



AAP 1003
ROYAL AUSTRALIAN AIR FORCE

Operations Law for RAAF Commanders

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Foreword



This is the second edition of *Operations Law for RAAF Commanders*, the legal companion volume to *Fundamentals of Australian Aerospace Power*. This second edition is being released as a result of major changes that have occurred in the international and national environments since the first edition was published. The global security situation is now less certain—international, as well as domestic law has evolved—and the Air Force itself has changed and adapted to these new demands.

The Air Force Vision is to be a ‘balanced, expeditionary force, capable of achieving the Government’s objectives through the swift and decisive application of air and space power, in joint operations or as part of a larger coalition force’. Operations Law assists us to achieve our Vision by strengthening our professional mastery. It is a complex and dynamic discipline in which our commanders play a critical role. To effectively fulfil this role, they must develop a working knowledge of the law and apply it in operational circumstances.

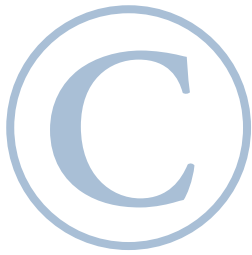
This new guide keeps commanders abreast of new developments and builds on the solid foundation of the first edition as a valuable first reference on a broad range of operational law issues.

At a time when observance of operations law has become a critical, and underpinning feature of all Air Force members’ duties, becoming well informed of the law also becomes every member’s responsibility.

This publication is not a substitute for the specialist advice of a legal officer. It does, however, provide a useful starting point for commanders to enable them to have the basic legal knowledge vital to their ability to conduct, or be prepared to conduct, operations. In an environment of rapid legal development, heightened operational tempo, and increasing scrutiny from the Government, media and the community, this publication is a timely and necessary addition to every commander’s reference collection.

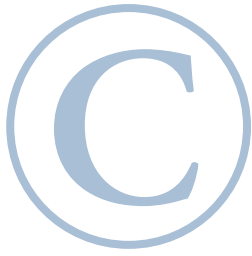
A.G. Houston AM, AFC

Air Marshal
Chief of Air Force



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Acronyms and Abbreviations

AAP 1000	RAAF Air Power Manual
ADDP	Australian Defence Doctrine Publication
ADIZ	Air Defence Identification Zone
ADF	Australian Defence Force
ADFP	Australian Defence Force Publication
AEZ	Air Exclusion Zone
AFR	Air Force Regulations
AFZ	Australian Fishing Zone
ASC	Australian Contingent
CAA	Civil Aviation Authority
CDF	Chief of Defence Force
COMAST	Commander Australian Theatre
Cth	Commonwealth
DACC	Defence Assistance to the Civil Community
DFACA	Defence Force Aid to the Civil Authority
DFDA	Defence Force Discipline Act
DI (AF)	Defence Instruction (Air Force)
DI (G)	Defence Instruction (General)
EEZ	Exclusion Economic Zone
EZ	Exclusion Zone
FIR	Flight Information Region
HPACC	Head Public Affairs and Corporate Communication
HQAC	Headquarters Air Command
IHL	International Humanitarian Law

ICAO	International Civil Aviation Organisation
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
INTERFET	International Force East Timor
LOAC	Law of Armed Conflict
1982 LOSC	1982 Law of the Sea Convention
m	Metres
MEZ	Maritime Exclusion Zone
nm	Nautical Miles
NOTAMS	Notices to Airmen
P5	Permanent 5 Members of the Security Council
PV	Protection Visa
PW	Prisoners of War
RAAF	Royal Australian Air Force
RAN	Royal Australian Navy
ROE	Rules of Engagement
SOFA	Status of Forces Agreement
TEZ	Total Exclusion Zone
TPV	Temporary Protection Visa
UCAV	Uninhabited Aerial Combat Vehicle
UN	United Nations
UNCLOS III	Third United Nations Conference on the Law of the Sea
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNTAET	United Nations Transitional Authority for East Timor
VC	Victoria Cross
VIP	Very Important Person
WMD	Weapons of Mass Destruction



Introduction

GENERAL

1. Operations law is concerned with legal issues that affect military operations. The manifestation of Australia's national will through the projection of air power, in accordance with the law, is an integral part of the RAAF mission. The RAAF stands for the 'delivery of effective, precision aerospace power [in] defence of Australia's people, security and interests'. To carry out their missions effectively, commanders must understand the legal regime that impacts on ADF operations. This publication is designed to assist commanders in the conduct of their operational mission.

2. **Scope:** By definition such a publication must describe the fundamental principles of international and domestic law that govern RAAF operations. Additionally, it provides an overview and general discussion of international law (the Law of Armed Conflict is a subset of international law) on the use of airspace, status of aircraft, law of the sea and operations in support of the United Nations. Domestic law governing RAAF operations is also discussed, particularly constitutional issues that may arise during the transition from peace to armed conflict, and military operations conducted in aid of the civil community. The publication also has relevance to all ADF commanders engaged in air operations or utilising RAAF capabilities.

3. **Organisation:** There are two parts to this publication. Part One deals with legal issues applicable to operation conducted in peacetime but which are also relevant in time of armed conflict. Part Two is concerned solely with legal issues that will arise in relation to operations carried out in time of armed conflict.

4. **Recommended Changes:** While operations law is a dynamic area this publication must concentrate on the law as it stands. Consequently revision will be necessary from time to time and any recommended changes should be sent to Director of the Air Power Development Centre and to the Director, Directorate of Operations and International Law, The Defence Legal Service.

DEFINITIONS

5. **Operations Law:** Operations law is that domestic and international law associated with planning and execution of military operations in peacetime or during armed conflict. It includes but is not limited to LOAC, air law, law of the sea, anti- and counter-terrorist activities, overseas procurement, discipline, pre-deployment preparation, deployment, status of forces agreements, operations against hostile forces, aid to the civil authority, border protection and civil affairs operations.

6. **International Law:** Operations law is primarily a product of international law which is itself concerned with international law and order and security. While it defies precise definition, international law is equally applicable to individuals despite the fact that it governs relations between states. In international law the term ‘states’ refers to nations which are accepted as legitimate members of the international community. For simplicity the term ‘state’ is used throughout this publication.
7. **Law of Armed Conflict (LOAC):** LOAC is a subset of international law. It is that law which governs states when they are engaged in armed conflict. LOAC is synonymous with the Law of War.
8. **International Humanitarian Law (IHL):** IHL is the body of rules which, in wartime, protects people who are not or are no longer participating in the hostilities. Its central purpose is to limit and prevent human suffering in times of armed conflict. The rules are to be observed not only by governments and their armed forces, but also by armed opposition groups and any other parties to a conflict. The four Geneva Conventions of 1949 and their two Additional Protocols of 1977 are the principal instruments of humanitarian law.
9. **Domestic Law:** Domestic or municipal law encompasses those internal laws that govern the behaviour of persons within a state and in some cases may affect nationals abroad. An Act of Parliament such as the *Defence Force Discipline Act 1982 (DFDA)* is an example of a domestic law that binds Australian Service personnel within Australia and abroad. International law can also become part of a state’s domestic law; the Australian Parliament’s ratification of the 1977 Protocols Additional to the Geneva Conventions of 1949 (Additional Protocols) being just one example. In the absence of specific legislation, international law can still be regarded as part of domestic law; although certain legal conditions are required.
10. **International Armed Conflict:** Generally, this term refers to a conflict between states in which at least one party has resorted to the use of armed force to achieve its aim.
11. Other specific LOAC terms are defined in Part Two of this publication.

INTERNATIONAL LAW AS A SYSTEM

12. International law as a system has substantial differences from domestic legal systems. One of the differences is its sources. International law emanates from five sources: custom, treaties, judicial decisions, legal texts and general legal principles. By far the most important sources of international law are custom and treaties.
13. **Customary International Law:** Customary international law encompasses those laws that represent the general and consistent practice among states with respect to a particular subject and are considered obligatory by states. Custom becomes customary international law when, after a period of time, a practice is accepted by the international community as being the result of a compulsory rule (*opinio juris*). Customary international law has been the principal source of international law and is binding on all states.

14. **Treaties:** Treaty law or international agreements represent commitments entered into by two or more states. These states indicate that they intend to be bound by the provisions of the agreement. Such agreements can be bilateral treaties, such as the Five Power Defence Arrangements, which comprises a number of bilateral treaties, or multi-lateral conventions such as the 1949 Geneva Conventions. Some treaties codify customary law and some broad multi-lateral treaties may eventually become customary international law which binds states regardless of whether they are party to the treaty or not.

15. **Compliance with International Law:** While international law is criticised because there is no central enforcement authority, breaches of international law can still have dire consequences. In the worst cases, war may result if two states cannot resolve their differences through international law and diplomacy. International law has been extended to cover the actions not only of states but also of individuals. International law provides stability in international relations and an expectation that certain acts or omissions will result in predictable consequences. Failure to observe international law will normally involve greater political and economic costs than would compliance.

HISTORICAL BACKGROUND OF LAW OF ARMED CONFLICT

16. Human societies have always developed legal systems to govern their relations. This includes situations of conflicts between groups. Early man and primitive societies had basic rules and ritualistic behaviour. As societies became more developed, so did the rules. A rudimentary form of international law was practised by Greek city states and the Romans. This included rules that regulated warfare. The rationale for these rules is the same today: for example, behaviour such as poisoning wells would have detrimental effects that may destroy the gains of victory.

17. During the 16th Century, nation states emerged in Europe and a system of international law came into being. Part of this law was a code of chivalry; however, the desire for regulating war derived principally from national or personal interests rather than humanitarian concerns. The modern law of armed conflict originated from the medieval customary practices adopted by those taking part in battles and was strongly influenced by religious practice.

THE MODERN LAW OF ARMED CONFLICT

18. The modern law of armed conflict can be traced to 1859 and the battle of Solferino in northern Italy. After witnessing the results of this battle a young Swiss merchant, Henri Dunant, wrote an influential book that described the carnage. The impact of this book and Dunant's subsequent efforts led to the formation of the Red Cross.

19. In 1864, the Swiss Government, at the urging of the Red Cross, convened the first conference on IHL. At this conference the first Geneva Convention for the 'Amelioration of the Condition of the Wounded in Armies in the Field' was drawn up and signed by 16 states. Subsequent conferences in 1906, 1929, and 1949 further developed and refined IHL (or Geneva law as it is often termed). The latest development has been the 1977 Additional Protocols. All of these conventions and protocols have been adopted by Australia.

20. **The Lieber Code:** The American Civil War produced the first attempt to codify LOAC. In 1863 Dr Francis Lieber, an eminent lawyer, was appointed by President Lincoln and in consultation with a board of officers, drew up a code of conduct titled ‘Instructions for the Government of Armies of the United States in the Field’. This instruction established limits on a belligerent’s means to wage war and identified military objectives as the only legitimate targets for deliberate attack.

21. **Hague Law:** Hague Law is a term used to describe the set of international laws that prescribe the means and methods of warfare. It is comprised of a series of treaties which state what is, or is not, legitimate in waging war. An early example of Hague Law is the 1868 Declaration of St Petersburg, in which 19 states renounced the use of particular types of explosive projectiles. Subsequent treaties included the 1899 Hague Conventions, 1907 Hague Conventions, Gas Protocol of 1925, 1954 Hague Cultural Property Convention, 1972 Biological Weapons Convention, 1980 Conventional Weapons Convention, the 1992 Chemical Weapons Convention and the 1999 Ottawa Land Mine Convention. The Additional Protocols are not confined to humanitarian issues; they also address issues that are traditionally regarded as Hague Law. Much of the Hague Law is accepted as customary international law and directly affects the use of air power.

RULES OF ENGAGEMENT (ROE)

22. ROE for the Australian Defence Force (ADF) are promulgated by the CDF after direction from Government. ROE are directions to commanders that define the circumstances and limitation within which armed force may be applied. Further detail on ROE will be found in Chapter 5 of this publication. *ADDP 06.1 Rules of Engagement* promulgates the agreed joint doctrine for the management and use of ROE by the ADF. *Operations Law for RAAF Commanders* provides general information only; it is not directive, and does not supersede guidance issued by or through the chain of command.

RELATIONSHIP TO AIR POWER

23. Clearly, the nature of air warfare presents RAAF personnel with unique LOAC problems. Both the Service’s reputation and its claim to professionalism are directly dependent upon the level of understanding each member has of LOAC codes. Accordingly, at every level in every unit there is a need for personnel to know both the general character of LOAC and specific provisions related to air power operations in which they may be involved.

Part ①

The Law and RAAF Peacetime Operations

1

Legal Division of Airspace and Oceans

INTRODUCTION

1.1 Airspace has traditionally been classified either as national or international airspace. This division closely follows the maritime regime whereby oceans are regarded as internal waters or territorial seas (national waters) or high seas (international waters). Air law and the law of the sea are closely related and an understanding of each is important when planning and conducting many RAAF operations. The law in these areas has evolved over the past century and will continue to change. Accordingly, this chapter will not only discuss basic concepts related to the legal division of airspace and oceans but also related issues such as the law relating to space. Navigation rights and responsibilities, air defence identification zones, and exclusion zones will be discussed in Chapter 2.

DEFINITIONS

1.2 **Aircraft:** An ‘aircraft’ is any machine, whether manned or unmanned that can derive support in the atmosphere from the reactions of the air, and includes any aeroplane, balloon, kite, airship or glider.

1.3 **Military Aircraft:** ‘Military aircraft’ means any aircraft belonging to the armed forces of a state. They must bear external marks distinguishing nationality, be under command of a member of the armed forces and where crewed, personnel are subject to regular armed forces discipline.

1.4 **State Aircraft:** ‘State aircraft’ include any aircraft used by a state’s military, police and customs services. The definition also includes any aircraft under the control of the national government and used for public service. Examples of this latter category are national VIP transports and aircraft on special missions.



A military aircraft.



A state aircraft.



A civil aircraft.

1.5 **Civil Aircraft:** ‘Civil aircraft’ are any aircraft not classified as State or Military aircraft.

1.6 **Airspace:** ‘Airspace’ is the zone next to the earth consisting of atmosphere capable of sustaining flight. While there is no general agreement, the boundary with space is somewhere between the outermost reach of airborne aircraft and the lower limit of spacecraft in orbit.

1.7 **National Airspace:** ‘National airspace’ is sovereign airspace directly above a state’s territory, including its territorial sea, archipelagic waters and internal waters.

1.8 **Space:** ‘Space’ is that zone beyond airspace.

CONTROL OF AIRSPACE

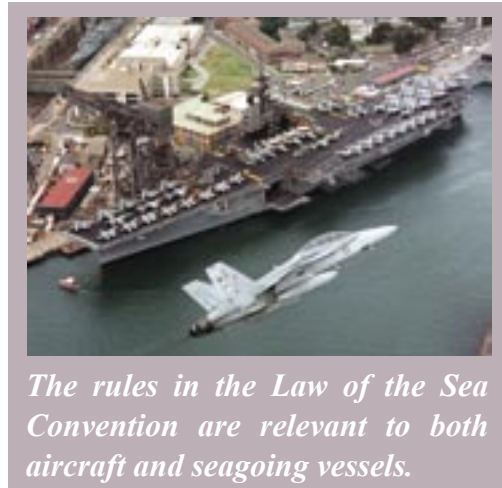
1.9 **General:** Until the advent of aircraft which could carry people and equipment, little thought was given to sovereignty, control or ownership of airspace. The assumption was that sovereignty over land implied sovereignty over superjacent airspace. This principle was subsequently adopted by the nations of the world and now regulates aviation. International law recognises that the legal status of airspace is akin to that of the state’s territory, internal waters and territorial seas. The concept of territorial sovereignty includes the right to regulate and if necessary prevent access, exit or transit of both personnel and aircraft, whether manned or not. This right, in relation to civil aircraft, has been modified by the provisions of the Chicago Convention.

1.10 **Chicago Convention:** The Convention on International Civil Aviation of 1944 (Chicago Convention) is primarily concerned with the regulation of civil aviation. The Chicago Convention confirmed the rule that aircraft of one state may not enter another state’s airspace without permission. State aircraft are not subject to its provisions and do not enjoy its privileges. Some states have, however, concluded bilateral agreements that grant overflight rights to their respective state aircraft. The status and navigation rights of civil and state aircraft are discussed in Chapter 2.

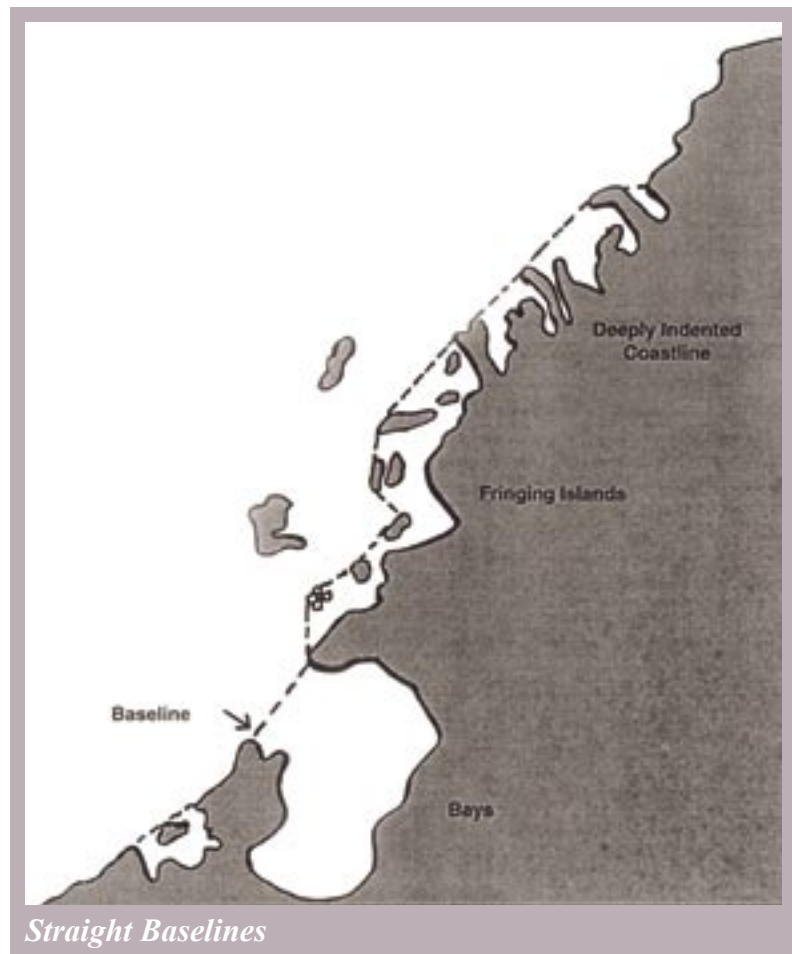
LEGAL DIVISION OF THE OCEANS

1.11 **General:** An understanding of the legal division of the oceans is necessary so that aircrew are aware of the rights of aircraft which transit above the various maritime zones. The legal regimes of airspace and oceans directly affect military operations because they determine the degree of control that a coastal state may exercise over foreign aircraft and ships within these zones.

1.12 Law of the Sea Convention: The seas around a state are divided into a number of zones including: internal waters, territorial waters, contiguous zones and exclusive economic zones (EEZ). These zones are measured from promulgated baselines. In 1958, four conventions on The Law of the Sea were produced as a result of the First United Nations Conference on the Law of the Sea. These conventions covered many of the important aspects of international law of the sea and were ratified by Australia in 1963. Since the 1958 conventions, new concepts have evolved which have resulted in the expansion of the jurisdictional claims of some coastal and island states. These claims included EEZs and archipelagic waters (see 1.18–1.20 below). To accommodate these claims the Third United Nations Conference on the Law of the Sea (UNCLOS III) was held and the result was the 1982 Law of the Sea Convention (1982 LOSC). This convention has been signed and ratified by Australia, thus it is the current law applicable to the RAAF. Further details on international law of the sea relevant to ADF operations can be found in the RAN publication *ABR 5179 Manual of International Law*.



1.13 Baselines: All maritime zones are measured from baselines. Baselines are generally drawn from the low water line along the coast as marked on large-scale charts. Australia's baselines were published in 1983 with amendments in 1987. Charts showing these baselines are held by Staff Officer Legal Services at Headquarters Air Command. Special rules regarding the drawing of baselines apply to deeply indented coastlines, coasts with fringing islands, unstable coastlines, bays, gulfs, river mouths and reefs. Some examples of these exceptions are shown in the diagram adjacent. Archipelagic states are able to use a different formula to draw their baselines.



NATIONAL AIRSPACE AND WATERS

1.14 National airspace and waters are those areas subject to the territorial sovereignty of individual states. All airspace above national waters and territory is national airspace. Airspace outside these zones is regarded as international airspace in which all states enjoy the traditional freedoms of navigation.

1.15 **Internal Waters:** Internal waters are landward from the baseline. Lakes, rivers, some bays, harbours, some canals and lagoons are examples. These areas have the same legal character as the land which surrounds them. There is no right of innocent passage in internal waters and unless in distress, no ship may enter internal waters without permission.

1.16 **Historic Bays:** Historic bays are recognised under the 1982 LOSC. A state's claims to historic bays can be based on historic or prescriptive rights, though a better basis for the claim is that the configuration and dimensions of the bay are such as to withdraw its water from international traffic and the normal regime of the high seas. Australia claims a number of historic bays including: Shark Bay, Spencer Gulf, Moreton Bay and St Vincent Gulf. The Gulf of Carpentaria is sometimes mentioned as an historic bay but is not claimed as such by Australia. The waters inside historic bays are regarded as internal waters. Some states claim historic bays which do not conform to the international standard which determines the maximum size of bays; an example of this is the Gulf of Sidra claimed by Libya.

1.17 **Territorial Seas:** The territorial sea is a zone of water which may extend out to a maximum of 12 nautical miles (nm) seaward of a state's baseline. Australia claims a 12 nm territorial sea. This claim is the maximum allowed under 1982 LOSC. Islands have their own territorial sea. Rocks which remain above water at high tide also possess a territorial sea but low tide elevations (drying rocks) do not. While low tide elevations do not have a territorial sea, they can extend the state's baseline if they are situated within the state's territorial sea and have permanent installations built upon them. Artificial off-shore installations do not have a territorial sea.

ARCHIPELAGIC WATERS

1.18 **General:** 1982 LOSC recognises the rights of archipelagic states—such as Indonesia, Papua New Guinea, Fiji and the Philippines—to draw straight baselines around the outermost points of their outermost islands. 1982 LOSC also recognised the interests of maritime states that wished to preserve the rights of passage in international sea lanes which traverse these archipelagos. The compromise reached in 1982 LOSC was recognition of archipelagic waters subject to the right of archipelagic sea lanes passage in all normal routes used for international navigation within the archipelago.

