

## CHAPTER 3

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

### 3.1 INTRODUCTION

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

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

A nation may enforce its domestic laws at sea provided there is a valid jurisdictional basis under international law to do so. Because U.S. naval commanders may be called upon to assist in maritime law enforcement actions, or to otherwise protect persons

and property at sea, a basic understanding of maritime law enforcement procedures is essential.

### 3.2 RESCUE, SAFE HARBOR, AND QUARANTINE

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

**3.2.1 Assistance to Persons, Ships, and Aircraft in Distress.** Customary international law has long recognized the affirmative obligation of mariners to go to the assistance of those in danger of being lost at sea. Both the 1958 Geneva Convention on the High Seas and the 1982 LOS Convention codify this custom by providing that every nation shall require the master of a ship flying its flag, insofar as he can do so without serious danger to his ship, crew, or passengers, to render assistance to any person found at sea in danger of being lost and to proceed with all possible speed to the rescue of persons in distress if informed of their need of assistance, insofar as it can reasonably be expected of him. He is also to be required, after a collision, to render assistance to the other ship, its crew, and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry, and the nearest port at which it will call. (See paragraph 2.3.2.5 for a discussion of "Assistance Entry.")

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

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

**3.2.2 Safe Harbor.** Under international law, no port may be closed to a foreign ship seeking shelter from storm or bad weather or otherwise compelled to enter it in distress, unless another equally safe port is open to the distressed vessel to which it may proceed without additional jeopardy or hazard. The only condition is that the distress must be real and not contrived and based on a well-founded apprehension of loss of or serious damage or injury to the vessel, cargo, or crew. In general, the distressed vessel may enter a port without being subject to local regulations concerning any incapacity, penalty, prohibition, duties, or taxes in force at that port. (See paragraph 4.4 for a discussion of aircraft in distress.)

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

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

*free pratique* in accordance with the Sailing Directions for that port.

### **3.3 ASYLUM AND TEMPORARY REFUGE**

**3.3.1 Asylum.** International law recognizes the right of a nation to grant asylum to foreign nationals already present within or seeking admission to its territory. The U.S. defines "asylum" as:

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

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

**3.3.1.1 Territories Under the Exclusive Jurisdiction of the United States and International Waters.** Any person requesting asylum in international waters or in territories under the exclusive jurisdiction of the United States (including the U.S. territorial sea, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, territories under U.S. administration, and U.S. possessions), will be received on board any U.S. armed forces aircraft, vessel, activity or station. Persons seeking asylum are to be afforded every reasonable care and protection permitted by the circumstances. Under no circumstances will a person seeking asylum in U.S. territory or in international waters be surrendered to foreign jurisdiction or control, unless at the personal direction of the Secretary of the Navy or higher authority. (See Article 0939, U.S. Navy Regulations, 1990; SECNAVINST 5710.22 (series), and U.S. Coast Guard Maritime Law Enforcement Manual, COMDTINST M16247.1 (series) (MLEM), Enclosure 17, for specific guidance.)

**3.3.1.2 Territories Under Foreign Jurisdiction.** Commanders of U.S. warships, military aircraft, and military installations in territories under foreign jurisdiction (including foreign territorial seas, archipelagic waters, internal waters, ports, territories, and possessions) are not authorized to receive on board foreign nationals seeking asylum. Such persons should be referred to the American Embassy or nearest U.S. Consulate in the country, foreign territory, or foreign possession involved, if any, for assistance in coordinating a request for asylum with the host government insofar as practicable. Because warships are extensions of the sovereignty of the flag nation and because of their immunity

from the territorial sovereignty of the foreign nation in whose waters they may be located, they have often been looked to as places of asylum. The U.S., however, considers that asylum is generally the prerogative of the government of the territory in which the warship is located.

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

**3.3.1.3 Expulsion or Surrender.** Article 33 of the 1951 Convention Relating to the Status of Refugees provides that a refugee may not be expelled or returned in any manner whatsoever to the frontier or territories of a nation where his life or freedom would be threatened on account of his race, religion, nationality, political opinion, or membership in a particular social group, unless he may reasonably be regarded as a danger to the security of the country of asylum or has been convicted of a serious crime and is a danger to the community of that country. This obligation applies only to persons who have entered territories under the exclusive jurisdiction of the United States. It does not apply to temporary refuge granted abroad.

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

SECNAVINST 5710.22 defines "temporary refuge" as:

*Protection afforded for humanitarian reasons to a foreign national in a Department of Defense shore installation, facility, or military vessel within the territorial jurisdiction of a foreign nation or [in international waters], under conditions of urgency in order to secure the life or safety of that person against imminent danger, such as pursuit by a mob.*

It is the policy of the United States to grant temporary refuge in a foreign country to nationals of that country, or nationals of a third nation, solely for humanitarian reasons when extreme or exceptional circumstances put in imminent danger the life or safety of a person, such as pursuit by a mob. The officer in command of the ship, aircraft, station, or activity must decide which measures can prudently be taken to provide temporary refuge. The safety of U.S.

personnel and security of the unit must be taken into consideration.

**3.3.2.1 Termination or Surrender of Temporary Refuge.** Although temporary refuge should be terminated when the period of active danger is ended, the decision to terminate protection will not be made by the commander. Once temporary refuge has been granted, protection may be terminated only when directed by the Secretary of the Navy, or higher authority. (See Article 0939, U.S. Navy Regulations, 1990, and SECNAVINST 5710.22 (series), and the Coast Guard's MLEM.)

