communication terminals and shortwave radio—and radars that allow them to communicate effectively with their military commands and enhance the CCG’s and PLAN’s maritime domain awareness in times of peace and war.<sup>193</sup> Members of the PAFMM receive military training from the PLA and are incorporated into military exercises and operations with PLAN and CCG vessels. Crews are paid salaries independent of their fishing duties to perform official missions.

### 3.8 Crews of Warships and Naval Auxiliaries

#### 3.8.1 Military Personnel of Warships

Military personnel of warships are combatants.<sup>194</sup> If they fall into the hands of the enemy, they enjoy POW status.<sup>195</sup> For some States, crew members of naval auxiliaries may be members of the armed forces.

#### 3.8.2 Naval Auxiliary Personnel

Officers and crew of naval auxiliaries that do not enjoy combatant status still enjoy POW status if they fall into the hands of the enemy.<sup>196</sup>

#### 3.8.3 Persons Authorized to Accompany the Armed Forces

Persons who are not members of the armed forces, but are authorized to accompany them, are a special category of “civilian.” Although they are not considered military personnel, they differ significantly from the civilian

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193. *Id.* at 4, 9–10.

194. Oxford Manual of Naval Warfare, art. 11.

195. GC III, art. 4(A); GC II, arts. 13, 16; GC I, arts. 13, 14; AP I, arts. 43, 44; Oxford Manual of Naval Warfare, arts. 11, 55, 56, 60; ADDP 06.4 ¶ 6.70; GERMAN MANUAL ¶ 1025; DOD LAW OF WAR MANUAL § 7.3.2; NWP 1-14M §§ 8.6.1, 11.3.1; NWIP 10-2 § 511(a).

196. It has long been established that crews of warships and of enemy merchant vessels enjoy POW status upon capture: *see, e.g.*, Oxford Manual of Naval Warfare, arts. 55, 56, 60. This Manual takes the position that the crews of naval auxiliaries therefore also enjoy POW status. ADDP 06.4 ¶ 6.70 and GERMAN MANUAL ¶ 1025 support this view.

population because they are authorized, or have been ordered, to accompany the armed forces to support military operations.<sup>197</sup> The crew of a warship may therefore include civilian mariners and civilian contractors who provide ship's services, such as food, cleaning, and laundry services, as well as maintaining electronic and weapons systems. The contribution of these civilian personnel is essential for the operation of the ship or its weapons systems. The presence of civilian mariners or civilian contractors on board a warship does not affect its legal status and it may exercise belligerent rights reserved to warships regardless of the makeup of the crew, so long as the ship is commanded by a commissioned officer and manned, in part, by a crew under regular armed forces discipline.<sup>198</sup>

Persons who accompany the armed forces include weapon systems technical representatives, civilian members of military aircraft crews, war correspondents, supply contractors, civilian government employees, and members of labor units or of services responsible for the welfare of the armed forces.<sup>199</sup> In the LOAC, persons authorized to accompany the armed forces may not be made the object of attack unless they commit acts of hostility. In the law of naval warfare, warships and military aircraft are lawful military objectives regardless of the makeup of the passengers or crew. Like members of the armed forces on board a warship, persons authorized to accompany the armed forces on a warship may be detained by enemy military forces and are entitled to POW status if they fall into the power of the enemy during an IAC.<sup>200</sup>

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197. *Damson Claim (U.S. v. Germany)*, 7 R.I.A.A. 184, 198 (1925); *Hungerford (United States) v. Germany*, 7 R.I.A.A. 368, 371 (1926); DOD LAW OF WAR MANUAL § 4.15; DoD Instruction 3020.41, Operational Contract Support (OCS) (Dec. 20, 2011); DoD Instruction 1100.22, Policies and Procedures for Determining Workforce Mix (Apr. 12, 2010); DoD Directive 1404.10, DoD Civilian Expeditionary Workforce (Jan. 23, 2009); DoD Instruction 1400.32, DoD Civilian Work Force Contingency and Emergency Planning Guidelines and Procedures (Apr. 24, 1995); DoD Directive 1404.10, Emergency-Essential DoD U.S. Civilian Employees (Apr. 10, 1992); DoD Instruction 3020.37, Continuation of Essential DoD Contractor Services During Crises (Nov. 6, 1990, incorporating Change 1, Jan. 26, 1996).

198. UK MANUAL ¶¶ 13.5, 13.91. *See also* UNCLOS, art. 29; NWP 1-14M § 2.2.1.

199. GC III, art. 4(A)(4); DOD LAW OF WAR MANUAL § 4.15.1; NWP 1-14M § 11.6; NWIP 10-2 § 511(a).

200. GC II, art. 13(4); GC III, art. 4(A)(4); DOD LAW OF WAR MANUAL § 4.15.1; NWP 1-14M § 11.6; NWIP 10-2 § 511(a); ADDP 06.4 ¶ 6.70; GERMAN MANUAL ¶ 1025.



### 3.8.4 Noncombatants

Noncombatants (designated military religious, medical, and hospital personnel) receive special protections under the LOAC. Noncombatants who fall into enemy hands are not considered POWs and must be repatriated at the earliest opportunity unless their retention by the enemy is required to provide for the medical or religious needs of POWs.<sup>201</sup>

### 3.9 Merchant Ships and Their Crews

A merchant ship “is a ship that is not a warship or [other State] ship and that is used . . . for commercial trade, fishing purposes or for passenger transport. Noncommercial privately owned vessels (such as yachts) fall into the category of merchant vessels.”<sup>202</sup>

#### 3.9.1 Exclusive Flag State Jurisdiction

Save in exceptional cases (e.g., the slave trade, piracy, or a UN Security Council resolution under Chapter VII), ships navigating seaward of the territorial sea are subject to the exclusive jurisdiction of the flag State.<sup>203</sup> This established peacetime rule is without prejudice to the law of naval warfare, which provides belligerents the right to impinge on the principle of exclusive flag State jurisdiction over enemy and neutral merchant vessels operating beyond neutral waters.

#### 3.9.2 Enemy Merchant Ships

Enemy merchant ships are liable to be captured as prize outside neutral waters for the entire duration of the armed conflict (see Chapter 9).<sup>204</sup> Without prejudice to the circumstances rendering a merchant ship liable to be attacked (see Chapter 8), it is, therefore, important to identify the criteria according to which a merchant ship has enemy character.

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201. Hague Regulations, art. 3; DOD LAW OF WAR MANUAL §§ 4.10, 4.10.2; NWP 1-14M § 11.5; NWIP 10-2 § 511(a); ADDP 06.4 ¶ 5.23 (medical personnel), ¶ 5.24 (religious personnel), ¶ 6.69 (retention for spiritual and medical care of POWs), ¶ 10.8; UK MANUAL ¶ 13.118.

202. GERMAN MANUAL ¶ 1008; NWIP 10-2 § 500(b); JMSDF TEXTBOOK 128.

203. UNCLOS, art. 92; High Seas Convention, art. 6.

204. GERMAN MANUAL ¶ 1027; UK MANUAL ¶ 13.99.

A merchant ship flying the enemy's flag "bears enemy character . . . whatever may be the nationality of her owner—whether a subject of a neutral State, or of either belligerent."<sup>205</sup> A merchant vessel flying the flag of an enemy State is conclusive evidence of its enemy character.<sup>206</sup>

Merchant ships flying the flag of a neutral State may nevertheless bear or acquire enemy character. The concept of "acquiring enemy character" is applied in U.S. doctrine<sup>207</sup> and in the 1909 London Declaration.<sup>208</sup> Under the concept, neutral merchant ships may acquire the status of either an enemy merchant ship or even an enemy warship based on their conduct. Nonetheless, the circumstances rendering merchant ships flying the flag of neutral States liable to be captured as prize ("acquiring the character of an enemy merchant ship") or lawful targets ("acquisition of the character of an enemy warship") are, in principle, without prejudice to their neutral character. Other States do not make use of this concept.

Irrespective of the different approaches, States widely agree that any merchant ship flying the flag of a neutral State bears enemy character in the following circumstances:<sup>209</sup>

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205. Declaration Concerning the Laws of Naval War art. 57, Feb. 26, 1909, 208 Consol. T.S. 338; NWIP 10-2 § 501; GERMAN MANUAL ¶ 1026; OPPENHEIM, *supra* note 60, at 277.

206. London Declaration of 1909, art. 57; NWP 1-14M § 7.5; NWIP 10-2 § 501; CANADIAN MANUAL ¶ 858(1); DANISH MANUAL ch. 14 § 4.5.2.1; GERMAN MANUAL ¶ 1026; NORWEGIAN MANUAL § 10.63; UK MANUAL ¶ 13.85. *See also* Japan, Rules of Naval War (1914), art. 18; Japan, Revised Rules of Naval War (1942), art. 18(1); Tucker, *supra* note 59, at 76–86; JMSDF TEXTBOOK 170.

207. NWP 1-14M § 7.5; NWIP 10-2 § 501; ADDP 06.4 ¶ 6.41 supports this interpretation and lists the circumstances when neutral merchant vessels may be attacked.

208. London Declaration of 1909, art. 46. *See also* The Hoegh de Vries, 17 INTERNATIONAL LAW REPORTS 447 (Prize Ct. of Alexandria 1950) (Egypt).

209. According to the controversial "Rule of 1756," if a neutral vessel engages in wartime trade under the license of an enemy government that was prohibited to it by that enemy State in time of peace, the neutral vessel may be treated as an enemy merchant vessel by other belligerent parties. This rule originated in the United Kingdom and later was followed by the United States, Japan, and other countries. The London Declaration of 1909 retained the Rule of 1756 in Article 57(2). Currently, most national military manuals, including the UK and U.S. manuals, do not mention the rule, which has largely become obsolete by desuetude. Nonetheless, several States have adopted cabotage laws to protect their domestic shipping industry from foreign competition and to maintain the domestic shipping infrastructure for national security purposes. In such cases, some States may retain a limited

- No entitlement under the domestic law of the respective State to fly its flag;<sup>210</sup>
- Being under the orders or control of an agent placed on board by the enemy government;<sup>211</sup>
- Being in the exclusive employment of the enemy government;<sup>212</sup>
- Operating directly under enemy control, orders, charter, employment, or direction;<sup>213</sup>
- Owned by enemy nationals or enemy corporations;<sup>214</sup> or
- Transfer from an enemy flag to a neutral flag, effected before or after the outbreak of hostilities, and such transfer is made to evade the consequences to which an enemy vessel is exposed.<sup>215</sup>

Enemy merchant vessels should not commit hostile acts in offensive military operations. However, merchant vessels may resist and defend themselves from attacks by enemy forces, to include counterattacks and seizure of the attacking enemy vessel.<sup>216</sup> Resisting or defending against an attack by enemy forces is not a violation of the LOAC,<sup>217</sup> but such acts render the vessel liable to attack.

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variant of the Rule of 1756 as a criterion for treating neutral merchant vessels as enemy merchant vessels.

210. OPPENHEIM, *supra* note 60, at 278; Japan, Revised Rules of Naval War (1942), art. 18(2).

211. London Declaration of 1909, art. 46(2), (3), which is declaratory of customary international law. *See* OPPENHEIM, *supra* note 60, at 278; Japan, Rules of Naval War (1914), art. 80(2).

212. London Declaration of 1909, art. 46(3); Japan, Revised Rules of Naval War (1942), art. 18(4); NWIP 10-2 § 501(b).

213. Japan, Revised Rules of Naval War (1942), art. 18(4); NWP 1-14M § 7.5.2.

214. Tucker, *supra* note 59, at 76; Japan, Revised Rules of Naval War (1942), art. 18(3).

215. London Declaration of 1909, arts. 55–56; Tucker, *supra* note 59, at 80; Japan, Rules of Naval War (1914), arts. 22, 23.

216. OPPENHEIM, *supra* note 60, at 266; DOD LAW OF WAR MANUAL § 4.16.

217. JAPANESE LAW OF WAR MANUAL 76; Italy, Rule of Naval Warfare, 1924; J.A. HALL, THE LAW OF NAVAL WARFARE 24 (1914); Tucker, *supra* note 59, at 56–57; OPPENHEIM, *supra* note 60, at 466–67.

### 3.9.2.1 Personnel of Enemy Merchant Vessels

Officers and crews of captured enemy merchant ships may be detained and made POWs.<sup>218</sup> However, Hague XI provides that the officers and crew of an enemy merchant vessel that did not take part in hostilities should not be held as POWs if they make a formal promise in writing not to undertake, while hostilities last, any service connected with the operations of the war.<sup>219</sup> The provisions of Hague XI proved ineffective during World Wars I and II and were disregarded by the belligerents. However, Geneva Convention III, Article 4(A)(5)—“[m]embers of crews . . . of the merchant marine . . . who do not benefit by more favorable treatment under any other provision of international law”—leaves open the possibility that Hague XI still applies.

Other enemy nationals on board enemy merchant vessels as private passengers, except those embodied in the armed forces of the enemy, are subject to the discipline of the captor and are to be landed at a convenient port as soon as possible.<sup>220</sup> They must be afforded certain fundamental guarantees of humane treatment and their personal belongings must be protected. They are not to be confined without special reason for it.<sup>221</sup> Enemy nationals on board the vessel who are in the public service of the enemy may be treated as POWs, if necessary. Nationals of neutral States on board captured enemy merchant ships should not be detained unless they have committed acts of hostility or resistance against the captor or are otherwise in the service of the enemy.<sup>222</sup> Nationals of the enemy State found on board captured enemy merchant ships, who are employed in religious, medical, or nursing work, are not to be made POWs. However, if their status is suspect, they may be detained until their status is determined.<sup>223</sup>

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218. GC II, art. 13(4); GC III, art. 4(A)(4); ADDP 06.4 ¶ 6.70; GERMAN MANUAL ¶ 1038; DOD LAW OF WAR MANUAL §§ 4.16.2, 13.5.3; NWP 1-14M § 8.6.2.1; NWIP 10-2 § 512.

219. Hague XI, arts. 6, 8; Japan, Rules of Naval War (1914), arts. 113–14.

220. ADDP 06.4 ¶ 6.71; GERMAN MANUAL ¶ 1039; Japan, Rules of Naval War (1914), art. 119; NWP 1-14M § 8.6.2.1.

221. Japan, Rules of Naval War (1914), art. 121.

222. Hague XI, arts. 5, 8; Japan, Rules of Naval War (1914), art. 112; DOD LAW OF WAR MANUAL §§ 4.16.2, 13.5.3; NWP 1-14M § 8.6.2.1; NWIP 10-2 § 512.

223. Japan, Rules of Naval War (1914), art. 120.

### 3.9.3 Neutral Merchant Vessels

Prima facie, merchant vessels flying the flag of a neutral State qualify as neutral merchant ships, unless they bear enemy character or otherwise acquire enemy character.<sup>224</sup> Accordingly, and without prejudice to the circumstances rendering them liable to be attacked or captured, vessels other than State ships have the status of neutral merchant vessels if they:

- Are entitled to fly the flag of a neutral State under the applicable domestic law of that State;
- Are not under the orders or control of an agent placed on board by the enemy government;
- Are not in the exclusive employment of the enemy government;
- Are not owned by enemy nationals or enemy corporations; or
- Are validly transferred from an enemy flag to a neutral flag, effected before or after the outbreak of hostilities, unless such transfer is made to evade the consequences to which an enemy vessel is exposed.<sup>225</sup>

#### 3.9.3.1 Crews of Neutral Merchant Vessels

The officers and crews of neutral merchant vessels captured as prize who are nationals of a neutral State may not be made POWs and must be repatriated as soon as circumstances reasonably permit.<sup>226</sup>

If a neutral merchant vessel takes a direct part in the hostilities on the side of the enemy, serves in any way as a naval or military auxiliary for the enemy, or otherwise becomes a lawful target, upon capture, its officers may be held as POWs.<sup>227</sup> Unless they have personally committed acts of hostility, crew members of neutral nationality may not be made POWs and must be repatriated without undue delay.

Enemy nationals found on board neutral merchant vessels as passengers who are embodied in the military forces of an enemy, who are en route to

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224. NWP 1-14M § 7.5.

225. London Declaration of 1909, arts. 55–56; Tucker, *supra* note 59, at 80.

226. ADDP 06.4 ¶ 6.71; Japan, Rules of Naval War (1914), art. 118; NWP 1-14M § 7.10.2; NWIP 10-2 § 513(a).

227. ADDP 06.4 ¶ 6.71; Japan, Rules of Naval War (1914), art. 118; NWP 1-14M § 7.10.2.

serve in the enemy's armed forces, or who are employed in the public service of the enemy or engaged in (or suspected of service in) the interests of the enemy may be interned until their status can be determined. All such enemy nationals may be removed from the neutral vessel whether there is reason to capture the vessel as a prize.<sup>228</sup>

### 3.10 Aircraft

“Aircraft” are defined in Annex 1 of the Chicago Convention as “any 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.”<sup>229</sup> Accordingly, the word “aircraft” describes different types of machines that are capable of flying, including pilotless aircraft. Examples of machines that are considered to be aircraft include airplanes, unmanned aerial systems (UASs), helicopters, airships (or dirigibles), gliders, and hot air balloons. Aircraft can be categorized as State aircraft or civil aircraft.

#### 3.10.1 State Aircraft

The Chicago Convention and rules adopted by the International Civil Aviation Organization (ICAO) apply only to civil aircraft, not State aircraft.<sup>230</sup> State aircraft include aircraft used in military, customs, and police services, and any other aircraft operated by a government exclusively for noncommercial purposes.<sup>231</sup> State aircraft are entitled to sovereign immunity and are not required to comply with normal ICAO flight procedures.<sup>232</sup> This status applies irrespective of ownership. The only requirement is that States operate their State aircraft, including UASs, with “due regard” for the safety of navigation of civil aircraft.<sup>233</sup> This standard of “due regard” means that

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228. NWP 1-14M § 7.10.2; NWIP 10-2 § 513(b); Japan, Rules of Naval War (1914), art. 82.

229. Chicago Convention, art. 8 (pilotless aircraft), annex 1 § 1.1.

230. Chicago Convention, art. 3(a); ADDP 06.4 ¶ 8.8; DOD LAW OF WAR MANUAL § 14.1.1.2.

231. Chicago Convention, art. 3(b); ADDP 06.4 Glossary, 6; GERMAN MANUAL ¶¶ 1103, 1104; DOD LAW OF WAR MANUAL § 14.1.1.2; NWP 1-14M §§ 2.4.2, 2.4.3.

232. NWP 1-14M § 2.4.3; ADDP 06.4 ¶ 8.13.

233. Chicago Convention, art. 3(d); DOD LAW OF WAR MANUAL § 14.1.1.4; NWP 1-14M §§ 2.7.2–2.7.2.2; DoD Instruction 4540.01, Use of International Airspace by U.S. Military Aircraft and for Missile/Projectile Firings, encl. (3) ¶ 3.c(1) (June 2, 2015, incorporating Change 1, May 22, 2017); ADDP 06.4 ¶ 8.20.

States owe one another the consideration called for by the circumstances and by the nature of the rights that each has as against the other.<sup>234</sup> Other State aircraft are assimilated to civil aircraft.<sup>235</sup>

In times of war, the provisions of the Chicago Convention shall not affect the freedom of action of belligerent or neutral States.<sup>236</sup> Thus, States' rights and duties under the LOAC prevail over the obligations under the Chicago Convention during an IAC. Some of the restrictions in the Convention applicable to civil aircraft may apply during an armed conflict as between neutral States. For example, the Convention prohibits civil aircraft from transporting munitions or implements of war in the national airspace of a State without the permission of that State.<sup>237</sup> Neutral civil aircraft would, therefore, still be required to seek permission from a foreign neutral State before transporting munitions or implements of war through another neutral State's national airspace.<sup>238</sup>

During combat operations, U.S. policy requires aircraft commanders, consistent with military necessity, to take all possible precautions to minimize hazards to the safety of civil aviation.<sup>239</sup>

During an IAC,<sup>240</sup> military aircraft and non-military aircraft assigned exclusively to a public service are considered public aircraft.<sup>241</sup> Any other aircraft are considered private aircraft. Military aircraft must carry an exterior mark indicating their nationality and their military character.<sup>242</sup> Similarly,

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234. Chagos Marine Protected Area (Mauritius v. U.K.), Award, 31 R.I.A.A. 359, 519, 534–536 (Perm. Ct. Arb., Mar. 18, 2015).

235. Hague Rules of Air Warfare art. 5.

236. Chicago Convention, art. 89; DOD LAW OF WAR MANUAL § 14.1.1.1.

237. Chicago Convention, art. 35.

238. Chicago Convention, art. 35(a); DOD LAW OF WAR MANUAL § 14.1.1.1.

239. DOD LAW OF WAR MANUAL § 14.1.1.4; DoD Instruction 4540.01, *supra* note 233, ¶ 3.e(4); DoD Instruction 4540.1, Use of Airspace by U.S. Military Aircraft and Firings Over the High Seas, ¶ 5.6.2 (Jan. 13, 1981).

240. Between December 1922 and February 1923, a commission of jurists from France, Great Britain, Italy, Japan, the Netherlands, and the United States prepared a set of rules for the control of radio in time of war (part I) and rules of air warfare (part II). Although these rules were never adopted in a legally binding instrument, they reflect the customary rules and general principles underlying treaties on the law of war on land and at sea. OPPENHEIM, *supra* note 60, at 519.

241. Hague Rules of Air Warfare art. 2.

242. *Id.* art. 3.

non-military public aircraft assigned to customs or police service must carry papers attesting that they are exclusively used for a public service and will carry an exterior mark indicating their nationality and their non-military public character.<sup>243</sup> If captured, military aircraft and non-military aircraft used exclusively for customs or police services become booty of war. Other non-military public aircraft other than those assigned to customs or police service shall be treated in the same manner as civil aircraft.<sup>244</sup>

### 3.10.2 Military Aircraft

“Military aircraft” include all aircraft (manned or unmanned) operated by the armed forces of a State; bearing the military markings of that State; commanded by a member of the armed forces; and controlled, manned, or preprogrammed by a crew subject to regular armed forces discipline.<sup>245</sup> Military aircraft may attack warships and military aircraft, naval (military) auxiliaries, and other military objectives and may intercept civil aircraft anywhere beyond neutral territory.<sup>246</sup>

#### 3.10.2.1 Crews of Military Aircraft

Military members of the crew of a military aircraft have combatant status. They shall wear a fixed distinctive emblem of such character as to be recognizable at a distance in case they become separated from their aircraft.<sup>247</sup> However, it is not required that the crew wear a certain uniform.<sup>248</sup> If they fall into the hands of the enemy, they enjoy POW status.<sup>249</sup>

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243. *Id.* art. 4.

244. *Id.* art. 5.

245. Hague Rules of Air Warfare Rules, art. 14; ADDP 06.4 ¶ 8.12, Glossary p. 5; GERMAN MANUAL ¶¶ 1103, 1110, 1111; JAPANESE LAW OF WAR MANUAL 262–67; NWIP 10-2 § 500(d); NWP 1-14M § 2.4.1.

246. Hague Rules of Air Warfare, art. 13; GERMAN MANUAL ¶ 1115; JAPANESE LAW OF WAR MANUAL 262; ADDP 06.4 ¶ 8.48; NWP 1-14M § 8.8. *See also* Chapter 8.

247. Hague Rules of Air Warfare, art. 15; JAPANESE LAW OF WAR MANUAL 265.

248. JAPANESE LAW OF WAR MANUAL 265.

249. GC III, art. 4; GC II, art. 13, 16; GC I, arts. 13, 14; AP I, art. 43; Hague Rules of Air Warfare, art. 36; Oxford Manual of Naval Warfare, arts. 11, 55, 56, 60; JAPANESE LAW OF WAR MANUAL 281; JMSDF TEXTBOOK 201; DOD LAW OF WAR MANUAL § 7.3.2; NWP 1-14M § 8.6.1; NWIP 10-2 § 511(a).



Civilian members of military aircraft crews enjoy POW status if they fall into the hands of the enemy.<sup>250</sup>

Enemy or neutral nationals on board enemy military aircraft may also be treated as POWs.<sup>251</sup>

### 3.10.2.2 Unmanned Aerial Systems

Aircraft, including State aircraft, can be either manned or unmanned.<sup>252</sup> UASs are aircraft that do not carry a human operator and are capable of flight with or without human remote control. They can be launched from the water (surface or subsurface), air, or land.

Article 8 of the Chicago Convention acknowledges the existence of “pilotless” aircraft.<sup>253</sup> Unmanned aircraft systems are further defined in ICAO Circular 328 as “aircraft and its associated elements which are operated with no pilot on board.”<sup>254</sup>

Like manned aircraft, UASs are entitled to the navigational rights and freedoms recognized in UNCLOS and the Chicago Convention, to include high seas freedoms beyond the territorial sea, transit passage through straits used for international navigation, and archipelagic sea lanes passage through

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250. GC III, art. 4(A)(4); ADDP 06.4 ¶ 8.58; JAPANESE LAW OF WAR MANUAL 281; JMSDF TEXTBOOK 201.

251. Hague Rules of Air Warfare, art. 36; JAPANESE LAW OF WAR MANUAL 281.

252. Note that the predecessor treaty to the Chicago Convention—the 1919 Paris Convention—imposed a manning and pilot-in-command requirement for State aircraft. *See* Paris Convention of 1919, art. 31 (“Every aircraft commanded by a person in military service detailed for the purpose shall be deemed to be a military aircraft.”).

253. Chicago Convention, art. 8 (“No aircraft capable of being flown without a pilot shall be flown without a pilot over the territory of a contracting State without special authorization by that State . . . . Each contracting State undertakes to ensure that the flight of such aircraft without a pilot in regions open to civil aircraft shall be so controlled as to obviate danger to civil aircraft.”). DOD LAW OF WAR MANUAL § 14.3.3; NWP 1-14M § 2.4.4; DoD Instruction 4540.01, *supra* note 233, at 11; DoD Instruction 4540.1, *supra* note 239, ¶ 3; DANISH MANUAL ch. 13 §§ 3.1, 3.2; GERMAN MANUAL ¶ 1110; NORWEGIAN MANUAL §§ 11.7, 11.9.

254. ICAO Cir. 328 (AN/190), Unmanned Aircraft Systems (UAS) (2011).

archipelagic waters. UASs that are designated as “military aircraft” are entitled to exercise belligerent rights.<sup>255</sup>

### 3.10.3 Civil Aircraft

Civil aircraft are all aircraft that are not military, police, or customs aircraft. For the purposes of the LOAC, State aircraft not belonging to any of these three categories are assimilated to civil aircraft.<sup>256</sup> Civil aircraft, when outside the jurisdiction of the flag State, shall not be armed in time of war.<sup>257</sup>

#### 3.10.3.1 Enemy Civil Aircraft

Civil aircraft that bear the marks indicating enemy nationality qualify as enemy civil aircraft. Civil aircraft bearing the marks of a neutral State bear enemy character if they operate “directly under enemy control, orders, charter, employment, or direction.”<sup>258</sup> Enemy civil aircraft, when outside the jurisdiction of their State of registry, shall not engage in hostilities and they may not be armed in time of war.<sup>259</sup> Enemy civil aircraft are liable to be captured outside neutral national airspace for the entire duration of the armed conflict (see Chapter 11).<sup>260</sup> If they make an effective contribution to the enemy’s military action (or war-sustaining effort), they are liable to be attacked (see Chapter 8).

#### 3.10.3.2 Neutral Civil Aircraft

Civil aircraft entitled to bear the marks of a neutral State have neutral character unless they operate “directly under enemy control, orders, charter, employment, or direction.”<sup>261</sup>

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255. Hague Rules of Air Warfare, art. 13; DoD Instruction 4540.01, *supra* note 233, Glossary, Part II (Definitions); NWP 1-14M § 2.4.4.

256. Hague Rules of Air Warfare, art. 5; ADDP 06.4 Glossary, 1.

257. Hague Rules of Air Warfare, art. 16; JAPANESE LAW OF WAR MANUAL 265–66.

258. NWP 1-14M § 7.5.2.

259. Hague Rules of Air Warfare, art. 16; JAPANESE LAW OF WAR MANUAL 265–66.

260. Hague Rules of Air Warfare, art. 52; GERMAN MANUAL ¶ 1124; JAPANESE LAW OF WAR MANUAL 289.

261. NWP 1-14M § 7.5.2.

### 3.10.3.3 Persons on Board Civil Aircraft

#### 3.10.3.3.1 Persons on Board Enemy Civil Aircraft

Pilots and crews of captured enemy civil aircraft may be detained as POWs.<sup>262</sup> Other enemy nationals on board such captured aircraft as private passengers are subject to the discipline of the captor. Enemy and neutral nationals in the public service of the enemy found on board captured enemy civil aircraft may be treated as POWs as necessary.<sup>263</sup> Nationals of a neutral nation on board captured enemy civil aircraft should not be detained unless they have participated in acts of hostility or resistance against the captor or are otherwise in the service of the enemy.<sup>264</sup>

#### 3.10.3.3.2 Persons on Board Neutral Civil Aircraft

Pilots and crews of captured neutral civil aircraft who are nationals of a neutral State do not become POWs and must be repatriated as soon as circumstances reasonably permit.<sup>265</sup> The same rule applies even if the neutral civil aircraft assumed the character of an enemy civil aircraft by operating under enemy control or resisting an intercept.<sup>266</sup> If the neutral aircraft took a direct part in the hostilities on the side of the enemy or served in any way as a military auxiliary for the enemy, they assume the character of enemy military aircraft and, upon capture or destruction, their pilots and crew may be held as POWs.<sup>267</sup>

Enemy nationals found on board neutral civil aircraft as passengers who are actually embodied in the military forces of the enemy, who are en route to serve in the enemy's armed forces, who are employed in the public service of the enemy, or engaged in, or suspected of service in, the interests of the enemy may be interned until a determination of their status has been made.<sup>268</sup> All such enemy nationals may be removed from the neutral aircraft whether or not there is reason for its capture as a neutral prize. Enemy nationals not

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262. Hague Rules of Air Warfare, art. 36(3).

263. *Id.*

264. *Id.*; JAPANESE LAW OF WAR MANUAL 281–82; DOD LAW OF WAR MANUAL § 13.5.3; NWP 1-14M § 8.6.2.1; NWIP 10-2 § 512.

265. Hague Rules of Air Warfare, art. 37(1); JAPANESE LAW OF WAR MANUAL 282–83.

266. NWP 1-14M § 7.10.2; NWIP 10-2 § 513(a).

267. Hague Rules of Air Warfare, art. 37(3); NWP 1-14M § 7.10.2.

268. Hague Rules of Air Warfare, art. 37(1).

falling within any of these categories are not subject to capture or detention.<sup>269</sup>

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269. NWP 1-14M § 7.10.2; NWIP 10-2 § 513(b).

## CHAPTER 4

## AREAS OF NAVAL OPERATIONS

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## 4.1 Legal Divisions of the Sea

The reach of naval weapons and operations may range throughout the land territory of the Earth, the oceans and atmosphere, and outer space. Naval warfare may be conducted at sea anywhere beyond neutral waters (see Section 11.3.1) unless expressly prohibited by specific agreements. The areas in which naval warfare may be conducted include the seabed and the subsoil, the superjacent water column, the surface of the water, and the airspace above it. The internal waters, archipelagic waters, and territorial sea of belligerents, the territory of belligerents accessible to naval forces, the airspace over such waters and territory, and all water and airspace seaward of the territorial sea of neutral States are the areas in which naval operations can be lawfully conducted.<sup>270</sup>

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270. 10 DIGEST OF INTERNATIONAL LAW 603–4 (Marjorie M. Whiteman ed., 1968); DOD LAW OF WAR MANUAL § 13.2; DANISH MANUAL ch. 14 § 4.3; GERMAN MANUAL ¶ 1011; NWP 1-14M § 1.3; JMSDF TEXTBOOK 120.

During armed conflict, sea areas are divided between neutral sea areas and areas where belligerent rights may be exercised. Neutral sea areas are the internal waters, archipelagic waters, and territorial sea of neutral States that are legally consistent with international law, including the United Nations Convention on the Law of the Sea (UNCLOS). Belligerent operations may be conducted in all waters beyond neutral sea areas.<sup>271</sup> However, belligerent operations may be prohibited in certain sea areas.<sup>272</sup>

The definitions of the maritime zones (internal waters, the territorial sea, archipelagic waters, the contiguous zone, the EEZ, the continental shelf, the high seas, and the Area<sup>273</sup>), as well as the legal concepts of innocent passage, transit passage, and archipelagic sea lanes passage (ASLP), are reflected in UNCLOS. Whereas UNCLOS reflects the customary law peacetime regime in respect of coastal State sovereignty, this regime is closely related to belligerent and neutral rights involving naval warfare. During hostilities and to the extent that these two bodies of law are inconsistent, the law of naval warfare is *lex specialis* and prevails over the peacetime international law of the sea as reflected in UNCLOS.<sup>274</sup>

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271. CANADIAN MANUAL ¶ 804; DANISH MANUAL ch. 2 § 3.5.1; FRENCH MANUAL 43; GERMAN COMMANDER'S HANDBOOK ¶ 11; NORWEGIAN MANUAL § 10.1; UK MANUAL § 13.6; NWP 1-14M § 8.6; JMSDF TEXTBOOK 120.

272. Treaty Between Norway, the United States of America, Denmark, France, Italy, Japan, the Netherlands, Great Britain and Ireland and the British overseas Dominions and Sweden concerning Spitsbergen, Feb. 9, 1920, 2 L.N.T.S. 8 (Svalbard Treaty). The islands were officially renamed Svalbard by Norway's Svalbard Act of July 17, 1925; Antarctic Treaty, Dec. 1, 1959, 402 U.N.T.S. 71; Åland Convention, Mar. 30, 1856; Convention Relating to the Non-Fortification and Neutralisation of the Åland Islands, Oct. 20, 1921, *reprinted in* 24 INTERNATIONAL LAW STUDIES 56 (1924).

273. UNCLOS, art. 1(1).

274. *See* VCLT, art. 73 ("The provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States."); Effects of Armed Conflicts on Treaties, in International Law Commission, Report of the International Law Commission on the Work of Its Sixty-Third Session, art. 1, U.N. Doc. A/66/10 (2011), *reprinted in* [2011] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 106, A/CN.4/SER.A/2011/Add.1 (Part 2) ("The present draft articles apply to the effects of armed conflict on the relations of States under a treaty.").

#### 4.1.1 Waters Under the Sovereignty of the Coastal State

Waters landward of the outer limit of the territorial sea are under the sovereignty of the coastal State. These waters include internal waters, the territorial sea, archipelagic waters, the seabed and water column within such areas, and the airspace above the water. States are entitled to claim a territorial sea not exceeding 12 nautical miles, measured from lawfully drawn baselines.<sup>275</sup> Hostilities may be conducted in and above waters under the sovereignty of parties to the conflict, including internal waters, the territorial sea, and archipelagic waters.

Belligerents may not exercise belligerent rights in and above neutral waters (see Chapter 11). However, neutral States, subject to impartiality, can determine the conditions for the replenishment and refueling of belligerent warships in their ports.<sup>276</sup>

##### 4.1.1.1 Baselines

Coastal State maritime zones are recognized only to the extent that they have been established on the basis of lawfully drawn baselines. Normally, the baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.<sup>277</sup> However, where a coast is deeply indented and cut into, or where there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline.<sup>278</sup> The drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the baselines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.<sup>279</sup> Straight baselines may be used across the mouth of a river between points on the low-water line of its banks.<sup>280</sup> Straight baselines also may be used to enclose bays where

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275. UNCLOS, art. 3; NWP 1-14M § 1.4.1. Neutral States that in peacetime have a territorial sea of 12 nautical miles may, for the duration of an international armed conflict, claim a territorial sea of less than 12 nautical miles to be able to enforce the law of maritime neutrality.

276. NWP 1-14M § 7.3.2.2.

277. UNCLOS, art. 5.

278. UNCLOS, art. 7(1).

279. UNCLOS, art. 7(3).

280. UNCLOS, art. 9.

the distance between the low-water mark of the natural entrance points does not exceed 24 nautical miles.<sup>281</sup>

#### 4.1.1.2 Internal Waters

Internal waters are landward of the baseline from which the territorial sea is measured.<sup>282</sup> Lakes, rivers, some bays, ports, harbors, some canals, and lagoons are examples of internal waters. Internal waters have the same legal character as the land territory itself.<sup>283</sup> The coastal State has sovereignty over internal waters.

There is no right of entry by foreign vessels and aircraft in internal waters and the airspace above without prior approval, except as rendered necessary by force majeure or for the purpose of rendering assistance to persons, ships, or aircraft in danger of distress.

There is no right of innocent passage in internal waters.<sup>284</sup> 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.<sup>285</sup> If the new baselines have the effect of enclosing as internal waters areas that had previously been considered an international strait connecting one area of the high seas or EEZ to another area of the high seas or EEZ, a right of transit passage exists in those waters.

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281. UNCLOS, art. 10(5).

282. UNCLOS, art. 8; NWP 1-14M § 1.3.1.

283. NWP 1-14M § 1.5.1. Note, however, that the Arbitral Tribunal in the Ukraine–Russia Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait rejected “the proposition that a dispute falls entirely outside the scope of . . . [UNCLOS] simply because the underlying events occurred in internal waters.” Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukr. v. Russ.), Case No. 2017-06, Award Concerning the Preliminary Objections of the Russian Federation, ¶ 296 (Perm. Ct. Arb. Feb. 21, 2020).

284. NWP 1-14M §§ 1.5.1, 2.5.1.

285. UNCLOS, art. 8(2).



#### 4.1.1.3 Territorial Sea

The territorial sea is a belt of ocean that is measured up to 12 nautical miles seaward from the baseline of the coastal State and is subject to its sovereignty.<sup>286</sup> This area includes the seabed and subsoil, the water column, and the surface of the water. Coastal State sovereignty also extends to the air-space above the water. In the territorial sea, coastal States possess civil and criminal jurisdiction over foreign-flagged merchant ships and government ships operated for commercial purposes, subject to limitations set out in Articles 27 and 28 of UNCLOS.<sup>287</sup> The lawful exercise of criminal and civil jurisdiction by a neutral coastal State over belligerent merchant vessels is not inconsistent with neutral status. Coastal States may not purport to subject to their jurisdiction in the territorial sea foreign warships and other government ships operated for noncommercial purposes, in accordance with Part II subsection C of UNCLOS. The right of innocent passage through the territorial sea continues to apply in the event of armed conflict in accordance with general international law.<sup>288</sup> Neutral States may restrict the right of innocent passage, subject to impartiality.<sup>289</sup>

During a non-international armed conflict, the State party to such conflict may suspend innocent passage, for example, in parts of its territorial sea off the territory controlled by the non-State organized armed group.<sup>290</sup>

#### 4.1.1.4 Straits

The term “strait used for international navigation” is both a geographic and juridical term that may apply to five types of straits that are subject to

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286. UNCLOS, art. 2; NWP 1-14M § 1.3.2.

287. For example, coastal States should not assert criminal jurisdiction over foreign-flagged merchant ships in the territorial sea, unless (a) the consequences of the crime extend to the coastal State; (b) the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; (c) the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or (d) such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances. UNCLOS, art. 27(1).

288. NORWEGIAN MANUAL § 10.23; NWP 1-14M § 7.3.4 (“A neutral State may allow the passage of belligerent warships and prizes through its territorial seas.” It does not use the term “innocent passage”).

289. Hague XIII, art. 9. This right under the law of naval warfare is distinct from coastal State rights under Article 25(3) of UNCLOS.

290. UNCLOS, art. 25(3).

one or more navigational regimes, namely (1) high seas freedoms; (2) transit passage; and (3) non-suspendable innocent passage:

(1) **Straits with a “high seas or EEZ corridor” beyond the territorial sea.**<sup>291</sup> Straits wider than 24 nautical miles lie beyond the coastal State territorial sea. The right of innocent passage applies in the territorial sea and high seas freedoms of navigation and overflight and other internationally lawful uses of the sea apply in the “high seas or EEZ corridor” beyond the territorial sea.<sup>292</sup> The Taiwan Strait, for example, is 100 miles (160 kilometers) at its narrowest point. High seas freedoms of navigation and overflight and other internationally lawful uses of the sea apply beyond the 12-nautical-mile territorial sea of mainland China and Taiwan, including in the strait. In straits less than 24 nautical miles wide, States may claim a territorial sea of less than 12 nautical miles to maintain a corridor of high seas or EEZ.<sup>293</sup>

(2) **Straits connecting one area of the high seas or EEZ with another area of the high seas or EEZ.**<sup>294</sup> The regime of passage through international straits overlapped by internal waters or territorial seas does not affect the legal status of the waters forming the strait or the exercise by the States bordering the straits of their sovereignty or jurisdiction over such waters, including their bed and subsoil, as well as the air space above them. Transit passage applies in such straits.<sup>295</sup> The right of transit passage also applies in straits used for international navigation that are not overlapped by internal waters or territorial sea if the high seas or EEZ corridor through the strait does not provide a route of similar convenience with respect to navigational and hydrographical characteristics.<sup>296</sup> All ships and aircraft enjoy the right of transit passage that shall not be impeded.<sup>297</sup> Transit passage means

291. UNCLOS, art. 36.

292. *Id.*

293. Japan, for example, claims only a 3-nautical-mile territorial sea in five straits: the Sōya (La Pérouse) Strait between Karafuto (Sakhalin) and Hokkaidō; the Tsugaru Strait between Hokkaidō and Honshū; the Osumi Strait between Kyushu and Tanegashima Island; the Tsushima East Channel between Tsushima and Kyūshū; and the Tsushima West Channel (Korea Strait). The Republic of Korea in the Tsushima West Channel between the Korean Peninsula and Tsushima; Germany in the Fehmarn Belt; Denmark and Sweden in Skagen, Laeso, Anholt, Bornholm, and the Sound Channels; and Finland in certain areas in the Baltic Sea adjacent to Estonia retain the territorial sea limit at less than 12 nautical miles.

294. UNCLOS, art. 37.

295. *Id.*

296. *Id.* art. 36.

297. *Id.* art. 38.

the exercise of freedom of navigation and overflight, in normal mode, solely for the purpose of continuous and expeditious transit of the strait.<sup>298</sup> The requirement for continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving, or returning from a State bordering the strait, subject to the conditions of entry to that State.<sup>299</sup> The laws and regulations of States bordering straits and archipelagic States relating to transit passage and ASLP adopted in accordance with general international law remain applicable.<sup>300</sup> Such laws and regulations shall 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.<sup>301</sup>

(3) **Straits formed by the mainland and an island, if there exists through the high seas or EEZ a route of similar convenience with respect to navigational and hydrographical characteristics.**<sup>302</sup> Ships and aircraft of all States enjoy the right of non-suspendable innocent passage through these straits.<sup>303</sup>

(4) **“Dead-end straits” that connect one area of the high seas or EEZ to the territorial sea of a foreign State.**<sup>304</sup> The regime of non-suspendable innocent passage shall apply in straits used for international navigation that are excluded from the regime of transit passage under Article 38(1) of UNCLOS or between a part of the high seas or an EEZ and the territorial sea of a foreign State.<sup>305</sup> For example, the regime of non-suspendable innocent passage applies in Head Harbor Passage between the United

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298. *Id.* art. 38(2). Concerning “normal mode,” 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 may transit international straits submerged, since that is their normal mode of operation. NWP 1-14M § 2.5.3.2.

299. UNCLOS, art. 38(2).

300. NORWEGIAN MANUAL § 10.29; UK MANUAL ¶ 13.13; NWP 1-14M § 7.3.6.

301. UNCLOS, art. 42(2).

302. *Id.* art. 38(1).

303. *Id.* art. 38(1). This is referred to as the “Messina exception.”

304. *Id.* art. 45(1)(b).

305. *Id.* art. 45(1)(a)–(b).

States and Canada and in the Strait of Tiran between the Egyptian Sinai peninsula and Tiran Island near the Saudi Arabian peninsula, ensuring access to the ports and the coastline of the territory located within the “cul de sac.”<sup>306</sup>

(5) **Straits subject to long-standing international conventions.**<sup>307</sup> Part III of UNCLOS does not affect 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. The Montreux Convention lays down detailed rules for the passage through the Turkish Straits (the Bosphorus and Dardanelles Straits and the Sea of Marmara) in peacetime and during armed conflict.<sup>308</sup> Free navigation is guaranteed through the Strait of Magellan by the 1984 Treaty between Argentina and Chile,<sup>309</sup> and through the Danish Straits (Belt and Sund) by the 1857 Treaty of Redemption of the Sound Dues<sup>310</sup> and the Convention on Discontinuance of Sound Dues between the United States and Denmark.<sup>311</sup>

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306. See also Section 11.3.3.5. The Strait of Tiran is also a dead-end strait, but it is subject to the Treaty of Peace, Egypt–Israel, Mar. 26, 1979, annex 1, art. V(2), *reprinted in* 18 INTERNATIONAL LEGAL MATERIALS 362, 365 (1979) (“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.”). For contending views on the navigational regime in the Strait of Tiran, see Mohamed El Baradei, *The Egyptian-Israeli Peace Treaty and Access to the Gulf of Aqaba: A New Legal Regime*, 76 AMERICAN JOURNAL OF INTERNATIONAL LAW 532 (1982); Ruth Lapidot, *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 (1983).

307. UNCLOS, art. 35(c).

308. *Id.* See, e.g., Montreux Convention, arts. 11–15. On February 28, 2022, Turkey effectively closed the Turkish Straits to warships of all nations, except warships returning to their home ports in the Black Sea. This action was apparently taken pursuant to Articles 19–21 of the Montreux Convention. Special interview with Foreign Minister Mevlüt Çavuşoğlu, February 25, 2022; 21:04. See also Tayfun Özberk, *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/>.

309. Treaty of Peace and Friendship between Argentina and Chile art. 10, Nov. 29, 1984, 1399 U.N.T.S. 102.

310. Treaty for the Redemption of the Sound Dues, Mar. 14, 1857, 116 Consol. T.S. 357.

311. Convention for the Discontinuance of Sound Dues between the United States and Denmark, Apr. 11, 1857, 116 Consol. T.S. 465.

The navigational regime applicable to international straits in peacetime continues to apply in situations of international and non-international armed conflict. Armed conflict at sea does not diminish the right of neutral ships and aircraft to traverse straits bordered by belligerent parties or the right of belligerent ships and aircraft to traverse straits bordered by neutral States, using the applicable navigational regime, as reflected in UNCLOS and customary international law.

Belligerent forces transiting through international straits overlapped by neutral waters must proceed without delay, must refrain from the threat or use of force against the neutral State, and must otherwise refrain from acts of hostility and other activities not incident to their transit. Belligerent forces in transit may, however, take defensive measures consistent with their security, including the launching and recovery of aircraft and military devices, screen formation steaming, and acoustic and electronic surveillance, and may respond in self-defense to a hostile act or demonstrated hostile intent. These are considered part of their “normal mode” during times of armed conflict.<sup>312</sup>

#### 4.1.1.5 Archipelagic Waters

Archipelagic States are constituted wholly of one or more groups of islands or archipelagos, and their land territory can include parts of islands.<sup>313</sup> Such States may draw straight archipelagic baselines joining the outermost points of the outermost islands, provided that the ratio of water to land within the baselines is between 1:1 and 9:1 and subject to additional requirements in UNCLOS.<sup>314</sup> The waters enclosed within legally drawn archipelagic baselines are called archipelagic waters. The archipelagic baselines are also the baselines from which the archipelagic State measures seaward its territorial sea, contiguous zone, and EEZ. The navigational regime of innocent passage applies in archipelagic waters outside of ASLP.<sup>315</sup>

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312. NWP 1-14M § 2.5.3.2.