1.19 **Archipelagic Area:** An archipelago is a state that is constituted wholly of islands. Baselines may be drawn around the outermost points of these islands provided the ratio of water to land is between 1:1 and 9:1. This baseline is then used in the normal way to measure national waters and other offshore zones subject to national jurisdiction.

1.20 **Archipelagic Sea Lanes:** An archipelagic state may designate sea lanes through and over its archipelagic waters that are suitable for the continuous and expeditious passage of ships and aircraft in their normal mode of operation. If the state does not designate such sea lanes the right of archipelagic sea lane passage may, nevertheless, be exercised by all states through routes normally used for international navigation and overflight. Navigation rights in and over archipelagos are discussed in Chapter 2, paras 2.10–2.12.

INTERNATIONAL WATERS

1.21 International waters include all areas not subject to territorial sovereignty. All waters seaward of the territorial sea are international waters in which the high seas' freedoms of overflight and navigation are preserved. International waters include contiguous zones, EEZs and the high seas.

1.22 **Contiguous Zones:** A contiguous zone is an area extending up to 12 nm seaward from the outer limit of the territorial sea. A state may exercise control in this zone only for the purpose of prevention or punishment of infringements of its customs, fiscal, immigration, and sanitary laws that may occur within its territory. The declaration of contiguous zones does not affect aircraft overflying such zones.

1.23 **Exclusive Economic Zones (EEZ):** EEZs are resource-related zones adjacent to the coast and extending beyond the territorial sea, up to 200 nm from national baselines. The concept was developed and codified in 1982 LOSC. An EEZ reserves a state's rights to the exploration, exploitation, management, and conservation of the resources in the waters, seabed, and subsoil of the zone. A state can sell licences to people from other countries to take advantage of these rights. In an EEZ all states can exercise the *navigational* freedoms of the high seas. Australia has proclaimed an EEZ by enacting the *Maritime Legislation Amendment Act 1994*. Many states in the region, such as the Pacific Island states and Indonesia, have declared EEZs. ADF members are authorised to take action to enforce the exclusive exploration and exploitation of the EEZ. Legal advice should be sought if any RAAF units are tasked to enforce protection of Australia's EEZ rights.

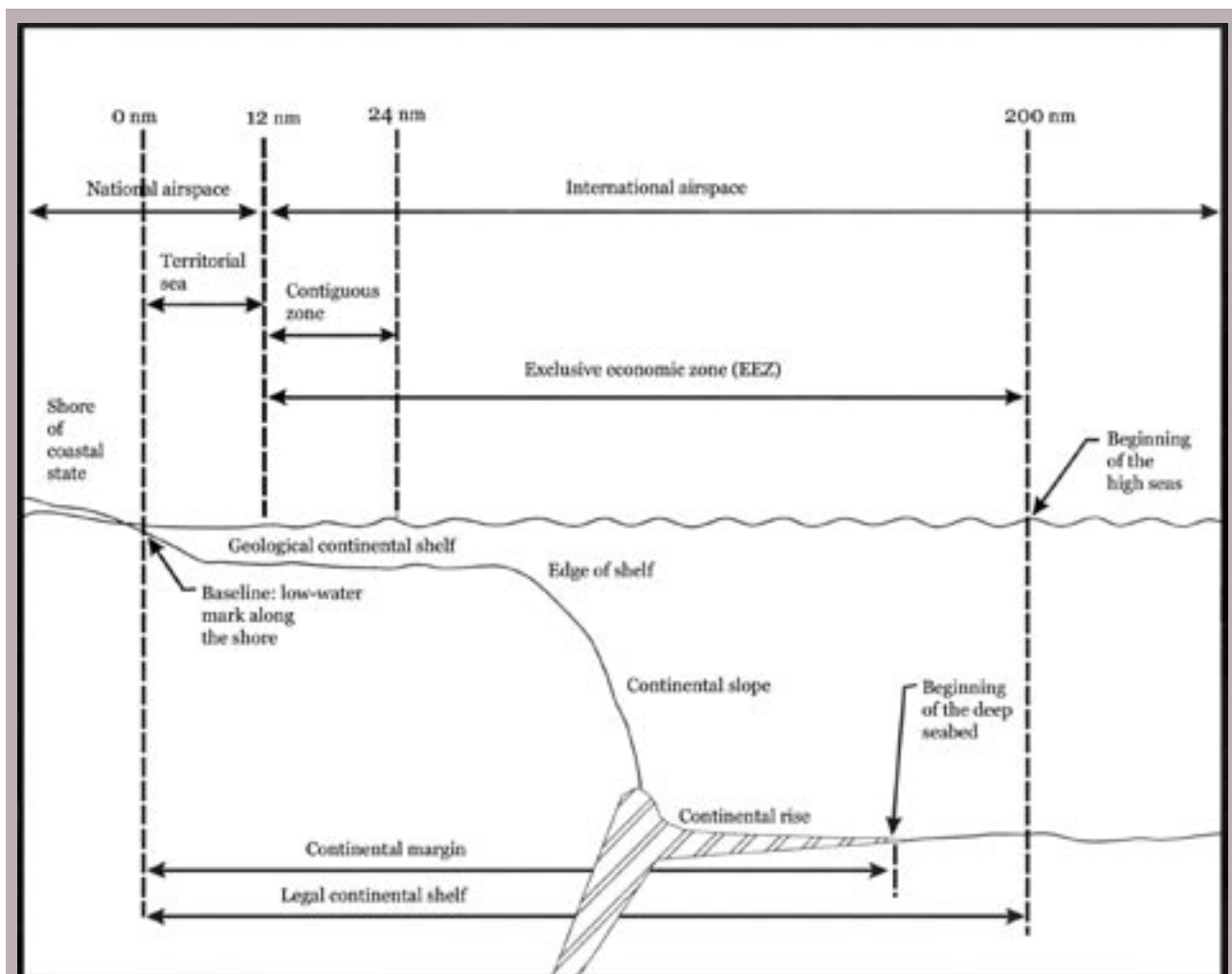
1.24 **Australian Fishing Zone (AFZ):** The AFZ was established in 1979 and includes waters within 200 nm of Australia's baseline. In most places this represents the same territory as the EEZ, but may need to be legally distinguished as a separate zone for the purposes of the application of legislation. It is illegal for a vessel within the AFZ to take fish for commercial or private purposes

unless a fishing licence has been issued. Exceptions are traditional Indonesian fishermen and areas set aside for fishermen of particular states under negotiated agreements. ADF members are authorised to take action to enforce the AFZ, however, legal advice should be sought if any RAAF units are tasked to enforce AFZ laws.

1.25 High Seas: The high seas are those waters seaward of territorial waters or EEZs where declared. From an overflight perspective, freedom of the high seas exists in all zones seaward of the border of the territorial sea regardless of the presence of EEZs or contiguous zones.

1.26 Military Security Zones: Some states, including states in our region, have declared military security zones in which they purport to regulate the activities of military ships and aircraft. International law does not recognise the validity of these zones.

1.27 Continental Shelves: The continental shelf of a state is the seabed and subsoil that extend beyond the territorial sea to the outer edge of the natural limit of the land mass under the sea. Under 1982 LOSC the continental shelf is artificially limited to a maximum claim of 350 nm from the



Legal division of the oceans.

baselines or 100 nm from the 2500 m isobath. An isobath is a line indicating the ocean depth. While the resource rights to the soil and subsoil of the continental shelf are reserved for the coastal state the legal status of the superjacent waters is not affected.

1.28 Timor Gap Treaty: The Timor Gap Treaty of 1989 between Australia and Indonesia regarding an area of overlapping claims in the Timor Gap between the parties has been superseded by the genesis of the state of East Timor. Australia and East Timor concluded a new Timor Gap Treaty in 2002, which delineates the parties' rights in respect of the Timor Gap oil and gas reserves. It does not affect overflight or navigation rights in the area.

SPACE

1.29 Space, while not having a clearly defined boundary, is still recognised as a zone to which particular legal obligations apply. All states enjoy equal access to space and none may claim it as national airspace or for exclusive use. A number of international agreements exist which govern the exploitation of space. Generally these place few restrictions on the non-aggressive military use of space, such as surveillance, reconnaissance, navigation, meteorology, and communications. Establishment of military bases on the moon or other celestial bodies, or the deployment of nuclear or other weapons of mass destruction (WMD) into space is prohibited. The deployment of military space stations and the testing and deployment in earth orbit of non-nuclear, non-WMD systems is permitted. Space may also be used when a state is acting in individual or collective self-defence in accordance with Article 51 of the UN Convention. Limitations that exist include a prohibition on the testing of any nuclear device, and the placing in orbit of any WMD. The Secretary-General of the UN must be notified when any space objects are launched.



The increasing use of satellites and other space-based systems is likely to result in further development of international law with respect to the use of space in the future.



International Status of Military Aircraft and Navigation Rights

STATUS OF MILITARY AIRCRAFT AND PERSONNEL

2.1 As previously discussed in para 1.10, military aircraft are classified as state aircraft (see para 1.4 for definition) under the terms of the Chicago Convention. This means that military aircraft are not subject to the provisions of the Chicago Convention and, therefore, the standards, practices and procedures of the International Civil Aviation Organisation (ICAO) do not apply. Likewise, military aircraft do not enjoy the overflight rights of civil aircraft accorded by the transit agreements negotiated under the Chicago Convention.

2.2 **Nationality and Markings:** A state's aircraft, like its ships, bear the nationality of the country in which they are registered. Civil aircraft must bear markings indicating their nationality. Military aircraft must bear markings indicating both nationality and military status.

2.3 **Immunity:** Military aircraft, similar to warships, have sovereign immunity from foreign laws in relation to search and inspection. This means that military aircraft cannot be boarded, searched or inspected by foreign authorities without the captain's consent. However, because military aircraft require diplomatic clearance to enter another state's airspace, they may be required to submit to search as a condition of entry. Host state authorities may not board a military aircraft without the captain's consent. If the captain does not or cannot comply with the host state's customs, immigration and quarantine requirements, the aircraft may be directed to leave that state's territory.

2.4 **Military Contract Aircraft:** Civilian aircraft that are contracted to support ADF operations are not normally regarded as state or military aircraft. If used exclusively by the ADF, civil aircraft could be designated as state aircraft and thus, enjoy sovereign immunity, and not be subject to ICAO regulation. However, only military aircraft can exercise the combat rights of a belligerent. Examples of such rights include attacking military objectives and overflying enemy territory. Civilian owned and registered aircraft would enjoy the rights of a military aircraft if they carried the markings of a military aircraft, were manned by ADF personnel and were used for national tasks.

2.5 **Status of Military Personnel:** Military aircrew, while in a foreign state, remain under the exclusive control of their commander as long as they are on board the military aircraft or warship. While the status of aircrew in a foreign country is not settled in customary international law, it is

reasonable for a commander to assert military jurisdiction over his military personnel when they are on duty and in uniform. A host state may rightly claim jurisdiction over military personnel who commit offences against local laws while off the aircraft. The overlapping jurisdiction of the commander and host state may cause dispute; for this reason Status of Forces Agreements (SOFAs) are negotiated between states to determine criminal jurisdiction issues. Australia currently has SOFAs with Malaysia, Singapore, Papua New Guinea and the United States (US personnel in Australia only). The Directorate of Agreements in The Defence Legal Service negotiates SOFAs on behalf of the ADF. When ADF personnel are deployed overseas, every effort will normally be made to conclude a SOFA with the appropriate state(s) as part of the planning process for the operation. SOFAs should be interpreted with the assistance of a Legal Officer.

AIR NAVIGATION RIGHTS

2.6 General Principles: Military and civil aircraft are free to operate in international airspace without interference. Civil aircraft are able to enter another state's airspace without diplomatic clearance, if they have followed ICAO procedures. The Chicago Convention reaffirmed the principle that every state has complete sovereignty over its national airspace. Military aircraft must always seek permission to enter another state's airspace. This may be a specific clearance or general permission granted by agreement. The clearance can be made conditional and any aircraft entering national airspace are subject to the agreed terms and conditions. Aircraft in distress are entitled to such measures of assistance as are necessary and practicable.

2.7 Innocent Passage: Unlike warships, aircraft have no right of innocent passage in another state's airspace over territorial seas. Innocent passage entitles a warship to traverse territorial seas 'continuously and expeditiously'. A ship may not enter internal waters unless it is entering or leaving from those waters. Passage is innocent as long as it is not prejudicial to the peace, good order or security of the coastal or island state. Military activities inconsistent with innocent passage are:

- a. the threat or use of force against the territorial integrity or political independence of the coastal or island state;
- b. any exercise or practice with weapons;
- c. intelligence collection activities detrimental to the security of the coastal or island state;
- d. the carrying out of research or survey activities; and
- e. the launching and landing of aircraft.



Launching and landing an aircraft from a vessel in the territorial sea of another state does not constitute innocent passage.

States have the right to take action to prevent passage that is not innocent.



Whilst a coastal state is not empowered by 1982 LOSC to require notification or authorisation of warships entering territorial seas for the purposes of innocent passage, one of the requirements of innocent passage is that submarines transit the surface and fly their ensign.

2.8 Warships and Innocent Passage: All warships, including submarines, have a specific right of innocent passage. This right does not extend to other platforms such as aircraft. When exercising the right of innocent passage, submarines must navigate on the surface and show their flag. Some states, including regional neighbours, dispute the right of warships to innocent passage and maintain that warships must seek permission or notify entry into the territorial sea. The 1982 Law of the Sea Convention (1982 LOSC) does not refer to the right of a coastal or island state to require notification or authorisation of warships entering territorial seas. However, the right of innocent passage can be temporarily restricted when it is essential for security. Any restriction must be non-discriminatory and promulgated to the international community.

2.9 International Straits: International straits are those straits used for international maritime navigation. They are international waterways, including territorial waters, which join areas of the high seas or exclusive economic zones (EEZs). All aircraft have the right to unimpeded transit passage through national airspace above international straits. Any transit must be continuous and expeditious, though aircraft are able to conduct air-to-air refuelling. Aircraft must not threaten or use force against the aircraft of the state, or states, bordering the strait. In addition, all aircraft must monitor the internationally designated air traffic control circuit or distress frequency while engaged in transit passage. This right of transit cannot be suspended in peacetime for any reason.

NAVIGATION IN ARCHIPELAGOS

2.10 Navigation rights in, and over, archipelagic waterways are particularly important for Australia because of the number of archipelagos in our region. Some states have asserted that archipelagic waters have the same status as internal waters. This view does not accord with the 1982 LOSC which provides that a state's sovereignty over archipelagic waters is exercised subject to the right of archipelagic sea lanes passage, through routes normally used for international navigation, as well as innocent passage through those parts of the archipelago not encompassed by the sea lanes. Indonesia is an example of a regional state that has declared archipelagic sea lanes. Australia and other states consider that Indonesia's declaration of archipelagic sea lanes is only partial and therefore assert a right of archipelagic sea lane passage through all routes normally used for international navigation, not just the few routes declared by Indonesia.

2.11 Archipelagic Sea Lanes Passage: An archipelagic state may designate sea lanes in its archipelagic waters. Such sea lanes are generally 25 nm on either side of a designated axis, but aircraft and ships must not approach closer to the coast than 10 per cent of the distance between the nearest bordering islands. All aircraft and ships enjoy the right of archipelagic sea lanes passage in these sea lanes. The right of archipelagic sea lanes passage is the right to conduct expeditious and continuous transit in the normal mode of operation, observing the same conditions applicable to transit passage through international straits. If the normal mode of operation for a reconnaissance aircraft is to have all of its systems operating then expeditiously and continuously transiting the archipelagic sea lane with systems operating is permissible under the LOSC. The right of transit exists even if the state has not declared such sea lanes. In common with vessels, aircraft can use all routes normally used for international navigation, to transit the archipelago. The right of archipelagic sea lanes passage cannot be impeded or suspended for any reason.

2.12 Innocent Passage in Archipelagic Waters: Aircraft have no right of innocent passage over archipelagic waters, outside of archipelagic sea lanes. Ships have a right of innocent passage similar to that exercised in territorial waters. This right of innocent passage can be temporarily suspended for security reasons, including weapons practice and military exercises.

NAVIGATION IN INTERNATIONAL AIRSPACE

2.13 General: International airspace is that airspace over the high seas, EEZs, contiguous zones and territory not subject to territorial sovereignty (eg. the Arctic). International airspace is open to aircraft of all states. Accordingly, military aircraft are free to operate in international airspace without interference from any other state. While in international airspace, military aircraft are free to engage in flight operations, including weapons testing and firing, surveillance, intelligence gathering, and support of naval activities. All such operations must be conducted with due regard to the safety and rights of other aircraft and vessels. An exception to this rule is that military manoeuvres and weapons testing cannot be carried out in Antarctic airspace, which is reserved for peaceful uses. A summary of navigation rights and duties is contained at Annex A to this chapter.

2.14 Antarctic Region: Australia is one of seven states that have claimed sovereignty over parts of the Antarctic. Australian policy is to preserve Australian sovereignty over the Australian Antarctic Territory, including sovereign rights over off-shore areas. This includes the protection of the Antarctic environment, having regard to its special qualities. Australian defence policy is to ensure Antarctica remains demilitarised and free from political and strategic competition. These policies are consistent with Australia's obligations under the Antarctic Treaty.

2.15 Antarctic Treaty: Australia is a party to the multi-national Antarctic Treaty of 1959. This treaty guarantees freedom of access to the Antarctic for scientific research without regard to conflicting

assertions of territorial claims. The treaty also provides that Antarctica shall be used for peaceful purposes only and that any measures of a military nature are prohibited. These measures include establishing military bases, weapons testing and military manoeuvres. The use of military personnel and equipment, however, is not excluded provided such personnel and equipment are only used in support of scientific effort or any other peaceful purpose consistent with the terms of the Treaty.

2.16 ICAO Flight Procedures: International Civil Aviation Organisation (ICAO) flight procedures are established under the terms of the Chicago Convention. As military aircraft are not subject to this convention, they are not bound by ICAO regulations, other than the requirement to operate with ‘due regard to the safety of civil aircraft’. It is RAAF practice to follow ICAO procedures, unless operational circumstances dictate otherwise. Operational circumstances which may not lend themselves to ICAO flight procedures include security contingencies and classified missions.

2.17 Flight Information Regions (FIR)s: FIRs are defined areas within which flight information and alerting services are provided. FIRs are established by ICAO for the safety of civil aviation and encompass both national and international airspace. As a matter of policy, RAAF aircraft on routine missions follow ICAO procedures and utilise FIR services. Acceptance by a state’s government of responsibility for an FIR does not grant that government sovereignty over that international airspace. Also, military aircraft retain the right to transit international airspace without interference and are not required to use FIR services.

AIR DEFENCE IDENTIFICATION ZONES

2.18 An Air Defence Identification Zone (ADIZ) is a defined area within which civil aircraft are required to identify themselves. The legal basis for such zones is the right of states, under the Chicago Convention, to establish conditions and procedures for entry into their national airspace. These zones are established above the high seas adjacent to the coast, and over the territorial sea and territory. Declaration of an ADIZ does not constitute a claim of any sovereign rights. Australia, from time to time, has declared an ADIZ for military exercise purposes. States which have standing ADIZs are Indonesia (over Java), the United States, Japan, Canada and France.

2.19 ADIZ Procedures: An aircraft approaching an ADIZ can be required to identify itself as a condition of entry to national airspace. ADIZ regulations generally require aircraft, bound for national airspace, to file flight plans and make periodic position reports. Failing voluntary identification, aircraft can expect to be identified by intercept aircraft. The declaration of an ADIZ does not confer on an intercepting pilot the right to engage an aircraft. Rules of Engagement (ROE) will provide guidance on the circumstances in which an aircraft may be engaged. There is no right to require an aircraft to identify itself if it does not intend to enter national airspace. These procedures reflect the peacetime

position. In the case of imminent or actual hostilities, a state may take self-defence measures that will affect overflight in international airspace.

2.20 Promulgation of an ADIZ: The activation of an ADIZ is effected by promulgation through military and civil agencies. In Australia, the Civil Aviation Authority (CAA), in concert with Headquarters Air Command (HQAC), promulgates ADIZs by the issue of Notices to Airmen (NOTAMS).

SECURITY ZONES

2.21 General: In the interests of safety, any state may declare a temporary closure, or warning area, on and over the high seas to advise other states of the conduct of hazardous activities. These warnings are cautionary, not mandatory. International law does not recognise the right of any state to restrict the right of navigation of military aircraft in international airspace. Pursuant to the inherent right of national or collective self-defence, some states have legitimately declared exclusion zones in times of conflict. The United Nations (UN) has also sanctioned air exclusion zones, following Security Council resolutions, in an effort to protect areas from attack.

2.22 Claims of Security Zones: Some states have asserted claims that purport to restrict the activities of military aircraft and warships in so-called ‘security zones’ that extend beyond national airspace. These zones have no basis in international law, in times of peace. Historically, these types of security zones have been restricted to times of conflict. In these circumstances, customary international law does not determine the extent of security zones, beyond having a requirement that they be reasonable in relation to the needs of national security.

EXCLUSION ZONES

2.23 In situations of international conflict and times of tension, a state is entitled, under the UN Charter, to exercise measures of individual or collective self-defence against an imminent threat of armed attack or an actual armed attack. On many occasions this century, states have declared an exclusion zone (EZ) in areas adjacent to national territory, invoking the principle of individual or collective self-defence. An exclusion zone can be a total exclusion zone (TEZ), maritime exclusion zone (MEZ) or air exclusion zone (AEZ).

2.24 An EZ is an area declared by a state, or military force, into which entry by designated forces is prohibited. An EZ may be stationary or moving. Neutral aircraft and ships should avoid such zones; those that enter navigate at their own risk. The use of EZs is expected to increase, as not only states but also the UN seek ways to localise conflicts. Because assessment of the acceptability of EZs will depend on a number of factors, clear guidance on the legal acceptability of an EZ is difficult, as each

situation is unique. In times of conflict a belligerent is not barred from using force outside the zone to eliminate enemy threats. Further guidance on the use of EZs can be obtained from *ADDP 06.1 – Rules of Engagement* and legal advisers.