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

**3.3.3 Inviting Requests for Asylum or Refuge.** U.S. armed forces personnel shall neither directly nor indirectly invite persons to seek asylum or temporary refuge.

**3.3.4 Protection of U.S. Citizens.** The limitations on asylum and temporary refuge are not applicable to U.S. citizens. See paragraph 3.10 and the standing rules of engagement for applicable guidance.

## 3.4 RIGHT OF APPROACH AND VISIT

As a general principle, vessels in international waters are immune from the jurisdiction of any nation other than the flag nation. However, under international law, a warship, military aircraft, or other duly authorized ship or aircraft may *approach* any vessel in international waters to verify its nationality. Unless the vessel encountered is itself a warship or government vessel of another nation, it may be stopped, boarded, and the ship's documents examined, *provided* there is reasonable ground for suspecting that it is:

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

The procedure for ships exercising the right of approach and visit is similar to that used in exercising the belligerent right of visit and search during armed conflict described in paragraph 7.6.1. See Article 630.23, OPNAVINST 3120.32B, and paragraph 2.9 of the Coast Guard's MLEM for further guidance.

### 3.5 REPRESSION OF PIRACY

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

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

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

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

Congress has exercised this power by enacting title 18 U.S. Code section 1651 which provides that:

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

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

**3.5.2 Piracy Defined.** Piracy is an international crime consisting of illegal acts of violence, detention, or depredation committed for private ends by the crew or passengers of a private ship or aircraft in or over international waters against another ship or aircraft or persons and property on board. (Depredation is the act of plundering, robbing, or pillaging.)

**3.5.2.1 Location.** In international law piracy is a crime that can be committed only on or over international waters (including the high seas, exclusive economic zone, and the contiguous zone), in international

airspace, and in other places beyond the territorial jurisdiction of any nation. The same acts committed in the internal waters, territorial sea, archipelagic waters, or national airspace of a nation do not constitute piracy in international law but are, instead, crimes within the jurisdiction and sovereignty of the littoral nation.

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

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

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

**3.5.3 Use of Naval Forces to Repress Piracy.** Only warships, military aircraft, or other ships or aircraft clearly marked and identifiable as being on governmental service and authorized to that effect, may seize a pirate ship or aircraft.

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

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

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

Pursuit of a pirate vessel or aircraft through or over international straits overlapped by territorial seas or through archipelagic sea lanes or air routes, may proceed with or without the consent of the coastal nation or nations, provided the pursuit is expeditious and direct and the transit passage or archipelagic sea lanes passage rights of others are not unreasonably constrained in the process.

### **3.6 PROHIBITION OF THE TRANSPORT OF SLAVES**

International law strictly prohibits use of the seas for the purpose of transporting slaves. The 1982 LOS Convention requires every nation to prevent and punish the transport of slaves in ships authorized to fly its flag. If confronted with this situation, commanders should maintain contact, consult applicable standing rules of engagement and Coast Guard use of force policy, and request guidance from higher authority.

### **3.7 SUPPRESSION OF UNAUTHORIZED BROADCASTING**

The 1982 LOS Convention provides that all nations shall cooperate in the suppression of unauthorized broadcasting from international waters. Unauthorized broadcasting involves the transmission of radio or television signals from a ship or off-shore facility intended for receipt by the general public, contrary to international regulation. Commanders should request guidance from higher authority if confronted with this situation.

### **3.8 SUPPRESSION OF INTERNATIONAL NARCOTICS TRAFFIC**

All nations are required to cooperate in the suppression of the illicit traffic in narcotic drugs and psychotropic substances in international waters. International law permits any nation which has reasonable grounds to suspect that a ship flying its flag is engaged in such traffic to request the cooperation of other nations in effecting its seizure. International law also permits a nation which has reasonable grounds for believing that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying the marks of registry of another nation is engaged in illegal drug trafficking to request confirmation of registry and, if confirmed, request authorization from the flag nation to take appropriate action with regard to that vessel. Coast Guard personnel, embarked on Coast Guard cutters or U.S. Navy ships, regularly board, search and take law enforcement action aboard foreign-flagged vessels pursuant to such special arrangements or standing, bilateral agreements with the flag state. (See paragraph 3.11.3.2 regarding utilization of U.S. Navy assets in the support of U.S. counterdrug efforts.)

### **3.9 RECOVERY OF GOVERNMENT PROPERTY LOST AT SEA**

The property of a sovereign nation lost at sea remains vested in that sovereign until title is formally relinquished or abandoned. Aircraft wreckage, sunken vessels, practice torpedoes, test missiles, and target drones are among the types of U.S. Government property which may be the subject of recovery operations. Should such U.S. property be recovered at sea by foreign entities, it is U.S. policy to demand its immediate return. Specific guidance for the on-scene commander in such circumstances is contained in the standing rules of engagement and applicable operation order (e.g., CINCPACFLT OPOD 201, CINCLANTFLT OPOD 2000).