313. UNCLOS, art. 46(1).

314. *Id.* art. 47.

315. *Id.* art. 52. There is no right of overflight over archipelagic waters outside ASLPs (and air routes above) and submarines must navigate on the surface and show their flag (*see Id.* arts. 20, 52).

ASLP means the exercise of the non-suspendable right of navigation and overflight in the normal mode solely for the purpose of continuous, expeditious, and unobstructed transit between one part of the high seas or EEZ and another part of the high seas or EEZ.<sup>316</sup> Archipelagic States may, but are not required to, designate archipelagic sea lanes (ASLs) through their archipelagic waters. Designation of ASLs shall include all normal passage routes used as routes for international navigation or overflight through or over archipelagic waters and must be adopted by the “competent international organization”—this role is undertaken by the International Maritime Organization (IMO).<sup>317</sup> If the archipelagic State does not designate ASLs or makes only a partial designation of ASLs, vessels and aircraft of all States may continue to exercise the right of ASLP in all passage routes normally used for international navigation and overflight through the archipelago.<sup>318</sup> The right of ASLP also applies in archipelagic straits that form part of an ASL (e.g., Lombok and Sunda Straits in the Indonesian archipelago).<sup>319</sup> Belligerent

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316. *Id.* art. 53. Concerning “normal mode,” 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 may transit international straits submerged, since that is their normal mode of operation. NWP 1-14M § 2.5.4.1.

317. UNCLOS, art. 53(9).

318. *Id.* art. 53(12); IMO Doc. SN/Circ.206/Corr.1, Guidance for Ships Transiting Archipelagic Waters (Mar. 1, 1999); IMO Doc. A.571(14), General Provisions on Ships’ Routing, Part I (Nov. 20, 1985); IMO Doc. SN/Circ. 206, Guidance for Ships Transiting Archipelagic Waters ¶ 2.1.1 (Mar. 1, 1999).

319. As to the designation of ASLs by Indonesia, see United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, *Indonesia: Archipelagic and Other Maritime Claims and Boundaries*, 56 (Limits in the Seas No. 141, Sept. 15, 2014) (“Indonesia has proposed and the IMO has adopted three archipelagic sea lanes, which the government of Indonesia designated in its Regulation No. 37 of 2002. These archipelagic sea lanes run in the north-south direction; no east-west routes have been submitted to the IMO for adoption. . . . In adopting three north-south routes, the IMO stipulated, and Indonesia confirmed at the time of adoption by the IMO, that this was a *partial* designation and that the provisions of Article 53.12 of the LOS Convention continued to apply pending adoption of designations for all normal passage routes. Therefore, the right of archipelagic sea lanes passage may be exercised within the three designated routes, and also within other routes normally used for international navigation.”). *See also* IMO, *Report of the Maritime Safety Committee*, IMO Doc. MSC 69/22, ¶ 5.23.2 (May 29, 1998); IMO, *Report of the Maritime Safety Committee*, IMO Doc. MSC 77/26, ¶ 25.40 (June 10, 2003); IMO Res. MSC.72(69), Adoption, Designation, and Substitution of Archipelagic Sea Lanes (May 19,

ships or aircraft, including surface warships, submarines, and military aircraft, retain the right of unimpeded ASLP through, under, and over neutral ASLs. Belligerent forces exercising the right of ASLP 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.<sup>320</sup>

#### 4.1.2 Waters Beyond the Sovereignty of the Coastal State

Waters lying outside the sovereignty of the coastal State include the high seas, the Area, the contiguous zone, the EEZ, and the continental shelf. For the purposes of the law of naval warfare and the law of the sea, international waters include the high seas, the Area, and coastal State contiguous zones, EEZs, and continental shelves. Ships and aircraft of all States may exercise high seas freedoms of navigation and overflight and other internationally lawful uses of the sea related to these freedoms, including belligerent rights during armed conflict, in these areas.<sup>321</sup> In the EEZ, “other pertinent rules of international law,” such as the law of naval warfare, apply.<sup>322</sup>

##### 4.1.2.1 Contiguous Zone, EEZ, and Continental Shelf

A neutral State’s contiguous zone, EEZ, and continental shelf do not constitute neutral sea areas. Belligerents may conduct hostilities and engage

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1998); IMO, *Report of the Maritime Safety Committee on Its Sixty-Ninth Session*, IMO Doc. MSC 69/22/Add.1, Annex 8 (June 1, 1998) (Annex 8 is IMO Res. MSC.71(69), Adoption of Amendments to the General Provisions on Ships’ Routeing (May 19, 1998)); 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); IMO Res. MSC.71(69), Adoption of Amendments to the General Provisions on Ships’ Routeing, ¶ 6.7 (May 19, 1998); IMO, Guidance for Ships Transiting Archipelagic Waters, IMO Doc. SN/Circ.206, ¶ 2.1.1 (Mar. 1, 1999).

320. CANADIAN MANUAL ¶ 820.3; UK MANUAL ¶ 13.20; NWP 1-14M § 7.3.6; JMSDF TEXTBOOK 123.

321. UNCLOS, arts. 58(1), 86–87.

322. *Id.* art. 58(2).

in other belligerent rights (e.g., visit and search) in the contiguous zone, in the EEZ, and on the continental shelf of neutral States.<sup>323</sup>

Belligerent operations during armed conflict may be conducted on and above the high seas and the Area and in the contiguous zone and EEZ, and on the continental shelf beyond the territorial sea of any State, including neutral States. Waters seaward of the outer boundary of the territorial sea are subject to the regime of freedom of navigation and overflight by ships and aircraft of all States.

Coastal States have competence to enforce fiscal, immigration, sanitary (health quarantine), and customs laws in a contiguous zone to prevent infringement of the territorial sea.<sup>324</sup> These limited rights do not affect or limit the right to conduct naval warfare in the contiguous zone. The navigational regime of high seas freedoms applies in a coastal State contiguous zone, including freedom of navigation and overflight and other internationally lawful uses of the sea related to those freedoms, such as those associated with the operation of ships and aircraft.<sup>325</sup>

The specified coastal State sovereign rights and jurisdiction in the EEZ and on the continental shelf, including prescriptive and enforcement jurisdiction over exclusive sovereign rights to the living and non-living resources in the zone, do not affect or limit the right to conduct naval warfare in these areas.<sup>326</sup> The navigational regime of high seas freedoms applies in coastal State EEZs and on their continental shelves.<sup>327</sup> The coastal State may establish, where necessary, reasonable safety zones, not to exceed 500 meters,

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323. NWP 1-14M § 7.3.8. The *San Remo Manual* suggests that belligerents shall have due regard for the resource rights of the neutral State when conducting hostilities in the EEZ or on the continental shelf (¶ 34). If a belligerent lays mines in a neutral State's EEZ or continental shelf, the *San Remo Manual* also requires it to notify the neutral State, as well as ensure that the size of the minefield and the types of mines employed do not interfere with the neutral State's resource rights (¶ 35). Belligerents shall additionally have due regard for the protection and preservation of the marine environment (¶ 35). These requirements of the *San Remo Manual* are a scholarly expression of progressive development of the law. This *lex ferenda* view is not formative of international law and it does not reflect the law of naval warfare as a *lex specialis* regime that displaces the law of the sea if the latter is inconsistent with the former. SAN REMO MANUAL; JMSDF TEXTBOOK 120–21.

324. UNCLOS, art. 33.

325. *Id.* arts. 58(2), 86, 87.

326. *Id.* art. 56.

327. *Id.* arts. 58(2), 86, 87.



around artificial islands, installations, and structures located in the EEZ and on the continental shelf.<sup>328</sup> The coastal State authority in the EEZ and on the continental shelf is without prejudice to the *lex specialis* of the law of naval warfare during armed conflict at sea. When conducting military operations in the EEZ and on the continental shelf, belligerents shall, consistent with military necessity and operational requirements, respect the rights and duties of neutral States.<sup>329</sup>

#### 4.1.2.2 High Seas

All parts of the ocean seaward of the EEZ constitute the high seas, where high seas freedoms of navigation and overflight are the applicable navigational regime.<sup>330</sup> The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty.<sup>331</sup> When conducting military operations on the high seas, including the seabed and ocean floor and subsoil thereof, belligerents shall, consistent with military necessity and operational requirements, respect the rights and duties of other States.<sup>332</sup>

In relation to the high seas, it is important to note that Article 88 of UNCLOS, which states that “[t]he high seas shall be reserved for peaceful purposes,” does not mean that hostilities governed by the law of naval warfare may not be conducted in, on, or above the high seas. This is clear for three reasons. First, the general provision on “[p]eaceful uses of the seas” in Article 301 of UNCLOS clearly recites and incorporates Article 2(4) of the UN Charter, which does not prohibit the resort to hostilities governed by the law of armed conflict in those situations where the use of armed force is permissible in accordance with the Charter. Second, Article 87 of UNCLOS, regarding the freedoms of the high seas, specifically includes reference to these freedoms being exercised “under the conditions laid down by this Convention and by other rules of international law,” of which the law of naval

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328. *Id.* arts. 60(4), 80.

329. *See, e.g.*, GC II, art. 27. *But see* CANADIAN MANUAL ¶ 821; GERMAN COMMANDER’S HANDBOOK ¶ 70; NORWEGIAN MANUAL § 4.4.1; UK MANUAL ¶ 13.21; NWP 1-14M §§ 3.10.1.2, 3.11.2.2.2, adopting the peacetime standard of “due regard,” which is not applicable during times of armed conflict.

330. UNCLOS, art. 86.

331. *Id.* art. 89.

332. *See, e.g.*, GC II, art. 27. *But see* CANADIAN MANUAL ¶ 823; GERMAN COMMANDER’S HANDBOOK ¶ 77; UK MANUAL ¶ 13.22, adopting the peacetime standard of “due regard,” which is not applicable during times of armed conflict.

warfare is a long-standing component part. Third, it is clear in State practice since 1945 in respect of the UN Charter, and since 1982 in respect of UNCLOS, that States have never abrogated their right (in those circumstances as permitted in accordance with the Charter) to conduct hostilities governed by the law of naval warfare in, on, and above the high seas.<sup>333</sup>

## 4.2 Special Areas

### 4.2.1 Antarctica and the Southern Ocean

Antarctica is a continent surrounded by the Southern Ocean and is not subject to the sovereignty of any State.<sup>334</sup> Claims to Antarctica are suspended under the 1959 Antarctic Treaty, which governs the continent and is designed to encourage scientific research and exploration. 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.”<sup>335</sup>

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333. U.N. Secretary-General, *Study on the Naval Arms Race: Report of the Secretary-General*, ¶ 188, U.N. Doc. A/40/535 (Sept. 17, 1985).

334. Argentina, Australia, Chile, France, New Zealand, Norway, and the United Kingdom maintain territorial claims in Antarctica. The United States and most other States do not recognize those claims. Although the United States maintains a basis to claim territory in Antarctica, it has not made a claim. 2 DIGEST OF INTERNATIONAL LAW 1247–63. (Marjorie M. Whiteman ed., 1963); ELEANOR C. MCDOWELL, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 107–11 (1975).

335. Antarctic Treaty, *supra* note 272, arts. I–II. Of note, the specific military prohibitions accompanying the reference to “peaceful purposes” in the Antarctic Treaty, and its application to sea areas south of 60° south latitude, is not identical to the more abbreviated reference to the reservation of the high seas for “peaceful purposes” in Article 88 of UNCLOS and the recitation of Article 2(4) of the UN Charter within Article 301 of UNCLOS, in respect of “peaceful uses of the seas.” It is State practice that neither of these UNCLOS provisions means that States may not engage in hostilities, and the accompanying exercise of belligerent rights, at sea. *See also* Chief of Naval Operations Instruction (OPNAVINST) 5721.1H, Release of Information on Nuclear Weapons and on Nuclear Weapons Capabilities of U.S. Navy Forces, ¶ 4b (Sept. 24, 2019) (“The [Antarctic] Treaty recognizes that ‘Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord . . .’ By ratifying the 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.’”). When replying to any inquiry regarding the nuclear capabilities of U.S. Navy

There are differing views as to the application during times of armed conflict of this Article I prohibition of, *inter alia*, “any measures of a military nature” including “the carrying out of military maneuvers” south of 60° south latitude. One view is that Article VI of the Antarctic Treaty, which states that “nothing in the present Treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to the high seas within that area,” is limited by the clear prohibition in Article I, including in times of armed conflict. The other view is that Article VI affirms that the Antarctic Treaty does not prohibit the exercise of belligerent rights during an international armed conflict in the sea areas south of 60° south latitude.<sup>336</sup>

Islands south of 60° south latitude (part of the South Sandwich Islands) lie outside the Antarctic Treaty System’s treatment of territorial claims on the continent of Antarctica. These islands are sovereign territory, and the territorial State may defend its territory during armed conflict. This position could entail the conduct of hostilities in accordance with the law of naval warfare, in defense of this territory, south of 60° south latitude.<sup>337</sup>

#### 4.2.2 Nuclear-Free Zones and Zones of Peace

Treaties or declarations regarding nuclear-free zones that purport to ban nuclear weapons or nuclear power or “zones of peace” that extend into the oceans and impose limits on high seas freedoms are binding only on States party to the agreements.<sup>338</sup>

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forces located in Antarctica (south of 60 degrees south latitude), Navy personnel shall indicate that: “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.” *Id.* ¶ 5c(4).

336. NWP 1-14M § 2.6.5.2.

337. Antarctic Treaty, *supra* note 272, art. VI.

338. *See* Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean, Apr. 22, 1968, 634 U.N.T.S. 325 (Treaty of Tlatelolco); South Pacific Nuclear Free Zone Treaty, Aug. 6, 1985, 1445 U.N.T.S. 177 (Treaty of Rarotonga); Treaty on the South-east Asia Nuclear-Weapon-Free Zone, Dec. 15, 1995, 1981 U.N.T.S. 129 (Treaty of Bangkok); Organization of African Unity: African Nuclear-Weapon-Free Zone Treaty June 25, 1995, 35 INTERNATIONAL LEGAL MATERIALS 698 (1996) (Treaty of Pelindaba). UK MANUAL § 6.17; NWP 1-14M § 2.66.

### 4.3 Legal Division of the Airspace

The lateral (vertical) boundaries of the airspace are determined by the status of the land or water directly beneath them.<sup>339</sup> Belligerent naval operations, including overflight, may be conducted in international airspace and in enemy national airspace. International airspace is the airspace seaward of the territorial sea of neutral States, including over the contiguous zone, EEZ, and continental shelf of neutral States.<sup>340</sup> Enemy national airspace is airspace over the land or within the internal waters, territorial waters, and archipelagic waters of enemy States.

Belligerent naval operations may not be conducted in neutral national airspace but may be conducted anywhere in outer space, including above neutral States. While there is no consensus on the division between airspace and outer space, generally the Kármán Line at a vertical height of 100 kilometers above the surface of the Earth is used to separate the two domains.<sup>341</sup>

#### 4.3.1 Air Defense Identification Zones (ADIZs)

International law does not prohibit States from establishing air defense identification zones (ADIZs) in their national airspace or airspace adjacent to their national airspace.<sup>342</sup> ADIZs, such as those employed by the United States, Canada, Japan, the Republic of Korea, and the People's Republic of China, extend to the airspace above the open sea. Aircraft approaching national airspace may be required to provide identification, even while in international airspace, but only as a condition of entry into the territory of a State or approval to overfly national airspace. Application of ADIZ procedures and regulations to aircraft transiting an ADIZ that do not intend to enter national airspace is inconsistent with international law. Aircraft of all nations are guaranteed freedom of overflight in international airspace seaward of the territorial sea.

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339. DOD LAW OF WAR MANUAL § 14.2.1.

340. DANISH MANUAL 546; NORWEGIAN MANUAL §§ 11.2–11.6.

341. The Kármán Jurisdiction Line is a boundary of approximately 100 kilometers (62 miles) above mean sea level, at which the atmosphere is regarded as too thin to support conventional aircraft to maintain flight.

342. NWIP 10-2 § 422(a); NWP 1-14M § 2.7.2.3.

### 4.3.2 National Airspace

National airspace extends to the airspace above the land territory, internal waters, and territorial sea of the State and is under the sovereignty of the State. The upper limit of airspace subject to national jurisdiction has not been authoritatively defined by international law. However, 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.<sup>343</sup> A common definition of space is known 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.<sup>344</sup>

There are no firmly established rules governing the treatment to be accorded to military aircraft forced by weather conditions or distress to enter the airspace of a foreign State without having obtained prior permission. However, the recent practice of States indicates that such intruding military aircraft are considered subject to reasonable measures of control by the State whose airspace they have entered. For example, it is a reasonable measure of control to require intruding military aircraft to land at a local airfield. On the other hand, a territorial State does not have the right to resort to measures of armed force that may involve the taking of human life where such aircraft indicate a willingness to submit to reasonable measures of control.<sup>345</sup>

#### 4.3.2.1 Neutral Airspace

Neutral airspace extends over the territory of neutral States and to the outer breadth of the territorial sea of such States. Belligerent military aircraft

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343. NWP 1-14M § 1.10.

344. DOD LAW OF WAR MANUAL § 14.2.2; ADDP 06.4 ¶ 8.6 (“the upper limit to a state’s rights in airspace is above the highest altitude at which an aircraft can fly and below the lowest possible perigee of an earth satellite in orbit”); UK MANUAL ¶ 12.13. For an explanation of the Kármán Line, see Leon Lipson & Nicholas deB. Katzenbach, *Report to the National Aeronautics and Space Administration on the Law of Outer Space* (October 1960), reprinted in LIBRARY OF CONGRESS, LEGISLATIVE REFERENCE SERVICE, LEGAL PROBLEMS OF SPACE EXPLORATION: A SYMPOSIUM PREPARED FOR THE USE OF THE COMMITTEE ON AERONAUTICAL AND SPACE SCIENCES, S. Doc. No. 26, 87th Cong., 1st Sess., 779, 895–96 (Mar. 22, 1961).

345. NWIP 10-2 § 422. Tucker, *supra* note 59, at 420, 422.

are forbidden to enter the airspace of a neutral State.<sup>346</sup> Exceptions to this prohibition include:

(1) **Belligerent medical aircraft.** 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.

(2) **Unarmed belligerent aircraft.** A neutral State may permit unarmed belligerent military aircraft to enter its airspace 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.

As to belligerent military aircraft that are forbidden to enter the airspace 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. Neutral States should, however, permit aircraft in evident distress to enter their airspace and land under such safeguards as they may wish to impose.

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346. UK MANUAL ¶ 12.14A; NWIP 10-2 § 444; NWP 1-14M § 7.39.

**CHAPTER 5**

**BASIC PRINCIPLES OF THE LAW OF ARMED CONFLICT**

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**5.1 Introduction**

Some components of the law of armed conflict (LOAC)—such as the fundamental principles addressed in this chapter—are of general application and apply at sea as well as on land, and in the air, cyber, and outer space domains. However, as noted in Chapter 1, the law of naval warfare is comprised of several component bodies of law apart from the LOAC, including prize law and the law of neutrality as applicable at sea. These components of the law of naval warfare require that belligerents respect the territorial sovereignty of neutral States in neutral waters under the law of maritime neutrality and the right of neutral merchant shipping to engage in maritime trade subject to the law of prize.

The obligation to respect neutral trade rights at sea results in some unique and specialized LOAC rules. This obligation also means that some rules of the LOAC that are of general application across all warfighting domains may apply differently at sea than they do on land—such as attack rules and targeting law, which at sea is platform-centric rather than person-centric (see Chapter 8). This chapter addresses the general principles of the LOAC. Other chapters will then outline when and how these basic principles of the LOAC are then interpreted and applied in the context of the law of naval warfare.

The LOAC is a scheme for balancing two sometimes—but not invariably—competing forces that must underpin warfighting:

- (1) The mandate—recognized as an animating concern of the LOAC—to weaken and defeat the enemy’s armed forces and achieve the mission as quickly as possible, which can require the infliction of death, destruction, and disruption targeted at the adversary’s military forces, but only employing permissible means and methods; and
- (2) The equally fundamental and animating concern to reduce and alleviate the effects and impacts of armed conflict upon civilians and other protected persons (i.e., persons not—or no longer—participating in hostilities), as well as civilian and specially protected objects.

The balance between these two concerns of the LOAC is best expressed in the preamble to the 1868 St. Petersburg Declaration.<sup>347</sup>

State doctrine and practice demonstrate a wide range of fundamental principles of the LOAC. The following table of fundamental principles demonstrates the variety of approaches to this issue in State practice, but also a general coherence and focus on the key underpinning factors that inform the interpretive framework to be applied.

Australia <sup>348</sup>	Military necessity, unnecessary suffering (humanity), proportionality
Canada <sup>349</sup>	“Primary concepts” (military necessity, humanity, chivalry) and “operational principles” (distinction, non-discrimination, proportionality, reciprocity)
Denmark <sup>350</sup>	Military necessity, humanity, distinction, proportionality
France <sup>351</sup>	Humanity, military necessity, distinction, proportionality

347. The Preamble of the St. Petersburg Declaration provides:

That the progress of civilization should have the effect of alleviating as much as possible the calamities of war;

That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;

That for this purpose it is sufficient to disable the greatest possible number of men;

That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable.

348. ADDP 06.4 ¶ 2.3.

349. CANADIAN MANUAL ¶¶ 203–4.

350. DANISH MANUAL ch. 4.

351. FRENCH MANUAL 8, 38–39, 55–56, 65–66, 78.



Germany <sup>352</sup>	Military necessity, humanity
India <sup>353</sup>	Military necessity, distinction, proportionality, unnecessary suffering, and reciprocity, with the need to balance military necessity and humanity
Japan <sup>354</sup>	Military necessity, humanity
Netherlands <sup>355</sup>	Military necessity, humanity, distinction, proportionality (and subsidiarity), honesty, and good faith
New Zealand <sup>356</sup>	Military necessity, humanity, proportionality, distinction, non-discrimination
Norway <sup>357</sup>	Distinction, military necessity and humanitarian considerations, proportionality
United Kingdom <sup>358</sup>	Military necessity, humanity, distinction, proportionality
United States <sup>359</sup>	Military necessity, humanity, proportionality, distinction, honor

This Manual adopts the approach that there are three key principles of the law of naval warfare: distinction, military necessity, and humanity. The position of the Manual is that proportionality is a basic rule of the law of naval warfare rather than a principle of the law of naval warfare;<sup>360</sup> that unnecessary suffering is a subcomponent of the principle of military necessity and humanity; and that honor or chivalry is an important perspective for warfighters but is difficult to characterize as a rule-creating normative fundamental principle.

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352. GERMAN MANUAL ¶¶ 129–32.

353. Indian Handbook, Vol. 2: Laws of Armed Conflict ch. 1.

354. JMSDF TEXTBOOK 117–18; JAPANESE LAW OF WAR MANUAL 45–63.

355. NETHERLAND MANUAL 28.

356. NZ MANUAL ch. 4.

357. NORWEGIAN MANUAL §§ 1.20–1.28.

358. UK MANUAL ch. 2. As to the relationship between *jus ad bellum* and *jus in bello*, see Section 2.4.3.

359. DOD LAW OF WAR MANUAL ch. II.

360. The legal basis of proportionality is the prohibition of excessive collateral damage, as codified in Article 51(5)(b) of AP I. In contrast, the principle of distinction has been codified in Article 48 of AP I. Accordingly, the law of naval warfare is not subject to a general principle of proportionality.

## 5.2 Humanity

Humanity forbids the infliction of suffering, injury, or destruction unnecessary to accomplish a legitimate military purpose. Once a military purpose has been achieved, inflicting more suffering is unnecessary and should be avoided. Thus, making enemy combatants who have been placed *hors de combat* the object of attack is forbidden. Similarly, the civilian population is immune from being made the object of attack because no military purpose is served by attacking them.<sup>361</sup> “The principle of humanity holds that not even armed conflict releases humankind from the most basic of obligations in respect of fellow human beings.”<sup>362</sup> The concept of humanity is reinforced by the Martens Clause in the preamble to the 1907 Hague IV.<sup>363</sup>

Humanity is a principle applicable in relation to both combatants and civilians. For example, the *UK Manual* states:

- (1) “[T]he principle of humanity confirms the basic immunity of civilian populations and civilian objects from attack because civilians and civilian objects make no contribution to military action”; and
- (2) “The principle of humanity is based on the notion that once a military purpose has been achieved, the further infliction of suffering is unnecessary”—that is, the principle applies in relation to combatants as well.<sup>364</sup>

This approach is also reflected in national doctrines.<sup>365</sup>

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361. DOD LAW OF WAR MANUAL § 2.3; CANADIAN MANUAL ¶ 202(6); UK MANUAL ¶ 2.4; OPPENHEIM, *supra* note 60 at 227 (§ 67).

362. NZ MANUAL § 4.3.1.

363. “[I]n cases not included [in other instruments of the LOAC] . . . the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, . . . the laws of humanity, and the dictates of the public conscience.” Hague IV, preamble.

364. UK MANUAL ¶ 2.4.1. Note, however, that “civilian immunity does not make unlawful the unavoidable incidental civilian casualties and damage which may result from legitimate attacks upon military objectives, provided that the incidental casualties and damage are not excessive in relation to the concrete and direct military advantage anticipated.” UK MANUAL ¶ 2.4.2.

365. *See, e.g.*, NORWEGIAN MANUAL §§ 1.23–1.25; DOD LAW OF WAR MANUAL § 2.3 (“*Humanity* may be defined as the principle that forbids the infliction of suffering, injury, or destruction unnecessary to accomplish a legitimate military purpose.”); DANISH MANUAL

Another purpose served by the principle of humanity is to inform or “animate” certain LOAC rules, including those related to “fundamental safeguards for persons who fall into the hands of the enemy”; “protections for the civilian population and civilian objects”; “protections for military medical personnel, units, and transports”; “prohibitions on weapons that are calculated to cause superfluous injury”; and “prohibitions on weapons that are inherently indiscriminate.”<sup>366</sup> The *Danish Manual* describes the function of the principle of humanity as “the fact that belligerents are limited in their use of means and methods of warfare. A belligerent State is not allowed to use weapons, ammunition, or methods of a nature to cause superfluous injury or unnecessary suffering.”<sup>367</sup> Another related purpose outlined in the *Danish Manual* is that “the principle [also] concerns a minimum standard for the humane treatment of any person who is held in the custody of a belligerent State.”<sup>368</sup> This second understanding of the principle of humanity that relates directly and only to combatants either incorporates or blurs into the similar yet distinct concept of “unnecessary suffering,” which is applicable only to combatants. The question as to whether the broad conception of humanity also covers combatants may be of limited practical relevance so long as it is accepted that the parallel principle of unnecessary suffering already covers combatants (see Section 5.5.2).

A further purpose served by the principle of humanity is as the counterpoint to military necessity when assessing proportionality. For example, the *DoD Law of War Manual* states:

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70–71 (“The principle of humanity expresses a fundamental prohibition against the infliction of suffering, injury, or destruction that is not actually necessary for the accomplishment of legitimate military purposes. The principle also implies the basic requirement of humane treatment.”); JAPANESE LAW OF WAR MANUAL 49 (“It is not necessary to inflict harm or injury on civilians not associated with the armed forces, or on those who are members of the armed forces but who have lost the ability to fight by sickness or wounds, in order to defeat an opponent’s armed forces. The only relationship that exists between these people and us is that of being equally universal human beings, and this relationship is governed by the principle of humanity.”). JMSDF TEXTBOOK 117.

366. DOD LAW OF WAR MANUAL § 2.3.2.

367. DANISH MANUAL 70.

368. *Id.* 71.

*Relationship Between the Principles of Humanity and Military Necessity.* Humanity is related to military necessity, and these principles logically complement one another.

Humanity may be viewed as the logical inverse of the principle of military necessity. If certain necessary actions are justified, then certain unnecessary actions are prohibited. The principle of humanity is an example of how the concept of necessity can function as a limitation as well as a justification.<sup>369</sup>

Under this approach, the principle of humanity is limited in application to civilians and civilian objects, like the first statement from the *UK Manual* above.<sup>370</sup> That is, when assessing the permissibility of an attack that is expected to cause civilian injury or damage, considerations of humanity in relation to those civilians and civilian objects only are to be weighed against the military necessity of the attack expressed in terms of the concrete military advantage anticipated. This analysis means that there is no additional consideration of humanity in relation to the effects that will be perpetrated on the targets of the attack—the combatants or other targetable people. Furthermore, any such consideration of humanity in relation to the combatants and other targetable people would be superfluous because the implications for them of “humanity” have already been considered through the application of the combatant-focused principle of not causing unnecessary suffering to combatants (see Section 5.5.2).

### 5.3 Military Necessity

Military necessity is the right of combatant forces to employ all lawful means and methods of warfare to achieve lawful military effects designed and intended to bring about the submission of the adversary’s military and other fighting forces at the earliest opportunity with the least expenditure of one’s own forces. The Lieber Code describes the concept as “the necessity

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369. DOD LAW OF WAR MANUAL § 2.3.1.1.

370. *See also* DANISH MANUAL 70–71:

The second aspect of the principle of humanity is the requirement that certain precautions—for instance, in the choice of means and methods—must be taken in connection with the planning and execution of attacks and in the defence against attacks. The purpose is to minimise or completely avoid loss of civilian life and, correspondingly, minimise damage to civilian objects.

of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.”<sup>371</sup> The *DoD Law of War Manual* expresses the principle as follows: “*Military necessity* may be defined as the principle that justifies the use of all measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of war.”<sup>372</sup> The *Indian Handbook* defines “military necessity” as the application of that degree of force, not otherwise prohibited by law, that is necessary for the partial or complete submission of the enemy, and with a minimum expenditure of time, life, and physical resources. It requires combat forces to engage in only those acts necessary to accomplish a legitimate military objective.<sup>373</sup> Other national doctrines adopt a similar approach.<sup>374</sup>

Most national doctrines also observe that military necessity “does not justify violation of LOAC” and may not be claimed to authorize “unnecessary acts of violence motivated by spite, revenge or profit.”<sup>375</sup> This caveat is reflected in, among other aspects of the LOAC and the law of naval warfare, the prohibition against means and methods that cause unnecessary suffering to combatants and other targetable people (see Section 5.5.2).

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371. Lieber Code, art. 14. In *United States v. List* (the Hostage Case), the court described military necessity as permitting “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.” *United States v. List* (The Hostage Case), 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 759, 1253 (1952).

372. DOD LAW OF WAR MANUAL § 2.2. *See also* ADDP 06.4 ¶ 2.6.

373. *Indian Handbook*, Vol. 2: Laws of Armed Conflicts ch. 1.

374. UK doctrine sets out “four basic elements” of military necessity:

- a. the force used can be and is being controlled;
- b. since military necessity permits the use of force only if it is “not otherwise prohibited by the law of armed conflict,” necessity cannot excuse a departure from that law;
- c. the use of force in ways which are not otherwise prohibited is legitimate if it is necessary to achieve, as quickly as possible, the complete or partial submission of the enemy;
- d. conversely, the use of force which is not necessary is unlawful, since it involves wanton killing or destruction.

UK MANUAL ¶ 2.2.1. *See also* CANADIAN MANUAL ¶¶ 202.2–202.5; DANISH MANUAL 67; GERMAN MANUAL ¶¶ 141–42; JAPANESE LAW OF WAR MANUAL 45–63; NORWEGIAN MANUAL §§ 1.23–1.25; JMSDF TEXTBOOK 117.

375. NZ MANUAL §§ 4.2.1–4.2.3. *See also* ADDP 06.4 ¶ 2.6.

The concept of military necessity is often juxtaposed against the equally vital concept of humanity (see Section 5.2), with the LOAC often described as a compromise between these two animating principles.<sup>376</sup>

#### 5.4 Distinction

Distinction is the obligation to distinguish between civilians, people *hors de combat*, and civilian objects, on the one hand; and combatants, other targetable individuals, and military objectives, on the other.<sup>377</sup> Civilians and civilian objects lose their protection against attack when and for such time as they are military objectives. When there is doubt about the characterization of a person or object, that person or object is considered to be civilian and therefore not subject to attack.<sup>378</sup> However, while it is widely accepted that the “doubt rule” applies to people, some national doctrines do not agree that the “doubt rule” applies in relation to objects<sup>379</sup> (see Chapter 8). For States party to Additional Protocol I (AP I), “[i]n case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.”<sup>380</sup>

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376. GERMAN MANUAL ¶ 142.

377. AP I, art. 48. The Indian Handbook defines “distinction” as a form of discrimination between lawful combatant targets and non-combatants or those who are no longer participants in the combat, whose central idea flows from the principle of “military necessity.” It states that an indiscriminate attack is one that strikes military objectives and civilians or civilian objects without distinction, which contravenes the principle of distinction. The principle also requires defenders to separate military objects from civilian objects to the maximum extent feasible. For example, it would be inappropriate to locate a hospital or POW camp adjacent to an ammunition factory. The example could be extended to the maritime domain, such as an enemy hospital ship sailing in close formation with an enemy warship. Indian Handbook, Vol. 2: Laws of Armed Conflicts ch. 1.

378. AP I, arts. 50(1), 52(3); CANADIAN MANUAL ¶¶ 404, 411, 423; DANISH MANUAL 72; NORWEGIAN MANUAL §§ 2.5, 7.17; UK MANUAL ¶¶ 5.3.4, 5.4.2.

379. 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 35–36 r. 10 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005). The U.S. position is that “[u]nder customary international law, no legal presumption of civilian status exists for persons or objects.” DOD LAW OF WAR MANUAL § 5.4.3.2.

380. AP I, art. 52(3).

During naval conflict, commanders identify military objectives by assessing the status or use of vessels and aircraft overall, rather than individualized assessment of embarked individuals. Distinction at sea is primarily between those vessels and aircraft associated with a belligerent and those associated with a neutral State. “[M]ilitary 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.”<sup>381</sup> By their nature, the total or partial destruction of military vessels and aircraft is presumed to offer a definite military advantage. Unless specially protected, vessels and aircraft associated with or in the service of a belligerent State will be military objectives by their nature, location, purpose, use, or war-supporting or war-sustaining roles (see Chapter 10).<sup>382</sup>

#### 5.4.1 The Purpose Served by Distinction

The purpose of distinction is to ensure respect for and protection of the civilian population and civilian objects, and therefore combatants must ensure that only those people and objects targetable under the LOAC are made the object of attack.<sup>383</sup> As the law of naval warfare focuses primarily on vessels and platforms, as opposed to persons, during hostilities at sea, the practical application of the principle of distinction concerns itself with, for example, distinguishing merchant vessels from warships and not with the status of individuals on board. Likewise, artificial islands, installations, and structures at sea may be considered military objectives by their nature, location, purpose, or use. In such case, the whole artificial island, installation, or structure may be deemed a single combat unit, like a ship or aircraft, and constitute a lawful target.<sup>384</sup> However, developments such as sea-steading<sup>385</sup>

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381. AP I, art. 52(2).

382. NWP 1-14M § 5.3.4.

383. API, art. 48. *See also* ADDP 06.4 ¶ 2.11; JAPANESE LAW OF WAR MANUAL 55–56; NZ MANUAL §§ 4.5.1–4.5.4; NORWEGIAN MANUAL § 2.3.

384. Iraq, for example, used oil platforms for military purposes during the Gulf War. U.S. DEPARTMENT OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS 240–52 (Apr. 1992); Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161, ¶ 9 (Nov. 6); *U.S. Reaction to ICJ Judgment in Iranian Oil Platforms Case*, 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 597 (2004).

385. “Sea-steading” is the practice of establishing permanent settlements on structures located at sea outside the jurisdiction of any State.

may produce situations that require the application of the principle of distinction in relation to people rather than objects.

## 5.5 Additional Basic Rules

The following rules are variously and separately asserted by a range of States as being fundamental, while other States do not necessarily describe them as such. Regardless of the varying discrete labels given to each of the following rules, however, they are nevertheless considered essential in the application of the LOAC and are recognized as such by States.

### 5.5.1 Proportionality (Prohibition of Excessive Collateral Damage)

Proportionality complements the principle of distinction and derives from and applies both military necessity and humanity. Proportionality requires that even when actions may be justified by military necessity, such actions cannot result in excessive civilian loss. “[A]n 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” is prohibited.<sup>386</sup> For the impact on targeting, see Section 8.9.

### 5.5.2 Unnecessary Suffering and Superfluous Injury

The prohibition of causing unnecessary suffering and superfluous injury was first recognized in the St. Petersburg Declaration of 1868, according to which the legitimate object of weakening the enemy “would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable” and “the employment of such arms would, therefore, be contrary to the laws of humanity.” The 1907 Hague Regulations also prohibit the employment of “arms, projectiles, or material calculated to cause unnecessary suffering.”<sup>387</sup>

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386. AP I, art. 51(5)(b). This provision is reflective of customary international law. *See also* ADDP 06.4 ¶ 2.8.

387. Hague Regulation, art. 23(e); *see also* AP I, art. 35(2); JAPANESE LAW OF WAR MANUAL 55–56.



Weapons must not cause “injury or suffering which is out of proportion to its military effectiveness.”<sup>388</sup> German doctrine similarly states that “[t]he employment of methods and means of warfare causes superfluous injury or unnecessary suffering if the expected impairment does not serve any military purpose or if injuries or suffering are caused by the effects of weapons or projectiles that are not necessary to neutralize the adversary forces.”<sup>389</sup>

Specific prohibitions on means of warfare expected to cause unnecessary suffering or superfluous injury are contained in the 1995 Protocols I (non-detectable fragments) and IV (blinding laser weapons) to the Convention on Certain Conventional Weapons.<sup>390</sup>

### 5.5.3 Chivalry/Honor

Although the principle of chivalry was in the past widely noted in military doctrines, it is no longer widely cited as a basic principle of the LOAC.<sup>391</sup> For example, the 1941 *Australian Manual of Military Law* defined chivalry as demanding “a certain amount of fairness in offence and defence, and a certain mutual respect between the opposing forces.”<sup>392</sup> Of current military

388. CANADIAN MANUAL ¶ 502.2; *see also* ADDP 06.4 ¶ 2.7; NZ MANUAL § 7.1.2.

389. GERMAN MANUAL ¶ 402. The Indian doctrine says: “While the framework of the Law is not intended to impede the conduct of hostilities, it ensures that the violence during such hostilities does not lead to purposeless and avoidable human misery and physical destruction.” Indian Handbook, Vol. 2: Laws of Armed Conflicts ch. 1. New Zealand doctrine summarizes the scope and purpose of the prohibition as follows:

There is no LOAC obligation to refrain from using a lawful, but highly destructive, weapon against members of the opposing force in favour of one that is less effective. Being better armed than the enemy is not a breach of LOAC. . . . A weapon is not unlawful simply because it is liable to cause large numbers of casualties amongst the opposing force, or large numbers of fatalities amongst those casualties.

By contrast, some weapons or munitions cause superfluous injury and unnecessary suffering or uselessly aggravate suffering or the wounding effect to an extent that goes beyond that demanded by military necessity. Such weapons and munitions are prohibited. NZ MANUAL §§ 7.2.7–7.2.9.

390. 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; Protocol on Non-Detectable Fragments, Oct. 10, 1980, 1342 U.N.T.S. 168 (Protocol I); Protocol on Blinding Laser Weapons, Oct. 13, 1995, 1380 U.N.T.S. 370 (Protocol IV).

391. ADDP 06.4 ¶ 2.4.

392. For example, AUSTRALIA, MILITARY BOARD, AUSTRALIAN EDITION OF MANUAL OF MILITARY LAW 194 (1941), citing three principles of the laws and usages of war: what

doctrine suites that maintain chivalry as a basic principle, Canadian doctrine acknowledges the difficulty in defining this “primary concept,” but observes that “[i]t refers to the conduct of armed conflict in accordance with certain recognized formalities and courtesies,” such as the specific prohibitions “against dishonourable or treacherous conduct and against misuse of enemy flags or flags of truce.”<sup>393</sup> The *DoD Law of War Manual* uses the term “honor” in preference to “chivalry,” describing the principle as comprised of two components:

*Honor* requires a certain amount of fairness in offense and defense. *Honor* forbids resort to means, expedients, or conduct that would constitute a breach of trust with the enemy.<sup>394</sup>

...

*Honor* demands a certain mutual respect between opposing military forces.<sup>395</sup>

The two main critiques associated with chivalry or honor being a fundamental principle of the LOAC are that they are (1) outdated; and (2) characterized by a lack of clear legal source. In relation to the second critique, however, there are specific rules within the LOAC that reflect or indicate chivalric or honor-based origins. These include, as noted in Canadian doctrine, specific LOAC rules dealing with the misuse of flags and treacherous conduct. Several practices trace their heritage at least in part to the principle of honor, including the subjection of enemy combatants to military tribunals rather than civilian courts, the offering of salutes and marks of respect by

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would today be labelled military necessity, humanity, and chivalry; TACHI, *INTERNATIONAL LAW IN WARTIME* 27–28. The legal adviser to the Japan Ministry of Foreign Affairs, at the time, listed military necessity and humanity as principles of the law of war, as well as the spirit of chivalry, similar to Japanese bushido.

393. CANADIAN MANUAL ¶ 202.7.

394. DOD LAW OF WAR MANUAL § 2.6.2.

395. *Id.* § 2.6.3.

non-officer prisoners of war (POWs) to their captor officers, and rules designed to avoid undermining the protections afforded by the LOAC.<sup>396</sup>

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396. *Id.* §§ 2.6.2.2, 2.6.3.1, 2.6.3.2. The *Japanese Law of War Manual* explains about the treatment of POWs: “the enemy officers and soldiers are all serving their duty, and they are willing to sacrifice their lives for their country. We should respect them in sympathy.” JAPANESE LAW OF WAR MANUAL 324–25. *See also* JMSDF TEXTBOOK 202.

## CHAPTER 6

## MEANS (WEAPONS) OF NAVAL WARFARE

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**6.1 Definition of Means of Naval Warfare**

The term “means of naval warfare” reflects the difference that exists between the weapons that are used in warfare (means) and the tactics and strategies (methods) that are employed to adversely affect the enemy. The overarching principle that applies equally to means and methods of warfare is that the belligerents in an armed conflict do not have an unlimited right to inflict superfluous injury or unnecessary suffering on an adversary.<sup>397</sup>

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397. Hague Regulations, arts. 22, 23(e). Article 22: “The right of belligerents to adopt means of injuring the enemy is not unlimited.” Article 23: “In addition to the prohibitions provided by special Conventions, it is especially forbidden . . . (e) To employ arms, projectiles, or material calculated to cause unnecessary suffering.”

There is no treaty definition of “means of warfare”<sup>398</sup> but some military manuals offer definitions of the term.<sup>399</sup> The term “means of warfare”—that is, acts of violence against an adversary that occur during armed conflict, the effects of which include injury, damage, destruction, or death—is closely linked to the notion of “attack.”<sup>400</sup> Accordingly, an object that is designed to produce, or intended to produce, such effects would qualify as a “means of warfare.” The means of warfare discussed herein are not exhaustive. New means of warfare are constantly emerging as technology develops. Nevertheless, any new means will be subject to the same legal principles.<sup>401</sup>

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398. For example, Part III Section I of Additional Protocol (AP I) has the heading “Methods and means of warfare” but the articles contained therein do not explicitly define what is meant by either term. Article 35 (Basic rules) uses the term “methods or means” but no definition is provided:

1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.
2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.
3. It 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.

Article 36 (“New weapons”) uses the terms “new weapon, means or method of warfare” but no definition is provided there either.

399. For example, UK MANUAL ¶ 5.32.4: “There is the obligation to select the means (that is, weapons) or methods of attack (that is, tactics) which will cause the least incidental damage commensurate with military success.” The *NZ Manual* uses a different approach by separating chapters into “Weapons and Munitions” (Chapter 7) and “Methods of Combat” (Chapter 8). Chapter 7 “deals with the rules of Law of Armed Conflict (LOAC) applicable to the ‘means of warfare,’ ie weapons and munitions that are prohibited under LOAC or in respect of which restrictions or special obligations apply.” § 7.1.1. “The rules set out in this chapter relate to the characteristics of weapons and munitions, not the use to which they are put. A completely lawful weapon can still be used in an unlawful way. The rules of LOAC which deal with the way that weapons and munitions are used are set out in Chapter 8.” § 7.1.5. The *DoD Law of War Manual* does not define the terms “means” and “methods,” nor does ADDP 06.4 ¶ 4.1.

400. Article 49 of AP I defines “Attacks” as “acts of violence against the adversary, whether in offence or in defence.” The definition in Article 49, however, does not affect the rules of international law applicable in armed conflict at sea. *See* art. 49(3) (“The provisions of this Section apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.”). *See also infra*, Section 8.1.

401. AP I, art. 36.

While the division between “means” and “methods” may be confusing or even arbitrary, generally, “means” are weapons, such as missiles, mines, torpedoes, and gun projectiles. The term “methods of warfare” is used in different contexts across the law of armed conflict (LOAC) and does not necessarily have an agreed or unified meaning. For example, in the context of legal reviews, when coupled with “means” (“means and methods”), “methods” are usually understood as the way in which the means are used.<sup>402</sup> In other contexts, such as methods under the law of naval warfare, it may be understood as applying certain weapons in tactics, such as blockade, zones, deception, and ruses.<sup>403</sup> Yet the two concepts can overlap, such as in the case of starvation of the civilian population as a (prohibited) *method* of warfare that could be achieved by using two *means* of warfare: the use of weapons to destroy objects indispensable to the survival of the civilian population and the employment of weapon systems to enforce a blockade to prevent food being imported into a country.<sup>404</sup>

## 6.2 Requirements Under Weapons Law

Weapons law applies to all means of warfare and not just weapons *per se*. Accordingly, it regulates which weapons and means can lawfully be used

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402. ICRC, A GUIDE TO THE LEGAL REVIEW OF NEW WEAPONS, MEANS AND METHODS OF WARFARE: MEASURES TO IMPLEMENT ARTICLE 36 OF ADDITIONAL PROTOCOL I OF 1977, at 9 (Jan. 2006).

403. Means of warfare refers to “the effect of weapons in their use against combatants,” in contrast to methods of warfare, which refers to “the way weapons are used in a broader sense.” W. Hays Parks, *Memorandum of Law: Travaux Préparatoires and Legal Analysis of Blinding Laser Weapons Protocol*, THE ARMY LAWYER 33–41 (June 1997). The ICRC Online Casebook defines “methods” as “[t]he tactics or strategy used in hostilities to defeat the enemy by using available information on him together with weapons, movement and surprise” and “means” as encompassing “weapons, weapons systems or platforms employed for the purposes of attack in an armed conflict. This term generally refers to the physical means that belligerents use to inflict damage on their enemies during combat. As such, the term encompasses all weapons, and includes weapons systems as well as delivery platforms.” ICRC, ONLINE CASEBOOK, <https://casebook.icrc.org>.