INTERCEPTION OF AIRCRAFT AND SEAGOING VESSELS

2.25 Peacetime: The use of force by a nation, in the exercise of its sovereign rights over its own airspace, is perhaps the most contentious aspect of the control of airspace in peacetime. Since World War II, there have been many instances of the shooting down of civil or military aircraft which were not involved in armed conflict. There is no general right to attack an intruder, whether civil or military. Indeed the Chicago Convention provides that ‘every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered’. This requirement is subject to a state’s inherent right of self-defence under Article 51 of the UN Charter. Thus an intruding aircraft may only be attacked where the right to invoke Article 51 self-defence can be demonstrated. Every state has the right to require the landing of a civil aircraft crossing its territory at some designated airport if the aircraft is flying without authority or if there are reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of the Convention. States may also give such aircraft any other instructions to put to an end any violations. There are detailed peacetime rules for dealing with such aircraft that are beyond the scope of this publication. For further information see *ADFP 13 – Joint Operations Air Defence and Airspace Control*.

2.26 Hot Pursuit: The law of hot pursuit is essentially a doctrine of maritime law which applies to the pursuit and arrest of vessels, on the high seas, that are suspected of committing local offences within national waters or airspace, and which try to escape arrest. This doctrine has been extended to encompass aircraft during peacetime operations. Hot pursuit means immediate and continuous pursuit when the intercepting aircraft has not lost contact with the aircraft or vessel being pursued. It can extend into international airspace but not into another state’s national airspace. An example of hot pursuit is the 2001 pursuit of the *South Tomi*. As part of operations aimed at protecting the population



There have been a number of incidents involving ADF enforcement of the Australian Fishing Zone with respect to illegal fishing of Patagonian Toothfish, pictured left. This has maritime patrol aircraft, RAN vessels and the Australian Customs vessel Southern Supporter engaging in hot pursuit of illegally fishing vessels. Australia has been successful in enforcing its exclusive rights to the fish stocks in the AFZ / EEZ by using hot pursuit to bring the illegally fishing vessels back to port to face domestic judicial action.

of Patagonian Toothfish around Heard and McDonald Islands, Australian fisheries patrol vessel *Southern Supporter* intercepted the Togo-registered vessel *South Tomi*. The *South Tomi* was pursued all the way to South Africa where it was apprehended and returned to Australia. Further guidance on hot pursuit is contained in the *RAN Publication ABR 5179 – RAN Manual of International Law*.

2.27 Armed Conflict: During an armed conflict, enemy military aircraft may be attacked and destroyed in any airspace other than that of a neutral state. The rights and obligations of neutral states are discussed in Chapter 12.

ANNEX TO CHAPTER 2

TABLE OF NAVIGATION RIGHTS AND DUTIES

	Innocent Passage	Transit Passage	Archipelagic Sea-Lanes Passage
Passage must be continuous and expeditious	✓	✓	✓
All ships enjoy right of navigation	✓	✓	✓
Right of overflight for aircraft	X	✓	✓
Submarines must navigate on the surface	✓	X	X
All activities not incidental navigation prohibited	✓	✓	✓
Threat or use of force not permitted	✓	✓	✓
Right of navigation may not be suspended	X	✓	✓
Local regulations must be respected (eg. traffic separation scheme, pollution control laws)	✓	✓	✓
Coastal state laws must not discriminate	✓	✓	✓

3

RAAF Peacetime Operations

INTRODUCTION

3.1 During peace and periods of tension short of conflict, the RAAF will be called upon to perform a wide variety of tasks, many of which will have legal implications. These legal implications will need to be considered when planning and carrying out such tasks. RAAF peacetime operations can range from furthering Australia's broader national interests as a good international citizen by providing disaster relief, to assisting the local civil community in times of need.

3.2 This chapter will consider RAAF operations which protect and further national interests, and which aid the domestic and international civil community. Assistance to civil agencies can be in the form of aid in emergencies or aid to the civil authority for domestic law enforcement. Assistance to civil authorities may include assistance with regard to terrorism.

PROTECTION OF AUSTRALIA'S NATIONAL INTERESTS

3.3 **National Interests:** The role of the ADF relates primarily to military threats to national security. Australia's national interests have been identified by the Department of Foreign Affairs and Trade to include 'the security and prosperity of Australia and Australians'. The exercise of authority over our continent and off-shore territories, our territorial sea and resource zones, our airspace, and the ability to protect our maritime and air approaches, is fundamental to our sovereignty and security. While the role of the ADF relates primarily to military threats to national security, the ADF also contributes to maintaining national security in peacetime.

3.4 **Military Intervention:** The subject of military intervention is a sensitive area. Any decisions on this subject will be made at the highest level of government. Policy guidance suggests that the use of military force will only be appropriate in unusual or extreme circumstances. While every situation will be treated on a case by case basis, the following criteria are relevant when considering the possibility of military intervention: the agreement



OP GOLD in support of the Sydney 2000 Olympics was one of many examples of the ADF engaging in a peacetime operation.

of recognised domestic authorities; whether there is a manifestly direct threat to Australian security interests; having a finite time frame for the operation; having a clear and achievable operational objective; and consultation with, and, if possible, the cooperation and participation of other states.

USE OF FORCE IN PEACETIME

3.5 General: International law governing the use of force between states has traditionally been divided into rules applicable in peacetime and rules applicable in time of war, although this distinction has become blurred in recent years. Customary international law recognises that there are circumstances during times of peace when states can legally resort to force to protect their national interests. Concepts such as intervention, embargo, maritime quarantine, to the extent they are still relevant, are based on the principle of self-defence, as sanctioned by Article 51 of the UN Charter. The details relating to a state's right to act in self-defence, as well as the transition period between peacetime and times of conflict, are covered in Chapter 6.

3.6 Rules of Engagement (ROE): ROE are issued to commanders to allow them to take action to protect forces under their command, national assets and Australian citizens. Although they do not and cannot cover all possible situations, these ROE provide guidance for RAAF commanders for the use of armed force, commensurate with international law and national policy.

DEFENCE FORCE AID

3.7 Australian Citizens: Australian citizens overseas may be afforded protection from persecution or danger to life or safety. After providing refuge, commanders should request guidance from the nearest Australian embassy or consulate on the handling of Australian citizens who seek assistance.

3.8 Asylum for Foreign Nationals: RAAF units, while overseas, may find themselves subject to approaches from foreign individuals seeking asylum. Australia has international obligations not to return a refugee to their homeland to face death or persecution, regardless of whether the refugee has broken Australia's migration laws. However, the *Migration Amendment (Excision from Migration Zone) Act 2001 (Cth)*, and the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001 (Cth)* have dramatically altered the procedural system through which such persons may apply for asylum. The new legislation has introduced a visa system that allows asylum seekers to apply for a protection visa (PV) or temporary protection visa (TPV). Only the Department of Immigration and Multicultural and Indigenous Affairs can grant a PV or TPV.

3.9 The new system is designed to encourage asylum seekers to remain in their country of first asylum, thus unauthorised arrivals in Australia are denied the right to apply for permanent residence in Australia if they have spent more than seven days in a country where they could have sought

and obtained effective asylum. Thus any RAAF personnel who allow an asylum seeker to enter Australia may preclude that asylum seeker from ever gaining permanent residency in Australia. Further, RAAF personnel who knowingly bring asylum seekers into Australia may commit an offence against Division 12 of the *Migration Act* section 229, 'Carriage of non-citizens to Australia without documentation'. RAAF members approached by asylum seekers should refer those persons to the nearest embassy or consulate.

3.10 Temporary Shelter for Foreign Nationals: RAAF units, while overseas, may be approached by foreign individuals seeking temporary shelter from immediate danger. A RAAF commander may authorise the provision of temporary shelter if there is immediate danger to the individual and if doing so would not prejudice the unit. This measure should be taken purely on humanitarian grounds and local authorities should be contacted as soon as possible.

INTERNATIONAL DUTIES

3.11 Assistance to Persons, Aircraft and Ships in Distress: International law provides that every state shall render assistance to any person who is found at sea and is in danger of being lost, and to any persons in distress, if informed of their need for assistance. Obviously, the conditions under which aircraft operate are different from those affecting ships. This means the obligation of an aircraft captain is much harder to fulfil. Nevertheless, the obligation is relevant and assistance should be provided, to the extent that it does not endanger the aircraft and its crew.



Although it is difficult for one aircraft to render assistance to another in distress, the RAAF has been involved in the ADF effort to render assistance to a number of seagoing vessels in distress, including to the lone yachtsman Tony Bullimore, pictured above.

3.12 Piracy: Piracy is an international crime punishable by all states. Piracy consists of illegal acts of violence, detention, or depredation that have been committed:

- a. for private ends by the crew or passengers of a private ship or aircraft;
- b. in or over international waters; and
- c. against another ship or aircraft, or persons aboard such ships or aircraft.

On the high seas, and in any other place outside the jurisdiction of a state, all states have a duty to take action and to cooperate to repress piracy. This could mean seizing or pursuing a pirate aircraft or ship.

3.13 Suppression of International Narcotics Traffic: The 1982 Law of the Sea Convention (1982 LOSC) provides that all states shall cooperate in the suppression of the illicit traffic in narcotic drugs by ships in international waters. The Convention also provides that any state which has reasonable grounds for believing that a ship flying its flag is engaged in such traffic may request the cooperation of other states in effecting its seizure.

RAAF ASSISTANCE TO CIVIL AUTHORITIES

3.14 There are two situations in which the RAAF may be called upon to provide assistance to civil authorities and organisations:

- a. Defence Assistance to the Civil Community (DACC), and
- b. Defence Force Aid to the Civil Authority (DFACA).

Details of policies and procedures for DACC are found in *Defence Instruction (G) OPS 05-1*.

DEFENCE ASSISTANCE TO THE CIVIL COMMUNITY

3.15 Scope of DACC: DACC is the provision of Defence resources for the performance of tasks that are primarily the responsibility of the civil community. The civil community includes Commonwealth

An example of emergency DACC was the firefighting undertaken by RAAF personnel from RAAF Glenbrook and RAAF Richmond in January 2002. RAAF Glenbrook, after having been successfully defended from the approaching fire front, was used as a command and control centre and for logistical support for the local firefighting effort.



and State/Territory departments, agencies and authorities, including law enforcement agencies, emergency services, and the community at large. DACC is only applicable if there is no likelihood that Defence personnel will be required to use force. Where there is a possibility that force will be required, the activity is defined as DFACA (Defence Force Aid to the Civilian Authorities).

3.16 Categories of DACC: DACC is categorised into the following:

Category 1 – **emergency assistance** not exceeding 24 hours for a specific task(s) provided by a Local Commander, from within their own resources, in localised emergency situations when immediate action is necessary to save human life or alleviate suffering, prevent extensive loss of animal life or prevent widespread loss/damage to property.

Category 2 – **emergency assistance**, beyond that provided under Category 1, in a more extensive or continuing disaster where action is necessary to save human life or alleviate suffering, prevent

extensive loss of animal life or prevent loss/damage to property, and when State/Territory resources are inadequate.

Category 3 – assistance associated with **recovery** from a civil emergency or disaster, which is not directly related to the saving of life or property.

Category 4 – **non-emergency assistance** provided to other Government departments or authorities, to State/Territory/Local Government or other authorities or organisations, commercial enterprises, non-profit organisations, or individuals or bodies in the general community.

Category 5 – **non-emergency assistance of a minor nature** which can be provided to local organisations from within the resources and authority of the Local Commander/Administrator, and which does not compromise unit effectiveness or readiness.

Category 6 – support to civilian authorities in the performance of **non-emergency law enforcement** related tasks where there is no likelihood that Defence personnel will be required to use force.

3.17 Policy: The provision of DACC should be regarded as an exception rather than the rule. All requests for assistance from media organisations, including producers of commercials, television programs, documentaries and films, must be referred to Head Public Affairs and Corporate Communication (HPACC) using the procedures in *DI(G) ADMIN 17-3 – Policy and Procedures for Use of Defence Resources in Support of Public Information Activities*. There is no cost recovery for DACC Category 1, 2 or 5. Current ADF policy is to recover costs for all other DACC, except where special circumstances eg. Public Relations or Recruiting benefits for Defence, demonstrate a justifiable basis for variation or waiver of cost recovery. While the Australian States and Territories have constitutional responsibility for the protection of the lives and property of their citizens, the Commonwealth will provide assistance where local authorities are unable to react with sufficient speed, or lack the necessary resources. ADF procedures for overseas disasters are subject to separate instructions (see *DI (G) OPS 01-3 – Policy and Procedures for Department of Defence Response to Overseas Disasters*).



A non-emergency example of DACC is the use of RAAF aircraft in flying displays at civilian events such as the 2003 Lexmark Indy 300 pictured above. DI(G) OPS 05-2 Flypasts and Flying Displays also applies to the use of RAAF assets for this purpose.



An example of RAAF personnel being used in a DFACA capacity is the 2003 visit of President George W. Bush to Canberra. Security for the President's visit included the use of No. 3 Control and Reporting Unit personnel and capabilities, pictured above, and No. 3 Squadron patrolling the skies over Canberra in their F/A-18s.

DEFENCE FORCE AID TO THE CIVIL AUTHORITY

3.18 **General:** In Australia, law enforcement is the shared responsibility of the Commonwealth and State/Territory law enforcement authorities. Situations can arise where the relevant law enforcement authority lacks the necessary resources or capabilities and requests assistance from the ADF. Where such assistance could involve the use of force by ADF personnel, DFACA policy and procedures are to apply.

3.19 **Call-Out:** Legislative authority for the use of military personnel for DFACA is contained in the Constitution (including Sections 51(vi), 61 and 119). This authority provides for the employment of the RAAF to protect Commonwealth servants or property and the employment of the RAAF in response to a formal request by a State/Territory government. In these situations, the Governor-General, acting on the advice of the Executive Council, may ‘call out’ any Australian Defence Forces. Any request for assistance by a law enforcement authority, which may result in the use of force, is to be referred to HQAST for direction.

3.20 **Part IIIAAA Call-Out:** Additional to the procedures enabling call-out described in 3.18, the *Defence Act 1903* was amended in 2000 to create a new Part IIIAAA to deal with the utilisation of the Defence Force to protect Commonwealth interests and the States and self-governing Territories against domestic violence. Before the Defence Force can be called out in response to a domestic violence occurring or likely to occur, the Prime Minister, Minister for Defence and Attorney-General need to be satisfied that a State or Territory is unable to maintain order or to protect the Commonwealth or itself, and that the Defence Force is needed. Part IIIAAA grants Defence members certain powers to search, recapture buildings, free hostages and seize dangerous things. Reserve forces may only be called out under Part IIIAAA when the Minister for Defence, after consultation with the Chief of Defence Force, is satisfied that sufficient numbers of the Permanent Force are not available.

3.21 **Other Legislation:** There are occasions when the RAAF may be required to enforce Commonwealth laws without being called out. The Constitution allows the ADF to execute and maintain laws of the Commonwealth. Pursuant to this section, border protection legislation, the Customs Act, Fisheries Act, Crimes Act, Quarantine Act and other legislation contain provisions that empower the ADF to take action to enforce the law. The RAN is most often used in this capacity, however, the RAAF often also plays a vital role, particularly with respect to border protection and enforcing the Australian Fishing Zone. Specialist legal advice should be sought as a matter of course with respect to use of the RAAF in these capacities.



RAAF Operations in Support of the United Nations

INTRODUCTION

4.1 General: Like many international organisations, the United Nations (UN) was set up by a multi-lateral treaty—The United Nations Charter. The UN Charter defines the purposes of the UN and confers certain powers on it. The Charter was adopted at the San Francisco Conference in 1945. The chief allied powers in 1945—Britain, China, France, the Union of Soviet Socialist Republics and the United States of America, decided that they should play a dominant role when the UN was called on to deal with threats to peace and security. These states became permanent members (referred to as the P5) of the Security Council, with a right of veto. The Security Council has primary responsibility for the maintenance of international peace and security, and is empowered to take enforcement action. UN membership has grown from the original 51 states to over 190, all of which have a seat in the General Assembly (GA). There are also non-member states and other organisations that sit in the GA, for example, the Holy See, the International Committee of the Red Cross (ICRC) and the European Community (EC). Non-members are not able to vote in the GA.

4.2 Australia and the UN: Australia was a founding member of the UN and has played an active part in many UN sponsored activities. These activities have included peacemaking and peacekeeping. The UN has also recommended or authorised states to take action to maintain international peace, notably in Korea in 1950, Kuwait in 1990 and East Timor in 1999. The ADF has participated in many UN sponsored peacekeeping, peace enforcement, or peace monitoring operations, including major commitments in Cambodia, Somalia, and East Timor. Since the end of the Cold War, there has been an increase in the number of military intervention missions that could be characterised as peacekeeping. These types of missions are expected to continue. In addition, there has also been an increase in peacekeeping type operations undertaken by coalitions not designated as UN forces.



HV Evatt was a key figure in Australian domestic and international legal history. He was a Justice of the High Court—the youngest ever High Court judge—a member of the House of Representatives, the Attorney-General and Minister for External Affairs in the Curtin, Forde and Chifley governments. He was the Australian delegate to the conference that founded the United Nations in San Francisco in 1945, and president of the General Assembly of the United Nations in 1948-49. Evatt facilitated the early strong support that Australia provided for the development of the international legal system.

4.3 Policy: Australia's policy is to consider the level of support UN sponsored operations on a case by case basis. The RAAF could be involved in UN operations through the provision of specialist personnel and by providing support, monitoring and/or enforcement elements. Operations could include the enforcement of air exclusion zones, enforcement of air or naval blockades, precision strikes against selected targets, strategic and tactical airlift, air support for ground forces, air monitoring of peace agreements, aerial surveys, search and rescue, aero-medical evacuations, and the operation of airfields and provision of specialist personnel. An understanding of the UN's legal basis, organisation and procedures will assist commanders in carrying out assigned tasks. Guidance



Adherence to operations law has become critical in recent times because of the increasing influence of international law in conflicts, the ADF's heightened operational tempo and increased scrutiny from the media and the public with respect to compliance with the law. Service legal officers are the commander's key tool for ensuring that the RAAF is discharging its legal duties and obligations.

on any aspects of these operations can be obtained from Strategic Operations Division in Headquarters Australian Defence Force, the International Policy Division and the ADF Peacekeeping Centre at RAAF Base Williamtown.

4.4 Role of Service Legal Officers: Legal officers are generally involved in planning for UN operations and legal officers would accompany major deployments, as was the case with Somalia (OPERATION *Solace*), and East Timor (INTERFET and UNTAET). Legal issues associated with overseas deployments include rules of engagement (ROE), international agreements, civil affairs and the law of armed conflict (LOAC)—all of which will need to be addressed when planning and carrying out operations in support of the UN. For further guidance on these issues, contact The Defence Legal Service (TDLS) or a legal officer.

DEFINITIONS

4.5 General: Terms have evolved which require definition, both for national and international use, as in all likelihood, UN operations will be an international activity requiring combined forces.

4.6 Peacemaking: Peacemaking is the diplomatic process of seeking a solution to a dispute, initially through negotiation, inquiry, mediation, conciliation or other peaceful means. Peacemaking generally will not involve force but situations could develop where military intervention could be sanctioned. Generally, peacemaking involves diplomatic action to bring hostile parties to a negotiated agreement through such peaceful means as those foreseen under chapter VI of the UN Charter.

4.7 Peacekeeping: Peacekeeping is a traditional activity carried out pursuant to Chapter VI of the UN Charter, which covers pacific settlement of disputes. Peacekeeping can be described as an operation involving military personnel, without powers of enforcement, established by the UN or some other group of states, to help restore and maintain peace in an area of conflict. Peacekeeping requires the consent of all parties, and involves the employment of a legitimate, international civil and/or military coalition. This force operates in an impartial, non-combatant manner. Peacekeeping is intended to implement conflict prevention and/or resolution arrangements, or assist humanitarian aid operations.

4.8 Peace Enforcement: Unlike peacekeeping, peace enforcement does not require the consent of all parties, and is usually sanctioned under Chapter VII of the UN Charter which authorises collective security action by air, sea and land forces, as may be necessary to maintain or restore international peace and security. Peace enforcement operations differ from war. In war, the ultimate military aim is to defeat a designated enemy force. In peace enforcement operations, the military aim will normally be to coerce the belligerent(s) or potential belligerent(s) into avoiding or ceasing armed conflict and participating in peaceful settlement of disputes.



Peace enforcement involves the most application of force of the various types of peace operations. The initial stage of Australia's involvement in East Timor in 1999 was of a peace enforcement nature for example.

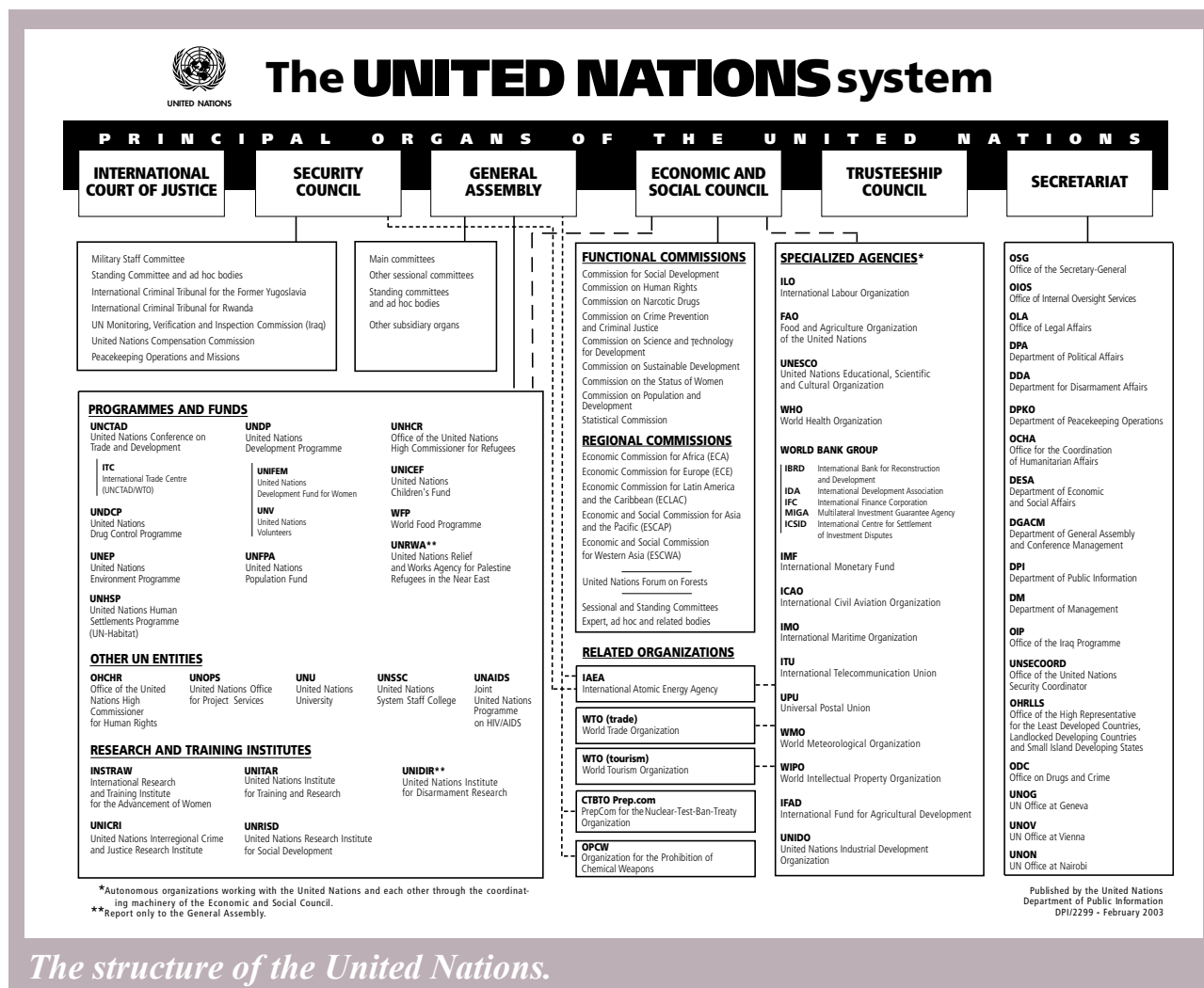
4.9 Purpose of the UN: Article 1 of the UN Charter states that the purpose of the UN is to maintain international peace and security, and to that end: 'take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace'. The UN is also empowered under Article 1 to bring about, by peaceful means, adjustment or settlement of international disputes, or situations which might lead to a breach of international peace. Accordingly, other than an individual state's inherent right to act in self-defence, there are two forms of action:

- a. collective action to prevent or remove threats and suppress acts of aggression; and
- b. action which brings about, by peaceful means, settlement of international disputes which could lead to a breach of peace.