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

In addition to the obligation and authority of warships to repress international crimes such as piracy, international law also contemplates the use of force in peacetime in certain circumstances to protect private and merchant vessels, private property, and persons at sea from acts of unlawful violence. The legal doctrines of individual and collective self-defense and protection of nationals provide the authority for U.S. armed forces to protect U.S. and, in some circumstances, foreign flag

vessels, aircraft, property, and persons from violent and unlawful acts of others. U.S. armed forces should not interfere in the legitimate law enforcement actions of foreign authorities even when directed against U.S. vessels, aircraft, persons or property. Consult the JCS Standing Rules of Engagement for U.S. Forces for detailed guidance.

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

**3.10.1.1 Foreign Internal Waters, Archipelagic Waters, and Territorial Seas.** Unlawful acts of violence directed against U.S. flag vessels and aircraft and U.S. nationals within and over the internal waters, archipelagic waters, or territorial seas of a foreign nation present special considerations. The coastal nation is primarily responsible for the protection of all vessels, aircraft and persons lawfully within its sovereign territory. However, when that nation is unable or unwilling to do so effectively or when the circumstances are such that immediate action is required to protect human life, international law recognizes the right of another nation to direct its warships and military aircraft to use proportionate force in or over those waters to protect its flag vessels, its flag aircraft, and its national s. Because the coastal nation may lawfully exercise jurisdiction and control over foreign flag vessels, aircraft and citizens within its internal waters, archipelagic waters, territorial seas and national airspace, special care must be taken by the warships and military aircraft of other nations not to interfere with the lawful exercise of jurisdiction by that nation in those waters and superjacent airspace. U.S. naval commanders should consult applicable standing rules of engagement for specific guidance as to the exercise of this authority.

### **3.10.1.2 Foreign Contiguous Zones and Exclusive Economic Zones and Continental Shelves.**

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

### **3.10.2 Protection of Foreign Flag Vessels and Aircraft, and Persons.**

International law, embodied in the concept of collective self-defense, provides authority for the use of proportionate force necessary for the protection of foreign flag vessels and aircraft and foreign nationals and their property from *unlawful* violence, including terrorist or piratical attacks, at sea. In such instances, consent of the flag nation should first be obtained unless prior arrangements are already in place or the necessity to act immediately to save human life does not permit obtaining such consent. Should the attack or other unlawful violence occur within or over the internal waters, archipelagic waters, or territorial sea of a third nation, or within or over its contiguous zone or exclusive economic zone, the considerations of paragraphs 3.10.1.1 and 3.10.1.2, respectively, would also apply. U.S. commanders should consult applicable standing rules of engagement for specific guidance.

### **3.10.3 Noncombatant Evacuation Operations (NEO).**

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

## 3.11 MARITIME LAW ENFORCEMENT

As noted in the introduction to this Chapter, U.S. naval commanders may be called upon to assist in the enforcement of U.S. laws at sea, principally with respect to the suppression of the illicit traffic in narcotic drugs and psychotropic substances into the United States. Activities in this mission area involve international law, U.S. law and policy, and political considerations. Because of the complexity of these elements, commanders should seek guidance from higher authority whenever time permits.

A wide range of U.S. laws and treaty obligations pertaining to fisheries, wildlife, customs, immigration, environmental protection, and marine safety are enforced at sea by agencies of the United States. Since these activities do not ordinarily involve Department of Defense personnel, they are not addressed in this publication.

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

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

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

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

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

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

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

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

## 3.11.2 Jurisdiction to Enforce

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

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

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

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

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

**3.11.2.2.1 Hot Pursuit.** Should a foreign ship fail to heed an order to stop and submit to a proper law enforcement action when the coastal nation has good reason to believe that the ship has violated the laws and regulations of that nation, hot pursuit may be initiated. The pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea, or the contiguous zone of the pursuing nation, and may only be continued outside the territorial sea or contiguous zone if the pursuit has not been interrupted. It is not necessary that,

at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone. If the foreign ship is within a contiguous zone, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own nation or of a third nation. The right of hot pursuit may be exercised only by warships, military aircraft or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect. The right of hot pursuit applies also to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal nation applicable to the exclusive economic zone or the continental shelf, including such safety zones.

**a. Commencement of Hot Pursuit.** Hot pursuit is not deemed to have begun unless the pursuing ship is satisfied by such practicable means as are available that the ship pursued, or one of its boats or other craft working as a team and using the ship pursued as a mother ship, is within the limits of the territorial sea, within the contiguous zone or the exclusive economic zone, or above the continental shelf. Pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

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

1. The preceding provisions apply.
2. The aircraft must do more than merely sight the offender or suspected offender to justify an arrest outside the territorial sea. It must first order the suspected offender to stop. Should the suspected offender fail to comply, pursuit may be commenced alone or in conjunction with other aircraft or ships.

**c. Requirement for Continuous Pursuit.** Hot pursuit must be continuous, either visually or through electronic means. The ship or aircraft giving the order to stop must itself actively pursue the ship until another ship or aircraft of or authorized by the coastal nation, summoned by the ship or aircraft, arrives to take over the pursuit, unless the ship or aircraft is itself able to arrest the ship.