404. AP I, art. 54(1)–(2). Article 54(1): “Starvation of civilians as a method of warfare is prohibited.” Article 54(2):

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.

during an armed conflict.<sup>405</sup> Weapons law is derived from customary international law and treaties and is concerned with the legality of weapons and means as such, as opposed to the use of those weapons on specific occasions. Customary international law regulates the legality of the means of warfare through the principle of distinction and the prohibition of unnecessary suffering. There are two concepts of weapons law: general principles (e.g., unnecessary suffering) and specific prohibitions (e.g., certain types of sea mines).

Weapons law is partially codified in treaties such as the 1907 Hague Regulations,<sup>406</sup> the 1925 Geneva Gas Protocol,<sup>407</sup> and the Environmental Modification (ENMOD) Convention.<sup>408</sup> Additionally, some States are bound by the Conventional Weapons Convention and its Protocols<sup>409</sup> and by the Ottawa<sup>410</sup> and Cluster Munitions Conventions,<sup>411</sup> which are not reflective of customary international law.<sup>412</sup> Consequently, States have different legal obligations in relation to the use of certain weapons. States operating in coalitions with allies or partner nations must take these different legal obligations into account.

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405. For example, Lieber Code, arts. 14–16; St. Petersburg Declaration.

406. Article 23(a) (poison), (e) (unnecessary suffering).

407. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65, *reprinted in* 14 INTERNATIONAL LEGAL MATERIALS 49 (1975).

408. Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques (ENMOD Convention).

409. 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; Protocol on Non-Detectable Fragments, Oct. 10, 1980, 1342 U.N.T.S. 168; 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; Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons, Oct. 10, 1980, 1342 U.N.T.S. 171; Protocol on Blinding Laser Weapons, Oct. 13, 1995, 1380 U.N.T.S. 370; Protocol on Explosive Remnants of War to the 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, Nov. 28, 2003, 2399 U.N.T.S. 100.

410. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211.

411. Convention on Cluster Munitions, May 30, 2008, 2688 U.N.T.S. 39.

412. While these instruments do not reflect customary law in their entirety, individual selected articles or provisions within them may reflect customary law.

### 6.2.1 Prohibition of Unnecessary Suffering

The 1868 St. Petersburg Declaration notes that the employment of arms that “uselessly aggravate the sufferings of disabled men, or render their death inevitable” is “contrary to the laws of humanity.”<sup>413</sup> This early recognition that limitations should be placed on what types of weapons are used during armed conflict, and the manner in which those weapons are used, is one of the two “cardinal principles contained in the texts constituting the fabric of humanitarian law.”<sup>414</sup> In the *Legality of Nuclear Weapons Advisory Opinion*, the ICJ noted that “it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.”<sup>415</sup>

In the naval context, the applicability of this principle does not preclude, for example, naval warfare between opposing ships at sea just because one likely outcome is that when a vessel is sunk, many of those onboard will drown. Nor does the principle preclude the use of a missile, torpedo, or gun shell to attack a vessel during armed conflict at sea. For the law of naval warfare, the practical relevance of the prohibition against unnecessary suffering is minor because attacks are directed against platforms, such as ships and aircraft.

### 6.2.2 Capable of Being Directed at a Military Objective

Means of warfare designed to conduct attacks that cannot be directed at a specific military objective are prohibited as such.<sup>416</sup> The requirement to target only military objectives reflects the basic principle that belligerents must distinguish between combatants and military objectives, on the one hand, and civilians and civilian objects, on the other (see Chapter 5).

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413. St. Petersburg Declaration, preamble.

414. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 78 (July 8).

415. *Id.* ¶ 7. See also UK MANUAL ¶ 6.1.4–6.1.5.

416. AP I, art. 51(4)(b). An example of such weapons is the V1 and V2 bombs used by Germany during World War II.



### 6.2.3 Effects Must Be Limited

Parties to an armed conflict have an obligation to ensure that the effects of the means of warfare they employ can be limited as required by the LOAC.<sup>417</sup> For example, biological weapons, although subject to express prohibitions, are prohibited by this rule because their effects cannot distinguish between combatants and military objectives, on the one hand, and civilians and civilian objects, on the other.

### 6.3 Environment

During an armed conflict, some damage to the natural environment will inevitably occur. This damage can be short term, such as pollution of the marine environment caused by oil escaping from a sinking vessel, but it can also be long term, such as radiation effects caused by the detonation of a nuclear weapon. Damage to forests and jungles has also regularly occurred during armed conflict. To limit such damage, States party to Additional Protocol I (AP I) undertook to place restrictions on weapons that are intended or may be expected to cause long-term, widespread, and severe damage to the natural environment.<sup>418</sup> “Long-term” damage is measured in decades, so conventional naval weapons systems are unlikely to cause such damage.<sup>419</sup> Moreover, this rule is not reflective of customary international law. The *San Remo Manual* asserts two rules *lex ferenda* on protection of the marine environment (paragraphs 11 and 44) that are aspirational and do not reflect treaty or customary international law.<sup>420</sup>

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417. AP I, art. 51(4)(c).

418. *Id.* art. 35(3); ADDP 06.4 ¶ 4.11; UK MANUAL ¶ 6.3. There is no agreed definition for these three terms and, albeit similar to the terms used in the ENMOD Convention, they must be distinguished (see *infra* Section 6.3.1). The ICRC Commentary on AP I, Article 35, indicates that “long-term” is measured in decades. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 1454 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987). See also 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 157–58 r. 45 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

419. U.S. DEPARTMENT OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS app. O (The Role of the Law of War) at 714: “The prohibitions on damage to the environment contained in Protocol I were not intended to prohibit battlefield damage caused by conventional operations . . . .”

420. SAN REMO MANUAL ¶ 11: “The Parties to the conflict are encouraged to agree that no hostile actions will be conducted in marine areas containing: (a) rare or fragile ecosystems; or (b) the habitat of depleted, threatened or endangered species or other forms of

### 6.3.1 Environmental Modification

The ENMOD Convention prohibits States parties from engaging “in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party.”<sup>421</sup> The term “environmental modification techniques” is defined as “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.”<sup>422</sup> The prohibition is therefore on using modification techniques that result in the environment itself being characterized as a weapon, rather than prohibiting certain military activities that cause damage to the environment.

Russia’s Poseidon underwater drone may be an example of a weapon that might produce an unlawful modification to the natural environment. The weapon is armed with a two-megaton nuclear warhead that when detonated at the coastline is designed to create a tsunami powerful enough to

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marine life.” At paragraph 44, the *Manual* suggests that “[m]ethods and means of warfare should be employed with due regard for the natural environment” and that “[d]amage to or destruction of the natural environment not justified by military necessity and carried out wantonly is prohibited.”

421. ENMOD Convention, art. I. The ENMOD Convention provides for a Consultative Committee of Experts to be appointed to make findings of fact and provide expert views. In the Annex to ENMOD, the Committee provided the following Understandings regarding the Convention:

It is the understanding of the Committee that, for the purposes of this Convention, the terms “widespread,” “long lasting” and “severe” shall be interpreted as follows:

- a) “widespread”: encompassing an area on the scale of several hundred square kilometres;
- b) “long-lasting”: lasting for a period of months, or approximately a season;
- c) “severe”: involving serious or significant disruption or harm to human life, natural and economic resources or other assets.

It is further understood that the interpretation set forth above is intended exclusively for this Convention and is not intended to prejudice the interpretation of the same or similar terms if used in connexion with any other international agreement.

ENMOD, Understanding Relating to Article I.

422. ENMOD Convention, art. II.

destroy enemy port cities and naval bases.<sup>423</sup> The unleashing of environmental forces is incompatible with the law of war.<sup>424</sup> Unlike a weapon designed to destroy enemy forces, the Poseidon uses the natural environment as an intervening cause of destruction and erases the distinction between the enemy's armed forces and the civilian population.<sup>425</sup>

## 6.4 Naval Guns

Naval guns are a permissible means of war if lawfully employed. Improvements in accuracy associated with state-of-the-art electro-optics, rate of fire, advanced payloads, and operator, machine, or autonomous targeting can make guns an effective component of a battle network. Guns may be employed as a core weapon onboard seagoing platforms or in shorter range target engagement as a terminal effort against incoming ordnance, such as the Phalanx close-in weapon system (CIWS).<sup>426</sup> Technologies have increased the accuracy of gunfire, aiding target discrimination and facilitating compliance with the rules of naval warfare. Research and development in other nascent technologies—for example, the electromagnetic railgun, which uses prodigious on-board electromagnetic energy to fire a projectile at hypersonic

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423. H.I. Sutton, *Russia's New "Poseidon" Super-Weapon: What You Need to Know*, NAVAL NEWS (Mar. 3, 2022), <https://www.navalnews.com/naval-news/2022/03/russias-new-poseidon-super-weapon-what-you-need-to-know/>; Natalie, Huet, *What Is Russia's Poseidon Nuclear Drone and Could It Wipe Out the UK in a Radioactive Tsunami?*, EURONEWS NEXT (May 5, 2022), <https://www.euronews.com/next/2022/05/04/what-is-russia-s-poseidon-nuclear-drone-and-could-it-wipe-out-the-uk-in-a-radioactive-tsun>. Powered by a small nuclear reactor, the drone can silently traverse 10,000 km underwater at speeds of up to seventy knots.

424. FM 6-27 ¶ 2-139.

425. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 418, ¶ 1453(c). The ICRC Commentary also states that methods or means of warfare are prohibited if the “direct effects would last more than three months or a season” for one of the parties, produce effects that are “widespread and severe,” regardless of duration, or generate collateral effects that “would cause widespread and severe damage over a period of decades.”

426. Jane's, *Mk 15 Close-In Weapon System (Phalanx)* (Feb. 17, 2020). The Phalanx is a leading CIWS in service with some 25 navies. The system features a 30mm Gatling-type gun capable of firing 4,200 rounds per minute; a tracking active electronically scanned-array (AESA) radar; a non-rotating, four-faced AESA search radar; and an electro-optical targeting system. Jane's Naval Weapons, *Executive Overview* (Nov. 16, 2021). Likewise, the Rheinmetall Oerlikon Searanger 20mm surface-to-surface naval gun system is fitted with an electrical trigger device and an electrical cannon control unit, presaging increasingly automated or even autonomous fire control.

speed over extended ranges—has also resulted in advances in naval guns.<sup>427</sup> (See also Section 8.7.)

## 6.5 Mines

Naval or sea mines are a permissible means of war if lawfully employed.<sup>428</sup> These weapons are used for area denial, coastal and harbor defense, anti-surface and anti-submarine warfare, and blockade.<sup>429</sup> 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.<sup>430</sup> 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.”<sup>431</sup> The rules governing automatic submarine contact mines that are contained in Hague VIII, which reflect customary international law, stipulate that it is forbidden to:

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427. Jane’s Naval Weapons, Executive Overview (Nov. 16, 2021).

428. ADDP 06.4 ¶¶ 4.34, 6.27–6.29; DOD LAW OF WAR MANUAL § 13.11.3; JMSDF Textbook 186.

429. DOD LAW OF WAR MANUAL § 13.11.1; UK MANUAL ¶ 13.52.

430. Jane’s, Mines and Depth Charges (Oct. 6, 2017).

431. Hague VIII, preamble.

- “[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”;<sup>432</sup> and
- “[L]ay anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings.”<sup>433</sup>

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.<sup>434</sup>

## 6.6 Torpedoes

Torpedoes are munitions that are propelled through the water and are a permissible means of war if lawfully employed.<sup>435</sup> The only treaty law that specifically applies to torpedoes is the 1907 Hague VIII, which prohibits the use of torpedoes that “do not become harmless when they have missed their mark.”<sup>436</sup> Hague VIII reflects customary international law. Hence, torpedoes must be designed to become harmless upon completion of their propulsion run, such as by sinking to the bottom.<sup>437</sup> Modern torpedoes may be equipped with autonomous fire-and-forget operation or wire-guide capability to allow post-launch monitoring and updates via the submarine combat system.

## 6.7 Missiles and Rockets

Missiles are a permissible means of war if lawfully employed. As is the case with all weapons, missiles must be designed and employed in a manner that complies with the law of naval warfare, and especially the principle of

432. Hague VIII, art. 1(1); ADDP 06.4 ¶ 6.27; UK MANUAL ¶ 13.54.

433. Hague VIII, art. 1(2); ADDP 06.4 ¶ 6.27; UK MANUAL ¶ 13.53.

434. 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 arts. 1–2, Feb. 11, 1971, 955 U.N.T.S. 115.

435. A. PEARCE HIGGINS, THE HAGUE PEACE CONFERENCES AND OTHER INTERNATIONAL CONFERENCES CONCERNING THE LAWS AND USAGES OF WAR: TEXTS OF CONVENTIONS WITH COMMENTARIES 328 n.2 (1909). In the nineteenth century, a “torpedo” referred to what are called “mines” today. DOD LAW OF WAR MANUAL § 13.12.1.

436. Hague VIII, art. 1(3).

437. ADDP 06.4 ¶ 6.30; DOD LAW OF WAR MANUAL § 13.12.

distinction. Like naval guns, the regulation of missiles requires the application of the LOAC and customary international law.

Missiles are weapons with guidance systems that are capable of striking targets at range. Their course of flight may be entirely through the atmosphere, or they may be capable of ballistic flight into outer space before they re-enter the atmosphere. These weapons have been developed in numerous variants and roles for employment throughout all levels of warfare, including tactical, operational, or theater, and strategic missions. Naval missiles include land-attack missiles, anti-ship cruise missiles (ASCMs), anti-ship ballistic missiles (ASBMs), surface-to-surface missiles (SSMs), missiles used in anti-submarine warfare (ASW), and surface-to-air missiles (SAMs).

A rocket is an unguided missile. Contemporary naval rockets include the U.S. High Mobility Artillery Rocket System (HIMARS) used for naval fires, in support of missions such as sea control and sea denial. The rules in Section 6.2 that apply to naval guns apply *mutatis mutandis* to rockets.

### 6.8 Directed Energy

Directed energy weapons (DEWs) are a permissible means of warfare if they are lawfully employed. DEWs are electromagnetic systems capable of converting chemical or electrical energy to radiated energy and focusing it on a target, resulting in physical damage. States are developing numerous types of directed energy weapons that include high-energy lasers and high-powered microwave weapons. Directed energy weapons use concentrated electromagnetic energy, rather than kinetic energy, to incapacitate, damage, disable, or destroy enemy equipment, facilities, and/or personnel.

Two examples are the U.S. HELIOS (High Energy Laser with Integrated Optical-dazzler and Surveillance) and the Russian 5P-42 Filin. HELIOS integrates a laser system into the Aegis afloat combat system to provide precision targeting data.<sup>438</sup> The Ruselectronics 5P-42 Filin uses high-intensity light

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438. Sam LaGrone, *Navy Ready to "Burn the Boats" with 2021 Laser Installation on a Destroyer*, USNI NEWS (Mar. 20, 2019), <https://news.usni.org/2019/03/20/navy-ready-burn-boats-2021-laser-installation-destroyer>.

radiation to disorientate an enemy through blinding visual-optical interference, potentially causing hallucinations and vomiting.<sup>439</sup> These systems are differentiated from purely optical dazzler systems, such as the 2021 U.S. Navy Optical Dazzling Interdictor, Navy (ODIN), which is a means of non-lethal electronic warfare to counter sensors and aircraft.<sup>440</sup>

### 6.8.1 Lasers

Lasers are a permissible means of warfare if lawfully employed.<sup>441</sup> Consideration of the application to naval warfare of the 1995 Protocol IV (blinding laser weapons) to the Conventional Weapons Convention is warranted. Article 1 of the Protocol states:

It is prohibited to employ laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices. The High Contracting Parties shall not transfer such weapons to any State or non-State entity.

However, Article 3 provides: “Blinding as an incidental or collateral effect of the legitimate military employment of laser systems, including laser systems used against optical equipment, is not covered by the prohibition of this Protocol.” Accordingly, the use of lasers that are not designed to cause permanent blindness is permissible under the law of naval warfare.

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439. By constantly changing the frequency of light, the system will affect combatants’ optic nerves and cause temporary eye disorders, including hallucination. This capability is currently effective at a range of 500–700 m. Talal Hussein, *HEL on High Water: The Top Navy Laser Weapon Systems*, NAVAL TECHNOLOGY (Apr. 1, 2019), <https://www.naval-technology.com/features/navy-laser-weapon-systems/>.

440. Brett Tingley, *Here’s Our Best Look Yet at the Navy’s New Laser Dazzler System*, THE WAR ZONE (July 13, 2021), <https://www.thedrive.com/the-war-zone/41525/heres-our-best-look-yet-at-the-navys-new-laser-dazzler-system>; Megan Eckstein, *Navy to Field High-Energy Laser Weapon, Laser Dazzler on Ships This Year as Development Continues* (May 30, 2019), <https://news.usni.org/2019/05/30/navy-to-field-high-energy-laser-weapon-laser-dazzler-on-ships-this-year-as-development-continues>.

441. ADDP 06.4 ¶ 4.12; UK MANUAL ¶¶ 6.15–6.15.2.

## 6.9 Incendiary Weapons

Incendiary weapons are regulated by Protocol III to the Conventional Weapons Convention.<sup>442</sup> An “incendiary weapon” is defined as “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.”<sup>443</sup> Some laser systems are specifically designed to set fire to objects or cause burn injuries. However, these systems are not considered incendiary weapons because the injuries are not produced by a chemical reaction delivered on target, and therefore lasers are not regulated by Protocol III.<sup>444</sup>

## 6.10 Nuclear Weapons

A small number of States possess nuclear weapons. The only instances of nuclear weapons being used in an armed conflict occurred at the end of

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442. Protocol III to the Conventional Weapons Convention prohibits:

- (1) Making the civilian population as such the object of attack by incendiary weapons;
- (2) Making any military objective located within a concentration of civilians the object of attack by air-delivered incendiary weapons;
- (3) Making any military objective located within a concentration of civilians the object of attack by means of incendiary weapons other than air-delivered incendiary weapons, except when such military objective is clearly separated from the concentration of civilians and all feasible precautions are taken with a view to limiting the incendiary effects to the military objective and to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians, and damage to civilian objects; and
- (4) Making 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.

Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons, *supra* note 409, art. 2. *See also* ADDP 06.4 ¶¶ 4.31–4.33; UK MANUAL ¶¶ 6.12–6.12.6.

443. Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons, *supra* note 409, art. 1.

444. DOD LAW OF WAR MANUAL § 6.14.1.1; Message from the President of the United States Transmitting Protocols to the 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: The Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps or Other Devices (Protocol II or the Amended Mines Protocol); The Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III or the Incendiary Weapons Protocol); and the Protocol on Blinding Laser Weapons (Protocol IV) 38, S. Treaty Doc. No. 105-1, 105th Cong., 1st Sess. (Jan. 7, 1997). *See also* ADDP 06.4 ¶ 4.31.



World War II when atomic bombs were dropped on Hiroshima and Nagasaki.

Attempts to regulate the horizontal proliferation of nuclear weapons have occurred with the introduction of the Nuclear Non-Proliferation Treaty (NPT)<sup>445</sup> and the Nuclear Test Ban Treaty.<sup>446</sup> The NPT seeks to limit the number of States that possess nuclear weapons while the Test Ban Treaty seeks to pursue disarmament through eliminating nuclear weapon test explosions. Not every State is party to the NPT, including some States (India, Israel, and Pakistan) that are known to possess nuclear weapons. In 1996, the International Court of Justice provided an advisory opinion on the legality of the threat or use of nuclear weapons,<sup>447</sup> wherein it declined to characterize the possession of nuclear weapons, or their use, as either lawful or unlawful.<sup>448</sup> Accordingly, the possession and use of nuclear weapons is lawful, subject to the LOAC. Questions naturally arise as to precisely what circumstances would permit the use of nuclear weapons during an armed conflict, but it is beyond the scope of this Manual to define those circumstances.

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445. Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

446. Comprehensive Nuclear-Test-Ban Treaty, Sept. 24, 1996, which is not yet in force: [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVI-4&chapter=26](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-4&chapter=26).

447. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 78 (July 8).

448. For States party to the NPT, it is prohibited to, inter alia, develop, test, produce, manufacture, otherwise acquire, possess or stockpile nuclear weapons or other nuclear explosive devices; and transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly or indirectly. None of the nuclear weapons States have signed the treaty nor have any non-nuclear NATO States or most other non-nuclear States that rely on a nuclear umbrella. U.N. Doc. A/CONF.229/2017/8 (July 7, 2017).

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## 7.1 Methods of Naval Warfare Defined

Military platforms—warships, military aircraft, etc.—are defined in Chapter 3. Methods of warfare describe how those platforms and weapons (along with sensors and other military equipment) are employed to achieve military effect during an armed conflict. The term “methods of warfare” is used in different contexts across the law of armed conflict (LOAC) and does not necessarily have an agreed or unified meaning. For example, in the context of legal reviews, when coupled with “means” (“means and methods”), “methods” are usually understood as the way in which the means are used.<sup>449</sup> In other contexts, such as methods under the law of naval warfare, it may be understood as applying to tactics, techniques, and procedures (TTP) or activities designed to adversely affect the enemy’s military operations or military capacity.<sup>450</sup> Naval operations also include TTP or activities that otherwise subdue the enemy.

This chapter describes methods of warfare that do not constitute attacks (which are addressed in Chapter 8). It groups these methods of warfare by the principal military effect they seek to achieve: sea control and sea denial; counter-sea control and sea denial operations; blockade; and deception, intelligence-gathering, and espionage operations.<sup>451</sup>

As recognized in Chapter 6, the right of belligerents to adopt means of injuring the enemy is not unlimited.<sup>452</sup> This rule has the effect of outlawing certain weapons or types of weapons, which are discussed in Chapter 6. However, the rule also places restrictions on certain methods of warfare, for example, methods of warfare that make improper use of a protected sign or symbol (see Section 7.5.2.2). Some of these restrictions take effect differently in naval warfare compared with armed conflict on land. Where such differences arise, they are set out in this chapter.

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449. ICRC, *A GUIDE TO THE LEGAL REVIEW OF NEW WEAPONS, MEANS AND METHODS OF WARFARE: MEASURES TO IMPLEMENT ARTICLE 36 OF ADDITIONAL PROTOCOL I OF 1977*, at 9 (Jan. 2006).

450. AIR AND MISSILE WARFARE MANUAL r. 1(v).

451. While it is convenient to group them in this way, some methods of naval warfare could be directed at more than one of these effects (e.g., a deception operation might be employed to achieve sea control or sea denial).

452. 1907 Hague Regulations, art. 22; *see also* AP I, art. 35(1).

## 7.2 Sea Control and Sea Denial

This section discusses methods employed by belligerents to secure sea control, or to deny sea areas to an enemy. An example of a sea control operation would be the regulation or restriction of merchant shipping within an area of operational interest to facilitate target identification or freedom of maneuver. This might be achieved by the declaration of a tailored maritime operational zone (see Section 7.2.1) or special restrictions (see Section 7.2.2).

Sea denial operations are sometimes referred to as “anti-access/area denial” (A2/AD) operations or operations to deny enemy access and maneuver in the global commons. Sea denial is intended to hamper an enemy from gaining access to a particular area and, if it does gain access, making the operating environment as hostile as possible.<sup>453</sup>

### 7.2.1 Maritime Operational Zones

A maritime operational zone is not a legal term of art—it is a method of warfare aimed at achieving effect at the tactical, operational, or even strategic level of war through water space deconfliction and management. As such, the same targeting law applies inside the zone as outside the zone. Zones vary in nature depending on the specific effect they are designed to achieve. For example, some are focused on reducing the presence of merchant shipping in a particular area, whereas others are focused on denying operating space to enemy warships or military aircraft, or for the protection of friendly, high value assets. Depending on the desired effect, a belligerent party establishing a maritime operational zone can demand that vessels entering this area meet various requirements, such as obtaining prior approval, identification upon their entry, and even not entering this area at all.<sup>454</sup>

State practice indicates that maritime operational zones may be established by belligerents for any purpose that does not contravene the law of naval warfare.<sup>455</sup> For example, a defensive zone might need only to be applied to enemy military units, such as the British Maritime Exclusion Zone

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453. See Chairman, Joint Chiefs of Staff, Joint Publication 3-32, Joint Maritime Operations (June 8, 2018, incorporating Change 1, Sept. 20, 2021).

454. DOD LAW OF WAR MANUAL § 13.9.4.

455. ADDP 06.4 ¶ 6.33; UK MANUAL ¶¶ 13.77–13.80; NWP 1-14M § 7.9.

(MEZ) declared around the Falkland/Malvinas Islands on April 12, 1982.<sup>456</sup> Alternatively, a zone designed to protect civilians and facilitate target identification within a particular area of the sea (such as that surrounding an area of enemy coast subject to naval bombardment or an amphibious landing) might seek to exclude temporarily all merchant vessels and aircraft.

For whatever purpose they are established, zones must comply with the following requirements under the law of naval warfare.

### 7.2.1.1 Notification

All aspects of the zone must be declared and notified—for example, in a Notice to Mariners and/or a Notice to Airmen (where the zone is also operative against aircraft), or some other official declaration or announcement by the belligerent State establishing the zone.<sup>457</sup>

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456. Letter dated Apr. 23, 1982, from the UK Permanent Representative to the United Nations to the President of the UN Security Council (S/14997).

457. ADDP 06.4 ¶ 6.34; UK MANUAL ¶ 13.78. *See, e.g.*, HYDROLANT 602/03 (54, 56) (Mar. 21, 2003):

1. U.S. FORCES IN THE EASTERN MEDITERRANEAN HAVE ESTABLISHED A MARITIME SAFETY ZONE AND ARE CONDUCTING COMBAT OPERATIONS IN INTERNATIONAL WATERS EAST OF CYPRUS THAT POSE A HAZARD TO NAVIGATION. ALL VESSELS ARE ADVISED TO EXERCISE EXTREME CAUTION AND TO REMAIN CLEAR OF AREA BOUND BY 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.

2. ALL VESSELS SHOULD MAINTAIN A SAFE DISTANCE FROM U.S. FORCES SO THAT INTENTIONS ARE CLEAR AND UNDERSTOOD BY U.S. FORCES. VESSELS THAT ENTER THE MARITIME SAFETY ZONE WHICH ARE APPROACHING U.S. FORCES, OR VESSELS WHOSE INTENTIONS ARE UNCLEAR ARE SUBJECT TO BOARDING AND VISIT BY U.S. FORCES. ALL VESSELS APPROACHING U.S. FORCES ARE REQUESTED TO MAINTAIN RADIO CONTACT WITH U.S. FORCES ON BRIDGE-TO-BRIDGE CHANNEL 16.

3. U.S. FORCES WILL EXERCISE APPROPRIATE MEASURES IN SELF-DEFENSE IF WARRANTED BY THE CIRCUMSTANCES. VESSELS APPROACHING U.S. FORCES WILL HELP MAKE THEIR INTENTIONS CLEAR AND AVOID UNNECESSARY INITIATION OF SUCH DEFENSIVE MEASURES BY MAKING PRIOR CONTACT AS DESCRIBED ABOVE.

4. NOTHING IN THIS WARNING IS INTENDED TO LIMIT OR EXPAND THE INHERENT SELF-DEFENSE RIGHTS OF U.S. FORCES. THIS SPECIAL WARNING IS PUBLISHED SOLELY FOR SAFETY OF NAVIGATION AND TO WARN VESSELS AWAY FROM COMBAT ACTIVITIES.

### 7.2.1.2 Enforcement

The same targeting law applies inside and outside the zone. A “free fire” zone of unrestricted warfare at sea is unlawful.<sup>458</sup> However, presence in a declared zone is one factor a commander may consider in determining whether a vessel is a military objective, but this determination is fact-dependent and context-specific (see Section 8.5).

Where a zone takes effect against neutral merchant shipping, enforcement by ordering a diversion of ships may be sufficient to achieve the zone’s purpose. A breach of a maritime operational zone may also generate the right to capture and condemn a vessel or aircraft as prize. In addition, resistance to lawful enforcement measures may lead to a vessel becoming subject to capture (see Sections 8.5 and 9.11) or targetable.

### 7.2.1.3 Effect on Neutral Rights

Maritime operational zones must balance the military requirement for the zone against any impact it has on the rights of neutral navigation. For example, an exclusion zone (excluding all shipping) declared in a remote sea area is more likely to be considered permissible vis-à-vis neutral rights than one declared over a busy shipping lane. Nonetheless, where the military requirement for the zone is of sufficient gravity, such a zone could still be lawful.<sup>459</sup>

## 7.2.2 Restrictions on the Immediate Vicinity of Naval Operations

On-scene commanders may restrict access to, and impose other conditions in, the immediate vicinity of naval operations. The immediate vicinity

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458. ADDP 06.4 ¶ 6.33; NWP 1-14M § 7.9. The Washington Conference of 1922, the London Naval Agreement of 1930, and the London Protocol of 1936 were entered into with full knowledge that such zones had been employed in World War I. Yet the Protocol made no exception for operational zones. The order of Admiral Dönitz during World War II to sink neutral ships without warning when found within these zones was, therefore, in the opinion of the Tribunal, a violation of the Protocol. Nonetheless, Admiral Dönitz was not sentenced for having ordered attacks on neutral merchant vessels, especially within “war zones,” because Allied forces (in particular, U.S. forces in the Pacific) conducted similar acts. *United States v. Dönitz*, 22 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 508 (1948).

459. ADDP 06.4 ¶ 6.34; UK MANUAL ¶ 13.78; NWP 1-14M § 7.9.

of naval operations is that area within which hostilities are taking place or belligerent forces are operating.<sup>460</sup> This concept is distinct from the right to establish maritime operational zones discussed above. The extent of the immediate vicinity, and the content and duration of restrictions and other conditions, are defined by operational requirements. This belligerent right is limited and transient, based on the need for a belligerent to conduct operations and to provide for the security of its forces.<sup>461</sup>

Within the immediate vicinity of naval operations, a belligerent may establish special restrictions upon the activities of all vessels and aircraft, including the control of all communications and the use of electronic equipment that may endanger naval operations, and may even impose restrictions on entry into the immediate vicinity of naval operations.<sup>462</sup> Noncompliance with legitimate belligerent orders entitles a belligerent to capture and condemn a vessel or aircraft as prize. Noncompliance may also render a vessel or aircraft a targetable military objective.<sup>463</sup>

### 7.2.3 Mining

Belligerents may lay mines for military purposes, including to deny sea areas to the enemy or defend certain locations subject to the rules of the LOAC. Mines may be used offensively as well as defensively. States may employ mines that can discriminate targets and/or automatic contact mines.

Where belligerents use mines that can discriminate targets, they pose no risk to innocent shipping. Use of these mines is subject to the limitations as to where hostilities may be conducted (see Chapter 4) and the rules on targeting (see Chapter 8). Such mines are not regulated by the rules that govern automatic contact mines.

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460. NWP 1-14M § 7.8; Japan, Rules of Naval War (1914), arts. 87–93; Japan, Revised Rules of Naval War (1942), art. 91(2), (3); JMSDF TEXTBOOK 177.

461. See ADDP 06.4 ¶¶ 6.16–6.17; JAPANESE LAW OF WAR MANUAL 167–71; UK MANUAL ¶ 13.106.e; JMSDF TEXTBOOK 177.

462. An exception may apply in the case of the need to use internationally recognized emergency frequencies.

463. Tucker, *supra* note 59, app. § 430(b); Japan, Revised Rules of Naval War (1942), art. 91(2), (3); ADDP 06.4 ¶ 6.16; NWP 1-14M § 7.8; JMSDF TEXTBOOK 177.

Where automatic contact mines (and by extrapolation other types of mines) are employed, the rules set out below are designed to “mitigate the severity of war.”<sup>464</sup>

### 7.2.3.1 Notification, Recording, and Monitoring

Notification of minefields must be made to avoid harm to innocent shipping.<sup>465</sup> Such notification may be through diplomatic channels, communications to the International Maritime Organization, Notice to Mariners, or public announcements.<sup>466</sup> If the minefield is to have a meaningful sea denial effect, operational requirements will also require notification of its area and rough boundaries. In order that notification is accurate, the belligerent that laid the minefield must also record the location of the minefield.<sup>467</sup>

Once laid and recorded, and once notification has been provided, minefields must also be actively monitored to ensure the safety of peaceful merchant shipping.<sup>468</sup> Belligerents must “do their utmost to render these mines

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464. Hague VIII, preamble. Although the provisions of Hague VIII specifically apply to “automatic contact” mines, they remain the only codified rules addressing the laying of conventional naval mines. Technological developments, however, have produced naval mines not contemplated by the drafters of these rules. The general principles of law embodied in Hague VIII (Articles 1, 2, 3, and 5), therefore, continue to serve as a guide for the lawful employment of all conventional naval mines. *See* NWP 1-14M § 9.2.

465. *Corfu Channel (U.K. v. Alb.)*, Judgment, 1949 I.C.J. 4, 22 (Apr. 9): “The obligation incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them.”; *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 215 (June 27): “[i]f a State lays mines in any waters whatever in which vessels of another State have rights of access or passage, and fails to give any warning or notification whatsoever . . . it commits a breach of the principles of humanitarian law underlying the specific provisions of Convention No. VIII of 1907.”

466. *See, e.g.*, Operation Pocket Money, Richard M. Nixon, Address to the Nation on the Situation in Southeast Asia (May 8, 1972), *reprinted in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RICHARD NIXON 1972, at 583, 585 (1974).

467. ADDP 06.4 ¶ 6.28; UK MANUAL ¶ 13.56; NWP 1-14M § 9.2.3 (“The location of minefields must be carefully recorded to ensure accurate notification and facilitate subsequent removal and/or deactivation.”). *See also* Wolff Heintschel von Heinegg, *The Law of Armed Conflict at Sea*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 463, 503 (Dieter Fleck ed., 3rd ed. 2013).

468. Hague VIII, art. 3.



harmless within a limited time” and, “should they cease to be under surveillance, . . . notify the danger zones as soon as military exigencies permit” by notifying ship owners and governments.<sup>469</sup>

### 7.2.3.2 Location of Mines

Belligerents may only lay mines in belligerent waters or outside neutral internal waters, archipelagic waters, and territorial seas.<sup>470</sup> Mining of a belligerent’s own waters within a strait where the right of transit passage or non-suspendable innocent passage applies, or in archipelagic sea lanes, is lawful provided that an alternative convenient or commercially acceptable route is available to neutral merchant shipping. In addition, it is forbidden to “lay automatic contact mines off the coast and ports of the enemy, with the sole object of intercepting commercial shipping.”<sup>471</sup>

### 7.2.3.3 Mine Clearance Post-Conflict

At the end of a conflict, belligerents must “do their utmost” to remove the automatic contact mines that they have laid.<sup>472</sup> If the mines cannot be removed or rendered harmless, then they may be marked temporarily by buoys until such time as removal or neutralization is possible.<sup>473</sup>

## 7.3 Counter-Sea Control or Counter-Sea Denial Operations

A belligerent may take measures to counter sea control established by the enemy, or to counter a sea denial effect. It is lawful to undertake mine countermeasure (MCM) operations against enemy-laid mines, as well as mines laid by neutral States if laid unlawfully. It is not lawful for a belligerent to conduct MCM operations against mines lawfully laid by a neutral State. The exercise of MCM is an exercise of belligerent rights and thus is reserved

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469. *Id.*

470. *See* Chapter 4.

471. Hague VIII, art. 2.

472. *Id.* art. 5.

473. This is currently being undertaken by Standing NATO Mine Countermeasures Group 1 in the Baltic Sea. *See NATO Forces Clear Mines from the Baltic in Open Spirit Operation*, NATO (May 7, 2021), <https://mc.nato.int/media-centre/news/2021/nato-forces-clear-mines-from-the-baltic-in-open-spirit-operation>.

to warships.<sup>474</sup> If a belligerent uses a commercial vessel to conduct MCM, that vessel is liable to attack.

## 7.4 Blockade

Blockade, the capture of contraband, and the capture or destruction of enemy property found at sea are lawful methods for interfering with enemy imports or exports. These methods deny an enemy the chance of economic revenue from its exports and the benefits of imports that support its war effort, or they may be used as a method of sea control.

Blockade must comply with the following rules.

### 7.4.1 Definition

A blockade is a belligerent operation intended to prevent vessel traffic from all States from entering or leaving specified coastal areas that are under the sovereignty, occupation, or control of an enemy. Such areas may include ports and harbors, the entire coastline, or parts of it.<sup>475</sup>

Blockade under the law of naval warfare is distinguished from:

- (1) Embargo or sanction enforcement operations, such as pursuant to a UN Security Council resolution (or other lawful authorization);

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474. This can include the use of unmanned systems deployed from warships. For example, during the Vietnam War, Mine Division 113 deployed four remotely controlled unmanned surface vehicles—modified 23-foot fiberglass hulls powered by a V-8 inboard gas engine—to conduct minesweeping missions in the rivers of South Vietnam. The use of these specialized “chain drag” minesweepers increased the effectiveness of minesweeping operations and was credited with reducing the number of casualties of mine warfare forces during periods of heavy combat on the rivers. Edward J. Marolda & R. Blake Dunnivant, *Combat at Close Quarters: Warfare on the Rivers and Canals of Vietnam*, in *THE U.S. NAVY AND THE VIETNAM WAR* 29 (Edward J. Marolda & Sandra J. Doyle eds., 2015). Similarly, during Operation Iraqi Freedom, unmanned underwater vehicles, like the Semi-Autonomous Hydrographic Reconnaissance Vehicle (SAHRV) and Sculpin, were used in mine-clearing operations of Umm Qasr in 2003. U.S. DEPARTMENT OF THE NAVY, *THE NAVY UNMANNED SURFACE VEHICLE (USV) MASTER PLAN* 2, 3, 24, 72 (2007).

475. NWIP 10-2 § 632; ADDP 06.4 ¶ 6.60. *See also* The Vrouw Judith (1799) 1 C. Rob. 150, 151–52; 165 ER 130, 131 (Sir William Scott); JAPANESE LAW OF WAR MANUAL 123; JMSDF TEXTBOOK 175.

- (2) A domestic security measure by a State to restrict access to its own coast, ports, or harbors (a blockade may be enforced against enemy-held territory); and
- (3) Prize measures.

This Manual does not address (1) or (2); (3) is discussed in Chapter 9.

A blockade may be solely maritime or solely aerial, or it may be established against maritime and aerial traffic. To be recognized under international law, a blockade must comply with the rules set out in this section.

#### 7.4.2 Notification

All aspects of the blockade (geographic extent, date of commencement, general scope of measures employed) must be declared and notified in a Notice to Mariners (for a maritime blockade) and/or a Notice to Airmen (where the blockade is also operative against aircraft), or some other official declaration or announcement, by the belligerent State establishing the blockade.<sup>476</sup>

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476. London Declaration of 1909, arts. 8–9; UK MANUAL ¶ 13.65; NWP 1-14M § 7.7.2.1. During the Vietnam War, the mining of Haiphong harbor was announced by President Nixon on radio and television on the evening of May 8, 1972. Appropriate notification was also given to all other nations concerned, both by a letter to the President of the UN Security Council and by direct bilateral diplomatic notification, as well as by notices to mariners. That same day (May 9, 1972, in Hanoi), mines were dropped by aircraft in Haiphong harbor (and in Cam Pha and Hon Gai harbors), three days in advance of the mines becoming armed, thus permitting the ships in the harbor three periods of daylight in which to leave if they so desired.

On May 26, 1904, during the Russo–Japanese War, Commander-in-Chief of the Combined Fleet Vice Admiral Togo declared a blockade against the southern Liaotung Peninsula and enforced it. The following declaration was issued:

I hereby declare, under command of His Imperial Japanese Majesty's Government that on the 26th day of the 5th month of the 37th year of Meiji the entire coast of that part of the Liaotung Peninsula, Province of Shing-king, China, which lies south of a straight line drawn between Pi-tsz-wo and Pu-lan-tien was placed in a state of blockade by a competent force of His Imperial Japanese Majesty's ships and is now, and will continue to be, in such a state of blockade; and that all measures authorised by the Law of Nations and the respective Treaties between the Empire of Japan and the different neutral Powers will be enforced on behalf of His Imperial Japanese Majesty's Government against all vessels that may attempt to violate the blockade.

Given on board H. I. J. M.'s ship *Mikasa*, this 26th day of the 5th month of the 37th year of Meiji.

(Signed) Heihachiro Togo, Vice-Admiral,  
Commander-in-Chief of the Combined Fleet

### 7.4.3 Effectiveness

A blockade must be maintained effectively by sufficient forces to ensure that there is a real danger of capture or interdiction for vessels or aircraft attempting to breach the blockade.<sup>477</sup> A blockade is effective if there is a sufficient probability that vessels breaching or attempting to breach the blockade are captured. In aerial warfare, “effectiveness” means a “sufficient degree of air superiority,”<sup>478</sup> which has no equivalent in the assessment of a naval blockade. Effectiveness is a question of fact, though to be “effective” in law does not require 100 percent enforcement success.<sup>479</sup>

Assuming that there is a sufficient degree of probability of capture, the distance of the blockading force from the coast is not relevant.

There is no rule limiting the type of forces a belligerent State may use to enforce a blockade. Therefore, a maritime blockade may be enforced purely by aerial assets, or an aerial blockade may be enforced purely by maritime assets, if they are in fact an effective means of enforcement. If possible, a maritime and/or aerial blockade may be enforced by purely cyber means.<sup>480</sup> So long as vessels or aircraft are in sufficient danger of interception and being prevented from reaching or leaving the blockaded coast, the blockade will satisfy the “effectiveness” requirement.

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*See* SAKUYÉ TAKAHASHI, INTERNATIONAL LAW APPLIED TO THE RUSSO–JAPANESE WAR WITH THE DECISIONS OF THE JAPANESE PRIZE COURTS, 359 (1908). The declaration of blockade of Liaotung Peninsula was announced by the Ministry of Navy and notified the Minister of each country in Japan via the Minister of Foreign Affairs on May 27. The reason for not providing the period within which neutral vessels may leave port is that there were no neutral vessels in the blockade area at the time. JAPANESE LAW OF WAR MANUAL 129–31.

477. Paris Declaration of 1856, art. 4; London Declaration of 1909, arts. 2–3. Japan, Rules of Naval War (1914), art. 35; UK MANUAL ¶ 13.67; NWP 1-14M § 7.7.2.3; JMSDF TEXTBOOK 175.

478. AIR AND MISSILE WARFARE MANUAL rr. 151, 154. Rule 154 applies to aerial blockades maintained and enforced exclusively by aircraft.

479. London Declaration of 1909, art. 3; ADDP 06.4 ¶ 6.62; JAPANESE LAW OF WAR MANUAL 127; NWP 1-14M § 7.7.2.3.

480. TALLINN MANUAL r. 67.

#### 7.4.4 Impartiality

A blockade must be enforced impartially against all vessels (and/or aircraft), regardless of flag or status as a State or private vessel or aircraft.<sup>481</sup> However, neutral warships, other State ships, neutral vessels in distress, and neutral military aircraft and State aircraft may, on a case-by-case basis, be allowed to enter or leave the blockaded area without affecting their neutrality.<sup>482</sup>

#### 7.4.5 Humanitarian Requirements

The establishment of a blockade is prohibited if it is solely or primarily intended to starve the civilian population, or solely or primarily intended to deprive the civilian population of objects essential to its survival.<sup>483</sup> However, there is no rule that a blockade is unlawful if it has an effect on the civilian population that is disproportionate to the military advantage gained from the blockade.<sup>484</sup> There is no exemption from blockade enforcement for vessels carrying humanitarian materials intended for the civilian population of a blockaded area. However, the blockading State may make and declare arrangements for the provision of humanitarian support to a blockaded area, whether by sea or by land.

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481. London Declaration of 1909, art. 5; Japan, Rules of Naval War (1914), art. 374; UK MANUAL ¶ 13.72; NWP 1-14M § 7.7.2.

482. London Declaration of 1909, art. 7; Japan, Rules of Naval War (1914), art. 47; NWP 1-14M § 7.7.3; Natalino Ronzitti, *Naval Warfare*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 19 (2015): “the effectiveness of the blockade is not frustrated by humanitarian actions. For instance, during the Israeli blockade of Lebanon, Italy was permitted to evacuate its own and other countries’ nationals. Humanitarian action requires the consent of the blockading State.”

483. ADDP 06.4 ¶ 6.66; GERMAN MANUAL ¶ 1051; UK MANUAL ¶ 13.74; NWP 1-14M § 7.7.2.5.

484. Rule 102(b) of the *San Remo Manual* applies the prohibition of excessive collateral damage to blockade, although a blockade does not qualify as an attack as defined in Chapter 8. The assertion in the *San Remo Manual* is without evidence of State practice or *opinio juris* in support of it and therefore not reflective of international law. See Eran Shamir-Borer, *The Revival of Prize Law—An Introduction to the Summary of Recent Cases of the Prize Court in Israel*, 50 ISRAELI YEARBOOK OF HUMAN RIGHTS 349, 366–69 (2020).

#### 7.4.6 Access to Neutral Coast

A blockade must not bar access to neutral ports or coasts, nor to straits used for international navigation or archipelagic sea lanes, in neutral waters.<sup>485</sup>

#### 7.4.7 Breach and Attempted Breach of Blockade

Whether a vessel or aircraft is in breach of a blockade is a question of fact in each circumstance. Where a blockading State has declared a blockade line, determining breach is simple: it occurs as soon as a vessel or aircraft crosses the line (towards or away from the relevant coast, port, or harbor). Where no blockade line is declared, determining breach is harder and will be a question for the enforcing commander.

An attempt to breach a blockade is a question of fact in each circumstance. The following are likely to constitute attempted breaches:

- (1) If a vessel departs from the blockaded port but fails to pass the blockading force;
- (2) If an aircraft takes off from the blockaded area but fails to pass the blockading force;
- (3) If a vessel sails towards the blockaded area with the intention of breaching the blockade;
- (4) If an aircraft flies towards the blockaded area with the intention of breaching the blockade; or
- (5) If a vessel is anchoring in the vicinity of the blockade line so that it could “slip into” (or out of) the blockaded area.<sup>486</sup>

Vessels or aircraft breaching or attempting to breach a blockade are liable to capture and condemnation or diversion (Section 9.10).<sup>487</sup> Knowledge of the existence of the blockade is essential before a vessel may be considered to be in breach of blockade or attempted breach of blockade. Knowledge

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485. London Declaration of 1909, art. 18; ADDP 06.4 ¶ 6.62; Japan, Rules of Naval War (1914), art. 46; UK MANUAL ¶ 13.71; NWP 1-14M § 7.7.2.5.

486. NWP 1-14M § 7.7.4.

487. UK MANUAL ¶ 13.70.

may be presumed once a blockade has been declared and appropriate notification provided to affected governments.<sup>488</sup>

Vessels or aircraft that resist capture or diversion may render themselves liable to attack (Sections 8.6 and 9.11).