In addition, the UN strives for international cooperation in solving international problems of an economic, social, cultural or humanitarian character. The UN is not authorised to intervene in matters which are essentially domestic in nature unless there is a danger to international peace and security.

ORGANISATION OF THE UN

4.10 The Organs of the UN: The UN has six principal organs: the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the Secretariat, and the International Court of Justice. There is a large bureaucracy supporting these and many subsidiary organs. The General Assembly consists of all member states but it is the Security Council that is the linchpin of the UN, in terms of military operations. The Secretary-General also plays an important part in these activities.



4.11 The Security Council: The Security Council has 15 members: the five permanent members (P5) and 10 other states which are elected every two years. Under the Charter, the main responsibility for maintaining international peace and security is given to the Security Council. The Security Council can make recommendations for the peaceful settlement of disputes and take enforcement action to deal with threats to peace and acts of aggression. All members of the UN are bound by the decisions of the Security Council. The P5 have veto rights over non-procedural Security Council decisions. Between 1945 and 2002 the veto was used 252 times. Since 1988 the Security Council has authorised over 40 United Nations operations.

4.12 The Secretariat: The Secretary-General of the UN is appointed by the General Assembly on the recommendation of the Security Council. The Secretary-General acts as the chief administrative officer of the UN for a term of five years. The Secretary-General is empowered to take political initiatives by referring matters that may threaten international peace to the Security Council. The Secretariat includes the headquarters staff of the UN, composed of international civil servants. Some military members are also on the staff of the Secretariat. The staff of the Secretariat administer the military operations and provide civilian field staff who accompany UN Forces.

ENFORCEMENT ACTION

4.13 General: While Chapter VI of the UN Charter is concerned with the pacific settlement of disputes, Chapter VII authorises action against threats to peace, breaches of the peace and acts of aggression. Peacemaking and peacekeeping are activities carried out in support of Chapter VI resolutions. Peace enforcement is action taken when peaceful means have failed. At the date of publication, the UN has made little use of this coercive power, preferring to authorise member states to take action on its behalf. An example of this is the establishment of the no-fly zones over Iraq and Bosnia-Herzegovina. The UN Charter has provision for dedicated UN forces but to date none have been formed.

4.14 Types of Enforcement Operations: If the Security Council decides there is a threat to the peace, breach of the peace or act of aggression, it may decide to take action to maintain or restore international peace and security. In the past, these actions have included economic sanctions, interruption of rail, sea, air, postal, telegraphic or other means of communication and the severance of diplomatic relations. These actions will require a sophisticated coordination of military operations in the air and sea. Finally, the UN can carry out peace enforcement. This involves the application of military force and could require commitment to offensive actions.

AUSTRALIAN INVOLVEMENT IN UN OPERATIONS

4.15 Planning: Policy considerations will influence the Australian Government's decision to participate in any UN operation. Military options would be provided by HQADF following consultation with the UN. A government decision to contribute forces would be made after a request has been received from the UN. Consultation, at this stage, would include Departments of Prime Minister and Cabinet, Attorney-General's, and Foreign Affairs and Trade. Following this process of consultation, the UN would determine the composition of the force. HQADF would then review all plans, and ultimately issue a warning order and operational instructions on behalf of CDF for forces to deploy.

4.16 Command and Control: Command of UN operations is vested, by the Security Council, in the Secretary-General who would appoint a UN Force Commander to command and control an operation.

CDF would normally command the Australian Contingent (ASC) through Commander Australian Theatre (COMAST) who would in turn appoint a Commander ASC, and authorise the assignment of the ASC to the UN Force and delegate operational control to the UN Force Commander. Authority to take disciplinary action is vested solely in the Commander ASC.

4.17 Legal Considerations: Legal issues which need to be considered for any ASC include:

- a. Status of Forces Agreements (SOFA) with the UN and host nations;
- b. the Participation Agreement between the UN and Australia;
- c. the UN mandate and Directive issued to the UN Force Commander;
- d. entry requirements into the host nation;
- e. relevant bilateral logistic support agreements which might be utilised;
- f. Defence Force Discipline Act arrangements; and
- g. LOAC.



A recent example of Australian involvement in a UN-mandated operation was Australia's leading role in UNTAET.

Under the UN Charter, a peacekeeping force enjoys immunities and privileges necessary to fulfil its purpose. These would be included in the SOFA negotiated by the UN with the host nation.

4.18 General Principles: The general principles that apply to peacekeeping forces are:

- a. to act in good faith;
- b. although armed, not to act as combatants or pursue military objectives;
- c. to keep UN operations distinct from national authorities;
- d. to operate only with the cooperation of all parties;
- e. to function as an integrated and efficient military unit of the combined force; and
- f. to retain the right to use force in self-defence. It may include action to prevent attempts to frustrate the implementation of the UN mandate. Such use of force must be proportional to the threat.

Some of the above principles may not apply to peace enforcement missions.

4.19 Law of Armed Conflict: Although the UN is bound to act in accordance with international law, it is not bound by those LOAC rules which are contained in international treaties. However, the UN is bound by LOAC, which is part of customary international law and as a matter of policy, requires UN forces to comply with all LOAC provisions. The General Assembly has passed a resolution, restated in a Bulletin issued by the Secretary-General, that the principles of LOAC will apply to United Nations forces conducting operations under United Nations command and control. This is enforced through the disciplinary systems of the individual nations which contribute personnel to the UN Force. This means that all ASCs are bound by Australian law that incorporates LOAC rules. While ROE will include relevant LOAC considerations, every ASC member will need to be aware of the basic humanitarian principles and act in accordance with those principles.

4.20 United Nations Insignia: It is an act of perfidy, contrary to Additional Protocol I to the 1949 Geneva Conventions, to feign protected status by using the signs or emblems of the United Nations. There are also strict formal and informal intellectual property restrictions on the use of the UN insignia, and legal advice should be sought if the emblem is to be used outside of an approved context.

Part 2

RAAF Operations in Time of Conflict



The Transition to Armed Conflict

INTRODUCTION

5.1 Australia's current defence policy indicates that future threats to Australia may involve many types of conflict, at both the lower- and higher-end of the conflict spectrum. This raises questions regarding the legal regimes that will apply to different situations. For example, when, at lower levels of conflict, does the Commonwealth defence power take precedence over peacetime domestic laws? In other words, when is the ADF acting in the defence of Australia and when is it acting in aid of the civil power? A related issue is the timing of the application of the international Law of Armed Conflict (LOAC). This chapter examines these questions and provides guidance on some of the unique legal problems that a commander may face during the transition from peace to armed conflict.

INTERNATIONAL LAW

5.2 **General:** Traditionally, international law has been divided into the law of war and the law of peace, with no intermediate stage between. On many occasions, international relations have deteriorated to a point where neither peace nor war, in the strict sense, existed and states observed for some purposes the law of peace and for others the law of war. The Falklands War of 1982 is typical in this respect: neither the UK nor Argentina at any stage declared war but both sides regarded LOAC as applicable. Increasingly, it is very rare for a state to 'declare war'. Instead, the decision to take part in an armed conflict may be based on a right under the UN Charter, such as individual or collective self-defence, or a broader doctrine such as humanitarian intervention. Another issue is that a struggle may be regarded by one party as an international conflict but by another as a civil war of internal concern only. The situation in East Timor in 1999 is an example of such a conflict. In classifying both the timing and character of a conflict there may be no clear-cut distinction. Each case is unique and should be treated as such.

5.3 **Armed Conflict and War:** Because of the increasing frequency of the mixed state of peace and war, it has become popular to distinguish between armed conflict and war, with the term 'war' being reserved for a state of affairs which satisfied the traditional concept. As a result, the laws relating to armed conflict in any form, traditional or otherwise, are referred to as LOAC rather than the older term, Law of War. The ADF, as a matter of policy, observes the term LOAC but commanders should recognise that LOAC and Law of War are synonymous. To avoid confusion, in this manual the terms armed conflict and war are synonymous.

5.4 War: As discussed below, the United Nations Charter limits the circumstances in which a state may resort to force. Some older laws also still have relevance, such as Hague Convention III of 1907 Relative to the Opening of Hostilities. This Convention requires states to declare war prior to commencing hostilities. This requirement does not rule out a pre-emptive attack contemporaneous with such a declaration. The Convention also requires that neutral states be informed of the declaration. Hague Convention III reflects the then prevailing legal rule that resort to war was a legitimate action by a state, subject to certain conditions.

5.5 UN Charter: Since the United Nations Charter was adopted in 1945, the circumstances in which states may resort to force are formally limited. Today, states are required to settle their disputes or aspirations by peaceful means in such a manner that international peace, security and justice are not endangered. The UN Charter prohibits states from resorting to acts of force or threats of force, unless authorised to do so by the Security Council under Chapter VII of the Charter. Article 51 of the Charter also recognises a state's inherent right of individual or collective self-defence. The question of whether a state of war or armed conflict exists is important because it determines the rights and duties of other states not directly involved in the conflict, particularly neutral states. This aspect will be discussed in Chapter 12. In any event, the armed forces of a state have an obligation to conduct themselves in accordance with LOAC whenever they are involved in an armed conflict.

5.6 Armed Conflict: A state of international armed conflict exists when states resort to the use of armed force against another or others. The duration and intensity of the conflict are not relevant to whether an armed conflict exists. An international armed conflict exists when there are military activities being undertaken which involve the threat of, or use of, force by organised military forces under the control of a national government, against another state. The Gulf War in 1991 was an



World War I provides a clear example of a large scale, international armed conflict, as does World War II. More recent conflicts have proven less easy to identify. For example the nature of the conflicts in the former Yugoslavia are still debated by international lawyers.

international armed conflict that illustrates this concept. The technical distinction between international and internal armed conflicts is now becoming less important, as shown by decisions of judicial bodies such as the International Criminal Tribunal for the former Yugoslavia.

5.7 Effects on Parties to Hostilities: The Australian Government will advise members of the RAAF whether an armed conflict exists. This determination will, to a large degree, be made on the basis of policy considerations. The Australian Government will invoke its constitutional defence power if an armed conflict arises which threatens Australia's security. Australian domestic law will be important to the actions of commanders in times of tension, prior to the onset of hostilities in Australia, because it will

directly affect the operations that commanders may be ordered to carry out. Issues will include the relationship with the civil power, applicability of domestic civil law to military personnel, application of LOAC, the expansion of disciplinary powers and relations with other states not involved in the conflict.

5.8 Termination of Hostilities: As with the start of hostilities, there is often controversy as to the end. The clearest way of ending hostilities is by a peace treaty. This may follow the unconditional surrender of a party. However, armed conflicts also end when a general armistice is declared. This could result in a permanent end of fighting, if ratified by political authorities. In any case all commands must be informed immediately as to the terms of any cessation of hostilities.

DOMESTIC LAW

5.9 Constitutional Issues: Under the Australian Constitution, the Commonwealth has legislative power for defence. The extent of this power is not constant; as it expands or contracts depending on circumstances. The existence and nature of any threat or actual hostilities will determine the extent of the defence power. In periods of international tension, the defence power will be wider than during peace. During a national emergency, involving armed conflict, it will be at its widest. During times of substantial armed conflict which threaten Australian sovereignty, like World War II, the Australian Government will have the power to take whatever action is necessary for the most efficient conduct of the conflict.

5.10 Peacetime Powers of Arrest: During times of peace, the general powers of arrest of RAAF members are the same as those of civilians. The exceptions relate to specific Commonwealth legislation. While the power of arrest is complicated by the existence of different legal regimes arising from Australia's federal system, there are a number of general principles that can be applied. The power of arrest can be exercised if:

- a. a serious crime has been committed or attempted,
- b. there is a danger of a serious crime being committed, or
- c. the person arrested is an escaped convict.



Another peacetime power of arrest derives from the Defence Force Discipline Act. This form of arrest is usually only exercised by Service Police.

In addition, ADF personnel may exercise powers of arrest under the Commonwealth Crimes Act and Defence Act. One of the most important provisions in this regard is Section 82 of the Defence Act, which authorises members of the ADF to arrest persons unlawfully on Defence land, and to arrest

persons taking any form of pictorial representation of defence aircraft or defence works. Great care needs to be taken in the exercise of this power.

5.11 Other Commonwealth Legislation: Other Commonwealth legislation which authorises the RAAF to take action to enforce Australian law includes provisions of the Customs Act, Fisheries Act Continental Shelf (Living Resources) Act and Border Protection legislation. Further details on these laws can be obtained from ADF legal officers.

5.12 Call-Out of Reserve Forces: RAAF Reserves may be used in times of contingencies, if the Reserve member volunteers for service.

5.13 Section 50D Call-Out: All or part of the Reserve forces may be called out by the Governor-General under s.50D *Defence Act 1903* to perform continuous full-time service in a range of activities including: humanitarian assistance; defence emergency; defence preparations; assistance to Federal, State or Territory agencies; civil emergency or disaster relief. Reserves do not attract any special powers under s.50D call-out. In addition, members may be required to serve in situations short of a defence emergency for the 'defence of Australia'. In this case members are only required to serve for a period of three months, though this may be extended by further proclamations of the Governor-General. After 12 consecutive months the member must be released from service.

5.14 Part IIIAAA Call-Out: Additional to the procedures enabling call-out described in 3.18, the *Defence Act 1903* was amended in 2000 to create a new Part IIIAAA to deal with the utilisation of the Defence Force to protect Commonwealth interests and the States and self-governing Territories against domestic violence. Before the Defence Force can be called out in response to a domestic violence occurring or likely to occur, the Prime Minister, Minister for Defence and Attorney-General need to be satisfied that a State or Territory is unable to maintain order or to protect the Commonwealth or itself, and that the Defence Force is needed. Part IIIAAA grants Defence members certain powers to search, recapture buildings, free hostages and seize dangerous things. Reserve forces may only be called out under Part IIIAAA when the Minister for Defence, after consultation with the Chief of Defence Force, is satisfied that sufficient numbers of the Permanent Force are not available.

5.15 Emergency Powers: During times of armed conflict, the Commonwealth may legislate emergency powers to control a wide range of activities. These emergency powers may authorise RAAF personnel to take control of civil facilities (eg. airports) and take action (eg. close airspace to civil traffic) for which they normally would not have legal power. The provision of such powers is dependent on enabling legislation. As contingent emergency regulations do not exist, commanders would need to seek legal advice on the extent of the powers available to personnel under their command. This is to ensure that activities are not conducted that may expose individual RAAF members to criminal or civil liability. For example, an RAAF member forcibly carrying out a search of a civil

vehicle which has stopped at a road block, when he has no legal power to conduct the search or stop traffic, could be prosecuted for obstructing traffic or even assault.

5.16 Rules of Engagement (ROE): ROE are directions to operational and tactical level commanders that delineate the circumstances and limitations within which armed force may be applied by the ADF to achieve military objectives. ROE are issued both in peace and armed conflict. ROE will be issued by the Chief of Defence Force to Commander Australian Theatre (COMAST). Joint Force Commanders and Australian Contingent Commanders will also receive ROE from COMAST. The factors that influence the formulation of ROE are diplomatic, political, operational, and international and domestic law. Any ROE issued will include legal consideration of these factors. Commanders at all levels have an obligation to review ROE constantly and seek necessary changes. Detailed guidance on ROE can be found in *ADDP 06.1 Rules of Engagement* and *ADDP 06.4 Laws of Armed Conflict*.

5.17 Self-Defence: The right of self-defence is related to but separate from ROE. All ADF members have an inherent right to defend themselves, and other ADF members using reasonable and necessary force. This right of self-defence exists regardless of whether or not it is explicitly stated in the ROE. The ROE may expressly permit the use of lethal force to defend ADF units and other designated entities.

5.18 Summary: In summary, during any contingency involving armed conflict against an enemy, all members of the RAAF will be subject to LOAC. Any operations conducted in aid of the civil authority will be governed by the relevant State or Commonwealth legislation. Such legislation may include emergency powers granted to ADF members for specific purposes, eg. control of civil air traffic, the searching of civilians and the use of force to maintain Australian sovereignty. The state of uncertainty preceding armed conflict will present legal dilemmas that will require commanders to maintain close control and seek specialist advice. This is necessary to ensure that members of their units are not exposed to the possibility of criminal liability, and action does not occur which may escalate a situation contrary to national policy.



All ADF members have an inherent right and duty to defend themselves and other ADF members using reasonable and necessary force.



Basic Principles of the Law of Armed Conflict

INTRODUCTION

6.1 **General:** The Law of Armed Conflict (LOAC) is derived from both treaty and customary international law. Often, it is little more than commonsense. RAAF personnel do not need to be told that it is wrong to target hospitals and churches, or that it is illegal to kill unarmed civilians or shoot prisoners of war. Instinctively, members of the RAAF could be expected to comply with most of the basic concepts of LOAC. Even if a RAAF member had received no specific training on LOAC, it would still be possible for that person to comply with LOAC provided he or she was aware of three fundamental concepts of military necessity, humanity and proportionality.

6.2 **Scope:** This chapter will discuss the sources of LOAC, define the three fundamental LOAC concepts of military necessity, humanity and proportionality, and explain related LOAC principles. Subsequent chapters will examine specific LOAC topics in detail.

SOURCES OF LOAC

6.3 **Customary International Law:** The principal sources of international law generally, and LOAC in particular, are treaties and the customary practice of states. Customary law derives from the practice of military, naval and air forces during hostilities. When a practice attains a degree of regularity and is accompanied by a general acknowledgment by states that behaviour, in conformity with the practice, is obligatory, it can be said to have become a rule of customary law. In a period marked by rapid technological developments, coupled with the broadening of the spectrum of warfare to encompass insurgencies and state-sponsored terrorism, it is not surprising that states often disagree as to the precise content of an accepted practice of warfare and to its status as a rule of law. This has led to a trend where much of customary law has been codified into treaties. The 1977 Protocols Additional to the Geneva Conventions of 1949 (Additional Protocols) contain examples of this.

6.4 **Treaty Law:** Treaties and international agreements, however described, have played a major role in the development of LOAC. Whether codifying customary law or creating new rules, treaties are the primary source of LOAC. Rules of law established by treaties are normally binding only on those states that have ratified them. Ratification is a formal process whereby a state confirms that it and its citizens are bound by the terms of the treaty; normally this involves the passage of domestic legislation. As part of the ratification process, the Australian Parliament confirmed the application

of the Additional Protocols when, in 1991, it passed amendments to the Geneva Conventions Act of 1957. Similarly, in 2002 the Australian Parliament passed domestic legislation to implement the 1998 Rome Statute of the International Criminal Court, comprehensively making war crimes and crimes against humanity part of Australian domestic law. Rules established by treaties are binding only to the extent required by the terms of the treaty, and any reservations or declarations of understanding accompanying the ratification. Australia has made declarations of understanding regarding the interpretation of some articles of the Additional Protocols. Even where states attempt to limit the application of treaties, where treaties codify existing customary law or otherwise, over time, represent a general consensus among states, they become binding on all states.

6.5 Principal Treaties: Some of the most significant treaties that reflect the development and codification of LOAC are:

- a. 1907 Hague Convention Respecting the Laws and Customs of War on Land (Hague IV);**
- b. 1907 Hague Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague V);**
- c. 1907 Hague Convention Relative to the Laying of Automatic Submarine Contact Mines (Hague VIII);**
- d. 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare;**
- e. 1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field;**
- f. 1949 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea;**
- g. 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War;**
- h. 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War;**
- i. 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict;**
- j. 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction;**
- k. 1977 Protocol Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I);**
- l. 1977 Protocol Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II);**

- m. **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 (Conventional Weapons Convention) and Additional Protocols:**
 - (i) **Protocol I: Non-Detectable Fragments**
 - (ii) **Protocol II: Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended on 3 May 1996**
 - (iii) **Protocol III: Prohibitions or Restrictions on the Use of Incendiary Weapons; and**
 - (iv) **Protocol IV: Blinding Laser Weapons, 13 October 1995;**
- n. **1992 Chemical Weapons Convention;**
- o. **1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Ottawa Treaty);**
- p. **1998 Rome Statute of the International Criminal Court;**
- q. **1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict;**
- r. **2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict;**

FUNDAMENTAL CONCEPTS OF LOAC

6.6 **Military Necessity:** Military necessity is the legitimate application of force to obtain a legitimate ‘military objective’. The nature of ‘military objectives’ will be examined in detail in Chapter 8, as it is crucial to an understanding of LOAC. RAAF personnel engaged in legitimate military operations are authorised agents of the Government. In appropriate circumstances, this means killing Australia’s enemies and destroying their ability to wage war. The four factors critical to adherence to the concept of military necessity are: lawful combatants can only use such force as is reasonably necessary to achieve a military objective; the use of such force cannot be prohibited by LOAC; the use of such force must result in the least expenditure of life and damage to property, as is possible under the prevailing circumstances; and the force used is regulated by the user.