**3.11.2.2.2 Constructive Presence.** A foreign vessel may be treated as if it were actually located at the same place as any other craft with which it is cooperatively

engaged in the violation of law. This doctrine is most commonly used in cases involving mother ships which use contact boats to smuggle contraband into the coastal nation's waters. In order to establish constructive presence for initiating hot pursuit, and exercising law enforcement authority, there must be:

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

**3.11.2.2.3 Right of Approach and Visit.** See paragraph 3.4.

**3.11.2.2.4 Special Arrangements and International Agreements.** International law has long recognized the right of a nation to authorize the law enforcement officials of another nation to enforce the laws of one or both on board vessels flying its flag. The 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances specifically recognizes and encourages such arrangements and agreements to aid in the suppression of this illegal traffic. Special arrangements may be formalized in written agreements or consist of messages or voice transmissions via diplomatic channels between appropriate representatives of the requesting and requested nations. International agreements authorizing foreign officials to exercise law enforcement authority on board flag vessels take many forms. They may be bilateral or multilateral; authorize in advance the boarding of one or both nations' vessels; and may permit law enforcement action or be more limited. Typically, the flag nation will verify (or refute) the vessel's registry claim, and authorize the boarding and search of the suspect vessel. If evidence of a violation of law is found, the flag nation may then authorize the enforcement of the requesting nation's criminal law (usually with respect to narcotics trafficking) or may authorize the law enforcement officials of the requesting nation to act as the flag nation's agent in detaining the vessel for eventual action by the flag nation itself. The flag nation may put limitations on the grant of law enforcement authority and these restrictions must be strictly observed.

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

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

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

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

**3.11.2.5 Other Actions.** When operating in international waters, warships, military aircraft, and other duly authorized vessels and aircraft on government service (such as auxiliaries), may engage in two other actions in conjunction with maritime law enforcement, neither of which constitute an exercise of jurisdiction over the vessel in question. However, such actions may afford a commander with information which could serve as the basis for subsequent law enforcement.

**3.11.2.5.1 Right of Approach.** See paragraph 3.4 for a discussion of the exercise of the right of approach preliminary to the exercise of the right of visit.

**3.11.2.5.2 Consensual Boarding.** A consensual boarding is conducted at the invitation of the master (or person-in-charge) of a vessel which is not otherwise subject to the jurisdiction of the boarding officer. The plenary authority of the master over all activities related to the operation of his vessel while in international waters is well established in international law and includes the authority to allow anyone to come aboard his vessel as his guest, including foreign law enforcement officials.

The voluntary consent of the master permits the boarding, but it does not allow the assertion of law enforcement authority (such as arrest or seizure). A consensual boarding is not, therefore, an exercise of maritime law enforcement jurisdiction *per se*. Nevertheless, such boardings have utility in allowing rapid verification of the legitimacy of a vessel's voyage by obtaining or confirming vessel documents, cargo, and navigation records without undue delay to the boarded vessel.

**3.11.3 Limitations on the Exercise of Maritime Law Enforcement Jurisdiction** Even where international and domestic U.S. law would recognize certain conduct as a criminal violation of U.S. law, there are legal and policy restrictions on U.S. law enforcement actions that must be considered. Outside of the U.S., a commander's greatest concerns will be: limitations on DOD assistance to civilian law enforcement agencies; the requirement for coastal nation authorization to conduct law enforcement in that nation's national waters; and the necessity for interagency coordination. Similarly, a fourth restriction, the concept of *posse comitatus*, limits U.S. military activities within the U.S.

**3.11.3.1 Posse Comitatus.** Except when expressly authorized by the Constitution or act of Congress, the use of U.S. Army or U.S. Air Force personnel or resources as a *posse comitatus* — a force to aid civilian law enforcement authorities in keeping the peace and arresting felons — or otherwise to execute domestic law, is prohibited by the Posse Comitatus Act, title 18 U.S. Code section 1385. As a matter of policy, the Posse Comitatus Act is made equally applicable to the U.S. Navy and U.S. Marine Corps. The prohibitions of the Act are not applicable to the U.S. Coast Guard, even when operating as a part of the Department of the Navy. (See SECNAVINST 5820.7 (series).) The Justice Department has opined that the Posse Comitatus Act itself

does not apply outside the territory of the United States. (Memorandum from the Office of Legal Counsel to National Security Council re: Extraterritorial Effect of the Posse Comitatus Act (Nov. 3, 1989)).

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

**3.11.3.2.1 Use of DOD Personnel.** Although Congress has enacted legislation in recent years expanding the permissible role of the Department of Defense in assisting law enforcement agencies, DOD personnel may not directly participate in a search, seizure, arrest or similar activity unless otherwise authorized by law. Permissible activities presently include training and advising Federal, State and local law enforcement officials in the operation and maintenance of loaned equipment. DOD personnel made available by appropriate authority may also maintain and operate equipment in support of civil law enforcement agencies for the following purposes:

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

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

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

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

**3.11.3.4 Interagency Coordination.** Presidential Directive NSC 27 (PD-27) requires coordination within the Executive Branch of the government for non-military incidents which could have an adverse impact on U.S. foreign relations. This coordination includes consultation with the Department of State and other concerned agencies prior to taking actions that could potentially have such an impact. The Coast Guard has developed an internal notification mechanism that results in the provision, or denial, of a Statement of No Objection (SNO) from the appropriate superior authority which constitutes authorization to conduct the specific action requested. Interagency coordination initiated for law enforcement actions on naval vessels will be made through appropriate law enforcement agency channels by the embarked Coast Guard LEDET.