Some States apply the “doctrine of continuous voyage” as an element of the law of blockade. Whereas the doctrine was rejected in Article 19 of the London Declaration of 1909, some States take the position that “[i]t is immaterial [whether] the vessel or aircraft is, at the time of interception, bound for neutral territory if its ultimate destination is the blockaded area.”<sup>489</sup>

## 7.5 Deception, Intelligence Gathering, and Espionage Operations

Deception and ruses of war are not unlawful, except in certain specific circumstances set out below. Similarly, the obtaining of information, whether through intelligence-gathering operations or espionage, is not *per se* unlawful under international law.

### 7.5.1 Permitted Ruses and Deceptions

The law of naval warfare permits deceiving the enemy through stratagems and ruses of war intended to mislead, to deter the enemy from acting, or otherwise to induce the enemy to act recklessly, provided the ruses do not violate the specific rules described below. Stratagems and ruses of war permitted in armed conflict include camouflage, deceptive lighting, dummy ships and dummy armament, decoys, simulated forces, feigned attacks and withdrawals, ambushes, false intelligence, electronic deceptions, and the use of enemy ciphers and passwords.<sup>490</sup> Akin to camouflage, physical and electronic concealment is permitted. Unless they are engaged in an attack, warships may feign neutral status, including by using a false automatic identification system (AIS) signal or flying a false flag.

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488. London Declaration of 1909, arts. 14–15. In the case of a vessel having no knowledge of the blockade, notification must be provided in accordance with Article 16 of the London Declaration of 1909. Japan, Rules of Naval War (1914), arts. 43–44.

489. ADDP 06.4 ¶ 6.63; NWP 1-14M § 7.7.4.

490. ADDP 06.4 ¶¶ 6.35, 7.2; UK MANUAL ¶¶ 5.17–5.17.2; NWP 1-14M § 12.1.1; TACHI, INTERNATIONAL LAW IN WARTIME 384.

## 7.5.2 Unlawful Deceptions and Perfidy

### 7.5.2.1 Perfidy

Acts of perfidy are acts designed to invite the confidence of the enemy to lead them to believe that they are obliged to accord protected status under the LOAC, or to lead them to believe that they are entitled to receive such protection, with the intent to betray that confidence.<sup>491</sup> It is prohibited to feign protected status when such an act is conducted with the aim of killing or injuring an adversary. For States party to Additional Protocol I (AP I), the prohibition extends to capturing an adversary; however, a number of States not party to AP I, such as Israel and the United States, do not recognize as perfidy feigning protected status in order to capture.<sup>492</sup> For example, feigning surrender to lure an enemy into a trap is a prohibited act of perfidy.<sup>493</sup> For States party to AP I, killing, injuring, or capturing an adversary through the perfidious use of the distinctive emblems of the Geneva Conventions, or another protective sign, is a war crime.<sup>494</sup> Killing or wounding treacherously individuals belonging to an adversary and making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury, are also war crimes.<sup>495</sup>

### 7.5.2.2 Misuse of Protective Signs, Signals, and Symbols

Even where there is no immediate intent to injure or kill, any misuse of a protected sign, signal, or symbol remains unlawful because these actions undermine the effectiveness of such signs, signals, and symbols, jeopardizing the safety of those who genuinely rely on their protection.<sup>496</sup> For example, using medical transport marked with a red cross, red crescent, or red crystal to carry combat divers, or to elude enemy forces, undermines the reliability and inviolability of the red cross, red crescent, or red crystal as a protected

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491. AP I, art. 37(1).

492. DOD LAW OF WAR MANUAL § 5.22.2.1.

493. ADDP 06.4 ¶ 6.36; UK MANUAL ¶¶ 5.9–5.9.4, 5.17.3; NWP 1-14M § 12.1.2; JMSDF TEXTBOOK 207–09.

494. AP I, art. 85(3)(f). *See also* ADDP 06.4 ¶ 13.29; JMSDF TEXTBOOK 207.

495. Rome Statute, art. 8(2)(b)(vii), (xi); Hague Regulations, art. 23(f). *See also* ADDP 06.4 ¶ 13.29; JMSDF TEXTBOOK 207.

496. AP I, art. 38(1).



sign. The white flag is recognized as a symbol indicating a desire to parley or surrender. Using the white flag to gain a military advantage over the enemy undermines its effectiveness when used for its authorized purpose and is thus forbidden.<sup>497</sup>

### 7.5.2.3 Feigning Distress

It is unlawful to feign distress through the false use of internationally recognized distress signals, such as SOS and MAYDAY.<sup>498</sup> In air warfare, it is permissible to feign disablement or other distress to induce an enemy to break off an attack. Consequently, there is no obligation in air warfare to cease attacks on a belligerent military aircraft that appears to be disabled. However, if it is known that the enemy aircraft is disabled so as to permanently remove it from the conflict—for example, because it has sustained major fire or structural damage—there is an obligation to cease attacking the aircraft to permit possible evacuation by aircrew or passengers.

## 7.5.3 Flags/Colors

### 7.5.3.1 At Sea

A warship may fly a false flag up until the point of an attack on an enemy.<sup>499</sup> This rule is different from the position on land. In the LOAC, belligerent forces may not fly false colors under any circumstances. While it is lawful to use a false flag at sea, the false flag must be struck and replaced with the rightful flag before a warship launches an attack.

It is also not illegal for a merchant vessel to fly a false flag on a temporary basis to evade capture. For example, Japan's current Ship Law of 1899 imposes penalties on foreign vessels flying the Japanese flag for the purpose of feigning nationality, but it excludes cases where such vessels fly the Japanese flag for the purpose of evading capture.<sup>500</sup>

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497. NWP 1-14M § 12.2.

498. *Id.* § 12.6; JMSDF TEXTBOOK 207.

499. AP I, art. 39(3); ADDP 06.4 ¶ 6.35; NWP 1-14M § 12.3.1; JMSDF TEXTBOOK 209; TACHI, INTERNATIONAL LAW IN WARTIME 384.

500. Japan Ship Law (1899), art. 22.

### 7.5.3.2 In the Air and on Land

Use in combat of false flags or deceptive markings to disguise belligerent military aircraft is prohibited.<sup>501</sup>

### 7.5.3.3 The United Nations Flag and Emblem

The flag of the United Nations and the letters “UN” may not be used in armed conflict for any purpose without the authorization of the United Nations.<sup>502</sup>

### 7.5.4 Intelligence-Gathering Operations

Military personnel or military platforms or equipment may conduct intelligence operations in belligerent territory, airspace, and waters or in international waters and airspace. These operations are not “espionage” so long as they are carried out by combatants that have distinguished themselves from the civilian population. While collecting such intelligence, the armed forces may employ any of the lawful deceptions or ruses described above.

### 7.5.5 Espionage

While often employed during armed conflict, it should be noted that espionage is not a concept limited to armed conflict. There is no international law rule prohibiting espionage, though many, if not all, States have domestic law provisions that criminalize espionage conducted against them.

Espionage may be carried out by combatants or civilians via cyber, electronic, or related means, or a human agent (a spy). A spy may be a civilian or a member of the regular armed forces who, while in territory under enemy control or in a zone of belligerent force operations, obtains or seeks to obtain information through false pretenses or while operating clandestinely.<sup>503</sup> While spying during armed conflict is not a violation of international law, captured spies are not entitled to prisoner of war (POW) status and the captor State may try and punish spies under its domestic law.<sup>504</sup> A spy who, after

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501. *Id.* §§ 12.3.2–12.3.3.

502. *Id.* § 12.4.

503. AP I, art. 46; NWP 1-14M § 12.8; TACHI, INTERNATIONAL LAW IN WARTIME 385.

504. AP I, art. 46; NWP 1-14M § 12.8.

rejoining the force to which he or she belongs, is subsequently captured by the enemy is treated as a POW and incurs no responsibility for his or her previous acts of espionage.<sup>505</sup>

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505. Hague Regulations, art. 31.

**CHAPTER 8****THE LAW OF TARGETING AT AND FROM THE SEA**

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## 8.1 Applicability of Targeting Law and the Concept of “Attack”

The law of targeting applies to all “attacks” carried out during an armed conflict with the intention to strike targets.<sup>506</sup> In the context of *jus in bello*, an “attack” differs fundamentally from the concept of a “use of force” or an armed attack under the *jus ad bellum*, which are beyond the scope of this chapter (or this Manual).

Note that certain attacks in armed conflict are not carried out with the intention to strike a target but to further some other legitimate operational purpose. For example, during a ground maneuver, artillery shells may be used in a confined area to suppress the movement of an enemy force scattered in unknown locations. Such use of artillery shells may be considered to be an “attack”; it is not a case of “targeting.”<sup>507</sup>

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506. Attacks carried out with a different rationale in mind involve a somewhat different application of rules such as that relating to distinction. This chapter is not concerned with such attacks.

507. The rule on distinction applies somewhat differently when the aim of an attack is not the destruction or neutralization of targets. Specifically, AP I’s famous classification of an attack as “indiscriminate” if it is not “directed at a specific military objective” (Article 51(4)(a)) assumes a case of targeting. Article 51(4)(a) is, accordingly, a paradigmatic representative of “targeting law,” and attacks that are not carried out with the intention to strike a target are not subject to this regime. The rules on distinction, precautions, and proportionality still apply, of course, but they do not include the application of rules such as Article 51(4)(a). An attack would thus be according with the rule on distinction, for example, if it is carried out “in order to achieve a particular objective that is lawful under humanitarian law

For purposes of the law of naval warfare, an attack is an act of violence against the adversary, whether in offense or defense. This definition is reflected in Additional Protocol I (AP I) and is a common point of departure for discussions pertaining to targeting law.<sup>508</sup> Whereas attacks are generally carried out by conventional, kinetic means (such as bombs, missiles, and torpedoes), they may also be carried out by non-kinetic means (such as cyber means) if the effect is equivalent to that of a kinetic attack—that is, if they result, or are designed to result, in damage, destruction, injury, or death.<sup>509</sup>

### 8.1.1 “Attack” Distinguished from Other Measures or Methods of Warfare

Attacks may be distinguished from the following law of naval warfare measures (described in Chapter 7), which are not “attacks” and thus are not circumscribed by the law of targeting:

1. **Declaring a blockade.** Declaring and establishing a blockade does not by itself constitute an attack. However, a vessel that breaches a blockade and resists enforcement measures by the blockading party renders itself liable to attack. Any such attack is governed by the rules set out in this chapter.
2. **Declaring a maritime zone or implementing restrictions in the immediate vicinity of naval operations.** Neither of these mechanisms qualifies as an attack, though, as with blockade, vessels that resist enforcement measures may render themselves liable to attack, which would be governed by the rules in this chapter.

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and that respects the difference between civilian persons and objects on the one hand, and combatants and military targets on the other.” KNUT DÖRMANN, *ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: SOURCES AND COMMENTARY* 309 (2003).

508. AP I, art. 49(1); ADDP 06.4 ¶ 5.2.

509. NWP 1-14M § 8.11.2; DOD LAW OF WAR MANUAL § 16.2.1. *But see* TALLINN MANUAL 2.0 r. 92, at 415: “A cyber attack is a cyber operation . . . that is reasonably expected to cause injury or death to persons or damage or destruction to objects.” For the Israeli position, see Roy Schöndorf, *Israel’s Perspective on Key Legal and Practical Issues Concerning the Application of International Law to Cyber Operations*, 97 *INTERNATIONAL LAW STUDIES* 395 (2021).

3. **Capture as booty of war or prize.** These measures are governed by the specific regime described in Section 9.2. Vessels that resist capture may render themselves liable to attack, but capture, as a discrete act, does not constitute an attack.
4. **Destruction of prizes or booty of war.** Belligerent destruction of prizes or captured booty of war is not an attack and is governed by the specific regime set out in Section 9.2.
5. **Visit, board, search, and seizure (VBSS).** These measures similarly do not constitute an attack, but where a vessel clearly resists such measures, it renders itself liable to attack under the rules in this chapter. VBSS may be conducted for a variety of purposes, including the right of visit and search, capture of contraband, or capture of enemy property at sea.

### 8.1.2 “Attack” in the Context of Naval Mine Warfare

There is often confusion about the applicability of the concept of an “attack” in the mine warfare context. Naval mines as a means of warfare are addressed in Chapter 6 and the rules governing mining as a method of warfare are set out in Chapter 7, but regarding mines and the concept of an “attack,” this Manual takes the following positions. Laying a minefield, either at sea or on land, never in itself constitutes an attack. As example 2 below notes, it is the activation of the mine that constitutes an attack. Declaration or notification of a minefield’s existence is often an application of the rules on precautions:

1. **Laying a minefield of automatic contact mines to protect a particular location, or a minefield established for anti-access/area denial (A2/AD) purposes.** Laying such a minefield does not constitute an attack. It is regulated, however, by the rules set out in Hague VIII (discussed in Chapter 6).
2. **Laying a mine (whether tethered or not) that can identify a particular vessel.** Laying a mine is not an attack. However, it constitutes an attack at the point at which the mine is activated to detonate.

3. **Laying of unanchored automatic contact mines.** The detonation of such mines will likely constitute an attack, which is governed by the rules in this chapter. States that use unanchored automatic contact mines must also observe the specific rules set out in Hague VIII.
4. **Laying anchored automatic contact mines for purposes other than those discussed in example 1.** This likely constitutes an attack at the point at which the mine detonates, which would be governed by the rules in this chapter. States that use such mines must also be cognizant of the specific rules set out in Hague VIII.

### 8.1.3 “Attacks” by Submarines

It is widely agreed that the law of armed conflict (LOAC) imposes essentially the same rules on attacks by submarines as those by any other warship or platform.<sup>510</sup>

### 8.1.4 “Attack” in the Context of Cyber Warfare

Based on the definition of “attack” set out in Section 8.1, a cyber operation only qualifies as an “attack” where it has a physical effect that is equivalent to an attack conducted by kinetic means: namely, if it results, or is designed to result, in death, injury, damage, or destruction.<sup>511</sup> For instance, a cyber operation that disables, or is intended to disable, the air-purification system of a submarine to neutralize its crew qualifies as an attack. A similar action targeting the safety system of a ship carrying hazardous cargo also qualifies as an attack if it is designed, or reasonably expected, to cause an explosion on board the ship. A cyber operation like GPS spoofing of a ship’s location would not qualify as an attack if it is akin merely to jamming. If so, it would merely degrade the efficacy of the ship’s navigational system, without causing a kinetic effect. However, if GPS spoofing is intended to mislead

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510. 10 DIGEST OF INTERNATIONAL LAW 650–66 (Marjorie M. Whiteman ed., 1968); ADDP 06.4 ¶ 6.26; DANISH MANUAL ch. 14 § 4.6.1; GERMAN MANUAL ¶ 10.46; JAPANESE LAW OF WAR MANUAL 77–78; UK MANUAL ¶ 13.31; DOD LAW OF WAR MANUAL § 13.7.2; NWP 1-14M § 8.7.

511. NWP 1-14M § 8.11.2; DOD LAW OF WAR MANUAL § 16.2.1. *But see* TALLINN MANUAL 2.0 r. 92, at 415: “A cyber attack is a cyber operation . . . that is reasonably expected to cause injury or death to persons or damage or destruction to objects.” For the Israeli position, see Schöndorf, *supra* note 509.



the ship into mined waters and thus is reasonably expected to damage the ship physically, it would amount to an attack.

## 8.2 Sources of Law on Targeting

The sources of law on targeting *at sea* are different from those governing the targeting of military objectives on land *from* the sea or from the air above the sea. The table below shows sources that may govern targeting activity at sea and from the sea onto land:

Attacks on Targets at Sea and Above the Sea	Attacks on Targets on Land Carried Out from the Sea
Customary international law	1907 Hague Convention IX Concerning Bombardment by Naval Forces in Time of War
	1907 Hague Convention IV Respecting the Laws and Customs of War on Land, Annex—the Hague Regulations, Articles 25–28
	1977 AP I
	Customary international law

Almost all the specific obligations set out in Hague IX, the referenced Hague Regulations, and the Draft Rules of Aerial Warfare are consistent with, or have been superseded by, customary international law. Some of the AP I rules are accepted by States as correct as a matter of law—where this is the case, it is made explicit in this Manual. This Manual also highlights where there is conflict between customary international law and the rules set out in a treaty or instrument.

## 8.3 Approach to Targeting Law in This Manual

During an armed conflict, naval commanders will be tasked with attacking targets at sea and on land. This Manual therefore describes both targeting regimes—separately, where required. Nonetheless, in many circumstances,

targeting considerations will be the same whether conducted at sea or from the sea to the land.<sup>512</sup>

The Manual notes that different States are party to different treaties. Therefore, commanders (and their advisers) during coalition operations will need to appreciate that their allies or coalition partners may be subject to different legal regimes.

#### **8.4 Distinction at Sea and on Land**

The fundamental customary international law rule encapsulating the principle of distinction (whether at sea or on land) is reflected in AP I: “In 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.”<sup>513</sup> (See Section 5.4.) The principle of distinction applies only to attacks.

#### **8.5 Military Objectives at Sea and on Land**

Military objectives are defined in Article 52(2) of AP I:

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.<sup>514</sup>

Article 52(2) provides a two-stage test for identifying a military objective: (1) makes an effective contribution to enemy military action by its nature, location, purpose, or use, and (2) whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage. This provision of AP I does not apply as a matter of

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512. Notwithstanding that protection of civilian objects and the need to keep collateral damage to a minimum is likely to be a weightier concern on land than when targeting a warship at sea.

513. AP I, art. 48; ADDP 06.4 ¶ 2.11; UK MANUAL ¶ 13.25; NWP 1-14M § 5.3.4.

514. AP I, art. 52(2); ADDP 06.4 ¶ 5.26.

treaty law to purely maritime engagements.<sup>515</sup> However, many States take the view in their national manuals that the principle in Article 52(2) is reflective of customary international law applicable at sea.<sup>516</sup> This Manual adopts that approach, although not all States accept this position.<sup>517</sup>

Indiscriminate attacks, which fail to distinguish between military objectives and civilian objects, are unlawful. Such attacks are indiscriminate when they:

- (a) are not directed at a specific military objective;
- (b) employ a method or means of combat that cannot be directed at a specific military objective; or
- (c) employ a method or means of combat the effects of which cannot be limited as required by the LOAC, and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.<sup>518</sup> Any object that is not classified as a military objective is a civilian object and is protected from being directly attacked.

### 8.5.1 Effective Contribution to Enemy Military Action

“Enemy military action” is a general term that is broadly construed and is not limited to a particular military operation.<sup>519</sup>

- **Nature.** The type of objects that by their nature are military objectives include enemy warships, auxiliaries, tanks, military aircraft, command centers, personnel barracks, military headquarters, communication stations, and any other military infrastructure or equipment. The location of an objective that is military by its “nature” does not obviate its status as such. For example,

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515. Article 49(3) of AP I states:

[Article 52(2) applies] to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. [It] further [applies] to all attacks from the sea or from the air against objectives on land but [does] not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.

516. See ADDP 06.4 ¶ 6.37; UK MANUAL ¶ 13.26.

517. For example, Japan and the United States have not adopted it, and this may be evidence that it has not become a customary international law position.

518. AP I, art. 51(4).

519. See ADDP 06.4 ¶ 5.29; UK MANUAL ¶ 5.4.4(f), (g).

the location of the Argentinian cruiser ARA *General Belgrano* outside of the British-declared 200-nautical-mile total exclusion zone during the 1982 Falklands/Malvinas conflict did not change the fact that it was a lawful military objective by its nature.

- **Location.** 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, neutralization, or destruction is necessary (e.g., to protect a vital line of communications, to ambush enemy forces, or to deny the enemy the opportunity to use it) or for other legitimate military reasons.<sup>520</sup>
- **Use.** An object might become a military objective because of the use the enemy is making of it presently (compare “Purpose” below, which refers to the *future* use of an object). For example, during the 1982 Falklands/Malvinas conflict, the Argentinian-flagged fishing trawler *Narwal* repeatedly reported the position of UK forces to Argentinian authorities. It was therefore attacked and disabled by the Royal Navy because it was being used by the enemy for military purposes. Similarly, during the 1971 India–Pakistan War, an Indian Navy missile boat targeted and sank the Liberian freighter MV *Venus Challenger*. The merchant vessel was a Pakistan-chartered ship with Pakistan Navy officers and sailors onboard. Escorted by PNS *Shah Jahan*, it was transporting U.S. ammunition from Saigon to Karachi for the war effort, turning it into a military objective.<sup>521</sup>
- **Purpose.** “Purpose” means the intended or future use of an object. An example would be a civilian airfield that is capable of being used for military purpose, where there are sufficient indications that the enemy is planning to use the airfield for such

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520. ADDP 06.4 ¶ 5.29; UK MANUAL ¶ 5.4.4; NWP 1-14M § 8.2.5.

521. G.M. HIRANANDANI, *TRANSITION TO TRIUMPH: HISTORY OF THE INDIAN NAVY 1965–75* (1999).

purpose, or a merchant vessel that is intended for use to transport troops or military equipment.

#### 8.5.1.1 “War Sustaining” as Making an Effective Contribution to Enemy Military Action

States are divided on whether civilian objects that contribute to the enemy’s war-sustaining effort—as distinguished from its war-fighting effort—are legitimate military objectives. This approach is reflected in some State manuals.<sup>522</sup> In this view, enemy export of certain goods, like crude oil, renders a vessel a military objective because the enemy earns revenue that contributes to its war-fighting effort. Another example is the neutralization of enemy shipping carrying strategic commodities, which could cause a strategic effect, thereby curtailing the opposing belligerent’s ability to sustain the war.<sup>523</sup> A majority of States do not recognize that a war-sustaining contribution to the war effort is within the definition of military objectives. According to the majority view, export products carried by neutral vessels cannot

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522. DOD LAW OF WAR MANUAL § 5.6.6.2; NWP 1-14M § 8.2. Note that the reference to the word “capture” in this definition merely recognizes that if it is lawful to target an objective, it is also lawful to capture it instead. It is not a reference to the concept of capture in prize (see Chapter 9). Another State manual that accepts this concept is the Indian Handbook, Volume 2: Laws of Armed Conflict. *See also* Brian Egan, Legal Adviser, U.S. Department of State, Address at the Annual Meeting of the American Society of International Law, Washington, DC: International Law, Legal Diplomacy, and the Counter-ISIL Campaign (Apr. 1, 2016), 92 INTERNATIONAL LAW STUDIES 235, 242 (2016) (“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.”).

523. Notwithstanding, the classification of export products as “war-sustaining” rather than “war-fighting” is always context dependent. There may be circumstances in which a vessel engaged in export will qualify as a military objective by purpose even under the “war-fighting” view. For example, this would be the case if a belligerent signs a barter deal whereby it will receive advanced weaponry, to be used in the conflict, from a third State in exchange for a certain export product (e.g., crude oil). A vessel transferring said product to the third State renders itself liable to attack even within the confines of the “war-fighting” approach.

be considered military objectives and may be interfered with only by establishing a lawful blockade. Enemy merchant vessels and their cargo, however, are always subject to capture outside neutral waters for supporting the war-fighting (or war-sustaining) effort, regardless of whether a blockade has been established.

### **8.5.1.2 “War Sustaining” Debate in the Maritime Context**

Enemy merchant vessels were attacked during both World Wars. These attacks could be justified under the “war-sustaining” logic discussed above, but State practice varied over time and by theater. While in the Atlantic theater such attacks were initially justified as reprisals against illegal acts of the enemy, in the Pacific theater neither Japan nor the United States justified its attacks on merchant vessels as reprisals, but rather made enemy merchant vessels military objectives from the outset of the war.<sup>524</sup> Both States integrated their merchant vessels into the war effort by taking them under State control. Merchant vessels were regularly armed and convoyed, participated in intelligence collection, and were otherwise incorporated directly or indirectly into the war effort. Consequently, enemy merchant vessels came to be widely regarded as legitimate military targets, subject to destruction on sight.<sup>525</sup> The view States take on this issue in any future conflict will likely be context specific, informed by the nature and scale of the conflict and their enemy’s strategic vulnerabilities and posture in respect of their merchant vessels.

### **8.5.2 Whose Total or Partial Destruction, Capture, or Neutralization, in the Circumstances Ruling at the Time, Offers a Definite Military Advantage**

In defining “military objectives,” Article 52(2) of AP I contains the phrase “whose total or partial destruction, capture or neutralization, in the

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524. On December 7, 1941, the day of the Pearl Harbor attack by the Carrier Strike Group of Japan, the United States Chief of Naval Operations sent a message to the Commander in Chief, U.S. Pacific Fleet, which stated: “Execute against Japan unrestricted air and submarine warfare.” On March 1, 1942, the Chief of Naval Operations of the Imperial Japanese Navy ordered attacks of enemy merchant vessels by submarines and aircraft without warning. There was no prosecution for the attacks on merchant vessels by naval forces of Japan in the International Military Tribunal for the Far East (Tokyo Tribunal).

525. NWP 1-14M § 8.6.2.2; JMSDF TEXTBOOK 131–33.

circumstances ruling at the time, offers a definite military advantage.” National military manuals have incorporated this text.<sup>526</sup>

“Definite” means a concrete and perceptible military advantage rather than a hypothetical and speculative one. Military advantage relates to the nature, location, use, or purpose.

“Military advantage” offered means the advantage resulting from the attack considered as a whole, in the context of the overall military campaign.<sup>527</sup> The military advantage need not result from every individual attack. Moreover, a specific military action need not provide immediate tactical or operational gains. Merely depriving the enemy of the use of an object that makes an effective contribution usually will be sufficient to satisfy the requirement. There is no requirement that a military objective pose any immediate threat to a belligerent’s own forces.<sup>528</sup> Similarly, there does not have to be any geographical proximity between the “effective contribution” and the “military advantage.” Actions that reduce the risk to the attacking force, such as attacks by unmanned systems rather than manned platforms, or actions that result primarily in psychological effects on the enemy, such as the Doolittle Raid,<sup>529</sup> may also produce military advantage. However, the military advantage must result directly from the attack.

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526. See ADDP 06.4 ¶ 5.29; UK MANUAL ¶ 5.4.5(h)–(j).

527. See the declarations to AP I by Australia, Canada, and the United Kingdom that the military advantage of an attack is intended to mean the advantage anticipated from the military attack considered as a whole, and not just isolated or particular aspects of that attack. This involves a variety of considerations, including the security of attacking forces. In the naval context, the notion of attack is not just a tactical concept regarding the sinking of an individual platform but includes considerations relating to the entire campaign. See also UK MANUAL ¶ 5.20.5.

528. The example of the ARA *General Belgrano* referenced above also makes this clear.

529. Following the Japanese surprise attack on Pearl Harbor in December 1941, a joint Army–Navy bombing project was conceived in January 1942 to bomb Japanese industrial centers to inflict both “material and psychological” damage on the enemy. On April 18, 1942, sixteen U.S. Army B-25 long-range bombers were launched from the deck of the USS *Hornet*. The first U.S. raid of the Japanese homeland took the Japanese by surprise. Carrying high explosive and incendiary bombs, the B-25s flew and hit targets in Tokyo, Yokosuka, Kobe, and Nagoya, against negligible opposition. Of the sixteen B-25s, fifteen crash-landed in occupied China and one landed in Vladivostok, Russia. Although the material damage inflicted by the raid proved small, its effect in Tokyo was enormous. Japan’s fear of a U.S. carrier strike against the homeland, deemed unreasonable by the Naval General Staff, had occurred unimpeded. *Doolittle Raid, 18 April 1942*, DEPARTMENT OF THE NAVY, NAVAL HISTORY AND HERITAGE COMMAND, (May 10, 2019), <https://www.history.navy.mil/>

“[I]n the circumstances ruling at the time” means that commanders must judge the military value of an objective as the facts reasonably appear to them at the time of conducting the attack.<sup>530</sup>

## 8.6 Targeting Military Objectives at Sea

The general rule set out above may be clarified as regards specific types of vessels and aircraft in the maritime domain as follows.

### 8.6.1 Enemy Warships and Naval Auxiliaries

Enemy warships and naval auxiliaries, whether manned or unmanned, are military objectives by nature that may be targeted anywhere and at any time (so long as they are not present in neutral waters).<sup>531</sup> The definite military advantage gained from sinking an enemy warship will be self-evident in any campaign in the maritime domain.<sup>532</sup> Warships and naval auxiliaries may be targeted regardless of the composition of the crew or passengers on board.<sup>533</sup>

### 8.6.2 Enemy Military Aircraft

As with warships, all enemy military aircraft are military objectives by their nature.

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[browse-by-topic/wars-conflicts-and-operations/world-war-ii/1942/halsey-doolittle-raid.html](#).

530. See *infra* Section 8.9 for the precautions that commanders, whether ashore or afloat, must observe during an attack and the duty continually to review the objective’s validity as a target throughout the conduct of an attack.

531. See *also* Chapter 11; JMSDF TEXTBOOK 125–27.

532. See, for example, the sinking of the ARA *General Belgrano* during the 1982 Falklands/Malvinas conflict.

533. Categories of maritime militia vessels that may be targeted are discussed in Section 3.7.1.



### 8.6.3 Enemy Merchant Vessels

Enemy merchant vessels, whether manned or unmanned, are always subject to capture (see Chapter 3), unless specially protected.<sup>534</sup> Under customary international law, the following activities, inter alia, can make an effective contribution to military action or the exercise of any other belligerent rights on behalf of the enemy and therefore render enemy merchant vessels military objectives, and thus targetable:

- (a) **Engaging in belligerent acts.** Belligerent acts by enemy merchant vessels include, but are not limited to, laying mines; gathering intelligence; minesweeping; providing targeting data; cutting submarine cables and pipelines; visiting, searching, or attacking other merchant ships; and using physical violence against a warship or its crew.
- (b) **Engaging in activities otherwise performed by naval auxiliaries.** This includes merchant vessels carrying troops or military material or material for the purpose of sustaining warships/other auxiliaries (such as fuel or food). However, the objects concerned must be directly intended for use by the enemy's armed forces. If that is not the case, the vessels and goods on board are subject only to capture and the attendant laws of prize.
- (c) **Being incorporated into or assisting the enemy's intelligence or military data-gathering systems.** This includes hydrographic survey, reconnaissance, early warning, and C-3 (command, control, and communications) missions in support of enemy forces. Even during the World Wars, this was considered sufficient grounds for attack without warning. In its decision against Admiral Dönitz, the Nuremberg Tribunal ruled that such vessels lose the protection of the 1936 London Protocol.<sup>535</sup>
- (d) **Actively resisting visit, search, or capture; refusing an order to stop; or refusing to abide by military regulations imposed by a naval commander in the immediate area of naval operations.**

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534. These protections apply only if they are engaged in their protected activity (*see infra* Section 9.5).

535. ADDP 06.4 ¶ 6.39 (referring to all acts (a)–(g)); CANADIAN MANUAL ¶¶ 834, 835; NWP 1-14M § 8.6.2.2; JMSDF TEXTBOOK 13.

Enemy merchant ships are always subject to capture for the duration of the conflict. Refusal to stop or resistance to capture makes them subject to attack.<sup>536</sup> The legitimacy of attack in such cases is not affected by the right of enemy merchant vessels to resist, evade, or escape capture, as described in Chapter 3 of this Manual.

- (e) **Sailing under convoy with enemy warships or military aircraft.** Whether a merchant ship is traveling in an enemy convoy is a question of fact. By traveling under convoy, the merchant vessel is manifesting its willingness to actively resist—with the help of the accompanying warship—visit, search, and capture.<sup>537</sup> Traveling in the vicinity of warships is by itself insufficient to determine that merchant ships are in a convoy. For example, during the Iran–Iraq War, some merchant ships sought protection by closely following convoys even though they were not under the control of the convoy commander.
- (f) **Being armed to an extent beyond that reasonably required to defend themselves.** Enemy merchant vessels may carry personal or small-caliber crew-served weapons or non-lethal weapons for anti-terrorism and force protection to resist capture by enemy warships or to protect against terrorists, pirates, and other like threats. Armaments beyond the scope of these weapons render merchant ships military objectives.
- (g) **Engaging (or intending to engage) in any other activity bringing them within the definition of a military objective.** The list is not exhaustive and there may be other conduct that renders enemy merchant ships lawful targets, such as intentionally hampering the movement of enemy forces or shielding enemy warships.

If enemy merchant vessels, including fishing craft, engage in any of these activities, they become military objectives.

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536. Cf. W. Schönborn, *Der Widerstand feindlicher Handelsschiffe gegen Visitationen und Aufbringung*, 38 ARCHIV FÜR ÖFFENTLICHES RECHT 161 (1918). JMSDF TEXTBOOK 134.

537. London Protocol of 1936; CANADIAN MANUAL ¶ 835(1e); NWP 1-14M § 8.6.2.2; JMSDF TEXTBOOK 129.

#### 8.6.4 Enemy Civil Aircraft

Enemy civil aircraft, manned or unmanned, may be captured unless they are specially protected.<sup>538</sup> Enemy civil aircraft may be attacked only if they are rendered military objectives through the following activities:<sup>539</sup>

- Engaging in belligerent acts—these acts would include laying mines, gathering intelligence, minesweeping, laying or monitoring acoustic sensors, engaging in electronic warfare, operating fire-control systems, relaying targeting data, integrating into the enemy’s military intelligence system, and intercepting or attacking other civil aircraft, military aircraft, or maritime vessels;
- Engaging in the carriage of enemy troops or military cargo or refueling enemy military aircraft;
- Refusing an order to identify themselves, change course, or be redirected for visit and search;<sup>540</sup>
- Flying under the protection of enemy aircraft or warships. This may also be indicative of their intent to resist visit and search, as mentioned above;
- Being armed with weapons, such as anti-air or anti-surface weapons;<sup>541</sup> or
- Engaging (or intending to engage) in any other activity which renders them a military objective.

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538. These protections apply only if they are engaged in their protected activity (see *infra* Section 9.5). ADDP 06.4 ¶ 6.40.

539. Note that the Chicago Convention sets out the constitutional framework of the International Civil Aviation Organization and the general regime of air navigation between States parties in times of peace. Article 3*bis* of the Convention provides that “[t]he contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered.” Nonetheless, the article further provides that “[t]his provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations,” including the right of self-defense under Article 51. Moreover, Article 89 of the Convention provides that “[i]n case of war, the provisions of this Convention shall not affect the freedom of action of any of the contracting States affected, whether as belligerents or as neutrals.” The LOAC is *lex specialis* and thus prevails over the peacetime air navigation regime reflected in the Chicago Convention during hostilities to the extent that these two bodies of law are inconsistent.

540. Once an enemy merchant vessel ceases to resist or complies with an order to stop, it is no longer a military objective but remains liable to capture.

541. Flares, for example, are not considered to be weapons.

### 8.6.5 Neutral Merchant Vessels

This section applies to merchant vessels flying the flags of neutral States and is without prejudice to their acquisition of enemy character under the rules set out in Section 3.9.2. Neutral merchant vessels become liable to attack if engaged in any of the following activities:<sup>542</sup>

- Engaging in belligerent acts;
- Engaging in activities on behalf of the enemy otherwise performed by naval auxiliaries;
- Being incorporated into or assisting the enemy's intelligence or military data-gathering systems;
- Actively resisting visit, search, or capture; refusing an order to stop; or refusing to abide by military regulations imposed by a naval commander;<sup>543</sup>
- Sailing under convoy with enemy warships or military aircraft; or
- Engaging (or intending to engage) in any other activity bringing them within the definition of a military objective.<sup>544</sup>

### 8.6.6 Neutral Civil Aircraft

Neutral civil aircraft may not be attacked unless they:<sup>545</sup>

- Engage in belligerent acts;
- Engage in the carriage of enemy troops or military cargo or refueling enemy military aircraft;
- Are incorporated into or assisting the enemy's intelligence system;
- Intentionally and clearly refuse to divert from their destination or refuse to proceed for visit and search to a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible; or

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542. ADDP 06.4 ¶ 6.41. The examples for each type of activity provided in the context of enemy merchant vessels apply to neutral merchant vessels as well.

543. Once a neutral vessel ceases to resist or complies with an order to stop, it is no longer a military objective but is still subject to visit and search.

544. Examples of "any other activity" include, but are not limited to, a malicious cyber operation that does not constitute an attack but effectively contributes to the enemy's military actions, or the carriage of contraband bound for an enemy port.

545. AIR AND MISSILE WARFARE MANUAL r. 174; ADDP 06.4 ¶ 6.43; *see also supra* note 535.

- Otherwise make an effective contribution to the enemy’s military action.

### 8.6.7 Surrender of Vessels and Aircraft

Vessels and aircraft that are lawful targets by nature, use, or purpose may surrender. In the case of a genuine surrender, they may not be attacked. However, they may be captured.

#### 8.6.7.1 Surrender by Vessels

Once a vessel clearly indicates its readiness to surrender (e.g., by hauling down its 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.<sup>546</sup>

#### 8.6.7.2 Surrender by Aircraft

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.<sup>547</sup>

### 8.6.8 Submarine Cables and Pipelines

Some 95 percent of intercontinental global Internet traffic travels over undersea cables on the seabed.<sup>548</sup> All States enjoy the right to lay submarine communications cables on the bed of the high seas and the continental shelf.<sup>549</sup> Contemporary submarine cables connect two physical locations, but generally are owned and operated by a consortium of from four to as many as forty stakeholders, each with a percentage ownership stake in the cable. The consortia are responsible for the construction, operation, and maintenance of the cable, and are typically based in tax havens. There is no global

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546. ADDP 06.4, Fig. 2–1 gives the example of SMS *Emden* not surrendering to HMAS *Sydney* in 1914, which allowed *Sydney* to continue to engage *Emden* until her colors were struck.

547. On surrender by aircraft, see AIR AND MISSILE WARFARE MANUAL rr. 128–29.

548. JUSTIN SHERMAN, CYBER DEFENSE ACROSS THE OCEAN FLOOR: THE GEOPOLITICS OF SUBMARINE CABLE SECURITY 1 (Sept. 13, 2021).

549. UNCLOS, arts. 79, 112; Convention for the Protection of Submarine Telegraph Cables art. 1, Mar. 14, 1884.

registry of ownership or stakeholder interest, which may be subleased through an indefeasible right of use without informing other owners, stakeholders, or landing States.

Military communications cables are military objects and may be targeted during armed conflict. Most military communications cable traffic, however, travels through commercial submarine cables. Military data through such cables is indistinguishable from ordinary commercial Internet traffic. The specific pathways that data packets travel through commercial submarine cables cannot be predicted or controlled by the cable owners. Although civilian submarine cables are civilian objects, their common use by the armed forces means that they may make an effective contribution to military action and their disruption or destruction may offer a definite military advantage.

Destruction of a cable is an act of violence against the adversary that constitutes an attack, which must be distinguished from other interference, such as eavesdropping. States party to a conflict may destroy bilateral cables lying outside neutral territorial seas connecting the enemy and neutral States “if the necessities of war require.”<sup>550</sup> This right would appear to extend to high voltage submarine cables and pipelines lying beyond the territorial sea, although no specific law pertains. Similarly, submarine cables connecting an occupied territory with a neutral territory are normally protected from seizure or damage “except in the case of absolute necessity.”<sup>551</sup> This wide exception provides a low bar in most circumstances for parties to a conflict to sever or destroy submarine cables serving the enemy. While cables connecting only neutral States that are not being used by a belligerent are inviolable, the globally connected nature of the Internet means that it is impossible to determine whether a particular cable is (or is not) serving the enemy. Consequently, “there are no discernible rules” against a belligerent targeting neutral

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550. In May 1898, for example, Commodore Dewey cut the Manila–Hong Kong cable owned by a British company and laid down under Spanish concession. The U.S. Naval War College concluded in 1902 that belligerent States acting on the high seas could interrupt or cut submarine cables between belligerents and neutral States if the “necessities of war require,” although cables connecting neutral States were inviolable. *Situation I—Submarine Telegraph Cables in Time of War*, in INTERNATIONAL LAW SITUATIONS WITH SOLUTIONS AND NOTES 7 (U.S. Naval War College ed., 1902) (Vol. 2, U.S. Naval War College INTERNATIONAL LAW STUDIES).

551. Hague IV, art. 54.

commercial submarine cables used by the enemy.<sup>552</sup> In such case, however, destruction of submarine cables that are deemed to be military objectives still requires the application of the principles of the LOAC, such as military necessity, distinction, and the rule of proportionality (see Chapter 2). Economic or commercial losses resulting from the destruction of a submarine cable normally do not qualify as collateral damage.<sup>553</sup>

## 8.7 Targeting Military Objectives on Land

Attacking military objectives on land from maritime platforms (often referred to as “bombardment”) remains an oft-used method of warfare in contemporary armed conflict, which includes the use of naval gunfire and missiles. A bombardment self-evidently qualifies as an “attack” and so must be limited to objectives that fall within the definitions and discussion in Section 8.5 above.

### 8.7.1 Undefended or Non-Defended Locations; Agreed Demilitarized Zones

Bombardment of “undefended ports, towns, villages, dwellings, or buildings is forbidden.”<sup>554</sup> If such a location is “defended,” only military objectives within it may be targeted and a proportionality assessment must be conducted in respect of each such objective. This is the case whether the attack is conducted from surface, subsurface, or aerial platforms.

Where certain conditions are met, including the evacuation of all combatants and their equipment, a party to the conflict may unilaterally declare

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552. The Eastern Extension arbitration held that “[n]ot only does the cutting of cables appear not to be prohibited by the rules of international law applicable to sea warfare, but such action may be said to be implicitly justified by that right of legitimate defence which forms the basis of the rights of any belligerent nation.” Eastern Extension, Australasia and China Telegraph Company, Ltd. (Great Britain) v. United States, 6 R.I.A.A. 112, 115 (1923). See also COLOMBOS, *supra* note 61, § 569.

553. Note that this Manual takes a position contrary to that reflected in paragraph 37 of the *San Remo Manual* (“Belligerents shall take care to avoid damage to cables and pipelines laid on the sea-bed which do not exclusively serve the belligerents.”).

554. Hague IX, art. 1; Hague Regulations, art. 25; Hague Rules of Air Warfare, arts. 22–26 (though different terminology is employed, the effect is the same); AP I, art. 59(1). See also *supra* Section 8.5.

a location as “non-defended.”<sup>555</sup> An opposing belligerent is not bound by such a unilateral declaration where the conditions are not met, and so lawful military objectives remain targetable even if they are within a unilaterally declared non-defended location.

A demilitarized zone, if agreed between the belligerents, is exempt from bombardment.<sup>556</sup>

### 8.7.2 Medical Facilities

Medical establishments and units (both mobile and fixed), medical vehicles, and medical equipment and stores may not be deliberately bombarded.<sup>557</sup> If medical facilities are used for military purposes inconsistent with their humanitarian mission, the facilities become subject to attack. The attack may be carried out, however, only after a due warning has been given and remains unheeded, unless providing the warning (or waiting for it to be heeded) presents an immediate threat to the lives of friendly forces. The distinctive medical emblem of a red cross, red crescent, or red crystal is to be clearly displayed on medical establishments and units to identify them as entitled to protected status. Whether marked with a protective symbol or not, any object recognized as being a medical facility may not be attacked, unless the conditions noted above have been met.

### 8.7.3 Other Protected Objects

“[S]acred edifices, buildings used for artistic, scientific, or charitable purposes, [and] historic monuments” are to be spared “as far as possible.”<sup>558</sup> This obligation is now subsumed in the customary law obligation to spare civilians and civilian objects from the dangers arising from military operations, and the obligation not to make the civilian population as such, as well as individual civilians, the object of attack.<sup>559</sup> For specific protections afforded to such buildings binding on AP I States, see Section 8.7.4.1. Objects

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555. AP I, art. 59(2).

556. *Id.* art. 60(1). For further detail on the establishment of demilitarized zones, see UK MANUAL.

557. GC I, art. 23; Hague IX, art. 5, Hague Regulations, art. 27; Hague Rules of Air Warfare, art. 25.

558. Hague IX, art. 5; Hague Regulations, art. 27; Hague Rules of Air Warfare, art. 25.

559. Reflected in Article 51(1) and (2) of AP I.



qualifying as cultural property under the 1954 Hague Cultural Property Convention enjoy special protection and may not be attacked. They should be marked with the distinctive emblem under that convention.<sup>560</sup>

#### **8.7.4 Targeting by States Party to Additional Protocol I: Additional Rules**

The following paragraphs describe rules set out in AP I that have not achieved customary international law status. They are binding only on States party to AP I.

##### **8.7.4.1 Religious and Cultural Buildings and Monuments**

Buildings devoted to religion or the arts, historic monuments, or other buildings or monuments characteristic of national identity should not be bombarded if they are not used for military purposes.<sup>561</sup> It is the responsibility of local inhabitants to ensure that such buildings and monuments are clearly marked with the distinctive emblem of such sites (see AP I, Annex I (Regulations concerning identification) for the relevant protective symbols).

For non-AP I States, these objects receive no special protection beyond the general prohibition against targeting non-military objectives.<sup>562</sup>

##### **8.7.4.2 Dams, Dykes, and Nuclear Electrical Generating Stations**

Works and installations containing dangerous forces, such as those listed, shall not be made the object of attack, even where those objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.<sup>563</sup> Other military objectives located at or in the vicinity of these works or installations shall

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560. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240; Protocol for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 358; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 2253 U.N.T.S. 172.

561. See also AP I, art. 53; ADDP 06.4 ¶¶ 5.45–5.47; UK MANUAL ¶ 5.25–5.26.8.

562. William J. Matheson, *Remarks in Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 419 (1987).

563. AP I, art. 56.

not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population. The word “severe” is not defined in the law but is subject to the good faith judgment of the commander contemplating an attack.<sup>564</sup> Commanders are in any case bound to take the usual precautions in attack (see Section 8.9).<sup>565</sup>

The special protection against attack of these works and installations shall cease:

- For a dam or a dyke only if it is used for other than its normal function and in regular, significant, and direct support of military operations and if such attack is the only feasible way to terminate such support;
- For a nuclear electrical generating station only if it provides electric power in regular, significant, and direct support of military operations and if such attack is the only feasible way to terminate such support; and
- For other military objectives located at or in the vicinity of these works or installations only if they are used in regular, significant, and direct support of military operations and if such attack is the only feasible way to terminate such support.

If a work, installation, or military objective is attacked, all practical precautions shall be taken to avoid the release of the dangerous forces.

In ratifying AP I, other States have taken reservations from this article.<sup>566</sup> Insofar as Article 56 deviates from the regular application of the principles

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564. An explanation of “severe” may be found at COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 2154 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987).

565. Power plants should not be attacked in circumstances where their destruction will cause disproportionate suffering to the civilian population; for example, if the power supplies to all city hospitals will be cut for weeks, an attack on a power plant is only likely to be lawful if the direct military advantage to be gained from targeting it is very significant.

566. United Kingdom, Statement on Ratification of AP I, Jan. 28, 1998, 2020 U.N.T.S. 75, 78 (“*Re: Articles 56 and 85, paragraph 3 (c)* The United Kingdom cannot undertake to grant absolute protection to installations which may contribute to the opposing Party’s war effort, or to the defenders of such installations, but will take all due precautions in military operations at or near the installations referred to in paragraph 1 of Article 56 in the light of the known facts, including any special marking which the installation may carry, to avoid severe

of distinction and proportionality, it does not reflect customary international law applicable in international armed conflicts and non-international armed conflicts.<sup>567</sup>

#### 8.7.4.3 Objects Indispensable to the Civilian Population for Survival

Starvation of civilians as a method of warfare is prohibited.<sup>568</sup> The intentional destruction of items such as 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 their use, is similarly prohibited.<sup>569</sup> The incidental destruction of such items is not prohibited, unless such collateral damage is excessive in relation to the military advantage anticipated by an attack.