The four factors critical to adherence to the concept of military necessity are:

1. *lawful combatants can only use such force as is reasonably necessary to achieve a military objective;*
2. *the use of such force cannot be prohibited by LOAC;*
3. *the use of such force must result in the least expenditure of life and damage to property, as is possible under the prevailing circumstances; and*
4. *the force used is regulated by the user.*

6.7 Limits on Military Necessity: Military necessity cannot be considered in isolation. In particular, it cannot justify violation of LOAC, as military necessity was a factor considered when the laws were formulated. For example, it cannot justify the killing of prisoners of war during a covert mission on the grounds that holding the prisoners would mean the mission would fail.



Military necessity cannot be used as a justification for breaking the laws of war. For example, killing prisoners of war for reasons of military necessity would never be acceptable.

6.8 Additional Protocol I and Military Necessity: Additional Protocol I does not define ‘military necessity’ but it does make a number of implied concessions to the concept. Article 51(5)(b) provides, in the context of civilian protection, that unlawful indiscriminate attacks include any ‘...which may be expected to cause incidental loss of civilian life ...which would be excessive in relation to the concrete and direct military advantage anticipated’.

Despite the use of negative language, the implied concession to military necessity is the recognition that ‘the concrete and military advantage’ to be gained from some attacks might outweigh collateral damage which otherwise could be considered excessive. This is one of the most delicate and difficult military judgments demanded of commanders by international humanitarian law.

6.9 Humanity: Related to the concept of military necessity, and implicitly contained within it, is the concept of humanity. This concept forbids any attack on an enemy that inflicts unnecessary suffering, injury or destruction. The principles applicable when considering humanity are that: the force used must not exceed the minimum required to achieve the military objective; there must be a valid military objective; destruction as an end in itself is prohibited; any destruction of property must contribute to the defeat of the enemy; and wanton killing and wilful infliction of suffering, as revenge, is prohibited.

The elements of humanity include:

- 1. the force used must not exceed the minimum required to achieve the military objective;*
- 2. there must be a valid military objective;*
- 3. destruction as an end in itself is prohibited;*
- 4. any destruction of property must contribute to the defeat of the enemy; and*
- 5. wanton killing and wilful infliction of suffering, as revenge, is prohibited.*

6.10 Proportionality: The concept of proportionality is the link between the concepts of military necessity and humanity. A commander is not allowed to cause damage and inflict suffering which is

disproportionate to the military need. Proportionality requires a commander to weigh the military value arising from the success of the operation against the possible harmful effects to protected persons and objects. That is, there must be an acceptable relationship between the legitimate destruction of military targets and the possibility of consequent collateral damage.

A commander must weigh the possibility and amount of the likely collateral damage against the advantage gained in targeting a legitimate military objective.

6.11 Additional Protocol I and Proportionality: In relation to Additional Protocol I, Australia has made a Declaration to the effect that the Australian Government's understanding is that references to military advantage in Articles 51(5)(b) and 57 mean '*the advantage anticipated from the attack as a whole and not only from isolated or particular parts of the attack*'.

In addition, the Declaration makes it clear that military advantage involves a number of considerations, including the security of attacking forces. The Australian Government's Declarations of Understanding also recognises that RAAF commanders will, by necessity, have to reach decisions on the basis of their assessment of the information available to them at the relevant time. Article 57 and the responsibilities of commanders, and their staff, who plan or make decisions regarding targeting, are discussed in Chapter 8. Australia's Declarations of Understanding to the Additional Protocols is at Annex A to this chapter.

RELATED PRINCIPLES

6.12 Distinction or Identification: LOAC is based largely on the distinction between combatants and non-combatants. This principle of distinction is also referred to as the principle of identification.



In each of the images above the non-combatants (civilians), protected personnel (medical personnel) and combatants are easily distinguishable from one another. In an armed conflict however the requirement to distinguish may become far more difficult to apply, for example where civilians are carrying weapons, a combatant's uniform is not readily distinguishable from the clothes of their civilian counterparts, or a protected person's customary insignia (such as the red cross) is obscured or missing. In all of these examples the requirement to distinguish between combatant and non-combatant still applies.

The population of a state is divided into two general classes: armed forces (combatants) and the civilian population (non-combatants). Each class has specific rights and obligations and no single individual can be simultaneously a combatant and non-combatant. Likewise, there is a distinction between military objectives and civil objects. Some members of the armed forces, chaplains and medical personnel, are given special status and are not combatants.

6.13 Distinction and the Commander's Responsibility: A commander's responsibility, when carrying out attacks, is to distinguish between legitimate military targets and the civilian population. This obligation is dependent on the quality of the information available at the time of the decision. If a commander makes reasonable efforts to gather intelligence, reviews the intelligence available, and concludes in good faith that he is attacking a military objective, only to find he has ordered an attack on a town unknowingly filled with refugees, he does not violate the principle of distinction.

The requirement to distinguish is not applied using hindsight, rather with the information that the Commander has available at the time. A commander must make reasonable efforts to gather enough intelligence to be able to make the decision to attack in good faith.

6.14 Chivalry: Chivalry is difficult to define but it refers to established formalities and courtesies respected by combatants during armed conflict. Today, war is rarely a chivalrous contest. Nevertheless, chivalry is reflected in specific prohibitions, such as those against treacherous conduct and misuse of enemy flags or flags of truce (perfidy).



A World War I example of chivalry was Australian personnel according the German fighter ace Baron Manfred von Richthofen ('The Red Baron') a funeral with full military honours.



6.15 **Non-Discrimination:** The principle of non-discrimination has two aspects. Firstly, LOAC binds all sides in a conflict. Although one side may assert that the other is the aggressor, that side is not entitled to apply the law in a different way because of the assertion. Secondly, the law must be applied without any adverse distinction founded on race, colour, religion, sex, birth, wealth or other similar criteria.

ANNEX TO CHAPTER 6

AUSTRALIA'S DECLARATIONS IN RELATION TO PROTOCOL I

In depositing its instrument of ratification for Protocol I, Australia hereby makes declarations of understanding in relation to Articles 5, 44 and 51–58 inclusive of the said Protocol.

It is Australia's understanding that in relation to Article 5, with regard to the issue whether, and in what measure, Protecting Powers may have to exercise any functions within the combat zone (such as may be implied by provisions in Parts II and IV of the Protocol), the role of the Protecting Power will be of a like character to that specified in the First and Second conventions and Part II of the Fourth Convention, which apply mainly to the battlefield and its immediate surroundings.

It is the understanding of Australia that in relation to Article 44, the situation described in the second sentence of paragraph 3 can exist only in occupied territory or in armed conflicts covered by paragraph 4 of Article 1. Australia will interpret the word 'deployment' in paragraph 3(b) of the Article as meaning any movement towards a place from which an attack is to be launched. It will interpret the words 'visible to the adversary' in the same paragraph as including visible with the aid of binoculars, or by infrared or image intensification devices.

In relation to Articles 51–58 inclusive it is the understanding of Australia that military commanders and others responsible for planning, deciding upon, or executing attacks, necessarily have to reach their decisions on the basis of their assessment of the information from all sources, which are available to them at the relevant time.

In relation to paragraph 5(b) of Article 51 and to paragraph 2(a)(iii) of Article 57, it is the understanding of Australia that references to the 'military advantage' are intended to mean the advantage anticipated from the military attack considered as a whole and not only from isolated or particular parts of that attack and that the term 'military advantage' involves a variety of considerations including the security of attacking forces. It is further the understanding of Australia that the term 'concrete and direct military advantage' used in Articles 51 and 57, means a bona fide expectation that the attack will make a relevant and proportional contribution to the objective of the military attack involved.

It is the understanding of Australia that the first sentence of paragraph 2 of Article 52 is not intended to, nor does it, deal with the question of incidental or collateral damage resulting from an attack directed against a military objective.



Adherence to and Enforcement of LOAC

ADHERENCE TO THE LAW OF ARMED CONFLICT

7.1 **General:** States and individuals adhere to the Law of Armed Conflict (LOAC), not only because they are legally obliged to, but also because there are sound practical reasons to do so. It is in the best interests of all parties to a conflict to have a consistent and mutually acceptable code of conduct. Occasional violations do not substantially affect the validity of a rule of law, provided routine compliance and enforcement continue to be the norm.



States adhere to LOAC not only because they are legally obliged to do so, but also because it is in their best interests to do so. Respecting LOAC helps to promote the likelihood of a lasting peace and contains the effect of the war on non-combatants.

7.2 **Adherence by Australia:** Australia has been a consistent supporter of the international rule of law. As a good international citizen, Australia has policies that respect and promote international law. This has meant that Australia has taken an active part in the formulation of, and has ratified, multi-lateral treaties that deal with LOAC. International law becomes part of Australian law through two processes: domestic legislation and common law. Domestic legislation includes Acts of the Commonwealth Parliament and subordinate legislation such as Defence Instructions. Through both of these methods, LOAC has become part of Australian law.

7.3 **ADF Policy on LOAC:** *Australian Defence Doctrine Publication (ADDP), 06.4 LOAC*, in accordance with CDF's directive, states that the ADF will comply with LOAC. *DI(AF) PERS 11-30 (DI(G) OPS 33-1) ADF LOAC Training* gives effect to CDF's direction. This reference states that the RAAF is responsible for:

An example of legislation that has incorporated LOAC into domestic law is the Geneva Conventions Act 1957-1973 (Cth) which has incorporated the provisions of the Geneva Conventions into Australian domestic law.

- a. training and dissemination of LOAC;
- b. the provision of legal advisers at the appropriate level;
- c. reporting and investigating violations of LOAC by or against members of the RAAF; and
- d. investigating war crimes reported by a Joint Force Commander committed by or against ADF personnel.

DI(AF) PERS 11-30 (DI(G) OPS 33-1) also provides guidance on levels of training for RAAF and ADF personnel, as well as setting accreditation requirements for ADF legal advisers.

7.4 Role of Legal Officers: The primary role of RAAF legal officers is to provide operational legal advice which will assist the commander execute his mission in accordance with the law. Further, the operational commander's legal adviser is also responsible for the training of ADF members under command. The requirement for legal advisers stems from an obligation imposed by Article 82 of Additional Protocol I. Both the Geneva Conventions and the Protocols have provisions that make LOAC training obligatory for members of armed forces.

7.5 Requirements of Legal Officers: Those legal officers providing advice to operational commanders will be specially trained and accredited to provide independent and timely advice to commanders. To provide such advice, RAAF legal officers must have the appropriate clearances and access to information concerning pending and current operations.

INTERNATIONAL ADHERENCE TO LOAC

7.6 General: States adhere to LOAC in varying degrees. If a state violates LOAC, it can expect international condemnation and in some cases may be held to account in an international forum. In extreme cases reprisals may be authorised. Failure to comply with LOAC usually involves greater political and economic costs than does observance. In short, states observe LOAC because it is in their best interests to do so.



The effect of breaching LOAC on the civilian population and environment can be horrific. LOAC exists to minimise and contain the suffering and long-term damage caused by armed conflict. Failing to comply with LOAC will therefore often result in undermining the objectives of engaging in armed conflict.

7.7 LOAC and Resort to Armed Conflict: Most states recognise that armed conflict is an instrument of last resort. Most people abhor the violence, suffering and destruction that war brings, and seek to abate its effects. LOAC is a code of conduct designed to achieve this end. In addition, most states recognise that war is not an end in itself. The object is to defeat the enemy and achieve a lasting peace. The use of excessive violence resulting in needless destruction of life and property is wasteful, immoral and prejudicial to the eventual resumption of cordial diplomatic relations. LOAC enhances the long-term outcome of military action—a stable peace.

7.8 LOAC and Air Power: Application of LOAC has special significance to those involved in air combat operations. Members of the RAAF who are responsible for

the selection and use of weapons have a statutory responsibility to comply with LOAC. For example, it is essential that only military objectives are targeted in times of conflict. Given the certainty of external scrutiny by the media and humanitarian agencies, such as the International Committee of the Red Cross (ICRC), commonsense dictates compliance with LOAC. Aircrew have unique difficulties associated with the application of LOAC because of the nature of the medium in which they operate. Often, decisions will have to be made quickly by aircrew under



Ruins of a bombed school that had been used as a military headquarters c. World War II. As it is essential that only military objectives are targeted in times of conflict; accurate, current intelligence must be made available to ensure LOAC compliance when targeting.

extreme pressure. At times, target information may be poor or ill-defined. In such circumstances, a clear understanding of LOAC will assist the decision-making process. Meticulous observance of LOAC also increases the chances that punitive sanctions will not be applied to downed aircrew who become prisoners of war (PWs).

RESPONSIBILITY FOR ADHERENCE TO LOAC

7.9 Command Responsibility: RAAF operational commanders are not only responsible for ensuring that all combat operations are conducted in accordance with LOAC; they are also responsible for the lawful conduct of their subordinates. This includes training personnel in LOAC. While a commander will delegate some or all of his authority, he cannot delegate responsibility for the conduct of individuals and units under his command. The fact that a commander did not authorise, or knowingly acquiesce in, a violation of LOAC will not relieve him of responsibility for its occurrence, if he failed to exercise his command authority, or otherwise failed to take measures to prevent, discover and correct violations.

7.10 Individual Responsibility: All RAAF members have a duty to comply with LOAC and to the best of their ability prevent violations by others. Under Australian law, a person may be held responsible for a war crime that they commit, or which they order, solicit, induce, facilitate or contribute to. RAAF members also have a responsibility to



Lt Gen Masao Baba, pictured above with the Japanese surrender delegation in Labuan September 1945, was later convicted by an Australian Military Court of the war crime of having 'unlawfully disregarded and failed to discharge his duty as a Commander to control the members of his command, whereby they committed brutal atrocities and other high crimes against the people of the Commonwealth of Australia and its Allies'.

obey lawful orders. Under both international and Australian law, an order to commit an obviously criminal act such as the murder of civilians, is an unlawful order. Certain crimes, such as genocide and crimes against humanity are said to be ‘manifestly unlawful’. A subordinate cannot plead the defence of superior orders if he obeys such an order. An individual has a duty to query and ultimately disobey orders that require him to commit an act that is a clear violation of LOAC. Only if the subordinate did not know, and could not reasonably be expected to know, that the order was unlawful, will the defence of obedience to a superior order be available.

ENFORCEMENT OF LOAC

7.11 Introduction: Various means are available under international law to enforce LOAC. In the event of clear violations, states may:

- a. publicise the facts with a view to influencing world public opinion;
- b. protest to the offending state and demand action by way of punishment of offenders and compensation;
- c. seek the intervention of a neutral party who may be available to assist protected persons, like PWs;
- d. seek action through the United Nations, such as prosecution of offenders by an international tribunal;
- e. execute a reprisal action; and
- f. punish offenders, either during hostilities or upon the cessation of hostilities.

7.12 Protecting Power: The Geneva Conventions provide that the treatment of PWs, interned civilians and inhabitants of occupied territory be monitored by a neutral state known as the Protecting Power. Due to the fact that states often disagree as to which states are neutral or otherwise, the ICRC has been authorised to perform some of the functions of the Protecting Power.

7.13 International Committee of the Red Cross: The ICRC is a humanitarian organisation based in Geneva. The ICRC should not be confused with national Red Cross societies, such as the Australian Red Cross. The function of the ICRC is to provide protection and assistance to victims of armed conflict. The Geneva Convention recognises the status of the ICRC and the specific tasks it performs. These include visiting and interviewing PWs, searching for information concerning missing persons, and offering its ‘good offices’ to facilitate establishment of hospitals and safety zones. The ICRC also promotes International Humanitarian Law (IHL) by disseminating information on the Geneva Conventions and Additional Protocols to military personnel and the community generally.

7.14 Reprisals: Under LOAC, reprisals are a lawful enforcement measure, consisting of acts that would otherwise be unlawful. A reprisal is not a retaliatory act or an act of vengeance, and must not

be committed against protected persons such as prisoners of war. The sole purpose of a reprisal is to induce the enemy to cease his unlawful act. While strict proportionality is not required, there must be a reasonable relationship between the original wrong and the reprisal measure. Additional Protocol I strictly limits the use of reprisals. The strict requirements for a lawful reprisal are beyond the scope of this publication and specialist advice should be sought if a reprisal is being considered. Any reprisal action will require authorisation by the national command authority.



Distinguishing a lawful reprisal from an unlawful act of revenge is important. An example of an unlawful act not constituting a reprisal is when FLTLT William Newton VC, pictured to the left, was beheaded by his Japanese captors in 1943. One of the many specific rules that apply to the characterisation of reprisals is that they may not be carried out against protected personnel such as PWs.

7.15 Prohibitions on Reprisals: Reprisals are prohibited against:

- a. wounded, sick, and shipwrecked personnel;
- b. hospitals and medical facilities, medical personnel and equipment, hospital ships, medical aircraft and medical vehicles;
- c. civilians and civilian objects;
- d. cultural places and places of worship;
- e. objects indispensable to the survival of the civilian population;
- f. the natural environment; and
- g. works and installations containing dangerous forces.

INTERNATIONAL CRIMINAL COURT (ICC)

7.16 Development of the ICC: The International Military Tribunals established by various countries at the end of World War II developed the concept of a judicial body that could hold war criminals to account. However, ad hoc tribunals, such as those held in Nuremberg or Tokyo sometimes suffered by being perceived as ‘victor’s justice’. This led to a push for a permanent, multinational court to try those responsible for genocide, war crimes and crimes against humanity. In 1998 a diplomatic conference was held in Rome and resulted in the *Rome Statute of the International Criminal Court*, a treaty that provides for the establishment of such a court. Australia signed the Statute and introduced it into domestic law in the *International Criminal Court Act 2002*.

7.17 Jurisdiction of the ICC: The jurisdiction of the ICC is ‘complementary’ to that of national courts. The ICC will have jurisdiction only where states parties are ‘unwilling or unable genuinely’ to investigate and/or prosecute war crimes allegedly committed by their nationals. In addition, before any Australian national is released to the ICC, the Attorney-General must authorise the release of that person.

WAR CRIMES, CRIMES AGAINST HUMANITY AND GENOCIDE

7.18 General: International tribunals and the ICC may prosecute defendants for war crimes, crimes against humanity and/or genocide. War crimes are violations of LOAC which are committed by armed forces or civilians. The Rome Statute defines ‘war crimes’ for the purposes of the ICC, and this definition was incorporated into Australia’s *Criminal Code Act 1995 (Cth)* by the *International Criminal Court (Consequential Amendments) Act 2002 (Cth)*. Generally war crimes are Grave Breaches of the Geneva Conventions and of Protocol I to the Geneva Conventions. The type of acts that may constitute a grave breach are discussed below. Crimes against humanity and genocide are also proscribed by Australian law. Crimes against humanity include causing the death, enslavement, forcible transfer, torture or rape of one or more persons as part of a systematic or widespread attack against a civilian population. Genocide refers to a number of acts such as murder, or causing serious



The Nazi attempt to destroy the Jewish peoples in World War II is an example of the war crime of genocide.

mental or bodily harm, when there is an intention to destroy, in whole or part, a national, ethnic, racial or religious group. Belligerent states have an obligation to punish their own nationals who commit war crimes. International law also provides that states may punish enemy armed forces’ personnel and enemy civilians who commit war crimes.

7.19 Grave Breaches: Grave breaches are war crimes that are specifically defined in the Geneva Conventions and Additional Protocols. Under Australian domestic law, a person who commits a grave breach is guilty of an indictable offence.

Such offences will be tried in an Australian State or Territory Supreme Court. These courts can deal with any person, regardless of nationality or citizenship. The punishments available to the court include imprisonment for life, if wilful killing is involved, and up to 25 years imprisonment for other crimes.

7.20 Military Jurisdiction: While grave breaches can be tried by Supreme Courts, it is highly likely that ADF personnel would be tried by Courts Martial under the *Defence Force Discipline Act (DFDA)* which can be exercised for offences involving a breach of military discipline. These offences

are set out in the DFDA and guidance can be found in the *Discipline Law Manual*. These offences can include a number of matters ranging from disobeying orders to murder. A General Courts Martial has the power to sentence offenders to life imprisonment for murder and other serious offences.

The following represent some examples of grave breaches:

- a. offences against prisoners of war, including killing without just cause, torture, inhumane treatment, denial of religious rights, unlawful labour and denial of the right to fair trial;*
- b. offences against civilians including, killing without just cause, torture, inhumane treatment, denial of religious rights, forced labour, deportation, and denial of the right to a fair trial;*
- c. offences against sick and wounded, including killing, wounding, and mistreatment;*
- d. denial of quarter (ie. not allowing a defeated enemy to surrender), and offences against combatants who have laid down their arms and surrendered;*
- e. offences against survivors of aircraft, or ships lost at sea, including, killing, wounding, or mistreating the shipwrecked, and failing to provide for the safety of survivors, as military circumstances permit;*
- f. attacks against civilian objects, cities, towns, and villages or devastation not justified by the requirements of military operations;*
- g. attacks against the civilian population;*
- h. indiscriminate attacks which may affect the civilian population or objects, in the knowledge that such attacks will cause excessive loss of life, injuries, or damage to civilian objects;*
- i. attacks against works or installations containing dangerous forces (dams, nuclear plants etc) in the knowledge that such attacks will cause excessive loss of life, injuries, or damage to civilian objects;*
- j. deliberate attacks upon medical facilities, hospital ships, medical aircraft, medical vehicles, or medical personnel;*
- k. plunder and pillage of public or private property;*
- l. mutilation or other mistreatment of the dead;*
- m. using forbidden arms or ammunition;*
- n. misuse, abuse, or firing on flags of truce or on the Red Cross, and other similar protective emblems;*
- o. treacherous request for quarter (ie feigning surrender in order to gain a military advantage); and*
- p. use of poison or poisoned weapons.*

8

The Law of Aerial Targeting

INTRODUCTION

8.1 **General:** This chapter considers the Law of Armed Conflict (LOAC) as it affects aerial targeting. LOAC considerations are relevant to strike, counter air, offensive air support and aerial mining operations. The law in relation to such operations has been late in developing and air force members have had difficulty finding authoritative and practical guidance. During the Vietnam War, this had disastrous results, in part because of undue interference by politicians into the air planning process, resulting in a loss of public support. In recent times, a body of law has developed which provides guidance. This body of law was successfully applied by the air planners of the Coalition forces during OPERATION *Desert Storm* in 1991 and OPERATION *Iraqi Freedom* (OPERATION *Falconer*) in 2003, as well as the conflicts in Kosovo, Bosnia and Afghanistan. The application of LOAC to strike operations is critical because of the potential for these operations to cause heavy and widespread damage in predominantly civil areas.