### 3.11.4 Counterdrug Operations

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

1. U.S. vessels anywhere (see paragraph 3.11.2.1)
2. Vessels without nationality (see paragraph 3.11.2.3)
3. Vessels assimilated to a status without nationality (see paragraph 3.11.2.4)
4. Foreign vessels where the flag nation authorizes enforcement of U.S. law by the United States (see paragraph 3.11.2.2.4)
5. Foreign vessels located within the territorial sea or contiguous zone of the United States (see paragraph 1.5.1)
6. Foreign vessels located in the territorial seas or archipelagic waters of another nation, where that nation authorizes enforcement of U.S. law by the United States (see paragraph 3.11.2.2.4).

**3.11.4.2 DOD Mission in Counterdrug Operations.** The Department of Defense has been designated by statute as lead agency of the Federal Government for the detection and monitoring of aerial and maritime transit of illegal drugs into the United States, including its possessions, territories and commonwealths. DoD is further tasked with integrating the command, control, communications and technical intelligence assets of the United States that are dedicated to the interdiction of illegal drugs into an effective communications network.

**3.11.4.3 U.S. Coast Guard Responsibilities in Counterdrug Operations.** The Coast Guard is the primary maritime law enforcement agency of the United States. It is also the lead agency for maritime drug interdiction and shares the lead agency role for air interdiction with the U.S. Customs Service. The Coast Guard may make inquiries, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection and suppression of violations of the laws of the United States, including maritime drug trafficking. Coast Guard commissioned,

warrant and petty officers may board any vessel subject to the jurisdiction of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect and search the vessel and use all necessary force to compel compliance. When it appears that a violation of U.S. law has been committed, the violator may be arrested and taken into custody. If it appears that the violation rendered the vessel or its cargo liable to fine or forfeiture, the vessel or offending cargo may be seized.

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

**3.11.5 Use of Force in Maritime Law Enforcement.** In the performance of maritime law enforcement missions, occasions will arise where resort to the use of force will be both appropriate and necessary. U.S. armed forces personnel engaged in maritime law enforcement actions may employ only such force, pursuant to U.S. Coast Guard Use of Force Policy, as is reasonable and necessary under the circumstances.

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

MLEM) which details the specific circumstances and limitations under which force may be used to terminate criminal activity and to apprehend those committing such acts. Neither the rules of engagement nor the rules for the use of force in law enforcement limit a commander's inherent authority and obligation to use all necessary means available and to take all appropriate action in self-defense of the commander's unit and other U.S. forces in the vicinity.

**3.11.5.2 Warning Shots.** A warning shot is a signal — usually to warn an offending vessel to stop or maneuver in a particular manner or risk the employment of disabling fire or more severe measures. Under international law, warning shots do not constitute a use of force. Disabling fire is firing under controlled conditions, when warning shots and further warnings are unheeded, into the steering gear or engine room of a vessel in order to cause the vessel to stop. U.S. armed forces personnel employing warning shots and disabling fire in a maritime law enforcement action will comply with the U.S. Coast Guard Use of Force Policy.

**3.11.6 Other Maritime Law Enforcement Assistance.** In addition to the direct actions and dedicated assistance efforts discussed above, the naval commander may become involved in other activities supporting law enforcement actions, such as providing towing and escort services for vessels seized by the U.S. Coast Guard. Naval commanders may also be called upon to provide assistance to law enforcement agencies in the return of apprehended drug traffickers and terrorists to the United States for prosecution. Activities of this nature usually involve extensive advance planning and coordination.

## CHAPTER 4

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

### 4.1 INTRODUCTION

This final chapter of Part I — Law of Peacetime Naval Operations — examines the broad principles of international law that govern the conduct of nations in protecting their interests at sea during time of peace. *As noted in the preface, this publication provides general information, is not directive, and does not supersede guidance issued by the commanders of the combatant commands, and in particular any guidance they may issue that delineates the circumstances and limitations under which the forces under their command will initiate and/or continue engagement with other forces encountered.*

Historically, international law governing the use of force between nations has been divided into rules applicable in peacetime and rules applicable in time of war. In recent years, however, the concepts of both "war" and "peace" have become blurred and no longer lend themselves to clear definition. Consequently, it is not always possible to try to draw neat distinctions between the two. Full scale hostilities continue to break out around the world, but few are accompanied by a formal declaration of war. At the same time, the spectrum of armed conflict has widened and become increasingly complex. At one end of that spectrum is total nuclear war; at the other, insurgencies and state-sponsored terrorism. For the purposes of this publication, however, the conduct of armed hostilities involving U.S. forces, irrespective of character, intensity, or duration, is addressed in Part II — Law of Naval Warfare.

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

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

Article 2, paragraph 4, provides that:

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

In combination, these two provisions establish the fundamental principle of modern international law that nations will not use force or the threat of force to impose their will on other nations or to otherwise resolve their international differences.

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

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

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

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

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

Article 42 provides that:

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

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

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

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

## **4.2 NONMILITARY MEASURES**

**4.2.1 Diplomatic.** As contemplated by the United Nations Charter, nations generally rely on peaceful means to resolve their differences and to protect their interests. Diplomatic measures include all those political actions taken by one nation to influence the behavior of other nations within the framework of international law. They may involve negotiation, conciliation or mediation, and may be cooperative or coercive (e.g., severing of diplomatic relations). The behavior of an offending nation may be curbed by appeals to world public opinion as in the General Assembly, or, if their misconduct endangers the maintenance of international peace and security, by bringing the issue before the Security Council. Ordinarily, however, differences that arise between nations are resolved or accommodated through the normal day-to-day, give-and-take of international diplomacy. The key point is that disputes between the U.S. and other nations arising out of conflicting interests are normally addressed and resolved through diplomatic channels and do not involve resort to the threat or use of force.