For non-AP I States, these objects receive no special protection beyond the general prohibition against targeting non-military objectives.

### 8.7.5 The Environment

#### 8.7.5.1 Effects of Hostilities on the Environment

There is no generally agreed definition of “natural environment.” Nonetheless, AP I prohibits the employment of methods or means of warfare (including attacks) that are intended, or which may be expected, to cause widespread, long-term, and severe damage to the natural environment.<sup>570</sup> The rule includes a duty to avoid such damage that is intended or may be expected to prejudice the health and survival of the population.<sup>571</sup> The rule

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collateral losses among civilian populations; direct attacks on such installations will be launched only on authorization at a high level of command.”); France, Statement on Ratification of AP I, *translated in* THE LAWS OF ARMED CONFLICTS 801 (Dietrich Schindler & Jiří Toman eds., 4th ed. 2004) (“The Government of the French Republic cannot guarantee an absolute protection to the works and installations containing dangerous forces which may contribute to the opposing Party’s war effort, or to the defenders of such installations, but will take all precautions referred to the provisions of Article 56, of Article 57, paragraph 2(a)(iii) and of paragraph 3(c) of Article 85 in order to avoid severe collateral losses among the civilian populations, including possible direct attacks.”).

567. DOD LAW OF WAR MANUAL § 5.13.1.

568. AP I, art. 54(1); ADDP 06.4 ¶¶ 9.30–9.31.

569. AP I, art. 54(2).

570. *Id.* art. 35(3); *see also* Section 6.3.

571. AP I, art. 55(1).

relates only to the use of conventional weapons and not to the use of strategic nuclear weapons.<sup>572</sup> This rule does not prohibit, for example, a deliberate attack on a natural land feature that is a military objective by its location (see Section 8.5.1) unless the anticipated consequence is widespread, long-term, and severe damage to the natural environment. Similarly, collateral damage to the environment caused by an attack on a military objective is not unlawful unless it is widespread, long-term, and severe, which is a matter of judgment for the attacking commander.

This rule is not reflective of customary law and binds only AP I States.

### 8.7.5.2 Environmental Modification as a Means of Warfare

The 1976 Environmental Modification (ENMOD) Convention prohibits “military or any other hostile use of environmental modification techniques having widespread, longlasting or severe effects as the means of destruction, damage or injury to any other State Party.”<sup>573</sup> An environmental modification technique is defined as “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.”<sup>574</sup>

This obligation is not reflective of customary law and binds only States party to the ENMOD Convention.

## 8.8 Proportionality at Sea and on Land

An attack will be disproportionate—and therefore unlawful—if it “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.”<sup>575</sup>

It is not unlawful to cause incidental injury to civilians or collateral damage to civilian objects during an attack on a military objective. Reasonably

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572. According to the UK: *see* UK MANUAL ¶ 5.29.3.

573. ENMOD Convention, art. I; ADDP 06.4 ¶¶ 7.15–7.17.

574. ENMOD Convention, art. II.

575. AP I, art. 51(5)(b), reflecting customary international law; ADDP 06.4 ¶ 2.8.

expected incidental injury or collateral damage must not, however, be excessive in light of the military advantage anticipated by the attack. In each instance, the commander must determine whether such injuries and damage would be excessive in relation to the military advantage anticipated from an attack, considered as a whole, in the context of the overall military campaign, based on an honest and reasonable assessment of the facts available. Similarly, the commander must decide, considering all the facts known or reasonably available, including the need to conserve resources and conclude the mission successfully, whether to adopt an alternative method of attack, if feasible, to reduce civilian casualties and damage.

### 8.8.1 Proportionality at Sea

As with other AP I targeting rules, Article 51(5)(b) is not applicable at sea even for States party to AP I. Nonetheless, the rule reflects customary international law that attacks on land *and at sea* must not be disproportionate.<sup>576</sup> Applying the prohibition of excessive collateral damage at sea often involves different factual considerations than on land. In the case of targeting an enemy military objective at sea, the risk of collateral damage to surrounding civilian objects is unlikely or much lower than in a targeting action on land.

Under the law of naval warfare, the crews or ship's companies of targetable enemy platforms (such as warships and auxiliaries) need not be subject to any proportionality assessment even where some or all of them are civilians. Nonetheless, naval commanders must still be reasonably satisfied that any attack they launch will not cause excessive collateral damage to civilian objects in the vicinity or injury to civilians external to the enemy warship. For example, on October 10–11, 1973, during the Arab–Israeli War, two Syrian missile boats fired back while Israeli missile boat squadrons were conducting an attack against a group of oil tankers located at the enemy naval bases near the port of Latakia and Baniyas. Israeli missile boats fired surface-to-surface missiles at the Syrian missile boats maneuvering among merchant vessels located at the Latakia port anchorage. Both Syrian missile boats were sunk, but the Greek ship *Timentavros* and the Japanese cargo ship *Yamashiro*

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576. 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW r. 14 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

*Maru*, which were anchored at the same anchorage, were also hit and sunk.<sup>577</sup> The Japan Ministry of Foreign Affairs (MOFA) took the position that it was illegal to attack the vessels of a neutral third country in a state of war, and the third country had the right to complain and claim damages from the attacking government. However, if a third country's vessels happen to be accidentally attacked while attacking a belligerent's military facilities and other objects, the attacking country may be exempted from responsibility for the attack as a result of *force majeure*. The MOFA did not express a public view as to whether damages were sought in respect of the *Yamashiro Maru*.<sup>578</sup>

It is an unsettled issue whether the passengers on board a merchant vessel that is liable to attack must be taken into consideration in a collateral damage assessment. According to one view, the presence of passengers on board a vessel qualifying as a lawful target does not require a collateral damage assessment. An opposite view would require an assessment to be conducted if there are passengers on board the target vessel. An historic example would be the sinking of the *Lusitania* in 1915.<sup>579</sup>

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577. JOSEPH F. BOUCHARD, *COMMAND IN CRISIS: FOUR CASE STUDIES* 170 (1991); Zbigniew Rotocki, *The Rocket Weaponry and the Naval Armed Conflicts*, 9 *POLISH YEARBOOK OF INTERNATIONAL LAW* 179, 193–94 (1977–78).

578. *Japanese Cargo Vessel in Flames After Being Attacked by Israeli Warship*, *ASASHI SHINBUN*, Oct. 12, 1973, at 1.

579. Germany provided the following justification for the sinking of the *Lusitania* without prior warning: (a) the *Lusitania* was one of the largest and fastest English commerce steamers, constructed with government funds as auxiliary cruisers, and expressly included in the navy list published by the British Admiralty; (b) practically all valuable English merchant vessels had been provided with guns, ammunition, and other weapons, and reinforced with crews specially practiced in manning guns; (c) the *Lusitania* undoubtedly had guns on board, which were mounted under decks and masked; (d) the British Admiralty had advised the British merchant marine by secret instruction of February 1915 to seek protection behind neutral flags and markings, and to attack German submarines by ramming them; (e) the *Lusitania*, on earlier occasions (including her last voyage), had Canadian troops and munitions on board, including no less than 5,400 cases of ammunition, and the German government acted in self-defense by destroying ammunition destined for the enemy; (f) the English steamship company was aware of the dangers to which passengers on board the *Lusitania* were exposed under these circumstances; and (g) according to the report of the submarine commander concerned, which was confirmed by all other reports, there was no doubt that the rapid sinking of the *Lusitania* was primarily due to the explosion of the cargo of ammunition caused by the torpedo. German Response to the Sinking of the *Lusitania* (Berlin, May 28, 1915), reprinted in *SOURCE RECORDS OF THE GREAT WAR: VOLUME 3, A.D. 1915*, at 195 (Charles F. Horne ed., 1923).

## 8.9 Precautions in Attack

States have recognized the principle of precautions in attack.<sup>580</sup>

### 8.9.1 Attacks Against Targets on Land

Naval commanders must take constant care to spare the civilian population, civilians, and civilian objects.<sup>581</sup> With respect to attack, the following precautions (unless stated otherwise) are reflective of customary international law:

- Those who plan or decide upon an attack shall:
  - Do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives and that it is not prohibited to attack them.<sup>582</sup> “Feasible precautions” have been defined as “those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.”<sup>583</sup> This rule requires commanders to be as certain as is feasible in the circumstances that a target (a) has been correctly identified and (b) is in fact a military objective.
  - 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.<sup>584</sup> This precaution requires a commander, where feasible, to select a weapon system for an attack that is consistent with the military necessity to destroy the target in question, but

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580. *See generally* ADDP 06.4 ¶¶ 5.53–5.60.

581. AP I, art. 57(2). The United States and others do not accept the “constant care” standard as reflective of customary international law. DOD LAW OF WAR MANUAL § 5.2.3.5.

582. AP I, art. 57(2)(a)(i).

583. Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended on 3 May 1996 art. 3(4), May 3, 1996, 2048 U.N.T.S. 93.

584. AP I, art. 57(2)(a)(ii).

that is also sufficiently precise not to cause excessive collateral damage or incidental injury. The direction from which the identified target is struck may also have a bearing on the amount of collateral damage that might be expected from an attack. If the attack takes place in a busy coastal or littoral environment and there is likely to be collateral civilian deaths or damage, it may be feasible to conduct the attack when civilian activity is at its lowest (e.g., at night).

- 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.<sup>585</sup> Where, even despite the precautions identified above, an attack would still be expected to cause excessive collateral injury or damage, the attack must not be launched.
- An attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection.<sup>586</sup> Commanders must keep all the above precautions under continual review throughout the conduct of an attack, including positive identification, and if it is revealed that circumstances have changed such that the military advantage in striking the target is reduced or the anticipated incidental injury or collateral damage is increased, then the attack may need to be cancelled or suspended.<sup>587</sup>

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585. *Id.* art. 57(2)(a)(iii).

586. *Id.* art. 57(2)(b); “apparent” carries its ordinary dictionary definition, for example, “readily perceived and understood” or “obvious.”

587. U.S. commanders may decide to cancel or suspend attacks based on new information of expected civilian casualties, or authorize subordinates to do so, to reduce the risk of harm to civilians and civilian objects. Nonetheless, subordinates generally are not authorized to suspend or cancel attacks contrary to specific military orders because they disagree with the commander’s decisions and judgments in relation to the principle of proportionality. Subordinate commanders or engagement authorities are required to report promptly new information of expected civilian casualties or to cancel or suspend attacks in appropriate circumstances. Subordinates also generally have the authority to make decisions required



- Effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.<sup>588</sup> For attacks on land, where the military situation permits, commanders should make every reasonable effort to ensure that the civilian population located in close proximity to the military objective selected for bombardment is given adequate warning of an attack. Warnings may be general rather than specific lest the bombarding force or mission itself be compromised. There is no requirement to give warnings where civilians are unlikely to be affected by the attack.

### 8.9.2 Attacks Against Targets at Sea

For States party to AP I, Article 57(4) provides that “[i]n 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 armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.”

The obligation to take such reasonable precautions, according to Article 49(3) of AP I, only applies to “air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land.” The standard for “reasonable” precautions in attack at sea in AP I Article 57(4) suggests that it is a lower bar to attack than the “feasible” precautions for attacks on land in AP I, art. 57(2)(a)(i).

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by the law of war, such as the decision to cancel or suspend an attack in light of new information, in order to effectuate the commander’s intent, especially when commanders are not able to maintain situational awareness of the risks of civilian casualties. The decision to cancel or suspend an attack based on new information raising concerns of expected civilian casualties does not necessarily mean that the attack would have been unlawful, such as by violating the prohibition against attacks expected to cause excessive incidental harm. *See* DOD LAW OF WAR MANUAL § 5.11.4.

588. AP I, art. 57(2)(c).

**CHAPTER 9****PRIZE LAW**

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## 9.1 Prize Defined

“Prize” is a term of art in the law of armed conflict (LOAC) denoting vessels or goods captured at sea and liable to condemnation. The law of prize allows belligerent maritime forces to capture enemy merchant vessels and civil aircraft as a right, and neutral merchant vessels or civil aircraft for cause (see Section 9.6). The practical means of effecting a capture is to gain control of the vessel by exercising the belligerent right of visit and search, a right reserved to warships (see Section 9.9).

A captured vessel need not necessarily be brought before a prize court. Capture is a step a belligerent may take for various reasons, including reasons of enforcement (e.g., blockade or military regulations imposed by a naval commander), and the belligerent may exercise discretion as to whether condemnation should be pursued. A belligerent is not obliged to pursue the condemnation of a captured vessel, aircraft, or goods. If there is no appetite for condemnation, the belligerent may forgo it but must then return the vessel, aircraft, or goods to the owner within a reasonable time frame.<sup>589</sup> What counts as a reasonable time frame depends on the circumstances of each case.<sup>590</sup>

In order to condemn a captured vessel, aircraft, or goods,<sup>591</sup> they must be adjudicated by a prize court—a domestic court under the jurisdiction of

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589. Belligerents are entitled to exercise discretion and decide whether they would like to release a captured vessel or aircraft or pursue condemnation. *See* *The Madonna Del Burso* (1802) 4 C. Rob. 169, 171; 165 E.R. 574, 575; *The Salerno* [1946] P 189, 196–98 (PDA); GREAT BRITAIN FOREIGN OFFICE, CORRESPONDENCE BETWEEN HIS MAJESTY’S GOVERNMENT AND THE UNITED STATES GOVERNMENT RESPECTING THE RIGHTS OF BELLIGERENTS 15–16 (1915); *Estate of Breitung v. United States in S.S. Seguranca, Disposal of Pecuniary Claims Arising Out of the Recent War* (1914–1918) (U.S. v. G.B.), 3 R.I.A.A. 1861 (1939).

590. *The Prins Knud* [1941] P 39, 40; CivA 7307/14 *State of Israel v. The Ship Estelle* (Supreme Court of Israel sitting as a Court of Civil Appeals) ¶¶ 24–38 (2016).

591. A belligerent is obliged to turn to a prize court only when it wishes to condemn a captured vessel or aircraft. *See* James Farrant, *Modern Maritime Neutrality Law*, 90 INTERNATIONAL LAW STUDIES 198, 263, 269 (2014); Eran Shamir-Borer, *The Revival of Prize Law—An Introduction to the Summary of Recent Cases of the Prize Court in Israel*, 50 ISRAEL YEARBOOK ON HUMAN RIGHTS 349 (2020); *The Falk* [1921] 1 AC 787, 794, 797 (PC) (appeal taken from the Prize Court, England); *The Prins Knud* [1941] P 39, 45–47; Neill H. Alford, Jr., *Modern Economic Warfare (Law and the Naval Participant)*, 56 INTERNATIONAL LAW STUDIES 1, 402 (1963); *The Patrai*, 19 INTERNATIONAL LAW REPORTS 634, 636 (1952); St. Juan Baptista

the capturing belligerent State that is authorized to make such adjudications (see Section 9.14)—and brought before it within a reasonable time frame.<sup>592</sup> To this end, before initiating a prize proceeding, a belligerent should take the necessary time to exercise discretion in the proceeding and gather the evidence necessary for showing that the capture was lawful.<sup>593</sup>

If the capture is adjudicated as lawful, the court will authorize one or more of the following measures to be taken against the captured vessel or aircraft and its cargo:<sup>594</sup>

- The belligerent State may take ownership and convert to its own use, if it sees fit, any *vessel or aircraft* which has been found to be lawfully captured; or
- The belligerent State may take ownership and convert to its own use any *cargo* found to be lawfully captured.

If the prize court adjudicates that a purported capture in prize is not lawful, the court may:

- Order that the vessel and/or its cargo be released from capture; or
- Order that the vessel owner be compensated for any loss or damage resulting from the unlawful capture. Compensation requests may possibly be addressed in a separate proceeding, in accordance with the domestic law governing in the belligerent’s State.

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(1803) 5 C. Rob. 33, 165 E.R. 687; *Jecker v. Montgomery*, 54 U.S. 498 (1851). *See also* Wolff Heintschel von Heinegg, *Visit, Search, Diversion, and Capture in Naval Warfare: Part I, the Traditional Law*, 29 CANADIAN YEARBOOK OF INTERNATIONAL LAW 283, 316 (1992) (“The seizure of neutral vessels and neutral cargo does not serve to effect transfer of title in favour of the captor, but only places him in temporary possession of the property. The final decision on whether there is sufficient cause for confiscating the vessel and cargo lies with the competent prize court alone.”).

592. Reflecting the principle that “*toute prise doit être jugée*” (“every prize must be adjudicated upon”); *see also* ADDP 06.4 ¶ 6.54; GERMAN MANUAL ¶¶ 1027, 1241. As for the time frame, *see* *The Patrai*, 19 INTERNATIONAL LAW REPORTS 634 (1957); *The Seguranca*, 10 INTERNATIONAL LAW REPORTS 598, 604 (1939); *The Lisman*, 32 AMERICAN JOURNAL OF INTERNATIONAL LAW 593 (1938); *CivA 7307/14 State of Israel v. The Ship Estelle* (Supreme Court of Israel sitting as a Court of Civil Appeals) ¶¶ 24–38 (2016).

593. *The Falk* [1921] 1 AC 787 at 797–800; *The Prins Knud* [1941] P 3, 45–47; ALFORD, *supra* note 591, at 402.

594. It is a principle of prize law that a prize court must condemn a vessel or goods that are condemnable under international law. *See* *The Odessa* [1916] 1 AC 145, 153 (PC); *The Stigstad* [1916] P 123, 128–29 (PDA); *S.S. Monte Contes* [1944] 6, 9 (PC).

Where the court reaches a mixed decision (e.g., that the cargo is lawful prize, but the vessel is not), it may make a combination of orders.

Whether the crew or any passengers can or must be detained following capture is governed by the rules set out in Chapter 10.

### 9.1.1 Legal Framework

While the substantive law governing the circumstances that allow for condemnation of a vessel as prize is the customary law of naval warfare,<sup>595</sup> the procedural law relating to prize proceedings is governed by the domestic law of the State.<sup>596</sup>

## 9.2 Distinguishing Prize from Booty

Belligerent States may capture enemy warships, naval auxiliaries, and other government vessels, military and other State aircraft, and any other military equipment as lawful “booty of war.” In accordance with the rules of targeting law set out in Chapter 8, if it is lawful to target a vessel or aircraft, it is also lawful to capture it instead. Hence, enemy merchant vessels and civil aircraft that have become a military objective can also be captured as “booty of war.” Unlike condemnation in prize, transfers of ownership over military objectives do not require adjudication in a prize court.

Military hospital ships, medical aircraft, or military medical transports are immune from capture as booty.

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595. COLOMBOS, *supra* note 61, at 805, 810, 812, 870; OPPENHEIM, *supra* note 60 at 484–85.

596. COLOMBOS, *supra* note 61, at 796 (“The natural tribunals of adjudication, under present municipal legislation, are the Prize Courts of the belligerent captors established by them on their own territory, and it is to these tribunals that every cause for the validity or otherwise of the capture must be deferred.”). *See also* OPPENHEIM, *supra* note 60, at 484–85 (“Prize courts are not international courts, but national courts instituted by Municipal Law. Every State is, however, bound by International Law to enact only such statutes and regulations for its Prize Courts as are in conformity with International Law. A State may, therefore, instead of making special regulations, directly order its Prize Courts to apply the rules of international law, and it is understood that, when no statutes are enacted or regulations are given, Prize Courts have to apply International Law.”); *The Südmark* (No. 2) [1918] AC 475, 481 (PC) (appeal taken from Prize Court, Egypt).

### 9.3 Determining the Character of the Vessel

Determining the character (enemy or otherwise) of a merchant vessel is an important first question under prize law. Historically, there were two approaches by belligerent States to determine the enemy character of a vessel or its cargo. The Anglo-American approach focused on the domicile of the owner as determinative of character, whereas continental European States preferred to use the owner's nationality as the defining criterion.<sup>597</sup> The dichotomy has never been finally resolved as a matter of international law, although the Anglo-American approach is widely accepted.<sup>598</sup>

Flying the flag of an enemy State or bearing the markings of a civil aircraft of an enemy State, is conclusive evidence of a vessel's or aircraft's enemy character. However, flying a neutral flag or bearing neutral aircraft markings is only *prima facie* evidence of neutral character. Belligerent warships and military aircraft commanders may visit, search, or divert a merchant vessel or civil aircraft bearing a neutral flag or markings to ascertain its true character. Neutrally flagged (or marked) merchant vessels and civil aircraft may be deemed to be of enemy character by registration, ownership, charter, or other criteria as defined by the belligerent State<sup>599</sup> (see Section 3.9.2).

### 9.4 Enemy Merchant Vessels and Civil Aircraft Subject to Capture in Prize

Enemy merchant vessels and civil aircraft are defined in Sections 3.9.2 and 3.10.3. While they are in or over international waters, or in or over any belligerent territorial sea or internal waters, enemy merchant vessels and civilian aircraft and their cargos are lawful prize and may be captured.<sup>600</sup> Captures in prize must not take place in neutral waters (as defined in Section 11.3.1). Vessels and aircraft exempt from capture may not be condemned.

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597. Heinegg, *supra* note 591, at 291.

598. The *Hoegh de Vries*, 17 INTERNATIONAL LAW REPORTS 447 (Prize Court of Alexandria 1950) (Egypt). Japan had traditionally used the nationality approach, but in 1942, to deal with Britain, which had become an enemy, it additionally adopted the ownership approach. Japan, Revised Rules of Naval War (1942), art. 18.

599. Heinegg, *supra* note 591, at 291.

600. ADDP 06.4 ¶ 6.54; GERMAN MANUAL ¶ 1027.

Exemption from capture is dependent on the vessels or aircraft complying with the conditions of their specially protected status.

### **9.5 Enemy Merchant Vessels and Civil Aircraft Exempt from Capture as Prize**

The following vessels or aircraft are exempt from capture as prize:<sup>601</sup>

- **Cartel ships or aircraft.** Belligerent vessels and aircraft engaged in non-hostile activities, such as treatment of the wounded and the exchange of prisoners of war (POWs) under agreement between belligerents, are cartel ships and aircraft. Cartel ships were used by the United Kingdom at the conclusion of the Falklands/Malvinas conflict to repatriate about 10,000 Argentine POWs. Each vessel flew the flag of truce and the colors of both States.<sup>602</sup>
  
- **Vessels or aircraft charged with religious or philanthropic missions.** Such vessels have been recognized as exempt from capture at least since Hague XI was agreed in 1907.<sup>603</sup> The rule now extends to aircraft employed for the same purposes. In the past, ships on religious missions were used to transport missionaries. Arguably, this has become an obsolete category. However, vessels providing religious services to fishermen or remote coastal communities can be considered to be charged with religious missions. The same holds true for vessels transporting pilgrims.

Today, philanthropic missions include relief operations that are impartial in character and conducted without adverse distinction, undertaken in support of the civilian population of any territory under the control of a party to the conflict, where such population is not adequately provided with supplies of basic foodstuffs

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601. ADDP 06.4 ¶¶ 6.44–6.45, 6.54; GERMAN MANUAL ¶ 1040.

602. SYLVIE-STOYANKA JUNOD, PROTECTION OF THE VICTIMS OF ARMED CONFLICT FALKLAND-MALVINAS ISLANDS (1982) (1984); U.S. NAVAL WAR COLLEGE, OCEANS LAW AND POLICY DEPARTMENT, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶ 8.2.3 n.61 (1997).

603. Hague XI, art. 4.

and medical supplies. Such operations may only be undertaken by agreement between the belligerent parties, and absent such agreement the vessel or aircraft involved may be captured.<sup>604</sup>

- **Vessels or aircraft engaged in non-military scientific operations.** Vessels engaged in the collection of scientific data of non-military application are exempt from capture.<sup>605</sup> This rule also extends to aircraft. These must be distinguished from vessels or aircraft undertaking research or data gathering that is of a military nature—such vessels are subject to capture as booty or may also be lawful targets for attack.
- **Vessels or aircraft transporting cultural property.** Where a State party to the 1954 Hague Cultural Property Convention has so requested, vessels transporting cultural property under the “special protection” or “urgent cases” arrangements set out in that treaty are immune from capture in prize.<sup>606</sup> Where the arrangements set out in the treaty have been complied with, those vessels shall be exempt from capture, but, in cases of doubt, commanders may exercise the right of visit and search to verify a vessel’s status and cargo.
- **Vessels and aircraft guaranteed safe conduct by prior arrangement between the belligerents.** Safe conduct is a document in which a belligerent permits neutral vessels or units belonging to a neutral or enemy State to reach a certain place.<sup>607</sup> Such vessels and aircraft are protected from attack and from capture unless they deviate from the activity or route permitted in

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604. *See also* AP I, art. 70(1).

605. Hague XI, art. 4.

606. Convention for the Protection of Cultural Property in the Event of Armed Conflict arts. 12–14, May 14, 1954, 249 U.N.T.S. 240; Protocol for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 358; Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, annexed to Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 2253 U.N.T.S. 172.

607. TACHI, INTERNATIONAL LAW IN WARTIME 458.



the safe conduct agreement or are otherwise used to commit acts harmful to the enemy.

- **Small coastal (but not deep sea) fishing vessels and small boats engaged in local coastal trade.** Such vessels are exempt from capture based on a longstanding “usage among civilized nations.”<sup>608</sup> The exemption only covers “[v]essels used exclusively for fishing, along the coast or small boats employed in local trade.”<sup>609</sup> It does not include deep sea or industrial fishing vessels or trawlers.
- **Life rafts or lifeboats.** On the grounds of humanity, as well as the fact that such vessels can in no way contribute to the economy of the belligerent State, life rafts and lifeboats are exempt from capture in prize.

The aforementioned vessels and aircraft lose their exemption from capture if they are used for any purpose other than the protected purposes. In situations of doubt, commanders may exercise the right of visit and search to determine the nature of a vessel’s activity. In addition, as evidenced by long-standing State practice, such vessels only retain their exemption from capture as long as they obey all the conditions below:

- They are innocently employed in their normal role;
- They do not commit acts harmful to the enemy;
- They obey regulations imposed by a naval commander operating in the area;
- They immediately submit to identification and inspection when required; and
- They do not intentionally hamper the movement of combatants and obey orders to stop or move out of the way when required.

A vessel or aircraft that fulfills the conditions for constituting a military objective (see Chapter 8) may be captured for that reason alone, and it is additionally subject to attack. If captured, ownership passes automatically, and it need not be adjudicated in a prize court.

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608. *The Paquete Habana*; *The Lola*, 175 U.S. 677, 686 (1900).

609. Hague XI, art. 3.

Commanders may exercise the right of visit and search to verify a vessel's true activity or status. The object vessel must submit to visit and search when required to do so. Aircraft may be hailed and diverted for inspection where required. Any resistance to enforcement measures may be dealt with in accordance with Section 9.11 below.<sup>610</sup>

### 9.6 Neutral Merchant Vessels and Civil Aircraft Subject to Capture as Prize

Belligerent States must not, so far as possible, interfere with neutral trade or neutral freedom of navigation, whether on the high seas, in an EEZ, or in the exercise of transit passage or archipelagic sea lanes passage. This rule is reflected in the 1856 Paris Declaration, which provided that “[t]he neutral flag covers enemy's goods, with the exception of contraband of war.”<sup>611</sup> The principle of “free ship, free goods” means that belligerents cannot interfere with private neutral traders even if they are carrying their enemies' goods. Belligerents may interfere with a neutral vessel only for one of the reasons set out below.

As evidenced by long-standing State practice, a belligerent warship may undertake visit and search in respect of a neutral vessel (or aircraft) if it reasonably suspects that the neutral vessel is engaged in one of the following activities:

- Acting on behalf of the enemy or operating directly under enemy control, orders, charter, employment, or direction;
- On a voyage especially undertaken with a view to transport individual passengers who are embodied within the armed forces of the enemy (historically, this was an example of “unneutral service”—see Section 9.6.1);
- Carrying contraband (see Section 9.6.2);
- Presenting irregular or fraudulent documents, lacking necessary documents, or destroying, defacing, or concealing documents;
- Breaching or attempting to breach a blockade (see Section 7.4.7);
- Violating regulations established by a belligerent in the immediate area of naval operations (see Section 7.2.2);
- Communicating information in the interest of the enemy;

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610. ADDP 06.4 ¶¶ 6.57–6.59.

611. Paris Declaration of 1856, art. 2.

- Engaging in activity rendering it a military objective (see Chapter 8);  
or
- Such other violations as may from time to time be recognized in law.<sup>612</sup>

### 9.6.1 Unneutral Service

Traditionally, carriage of enemy troops or dispatches constituted “unneutral service” and rendered a neutral vessel subject to capture in prize. In some circumstances, the carriage of enemy troops, or the forwarding of enemy military communications, may render a neutral vessel or aircraft a lawful object of attack (see Chapter 8). However, reasonable suspicion that a vessel or aircraft is engaged in either act also justifies visit and search and, if proven, capture as prize.<sup>613</sup>

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612. For example, in the 1700s, some States recognized a rule known as the “Rule of 1756,” which prohibited engagement in a trade ordinarily forbidden to them. While generally considered a hangover from colonial times, the rule has occasionally resurfaced in a different form. For example, vessels engaged under the license of an enemy government, in a trade that the enemy State forbids to foreign vessels in time of peace, possess enemy character. JMSDF TEXTBOOK 172. In 1906, the Japanese Prize Court enforced the 1756 Rule against the American flag steamship *Montara*, which had been captured by the Japanese warship *Idzumi* in August 1905 during the Russo–Japanese War. The Kommandorski and other islands off Petro-Pavlovsk, Kamchatka Peninsula, where the *Montara* was trading, were formerly closed to foreign vessels. But on the outbreak of the Russo–Japanese War, the Russian government gave a license to two companies, permitting the vessels chartered by those companies to navigate to those districts, “because Russian vessels alone were not sufficient to carry provisions there.” The *Montara* sailed to the Kommandorski Islands and other places by virtue of this license. The Yokosuka Prize Court concluded that when a belligerent gave a license to certain ships for trade in a district closed to foreign vessels in time of peace, the other belligerent may confiscate such vessels, even of neutral ownership, voyaging under such license, as having the enemy character, and also the goods on board belonging to enemy persons. The Court also stated, “this is recognized by the precedents and theory of International Law.” SAKUYÉ TAKAHASHI, INTERNATIONAL LAW APPLIED TO THE RUSSO–JAPANESE WAR WITH THE DECISIONS OF THE JAPANESE PRIZE COURTS 633–38 (1908). See also *supra* note 721.

613. Tucker, *supra* note 59, at 318–31. Also, Article 1 of Hague XI states that neutral or belligerent postal correspondence is “inviolable.” Military communications are exempt from this rule.

## 9.6.2 Carriage of Contraband

There is no prohibition of the carriage of contraband, but it subjects a neutral vessel to the risk of visit and search, capture as prize, and attack (if the vessel constitutes a military objective).

### 9.6.2.1 Contraband Defined

Contraband is any item that may be of use to the enemy in waging war and which is ultimately destined for the enemy.<sup>614</sup> In principle, any goods can amount to contraband, unless they are goods serving a purely humanitarian function for victims of armed conflict.

The traditional distinction before World War II between absolute and conditional contraband is cited in some military manuals<sup>615</sup> but there is disagreement whether it is still in force. For some, absolute contraband need not be included in any list to count as such and may therefore be automatically captured and condemned as prize. For others, the distinction has become obsolete, and a belligerent should issue a list declaring which items constitute contraband (or, alternatively, which items will be considered “free goods”).<sup>616</sup> In any case, goods (of any sort) may be captured only where there is reasonable suspicion that they may be used to support the enemy’s war effort, and prize courts may only condemn such goods as lawful prize where that evidentiary burden (which may very well make use of classified intelligence) is met.

### 9.6.2.2 Contraband Lists

Because an item’s utility in any given armed conflict will depend on the circumstances of that conflict, as long ago as 1589 belligerent States began a practice of publishing lists of items they considered to be contraband and

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614. Belligerents publish contraband lists. The items on the list are not unlawful per se; rather, they become liable to capture if declared and onboard a vessel destined to the enemy. ADDP 06.4 ¶ 6.50; GERMAN MANUAL ¶ 1239.

615. *See* ADDP 06.4 ¶¶ 6.51–6.52; GERMAN MANUAL ¶ 1239.

616. DOD LAW OF WAR MANUAL § 15.12.1.1; NWP 1-14M § 7.4.1.1; JMSDF TEXT-BOOK 174.

liable to capture and condemnation.<sup>617</sup> Goods not included in the lists were considered “free” and could not be interfered with.<sup>618</sup> Listing, therefore, came to be a lawful requirement before items could be condemned as contraband.<sup>619</sup>

Some national manuals continue to reflect the requirement for notification of items that will be considered contraband in published lists.<sup>620</sup> One national manual observes the requirement for lists but takes the position that it can be satisfied by the publication of a list of what will be considered “free” goods.<sup>621</sup> The position of this Manual is that either approach is acceptable.

### 9.6.2.3 Free Goods

International law recognizes certain items, or free goods, that should never be included in a contraband list.<sup>622</sup> These include articles intended for the treatment of the sick and wounded, civilian bedding, essential foodstuffs and means of shelter, items for POWs, and other goods not susceptible for use in armed conflict.<sup>623</sup>

### 9.6.2.4 Enemy Destination

Contraband items may be seized in prize if their destination is into territory under the control of the enemy. They may also be seized if their “ultimate destination” is territory under the control of the enemy. This rule (known as the rule of “continuous voyage”) allows goods to be seized even where they are destined for a port that is not under enemy control, so long

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617. ADDP 06.4 ¶ 6.51. An early example was the war between the United Provinces and the Spanish Netherlands in 1589. It is described in R.G. Marsden, *Early Prize Jurisdiction and Prize Law: Part I*, 24 ENGLISH HISTORICAL REVIEW 675, 692 (1909).

618. Paris Declaration of 1856, art. 2.

619. London Declaration of 1909, arts. 22–25.

620. UK MANUAL ¶ 13.109; GERMAN COMMANDER’S HANDBOOK ¶ 260.

621. NWP 1-14M § 7.4.1. Gisha—Legal Center for Freedom of Movement, Partial List of Items Prohibited/Permitted into the Gaza Strip (May 2010), <https://gisha.org/UserFiles/File/HiddenMessages/ItemsGazaStrip060510.pdf>.

622. See, e.g., London Declaration of 1909, arts. 28–29; James Brown Scott, *The Declaration of London of February 26, 1909*, 8 AMERICAN JOURNAL OF INTERNATIONAL LAW 274, 311–12 (1914).

623. ADDP 06.4 ¶ 6.53; GERMAN COMMANDER’S HANDBOOK ¶ 261; Japan, Rules of Naval War (1914), art. 57; UK MANUAL ¶ 13.110; NWP 1-14M § 7.4.1.1.

as it may be established that they are ultimately destined for territory under the control of the enemy.<sup>624</sup>

#### 9.6.2.5 Navigation Certificates (Navicerts)

As a matter of long-standing State practice reflected in national manuals, the law of contraband may be enforced through a system of navigation certificates issued in port rather than by visit and search operations carried out at sea. A navigation certificate may be awarded by a belligerent government inspector to a neutral vessel before it sails from a neutral port, guaranteeing that its cargo is free from contraband and safeguarding it from interdiction. Such a certificate is *prima facie* evidence of a lack of contraband; however, all vessels, whether carrying navigation certificates or not, may still be visited and searched where there is reasonable suspicion.

Compliance with a navigation certificate system is not a breach of neutrality by either the neutral State from which the vessel sailed or the flag-State of the neutral vessel (if different).<sup>625</sup>

### 9.7 Neutral Merchant Vessels and Civil Aircraft Exempt from Visit and Search

#### 9.7.1 Neutral Merchant Vessels Under Neutral Convoy of the Same Nationality

In addition to the general prohibition on interfering with neutral trade, neutral merchant vessels are exempt from visit and search if the following conditions are satisfied: (1) the vessel is bound for a neutral port under the convoy of an accompanying neutral warship of the same nationality; (2) the accompanying warship warrants that the vessel is carrying no contraband; and (3) the convoy commander provides such information about the vessel as would otherwise have been obtained through visit and search.<sup>626</sup>

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624. *See* *The Jesus* (1756) Burrell 165 (English prize court); *The Louisiana* [1918] AC 461, 470 (PC) (Lord Parker of Waddington); *The Flying Trader*, 17 INTERNATIONAL LAW REPORTS 440, 442 (Prize Court of Alexandria 1956) (Egypt).

625. NWP 1-14M § 7.4.2; GERMAN COMMANDER'S HANDBOOK ¶ 263.

626. NWP 1-14M § 7.6; UK MANUAL ¶ 13.93; JMSDF TEXTBOOK 167–68.

### 9.7.2 Neutral Civil Aircraft Under Escort of an Accompanying Neutral Military Aircraft or Warship

Analogous to the position in respect of merchant vessels under neutral convoy, neutral civil aircraft that are escorted by a neutral military aircraft or neutral warship are exempt from visit and search if (1) they are bound for a neutral airfield; (2) the accompanying military aircraft or warship warrants that the aircraft is not carrying contraband; and (3) the convoy commander provides such information about the aircraft as would otherwise have been obtained through visit and search.

### 9.8 Neutral Warships, Other State Vessels, and State Aircraft

Neutral warships, auxiliaries, and State aircraft enjoy sovereign immunity and are exempt from capture as prize and may not be subject to visit and search. Neutral vessels engaged in government noncommercial service are also exempt from capture as prize and may not be subject to visit and search.

### 9.9 The Belligerent Right of Visit and Search

Visit and search is an important means by which a belligerent warship or military aircraft may determine the true character (enemy or neutral—see Section 9.3) of merchant ships encountered outside neutral waters.<sup>627</sup> It may also be used to verify the nature of their cargo, the manner of their employment, and other facts bearing on their relationship, if any, to the armed conflict. Belligerents are always entitled to visit and search neutral merchant vessels and civil aircraft. The right of belligerents to visit and search is a time-honored exception to the right of freedom of the seas. Given operational constraints, however, visit and search of neutral merchant vessels and civil aircraft usually occurs if there is suspicion that they are engaged in an activity rendering them liable to capture (see Section 9.6).<sup>628</sup>

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627. UK MANUAL ¶¶ 13.91–13.94; Japan, Rules of Naval War (1914), arts. 1, 136; JAPANESE LAW OF WAR MANUAL 262; JMSDF TEXTBOOK 164.

628. The belligerent right of visit and search may be exercised anywhere outside of neutral jurisdiction upon all merchant vessels and aircraft to determine 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. ADDP 06.4 ¶¶ 6.46–6.47; NWIP 10-2 § 502; NWP 1-14M §§ 7.4, 7.6. Contrary to paragraph 118 of the *San Remo Manual*, State practice suggests that there is no threshold standard of reasonable suspicion before a belligerent can exercise the right of visit and search of a neutral vessel or aircraft.

In the absence of special instructions, the belligerent right of visit and search should be conducted in accordance with the following procedures:

- Before requiring a vessel to submit to a visit and search, the belligerent warship should hoist its own colors, if not already aloft.
- The contact vessel, if neutral, is bound to stop and display its own colors.
- If the contact vessel fails to stop, it may be pursued, and force may be used to compel it to stop. Where a vessel actively resists visit and search, it may render itself a lawful military objective and, therefore, a target for attack (see Section 9.11 and Section 8.5).
- Merchant vessels may be diverted to a belligerent controlled port for the exercise of visit and search, where visit and search at sea is impossible or unsafe. Civilian aircraft may be diverted to a belligerent controlled airfield so that visit and search might be effected.
- As an alternative to visit and search, merchant vessels reasonably suspected of liability to capture may be ordered to proceed on a particular course or to a particular port or area (see Section 9.10).

### 9.10 Diversion

A belligerent might wish to divert a merchant vessel from its course for two purposes. First, diversion might be a measure employed to prevent the neutral vessel from committing some unneutral act, for example, breaching a blockade. This is a “simple diversion.” Second, it might be diverted so that visit and search might be carried out in one of the captor’s ports, an allied port, or any other area outside neutral waters.

As to simple diversion, some national manuals recognize the right to divert a neutral merchant vessel from its declared destination.<sup>629</sup> The rule eliminates the need for a time-consuming and potentially hazardous visit and search operation. The consent of the neutral vessel is not required.<sup>630</sup>

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629. ADDP 06.4 ¶ 6.47 (no consent); GERMAN MANUAL ¶ 1234 (no consent required); NWP 1-14M § 7.6.1.5 (no consent).

630. To the extent that paragraph 119 of the *San Remo Manual* requires the consent of the neutral vessel before it can be diverted, it is not reflective of State practice.



Diversion to facilitate visit and search was heavily employed during World Wars I and II. Visit and search had by then become more difficult at sea for practical reasons: the increase in the size of merchant vessels, neutral shippers' ability to hide contraband items among other cargo, and the risk of submarine attack borne by a stationary warship undertaking visit and search. These difficulties persist to this day, and so it remains open to a belligerent commander to divert a neutral merchant vessel to a place where it is safe for an effective visit and search to be conducted.

### 9.11 Active Resistance

Enemy merchant vessels are not legally obliged to comply with orders, including diversion or stop for visit and search by belligerent warships. However, they refuse to comply at their own risk. Neutral merchant vessels are so obliged. Failure to do so may entitle the belligerent warship commander to consider whether the vessel is actively resisting capture.

If an enemy merchant vessel refuses to comply with an order to stop or divert, or if a neutral merchant vessel actively resists capture, it may be warned that it might be attacked if it persists.<sup>631</sup> "Active" (as opposed to passive) resistance is a question of fact in each circumstance.

In the context of blockade enforcement, for instance, attempting to flee without persisting in breaching the blockade is not sufficient to render resistance "active." Firing upon the blockade force or continuing to attempt to breach the blockade meets the threshold.

More broadly, attempting to ram an enforcing belligerent warship qualifies as active resistance, as was the case in World War II when the British government instructed its merchant ships to resist boardings and attempt to ram German U-boats.<sup>632</sup>

Attacks on vessels that actively resist enforcement measures must comply with the rules on targeting set out in Chapter 8.

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631. ADDP 06.4 ¶ 6.39; NWP 1-14M § 7.10; UK MANUAL ¶¶ 13.41 (enemy merchant vessels), 13.47 (neutral merchant vessels); JMSDF TEXTBOOK 134, 138–39.

632. 1 TRIALS OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 312–13 (1947); W.J. Fenrick, *The Exclusion Zone Device in the Law of Naval Warfare*, 24 CANADIAN YEARBOOK OF INTERNATIONAL LAW 91, 102 (1987).

### 9.12 Capture as Prize

Once a commander has concluded, following visit and search, that a vessel may be captured as prize, then it must be transferred to a port under the belligerent State's control for adjudication. This usually requires the appointing of a prize crew from within the capturing warship's own crew.

### 9.13 Destruction of Prizes After Capture

Condemnation as prize is onerous and time-consuming. Accordingly, when military circumstances preclude taking captured enemy vessels or aircraft to adjudication, they may be destroyed, but only after the passengers, crew, and ships' papers are first located to a place of safety.<sup>633</sup>

Most States apply this rule equally to neutral prizes. However, the United Kingdom, seemingly uniquely, takes the view that the destruction of a neutral prize after capture is not permissible and, where taking it for adjudication as prize is not possible or practicable, then it must be released.<sup>634</sup>

### 9.14 Prize Courts and Adjudication

Where vessels, aircraft, or cargo are captured and the captor wishes to condemn it, a condemnation proceeding before a prize court is required (see Section 9.1). The primary function of prize courts is to determine whether,

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633. London Protocol of 1936, r. 2: "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." The 1936 Protocol emerged from the 1922 Treaty Relating to the Use of Submarines and Noxious Gases in Warfare, Feb. 6, 1922, 25 L.N.T.S. 202 and the 1930 Treaty for the Limitation and Reduction of Naval Armament, Apr. 22, 1930, 112 L.N.T.S. 65. The 1930 treaty expired in 1936, with the exception of its Article 23, which eventually became the London Protocol of 1936.

The argument of the Defense is that the security of the submarine is, as the first rule of the sea, paramount to rescue, and that the development of aircraft made rescue impossible. This may be so, but the Protocol is explicit. If the commander cannot rescue, then under its terms he cannot sink a merchant vessel and should allow it to pass harmless before his periscope. These orders, then, prove Dönitz is guilty of a violation of the Protocol.

1 TRIALS OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 312–13 (1947).

634. *The Felicity* (1819) 2 Dods. 381; 165 ER 1520. *See also* UK MANUAL ¶ 13.103.

at the time of capture, there were reasonable grounds to believe that the vessel was engaged in behavior that renders it liable to capture<sup>635</sup> and whether this belief was subsequently proven to be correct.<sup>636</sup>

Once a prize court approves condemnation, the condemned vessel, aircraft, or cargo transfer with clean title.<sup>637</sup> Consequently, the belligerent captor cannot recognize a mortgage or lien that third parties allege to have on the captured property.<sup>638</sup>

Few conflicts have required the establishment or use of prize courts since 1971. The Israeli court has exercised its jurisdiction in prize in four cases. In all those cases, the State of Israel requested the condemnation as prize of a neutral vessel attempting to breach the naval blockade imposed in 2009 on the Gaza Strip (up to a distance of 20 nautical miles from the coast).<sup>639</sup> The English High Court also maintains jurisdiction in prize.<sup>640</sup>

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635. For situations in which neutral merchant vessels may be captured, see art. 20 of the 1909 London Declaration, 3 AMERICAN JOURNAL OF INTERNATIONAL LAW SUPPLEMENT OFFICIAL DOCUMENTS 179, 195 (July 1909). An attempt to breach the blockade occurs as soon as the vessel sets sail with the intention of breaching the blockade. *See* NWP 1-14M § 7.7.4.

636. Yoram Dinstein, *The Laws of War at Sea*, 10 ISRAEL YEARBOOK ON HUMAN RIGHTS 38, 42 (1980). Capture may be lawful even if a prize court later decides that there are no grounds under international law for condemning a vessel. Heinegg, *supra* note 591, at 316 (“the legality of capture of neutral merchant vessels is not dependent upon later condemnation by a prize court. It suffices if the captor can establish that ‘at the moment of seizure circumstances were such as to warrant suspicion of enemy character, whether of vessel or of cargo, or of the performance of acts held to constitute contraband carriage, blockade breach, or unneutral service’”).

637. *See* Roni Katzir & Steve Fikhman, *Prize Law and the Unique Nature of the Law of Naval Warfare: Comments on Recent Israeli Jurisprudence*, 52 ISRAEL YEARBOOK ON HUMAN RIGHTS 197, 213–15 (2022).