The application of LOAC by air planners in more recent conflicts such as OPERATION Falconer has been far more successful than in previous conflicts.

8.2 **History:** Aerial bombardment has always been controversial. The first law that dealt with aerial bombardment, the Hague Peace Conference of 1899, simply prohibited the dropping of bombs from balloons. During World War II, Air Marshal Harris believed that in 'the use of aircraft in war there is, it so happens, no international law at all'. In Vietnam, considerable restraint was placed on US air power by political directives. One of the reasons why these directives were so restrictive was because of a misunderstanding of LOAC. When President Nixon liberalised the political directives, OPERATIONS *Linebacker I* and II produced more effective results. Some 20 years later, one of the major successes of OPERATION *Desert Storm* was the impressive results of the Coalition air effort, conducted in accordance with LOAC.

8.3 **Principles of Aerial Targeting:** The law of aerial targeting is based upon fundamental principles: the right to adopt means of defeating the enemy is not unlimited; military necessity, proportionality and humanity.

The three fundamental principles of aerial targeting:

1. *there must be a military necessity for the use of force against a target;*
2. *the use of force must be proportional to the military value of the target; and*
3. *the principle of humanity should be followed to prevent unnecessary suffering as a result of the use of force.*

These principles may coincide with principles of war: such as selection and maintenance of the aim, concentration of force, or economy of effort. That is, the law requires that only objectives of military value be attacked.

MILITARY OBJECTIVES

8.4 **General Principles:** Any aerial attack, and, of course, any other form of attack, must be directed against military objectives. All feasible precautions must be taken to avoid loss of civilian life, injury to civilians and damage to civilian objects. Due regard must be paid to the principle of proportionality at all times, and everything feasible must be done to gather intelligence to ensure that attacks are directed exclusively against military objectives. An attack on a military objective is not indiscriminate or otherwise unlawful simply because there is a risk of incidental injury or collateral damage. The expected extent of such injuries and damage must not, however, be disproportionate to the concrete and direct military advantage anticipated from the attack.

8.5 **Definition of Military Objectives:** Military objectives are enemy combatants and are those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military of advantage. The military advantage is the advantage anticipated from the attack. This advantage may be measured by its effect on the whole military operation or campaign and the attack need not be viewed in isolation. Military advantage includes the security of friendly forces.

8.6 **Examples of Military Objectives:** Some obvious examples of objects that are likely to be military objectives are military aircraft, military airfields, weapons, armour, artillery, warships, military headquarters, military fuel storage areas and anything used to conduct or support military operations. Civilian vessels, aircraft, vehicles and buildings may be attacked if they contain combatant personnel or military equipment, or are otherwise used to support combat activity inconsistent with their protected civil status. Economic targets such as railways, transport nodes, communication centres, fuel dumps and industrial installations may be attacked if they meet the criteria for military objectives set out above. However, a mere contribution to a country's economic output is unlikely to

be sufficient to meet the criteria required for a military objective. An area of land, such as a mountain pass, may be a military objective, provided that the area would be of direct use to belligerent forces.

CIVILIANS AND CIVILIAN OBJECTS

8.7 Definition of Civilians: Protocol I defines a civilian as any person who is not a member of the armed forces. Similarly, ‘civilian population’ comprises all persons who are ‘civilians’. A civilian has no general right to take part in hostilities.

8.8 Definition of Civilian Objects: Protocol I defines ‘civilian objects’ as all objects which are not military objectives. As to ‘military objectives’, see paragraphs 8.4–8.6. In cases of doubt about whether an object, normally dedicated to civilian purposes, is being used to make an effective contribution to military action, the presumption is that it is a civilian object. For this purpose, ‘use’ does not necessarily mean occupation. For example, if enemy soldiers use a school building as shelter from attack by direct fire, then they are clearly gaining a military advantage from the school. This means the school becomes a military objective and can be attacked.

PROHIBITION OF ATTACKS ON CIVILIANS AND CIVILIAN OBJECTS

8.9 Protection of Civilians and Civilian Objects: There is a fundamental rule that parties to a conflict must direct their operations against only military objectives. Protocol I expressly provides that the civilian population and civilian objects are to be protected against attack. Acts or threats of violence primarily intended to spread terror among the civilian population are prohibited. Reprisal actions against civilians are also prohibited.

8.10 Scope of Protection: Civilians are only protected as long as they refrain from taking a direct part in hostilities. Whether or not a civilian is involved in hostilities is a difficult question that must be determined by the facts of each individual case. However, ‘hostilities’ is not a synonym for ‘military activities’. During an armed conflict, civilians bearing arms and taking part in military operations against the enemy are clearly taking part in hostilities. Civilians manning a store on a military air base are not taking a direct part *in hostilities*. However, stores depots, supply columns and military installations are clearly military objectives which may be attacked, regardless of the presence of civilian workers as long as the rule of proportionality is not breached.



Civilians are protected as long as they refrain from taking a direct part in hostilities.

8.11 Requirement to Distinguish: The requirement to distinguish between military objectives and the civilian population imposes obligations on all parties to a conflict. The requirement is to establish and maintain the distinction between these two. During times of peace, the planners of military facilities must be mindful of the above requirement.

8.12 Obligation of Defenders: Civilians may not be used to shield or hide military objectives. A party to a conflict that uses its civilian population for military purposes violates its obligation to protect its own civilian population. The misuse of civilians does not release the attacking forces from either their obligation to protect civilians, or to minimise incidental injury and collateral damage.

8.13 Incidental Injury and Collateral Damage: Incidental injury and collateral damage may be the inevitable result of aerial attack. This fact is recognised by LOAC and, accordingly, it is not unlawful to cause such injury and damage. The concept of proportionality dictates that the expected results of such action must not be excessive in light of the concrete and direct military advantage anticipated from the attack. Additionally, commanders are obliged to take all feasible precautions, taking into account military and humanitarian considerations, to keep civilian casualties and damage to a minimum consistent with mission accomplishment, and aircrew safety. This is one of the most difficult decisions a commander will make and one of the most difficult to describe. The commander is required to make a reasonable and honest effort to minimise civilian injuries and damage after he has considered all the available information, and the requirement to complete the mission. A commander's decision regarding these issues will be evaluated according to information available at the time. Further guidance is set out in Protocol I and specialist legal advice should be sought when considering targeting issues.

8.14 Protocol I and the Duties of Commanders: One of the most significant consequences of Protocol I has been the emphasis placed on the duties of commanders to comply with the humanitarian aspects of LOAC. The Protocol reminds commanders that, in the conduct of military operations, constant care must be taken to spare the civilian population and civilian objects to the maximum extent possible.

Protocol I Duties of Commanders:

- a. endeavour to remove civilians and civilian objects from the vicinity of military objectives;*
- b. avoid the location of military objectives within or near densely-populated areas;*
- c. take precautions to protect civilians and civilian objects from the dangers of military operations;*
- d. do everything feasible to verify that objects being attacked are military objectives;*
- e. take all feasible precautions, in the choice of means and methods of attack, to minimise incidental injuries and collateral damage;*

- f. refrain from launching any attack which may be expected to cause incidental injury, or collateral damage, which would be excessive in relation to the concrete and direct military advantage anticipated; and*
- g. cancel or suspend an attack if it becomes apparent that the target is not a military objective or is subject to special protection or that the attack may be expected to cause disproportionate incidental injury or collateral damage.*

8.15 Objects Indispensable to Survival: Starvation of the civilian population as a method of warfare is forbidden. Protocol I expressly forbids attacks against objects that are indispensable to the survival of the civilian population. Examples given in the Protocol are: ‘foodstuffs, agricultural areas, crops, livestock, drinking water installations...’. This prohibition relates to attacks made for the specific purpose of denying these items to the civilian population. Incidental damage to foodstuffs is not a violation of the rules as long as the intention was to gain a military advantage by attacking a military objective.



Objects indispensable to the survival of the civilian population are protected under Protocol I. They may not be targeted because of their value to civilian population, however, where damage to these objects is collateral, and in proportion to the military advantage gained it is not prohibited.

8.16 Declarations of Understanding to Protocol I: Australia has placed on record Declarations of Understanding to Protocol I, relating to the Protocol’s articles dealing with the protection of civilians and civilian objects. This states that these articles must be interpreted on the understanding ‘that military commanders and others responsible for planning, deciding upon, or executing attacks, necessarily have to reach their decision on the basis of their assessment of the information from all sources, which is available to them at the relevant time’. A further understanding is that the ‘concrete and direct military advantage anticipated’ means ‘a bona fide expectation that the attack will make a relevant and proportional contribution to the objective of the military attack involved’. Although over 150 states have ratified the Protocols, certain countries, such as the United States, have not. In addition, some regional states, such as Indonesia, have not ratified the Protocols. Australia’s Declarations of Understanding are contained in Annex A to Chapter 6.

8.17 Warning: Where the military situation permits, commanders are to make every reasonable effort to warn the civilian population located in close proximity to a military objective targeted for attack. Warnings may be general rather than specific, to avoid jeopardising the attacking force and success of the mission.

SPECIAL PROTECTION

8.18 **Introduction:** In addition to the protection of the civilian population afforded by LOAC, specific protection is also afforded other designated facilities and objects.

8.19 **Medical Facilities:** Medical facilities and units (both mobile and fixed), medical aircraft, medical vehicles, medical equipment and stores may not be deliberately attacked. All parties to a conflict must ensure that medical facilities are situated such that they are not endangered by attacks on military targets in their vicinity. The distinctive Red Cross or Red Crescent should be clearly displayed on all these facilities. If medical facilities are used for military purposes, inconsistent with their humanitarian purposes, the right to special protection is lost. Any medical facility is protected regardless of whether it is marked with either a Red Cross or Red Crescent as shown in Annex A to Chapter 10.

8.20 **Religious, Cultural and Charitable Buildings, and Monuments:** Buildings devoted to religion, the arts, or charitable purposes; historic monuments; and other religious, cultural, or charitable facilities should not be attacked, provided they are not used for military purposes. It is the responsibility of the local population to ensure that such buildings are clearly marked with the distinctive emblem. These emblems are shown in Annex A to Chapter 10.

8.21 **Dams, Dykes and Nuclear Power Stations:** Dams, dykes and nuclear power stations may not be made the object of an attack, if that attack would cause the release of dangerous forces which would cause severe losses amongst the civilian population. This is the position even if such installations are military objectives. Such objects should be identified using the distinctive emblems shown in Annex A to Chapter 10. Failure to display the emblem does not remove the protection afforded the installation. In exceptional circumstances, the protection ceases if the installation is used in 'regular, significant and direct support of military operations'. In any case, such an attack must be the only



Dams, dykes and nuclear power stations may not be made the object of attack where that attack causes the release of dangerous forces which would damage the civilian population. Note the damage done to a civilian town five miles downstream from the bombing of the dam pictured above. This would be unacceptable according to current international law.

feasible way to stop the support, and any such attack would have to be approved by the National Command Authority.

8.22 The Environment: Those responsible for planning and conducting military operations have a duty to ensure that the natural environment is protected. Specific rules are in effect to protect the environment. In addition, the environment remains under the protection and authority of customary international law, principles of humanity and dictates of public conscience. Some of the specific rules are:

- a. The natural environment is not a legitimate object of attack. Destruction of the environment, not justified by military necessity, is punishable as a violation of international law.
- b. It is prohibited to employ methods or means of war which cause widespread, long-term and severe damage to the environment or may be expected to cause such damage and prejudice the health or survival of the population.
- c. The general prohibition on destroying civilian objects, unless justified by military necessity, also protects the environment.
- d. Attacks on forests or other types of plant cover with incendiary weapons are prohibited, unless such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.
- e. It is prohibited to use environmental modification techniques (ie. any technique for changing, through deliberate manipulation of natural process, the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of space) having widespread, long lasting or severe effects as the means of destruction, damage or injury to an enemy.
- f. Attacks against the environment by way of reprisal are prohibited.
- g. In times of armed conflict, parties to the conflict shall facilitate and protect the work of impartial organisations contributing to the prevention of damage, or repair of damage to the environment (eg. civil defence organisations). This shall be done by agreement between the parties to a conflict or with the permission of a party to a conflict. Any such work shall be done with due regard to the security interests of the party concerned.
- h. In the event of breaches to the rules protecting the environment, commanders are required to stop the violations, take action to prevent further breaches and report violations to higher authority so further action can be taken.

AIR COMBAT OPERATIONS

8.23 Enemy Aircraft: During armed conflict, enemy military aircraft and missiles may be attacked and destroyed in airspace beyond neutral jurisdiction. Similarly, enemy aircraft may be captured

outside neutral jurisdiction. Some military aircraft, such as medical aircraft and aircraft given special protection by agreement between the parties to a conflict, are not liable to attack.

8.24 Method of Attack: Attacks against aircraft may be made by any method, not otherwise prohibited, including air-to-air missiles, surface-to-air missiles, and explosive or incendiary projectiles. Ramming, including suicide attacks, is also a legitimate tactic if carried out by military personnel in military aircraft during a time of armed conflict.

8.25 Surrender and Aircraft in Distress: In air-to-air combat, surrender is usually impractical and occurs infrequently. Nevertheless, if there is a surrender that is offered in good faith, and can be accepted without jeopardising the attacking aircraft it should be accepted. The result could be a valuable intelligence or psychological gain. The strict rule that combatants who are wounded, or in distress, should not be attacked is difficult to apply in air-to-air combat. Aircraft can easily feign distress. Accordingly, it is frequently necessary for aircraft to pursue and continue their attack on an aircraft, seemingly in distress, because of the inability to verify its condition. If it is clear that an aircraft is beyond recovery and cannot resume combat, and its immediate destruction would offer no military advantage, then the attack must be broken off to allow its crew to evacuate.

8.26 Parachutists and Downed Aircrew: Persons parachuting from an aircraft in distress must not be attacked. Upon reaching the ground, any person who parachutes from an aircraft and lands



Personnel parachuting from an aircraft in distress are protected, however paratroopers are not.

in territory controlled by the enemy must be given the opportunity to surrender, unless it is apparent that he or she is engaging in a hostile act. Paratroopers are not entitled to the above protections. Aircrew who become prisoners of war are entitled to the same protection as other members of the armed forces. Aircrew downed at sea are accorded the same protection as shipwrecked sailors and must not be attacked unless they commit a hostile act. Rescue attempts of aircrew at sea constitute a combatant activity that is not afforded any special protection under international law.

AIR WARFARE AT SEA

8.27 General: Except in neutral waters, military aircraft may use the full range of conventional weapons to attack enemy warships, including naval and military auxiliaries. Surrender to aircraft is not normally possible, but if a surrender is made in good faith by an obviously defenceless vessel, it should be accepted.

8.28 Enemy Merchant Shipping and Civil Aircraft: Enemy merchant vessels and civil aircraft may be attacked by military aircraft only in the following circumstances:

- a. when refusing to comply with directions from an intercepting aircraft;
- b. when assisting the enemy's intelligence system or acting as an auxiliary to the enemy's armed forces;
- c. when sailing under convoy of enemy warships, escorted by enemy military aircraft, or armed; and
- d. when otherwise integrated into the enemy's war effort.

Protected Vessels: Certain enemy vessels, when innocently employed, have specific protection from attack:

- a. *hospital ships, medical transports and coastal rescue aircraft;*
- b. *vessels engaged exclusively in religious, philanthropic or scientific missions, so long as the vessel pursues its normal functions, does not engage in hostilities, and does not serve the commercial interests of the enemy;*
- c. *vessels guaranteed safe conduct by prior agreement;*
- d. *vessels carrying the white flag (cartel vessels); and*
- e. *vessels used exclusively for inshore fishing, and small boats engaged in local coastal trade, not taking part in hostilities.*





Weapons and Weapon Systems

INTRODUCTION

9.1 **General:** This chapter discusses the use of particular weapons and weapon systems. It is a fundamental tenet of the law of armed combat (LOAC) that the right of states to choose methods and means of warfare is not unlimited. Accordingly, the employment of weapons, materiel and methods of warfare that are designed to cause superfluous injury or unnecessary suffering is prohibited. A corollary is that weapons, which by their nature are incapable of being directed against military objects, are forbidden due to their indiscriminate effect. A few weapons, such as certain types of chemicals are unlawful, no matter how they are employed. Other weapons may be rendered unlawful by alterations, such as by interfering with a bullet so that it flattens more easily on impact with a human. Still others may be unlawfully employed, for example, releasing drifting armed contact mines which endanger innocent shipping. Finally, any weapon is used in an unlawful manner when it is directed against non-combatants or other protected persons or property.

9.2 **Scope:** This chapter will address LOAC as it affects weapons and weapon systems of particular interest to RAAF commanders: aircraft weapon systems, weapon systems that provide over-the-horizon and beyond-visual-range capability, incendiary weapons, blinding laser weapons, mines, cluster/fragmentation weapons, and torpedoes. Particular prohibitions on weapons will also be discussed.

BASIC PRINCIPLES

9.3 **Unnecessary Suffering:** Anti-personnel weapons are designed to kill or disable enemy combatants, and are lawful, notwithstanding the death, pain and suffering they inflict. Weapons that are designed to cause unnecessary suffering or superfluous injury are prohibited because their injurious effects are disproportionate to the military advantage that would be gained by their use. Laser weapons designed to cause permanent blindness, poisoned projectiles and soft-nosed lead (dum-dum) bullets fall into this category. Similarly, the use of projectiles and bullets manufactured from materials that are difficult to detect, or are undetectable by x-rays, such as glass or clear plastic, is prohibited since they unnecessarily inhibit the treatment of wounds.

An example of weapons that cause unnecessary suffering are pongree sticks which were used in Vietnam. These sticks were sharpened, covered with faeces and placed in pits so that when fallen upon they caused a prolonged death from blood loss and gangrene.

9.4 **Indiscriminate Effect:** Weapons that cannot be specifically directed against military targets are forbidden because of their indiscriminate effect. Drifting armed contact mines and long-range unguided missiles fall into this category. A weapon is not indiscriminate simply because it may cause incidental or collateral damage. A precision-guided munition which can be directed at a military objective, but which may also miss its target because of a failure in its guidance system, is not an indiscriminate weapon because of this potential for failure. Conversely, uncontrolled balloon-borne bombs, like those released by the Japanese against the west coast of the United States during World War II, lack the capability of direction and are, therefore, unlawful. Where a conventional weapon is able to be directed at a target with sufficient accuracy, there is no additional obligation to use a precision-guided weapon. Free-fall or ‘dumb’ weapons are lawful provided that the overriding LOAC principles of necessity, proportionality, unnecessary suffering and other applicable rules are not violated.

9.5 **Legal Review of Weapons:** All weapons must be used in compliance with LOAC principles, and RAAF personnel will not be ordered to use prohibited weapons. Protocol I requires Australia to determine whether the employment of new weapons would ‘in some or all circumstances, be prohibited by this Protocol or by any other rule of international law...’. This obligation rests on all states that study, develop, acquire or adopt a weapon; not only on the state that actually produces the weapon. To this end, an effective legal review process is required.

9.6 **Aircraft, Guided Missiles and Air Strike:** The use of aircraft and guided missiles by air, land or sea forces against military objectives is clearly legal under international law, and has been confirmed by the extensive practice of states in wars during the 20th Century. This is despite attempts by states, at various diplomatic conferences, to outlaw the use of aircraft; the most recent being during negotiation of the Additional Protocols, between 1974 and 1977. The use of aircraft (like any weapon system) in armed conflict today, is subject to specific regulation, much of it emanating from Additional Protocol I.

9.7 **Over-the-Horizon and Beyond-Visual-Range Weapon Systems:** Missiles and projectiles which are dependent on over-the-horizon or beyond-visual-range guidance systems are lawful. However, their use requires careful judgment that must include consideration of the risk to innocent or protected personnel, objects, facilities or units. Normally, these systems should have sensors or should be used in conjunction with external sources of targeting data that provide effective target discrimination.

9.8 **Uninhabited Combat Aerial Vehicles (UCAVs):** UCAVs are aircraft that can launch, strike and return to base without having aircrew onboard. There are still legal ambiguities regarding the use of UCAVs, such as the extent to which a human operator is required to make targeting decisions and

the status of civilians who may be operating UCAVs. Legal advice on these issues should be sought with reference to the specific situation contemplated.

PARTICULAR WEAPONS AND WEAPON SYSTEMS

9.9 Incendiary Weapons: The Conventional Weapons Convention, which Australia has ratified, invokes certain rules which restrict the use of incendiary weapons. An incendiary weapon is any weapon or munition which is primarily designed to set fire to objects or to cause burn injuries to persons, through the action of heat and flame; examples are flame throwers, shells, rockets, bombs and other containers of incendiary substances. The following are not regarded as incendiary weapons: illuminants, tracers, smoke or signalling systems, and munitions designed to combine blast or fragmentation effects with incendiary effects. The specific rules regarding the use of incendiary weapons under the Conventional Weapons Convention are:

- a. It is prohibited in all circumstances to attack the civilian population, individual citizens or civilian objects with air-delivered incendiary weapons.
- b. It is prohibited in all circumstances to make any military objective located within a concentration of civilians the object of attack by air-delivered incendiary weapons.
- c. It is prohibited to make any military objective located within a concentration of civilians the object of attack by other than air-delivered incendiary weapons, except where the military objective is clearly separated from the civilians and all feasible precautions are taken to minimise incidental loss of civilian life and damage to civilian objects.
- d. It is prohibited to make forests or other kinds of plant cover the object of attack by incendiary weapons except when such elements are used to cover, conceal or camouflage combatants or other military objectives, or they are themselves, military objectives.

9.10 Cluster and Fragmentation Weapons: Cluster and fragmentation weapons are projectiles, bombs, missiles, and grenades that are designed to fragment prior to, or upon detonation, thereby expanding the radius of their lethality and destructiveness. These weapons are lawful when used against combatants. When used in proximity to non-combatants or civilian objects, their employment should be carefully monitored to ensure that collateral civilian casualties, or damage, are not excessive, in relation to the legitimate military advantage sought. Fragmentation weapons which discharge pieces of glass or nails and the like are banned as they breach the rule against unnecessary suffering set out in Article 35(2) of Protocol I. The Conventional Weapons Convention has expanded this provision to



The use of UCAVs raises legal issues with the extent to which a human must be kept in the loop to make targeting decisions. Where and when humans will legally need to be involved will depend on the basic principles outlined in Chapter 6 and 8 as applied to the particular fact situation.

prohibit the use of any weapon ‘whose primary effect is to injure by fragments which, in the human body, escape detection by x-rays’.