**4.2.2 Economic.** Nations often utilize economic measures to influence the actions of others. The granting

or withholding of "most favored nation" status to another country is an often used measure of economic policy. Similarly, trade agreements, loans, concessionary credit arrangements and other aid, and investment opportunity are among the many economic measures that nations extend, or may withhold, as their national interests dictate. Examples of the coercive use of economic measures to curb or otherwise seek to influence the conduct of other nations include the suspension of U.S. grain sales and the embargo on the transfer of U.S. technology to the offending nation, boycott of oil and other export products from the offending nation, suspension of "most favored nation" status, and the assertion of other economic sanctions.

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

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

## **4.3 MILITARY MEASURES**

The mission of U.S. military forces is to deter armed attack against the United States across the range of military operations, defeat an armed attack should deterrence fail, and prevent or neutralize hostile efforts to intimidate or coerce the United States by the threat or use of armed force or terrorist actions. In order to deter armed attack, U.S. military forces must be both capable and ready, and must be perceived to be so by potential aggressors. Equally important is the perception of other nations that, should the need arise, the U.S. has the will to use its forces in individual or collective self-defense.

**4.3.1 Naval Presence.** U.S. naval forces constitute a key and unique element of our national military capability. The mobility of forces operating at sea combined with the versatility of naval force composition — from units operating individually to multi-battle group formations — provide the National Command Authorities with the flexibility to tailor U.S. military presence as circumstances may require.

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

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

1. Necessity — The requirement that a use of force be in response to a hostile act or demonstration of hostile intent.
2. Proportionality — The requirement that the use of force be in all circumstances limited in intensity, duration, and scope to that which is reasonably required to counter the attack or threat of attack and to ensure the continued safety of U.S. forces.

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

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

**4.3.2.1 Anticipatory Self-Defense.** Included within the inherent right of self-defense is the right of a nation (and its armed forces) to protect itself from imminent attack. International law recognizes that it would be contrary to the purposes of the United Nations Charter if a threatened nation were required to absorb an aggressor's initial and potentially crippling first strike before taking those military measures necessary to thwart an imminent attack. Anticipatory self-defense involves the use of armed force where attack is imminent and no reasonable choice of peaceful means is available.

**4.3.2.2 JCS Standing Rules of Engagement (SROE).** The JCS Standing Rules of Engagement establish fundamental policies and procedures governing the actions to be taken by U.S. commanders during military operations, contingencies, or prolonged conflicts. (See also the discussion of SROE in the Preface.) At the national level, rules of engagement are promulgated by the NCA, through the Chairman of the Joint Chiefs of Staff, to the combatant commanders to guide them in the employment of their forces toward the achievement of broad national objectives. At the tactical level, rules of engagement are task and mission-oriented. At all levels, U.S. rules of engagement are consistent with the law of armed conflict. Because rules of engagement also reflect operational and national policy factors, they often restrict combat operations far more than do the requirements of international law. A full

range of options is reserved to the National Command Authorities to determine the response that will be made to hostile acts and demonstrations of hostile intent. The SROE provide implementation guidance on the inherent right and obligation of self-defense and the application of force for mission accomplishment. A principal tenet of these ROE is the commander's inherent authority and obligation to use all necessary means available and to take all appropriate action in self-defense of the commander's unit and other U.S. forces in the vicinity.

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

All nations have complete and exclusive sovereignty over their national airspace (see paragraphs 1.8 and 2.5.1). With the exception of overflight in transit passage of international straits and in archipelagic sea lanes passage (see paragraphs 2.3.3 and 2.3.4.1), distress (see paragraph 3.2.2.1), and assistance entry to assist those in danger of being lost at sea (see paragraph 2.3.2.5), authorization must be obtained for any intrusion by a foreign aircraft (military or civil) into national airspace (see paragraph 2.5). That authorization may be flight specific, as in the case of diplomatic clearance for the visit of a military aircraft, or general, as in the case of commercial air navigation pursuant to the Chicago Convention.

Customary international law provides that a foreign aircraft entering national airspace without permission due to distress or navigational error may be required to comply with orders to turn back or to land. In this connection the Chicago Convention has been amended to provide, in effect:

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

The amendment was approved unanimously on 10 May 1984 and will come into force upon ratification by 102 of ICAO's members in respect of those nations which have ratified it. The Convention, by its terms, does not apply to intruding military aircraft. The U.S. takes the position that customary international law establishes similar standards of reasonableness and proportionality with respect to a nation's response to military aircraft that stray into national airspace through navigational error or that are in distress.