638. C. JOHN COLOMBOS, A TREATISE ON THE LAW OF PRIZE 96 (3rd ed. 1949).

639. For a summary of the Israeli naval Prize Court’s previous judgments, see Shamir-Borer, *supra* note 591; Katzir & Fikhman, *supra* note 637; Jeff Lahav, *Summary of Recent Cases of the Courts of Israel Relating to Prize Law and Israel’s Naval Blockade of the Gaza Strip*, 50 ISRAEL YEARBOOK ON HUMAN RIGHTS 373, 376ff. (2020); Jeff Lahav, *Judicial Summary, In the Matter of the Ship Freedom and the Ship Kaarstein Case Nos. 26933-08-18 and 26966-08-18, The Maritime Court in Haifa (decided September 30, 2021)*, 52 ISRAEL YEARBOOK ON HUMAN RIGHTS 419 (2022).

640. Senior Courts Act 1981 (U.K.) §§ 27, 62(2), which direct that prize proceedings are to be heard in the Admiralty Court. Section 16(2) of the same Act provides that appeals from decisions of the High Court in prize shall be to His Majesty in Council in accordance with the Prize Acts 1864 to 1944. In Japan, the Restriction of Maritime Transportation Act

### 9.15 Crews and Passengers of Merchant Vessels

Regarding the status of crews and passengers of enemy merchant vessels and neutral merchant vessels, see Sections 3.9.2.1 and 3.9.3.1.

### 9.16 Unmanned Merchant Vessels

The employment of unmanned vessels (whether autonomous or otherwise) will influence the way that prize law is given effect in several ways:

- Visit and search may not be optimal for determining the neutral character of a ship or its cargo. Without a crew to respond to and engage with the enforcing commander, a different means of “fact finding” may be required.
- Enforcing compliance measures against unmanned ships may be either easier or more difficult, depending on the configuration of the ship. For example, physically capturing an unmanned prize and then conveying it to a port under the belligerent’s control may depend on whether the vessel is constructed for manned operations or can be otherwise controlled.
- Determining when an unmanned vessel is “actively resisting” enforcement measures may be similarly difficult.

Reliance on “navicert” regimes (see Section 9.6.2.5) is likely to be an even more important part of the enforcement framework in the context of unmanned vessels than it has already become in the context of manned vessels. Communication between the belligerent commander (or higher headquarters) and the vessel’s owner or operator ashore is likely to be a better means to obtain the information that would otherwise be obtained through visit and search, and to effect diversion or capture.

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(2004) provides for the ad hoc establishment of prize courts under the Ministry of Defense (arts. 1, 7).

**CHAPTER 10**

**PROTECTED VESSELS, AIRCRAFT, AND PERSONS AT SEA**

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### 10.1 The Second Geneva Convention

This chapter focuses on protected vessels, persons, and aircraft at sea. First, it looks at the obligations under the Second Geneva Convention (GC II) and then the applicability of conventions under the auspices of the International Maritime Organization (IMO) and other treaties, including the United Nations Convention on the Law of the Sea (UNCLOS). Then, it turns to the rules applicable to specially protected vessels, such as hospital ships, and specially protected aircraft and persons at sea.

GC II sets forth a legal framework for the humane treatment and protection of victims of armed conflict at sea. The Convention requires parties to the conflict to, *inter alia*, respect and protect individuals falling within the scope of the Convention “who are at sea and who are wounded, sick or shipwrecked.”<sup>641</sup> Parties to a conflict are thus required, after each engagement and without delay, to “take all possible measures to search for and

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641. GC II, arts. 12–13.

collect the shipwrecked, wounded and sick,” without discriminating between their own and enemy personnel.<sup>642</sup>

If a belligerent does not have the capability or capacity to conduct search and rescue operations after an engagement, Article 21 of GC II states that it may appeal “to the charity of commanders of neutral merchant vessels, yachts or other craft, to take on board and care for wounded, sick or shipwrecked persons, and to collect the dead.”<sup>643</sup> Under GC II, there is no obligation, however, on the part of a neutral vessel to provide the requested assistance. The International Committee of the Red Cross (ICRC) takes the position that Article 21 is not a “discretionary” function.<sup>644</sup> The plain language of Article 21—“may appeal”—does not support this conclusion. Nonetheless, there are several treaties that impose an obligation on States (*sua sponte*, or upon request) to require masters of the ships flying their flag to come to the assistance of persons in danger of being lost at sea. To the extent that these treaties are not terminated or suspended during armed conflict by their terms or the doctrine of *lex specialis*, they remain in effect during an armed conflict and may impose obligations on the belligerents and neutral States alike to assist persons in danger of being lost at sea.

## 10.2 Other International Treaties

Customary international law recognizes the affirmative obligation of mariners 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.<sup>645</sup> This long-standing custom is codified in several treaties adopted under the

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642. *Id.* art. 18; ICRC, COMMENTARY ON THE SECOND GENEVA CONVENTION: CONVENTION (II) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA ¶ 1618 (2017), <https://ihl-databases.icrc.org/en/ihl-treaties/gcii-1949/article-18/commentary/2017?activeTab=undefined> [hereinafter 2017 GC II COMMENTARY]; Hague X, art. 16.

643. GC II, art. 21; AP I, art. 17; Hague X, art. 9.

644. In circumstances where it is not feasible for a belligerent warship to conduct a search and rescue operation, the ICRC believes that the parties to the conflict may be legally bound to notify nearby neutral coastal authorities, humanitarian organizations, or “vessels in the vicinity that there are shipwrecked, wounded, sick or dead in need of rescue or recovery, and appeal to their charity to take them on board and care for them.” 2017 GC II COMMENTARY, *supra* note 642, ¶ 1637.

645. NWP 1-14M § 3.2.1; GERMAN COMMANDER’S HANDBOOK; Japan, Mariners Act (1947), art. 14.

auspices of the IMO, as well as the 1958 Geneva Convention on the High Seas<sup>646</sup> and the 1982 UNCLOS.<sup>647</sup>

Nothing in the law of armed conflict (LOAC) precludes neutrals from providing such assistance. Additional Protocol I (AP I) specifically authorizes the civilian population and aid societies, even on their own initiative, “to collect and care for the wounded, sick and shipwrecked, even in invaded or occupied areas,” which suggests that the customary duty to render assistance remains in force during an armed conflict.<sup>648</sup>

Although the duty to render assistance codified in the following international treaties applies only to merchant ships and other civilian vessels,<sup>649</sup> some States, including Japan and the United States, impose a similar obligation on their warships.<sup>650</sup> In the case of the U.S. Coast Guard, the duty to render assistance applies only to “vessels or aircraft [and seamen or airmen]

646. High Seas Convention, art. 12.

647. UNCLOS, art. 98.

648. AP I, art. 17.

649. The obligation to render assistance to those in distress at sea under Article 98 of UNCLOS, according to its wording, only applies to masters of merchant vessels, not to commanders of warships and other State ships. However, naval commanders are obliged to render assistance under either applicable domestic law or customary international law.

650. Japan, JMSDF Regulations for Officers and Crews of Warships art. 102; U.S. Department of the Navy, U.S. Navy Regulations, art. 0925 (1990) (“Insofar as can be done without serious danger to the ship or crew, the commanding officer or the senior officer present . . . shall: a. proceed with all possible speed to the rescue of 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; c. afford all reasonable assistance to distressed ships and aircraft; and d. render assistance to the other ship, after a collision, to her crew and passengers and, where possible, inform the other ship of his or her identity.”); Commandant, U.S. Coast Guard, COMDTINST M5000.3B, United States Coast Guard Regulations § 4-1-7B (1992) [hereinafter COMDTINST M5000.3B] (“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.” § 4-2-5A. 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 within the range of operation.” § 4-2-5B. 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.” § 4-2-5C. When rendering assistance, “the commanding officer shall use sound discretion and shall not unnecessarily jeopardize the vessel or the lives of the personnel assigned to it.”).



of a foreign state at peace with the United States.”<sup>651</sup> Thus, if the United States is a neutral during an international armed conflict (IAC), Coast Guard ships can provide assistance to any of the belligerents, as well as to other neutral nations.

### 10.2.1 IMO Treaties

The duty to render assistance appears in several IMO treaties, including (1) the 1974 Safety of Life at Sea Convention (SOLAS);<sup>652</sup> (2) the 1979 Search and Rescue (SAR) Convention;<sup>653</sup> and (3) the 1989 Salvage Convention.<sup>654</sup>

#### 10.2.1.1 Safety of Life at Sea Convention (SOLAS)

Chapter V of SOLAS requires States to ensure that necessary arrangements are in place “for the rescue of persons in distress at sea around its coasts.”<sup>655</sup> Additionally, masters of ships at sea, which are in a position to provide assistance, upon receiving a signal from any source that persons are in distress at sea, shall “proceed with all speed to their assistance,” except when the “ship receiving the distress alert is unable or . . . considers it unreasonable or unnecessary to proceed to their assistance.”<sup>656</sup> The relevant search and rescue service may also requisition ships to render assistance, and the masters of the ships requisitioned have a duty to comply with the request.<sup>657</sup> Warships, naval auxiliaries, and other government-owned or operated noncommercial ships are exempt from compliance with Chapter V of SOLAS, but “are encouraged to act in a manner consistent, so far as reasonable and practicable, with . . . chapter [V].”<sup>658</sup>

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651. COMDTINST M5000.3B, *supra* note 650, §§ 4-2-5D, 4-2-5F.

652. International Convention for the Safety of Life at Sea (SOLAS), 1974, Nov. 1, 1974, 32 U.S.T. 47, 1184 U.N.T.S. 277 (as amended).

653. International Convention on Maritime Search and Rescue (SAR Convention), 1979 (with annex), April 27, 1979, T.I.A.S. No. 11,093, 1405 U.N.T.S. 119.

654. International Convention on Salvage, Apr. 28, 1989, 1953 U.N.T.S. 165 [hereinafter 1989 Salvage Convention].

655. SOLAS, annex, ch. V, reg. 7.

656. *Id.* annex, ch. V, reg. 33, ¶ 1.

657. *Id.* annex, ch. V, reg. 33, ¶ 2.

658. *Id.* annex, ch. V, reg. 1, ¶ 1.

### 10.2.1.2 Search and Rescue (SAR) Convention

The SAR Convention similarly requires States to establish and provide “adequate search and rescue services for persons in distress at sea round their coasts.”<sup>659</sup> Any unit receiving information of a distress situation shall take “immediate action to assist as is within its capability or shall alert other units which might be able to assist.”<sup>660</sup> The convention further encourages States to provide assistance, when requested, in the form of vessels, aircraft, personnel, or equipment.<sup>661</sup> Such assistance shall be provided “regardless of the nationality or status of such a person or the circumstances in which that person is found,”<sup>662</sup> which suggests that the obligation applies in times of peace, as well as during an armed conflict at sea.

### 10.2.1.3 1989 Salvage Convention

The 1989 Salvage Convention imposes a duty on every master, “so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea.”<sup>663</sup> The convention does not apply to warships and other government-owned or operated vessels unless the flag State decides otherwise.<sup>664</sup>

## 10.2.2 Other Treaties

The duty to render assistance first appeared in the 1910 Salvage Convention.<sup>665</sup> The obligation to render assistance is also imposed under the 1958 High Seas Convention, 1982 UNCLOS, and 1944 Chicago Convention.

### 10.2.2.1 1910 Salvage Convention

The 1910 Salvage Convention requires every master, “so far as he can do so without serious danger to his vessel, her crew and her passengers, to

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659. SAR Convention, annex ¶¶ 2.1.1, 2.1.9.

660. *Id.* annex, ch. 5, ¶ 5.9.1.

661. *Id.* annex, ch. 3, ¶ 3.1.7.

662. *Id.* annex, ch. 2, ¶ 2.1.10.

663. 1989 Salvage Convention, *supra* note 654, art. 10.

664. *Id.* art. 4.

665. 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.

render assistance to everybody, even though an enemy, found at sea in danger of being lost.”<sup>666</sup> The phrase “even though an enemy” confirms that the duty to render assistance applies in both peacetime and during an armed conflict.

#### 10.2.2.2 High Seas Convention

The High Seas Convention mandates that every State “require the master of a ship sailing under its flag, insofar 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;
- (b) To proceed with all possible speed to the rescue of persons in distress if informed of their need of assistance, insofar as such action may reasonably be expected of him.<sup>667</sup>

#### 10.2.2.3 United Nations Convention on the Law of the Sea (UNCLOS)

UNCLOS imposes a similar obligation. “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;
- (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him.<sup>668</sup>

UNCLOS further clarifies that nothing in the convention alters the rights and obligations of States that arise from other agreements that are compatible with UNCLOS and do not affect the enjoyment by other States of their rights or performance of their obligations under UNCLOS.<sup>669</sup> The duty to search for casualties after an engagement imposed by Article 18 of GC II is consistent with the duty to render assistance under Article 98.

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<sup>666</sup> *Id.* art. 11.

<sup>667</sup> High Seas Convention, art. 12.

<sup>668</sup> UNCLOS, art. 98.

<sup>669</sup> *Id.* art. 311.

#### 10.2.2.4 1944 Chicago Convention

The Chicago Convention requires States to devote aviation assets to provide prompt search and rescue services. Annex 12 to the convention requires States to, *inter alia*, “arrange for the establishment and prompt provision of search and rescue services within their territories to ensure that assistance is rendered to persons in distress.”<sup>670</sup> This assistance shall be provided to persons in distress regardless of their nationality or status, or the circumstances in which they are found, which suggests that the obligations of the Chicago Convention remain in force during an armed conflict.<sup>671</sup>

### 10.3 Applicability of Other Treaties During International Armed Conflict

Treaties “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>672</sup> A treaty may only be terminated or suspended by application of its provisions, the doctrine of *lex specialis*, or the Vienna Convention on the Law of Treaties (VCLT).<sup>673</sup> None of the treaties imposing the duty to render assistance contain an express provision providing for their suspension or termination during an armed conflict. An interpretation that these treaties automatically terminate or are suspended at the outbreak of an armed conflict would therefore be “manifestly absurd or unreasonable.”<sup>674</sup>

It is generally agreed that “[t]he existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties” as between States party to the conflict or as between a State party to the conflict and a State that is not.<sup>675</sup> Thus, an armed conflict may affect the obligations of parties to

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670. Chicago Convention, annex 12 (Search and Rescue), ch. 2, ¶ 2.1.1.

671. *Id.* ¶ 2.1.2.

672. VCLT, art. 31(1).

673. *Id.* art. 42(2); Draft Articles on the Effects of Armed Conflicts on Treaties, with Commentaries art. 4; International Law Commission, Report on the Work of Its Sixty-Third Session, U.N. Doc. A/66/10 (2011), reprinted in [2011] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION [hereinafter Draft ILC Articles]; Institute of International Law, The Effects of Armed Conflicts on Treaties arts. 3, 4 (Aug. 28, 1985).

674. VCLT, art. 32; Draft ILC Articles, *supra* note 673, art. 5.

675. Draft ILC Articles, *supra* note 673, art. 3; 2017 GC II COMMENTARY, *supra* note 642, ¶ 40; OPPENHEIM, *supra* note 60 at 302; Institute of International Law, *supra* note 673,

a preexisting treaty in different ways, depending on whether they are a belligerent State or a neutral State.<sup>676</sup>

Even if one or all these other treaties were to terminate or be suspended at the outbreak of hostilities, that would not relieve a belligerent or neutral State of its duty to fulfill an obligation embodied in the treaty that it would be subject to under international law independently of the treaty.<sup>677</sup> The duty to render assistance to persons in distress at sea is a customary norm of international law that remains in force during an armed conflict, subject to *lex specialis* considerations pertaining to the parties to the conflict.

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arts. 2, 5; *Society for the Propagation of the Gospel v. Town of New Haven*, 21 U.S. (8 Wheat.) 464, 494–95 (1823); *Karnuth v. United States*, 279 U.S. 231, 236–37 (1929); *Techt v. Hughes*, 229 N.Y. 222, 240–43 (1920); *Clark v. Allen*, 331 U.S. 503, 508–9 (1947).

676. Letter from Ernest A. Gross, Legal Adviser, U.S. Department of State, to Richard Rank (Jan. 29, 1948), in Richard Rank, *Modern War and the Validity of Treaties*, 38 CORNELL LAW REVIEW 321, 343–44 (1953), reprinted in Draft ILC Articles, *supra* note 673, cmt. to annex, ¶ 17, at 202–3 (“non-political multilateral treaties to which the United States was a party when the United States became a belligerent in the war, and which . . . [the United States] has not since denounced in accordance with the terms thereof, are still in force in respect of the United States and that the existence of a state of war between some of the parties to such treaties did not *ipso facto* abrogate them, although it is realized that, as a practical matter, certain of the provisions might have been inoperative. The view of this Government is that the effect of the war on such treaties was only to terminate or suspend their execution as between opposing belligerents, and that, in the absence of special reasons for a contrary view, they remained in force between co-belligerents, between belligerents and neutral parties, and between neutral parties.”); Letter from J. Mervyn Jones, British Foreign Office, to Richard Rank (Jan. 7, 1948), in Rank, *supra*, at 346–47, reprinted in Draft ILC Articles, *supra* note 673, cmt. to annex, ¶ 18, at 203 (“It is not the view of His Majesty’s Government that multilateral conventions *ipso facto* should lapse with the outbreak of war, and this is particularly true in the case of conventions to which neutral Powers are parties. . . . Indeed, the true legal doctrine would appear to be that it is only the suspension of normal peaceful relations between belligerents which renders impossible the fulfilment of multilateral conventions in so far as concerns them, and operates as a temporary suspension as between the belligerents of such conventions. . . . As regards multilateral conventions to which only the belligerents are parties, if these are of a non-political and technical nature, the view upon which His Majesty’s Government would probably act is that they would be suspended during the war, but would thereafter revive automatically unless specifically terminated.”).

677. VCLT, art. 43; Draft ILC Articles, *supra* note 673, art. 10; *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Jurisdiction of the Court and Admissibility of the Application, Judgment, 1984 I.C.J. 392, ¶ 73 (Nov. 26).

GC II is viewed as *lex specialis* in relation to treaties that provide peacetime norms concerning the same subjects.<sup>678</sup> Thus, as between opposing belligerents, GC II would be viewed as *lex specialis* in relation to the duty to render assistance to persons in distress at sea contained in the various peacetime maritime treaties, regardless of the proximity to the battlefield.<sup>679</sup> Nonetheless, consistent with the principle of *pacta sunt servanda* (“agreements must be kept”),<sup>680</sup> the obligation to render assistance would remain in force between neutrals and between belligerents and neutrals.

Thus, the peacetime duty to render assistance to mariners in distress at sea remains in effect during an armed conflict as a treaty obligation and/or as a matter of customary international law in the following circumstances: (1) neutral parties must render assistance to other neutral parties; (2) neutral parties must render assistance to belligerents upon request or *sua sponte*; and (3) belligerent parties must render assistance to neutral parties; the obligation is suspended, however, as between the belligerents during the armed conflict. Nonetheless, GC II requires the parties to the conflict to take all possible measures to search for and collect the shipwrecked, wounded, and sick without discriminating between their own and enemy personnel.

#### 10.4 Specially Protected Vessels

Under the law of naval warfare, the following vessels are specially protected because of the humanitarian functions they perform in times of armed conflict:

- Hospital ships;
- Coastal rescue craft; and
- Medical transports.

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678. DOD LAW OF WAR MANUAL § 1.3.2.

679. See COMDTINST M5000.3B, *supra* note 650, §§ 4-2-5D, 4-2-5F (The duty to render assistance only applies to “vessels or aircraft of a foreign state at peace with the United States.”). The GC II Commentary suggests that “the more a question is linked, or the closer it occurs to, actual hostilities,” the more GC II prevails. Thus, “situations far from the battlefield or not linked to actual hostilities may still be regulated by” the maritime treaties. While the ICRC position has some humanitarian appeal, it is not supported in law or by State practice. 2017 GC II COMMENTARY, *supra* note 642, ¶ 58.

680. VCLT, art. 26 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”).

The concept of “special protection” should be distinguished from “general protection” insofar as specially protected vessels may not be attacked or captured and they must be respected and protected—they must be allowed, subject to some limited exceptions, to perform their humanitarian functions. However, the protection to which specially protected vessels are entitled shall cease if they do not comply with the conditions of protection (see Section 10.4.1.6) or if they commit or are used to commit, outside their proper tasks, acts harmful to the enemy (see Section 10.4.1.5.3).<sup>681</sup>

Those specially protected vessels must be distinguished from enemy vessels protected from capture under the 1907 Hague XI, which are addressed in Chapter 9. Moreover, and against allegations to the contrary,<sup>682</sup> passenger liners do not belong to any of the categories of specially protected vessels.

Passenger liners qualify as merchant vessels as defined in Chapter 3. If they have enemy character, they are liable to capture irrespective of the presence of civilian passengers on board. The only legally relevant issue that may arise relates to a passenger liner qualifying as a lawful military objective by use. While it would then be liable to attack, some States are of the view that the civilian passengers on board specially protected vessels must be included in the collateral damage assessment.<sup>683</sup> The classification of these passengers depends on the circumstances of the situation.

## 10.4.1 Hospital Ships

### 10.4.1.1 Belligerent Military Hospital Ships

According to Article 22(1) of GC II, belligerent military hospital ships are surface ships “built or equipped . . . specially and solely with a view to

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681. Even though hospital ships, rescue craft, and medical transports are considered as engaged in “civil defence” and are therefore vessels specially protected from attack (and from capture as prize), the protection is not absolute. *See* AP I, arts. 61, 65(1).

682. *See* SAN REMO MANUAL ¶ 47(e).

683. NWP 1-14M § 8.6.3.2 (“Civilian passenger vessels at sea and civil airliners in flight are subject to capture but 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.”). *See also* Chapter 8.

assisting the wounded, sick and shipwrecked, to treating them and to transporting them.”<sup>684</sup> In order to qualify as “military” hospital ships, as distinguished from hospital ships of enemy or neutral Red Cross/Red Crescent Societies, they must be operated by, or be under the exclusive control of, the regular armed forces of a State party to the conflict. They qualify as warships (see Chapter 3) if they are under the command of a duly commissioned officer, or as auxiliaries (see Chapter 3) if they are under the command of a civilian master.<sup>685</sup>

For a ship to qualify as a military hospital ship, it must be either specially built or specially equipped to render assistance to victims of armed conflict at sea. Accordingly, the ship need not be especially designed for that function. According to Article 33 of GC II, it is permissible to convert a merchant vessel into a (military) hospital ship.<sup>686</sup>

The ship must be built or equipped such as to be in fact capable of rendering assistance to, treating, and transporting victims of armed conflict at sea. Whereas the law of naval warfare provides no detailed requirements for the construction or equipment, the ship must be so equipped as to be capable of providing medical care to the wounded, sick, and shipwrecked and of transporting them. It is not sufficient to be merely capable of conducting rescue operations.<sup>687</sup>

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684. Whereas submarines qualify as “ships,” they may not be used as hospital ships because they are difficult to identify and because they cannot be controlled and searched, as provided for under Article 31 of GC II.

685. The U.S. hospital ships USNS *Mercy* and USNS *Comfort* are auxiliaries because they are operated by the U.S. Military Sealift Command with a civilian master and crew. Their medical staffs are under the command of medical officers of the medical corps. See USNS *Mercy*, U.S. NAVY’S MILITARY SEALIFT COMMAND, <https://www.msc.usff.navy.mil/Ships/Mercy/>; USNS *Comfort*, U.S. NAVY’S MILITARY SEALIFT COMMAND, <https://www.msc.usff.navy.mil/Ships/Comfort/>. The same holds true for the Russian hospital ships *Iryysb*, *Svir*, and *Yebisev*. Although the Chinese *Peace Ark* operated by the People’s Liberation Army Navy is under the command of a duly commissioned officer and manned by a crew under regular armed forces discipline, the People’s Liberation Army Navy considers it to be an auxiliary.

686. The USNS *Mercy* and the USNS *Comfort* are converted former merchant vessels. They both were originally built as oil tankers, the SS *Worth* and the SS *Rose City*, and were commissioned as hospital ships in 1986 and 1987, respectively.

687. 2-A FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 202 (1949).



The term “solely” in Article 22 means that a hospital ship may not be built or equipped to serve any other purpose than the humanitarian purpose of assisting, treating, and transporting the wounded, sick, or shipwrecked (for further conditions of protection, see Section 10.4.1.5).

Practically, such capability requires that the ship have a minimum size. However, according to Article 26 of GC II, the protection afforded under Article 22 of GC II “shall apply to hospital ships of any tonnage.” The parties to the conflict shall, however, “endeavour to utilize, for the transport of wounded, sick and shipwrecked over long distances and on the high seas, only hospital ships of over 2,000 tons gross.” Accordingly, ships of less than 2,000 tons gross<sup>688</sup> may qualify as protected military hospital ships.<sup>689</sup> However, if such ships are used not only to transport, but also to treat the wounded, sick, and shipwrecked and to “ensure the maximum comfort and security,”<sup>690</sup> they must have sufficient space for the necessary medical equipment and the patients. Accordingly, the parties to the conflict should comply with the recommendation of Article 26 of GC II, if feasible.<sup>691</sup>

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688. Whereas warships are usually measured using “displacement tonnage,” Article 26 of GC II refers to the measurement applied to merchant vessels, that is, to “registered tons gross,” which is synonymous with “tons gross.” According to the 1969 International Convention on Tonnage Measurement of Ships, the size of ships is measured by “gross register tonnage” (GRT).

689. The reason for the lack of a specific obligation to use ships only of over 2,000 tons gross is the inability of the delegations at Geneva to agree on a binding minimum tonnage. In particular, Scandinavian States wished to extend the protection to small hospital ships capable of navigating and operating in the shallow waters of the Baltic Sea. Other States, such as the United States and the United Kingdom, objected to an inclusion into the protection of ships of less than 2,000 or 3,000 tons gross because small (and fast) vessels were difficult to identify. For the discussion at Geneva, see 2-A FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 108–12 (1949).

690. GC II, art. 26.

691. See also the Report of Committee I of the 1949 Geneva Conference, according to which “it did not intend to limit the protection of hospital ships to those of any particular tonnage. It fully recognized that the visibility of ships of 2,000 tons gross and over was an important factor of security. It also agreed that vessels of this tonnage were the only ones capable of ensuring sufficient comfort for the wounded, sick and shipwrecked. The Committee therefore recommended the use of such vessels. But after taking into consideration the evidence that several nations would find it impossible to acquire ships of this size, it declined to specify a minimum tonnage.” 2-A FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 202 (1949).

#### 10.4.1.2 Hospital Ships Utilized by Red Cross/Red Crescent Societies of the Belligerents

Hospital ships “utilized by National Red Cross Societies, by officially recognized relief societies or by private persons shall have the same protection as military hospital ships.”<sup>692</sup> The protection also applies to hospital ships utilized by Red Crescent Societies. The ships utilized by other relief societies depend on the official recognition by the respective belligerent. Other than military hospital ships, private hospital ships must have been given an official commission by the belligerent they depend on and they “must be provided with certificates from the responsible authorities, stating that the vessels have been under their control while fitting out and on departure.”<sup>693</sup>

#### 10.4.1.3 Hospital Ships Utilized by Red Cross/Red Crescent Societies or by Private Persons of Neutral Countries

The protection of hospital ships utilized by Red Cross or Red Crescent Societies, officially recognized relief societies, or private persons of neutral countries requires that “they have placed themselves under the control of one of the Parties to the conflict, with the previous consent of their own governments and with the authorization of the Party to the conflict concerned.”<sup>694</sup>

#### 10.4.1.4 Scope of Protection of Hospital Ships and Their Personnel

Ships qualifying as hospital ships “may in no circumstances be attacked or captured, but shall at all times be respected and protected.”<sup>695</sup> The prohibition of attacks against hospital ships applies to all acts of violence—that is, acts designed to cause, or in fact resulting in, physical damage, destruction, injury, or death. Such acts need not be kinetic—that is, caused using conventional naval weapons—but also include cyber attacks that are designed

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692. GC II, art. 24.

693. *Id.* art. 24.

694. *Id.* art. 25.

695. *Id.* arts. 22, 24, 25; NWP 1-14M § 8.6.3.1; ADDP 06.4 ¶ 6.44; DANISH MANUAL ch. 14 § 4.5.2.2; JMSDF TEXTBOOK 144–45.

to result in the said effects.<sup>696</sup> Any physical damage caused to a hospital ship and its equipment is prohibited. However, the prohibition does not apply to damage inflicted unintentionally. Article 30(4) of GC II provides that hospital ships “during and after an engagement . . . act at their own risk.”

The prohibition of capture, which does not apply to temporary control and search according to Article 31(1) of GC II, covers all acts by which a belligerent acquires full and permanent control over the ship. Although military hospital ships qualify as either warships or auxiliaries, they may not be made booty of war.

Contrary to the wording of Article 22(1) of GC II—“in no circumstances”—the prohibitions of attack and capture are not absolute, because hospital ships not complying with the conditions of their protection lose their protected status and, thus, their protection from capture and attack. If they commit “acts harmful to the enemy,” they may become lawful targets (see Section 10.4.1.6).

The obligation of the parties to the conflict to “respect” and “protect” hospital ships “at all times” implies a negative obligation to refrain from any action interfering or preventing the exercise of their humanitarian functions (“respect”) and a positive obligation to defend them against attacks or interference by others, including non-State actors (“protect”). Those obligations apply “at all times,” that is, they do not depend on the presence of wounded, sick, and shipwrecked on board a hospital ship. As in the case of the prohibitions of attack and capture, the obligation to respect and protect no longer applies if a hospital ship no longer complies with the conditions of its protection or if it commits acts harmful to the enemy (see Section 10.4.1.6).

If a hospital ship is in a port that has fallen into the hands of the enemy, it must be authorized to leave the port.<sup>697</sup> If in a neutral port, military hospital ships are not classed as warships “as regards their stay.”<sup>698</sup> Accordingly, the 24-hour rule of Article 12 of the 1907 Hague XIII (see Chapter 11) does not apply even if the hospital ship qualifies as a warship.

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696. NWP 1-14M § 8.11.2. *But see* TALLINN MANUAL 2.0 r. 92, at 415: “A cyber attack is a cyber operation . . . that is reasonably expected to cause injury or death to persons or damage or destruction to objects.”

697. GC II, art. 29.

698. *Id.* art. 32.

During the wars and IACs of the past, (military) hospital ships were often used to perform, outside their humanitarian functions, various activities for military purposes.<sup>699</sup> The right of control and search under Article 31 of GC II is, therefore, a necessary corollary to their specially protected status. According to Article 31(1), belligerents are entitled to control and search enemy military hospital ships with a view to verifying whether they comply with the conditions of their protection. Under Article 31(2), they may also “put a commissioner temporarily on board whose sole task shall be to see that orders given . . . are carried out.” The commissioner may be a neutral national if the belligerents, “either unilaterally or by particular agreements,” so decide.<sup>700</sup> Belligerents “can refuse assistance” from military hospital ships, “order them off, make them take a certain course, control the use of their wireless and other means of communication, and even detain them for a period not exceeding seven days from the time of interception, if the gravity of the circumstances so requires.”<sup>701</sup> “[A]s far as possible, the Parties to the conflict shall enter in the log of the hospital ship, in a language he can understand, the orders they have given the captain of the vessel.”<sup>702</sup>

To be capable of performing their humanitarian functions, hospital ships are highly dependent on their personnel. Therefore, the “religious, medical and hospital personnel of hospital ships and their crews shall be respected and protected; they may not be captured during the time they are in the service of the hospital ship, whether or not there are wounded and sick on board.”<sup>703</sup>

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699. For the Russo–Japanese War, see SAKUYÉ TAKAHASHI, *INTERNATIONAL LAW APPLIED TO THE RUSSO–JAPANESE WAR WITH THE DECISIONS OF THE JAPANESE PRIZE COURTS* 620ff. (1908). For the abuse of military hospital ships during the two World Wars, see 1 JAMES WILFORD GARNER, *INTERNATIONAL LAW AND THE WORLD WAR*, 2444ff. (1920); OPPENHEIM, *supra* note 60, at 504–5; COLOMBOS, *supra* note 61, at 591–92; J.C. Mossop, *Hospital Ships in the Second World War*, 24 *BRITISH YEAR BOOK OF INTERNATIONAL LAW* 398 (1947).

700. GC II, art. 31(4).

701. *Id.* art. 31(1).

702. *Id.* art. 31(3).

703. *Id.* art. 36.

### 10.4.1.5 Conditions of Protection

#### 10.4.1.5.1 Hospital Ship Employment Notification

The protection of hospital ships, whether military or private, is dependent on the condition “that their names and descriptions have been notified to the Parties to the conflict ten days before those ships are employed.”<sup>704</sup> 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.”<sup>705</sup>

#### 10.4.1.5.2 Impartial Relief and Assistance

Hospital ships are required to “afford relief and assistance to the wounded, sick and shipwrecked without distinction of nationality.”<sup>706</sup> This obligation applies to the wounded, sick, and shipwrecked members of the regular armed forces (including militias and voluntary corps) of the belligerents and to the crews of enemy merchant vessels and civil aircraft. Regarding the latter, an important exception applies insofar as the crews and passengers of enemy merchant vessels that are to be destroyed as prize (see Chapter 9) are concerned. If the captor intends to destroy an enemy merchant vessel captured as prize (which must be distinguished from the sinking of an enemy merchant vessel qualifying as a lawful target) because it is impossible to bring the vessel to its own or an allied port, the captor is obliged to first place the “passengers, crew and ship’s papers in a place of safety.”<sup>707</sup> Accordingly, a hospital ship is allowed to render assistance to wounded and sick passengers and crew members of captured enemy merchant vessels, but “it does not

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704. *Id.* art. 22(1). According to Articles 24(1) and 25 of GC II, the notification requirement also applies to enemy and neutral private hospital ships. See ADDP 06.4 ¶ 6.72; GERMAN MANUAL ¶ 1065; NWP 1-14M § 8.6.3.1; JMSDF TEXTBOOK 144–45.

705. GC II, art. 22(2). During Operation Desert Shield, the employment of the USNS *Mery* was notified in accordance with these provisions. Communication to the Governments of the States Parties to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, Berne, p.o. 411.61.(4) (Jan. 29, 1991).

706. GC II, art. 30(1).

707. London Protocol of 1936, r. 2. For further details, see Chapter 9.

come within her functions to provide accommodation for uninjured passengers and crews taken from destroyed merchant vessels, thereby rendering valuable assistance to the warship from which they are received.”<sup>708</sup>

The masters and crews of neutral merchant vessels that have been attacked as military objectives (see Chapter 8) are not included in the categories of protected persons under GC II. Nevertheless, those persons will qualify as civilians. The presence of civilians on board a hospital ship does not deprive the ship of the protection under Articles 22, 24, or 25 of GC II.<sup>709</sup> Hospital ships of States party to AP I are explicitly allowed, under Article 22(1) of AP I, to render assistance to wounded, sick, and shipwrecked civilians “who do not belong to any of the categories mentioned in Article 13 of the Second Convention.” Finally, the transportation of civilians who are not wounded or sick or otherwise “in need of immediate medical assistance or care”<sup>710</sup> is not considered a humanitarian function that hospital ships are required and allowed to perform. Accordingly, the transportation of civilians trying to flee from an area of hostilities is not an authorized function of hospital ships. Such transports may, however, be undertaken by cartel vessels (see Chapter 9).

#### 10.4.1.5.3 No Use for Military Purposes

Belligerents are prohibited to use hospital ships “for any military purpose.”<sup>711</sup> This prohibition is not limited to the gathering of information, the carriage of dispatches, or the transportation of troops, arms, and munitions,<sup>712</sup> but applies to any use of a military nature or that is of military value, such as hydrographic surveys.

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708. A. Pearce Higgins, *Hospital Ships and the Carriage of Passengers and Crews of Destroyed Prizes*, 26 LAW QUARTERLY REVIEW 408, 414 (1910). See also COLOMBOS, *supra* note 61, at 591.

709. GC II, art. 35(4).

710. AP I, art. 8(a).

711. GC II, art. 30(2).

712. THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES: THE CONFERENCE OF 1899, at 36 (James B. Scott ed., 1920).

#### 10.4.1.5.4 No Hampering of the Movements of Combatants

The prohibition of hampering the movements of combatants only applies to intentional hampering.<sup>713</sup> The mere fact that the presence of a hospital ship causes a belligerent warship to change its course or to lower its speed is not sufficient.

#### 10.4.1.5.5 Compliance with Legitimate Orders

Hospital ships are obliged to comply with legitimate belligerent orders, military regulations, and measures. These include the rights under Article 31 of GC II (see Section 10.4.1.4—control, search, diversion, and exceptional detention) and the right, under Article 14 of GC II, to “demand that the wounded, sick or shipwrecked on board military hospital ships . . . shall be surrendered.”

#### 10.4.1.5.6 Marking with the Distinctive Emblem

Hospital ships shall be marked in accordance with Article 43 of GC II. “All exterior surfaces of hospital ships are painted white and the distinctive emblem of the Red Cross or Red Crescent [or Red Crystal] is displayed on the hull and on horizontal surfaces.”<sup>714</sup> Such marking, however, is not constitutive for the specially protected status of hospital ships. Its purpose is to facilitate their visual identification. Hospital ships may also make use of the distinctive signals provided for in Articles 6–12 of Annex I to AP I and in Article 1 of the Annex to Additional Protocol III (AP III) to the Geneva Conventions of 12 August 1949.<sup>715</sup>

#### 10.4.1.6 Loss of Protection

The loss of the protection hospital ships enjoy is not limited to the commitment, outside their humanitarian duties, of “acts harmful to the enemy,” as provided for in Article 34(1) of GC II. The conditions of protection under Articles 22, 24, 25, and 30 of GC II are constitutive for their special protection, not only from attack, but also from capture and for their entitlement to

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713. GC II, art. 30(3).

714. NWP 1-14M § 8.6.3.1.

715. AP I, annex I (1993); GERMAN MANUAL ¶¶ 1066, 1067; NWP 1-14M § 8.5.2; JMSDF TEXTBOOK 148–49.

be respected and protected. Although Article 30 of GC II does not explicitly provide, noncompliance with those conditions will result in the loss of special protection even if the respective conduct does not qualify as an act “harmful to the enemy.”<sup>716</sup> For instance, a hospital ship that, contrary to Article 30(1) of GC II, does not render assistance to the wounded, sick, and shipwrecked in an impartial manner will not become liable to attack, but it will lose its protection against capture and its entitlement to be respected and protected.

#### 10.4.1.6.1 Conditions Not Depriving Hospital Ships of Protection

The “following conditions shall not be considered as depriving hospital ships . . . of the protection due to them”:

- (1) The fact that the crews . . . are armed for the maintenance of order, for their own defence or that of the sick and wounded.
- (2) The presence on board of apparatus exclusively intended to facilitate navigation or communication.
- (3) The discovery on board . . . of portable arms and ammunition taken from the wounded, sick and shipwrecked and not yet handed to the proper service.
- (4) The fact that the humanitarian activities . . . extend to the care of wounded, sick or shipwrecked civilians.
- (5) The transport of equipment and of personnel intended exclusively for medical duties, over and above the normal requirements.<sup>717</sup>

#### 10.4.1.6.2 Acts Harmful to the Enemy

Hospital ships lose their protection if “they are used to commit, outside their humanitarian duties, acts harmful to the enemy.”<sup>718</sup> The concept of “acts harmful to the enemy” has not been defined either in GC II or in any other international agreement. The context with Articles 34(2) and 35 of GC II, however, implies that the concept is not limited to “attacks” as defined under the LOAC (see Chapter 8). Further guidance has been given by the ICRC, which has provided the following definition: “acts the purpose or effect of which is to harm the adverse party, by facilitating or impeding military

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716. See ADDP 06.4 ¶ 6.45; CANADIAN MANUAL ¶ 722; JMSDF TEXTBOOK 145–47.

717. GC II, art. 35.

718. *Id.* art. 34(1).



operations.”<sup>719</sup> Accordingly, any conduct designed or in fact resulting in a military advantage for the enemy, by either facilitating the enemy’s military operations or impeding the military operations of the other belligerent, will qualify as an act “harmful to the enemy.” Therefore, apart from the use of a secret code that will be dealt with below, acts harmful to the enemy include, but are not limited to:<sup>720</sup>

- Attacks against warships, military aircraft, merchant vessels, and civil aircraft;
- Minelaying and mine countermeasures;
- Integration into or assistance to the enemy’s military intelligence or command, control, and communication systems;
- Transportation of able-bodied enemy combatants and of weapons and munitions;
- Destruction and damage of, or interference with, submarine communication cables; and
- Visit, search, diversion, and capture.

#### 10.4.1.6.3 Contentious Issues

There is no general agreement on whether any of the following activities qualify as “acts harmful to the enemy.”

##### *Traveling Under Convoy of Enemy Warships*

The first relates to a hospital ship under convoy of an enemy warship, which may be indicative of the intention of the hospital ship not to submit to inspection and search according to Article 30(1) of GC II.<sup>721</sup> While traveling under convoy will result in a loss of protection from capture and of the entitlement to respect and protection, it is unsettled whether a refusal to

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719. See 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) [hereinafter 1960 GC II COMMENTARY].

720. CANADIAN MANUAL ¶¶ 722, 830; DANISH MANUAL ch. 14 § 4.5.2.2; GERMAN MANUAL ¶ 1074; NWP 1-14M § 8.6.3.1; JMSDF TEXTBOOK 145–47.

721. For merchant vessels traveling under convoy of an enemy warship, it is generally agreed that this is sufficient evidence of an intent to refuse to stop on being duly summoned or to render active resistance to visit and search. According to the London Protocol of 1936, such conduct renders the merchant vessel a lawful target. See also Chapter 8.

submit to inspection and search would qualify as an act harmful to the enemy. Moreover, it would be difficult to establish whether the hospital ship is in fact traveling under convoy or whether it is in the vicinity of the warship to perform its humanitarian functions.<sup>722</sup>

### *Arming of Hospital Ships*

The second relates to the arming of hospital ships. For a long time, the arming of hospital ships was considered incompatible with their humanitarian functions. Accordingly, the presence of weapons on board a hospital ship beyond small arms carried by the crew (Article 35(1) of GC II) or of “portable arms and ammunition taken from the wounded, sick and shipwrecked” (Article 35(2) of GC II) resulted in a loss of their protection.

During the 1990 Iraq–Kuwait conflict, the United Kingdom believed that it was impossible to preserve the protected status of hospital ships if they were equipped to effectively defend themselves against illegal attacks.<sup>723</sup> The only concession some were prepared to make is that hospital ships “may be equipped with purely deflective means of defense, such as chaff or flares.”<sup>724</sup> However, such “purely deflective means” are not sufficient for an effective defense against terrorist or suicide attacks or other illegal attacks. Therefore, during the 2003 Iraq War, the USNS *Comfort* was equipped with .30-caliber and .50-caliber machine guns to fend off attacks by swarming, heavily armed speed boats or suicide craft.<sup>725</sup> Since no State party to GC II protested those measures, it is safe to conclude that they have acquiesced in the U.S. practice. Accordingly, it is permissible to equip hospital ships with machine guns and other defensive weapons, if there are reasonable grounds

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722. See also 1960 GC II COMMENTARY, *supra* note 719, at 180.

723. Accordingly, the RFA *Argus*, which had been equipped with an air defense system, was not notified and employed as a hospital ship but as a “casualty receiving ship” that was also used for the transportation of military personnel. See David Foxwell & Rick Jolly, *The RFA Argus: A Gas-Tight, Floating Field Hospital*, 24 INTERNATIONAL DEFENCE REVIEW 116 (1991); Antoine Bouvier, *Fighting Hospital Ships*, 25 INTERNATIONAL DEFENCE REVIEW 246 (1992).

724. SAN REMO MANUAL ¶ 170. See also FRENCH MANUAL 43 (“Un navire hôpital ne doit pas être doté d’armements: il peut toutefois posséder des armes portatives d’auto défense.”).

725. Michael Sirak, *U.S. Navy Seeks to Revise Laws of War on Hospital Ships*, JANE’S DEFENCE WEEKLY, Aug. 19, 2003.

for assuming that, in the circumstances ruling at the time, their protected status will be disregarded by the enemy or by non-State actors.<sup>726</sup>

*Use of Encryption for Communication Purposes*

The third issue relates to the possession or use of a secret code for wireless or other means of communication that is prohibited under Article 34(2) of GC II. Whereas the English version of GC II seems to indicate that this prohibition is absolute, the equally authentic French version merely prohibits the possession or use of a secret code for the transmission of messages.<sup>727</sup> Moreover, the provision must be interpreted considering the subsequent practice of the States party to GC II. Hospital ships communicate via satellites, thus by the use of encryption. Accordingly, “modern navigational technology requires the traditional rule prohibiting secret codes be understood to not include modern communications encryption systems.”<sup>728</sup> Of course, “[s]uch systems must not be used for military purposes in any way harmful to a potential adversary.”<sup>729</sup> The medical information of patients also may be encrypted or otherwise protected.

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726. NWP 1-14M § 8.6.3.1 (“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.”).

727. The French version reads: “*En particulier, les navires hôpitaux ne pourront posséder ni utiliser de code secret pour leurs émissions par T.S.F ou par tout autre moyen de communication.*” It must be borne in mind that the technology used in 1949 and in the 1950s was such that ships had separate compartments for the apparatuses transmitting and receiving messages. Moreover, the permissibility of the possession or use of a secret code for receiving messages under the French version was logical. For a hospital ship to arrive on time in a sea area of prospective hostilities, it needs to be ordered in advance without the enemy becoming aware of its future employment in the said sea area.

728. NWP 1-14M § 8.6.3.1. *See also* DOD LAW OF WAR MANUAL § 7.12.2.7; GERMAN MANUAL ¶ 1070: “Digitalisation as such is not viewed as the use of secret codes.” *See also* ADDP 06.4 ¶ 6.72; UK MANUAL ¶ 13.125.

729. NWP 1-14M § 8.6.3.1.

#### 10.4.1.6.4 Consequences of Acts Harmful to the Enemy

Any of the “acts harmful to the enemy” will deprive a hospital ship of its protection not only from capture, but also from attack because, by such acts, it would make an effective contribution to military action. However, “protection 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.”<sup>730</sup> It is important to note that compliance with such a warning will merely protect the hospital ship from attack. The fact that it has committed an act harmful to the enemy is sufficient grounds for it to be deprived of its protection from capture and of its entitlement to be respected and protected. In any event, the presence of wounded, sick, and shipwrecked on board a hospital ship that has become liable to attack must be taken into due consideration.

#### 10.4.2 Sick Bays

The protection afforded to the sick bays on board warships by Article 28 of GC II only applies if fighting occurs on board the warship—which in modern warfare is a highly improbable situation.<sup>731</sup> Nevertheless, in such rare and exceptional situations that must be distinguished from distance attacks by guns, torpedoes, or missiles, the sick bays of warships “shall be respected and spared as far as possible.” Accordingly, the sick bays must be allowed to continue to perform their humanitarian functions and they may not be made the object of attack or any other interference by the ongoing fighting on board. The protection does not include an obligation to protect. The obligations to respect and spare sick bays apply only “as far as possible.” This means that those engaged in close quarters fighting aboard a warship must, subject to the prevailing circumstances, refrain from an interference with the operation of the sick bays they are reasonably able to avoid. The

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730. GC II, art. 34(1).