9.11 Torpedoes: Torpedoes that do not become harmless after missing their target can be a danger to innocent shipping, and are, therefore, unlawful. The RAAF currently uses torpedoes that can be detonated, or are designed to become harmless, upon completion of their run.



Torpedoes may only be used if they do not present a danger to innocent shipping should they miss their target. They must be able to be detonated or rendered harmless should they miss.

PROHIBITIONS ON PARTICULAR WEAPONS

9.12 Ammunition: LOAC prohibits the use of bullets that expand or flatten easily in the human body. These bullets are normally referred to as ‘dum-dum’ bullets. Examples of such bullets are unjacketed lead rounds and hollow-point rounds. It is, therefore, unlawful for air force members to interfere with ammunition so that it will effectively flatten on impact with a human body.

9.13 Poison: Customary international law prohibits the use of poisons or poisoned weapons in armed conflict. The prohibition applies to any use of poison and, therefore, renders unlawful the poisoning or contamination of water supplies.

9.14 Bacteriological and Biological Weapons: All bacteriological and biological weapons or methods of warfare, whether directed against persons, animals or plant life, are prohibited by LOAC.

9.15 Chemical Weapons: Both customary and treaty law prohibit the use of lethal chemical weapons in armed conflict. The Chemical Weapons Convention of 1992 prohibits the development, production, testing, stockpiling and use of chemical weapons.

9.16 Riot Control Agents: Riot control agents are those liquids, gases and similar substances that are widely used by civil law enforcement agencies. Riot control agents, in all but the most unusual circumstances, cause transient effects that disappear within minutes of exposure. Tear gas is one example of a riot control agent. The use of such agents, as a method of warfare, is prohibited by the 1992 Chemical Weapons Convention. This does not mean riot control agents cannot be used at all in times of conflict, however, use of such agents should be authorised by the Chief of Defence Force and only then in specific circumstances. When considering the use of riot control agents, specialist legal advice should be sought.

Situations where the use of riot control agents may be considered are:

- a. to control rioting prisoners of war (PWs);
- b. rescue missions involving downed aircrew or escaped PWs;
- c. protection of supply depots, military convoys and other rear echelon areas from civil disturbances and terrorist activities;
- d. civil disturbance where the ADF is providing aid to the civil power; and
- e. during humanitarian evacuations involving Australian or foreign nationals.

9.17 Environment Altering Weapons: Generally, it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment. Weapons that cannot be directed at military objectives, or the effect of which cannot be limited, are prohibited.

9.18 Anti-Personnel Landmines: Parties to the 1997 Ottawa Convention, including Australia, accept a prohibition on the possession or use of anti-personnel landmines as well as assistance, encouragement or inducement to any other person to possess or use these mines. ADF members will not be guilty of an offence merely because they are part of an allied or coalition force that use anti-personnel landmines. Further guidance on this matter should be sought from a legal officer.

9.19 Anti-Vehicle Landmines: Anti-vehicle landmines may only be deployed against or to protect military objectives and feasible precautions must be taken to protect civilians from their effects. If possible, the civilian population should be warned in advance of the arrival of remotely delivered mines that may affect them. The use of anti-vehicle landmines is permitted so long as:

- a. they are not designed to be detonated by mine detectors; and
- b. remotely delivered anti-vehicle landmines must be self-deactivating and their location must be recorded.

AERIAL LAYING OF MARITIME MINES

9.20 Introduction: Maritime mines have been effectively employed for area denial, coastal and harbour defence, anti-surface and anti-submarine warfare, and blockade. Maritime mines are lawful weapons but their potential for indiscriminate effect has led to specific regulation of their use. The purpose of the rule is to ensure, to the extent practicable, the safety of peaceful shipping by requiring maritime mines to become harmless should they break loose, or otherwise become incapable of control by the belligerent who laid them. The rules also require warnings to be issued so that innocent shipping has a chance to avoid minefields and, on the cessation of a conflict, for minefields to be either cleared or rendered safe in other ways.



Unlike anti-personnel landmines, the use of maritime mines is legal subject to a strict regime designed to protect innocent shipping.

9.21 Peacetime Mining: During times of peace, a state may, consistent with the safety of its own citizens, lay mines in internal waters, territorial sea and archipelagic waters. Mines laid within the territorial sea and archipelagic waters must not impede the right of transit passage or non-suspendable innocent passage of foreign vessels through straits used for international navigation or archipelagic sea lanes. Because a state, for security reasons, may temporarily suspend the right of innocent passage within its territorial sea, not forming part of an international strait, the laying of minefields within territorial waters is lawful. However, notice of armed mines that have been laid in territorial seas, straits

used for international navigation and archipelagic waters must be given to the international shipping community and the mines must be removed when the security threat has passed. Mines laid in the high seas during peace are not lawful because the mines violate the freedom of the high seas, which entitles all ships to freedom of navigation on the high seas. Similarly, mines laid in another state's territorial sea or archipelagic waters are unlawful because the mines violate that state's sovereign rights.

9.22 Mining During Armed Conflict: Maritime mines may be lawfully employed by parties to an armed conflict, subject to the following conditions:

- a. International notification of the location of armed mines must be made as soon as military exigencies permit.
- b. Mines may not be emplaced by belligerents in neutral waters.
- c. Anchored mines must become harmless as soon as they have broken their moorings.
- d. Unanchored mines, not otherwise affixed or embedded in the sea bed, must become harmless within one hour after loss of control over them.
- e. The location of minefields must be carefully recorded to ensure accurate notification and to facilitate subsequent removal and/or deactivation.
- f. Maritime mines may be employed to channel neutral shipping, but not in a manner which impedes transit passage or non-suspendable innocent passage in straits used for international navigation and archipelagic sea lanes passage.
- g. Maritime mines may not be placed off the coasts and ports of the enemy with the sole objective of intercepting commercial shipping, but may otherwise be employed in the strategic blockade of enemy ports, coasts, and waterways.

- h. Mining of areas for an indefinite period in international waters is prohibited. Limited barred areas may be established by maritime mines, provided neutral shipping retains an alternate route around or through such an area with reasonable assurance of safety.

9.23 Summary: The legal restrictions on mine-laying are complicated because of the potentially indiscriminate effect of some mines and technological developments which are not specifically addressed in the relevant treaties. Maritime mine-laying is a legitimate use of force in self-defence and it may be employed against an opponent as necessary, and in proportion to the threat posed. Freedom of navigation for ships, not participating in the conflict, must be preserved by the notification of minefields and subsequent clearance of minefields on cessation of hostilities. Any commander considering mine-laying action should seek advice from legal officers who are familiar with the maritime environment.

9.24 Delayed Action Devices: Booby-traps and other delayed action devices are not unlawful, provided they are not designed or employed to cause unnecessary suffering or to injure civilians. Devices that are designed to simulate items, such as toys, animals, food, drink, kitchen utensils etc, which may attract and injure non-combatants, are prohibited. Similarly, placing these types of devices in areas likely to attract and injure non-combatants, for example, historic monuments and burial sites, is also prohibited. Attaching booby-traps to protected persons or objects, such as wounded and sick, dead bodies, or medical facilities and supplies is similarly prohibited. Where booby traps are not prohibited, those that are used must not be designed to cause unnecessary injury or suffering.

9.25 Nuclear Weapons: Nuclear weapons have been the subject of intense international political interest and international regulation because of their potential for mass destruction. The United Nations General Assembly has condemned nuclear weapons as illegal, although the international community itself is divided on this question. The nuclear powers have stated that nuclear weapons do not come under Additional Protocol I. It would appear that, although they are not specifically prohibited, they may come within general provisions, such as the prohibition against means and methods of warfare causing unnecessary suffering or injury, or those which cause widespread long-term and severe damage to the natural environment. Their use may be in breach of Additional Protocol I, unless their effects are strictly limited. In 1985, Australia ratified the Treaty of Rarotonga that brought into effect the South Pacific Nuclear Free Zone. Pursuant to the terms of this Treaty, Australia has undertaken to prevent the stationing of any nuclear explosive device on Australian territory. The Treaty preserves Australia's right to decide whether to allow visits by foreign aircraft or ships which might be either nuclear-powered or nuclear-armed.



Nuclear weapons have not been specifically prohibited under international law, however, their use is exceptionally controversial.

ANNEX TO CHAPTER 9

Australia's National Declaration accompanying its ratification of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, done at Oslo on 18 September 1997.

In depositing Australia's instrument of ratification of the Convention, Australia will issue a national declaration setting out its understanding of the Convention's obligations as follows:

'In depositing its instrument of ratification for this Convention, Australia hereby makes declarations of understanding in relation to Articles 1, 2, 4, 5 and 7 of the said Convention.

It is the understanding of Australia that, in the context of operations, exercises or other military activity authorised by the United Nations or otherwise conducted in accordance with international law, the participation by the Australian Defence Force, or individual Australian citizens or residents, in such operations, exercises or other military activity conducted in combination with the armed forces of States not party to the Convention which engage in activity prohibited under the Convention would not, by itself, be considered to be in violation of the Convention.

It is the understanding of Australia that, in relation to Article 1(a), the term "use" means the actual physical emplacement of anti-personnel mines and does not include receiving an indirect or incidental benefit from anti-personnel mines laid by another State or person. In Article 1(c) Australia will interpret the word "assist" to mean the actual and direct physical participation in any activity prohibited by the Convention but does not include permissible indirect support such as the provision of security for the personnel of a State not party to the Convention engaging in such activities, "encourage" to mean the actual request for the commission of any activity prohibited by the Convention, and "induce" to mean the active engagement in the offering of threats or incentives to obtain the commission of any activity prohibited by the Convention.

It is the understanding of Australia that in relation to Article 2(1), the definition of "anti-personnel mines" does not include command detonated munitions.

In relation to Articles 4, 5(1) and (2), and 7(1)(b) and (c), it is the understanding of Australia that the phrase "jurisdiction or control" is intended to mean within the sovereign territory of a State Party or over which it exercises legal responsibility by virtue of a United Nations mandate or arrangement with another State and the ownership or physical possession of antipersonnel mines, but does not include the temporary occupation of, or presence on, foreign territory where anti-personnel mines have been laid by other States or persons.'

10

Protection of Non-Combatants

INTRODUCTION

10.1 General: As discussed in Chapter 7, the Law of Armed Conflict (LOAC) is based on the distinction between combatants and non-combatants. Combatants are entitled to take a direct part in hostilities and engage in combat. Non-combatants are not so entitled and if convicted, after a lawful trial, may be punished for engaging in combat. As a result of military operations in Afghanistan against the Taliban and Al Qaeda, it has been suggested that there is another category of ‘unlawful’ combatants, although this remains a controversial issue with various split opinions. Non-combatants include those members of the armed forces who enjoy special protected status, such as medical personnel, and those who have been rendered incapable of combat by wounds, sickness, shipwreck or capture. This chapter reviews the categories of non-combatants, and outlines the general LOAC rules designed to protect them from direct attack.

10.2 Combatant Status: LOAC distinguishes between combatants and non-combatants. Normally, only members of a state’s armed forces enjoy combatant status. Civilians employed in industries or other activities connected with the war effort may lose some, or all, of their protected status as civilians, but they do not become combatants. Various treaties have set out criteria for combatant status. The 1949 Geneva Conventions dictate that the following criteria determine combatant status:

- a. being commanded by a person responsible for his subordinates;*
- b. having a fixed sign or uniform, recognisable at a distance;*
- c. carrying arms openly; and*
- d. conducting operations in accordance with LOAC.*

The 1977 Protocols Additional to the 1949 Geneva Conventions (Protocols I and II) recognised there were some conflicts in which, owing to the nature of the hostilities, an armed combatant cannot distinguish himself from the civilian population. These types of conflicts would generally be wars of national liberation.

In these situations combatants must:

- a. be subject to a discipline system which enforces LOAC; and
- b. carry their arms openly:
 - (i) during each military engagement; and
 - (ii) during such time as they are visible to the adversary while engaged in deployment preceding an attack.

10.3 Mercenaries: While distinction may not be drawn between regular troops, volunteers, conscripts or members of the militia who are part of an armed force, mercenaries are denied the status of combatants. This means that mercenaries are not entitled to be treated as prisoners of war (PWs). However, these provisions do not prevent a capturing state from treating mercenaries as PWs, if it so chooses. In any event, mercenaries have a right to humane treatment according to the fundamental guarantees provided for in Article 75 of Additional Protocol I and under international human rights law.

PROTECTED STATUS

10.4 LOAC prohibits making non-combatants the object of attack. It requires that all non-combatants are made safe from injuries, which are not incidental to military operations against legitimate military objectives. When circumstances permit, advance warning should be given of attacks that might endanger non-combatants. Such warnings are not required if surprise is a necessary element of the attack. On the other hand, a party to an armed conflict that has control over non-combatants has a



Civilians were only granted formal legal protection in 1949 with the introduction of the fourth Geneva Convention. This was in response to huge civilian casualties in World War II. Civilians that ADF personnel encounter during deployment are entitled to protection unless they lose that status by taking part in hostilities.

duty to remove them from the vicinity of targets of likely enemy attack. Similarly, wherever possible, military activities should not be carried out in the vicinity of concentrations of non-combatants. The presence of non-combatants in the vicinity of a legitimate target does not, however, preclude attacks against that target.

THE CIVILIAN POPULATION

10.5 Chapter 8 discussed the protection of civilians from deliberate aerial targeting. The civilian population is not to be the subject of attack, threats of attack, acts of terrorisation or reprisal actions. The civilian population comprises all persons not in the armed forces, militia, or

para-military forces, and others not taking a direct part in hostilities. Unlike military combatant personnel, who may be attacked at any time, whether on duty or on leave, civilians are immune from attack except in particular circumstances. Advice from a legal officer must be sought when a commander is contemplating a target that includes civilians.

10.6 Civilians who take up arms and become engaged in hostilities lose their immunity and may be attacked. In some situations it may be difficult to distinguish civilians from combatants, for example, terrorists are technically civilians who carry out criminal acts. Similarly, where they are taking a direct part in hostilities, civilian lookouts, guards, or intelligence agents for military forces may be attacked.

10.7 **Status of Accompanying Civilians:** Persons who accompany armed forces of a state without being members of its armed forces, such as civilian pilots and crews of aircraft used to transport armed forces or materiel, war correspondents, defence civilian contractors, caterers, members of labour units or of services responsible for the welfare of the armed forces, are not protected against attack when engaged in those activities. However, they are not combatants and, therefore, may not be engaged when not so employed. Nor are they permitted to bear arms except in immediate self-defence. The degree to which a commander has control over, and responsibility for, accompanying civilians will vary with individual circumstances. Legal advice should be sought if further guidance regarding a particular situation is required. Provided that they are duly authorised by the armed forces and carry identity documents to that effect, accompanying civilians are entitled to PW status if captured.



Increasingly, journalists may accompany forces deployed on operations. Information from the media is often important to the way that the public views armed conflicts.

10.8 **Journalists and War Correspondents:** A distinction is drawn in Additional Protocol I between journalists and war correspondents. The latter are persons officially accompanying the armed forces in that capacity and are treated as accompanying civilians (see 10.7 above). Journalists who are not accredited war correspondents, even if present in an area of hostilities with the express permission of an armed force, are treated simply as civilians. If they participate in hostilities they lose their protected civilian status. Separate kinds of identity cards are issued to distinguish between war correspondents and journalists.

MEMBERS OF ARMED FORCES WHO ARE NON-COMBATANTS

10.9 Medical Personnel: Medical personnel, such as doctors, nurses, dentists, technicians and all medical support personnel, have special protected status when engaged in medical duties. Assignments as medical personnel can be either temporary or permanent, but the critical issue is whether, at the time of any determination of protected status, that person was engaged in medical or medical support duties. This special protection means that medical personnel cannot lawfully be attacked. To assist identification, medical personnel should wear Red Cross armlets on their left arm and carry an official identity card, identifying them as medical personnel. Failure to wear the armlet does not disqualify a person from protection under LOAC.

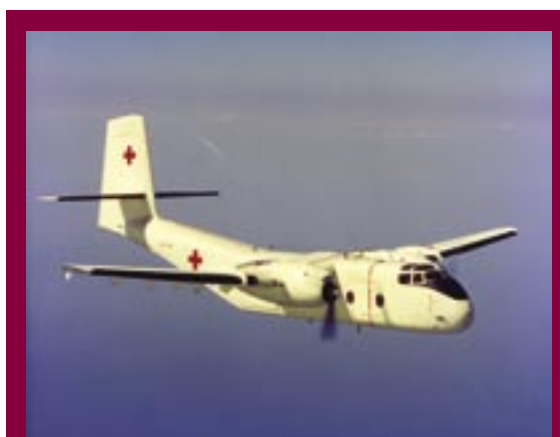


Australian medical personnel are often identified by armlets marked with a Red Cross.

10.10 Medical Personnel and Use of Weapons: Medical personnel may carry small arms for self-protection and for the protection of the wounded and sick. Use of such weapons against marauders and others violating LOAC does not mean medical personnel lose their protected status. Medical personnel, however, cannot use such arms against combatants who are acting in accordance with LOAC. This means that medical personnel cannot resist capture from enemy forces who obey LOAC. Medical personnel who directly engage in combat, while under the cloak of their protected status, are guilty of a serious LOAC violation.

10.11 Chaplains: Chaplains engaged in religious duties ministering to armed forces enjoy protected status similar to medical personnel. LOAC does not determine who may be classified as religious personnel. This determination is made by the armed services of individual states. Chaplains must be identified by a Red Cross armlet worn on the left arm and they must carry an official identity card, identifying them as chaplains. LOAC does not determine when chaplains may use weapons, but any use would be strictly limited to self-defence and situations where civil order had broken down.

10.12 Medical Personnel and Chaplains who are Captured: Unlike other members of the armed forces, medical personnel and chaplains cannot become PWs.



Like personnel, aircraft that are carrying out medical functions should be clearly marked with a Red Cross. Medical aircraft should not be armed.

If captured, medical personnel and chaplains may only be retained by an enemy if they are required to provide for the medical or religious needs of PWs. Any captured medical personnel or chaplains should be repatriated as soon as possible.

10.13 Use of Medical Aircraft: Like other medical facilities, medical aircraft have special protected status. Medical aircraft should be clearly marked with the Red Cross and national emblem on their lower, upper and lateral surfaces. Medical aircraft are those aircraft assigned exclusively to medical transportation and under the control of a competent authority of a party to the conflict. Medical aircraft may fly over areas controlled by their own forces and over sea areas not controlled by the enemy. Flights over enemy controlled areas are forbidden without prior agreement. In the absence of any agreement, medical aircraft flying over the contact zone do so at their own risk. In any case, if the aircraft are recognised as medical aircraft they cannot be attacked, but may be ordered to land and be inspected. They can be attacked if they do not comply with such directions. Medical aircraft must not be used to gain any military advantage. Additional Protocol I contains seven articles which outline the rules applicable to medical aircraft, and these should be considered by commanders involved in the use of medical aircraft during armed conflict.

THE WOUNDED, SICK AND SHIPWRECKED

10.14 General: Members of the armed forces who are no longer capable of engaging in combat are regarded as ‘hors de combat’, or out of combat. These include wounded, sick, helpless, surrendered and captured personnel. These personnel may not be attacked.

10.15 Treatment of Wounded, Sick and Shipwrecked: The wounded, sick and shipwrecked members of armed forces are to be protected and treated humanely without discrimination. Only urgent medical requirements are to justify any priority in treatment among those sick and wounded, although women are to be treated with due consideration because of their sex. As soon as possible after an engagement, all parties must take all possible measures to search for and collect the wounded and sick on the field of battle, protect them from harm and ensure their care. The physical and mental well-being of enemy wounded and sick may not be unjustifiably endangered, nor may they be made subject of any medical procedure not called for by their condition, or inconsistent with accepted medical standards and practices.

10.16 The Shipwrecked: Shipwrecked persons, whether military or civil, may not be attacked. Shipwrecked persons are those in peril at sea, or other waters, as a result of either sinking, grounding or other damage to a vessel on which they were embarked. It also includes persons in peril in water following the downing of an aircraft. It is immaterial if the peril was caused by civil or military action. Following air or naval engagements at sea, the parties to a conflict should take all possible measures to search for and rescue the shipwrecked. Shipwrecked persons do not include combatant personnel

engaged in amphibious, underwater or airborne attacks unless they are clearly in distress and require assistance. In the latter case, the enemy personnel should cease all combat activity and be clearly recognisable as in distress.

10.17 Parachutists and Downed Aircrew: Generally, parachutists descending from disabled aircraft may not be attacked while in the air. Downed aircrew must be afforded the opportunity to surrender if they land in enemy territory. If downed aircrew land in territory controlled by friendly forces, any enemy may attack them as soon as they land. Any parachutist who engages in combat while descending may also be attacked. Airborne troops, special warfare infiltrators, and intelligence agents are not protected and may be attacked at any time, unless they have indicated they wish to surrender. The rescue of downed aircrew is a combatant activity that is not protected by LOAC. Such activity may be carried out and resisted by armed force.



As these buildings in Dunkirk during World War II show, facilities that house PWs should be identified so that their protected status can be respected.

PRISONERS OF WAR

10.18 General: While it is not possible to discuss the entire Geneva Convention relevant to the treatment of PWs, some of the basic rules of the Convention are set out to assist commanders who may have to handle PWs and whose personnel may be subject to capture. Further guidance can be found in *Australian Defence Doctrine Publication (ADDP) 6.4 LOAC*. The fundamental principle underlying the treatment of PWs is that they are war victims not criminals, and accordingly entitled to humane and decent treatment. Ultimately, the Australian Army has

responsibility for the care of PWs, but RAAF members may have to make short-term arrangements for the treatment of prisoners. If PWs are not treated correctly, there is a danger that the enemy will not treat our members correctly. Generally, during World War II the Germans, in compliance with the Geneva Conventions, treated Australian, British and American PWs correctly. As a result, almost 85 per cent of these allied prisoners survived to the end of the war. On the other hand, there was no such recognition of the rules applicable to PWs between the Germans and the Russians. As a consequence, at the end of the war only 15 per cent of Russian PWs returned home. Publications produced by the International Committee of the Red Cross (ICRC) provide detailed information on the treatment of PWs, or alternatively a legal officer may be consulted.