## **PART II**

# **Law of Naval Warfare**

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

Chapter 6 — Adherence and Enforcement

Chapter 7 — The Law of Neutrality

Chapter 8 — The Law of Targeting

Chapter 9 — Conventional Weapons and Weapons Systems

Chapter 10 — Nuclear, Chemical, and Biological Weapons

Chapter 11 — Noncombatant Persons

Chapter 12 — Deception During Armed Conflict



## CHAPTER 5

# Principles and Sources of the Law of Armed Conflict

### 5.1 WAR AND THE LAW

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

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

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

1. Only that degree and kind of force, not otherwise prohibited by the law of armed conflict, required for the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources may be applied.
2. The employment of any kind or degree of force not required for the purpose of the partial or

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

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

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

### 5.3 COMBATANTS AND NONCOMBATANTS

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

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

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

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

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

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

## **5.4 SOURCES OF THE LAW OF ARMED CONFLICT**

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

**5.4.1 Customary Law.** The customary international law of armed conflict derives from the practice of military and naval forces in the field, at sea, and in the air during hostilities. When such a practice attains a degree of regularity and is accompanied by the general conviction among nations that behavior in conformity with that practice is obligatory, it can be said to have become a rule of customary law binding upon all na-

tions. It is frequently difficult to determine the precise point in time at which a usage or practice of warfare evolves into a customary rule of law. In a period marked by rapid developments in technology, coupled with the broadening of the spectrum of conflict to encompass insurgencies and state-sponsored terrorism, it is not surprising that nations often disagree as to the precise content of an accepted practice of armed conflict and to its status as a rule of law. This lack of precision in the definition and interpretation of rules of customary law has been a principal motivation behind efforts to codify the law of armed conflict through written agreements (treaties and conventions.) However, the inherent flexibility of law built on custom and the fact that it reflects the actual — albeit constantly evolving — practice of nations, underscore the continuing importance of customary international law in the development of the law of armed conflict.

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

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

of these agreements (for purposes of this publication) are listed chronologically as follows:

1. 1907 Hague Convention Respecting the Laws and Customs of War on Land (Hague IV)
2. 1907 Hague Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague V)
3. 1907 Hague Convention Relative to the Laying of Automatic Submarine Contact Mines (Hague VIII)
4. 1907 Hague Convention Concerning Bombardment by Naval Forces in Time of War (Hague IX)
5. 1907 Hague Convention Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War (Hague XI)
6. 1907 Hague Convention Concerning the Rights and Duties of Neutral Powers in Naval War (Hague XIII)
7. 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare
8. 1936 London Protocol in Regard to the Operations of Submarines or Other War Vessels with Respect to Merchant Vessels (Part IV of the 1930 London Naval Treaty)
9. 1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field\*
10. 1949 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea\*
11. 1949 Geneva Convention (III) relative to the Treatment of Prisoners of War\*
12. 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War\*
13. 1954 Hague Convention for the Protection of Cultural Property in the event of armed conflict
14. 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction
15. 1977 Protocol Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of International Armed Conflict (Additional Protocol I)\*
16. 1977 Protocol Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II)\*
17. 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects\*
18. 1993 Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction

## 5.5 RULES OF ENGAGEMENT

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

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



## CHAPTER 6

# Adherence and Enforcement

### 6.1 ADHERENCE TO THE LAW OF ARMED CONFLICT

Nations adhere to the law of armed conflict not only because they are legally obliged to do so but for the very practical reason that it is in their best interest to be governed by consistent and mutually acceptable rules of conduct. The law of armed conflict is effective to the extent that it is obeyed. Occasional violations do not substantially affect the validity of a rule of law, provided routine compliance, observance, and enforcement continue to be the norm. However, repeated violations not responded to by protests, reprisals, or other enforcement actions may, over time, indicate that a particular rule is no longer regarded as valid.

**6.1.1 Adherence by the United States.** The Constitution of the United States provides that treaties to which the U.S. is a party constitute a part of the "supreme law of the land" with a force equal to that of law enacted by the Congress. Moreover, the Supreme Court of the United States has consistently ruled that where there is no treaty and no controlling executive, legislative, or judicial precedent to the contrary, customary international law is a fundamental element of U.S. national law. Since the law of armed conflict is based on international agreements to which the U.S. is a party and customary law, it is binding upon the United States, its citizens, and its armed forces.

**6.1.2 Department of the Navy Policy.** SECNAV-INST 3300.1A states that the Department of the Navy will comply with the law of armed conflict in the conduct of military operations and related activities in armed conflicts. Article 0705, U.S. Navy Regulations, 1990, provides that:

*At all times, commanders shall observe, and require their commands to observe, the principles of international law. Where necessary to fulfill this responsibility, a departure*

*from other provisions of Navy Regulations is authorized.*

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

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

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

**6.1.3 Command Responsibility.** Officers in command are not only responsible for ensuring that they conduct all combat operations in accordance with the law of armed conflict; they are also responsible for the proper performance of their subordinates. While a commander may delegate some or all of his authority, he cannot delegate responsibility for the conduct of the forces he commands. The fact that a commander did not order, authorize, or knowingly acquiesce in a violation of the law of armed conflict by a subordinate will not relieve him of responsibility for its occurrence if it is established that he failed to exercise properly his command authority or failed otherwise to take reasonable measures to discover and correct violations that may occur.

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

## **6.2 ENFORCEMENT OF THE LAW OF ARMED CONFLICT**

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

1. Publicize the facts with a view toward influencing world public opinion against the offending nation
2. Protest to the offending nation and demand that those responsible be punished and/or that compensation be paid

3. Seek the intervention of a neutral party, particularly with respect to the protection of prisoners of war and other of its nationals that have fallen under the control of the offending nation
4. Execute a belligerent reprisal action (see paragraph 6.2.3)
5. Punish individual offenders either during the conflict or upon cessation of hostilities.