731. ICRC, REPORT CONCERNING THE REVISION OF THE “TENTH HAGUE CONVENTION OF 1907 FOR THE ADAPTATION TO MARITIME WARFARE OF THE PRINCIPLES OF THE GENEVA CONVENTION OF 1906” 33 (1937). At the 1949 Diplomatic Conference, the protection of sick bays was considered “to be out of date.” *See* 2-A FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 76 (1949).

protection of sick bays ceases if they are used for “acts harmful to the enemy.”<sup>732</sup> Any of the conditions enumerated in Article 35 of GC II will not deprive sick bays of their protection under Article 28 of GC II.

If, after the end of fighting, the warship has fallen into the hands of the enemy, the sick bays and their equipment become booty of war. However, the captor is obliged not to divert them “from their purpose so long as they are required for the wounded and sick.”<sup>733</sup> Their use for other purposes is subject to two conditions: (1) ensuring the proper care of the wounded and sick; and (2) in case of urgent military necessity.

### 10.4.3 Coastal Rescue Craft and Their Fixed Coastal Installations

As stated in the first section of the present chapter, the protection of coastal rescue craft and their fixed installations in times of an IAC is to be assessed under Article 27 of GC II, which as *lex specialis* prevails over the peacetime rules on the status and operation of such craft. In that context, it may be added that the various initiatives of the past to improve the protection of coastal rescue craft and their coastal installations in times of armed conflict were but recommendatory and have not been officially endorsed by States.<sup>734</sup>

#### 10.4.3.1 Coastal Rescue Craft

##### 10.4.3.1.1 Definition

GC II does not define the term “small craft.” The adjective “small” indicates that such craft may not exceed a given size. During the deliberations of the 1949 Geneva Conference, some States were hesitant to accord protection to small and fast craft because they were difficult to identify and to be submitted to inspection.<sup>735</sup> The ensuing compromise in Article 26 of GC II on a recommendation of a minimum tonnage of hospital ships is not indicative of the permissible maximum size of coastal rescue craft. A comparison of Article 27 of GC II with the rules on hospital ships merely justifies

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<sup>732</sup> GC II, art. 34.

<sup>733</sup> *Id.* art. 28.

<sup>734</sup> For those initiatives, see 2017 GC II COMMENTARY, *supra* note 642, ¶¶ 2169ff.

<sup>735</sup> 2-A FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 63, 108–112 (1949).

the conclusion that coastal rescue craft need not be especially built or equipped for coastal rescue operations and that it suffices that they are capable to conduct such rescue operations. They need not be equipped to render medical care to the wounded, sick, and shipwrecked they have rescued, but they may, of course, be equipped with the devices and tools necessary for first aid. The phrase “employed . . . for coastal rescue operations” does not exclude craft used for rescue operations far from the coast. State practice allows the conclusion that the following vessels used by coast guards or private lifeboat institutions (today, search and rescue (SAR) organizations), belong to the category of vessels protected by Article 27 of GC II:<sup>736</sup>

- small, maneuverable craft, such as inflatable or rigid-hull inflatable boats and hovercraft, primarily designed for inshore rescue and capable of high-speed operation in suitable conditions;
- larger craft (rescue boats) of less than 24 meters in length and often designed to operate in severe weather and sea conditions;
- rescue vessels (or rescue cruisers) of more than 24 meters in length, capable of extended seakeeping and often equipped with daughter craft, firefighting capability, etc.

Coastal rescue craft should be properly marked to facilitate identification.<sup>737</sup>

#### 10.4.3.1.2 Scope of Protection

Coastal rescue craft must be respected and protected. They may be neither captured nor attacked, and they must be allowed to perform coastal rescue operations.<sup>738</sup> Moreover, they must be protected against any interference by private actors. That protection, however, only applies “so far as operational requirements permit.”<sup>739</sup> Such operational requirements must be distinguished from “military necessity.” For instance, coastal rescue craft may be barred from operating in a restricted sea area if such operations prevent the establishment of a recognized military picture.<sup>740</sup>

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736. 2017 GC II COMMENTARY, *supra* note 642, ¶ 2178.

737. NWP 1-14M § 8.6.3.1; JMSDF TEXTBOOK 147–48.

738. ADDP 06.4 ¶ 6.44.

739. GC II, art. 27(1).

740. At the 1949 Diplomatic Conference, it was

understood that the protection promised to these low tonnage craft . . . could not be absolute. Such protection can only be afforded within the measure of operational necessities. A

Regarding their stay in neutral ports, coastal rescue craft are not classed as warships, and are not limited by the 24-hour rule (see Sections 11.4.1.2 and 11.4.1.3).<sup>741</sup> According to Article 43(6) of GC II, they may, in times of occupation and with the consent of the occupying power, continue to operate.

#### 10.4.3.1.3 Conditions of Protection

To enjoy the protection under Article 27 of GC II, coastal rescue craft must fulfill the following conditions of protection:

- They must be operated either by a party to the IAC, that is, by the State (e.g., by the Coast Guard), or by officially recognized lifeboat institutions, which today are called SAR organizations.<sup>742</sup>
- Their names and descriptions, including the characteristics enumerated in Article 22(2) of GC II, must be notified to the parties to the conflict ten days prior to their employment. For the States party to AP I, such notification is no longer required according to Article 22(3) of AP I.
- They must comply with the conditions laid down in Article 30 of GC II.
- They must comply with the control measures taken by the enemy in accordance with Article 31 of GC II.

#### 10.4.3.1.4 Loss of Protection

As in the case of hospital ships, coastal rescue craft not acting in compliance with the conditions of their protection lose their protection and their entitlement of being respected and protected. Although they are not included

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belligerent face to face with an opponent in a restricted maritime area would find it difficult to tolerate the traffic of a large number of very fast, small craft belonging to the adverse party.

*See* 2-A FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 202 (1949).

<sup>741</sup> GC II, art. 32.

<sup>742</sup> For instance, the private German Society for the Rescue of Shipwrecked People (Deutsche Gesellschaft zur Rettung Schiffbrüchiger) has been officially recognized by the Federal Maritime Responsibilities Act of 1965. In the United Kingdom, the Royal National Lifeboat Institution has been entrusted with maritime search and rescue operations.

in Article 34 of GC II, they become liable to attack if they commit, outside their humanitarian function, “acts harmful to the enemy” as defined in Section 10.4.1.6.2. It is important to note that an attack against a coastal rescue craft that has committed such an act and, thus, becomes a lawful military objective is not dependent on a warning and the further conditions in Article 34(1) of GC II.

#### 10.4.3.2 Fixed Coastal Installations

The fixed coastal installations used exclusively by coastal rescue craft for their humanitarian mission must be respected and protected.<sup>743</sup> That protection must, however, be afforded only “so far as possible.” The standard of “possible” is less strict than the standard of “operational requirements.”

#### 10.4.4 Ships Used for the Transport of Medical Equipment

Ships authorized to transport medical equipment exclusively intended for the treatment of the wounded and sick, and for the prevention of disease, and the equipment they are transporting are protected from capture or seizure.<sup>744</sup> According to the text, the protection of Article 38 of GC II would only extend to “[s]hips chartered for that purpose,” which would exclude from the scope of protection government ships tasked with the transportation of medical equipment. However, the protection under Article 38 of GC II has been granted primarily regarding the medical equipment that is to be used for the treatment of the wounded and sick, and for disease prevention. Accordingly, any vessel may be used for the transport of such equipment. If private vessels are chartered for such transports, the respective party to the conflict must have provided authorization to that effect. It is important to note that the medical transports protected under Article 38 of GC II must exclusively transport the said equipment.

Medical transports shall be properly marked to facilitate identification.<sup>745</sup> The “particulars regarding their voyage” must have been notified and approved by the enemy belligerent, which continues to be entitled to board such ships with a view of verifying whether they act in compliance with Article 38(1) of GC II. Article 38(2) of GC II provides: “By agreement amongst

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743. GC II, art. 27(2).

744. *Id.* art. 38(1).

745. NWP1-14M § 8.6.3.1; JMSDF TEXTBOOK 149–51.



the Parties to the conflict, neutral observers may be placed on board such ships to verify the equipment carried. For this purpose, free access to the equipment shall be given.”

Medical transports lose their protection from capture if they are not employed in their innocent role of transporting medical equipment or if their voyage has not been approved by the enemy or if they do not meet conditions of protection (see Section 10.4.1.5). A vessel or aircraft that constitutes a military objective (see Chapter 8) may be captured for that reason alone and is additionally subject to attack. If it commits an act harmful to the enemy—that is, makes an effective contribution to the enemy’s military action—it becomes liable to attack.

## 10.5 Medical Aircraft

### 10.5.1 Definition

Medical aircraft are civilian or military aircraft “exclusively employed for the removal of wounded, sick and shipwrecked, and for the transport of medical personnel and equipment.”<sup>746</sup> The aircraft may be fixed wing or rotary propelled aircraft. Medical aircraft are not limited to those that have been exclusively assigned to the transportation of the said people or equipment. Aircraft that are equipped for the treatment of the wounded and sick (e.g., with installations for surgery) also belong to the category of medical aircraft. A medical aircraft may either be permanently or temporarily assigned to those functions.<sup>747</sup> Combat search and rescue aircraft do not qualify as medical aircraft.

Medical aircraft shall be marked with the distinctive emblem and any other technical means facilitating their identification.<sup>748</sup>

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746. GC II, art. 39(1).

747. AIR AND MISSILE WARFARE MANUAL r. 1(u). According to Article 8(k) of AP I, permanent medical aircraft are those aircraft that have been “assigned exclusively to medical purposes for an indeterminate period,” whereas temporary medical aircraft are assigned to those tasks for a limited period.

748. GC II, art. 39(2); AP III, annex, art. 1; ADDP 06.4 ¶ 8.60; AIR AND MISSILE WARFARE MANUAL r. 76; NWP 1-14M § 8.6.3.1; JMSDF TEXTBOOK 148, 159–60.

## 10.5.2 Scope of Protection

Medical aircraft “may not be the object of attack, but shall be respected,”<sup>749</sup> if they operate in compliance with the conditions of their protection. Their entitlement to be respected means that they must be allowed to perform their humanitarian functions without any undue interference by a belligerent. It must be noted that the belligerents are not obliged to protect enemy medical aircraft, unless they are parties to AP I.<sup>750</sup>

## 10.5.3 Conditions of Protection

### 10.5.3.1 Prior Agreement

Medical aircraft are protected “while flying at heights, at times and on routes specifically agreed upon between the Parties to the conflict concerned.”<sup>751</sup> The requirement for an agreement between the belligerents specifying flight details is not limited to a given airspace. Medical aircraft are prohibited to fly over enemy or enemy-occupied territory unless the belligerents have agreed otherwise.<sup>752</sup>

For the States party to AP I, the protection of medical aircraft is not dependent on an agreement between the belligerents if the aircraft operate “[i]n and over land areas physically controlled by friendly forces, or in and over sea areas not physically controlled by an adverse Party.”<sup>753</sup> If medical aircraft operate “[i]n and over those parts of the contact zone which are physically controlled by friendly forces and in and over those areas the physical control of which is not clearly established,” their protected status is not dependent upon a prior agreement. However, Article 26(1) of AP I provides that the “protection for medical aircraft can be fully effective only by prior agreement.”<sup>754</sup> In the absence of such an agreement, “medical aircraft operate at their own risk,” but “they shall nevertheless be respected after they

749. GC II, art. 39(1).

750. AP I, art. 24.

751. GC II, art. 39(1).

752. *Id.* art. 39(3); ADDP 06.4 ¶ 8.61; GERMAN MANUAL ¶ 1133.

753. Article 25 of AP I, which, however, encourages the parties to the conflict “[f]or greater safety” to “notify the adverse Party, as provided in Article 29, in particular when such aircraft are making flights bringing them within range of surface-to-air weapons systems of the adverse Party.”

754. *See also* AIR AND MISSILE WARFARE MANUAL r. 78(a).

have been recognized as such.” According to Article 27(1) of AP I, a prior agreement is required if medical aircraft are “flying over land or sea areas physically controlled by an adverse Party.” If a medical aircraft operates over such areas without or in deviation of the prior agreement, either because of navigational error or because of an emergency affecting the safety of the flight, it does not automatically become a lawful target. Rather, both the respective medical aircraft and the enemy belligerent are obliged, under Article 27(2) of AP I, to allow the aircraft time for compliance with the belligerent’s orders, before resorting to an attack against the aircraft. Those provisions of AP I relating to medical aircraft are widely considered as being reflective of customary law.<sup>755</sup>

### 10.5.3.2 Compliance with Belligerent Orders

Medical aircraft are required to comply with belligerent orders. Medical aircraft must comply with a request to land for inspection. These requests are to be given in accordance with International Civil Aviation Organization (ICAO) standard procedures for the interception of civil aircraft. Medical aircraft complying with such a request to land must be allowed to continue their flight, with all personnel on board belonging to their forces, to neutral countries, or to countries not a party to the conflict, so long as inspection does not reveal that the aircraft was engaging in acts harmful to the inspecting force or otherwise violating the 1949 Geneva Conventions. Persons of the nationality of the inspecting force found on board may be taken off and retained.<sup>756</sup>

### 10.5.4 Loss of Protection

Medical aircraft are no longer protected from capture if they do not comply with legitimate belligerent orders or if they engage in any of the following activities:

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755. Michael J. Matheson, *Remarks in Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 419, 423–24 (1987) (“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.”).

756. NWP 1-14M § 8.6.3.1. *See also* AIR AND MISSILE WARFARE MANUAL rr. 79, 80.

- Attempt to acquire any military advantage over an adverse party;
- Commit acts harmful to the enemy;
- Transportation of arms and ammunition other than those belonging to the wounded and sick or necessary for the defense of the wounded and sick and the medical personnel;<sup>757</sup>
- Possession or use of equipment to collect or transmit intelligence data. “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”;<sup>758</sup> or
- Used for the collection or transmission of intelligence data.

Medical aircraft shall contain no armament other than small arms and ammunition.

Finally, medical aircraft that constitute a military objective (see Chapter 8) may be subject to attack. For example, medical aircraft committing, outside their humanitarian duties, “acts harmful to the enemy” lose their protection from attack. However, prior to attack, all feasible steps should be taken to instead force the medical aircraft to land or to alight on water.<sup>759</sup>

## 10.6 Protected Persons

The parties to the conflict are required to take all possible measures after each naval engagement “to search for and collect the shipwrecked, wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled.”<sup>760</sup> This obligation shall be applied impartially to all the wounded, sick, and shipwrecked at sea enumerated in Article 13 of GC II without discriminating between their own and enemy personnel.<sup>761</sup> Combatant person-

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757. NWP 1-14M § 8.6.3.1; GERMAN MANUAL ¶ 1135; AIR AND MISSILE WARFARE MANUAL r. 82, according to which “medical aircraft may be equipped with deflective means of defence (such as chaff or flares).”

758. NWP 1-14M § 8.6.3.1. *See also* AIR AND MISSILE WARFARE MANUAL r. 81.

759. ADDP 06.4 ¶¶ 8.61–8.63.

760. GC II, art.18; Hague X, art. 16(1); Oxford Manual of Naval Warfare, art. 85(1).

761. GC II, art. 12.

nel engaged in a seaborne attack who are proceeding ashore are not considered “shipwrecked” persons unless they are clearly in distress and require assistance, and have ceased all active combat activity.<sup>762</sup>

A willful violation of Article 18(1) of GC II that leads to the death of protected persons enumerated in Article 13—for example, willfully leaving shipwrecked survivors without assistance in the sea—could amount to the grave breach of willful killing by omission. For example, at the conclusion of World War II, Admiral Karl Dönitz was prosecuted in the International Military Tribunal at Nuremberg for allegedly ordering the deliberate killing of survivors of enemy and neutral shipwrecked vessels. In September 1942, German and Italian U-boats attempting to rescue survivors of the British ocean liner RMS *Laconia* off the coast of West Africa were attacked by U.S. aircraft. Admiral Dönitz responded on September 17, 1942 by issuing the *Laconia* Order, which provided, in part:

No attempt of any kind must be made at rescuing members of ships sunk; and this includes picking up persons in the water and putting them in lifeboats, righting capsized lifeboats and handing over food and water. Rescue runs counter to the rudimentary demands of warfare for the destruction of enemy ships and crews.<sup>763</sup>

The defense argued “that the security of the submarine is, as the first rule of the sea, paramount to rescue, and that the development of aircraft made rescue impossible.”<sup>764</sup> Nonetheless, the Tribunal determined that the 1936

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762. NWP 1-14M § 8.2.3.1; JMSDF TEXTBOOK 198.

763. The *Laconia* Order provided:

1. No attempt of any kind must be made at rescuing members of ships sunk; and this includes picking up persons in the water and putting them in lifeboats, righting capsized lifeboats and handing over food and water. Rescue runs counter to the rudimentary demands of warfare for the destruction of enemy ships and crews.
2. Orders for bringing in captains and chief engineers still apply.
3. Rescue the shipwrecked only if their statements will be of importance to your boat.
4. Be harsh, having in mind that the enemy takes no regard of women and children in his bombing attacks on German cities.

V TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 220 (1947).

764. I TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 313 (1947).

London Protocol<sup>765</sup> was explicit—“[i]f the commander cannot rescue, then . . . he cannot sink a merchant vessel and should allow it to pass harmless before his periscope”—and that Dönitz’s orders had violated the Protocol.<sup>766</sup> However, considering that the British and Americans similarly engaged in unrestricted submarine warfare, Admiral Dönitz’s sentence was “not assessed on the ground of his breaches of the international law of submarine warfare.”<sup>767</sup>

In recent times, the Article 18(1) obligation has been interpreted to mean that “[a]s far as military exigencies permit,” all possible measures should be taken without delay after each engagement to search for and collect the shipwrecked, wounded, and sick, and to recover the dead.<sup>768</sup> The rule applies equally to military aircraft, submarines, and surface warships. In the case of submarines, if search and rescue after an engagement would subject the “submarine to undue additional hazard or prevent it from accomplishing its military mission,” it should pass the location of possible survivors “at the first opportunity to a surface ship, aircraft, or shore facility capable of rendering assistance.”<sup>769</sup>

### 10.6.1 Categories of Persons at Sea Under Articles 13 and 16 of Geneva Convention II

#### 10.6.1.1 Wounded, Sick, and Shipwrecked at Sea

Article 13 of GC II—which parallels in most respects Article 4(A) of Geneva Convention III (GC III)—sets out the applicable scope of GC II as being the “wounded, sick and shipwrecked at sea” of the following relevant categories:

- (1) Members of the armed forces—this includes warship crews and military aircraft crews, and the military members of auxiliary crews, and any other military member at sea regardless of whether they belong to the naval, marine, air, land, or other military forces of the enemy.

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765. London Protocol of 1936.

766. I TRIALS OF WAR CRIMINALS, *supra* note 764, at 313.

767. *Id.*

768. NWP 1-14M § 8.6.1; ADDP 06.4 ¶ 6.68.

769. NWP 1-14M § 8.7.

- (2) “Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict” that meet the four conditions required.
- (3) “Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power”—for example, North Vietnamese naval forces during the Vietnam War, where North Vietnam was not recognized as a “government or authority” by the United States.
- (4) Authorized “Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors”—such as a radar technician working for a defense equipment company who is on a belligerent warship to maintain or repair that system and who has received the requisite authorization from that warship’s sovereign, and civilian crews of auxiliary vessels.
- (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.”<sup>770</sup> For example, 1907 Hague VII “provides that certain merchant seamen must not be made prisoners of war. They must, however, be respected, collected and cared for in accordance with the Second Convention.”<sup>771</sup>
- (6) Persons who are part of a *levee en masse*—this status is related to spontaneous territorial defense against the initial stages of an enemy invasion, and as such its application at sea is unlikely. However, it is possible that this status could apply to resistance in the territorial sea against an attempt by an invader’s forces to land on the responding territory of the *levee en masse*.

Article 13, therefore, does not specifically speak to the post-recovery status of other categories of sick, wounded, and shipwrecked at sea—such as civilian passengers—who would be covered by, inter alia, the general protective principles of the LOAC, as well as (where applicable, including at sea) the specific provisions of the 1949 Geneva Convention IV (GC IV) relating to civilians. This means that, in any situation involving the sick, wounded, and shipwrecked at sea, the 1949 Geneva Conventions I–IV may all operate in parallel at sea until those protected persons are placed ashore, at which

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770. Hague VII, arts. 5–8.

771. 2017 GC II COMMENTARY, *supra* note 642, ¶ 1500.

point the more detailed regimes elaborated in GC III in relation to prisoners of war (POWs), and GC IV in relation to civilians, will generally cover the field.

### 10.6.1.2 Wounded, Sick, and Shipwrecked at Sea in Enemy Hands

The first part of Article 16 of GC II reiterates the POW status of “the wounded, sick and shipwrecked of a belligerent who [are of an Article 13 category, and] fall into enemy hands.” However, as noted above, this provision must be read within the broader corpus of the 1949 Geneva Conventions scheme and acknowledges the parallel application of non-GC II rules:

Article 16 defines the status of a wounded, sick or shipwrecked member of the armed forces who falls into enemy hands. In that situation, a member of the armed forces is both a wounded, sick or shipwrecked person, possibly needing medical care, and an individual who is entitled to become—and thus becomes—a prisoner of war. The Second and Third Conventions will therefore apply simultaneously.<sup>772</sup>

### 10.6.1.3 Paramilitary, Police, or Militia Forces

Articles 43–45 of AP I elaborate and update elements of the 1949 Geneva Conventions I–III POW regime. It should be stressed, however, that not all States agree that Article 44 is reflective of customary international law.<sup>773</sup> For States party to AP I, the key additional consequence is that Article 44(8) adds a further group of relevance to naval warfare to the concept of “armed forces” entitled to POW status, as set out in Article 13 of GC I and II: “Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.”<sup>774</sup> That is, where the appropriate declaration is made, paramilitary, police, or other militia forces at sea—for example, civil (non-armed forces) coast guards, maritime police, and so on—are to be considered as part of the armed forces of the adversary and treated as such upon falling into the hands of their enemy.

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772. *Id.* ¶ 1564.

773. See DOD LAW OF WAR MANUAL § 4.6.1.2.

774. AP I, art. 43(3).



Article 45(1) of AP I provides for a status review in cases of doubt as to whether a person “who takes part in hostilities and falls into the power of an adverse Party” is entitled to the protections of GC III. This does not mean that the assessment of status is limited to those categories under Article 4(A) of GC III alone, but also includes—where the person fell into the enemy’s hands at sea—any nuance applicable in relation to Article 13 of GC II. For example, as noted below, the land-based interpretation of direct participation in hostilities (DPH) and organized armed groups (OAGs) differs from the application of those concepts at sea such that application of the land-based approach would exclude persons from the POW regime who, when considered in terms of the specific law applicable to that conduct at sea, would be entitled to POW status.

#### **10.6.2 Civilian Passengers Onboard Enemy and Neutral Merchant Vessels**

Passengers are not crew, and while they are covered by GC II obligations to protect the sick, wounded, and shipwrecked at sea, including the obligation to “search for and collect the shipwrecked, wounded and sick” after each engagement,<sup>775</sup> they are otherwise civilians who may be subject to GC IV. The one exception to this is where passengers directly participate in hostilities, in which case they are treated in accordance with the interpretation of the DPH concept on land. This means that passengers in an enemy or neutral merchant vessel who attack a naval boarding team are not considered part of the crew of the vessel and thus are not entitled to POW status. They are liable to treatment in the same way as civilians directly participating in hostilities on land—which is to say that it is open to the capturing power to detain and treat them as criminals.

One example of this differentiation between crew and passengers is the 2010 *Mavi Marmara* incident. When the Israel Defense Force (IDF) boarded the *Mavi Marmara* to enforce a declared blockade of the coast of the Gaza Strip, some passengers (who were not part of the vessel’s crew) used force against the IDF boarding team members. The Turkel Commission concluded that the proper assessment regime to apply to the conduct of the

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775. GC II, art. 18.

passengers was DPH,<sup>776</sup> with all the criminal liabilities that can attend civilian DPH conduct (noting, however, that while a criminal investigation was commenced in this case, it was ultimately discontinued).<sup>777</sup> This specific distinction appears to be absent from national military manuals and is only obliquely endorsed in U.S. manuals.<sup>778</sup> Nevertheless, the law clearly implies this distinction and it is significant in terms of the *de jure* availability, or not, of POW status.

### 10.6.3 Persons Qualifying for POW Status

This section discusses persons qualifying for POW status.<sup>779</sup> The POW regime “provides a detailed and comprehensive framework for the treatment of prisoners of war, namely members of the armed forces and other defined categories of persons who fall into enemy hands during an international armed conflict.”<sup>780</sup> At sea, the regime covers “members of the armed forces and other categories of persons who, while not being members of the armed

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776. TURKEL COMMISSION, THE PUBLIC COMMISSION TO EXAMINE THE MARITIME INCIDENT OF 31 MAY 2010: REPORT, PART ONE ¶ 201 (January 2011) (“Based on the criteria established in the *Targeted Killings* case, the Commission concludes that the IHH activists who participated in violence on the *Mavi Marmara* were direct participants in hostilities. In addition, it should be noted that the Commission would have reached the same conclusion by applying the standards set out in the ICRC *DPH Interpretive Guidance on the Notion of Direct Participation in Hostilities*.”).

777. *Id.* ¶ 113 (“Subsequently, the participants of the flotilla were transferred to several prisons where they were detained. On June 2, 2010, after the Attorney-General decided to terminate the criminal investigation that he had ordered on June 1, 2010, and after the approval of the Supreme Court was given in this regard, the participants were taken to Ben-Gurion Airport and flown to the countries from which the flotilla set sail.”).

778. DOD LAW OF WAR MANUAL § 15.15.4.2 (“*Enemy Nationals Found Onboard Neutral Merchant Vessels and Civil Aircraft*. Belligerents have a right to remove certain enemy persons from neutral vessels or aircraft, even if there are no grounds for the capture of the vessel or aircraft as prize. Enemy nationals found onboard a neutral State’s merchant vessels or civil aircraft as passengers who are . . . 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.”).

779. *See also* Sections 3.9.2.1 (Personnel of Enemy Merchant Vessels), 3.9.3.1 (Crews of Neutral Merchant Vessels).

780. ICRC, COMMENTARY ON THE THIRD GENEVA CONVENTION: CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, ¶ 1 (2020), <https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/introduction/commentary/2020?activeTab=1949GCs-APs-and-commentaries> [hereinafter 2020 GC III COMMENTARY].

forces, either have combatant status or are otherwise entitled to prisoner-of-war status.”<sup>781</sup>

This means that POW status is available to certain people at sea, whereas POW status would not be available to an equivalent person on land. For example, while the civilian crew of an enemy merchant vessel are entitled to POW status upon falling into the hands of the adversary—even if the merchant vessel actively resisted capture and inflicted damage on the adversary warship and/or injured adversary combatants in the process of resistance—those undertaking such active resistance on land would likely be classified as civilians directly participating in hostilities and, upon falling into the hands of their enemy, not be entitled *de jure* to POW status. An iconic case on this difference is that of Captain Fryatt, a British merchant marine Master of a British flagged merchant vessel during World War I. Following Admiralty orders, he attempted to ram a German U-boat that had attempted to capture his vessel. Several months later, the vessel was captured, and Captain Fryatt was subjected to a German court-martial as a “franc-tireur,” convicted, and executed. This action was universally condemned as wrongful because the applicable law provided that enemy merchant mariners should be made POWs, and that resistance to visit and search, capture, or attack was not to be equated with direct participation in hostilities—as equivalent conduct ashore would likely be.<sup>782</sup>

### 10.6.3.1 Internment of POWs at Sea

One concern that arises “at sea” with the second part of Article 16 of GC II is the length of time POWs may be kept at sea.

The captor may decide, according to circumstances, whether it is expedient to hold them, or to convey them to a port in the captor’s own country, to a neutral port or even to a port in enemy territory. In the last case, prisoners of war thus returned to their home country may not serve for the duration of the war.

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781. 2017 GC II COMMENTARY, *supra* note 642, ¶ 1484; ADDP 06.4 ¶¶ 6.70–6.71.

782. James Brown Scott, *The Execution of Captain Fryatt*, 10 AMERICAN JOURNAL OF INTERNATIONAL LAW 865 (1916); Edwin Maxey, *The Execution of Captain Fryatt*, 37 CANADIAN LAW TIMES 456 (1917); Hugh Bellot, *The Right of a Belligerent Merchantman to Attack*, 7 TRANSACTIONS OF THE GROTIUS SOCIETY 43 (1921): “He [Captain Fryatt] was therefore condemned as a franc-tireur. This is a purely German conception. Such a personage has no existence at sea in International Law.”

This authorization is not to be read as a general permission to intern POWs at sea for the following reasons:

- (1) GC III is explicit that internment of POWs is to be on land: Article 22 states that “Prisoners of war may be interned *only* in premises located *on land*.”<sup>783</sup> The rationale for this limitation includes that internment in ships “would render access to essential services more difficult,” make “the right of delegates of the Protecting Power, if one is appointed, and of the ICRC to visit prisoners of war pursuant to Article 126” extremely difficult, and, more difficult, create challenges to guaranteeing “the minimum requirements set by the Convention in terms of, for example, hygiene and space for recreational and physical activities.”<sup>784</sup> This understanding is widely reflected in national military manuals.<sup>785</sup>
- (2) The conditions for internment of POWs are difficult to maintain at sea: The rationale for this rule is that “POWs are [to be] interned in a relatively safe and healthy environment. . . . [I]n 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.”<sup>786</sup> For example, in February 1940, when they were freed by a British operation in a neutral Norwegian fjord, many of the POWs in the German vessel *Altmark* had been held onboard for months. A contemporary report noted that “300 British seamen had been kept for weeks and months in close confinement” and “had for long been living under intolerable conditions.”<sup>787</sup> Indeed, “the British prisoners . . . were found locked in shell rooms and store rooms and in an empty oil tank.”<sup>788</sup> During the Second Gulf War in 2003, Iraqi sailors captured at sea, as well as some Iraqi personnel captured or who surrendered ashore in the Al Faw peninsula area, were held

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783. GC III, art. 22 (emphasis added): “Prisoners of war may be interned *only* in premises located *on land* and affording every guarantee of hygiene and healthfulness . . . .”

784. 2020 GC III COMMENTARY, *supra* note 780, ¶ 1984.

785. ADDP 06.4 ¶ 10.28, which stipulates that POWs may only be interned on land; CANADIAN MANUAL ¶ 1024.1; DANISH MANUAL ch. 12 § 9.1; GERMAN MANUAL ¶ 8.26; NZ MANUAL § 12.7.5; NORWEGIAN MANUAL § 6.63; UK MANUAL ¶ 8.37; DOD LAW OF WAR MANUAL § 9.10.4; JMSDF TEXTBOOK 198–204.

786. DOD LAW OF WAR MANUAL § 9.11.3.1.

787. *The “Altmark” Incident*, 17 BULLETIN OF INTERNATIONAL NEWS 225 (Feb. 24, 1940).

788. *Id.* at 226.

only for a very short period on coalition warships pending transport to shore and internment in a POW camp that was still being prepared. As was observed at the time, “While not an ideal scenario for naval commanders, and not a measure to be taken lightly in view of the existing law, this was deemed a prudent contingency to provide a realistic and reasonably safe temporary option in view of the relatively low risk to the warships in the northern Arabian Gulf.”<sup>789</sup>

- (3) Article 13 of GC III requires, *inter alia*, that all POW be “humanely treated.” This obligation is both broad and contextual, but requires, as a minimum, “provision of adequate food and drinking water; provision of adequate clothing; safeguards for health and hygiene; provision of suitable medical care; protection from violence and against the dangers of the armed conflict; entitlement to sleep; and the right to maintain appropriate contacts with the outside world.”<sup>790</sup> Additionally, Article 16 states that POWs must have access to “the medical attention required by their state of health.”<sup>791</sup> As the U.S. *Department of Defense Law of War Manual* observes of this obligation, “POWs suffering from serious disease, or whose condition necessitates special treatment, a surgical operation, or hospital care, *must* be admitted to any military or civilian medical unit where such treatment can be given.”<sup>792</sup> Finally, internment of POWs at sea, and the need for operational security (OPSEC) in relation to vessel movements, would effectively foreclose any possibility that the ICRC could gain regular

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789. Neil Brown, *Legal Considerations in Relation to Maritime Operations Against Iraq*, 86 INTERNATIONAL LAW STUDIES 128, 134 (2010). DOD LAW OF WAR MANUAL § 9.10.4 (Use of Ships for Temporary Detention). 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. For example, they may be temporarily detained on board naval vessels: (a) while being transported between 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 internment of POWs on land. During the Falklands War, the United Kingdom kept Argentinian POWs at sea instead of ashore because of austere weather conditions and the loss of equipment to build POW camps contained in the *Atlantic Conveyor*. MAX HASTINGS & SIMON JENKINS, *THE BATTLE FOR THE FALKLANDS* (1991); see also MARTIN MIDDLEBROOK, *TASK FORCE: THE FALKLANDS WAR*, 1982, at 247, 381, 385 (1982).

790. 2020 GC III COMMENTARY, *supra* note 780, ¶ 1575.

791. See AP I, art. 11(3)–(6).

792. DOD LAW OF WAR MANUAL § 9.14.2.1 (emphasis added).

access to all persons deprived of their liberty—including POWs—as required during an IAC.<sup>793</sup>

- (4) Interning POWs at sea can breach the requirement to evacuate them from the combat zone. The POW regime is clear that “[n]o POW may at any time be sent to or detained in areas where he or she may be exposed to the fire of the combat zone.”<sup>794</sup> It is improbable that an enemy vessel would not be a priority target for capture or attack, thus rendering the long-term detention of POWs in such a place impermissible.

This does not, however, mean that the temporary holding of POWs in ships for the purposes of evacuation from the area of naval operations, and the transport to an appropriate place of internment on land, is not permitted. Additionally, other factors that may temporarily delay the transfer of a POW or group of POWs from a ship to internment ashore may also be acceptable, within reason<sup>795</sup>—for example, a POW is too sick or injured to be moved, or the medical support required is available in the ship but not yet in the internment facility ashore. Finally, operational considerations, such as weather, routing to avoid combat operations, the unavailability of suitable facilities ashore, and other such delaying factors, may also mean that POWs may need to be held onboard a ship longer than is generally desirable prior to transfer to internment ashore. This is to be assessed on a case-by-case basis, and within the overall context of the priority to intern on land and to avoid long-term internment in ships. Such temporary internment in a vessel is to be “as brief as possible.”<sup>796</sup>

### 10.6.3.2 The Option of “Parole” as an Alternative to Making Merchant Mariners POWs

An important difference between the application of the POW regime at sea and ashore is that there is a specialized “parole” option available for some merchant mariners who fall into enemy hands—an option that has no equivalent on land. This parole option is encapsulated in the “more favourable treatment” reference found in Article 13(5) of GC II and Article 4(A)(5) of GC III. This phrase imports 1907 Hague XI, “which provides that certain

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793. GC III, art. 126.

794. DOD LAW OF WAR MANUAL § 9.5.2.3.

795. *Id.* § 9.10.4; 2017 GC II COMMENTARY, *supra* note 642, ¶ 1577.

796. 2020 GC III COMMENTARY, *supra* note 780, ¶ 1985.

merchant seamen must not be made prisoners of war,” although they must nevertheless “be respected, collected and cared for in accordance with the Second Convention.”<sup>797</sup> This provision arose out of the Hague 1907 conference, which decided to create an option of freedom for captured neutral mariners. This development reaffirmed that the routine status and treatment regime for such mariners was that of POW, and that this innovation was an explicit amendment of that customary rule.<sup>798</sup> Consequently, there are two special conditions applicable to an IAC at sea, which allow for the application of a treatment regime more beneficial (as opposed to less beneficial, as with DPH and OAGs on land) to the captured merchant mariner, than the otherwise applicable POW regime:

- (1) 1907 Hague XI, Article 5: “When an enemy merchant ship is captured by a belligerent, such of its crew as are nationals of a neutral State are not made prisoners of war. The same rule applies in the case of the captain and officers likewise nationals of a neutral State, if they promise formally in writing not to serve on an enemy ship while the war lasts.”
- (2) 1907 Hague XI, Article 6: “The captain, officers, and members of the crew, when nationals of the enemy State, are not made prisoners of war, on condition that they make a formal promise in writing, not to undertake, while hostilities last, any service connected with the operations of the war.”

The purpose behind this special parole regime was to recognize that merchant seamen of the enemy, or neutral merchant seamen serving in enemy merchant vessels, were often obligated to take such sea service to earn a livelihood. Consequently, they should not be burdened with indefinite internment as a POW for the duration of the conflict, so long as they undertake to avoid sea service in support of the enemy’s war operations and to obey military regulations by the commander in the immediate area of naval operations.<sup>799</sup> For example, an enemy merchant mariner captured and pa-

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797. 2017 GC II COMMENTARY, *supra* note 642, ¶ 1500.

798. THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES: THE CONFERENCE OF 1907, VOLUME 3: MEETINGS OF THE SECOND, THIRD, AND FOURTH COMMISSIONS 947–51 (James B. Scott ed., 1907).

799. THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES: THE CONFERENCE OF 1907, VOLUME 1: PLENARY MEETINGS OF THE CONFERENCE 262–63 (James B. Scott ed., 1907).

roled under this condition would not be permitted to serve in an enemy auxiliary or merchant vessel carrying military or contraband material, but would be permitted to return to service at sea in (inter alia) enemy fishing vessels, SAR vessels, or humanitarian vessels.

However, this parole option is limited by an additional condition that further points to the differences between entitlement to POW status at sea and on land for equivalent conduct. Article 8 of the 1907 Hague XI states that “The provisions of the three preceding articles [Articles 5–7] do not apply to ships taking part in the hostilities.” That is, if an enemy merchant vessel takes a direct part in hostilities, then this option of parole is forfeited by that crew (regardless of enemy or neutral nationality) and their treatment regime will revert to that otherwise applicable to merchant crews—that is, they will be treated as POWs. This is different from dealing with civilians directly participating in hostilities on land, who are not entitled *de jure* to POW status and can be detained and prosecuted as criminals. During the 1907 Hague Conference, the report of the specialist committee assigned the task of analyzing the proposed Regulations Respecting the Laws and Customs of War on Land (which became the Annex to 1907 Hague IV Respecting the Laws and Customs of War on Land) was very clear on this point. The purpose of the examination was to ascertain which of the Annex’s provisions might have relevance for the proposed naval warfare conventions. The committee’s assessment was that “[i]nasmuch as in the present state of affairs there can be no further thought of irregular hostilities on the seas, the considerations which prompted Article 1 do not appear to be applicable to naval warfare.”<sup>800</sup>

### 10.6.3.3 Concurrent Application of Geneva Conventions I, II, and III in Relation to POWs, But Then Geneva Convention III Once Ashore

The ICRC Geneva Convention II Commentary of 2017 describes the concurrency of application of the 1949 Geneva Conventions at sea as follows:

Thus, on a ship, the obligations set out in the Second Convention will predominate. Where possible, and as soon as necessary, however, the more detailed provisions of the Third Convention will apply. In any event, as

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800. PROCEEDINGS OF THE HAGUE PEACE CONFERENCES: VOLUME 3, *supra* note 798, at 1037.



soon as wounded, sick or shipwrecked persons are transferred to land, the First and Third Conventions will apply.<sup>801</sup>

Additionally, Article 13 of GC II applies to all sick, wounded, and shipwrecked at sea, including those who are neutral civilians who cannot be “a person . . . in enemy hands” because their State is not a belligerent and thus has no “enemy” in this situation. This means that these persons are covered initially by GC II, but also by, *inter alia*, GC IV in respect of civilians.<sup>802</sup>

### 10.7 Other People in Distress at Sea

As a rule, other people encountered at sea by a belligerent will be treated as neutral civilians. However, determining whether Article 18 of GC II, or some other rule set, is applicable will depend primarily upon the connection of that situation to the armed conflict. The routine peacetime rules regarding the provision of assistance to persons in distress at sea will apply in respect of neutral civilians encountered in distress at sea, where that distress is not connected to the armed conflict.<sup>803</sup> However, for the responding belligerent unit, this peacetime obligation in relation to these neutral civilians in distress at sea always remains subject to the military circumstances ruling at the time.

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801. 2017 GC II COMMENTARY, *supra* note 642, ¶ 1577.

802. *Id.* ¶ 1485.

803. *See supra* Section 10.2.

## Annex

<b>Category</b>	<b>Status upon Falling into the Hands of the Adversary</b>	<b>Applicable Provisions</b>
Combatants, including civilians in warship crews	POW	Article 13(1) of GC II Article 4(A)(1) of GC III
Auxiliary crews	POW	Article 13(1) or (4) of GC II
Military medical and chaplaincy personnel	Retained personnel	Article 37 of GC II Articles 4C and 33 of GC III Article 8 of AP I
Incorporated para-military, police, and militia forces	POW	Articles 43(3) and 44(8) of AP I
Enemy merchant mariners	1. Parole 2. POW (either instead of parole, or because parole is not an option due to the vessel taking part in hostilities)	Article 6 of 1907 Hague XI (noting the DPH caveat in Article 8) Article 13(5) of GC II Article 4(A)(5) of GC III
Neutral merchant mariners serving in enemy merchant vessels	1. Parole 2. POW	Article 5 of 1907 Hague XI Article 13(5) of GC II

Neutral merchant mariners in neutral merchant vessels which render unneutral service	1. Civilians (to be repatriated/released) if mere unneutral service 2. If unneutral service assimilated to enemy merchant vessel character—repatriated civilian or POW 3. In unneutral service assimilated to enemy warship or auxiliary—repatriated civilian or POW	Articles 45 and 46 of London Declaration of 1909 GC IV <sup>804</sup>
Maritime militia	POW	Article 13(1), (4), or (5) of GC II Article 4(A)(2) of GC III
Passengers in enemy or neutral merchant vessels	1. Civilians 2. If they directly participate in hostilities against the interdicting naval force—civilians directly participating in hostilities	GC IV Article 51(3) of AP I <sup>805</sup>

804. 2017 GC II COMMENTARY, *supra* note 642, ¶ 1500: “The crews of neutral merchant vessels and civilian aircraft are not protected by the Second Convention, but they may be protected by the Fourth Convention.”

805. AP I, art. 51(1), (3):

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.

...

3. Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.

## CHAPTER 11

## MARITIME NEUTRALITY

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## 11.1 Definition of Neutrality

Many of the rules concerning the rights and duties of neutral States and belligerent States in naval warfare are set out in Hague XIII (1907).<sup>806</sup> Others are sourced in customary international law.<sup>807</sup> As a general rule, neutral States constitute all States not party to an international armed conflict (IAC).<sup>808</sup> The law of neutrality defines the legal relationship between belligerent States engaged in an IAC and neutral States not taking part in the conflict. The law of armed conflict imposes duties and confers rights upon neutral and belligerent States. The law of maritime neutrality is designed to protect the sovereignty of neutral States and, by imposing on them certain obligations, to prevent an escalation of the conflict.

## 11.2 Neutrality and Jus ad Bellum

### 11.2.1 UN Charter

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 UN “every assistance” in its actions, especially enforcement actions.<sup>809</sup> 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.<sup>810</sup> However, if the Security Council implements preventive or en-

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806. Hague XIII, arts. 1, 2, 5, 6, 24. For an example of a regional agreement, see Convention on Maritime Neutrality, Feb. 20, 1928, 135 L.N.T.S. 187.

807. For example, the rule that prohibits belligerents from basing operations in neutral waters, and the obligation on belligerents not to use neutral waters or territory as a sanctuary, discussed at Sections 11.3.2.1 and 11.3.2.2 respectively. *See* NWP 1-14M §§ 7.1, 7.2; NWIP 10-2 § 230.

808. The French Manual provides that States not parties to an IAC are bound by the law of neutrality either by a formal declaration of neutrality or by their actual conduct. FRENCH MANUAL 66.

809. U.N. Charter arts. 2(5), 49.

810. DOD LAW OF WAR MANUAL § 15.2.3.2; NWP 1-14M § 7.2.2; NWIP 10-2 § 232; JMSDF TEXTBOOK 114.

forcement measures, any State that finds itself confronted with special economic problems arising from carrying out such measures has the right to consult with the Security Council regarding a solution to those problems.<sup>811</sup>

### 11.2.2 Qualified/Benevolent Neutrality

The concept of qualified/benevolent neutrality, as an exception to the traditional law of neutrality, is not universally recognized. The law of neutrality historically requires 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, some States take 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.<sup>812</sup> Proponents of qualified neutrality suggest that neutral States supplying weapons and other war material to the victim of aggression are not acting contrary to the law of neutrality.<sup>813</sup> The Russia–Ukraine conflict is the most recent example.<sup>814</sup>

### 11.2.3 UN Enforcement Actions

Some States take the position that a State may only violate the law of neutrality if the UN Security Council has decided to take preventive or enforcement action against a specific State under Chapter VII of the UN Charter.<sup>815</sup> States that hold this view consider that absent a decision by the Security Council, the law of neutrality remains in full force and neutrals must observe strict impartiality between the parties to the conflict.

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811. U.N. Charter art. 50.

812. General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 94 L.N.T.S. 57.

813. NWP 1-14M § 7.2.1.

814. Over forty States have provided military and other aid to Ukraine since the war began. See *Ukraine Support Tracker*, KIEL INSTITUTE FOR THE WORLD ECONOMY, <https://www.ifw-kiel.de/topics/war-against-ukraine/ukraine-support-tracker/>; Martin Armstrong, *The Countries Sending the Most Military Aid to Ukraine*, STATISTA (Feb. 24, 2023), <https://www.statista.com/chart/27278/military-aid-to-ukraine-by-country/>.

815. U.N. Charter arts. 2(5), 25.

## 11.2.4 Law of State Responsibility

Another view is that States can justify their actions in violation of their neutral duties of strict impartiality and abstention by applying the law of State responsibility.<sup>816</sup> By engaging in a war of aggression in violation of the UN Charter,<sup>817</sup> a State endangers international peace and security, an internationally wrongful act for which it bears State responsibility.<sup>818</sup> Thus, any member State may take lawful countermeasures (to include acts inconsistent with the law of neutrality) against the aggressor State for its internationally wrongful act of breaching international peace and security.<sup>819</sup>

## 11.3 Belligerent Activities in Neutral Territory and Waters

### 11.3.1 Neutral Territory, Neutral Waters, and Neutral Airspace

Neutral territory is the land territory of any neutral State. Neutral waters include the internal waters (ports), roadsteads, territorial sea, and archipelagic waters of any neutral State and do not include the contiguous zone, the EEZ, the continental shelf, the high seas, or the international deep seabed (the “Area”).<sup>820</sup> Neutral airspace is the national airspace of any neutral State, that is, the airspace above the land territory and neutral waters.<sup>821</sup>

Neutral territory and neutral airspace are inviolable, and belligerents have a duty to respect the inviolability of a neutral State. For example, a State that flies an aircraft or fires a missile or other projectile through neutral airspace on its way to an enemy target violates the State’s neutrality and sovereignty. Neutral waters are also inviolable, subject to any express rule of law that permits belligerent use thereof, as set out in this chapter. For example, the neutrality of a State is not affected by the “mere passage” through its territorial sea (and/or archipelagic waters) of warships, naval auxiliaries, or prizes

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816. G.A. Res. 56/83, Responsibility of States for Internationally Wrongful Acts arts. 1, 2, 12 (Dec. 12, 2001), corrected by document A/56/49(Vol. I)/Corr.4.