10.19 PW Status: Combatants who have surrendered, or are captured, are entitled to PW status. They must be protected from violence, intimidation, insult and public curiosity. During medical

treatment, distinction must not be made, except on medical grounds. Should a question arise as to the entitlement of PW status, the individual involved should be accorded PW entitlements until a competent tribunal, convened by the captor, determines the status of the individual. Individuals who are captured as spies or illegal combatants are entitled to have their assertion of PW status tried by a judicial tribunal, in accordance with Australian law. Such persons must be fairly tried for violations of LOAC and must not be summarily executed.

10.20 Conditions of Captivity: There are almost 100 articles in the Geneva Convention which deal with conditions under which PWs may be detained. They cover questioning on capture, living quarters, food, clothing, hygiene and medical attention, labour, working conditions, pay, recreation, mail, complaints, escape, discipline and punishment. Some of the most important rules are:

- a. Housing – PWs must be housed in hygienic premises under conditions similar to troops of the detaining power in the area.*
- b. Diet – Food rations must be of sufficient quantity and quality to keep PWs in good health, and the diet must take into account the PWs' culture and dietary habits.*
- c. Food – PWs should prepare their own food and should never be deprived of food as punishment.*
- d. Labour – PWs may be required to work, as it helps to overcome boredom. Any work must be related to the camp and must not have a military character. Officers cannot be compelled to work and NCOs can only be compelled to supervise work.*
- e. Discipline – Minor infraction of rules may result in disciplinary action, however, serious infractions like assault and murder may result in penal action. Escaping and attempts to escape, which do not result in injuries to, or the death of, guards only attract a disciplinary sanction. Disciplinary action cannot result in punishment of more than 30 days confinement.*
- f. Torture – Torture is forbidden.*
- g. Repatriation – PWs who are seriously ill should be released and either sent home or to a neutral country. All PWs must be repatriated without delay at the close of hostilities.*

10.21 Questioning and Interrogation: Upon capture, a prisoner is required to give only name, rank, service number and date of birth. Failure to give this information may result in loss of privileges appropriate to rank. While a captor may not use force to obtain information, certain types of conversation are permissible. For example, prisoners may, but are not obliged to, fill out a Geneva Convention 'capture card'. Further, prisoners should feel free to talk to captors about health and welfare, while at the same time acknowledging that the senior ranking prisoner has a duty to represent prisoners in matters of camp administration.

PROTECTION OF CIVIL DEFENCE PERSONNEL

10.22 Civil Defence: Protocol I provides that civil defence personnel and their organisation be respected and protected. Civil defence is defined as the performance of specified humanitarian tasks which are intended to protect the civilian population against the dangers, and to help it recover from the immediate effects of hostilities or disasters. Civil defence tasks include: providing warning, evacuation, shelter, rescue services, firefighting services and medical services, and maintaining public order and utilities.

10.23 Protected Status: To take advantage of their protected status civil defence personnel should wear the emblem described in paragraph 10.25 and carry official identity cards. Civil defence personnel may bear light weapons for the purposes of maintaining order and self-defence. Civil defence personnel must not commit acts harmful to the enemy. The assignment of military personnel to civil defence organisations is allowable but should only occur if the assignment is to be of a permanent nature. Legal advice should be sought on the effect of any such assignment.

PROTECTIVE SIGNS AND SYMBOLS

10.24 Introduction: As discussed above, certain individuals and objects are immune from attack. To assist in the protection of particular individuals and objects, LOAC provides a number of internationally recognised symbols that designate protected objects. The most important protected symbols are set out in Annex A to this chapter. Misuse of a protective symbol is regarded as perfidy and forbidden by LOAC. Non-use of a protective symbol does not render an otherwise protected person, or object, liable to attack.

10.25 Red Cross and Red Crescent: A Red Cross on a white field is the internationally accepted symbol for protected medical and religious personnel, facilities and activities. Some Moslem countries use a Red Crescent on a white field for the same purpose. All Australian medical aircraft, ships, hospitals and facilities should bear the Red Cross to ensure protection. Any decision to attack an object carrying the protective emblem would be made only after obtaining clear evidence that the emblem was being misused and after a warning had been ignored.

10.26 Other Protective Emblems: Another protective emblem, recognised by international law, is an oblique red band on a white background used to designate hospital zones and safe havens for non-combatants. Additionally, PW camps are marked by the letters 'PW' or 'PG', and civilian internment camps with the letters 'IC'. Finally, a royal blue diamond and royal blue triangle on a white shield is used to designate cultural buildings, museums, historic monuments, and other cultural objects that are exempt from attack.

10.27 Protected Emblems under Protocol I: Protocol I created two new symbols to protect works and installations containing dangerous forces, and civil defence personnel. Works and installations containing forces potentially dangerous to the civilian population, such as dams and nuclear power stations, may be marked by three, bright, orange circles of equal size on the same axis. Civil defence personnel should be identified by an equilateral blue triangle on an orange background.






10.28 The White Flag: Customary international law recognises the white flag as symbolising a request to cease fire or to negotiate a surrender. Enemy forces showing a white flag should be given the opportunity to surrender or to communicate a request for cease-fire or negotiation.



In this image of German delegates surrendering to Field Marshal Montgomery in World War II, one of the delegates holds a folded white flag under his arm.

ANNEX TO CHAPTER 10

PROTECTIVE SIGNS AND SYMBOLS

Distinctive Sign of:	Sign:	Application/ Explanation
Civilian and Military Medical Units and Religious Personnel		Used as a symbol to protect medical units including field hospitals, transports, medical and religious personnel.
International Red Cross and Red Crescent Movement (Geneva Conventions I-IV, 1949) (Protocols I & II, 1977)		Protective emblem of ICRC delegates in conflicts. Used to indicate activities of National Societies, such as the Australian Red Cross Society. In times of conflict, a National Society can only use the emblem as a protective sign if they are an official auxiliary to the medical services of the armed forces.
Civil Defence (Protocol I, 1977)		Used as a symbol to protect personnel and equipment engaged in providing assistance to civilian victims of war. The symbol is used by personnel such as firefighters, police and emergency rescue workers.
Cultural Property (The Hague Convention of 1954) (Protocol I, 1977)		Provides general protection to places and objects of cultural significance. Special protection for places that are registered with UNESCO, eg. churches, archaeological sites, monuments and museums.
Dangerous Forces (Protocol I, 1977)		Provides specific protection to works or places that may contain dangerous forces, eg. dams or atomic reactors.

11

Deception During Armed Conflict

INTRODUCTION

11.1 **General:** RAAF doctrine and the law of armed conflict (LOAC) recognise that the element of surprise is a powerful influence in war. Surprise is also an inherent characteristic of air power. Deception, through stratagems or ruses, can be an integral part of surprise. Deceptions may mislead the enemy or induce him to act recklessly. Such actions are lawful provided that the ruses do not violate the rules of international law applicable to armed conflict.

11.2 **Lawful Deceptions:** Ruses of war are measures taken to obtain advantage of the enemy by mystifying or misleading him. Ruses of war which are acceptable under LOAC include, camouflage, deceptive lighting, decoys, dummy aircraft and facilities, simulated forces, feigned attacks and withdrawals, ambushes, false intelligence information, electronic deception, and use of enemy codes and countersigns.



One deception practised during World War II was the use of fake weaponry and personnel, so as to confuse enemy forces as to your capability, and to draw their fire.

PROHIBITED DECEPTIONS

11.3 Perfidy or treachery is the use of prohibited deceptions. Acts of perfidy are designed to invite the confidence of the enemy to lead him to believe that he is entitled to, or is obliged to, accord a person, class of persons or objects protected status under LOAC. The intent of such acts is to betray the confidence that armed forces place in LOAC, and the respect accorded to protected individuals and objects. It would be perfidious, for example, to induce the enemy to lay down their arms and surrender by falsely declaring that a truce had been agreed, because that would induce them to believe that they were entitled to protection under LOAC. It would be lawful, however, for a few soldiers to summon an enemy force to surrender on the false suggestion that they were surrounded, or to threaten bombardment when no guns were actually in place.

11.4 **Misuse of Protective Signs, Signals and Symbols:** Misuse of protective signs, signals and symbols, in order to gain a military advantage, constitutes an act of perfidy. These acts undermine the effectiveness of protective signs, signals and symbols and thereby jeopardise the safety of non-combatants and the immunity of protected facilities and activities. For example, using an aircraft marked with a red cross to carry armed soldiers, weapons or ammunition is prohibited. Another

example is the use of false radio distress signals and messages to gain an advantage over an enemy. Any unauthorised use of the United Nations flag or emblems is also prohibited.

11.5 Neutral or Enemy Flags, Insignia and Uniforms: LOAC prohibits the improper use of the national flag, military insignia and uniform of neutrals or the enemy. Protocol I prohibits such use while engaged in attacks or in order to shield, favour, protect or impede military operations. Accordingly, it is unlawful for aircraft to use false or deceptive markings in these circumstances. There are special customary international law rules regulating naval warfare which allow a belligerent warship to disguise itself and fly false colours in order to deceive an enemy into believing the vessel is from a neutral nationality, or is not a warship. These naval rules dictate that any warship using such deception must show her true colours before engaging in combat. There is no rule applicable in the air, or on land, which permits such deception.

If downed aircrew and escaping prisoners of war (PWs) use enemy uniforms or civilian clothing to evade capture, as a practical matter, when captured or recaptured, their status as PWs may be difficult to establish.



There are particular rules about using the image of the Red Cross. A red cross does not indicate first aid, it means don't shoot and should be only used in limited circumstances. A green cross should be used to indicate first aid.

FEIGNING DISTRESS

11.6 Generally, it is unlawful to feign distress through the use of internationally recognised distress signals, such as MAYDAY and SOS. In air warfare, however, it is permissible to feign distress or disablement as a means of inducing the enemy to break off an attack. As a result, there is no rule that requires an attacking aircraft to cease attacking an aircraft seemingly in distress. However, if aircrew know for certain that an aircraft is disabled, such as to make it permanently out of combat or helpless (eg. a major fire or structural damage), there is an obligation to cease attacking the aircraft so that the aircrew and passengers may leave the aircraft.

FALSE CLAIMS OF NON-COMBATANT STATUS

11.7 It is a violation of LOAC to feign non-combatant status so that a tactical advantage may be gained. A surprise attack by a person feigning shipwreck, sickness or wounds undermines the protected status of those rendered incapable of combat. Similarly, attacking enemy forces after posing as a civilian or civilian object puts all civilians at risk. An example is a military aircraft, deceiving an enemy by operating and identifying itself as a civilian aircraft, and then attacking an enemy warship,

which had allowed the military aircraft to approach, due to the mistaken belief that the aircraft was a non-combatant civil aircraft. Such acts of perfidy are punishable as war crimes.

11.8 Persons who take part in combat without distinguishing themselves from the civilian population are illegal combatants who do not have the right to engage in combat. Accordingly, they are not afforded the protection of LOAC and may be punished by the applicable civil law. If captured, they may be denied PW status, after having the question of their status examined by a competent tribunal. Military aircraft must be distinguished from civil aircraft by their markings so that their occupants are entitled to the protection afforded by international law to lawful combatants. Civil aircraft and state aircraft, which are not military aircraft, may not take part in combat, even if their crew is made up of members of the air force.

SPIES

11.9 A spy is someone who, while in territory under enemy control, seeks to obtain information under a false claim of non-combatant or friendly force status, with the intention to pass that information to an opposing belligerent. Members of armed forces who enter enemy-held territory in civilian clothing, or in enemy uniform, to collect intelligence are spies. Conversely, personnel who conduct reconnaissance behind enemy lines while in the uniform of their army are not spies. Aircrew engaged in intelligence collection in enemy airspace are not spies unless their aircraft displays false, civilian, neutral or enemy markings.

11.10 Spying in itself is not contrary to LOAC. Spies, however, are not entitled to PW status and may be tried and punished under the law of the enemy. A spy should be treated humanely and any trial should respect established judicial safeguards. Spies are not to be summarily tried and executed by military commanders.

ASSASSINATION

11.11 Whether or not the killing of an enemy individual by assassination amounts to a breach of LOAC depends on the circumstances of each case. LOAC prohibits treacherous killing, such as making enemy individuals outlaws, or advertising a reward for capture 'dead or alive'. LOAC does not preclude lawful attacks on enemy combatants, including combatant members of the armed forces and all enemy who are in the national chain of command.



Rights and Duties of Neutrals

INTRODUCTION

12.1 **General:** Neutrality is the impartial or non-favouring, non-participation of a state in an armed conflict. The law of neutrality defines the legal rights and duties of states engaged in armed conflict (belligerents) and neutral states, and limits the conduct of armed conflict in air, on sea and on land. The law regulating neutrality also lessens the impact of armed conflict on international commerce. These laws were developed at a time when the transition to armed conflict was relatively clear cut. As discussed in Chapter 5, the transition is no longer clear, partly because declarations of war are seldom made by states. Nevertheless, the law of neutrality continues to serve an important role in limiting the spread of armed conflict, regulating the conduct of belligerents with respect to neutrals, and reducing the harmful effect of hostilities on international trade.

12.2 **Definitions:** For the purposes of this publication, a belligerent is defined as a state engaged in an international armed conflict regardless of whether a formal declaration of war has been made. A neutral state is defined as a state that has proclaimed its neutral status or otherwise assumed neutral status with respect to an ongoing conflict.

12.3 **Neutral Status:** All states have the right to refrain from participation in an armed conflict by adopting neutral status. Historical examples include the proclamation of neutrality by the President of the United States of America in 1939 and Iran during the Gulf War of 2003. Once established, neutral status remains in effect until the neutral state abandons its neutrality by entering the conflict or is itself attacked by a belligerent.

12.4 **Australia and Neutrality:** Australia has not formally taken a neutral stance in a major conflict but if Australia was to find itself in the position of a neutral, there is little doubt it would adopt those rules of neutrality accepted as international law. LOAC imposes certain duties and accords certain rights to neutral states.

12.5 **Primary Rights and Duties of Neutrals:** The primary right of a neutral state is that of inviolability; that is, the belligerents must not violate neutral territory. The primary duty of a neutral state is to be impartial and to abstain from involvement in the conflict.

NEUTRALITY AND THE UNITED NATIONS

12.6 The Charter of the United Nations (UN) requires states to settle their disputes peacefully and to refrain from the threat or use of force in international relations. In the event of a threat to, or breach of, international peace the Security Council may take enforcement action on behalf of member nations to maintain or restore peace. These actions may, or may not, involve the use of armed force. All member nations of the UN have an obligation to support the UN in such actions. If this occurs, a state cannot declare itself neutral. Even if enforcement action does not involve armed force, states may be required to lend assistance, other than military forces, which results in their adopting a partisan position inconsistent with the requirement of impartiality. If armed forces or other assistance is not provided to the UN then the state can assume neutral status.

NEUTRAL TERRITORY

12.7 As a general rule of international law, all acts of hostility in neutral territory, including neutral airspace, neutral waters and neutral lands are prohibited. A neutral state has a duty to prevent the use of its territory as a sanctuary or base for operations by forces from any side. If the neutral state is unable or unwilling to enforce this duty effectively, an aggrieved belligerent may use force against enemy forces, including aircraft and warships, unlawfully using neutral territory. Belligerent forces always have the right to act in self-defence if threatened or attacked while in neutral territory, or when attacked or threatened from neutral territory.

NEUTRAL AIRSPACE

12.8 **General Principles:** In accordance with the general principles set out above, belligerent aircraft may not enter the airspace of a neutral state, even in hot pursuit, unless the airspace is being used as a recognised sanctuary for the enemy. Neutral airspace extends over a neutral state's lands, internal waters, archipelagic waters (if any) and territorial sea. Any violations of neutral airspace should be repulsed with force, if necessary, by the neutral state, and offenders may be liable for any damage caused as a result of the intrusion. Should a neutral state fail to enforce its neutral status, belligerents may take military action in self-defence. This may involve entry into neutral airspace to attack the enemy. Any decision to do so would be made at an appropriately high political level.

12.9 **Exceptions on Prohibition to Enter Neutral Airspace:** While the general rule is that belligerent aircraft may not enter neutral airspace, the following exceptions are allowed:

- a. *Straits – The airspace above neutral international straits and archipelagic sea lanes remains open at all times to belligerent aircraft. This right extends to armed military aircraft engaged in transit or archipelagic sea lanes passage. This passage must be continuous and expeditious. Belligerent aircraft must not engage in hostile acts while in transit but may conduct activities which are consistent with their*

security and the security of accompanying surface and subsurface forces. This includes the right to use force in self-defence if attacked by an enemy whilst in transit.

- b. Agreement of Neutral – Unarmed military aircraft may enter neutral airspace with the agreement of the neutral state. Such aircraft are subject to any impartial terms and conditions imposed by the neutral state. If an unarmed aircraft breaches any of these conditions, or otherwise violates the state's neutral status, the aircraft and crew must be interned.*
- c. Medical Aircraft – Any medical aircraft may fly in neutral airspace and land in neutral territory in cases of emergency. Belligerent medical aircraft must obtain the consent of the neutral before entering neutral airspace and all aircraft must obey any directions and restrictions imposed by the neutral state. This includes orders to land and orders to submit to search. Any restrictions or conditions must apply equally to all belligerents.*
- d. Aircraft in Distress – Belligerent aircraft in distress are permitted to enter neutral airspace under such safeguards as the neutral state may wish to impose. The neutral state may require such aircraft to land, in which case, the aircraft and crew would be interned until the end of hostilities.*

NEUTRAL LANDS

12.10 Belligerents may not move troops or war materiel across neutral territory. Any belligerent troops who are in neutral territory at the start of a conflict or who enter neutral territory should be disarmed and interned until the end of the conflict. A neutral state may allow passage through its territory of wounded and sick belonging to both sides of an armed conflict, on condition that the vehicles transporting them do not carry combatants or war materiel. PWs who have escaped into a neutral state may either be repatriated, or left at liberty in the neutral state, but they must never take part in belligerent activities while in neutral territory.

NEUTRAL WATERS

12.11 As a general rule, belligerent warships must abstain from acts of hostility in neutral waters. Belligerents must not use neutral ports and waters as a base for operations against an adversary. Neutrals are obliged to protect their neutral status against violation. The neutrality of a state is not affected by the mere passage through its internal waters or territorial seas of belligerent warships. Warships may exercise their right of transit passage in international straits and archipelagic sea lanes passage, and the right of innocent passage in the territorial sea of a neutral state and in archipelagic waters, outside archipelagic sea lanes, of a neutral state. A neutral state may allow all belligerents to use its ports but any such use may be subject to restrictions which must apply equally to all belligerents.

NEUTRAL COMMERCE

12.12 One of the main reasons for the law of neutrality is to regulate belligerent activity which may affect neutral international commerce. Neutral commerce is all trade between a neutral state and another state which does not involve war materiel or armaments destined for a belligerent, and all trade between a neutral and a belligerent which does not involve contraband or otherwise sustain a belligerent's war fighting capability. Neutral merchant vessels and civil aircraft engaged in trade are subject to visit and search, but may not be captured or destroyed by belligerent forces. A neutral state may trade with a belligerent but it risks violating its neutral status if the items traded assist a belligerent's war effort.

CONTRABAND

12.13 Contraband consists of goods which are destined for a belligerent and which assist the belligerent's war effort. Contraband can be lawfully seized by an adversary, even if it is carried on a neutral vessel or aircraft, and even if it belongs to a neutral citizen. Before a belligerent can seize contraband, it must establish two facts:

- a. the goods must have a war purpose; and
- b. the goods must be en route to an enemy destination.

12.14 Goods which have no intrinsic military value, such as luxury items, cannot constitute contraband. Absolute contraband, and the vessel carrying it, are subject to seizure, but conditional contraband may only be seized when it is being shipped direct to the enemy. Contraband goods have traditionally been classified as:

- a. 'absolute' contraband—goods exclusively or primarily for warlike purposes; and
- b. 'conditional' contraband—goods which have equal utility for warlike and peaceful purposes.

It has been the practice for belligerents to publish lists of goods considered to be conditional contraband.

VISIT AND SEARCH

12.15 Visit and search is the means by which a belligerent warship or belligerent military aircraft may determine:

- a. the true character, whether enemy or neutral, of merchant ships;
- b. the nature, whether exempt or contraband, of their cargo;
- c. the manner, whether innocent or hostile, of their employment; and
- d. other facts relevant to the armed conflict.

Although there is a right of visit and search by military aircraft, there is no established international practice as to how this right is to be exercised, except by rotary-wing aircraft operating from naval vessels or land bases. Ordinarily, visit and search by an aircraft would be accomplished by directing and escorting a vessel to the vicinity of a belligerent warship or to a belligerent port. Visit and search of a neutral aircraft would be conducted by the belligerent military aircraft directing the neutral aircraft to proceed, under escort, to the nearest convenient belligerent aerodrome.

CAPTURE OF NEUTRAL AIRCRAFT AND VESSELS

12.16 Neutral civil aircraft and merchant vessels may be captured if engaged in the following activities:

- a. avoiding attempts to establish identity;
- b. resisting visit and search;
- c. carrying contraband;
- d. breaking or attempting to break blockade;
- e. presenting irregular or fraudulent papers, not having necessary papers, or destroying, concealing or defacing papers;
- f. violating regulations imposed by a belligerent in an area of operations;
- g. carrying enemy military or public service personnel; and
- h. communicating information useful to the enemy.

BLOCKADE

12.17 Blockade is a military operation to prevent aircraft and vessels of all states from entering or exiting specified ports or airfields belonging to, or occupied by, the enemy. A belligerent's right of blockade is designed to prevent all aircraft and vessels from crossing an established and publicised cordon, separating the enemy and international airspace and waters. A blockade must be imposed impartially with regard to aircraft and ships of all states. A neutral aircraft or ship which breaks a blockade declares its partiality and, therefore, loses its neutral status. Certain set criteria have been established under international law for blockade, and any commander involved in enforcing a blockade should seek specialist advice as to the legal requirements of a blockade. Blockades imposed by belligerents are different in nature to blockades authorised and enforced under UN Security Council Resolutions.

LOSS OF NEUTRAL STATUS

12.18 Neutral individuals lose their status if they commit hostile acts against a belligerent or act in favour of a belligerent, particularly if they enlist in the armed forces of a belligerent. A neutral

state cannot lose its neutral status if it commits hostile acts against a belligerent who violates the neutral state's right to inviolability. Any severe and sustained breaches of neutrality may result in a belligerent taking action. This traditionally has included:

- a. complaint to the state concerned and the UN;
- b. claiming damages, by way of reparations;
- c. intervening, subject to the UN Charter; and
- d. commencing armed hostilities against the state concerned.