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

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

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

**6.2.3.1 Requirements for Reprisal.** To be valid, a reprisal action must conform to the following criteria:

1. Reprisal must be ordered by an authorized representative of the belligerent government. (For the rule applicable to the United States, see paragraph 6.2.3.3).
2. It must respond to illegal acts of warfare committed by an adversary government, its military commanders, or combatants for which the adversary is responsible. Anticipatory reprisal is not authorized.
3. When circumstances permit, reprisal must be preceded by a demand for redress by the enemy of his unlawful acts.
4. Its purpose must be to cause the enemy to cease its unlawful activity. Therefore, acts taken in reprisal should be brought to the attention of the enemy in order to achieve maximum effectiveness. Reprisal must never be taken for revenge.
5. Reprisal must only be used as a last resort when other enforcement measures have failed or would be of no avail.
6. Each reprisal must be proportional to the original violation.
7. A reprisal action must cease as soon as the enemy is induced to desist from its unlawful activities and to comply with the law of armed conflict.

**6.2.3.2 Immunity From Reprisal.** Reprisals are forbidden to be taken against:

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

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

**6.2.4 Reciprocity.** Some obligations under the law of armed conflict are reciprocal in that they are binding on the parties only so long as both sides continue to comply with them. A major violation by one side will release the other side from all further duty to abide by that obligation. The concept of reciprocity is not applicable to humanitarian rules of law that protect the victims of armed conflict, that is, those persons protected by the 1949 Geneva Conventions. The decision to consider the United States released from a particular obligation following a major violation by the enemy will be made by the NCA.

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

The following acts are representative war crimes:

1. Offenses against prisoners of war, including killing without just cause; torture or inhuman treatment; subjection to public insult or curiosity; unhealthy, dangerous, or otherwise prohibited labor; infringement of religious rights; and denial of fair trial for offenses
2. Offenses against civilian inhabitants of occupied territory, including killing without just cause, torture or inhuman treatment, forced labor, deportation, infringement of religious rights, and denial of fair trial for offenses
3. Offenses against the sick and wounded, including killing, wounding, or mistreating enemy forces disabled by sickness or wounds
4. Denial of quarter (i.e., killing or wounding an enemy hors de combat or making a genuine offer of surrender) and offenses against combatants who have laid down their arms and surrendered
5. Offenses against the survivors of ships and aircraft lost at sea, including killing, wounding, or mistreating the shipwrecked; and failing to

provide for the safety of survivors as military circumstances permit

6. Wanton destruction of cities, towns, and villages or devastation not justified by the requirements of military operations; and bombardment, the sole purpose of which is to attack and terrorize the civilian population
7. Deliberate attack upon medical facilities, hospital ships, medical aircraft, medical vehicles, or medical personnel
8. Plunder and pillage of public or private property
9. Mutilation or other mistreatment of the dead
10. Employing forbidden arms or ammunition
11. Misuse, abuse, or firing on flags of truce or on the Red Cross device, and similar protective emblems, signs, and signals
12. Treacherous request for quarter (i.e., feigning surrender in order to gain a military advantage).

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

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

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

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

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

In the United States, its territories and possessions, jurisdiction is not limited to offenses against U.S. nationals, but extends to offenses against persons of other nationalities. Violations by enemy nationals may be tried as offenses against international law, which forms part of the law of the United States. In occupied territories, trials are usually held under occupation law. Trials of such personnel have been held in military courts, military commissions, provost courts, military government courts, and other military tribunals. There is no statute of limitations on the prosecution of a war crime. (On jurisdiction generally, see paragraph 3.11.1.)

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

#### **6.2.5.5 Defenses**

**6.2.5.5.1 Superior Orders.** The fact that a person committed a war crime under orders of his military or civilian superior does not relieve him from responsibility under international law. It may be considered in mitigation of punishment. To establish responsibility, the person must know (or have reason to know) that an act he is ordered to perform is unlawful under international law. Such an order must be manifestly illegal. The standard is whether under the same or similar circumstances a person of ordinary sense and understanding

would know the order to be unlawful. If the person knows the act is unlawful and only does it under duress, this circumstance may be taken into consideration either by way of defense or in mitigation of punishment.

**6.2.5.5.2 Military Necessity.** The law of armed conflict provides that only that degree and kind of force, not otherwise prohibited by the law of armed conflict, required for the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources may be applied. This principle, often referred to as "military necessity," is a fundamental concept of restraint designed to limit the application of force in armed conflict to that which is in fact required to carry out a lawful military purpose. Too often it is misunderstood and misapplied to support the application of military force that is excessive and unlawful under the misapprehension that the "military necessity" of mission accomplishment justifies the result. While the principle does recognize that some amount of collateral damage and incidental injury to civilians and

civilian objects may occur in an attack upon a legitimate military objective, it does not excuse the wanton destruction of life and property disproportionate to the military advantage to be gained from the attack.

**6.2.5.5.3 Acts Legal or Obligatory Under National Law.** The fact that national law does not prohibit an act which constitutes a war crime under international law does not relieve the person who committed the act from responsibility under international law. However, the fact that a war crime under international law is made legal and even obligatory under national law may be considered in mitigation of punishment.

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