817. U.N. Charter art. 2(3), (4).

818. G.A. Res. 56/83, *supra* note 816, art. 28.

819. *Id.* arts. 49–51.

820. DOD LAW OF WAR MANUAL § 15.7.1.

821. This is without prejudice to the rights of transit and ASLP discussed below in Sections 11.3.3.5 and 11.3.3.6. The navigational regimes have no effect on the legal status of the sea areas.

of the belligerents.<sup>822</sup> The neutral State must treat the opposing belligerent States impartially and has an obligation to ensure that its territorial and neutral waters are not used by parties to the conflict, except in permissible circumstances (see Section 11.3.3).

### 11.3.2 Prohibited Activities

#### 11.3.2.1 Inviolability of Neutral Territory

Neutral territory is inviolable, and belligerents have a duty to respect the inviolability of a neutral State.<sup>823</sup> Thus, belligerents must not use neutral ports and waters as a base of operations against their adversaries, or erect or use any apparatus to communicate with belligerent forces on land or at sea.<sup>824</sup> Nor may belligerent warships make use of neutral ports, roadsteads, or territorial waters to replenish or increase their supplies of war materials or armaments or complete their crews, subject to certain permissible activities (see Section 11.3.3.4).<sup>825</sup>

#### 11.3.2.2 International Straits and Archipelagic Waters

When exercising the right of transit passage or archipelagic sea lanes passage (ASLP), belligerent forces shall proceed without delay and shall refrain from the threat or use of force against the sovereignty, territorial integrity, or political independence of neutral States bordering the strait or of the neutral archipelagic State. Belligerent forces are also prohibited from using neutral straits and archipelagic sea lanes as a place of sanctuary or a base of operations and may not exercise the right of visit and search in such straits or sea lanes.

#### 11.3.2.3 Right of Visit and Search

Belligerent warships are prohibited from engaging in any act of hostility, including capture and the exercise of the right of visit and search in neutral waters.<sup>826</sup> This rule is subject to the right of self-help (Section 11.3.3.1).

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822. Hague XIII, art. 10. On “mere passage,” see *infra* Section 11.3.3.5.

823. Hague XIII, art. 1.

824. *Id.* art. 5.

825. *Id.* arts. 17–18.

826. *Id.* art. 2.



### 11.3.2.4 Prize Courts

Belligerents cannot set up a prize court on neutral territory or on a vessel in neutral waters.<sup>827</sup>

### 11.3.3 Permissible Belligerent Activities

#### 11.3.3.1 Right of Self-Help

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 enemy force, including the use of force.<sup>828</sup> In such case, there is no requirement that a belligerent first notify the neutral State and give the neutral State a reasonable time to terminate the violation of its neutrality by another belligerent before it can exercise the right of self-help.<sup>829</sup>

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827. *Id.* art. 4.

828. Article 25 of Hague XIII provides that “[a] neutral Power is bound to exercise such surveillance as the means at its disposal allow to prevent any violation of . . . [its neutrality] occurring in its ports or roadsteads or in its waters.” This implies a positive obligation of the neutral State to take action. The *Altmark* incident is an example of the exercise of the right of self-help. In February 1940, the German tanker *Altmark*, en route to Germany with 299 British prisoners of war (POWs), passed through Norwegian waters. The tanker was boarded on three occasions by Norwegian authorities, but no evidence of the POWs was found. The *Altmark* was under escort of three Norwegian warships when it was intercepted in Norwegian waters by HMS *Cossack*. After the Norwegian escorts blocked initial attempts to board the tanker, HMS *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 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. WINSTON S. CHURCHILL, *THE GATHERING STORM* 532 (1948). See DOD LAW OF WAR MANUAL §§ 15.3.1.2, 15.4.2; ADDP 06.4 ¶¶ 11.8, 11.17; CANADIAN MANUAL ¶ 1304(3); GERMAN COMMANDER’S HANDBOOK ¶ 232; NWP 1-14M § 7.3; JMSDF TEXTBOOK 121–22.

829. The *San Remo Manual* provides that a belligerent must first notify the neutral State and give the neutral a reasonable time to terminate the violation of its neutrality by another

### 11.3.3.2 Self-Defense

A belligerent warship or auxiliary may act in self-defense if attacked or under threat of imminent attack while in, or transiting to or from, neutral waters, airspace, or territory.<sup>830</sup> Likewise, military aircraft conducting transit passage over neutral straits used for international navigation or ASLP may act in self-defense if attacked or under threat of imminent attack.

### 11.3.3.3 Port Visits

If permitted by the neutral State, belligerent warships may visit neutral ports and roadsteads, but may only remain in a port, roadstead, or territorial sea for 24 hours, unless otherwise provided by the neutral State or on account of damage or stress of weather.<sup>831</sup> The warship must depart as soon as the cause of the delay is over.<sup>832</sup> The time limits do not apply to warships devoted exclusively to philanthropic, religious, or nonmilitary scientific purpose or military hospital ships or coastal rescue craft of parties to the conflict.<sup>833</sup>

Unless otherwise provided by the neutral State, no more than three warships of any one belligerent may be present in the same port or roadstead at any one time.<sup>834</sup> If warships of opposing belligerents are present in a neutral

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belligerent before it can exercise the right of self-help. Excepted from the rule are violations of neutrality by a belligerent that constitute a serious and immediate threat to the security of the opposing belligerent. In such cases, if the violation is not terminated, then the belligerent may use such force as is strictly necessary to respond to the threat posed by the violation, but only in the absence of any feasible and timely alternative. The limitations reflected in the *San Remo Manual* are not reflected in State practice or *opinio juris* and represent a progressive statement of the law. SAN REMO MANUAL ¶ 22.

830. DOD LAW OF WAR MANUAL §§ 15.3.1.2, 15.4.2; NWP 1-14M § 7-3; NWIP 10-2 § 441.

831. Hague XIII, arts. 12, 14; Pan American Convention, art. 5; JAPANESE LAW OF WAR MANUAL 246; DOD LAW OF WAR MANUAL § 15.7.3; NWP 1-14M § 7.3.2.1; NWIP 10-2 § 443.

832. Hague XIII, art. 14; Pan American Convention, art. 5; NWP 1-14M § 7.3.2.1; NWIP 10-2 § 443; JAPANESE LAW OF WAR MANUAL 246–47.

833. Hague XIII, art. 14; GC II, art. 32; Pan American Convention, art. 5; NWP 1-14M § 7.3.2.1; JAPANESE LAW OF WAR MANUAL 247.

834. Hague XIII, art. 15; Pan American Convention, art. 7; DOD LAW OF WAR MANUAL § 15.9.1; NWP 1-14M § 7.3.2.1; JAPANESE LAW OF WAR MANUAL 248.

port or roadstead at the same time, not less than 24 hours must elapse between the departures of the respective enemy vessels. The warships will depart based on their order of arrival unless an extension of the stay is granted by the neutral State to the first vessel to arrive. A belligerent warship may not leave a neutral port or roadstead until 24 hours after the departure of a merchant ship flying the flag of its adversary.<sup>835</sup>

### 11.3.3.4 Repairs and Replenishment in Port

Belligerent warships in a neutral port or roadstead may carry out such repairs as are “absolutely necessary,” as determined by the neutral State, to render them seaworthy.<sup>836</sup> However, the Pan American Convention specifically prohibits the repair of battle damage in neutral ports for those States that are parties to the convention.<sup>837</sup>

Belligerent warships may take on food “to the peace standard” and fuel to enable them to reach the nearest port in their own country.<sup>838</sup> Belligerent warships may also take on bunker fuel if the neutral State has adopted this method for determining the amount to be supplied.<sup>839</sup> Once a belligerent

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835. Hague XIII, art. 16; Pan American Convention, art. 8; DOD LAW OF WAR MANUAL § 15.9.3; NWP 1-14M § 7.3.2.1; NWIP 10-2 § 443; JAPANESE LAW OF WAR MANUAL 248–49.

836. Hague XIII, art. 17; DOD LAW OF WAR MANUAL § 15.9.4.1; NWP 1-14M § 7.3.2.2; NWIP 10-2 § 443; JAPANESE LAW OF WAR MANUAL 247–48.

837. Pan American Convention, art. 9; DOD LAW OF WAR MANUAL § 15.9.4.2; NWP 1-14M § 7.3.2.2. Hague XIII is silent on whether battle damage may be repaired in a neutral port or roadstead.

838. Hague XIII, art. 19; Pan American Convention, art. 10; DOD LAW OF WAR MANUAL § 15.9.4.1; NWP 1-14M § 7.3.2.2. The “peace standard” is not defined but may be considered to be “topping up.” For India, the peace standard for the minimum level of victualling stock to be held onboard Indian warships is stipulated in Indian Navy Victualling Directive (INBR-14) as one month. Indian Navy Victualling Directive, Indian Navy Book of Reference (INBR) 14 (Revised) (2017). Accordingly, the Indian Handbook stipulates that the quantity of victuals supplied to the belligerent ship in a neutral port “is not to exceed peace time standards.” Indian Handbook, Vol. 2: Laws of Armed Conflicts ¶ 2.16. Japan made a reservation to Article 19 of Hague XIII, indicating that the limitation on vessels to ship sufficient fuel should not be restricted to the nearest port in their own country. JAPANESE LAW OF WAR MANUAL 250–51.

839. Hague XIII, art. 19; Pan American Convention, art. 10; DOD LAW OF WAR MANUAL § 15.9.4.1; NWP 1-14M § 7.3.2.2. Japan opposed this provision as excessively generous. JAPANESE LAW OF WAR MANUAL 251.

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 power.<sup>840</sup>

### 11.3.3.5 Mere Passage Through Neutral Waters

A neutral State may (but is not required to) allow the passage of belligerent warships and prizes through its territorial sea on a nondiscriminatory basis. The neutrality of the neutral State is not affected by the “mere passage” through its territorial sea of warships, auxiliaries, or prizes of the belligerents.<sup>841</sup> The neutral State is entitled to suspend access to its territorial sea or archipelagic waters on an impartial basis, without prejudice to the non-suspendable rights of transit passage and ASLP.<sup>842</sup> The same rules apply to straits formed by an island of a State bordering the strait and its mainland, if there exists seaward of the island a route through the high seas or through an EEZ of similar convenience with respect to navigational and hydrographical characteristics (e.g., Strait of Messina) and straits used for international navigation between a part of the high seas or an EEZ and the territorial sea of a State (e.g., Head Harbor Passage), where a right of non-suspendable innocent passage applies.<sup>843</sup>

### 11.3.3.6 Transit Passage Through Straits Used for International Navigation

Belligerent ships (including submarines) and aircraft have a right of non-suspendable transit passage in the normal mode of operation through international straits between one part of the high seas or an EEZ and another

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840. Hague XIII, art. 20; Pan American Convention, art. 11; NWP 1-14M § 7.3.2.2.

841. Hague XIII, art. 10; DOD LAW OF WAR MANUAL § 15.7.4; JAPANESE LAW OF WAR MANUAL 243–44.

842. NWP 1-14M § 7.3.7.

843. UNCLOS, arts. 38, 45. The Strait of Tiran is also a dead-end strait, but it is subject to the Treaty of Peace, Egypt–Israel, Mar. 26, 1979, annex 1, art. V(2), *reprinted in* 18 INTERNATIONAL LEGAL MATERIALS 362, 365 (1979) (“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.”). For contending views on the navigational regime in the Strait of Tiran, see Mohamed El Baradei, *The Egyptian-Israeli Peace Treaty and Access to the Gulf of Aqaba: A New Legal Regime*, 76 AMERICAN JOURNAL OF INTERNATIONAL LAW 532 (1982); Ruth Lapidot, *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 (1983).

part of the high seas or an EEZ.<sup>844</sup> “Normal mode” may be determined by the circumstances ruling at the time, such as heightened force protection measures during armed conflict. Accordingly, a warship in transit passage may engage in activities that would be prohibited in times of peace, such as the use of fire control radar.<sup>845</sup> This right persists for belligerent ships through international straits that pass through neutral waters. Belligerent ships and aircraft have a right of non-suspendable innocent passage through straits that link a part of the high seas or an EEZ and the territorial sea of a neutral State.<sup>846</sup> Belligerent ships and aircraft shall proceed without delay and refrain from the threat or use of force against the sovereignty, territorial integrity, or political independence of neutral States bordering the strait.<sup>847</sup> The right of non-suspendable innocent passage through international straits where the right of transit passage does not apply may not be suspended during an armed conflict.<sup>848</sup>

### 11.3.3.7 Neutral Archipelagic Waters

Belligerent ships (including submarines) and aircraft retain the right of non-suspendable ASLP in the normal mode of operation through, under, and over all normal passage routes used for international navigation through neutral archipelagic waters whether or not sea lanes have been formally designated by the neutral State.<sup>849</sup> Belligerent ships and aircraft shall proceed

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844. UNCLOS, arts. 34, 37–44; DOD LAW OF WAR MANUAL § 15.8.1; NWP 1-14M §§ 7.3.4, 7.3.5; JAPANESE LAW OF WAR MANUAL 243–44.

845. Although it did not arise from the application of the law of neutrality, the ICJ determined in the *Corfu Channel* case that, in view of a previous incident where Albanian shore batteries had fired on British warships, 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. Thus, belligerent forces in transit 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. *Corfu Channel* (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 31 (Apr. 9); DOD LAW OF WAR MANUAL § 15.8.1; NWP 1-14M § 7.3.6; UNCLOS, art. 39(1)(c).

846. UNCLOS, arts. 34, 45; DOD LAW OF WAR MANUAL § 15.8.1; NWP 1-14M §§ 7.3.4, 7.3.5.

847. UNCLOS, art. 39; NWP 1-14M § 7.3.6.

848. *See supra* note 843.

849. *See supra* note 845 for a discussion of “normal mode.” UNCLOS, art. 53; DOD LAW OF WAR MANUAL § 15.8.2; NWP 1-14M § 2.5.4.1; JMSDF TEXTBOOK 123.

without delay and refrain from the threat or use of force against the sovereignty, territorial integrity, or political independence of the neutral archipelagic State.<sup>850</sup>

### 11.3.3.8 Neutral Exclusive Economic Zones

A neutral State's EEZ is not considered neutral waters. As a result, belligerents may conduct hostilities and engage in other belligerent rights (e.g., visit and search) in the EEZ of neutral States.<sup>851</sup> For example, U.S. forces routinely conducted offensive operations from foreign EEZs during Operation Enduring Freedom.<sup>852</sup> When conducting military operations in the EEZ and on the continental shelf, belligerents shall, consistent with military

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850. UNCLOS, arts. 39, 54; NWP 1-14M § 7.3.7; JMSDF TEXTBOOK 123.

851. NWP 1-14M § 7.3.8; see *supra* Section 4.1.2.1. The *San Remo Manual* suggests that belligerents must have due regard for the resource rights of the neutral State when conducting hostilities in the EEZ or on the continental shelf (¶ 34). If a belligerent lays mines in a neutral State's EEZ or continental shelf, the *San Remo Manual* also requires it to notify the neutral State, as well as ensure that the size of the minefield and the types of mines employed do not interfere with the neutral State's resource rights (¶ 35). Belligerents shall additionally have due regard for the protection and preservation of the marine environment (¶ 35). These *lex ferenda* requirements of the *San Remo Manual* are a scholarly expression of progressive development of the law. This view is not formative of international law and it does not reflect the law of naval warfare as a *lex specialis* regime that displaces the law of the sea if the latter is inconsistent with the former; JMSDF TEXTBOOK 120–21.

852. Between the start of Operation Enduring Freedom on October 7, 2001 and the end of December 2001, carrier-based strike fighters and TLAM-armed warships operating from the Northern Arabian Sea off the coast of Pakistan conducted thousands of strikes against al-Qaeda and Taliban targets in Afghanistan. During this time frame, Navy strike fighters from the USS *Enterprise* (CVN-65), USS *Carl Vinson* (CVN-70), USS *Theodore Roosevelt* (CVN-71), and USS *John C. Stennis* (CVN-74) flew over 70 percent of all strike missions in Afghanistan. The USS *Kitty Hawk* (CV-63) was also deployed to the Northern Arabian Sea and used as an afloat forward staging base by joint special operations forces conducting raids into Afghanistan. Additionally, amphibious ready groups operating from the Northern Arabian Sea and their embarked Marine expeditionary units executed numerous expeditionary missions into Afghanistan. U.S. and Coalition naval forces also carried out wide-ranging maritime interception operations in foreign EEZs throughout the region to inhibit illegal maritime activities. Gregory Bereiter, *The US Navy in Operation Enduring Freedom, 2001–2002*, NAVAL HISTORY AND HERITAGE COMMAND (2016), <https://www.history.navy.mil/research/library/online-reading-room/title-list-alphabetically/u/us-navy-operation-enduring-freedom-2001-2002.html>.

necessity and operational requirements, respect the rights and duties of neutral States.<sup>853</sup>

## 11.4 Neutral Rights and Obligations

The principal duties of a neutral State are abstention (a duty to abstain from providing belligerents with war-related goods or services) and impartiality (exercising duties and rights in a nondiscriminatory manner towards all belligerents).

### 11.4.1 Rights of Neutral States

#### 11.4.1.1 Enforcing Neutrality

A neutral State may legally use force to resist attempts to violate its neutrality, although not every violation of neutrality entitles a State to use force. The exercise by a neutral State of its rights to enforce its neutrality shall not be considered as an unfriendly act by the belligerents.<sup>854</sup>

#### 11.4.1.2 Closure of Ports and Roadsteads

Neutral States may, but are not required to, close their ports and roadsteads to belligerent warships on a nondiscriminatory basis. At the outbreak of an armed conflict, if a neutral State closes its ports or roadsteads to belligerent warships, it must provide belligerent warships in its ports or roadsteads a 24-hour notice to depart, unless local regulations stipulate a different time period.<sup>855</sup> Even if a neutral port remains open to the belligerents, a neutral State may prohibit a belligerent vessel that has failed to conform to the orders and regulations made by the neutral State, or has violated its neutrality, to enter its ports or roadsteads.<sup>856</sup>

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853. See GC II, art. 27; *supra* Section 4.1.2.1. *But see* ADDP 06.4 ¶ 6.15; CANADIAN MANUAL ¶ 821; GERMAN COMMANDER'S HANDBOOK ¶ 70; NORWEGIAN MANUAL § 4.4.1; UK MANUAL ¶ 13.21, adopting the peacetime standard of “due regard,” which is not applicable during times of armed conflict.

854. Hague XIII, art. 26.

855. *Id.* art. 13; Pan American Convention, art. 5; DOD LAW OF WAR MANUAL § 15.7.3.1; NWP 1-14M § 7.3.4; NWIP 10-2 § 443; JAPANESE LAW OF WAR MANUAL 246–47.

856. Hague XIII, art. 9.

### 11.4.1.3 Closure of Territorial Sea

Any State (neutral or belligerent) may in times of peace or war, on a nondiscriminatory basis, suspend temporarily innocent passage of foreign ships in specified areas of its territorial sea if such suspension is essential for the protection of its security.<sup>857</sup> Neutral States may, on a nondiscriminatory basis, suspend the passage of belligerent warships, including submarines, through their territorial sea except as may be necessitated by distress or force majeure.<sup>858</sup> At the outbreak of an armed conflict, if a neutral State closes its territorial sea to belligerent warships, it must provide belligerent warships in its territorial sea a 24-hour notice to depart, unless local regulations stipulate a different time period.<sup>859</sup>

### 11.4.2 Obligations of Neutral States

Neutral States have a duty to prevent belligerents from violating their neutrality.<sup>860</sup> A neutral State is obligated to exercise such surveillance, using all means at its disposal, to prevent any violations of its neutrality occurring in its ports or roadsteads or in neutral waters.<sup>861</sup> As discussed above (Section 11.3.3.1), where neutral States breach their obligations, or are unable or unwilling to prevent their breach by a belligerent adversary, the wronged belligerent may act itself. Such action might range from diplomatic demarche up to and including proportionate and necessary force to correct the breach. Ultimately, neutral States that fail to comply with their obligations may lose their neutral status, thereby becoming a party to the conflict.<sup>862</sup>

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857. UNCLOS, art. 25.

858. DOD LAW OF WAR MANUAL §§ 15.7.4, 15.7.4.1; NWP 1-14M § 7.3.4; JMSDF TEXTBOOK 121. *See also* Hague XIII, arts. 9–10.

859. Hague XIII, art. 13; Pan American Convention, art. 5; DOD LAW OF WAR MANUAL § 15.7.3.1; NWP 1-14M § 7.3.2; NWIP 10-2 § 443.

860. Article 25 of Hague XIII states: “A neutral Power is bound to exercise such surveillance as the means at its disposal allow to prevent any violation of the provisions of the above Articles occurring in its ports or roadsteads or in its waters.”

861. Hague XIII, art. 25; Pan American Convention, art. 26.

862. Hague XIII, arts. 1, 2, 5, 6, 24; NWP 1-14M §§ 7.1, 7.2; NWIP 10-2 § 230.



#### **11.4.2.1 Impartiality**

A neutral State must apply impartially to the belligerents any conditions, restrictions, or prohibitions made by it regarding the admission into its ports, roadsteads, or territorial waters of belligerent warships or of their prizes.<sup>863</sup>

#### **11.4.2.2 Abstention**

A neutral State is prohibited from supplying to a belligerent, in any manner, directly or indirectly, warships, ammunition, or war material of any kind.<sup>864</sup> This rule is subject to the exceptions discussed in Section 11.2.

#### **11.4.2.3 Prevention**

Neutral States have a duty to prevent belligerents from violating their neutrality. They must prevent belligerent acts undertaken from neutral waters and airspace and must not allow belligerents to use neutral ports and waters as a sanctuary or base of operations.<sup>865</sup>

#### **11.4.2.4 Fitting Out and Arming of Vessels**

A neutral State is obligated to prevent the fitting out or arming of any vessel within its jurisdiction that it has reason to believe is intended to cruise, or engage in hostile operations, against a State with which the neutral is at peace. A neutral is also obligated to prevent the departure from its jurisdiction of any vessel that is intended to cruise or engage in hostile operations and that has been adapted entirely or partly within its jurisdiction for use in war.<sup>866</sup>

#### **11.4.2.5 Prize**

A belligerent may only bring a prize into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions. The prize must leave as soon as the circumstances that justified its entry end. If the

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863. Hague XIII, art. 9; JAPANESE LAW OF WAR MANUAL 231.

864. Hague XIII, art. 6; JAPANESE LAW OF WAR MANUAL 239.

865. DOD LAW OF WAR MANUAL §§ 15.3.2.2, 15.4.3; NWP 1-14M § 7.2; JAPANESE LAW OF WAR MANUAL 258; JMSDF TEXTBOOK 121–22.

866. Hague XIII, art. 8; JAPANESE LAW OF WAR MANUAL 242–43.

prize does not depart, the neutral State must order it to leave at once. If the prize refuses to obey the order to leave, the neutral State must release the prize with its officers and crew and intern the prize crew.<sup>867</sup>

#### 11.4.2.6 Detention of Belligerent Warships

After notification by the neutral State, if a belligerent warship does not leave a neutral port where it is not entitled to remain, the neutral State is entitled (and in some cases, out of respect for the rule of impartiality between the belligerents, will be obliged) to detain the warship and its officers and crew. The officers and crew may be left in the ship or kept either on another vessel or on land, and may be subjected to the measures of restriction, as may be deemed necessary. The officers may be left at liberty after giving their word that they will not leave the neutral territory without permission.<sup>868</sup>

#### 11.4.2.7 International Straits and Archipelagic Waters

Passage of foreign ships and belligerent warships may not be suspended in international straits overlapped by neutral waters where the right of transit passage or non-suspendable innocent passage applies, or in neutral archipelagic waters (whether or not sea lanes have been formally designated) where the right of ASLP applies.<sup>869</sup> Nonetheless, States bordering international straits and archipelagic States retain all other rights of neutral States in case violations of neutrality occur while belligerent ships and aircraft exercise their rights of passage.

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867. Hague XIII, art. 21; JAPANESE LAW OF WAR MANUAL 253–54.

868. Hague XIII, art. 24; Pan American Convention, art. 6; DOD LAW OF WAR MANUAL § 15.9.2; NWP 1-14M § 7.3.2.1; NWIP 10-2 § 443. In 1904, during the Russo–Japanese War, the government of China, as a neutral power, after negotiating with the belligerent government of Japan, detained and disarmed the Russian warship (gunboat) *Mandjur*, which had been in Shanghai since before the outbreak of the war, after demanding its departure. Another Russian warship (auxiliary cruiser), *Lena*, which put into San Francisco in September 1904, disarmed herself and was entrusted to the United States Navy to be detained there during war. Three officers of the *Lena* escaped, but the Russian government ordered them to return to the United States and stay there for the duration of the war. JAPANESE LAW OF WAR MANUAL 255–57.

869. UNCLOS, arts. 37–45, 53; DOD LAW OF WAR MANUAL §§ 15.8.1, 15.18.2; NWP 1-14M §§ 7.3.4, 7.3.5; JMSDF TEXTBOOK 122–23. See *supra* Sections 11.3.3.6, 11.3.3.7.

## CHAPTER 12

### THE LAW OF NAVAL WARFARE AND NON-INTERNATIONAL ARMED CONFLICTS

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### 12.1 Introduction

While there are no treaty rules specially designed to apply in situations of non-international armed conflict (NIAC), as defined in Section 2.2.1, where the hostilities extend to the sea, there is no reason why the parties to the conflict would be absolved from the law of armed conflict (LOAC) if the hostilities occur in the internal waters, archipelagic waters, or territorial sea of the State concerned or on the high seas areas. There is no indication that the law governing NIACs ceases to apply if the hostilities extend to the sea. Accordingly, in their relations, the parties to a NIAC will be bound by the principles and rules on the conduct of hostilities and on the protection of victims of armed conflict. Customary LOAC rules that are applicable in all armed conflicts (such as the principle of distinction) will also apply in NIACs at sea. Furthermore, certain treaty obligations that are expressed as applying to armed conflict generally (such as the prohibition on the use of chemical weapons<sup>870</sup>) will also apply in NIAC at sea.

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<sup>870</sup> Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction art. I, Jan. 13, 1993, 1974 U.N.T.S. 45.

During a NIAC, neither prize law (see Chapter 9) nor the law of maritime neutrality (see Chapter 11) applies in the strict application of legal doctrine since these concepts historically were features of international armed conflict (IAC). In practice, however, some States have exercised maritime interception operations against non-State threats that are akin to the belligerent right of visit and search. For example, during Maritime Interception Force operations in the Persian Gulf in 2001, and especially after the attacks on 9/11, an international coalition conducted numerous compliant and noncompliant boardings of vessels under UN Security Council resolutions and the rationale or legal theories of master's consent, ships assimilated as Stateless vessels, or the exercise of national self-defense.<sup>871</sup>

If there is a recognition of belligerency of the non-State party to such conflict, the LOAC and law of naval warfare applicable during IAC apply as between the relevant parties.<sup>872</sup> This occurs only in exceptional circumstances.<sup>873</sup>

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871. The maritime interception operations that took place over 13 years in the Persian Gulf were initially undertaken as compliant boardings. This situation changed for the Royal Australian Navy after the arrival of HMAS *Anzac* in the Gulf on July 30, 2001. After conducting only compliant boardings for several weeks, HMAS *Anzac*'s commanding officer took the view that his rules of engagement authorized noncompliant boardings and, on August 11, 2001, a noncompliant boarding of MV *Catrina* (carrying 5,000–8,000 tonnes of oil) was carried out. See Captain Nigel Coates *in* PRESENCE, POWER PROJECTION AND SEA CONTROL: THE RAN IN THE GULF 1990–2009, at 193–99 (John Mortimer & David Stevens eds., 2009). In Operation Enduring Freedom (Afghanistan), ship boarding operations were conducted pursuant to the Authorization to Use Military Force (AUMF) under the names Maritime Interception Operations (MIO), Leadership Interception Operations (LIO), and Expanded Maritime Interception Operations (E-MIO). LIO “involved querying, stopping, visiting, boarding, and searching vessels suspected of moving terrorists, particularly terrorist leaders.” NAVCENT rules of engagement for U.S. ship commanders “permitted the use of disabling fire to halt suspicious vessels and to search or seize non-government vessels based on actionable intelligence.” The first noncompliant boarding of the conflict occurred on December 6, 2001, when Navy SEALs and Marines from the USS *Shreveport* (LPD 12) boarded MV *Kota Sejarab* in the Arabian Sea and conducted an inspection of accessible containers on the ship to see if they had been converted for human habitation to accommodate fleeing al Qaeda leaders. See Gregory Bereiter, *The US Navy in Operation Enduring Freedom, 2001–2002*, NAVAL HISTORY AND HERITAGE COMMAND (2016), <https://www.history.navy.mil/research/library/online-reading-room/title-list-alphabetically/u/us-navy-operation-enduring-freedom-2001-20-02.html>.

872. ADDP 06.4 ¶ 1.35; DOD LAW OF WAR MANUAL §§ 3.3.3.1–3.3.3.3.

873. On recognition of belligerency, see DOD LAW OF WAR MANUAL § 3.3.3.1; UK MANUAL ¶ 3.1.2; 10 DIGEST OF INTERNATIONAL LAW 875 (Marjorie M. Whiteman ed.,

For example, during the Algerian conflict (1954–62), France, as the State party to the conflict, visited, searched, and captured foreign merchant vessels far beyond the outer limit of the territorial sea.<sup>874</sup> The flag States whose vessels had been subjected to those measures protested,<sup>875</sup> which provides evidence of a general conviction that prize measures are impermissible during a NIAC. Accordingly, measures by the parties to the conflict directed against foreign-flag vessels and aircraft beyond the outer limit of the territorial sea must be assessed under other rules and principles of international law rather than under the LNW (see Section 12.4).

## 12.2 Geographical Scope of Applicability

For the general aspects of the geographical scope of the LOAC regulating NIACs, see Section 2.2.2.

During a NIAC, hostilities may extend beyond the outer limit of the territorial sea, whereas prize measures may not be taken. This applies to all parties to such an armed conflict. The rights the coastal State enjoys in its contiguous zone remain limited to fiscal, immigration, sanitary, and customs regulations and they may not be extended to security interests. However, this is without prejudice to the coastal State's right to make use of Article 33 of the United Nations Convention on the Law of the Sea (UNCLOS) to prevent

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1968). The threshold for recognition of belligerency is set out in advice by UK government lawyers in 1957 (in relation to the Communist–Nationalist war in China), as follows:

- (i) There must exist an armed conflict of a general (as distinguished from a purely local) character.
- (ii) The contesting party which is not the legitimate government must occupy and administer a substantial portion of the national territory.
- (iii) The above-named contesting party must conduct the hostilities in accordance with the rules of war and through organised armed forces acting under a responsible authority.
- (iv) There must exist circumstances which make it necessary for outside states to define their attitude by means of recognition of belligerency.

The advice is available at [https://lieber.westpoint.edu/wp-content/uploads/2020/09/UK-Archives-FO-371\\_120939-Formosa-Recognition-of-Belligerency-Legal-Advice.pdf](https://lieber.westpoint.edu/wp-content/uploads/2020/09/UK-Archives-FO-371_120939-Formosa-Recognition-of-Belligerency-Legal-Advice.pdf).

874. Laurent Lucchini, *Actes de contrainte exercés par la France en Haute Mer au cours des opérations en Algérie*, 12 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 805 (1966). See also D.P. O'Connell, *International Law and Contemporary Naval Operations*, 44 BRITISH YEAR BOOK OF INTERNATIONAL LAW 19, 36–39 (1970).

875. O'Connell, *supra* note 874, at 36.

certain activities designed to assist the non-State organized armed group—for example, the transport of weapons destined to the non-State organized armed group.

There has been a range of NIACs where the parties did not limit armed hostilities to the land territory and territorial sea of the respective State. Traditionally, NIACs have been limited to the territory of one State. However, in State practice, the relevance of such spatial restriction has been receding. During the Spanish Civil War (1936–39), foreign vessels and aircraft assisting the government forces were attacked by unknown military aircraft and submarines. During the armed conflict in Sri Lanka (1983–2009) between the government forces and the Liberation Tigers of Tamil Eelam (LTTE), both parties engaged in attacks against the enemy at sea and they also attacked and captured foreign vessels.<sup>876</sup> The Gaza conflict was a NIAC in which the State party to the conflict established and enforced a naval blockade off Gaza.<sup>877</sup> During the armed conflict in Yemen, the Houthi rebels attacked vessels in the Red Sea.<sup>878</sup> These examples indicate the potential for NIAC to spill over into the conflict State's territorial sea, and then into adjacent EEZ and high seas areas, and for the effects of the hostilities to affect other States and their vessels.

While the use of force in many of these situations was based on NIAC LOAC, occasionally the authorization for the use of force was based on maritime security law. For example, during the NIAC between the LTTE and the Sri Lankan government in the years preceding 2009, the Sri Lanka Navy intercepted many foreign-flagged vessels in international waters carrying weapons and other supplies to the LTTE. The sinkings of MV *Koimar* (March 2003), MT *Sbosin* (June 2003), and MV *Princess Christina* (December 2009) by the Sri Lanka Navy are cases in point. These interceptions, however, were

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876. Wolff Heintschel von Heinegg, *Methods and Means of Naval Warfare in Non-International Armed Conflicts*, 88 INTERNATIONAL LAW STUDIES 211, 215–16 (2012).

877. Note, however, that the Palmer Report treated the conflict as an IAC. U.N. Panel of Inquiry on the 31 May 2010 Flotilla Incident, *Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident*, ¶ 73 (Sept. 2011) [hereinafter Palmer Report]; Heinegg, *supra* note 876, at 216.

878. For the most recent attacks by the Houthi rebels, see *Houthis Seize "Hostile" Vessel off Yemen That Saudis Say Carried Medical Equipment*, REUTERS, Jan. 3, 2022, <https://www.reuters.com/markets/commodities/ukmto-says-it-received-reports-vessel-attacked-off-yemen-2022-01-03/>; *Houthis Confirm They Seized UAE Vessel in Red Sea*, IRAN INTERNATIONAL, Jan. 3, 2022, <https://www.iranintl.com/en/202201039673>.

not premised on the existence of IAC or NIAC (and thus applicable LOAC), but rather the UNCLOS Article 110 right of visit by a warship in the high seas (including the EEZ) and the right of self-defense.<sup>879</sup>

India also acted at sea against the LTTE when the Indian Navy interdicted the Honduras-flagged MV *Yahata* (sailing under the false name MV *Abat*) carrying weapons, ammunition, and explosives for the LTTE, with LTTE cadres (including the LTTE leader Kittu) embarked onboard. The ship was not flying a flag and was drifting in the high seas with not-under-command (NUC) lights switched on. The ship also resisted calls from the Indian warship to stop for visit to verify its identity. The ship was eventually destroyed and scuttled by the LTTE cadres onboard to prevent the cargo and personnel falling into the hands of Indian authorities. This was a maritime law enforcement/security operation, as India was not a party to the NIAC and thus had no legal basis under applicable LOAC relating to NIAC to engage in LNW-based operations against the LTTE.

The NIAC between Israel and Hamas possibly represents a distinct (if not unique) case of Israel applying the legal provisions available under IAC for intercepting foreign-flagged vessels in international waters. The seizure of the *Mavi Marmara* in 2010 is well documented.<sup>880</sup> In March 2014, Israel intercepted a Panama-flag ship, *Klos-C*, in the Red Sea carrying an Iranian arms shipment (Syrian M-302 missiles) from Umm Qasr (Iraq) to the Gaza Strip via Port Sudan.<sup>881</sup> However, these examples are somewhat complicated by the fact that the Palmer Report characterized the conflict with Hamas as subject to IAC LOAC.<sup>882</sup> On the other hand, Israel has consistently taken measures it considered lawful in both IAC and NIAC, including the imposition and enforcement of blockades.

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879. Input sourced from the Director General Operations of the Sri Lanka Navy, Jan. 10, 2023.

880. ICC Office of the Prosecutor, *Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report*, ¶ 14 (Nov. 6, 2014).

881. *Statements by PM Netanyahu, DM Yaalon, Pres Peres*, MISSION OF ISRAEL TO THE UN IN GENEVA (Mar. 5, 2014), <https://embassies.gov.il/UnGeneva/NewsAndEvents/Pages/Seizure-of-an-Iranian-arms-ship-in-the-Red-Sea-5-Mar-2014.aspx>.

882. State of Israel, *The Operation in Gaza 27 December 2008–18 January 2009: Factual and Legal Aspects* ¶¶ 28–31 (July 2009), <https://www.gov.il/en/Departments/General/the-operation-in-gaza-factual-and-legal-aspects>.

Notably, the 2017 International Committee of the Red Cross (ICRC) Commentary on Geneva Convention II (GC II) (paragraph 489) states that the object and purpose of Common Article 3 supports its applicability in NIAC beyond the territory of one State. Given that its aim is to provide persons not participating in hostilities with minimum protections during such armed confrontations, it is logical that those same protections would apply when such violence spans the territory of more than one State. It appears that the ICRC has changed its position since the 2016 Geneva Convention I (GC I) commentary, which was more restrictive on the geographical scope of a NIAC.<sup>883</sup> Determining boundaries and borders on land is also much easier than at sea and with contentious maritime boundary disputes, it will be extremely difficult to determine the geographical scope of a NIAC at sea. Considering the current nature of NIAC, where non-State actors often possess military power and capacity that equals that of many nations, there is no clear rationale why NIAC, in terms of geographical scope, should be treated differently from IAC. Although the ICRC is not specific on this issue, NIAC may also take place in international waters. State practice also seems to support this, as mentioned above. The application of Additional Protocol II (AP II) does not imply any qualitative legal differences for armed conflict at sea in comparison with Common Article 3.

### 12.3 Conduct of Hostilities

#### 12.3.1 No Limitation of the Exercise of Belligerent Rights to Warships and Military Aircraft

The parties to a NIAC are not required to limit the exercise of hostile acts to warships and military aircraft as defined under the law of naval and aerial warfare.<sup>884</sup> Accordingly, they may make use of any vessel or aircraft at their disposal for the purpose of engaging the respective enemy. There is no treaty or customary rule according to which the platforms used by the parties to a NIAC must be distinctively marked or recognizable as being used by them for the conduct of hostilities.

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883. See ICRC, COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD, ¶¶ 471/ff. (2016), <https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-3/commentary/2016?activeTab=undefined>.

884. See *supra* Section 3.1.



### 12.3.2 Limitation of Attacks Against Persons and Objects Qualifying as Lawful Targets

#### 12.3.2.1 Principle of Distinction

It is generally recognized that the principle of distinction as found in the LOAC applicable in IAC also applies in situations of NIAC as customary international law.<sup>885</sup> Accordingly, the parties to the conflict shall at all times distinguish between the civilian population and members of State forces or non-State organized armed groups and between civilian and military objectives.<sup>886</sup> The principle of distinction is only applicable to attacks.

#### 12.3.2.2 Lawful Targets in Non-International Armed Conflict

Although non-State organized armed groups in a NIAC may conduct attacks against military objectives under the LOAC, such attacks likely continue to be criminal acts under the applicable domestic law.

##### 12.3.2.2.1 Individuals

The following individuals qualify as lawful targets during a NIAC:

- Members of the State's regular armed forces and other security forces employed in the conduct of hostilities;
- Members of a non-State organized armed group, irrespective of whether or not they perform, within that group, a "continuous combat function";<sup>887</sup> and

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885. DANISH MANUAL 147, 186; GERMAN MANUAL ¶ 1307; DOD LAW OF WAR MANUAL § 17.5; JMSDF TEXTBOOK 115.

886. This is a modification of the wording of Article 48 of AP I.

887. *But see* ICRC INTERPRETIVE GUIDANCE ON THE NOTION OF DPH, according to which "organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in the hostilities ('continuous combat function')." This requirement is not universally accepted. *See, e.g.*, Explanatory Memorandum to the Criminal Code Amendment (War Crimes) Bill 2016 (Austl.), ¶ 10 (emphasis added) ("'Membership' of an organised armed group is a question of fact, to be determined on the basis of all reasonably available information and intelligence. *While a person's function*—what that individual does, the role they play, and the extent of that role in contributing to the military aims or objectives of the organised armed group—*will provide a strong indication as to whether or not that individual 'belongs' to the group, organised armed groups often have a membership structure based on more than mere function.*").

- Civilians directly participating in the hostilities (see Chapter 8). Acts qualifying as “direct participation in hostilities,” which are dealt with in Chapter 8, include the voluntary shielding against attacks of persons and objects qualifying as lawful targets. Individuals are, therefore, liable to be attacked for such time they are serving as voluntary human shields. The mode of attack against civilians directly participating in the hostilities is of no relevance. Accordingly, they may be attacked from the sea, from the air, or by any distance weapons.<sup>888</sup>

#### 12.3.2.2.2 Objects

The definition of military objectives found in the LOAC applicable to IAC applies in situations of NIAC as customary law.<sup>889</sup> Accordingly, military objectives are those objects that “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.”<sup>890</sup>

During a NIAC, the following objects, inter alia, qualify as lawful targets by nature:

- Headquarters of the parties to the conflict, wherever located;
- The military vehicles, weapons, and equipment of the parties to the conflict. Accordingly, the vessels and aircraft in possession of a non-State organized armed group are liable to be attacked even if they are not, at the time, used for military purposes;
- Command, control, and communication equipment of the regular armed forces and of the non-State organized armed group; and
- All other military equipment.

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888. *But see* ICRC INTERPRETIVE GUIDANCE ON THE NOTION OF DPH 57, according to which “in operations involving more powerful weaponry, such as artillery or air attacks, the presence of voluntary human shields often has no adverse impact on the capacity of the attacker to identify and destroy the shielded military objective.” In such situations, civilians voluntarily acting as human shields continue, according to the ICRC, to qualify as protected civilians who must be taken account of in the collateral damage assessment.

889. DOD LAW OF WAR MANUAL § 17.7; GERMAN MANUAL ¶ 1307; JMSDF TEXT-BOOK 115.

890. AP I, art. 52(2). *See also supra* Chapter 8.

Other objects will be liable to attack if they are used for military action or if there are clear indications that they will be so used in the near future. For instance, vessels flying the flag of a foreign State will qualify as lawful targets if they support the non-State party to the conflict by transporting military equipment destined to that enemy.

It is an unsettled issue whether and to what extent foreign vessels outside the territorial sea qualify as lawful military objectives. It must be noted that during the Spanish Civil War, attacks on foreign-flagged vessels and aircraft were assimilated to acts of piracy by the Nyon Arrangement.<sup>891</sup> At the same time, the States party to the Nyon Arrangement rejected the right of either party to the conflict in Spain to exercise belligerent rights or to interfere with merchant ships on the high seas even if the laws of warfare at sea were observed.

For the purposes of this Manual, measures taken by the State party to the conflict must be distinguished from measures taken by the non-State party to the NIAC. Attacks by the non-State party outside the territorial sea will qualify either as acts of piracy or as offenses under the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.<sup>892</sup>

The existence of a NIAC is without prejudice to the rights States enjoy under general international law, including the law of the sea. The State party to the NIAC retains its right of self-defense against foreign-flagged vessels, wherever located, that manifest a threat or use of force against that State party. Likewise, in the contiguous zone, coastal States that are parties to the NIAC also may exercise the control necessary to prevent and punish infringement of fiscal, immigration, sanitary, and customs laws and regulations within their territory or territorial sea. For example, actions can be taken

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891. Nyon Agreement, Sept. 14, 1937, 181 L.N.T.S. 137; Agreement Supplementary to the Nyon Arrangement, Sept. 17, 1937, 181 L.N.T.S. 151. In the Nyon Agreement, the nine States parties condemned attacks by “submarines against merchant ships not belonging to either of the conflicting Spanish parties” as “violations of international law” (i.e., of the London Protocol of 1936). They agreed that such submarines “shall be counter-attacked and, if possible, destroyed.” In the Supplementary Agreement, the States parties considered it “expedient that such measures should be taken against similar acts by surface vessels and aircraft.”

892. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221.

against a foreign-flagged vessel if it intends to violate immigration or customs laws by transporting rebel fighters, weapons, or military equipment.

### 12.3.3 Prohibited Methods and Means of Warfare

The methods and means of warfare that are prohibited under the law of naval warfare or the general LOAC are equally prohibited in NIAC.

#### 12.3.3.1 Prohibited Methods

Prohibited methods of warfare in NIAC include:<sup>893</sup>

- Unrestricted warfare at sea, such as engaging all vessels and aircraft encountered in a sea area and the airspace above without verifying whether they qualify as lawful targets;
- Perfidy;
- Abuse of protective emblems, including flags of truce;
- Use of human shields;
- No quarter;
- Pillage;
- Starvation of civilians as a method of combat;
- Naval and aerial blockade, unless the NIAC is of such exceptional character that it has more in common with an IAC;<sup>894</sup>
- Exclusion zones beyond the territorial sea;
- Mining operations outside the territorial sea;<sup>895</sup> and
- Indiscriminate naval mining.

#### 12.3.3.2 Prohibited Means

Prohibited means of warfare also apply in NIAC.<sup>896</sup> Apart from weapons specifically prohibited by an applicable treaty, prohibited means of warfare in NIAC are those:<sup>897</sup>

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893. AP II, art. 14; DOD LAW OF WAR MANUAL § 17.19.2; GERMAN MANUAL ¶ 1307; *see also supra* Chapter 7.

894. Note that, according to the Palmer Report, the blockade of Gaza by the Israel Defense Forces, was considered permissible when the armed conflict “has all the trappings of an international armed conflict.” Palmer Report, *supra* note 877, ¶ 73.

895. NWP 1-14M § 9.2.2.

896. *See supra* Chapter 6.

897. DOD LAW OF WAR MANUAL § 17.13.

- That are expected to cause unnecessary suffering or superfluous injury;
- That are used for targeting but cannot be directed at a specific military objective; and
- The effects of which cannot be limited, which is reflected in AP I, binding on States party to that Protocol.

#### 12.3.4 Prohibited Attacks

In a NIAC, indiscriminate attacks are prohibited (see Chapter 8). Those prohibitions apply in particular to attacks from the sea against targets on land.

#### 12.4 Protection of Victims

Without prejudice to the peacetime duties to render assistance to those in distress at sea,<sup>898</sup> the obligation to render assistance to wounded, sick, and shipwrecked amongst the parties in a NIAC is functionally the same as for an IAC. Rather than finding this obligation in GC II, the source of the obligation is Common Article 3 and/or customary international law,<sup>899</sup> or, in a very few situations, the 1977 AP II, where it is applicable *de jure*.<sup>900</sup>

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898. UNCLOS, art. 98; SOLAS; SAR Convention; NWP 1-14M § 3.2.1.

899. 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, rr. 109–110 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

900. AP II, arts. 7–8.